

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JUL 09 2008

ALAN SLATER, Clerk of the Court

BY: R. VAVRA DEPUTY

1 Mark P. Robinson, Jr., Esq. (SBN: 054426)
Kevin F. Calcagnie, Esq. (SBN: 108994)
2 Karen L. Karavatos, Esq. (SBN: 131718)
ROBINSON, CALCAGNIE & ROBINSON, INC.
3 620 Newport Center Drive, Suite 700
Newport Beach, CA 92660
4 T: (949) 720-1288; F: (949) 720 1292

5 Ray Chester (*pro hac vice* application to be filed)
Amy Clark Meachum (*pro hac vice* application to be filed)
6 Jessica Palvino (*pro hac vice* application to be filed)
McGINNIS, LOCHRIDGE & KILGORE, L.L.P.
7 600 Congress Avenue, Suite 2100
Austin, TX 78701
8 T: (512) 495-6000 ; F: (512)505-6351

**THIS CASE IS SUBJECT TO
MANDATORY ELECTRONIC FILING
PURSUANT TO RULE 308 OF THE LOCAL RULES
OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE**

9 Jason Mark (*pro hac vice* application to be filed)
MARK & ASSOCIATES, P.C.
10 626 RexCorp Plaza
Uniondale, NY 11556
11 T: (516) 333-1415; F: (516)333-1838

**JUDGE RONALD L. BAUER
DEPT. CX103**

12 Attorneys for Plaintiffs

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **FOR THE COUNTY OF ORANGE**

30-2008

15
16 BRYAN KRAMER AND LYNN BRYANT individually)
and as successors-in-interest to SONDR A BRYANT;)
17 DEE SPEARS, individually and as successor -in-interest,)
to KRISTEN SPEARS; SUSAN DOOLITTLE; LICIA)
18 CLARK; SHEILA WHIDDEN; DELBERT POWELL;)
CARL MOORE; JANICE HENNESSY; JERALD)
19 SODY, individually and as successor -in-interest to)
STANFORD SODY; KAREN BREEDING; RHONDA)
20 DOWNEY; JOANNE UNDERWOOD-BOSWELL and)
21 JOHN ROBERT BOSWELL, III, individually and as)
successors-in-interest to ROBERT UNDERWOOD-)
22 BOSWELL; BEVERLY REED-MOMOT; BARBARA)
PURDON; and SPENCER HAHN, a minor, through his)
23 guardian ad litem, ERICA HAHN;)

Case No. **00180033**

**COMPLAINT FOR DAMAGES AND
DEMAND FOR JURY TRIAL**

- 1. Strict Liability-Failure to Warn
- 2. Strict Liability – Manufacturing Defect
- 3. Negligence
- 4. Breach of Implied Warranty
- 5. Breach of Express Warranty
- 6. Deceit By Concealment
- 7. Negligent Misrepresentation
- 8. Survival

24 Plaintiffs,)

25 vs.)

26 ALLERGAN, INC., AND DOES 1-25, inclusive,)

27 Defendants)
28)

1 NOW COME the following Plaintiffs: Brian Kramer and Lynn Bryant, individually and as
2 successors-in-interest of Sondra Bryant; Dee Spears, individually and as successor-in-interest of Kristen
3 Spears; Susan Doolittle; Licia Clark; Sheila Whidden; Delbert Powell; Carl Moore; Janice Hennessy;
4 Jerald Sody, individually and as successor-in-interest of Stanford Sody; Karen Breeding; Rhonda
5 Downey; Joanne Underwood-Boswell and John Robert Boswell, III, individually and as successors-in-
6 interest of Robert Underwood-Boswell; Beverly Reed-Momot; Barbara Purdon; and Spencer Hahn, a
7 minor, through his guardian ad litem, Erica Hahn, and file this Complaint seeking judgment against
8 Defendant Allergan, Inc. and DOES 1-25, inclusive for injuries and deaths caused by Botox® and in
9 support thereof, state as follows:

10 **NATURE OF THE ACTION**

11 1. Each Plaintiff was injured from using either Botox® and/or Botox® Cosmetic, which are the
12 same product formulations but have different labels for marketing purposes (hereinafter "Botox®").
13 Each of the Plaintiffs or the Plaintiffs' Decedents suffered personal injuries as a direct and proximate
14 result of Botox® injections and incurred medical expenses, pain and suffering, and, in some instances,
15 lost earnings and lost earnings capacity. Each Plaintiff seeks actual and punitive damages from the
16 Defendants due to damages caused by Botox®

17 2. As is more fully set forth below, Defendant's wrongful and negligent conduct caused
18 Plaintiffs' injuries. Defendant Allergan is in the business of researching, designing, developing,
19 licensing, compounding, testing, producing, manufacturing, processing, packaging, inspecting, labeling,
20 warranting, marketing, promoting, advertising, distributing, selling, and/or introducing into interstate
21 commerce, either directly or indirectly through third parties or related entities, the prescription drug
22 Botox®.

