

ESTTA Tracking number: **ESTTA305085**

Filing date: **09/08/2009**

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

Proceeding	91184978
Party	Plaintiff McNEIL-PPC, Inc.
Correspondence Address	James D. Weinberger Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Plaza New York, NY 10017 UNITED STATES lpopp-rosenberg@frosszelnick.com
Submission	Other Motions/Papers
Filer's Name	Laura Popp-Rosenberg
Filer's e-mail	lpopp-rosenberg@fzlz.com
Signature	/Laura Popp-Rosenberg/
Date	09/08/2009
Attachments	McNEIL's Opposition to Motion to Amend (F0510892).PDF ( 34 pages ) (1973494 bytes )

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

McNEIL-PPC, INC.,

Opposer,

-against-

WALGREEN CO.,

Applicant.

**Opp. No. 91184978**

**OPPOSITION TO CONTESTED MOTION TO AMEND ANSWER**

Applicant Walgreen Co. (“Walgreen”) has moved this Board for leave to amend its answer in these proceedings. Specifically, Applicant seeks the Board’s leave to add an additional affirmative defense that opposer McNEIL-PPC, Inc. (“Opposer”) lacks standing in this proceeding. Because the addition of an affirmative defense that Opposer lacks standing would serve no useful purpose, Opposer hereby opposes Applicant’s Contested Motion to Amend Answer (“Motion to Amend”).

**ARGUMENT**

Opposer recognizes that the Board liberally grants motions to amend pleadings. However, the Board does not grant such motions as a matter of course. In fact, the Board regularly denies such requests when the amendment would be prejudicial to the non-moving party or where the amendment would be futile. TBMP § 507.02 at 500-32; *Iomega Corp. v. Info. Tech. Int’l Corp.*, Opp. No. 91117476, 2001 WL 826856, at \*3 (T.T.A.B. July 20, 2001) (“[w]here the moving party seeks to add a new claim or defense, and the proposed pleading thereof is legally insufficient, or would serve no

useful purpose, the Board normally will deny the motion for leave to amend”) (citing *Octocom Sys. Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 U.S.P.Q.2d 1783 (Fed. Cir. 1990); *Commodore Elecs. Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503 (T.T.A.B. 1993); and *Microsoft Corp. v. Qantel Bus. Sys. Inc.*, 16 U.S.P.Q.2d 1732 (T.T.A.B. 1990)).

Here, there can be no question that the proposed amendment would be futile as serving no useful purpose, first because standing is part of Opposer’s *prima facie* case and there is consequently no need for Applicant to add such an affirmative defense, and second – and more importantly – because Applicant has admitted over and over again that Opposer has standing to bring this opposition.

**I. There is No Need for the Affirmative Defense**

Applicant’s motion should be denied as serving no useful purpose because there is no need for Applicant to assert lack of standing as an affirmative defense. Standing must be proved by Opposer as part of its *prima facie* case. Applicant is free to contest Opposer’s standing at any time, and need not assert an affirmative defense directed to standing to do so. *I.C.E. Mktg. Corp. v. Neutrogena Corp.*, Canc. No. 92043193, <http://des.uspto.gov/Foia/ReterivePdf?flNm=92043193-06-16-2009&system=TTABIS>, 5-6, available at 2009 WL 1896062, at \*2 (T.T.A.B. June 16, 2009) (an argument that an opposer lacks standing “may be advanced without first pleading [it] as [an] affirmative defense”; ignoring respondent’s motion to amend its answer to assert lack of standing because respondent did not need to add it as an affirmative defense in order to argue it) (citing *Lipton Indus. v. Ralston Purina Co.*, 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982)). Because Applicant can contest Opposer’s standing without first asserting an

affirmative defense, adding such an affirmative defense serves no useful purpose.

Applicant's motion should therefore be denied.

## **II. Applicant Has Repeatedly Admitted Opposer's Standing**

In this proceeding, Opposer asserts that the contested mark, WAL-ZYR, is likely to be confused with and/or is likely to dilute the mark ZYRTEC. *See* Notice of Opposition, ¶¶ 16-30. Applicant seeks to amend its answer to add an affirmative defense that Opposer lacks standing solely based on the theory that Opposer cannot prove that it is a licensee of UCB Pharma S.A. ("UCB"), the owner of Registration No. 2,024,253 and various other registrations for the mark ZYRTEC and marks including ZYRTEC. *See* Motion to Amend at ¶¶ 9-11. The problem with Applicant's theory at this point is that Opposer need not prove that it is UCB's licensee in order to establish standing in this proceeding.

The standing requirements in *inter partes* proceedings are very liberal. Section 13 of the Lanham Act permits "[a]ny person who believes that he would be damaged by the registration of a mark" to file an opposition. 15 U.S.C. § 1063. The Federal Circuit has interpreted this provision to require that would-be opposers have (1) a "real interest" in the proceeding, and (2) a reasonable basis for the belief of damage. *Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 U.S.P.Q.2d 1023, 1025 (Fed. Cir. 1999). Stated another way, "[a]ll that is necessary . . . is that the 'person' bringing the opposition establish conditions and circumstances from which damage to it from the opposed mark can be assumed." *FBI v. Societe: "M. Bril & Co."*, 172 U.S.P.Q. 310, 313 (T.T.A.B. 1971). These standing requirements are applied liberally, *Honest Tea, Inc. v. Annona Co., L.L.C.*, Opp. No. 91178652, <http://des.uspto.gov/Foia/ReterivePdf?flNm=91178652-04-09->

2009&system=TTABIS, 9, available at 2009 WL 1068775, at \*3 (T.T.A.B. Apr. 9, 2009) (citing *Ritchie*, 50 U.S.P.Q.2d at 1025), since the only purpose is to weed out “intermeddlers” from those with “a personal interest in the outcome [of the opposition] beyond that of the general public.” *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1029, 213 U.S.P.Q. 185, 188 (C.C.P.A. 1982); see also *Ritchie*, 170 F.3d at 1095, 50 U.S.P.Q.2d at 1035.

