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

Proceeding	91169654
Party	Defendant Neways, Inc. Neways, Inc. 2089 Neways Drive Springville, UT 84663
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Date	09/11/2006
Attachments	011 Stip Prop Protective Order.pdf (18 pages)(651342 bytes)

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

In the matter of Trademark Application Nos. 78/490,974 and 78/490,954
Published in the Official Gazette of September 13, 2005
Filing Date: September 28, 2004
For the Marks: **RESURRECTION BIOMIST** and
NEWAYS RESURRECTION BIOMIST

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VISUAL CHANGES SKIN CARE)	
INTERNATIONAL, INC.)	
	Opposer,)	[PROPOSED] STIPULATED
)	PROTECTIVE ORDER
	v.)	
)	
NEWAYS, INC.,)	Opposition No. 91169654
	Applicant.)	Opposition No. 91169655
)	
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The parties hereto have acknowledged that during the course of this proceeding certain matters may be produced which are or may constitute trade secret, confidential research, development, or otherwise confidential commercial information within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120. The parties are desirous of protecting such confidential information from inappropriate disclosure and have therefore stipulated that this Protective Order be entered by the United States Trademark Trial and Appeal Board (“TTAB”) or any subsequent court of competent jurisdiction and that it shall govern all confidential and protected information produced in this proceeding. Accordingly, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Definition of Protected Information: Any party to this action, and any non-party from whom discovery is sought in connection with this action, may designate as “Subject to Protective Order” and

CONFIDENTIAL
or
ATTORNEYS’ EYES ONLY

any documents, things, interrogatory answers, responses to request for admissions, trial or deposition testimony, or other material that contains material or information that is not publicly known which is produced in this opposition by one party to the other including, without limitation, confidential business information, confidential technology, trade secrets, know-how, proprietary data, confidential research, development or commercial information including, but not limited to, production, sales, shipments, purchases, transfers, identification of customers, inventories, amount or source of any income, profits, losses, or expenditures, agreements, contracts, job information, invoices, orders, things, notes, outlines, compilations, memoranda, operating manuals or instructions, correspondence, reports, records, data, charts, specifications, designs, flowcharts, and software and other written, recorded or graphic material, and which is designated as confidential in the manner described in this Order (hereinafter “Protected Information”). Protected Information includes all such confidential information, whether revealed during a deposition, in a document, in an interrogatory answer, by production of tangible evidence, hearing or trial transcripts, responses to requests for admissions or otherwise made available to counsel for either party in this action.

2. Scope of Protected Information: CONFIDENTIAL and ATTORNEYS’ EYES ONLY material, as used in this Order, shall refer to any Protected Information designated pursuant to paragraph 1 above, and all copies thereof, and shall also refer to the information contained in or derived from material designated pursuant to paragraph 1 above, including excerpts, summaries, indices, abstracts, or copies of such material.

3. Limits of Protected Information: No designation of materials as CONFIDENTIAL or ATTORNEYS' EYES ONLY shall be made unless the designated material comprises or contains confidential, highly sensitive technical, marketing, financial, sales or other business information which could be used by the receiving party to obtain a business (not legal) advantage over the producing party.

4. Good Faith Designation: No designation of material as CONFIDENTIAL or ATTORNEYS' EYES ONLY shall be made unless the designating party or non-party believes in good faith that the designated material is Protected Information and entitled to protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure or protected under 37 C.F.R. § 2.120.

5. Authorized Recipients of Protected Information: The following individuals and groups are exclusively authorized to receive Protected Information as stated therein, until and unless the producing party agrees or the TTAB rules that any information, document or thing designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY herein is not Protected Information, or may be disclosed beyond the limits permitted by this Order:

(a) Counsel of the respective parties, including secretarial, clerical, litigation support and paralegal personnel regularly employed by such counsel, may receive Protected Information designated CONFIDENTIAL or ATTORNEYS' EYES ONLY;

(b) Translators of foreign language documents or foreign language testimony who are not employed by one of the parties, but are retained to provide translations of any material or testimony designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY, may receive materials so designated, but only for purposes of translating such documents or testimony;