23 **PARTIES**

24 3. Plaintiffs Brian Kramer and Lynn Bryant, are individuals who reside in Ector County and
25 Midland County, Texas, respectively. They are the surviving heirs of their mother, Sondra Bryant, who
26 died as a result of Botox® injections on March 9, 2008 in Midland, Texas.

1 4. Plaintiff Dee Spears, is an individual who resides in Potter County, Texas. She is the
2 surviving heir of her 7-year-old daughter Kristen Spears, who died as a result of Botox® injections on
3 November 24, 2007 in Amarillo, Texas.

4 5. Plaintiff Susan Doolittle, a resident of San Francisco County, California, was born 01/21/62.
5 Botox® injections in 2007 have caused her to develop blurred vision and bilateral ptosis, which is an
6 inability to lift the eyelids that cover her eyes.

7 6. Plaintiff Licia Clark, a resident of Davis County, Utah, was born 03/10/63. After receiving a
8 set of Botox® injections in January 2008 for headaches and a pinched nerve, she became very sick with
9 vomiting and dysphagia (swallowing difficulty), as well as an inability to speak. She was hospitalized
10 for several weeks after her kidneys shut down.

11 7. Plaintiff Sheila Whidden, a resident of Hendry County, Florida, was born on 07/25/61.
12 Botox® injections from 2007 have caused serious muscle weakness in her neck and ongoing muscular
13 pain.

14 8. Plaintiff Delbert Powell, a resident of Piatt County, Illinois, was born 03/10/54. After
15 receiving Botox® injections in 2006, he suffered from dysphagia, breathing problems and partial
16 paralysis of his vocal chords.

17 9. Plaintiff Carl Moore, a resident of Beaufort County, South Carolina, was born 01/17/76.
18 Botox® injections in 2008 have caused him to have full-body muscle weakness, numbness, head and
19 neck pain, severe headaches and lethargy.

20 10. Plaintiff Janice Hennessy, a resident of San Francisco County, California, was born on
21 04/12/72. After Botox® injections in 2007, she was hospitalized for shortness of breath and flu-like
22 symptoms. She also continues to experience parasthesia (numbness and tingling in extremities) and
23 muscle weakness.

24 11. Plaintiff Jerald Sody, is an individual who resides in Gloucester County, New Jersey. He is
25 the surviving heir of his brother, Stanford Sody, who died on April 2, 2008, in Woodbury, New Jersey, as
26 a result of the Botox® injections he received earlier in the year.

1 12. Plaintiff Karen Breeding, a resident of Jefferson County, Kentucky, was born on 02/16/60.
2 Botox® injections for migraines in February 2008 have caused her right eye to be partially paralyzed
3 with ptosis, blurred vision and an increase in headaches.

4 13. Plaintiff Rhonda Downey, born 10/04/71, a resident of Jackson County, Ohio, received
5 Botox® injections in January 2008. As a result, she was hospitalized due to a severe allergic reaction,
6 flu-like symptoms and inability to speak. She continues to suffer from muscle weakness, dysphagia,
7 facial swelling, sensitivity to sunlight, and various other symptoms caused by the Botox® injections.

8 14. Joanne Underwood-Boswell and John Robert Boswell, III, are individuals who reside in
9 Charles County, Maryland. They are the surviving heir of their son, Robert Underwood-Boswell, who
10 died from Botox® injections on October 27, 2007 at the age of 4 in Maryland.

11 15. Plaintiff Beverly Reed-Momot, born 07/17/54, a resident of Mercer County, New Jersey,
12 suffers from ptosis in both eyes and blurred vision, after receiving Botox® injections in February 2008.

13 16. Plaintiff Barbara Purdon, born 07/13/36, resides in Maricopa County, Arizona. She received
14 Botox® injections in July 2007. Since that time, she has suffered from dysphagia, breathing problems,
15 weight loss, and dysphonia (inability to speak).

16 17. Plaintiff Spencer Hahn, born 12/07/05, resides in Marion County, Indiana. After Botox®
17 injections in 2007, Spencer suffered from rashes, swelling, difficulty breathing and pneumonia-like
18 symptoms. Erica Hahn is Spencer's mother and guardian ad litem.

19 18. Defendant Allergan, Inc. is a Delaware corporation that has its principal place of business at
20 2525 Dupont Drive, Irvine, California, 92612. Allergan may be served through its registered agent: The
21 Prentice-Hall Corporation System, Inc., 2730 Gateway Oaks Drive, Suite 100, Sacramento, California,
22 95833.

23 19. Allergan designed, developed, manufactured, tested, marketed, promoted, distributed, and
24 sold Botox®. In doing so, Allergan placed the product in the stream of commerce in California and
25 throughout the United States. Allergan has received, and will continue to receive, substantial benefits
26 and income through its activities. Allergan authorized the actions attributed to it herein through its
27 officers, directors, and managing agents.

