

ESTTA Tracking number: **ESTTA43648**

Filing date: **08/30/2005**

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

<b>Proceeding</b>	91161603
<b>Party</b>	Plaintiff Allergan, Inc. Allergan, Inc. 2525 Dupont Drive Irvine, CA 92612
<b>Correspondence Address</b>	SUSAN J. HINCHEY CORPORATE TRADEMARK DEPT. 2525 DUPONT DR IRVINE, CA 92612-1599
<b>Submission</b>	Opposer's Renewed Notice of Motion and Motion to Compel; Decls of Wilton and West in Support Thereof
<b>Filer's Name</b>	Kenneth L. Wilton
<b>Filer's e-mail</b>	kwilton@seyfarth.com, kelko@seyfarth.com
<b>Signature</b>	/Kenneth L. Wilton/
<b>Date</b>	08/30/2005
<b>Attachments</b>	Renewed Notice of Motoin and Motion to Compel Respsnes.pdf ( 11 pages ) Decl of Wilton in Support of Renewed Motion to Compel.pdf ( 21 pages ) Decl of West in Support of Renewed Motoin to Compel.pdf ( 3 pages )

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

In the Matter of Application Serial No. 78/320,975  
Published in the Official Gazette on August 3, 2004

ALLERGAN, INC.,

Opposer,

v.

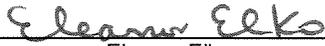
BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

**CERTIFICATE OF ON-LINE FILING**

I hereby certify that this paper was filed on-line with the  
Trademark Trial and Appeal Board on August 30, 2005

  
\_\_\_\_\_  
Eleanor Elko

**OPPOSER'S RENEWED NOTICE OF MOTION AND MOTION TO COMPEL  
RESPONSES TO ITS FIRST SETS OF INTERROGATORIES AND REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND THINGS**

**TO APPLICANT:**

PLEASE TAKE NOTICE that pursuant to Rule 2.120 of the Trademark Rules of Practice, opposer Allergan, Inc. ("Opposer") hereby once again moves the Trademark Trial and Appeal Board for an order compelling responses, without any objections, by applicant BioCentric Laboratories, Inc. ("Applicant") to Opposer's first sets of interrogatories and requests for production of documents and things, and for the production of responsive documents and things. In addition, Opposer seeks an order extending the discovery cutoff and trial dates in this matter for ninety (90) days.

This motion is based upon this Notice, the attached brief in support of the motion, the accompanying declarations of Kenneth L. Wilton and Peggy West, those facts of which the Board may take judicial notice including the prior filings by the parties in connection with this

proceeding, and such other argument and evidence as may be presented to the Board on this motion.

Dated: August 30, 2005

Respectfully submitted,

SEYFARTH SHAW LLP

By: \_\_\_\_\_

  
Kenneth L. Wilton  
Attorneys for Opposer  
ALLERGAN, INC.

2029 Century Park East, Suite 3300  
Los Angeles, CA 90067-3063  
Telephone: (310) 277-7200  
Facsimile: (310) 201-5219

## **OPPOSER'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL**

### **INTRODUCTION**

Opposer owns various registrations of the "BOTOX" trademark in the United States and in this proceeding has opposed Applicant's application to register "SEATOX" for goods identified as "cosmetic."

This is not the first time Opposer has sought an order compelling Applicant to comply with its obligations under the Federal Rules of Civil Procedure and the Trademark Rules of Practice. While the first motion was denied, the Board extended the discovery cutoff and trial dates to allow Applicant to respond to the discovery. Now Applicant is again claiming not to have received the copy that was mailed to it, this time served at its specified address of record, and is refusing to cooperate in any manner with Opposer's attempts to conduct discovery in this matter. Applicant's latest claims of non-receipt are not credible, and its abject refusal to cooperate in discovery should not be countenanced.

### **BACKGROUND FACTS**

In response to Opposer's first motion to compel, Applicant claimed that it had not received the first sets of interrogatories, requests for production of documents and things, and requests for admission that were served on April 4, 2005. [See Applicant's June 16, 2005 Response.] Specifically, Applicant indicated that its address of record was not the address to which Opposer had sent the discovery, but rather "P.O. Box 1018, Brighton, CO 80601." [Id.]

Accordingly, on July 1, 2005, Opposer re-served its first sets of interrogatories, requests for production of documents and things, and requests for admission on Applicant by mailing copies to Applicant at the Post Office Box address specified *by the Applicant*. [Wilton Decl., ¶ 3; Ex. 1.] As can be seen from the copies of the written discovery attached hereto, the discovery was properly served and the representation by counsel's assistant, Eleanor Elko, to that

effect provides *prima facie* proof of service. Trademark Rule 2.119(a). [Wilton Decl. ¶ 3.] To date, no responses have been received by Opposer.<sup>1</sup> [Wilton Decl. ¶ 3.]

Moreover, Opposer provided additional notice of the fact that it was serving the discovery in its July 1, 2005 Reply Brief filed with the Board when it stated “another copy of the discovery is being served concurrently herewith upon Applicant ... on the Post Office Box address for Applicant.” [July 1, 2005 Reply Brief, p. 2.] Not only was the Reply Brief served on Applicant, but Applicant has told the Board that it reviews the TTABVUE site “every Thursday” and therefore should have realized that Opposer was again serving the discovery. [Applicant’s June 16, 2005 Response.]