(c) Third parties, who are not affiliates of or employed by one of the parties, but are specifically retained to assist the counsel of the parties or a party in copying or computer coding or imaging of documents, may receive materials designated CONFIDENTIAL or ATTORNEYS' EYES ONLY, but only for

purposes of copying or computer coding or imaging Protected Information contained therein;

(d) The TTAB, or any other court of competent jurisdiction, and its employees and stenographers, whose function requires them to have access to material designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY may receive such materials, but only for purposes of discharging the function which requires them to have access thereto;

(e) Independent outside experts and their clerical and support staff specifically engaged by counsel or the parties to assist in this opposition may receive Protected Information designated CONFIDENTIAL or ATTORNEYS' EYES ONLY, subject to the provisions of paragraphs 6 and 7 below; and

(f) Up to two (2) employees, officers or directors of the parties may be designated and permitted to receive Protected Information designated CONFIDENTIAL, subject to the provisions of paragraphs 6 and 7 below.

6. Before any disclosure of Protected Information is made pursuant to paragraphs 5(e) or 5(f) above, the following must occur:

(a) the individual to whom disclosure is to be made must be given a copy of this Order, and the provisions of this Order must be explained to the individual to whom disclosure is to be made by an attorney;

(b) the individual to whom disclosure is to be made must sign an undertaking in the form of the attached Exhibit A;

(c) if the individual to whom disclosure is to be made is an expert, a copy of the signed undertaking, a curriculum vitae of the proposed expert, and an identification of any past or present employment or consulting relationship with any party or any related company, must be served by facsimile on opposing counsel at least ten (10) business days before the Protected Information is shown to such an expert; and

(d) if the individual to whom disclosure is to be made is not an expert, or is an employee of either party, an identification of the employee, officer, or director, including all of their titles and responsibilities, must be served by facsimile on opposing counsel at least ten (10) business days before the Protected Information is shown to such employee, officer, or director.

7. Any party may object to the disclosure of Protected Information pursuant to paragraphs 5(e) or 5(f) above, within (7) business days of receiving all of the information required to be provided by subparagraph 6(c) or 6(d). The procedure for making and resolving any such objection shall be as follows:

(a) Any objection made pursuant to this paragraph 7 must be in writing and state the reasons for such objection;

(b) After written objection is made, no disclosure of Protected Information shall be made to that employee, officer, director or expert until the matter is resolved by the TTAB or upon agreement of the parties;

(c) Within ten (10) business days after service of said objection, the objecting party may move the TTAB for an order denying disclosure of any such Protected Information to any such employee, officer, director or expert as to whom a notice of objection had been served, and failure to timely file such a motion shall operate as a waiver of objection to the disclosure of Protected Information to the employee, officer, director or expert concerning whom the objection was made;

(d) The party seeking to disclose Protected Information to the individual concerning whom an objection is made shall have ten (10) business days to file an opposition to any motion filed pursuant to the foregoing subparagraph 7(c);

(e) Upon motion and briefing as set forth in the foregoing subparagraphs 7(c) and 7(d), the TTAB shall then make a determination without further briefing, submission or hearing unless expressly ordered by the TTAB.

8. Certain Information Not Subject to Scope of Order: The restrictions of this Protective Order shall not apply to information which (a) was, is, or becomes public knowledge, not in violation of this Protective Order; (b) was or is acquired from a third party possessing such information and having no obligation of confidentiality to the designating party; or (c) the receiving party can establish that the information was in its rightful and lawful possession at the time of disclosure or was developed independently by the receiving party without the use of Confidential Information.

9. Exceptions by TTAB Order or by Agreement by Parties: Nothing shall prevent disclosure beyond the terms of this Order if the party designating the information consents in writing to such disclosure or if the TTAB, after notice to the other party and the opportunity to be heard, orders such disclosure.

10. Inadvertent or Unintentional Disclosure: The inadvertent or unintentional disclosure by the producing party of information designated under this Protective Order, regardless of whether the information was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of a party's claim of confidentiality, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter. Counsel for the parties shall in any event, to the extent possible, upon discovery of an inadvertent error, cooperate to restore the confidentiality of the designated information. Upon receipt of written notification and identification of inadvertent disclosure of CONFIDENTIAL or ATTORNEYS' EYES ONLY information, the receiving party shall either mark the materials with the appropriate designation or return them to the producing party for such marking.