1 20. Plaintiffs do not know the true names and capacities of those defendants named and sued
2 herein as Does 1 through 25, and for that reason have sued said defendants by such fictitious names.
3 Plaintiffs will seek leave to amend this complaint to reflect their true names when ascertained. Plaintiffs
4 are informed and believe, and accordingly allege, that each of the defendants sued herein as Does 1
5 through 25 is responsible in some manner for the occurrences alleged in this action and that these
6 defendants proximately caused the harms suffered by plaintiffs.

7 JURISDICTION AND VENUE

8 21. At all relevant times alleged herein, Defendant Allergan, Inc. has been a corporation with its
9 principal place of business in the State of California, County of Orange. Allergan's headquarters are
10 located at 2525 Dupont Drive, Irvine, California 92612-1531.

11 22. At all relevant times alleged herein, Defendant Allergan was in the business of researching,
12 designing, developing, licensing, compounding, testing, producing, manufacturing, assembling,
13 processing, packaging, inspecting, labeling, warranting, marketing, promoting, advertising, distributing,
14 selling, and/or introducing into interstate commerce, either directly or indirectly through third parties or
15 related entities, the prescription drug Botox®.

16 23. At all times relevant hereto, Defendant Allergan designed, developed, manufactured,
17 promoted, marketed, distributed, tested, warranted and sold Botox® in interstate commerce and in the
18 County of Orange, State of California. Defendant conducted substantial business at this location in the
19 County of Orange, advertised Botox® in this county, received substantial compensation and profits from
20 sales of Botox® in this county, and made material omissions and misrepresentations and committed
21 breaches of warranties in this county.

22 24. A substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in
23 Orange County, California. Plaintiffs are proper parties for a single action under California's permissive
24 joinder statute (Cal. Code Civil Pro. § 378) in that each was injured through the same transactions,
25 occurrences or series of transactions or occurrences – the manufacture, marketing, distribution and sale
26 of Botox® - and common questions of law or fact exist as to all Plaintiffs. *See Anaya v. Superior Court*,
27 160 Cal. App 3d 228 (1984).

1 FACTUAL ALLEGATIONS

2 25. Upon information and belief, at all times relevant hereto, Allergan, by and through its
3 employees, agents, affiliates, subsidiaries, and representatives, were involved in developing, designing,
4 testing, manufacturing, and/or marketing Botox®.

5 26. Botox® is a brand name for Botulinum Toxin Type A, which is produced by the bacterium
6 Clostridium botulinum. In its purest form, botulinum is one of the deadliest poisons known to humans.
7 It can cause death by paralysis. Botox® is a part of the same family of poisons as botulism, a common
8 cause of fatal food poisoning. Found in food that is badly preserved, the toxin can be lethal when eaten
9 because it stops nerves from releasing acetylcholine, essential for muscle contraction. The muscles relax,
10 leaving the victim paralyzed and susceptible to suffocation. Botox® works in the same basic manner.
11 There are seven strains of Botulinum Toxin, types A to G; Botox® is the “purified” form of Botulinum
12 Toxin Type A.

13 27. Before Allergan began marketing Botox® to doctors and their patients as a panacea for a
14 large assortment of illnesses and cosmetic purposes, it was researched by the United States government
15 in the 1940s as a biological weapon – considered to be one of the most toxic substances on the planet. It
16 was not until the 1970s that a San Francisco doctor first used the toxin as a way to treat crossed eyes, or
17 strabismus. Allergan purchased the rights to the doctor’s discovery in 1987, and the rest is mass-
18 marketing history.

19 28. Botox® emerged from obscurity in the mid-1990s when Allergan began capitalizing on the
20 drug’s paralyzing properties, which temporarily reduce frown lines and wrinkles in patients when
21 injected around the eyes. This created the commercial sensation that is Botox® Cosmetic. Over the past
22 two decades Botox® has been heavily promoted to doctors and consumers and marketed by Allergan for
23 a variety of therapeutic and cosmetic purposes – most of them off-label uses of the toxin. By 2007,
24 Botox® annual sales were over \$1.2 billion.

25 29. Allergan emphasizes that Botox® is a miracle drug and has often compared it to “penicillin.”
26 Meanwhile, Allergan obscures that Botox® is a highly lethal toxin with serious and life-threatening side
27 effects. The most common side effects of Botox® are dysphagia (swallowing difficulties),
28

1 pneumonia/flu-like symptoms and muscle weakness. During Allergan’s clinical trials for Botox®, 19
2 percent of those injected with Botox® suffered dysphagia, 12-percent developed flu-like symptoms, and
3 11 percent suffered from neck pain and muscle weakness. Yet, in Allergan’s off-label promotion of the
4 toxin, it rarely – if ever – mentions these common and often life-threatening side effects.

