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

Proceeding	91184978
Party	Plaintiff McNeil-PPC, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

McNEIL-PPC, INC.,

Opposer,

Opp. No. 91184978

-against-

WALGREEN CO.,

Applicant.

**OPPOSER’S RESPONSE TO APPLICANT’S MOTION
TO PRECLUDE DOCUMENTS FROM INTRODUCTION AT TRIAL**

Applicant’s Motion to Preclude Documents from Introduction at Trial (“Motion to Preclude”) is yet another in a string of meritless motions that Applicant has filed in this proceeding. Its lack of merit is apparent from the fact that the motion was filed on the second business day of Opposer’s trial period *before* Opposer had attempted to introduce *any* documents into evidence at trial. Moreover, the Motion is supported¹ by false accusations and mischaracterizations of the discovery history in this proceeding. The truth is that Opposer produced *thousands* of pages of responsive documents shortly after the proceeding opened – including documents responsive to the various document requests identified in Applicant’s Motion – and continued to produce documents thereafter throughout the discovery period as such documents became available. Applicant also conspicuously fails to mention a third set of documents requests served on Opposer just before the close of discovery on October 25, 2010, and fails to mention that some of the documents about which Applicant complains were

¹ The term “supported” is used loosely, since, just as with Applicant’s earlier motions, Applicant has not accompanied this motion with a declaration attesting to the facts, but instead constructs the brief from unverified assertions presented as “facts.”

responsive to those later requests. Also absent from Applicant's version of the facts is that all of the complained-of documents were produced to update Opposer's earlier production of similar documents and were not the first documents produced in response to *any* of Applicant's document requests.² Applicant also fails to mention that the vast majority of the complained-of production was created or compiled within one or two months of production, not years before as Applicant's brief falsely asserts.

In sum, the truth is that Opposer's production the day after the close of discovery was timely in satisfaction of the applicable rules and that Applicant was not prejudiced by the timing of the production in any way. When the Board analyzes the Motion to Preclude in detail and with an honest view of the history rather than under the misdirecting gloss of Applicant's skewed presentation, Opposer is confident that the Board will agree that the Motion is meritless and should be in all respects denied.

FACTS

Discovery in the underlying proceeding began on September 10, 2008. Both parties served their first sets of discovery requests, including document requests, shortly thereafter, Applicant on October 8, 2008, and Opposer on October 17, 2008. (Popp-Rosenberg Decl. at ¶ 3; *see also* Motion to Compel at Exh. A.) Opposer provided timely written responses to Applicant's first set of documents requests. Opposer thereafter made its first production, totaling 1,324 pages, on February 19, 2009. Opposer produced additional responsive documents on June 23, June 25 and July 7, 2009, both to supplement its initial production and in response to

² It should be pointed out that Opposer objected *in toto* to several of the document requests identified in Applicant's Motion, including Document Requests Nos. 26 and 30, and never agreed to produce any responsive documents (*see* Popp-Rosenberg Decl. at Exhs. 1-2), a fact which Applicant conveniently ignores. Opposer also objected in part to all of the remaining document requests, and therefore agreed to produce only certain documents in response (*see id.*), another fact that Applicant conveniently ignores.

Applicant's second set of document requests dated April 30, 2009. Opposer produced an additional 3,556 pages of documents in June and July of 2009, bringing Opposer's total production to 4,880 pages.³

Shortly thereafter, on October 9, 2009, the proceeding was suspended for eight months due to Applicant's filing of an unrelated motion to compel production of materials that Opposer contended were both irrelevant and immune to discovery under the attorney-client privilege and work product doctrine, and that the Board ultimately agreed were irrelevant (without opining on their protected status).⁴ During the time the proceedings were suspended, the parties largely ceased communications, including about discovery. When proceedings resumed at the end of July 2010, the parties began communicating about discovery issues continuously up until and even after the close of discovery, exchanging deficiency letters and engaging in phone calls to discuss supplementation of both parties' productions. (*See* Popp-Rosenberg Decl. at ¶ 7.)⁵

During this time, Opposer's counsel was actively communicating with Opposer in an effort to locate additional documents that Applicant had specifically requested. (*See* Popp-Rosenberg Decl. at ¶ 8.) Not surprisingly, considering the thoroughness of Opposer's initial search for responsive documents and the size of Opposer's organization, the search for additional documents was a laborious process that did not produce results instantaneously. (*Id.*) In

³ Applicant attempts to call Opposer's document production into question by contrasting Opposer's five dates of production (including the complained-of October 27, 2010 production) with Applicant's twelve dates of production. (*See* Motion at ¶ 3.) However, it is the *completeness* of the production not the *frequency* of the production that is relevant. The fact that Applicant may produced documents on twelve separate occasions and Opposer only on five is completely beside the point.

⁴ According to the "facts" as presented Applicant's Motion to Preclude, by the time Applicant filed its Motion to Compel on October 5, 2009, Opposer had already failed to fully respond to Applicant's document requests served in October 2008 and April 2009. Tellingly, however, Applicant's October 5, 2009 Motion to Compel did not call for the production of those documents.

⁵ Although Applicant's Motion attempts to paint Opposer as the repeatedly failing in discovery obligations, the truth is that Opposer complained about Applicant's inadequate production as much as if not more than Applicant complained of Opposer's. (*See* Popp-Rosenberg Decl. at ¶¶ 5-6.)

addition to searching for additional documents responsive to Applicant's specific production concerns, Opposer also was compiling supplemental information to reflect updates since Opposer's earlier production, such as for sales figures and press mentions. (*Id.* at ¶ 9.) After Opposer collected all of the supplemental discovery information, Opposer's counsel needed time to review the materials and prepare them for production, which counsel did in as timely a manner as it was able. (*Id.* at ¶ 14.)

While Opposer was collecting these materials and readying them for production, on October 25, 2010 (the day before the close of discovery), Applicant informed Opposer that it had sent a third set of document requests on August 25, 2010 ("Third Document Requests"), and had not received Opposer's response by September 29, 2010, as it expected. (*See* Popp-Rosenberg Decl. at ¶ 12 & Exh. 6.) Though Applicant's month-long delay in alerting Opposer to the allegedly overdue discovery responses seemed an attempt to deprive Opposer of time to respond to the Third Document Requests, Opposer pulled together a written response in less than three and a half hours and informed Applicant that it would produce responsive documents as soon as possible. (*See Id.* at ¶ 13 & Exh. 7.)

Two days later, on October 27, 2010, Opposer produced documents both to supplement its production and to respond to the Third Documents Requests. Ultimately, Opposer produced the following materials:⁶

- An amendment to the license agreement giving Opposer rights in the ZYRTEC mark, dated January 27, 2010 (MCNEIL 005040-56; *see* Motion to Preclude at Exh. E), produced to update earlier license-related documents produced by Opposer on February 19, 2009;

⁶ Omitted from this list are documents which Opposer did not rely upon at trial: MCNEIL 004970-5039 (updated search results for the terms "wal-zyr" and "zyrtec" on Applicant's website), MCNEIL 005057-101 (questions used in surveys and market research) and MCNEIL 005113 (updated hits to website). Although, for all the reasons set forth in this brief, Opposer also believes these documents should not be excluded from trial, the question of their exclusion is presently moot.

- Updated ZYRTEC sales figures (MCNEIL 005102-07 and MCNEIL 005129-32; *see, e.g.*, Motion to Preclude at Exh. H), compiled the month before production and produced as an update to sales data originally produced on July 7, 2009 and in response to Applicant's specific request for updated sales figures (*see* Popp-Rosenberg Decl. at ¶ 6);
- Updated customer comments on ZYRTEC (MCNEIL 005108-112; *see* Motion to Preclude at Exh. I), compiled the month before production and produced as an update to customer comments originally produced on June 23, 2009 and July 7, 2009 and in response to Applicant's specific request for updated consumer comments (*see* Popp-Rosenberg Decl. at ¶ 6);
- Advertisements for ZYRTEC (MCNEIL 005114-28 and 5157-60; *see, e.g.*, Motion to Preclude at Exh. K), produced to update earlier advertisements originally produced on February 19, 2009, June 23, 2009, and July 7, 2009 and in response to Applicant's request for supplementation of advertising documents (*see* Popp-Rosenberg Decl. at ¶ 6);
- Articles referencing ZYRTEC (MCNEIL 005133-45; *see* Motion to Preclude at Exh. L), produced to update and supplement media articles and searches originally produced on July 7, 2009 and in response to Applicant's specific request for additional media references to ZYRTEC (*see* Popp-Rosenberg Decl. at ¶ 6);
- Media plans from 2009 and 2010 (MCNEIL 005146-56; *see* Motion to Preclude at Exh. M), produced to update media plans originally produced on February 19, 2009 and in response to Applicant's request for updated advertising expenditures and plans (*see* Popp-Rosenberg Decl. at ¶ 6); and
- Results of searches in Westlaw's USNEWS database for media references to ZYRTEC (MCNEIL 005177-9498; *see, e.g.*, Motion to Preclude at Exh. N), compiled the month before production, and produced to supplement Westlaw news searches originally produced on July 7, 2009 and in response to Applicant's request for updated and additional media references to ZYRTEC (*see* Popp-Rosenberg Decl. at ¶ 6).

(Popp-Rosenberg Decl. at ¶ 14.) As the above demonstrates, the entire complained-of production updated previously produced materials that had changed over the course of discovery (such as sales figures, advertising, and press references) or to respond to Applicant's Third Document Requests or to specific continuing requests from Applicant for more information. (In fact, the vast bulk of the production – all but 207 pages of the 4,528-page production – was

Westlaw news search results which updated and largely duplicated the earlier-produced Westlaw news search results.)

Several weeks later, on November 17, 2010, Applicant sent Opposer an email complaining that the October 27 document production was untimely and demanding that Opposer agree not to rely on the documents at trial. (*See* Popp-Rosenberg Decl. at Exh. 8.)⁷ Opposer replied by email on November 26, 2010, rejecting Applicant's characterization of Opposer's production as late and detailing how each produced document updated earlier produced documents. (*See Id.* at Exh. 9.) Opposer further offered to discuss the matter with Applicant by telephone if Applicant had any continuing concerns. (*Id.*) Applicant never responds to Opposer's email or offer for a teleconference, and Opposer therefore reasonably concluded that the matter was settled. (*Id.*)

As it turned out, however, Applicant did not respond to Opposer's November 26 email not because it was satisfied with Opposer's response but rather because it had a different plan: to blindside Opposer by filing a premature motion to preclude on the second business day of Opposer's trial period before Opposer had even offered to introduced a single piece of evidence. In response, Opposer wrote to Applicant requesting that it withdraw its premature motion without prejudice to refiling *after* Opposer had actually attempted to rely on any of the objected-to documents at trial. (*See* Popp-Rosenberg Decl. at ¶ 18 & Exh. 10.) Applicant replied that it would be willing to withdraw its motion only if Opposer agreed not to rely on any of the documents at trial or only agreed to rely on certain documents to which Opposer had no objection. (*See Id.* at ¶ 19 & Exh. 11.) In response, since Applicant had asserted that Opposer's

⁷ Again, although this motion is not about Applicant's discovery deficiencies, it is worthwhile noting that the very day after complaining about Opposer's production, Applicant made its own supplemental production after discovery closed, including documents responsive to Opposer's First Set of Document Requests issued on October 17, 2008 and containing information dating back to as early as 1984. (*See* Popp-Rosenberg Decl. at ¶ 16.)

October 27 production deprived it of the opportunity to take follow-up discovery, Opposer offered to consider making follow-up discovery available if Applicant could identify any follow-up discovery it actually needed. (*See Id.* at ¶ 20 & Exh. 12.) Opposer refused this suggestion, and refused even to identify any legitimate follow-up discovery. (*Id.* at ¶ 21 & Exh. 13.) As a compromise, the parties agreed to an extension of Opposer's time to respond to the Motion to Preclude until after the close of Opposer's discovery period when the motion would be ripe. (*See Id.* at ¶ 22.)

ARGUMENT

I. **Opposer Complied with the Applicable Rules and Made Timely Production**

Through its Motion to Preclude, Applicant seeks to keep Opposer from relying at trial on certain documents merely because there were produced one day after discovery closed. However, as much as Applicant would like to deny it, there is no rule requiring Opposer to produce documents by a date certain, and no rule requiring the Board to exclude documents produced one day after the close of discovery. Rather, the applicable rules require only that Opposer's initial production be made on at a reasonable time and that any supplemental production be made "in a timely matter" after additional responsive information is discovered. *See* Federal Rules of Civil Procedure 34(b)(1)(B) and 26(e).

Although Applicant's motion conveniently glosses over Opposer's earlier productions, Applicant does not (and cannot) complain that Opposer's initial productions in February, June and July 2009 were not reasonable in time after Applicant's November 2008 and April 2009 document requests. And as much as Applicant may like to pretend that the complained-of October 27 production is the first time Opposer produced documents in response to a number of these early document requests, that is simply untrue. Each and every document about which

Applicant complains was produced as an update to previously produced documents to reflect information that had changed or developed over the course of the lengthy discovery period in this proceeding. The only question, then, is whether Opposer's October 27 supplemental production was made "in a timely manner" as required by Federal Rule of Civil Procedure 26(e). The facts clearly demonstrate that it was.