11. Challenges to Designations: A party shall not be obligated to challenge the propriety of a designation under this Protective Order at the time made, and failure to do so shall not preclude a subsequent challenge thereto. In the event that either party to this opposition disagrees at any point in these proceedings with the designation by the producing party of any information, the parties shall first attempt to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved, the objecting party may seek appropriate relief from the TTAB, and the party asserting confidentiality shall have the burden of proving the same. The parties may, by written stipulation, provide for exceptions to this Order.

12. Documents Under Seal: The Clerk of the TTAB is directed to maintain under seal all documents and transcripts of deposition testimony submitted to the TTAB in this proceeding which have been designated in whole or in part, as CONFIDENTIAL or ATTORNEYS' EYES ONLY by a party to this proceeding according to TBMP § 412.04 (2d. ed. June 2003). All designated information filed under seal with the TTAB in any form, shall be filed in a sealed envelope, prominently marked CONFIDENTIAL or where appropriate, ATTORNEYS' EYES ONLY with the following statement.

FILED UNDER SEAL SUBJECT TO PROTECTIVE ORDER

The materials contained in this envelope have been designated confidential, pursuant to a protective order, and are not to be disclosed or revealed except to the Trademark Trial and Appeal Board and counsel for the parties, or by order of a court.

A similar notification shall be placed on the cover page of the document being filed.

13. Filing of Briefs or Declarations Containing Confidential Information: In the event that a party wishes to use any information designated under this Protective Order in any affidavit, brief, memorandum of law, or other paper filed in this proceeding, such information used therein shall be filed under seal and maintained under seal by the TTAB as provided in Paragraph 12. Nothing in this paragraph shall be construed to preclude a party from delivering

an additional courtesy copy of any paper containing designated information, which copy is not sealed, directly to the ALJ or ALJ panel responsible for this proceeding.

14. Return or Destruction of Confidential Information: Within sixty (60) days after the final conclusion of this proceeding including all appeals, all originals and reproductions of any documents produced and designated under this Protective Order by a party shall be returned to the producing party or, at the option of the receiving party, receiving counsel shall destroy and certify in writing that such material has been destroyed. Outside counsel may retain one copy of any material containing Protected Information marked CONFIDENTIAL or ATTORNEYS' EYES ONLY and one copy of counsel's work product incorporating such Protected Information, which shall remain subject to the provisions of this order.

15. Continuing Effect: This Order shall continue to be binding after the conclusion of this proceeding except that (a) there shall be no restriction on documents that will be used as exhibits in Open Court (unless an appropriate order is entered to maintain the confidentiality of said exhibit) and (b) a party may seek the written permission of the other party or further order of the TTAB, after notice to the other party and opportunity to be heard, with respect to dissolution or modification of this Protective Order.

16. Advice to Client Based on Confidential Information: Nothing in this Order shall bar or otherwise restrict any attorney herein from rendering advice to his client with respect to this proceeding and in the course thereof, referring to or relying upon the attorney's examination of designated information; provided, however, that in rendering such advice and in otherwise communicating with his clients, the attorney shall not disclose the contents or the source of any Protected Information.

17. Discovery Objections, Claim of Privilege: It is not the intention of this Protective Order to deal with any discovery objections to produce, answer or respond on the grounds of attorney-client privilege or work product or to preclude any party from seeking further relief or protective orders from the TTAB as may be appropriate under the Federal Rules of Civil Procedure or 37 C.F.R. § 2.120.

18. Examination of Witnesses Regarding Confidential Information: Notwithstanding any of the provisions of this Order, any witness subject to a noticed deposition in this opposition and his counsel may be shown and questioned, concerning any document of which he is alleged or claims to be the author or a recipient or of which he is alleged to have knowledge. Nothing in this Order shall preclude TTAB officials, or any certified reporter retained to transcribe depositions in this proceeding from access to designated materials during judicial proceedings or depositions in this proceeding.

19. Treatment of Confidential Information Produced by Third Parties: If in the course of this action, discovery is sought from third parties which would require such parties to disclose and/or produce CONFIDENTIAL or ATTORNEYS' EYES ONLY information, such third parties may gain the protection of this Protective Order by simply agreeing in writing to produce documents pursuant to this Order and to be bound by it.