5 30. Instead, Allergan sponsors Botox®-injection conferences for doctors all over the world and
6 maintains Botox® is “well-tolerated,” “safe” and “effective.” Allergan downplays the side effects to
7 medical professionals and instead promotes the monetary boon that Botox® can be to neurologists,
8 dermatologists and pain specialists. These Allergan-sponsored medical conferences promote Botox® as
9 an off-label panacea for over 100 ailments, including cerebral palsy, whiplash and headaches.

10 31. Allergan contracts out much of its promotions and marketing for Botox® to The Neurotoxin
11 Institute (“NTI”), especially the off-label marketing. In turn, NTI operates a website in concert with
12 Allergan and with funding received from Allergan to mislead the public and medical community
13 regarding the “safety” and “efficacy” of Botox®. Moreover, NTI, with funding from and in concert with
14 Allergan, hosts medical conferences and training for physicians to “teach” them about the many on- and
15 off-label uses of the toxin and to promote false and misleading information regarding Botox®’s safety
16 record.

17 32. In January 2008, the consumer group Public Citizen announced that it had found reports of 16
18 deaths associated with usage of Botox® or its sister drug Myobloc® from November 1997 through 2006.
19 Four of the 16 deaths occurred in children under 18, who were given Botox® to treat limb spasticity.
20 Among the group’s other findings were 180 patients had developed life-threatening conditions after
21 being injected with Botox®, including 87 hospitalizations. The injections of the neurotoxin caused side
22 effects that mimicked the effects of botulism poisoning – apparently causing paralysis of the respiratory
23 muscles, dysphagia and/or pneumonia. Public Citizen cited to a study published in 2005 in the *Journal*
24 *for the American Academy of Dermatology*, which recognized the serious risks of Botox®, finding 406
25 adverse event reports related to the therapeutic uses of botulinum toxin, including 26 reports of serious
26 events involving dysphagia and one death from aspiration pneumonia. The documented reports of

27
28

1 33. Botox®-caused injuries and deaths only represent a fraction of the total and most, if not all,
2 of the plaintiffs herein were not included in the 2005 reports.

3 34. Recent animal studies have proven – to the extent there was any doubt – that Botox® moves
4 beyond its injection site into other surrounding muscles causing paralysis and weakness. A recent
5 *Journal of Neuroscience* study has concluded that Botox® also disrupts the body’s cell communication
6 by destroying nerve cells and traveling to neighboring nerves and even reaching the brain.

7 35. Despite the concerns raised by Public Citizen and medical publications, Allergan continues to
8 promote the off-label use of the drug and to misrepresent Botox®’s safety record. For example, Allergan
9 CEO David Pyott recently stated that in all the years that Botox® had been used for cosmetic purposes,
10 there had been no reported deaths linked to the drug, yet he neglected to mention the 16 known deaths
11 associated with therapeutic use. (“Fortune Magazine, “A Wrinkle in the Botox Story,” February 12,
12 2008).

13 36. Allergan has known about the serious side effects of Botox® for years, especially when
14 injected at the higher dosages commonly used for therapeutic purposes. Nevertheless, Allergan has
15 failed to adequately inform health care providers and the public about these risks. Had Allergan
16 informed the public and medical professionals of these risks, the injuries described herein could have
17 been avoided. Knowing the risks that Botox® injections carry, it is likely that each recipient would have
18 refused the injections and their doctors would have refused to prescribe it.

19 37. Plaintiff Sondra Bryant, a registered nurse, received Botox® injections in 2007 to lessen her
20 neck and shoulder pain. After a series of injections, the 69-year old was unable to work; she developed
21 severe dysphasia, required full-time care, lost approximately 50 pounds, and had a gastric feeding tube
22 inserted. The injections also caused muscle weakness in her neck, which made it difficult to hold up her
23 head. She died of aspiration and/or malnutrition on March 9, 2008. She is survived by her two children,
24 Lynn Bryant and Bryan Kramer.

25 38. Plaintiff Kristen Spears was a 7-year-old girl with cerebral palsy who lived in Texas and
26 received Botox® injections for limb spasticity. After receiving a series of Botox® injections, she
27 developed pneumonia, and her seizures worsened dramatically. She developed muscle weakness in her
28

1 neck, which left her unable to hold her head up, and she died on November 24, 2007. her mother, Dee
2 Spears, is her surviving heir and successor-in-interest.

3 39. Plaintiff Susan Doolittle, age 46, received two treatments of Botox® injections in early 2007
4 in her forehead and around her eyes. The Botox® caused her to develop a neurological condition called
5 myasthenia gravis, which has left her with blurred vision and ptosis.

6 40. Plaintiff Licia Clark, age 45, received a set of Botox® injections in January 2008 for
7 headaches and a pinched nerve. Soon thereafter, she became very sick with muscle weakness, including
8 problems holding up her head, lethargy, severe vomiting and dysphagia, as well as dysphonia. She was
9 hospitalized for several weeks after her kidneys shut down and required surgery. She is unable to work
10 as a result of her injuries.