As explained above, all of the complained-of documents updated information that had changed or developed over the course of the discovery period. The vast majority of the complained-of documents, including sales figures and press references, changed on a virtually constant basis. Other materials, such as media plans and advertisements, changed less regularly over the discovery period, but nonetheless still evolved routinely over the period. In order to produce the most up-to-date information, Opposer compiled updated materials such as financial results, customer comments and press references, as well as updated media plans and advertisements, just before the close of discovery. In fact, most of the produced documents did not even *exist* until shortly before they were produced.

Applicant's motion would seem to suggest that, for this type of regularly developing information, Opposer should have produced supplemental documents monthly, weekly or even daily. This is simply not the rule. Instead, supplementation "in a timely manner" has alternatively been described as "at appropriate intervals," and is satisfied where a party collects updated information over a short period of time then produces cumulative updates to its production, as Opposer did here. *See* 1993 and 2007 Advisory Committee notes to Amendments to Federal Rule of Civil Procedure 26(e)(1).⁸ Moreover, where a document is not in existence at

⁸ Notes to the 1993 Amendments state: "Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches." Notes to the 2007 Amendments further clarified 26(e), stating: "Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were

an earlier date, a party does not violate discovery rules by producing the document shortly after its creation. *See, e.g., Ortiz v. Norton*, 254 F.3d 889, 899 (10th Cir. 2001). Therefore, there can be no real question that Opposer met the timely supplementation requirement as to these materials.

The only document that does not fit exactly into the category of regularly evolving information – an amendment, dated January 27, 2010, to the license agreement giving Opposer rights in ZYRTEC – was nonetheless also produced in a timely manner given the facts of the case. The license amendment was executed right in the middle of the lengthy eight-month suspension of the proceedings. Opposer’s counsel did not receive a copy of the executed amendment until mid-September 2010, only a month before it was produced. (Popp-Rosenberg Decl. at ¶ 9.) Opposer was at the time preparing a collection of documents for production and produced all the materials, including the license agreement amendment, in good faith, as soon as it was able to do so.

II. Applicant is Not Prejudiced by the Complained-of Production

Applicant’s statement that it has been prejudiced because Opposer’s October 27 production allegedly prevented it from taking follow-up discovery is merely posturing, as Applicant’s actions both before and after the complained-of production show.

As explained above, every document at issue was merely an update to previously produced material Applicant long had in its possession. For some of these materials, Applicant had already taken follow-up discovery in the form of two depositions of Opposer’s main witness, Rohinish Hooda. For other of these materials, however, Opposer did not take any follow-up

to be supplemented ‘at appropriate intervals.’ A prior discovery response must be ‘seasonably * * * amend[ed].’ The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct ‘in a timely manner.’”

discovery despite having fifteen months or more to do so, apparently deciding that follow-up discovery was not necessary. For Opposer to state now that it needs follow-up discovery on the same type of materials that it has had in its possession for fifteen or more months defies belief.

Moreover, and perhaps more importantly, Opposer in fact had the opportunity to take follow-up discovery with respect to the complained-of production. During Opposer's testimony period, Applicant had the opportunity to question witnesses on each of the documents about which it now complains. In the case of some documents, Applicant availed itself of this opportunity by cross-examining Opposer's witness (Rohinish Hooda) about the documents. (Popp-Rosenberg Decl. at ¶ 23.) However, in the case of the vast majority of the complained-of materials – specifically, the Westlaw news searches – Applicant did not even bother to pose one question to the witness called to authenticate the documents. (*Id.* at ¶ 24.) *Cf. Williams v. Morton*, 343 F.3d 212 (3d Cir. 2003) (where witness was identified six months after close of discovery, Court refused to preclude testimony where opposing party was given adequate opportunity to depose the witness). Additionally, when Applicant complained about the October 27 production, Opposer offered on multiple occasions to make follow-up discovery available, if only Applicant could identify any follow-up discovery that it would want to take. Applicant refused to take Opposer up on this request and refused to identify even one avenue of follow-up discovery that it deemed necessary or even desirable. *Cf. Tezak v. Montgomery Ward & Co.*, 33 F. App'x 172, 179 (6th Cir. 2002) (where defendants provided name of expert after close of discovery, Court found no prejudice where plaintiff was given opportunity for follow-up discovery but declined to take it, stating, “[plaintiff] made no effort to [take the opportunity for follow-up discovery], and cannot now argue that they were prejudiced.”)

Actions speak louder than words, and the unmistakable message of Applicant's actions is that there is *no* follow-up discovery that Applicant needs or even wants with respect to the complained-of documents. Applicant's cries of "prejudice" should therefore be ignored.

III. There is No Case Law to Support Preclusion Here

The cases that Applicant cites in its brief do not support its position that any of the documents produced by Opposer on October 27 should be precluded. The cases cited in Applicant's brief all involve situations in which a party failed to disclose *any* information in response to discovery requests and then tried to rely on documents at trial. For example, Applicant cites *Mana Products, Inc. v. Black Onyx, Inc.*, Opp. No. 91112190, 2001 WL 930583, at *2 (T.T.A.B. Aug. 15, 2001), for the proposition that "documents not produced during the discovery period" are inadmissible at trial. (Motion to Preclude at ¶ 20.) In fact, *Mana Products* involved a situation where documents were excluded because they had not been produced *at all*. See also *Bison Corp. v. Perfecta Chemie B.V.*, 4 U.S.P.Q.2d 1718 (T.T.A.B.) (considering whether to strike documents not produced until a testimonial deposition); *Panda Travel Inc. v. Resort Option Enters. Inc.*, 94 U.S.P.Q.2d 1789, 1791-93 (T.T.A.B. 2009) (considering whether to strike documents not produced until after opening of testimony period). Applicant's reliance on these cases is disingenuous at best, since unlike the at-fault parties in those cases, Opposer produced all the documents in question and produced them well before its testimony period.

Worse than disingenuous is Applicant's reliance on *Aon Risk Services, Inc. of Illinois v. Shetzer*, 01 C 7813, 2002 WL 1989466, at *6 (N.D. Ill. Aug. 27, 2002), for the proposition that "[i]n federal district courts also following the Federal Rules of Civil Procedure, the preclusion requested here is *automatic* even when documents are produced in advance of trial and the production not [sic?] harmless." (Motion to Preclude at ¶ 21 (emphasis added).) *Aon Risk*

involved a local court rule and previous court order that *mandated* supplementation by the close of discovery, and thus is manifestly irrelevant here.

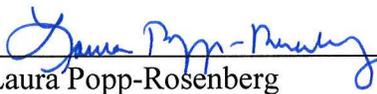
While Applicant's citations do not support Applicant's position, they do support Opposer's. As stated in *Mana Products*, only "[a] party which fails to produce documents or information in response to its opponent's proper discovery requests will be precluded from introducing or relying on such documents or information at trial." 2001 WL 930583, at *2 (citing *Johnston Pump/General Valve Inc. v. Chomalloy AM. Corp.*, 10 U.S.P.Q.2d 1671, 1677 (T.T.A.B. 1989); *Nat'l Aeronautics & Space Administration v. Bully Hill Vineyards Inc.*, 3 U.S.P.Q.2d 1671, 1672 n. 3 (T.T.A.B. 1987)). Here, Opposer produced the complained-of documents in response to Applicant's discovery requests well in advance of trial, and there is no reason they should be excluded.

CONCLUSION

For the reasons set forth above, Opposer respectfully requests that Applicant's Motion to Preclude be denied in all respects.

Dated: New York, New York
January 31, 2011

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO PRECLUDE DOCUMENTS FROM INTRODUCTION AT TRIAL** to be served via First Class U.S. Mail, postage prepaid, in an envelope addressed to counsel for Applicant, Caroline L. Stevens, Esq., Leydig, Voit & Mayer, 1420 Fifth Avenue, Suite 3670, Seattle, WA 98101, this 31st day of January, 2011.



Laura Popp-Rosenberg

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

McNEIL-PPC, INC.,

Opposer,

Opp. No. 91184978

-against-

WALGREEN CO.,

Applicant.

**DECLARATION OF LAURA POPP-ROSENBERG
IN SUPPORT OF OPPOSER'S RESPONSE TO APPLICANT'S
MOTION TO PRECLUDE DOCUMENTS FROM INTRODUCTION AT TRIAL**

I, Laura Popp-Rosenberg, hereby declare and state under penalty of perjury as follows:

1. I am a member of the firm Fross Zelnick Lehrman & Zissu, P.C., which represents Opposer McNEIL-PPC, Inc. ("Opposer") in the underlying opposition proceeding, Opposition No. 91184978.

2. I make this declaration in support of Opposer's Response to Applicant's Motion to Preclude Documents from Introduction at Trial ("Motion to Preclude"). This declaration is based on my personal knowledge and on my firm's records.

3. Discovery in the underlying proceeding began on September 10, 2008. Both parties served discovery requests at the start of the opposition proceeding in 2008, with Applicant serving its requests, including document requests, on October 8, 2008, and Opposer on October 17, 2008. Applicant served additional document requested dated April 30, 2009.

4. Opposer timely responded to Applicant's first and second set of document requests. Attached hereto as **Exhibits 1 and 2** are true and correct copies of Opposer's Responses and Objections to Applicant's First and Second Document Requests, respectively.

5. During the course of the discovery period, both sides raised objections to the other side's discovery responses on multiple occasions. Opposer, for example, sent at least six deficiency letters to Applicant dated February 17, 2009, March 26, 2009, August 27, 2010, September 15, 2010, October 27, 2010 and November 5, 2010.

6. For its own part, Applicant raised issues about Opposer's discovery responses on at least two occasions. Attached hereto as **Exhibit 3** are true and correct copies of two letters between counsel for Applicant and Opposer concerning deficiencies in Opposer's production, dated May 5, 2009 and May 7, 2009. The parties also engaged in phone calls concerning specific requests for supplementation by Applicant, including on June 22, 2009, in which Applicant specifically requested that Opposer supplement certain categories of information, including but not limited to, documents sufficient to show the chain of title of the ZYRTEC mark, consumer comments and opinions about the ZYRTEC products, media references to the ZYRTEC mark, representative advertisements, advertising expenditures, sales figures, and lists of all questions used in surveys and other market research.

7. On October 9, 2009, the opposition was suspended for eight months. During that time, the parties largely ceased communications and discovery efforts. However, when proceedings resumed on July 16, 2010, the parties began communicating about discovery almost continuously up until and even after the close of discovery, exchanging deficiency letters and

additional discovery requests, and engaging in phone calls to discuss supplementation of both parties' productions.

8. In response to certain issues that Applicant raised about Opposer's production, I and my colleague Giselle Woo communicated with Opposer to search for additional responsive documents to respond to Applicant's concerns. Since Opposer's initial search for documents had been so thorough, and given the size of Opposer's operations, the search for additional responsive documents took some time.

9. During this time Ms. Woo and I also arranged for Opposer to update certain information that Opposer had produced earlier in the discovery period, such as sales and advertising information. Among the documents received from Opposer during this time period, and specifically on September 13, 2010, was an amendment to the license agreement between Opposer and UCB, the owner of the ZYRTEC mark.

10. On August 25, 2010, at Opposer's request, the parties sought a thirty-day extension of the close of discovery to give Opposer time to respond to and supplement discovery requests. Attached hereto as **Exhibit 4** is a true and correct copy of an August 25, 2010 email from Applicant's counsel, Caroline Stevens, to me concerning the discovery extension.

11. A month later, this time at Applicant's request, the parties sought an additional thirty-day extension of the close of discovery to give Applicant time to gather documents for its own supplemental production. Attached hereto as **Exhibit 5** is a true and correct copy of an email from Ms. Stevens to me, dated September 15, 2010, concerning the discovery extension.

12. On October 25, 2010, the day before the close of discovery, Applicant informed Opposer that it had sent a third set of discovery requests on August 25, 2010 (the "Third

Document Requests”), and had not received Opposer’s response by September 29, 2010, as it expected. Attached hereto as **Exhibit 6** is a true and correct copy of an email from Ms. Stevens to me, dated October 25, 2010, attaching the Third Document Requests.

13. Despite being previously unaware of the Third Document Requests, Opposer drafted and served its written response in less than three and a half hours, and informed Applicant that it would start gathering responsive documents and produce them as soon as possible. Attached hereto as **Exhibit 7** is a true and correct copy of an email from me to Ms. Stevens, dated October 25, 2010, attaching a courtesy copy of Opposer’s Objections and Responses to Applicant’s Third Request for the Production of Documents and Things.

