

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Service Mark Application of: Nutek International, Inc.
Application Serial No.: 76/610,358
Filing Date: September 7, 2004
Mark: CRISPAIR
Published for Opposition: August 30, 2005
Law Firm File Ref. No.: 00077.0005

Box TTAB
Commissioner for Trademarks
PO Box 1451
Alexandria, VA 22313-1451

REQUEST TO REINSTATE OPPOSITION

Commissioner:

This *Request to Reinstate Opposition* (the "Request"), and all accompanying Exhibits, are being submitted to seek reinstatement of an opposition proceeding noticed on October 28, 2005 regarding the above-referenced application.

THE RELEVANT FACTS

1. The above-referenced application was published for opposition on August 30, 2005. Pursuant to, *inter alia*, Lanham Act § 13(a), 15 U.S.C. § 1063(a), a *Request For A 30-Day Extension Of Time To File A Notice Of Opposition* was filed, and it was granted on September 29, 2005; this grant conferred the right to file a *Notice of Opposition* until October 29, 2005.
2. Opposer's *Notice of Opposition* (the "Notice") was filed, in accordance with an accompanying certificate of mail, on October 28, 2005. See Exhibit 1, Exhibit 4. That *Notice* is expressly incorporated herein by reference and all facts and law urged therein are hereby expressly incorporated by reference.
3. The contents of the *Notice* were as follows: (a) a 14-page body; (b) a check no. 1206 drawn on Opposer's counsel's firm bank account in the amount of \$300.00; (c) a separate one-page *Certificate of Mail Under 37 C.F.R. § 1.8* (the "Certificate") itemizing the contents of the *Notice*; and (d) a self-addressed stamped *Postcard Acknowledgment Receipt* (the "Postcard") also itemizing the contents of the *Notice*. See Exhibit 1, Exhibit 4.
4. The *Notice* was clearly received by the U.S. Patent and Trademark Office (the "P.T.O.") on or about November 1, 2005, because the P.T.O. stamped the *Postcard* with its official stamp on November 1, 2005. See Exhibit 2.
5. The P.T.O. mailed the *Postcard* back to Opposer's counsel, a law firm, and it received the *Postcard* on November 9, 2005. See Exhibit 2, Exhibit 4.

6. The P.T.O.-stamped *Postcard* contains no strikeouts or notations of any kind indicating that the P.T.O. found it to contain any kind of error, misstatement, or omission regarding the contents of the Notice. *See Exhibit 2.*
7. The P.T.O. filed a *Denial of Notice of Opposition* (the "Denial") on November 29, 2005. *See Exhibit 3.* The *Denial* asserted a single reason as the basis for the denial: "Inasmuch as the opposition *was not accompanied by the required fee*, the notice of opposition cannot be given consideration. Trademark Rule 2.101(d)(3)(i), as amended effective November 2, 2003. *See Exhibit 3 (emphasis added).*
8. Opposer and its counsel first learned of the *Denial* on Friday, December 2, 2005. *See Exhibit 4.*
9. Opposer's counsel, Paul W. Fulbright of the Law Office of Paul W. Fulbright, PLLC, placed a first telephone call on Friday, December 2, 2005, and a second telephone call on Wednesday, December 7, 2005, to the P.T.O. Trademark Trial and Appeal Board (the "T.T.A.B.") and left voicemail messages (bearing the application number) in an effort to speak to someone at the P.T.O. / T.T.A.B. to discuss the matter; those telephone calls were not returned. *See Exhibit 4.*
10. This *Request* is being filed on Saturday, January 28, 2006.

POINTS FOR REVIEW BY THE T.T.A.B.**I. P.T.O. Rules and Regulations Provide a Procedure to be Followed Whenever Correspondence is Filed But Not Received.****A. 37 C.F.R. § 2.197(b) Provides the General Procedure to be Followed Whenever Correspondence is Filed But Not Received.**

37 C.F.R. § 2.197(b) reads in pertinent part as follows:

In the event that correspondence is considered timely filed by being mailed or transmitted in accordance with paragraph (a) of this section, but not received in the Office, and an application is abandoned, a registration is cancelled or expired, or a proceeding is dismissed, terminated, or decided with prejudice, the correspondence will be considered timely if the party who forwarded such correspondence:

- (1) *Informs the Office of the previous mailing or transmission of the correspondence within two (2) months after becoming aware that the Office has no evidence of receipt of the correspondence;*
- (2) *Supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and*
- (3) *Includes a statement which attests on a personal knowledge basis or to the satisfaction of the Director to the previous timely mailing or transmission.*

37 C.F.R. § 2.197(b) (emphasis added for clarification).

B. 37 C.F.R. § 2.197(a) Provides the General Procedure for the "Timely Filing" of an Item of Correspondence.

37 C.F.R. § 2.197(a) reads in pertinent part as follows:

Except in the cases enumerated in paragraph (a)(2) of this section, *correspondence* required to be filed in the Office within a set period of time *will be considered as being timely filed if the procedure described in this section is followed.* The actual date of receipt will be used for all other purposes.

