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Filing date: **08/31/2006**

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

Proceeding	91169654
Party	Plaintiff Visual Changes Skin Care International, Inc.
Correspondence Address	Mark D. Miller Kimble, MacMichael & Upton 5260 N. Palm Ave., Ste. 221 Fresno, CA 93704 UNITED STATES mmiller@kmulaw.com
Submission	Motion to Amend Pleading/Amended Pleading
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Signature	/Mark D. Miller/
Date	08/31/2006
Attachments	motion.to.amend.pdf ( 7 pages )(400623 bytes )

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

3 \* \* \*

4 In the matter of Trademark Application No. 78/490,974  
5 Published in the "Official Gazette" of September 13, 2005  
6 Filing Date: September 28, 2004  
7 For the Mark: **RESURRECTION BIOMIST**

8 -and-

9 In the matter of Trademark Application No. 78/490,954  
10 Published in the "Official Gazette" of September 13, 2005  
11 Filing Date: September 28, 2004  
12 For the Mark: **NEWAYS RESURRECTION BIOMIST**

13 VISUAL CHANGES SKIN CARE  
14 INTERNATIONAL, INC.

15 Opposer

16 v.

17 NEWAYS, INC.

18 Applicant

**MOTION TO AMEND  
NOTICE OF OPPOSITION,  
AND TO EXTEND TRIAL  
DATES**

Opposition No. 91169654

- consolidated with -

Opposition No. 91169655

19 Opposer, Visual Changes Skin Care International, Inc., hereby moves to amend its Notice  
20 of Opposition in the above-captioned consolidated cases, pursuant to Rules 2.107 of the Rules of  
21 Practice of the Patent and Trademark Office and Rule 15 of the Federal Rules of Civil Procedure.  
22 Specifically, Opposer seeks to amend said Notice of Opposition to eliminate reliance on its  
23 federal registration in this proceeding, and to instead rely on its common law rights as more  
24 particularly set forth in the attached proposed Amended Notice of Opposition. The original  
25 Notice of Opposition included claims based on both the Opposer's registration and the Opposer's  
26 common law rights.

27 Applicable Law: Rule 15(a) of the Federal Rules of Civil Procedure provides liberality in  
28 amending pleadings where justice so requires. For example, the Fourth Circuit Court of Appeals  
has construed Rule 15(a) as follows:

1 Under Federal Rules of Civil Procedure 15(a), leave to amend a pleading  
2 'shall be freely given when justice so requires.' Fed. R. Civ. P. 15(a). The  
3 Supreme Court has declared that 'this mandate is to be heeded.' *Foman v. Davis*,  
4 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed. 2d 222 (1962). The law is well  
5 settled 'that leave to amend a pleading should be denied only when the  
6 amendment would be prejudicial to the opposing party, there has been bad faith  
7 on the part of the moving party, or the amendment would be futile.' *Johnson v.*  
8 *Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986). Delay alone is an  
9 insufficient reason to deny leave to amend. *See id.* Rather, the delay must be  
10 accompanied by prejudice, bad faith, or futility. *See id.*

11 *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999).

12 In *Island Creek Coal Co. v. Lake Shore, Inc.* 832 F.2d 274, 279 (4th Cir. 1987), the Court  
13 held that even though the action had been pending in the district court for three and a half years,  
14 the district court abused its discretion by denying the plaintiffs' motion for leave to amend their  
15 complaint to allege a new theory of recovery.

16 It is the practice of the Patent and Trademark Office to liberally grant motions to amend.  
17 *Cool Ray, Inc. v. Eye Care, Inc.*, 183 U.S.P.Q. 618, 174 WL 20036 (Trademark Trial and App.  
18 Bd. 1974) (no prejudice in allowing amendment since trial period had not commenced). This is  
19 so even when a plaintiff seeks to amend its complaint to plead a claim other than those stated in  
20 the original complaint. TBMP § 507.02.

21 In the present case, the proposed amendment narrows the issues to be determined in the  
22 consolidated opposition proceedings by eliminating one of the bases for the opposition. With  
23 regard to timing, the consolidated opposition proceedings are still in the early stages, the  
24 opposition itself having been filed less than 6 months ago, and the discovery cutoff still well over  
25 a month away. To the extent that additional discovery may be desired by either side as a result of  
26 the proposed amendment, the Opposer is willing to stipulate to reasonable extensions of time for  
27 not only the discovery deadline, but also for all of the other deadlines in this proceeding.  
28 Accordingly, there is no prejudice to the Applicant by the proposed amended pleading.

In light of the above, it is respectfully requested that Opposer's Motion to Amend be  
granted as to these consolidated opposition proceedings. Opposer also moves that the discovery  
cutoff and all other deadlines in this proceeding be extended for a period of 60 days.


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1 Dated: August 31, 2006

Respectfully Submitted,

2 KIMBLE, MacMICHAEL & UPTON  
3 A Professional Corporation

4 By   
5 MARK D. MILLER  
6 5260 North Palm Ave., Suite 221  
7 Fresno, California 93704  
8 Telephone: (559) 435-5500  
9 Facsimile: (559) 435-1500  
10 Attorneys for Opposer  
11 Visual Changes Skin Care International, Inc.