11 41. Plaintiff Sheila Whidden, age 46, received Botox® injections in December 2007 for neck and
12 shoulder pain. These injections caused muscle weakness in her neck, which made it difficult for her to
13 hold her head up, and it caused severe pain in her upper extremities, for which she is still seeking medical
14 treatment.

15 42. Plaintiff Delbert Powell, age 54, received Botox® injections, ostensibly for cervical dystonia
16 as well as other aches and pains in the right neck musculature. After receiving several injections in July
17 2006, Plaintiff suffered serious adverse reactions, including dysphagia and dysphonia and an inability to
18 speak normally, which have not resolved.

19 43. Plaintiff Carl Moore, age 32, is a staff sergeant in the United States Marine Corps. After
20 being injured from a roadside bomb in Afghanistan, he experienced neck pains and headaches. In
21 February 2008, he was injected with Botox®. Since the injections, he has had shortness of breath,
22 muscle cramping, increased headaches, light sensitivity, muscle weakness and numbness, and is being
23 forced to retire from military active duty.

24 44. Plaintiff Janice Hennessy, age 29, received Botox® injections for palmar hyperhidrosis in
25 2007 and 2008. As a result, she developed parasthesia in her hands, arms and shoulders, as well as
26 shortness of breath, requiring hospitalization. She continues to experience muscle weakness, numbness
27 in her hands and shortness of breath.

1 45. Stanford Sody, 60, died on April 2, 2008 from Botox® complications. He was given two
2 rounds of Botox® injections in February and March 2008 and, as a result, developed a as a severe case of
3 dysphagia requiring a feeding tube, as well as voice problems. He died soon thereafter from aspiration
4 pneumonia. His brother, Jerald Sody, is his surviving heir and successor-in-interest.

5 46. Plaintiff Karen Breeding, age 48, received Botox® injections for the first time in February
6 2008 for migraine relief. Since the injections, she suffers from right-eye paralysis, blurred vision, and
7 watery and drooping eyelids. In addition, her migraine headaches have worsened since the injections,
8 which have caused her problems with attending work and performing her job.

9 47. Plaintiff Rhonda Downey, age 36, received Botox® injections in January 2008. As a result,
10 she was hospitalized due to a severe allergic reaction, flu-like symptoms and inability to speak. She has
11 persistent muscle weakness, dysphagia, facial swelling, and sensitivity to sunlight.

12 48. Robert Underwood-Boswell developed pneumonia and severe breathing problems from
13 Botox® injections received in July 2007. In addition, he developed muscle weakness in his neck, which
14 made it difficult to hold up his head. He died on October 27, 2007 at the age of 4. His mother and
15 father, Joanne Underwood-Boswell and John Robert Boswell, III, are his surviving heirs and successors-
16 in-interest.

17 49. Plaintiff Beverly Reed-Momot, 53, received Botox® injections in early 2008. She suffers
18 from persistent ptosis and blurred and double vision as a result.

19 50. Plaintiff Barbara Purdon, age 71, received Botox® injections for the first and only time in
20 July 2007. Soon after the procedure, she developed sores near the injection site. Since that time, she has
21 suffered from dysphagia, breathing problems, weight loss, and is unable to speak.

22 51. Plaintiff Spencer Hahn received Botox® injections in 2007. He had a severe allergic reaction
23 to the Botox® causing swelling and breathing difficulties that required intubation. His mother, Erica
24 Hahn, is his guardian ad litem.

25 52. Each Plaintiff has suffered damages in an amount in excess of the minimum jurisdictional
26 limits of this Court.

1 **WRONGFUL DEATH ALLEGATIONS**

2 53. Plaintiffs Lynne Bryant and Bryan Kramer, individually and as personal representatives of
3 Sondra Bryant, Plaintiff Dee Spears, individually and as personal representative of Kristen Spears,
4 Plaintiff Jerald Sody, individually and as personal representative of Stanford Sody, and Plaintiffs Joanne
5 Underwood-Boswell and John Robert Boswell, III, individually and as personal representatives of Robert
6 Underwood-Boswell, repeat and re-allege the allegations set forth in the above paragraphs as though
7 fully stated herein. As a result of Defendant's acts set forth herein, Decedents suffered injuries resulting
8 in their deaths.

9 54. As a proximate result of the conduct of the Defendant, the Plaintiffs who are heirs of the
10 Decedents have been deprived of the love, companionship, comfort, care, assistance, protection,
11 affection, society, financial support, and moral support of the Decedents, and thereby proximately
12 causing Plaintiffs' grief, sorrow, mental anguish, pain and suffering, all to Plaintiffs' damages according
13 to proof. As a further proximate result of the conduct of Defendant, Plaintiffs have incurred expenses for
14 funeral, burial, and other related costs pertaining to Decedents' deaths in an amount to be ascertained.

15 **PUNITIVE DAMAGES ALLEGATIONS**

16 55. Each Plaintiff repeats and re-alleges the allegations set forth in the foregoing paragraphs as
17 though fully stated herein.