- (1) *Correspondence will be considered as being timely filed if:*
 - (i) *The correspondence is mailed or transmitted prior to the expiration of the set period of time by being:*
 - (A) *Addressed as set out in § 2.190 and deposited with the U.S. Postal Service with sufficient postage as first class mail; or*
 - (B) *Transmitted by facsimile to the Office in accordance with § 2.195(c); and*
 - (ii) *The correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have a reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.*
- (2) *The procedure described in paragraph (a)(1) of this section does not apply to the filing of a trademark application.*

37 C.F.R. § 2.197(a) (emphasis added for clarification).

C. TMEP 108 (“Filing Receipts”) and MPEP 503 (“Application Number and Filing Receipt”) Provide a Procedure for Evidencing the Date of Filing of a Document.

Trademark Manual of Examining Procedure (“T.M.E.P.”) § 108 reads in pertinent part as follows:

When a document (with or without a fee) intended for the Board is filed in the Office, it is possible to obtain a receipt evidencing the date of such filing. In the case of a document sent by mail, a receipt may be obtained by submitting with the document a stamped, self-addressed postcard with sufficient information to identify clearly [a] the document, [b] the party in whose behalf the paper is being filed, and [c] the proceeding or application in connection with which the document is being filed.

When the Office receives the document and the postcard, it will date-stamp both of them and mail the postcard back.

T.M.E.P. § 108 (emphasis and bracketed material added for clarification).

Similarly, the Manual of Patent Examining Procedure (“M.P.E.P.”) § 503 reads in pertinent part as follows:

A postcard receipt which itemizes and properly identifies the items which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO....

The person receiving the item(s) in the USPTO will check the listing on the postcard against the item(s) being filed to be sure they are properly identified and that all the items listed on the postcard are presently being submitted to the USPTO. If any of the items listed on the postcard are not being submitted to the USPTO, those items will be crossed off and the postcard initialed by the person receiving the items.

M.P.E.P. § 503 (emphasis added for clarification).

II. Application to This Case.

A. The Correspondence at Issue Here (i.e., the Check) Was Clearly "Timely Filed" Pursuant to the Rules.

Rule 297(a) clearly states that an item of correspondence (i.e., a check) will be considered timely filed if: (i) the correspondence was mailed by being properly addressed and deposited with the U.S. Postal Service with sufficient postage as first-class mail; and (ii) the correspondence is accompanied by a fully itemizing certificate attesting to the date of deposit. Both of those requirements were *clearly* met here. See Relevant Facts 2-3.

B. The P.T.O. – Stamped *Postcard* Provides Powerful Evidence Generated by the P.T.O. Itself that the Check Was Received by the Office and Subsequently Misplaced.

T.M.E.P. § 108 and M.P.E.P. § 503 are clear. The postcard is a *receipt*.

The time-honored practice of the P.T.O. is to carefully review the contents of the envelope and, if an item appearing on the *Postcard* is missing from the envelope, to make a *strikeout* notation on the *Postcard* correcting the receipt and mail it back (notifying the sender of the problem). The language of TMEP 108 (entitled "Filing *Receipts*") supports this longstanding practice: "When the Office receives [both] the document *and* the postcard, it will date-stamp *both* of them and *mail the postcard back*." See T.M.E.P. 108 (emphasis and bracketed material added for clarification); cf. 37 C.F.R. § 1.10(e).

C. Opposer Requests Reinstatement of the Opposition Pursuant to 37 C.F.R. § 2.197(b) by Tendering Herein the Required Showing.

Opposer encloses with this *Request* the *Declaration of Paul W. Fulbright, Esq.* (the "Declaration"). *See Exhibit 4.* That *Declaration* specifically attests, on the basis of personal knowledge, to the previous timely mailing or transmission of the correspondence (i.e., the check). *See Exhibit 4.*

Opposer also has enclosed a complete additional copy of the previously mailed or transmitted correspondence and certificate. *See Exhibit 1.* Specifically, Exhibit 1 contains a complete copy of the correspondence at issue (i.e., the check) and the certificate of mail specifically itemizing the contents of the envelope (including the check). *See Exhibit 1.*

It is clear that this *Request* is timely. The T.T.A.B. filed its *Denial* on November 29, 2005, and Opposer and its counsel didn't learn of the *Denial* until December 2, 2005. *See Relevant Facts 7,8.* Because this *Request* is being filed on Saturday, January 28, 2006, within the two-month period specified by rule, the *Request* is timely.

D. To Facilitate Reinstatement, a Substitute Check in the Amount of \$300.00 is Enclosed Herein.

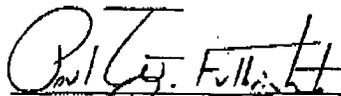
Finally, to facilitate reinstatement of the opposition at the earliest possible time, Opposer's counsel tenders herein a substitute check in the amount of \$300.00. A stop-payment will be issued by Opposer's counsel on the original check when the substitute check enclosed herein has cleared.