In opposition to Opposer’s first motion to compel, Applicant noted that, given that Opposer was requesting a “face to face meeting” (a reference to the date and time of production) it was surprising that it did not contact Applicant immediately after Applicant failed to appear. [Applicant’s June 16, 2005 Response, p. 2.] Accordingly, and expecting Applicant to comply with its discovery obligations, on August 8, 2005, the date set for the production of documents, Opposer sent a representative, Ms. Peggy West, to the address set for the production of documents. [West Decl. ¶ 1.] When no one appeared at that address, Opposer’s representative traveled to the address of Applicant’s registered agent as reflected in the records of the Colorado Secretary of State. [*Id.* at ¶ 2.]

Applicant’s registered agent, Ms. Margaret Turek, said that she had no documents to produce, and refused to provide Opposer’s representative an address or telephone number where she could reach Biocentric Laboratories, Inc.. [*Id.*] Instead, Ms. Turek called Rebecca Spaar,

---

<sup>1</sup>The requests for admission are not before the Board on this motion, as they are automatically deemed admitted under Rule 36 of the Federal Rules of Civil Procedure on the basis of Applicant’s failure timely to respond to them.

the Chief Executive Officer of Applicant, and allowed Opposer's representative to speak directly with Ms. Spaar. [Id.] Ms. Spaar, when asked about the production, stated that she would have to speak with her general manager to see if there was anything to produce. At no time did Ms. Spaar indicate that she did not know about the document production or question why Opposer's representative expected documents to be produced. [West Decl., ¶¶ 2-3.] These representations stand in stark contrast to Applicant's later claim that it did not receive the second copy of the discovery. [Applicant's August 9, 2005 filing.]

Notwithstanding Applicant's repeated failure and refusal to respond to discovery, on August 22, 2005, in a good faith effort to resolve this dispute, Opposer's counsel attempted to contact Applicant at the telephone numbers listed on its previous correspondence. [Wilton Decl. ¶ 4.] In addition, Opposer re-served its discovery *for a third time*, this time by Express Mail, to *both* the Post Office Box address and the new address for Applicant found in the Colorado Secretary of State's records. [Id.] This copy *was* demonstrably received by Applicant. [Id.]

In response to Opposer's counsel's telephone message, Applicant requested that Opposer communicate with it via e-mail concerning this matter. Accordingly, on August 24, 2005, Opposer's counsel sent an e-mail discussing Applicant's failure to timely respond to the discovery and to produce the requested documents, and, in view of the re-served discovery, requested that Applicant stipulate to an extension of the August 31, 2005 discovery cut-off. [Wilton Decl. ¶ 4.] The e-mail to Applicant stated:

Dear Ms. Spaar:

I received a call today from your assistant, Andi VanMeter, who informed me that you have authorized us to communicate with BioCentric via this e-mail address in connection with this matter.

Further to my telephone message on Monday (to which Ms. VanMeter was responding), in light of your claim in your August

9, 2005 filing with the TTAB that you did not receive the second copy of our written discovery which properly was sent to your company's post office box, yesterday we served a third copy of the discovery. This copy was sent via Express Mail to both the post office box address and the address set forth in your August 9, 2005 filing with the Colorado Secretary of State's office.

Without waiving Allergan's rights vis-à-vis BioCentric's failure to respond to the second set of discovery, and in particular the Requests for Admission, at this juncture our primary concern is getting the information we have requested with sufficient time to conduct follow-up discovery. We therefore request that you agree to a ninety (90) day extension of the discovery cutoff in this matter until November 30, 2005. If not, we will request that the TTAB compel your company to respond to the earlier discovery (or deem it admitted as appropriate) and extend the date.

Please advise whether you will agree to the requested extension.

Best regards,

Ken Wilton

[Wilton Decl. ¶ 4; Ex. 2.]

On August 24, 2005, Applicant's Chief Executive Officer acknowledged receipt of Opposer's counsel's e-mail, and requested further "clarification" of what was meant by the statement "the second copy of our written discovery which properly was sent to your company's post office box." [Wilton Decl. ¶ 5; Ex. 3.] Although the statement seemed clear and unequivocal, on August 24, 2005, Opposer's counsel responded that the second copy of the discovery was served on the "P.O. Box 1018" address, and again requested that Applicant agree to an extension of the discovery cut-off. [Wilton Decl., ¶ 6; Ex. 4.]

On Friday, August 26, 2005, Applicant acknowledged receipt of Opposer's "request" on August 25, 2005, a reference apparently to the re-served discovery, and stated it would provide an answer by Monday, August 29, 2005. [Wilton Decl., ¶ 7; Ex. 5.] On August 29, 2005, Applicant stated that "[a]fter careful review, we have to decline." [Wilton Decl., ¶ 8; Ex. 6.] No

reason was given for Applicant's refusal to extend the discovery cutoff. [Wilton Decl., ¶ 8.] Moreover, given Applicant's earlier e-mail equating the re-served discovery with Opposer's "request", the response may be construed to mean that Applicant simply is declining to respond to *any* discovery, extended date or not. Applicant's refusal to cooperate and provide discovery responses necessitated the filing of this motion.

Opposer's counsel has complied with the Rules, served the subject discovery on *three* separate occasions to each of the addresses specified by Applicant, bent over backwards to accommodate Applicant's failure to understand and follow the rules, and still Applicant refuses to respond to discovery in this proceeding. The Board must not allow Applicant's gamesmanship to continue nor allow Applicant's conduct to deprive Opposer of its right to conduct and complete all necessary, relevant discovery in sufficient time to prepare to present testimony.