18 56. The acts, conduct, and omissions of Defendant, as alleged throughout this Complaint, were
19 willful and malicious and were done with a conscious disregard for the rights or each of the Plaintiffs and
20 other recipients of Botox® and for the primary purpose of increasing Defendant's profits from the sale,
21 marketing and distribution of Botox®. Defendant's outrageous and unconscionable conduct warrants an
22 award of exemplary and punitive damages against Defendant in an amount appropriate to punish and
23 make an example of Defendant Allergan.

24 57. Prior to the manufacturing, marketing, sale and distribution of said prescribed medication,
25 Defendant knew that said toxin was in a defective condition as previously described herein and knew that
26 those who were prescribed the toxin would experience and did experience severe physical, mental, and
27 emotional injuries. Further, Defendant, through its officers, directors, managers, and agents, had
28

1 knowledge that the prescription toxin presented a substantial and unreasonable risk of harm to the public,
2 including each of the Plaintiffs and as such, said consumers of Botox® were unreasonably subjected to
3 risk of injury or death.

4 58. Despite such knowledge, Defendant, acting through its officers, directors, and managing
5 agents for the purpose of enhancing Defendant's profits, knowingly and deliberately failed to remedy the
6 known defects in Botox® and failed to warn the public, including each of the Plaintiffs and the
7 Decedents, of the extreme risk of injury occasioned by said defects inherent in Botox®. Defendant and
8 its individual agents, officers, and directors intentionally proceeded with the manufacturing, sale,
9 distribution and marketing of Botox® knowing that the public, including each of the Plaintiffs, would be
10 exposed to serious danger in order to advance Defendant's pecuniary interests and monetary profits.

11 59. Defendant acted with oppression, fraud and malice in that Defendant knew or had reason to
12 know prior to each use specified herein that Botox® was unreasonably dangerous and intentionally
13 misrepresented or concealed this fact from each user and their health care providers. Defendant acted
14 with full awareness of the harm that could result and as a consequence, is liable for exemplary damages
15 under *Civil Code* § 3294.

16 **FIRST CAUSE OF ACTION: STRICT LIABILITY/FAILURE TO WARN**

17 **(BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

18 60. Each Plaintiff repeats and re-alleges the allegations set forth above in the foregoing
19 paragraphs as though fully stated herein, against Defendant Allergan, Inc.

20 61. Defendant Allergan does not sufficiently warn of the likelihood of potential fatal or life-
21 threatening consequences of Botox® injections received for cosmetic or therapeutic purposes. Allergan
22 does not list "death" as a possible adverse reaction on the Botox® label. The warnings are defective in
23 that they do not mention the common spread of the toxin from the site of the injection to other parts of
24 the body through the nervous system and the bloodstream – especially when administered at higher
25 dosages. Both the Botox® Cosmetic label and the Botox® therapeutic label fail to warn about all of the
26 possible side effects of Botox® or explain that the drug can cause the same symptoms as botulism
27 poisoning. The Botox® Cosmetic label only briefly mentions that swallowing, speech or respiratory
28

1 disorders “may arise” but fails to mention that the mechanism of toxicity is through distant spread of the
2 botulinum bacteria throughout bloodstream and nervous system. The therapeutic Botox® label
3 specifically warns cervical dystonia patients about dysphagia leading to aspiration, shortness of breath,
4 and pneumonia, but again there is no warning about the distant spread of the toxin throughout the body or
5 that injections for conditions other than cervical dystonia can also lead to these adverse events.

6 62. In addition, Allergan failed to warn physicians and health care providers of all of the known
7 risks of Botox®, including muscle weakness and fatal respiratory disease, or that the mechanism of
8 toxicity is through distant spread of the neurotoxin to other parts of the body. For the off-label uses, the
9 failure to warn is even more egregious and reckless because Allergan markets and promotes the off-label
10 use of a dangerous toxin for a host of untested ailments; this constitutes the worst kind of corporate
11 behavior.

12 63. The staggering number of adverse events and the seriousness of the events reported to
13 Allergan since Botox® left the Allergan’s control also mandated that the Botox® warnings be
14 supplemented or modified to protect consumers, patients and medical providers. Allergan’s failure to
15 supplement or modify the warnings in its labels and its marketing has left health care providers unable to
16 appreciate the actual risk of using Botox® injections.

17 64. The risks of the Botox® were actually known by Allergan or were reasonably scientifically
18 knowable at the time Botox® injured each of the Plaintiffs, and each of the Plaintiffs’ Decedents, as
19 emphasized by the recent Public Citizen petition and medical journal publications.

20 65. The lack of sufficient warnings was a substantial factor in causing each of the Plaintiff’s
21 injuries and damages in an amount in excess of the minimum jurisdictional limits of this Court. If
22 Allergan had informed each recipient of its product, and each recipient’s health care providers, of the
23 known risks of Botox®, they would have refused to use Botox® and the health care providers would
24 have refused to prescribe it.