Applicant seems to have a very rigid view of the Board’s standing requirements since it contends that Opposer must be a licensee of UCB to have standing. In fact, there is no such requirement that an opposer have a proprietary interest in the mark on which it basis its opposition. See *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 U.S.P.Q.2d 2021, 2024 (Fed. Cir. 1987) (an opposer “need not have a proprietary interest in the mark on which the section 2(d) opposition is grounded”; trade group established standing); *Honest Tea, Inc.*, Opp. No. 91178652, <http://des.uspto.gov/Foia/RetrievePdf?flNm=91178652-04-09-2009&system=TTABIS> at 9, 2009 WL 1068775 at \*3 (“It is not necessary that opposer establish its own prior rights in the mark at issue in order to prove standing”) (citing *Ritchie*, 50 U.S.P.Q.2d at 1025). A “real interest” in the opposition can be shown in many other ways, including by establishing that the parties are competitors, see *Books on Tape, Inc. v. Booktape Corp.*, 836 F.2d 519, 520, 5 U.S.P.Q.2d 1301, 1302 (Fed. Cir. 1987), or that the opposer is a distributor of the trademarked products. See, e.g., *Revlon, Inc. v. La Maur, Inc.*, 157 U.S.P.Q. 602, 604 (T.T.A.B. 1968); *America Honda Motor Co. v. TBC Corp.*, Opp. No. 91121151, <http://des.uspto.gov/Foia/RetrievePdf?flNm=91121151-05-31-2005&system=TTABIS>,

10-12, available at 2005 WL 1463865, at \*4 (T.T.A.B. May 31, 2005); see also *William & Scott Co. v. Earl's Rests. Ltd.*, 30 U.S.P.Q.2d 1870, 1873 n.2 (T.T.A.B. 1994).

While Opposer is confident that it will prove itself at trial to be UCB's exclusive U.S. licensee of the ZYRTEC mark, it need not establish that fact to have standing in this proceeding. It has standing as a distributor of ZYRTEC and a competitor of Applicant, both of which facts Applicant has admitted repeatedly in the marketplace and in these proceedings.

In the marketplace, packages of Applicant's WAL-ZYR product themselves proclaim that Opposer distributes ZYRTEC, as those packages bear the statement, ". . . McNeil Consumer Healthcare, division of McNeil-PPC, Inc. [sic], distributor of Zyrtec®." See, e.g., Exhibit 1 (reproductions of WAL-ZYR packaging produced by Applicant in this proceeding). Applicant also has made the same admission in numerous documents in this proceeding. For example, Applicant admitted that Opposer distributes ZYRTEC products in response to an interrogatory, see Exhibit 2 (Applicant's Response to Opposer's First Set of Interrogatories at 9-10, Response to Interrogatory No. 18 ("Only this year [2008] has Opposer offered any products under the 'ZYRTEC' mark over-the-counter and to the general public . . .")), and in Applicant's Supplemental Initial Disclosures, see Exhibit 3 (identifying Rohinish Hooda, an employee of Opposer, as a potential witness on the following subjects: "McNeil's [sic] . . . use of the ZYRTEC mark, products sold under the ZYRTEC mark, advertising and marketing effort for goods sold under the ZYRTEC mark, channels of trade for goods sold under the ZYRTEC mark . . . and any other topics pertaining to the ZYRTEC mark or McNeil's [sic] products sold under that mark"). Even Applicant's original answer and proposed amended answer

admit Opposer's standing as a distributor of ZYRTEC and a competitor to Applicant's WAL-ZYR products. *See* Applicant's Answer to Notice of Opposition, at ¶ 20 ("Applicant admits that one of the ways it markets and intends to market its WAL-ZYR product is next to or in close proximity to Opposer's product on Applicant's shelves as alleged in Paragraph 20 of the Notice of Opposition [alleging that "Applicant markets and intends to market its WAL-ZYR product directly next to Opposer's ZYRTEC product on store shelves"]); *see* Exhibit A to Motion to Amend, "Applicant's First Amended Answer to Notice of Opposition," at ¶ 20.<sup>1</sup>

These marketplace admissions and admissions in the context of this proceeding are more than sufficient to establish Opposer's standing in this proceeding and to render Applicant's motion to amend to add an affirmative defense of Opposer's lack of standing futile. *Cf. Nextel Commc'ns., Inc. v. Motorola, Inc.*, Opp. No. 91161817, <http://des.uspto.gov/Foia/RetrievePdf?flNm=91161817-02-27-2008&system=TTABIS>, 5-6, 8, *available at* 2008 WL 902843, at \*2-4 (T.T.A.B. Feb. 27, 2008) (admissions in answer sufficient to establish opposer's standing); *Wyeth v. Fempro, Inc.*, Opp. No. 91121800, 10-11, *available at* 2003 WL 22415596, at \*4 (T.T.A.B. Oct. 20, 2003) (over applicant's objection that opposer had not established its status as licensee of mark, finding opposer had nonetheless established standing through demonstrating its sales of product under the mark). Because Applicant's proposed amendment would serve no useful purpose, Applicant's Motion to Amend should be denied.

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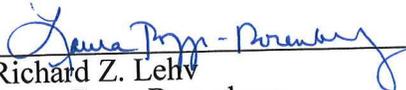
<sup>1</sup> The admissions in Paragraphs 20 of Applicant's answer and proposed amended also establish that the parties are competitors, further confirming Opposer's standing in this proceeding.

## CONCLUSION

For the reasons set forth above, Opposer respectfully requests that Applicant's Motion to Amend be denied.

Dated: New York, New York  
September 8, 2009

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By:   
Richard Z. Lehv  
Laura Popp-Rosenberg  
866 United Nations Plaza  
New York, New York 10017  
Tel: (212) 813-5900  
Email: rlehv@frosszelnick.com  
lpopp-rosenberg@frosszelnick.com

*Attorneys for Opposer McNEIL-PPC, Inc.*

# **EXHIBIT 1**

Walgreens

**WAL-ZYR™**

Cetirizine Hydrochloride Tablets, 10mg/Antihistamine



100% Satisfaction Guaranteed with all Walgreens Products or Your Money Back.  
www.walgreens.com

DPC 1107  
Distributed by Walgreen Cos.  
200 Walnut St., Lombard, IL  
60148-4416

TEAR ALONG PERFORATION, PEEL OFF PAPER AND PUSH PRODUCT THROUGH FOIL. IF DIFFICULT TO OPEN USE SCISSORS.