### ARGUMENT

#### THE BOARD SHOULD ORDER APPLICANT TO RESPOND TO THE OUTSTANDING DISCOVERY REQUESTS WITHOUT ANY OBJECTIONS AND SHOULD EXTEND THE PERIOD FOR DISCOVERY AFTER DISPOSITION OF THIS MOTION TO PERMIT OPPOSER TO CONDUCT FOLLOW-UP DISCOVERY

Rule 2.120(e)(1) of the Trademark Rules of Practice provides, in pertinent part, that "[i]f a party . . . fails to answer . . . any interrogatory, or fails to produce and permit the inspection and copying of any document or thing, the party seeking discovery may file a motion before the Trademark Trial and Appeal Board for an order to compel . . . an answer, or production and an opportunity to inspect and copy." 37 C.F.R. § 2.120(e)(1). The motion "must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion and has been unable to reach agreement." *Id.* As

discussed above, Opposer has made repeated attempts to extract discovery responses from Applicant, only to be met with claims of non-receipt followed by express refusals to cooperate. [See Wilton Decl.; West Decl.] As a result, this motion should be granted.

I.

**OPPOSER HAS MADE A GOOD FAITH EFFORT TO  
RESOLVE THIS DISCOVERY DISPUTE.**

Where “there has been a complete failure to respond to discovery, the party seeking discovery has a duty under [Rule 2.120(e)(1)] to contact his opponent to ascertain why there has been no response and whether the matter can be resolved amicably. If the party seeking discovery is not satisfied with his opponent’s answer to this inquiry, he may then file a motion to compel, supported by the statement required by [Rule 2.120(e)(1)].” *MacMillan Bloedel Ltd. v. Arrow-M Corp.*, 203 USPQ 952, 959 (TTAB 1979); *see also Environtech Corp. v. Compagnie des Lampes*, 219 USPQ 448 (TTAB 1979) (telephone conference with counsel for non-moving party sufficient to satisfy obligations under Rule 2.120(e)(1)).

Opposer’s counsel contacted Applicant both telephonically and in writing regarding the reasons for Applicant’s failure to respond to Opposer’s discovery requests, and received Applicant’s response expressly refusing to cooperate. It is plain that further attempts to resolve this dispute would be fruitless. As a result, these actions are more than sufficient to satisfy Opposer’s obligations under Rule 2.120(e)(1).

## II.

**THE BOARD SHOULD ORDER APPLICANT TO RESPOND TO OPPOSER'S FIRST SETS OF INTERROGATORIES AND PRODUCTION REQUESTS WITHOUT ANY OBJECTIONS, AND TO PRODUCE RESPONSIVE DOCUMENTS AND THINGS WITHOUT ANY OBJECTIONS BY COPYING THEM AND MAILING THEM TO OPPOSER'S COUNSEL.**

“Under the Board’s discovery practice, a party who fails to respond to a request for discovery during the time allowed therefor is deemed to have forfeited its right to object to the request on its merits unless [it] can show that failure to timely respond was the result of excusable neglect.” *MacMillan Bloedel Ltd.*, *supra*, 203 USPQ at 953, citing *Crane v. Shimano Industrial Co., Ltd.*, 184 USPQ 691 (TTAB 1975); *see also* TBMP §§ 405.04(a), 406.04(a); *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1555 (TTAB 2000).

Applicant cannot possibly show excusable neglect given the fact that it has repeatedly failed to follow the Rules of this Board, and has been specifically warned that it was required to do so. Moreover, Applicant’s claim that it did not receive the second re-served copy of Opposer’s discovery rings hollow, particularly in light of its lack of surprise when Opposer’s representative appeared to copy whatever documents were being produced. As a result, the Board should exercise its discretion to order Applicant to answer Opposer’s first set of interrogatories without any objections and to order Applicant to respond to Opposer’s first set of requests for production of documents and things, and to produce all responsive documents and things, without any objections, by copying them at Applicant’s expense and mailing them to Opposer’s counsel.

Although the filing of this motion will result in a suspension of proceedings with respect to all matters not germane to the motion, Opposer respectfully requests that upon resumption of the proceedings, the Board extend the period for discovery to permit Opposer to conduct follow-up discovery after receipt of Applicant’s written responses and responsive documents and things,

and that the discovery cutoff be set 90 days from the date the proceeding is reopened, with the testimony dates set appropriately thereafter.

**III.**

**THE BOARD SHOULD EXTEND THE DISCOVERY-CUT OFF TO ENABLE OPPOSER TO CONDUCT AND COMPLETE ALL RELEVANT DISCOVERY, INCLUDING FOLLOW UP DISCOVERY.**

By reason of Applicant's failure and refusal to respond to discovery, defiance and refusal to cooperate, and elaborate steps to avoid its discovery obligations as detailed herein, Opposer has been deprived of its ability to complete relevant discovery in advance of the August 31, 2005 discovery cut-off. A party may obtain relief from the discovery cut-off date by demonstrating good cause for allowing further discovery. Fed. R. Civ. P. 16(b). Applicant's defiance and abuse of the discovery process constitutes good cause herein.

**CONCLUSION**

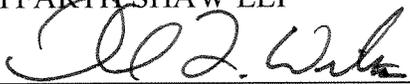
For all of the foregoing reasons, Opposer's motion to compel should be granted in its entirety.