20. Disclosure Outside of Order: In the event that counsel for either party believes or deems it necessary to disclose Protected Information to an officer, employee or agent of their client other than those to whom disclosure is provided for in this Order, the parties agree to negotiate in good faith whether such disclosure may occur and the terms on which such disclosure can occur. In the event the parties are unable to agree, the party seeking disclosure may make application to the TTAB for such disclosure.

21. Maintaining Information Confidential: Until or unless the TTAB rules otherwise, Protected Information and any information derived therefrom, including excerpts, summaries, indices, abstracts or copies thereof, shall be maintained in confidence by the person to whom such material is produced and shall not be disclosed to any person without the express written consent, or consent on the record, of the producing party, except as set forth above.

22. Duty of Receivers of Protected Information: Any person to whom Protected Information is divulged pursuant to the provisions of this Order is similarly obligated to maintain the confidence of such Protected Information, and not to disclose it to any person other than a person authorized under this Order. All produced Protected Information shall be carefully maintained so as to preclude access by the officers, employees and agents of either party other than those otherwise authorized under this Order.

23. Solely for this Proceeding: Protected Information shall not be used for any purposes other than this consolidated opposition proceeding (covering both Opposition Nos. 91169654 and 91169655).

24. Redactions: Any redaction of confidential information, not agreed to by both parties or ordered by the TTAB, shall be accompanied by a notification indicating that the redaction has been made and shall further provide the reasoning for the redaction.

25. Producing Documents for Inspection: In the event a producing party or a third party elects to produce documents or other material for inspection, no markings need be made by the producing party or third party in advance of the inspection. All such documents or other material may be temporarily designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY and shall be treated by the receiving party as if they were so marked. After selection by the receiving party of specified documents or material for copying, the producing party without delay shall make its designation under this Order, if any, and the party making copies shall ensure that any copies include any designation made by the producing party.

26. Alternative Designations: Except as otherwise provided herein, no designation shall be effective unless there is placed or affixed on such material as CONFIDENTIAL or ATTORNEYS' EYES ONLY marking, or unless the parties agree upon some other appropriate methods of designation. The designations "*Highly Confidential Attorneys Eyes Only*," and "*Confidential Attorneys Eyes Only*" shall have the same meaning and effect as the designation ATTORNEYS' EYES ONLY.

27. Non-Tangible Information: All Protected Information not reduced to documentary, tangible or physical form, or which cannot be conveniently designated pursuant to paragraph 1, shall be designated by the producing party by informing the opposing party in writing.

28. Protected Deposition Materials: Depositions or portions thereof which contain Protected Information may be designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY and shall be separately bound in a confidential volume, marked in accordance with paragraph 1, and shall, if required, be separately filed as provided herein so as to distinguish such confidential deposition or confidential portions thereof from non-confidential public depositions or public portions thereof.

29. Designation of Deposition Testimony and Materials: At any deposition session, where appropriate, counsel for a party may temporarily designate as CONFIDENTIAL or ATTORNEYS' EYES ONLY the entire deposition transcript. When such a designation is made, all parties shall maintain the entire deposition transcript and all information contained therein as required by such designation CONFIDENTIAL or ATTORNEYS' EYES ONLY until twenty-one (21) calendar days after receipt of a copy of the transcript. During that period, the party desiring to maintain confidentiality must designate in writing those portions of the transcript regarded as CONFIDENTIAL or ATTORNEYS' EYES ONLY and only those portions will thereafter be handled and marked in accordance with the provisions of this Order. Designation of material at a deposition as Protected Information shall not, however, operate to exclude a party's representative, not authorized to receive Protected Information, from any part of a deposition except when counsel for a party deems that a question and/or the answer to a question will result in disclosure of Protected Information. Only individuals otherwise authorized to receive such Protected Information under the terms of this Order will be allowed to attend confidential portions of depositions.