Conclusion

For at least the above-referenced reasons, Opposer respectfully requests that the T.T.A.B. reinstate its October 28, 2005 *Notice of Opposition* at the earliest possible date.

Respectfully submitted,

CONSEAL INTERNATIONAL INCORPORATED



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CONSEAL INTERNATIONAL INCORPORATED

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Certificate of Mail Under § 1.8

I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: BOX TTAB, Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451 on the date shown below.

Paul W. Fulbright
Paul W. Fulbright

10/28/2005
October 28, 2005

In re Service Mark Application of: Nutek International, Inc.
Application Serial No.: 76,610,358
Filing Date: September 7, 2004
Mark: CRISPAIR
Published for Opposition: August 30, 2005
Law Firm File Ref. No.: 00077.0005

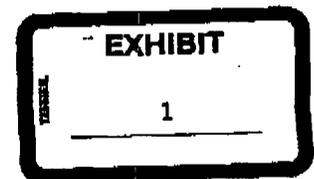
BOX TTAB
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

NOTICE OF OPPOSITION

Commissioner:

1. **Notice of opposition / identity of opposer:** Conseal International

Incorporated ("Conseal" or "Opposer"), a Florida corporation, with a principal place of business of 90 Kerry Place Suite 2, Norwood MA 02062, through its attorney, hereby provides notice that it opposes registration of the application identified below.



2. **Application opposed:** U.S. Trademark Application Serial Number 76/610,358 (the “358 application” or the “Application”) filed 09/07/2004 for the word mark “CRISPAIR” (the “Mark” or “Mark in dispute in this proceeding”) for the following goods and services in International Class 11: “Ozone air purification system comprising ionization tubes and power supplies, all sold as a unit.” (the “Goods”). Alleged date of first use: 01/17/1997. Alleged date of first use in commerce: 01/17/1997. The ‘358 application was published for opposition on 08/30/2005.

3. **Identity of applicant:** Nutek International, Inc. (“Nutek-Edgewater”), a Florida corporation, 704-1 West Park Avenue / Edgewater FL 32132.

4. **Timeliness of Notice of Opposition:** The ‘358 application was published for opposition on 08/30/2005. Pursuant to, *inter alia*, Lanham Act § 13(a), 15 U.S.C. § 1063(a), a *Request For A 30-Day Extension Of Time To File A Notice Of Opposition* was filed, and it was granted on 09/29/2005; this grant conferred the right to file a *Notice of Opposition* until 10/29/2005. As such, this Notice is timely filed.

5. **Goods / Services affected by the opposition:** All goods / services listed in International Class 11 are opposed; namely, “Ozone air purification system comprising ionization [sic: ozonation] tubes and power supplies, all sold as a unit.” (the “Goods”).

6. **Fee:** Pursuant to 37 C.F.R. § 2.101(a), the fee specified pursuant to 37 C.F.R. § 2.6(a)(17) of \$300.00 is enclosed.

STANDING

7. **Applicant:** Nutek International, Inc. (“Nutek-Edgewater”), a Florida corporation, 704-1 West Park Avenue / Edgewater FL 32132 filed U.S. Trademark Application Serial Number 76/610,358 (the “358 application”) on 09/07/2004 for the

word mark "CRISPAIR" for the following goods and services in International Class 11: "Ozone air purification system comprising ionization tubes and power supplies, all sold as a unit." (the "Goods"). In its '358 application, Nutek alleged a date of first use of 01/17/1997 and a date of first use in commerce of 01/17/1997. The '358 application was published for opposition on 08/30/2005.

8. **Opposer:** Conseal began its use in commerce of the "CRISPAIR" trademark for the Goods at least as early as 1988, and it has used its distinctive mark continuously in commerce since its first use for the Goods. As such, Opposer Conseal, and not Applicant Nutek-Edgewater, has priority of use.

9. **Standing:** Pursuant to Lanham Act §§ 13-14, 15 U.S.C. §§ 1063-64, Opposer Conseal asserts in good faith that it has standing as it believes that it is, and will continue to be, damaged by the application for registration of the mark "CRISPAIR" as shown in the '358 application, and it hereby opposes same.

10. **Damage:** The sources of actual, potential, and further damage are numerous and include the following: (a) Opposer Conseal's own Trademark Application No. 76/615,509 (the "'509 application") for registration of the Mark "CRISPAIR" has been suspended pending the disposition of the '358 application upon which this opposition is based (the Examiner of the '509 application stating that she may cite any registration resulting from the '358 application against the '509 application); and (b) if the Examiner of the '509 application is correct, the likelihood of confusion between the Mark sought to be registered by Applicant and Opposer's prior mark given the associated Goods.