Dated: August 30, 2005

Respectfully submitted,

SEYFARTH SHAW LLP

By: \_\_\_\_\_

  
Kenneth L. Wilton  
Attorneys for Opposer  
ALLERGAN, INC.

2029 Century Park East, Suite 3300  
Los Angeles, CA 90067-3063  
Telephone: (310) 277-7200  
Facsimile: (310) 201-5219

**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2005, I served the foregoing Opposer's Renewed Notice of Motion and Motion to Compel Responses to Its First Sets of Interrogatories and Requests for Production of Documents and Things on the Applicant by depositing a true copy thereof in a sealed envelope with the United States Postal Service "Priority Mail" addressed to applicant as follows:

Ms. Rebecca Spaar  
Chief Executive Officer  
BioCentric Laboratories, Inc.  
854 Baseline Place  
Suite B  
Brighton, CO 80603

AND

Ms. Rebecca Spaar  
Chief Executive Officer  
BioCentric Laboratories, Inc.  
P.O. Box 1018  
Brighton, CO 80601



\_\_\_\_\_  
Eleanor Elko

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

In the Matter of Application Serial No. 78/320,975  
Published in the Official Gazette on August 3, 2004

ALLERGAN, INC.,

Opposer,

v.

BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

**CERTIFICATE OF ON-LINE FILING**

I hereby certify that this paper was filed on-line with the  
Trademark Trial and Appeal Board on August 30, 2005.

  
Eleanor Elko

**DECLARATION OF KENNETH L. WILTON IN SUPPORT OF OPPOSER'S  
RENEWED MOTION TO COMPEL RESPONSES TO ITS FIRST SETS OF  
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND  
THINGS**

I, Kenneth L. Wilton, hereby declare:

1. I am a member of the bar of the State of California, and am a member of the firm of Seyfarth Shaw LLP, counsel of record for opposer Allergan, Inc. ("Opposer") in this opposition. I make this declaration on the basis of my own personal knowledge and in support of Opposer's renewed motion to compel responses, without any objections, by applicant BioCentric Laboratories, Inc. ("Applicant") to Opposer's first sets of interrogatories and requests for production of documents and things, and production of documents and things without any objections.

2. On April 4, 2005, Opposer served its first sets of interrogatories, requests for production of documents and things, and requests for admission on Applicant by mailing copies to Applicant at its address of record. Applicant's responses to this discovery was due to be served on or before May 9, 2005. Applicant did not respond.

3. On June 8, 2005, I sent via Express Mail a letter to Applicant's Chief Executive Officer, Rebecca Spaar, regarding the fact that Applicant had not responded to the written discovery and demanding an immediate response. Again, Applicant did not respond to my letter. Thus, my office filed a motion to compel responses. In opposition to the Motion to Compel, Applicant claimed that it never received copies of the discovery because the discovery was not served at Applicant's new address of record. Upon learning of Applicant's claim that it did not receive Opposer's discovery requests, on July 1, 2005, I caused to be re-served Opposer's first sets of interrogatories, requests for production of documents and things, and requests for admission on Applicant by mailing copies to Applicant at the new address of record specified *by the Applicant*. Copies of the first sets of interrogatories and first sets of requests for production of documents and things which were re-served on July 1, 2005 are attached hereto as Exhibit 1. To date, no responses have been received by Opposer.

4. On August 22, 2005, I telephoned Applicant to discuss Applicant's failure to timely respond to the discovery and to produce the requested documents. I left a telephone message at the 800 number provided by Applicant. In addition, on August 22, 2005 I caused to be re-served Opposer's first sets of interrogatories, requests for production of documents and things, and requests for admission on Applicant, *for a third time*, this time by Express Mail. In response to my telephone call, Andi VanMeter, assistant to Applicant's Chief Executive Officer, Ms Rebecca Spaar, called me and informed me that Ms Spaar had authorized us to communicate with BioCentric in connection with this matter via e-mail at [biocentriclabs@aol.com](mailto:biocentriclabs@aol.com). On August 24, 2005, I sent an e-mail to discuss Applicant's failure to timely respond to the discovery and to produce the requested documents, and, in view of the reserved discovery and fast-approaching discovery cut-off, requested that Applicant stipulate to an extension of the

August 31, 2005 discovery cut-off. A true and correct copy of my August 24, 2005 e-mail is attached hereto as Exhibit 2.

5. On August 24, 2005, Ms. Spaar sent me an e-mail acknowledging receipt of my e-mail and requesting clarification. A true and correct copy of the e-mail I received on August 24, 2005 from Ms. Spaar is attached hereto as Exhibit 3.

6. On August 24, 2005, I responded to Ms. Spaar's August 24<sup>th</sup> e-mail, and again requested that Applicant agree to an extension of the discovery cut-off to avoid the filing of this motion and to enable Applicant a final opportunity to respond to the subject discovery. A true and correct copy of my August 24, 2005 e-mail is attached hereto as Exhibit 4.

7. On Friday, August 26, 2005, I received an e-mail from Applicant acknowledging receipt of Opposer's "request" on August 25, 2005, and agreeing to have an answer by Monday, August 29, 2005. A true and correct copy of the e-mail I received on August 26, 2005 from Ms. Spaar is attached hereto as Exhibit 5.