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**Certificate of Mailing 37 CFR § 2.197**

I hereby certify that that a true copy of the foregoing Motion to Amend Notice of Opposition is being served on the Applicant by being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to:

John C. Stringham  
Robyn L. Phillips, Esq.  
WORKMAN NYDEGGER  
1000 Eagle Gate Tower  
60 East South Temple Street  
Salt Lake City, Utah 84111

on August 31, 2006.

Signed:   
Deniece Turner

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

3 \* \* \*

4 In the matter of Trademark Application No. 78/490,974  
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11 VISUAL CHANGES SKIN CARE )  
12 INTERNATIONAL, INC. )

13 Opposer )

14 v. )

15 NEWAYS, INC. )

16 Applicant )

**PROPOSED AMENDED  
NOTICE OF OPPOSITION TO  
REGISTRATION**

Opposition No. 91169654

- consolidated with -

Opposition No. 91169655

17  
18 Opposer Visual Changes Skin Care International, Inc., a California corporation located  
19 and doing business at 2491 W. Shaw Ave., Ste. 110, Fresno, California 93711 ("Opposer"),  
20 believes that it will be damaged by registration of the mark shown in Serial No. 78/490,974  
21 (RESURRECTON BIOMIST), and by the mark shown in Serial No. 78/490,954 (NEWAYS  
22 RESURRECTON BIOMIST), and hereby opposes same.

23 **Description of Applicant's Applications:**

24 1. Serial No. 78/490,974

25 Filed on September 28, 2004.

26 Published for opposition on September 13, 2005.

27 Mark: RESURRECTON BIOMIST in class 003 for personal care preparation; skin  
28 moisturizer made from the Resurrection Plant.

27 ///

1 2. Serial No. 78/490,954  
2 Filed on September 28, 2004.  
3 Published for opposition on September 13, 2005.  
4 Mark: NEWAYS RESURRECTION BIOMIST in class 003 for personal care  
5 preparation; skin moisturizer made from the Resurrection Plant.

6 As grounds of opposition it is alleged that:

7 1. Opposer, since May 31, 2003, has been, and is now, using the mark  
8 RESURRECTION in connection with the sale of skin care products in the form of a non-  
9 medicated skin care agent, emulsion, lotion, cream, and moisturizer for personal use; namely:  
10 topical skin treatment for skin lightening, tyrosinase inhibiting, skin toning, environmentally  
11 damaged repair, environmental protection, anti-aging, age retarding, firming, tightening, wrinkle  
12 reducing, collagen and elastin synthesizing, increasing skin elasticity, increasing cell respiration,  
13 stimulating growth for aged keratinocytes, stimulating multiplication of fibroblasts, synthesizing  
14 glycosaminoglycans, accelerating cell turn over, preventing glycation, anti collagenase,  
15 elastinase and hyaluronidase activity, reducing epidermal water loss, rejuvenating dull, rough or  
16 tired skin, holding oxygen in cell membranes, assisting with cell growth, stabilizing the lipids in  
17 the skin, inhibiting matrix metalloproteinase, stimulating growth factors, reducing redness,  
18 assisting in calcium and iron absorption, energizing, hydrating, moisturizing, lubricating,  
19 softening, nourishing, reducing inflammation, healing, protecting, barrier assistance, vitamin  
20 supplement, free radical prevention; Non-medicated plant, fruit, and flower based cream and  
21 lotion, natural cream and lotion, herbal cream and lotion, mineral cream and lotion, penetrating  
22 agent, facial cream and lotion, night cream and lotion, herbal cream and lotion, cream and lotion,  
23 anti-aging cream and lotion, eye cream and lotion, vanishing cream and lotion, emollient cream  
24 and lotion, peptide cream and lotion, and skin conditioner. Said use has been valid and  
25 continuous since said date of first use, and has not been abandoned. Said mark  
26 RESURRECTION of Opposer is symbolic of extensive good will and consumer recognition built  
27 up by Opposer through substantial amounts of time and effort in advertising and promotion. In  
28 view of the similarity of the respective marks and the related nature of the goods and services of  
the respective parties, it is alleged that Applicant's marks RESURRECTION BIOMIST and

1 NEWAYS RESURRECTON BIOMIST so resemble Opposer's mark RESURRECTION,  
2 previously used in the United States and not abandoned, as to be likely to cause confusion, or to  
3 cause mistake or to deceive.

4 WHEREFORE, Opposer prays that registration be refused for application serial number  
5 78/490,974 for the mark RESURRECTON BIOMIST, and for application serial number  
6 78/490,954 for the mark NEWAYS RESURRECTON BIOMIST, and that no registrations  
7 thereon be issued to Applicant, and that this opposition be sustained in favor of Opposer.

8 The Office is authorized to charge any fees required by this paper to deposit account  
9 502429.

10 Dated: August 31 2006

Respectfully Submitted,

KIMBLE, MacMICHAEL & UPTON  
A Professional Corporation

By   
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