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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
Correspondence Address	John C Stringham Workman Nydegger 1000 Eagle Gate Twr, 60 E South Temple Salt Lake City, UT 84111
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Date	09/22/2006
Attachments	015 Mot to Dismiss.pdf (6 pages)(199553 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 Mark: **RESURRECTION BIOMIST** and
NEWAYS RESURRECTION BIOMIST

VISUAL CHANGES SKIN CARE INTERNATIONAL, INC.)	
)	
)	NEWAYS' MOTION TO DISMISS AND
Opposer,)	MEMORANDUM IN SUPPORT
)	THEREOF
v.)	
)	
NEWAYS, INC.,)	Opposition No. 91169654
)	- consolidated with -
Applicant.)	Opposition No. 91169655

MOTION TO DISMISS

Applicant Neways, Inc. ("Neways") hereby submits its Motion to Dismiss the Notice of Opposition filed by Opposer Visual Changes Skin Care International, Inc. ("Opposer"). Opposer's request to amend its Notice of Opposition by removing its only argument from the Notice and replacing it with an entirely new argument implies that Opposer did not have a reasonable legal and factual basis for its Notice of Opposition as required by Fed. R. Civ. P. 11(b)(3). Opposer now seeks to add a completely new argument several months after the deadline to file an opposition. As such, Neways hereby moves the Board to dismiss the Notice of Opposition in its entirety.

Other grounds for this Motion to Dismiss are fully set forth in the accompanying Memorandum.

DATED this 22 day of September, 2006.

Respectfully submitted,



John C. Stringham, Reg. No. 40,331

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Matthew A. Barlow

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ATTORNEYS FOR APPLICANT
NEWAYS, INC.

MEMORANDUM OF LAW

I. INTRODUCTION

On September 28, 2004, Neways filed two separate trademark applications: United States Trademark Application Serial No. 78/490,974 for the mark “RESURRECTION BIOMIST” and United States Trademark Application Serial No. 78/490,954 for the mark “NEWAYS RESURRECTION BIOMIST.” Both applications were published on September 13, 2005, thus commencing the thirty (30) day time period in which the applications could be opposed pursuant to 15 U.S.C. § 1063(a) and 37 C.F.R. § 2.101(c). Opposer moved and was granted two separate extensions of time to file the Opposition by the Board, once on October 10, 2005 and again on November 7, 2005. The parties then stipulated to a third extension on January 10, 2006. Finally, on March 9, 2006, Opposer filed Opposition Nos. 91169654 and 91169655.¹

Now, nearly six months later, Opposer has sought to amend its Notice of Opposition by removing the only allegation articulated in the Notice of Opposition (the reliance on Opposer’s federal registration) and to add a completely new allegation that is being asserted for the first time (the reliance on Opposer’s alleged common law rights). Opposer failed to plead any allegation based on its alleged common law rights in its Notice of Opposition despite having received extensions totaling nearly 5 months to file its Opposition. As articulated below, Opposer’s actions demonstrate the insufficiency of the Notice of Opposition. Therefore, Neways respectfully requests that the Notice of Opposition be dismissed.

II. OPPOSER’S NOTICE OF OPPOSITION SHOULD BE DISMISSED

A motion to dismiss is a test of the legal sufficiency of the notice of opposition. In order to withstand a motion to dismiss, the notice of opposition needs to allege such facts as would, if proved, establish that Opposer is entitled to the relief sought. Therefore, Opposer needs to show that it has a valid statutory ground for denial of the registration sought. *Lipton Indus. Inc. v. Ralston Purina Co.*, 670 F.2d 1024 (CCPA 1982); *Kelly Servs. Inc. v. Greene’s Temporaries*

¹ These two Oppositions were consolidated by the Board into the present action on July 11, 2006.

Inc., 25 USPQ2d 1460, 1462 (TTAB 1992); TBMP § 503.02. Further, Fed. R. Civ. P. 11 mandates that the allegations contained within any pleading that is submitted to the court “have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” Fed. R. Civ. P. 11(b)(3).² For its part, Rule 11(b) “requires that an attorney conduct a reasonable investigation of the factual and legal basis for his claim before filing.” *Brubaker v. City of Richmond*, 943 F.2d 1363, 1373 (4th Cir. 1991).

Pursuant to 15 U.S.C. § 1063(a) and 37 C.F.R. § 2.101(c), Opposer was required to file its Notice of Opposition within thirty (30) days of the publication of the application being opposed or within any extension of time granted by the Board or stipulated by the parties. Opposer did so, basing its Notice of Opposition on Opposer’s own federal registration. Now, by its request for leave to amend, Opposer is seeking to walk away from the grounds on which it based its Notice of Opposition and now assert an entirely new legal theory. Opposer’s desire to remove its only cause of action from the Notice of Opposition (the reliance on Opposer’s federal registration) and add an entirely new argument (the reliance on Opposer’s alleged common law rights) implies that Opposer does not have and never had, a reasonable legal and factual basis for its argument based on its federal registration.

Further, Opposer was required to conduct a reasonable investigation to determine a legal and factual basis for its claim. Opposer’s actions imply that Opposer failed in its obligation, for if there were a reasonable legal and factual basis for this argument, there would be no need to replace it with a new legal theory. Opposer is seeking to remove the only statutory ground for the relief it sought in the Notice of Opposition, and thus cannot meet the standard for prevailing against a motion to dismiss.

² Rule 11, like all the other Federal Rules of Civil Procedure, is applicable to proceedings before this Board. See 37 C.F.R. § 2.116(a).

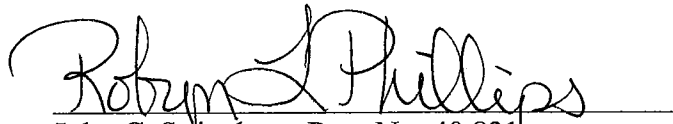
Opposer's Notice of Opposition should therefore be dismissed. By its request to wholly change the basis for its Notice of Opposition, Opposer is acknowledging that there is some factual or legal problem with the only basis which was filed within the deadline for opposing the application. Accordingly, Opposer had no basis for filing this opposition at the time the Notices were filed and the present Opposition should be dismissed.

III. CONCLUSION

Opposer's actions in seeking leave to amend the Notice of Opposition demonstrate that Opposer failed to provide a reasonable legal and factual basis for its opposition, as mandated by Fed. R. Civ. Proc. 11, within the time period prescribed by 15 U.S.C. § 1063(a) and 37 C.F.R. § 2.101. As such, Neways respectfully requests that the Board dismiss the Notice of Opposition for the above-referenced matter.

DATED this 22 day of September, 2006.

Respectfully submitted,



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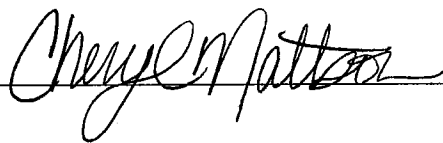
ATTORNEYS FOR APPLICANT

NEWAYS, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of September, 2006, a true and correct copy of the foregoing **NEWAYS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF** has been provided by United States First Class Mail, postage prepaid, in an envelope addressed as follows:

Mark D. Miller
Robert D. Branch
KIMBLE, MAC MICHAEL & UPTON
Post Office Box 9489
Fresno, CA 93792-9489

A handwritten signature in cursive script, appearing to read "Cheryl Matton", is written over a horizontal line.

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