11. As support for the grounds for the opposition, Conseal alleges as follows, upon actual knowledge with respect to itself and its own acts, and upon information and belief as to other matters:

**THE FOUR "CRISPAIR" TRADEMARK APPLICATIONS
APPEARING ON THE PRINCIPAL REGISTER.**

12. A cursory check of the Principal Register reveals no less than four (4) trademark applications, including the '358 application, which have been filed relating to the mark "CRISPAIR" and ozone-based air purification systems. A brief review of these applications is helpful to an understanding of the facts of this case. The four (4) applications, in order of filing date, are:

13. First, U.S. Trademark Application No. 78/042,176 (the "'176 application") was filed 01/08/2001 by Nutek International ("Nutek-Wilmington"), a Delaware corporation, 1220 North Market Street Suite 606, Wilmington Delaware 19801, for "CRISPAIR" for "Ozone air purification system comprising ionization tubes and power supplies, all sold as a unit." The '176 application alleged a first use date of 2/1/1989 and a first use in commerce date of 2/1/1989. This application matured on 06/04/2002 into the U.S. Trademark Registration No. 2,576,285 (the "'285 registration").

14. However, the '285 registration was cancelled very recently on 04/13/2005 when its owner failed to respond to a cancellation proceeding filed by Nutek-Edgewater. Because this registration was cancelled, the '285 Registrant and the '285 Registration are *not directly relevant* to this proceeding. However, the cancellation proceeding for the '285 registration was instituted by petitioner Nutek-Edgewater, *the Applicant in this proceeding*. Conseal notes that, in Nutek-Edgewater's Petition for Cancellation of the '285 registration, *Nutek-Edgewater itself alleged, on several occasions, that "Petitioner*

[Nutek-Edgewater] and Conseal were the true source of the 'Ozone Air Purification Systems' which [the '285] Registrant sought to register improperly in Registrant's own name." (bracketed material added for clarification).

15. As will be seen further below, *it is indeed proper to characterize Conseal as the "true source" of ozone - based air purification systems marketed under the "CRISPAIR" mark in the United States.* However, *any suggestion (as in the '358 application at issue in this opposition proceeding) that Nutek-Edgewater is a proper, first, or co-owner of rights in the "CRISPAIR" mark for ozone - based air purification systems is patently false.*

16. **Second, U.S. Trademark Application No. 78/072,467 (the "'467 application")** was filed 07/05/2001 by Conseal International, Inc. ("Conseal"), a Florida corporation, 728 Industry Road, Longwood Florida 32750, for "CRISPAIR" for "Electrically operated ozone generation systems for purifying and deodorizing air." The '467 application alleged a first use date of 4/11/1993 and a first use in commerce date of 4/11/1993. This application was abandoned for the inadvertent failure to respond to a non-final office action. As such, it too is *not directly relevant* to this proceeding; however, the application is cited as evidence buttressing Conseal's use of the "CRISPAIR" mark at least as early as the early 1990's (in contrast to Nutek-Edgewater's alleged date of first use of 01/17/1997).

17. **Third, U.S. Trademark Application No. 76/610,358 (the "'358 application" or the "Application"),** the application that is the subject of this proceeding, was filed by Nutek International, Inc. ("Nutek-Edgewater"), *the Applicant in this proceeding*, a Florida corporation, 704-1 West Park Avenue / Edgewater FL 32132 on

09/07/2004 for the word mark "CRISPAIR" for the following goods and services in International Class 11: "Ozone air purification system comprising ionization tubes and power supplies, all sold as a unit." In its '358 application, Nutek alleged a date of first use of 01/17/1997 and a date of first use in commerce of 01/17/1997. The '358 application was published for opposition on 08/30/2005.

18. Fourth, U.S. Trademark Application No. 76/615,509 (the "'509 application"), was filed by Conseal International, Inc., *the Opposer in this proceeding*, a Florida corporation, 90 Kerry Place Suite 2, Norwood Massachusetts 02062, on 10/12/2004 for the word mark "CRISPAIR" for the following goods and services in International Class 11: "Ozone-based or ozonator-based air and water purification systems, equipment, and related supplies." In its '509 application, Conseal alleged a date of first use of 1991 and a date of first use in commerce of 1991; however, it is Opposer Conseal's intention to amend the dates of first use in due course so as to reflect the fact that it first used the Mark for the Goods (and first used the Mark in commerce for the Goods) at least as early as 1988. The '509 application is in suspension awaiting the results of this opposition proceeding.

GROUNDS FOR OPPOSITION

19. Opposer Conseal respectfully opposes registration of the Mark shown in the '358 application on the following separate and independent grounds:

COUNT I - LIKELIHOOD OF CONFUSION

20. Opposer repeats and realleges each and every allegation set forth in the preceding paragraphs.

21. Conseal began its use in commerce of the "CRISPAIR" trademark for the Goods at least as early as 1988.

22. Since 1988, Conseal has used its distinctive "CRISPAIR" mark continuously in commerce for the Goods. Conseal has sold its CRISPAIR air purification systems in substantial numbers throughout the United States, and many of these sales were consummated in commerce *prior* to January 17, 1997 (Applicant's alleged date of first use in the application at issue in this proceeding).

23. Applicant's CRISPAIR *word mark* is identical to Opposer's mark, and, as such, is clearly intended to trade upon the goodwill associated with Opposer's famous, valuable, prior trademark.

24. Because Applicant's mark is identical to Opposer's, and because it is used *for identical goods*, it is extremely likely that the Applicant's use of Opposer's mark will cause confusion, mistake, and / or deception in United States commerce in violation of the Lanham Act.