14. Two days later, on October 27, 2010, Opposer produced documents both to update its earlier production and to respond to the Third Document Requests. Opposer’s counsel made this production in good faith as soon and as soon as it was able to after collecting responsive documents from Opposer and preparing them for production. Opposer’s supplemental production consisted of the following documents:

- a. Search results for the terms “wal-zyr” and “zyrtec” on Applicant’s website (MCNEIL 004970-5039);
- b. An amendment to the license agreement giving Opposer rights in the ZYRTEC mark, dated January 27, 2010 (MCNEIL 005040-56, produced to update earlier license-related documents produced by Opposer on February 19, 2009);
- c. Surveys and market research (MCNEIL 005057-101), produced to supplement surveys and market research previously produced on February 19, 2009 and June 23, 2009;
- d. Updated ZYRTEC sales figures (MCNEIL 005102-07 and MCNEIL 005129-32), compiled the month before production and produced as an update to sales data originally produced on July 7, 2009 and in response to Applicant’s specific request for updated sales figures;

- e. Hits to ZYRTEC websites (MCNEIL 005113), produced to update information previously produced on June 23, 2009;
- f. Updated customer comments on ZYRTEC (MCNEIL 005108-112), compiled the month before production and produced as an update to customer comments originally produced on June 23, 2009 and July 7, 2009 and in response to Applicant's Third Document Requests;
- g. Advertisements for ZYRTEC (MCNEIL 005114-28 and 5157-60), produced to update earlier advertisements originally produced on February 19, 2009, June 23, 2009, and July 7, 2009 and in response to Applicant's request for supplementation of advertising documents;
- h. Articles referencing ZYRTEC (MCNEIL 005133-45), produced to update and supplement media articles and searches originally produced on July 7, 2009 and in response to Applicant's specific request for additional media references to ZYRTEC;
- i. ZYRTEC media plans from 2009 and 2010 (MCNEIL 005146-56), produced to update media plans originally produced on February 19, 2009 and in response to Applicant's request for updated advertising expenditures and plans; and
- j. Results of searches in Westlaw's USNEWS database for media references to ZYRTEC (MCNEIL 005177-9498), compiled the month before production, and produced to supplement Westlaw news searches originally produced on July 7, 2009 and in response to Applicant's request for updated and additional media references to ZYRTEC.

15. On November 17, 2010, Applicant's counsel wrote to me objecting to the October 27 production as untimely and demanding that Opposer not rely on the documents produced on that date at trial. Attached hereto as **Exhibit 8** is a true and correct copy of the November 17, 2010 email from Ms. Stevens to me.

16. On November 18, 2010, a day *after* complaining about Opposer's allegedly untimely supplemental production, Applicant sent Opposer its own supplemental production, including documents that were responsive to Opposer's First Set of Document Requests issued two years earlier on October 17, 2008 and including information dating back as early as 1984.

17. On November 26, 2010, I emailed Ms. Stevens responding in detail to her November 17 email concerning Opposer's supplemental production. Attached hereto as **Exhibit 9** is a true and correct copy of my November 26, 2010 email to Ms. Stevens. Applicant's counsel never responded to this email, and I concluded that my response had resolved the issue.

18. After receiving the Motion to Preclude, on January 4, 2010, I wrote to Ms. Stevens to request that Applicant withdraw its premature motion. Attached hereto as **Exhibit 10** is a true and correct copy of my January 4, 2010 email to Ms. Stevens.

19. Applicant's counsel responded that Applicant would be willing to withdraw its motion if Opposer agreed not to rely on any of the October 27 production that Applicant deemed objectionable. Attached hereto as **Exhibit 11** is a true and correct copy of an email dated January 5, 2011 from Ms. Stevens to me.

20. In reply, I suggested an alternative means of resolving the parties' dispute by offering that if Applicant identified what type of follow-up discovery it sought with respect to Opposer's supplemental production, Opposer would attempt to make such follow-up discovery available. Attached hereto as **Exhibit 12** is a true and correct copy of my January 5, 2011 email to Ms. Stevens.

21. Applicant's counsel responded the next day, refusing the offer of follow-up discovery. Attached hereto as **Exhibit 13** is a true and correct copy of a January 6, 2011 email from Ms. Stevens to me.

22. As a compromise to the dispute, the parties agreed to extend Opposer's deadline to respond to the Motion to Preclude until after Opposer's testimony period had ended.

23. At the deposition of Opposer's trial witness, Rohinish Hooda, taken January 13, 2011, Opposer introduced a number of the documents produced on October 27, 2010, including documents identified in subparagraphs b, d, and f-i of Paragraph 14 above. Applicant's counsel had the opportunity to cross-examine Mr. Hooda about each of the documents, and in fact asked questions concerning certain of the documents.

24. At trial, Opposer also introduced the documents identified in subparagraph j of Paragraph 14 above through the trial declaration of Giselle C. Woo. Applicant agreed to allow Ms. Woo to testify by declaration rather than by oral deposition, but reserved its right to conduct an oral cross-examination of Ms. Woo after receiving her declaration. Applicant requested no such cross-examination.

I declare under penalty of perjury that the foregoing is true and correct.

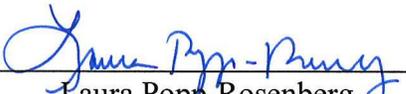
Dated: New York, New York
January 31, 2011



Laura Popp-Rosenberg

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2011, I caused a copy of the foregoing **DECLARATION OF LAURA POPP-ROSENBERG IN SUPPORT OF OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO PRECLUDE DOCUMENTS FROM INTRODUCTION AT TRIAL** to be served via First Class U.S. Mail, postage prepaid, in an envelope addressed to counsel for Applicant, Caroline L. Stevens, Esq., Leydig, Voit & Mayer, 1420 Fifth Avenue, Suite 3670, Seattle, WA 98101, this 31st day of January, 2011.



Laura Popp-Rosenberg

EXHIBIT 1

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**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

**OPPOSER'S OBJECTIONS AND RESPONSES TO APPLICANT'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and Rules 2.116 and 2.120 of the Trademark Rules of Practice, Opposer Novartis AG ("Opposer"), by its counsel Fross Zelnick Lehrman & Zissu, P.C., responds as follows to Applicant's First Request for Production of Documents and Things (the "Requests" and each individual request, a "Request") as follows:

GENERAL OBJECTIONS

The following general objections are incorporated in full into each response as if fully set forth therein, and all responses are subject to these general objections.

1. Opposer objects to the requirement that it produce responsive documents within thirty days of service of the Requests as unreasonable. Rule 34 of the Federal Rules of Civil Procedure require only written responses within 30 days of service, and states that production of responsive documents must be at a reasonable time.

2. Opposer objects to the Instructions and Definitions set forth in the Requests to the extent they seek to impose greater burdens on Opposer than are permitted by the Federal Rules of Civil Procedure and the Trademark Rules of Practice.

3. Opposer objects to the definition of "Opposer" to the extent that the definition purports to require Opposer to seek or obtain information that is not in its possession, custody or control.

4. Opposer objects to the definition of "Advertising" as vague and ambiguous. Opposer will interpret "Advertising" as used in the Requests to encompass only those activities considered by Opposer to constitute marketing, promotion and advertising.

5. Opposer objects to every Request to the extent that it calls for documents subject to the attorney-client, work product or other privilege.

6. Opposer objects to every Request that calls for the production of "any," "each" or "all" documents or information of a specific nature or type, when a limited amount of such documents or information will provide the requested information.

7. Opposer objects to every Request to the extent that it is not limited as to time. Unless specifically noted otherwise, Opposer will generally produce responsive documents relating to the past five years.

8. Opposer objects to every Request to the extent that it is not limited to information concerning activities in the United States. Except as otherwise specifically stated, Opposer will produce responsive documents only concerning activities in the United States.

9. Opposer's responses and objections are without prejudice to, and Opposer does not waive, any evidentiary objections relating to any Request.

10. Where Opposer has objected on the grounds that a Request is burdensome, duplicative and/or overbroad, it nevertheless may provide responsive information that it considers to be sufficient for the purposes of the proceeding with respect to the subject of the Request. The fact that Opposer has provided such information is not a waiver of its objections.

11. Opposer has not concluded its investigation of the facts relating to this case and has not completed formal discovery or preparation for trial. Accordingly, there may exist documents responsive to the Requests that Opposer does not yet have knowledge of or has not yet located, identified or reviewed. All of the following responses are therefore based on such documents currently known or available to Opposer after a reasonable inquiry. Opposer reserves the right to alter, amend or supplement its responses at any time, including after the close of discovery.

12. Nothing contained in any response to any Request shall be construed as an admission by Opposer relative to the existence or non-existence of any documents or information, and no such response shall be construed as an admission respecting the relevance or admissibility of any document or information, or the truth or accuracy of any statement or characterization contained in any Request.

SPECIFIC OBJECTIONS

The following specific objections may be incorporated in Opposer's response to a particular Request. Opposer's decision not to specifically reference one or more of the following objections in its response to a particular Request is not an admission that the Request is not objectionable on that basis.

A. The Request exposes Opposer to undue burden or expense in relation to its likely benefit, taking into account the needs of the case, the property in controversy, Opposer's

resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

B. The Request is unreasonably cumulative or duplicative, or the requested information can be obtained from some other source that is more convenient, less burdensome, or less expensive.

C. The Request is not reasonably calculated to lead to the discovery of admissible or relevant evidence.

D. The Request is not reasonably particular, or seeks information merely tangential to the matters at issue in the case, or is not limited to a particular time period or geographic region.

E. The Request seeks information that is not within Opposer's possession, custody or control.

F. The wording of the Request is vague and/or ambiguous including, without limitation, due to use of undefined terms.

SPECIFIC RESPONSES AND OBJECTIONS

Document Request No. 1: Each and every document and thing identified by Opposer or requested to be identified by Opposer in its Responses to Applicant's First Set of Interrogatories.

Response to Request No. 1:

Opposer incorporates Opposer's Objections and Responses to Applicant's First Set of Interrogatories as if fully set forth herein. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents and things identified by Opposer in its Responses to Applicant's First Set of Interrogatories.

Document Request No. 2: Each and every document and thing used by Opposer in preparing its Responses to Applicant's First Set of Interrogatories.

Response to Request No. 2:

Opposer objects to Document Request No. 2 on the basis of Specific Objections A and D.

Document Request No. 3: All documents concerning Opposer's first conceptualization of the "ZYRTEC" mark.

Response to Request No. 3:

Opposer objects to Document Request No. 3 on the basis of Specific Objections C, D and F. Subject to and without waiving the foregoing objections, to the extent that Opposer understands what is meant by the term "conceptualize," there are no responsive documents because Opposer did not create Opposer's Mark.

Document Request No. 4: All internal correspondence relating or referring to Opposer's application(s) for registration of "ZYRTEC" or other marks using "ZYRTEC."

Response to Request No. 4:

Opposer objects to Document Request No. 4 on the basis of Specific Objections C, D, E and F. Subject to and without waiving the foregoing objections, there are no responsive documents since Opposer has not applied to register the mark ZYRTEC or any other marks incorporating ZYRTEC.

Document Request No. 5: All correspondence with the U.S. Patent and Trademark Office and any state trademark agencies in support of any applications for registration of ZYRTEC or other marks using ZYRTEC.

Response to Request No. 5:

Opposer objects to Document Request No. 5 on the basis of Specific Objections E and F. Opposer further objects to Document Request No. 5 to the extent that the requested documents are publicly available, including on the U.S. Patent and Trademark Office's website. Subject to and without waiving the foregoing objections, Opposer will produce correspondence with the U.S. Patent and Trademark Office in support of any applications for registration of ZYRTEC or

other marks using ZYRTEC in its possession, custody or control. There are no responsive documents in Opposer's possession, custody or control concerning state trademark agencies.

Document Request No. 6: All documents and things sufficient to identify all goods and/or services provided, or intended to be provided by Opposer, on or in connection with the "ZYRTEC" mark.

Response to Request No. 6:

Opposer objects to Document Request No. 6 on the basis of Specific Objections C and F. Opposer further objects to Document Request No. 6 to the extent that the requested information is already known to Applicant, since Applicant sells Opposer's full range of ZYRTEC products. Subject to and without waiving the foregoing objections, Opposer will produce documents or things sufficient to identify all goods provided under the mark ZYRTEC.

Document Request No. 7: All documents and things referring or relating to, or comprising, any plans Opposer has to expand or change the goods or services offered for sale or intended to be offered for sale under "ZYRTEC."

Response to Request No. 7:

Opposer objects to Document Request No. 7 on the basis of Specific Objections A, B, C, D and F.

Document Request No. 8: All documents and things sufficient to identify all geographic areas in which Opposer uses the "ZYRTEC" mark.

Response to Request No. 8:

Opposer objects to Document Request No. 8 on the basis of Specific Objections B and F. Opposer further objects to Document Request No. 11 to the extent that the requested information is already in Applicant's possession, custody or control since Applicant distributes Opposer's products sold under the ZYRTEC mark and knows better than Opposer Applicant's geographic

scope of sales and distribution. Subject to and without waiving the foregoing objections,

Opposer states that Opposer uses the ZYRTEC mark throughout the United States.

Document Request No. 9: All documents and things relating or referring to the geographic scope of sale of Opposer's goods bearing the "ZYRTEC" mark.

Response to Request No. 9:

Opposer objects to Document Request No. 9 on the basis of Specific Objections B and F.

Subject to and without waiving the foregoing objections, Opposer incorporates its Response to Request No. 8 as if fully set forth herein.

Document Request No. 10: All documents and things relating or referring to the alleged fame of Opposer's "ZYRTEC" mark.

Response to Request No. 10:

Opposer objects to Document Request No. 10 on the basis of Specific Objections A, E and F. Opposer further objects to Document Request No. 10 to the extent that the requested information is already in Applicant's possession, custody or control. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents.