30. Subsequent Designation of Deposition Testimony and Materials: Material and deposition transcripts produced without the designation of CONFIDENTIAL or ATTORNEYS' EYES ONLY may be so designated subsequent to production or testimony if the producing party provides replacement materials bearing appropriate designations and notifies the receiving party promptly after becoming aware of same that the producing party failed to make such designation at the time of production, during the testimony, or during the twenty-one (21) day period after receipt of the transcript through inadvertence, mistake, or error. If discovery material is designated CONFIDENTIAL or ATTORNEYS' EYES ONLY subsequent to production or testimony, the receiving party promptly shall collect any copies that have been provided to individuals other than those authorized to receive Protected Information so designated under this Order, and shall affix the appropriate designation to any copies that have been provided to individuals authorized to receive Protected Information so designated under this Order.

31. Privileged Information: Any discovery documents produced in this opposition may be later designated as "Attorney Client Privileged" or "Attorney Work Product" promptly upon discovery by the producing party that any such privileged or immune document was produced through inadvertence, mistake, or other error, and no waiver or privilege or immunity shall be deemed to have occurred. Upon such designation, the receiving attorney promptly shall make best efforts to collect all copies of the documents and return them to the producing party. In the event that the receiving attorney believes in good faith that the producing party cannot properly assert any privilege or immunity with respect to the documents, the receiving attorney must notify the designating attorney in writing and the designating attorney shall within thirty (30) days of such notice file a motion to establish that the material is attorney-client privileged; otherwise, the claim of privilege shall be deemed waived.

32. Opposition to Production Rights Preserved: This Order shall be without prejudice to the right of any party to oppose production of any information for any reason permitted under the Federal Rules of Civil Procedure and/or 37 C.F.R. § 2.120.

33. Modification of Protective Order: A party may seek the written permission of the other party or further order of the TTAB, after notice to the other party and opportunity to be heard, with respect to modification of this Protective Order.

IT IS SO ORDERED.

DATED this _____ day of September, 2006.

BY THE UNITED STATES
PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND
APPEAL BOARD

STIPULATED TO:

KIMBLE, MacMICHAEL & UPTON

DATED this ___ day of August, 2006.

By: _____

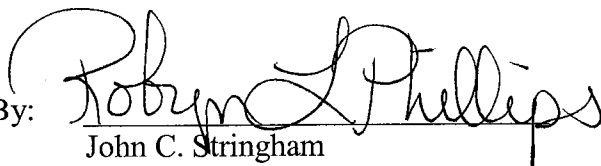
Mark D. Miller
Jeremy D. Clar
5260 North Palm, Suite 221
Fresno, California 93792-9489

Attorneys for Opposer
VISUAL CHANGES SKIN CARE
INTERNATIONAL, INC.

WORKMAN | NYDEGGER

DATED this 11th day of September, 2006

By: _____



John C. Stringham
Robyn L. Phillips
Michael M. Ballard
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Applicant
NEWAYS, INC.

MMB:jbe
J:\1456462\011 Stip Prop Protective Order-final.doc

6. I have carefully read and understand the provisions of the Protective Order.
7. I will comply with all of the provisions of the Protective Order.
8. I will hold in confidence, will not disclose to anyone not qualified under the Protective Order, and will use only for purposes of this action any confidential materials which are disclosed to me.
9. I will return all confidential material that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained.
10. I hereby submit to the jurisdiction of the TTAB and any subsequent court of competent jurisdiction for the purposes of enforcement of the Protective Order in this action.

DATED this _____ day of _____ 2006.

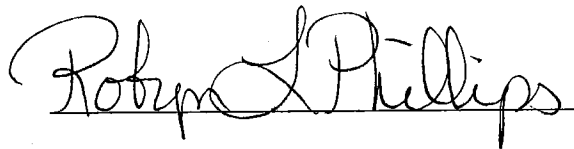
(Signature)

(Typed Name)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **[PROPOSED]** **STIPULATED PROTECTIVE ORDER** was served on Opposer by mailing a true copy thereof to its attorney of record, by First Class Mail, postage prepaid this 11th day of September, 2006, in an envelope addressed as follows:

Mark D. Miller
KIMBLE, MacMICHAEL & UPTON
5260 North Palm Avenue, Suite 221
Post Office Box 9489
Fresno, California 93792-9489

A handwritten signature in cursive script that reads "Robyn L. Phillips". The signature is written in black ink and is positioned above a horizontal line.