25. Therefore, based upon, *inter alia*, Lanham Act § 2(d), 15 U.S.C. § 1052(d), Conseal respectfully opposes Applicant's request for registration and requests that Applicant's registration application for "CRISPAIR" in U.S. Trademark Application Serial Number 76/610,358 (the "358 application") filed 09/07/2004 for the word mark "CRISPAIR" be denied.

**COUNT II – APPLICATION VOID DUE TO
LACK OF A *BONA FIDE* USE OF THE MARK**

26. Opposer repeats and realleges each and every allegation set forth in the preceding paragraphs.

27. Conseal's use of its CRISPAIR mark, which commenced at least as early as 1988, began prior to the corporate creation of Applicant in 1996.

28. The owner of Opposer Conseal is Mr. Stephen C. Perry ("Perry"). He and Mr. Douglas A. Moxley ("Moxley") are two of the original co-owners of Applicant Nutek-Edgewater. As such, Perry has intimate personal knowledge of the details surrounding the operation of Nutek-Edgewater at the time of its inception and during the year or two that followed.

29. The evidence in this proceeding will demonstrate conclusively that, at the time Applicant was created, and at the time of its alleged first use of the Mark in dispute in this proceeding, *only Opposer Conseal* was engaged in a *bona fide* use of the "CRISPAIR" mark for the Goods in commerce.

30. The evidence will also demonstrate that Moxley was fully aware of Conseal's senior trademark rights in the "CRISPAIR" mark for the Goods at all times from its alleged date of first use (a fabrication) through to and including the filing date of the Application in suit, the '358 application.

31. Opposer Conseal has never assigned rights in the "CRISPAIR" mark, or any portion thereof, to Applicant Nutek-Edgewater, either expressly or by implication.

32. Opposer Conseal has never licensed Applicant Nutek-Edgewater, either expressly or by implication, to use the "CRISPAIR" mark for the Goods or, indeed, for any purpose or for any goods or services whatsoever. In fact, Opposer Conseal has never even sold Goods bearing the "CRISPAIR" mark to Applicant Nutek-Edgewater for distribution (even though such pass-through sales would be insufficient to confer trademark rights in Applicant in the first place).

33. Thus, at a minimum, Applicant Nutek-Edgewater had not built, marketed, offered for sale, or sold Goods under the "CRISPAIR" mark until *after* being introduced to Conseal, the true owner of the "CRISPAIR" mark for the Goods.

34. Thus, Applicant did not commence a *bona fide* use in commerce of the "CRISPAIR" mark for the Goods on or before January 17, 1997 as represented in its '358 application for registration (the application in suit).

35. Therefore, based upon, *inter alia*, Lanham Act § 1(a), 15 U.S.C. § 1051(a), Conseal respectfully opposes Applicant's request for registration and requests that Applicant's registration application for "CRISPAIR" in U.S. Trademark Application Serial Number 76/610,358 (the "'358 application") filed 09/07/2004 for the word mark "CRISPAIR" be denied.

**COUNT III – APPLICATION VOID DUE TO
FRAUDULENT MISREPRESENTATIONS REGARDING
BONA FIDE USE**

36. Opposer repeats and realleges each and every allegation set forth in the preceding paragraphs.

37. As stated hereinabove, the evidence will demonstrate that Moxley was fully aware of Conseal's senior trademark rights in the "CRISPAIR" mark for the Goods at all times from its alleged date of first use (a fabrication) through to and including the filing date of the Application in suit, the '358 application.

38. Specifically, not only did Applicant Nutek-Edgewater not commence a *bona fide* use in commerce of the "CRISPAIR" mark for the Goods on or before January 17, 1997 as represented in its '358 application for registration (the application in suit), but, in addition, at the time it filed its '358 application for registration, it knew for a fact

that its allegations of a *bona fide* first use in commerce commencing on January 17, 1997 were in fact false.

39. Applicant's representations were clearly fraudulent as Applicant, possessing direct, personal knowledge to the contrary, provided a *verified* statement / declaration at the time of its application for registration that the "CRISPAIR" mark was the subject of a *bona fide* use in commerce *by Applicant* on or in connection with the Goods listed in the application as required by 37 C.F.R. § 2.34(a)(1)(i).

40. Therefore, based upon, *inter alia*, 37 C.F.R. § 2.193(c)(2) and 37 C.F.R. § 10.18(b), Conseal respectfully opposes Applicant's request for registration and requests that Applicant's registration application for "CRISPAIR" in U.S. Trademark Application Serial Number 76/610,358 (the "358 application") filed 09/07/2004 for the word mark "CRISPAIR" be denied.

**COUNT IV – APPLICATION VOID DUE TO
MIS-DESIGNATION OF THE RIGHTFUL OWNER OF THE MARK**

41. Opposer repeats and realleges each and every allegation set forth in the preceding paragraphs.

42. As stated hereinabove, the evidence in this proceeding will demonstrate conclusively that, at the time Applicant was created, and at the time of its alleged first use of the Mark in dispute in this proceeding, *only Opposer Conseal* was engaged in a *bona fide* use of the "CRISPAIR" mark for the Goods in commerce.