Document Request No. 11: All documents and things regarding the types of consumers and prospective consumers to which, and the markets and channels of trade in which, Opposer markets, advertises, promotes, or sells or intends to market, advertise, promote or sell products or services under "ZYRTEC."

Response to Request No. 11:

Opposer objects to Document Request No. 11 on the basis of Specific Objections A, E and D. Opposer further objects to Document Request No. 11 to the extent that the requested information is already in Applicant's possession, custody or control. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents.

Document Request No. 12: All documents and things relating or referring to the care exercised by consumers and potential consumers of “ZYRTEC” when making purchases.

Response to Request No. 12:

Opposer objects to Document Request No. 12 on the basis of Specific Objections A, D, E and F. Opposer further objects to Document Request No. 12 to the extent that the requested information is already in Applicant’s possession, custody or control. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents.

Document Request No. 13: All documents which Opposer consulted, referenced, used, or relied upon in defining its target market for the goods offered under “ZYRTEC.”

Response to Request No. 13:

Opposer objects to Document Request No. 13 on the basis of Specific Objections A, C, D and F.

Document Request No. 14: A list of competitors for the goods offered under, or intended to be offered under the “ZYRTEC” mark.

Response to Request No. 14:

Opposer objects to Document Request No. 14 on the basis of Specific Objections C, E and F. Opposer further objects to Document Request No. 14 to the extent that the requested information is already in Applicant’s possession, custody or control. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents.

Document Request No. 15: All reports, research, searches, investigations, recommendations and opinions Applicant consulted, referenced, used, or relied upon in deriving Opposer’s strategy for the marketing, promotion and advertising for the goods offered under “ZYRTEC.”

Response to Request No. 15:

Opposer objects to Document Request No. 15 on the basis of Specific Objections A, C, D, E and F.

Document Request No. 16: All documents and things related to all magazines, journals, newspapers or publications in which Opposer's mark "ZYRTEC" has appeared or in which Opposer intends for the mark to appear.

Response to Request No. 16:

Opposer objects to Document Request No. 16 on the basis of Specific Objections A, C, D, E and F. Opposer further objects to Document Request No. 16 to the extent that at least some of the requested information is already in Applicant's possession, custody or control, since Applicant has advertised products under the ZYRTEC mark in publications. Subject to and without waiving the foregoing objections, Opposer will produce media references to the ZYRTEC mark in its possession, custody or control as well as media schedules identifying publications in which Opposer has advertised products under the ZYRTEC mark.

Document Request No. 17: All documents and things related to Opposer's adoption of the "ZYRTEC" mark.

Response to Request No. 17:

Opposer objects to Document Request No. 17 on the basis of Specific Objections A and F. Subject to and without waiving the foregoing objections, Opposer will produce the license agreement with UCB covering the mark ZYRTEC.

Document Request No. 18: All documents and things related in any way to consumers' perception of "ZYRTEC."

Response to Request No. 18:

Opposer objects to Document Request No. 18 on the basis of Specific Objections A, C, D and F. Subject to and without waiving the foregoing objections, Opposer will produce documents concerning consumers' perception of the mark ZYRTEC.

Document Request No. 19: All advertising and promotional materials for goods sold or intended to be sold in the United States under "ZYRTEC" as well as all documents reflecting the

success of such advertising and promotion such as documents reflecting, referring, or related to brand awareness.

Response to Request No. 19:

Opposer objects to Document Request No. 19 on the basis of Specific Objections A, B, D, E and F. Opposer further objects to Document Request No. 19 to the extent that at least some of the requested information is already in Applicant's possession, custody or control. Subject to and without waiving the foregoing objections, Opposer will produce representative samples of advertising and promotional materials for goods sold under the mark ZYRTEC and documents concerning brand awareness.

Document Request No. 20: All documents and things relating to annual budgets and expenditures or intended annual budgets and expenditures to advertise and/or promote goods under the "ZYRTEC" mark.

Response to Request No. 20:

Opposer objects to Document Request No. 20 on the basis of Specific Objections A, B and E. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents.

Document Request No. 21: All documents and things relating to the annual revenues or projected annual revenues for the goods offered under "ZYRTEC" as well as all documents reflecting sales and market share of "ZYRTEC."

Response to Request No. 21:

Opposer objects to Document Request No. 21 on the basis of Specific Objections A, C, D, E and F. Opposer further objects to Document Request No. 21 to the extent that at least some of the requested information is already in Applicant's possession, custody or control. Subject to and without waiving the foregoing objections, Opposer will produce documents sufficient to show its

revenues from goods offered under the mark ZYRTEC and documents reflecting ZYRTEC's share of the relevant market.

Document Request No. 22: All documents referring to any contracts, licenses and/or agreements or intended contracts, licenses and/or agreements between Opposer and any third party regarding the use of "ZYRTEC."

Response to Request No. 22:

Opposer objects to Document Request No. 22 on the basis of Specific Objections A, C, D and F. Subject to and without waiving the foregoing objections, Opposer will produce the license agreement with UCB concerning the mark ZYRTEC.

Document Request No. 23: All documents referring to any surveys, studies, polls or other undertakings regarding "WAL-ZYR" or "ZYRTEC."

Response to Request No. 23:

Opposer objects to Document Request No. 23 on the basis of Specific Objections A, B, C, D and F. Subject to and without waiving the foregoing objections, Opposer will produce any consumer surveys, studies, or polls, or any other market research, undertaken by or on behalf of Opposer into any issue relevant to this proceeding.

Document Request No. 24: All documents concerning the circumstances under which Opposer first learned of Applicant's Mark.

Response to Request No. 24:

Opposer objects to Document Request No. 24 on the basis of Specific Objections C and D. Subject to and without waiving the foregoing objections, Opposer will produce documents sufficient to identify the circumstances under which Opposer first learned of Applicant's Mark, if any.

Document Request No. 25: All documents relating in any way to any confusion or inquiries regarding Applicant or Applicant's mark.

Response to Request No. 25:

Opposer objects to Document Request No. 25 on the basis of Specific Objections A, D and F. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents concerning confusion or inquiries arising from Applicant's use of Applicant's Mark.

Document Request No. 26: All documents and things in Opposer's possession on control referring to or relating to Applicant.

Response to Request No. 26:

Opposer objects to Document Request No. 26 on the basis of Specific Objections A, C and D.

Document Request No. 27: All documents and things in Opposer's possession on control referring to or relating to objections in any form to any third-party mark based in whole or in part on Opposer's alleged "ZYRTEC" mark.

Response to Request No. 27:

Opposer objects to Document Request No. 27 on the basis of Specific Objections A, C, D and F. Opposer further objects to Document Request No. 27 to the extent it questions the existence or validity of the mark ZYRTEC. Subject to and without waiving the foregoing objections, Opposer will produce documents sufficient to identify any objections to any third-party mark made by or on behalf of Opposer based on Opposer's rights in the mark ZYRTEC, if any.

Document Request No. 28: All documents and things in Opposer's possession or control referring to or relating to third party uses of any marks containing the "ZYR" term within the pharmaceutical market.

Response to Request No. 28:

Opposer objects to Document Request No. 28 on the basis of Specific Objections A, B and C. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents.

Document Request No. 29: All documents and things relating in any way to the alleged dilution of Opposer's Mark by Applicant.

Response to Request No. 29:

Opposer objects to Document Request No. 29 on the basis of Specific Objections A, B and E. Opposer further objects to Document Request No. 29 to the extent that at least some of the requested information is already in Applicant's possession, custody or control. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents.

Document Request No. 30: Each and every document not already produced in response to these Requests upon which Opposer will rely in this Opposition proceeding.

Response to Request No. 30:

Opposer objects to Document Request No. 30 on the basis of Specific Objections A, B and E, and on the basis of Federal Rule of Civil Procedure 34(b)(1)(A).

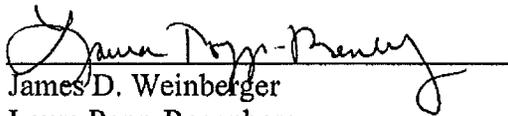
Document Request No. 31: All documents in Opposer's possession or control concerning persons who will provide written statements or who Opposer intends to call as a witness in connection with this opposition.

Response to Request No. 31:

Opposer objects to Document Request No. 31 on the basis of Specific Objections A, C, D and F.

Dated: New York, New York
November 14, 2008

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 
James D. Weinberger
Laura Popp-Rosenberg
866 United Nations Plaza
New York, New York 10017
(212) 813-5900

Attorneys for Opposer McNEIL-PPC, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposer's Objections and Responses to Applicant's First Request for Production of Documents and to Applicant to be sent by First Class mail, postage pre-paid, in an envelope addressed Applicant's counsel, Mark J. Liss, Esq., Leydig, Voit & Mayer, Two Prudential Plaza, 180 North Stetson, Chicago, IL 60601, this 14th day of November, 2008.

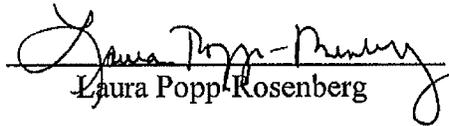

Laura Popp-Rosenberg

EXHIBIT 2

**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

**OPPOSER'S OBJECTIONS AND RESPONSES TO APPLICANT'S
SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and Rules 2.116 and 2.120 of the Trademark Rules of Practice, Opposer McNEIL-PPC, Inc. ("Opposer"), by its counsel Fross Zelnick Lehrman & Zissu, P.C., responds to Applicant's Second Request for Production of Documents and Things (the "Requests" and each individual request, a "Request") as follows:

GENERAL OBJECTIONS

The General Objections set forth in Opposer's Objections and Responses to Applicant's First Request for Production of Documents and Things, except for General Objection No. 1, are incorporated by reference as if fully set forth herein.

SPECIFIC OBJECTIONS

The following specific objections may be incorporated in Opposer's response to a particular Request. Opposer's decision not to specifically reference one or more of the following objections in its response to a particular Request is not an admission that the Request is not objectionable on that basis.

A. The Request exposes Opposer to undue burden or expense in relation to its likely benefit, taking into account the needs of the case, the property in controversy, Opposer's resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

B. The Request is unreasonably cumulative or duplicative, or the requested information can be obtained from some other source that is more convenient, less burdensome, or less expensive.

C. The Request is not reasonably calculated to lead to the discovery of admissible or relevant evidence.

D. The Request is not reasonably particular, or seeks information merely tangential to the matters at issue in the case, or is not limited to a particular time period or geographic region.

E. The Request seeks information that is not within Opposer's possession, custody or control.

F. The wording of the Request is vague and/or ambiguous including, without limitation, due to use of undefined terms.

SPECIFIC RESPONSES AND OBJECTIONS

Document Request No. 32: All Communications between persons employed by UCB Pharma, S.A., UCB S.A. and McNeil-PPC, Inc., McNeil Consumer Healthcare, Johnson & Johnson, or any of their divisions or related companies in Opposer's possession, custody and control concerning Applicant's use or registration of Applicant's Mark or this Opposition.

Response to Request No. 32:

Opposer objects to Document Request No. 32 on the basis of Specific Objections A, B, C, D and F.

Document Request No. 33: Any and all communications, contracts, licenses, agreements and other Documents concerning the chain of title of Opposer's Mark or licensing of rights in and to Opposer's Mark.

Response to Request No. 33:

Opposer objects to Document Request No. 33 on the basis of Specific Objections A, B, C, D and E. Subject to and without waiving the foregoing objections, Opposer has produced documents responsive to this Request and will produce additional documents sufficient to establish its rights in the mark ZYRTEC.

Document Request No. 34: All reports, studies, surveys or polls concerning consumer consideration of active ingredients in allergy medicine when selecting and purchasing allergy medicine.

Response to Request No. 34:

Opposer objects to Document Request No. 34 on the basis of Specific Objections A, B, D and F. Subject to and without waiving the foregoing objections, Opposer has produced documents responsive to this Request and will produce additional responsive documents, if any.

Document Request No. 35: Documents sufficient to establish any and all guidelines or requirements for use of Opposer's Mark

Response to Request No. 35:

Opposer objects to Document Request No. 35 on the basis of Specific Objection F. Subject to and without waiving the foregoing objections, Opposer has produced responsive documents and will produce additional documents sufficient to show Opposer's brand use guidelines for the mark ZYRTEC.

Document Request No. 36: Documents reflecting the number of "hits" or "visits" to www.zyrtec.com, www.zyrtopia.com, www.zyrtecprofessional.com, and any other website or web page that features products offered under Opposer's Mark.

Response to Request No. 36:

Opposer objects to Document Request No. 36 on the basis of Specific Objections A, D, E and F. Subject to and without waiving the foregoing objections, Opposer will produce documents,

if any, sufficient to show visits to the websites www.zyrtec.com, www.zyrtopia.com and www.zyrtecprofessional.com.

Document Request No. 37: Documents showing the number of Communications that refer to the products offered under Opposer's Mark and received through www.zyrtec.com, www.zyrtopia.com, and www.zyrtecprofessional.com, and any other website or web page that features products offered under Opposer's Mark.

Response to Request No. 37:

Opposer objects to Document Request No. 37 on the basis of Specific Objections D and F. Subject to and without waiving the foregoing objections, Opposer will produce documents, if any, sufficient to show the number of consumer communications received by Opposer through the websites www.zyrtec.com, www.zyrtopia.com, and www.zyrtecprofessional.com concerning offered under Opposer's Mark.