8. On August 29, 2005, I received an e-mail from Applicant declining Opposer's request. Applicant's response is ambiguous, because it could mean that Applicant is refusing to agree to an extension of the discovery cut-off or that it is refusing to respond to the discovery it received on August 25, 2005. No reason was given for why Applicant "had to decline." A true and correct copy of the e-mail I received on August 29, 2005 from Ms. Spaar is attached hereto as Exhibit 6.

9. True and correct copies of the records of the United States Post Office, attached hereto as Exhibit 7, indicate that the re-served copies of Opposer's discovery were received by Applicant on August 24, 2005.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of August, 2005 at Los Angeles, California.

A handwritten signature in cursive script, appearing to read "K. L. Wilton", written in black ink.

---

Kenneth L. Wilton

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

In the Matter of Application Serial No. 78/320,975  
Published in the Official Gazette of August 3, 2004

ALLERGAN, INC.,

Opposer,

v.

BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

**OPPOSER'S FIRST SET OF WRITTEN INTERROGATORIES TO APPLICANT**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, opposer Allergan, Inc. hereby propounds its first set of written interrogatories to applicant BioCentric Laboratories, Inc. These interrogatories are to be answered separately and fully, in writing under oath, within 30 days of the date of their service.

**DEFINITIONS**

For purposes of these requests:

1. "Opposer" means the opposer in this action, Allergan, Inc.
2. "Applicant" means the applicant in this action, BioCentric Laboratories, Inc.
3. "Opposed Application" means Application Serial No. 78/320,975, the application at issue in this action.
4. "Applicant's Mark" means the mark shown in the Opposed Application.
5. "Opposer's Mark" means the mark "BOTOX."

## **INTERROGATORIES**

### **INTERROGATORY NO. 1:**

State the name, title, and address of each person involved in the selection, adoption, and/or clearance of Applicant's Mark.

### **INTERROGATORY NO. 2:**

State the name, title, and address of each person involved in the decision to file the Opposed Application.

### **INTERROGATORY NO. 3:**

State in detail the reasons for selecting Applicant's Mark.

### **INTERROGATORY NO. 4:**

Identify any other marks that were considered as an alternative to Applicant's Mark in the process of selecting, adopting, and clearing Applicant's Mark.

### **INTERROGATORY NO. 5:**

State when and under what circumstances Applicant first became aware of Opposer and/or Opposer's Mark.

### **INTERROGATORY NO. 6:**

Identify the class or classes of consumers to whom Applicant intends to market or promote the products intended to be sold under Applicant's Mark.

### **INTERROGATORY NO. 7:**

Describe all efforts undertaken by or on behalf of Applicant to determine the nature, extent, and duration of any actual use in commerce or existence of marks, other than Opposer's Mark, containing a "TOX" suffix.

**INTERROGATORY NO. 8:**

State the name and address of any person who has expressed the belief, orally, in writing, or by conduct, that Applicant's Mark is similar to Opposer's Mark, and/or reminded the person of Opposer and/or Opposer's Mark, and as to each person so identified, state the date and substance of his or her statement or act.

**INTERROGATORY NO. 9:**

State the name and address of any person who has expressed the belief, orally, in writing, or by conduct, that Applicant's goods sold or to be sold under Applicant's Mark originate or are associated with, or are sponsored, authorized or licensed by, Opposer.

**INTERROGATORY NO. 10:**

Identify by name, date, and title any consumer research, market research, focus groups, studies, or other forms of research regarding Applicant's Mark.

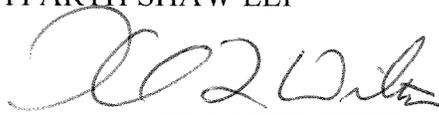
**INTERROGATORY NO. 11:**

For each of Applicant's responses to each request for admission contained in Opposer's First Set of Requests for Admission served concurrently herewith that is not an unqualified admission, state all facts that support Applicant's response.

Respectfully submitted,

Dated: July 1, 2005

SEYFARTH SHAW LLP

By: 

Kenneth L. Wilton  
Attorneys for Opposer  
ALLERGAN, INC.

2029 Century Park East, Suite 3300  
Los Angeles, California 90067-3063  
Telephone: (310) 277-7200  
Facsimile: (310) 201-5219

**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2005, I served the foregoing Opposer's First Set Of Written Interrogatories To Applicant on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First-Class U.S. mail addressed to the applicant and respondent as follows:

Ms. Rebecca Spaar  
Chief Executive Officer  
BioCentric Laboratories, Inc.  
P.O. Box 1018  
Brighton, CO 80601

  
Eleanor Elko

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

In the Matter of Application Serial No. 78/320,975  
Published in the Official Gazette of August 3, 2004

ALLERGAN, INC.,

Opposer,

v.

BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

**OPPOSER'S FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, opposer Allergan, Inc. hereby requests that applicant BioCentric Laboratories, Inc. produce for opposer's inspection and copying the documents and things requested below at 10:00 a.m. on August 8, 2005 at applicant's offices at 10749 Owens Street, Westminster, CO 80021, or at such other time and place or by such other means as may be agreed upon by the parties, and that applicant serve a written response to these requests within 30 days of their service.

**DEFINITIONS**

For purposes of these requests:

1. "Opposer" means the opposer in this action, Allergan, Inc.
2. "Applicant" means the applicant in this action, BioCentric Laboratories, Inc.
3. "Opposed Application" means Application Serial No. 78/320,975, the application at issue in this action.

4. “Applicant’s Mark” means the mark shown in the Opposed Application.
5. “Opposer’s Mark” means the mark “BOTOX.”