NDC 0263-0458-66

Compare to Zyrtec active ingredients

Walgreens

NEW!

**WAL-ZYR™**

Cetirizine Hydrochloride Tablets, 10mg/Antihistamine

ALL DAY ALLERGY

**Indoor & Outdoor**  
ALLERGIES



24 Hour Relief of:

- Runny Nose • Itchy, Watery Eyes
- Sneezing • Itchy Throat or Nose

14 TABLETS

<b>Drug Facts</b>		<b>Drug Facts (continued)</b>	
<b>Active ingredient (in each tablet)</b> Cetirizine HCl 10 mg	<b>Purpose</b> Antihistamine	If pregnant or breast-feeding: ■ if breast-feeding: not recommended ■ if pregnant: ask a health professional before use. <b>Keep out of reach of children.</b> In case of overdose, get medical help or contact a Poison Control Center right away.	
<b>Uses</b> temporarily relieves these symptoms due to hay fever or other upper respiratory allergies: ■ runny nose ■ sneezing ■ itchy, watery eyes ■ itching of the nose or throat		<b>Directions</b> adults and children 6 years and over      one 10 mg tablet once daily; do not take more than one 10 mg tablet in 24 hours. A 5 mg product may be appropriate for less severe symptoms. adults 65 years and over      ask a doctor children under 6 years of age      ask a doctor consumers with liver or kidney disease      ask a doctor	
<b>Warnings</b> Do not use if you have ever had an allergic reaction to this product or any of its ingredients or to an antihistamine containing hydroxyzine. Ask a doctor before use if you have liver or kidney disease. Your doctor should determine if you need a different dose. Ask a doctor or pharmacist before use if you are taking tranquilizers or sedatives.		<b>Other information</b> ■ do not use if blister unit is broken or torn ■ store between 20° to 25°C (68° to 77°F)	
<b>When using this product</b> ■ drowsiness may occur ■ avoid alcoholic drinks ■ alcohol, sedatives, and tranquilizers may increase drowsiness ■ be careful when driving a motor vehicle or operating machinery Stop use and ask a doctor if an allergic reaction to this product occurs. Seek medical help right away.		<b>Inactive ingredients</b> corn starch, FD&C blue #1, hypromellose, lactose, magnesium stearate, polydextrose, polyethylene glycol, povidone, titanium dioxide, triacetin	

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ITEM 542429



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**Questions?** If you have questions of a medical nature, please contact your pharmacist, doctor or health care professional.

\*This product is not manufactured or distributed by McNeil Consumer Healthcare, division of McNeil-PPC, Inc., distributor of Zyrtec®.



NDC 0363-0458-02      Compare to Zyrtec<sup>®</sup>  
active ingredient\*

**NEW!**

# WAL-ZYR<sup>™</sup>

Cetrizine Hydrochloride Tablets, 10mg/Antihistamine

## ALL DAY ALLERGY

**Indoor & Outdoor**  
ALLERGIES      24 HOUR

Allergy

**24 Hour Relief of:**

- Runny Nose • Itchy, Watery Eyes
- Sneezing • Itchy Throat or Nose

**45 TABLETS**

TEAR ALONG PERFORATION, PEEL OFF PAPER AND PUSH PRODUCT THROUGH FOIL. IF DIFFICULT TO OPEN USE SCISSORS.

10 14 98294

<p><b>Drug Facts</b></p> <p><b>Active ingredient (in each tablet)</b>      <b>Purpose</b> Cetrizine HCl 10 mg..... Antihistamine</p> <p><b>Uses</b> temporarily relieves these symptoms due to hay fever or other upper respiratory allergies:  <ul style="list-style-type: none"> <li>■ runny nose    ■ sneezing</li> <li>■ itchy, watery eyes</li> <li>■ itching of the nose or throat</li> </ul> </p> <p><b>Warnings</b> Do not use if you have ever had an allergic reaction to this product or any of its ingredients or to an antihistamine containing hydroxyzine. Ask a doctor before use if you have liver or kidney disease. Your doctor should determine if you need a different dose. Ask a doctor or pharmacist before use if you are taking tranquilizers or sedatives.</p> <p><b>When using this product</b>  <ul style="list-style-type: none"> <li>■ drowsiness may occur</li> <li>■ avoid alcoholic drinks</li> <li>■ alcohol, sedatives, and tranquilizers may increase drowsiness</li> <li>■ be careful when driving a motor vehicle or operating machinery</li> </ul> </p> <p>Stop use and ask a doctor if an allergic reaction to this product occurs. Seek medical help right away. ▶</p>	<p><b>Drug Facts (continued)</b></p> <p>If pregnant or breast-feeding:  <ul style="list-style-type: none"> <li>■ if breast-feeding: not recommended</li> <li>■ if pregnant: ask a health professional before use.</li> </ul> <b>Keep out of reach of children.</b> In case of overdose, get medical help or contact a Poison Control Center right away.</p> <p><b>Directions</b></p> <table style="width: 100%; border: none;"> <tr> <td style="border: none;">adults and children 6 years and over</td> <td style="border: none;">one 10 mg tablet once daily; do not take more than one 10 mg tablet in 24 hours. A 5 mg product may be appropriate for less severe symptoms.</td> </tr> <tr> <td style="border: none;">adults 65 years and over</td> <td style="border: none;">ask a doctor</td> </tr> <tr> <td style="border: none;">children under 6 years of age</td> <td style="border: none;">ask a doctor</td> </tr> <tr> <td style="border: none;">consumers with liver or kidney disease</td> <td style="border: none;">ask a doctor</td> </tr> </table> <p><b>Other information</b>  <ul style="list-style-type: none"> <li>■ do not use if blister unit is broken or torn</li> <li>■ store between 20° to 25°C (68° to 77°F)</li> </ul> </p> <p><b>Inactive ingredients</b> corn starch, FD&amp;C blue #1, hypromellose, lactose, magnesium stearate, polydextrose, polyethylene glycol, povidone, titanium dioxide, triacetin</p>	adults and children 6 years and over	one 10 mg tablet once daily; do not take more than one 10 mg tablet in 24 hours. A 5 mg product may be appropriate for less severe symptoms.	adults 65 years and over	ask a doctor	children under 6 years of age	ask a doctor	consumers with liver or kidney disease	ask a doctor
adults and children 6 years and over	one 10 mg tablet once daily; do not take more than one 10 mg tablet in 24 hours. A 5 mg product may be appropriate for less severe symptoms.								
adults 65 years and over	ask a doctor								
children under 6 years of age	ask a doctor								
consumers with liver or kidney disease	ask a doctor								

ITEM 547951

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**Questions?** If you have questions of a medical nature, please contact your pharmacist, doctor or health care professional.