Document Request No. 38: All Documents and reports concerning consumer comments or opinions relating to Opposer's Mark or products offered under the Opposer's Mark.

Response to Request No. 38:

Opposer objects to Document Request No. 38 on the basis of Specific Objections A, B, C, D and F. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents.

Document Request No. 39: All educational and promotional Documents and materials intended to educate consumers on the spelling and/or pronunciation of Opposer's Mark.

Response to Request No. 39:

Opposer objects to Document Request No. 39 on the basis of Specific Objections A, B, D, E and F. Subject to and without waiving the foregoing objections, Opposer has produced documents responsive to this Request and will produce additional marketing materials the primary purpose of which is to educate consumers as to the spelling or pronunciation of Opposer's Mark, if any.

Document Request No. 40: All Documents, including, but not limited to, focus group studies or qualitative feedback reports, concerning whether consumers believe that store brand products may be manufactured by the same companies that manufacture the brand name equivalent products.

Response to Request No. 40:

Opposer objects to Document Request No. 40 on the basis of Specific Objections A, B and F. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents, if any.

Document Request No. 41: All Documents reflecting data on how consumers become aware of or decide to purchase products offered under Opposer's Mark, including, but not limited to, data concerning physician recommendations, historic prescriptions, word-of-mouth recommendations, and advertisements.

Response to Request No. 41:

Opposer objects to Document Request No. 41 on the basis of Specific Objections A, B and F. Subject to and without waiving the foregoing objections, Opposer has produced documents responsive to this Request and will produce additional responsive documents, if any.

Document Request No. 42: Documents sufficient to identify market share for the products sold under the Opposer's Mark and for products that compete with such products.

Response to Request No. 42:

Opposer objects to Document Request No. 42 on the basis of Specific Objection F. Subject to and without waiving the foregoing objections, Opposer has produced documents responsive to this Request and will produce additional responsive documents, if any.

Document Request No. 43: All Documents concerning any Communications between Opposer or its counsel and any third-party expert or consultant engaged to render services on behalf of Opposer in connection with this proceeding.

Response to Request No. 43:

Opposer objects to Document Request No. 43 on the basis of Specific Objections C, D and F. Subject to and without waiving the foregoing objections, Opposer will produce responsive documents, if any.

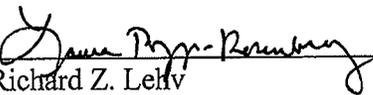
Document Request No. 44: All Documents reflecting data on how consumers become aware of or decide to purchase over the counter antihistamines, including, but not limited to, data concerning physician recommendations, historic prescriptions, word-of-mouth recommendations, and advertisements.

Response to Request No. 44:

Opposer objects to Document Request No. 44 on the basis of Specific Objection B. Subject to and without waiving the foregoing objections, Opposer incorporates its Response to Request No. 41 as if fully set forth herein.

Dated: New York, New York
June 11, 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.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposer's Objections and Responses to Applicant's Second Request for Production of Documents and Things to be sent by First Class mail, postage pre-paid, in an envelope addressed to Applicant's counsel, Mark J. Liss, Esq., Leydig, Voit & Mayer, Two Prudential Plaza, 180 N. Stetson Ave., Suite 4900, Chicago, IL 60601, this 11th day of June, 2009.

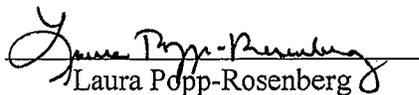

Laura Popp-Rosenberg

EXHIBIT 3

LAW OFFICES
LEYDIG, VOIT & MAYER, LTD.
A PROFESSIONAL CORPORATION

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(312) 616-5600
FACSIMILE: (312) 616-5700
WWW.LEYDIG.COM

May 5, 2009

*Via First Class Mail
Confirmation via E-mail*

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BRUCE M. GAGALA
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JAMES D. ZALEWA
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ELIZABETH M. CROMPTON* P. RAYMOND CHEN

ALL RESIDENT IN CHICAGO EXCEPT AS NOTED
*RESIDENT IN WASHINGTON OFFICE ***RESIDENT IN SEATTLE OFFICE
**RESIDENT IN ROCKFORD OFFICE

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

**Re: Trademark Opposition to WAL-ZYR
Our Ref. No.: 262981**

Dear Laura:

We are writing in regard to a few outstanding matters related to the above-referenced matter. First, we received the transcript for the 30(b)(6) deposition of McNeil, correcting the spelling of Mr. Hooda's name. We trust that you received a corrected copy, too, as the court reporter carbon copied you on the cover letter accompanying the transcript.

We understand that your client had requested more time to correct the transcript and mark confidential portions thereof. We are agreeable to a two-week extension of the current deadline, i.e., until May 25, 2009 according to our calendar, provided that your client will extend the same courtesy to us. (If you have calculated a different date based on the two-week extension, please let us know.)

Second, we understand that McNeil will send photographs of the product samples used and marked as exhibits during the 30(b)(6) deposition of Walgreens and the personal deposition of Mr. Potts. We look forward to receiving those photographs.

Third, we understand that Mr. Hooda has a busy schedule, so we would like to schedule his personal deposition now, well in advance of the deposition date. We suggest any day during the week of June 8, 2009. Please let us know if one of these days works for you and Mr. Hooda.

Fourth, we sent additional document requests on April 30, 2009, and we noticed that the last request was numbered 42, but it should have been numbered 44. We ask that McNeil please refer to this last document request as 44 rather than 42 in its responses.

Finally, we previously sent you a letter, listing the documents that were requested from McNeil during the 30(b)(6) deposition of McNeil. You asked that we indicate the document request to which each document corresponded, and we have provided that information below. We also ask that McNeil produce all of the documents in advance of the personal deposition of Mr. Hooda.

List of Documents Requested During 30(b)(6) Deposition of McNeil

1. All qualitative reports showing that consumers pay attention to active ingredient in allergy medicine. (See p. 13 of Rough Draft Deposition Transcript "RDT"). (Doc. Request No. 34).
2. All documents, including but not limited to communications and agreements showing title and/or transfer of title in ZYRTEC mark, including any such agreements between UCB, Pfizer Consumer Healthcare, Johnson & Johnson, Warner-Lambert, and any other parties. (See RDT pp. 26, 27). (Doc. Request Nos. 22 and 33).
3. All documents, including, but not limited to, communications and agreements, concerning the licensing of rights to use the ZYRTEC mark, including any such agreements between UCB, Pfizer Consumer Healthcare, Johnson & Johnson, Warner-Lambert, McNeil-PPC, and any other parties. (See RDT pp. 34, 35, 37). (Doc. Request Nos. 22 and 33).
4. All documents concerning a manual or guidelines or requirements for use of ZYRTEC Mark. (See RDT p. 39). (Doc. Request No. 35).
5. All documents concerning storyboards for TV commercials for ZYRTEC. (See RDT p. 42). (Doc. Request No. 19).
6. Copies of all TV commercials for ZYRTEC. (See RDT p. 42). (Doc. Request No. 19).
7. All print ads for ZYRTEC. (See RDT p. 43). (Doc. Request No. 19).
8. Copies of all Internet ads for ZYRTEC. (See RDT p 44). (Doc. Request No. 19).
9. Documents reflecting the number of hits/visits to the ZYRTEC website(s) as discussed during the deposition. (see RDT p. 44). (Doc. Request No. 36).
10. Documents reflecting the number of communications received through the ZYRTEC website that refer to the ZYRTEC product. (See RDT pp. 45, 46). (Doc. Request No. 37).

Laura Popp-Rosenberg
May 5, 2009
Page 3

11. All documents/reports concerning consumer feedback on ZYRTEC. (See RDT p. 47). (Doc. Request No. 38).
12. Copies of all educational/promotional materials used to educate consumers on how to spell and pronounce ZYRTEC. (See RDT p. 86). (Doc. Request Nos. 17, 18, 19 and 39).
13. Copies of all videos or notes from focus groups discussing whether consumers believe that store brands are made by the brand name company or a brand name company. (See RDT p. 101). (Doc. Request No. 40).
14. All documents showing any payments by McNeil to Walgreen's for advertising or promotional efforts for ZYRTEC. (See RDT p. 128). (Doc. Request Nos. 20 and 26).
15. All documents reflecting data on how consumers become aware of and/or decide to purchase ZYRTEC, including but not limited to physician recommendations, historic prescription customers, word-of-mouth recommendations, and advertisements. (See RDT pp. 147, 148). (Doc. Request No. 41).
16. Documents sufficient to identify market share for the ZYRTEC product and for competitors' products. (See RDT pp. 152-154). (Doc. Request No. 42).
17. All documents concerning demographic data of target and actual consumers of ZYRTEC products. (See RDT pp. 163-164). (Doc. Request No. 11).
18. List of all questions used in surveys concerning brand awareness, advertising awareness and usage of ZYRTEC and its competitors. (See RDT p. 174). (Doc. Request No. 23).

Very truly yours,

LEYDIG, VOIT & MAYER, LTD.

By: 
Caroline L. Stevens

CLS/bsg

cc: Mark J. Liss (via e-mail)
Richard Lehv (via e-mail)

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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Xiomara Triana
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Todd Madin

May 7, 2009

BY EMAIL

Caroline Stevens, Esq.
Leydig, Voit & Mayer, Ltd.
Two Prudential Plaza, Suite 4900
Chicago, IL 60601-6731

Re: *McNEIL PPC, Inc. v. Walgreen Co.*, Opposition No.
91184978 (Our Ref.: J&J USA TC-08/05863)

Dear Caroline:

This responds to your letter dated May 5, 2009.

McNEIL 30(b)(6) Deposition Transcript. We received the revised transcript correcting Mr. Honda's name. Thank you for the extension of time to make corrections and mark confidential portions.

Photographs of Physical Deposition Exhibits from Depositions of Walgreens' Witnesses. This is in process, and we will send you electronic copies of the photographs as soon as they are completed.

Second Honda Deposition. We have inquired about Mr. Honda's availability for deposition during the week of June 8, 2009, and will advise you as to the response. We note that you have requested that McNEIL produce all responsive documents by that date. We reserve the right to continue to produce documents as permitted under the Federal Rules of Civil Procedure and the Trademark Rules of Practice and applicable case law. You therefore may wish to consider whether it might be advisable to take Mr. Hooda's deposition at a later date.

List of Documents Requested During McNEIL 30(b)(6) Deposition. I have reviewed your list of documents requests. With regard to requests that are the subject solely of recently served formal document requests (Nos. 1, 4, 9, 10, 11, 13, 15 and 16), we will provide our responses by the applicable deadline.

Nos. 2 and 3: You have indicated that these requests correspond to Document Request No. 22 from Walgreens' first set of document requests and to Document Request No. 33 from Walgreens' second set of document requests. We will respond to Document Request No. 33 by the applicable deadline. Our objections and response to Document Request No. 22 still stand. We will produce documents sufficient to show the chain of title of the ZYRTEC mark from UCB to McNEIL.

Nos. 5-8: You have indicated that these requests correspond to Document Request No.19. Our objections and response to Document Request No.19 still stand. We have produced or will produce representative samples of advertising and promotional materials for produced products sold under the ZYRTEC brand, including but not limited to television commercials, print advertisements and Internet advertisements. The request for "all" such materials is, among other things, burdensome. Cf. TBMP 414(2). We also do not see why Walgreens needs storyboards rather than the actual commercials.

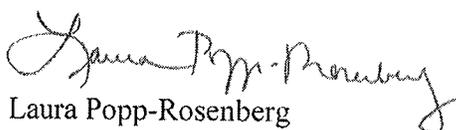
No. 12: You have indicated that this request corresponds to Document Request Nos. 17-19 from Walgreens' first set of document requests and to Document Request No. 39 from Walgreens' second set of document requests. We will respond to Document Request No. 39 by the applicable deadline. We do not agree that the request corresponds to Document Requests Nos. 17 or 18. Our objections and response to Document Request No. 19 still stand. To the extent that McNEIL is in possession of advertising materials that educate consumers on how to spell and pronounce ZYRTEC (which advertising was undertaken by Pfizer), such materials may be among the representative samples of ZYRTEC advertising produced in response to Document Request No. 19.

No. 14: You have indicated that this request corresponds to Document Request Nos. 20 and 26. Our objections to Document Request No. 26 still stand, and we will not produce any materials solely in response to that request. Our objections and response to Document Request No. 20 still stand. Further, we do not see why Walgreens needs McNEIL to produce documents showing payments by McNEIL to Walgreens for ZYRTEC promotions or advertising, since Walgreens clearly already has this information. Since Walgreens already has this information in its possession, custody and control, its request for this information from McNEIL work an undue burden on McNEIL, and is therefore objectionable. However, I will confer with McNEIL to determine how difficult it will be for McNEIL to extract this information, and if it is simple to do so, we will produce documents sufficient to show such payments.

No. 17: You have indicated that this request corresponds to Document Request No. 11. Our objections to Document Request No. 11 still stand. McNEIL has already produced multiple documents showing the demographic profile of ZYRTEC consumers. See, e.g., McNeil 000774-80; McNeil 000850-52. I will inquire whether McNEIL has documents concerning the demographics of *target* consumers, and will produce documents sufficient to show such demographics if available.