43. As such, only Opposer Conseal, and not Applicant Nutek-Edgewater, could appear *as the rightful trademark owner / applicant* on a trademark application for "CRISPAIR" for the Goods.

44. As further stated hereinabove, Opposer Conseal has never assigned or licensed rights in the "CRISPAIR" mark, or any portion thereof, to Applicant Nutek-Edgewater, either expressly or by implication. Furthermore, Opposer Conseal and Applicant Nutek-Edgewater have never operated, either expressly or by implication, as related companies within the meaning of the Lanham Act.

45. Thus, regardless of whether Applicant Nutek-Edgewater has built, marketed, offered for sale, or sold any Goods under the "CRISPAIR" mark, any such activities only commenced *after* it was introduced to Conseal, the true and rightful owner of and applicant for the "CRISPAIR" mark for the Goods.

46. Therefore, based upon, *inter alia*, 37 C.F.R. § 2.33, 37 C.F.R. § 2.34, and 37 C.F.R. § 2.71(d), Conseal respectfully opposes Applicant's request for registration and requests that Applicant's registration application for "CRISPAIR" in U.S. Trademark Application Serial Number 76/610,358 (the "'358 application") filed 09/07/2004 for the word mark "CRISPAIR" be denied.

**COUNT V – APPLICATION VOID DUE TO
FRAUDULENT MISREPRESENTATIONS REGARDING
THE RIGHTFUL OWNER OF THE MARK**

47. Opposer repeats and realleges each and every allegation set forth in the preceding paragraphs.

48. As stated hereinabove, the evidence will demonstrate that Moxley was fully aware of Conseal's senior trademark rights in the "CRISPAIR" mark for the Goods at all times from its alleged date of first use (a fabrication) through to and including the filing date of the Application in suit, the '358 application.

49. Specifically, Applicant Nutek-Edgewater knew, at the time it filed its '358 application for registration, that its statement that it, and not Opposer Conseal, was the

rightful owner of / applicant for the registration of "CRISPAIR" for the Goods was in fact false.

50. Applicant's representations were clearly fraudulent as Applicant, possessing direct, personal knowledge to the contrary, provided a *verified* statement / declaration that it was the rightful owner of / applicant for the registration of "CRISPAIR" for the Goods so as to fraudulently satisfy the statutory strictures of 37 C.F.R. § 2.33, 37 C.F.R. § 2.34, and 37 C.F.R. § 2.71(d).

51. Therefore, based upon, *inter alia*, 37 C.F.R. § 2.193(c)(2) and 37 C.F.R. § 10.18(b), Conseal respectfully opposes Applicant's request for registration and requests that Applicant's registration application for "CRISPAIR" in U.S. Trademark Application Serial Number 76/610,358 (the "'358 application") filed 09/07/2004 for the word mark "CRISPAIR" be denied.

**COUNT VI – APPLICATION VOID DUE TO
MIS-DESIGNATION OF DATES OF FIRST USE**

52. Opposer repeats and realleges each and every allegation set forth in the preceding paragraphs.

53. As stated hereinabove, Conseal's use of its "CRISPAIR" mark, which commenced at least as early as 1988, began long prior to the corporate creation of Applicant in 1996.

54. In addition, as stated above, the evidence in this proceeding will demonstrate conclusively that, at the time Applicant was created, and at the time of its alleged first use of the Mark in dispute in this proceeding, *only Opposer Conseal* was engaged in a *bona fide* use of the "CRISPAIR" mark for the Goods in commerce.

55. Specifically, Applicant did not commence a *bona fide* use of any kind (including a use affecting commerce) of the "CRISPAIR" mark for the Goods on or before January 17, 1997 as represented in its '358 application for registration (the application in suit).

56. Therefore, based upon, *inter alia*, 37 C.F.R. § 2.33 and 37 C.F.R. § 2.34, Conseal respectfully opposes Applicant's request for registration and requests that Applicant's registration application for "CRISPAIR" in U.S. Trademark Application Serial Number 76/610,358 (the "'358 application'") filed 09/07/2004 for the word mark "CRISPAIR" be denied.

**COUNT VII – APPLICATION VOID DUE TO
FRAUDULENT MISREPRESENTATIONS REGARDING
DATES OF FIRST USE**

57. Opposer repeats and realleges each and every allegation set forth in the preceding paragraphs.

58. As stated hereinabove, the evidence will demonstrate that Moxley was fully aware of Conseal's senior trademark rights in the "CRISPAIR" mark for the Goods at all times from its alleged date of first use (a fabrication) through to and including the filing date of the Application in suit, the '358 application.

59. Specifically, Applicant Nutek-Edgewater knew, at the time it filed its '358 application for registration, that its statement that it had commenced a *bona fide* use (constituting a *bona fide* use in commerce) on 01/17/1997 qualifying it, and not Opposer Conseal, as the rightful owner of / applicant for the registration of "CRISPAIR" for the Goods was in fact false.