\*This product is not manufactured or distributed by McNeil Consumer Healthcare, division of McNeil-PPC, Inc., distributor of Zyrtec®.



NDC 0363-0458-13 **Compare to Zyrtec®**  
 active ingredient\*

*Walgreens*

**NEW!**

**WAL-ZYR**<sup>TM</sup>  
 Cetirizine Hydrochloride Tablets, 10mg/Antihistamine

**ALL DAY ALLERGY**

**Indoor & Outdoor**  
 ALLERGIES **24 HOUR**

**24 Hour Relief of:**

- Runny Nose • Itchy, Watery Eyes
- Sneezing • Itchy Throat or Nose

**5 TABLETS**

TEAR ALONG PERFORATION. PEEL OFF PAPER AND PUSH PRODUCT THROUGH FOIL. IF DIFFICULT TO OPEN USE SCISSORS.

DO NOT EXCEED 5 TABLETS PER DAY

<b>Drug Facts</b>		<b>Drug Facts (continued)</b>	
<b>Active ingredient (in each tablet)</b> Cetirizine HCl 10 mg	<b>Purpose</b> Antihistamine	<b>If pregnant or breast-feeding:</b> ■ if breast-feeding: not recommended ■ if pregnant: ask a health professional before use. <b>Keep out of reach of children.</b> In case of overdose, get medical help or contact a Poison Control Center right away.	
<b>Uses</b> temporarily relieves these symptoms due to hay fever or other upper respiratory allergies: ■ runny nose ■ sneezing ■ itchy, watery eyes ■ itching of the nose or throat		<b>Directions</b>	
<b>Warnings</b> Do not use if you have ever had an allergic reaction to this product or any of its ingredients or to an antihistamine containing hydroxyzine.  <b>Ask a doctor before use if you have liver or kidney disease.</b> Your doctor should determine if you need a different dose.  <b>Ask a doctor or pharmacist before use if you are taking tranquilizers or sedatives.</b>  <b>When using this product</b> ■ drowsiness may occur ■ avoid alcoholic drinks ■ alcohol, sedatives, and tranquilizers may increase drowsiness ■ be careful when driving a motor vehicle or operating machinery  <b>Stop use and ask a doctor if an allergic reaction to this product occurs.</b> Seek medical help right away.		adults and children 6 years and over    one 10 mg tablet once daily; do not take more than one 10 mg tablet in 24 hours. A 5 mg product may be appropriate for less severe symptoms.  adults 65 years and over    ask a doctor  children under 6 years of age    ask a doctor  consumers with liver or kidney disease    ask a doctor	
		<b>Other information</b> ■ do not use if blister unit is broken or torn ■ store between 20° to 25°C (68° to 77°F)	
		<b>Inactive ingredients</b> corn starch, FD&C blue #1, hypromellose, lactose, magnesium stearate, polydextrose, polyethylene glycol, povidone, titanium dioxide, triacetin	

ITEM 547954

**Questions?** If you have questions of a medical nature, please contact your pharmacist, doctor or health care professional.

\*This product is not manufactured or distributed by McNeil Consumer Healthcare, division of McNeil-PPC, Inc., distributor of Zyrtec®.

*Walgreens*

**WAL-ZYR™**  
Cetirizine Hydrochloride  
Tablets, 10mg / Antihistamine

ALL DAY  
ALLERGY

*Walgreens* NDC 0363-0458-72 Compare to Zyrtec® active ingredient\*

**WAL-ZYR™ NEW!**  
Cetirizine Hydrochloride Tablets, 10mg / Antihistamine

ALL DAY ALLERGY Actual Size

**Indoor & Outdoor**  
ALLERGIES 24 HOUR

24 Hour Relief of: Runny Nose; Itchy, Watery Eyes; Sneezing; Itchy Throat or Nose **60 TABLETS**

**Drug Facts**

**Active Ingredient Purpose (in each tablet)**  
Cetirizine HCl 10 mg..... Antihistamine

**Uses**  
temporarily relieves these symptoms due to hay fever or other upper respiratory allergies:  
 ■ runny nose ■ sneezing  
 ■ itchy, watery eyes  
 ■ itching of the nose or throat

**Warnings**  
Do not use if you have ever had an allergic reaction to this product or any of its ingredients or to an antihistamine containing hydroxyzine.  
 Ask a doctor before use if you have liver or kidney disease. Your doctor should determine if you need a different dose.  
 Ask a doctor or pharmacist before use if you are taking tranquilizers or sedatives.

**When using this product**  
 ■ drowsiness may occur  
 ■ avoid alcoholic drinks  
 ■ alcohol, sedatives, and tranquilizers may increase drowsiness  
 ■ be careful when driving a motor vehicle or operating machinery

**Drug Facts (continued)**

Stop use and ask a doctor if an allergic reaction to this product occurs. Seek medical help right away.

**If pregnant or breast-feeding:**  
 ■ if breast-feeding: not recommended  
 ■ if pregnant: ask a health professional before use.