If you have any questions about the above, please contact me by telephone.

Very truly yours,



Laura Popp-Rosenberg
212.813.5943
lrosenberg@fzlj.com

cc: Richard Z. Lehv, Esq.
Mark J. Liss, Esq.

EXHIBIT 4

Laura Popp-Rosenberg

From: Laura Popp-Rosenberg
Sent: Wednesday, August 25, 2010 5:03 PM
To: 'Stevens, Caroline'
Cc: Giselle C. Woo; 'Liss, Mark'
Subject: RE: WAL-ZYR Opposition; LVM Ref. 262981

Dear Caroline:

McNEIL agrees to the conditions set forth in your email below concerning the extended discovery period. Per our telephone discussion, the discovery deadline extension is solely to take care of the Pfizer deposition issue, and neither party may serve additional discovery requests or deposition notices during the extended period. Of course, the parties may continue to respond to outstanding discovery requests, supplement production, etc. during the extended period.

We will file the extension request through ESTTA, and appreciate you consenting to email service.

Regards,
Laura

From: Stevens, Caroline [<mailto:cstevens@leydig.com>]
Sent: Wednesday, August 25, 2010 4:31 PM
To: Laura Popp-Rosenberg
Cc: Giselle C. Woo; Liss, Mark
Subject: WAL-ZYR Opposition; LVM Ref. 262981

Laura,

Given the urgent nature of McNeil's request, we reviewed the matter with our client and have their response. Walgreens consented to a thirty-day extension of the discovery deadline, with the agreement that we are extending the discovery period for the limited purpose of allowing McNeil to pursue the deposition of Pfizer, and to respond to and supplement discovery requests. We would need to extend all of the other opposition deadlines by thirty days, and we would need to agree that the parties may not issue additional discovery requests after August 27, 2010, the current date of the close of discovery. Walgreens is consenting to this request with the understanding that McNeil would consent to a similar request if made by Walgreen's in the future.

We have had time to review some of the Pfizer documents, but not all of them. Due to the confidentiality designations on the documents, we did not show the documents to our client. However, our client would not consent to authenticating the documents by affidavit. Given the content of the documents, which appears to concern financials and marketing but which we do not believe is clear on its face, and given the redactions, we believe a deposition is the appropriate means to discuss the documents.

If McNeil decides to file a consented request to extend the deadlines through the ESTTA automated system, we consent to the filing and service by email. If McNeil decides to prepare its own written consented motion for filing (rather than using the automated form), then please send us the motion for review before filing.

Regards,

Caroline

Caroline L. Stevens

Leydig, Voit & Mayer, Ltd.
1420 Fifth Ave., Suite 3670
Seattle, WA 98101
(206) 428-3111 (tel)
(312) 616-5700 (fax)
cstevens@leydig.com

The information contained in this communication is confidential and may contain information that is privileged and/or exempt from disclosure under applicable law. If you have received this communication in error, please notify me immediately and delete the original and all copies of this communication. Thank you.

EXHIBIT 5

Laura Popp-Rosenberg

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Wednesday, September 15, 2010 2:27 PM
To: Laura Popp-Rosenberg; Giselle C. Woo
Cc: Liss, Mark
Subject: WAL-ZYR Opposition; LVM Ref. 262981
Attachments: 262981 Response to August 2010 Discovery Deficiency Letter 9-15-2010.pdf^.pdf

Dear Laura,

We attached our response to your August 27, 2010 letter. We are preparing Walgreen's supplemental documents for production and plan to send them to you soon. Walgreens is still gathering some documents responsive to McNeil's requests, and one of the people gathering the documents will be out of the office next week. Thus, Walgreens has asked to extend the discovery deadline by thirty days. As a result, it will be necessary to extend the other opposition deadlines, too. Given the extension requested last month, we believe that McNeil will consent to Walgreen's request. Please confirm this is the case, and we will file a request with the TTAB.

Regards,

Caroline

Caroline L. Stevens
Leydig, Voit & Mayer, Ltd.
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Seattle, WA 98101
(206) 428-3111 (tel)
(312) 616-5700 (fax)
cstevens@leydig.com

The information contained in this communication is confidential and may contain information that is privileged and/or exempt from disclosure under applicable law. If you have received this communication in error, please notify me immediately and delete the original and all copies of this communication. Thank you.

EXHIBIT 6

Laura Popp-Rosenberg

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Monday, October 25, 2010 1:24 PM
To: Laura Popp-Rosenberg; Giselle C. Woo
Cc: Liss, Mark
Subject: Late Discovery Responses; LVM Ref. 262981
Attachments: 2010.08.25 WG's Third Request for Documents.pdf^*.pdf

Importance: High

Dear Laura:

We served McNeil with Walgreens' Third Set of Requests for the Production of Documents and Things August 25, 2010. McNeil's written responses were due September 29, 2010 – twenty-six days ago – but we still have not received them and discovery is set to close tomorrow. There are three outstanding requests, and we ask that McNeil provide its responses by the end of the day today.

Regards,

Caroline

Caroline L. Stevens
Leydig, Voit & Mayer, Ltd.
1420 Fifth Ave., Suite 3670
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(206) 428-3111 (tel)
(312) 616-5700 (fax)
cstevens@leydig.com

The information contained in this communication is confidential and may contain information that is privileged and/or exempt from disclosure under applicable law. If you have received this communication in error, please notify me immediately and delete the original and all copies of this communication. Thank you.

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 THIRD REQUEST FOR
PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, and the Trademark Trial and Appeal Board's Manual of Procedure, Section 406, Applicant requests Opposer to produce to Applicant's counsel, per the signature page below, within the time period permitted by the Trademark Rules of Practice and the Federal Rules of Civil Procedure, the documents and things set forth below, subject to the following definitions and instructions:

INSTRUCTIONS AND DEFINITIONS

A. These requests shall be deemed to seek production of all documents and things which are now in the possession, custody or control of Opposer, or hereafter come into the possession, custody or control of Opposer during the pendency of this proceeding, up to and including the termination of the discovery period set by the Board.

B. The definitions contained in Applicant's First and Second Set of Interrogatories to Opposer are incorporated by reference as if fully set forth herein.

DOCUMENT REQUESTS

REQUEST NO. 45:

All Documents, including, but not limited to, market research, focus group studies or qualitative feedback reports, concerning whether consumers believe that the active ingredient of store brand over-the-counter medications may be manufactured by the same companies that manufacture the active ingredient of the brand name equivalent products.

REQUEST NO. 46:

All Documents, including, but not limited to, market research, focus group studies or qualitative feedback reports, concerning whether consumers believe that the goods bearing Applicant's Mark or any ingredients in goods bearing Applicant's Mark, are manufactured or otherwise supplied by Opposer or any other company associated with or connected to Opposer.

REQUEST NO. 47:

All Documents, including, but not limited to, market research, focus group studies, or qualitative feedback reports, concerning whether consumers believe that goods bearing Applicant's Mark, or the active ingredient in such goods, are manufactured or supplied by, or otherwise sourced from, the same company that manufactures or otherwise supplies goods bearing Opposer's Mark or the active ingredient thereof.

Respectfully submitted,



Mark J. Liss

Caroline L. Stevens

Leydig, Voit & Mayer

Two Prudential Plaza, 180 North Stetson Ave.

Suite 4900

Chicago, Illinois 60601

(312) 616-5600

mliss@leydig.com

Attorneys for Applicant Walgreen Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing Applicant's Third Request for Production of Documents and Things was mailed by Fed Ex, postage prepaid on this 25th day of August, 2010 to:

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

Caroline Stevens

EXHIBIT 7

Laura Popp-Rosenberg

From: Laura Popp-Rosenberg
Sent: Monday, October 25, 2010 4:52 PM
To: 'Stevens, Caroline'
Cc: 'Liss, Mark'; Giselle C. Woo
Subject: RE: Late Discovery Responses; LVM Ref. 262981
Attachments: F0699013.PDF

Dear Caroline:

As discussed, please find attached a courtesy copy of McNEIL's response to the Walgreen's Third Set of Requests for Production of Documents and Things. A service copy has been sent by mail today. (For future purposes, should we direct service to you in Seattle or Mark in Chicago?)

We have requested McNEIL to gather responsive documents as indicated in the attached, and we will produce those documents as soon as possible.

Regards,
Laura

From: Stevens, Caroline [<mailto:cstevens@leydig.com>]
Sent: Monday, October 25, 2010 2:20 PM
To: Laura Popp-Rosenberg; Giselle C. Woo
Cc: Liss, Mark
Subject: Late Discovery Responses; LVM Ref. 262981

Dear Laura:

We understand that McNeil will respond to Walgreen's Third Set of Requests for Production of Documents and Things as possible, but that McNeil may not be able to respond today. We look forward to receiving the responses as soon as possible. We confirmed through our Fed Ex record that the package was received on August 27, 2010 (not August 26 as we discussed on the phone). We are forwarding you the record in case it helps you track down the original package.

Regards,

Caroline

Caroline L. Stevens
Leydig, Voit & Mayer, Ltd.
1420 Fifth Ave., Suite 3670
Seattle, WA 98101
(206) 428-3111 (tel)
(312) 616-5700 (fax)
cstevens@leydig.com

The information contained in this communication is confidential and may contain information that is privileged and/or exempt from disclosure under applicable law. If you have received this communication in error, please notify me immediately and delete the original and all copies of this communication. Thank you.

This tracking update has been requested by:

Company Name: Leydig, Voit & Mayer
Name: Diane Braun
E-mail: dbraun@leydig.com

Our records indicate that the following shipment has been delivered:

Reference: 262981
Ship (P/U) date: Aug 25, 2010
Delivery date: Aug 27, 2010 9:49 AM
Sign for by: A.DEDIER
Delivery location: NEW YORK, NY
Delivered to: Receptionist/Front Desk
Service type: FedEx 2Day
Packaging type: FedEx Envelope
Number of pieces: 1
Weight: 0.50 lb.
Special handling/Services: Adult Signature Required
Deliver Weekday

Tracking number: [793853422177](https://www.fedex.com/track/793853422177)

Shipper Information	Recipient Information
Diane Braun	Laura Popp-Rosenberg
Leydig, Voit & Mayer	Fross Zelnick Lehrman & Zissu, P.C.
1420 Fifth Avenue, Suite 3670	866 United Nations Plaza
Seattle	New York
WA	NY
US	US
98101	10017

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To learn more about FedEx Express, please visit our website at fedex.com.

All weights are estimated.

To track the latest status of your shipment, click on the tracking number above, or visit us at fedex.com.

This tracking update has been sent to you by FedEx on the behalf of the Requestor noted above. FedEx does not validate the authenticity of the requestor and does not validate, guarantee or warrant the authenticity of the request, the requestor's message, or the accuracy of this tracking update. For tracking results and fedex.com's terms of use, go to fedex.com.

Thank you for your business.

**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

**OPPOSER'S OBJECTIONS AND RESPONSES TO APPLICANT'S
THIRD REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and Rules 2.116 and 2.120 of the Trademark Rules of Practice, Opposer McNEIL-PPC, Inc. ("Opposer"), by its counsel Fross Zelnick Lehrman & Zissu, P.C., responds to Applicant's Third Request for Production of Documents and Things (the "Requests" and each individual request, a "Request") as follows:

GENERAL OBJECTIONS

The General Objections set forth in Opposer's Objections and Responses to Applicant's First Request for Production of Documents and Things, except for General Objection No. 1, are incorporated by reference as if fully set forth herein.

SPECIFIC OBJECTIONS

The following specific objections may be incorporated in Opposer's response to a particular Request. Opposer's decision not to specifically reference one or more of the

following objections in its response to a particular Request is not an admission that the Request is not objectionable on that basis.

A. The Request exposes Opposer to undue burden or expense in relation to its likely benefit, taking into account the needs of the case, the property in controversy, Opposer's resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

B. The Request is unreasonably cumulative or duplicative, or the requested information can be obtained from some other source that is more convenient, less burdensome, or less expensive.

C. The Request is not reasonably calculated to lead to the discovery of admissible or relevant evidence.

D. The Request is not reasonably particular, or seeks information merely tangential to the matters at issue in the case, or is not limited to a particular time period or geographic region.

E. The Request seeks information that is not within Opposer's possession, custody or control.

F. The wording of the Request is vague and/or ambiguous including, without limitation, due to use of undefined terms.

SPECIFIC RESPONSES AND OBJECTIONS

Document Request No. 45: All Documents, including, but not limited to, market research, focus group studies or qualitative feedback reports, concerning whether consumers believe that the active ingredient of store brand over-the-counter medications may be manufactured by the same companies that manufacture the active ingredient of the brand name equivalent products.

Response to Request No. 45:

Opposer objects to Document Request No. 45 on the basis of Specific Objections D and F. Subject to and without waiving the foregoing general and specific objections, Opposer will produce any responsive documents in Opposer's possession, custody or control.

Document Request No. 46: All Documents, including, but not limited to, market research, focus group studies or qualitative feedback reports, concerning whether consumers believe that the goods bearing Applicant's Mark or any ingredients in goods bearing Applicant's Mark, are manufactured or otherwise supplied by Opposer or any other company associated with or connected to Opposer.