60. Applicant's representations were clearly fraudulent as Applicant, possessing direct, personal knowledge to the contrary, provided a *verified* statement /

declaration attesting to its good-faith belief in the accuracy of the dates of first use and first use in commerce so as to fraudulently satisfy the statutory strictures of 37 C.F.R. § 2.33 and 37 C.F.R. § 2.34.

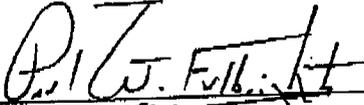
61. Therefore, based upon, *inter alia*, 37 C.F.R. § 2.193(c)(2) and 37 C.F.R. § 10.18(b), Conseal respectfully opposes Applicant's request for registration and requests that Applicant's registration application for "CRISPAIR" in U.S. Trademark Application Serial Number 76/610,358 (the "358 application") filed 09/07/2004 for the word mark "CRISPAIR" be denied.

CONCLUSION

62. WHEREFORE, Opposer Conseal prays that, based upon the foregoing and the applicable law, the Board deny Applicant's request for registration of "CRISPAIR" in U.S. Trademark Application Serial Number 76/610,358 (the "358 application") filed 09/07/2004 for the word mark "CRISPAIR."

Respectfully submitted,

CONSEAL INTERNATIONAL INCORPORATED


Paul W. Fulbright, Esq.

Law Office of Paul W. Fulbright, PLLC
2003 J J Pearce Drive
Richardson, Texas 75081-5447
Office tel: 972-907-8679
Office fax: 972-907-8879

ATTORNEY FOR
CONSEAL INTERNATIONAL INCORPORATED

CERTIFICATE OF MAIL UNDER 37 C.F.R. § 1.8

I hereby certify that the papers itemized below are being deposited with the U.S. Postal Service with sufficient postage as first class mail on the date indicated below in an envelope addressed to:

MAIL STOP TTAB
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

on October 28, 2005.

Subject Matter:

Trademark Application No.: 76/610,358
Filing Date: 09/07/2004
Mark: CRISPAIR
Published for Opp'n: 08/30/2005
Law Firm File Ref. No.: 00077.0005

Itemized listing of contents of envelope:

- (1) *Notice of Opposition* (14 pages);
- (2) Check in the amount of \$300.00 (1 check);
- (3) Postcard Acknowledgment (1 postcard); and
- (4) this Certificate of Mail Under 37 C.F.R. § 1.8 (1 page).



Paul W. Fulbright

Postcard Acknowledgment
U.S.P.S. First Class Mail (deposited October 28, 2005)

Envelope contents relate to:

Trademark Application No.: 76/610,358
Filing Date: 09/07/2004
Mark: CRISPAIR
Published for Opp'n: 08/30/2005
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NOV 09 2005

Postcard Acknowledgment

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11-01-2006

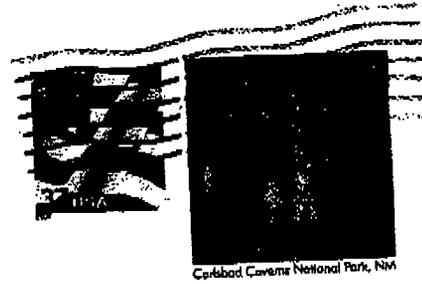
U.S. PATENT & TRADEMARK MAIL POSTAGE #64

Itemized listing of contents of envelope:

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EXHIBIT

2



Law Office – Paul W. Fulbright, PLLC
2003 J J Pearce Drive
Richardson, Texas 75081-5447



**United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Mailed: November 29, 2005

Applicant: Nutek International, Inc.
Serial No.: 76610358
Filed: 09/07/2004
Mark: CRISPAIR

Paul W. Fulbright
Law Office of Paul W. Fulbright, PLLC
2003 J J Pearce Drive
Richardson, TX 75081

TAMMY LOGAN, LEGAL ASSISTANT

It is noted that on November 1, 2005, Conseal International Incorporated filed a notice of opposition to registration of the mark shown in the above-identified application.

Inasmuch as the opposition was not accompanied by the required fee, the notice of opposition cannot be given consideration. Trademark Rule 2.101(d)(3)(i), as amended effective November 2, 2003.

EXHIBIT

3

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Service Mark Application of: Nutek International, Inc.
Application Serial No.: 76/610,358
Filing Date: September 7, 2004
Mark: CRISPAIR
Published for Opposition: August 30, 2005
Law Firm File Ref. No.: 00077.0005

Box TTAB
Commissioner for Trademarks
PO Box 1451
Alexandria, VA 22313-1451

DECLARATION OF PAUL W. FULBRIGHT, ESQ.