**Keep out of reach of children.** In case of overdose, get medical help or contact a Poison Control Center right away.

**Directions**

adults and children 6 years and over	one 10 mg tablet once daily; do not take more than one 10 mg tablet in 24 hours. A 5 mg product may be appropriate for less severe symptoms.
adults 65 years and over	ask a doctor
children under 6 years of age	ask a doctor
consumers with liver or kidney disease	ask a doctor

**Other information**  
 ■ do not use if printed foil under cap is broken or missing  
 ■ store between 20° to 25°C (68° to 77°F)

**Drug Facts (continued)**

**Inactive ingredients**  
corn starch, FD&C blue #1, hypromellose, lactose, magnesium stearate, polydextrose, polyethylene glycol, povidone, titanium dioxide, triacetin

**Questions?** If you have questions of a medical nature, please contact your pharmacist, doctor or health care professional.

\*This product is not manufactured or distributed by McNeil Consumer Healthcare, division of McNeil-PPC, Inc., distributor of Zyrtec®.

ORG 1207  
 Distributed by: Walgreen Co.,  
 200 Wilmot Rd., Deerfield, IL  
 60015-4616

 100% Satisfaction Guaranteed with all Walgreens Products or Year Money Back. [www.walgreens.com](http://www.walgreens.com)

ITEM 542424



3 11917 09125 9

LOT NO.

EXP.

44272 94 C3

Walgreens

**WAL-ZYR™**  
Cetirizine Hydrochloride  
Tablets, 10mg / Antihistamine

ALL DAY  
ALLERGY

Walgreens NDC 0369-0458-75 Compare to Zyrtec® active ingredient\*

**WAL-ZYR™ NEW!**  
Cetirizine Hydrochloride Tablets, 10mg / Antihistamine

ALL DAY ALLERGY Actual Size

**Indoor & Outdoor**  
ALLERGIES 24 HOUR

24 Hour Relief of  
Runny Nose, Itchy, Watery Eyes, Sneezing, Itchy Throat

90 TABLETS

**Drug Facts**

Active ingredient (in each tablet)	Purpose
Cetirizine HCl 10 mg.....	Antihistamine

**Uses**  
temporarily relieves these symptoms due to hay fever or other upper respiratory allergies:

- runny nose    ■ sneezing
- itchy, watery eyes
- itching of the nose or throat

**Warnings**  
Do not use if you have ever had an allergic reaction to this product or any of its ingredients or to an antihistamine containing hydroxyzine.

**Ask a doctor before use if you have liver or kidney disease.** Your doctor should determine if you need a different dose.

**Ask a doctor or pharmacist before use if you are taking tranquilizers or sedatives.**

**When using this product**

- drowsiness may occur
- avoid alcoholic drinks
- alcohol, sedatives, and tranquilizers may increase drowsiness
- be careful when driving a motor vehicle or operating machinery

**Drug Facts (continued)**

Stop use and ask a doctor if an allergic reaction to this product occurs. Seek medical help right away.

**If pregnant or breast-feeding:**

- if breast-feeding: not recommended
- if pregnant: ask a health professional before use.

**Keep out of reach of children.** In case of overdose, get medical help or contact a Poison Control Center right away.

**Directions**

adults and children 6 years and over	one 10 mg tablet once daily; do not take more than one 10 mg tablet in 24 hours. A 5 mg product may be appropriate for less severe symptoms
adults 65 years and over	ask a doctor
children under 6 years of age	ask a doctor
consumers with liver or kidney disease	ask a doctor

**Other information**

- do not use if printed foil under cap is broken or missing
- store between 20° to 25°C (68° to 77°F)

**Drug Facts (continued)**

**Inactive ingredients**  
corn starch, FD&C blue #1, hypromellose, lactose, magnesium stearate, polydextrose, polyethylene glycol, povidone, titanium dioxide, triacetin

**Questions?** If you have questions of a medical nature, please contact your pharmacist, doctor or health care professional.

\*This product is not manufactured or distributed by McNeil Consumer Healthcare, division of McNeil-PPC, Inc., distributor of Zyrtec®.

ORG 1207  
Distributed by: Walgreen Co.,  
200 Wilmot Rd., Deerfield, IL  
60015-4616

Quality Guaranteed  
100% Satisfaction Guaranteed with all Walgreens Products or Your Money Back.  
www.walgreens.com

ITEM 539366

3 11917 09280 5

LOT NO.

EXP.

44275 94 C3

## **EXHIBIT 2**

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

McNEIL-PPC, INC.,

Opposer,

Opp. No. 91184978

v.

WALGREEN CO.,

Applicant.

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

Applicant hereby responds to Opposer's First Set of Interrogatories as follows:

**GENERAL OBJECTIONS**

Applicant objects to the nearly seven pages of definitions and instructions preceding the interrogatories. Such definitions and instructions are cumbersome and unduly burdensome in that constant reference back and forth to the lengthy definition and instructions is required. Furthermore, Applicant objects to the definitions and instructions to the extent they request either privileged or non-discoverable information. Notwithstanding these objections, Applicant will respond to the interrogatories using the plain meaning of the words contained therein.

**RESPONSES TO INTERROGATORIES**

Interrogatory No. 1

Identify (including by SKU) each good in connection with which Applicant's Mark has been used, and each additional good for which Applicant has considered using Applicant's Mark.

Response to Interrogatory No. 1

Pursuant to a protective order, documents identifying the goods sold in connection with Applicant's mark as described in the opposed application will be made available for inspection

and copying. Applicant objects to this interrogatory to the extent it asks Applicant to identify goods for which Applicant has considered using Applicant's mark, but where no use has been made. Notwithstanding the foregoing objection, Applicant states it has used the mark "WAL-ZYR" only for the goods covered in the opposed application, namely, allergy medications.

Interrogatory No. 2

For each good identified in response to Interrogatory No. 1, describe the purpose or intended use of each such product, including, if appropriate, any health symptoms, ailments or diseases such product is intended to treat or otherwise aid.

Response to Interrogatory No. 2

For the allergy medications sold by Applicant under the mark "WAL-ZYR," documents responsive to this interrogatory will be made available for inspection and copying. The medications sold by Applicant under the "WAL-ZYR" mark have the following uses: Temporarily relieves the following symptoms due to hay fever or other upper respiratory allergies: runny nose; itchy, watery eyes; itching of the nose or throat; and sneezing.