Response to Request No. 46:

Opposer objects to Document Request No. 46 on the basis of Specific Objections B and F. Subject to and without waiving the foregoing general and specific objections, Opposer will produce any responsive documents in Opposer's possession, custody or control.

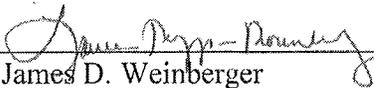
Document Request No. 47: All Documents, including, but not limited to, market research, focus group studies or qualitative feedback reports, concerning whether consumers believe that goods bearing Applicant's Mark, or the active ingredient in such goods, are manufactured or supplied by, or otherwise sourced from, the same company that manufactures or otherwise supplies goods bearing Opposer's Mark or the active ingredient thereof.

Response to Request No. 47:

Opposer objects to Document Request No. 47 on the basis of Specific Objections B and F. Subject to and without waiving the foregoing general and specific objections, Opposer will produce any responsive documents in Opposer's possession, custody or control.

Dated: New York, New York
October 25, 2010

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 
James D. Weinberger
Laura Popp-Rosenberg
Giselle C. Woo
866 United Nations Plaza
New York, New York 10017
Tel: (212) 813-5900
Email: jweinberger@frosszelnick.com
lpopp-rosenberg@frosszelnick.com
gwoo@frosszelnick.com

Attorneys for Opposer McNEIL-PPC, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposer's Objections and Responses to Applicant's Third Request for Production of Documents and Things to be sent by First Class mail, postage pre-paid, in an envelope addressed to Applicant's counsel, Mark J. Liss, Esq., Leydig, Voit & Mayer, Two Prudential Plaza, 180 N. Stetson Ave., Suite 4900, Chicago, IL 60601, this 25th day of October, 2010.

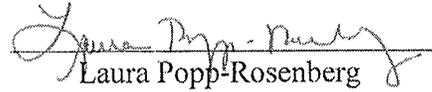

Laura Popp-Rosenberg

EXHIBIT 8

Laura Popp-Rosenberg

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Wednesday, November 17, 2010 4:08 PM
To: Laura Popp-Rosenberg
Cc: Liss, Mark
Subject: 262981; WAL-ZYR Opposition

Dear Ms. Popp-Rosenberg:

We are writing with regard to our strong objections to McNeil's production of over 4500 documents after the close of discovery. Many of the documents include information that dates back to 2008, 2009, and early to mid 2010. This information and the documents that contain the information are not supplements of prior production, such as updated sales figures. Instead, the information and documents simply should have been produced in response to our requests long ago, and certainly prior to the close of discovery.

Producing the information and documents after such a long delay and after the close of discovery unfairly prejudices Walgreens, Walgreens has no opportunity for follow-up discovery, and there is no justification for the delay. Such information and the documents that contains the information must be excluded from the dispute. *See, e.g., Mana Prods. Inc. v Black Onyx, Inc.*, 2001 WL 930583 (TTAB 2001) (the Board excluded documents not produced during discovery period, and stated "A party which fails to produce documents or information in response to its opponent's proper discovery requires will be precluded from introducing or relying on such document or information at trial" and "In view of applicant's failure to produce the documents at issue during discovery, applicant is not entitled to rely on those documents at trial"); *Panda Travel Inc. v. Resort Option Enterprises Inc.*, 94 USPQ2d 1789 (TTAB 2009) (Board excluded documents not produced during discovery period and stated, "opposer should not complain when the documents it failed to produce during discovery are stricken at trial" and noting that production must be made in a "timely fashion").

In past correspondence with you, McNeil has taken the position it can produce documents in response to Walgreen's discovery requests at *any* time until the very last day of discovery. Walgreens consistently disagreed with this position because the position goes against discovery rules requiring McNeil to produce responsive documents in a timely manner. Notwithstanding Walgreen's position, McNeil waited months and even years in some cases to produce certain information and documents, and McNeil did not produce the information and documents until after the close of discovery, a clear abuse of discovery procedure.

Accordingly, Walgreens requests that McNeil agree that it will not introduce into evidence or attempt to rely on the documents produced after the close of discovery and which are not supplements in this opposition. Based on our review of those documents, we believe those documents include Bates Nos. McNeil 5040-5128; 5133-5161; 5175-9498. More specifically, Walgreens is seeking to exclude documents that appear to be an Amended License Agreement, various studies, records of consumer comments, advertisements, a chart showing the number of visitors (to what is not known), articles, and Westlaw search results, among other documents, because Walgreens has no opportunity to inquire into the information and content of these documents through regular discovery procedures, and there is no justification for producing the documents after the close of discovery.

Walgreens is reaching out to McNeil about this matter in an effort to amicably resolve the issue and avoid the time, expense, and delay of a motion to the Board. If McNeil is not willing to agree to the requests in this email, however, Walgreens is prepared to file a motion seeking to exclude the documents referenced in the

paragraph above. If you would like to discuss our objections to the specific documents, please let us know and we can set up a conference call.

Finally, we did not receive document Bates Nos. McNeil 4888-4969. It appears that McNeil skipped these numbers in its production, but if not please let us know. Also, many of the words and numbers on documents Bates Nos. McNeil 5146-56 are illegible. We request a legible version of these documents, although we do maintain our objection to these documents due to late production.

Regards,

Caroline

Caroline L. Stevens
Leydig, Voit & Mayer, Ltd.
1420 Fifth Ave., Suite 3670
Seattle, WA 98101
(206) 428-3111 (tel)
(312) 616-5700 (fax)
cstevens@leydig.com

The information contained in this communication is confidential and may contain information that is privileged and/or exempt from disclosure under applicable law. If you have received this communication in error, please notify me immediately and delete the original and all copies of this communication. Thank you.

EXHIBIT 9

Laura Popp-Rosenberg

From: Laura Popp-Rosenberg
Sent: Friday, November 26, 2010 4:21 PM
To: 'Stevens, Caroline'
Cc: Giselle C. Woo
Subject: RE: 262981; WAL-ZYR Opposition

Dear Caroline,

We strongly disagree with the statements in your November 17 email below. There is no question that a party can produce documents at any time prior to the trial testimony period, and there can be no question that McNEIL supplemented its production in a timely manner.

The cases that you cited in your email have no relevance for the current situation. Both cited cases concern opposers who failed to produce documents "either initially or by supplementation," then attempted to rely on said documents at trial or to produce them during the trial testimony period. *See Mana Prods., Inc. v. Black Onyx, Inc.*, Opp. No. 112,190, 2001 Westlaw 930583, at *2 (T.T.A.B. Aug. 15, 2001); *Panda Travel Inc. v. Resort Option Enters. Inc.*, 94 U.S.P.Q.2d 1789, 1791-93 (T.T.A.B. 2009) (faulting opposer who engaged in a "bait and switch" by allowing applicant to believe opposer had produced all responsive documents and would not need to supplement its production). Throughout the parties' communications, we have always made clear that we planned to supplement McNEIL's production, and thus Walgreen has not been misled. On the contrary, McNEIL and Walgreen have been in almost continuous communication regarding McNEIL's supplemental production, particularly concerning documents that Walgreen specifically requested in categories of documents to which Walgreen currently objects. McNEIL produced its supplemental production well in advance of the testimony period and in a timely fashion, and as such, these cases are inapplicable. (I also dispute that you have "consistently disagreed" with McNEIL's position that documents could be produced after the close of discovery, but the point is not important enough for me to spend the time or resources reviewing our communications on this issue.)

In regard to your objection to the production of specific documents, all of the documents produced in McNEIL's most recent production were produced to supplement McNEIL's previous productions and were produced either in response to specific supplementation requests by made by you, or to produce documents that were not in existence until shortly before their production (this latter category constituting the vast majority of the recent production). More specifically:

- The UCB Amended License Agreement did not exist before 2010 and was produced to supplement the UCB License Agreement produced at MCNEIL_000193-238. This document was also produced in response to Walgreen's specific requests for documents regarding the relationship between UCB and McNEIL and for supplementation of documents responsive to Document Requests #22.
- The documents related to the Transaction Study, produced at MCNEIL_005057-5101, were produced to supplement past productions and in response to Walgreen's specific request for lists of questions and other materials concerning studies already produced to Walgreen at MCNEIL_001445-1532 in response to Document Request #23.
- The documents produced at MCNEIL_005102-07 supplements MCNEIL's production of sales documents, previously produced at MCNEIL_002214-17, in response to Walgreen's specific request for updated sales figures responsive to Document Request #21.
- The media reports produced at MCNEIL_5147-9498 did not exist until shortly before we produced them, as evidenced by the date on the reports themselves. These reports and those produced at MCNEIL_5133-45 were produced in response to Walgreen's specific request for additional media references to ZYRTEC responsive to Document Request #16.
- The document produced at MCNEIL_005108-12 supplements MCNEIL's prior production of Verbatim comments at MCNEIL_001534-50, and was produced in response to Walgreen's specific request that McNEIL supplement the reports of consumer comments and opinions responsive to Document Request #38.

- The document evidencing visits to the Zyrtec website, produced at MCNEIL_005113, supplements such information previously produced at MCNEIL_001426-44.
- The advertisements objected to by Walgreen, produced at MCNEIL_005114-128, 5157-61, and 5175-76, are all advertisements created in 2010 and produced to supplement previous productions.
- The media plans produced at MCNEIL_005146-56 supplement those previously produced, including at MCNEIL_000734-736, and were produced in response to Walgreen's specific request for updated advertising expenditures and plans responsive to Document Request #20.

We are particularly surprised that you would voice objection to McNEIL's production considering that Walgreen has continued to supplement its production at an even later date than McNEIL. Moreover, Walgreen's own supplemental production suffers from the same "defects" of which you accuse McNEIL. For instance, Walgreen produced at W5858-5953 USPTO status reports for trademarks dating back to 2003, most of which could have been produced at the start of this proceeding and half of which were not produced until the end of last week. Walgreen further produced invoice information at W5833-46 dating back to August 2009, some of which clearly could have been produced many months ago, as well as revenue information dating back to 2008 at W5849-56.

If you would like to discuss this matter further, please let me know and we can set up a teleconference.

With regard to the question of whether McNEIL skipped document range 4888-4969, Giselle will get back to you on this issue next week. She will also look into the legibility of document range 5146-5156, and send clearer copies if they are available.

Regards,
Laura

From: Stevens, Caroline [mailto:cstevens@leydig.com]
Sent: Wednesday, November 17, 2010 4:08 PM
To: Laura Popp-Rosenberg
Cc: Liss, Mark
Subject: 262981; WAL-ZYR Opposition

Dear Ms. Popp-Rosenberg:

We are writing with regard to our strong objections to McNeil's production of over 4500 documents after the close of discovery. Many of the documents include information that dates back to 2008, 2009, and early to mid 2010. This information and the documents that contain the information are not supplements of prior production, such as updated sales figures. Instead, the information and documents simply should have been produced in response to our requests long ago, and certainly prior to the close of discovery.

Producing the information and documents after such a long delay and after the close of discovery unfairly prejudices Walgreens, Walgreens has no opportunity for follow-up discovery, and there is no justification for the delay. Such information and the documents that contains the information must be excluded from the dispute. *See, e.g., Mana Prods. Inc. v Black Onyx, Inc.*, 2001 WL 930583 (TTAB 2001) (the Board excluded documents not produced during discovery period, and stated "A party which fails to produce documents or information in response to its opponent's proper discovery requires will be precluded from introducing or relying on such document or information at trial" and "In view of applicant's failure to produce the documents at issue during discovery, applicant is not entitled to rely on those documents at trial"); *Panda Travel Inc. v. Resort Option Enterprises Inc.*, 94 USPQ2d 1789 (TTAB 2009) (Board excluded documents not produced during discovery period and stated, "opposer should not complain when the documents it failed to produce during discovery are stricken at trial" and noting that production must be made in a "timely fashion").

In past correspondence with you, McNeil has taken the position it can produce documents in response to Walgreen's discovery requests at *any* time until the very last day of discovery. Walgreens consistently disagreed with this position because the position goes against discovery rules requiring McNeil to produce responsive documents in a timely manner. Notwithstanding Walgreen's position, McNeil waited months and even years in some cases to produce certain information and documents, and McNeil did not produce the information and documents until after the close of discovery, a clear abuse of discovery procedure.

Accordingly, Walgreens requests that McNeil agree that it will not introduce into evidence or attempt to rely on the documents produced after the close of discovery and which are not supplements in this opposition. Based on our review of those documents, we believe those documents include Bates Nos. McNeil 5040-5128; 5133-5161; 5175-9498. More specifically, Walgreens is seeking to exclude documents that appear to be an Amended License Agreement, various studies, records of consumer comments, advertisements, a chart showing the number of visitors (to what is not known), articles, and Westlaw search results, among other documents, because Walgreens has no opportunity to inquire into the information and content of these documents through regular discovery procedures, and there is no justification for producing the documents after the close of discovery.

Walgreens is reaching out to McNeil about this matter in an effort to amicably resolve the issue and avoid the time, expense, and delay of a motion to the Board. If McNeil is not willing to agree to the requests in this email, however, Walgreens is prepared to file a motion seeking to exclude the documents referenced in the paragraph above. If you would like to discuss our objections to the specific documents, please let us know and we can set up a conference call.