25 66. As a direct and proximate result of the defects in Botox® and the conduct of the Defendant,
26 Plaintiffs Susan Doolittle, Licia Clark, Sheila Whidden, Delbert Powell, Carl Moore, Janice Hennessy,
27 Karen Breeding, Rhonda Downey, Beverly Reed-Momot, Barbara Purdon, and Spencer Hahn have
28

1 sustained medical expenses from hospitals, physicians, surgeons, at-home care, and incidental expenses,
2 and each of them will necessarily incur additional such expenses for an indefinite period of time in the
3 future. Each of these Plaintiffs has also sustained physical injury, pain and suffering and mental anguish
4 damages in the past and future, and certain of them have sustained loss of earnings, past, present, and
5 future, and loss of earning capacity.

6 67. As a direct and proximate result of the defects in Botox® and the conduct of the Defendant,
7 Plaintiffs Bryan Kramer and Lynne Bryant; Dee Spears; Jerald Sody; and Joanne Underwood-Boswell
8 and John Robert Boswell all suffered the loss of society, comfort, care, affection and support of the
9 Decedents. The Plaintiff Decedents: Sondra Bryant, Kristen Spears, Stanford Sody and Robert
10 Underwood-Boswell suffered catastrophic injuries, resulting in their deaths, thereby depriving their heirs
11 of love, companionship, comfort, care, assistance, protection, affection, society, financial support, and
12 moral support, and thereby proximately causing Plaintiffs grief, sorrow, mental anguish, pain and
13 suffering, all to Plaintiffs' damages according to proof. As a further proximate result of the conduct of
14 Defendant, Plaintiffs have incurred expenses for funeral, burial, and other related costs pertaining to
15 Decedent's deaths in an amount to be ascertained.

16 68. The acts, conduct, and omissions of Defendant, as alleged throughout this Complaint, were
17 willful and malicious and were done with a conscious disregard for the rights of each of the Plaintiffs and
18 users of Botox® and for the primary purpose of increasing Defendant's profits from the sale, marketing
19 and distribution of Botox®. Defendant's outrageous and unconscionable conduct warrants an award of
20 exemplary and punitive damages against Defendant in an amount appropriate to punish and make an
21 example of Defendant Allergan.

22 69. Prior to the manufacturing, marketing, sale and distribution of said prescribed medication,
23 Defendant knew that said toxin was in a defective condition as previously described herein and knew that
24 those who were prescribed the toxin would experience and did experience severe physical, mental, and
25 emotional injuries. Further, Defendant, through its officers, directors, managers, and agents, had
26 knowledge that the prescription toxin presented a substantial and unreasonable risk of harm to the public,
27
28

1
2 including each of the Plaintiffs and their Decedents and as such, said consumers of Botox® were
3 unreasonably subjected to risk of injury or death.

4 70. Despite such knowledge, Defendant, acting through its officers, directors, and managing
5 agents for the purpose of enhancing Defendant's profits, knowingly and deliberately failed to remedy the
6 known defects in Botox® and failed to warn the public, including each of the Plaintiffs, of the extreme
7 risk of injury occasioned by said defects inherent in Botox®. Defendant and its individual agents,
8 officers, and directors intentionally proceeded with the manufacturing, sale, distribution and marketing of
9 Botox® knowing that the public, including each of the Plaintiffs, would be exposed to serious danger in
10 order to advance Defendant's pecuniary interests and monetary profits.

11 71. Defendant acted with oppression, fraud and malice in that Defendant knew or had reason to
12 know prior to each use specified herein that Botox® was unreasonably dangerous and intentionally
13 misrepresented or concealed this fact from each user and their health care providers. Defendant acted
14 with full awareness of the harm that could result and as a consequence, is liable for exemplary damages.

15 **SECOND CAUSE OF ACTION: STRICT LIABILITY/MANUFACTURING DEFECT**

16 **(BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

17 72. Each Plaintiff repeats and re-alleges the allegations set forth in the foregoing paragraphs as
18 though fully stated herein.

19 73. Defendant is the manufacturer, distributor, and supplier of Botox®. This product reached
20 each user without a substantial change in its condition upon leaving the Defendant.

21 74. The Botox® given to each user contained a defect in its manufacture. This defect in Botox®
22 existed at the time Botox® left the possession and control of the Defendant. This defect resulted in a
23 product that was not in conformity with the manufacturer's intended result and/or the manufacturing
24 specifications for Botox®.

25 75. The defect in Botox® caused it to fail during the time of use. This failure caused Plaintiffs to
26 suffer the injuries and damages detailed above.

1 76. Botox® was prescribed by each user's physicians in a manner foreseeable to Defendant and
2 in fact was used in the manner that Defendant instructed physicians and their patients to use the product.