Interrogatory No. 3

Describe in detail the development and selection of Applicant's Mark, including other marks considered for Applicant's Product and Applicant's reason(s) for rejecting each; Applicant's reason(s) for selecting Applicant's Mark; the meaning and derivation of Applicant's Mark; and any meaning or significance of Applicant's Mark.

Response to Interrogatory No. 3

Applicant objects to Interrogatory No. 3 as requesting information that is neither relevant nor likely to lead to relevant information, in that it asks for information about marks considered but rejected by Applicant, and the reasons for rejection. Without waiving this objection,

Applicant selected Applicant's Mark because it is in conformity with Applicant's standard procedure for selecting marks for over-the-counter products in that the dominant element of the mark is "WAL".

Interrogatory No. 4

Identify all Persons (including but not limited to employees of Applicant and outside market research firms, advertising agencies, and any others) who participated in or were consulted Concerning the development and selection of Applicant's Mark.

Response to Interrogatory No. 4

Applicant objects to Interrogatory No. 4 as over broad and unduly burdensome, in that it asks Applicant to identify "all Persons." Applicant objects to Interrogatory No. 4 also because it requests information, namely, the identity of "all Persons" who participated or were consulted in the development of Applicant's Mark, and such information related to "all Persons" is not relevant or likely to lead to information that is relevant. Without waiving this objection, Applicant will identify individuals principally responsible for the development and selection of Applicant's Mark:

Francis Kowalik, Esq. (Senior Attorney, Intellectual Property, Walgreen Company)

Daniel Potts (Category Manager, Purchasing Health and Wellness, Walgreen Company)

Kate Collins (IP Legal Assistant, Walgreen Company)

Interrogatory No. 5

Describe what steps were taken to determine whether Applicant could use Applicant's Mark (e.g., conducting or commissioning trademark search reports, conducting or commissioning investigations, obtaining advice of counsel, etc.).

Response to Interrogatory No. 5

Applicant took the following steps to determine whether Applicant could use Applicant's Mark: conducted online search; reviewed online search with legal counsel.

Interrogatory No. 6

Identify all Persons (including but not limited to employees of Applicant, outside attorneys and any others) who participated in or were consulted concerning the clearance of Applicant's Mark.

Response to Interrogatory No. 6

Francis Kowalik, Esq.

Daniel Potts

Kate Collins

Interrogatory No. 7

State when and describe how Applicant first became aware of Opposer's Marks.

Response to Interrogatory No. 7

Applicant lacks the information needed to state when and how Applicant first became aware of Opposer's Mark, but Applicant has been selling prescription "ZYRTEC" for several years.

Interrogatory No. 8

Describe in detail how goods and services offered under Applicant's Mark have been and are planned to be advertised, marketed, promoted or publicized. Where applicable, the response should include each type of media (e.g., newspapers, television) and media outlet (e.g., The New York Times, CBS) through which such activity was, or is planned to be, conducted.

Response to Interrogatory No. 8

Documents reflecting how Applicant's goods offered under Applicant's Mark have been advertised, marketed, promoted and publicized will be made available for inspection and copying. Where applicable, the documents made available will indicate the type of media and media outlets utilized. Applicant objects to the remainder of Interrogatory No. 8 as requesting information that is neither relevant nor likely to lead to relevant information, and as requesting information that is speculative, in that it requests information about how Applicant plans to advertise the goods and services offered under Applicant's Mark. Without waiving these objections, in the interest of furthering discovery, Applicant states it believes that future advertising, marketing, promotional and publicity efforts will be consistent with historic efforts.

Interrogatory No. 9

Identify all advertising agencies, public relations agencies or market research agencies that Applicant has communicated with or has plans to communicate with Concerning the advertising, marketing, promoting or publicizing of goods or services under Applicant's Mark.

Response to Interrogatory No. 9

Documents describing any advertising agencies, public relations agencies or market research agencies that Applicant has communicated with concerning the advertising, marketing, promoting, or publicizing of Applicant's goods under the mark "WAL-ZYR" will be made available for inspection and copying. Applicant objects to the remainder of Interrogatory No. 9 as requesting information that is neither relevant nor likely to lead to relevant information and as requesting information that is speculative, in that it requests information about advertising agencies, public relations agencies, and market research agencies that Applicant plans to contact.

Interrogatory No. 10

Identify (i) all webpages connected with the walgreens.com website in the format of http://www.walgreens.com/[BRAND], such as http://www.walgreens.com/zyrtec; and (ii) the inclusive dates on which such webpages have been or were available at the walgreens.com website.

Response to Interrogatory No. 10

Applicant objects to Interrogatory No. 10 as it is not understood what is requested. To the extent Interrogatory No. 10 may be understood, it seemingly requests information which is neither relevant nor likely to lead to any relevant information in this proceeding.

Interrogatory No. 11

Identify (i) all advertisements other than circulars by or on behalf of Applicant that have included or otherwise referenced Opposer's Mark or goods offered under Opposer's Mark; (ii) the total expenses incurred in connection with each such advertisement; (iii) the specific media outlet (e.g., The New York Times, CBS, etc.) in which such advertisements appeared; and (iv) the inclusive dates on which such advertisements appeared in each such channel.

Response to Interrogatory No. 11

To the extent they exist, representative advertisements other than circulars by or on behalf of Applicant that include or otherwise reference Opposer's Mark or goods offered under Opposer's Mark will be made available for inspection and copying. Pursuant to a protective order, documents reflecting total expenses incurred in connection with each such advertisement will be made available for inspection and copying to the extent such document exists.

Documents showing the specific media outlet in which such advertisements appeared and

the date such advertisement appeared in each such media outlet will be made available for inspection and copying to the extent such documents exist.

Interrogatory No. 12

Describe with particularity the nature of consumers to whom goods or services offered under Applicant's Mark are, or are intended to be, sold, advertised, marketed, promoted or otherwise publicized. The response should identify both the demographic and geographic characteristics of the consumers.

Response to Interrogatory No. 12

The target consumers of Applicant's goods sold under Applicant's Mark are adults seeking relief from allergy symptoms.

Interrogatory No. 13

Identify all Communications and Documents indicating that a Person was or may have been confused as a result of the use of Applicant's Mark.