Finally, we did not receive document Bates Nos. McNeil 4888-4969. It appears that McNeil skipped these numbers in its production, but if not please let us know. Also, many of the words and numbers on documents Bates Nos. McNeil 5146-56 are illegible. We request a legible version of these documents, although we do maintain our objection to these documents due to late production.

Regards,

Caroline

Caroline L. Stevens
Leydig, Voit & Mayer, Ltd.
1420 Fifth Ave., Suite 3670
Seattle, WA 98101
(206) 428-3111 (tel)
(312) 616-5700 (fax)
cstevens@leydig.com

The information contained in this communication is confidential and may contain information that is privileged and/or exempt from disclosure under applicable law. If you have received this communication in error, please notify me immediately and delete the original and all copies of this communication. Thank you.

EXHIBIT 10

Laura Popp-Rosenberg

From: Laura Popp-Rosenberg
Sent: Tuesday, January 04, 2011 4:15 PM
To: 'Stevens, Caroline'
Cc: Giselle C. Woo
Subject: WAL-ZYR

Dear Caroline,

We have now had an opportunity to review Applicant's Motion to Preclude Documents from Introduction at Trial. In addition to lacking substantive merit, the motion is premature: McNEIL has yet to introduce *any* documents into evidence, including those referenced in the motion. In fact, you tacitly acknowledge in your motion that it is premature, and thus we can only assume that you filed it at this time in an attempt to disrupt our trial period.

We therefore request that you withdraw the premature motion. Of course, we have no objection to you reserving your right to refile it if and when we actually introduce any of the referenced documents into evidence (although, as noted above, we believe the Board will agree that the motion lacks substantive merit).

Regards,
Laura

Laura Popp-Rosenberg | Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza | New York, New York 10017
T: (212) 813-5943 | F: (212) 813-5901 | www.frosszelnick.com

EXHIBIT 11

Laura Popp-Rosenberg

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Wednesday, January 05, 2011 1:34 PM
To: Laura Popp-Rosenberg; Giselle C. Woo
Cc: Liss, Mark; Calkins, Michelle
Subject: WAL-ZYR; 262981

Dear Laura and Giselle,

In an effort to amicably resolve the Motion to Preclude and to avoid what may be unnecessary expense, Walgreens may be willing to withdraw the Motion if McNeil does not plan to rely at trial on documents Bates Nos. McNeil 5040-5128, 5133-5161, and 5175-9498, or if McNeil plans to rely on only some of these documents. So we and our client can discuss whether withdrawal of the Motion to Preclude is appropriate, please let us know which, if any, of these documents McNeil plans to rely on at trial.

To address some of the specific statements in your email below, we do not agree that the Motion to Preclude lacks substantive merit; McNeil produced over 4500 pages of documents after the close of discovery which violates trademark and federal rules and unfairly prejudices Walgreens. We did not file the motion to disrupt McNeil's trial period, and we do not agree that the motion is premature. We filed the motion at this time to avoid the unfair prejudice that would result in requiring Walgreens to prepare on thousands of documents that should be excluded from the trial due to untimely production. In fact, it seems your deliberate production of thousands of pages of documents (many of which were over two years old) the day after the discovery period closed was designed to harass and prejudice Walgreens. However, we are willing to discuss an amicable resolution as discussed above.

Finally, we understand that extra time may be required to sign and correct Mr. Donohue's deposition transcript, as we needed extra time to do so with regard to Dr. Simonson's discovery deposition transcript. Accordingly, we consent to extending the deadline for providing the signed and corrected copy of Mr. Donohue's deposition transcript until the end of McNeil's testimony period, provided Walgreens will be given additional time to address any changes to the transcript that Walgreens believes to be substantive changes.

Regards,

Caroline

Caroline L. Stevens - (206) 428-3111 - cstevens@leydig.com

From: Laura Popp-Rosenberg [<mailto:lpopp-rosenberg@fzlj.com>]
Sent: Tuesday, January 04, 2011 1:15 PM
To: Stevens, Caroline
Cc: Giselle C. Woo
Subject: WAL-ZYR

Dear Caroline,

We have now had an opportunity to review Applicant's Motion to Preclude Documents from Introduction at Trial. In addition to lacking substantive merit, the motion is premature: McNEIL has yet to introduce *any* documents into evidence, including those referenced in the motion. In fact, you tacitly acknowledge in your motion that it is premature, and thus we can only assume that you filed it at this time in an attempt to disrupt our trial period.

We therefore request that you withdraw the premature motion. Of course, we have no objection to you reserving your right to refile it if and when we actually introduce any of the referenced documents into evidence (although, as noted above, we believe the Board will agree that the motion lacks substantive merit).

Regards,
Laura

Laura Popp-Rosenberg | Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza | New York, New York 10017
T: (212) 813-5943 | F: (212) 813-5901 | www.frosszelnick.com

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EXHIBIT 12

Laura Popp-Rosenberg

From: Laura Popp-Rosenberg
Sent: Wednesday, January 05, 2011 5:01 PM
To: 'Stevens, Caroline'
Cc: 'Liss, Mark'; 'Calkins, Michelle'; Giselle C. Woo
Subject: RE: WAL-ZYR; 262981
Attachments: F0732190.PDF; F0732178.DOC

Dear Caroline:

Thank you for your accommodation on the Pfizer transcript. We are amenable to providing Walgreens extra time to address any changes to the Mr. Donahue's transcript that seem substantive. Note that, as of now, we have no information as to whether Pfizer intends to make changes.

With regard to your motion to preclude, we will not address the substantive merits or the timing issues further (except to remind you of our unanswered email of November 26), as we are sure that neither side is going to convince the other of its position. At the same time, we do appreciate your openness to an amicable resolution. However, we do not believe that identifying the documents on which we intend to rely would progress the issue, as we expect that the documents we would identify would cause you to refuse to withdraw the motion in any event. However, we are open to other means of resolving the dispute. For example, if you would identify what type of follow-up discovery you would have taken with respect to particular documents, perhaps we can make such follow-up discovery available.

In revisiting the issue of your motion to exclude, we discovered a mistake in our pre-trial disclosures. Due to an oversight, we had not identified the Westnews documents No. 5177-9498. An amended set of pre-trial disclosures is attached. To summarize the only change, Giselle will be called to authenticate 5177-9148 as well as 2188-4887. Please advise whether you are still amenable to having Ms. Woo submit her testimony by affidavit with leave given to Walgreens to conduct cross-examination by telephone (or in person) if it so chooses. Obviously, an agreement to permit testimony through affidavit would not waive any objections, procedural or substantive, Walgreens may have to the evidence.

Regards,
Laura

From: Stevens, Caroline [mailto:cstevens@leydig.com]
Sent: Wednesday, January 05, 2011 1:34 PM
To: Laura Popp-Rosenberg; Giselle C. Woo
Cc: Liss, Mark; Calkins, Michelle
Subject: WAL-ZYR; 262981

Dear Laura and Giselle,

In an effort to amicably resolve the Motion to Preclude and to avoid what may be unnecessary expense, Walgreens may be willing to withdraw the Motion if McNeil does not plan to rely at trial on documents Bates Nos. McNeil 5040-5128, 5133-5161, and 5175-9498, or if McNeil plans to rely on only some of these documents. So we and our client can discuss whether withdrawal of the Motion to Preclude is appropriate, please let us know which, if any, of these documents McNeil plans to rely on at trial.

To address some of the specific statements in your email below, we do not agree that the Motion to Preclude lacks substantive merit; McNeil produced over 4500 pages of documents after the close of discovery which violates trademark and federal rules and unfairly prejudices Walgreens. We did not file the motion to disrupt McNeil's trial period, and we do not agree that the motion is premature. We filed the motion at this time to avoid the unfair prejudice that would

result in requiring Walgreens to prepare on thousands of documents that should be excluded from the trial due to untimely production. In fact, it seems your deliberate production of thousands of pages of documents (many of which were over two years old) the day after the discovery period closed was designed to harass and prejudice Walgreens. However, we are willing to discuss an amicable resolution as discussed above.

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Regards,

Caroline

Caroline L. Stevens - (206) 428-3111 - cstevens@leydig.com

From: Laura Popp-Rosenberg [<mailto:lpopp-rosenberg@fzlj.com>]
Sent: Tuesday, January 04, 2011 1:15 PM
To: Stevens, Caroline
Cc: Giselle C. Woo
Subject: WAL-ZYR

Dear Caroline,

We have now had an opportunity to review Applicant's Motion to Preclude Documents from Introduction at Trial. In addition to lacking substantive merit, the motion is premature: McNEIL has yet to introduce *any* documents into evidence, including those referenced in the motion. In fact, you tacitly acknowledge in your motion that it is premature, and thus we can only assume that you filed it at this time in an attempt to disrupt our trial period.

We therefore request that you withdraw the premature motion. Of course, we have no objection to you reserving your right to refile it if and when we actually introduce any of the referenced documents into evidence (although, as noted above, we believe the Board will agree that the motion lacks substantive merit).

Regards,
Laura

Laura Popp-Rosenberg | Fross Zelnick Lehrman & Zissu, P.C.
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EXHIBIT 13

Laura Popp-Rosenberg

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Thursday, January 06, 2011 7:03 PM
To: Laura Popp-Rosenberg; Giselle C. Woo
Cc: Liss, Mark; Calkins, Michelle
Subject: WAL-ZYR; 262981

Dear Laura:

Since McNeil is concerned about handling both its testimony period and its response to Walgreens Motion to Preclude during the same time period, as a courtesy, Walgreens would agree to a short extension of McNeil's deadline to respond to the Motion. In addition, Walgreen's offer to try to amicably resolve the matter, if McNeil would first identify the late-produced documents it intends to rely on at trial, remains open. McNeil refused this offer, but if McNeil reconsiders, we are open to discussions.

McNeil offered, as an alternative, to possibly allow Walgreens to take additional discovery to address McNeil's late-produced documents. While Walgreens would like to resolve the matter amicably, this offer is not acceptable to Walgreens. McNeil chose not to produce thousands of documents until after the close of discovery. McNeil thereby denied Walgreens the opportunity to explore these documents during the regular discovery period and violated trademark and federal discovery rules. The consequences of these violations should be not borne by Walgreens in the form further delay of the opposition, which has already lasted more than two years, and in the form of the significant expense of additional depositions and possibly written discovery, when Walgreens already took two depositions of McNeil's witness, Mr. Hooda, during the regular discovery period. The consequences of McNeil's actions, according to the rules, are that the documents cannot be relied on at trial, and we believe this is fair.

You state that your November 26, 2010 email was "unanswered" by Walgreens. This is a misleading characterization of the situation. We did not respond to your November 26, 2010 email because your email did not call for an answer. On November 17, 2010, we sent you an email to try to amicably resolve the discovery dispute concerning McNeil's late-produced documents. We asked McNeil to agree not to rely on the late-produced documents to avoid our having to file a Motion to Preclude. In your November 26, 2010 email, you said that McNeil refused our request. You added that, if we wanted to discuss the matter further, you would agree to a teleconference, but you did not ask us to call you, you did not ask us any follow-up questions, and you did not ask us to respond to your email. Since McNeil had refused our offer and did not offer an alternative solution, we did not feel further discussions would be beneficial, and we moved forward with the Motion to Preclude as we told you we would.

We will get back to you as soon as possible regarding McNeil's request to submit Giselle Woo's affidavit to authenticate documents Bates No. McNeil 5177-9148 as well as McNeil 2188-4887.

Regards,

Caroline

Caroline L. Stevens - (206) 428-3111 - cstevens@leydig.com

From: Laura Popp-Rosenberg [<mailto:lpopp-rosenberg@fz|z.com>]
Sent: Wednesday, January 05, 2011 2:01 PM
To: Stevens, Caroline
Cc: Liss, Mark; Calkins, Michelle; Giselle C. Woo
Subject: RE: WAL-ZYR; 262981

Dear Caroline:

Thank you for your accommodation on the Pfizer transcript. We are amenable to providing Walgreens extra time to address any changes to the Mr. Donahue's transcript that seem substantive. Note that, as of now, we have no information as to whether Pfizer intends to make changes.

With regard to your motion to preclude, we will not address the substantive merits or the timing issues further (except to remind you of our unanswered email of November 26), as we are sure that neither side is going to convince the other of its position. At the same time, we do appreciate your openness to an amicable resolution. However, we do not believe that identifying the documents on which we intend to rely would progress the issue, as we expect that the documents we would identify would cause you to refuse to withdraw the motion in any event. However, we are open to other means of resolving the dispute. For example, if you would identify what type of follow-up discovery you would have taken with respect to particular documents, perhaps we can make such follow-up discovery available.

In revisiting the issue of your motion to exclude, we discovered a mistake in our pre-trial disclosures. Due to an oversight, we had not identified the Westnews documents No. 5177-9498. An amended set of pre-trial disclosures is attached. To summarize the only change, Giselle will be called to authenticate 5177-9148 as well as 2188-4887. Please advise whether you are still amenable to having Ms. Woo submit her testimony by affidavit with leave given to Walgreens to conduct cross-examination by telephone (or in person) if it so chooses. Obviously, an agreement to permit testimony through affidavit would not waive any objections, procedural or substantive, Walgreens may have to the evidence.

Regards,
Laura