### **REQUESTS FOR PRODUCTION**

#### **REQUEST NO. 1:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, Applicant’s selection and adoption of Applicant’s Mark, including, without limitation, all investigations, trademark searches, consumer or other research, and lists of marks and names considered.

#### **REQUEST NO. 2:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, Applicant’s awareness of Opposer, when Applicant selected Applicant’s Mark.

#### **REQUEST NO. 3:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, Applicant’s awareness of Opposer’s Mark, when Applicant selected Applicant’s Mark.

#### **REQUEST NO. 4:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any correspondence or communication between Applicant and any third party (other than Applicant’s counsel) regarding Opposer.

#### **REQUEST NO. 5:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any correspondence or communication between Applicant and any third party (other than Applicant’s counsel) regarding Opposer’s Mark.

**REQUEST NO. 6:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, the nature, duration, and/or extent of any actual use in commerce or existence of marks, other than Opposer's Mark, containing a "TOX" suffix.

**REQUEST NO. 7:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any consumer research, market research, focus groups, studies, or other forms of research regarding Applicant's Mark.

**REQUEST NO. 8:**

All documents relating or referring to, or evidencing, reflecting, or constituting, any instance in which any person has expressed the belief, orally, in writing, or by conduct, that Applicant's goods sold or to be sold under Applicant's Mark originate or are associated with, or are licensed, sponsored, or authorized by, Opposer.

**REQUEST NO. 9:**

All documents relating or referring to, or evidencing, reflecting, or constituting, any instance in which any person has expressed the belief, orally, in writing, or by conduct, that Applicant's Mark is similar to Opposer's Mark, or brings to mind Opposer's Mark.

**REQUEST NO. 10:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any samples, prototypes, mock-ups, models, artist's renderings, or actual production pieces of the goods identified in the Opposed Application sold or to be sold under Applicant's Mark.

**REQUEST NO. 11:**

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any sales or promotional materials for any of the goods identified in the Opposed Application sold or to be sold under Applicant's Mark, including, without limitation, any catalogs, mailers, promotional literature, brochures, scripts, online advertisements, and other materials.

**REQUEST NO. 12:**

Representative samples of each form of packaging and labeling for any of the goods identified in the Opposed Application sold or to be sold under Applicant's Mark.

**REQUEST NO. 13:**

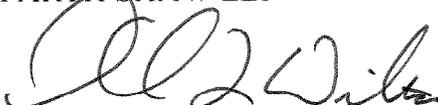
Representative samples of products sold or to be sold containing Applicant's Mark.

Respectfully submitted,

Dated: July 1, 2005

SEYFARTH SHAW LLP

By: \_\_\_\_\_

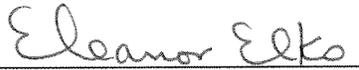
  
Kenneth L. Wilton  
Attorneys for Opposer  
ALLERGAN, INC.

2029 Century Park East, Suite 3300  
Los Angeles, California 90067-3063  
Telephone: (310) 277-7200  
Facsimile: (310) 201-5219

**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2005, I served the foregoing Opposer's First Set Of Requests For Production Of Documents And Things on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First-Class U.S. mail addressed to the applicant and respondent as follows:

Ms. Rebecca Spaar  
Chief Executive Officer  
BioCentric Laboratories, Inc.  
P.O. Box 1018  
Brighton, CO 80601



Eleanor Elko

## Jacobs, Jill Ann

---

**From:** Wilton, Kenneth  
**Sent:** Wednesday, August 24, 2005 9:29 AM  
**To:** 'biocentriclabs@aol.com'  
**Cc:** Jacobs, Jill Ann  
**Subject:** Allergan, Inc. v. BioCentric Laboratories

Dear Ms. Spaar:

I received a call today from your assistant, Andi VanMeter, who informed me that you have authorized us to communicate with BioCentric via this e-mail address in connection with this matter.

Further to my telephone message on Monday (to which Ms. VanMeter was responding), in light of your claim in your August 9, 2005 filing with the TTAB that you did not receive the second copy of our written discovery which properly was sent to your company's post office box, yesterday we served a third copy of the discovery. This copy was sent via Express Mail to both the post office box address and the address set forth in your August 9, 2005 filing with the Colorado Secretary of State's office.

Without waiving Allergan's rights vis-à-vis BioCentric's failure to respond to the second set of discovery, and in particular the Requests for Admission, at this juncture our primary concern is getting the information we have requested with sufficient time to conduct follow-up discovery. We therefore request that you agree to a ninety (90) day extension of the discovery cutoff in this matter until November 30, 2005. If not, we will request that the TTAB compel your company to respond to the earlier discovery (or deem it admitted as appropriate) and extend the date.

Please advise whether you will agree to the requested extension.

Best regards,  
Ken Wilton

Kenneth L. Wilton | Seyfarth Shaw LLP  
Suite 3300 | 2029 Century Park East | Los Angeles, California 90067  
Direct: 310.201.5271 | General: 310.277.7200 | Facsimile: 310.201.5219

-----Original Message-----

**From:** BioCentricLabs@aol.com [mailto:BioCentricLabs@aol.com]

**Sent:** Wednesday, August 24, 2005 2:51 PM

**To:** Wilton, Kenneth

**Subject:** Re: Allergan, Inc. v. BioCentric Laboratories

Dear Mr. Wilton,

I would like to clarify your statement "the second copy of our written discovery which properly was sent to your company's post office box."