Response to Interrogatory No. 13

After due inquiry, Applicant is unaware of any confusion of any nature.

Interrogatory No. 14

Identify all third parties believed or known by Applicant to have used, applied to register and/or registered a mark comprised in whole or part of ZYR or a close variation thereof in connection with any goods classified in International Class 5, and any additional third parties having or claiming rights in marks Applicant intends to rely on for any purpose in this proceeding.

Response to Interrogatory No. 14

Applicant objects to Interrogatory No. 14 as it seeks information which is neither relevant nor likely to reach relevant information. Neither Applicant's nor Opposer's mark consists of "ZYR". Applicant believes it is not proper to attempt to dissect the marks, as the marks must be viewed as a whole. Accordingly, Applicant objects to Interrogatory No. 14. Notwithstanding this objection, Applicant will make available for inspection and copying documents listing at least some of the third parties that Applicant believes have used, applied to register, and/or registered a mark comprised in whole or part of ZYR.

Interrogatory No. 15

For each third party identified in response to Interrogatory No. 14, Identify:

- (a) the mark used by such third party;
- (b) the specific good(s) or service(s) in connection with which the third party's mark has been used;
- (c) the annual sales volumes in dollars and units for good(s) or service(s) sold under the third party's mark;
- (d) the third party's annual expenditures to advertise, market or otherwise promote the third party's mark; and
- (e) the percentage share of the total relevant market enjoyed by goods sold under the third party's mark.

Response to Interrogatory No. 15

No answer required.

Interrogatory No. 16

Identify all WAL-Formative Marks and the comparable national brand(s) for the product sold under each such mark.

Response to Interrogatory No. 16

Applicant objects to this interrogatory as vague and ambiguous, because Applicant owns or has owned many marks that include the prefix “WAL”, but that do not necessarily have a comparable national brand, including Applicant’s marks that are comprised in whole or part of “WALGREEN”, “WALGREENS”, or “WALGREEN’S”. Without waiving this objection, documents responsive to Interrogatory No. 16 will be made available for inspection and copying, and Applicant attaches Exhibit A hereto in response to this request.

Interrogatory No. 17

Identify all third parties who have objected to Applicant’s use or registration of any WAL-Formative Mark and the status of each such dispute.

Response to Interrogatory No. 17

Applicant objects to Interrogatory No. 17 on the grounds that it requests information which is neither relevant nor likely to lead to any relevant information in this proceeding.

Interrogatory No. 18

Set Forth the Basis (see Definition S) for Applicant’s denial that “ZYRTEC is well known and famous” as stated in Paragraph 12 of the Answer.

Response to Interrogatory No. 18

Applicant objects to Interrogatory No. 18 to the extent it seeks legal conclusions and argument. Without waiving this objection, until early 2008, Opposer’s products offered under the “ZYRTEC” mark apparently were directed to a narrow audience, as the products were

available on a prescription basis only. Only this year has Opposer offered any products under the “ZYRTEC” mark over-the-counter and to the general public Applicant is unaware of any extensive advertising and promotion of this mark, lengthy use or consumer awareness or recognition of “ZYRTEC”. Accordingly, it is believed that “ZYRTEC” is neither well known nor famous as stated in Paragraph 12 of the Answer.

Interrogatory No. 19

Set Forth the Basis (see Definition S) for Applicant’s denial of Paragraph 17 of the Notice of Opposition that “Applicant’s WAL-ZYR mark is highly similar to Opposer’s ZYRTEC mark.”

Response to Interrogatory No. 19

Applicant objects to Interrogatory No. 19 to the extent it seeks legal conclusions and argument. Nonetheless, pending further discovery Applicant states that “WAL-ZYR” is different from Opposer’s “ZYRTEC” mark in sound, appearance, meaning and overall commercial impression. Further answering, the Applicant states that “WAL-ZYR” will be perceived by the relevant consumer as one of the many “WAL” prefixed marks owned by Applicant, while no such meaning attaches to “ZYRTEC”.

Interrogatory No. 20

Set Forth the Basis (see Definition S) for Applicant’s denial of Paragraph 18 of the Notice of Opposition that “The goods set forth in the Application are closely related if not identical to the goods in connection with which Opposer uses the ZYRTEC mark.”

Response to Interrogatory No. 20

Applicant objects to Interrogatory No. 20 because the phrase “closely related” is vague and ambiguous. From a review of the labels for the products sold under Applicant’s Mark and

under Opposer's Mark, both products contain the same active ingredient, but Applicant is not aware of the exact formulations, including the inactive ingredients, of the products or whether the formulations are identical or "closely related," to the extent that phrase is understood.

Interrogatory No. 21

Set Forth the Basis (see Definition S) for the allegation in Applicant's Affirmative Defense that "Applicant has developed a family of marks using the prefix WAL-."

Response to Interrogatory No. 21

Documents responsive to Interrogatory No. 21 will be made available for inspection and copying.

Interrogatory No. 22

Set Forth the Basis (see Definition S) for the allegation in Applicant's Affirmative Defense that "The public has come to know Applicant and its goods by marks using the distinctive 'WAL-' prefix."

Response to Interrogatory No. 22

Applicant has been using WAL-Formative Marks since at least as early as July 1978 in connection with products offered by Applicant. Applicant has invested substantial sums of money advertising and promoting the products sold under its WAL-Formative Marks, and Applicant has generated substantial sales of the products sold under its WAL-Formative Marks. As a result, the public has come to know Applicant and its goods through the WAL-Formative Marks.

Interrogatory No. 23

Identify each natural Person who provided the substantive information set forth in Applicant's responses to these interrogatories, specifying each answer for which such assistance was given by such Person.

Response to Interrogatory No. 23

The people who provided the substantive information set forth in Applicant's responses to these interrogatories are Francis Kowalik, Daniel Potts, and Kate Collins.