I, Paul W. Fulbright, Esq., an authorized representative of Conseal International, Incorporated ("Conseal"), do hereby attest to and declare the following facts in support of the *Request to Reinstate Opposition* (the "Request") dated January 28, 2006:

1. Opposer's *Notice of Opposition* (the "Notice") was filed, in accordance with an accompanying certificate of mail, on October 28, 2005. I personally prepared and filed that *Notice*, and a true and correct copy of the *Notice* is attached as Exhibit 1 to the *Request*.
2. Unless otherwise specified, all references to Exhibits in this *Declaration* are to Exhibits included in the *Request*.
3. The contents of the *Notice* were as follows: (a) a 14-page body; (b) a check no. 1206 drawn on Opposer's counsel's firm bank account in the amount of \$300.00; (c) a separate one-page *Certificate of Mail Under 37*

EXHIBIT

4

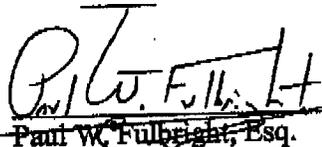
C.F.R. § 1.8 (the "Certificate") itemizing the contents of the *Notice*; and
(d) a self-addressed stamped *Postcard Acknowledgment Receipt* (the
"Postcard") also itemizing the contents of the *Notice*. See Exhibit 1.

4. The *Notice* appears to have been received by the U.S. Patent and Trademark Office (the "P.T.O.") on or about November 1, 2005, because the P.T.O. stamped the *Postcard* with its official stamp on November 1, 2005. See Exhibit 2.
5. The P.T.O. also apparently mailed the *Postcard* back, because my firm received the *Postcard* on November 9, 2005. See Exhibit 2.
6. The P.T.O.-stamped *Postcard* contained no strikeouts or notations of any kind indicating that the P.T.O. found it to contain any kind of error, misstatement, or omission regarding the contents of the *Notice*, and neither I nor anyone at my firm has tampered with or altered the *Postcard* in any way. See Exhibit 2.
7. I first learned of the *Denial* on the morning of Friday, December 2, 2005, when my client representative contacted me advising that he too had just learned of the *Denial*.
8. I placed a first telephone call on Friday, December 2, 2005, and a second telephone call on Wednesday, December 7, 2005, to the P.T.O. Trademark Trial and Appeal Board (the "T.T.A.B.") and left voicemail messages (bearing the application number) in an effort to speak to someone at the P.T.O. / T.T.A.B. to discuss the matter; those telephone calls were not returned.

9. I, Paul W. Fulbright, being duly warned that willful false statements and the like so made are punishable by fine or imprisonment or both under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application, document, or any registration resulting therefrom, declare that I am counsel to Conseal International Incorporated, the Opposer in the above-referenced opposition proceeding, and am authorized to make this declaration on behalf of Opposer; that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true.

Respectfully submitted,

CONSEAL INTERNATIONAL INCORPORATED


Paul W. Fulbright, Esq.
Law Office of Paul W. Fulbright, PLLC
2003 J J Pearce Drive
Richardson, Texas 75081-5447
Office Tel: 972/907-8679
Office Fax: 972/907-8879

01/28/2006

Attorney for
CONSEAL INTERNATIONAL INCORPORATED

LAW OFFICE PAUL W. FULBRIGHT, PLLC
972-907-8679
2003 J J PEARCE DR.
RICHARDSON, TX 75081-5447

04-03

1232

Date 01/22/2006

32-2/1110 TX
1571

Pay to the order of J.S. Content of Trademark Office \$ 300.00

Three hundred dollars and 00/100 Dollars

Bank of America



ACH/RFT 111000025

For Reinstatement Oppn. 7/6/00, 359

⑆111000025⑆ 006774521175⑆ 1232

CERTIFICATE OF MAIL

I hereby certify that the papers itemized below are being deposited with the U.S. Postal Service with sufficient postage as first class mail on the date indicated below in an envelope addressed to:

MAIL STOP TTAB
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

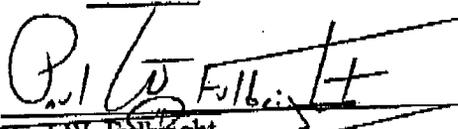
on January 28, 2006.

Subject Matter:

Trademark Application No.: 76/610,358
Filing Date: 09/07/2004
Mark: CRISPAIR
Published for Opp'n: 08/30/2005
Law Firm File Ref. No.: 00077.0005

Itemized listing of contents of envelope:

- (1) *Request for Reinstatement of Opposition* (9 pages);
- (2) *Exhibit 1 – Copy of Notice of Opposition* (17 pages);
- (3) *Exhibit 2 – Copy of Postcard Acknowledgment* (2 pages);
- (4) *Exhibit 3 – Copy of Denial* (1 page);
- (5) *Exhibit 4 – Declaration of Paul W. Fulbright, Esq.* (3 pages);
- (6) Check in the amount of \$300.00 (1 check);
- (7) *Postcard Acknowledgment* (1 postcard); and
- (8) *this Certificate of Mail* (1 page).


Paul W. Fulbright

Postcard Acknowledgment

U.S.P.S. First Class Mail (deposited Jan. 28, 2006)

Subject Matter:
Trademark Application No.: 76/610,358
Filing Date: 09/07/2004
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- (4) *Exhibit 3 - Copy of Dental* (1 page);
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- (8) *Certificate of Mail* (1 page).