You are stating that after the Board sent the letter "Trail Dates Reset," dated 07/07/05, you sent a second request that included new meeting times and dates?

Thank you,  
Rebecca Spaar  
BioCentric Laboratories, Inc.

8/30/2005

## Wilton, Kenneth

---

**From:** Wilton, Kenneth  
**Sent:** Wednesday, August 24, 2005 3:12 PM  
**To:** 'BioCentricLabs@aol.com'  
**Cc:** Jacobs, Jill Ann  
**Subject:** RE: Allergan, Inc. v. BioCentric Laboratories

Dear Ms. Spaar:

To clarify my statement, as we stated in our Reply Brief filed July 1, 2005, the second copy of the discovery was sent to the P.O. Box 1018 address on July 1, 2005.

Please inform me whether you will agree to the requested extension of the discovery cutoff.

Best regards,  
Ken Wilton

Kenneth L. Wilton | Seyfarth Shaw LLP  
Suite 3300 | 2029 Century Park East | Los Angeles, California 90067  
Direct: 310.201.5271 | General: 310.277.7200 | Facsimile: 310.201.5219

-----Original Message-----

**From:** BioCentricLabs@aol.com [mailto:BioCentricLabs@aol.com]  
**Sent:** Wednesday, August 24, 2005 2:51 PM  
**To:** Wilton, Kenneth  
**Subject:** Re: Allergan, Inc. v. BioCentric Laboratories

Dear Mr. Wilton,

I would like to clarify your statement "the second copy of our written discovery which properly was sent to your company's post office box."

You are stating that after the Board sent the letter "Trail Dates Reset," dated 07/07/05, you sent a second request that included new meeting times and dates?

Thank you,  
Rebecca Spaar  
BioCentric Laboratories, Inc.

-----Original Message-----

**From:** BioCentricLabs@aol.com [mailto:BioCentricLabs@aol.com]

**Sent:** Friday, August 26, 2005 10:26 AM

**To:** Wilton, Kenneth

**Subject:** Re: Allergan, Inc. v. BioCentric Laboratories

Dear Mr. Wilton,

Yesterday, 08/25/05, we received your request. I will review it and have an answer for you on Monday, 08/29/05.

Sincerely,  
Rebecca Spaar  
BioCentric Laboratories, Inc.

8/30/2005

-----Original Message-----

**From:** BioCentricLabs@aol.com [mailto:BioCentricLabs@aol.com]

**Sent:** Monday, August 29, 2005 3:32 PM

**To:** Wilton, Kenneth

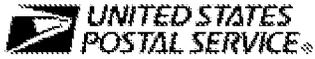
**Subject:** Re: Allergan, Inc. v. BioCentric Laboratories

Dear Mr. Wilton,

After careful review, we have to decline.

Best regards,  
Rebecca Spaar  
BioCentric Laboratories, Inc.

8/30/2005

[Track & Confirm](#)[FAQs](#)

## Track & Confirm

### Search Results

Label/Receipt Number: EV17 1936 755U S  
Detailed Results:

- Delivered, August 25, 2005, 11:52 am, BRIGHTON, CO 80603
- Arrival at Unit, August 25, 2005, 8:40 am, BRIGHTON, CO 80601
- Enroute, August 25, 2005, 6:56 am, DENVER, CO 80266
- Enroute, August 24, 2005, 4:16 pm, LOS ANGELES, CA 90009
- Acceptance, August 24, 2005, 11:53 am, LOS ANGELES, CA 90009

[< Back](#)[Return to USPS.com Home >](#)[Track & Confirm](#)

Enter Label/Receipt Number.

[Go >](#)

### Notification Options

Track & Confirm by email

Get current event information or updates for your item sent to you or others by email. [Go >](#)

Proof of Delivery

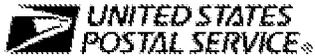
Verify who signed for your item by email, fax, or mail. [Go >](#)



POSTAL INSPECTORS  
Preserving the Trust

[site map](#)[contact us](#)[government services](#)[jobs](#)[National & Premier Accounts](#)

Copyright © 1999-2004 USPS. All Rights Reserved. [Terms of Use](#) [Privacy Policy](#)


[Track & Confirm](#)
[FAQs](#)

## Track & Confirm

### Search Results

Label/Receipt Number: EV17 1936 764U S

Detailed Results:

- Delivered, August 25, 2005, 11:34 am, BRIGHTON, CO 80601
- Notice Left, August 25, 2005, 8:58 am, BRIGHTON, CO 80601
- Arrival at Unit, August 25, 2005, 8:40 am, BRIGHTON, CO 80601
- Enroute, August 25, 2005, 6:04 am, DENVER, CO 80266
- Enroute, August 24, 2005, 4:16 pm, LOS ANGELES, CA 90009
- Acceptance, August 24, 2005, 11:52 am, LOS ANGELES, CA 90009

[< Back](#)
[Return to USPS.com Home >](#)
[Track & Confirm](#)

Enter Label/Receipt Number.