Respectfully submitted,

AS TO OBJECTIONS:

Date: November 21, 2008



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Mark J. Liss  
Ill. Bar No. 6181002  
Caroline L. Stevens  
Ill. Bar No. 6274252  
LEYDIG, VOIT & MAYER, LTD.  
Two Prudential Plaza - Suite 4900  
Chicago, Illinois 60601  
Telephone: (312) 616-5600  
Facsimile: (312) 616-5700

Attorneys for Plaintiff, Walgreen Company

AS TO INTERROGATORY ANSWERS:

VERIFICATION

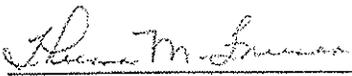
The undersigned, Robert Tompkins, on behalf of Walgreen Company, being first duly sworn, deposes and states as follows:

I, Robert Tompkins, am the General Merchandise Manager, Health & Wellness Division, of Walgreen Company, and as such, I am authorized and qualified to make this verification on behalf of Walgreen Company. I have read the foregoing responses to interrogatories and know the contents thereof; said responses are true of my own knowledge or belief or have been obtained for me by persons whom I believe to be reliable and capable of ascertaining the truth.

  
\_\_\_\_\_  
Signed Name

Robert Tompkins  
\_\_\_\_\_  
Printed Name

Subscribed and sworn to before me  
this 19<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
Notary Public

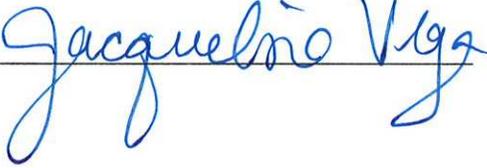


CERTIFICATE OF SERVICE

I certify that the "Applicant's Responses to Opposer's First Set of Interrogatories" was served by First Class Mail and e-mail on the date indicated below and to the following:

James D. Weinberger  
Laura Popp-Rosenberg  
Fross Zelnick Lehrman & Zissu, P.C.  
866 United Nations Plaza  
New York, NY 10017  
jweinberger@fzlz.com  
lpopp-rosenberg@frosszelnick.com

November 21, 2008

  
\_\_\_\_\_

## **EXHIBIT 3**

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

McNEIL-PPC, Inc.	)	In re Trademark Application
	)	Serial No. 76/682,070
Opposer,	)	Opposition No. 91184978
	)	Trademark: WAL-ZYR
v.	)	
	)	
WALGREEN COMPANY,	)	
	)	
Applicant.	)	

**APPLICANT'S SUPPLEMENTAL INITIAL DISCLOSURES**

In accordance with 37 C.F.R. 2.120(a)(3), Applicant Walgreen Co. hereby makes the following supplemental initial disclosures. These disclosures are based on information reasonably available to Applicant at the present time and Applicant reserves its right to amend these disclosures as additional or different information comes to light.

- A. The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of the information.**

<u>Person</u>	<u>Subject Matter</u>
Mr. Dan Potts c/o Walgreen Company 104 Wilmot Rd. Deerfield, IL 60015	Products bearing the marks at issue; competitive goods; advertising, marketing and distribution of goods bearing the mark at issue; current, historical and future promotional and advertising efforts; Applicant's historic sales information related to goods bearing the marks at issue
Mr. Robert Tompkins Divisional Merchandise Manager Walgreen Company 104 Wilmot Rd. Deerfield, IL 60015	Products bearing the marks at issue; competitive goods; advertising, marketing and distribution of goods bearing the mark at issue; current, historical and future promotional and advertising efforts; Applicant's historic sales information related to goods bearing the marks at issue

<u>Person</u>	<u>Subject Matter</u>
Dr. Alex Simonson, Ph.D. Simonson Associates, Inc. 560 Sylvan Avenue Englewood Cliffs, NJ 07632	Dr. Simonson is likely to have discoverable information concerning the likelihood of confusion between the WAL-ZYR and ZYRTEC marks.
Rohonish Hooda McNeil Consumer Healthcare	McNeil's business activities, use of the ZYRTEC mark, products sold under the ZYRTEC mark, advertising and marketing effort for goods sold under the ZYRTEC mark, channels of trade for goods sold under the ZYRTEC mark, absence of confusion between the ZYRTEC mark and the WAL-ZYR mark, and any other topics pertaining to the ZYRTEC mark or McNeil's products sold under that mark.

**B. A copy of, or a description by category and location of all documents, data compilations and tangible things in the possession of the party that are relevant to disputed facts alleged with particularity in the pleadings.**

Applicant's search for documents is ongoing. Documentation that Applicant expects to provide in this matter may include, by category, non-privileged records relating to conception and adoption of the WAL-ZYR mark, non-privileged documents pertaining to Applicant's application to register the WAL-ZYR mark, exemplar documents relating to marketing and advertising of products bearing the WAL-ZYR and ZYRTEC trademarks; documents, exemplars and reproductions of goods bearing the mark; documents relating to channels of trade and distribution of products bearing the trademark; documents regarding Applicant's sales of products bearing the WAL-ZYR and ZYRTEC marks; documents regarding competitive goods; expert reports produced by the parties in this case. Documents will be made available to Opposer by photocopy and/or inspection at Applicant's place of business.

**C. Certification of Disclosure**

The undersigned hereby certifies that, to the best of his knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the foregoing Initial Disclosure is complete and correct as of the time made. However, as noted above, Applicant reserves its right to amend these disclosures as additional or different information comes to light.

Respectfully submitted,



Mark J. Liss  
Caroline L. Stevens  
Leydig, Voit & Mayer  
Two Prudential Plaza  
180 North Stetson  
Chicago, Illinois 60601  
(312) 616-5600  
Attorneys for Applicant Walgreen Co.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above foregoing Applicant's Supplemental Initial Disclosures was mailed by first class mail, postage prepaid on this 14th day of July, 2009 to:

Laura Popp-Rosenberg  
Fross Zelnick Lehrman & Zissu, P.C.  
866 United Nations Plaza  
New York, NY 10017

Michelle Ball

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing Opposition to Contested Motion to Amend to be served by First Class mail, postage pre-paid, on Applicant's counsel, Caroline Stevens, Esq., Leydig, Voit & Mayer, Two Prudential Plaza, 180 North Stetson, Chicago, IL 60601, this 8<sup>th</sup> day of September, 2009.

  
\_\_\_\_\_  
Laura Popp-Rosenberg