[Go >](#)

### Notification Options

Track & Confirm by email

Get current event information or updates for your item sent to you or others by email. [Go >](#)

Proof of Delivery

Verify who signed for your item by email, fax, or mail. [Go >](#)



POSTAL INSPECTORS  
Preserving the Trust

[site map](#)
[contact us](#)
[government services](#)
[jobs](#)
[National & Premier Accounts](#)

Copyright © 1999-2004 USPS. All Rights Reserved. [Terms of Use](#) [Privacy Policy](#)

**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2005, I served the foregoing Declaration of Kenneth L. Wilton in Support of Opposer's Renewed Motion to Compel Responses to Its First Sets of Interrogatories and Requests for Production of Documents and Things on the applicant by depositing a true copy thereof in a sealed envelope with the United States Postal Service "Priority Mail" addressed to applicant as follows:

Ms. Rebecca Spaar  
Chief Executive Officer  
BioCentric Laboratories, Inc.  
854 Baseline Place  
Suite B  
Brighton, CO 80603

AND

Ms. Rebecca Spaar  
Chief Executive Officer  
BioCentric Laboratories, Inc.  
P.O. Box 1018  
Brighton, CO 80601

  
\_\_\_\_\_  
Eleanor Elko

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

In the Matter of Application Serial No. 78/320,975  
Published in the Official Gazette on August 3, 2004

ALLERGAN, INC.,

Opposer,

v.

BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

**CERTIFICATE OF ON-LINE FILING**

I hereby certify that this paper was filed on-line with the  
Trademark Trial and Appeal Board on August 30, 2005.



Eleanor Elko

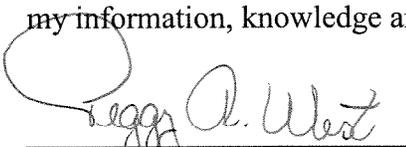
**DECLARATION OF PEGGY A. WEST IN SUPPORT OF OPPOSER'S RENEWED  
MOTION TO COMPEL RESPONSES TO ITS FIRST SETS OF INTERROGATORIES  
AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS**

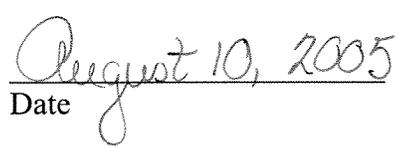
I, Peggy West, am over the age of eighteen years and am a resident of the State of Colorado. I am employed as a legal assistant by the law firm of Sheridan Ross, P.C. and have worked in this capacity for over 14 years.

On Monday, August 8<sup>th</sup>, 2005, at the request of the firm of Seyfarth Shaw LLP, I traveled to the address of Biocentric Laboratories, Inc. to obtain copies of documents and things in response to a request for production of documents and things in Allergan, Inc. V. Biocentric Laboratories, Inc., which is indicated by the website of the Colorado Secretary of State to be 10749 Owens Street, Westminster, CO 80021. Pursuant to address searches performed on Internet sites MSN Map and MapQuest, the only address in Westminster, Colorado for 10749 Owens Street, is a residential address at 10749 North Owens Street. I went to this address at 10:00 am on August 8<sup>th</sup> and found that it is a house in a residential area. When I arrived, there was a Federal Express delivery person attempting to deliver a package to the residence. The deliveryman got no response at the front door and left without making his delivery.

Upon further review of the Secretary of State's website information, I determined that the registered agent for the corporation, Margaret Turek, listed the corporation's registered agent street address at 10023 W. Zephr, Broomfield, CO 80021. I then drove to that address, another residential property. There I contacted Margaret Turek at approximately 10:30 am with regard to the document production. I identified myself and indicated to her that I was there on behalf of Seyfarth Shaw representing Allergan, Inc. and asked if she had any documents to produce and if the address on 10749 North Owens Street was an accurate address for Biocentric Laboratories, Inc. Ms. Turek stated that she did not have any knowledge of Biocentric Laboratories, Inc. other than she loaned her daughter, Rebecca Spaar, money in order to start the company and that her daughter no longer owned the property on 10749 North Owens Street. Ms. Turek stated that she did not have any documents or things to produce. Ms. Turek then contacted Ms. Spaar by telephone and allowed me with speak with Ms. Spaar. I asked Ms. Spaar if she would provide an address at which the production of documents and things could take place and she refused stating that she did not want me to come to her office, and that she would have to speak with her general manager to see if there was anything to produce. I stated that I had been instructed to pick up the requested documents at 10:00 am on August 8<sup>th</sup> and she asked for my telephone number and indicated that she would call once she had spoken with her general manager. She also refused to produce a telephone number where she could be reached. When we concluded the telephone conversation, I asked Ms. Turek if she would provide me with an address or telephone number where I could reach Biocentric Laboratories, Inc. or Rebecca Spaar, but she declined. To date, I have not received a call from Ms. Spaar regarding the document production.

I affirm under penalty of perjury that the above foregoing statement is true to the best of my information, knowledge and belief.

  
\_\_\_\_\_  
Peggy A. West

  
\_\_\_\_\_  
Date

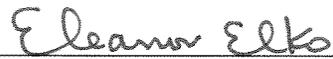
**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2005, I served the foregoing Declaration of Peggy A. West in Support of Opposer's Renewed Motion to Compel Responses to Its First Sets of Interrogatories and Requests for Production of Documents and Things on the applicant by depositing a true copy thereof in a sealed envelope with the United States Postal Service "Priority Mail" addressed to applicant as follows:

Ms. Rebecca Spaar  
Chief Executive Officer  
BioCentric Laboratories, Inc.  
854 Baseline Place  
Suite B  
Brighton, CO 80603

AND

Ms. Rebecca Spaar  
Chief Executive Officer  
BioCentric Laboratories, Inc.  
P.O. Box 1018  
Brighton, CO 80601



\_\_\_\_\_  
Eleanor Elko