3 77. As a direct and proximate result of the defects in manufacturing Botox® and Defendant's
4 actions, Plaintiffs Susan Doolittle, Licia Clark, Sheila Whidden, Delbert Powell, Carl Moore, Janice
5 Hennessy, Karen Breeding, Rhonda Downey, Beverly Reed-Momot, Barbara Purdon, and Spencer Hahn
6 have sustained medical expenses from hospitals, physicians, surgeons, at-home care, and incidental
7 expenses, and each of them will necessarily incur additional such expenses for an indefinite period of
8 time in the future. Each of these Plaintiffs has also sustained physical injuries, pain and suffering and
9 mental anguish damages in the past and future, and certain of them have sustained loss of earnings, past,
10 present, and future, and a loss of earning capacity.

11 78. As a direct and proximate result of the defects in manufacturing Botox® and Defendant's
12 actions, Plaintiffs Bryan Kramer and Lynne Bryant; Dee Spears; Jerald Sody; and Joanne Underwood-
13 Boswell and John Robert Boswell all suffered the loss of society, comfort, care, affection and support of
14 the Decedents. The Plaintiff Decedents: Sondra Bryant, Kristen Spears, Stanford Sody and Robert
15 Underwood-Boswell suffered catastrophic injuries, resulting in their deaths, thereby depriving their heirs
16 of love, companionship, comfort, care, assistance, protection, affection, society, financial support, and
17 moral support, and thereby proximately causing Plaintiffs grief, sorrow, mental anguish, pain and
18 suffering, all to Plaintiffs' damages according to proof. As a further proximate result of the conduct of
19 Defendant, Plaintiffs have incurred expenses for funeral, burial, and other related costs pertaining to
20 Decedent's deaths in an amount to be ascertained.

21 **THIRD CAUSE OF ACTION: NEGLIGENCE**

22 **(BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

23 79. Each Plaintiff repeats and re-alleges the allegations set forth in the foregoing paragraphs as
24 though fully stated herein.

25 80. Defendant was negligent in marketing Botox® and such negligence was a proximate cause of
26 injuries and damages to each of the Plaintiffs. Allergan, through its agents, employees and/or servants,
27 designed, manufactured, produced, inspected, tested, maintained, sold and/or made available Botox® to
28

1 each of the Plaintiffs and their Decedents – mostly for off-label uses not approved by the FDA. Each
2 user suffered personal injuries from Botox® caused by the negligence of Allergan. The negligence on the
3 part of Defendant included, but was not limited to: marketing and making available Botox® to each user
4 even though it was a dangerous, defective and deficient drug; and failing to provide each user’s health-
5 care providers sufficient information as to the product’s known dangers and risks, including off-label
6 uses and high-dosage injections.

7 81. Defendant Allergan was negligent in designing Botox® and such negligence was a proximate
8 cause of injuries and damages to each of the Plaintiffs and their Decedents. Allergan, through its agents,
9 employees and/or servants, designed, manufactured, produced, inspected, tested, maintained, sold and/or
10 made available Botox® to each user. Each user suffered personal injuries from Botox® caused by
11 negligence of Allergan. The negligence on the part of Allergan included, but was not limited to: failing
12 to conduct sufficient, reasonable, adequate, comprehensive research and tests of Botox® prior to making
13 it available to the American public and Plaintiffs, their Decedents and their health care providers; and
14 failing to recognize and correct defects that were known, or reasonably knowable, to Allergan prior to
15 making it available to each user; and negligently marketing and promoting the toxin for off-label uses
16 that were unsafe for the public.

17 82. As a consequence of Defendant’s negligence, careless conduct, and its failure to exercise
18 ordinary and reasonable care and caution, each Plaintiff has suffered damages in an amount in excess of
19 the minimum jurisdictional limits of this Court.

20 83. As a direct and proximate result of Defendant’s negligence, Plaintiffs Susan Doolittle, Licia
21 Clark, Sheila Whidden, Delbert Powell, Carl Moore, Janice Hennessy, Karen Breeding, Rhonda Downey,
22 Beverly Reed-Momot, Barbara Purdon, and Spencer Hahn have sustained medical expenses from
23 hospitals, physicians, surgeons, at-home care, and incidental expenses, and each of them will necessarily
24 incur additional such expenses for an indefinite period of time in the future. Each of these Plaintiffs has
25 also sustained physical injuries, pain and suffering and mental anguish damages in the past and future,
26 and certain of them have sustained loss of earnings, past, present, and future, and a loss of earning
27 capacity.

1 84. As a direct and proximate result of Defendant's negligence, Plaintiffs Bryan Kramer and
2 Lynne Bryant; Dee Spears; Jerald Sody; and Joanne Underwood-Boswell and John Robert Boswell all
3 suffered the loss of society, comfort, care, affection and support of the Decedents. The Plaintiffs'
4 Decedents: Sondra Bryant, Kristen Spears, Stanford Sody and Robert Underwood-Boswell suffered
5 catastrophic injuries, resulting in their deaths, thereby depriving their heirs of love, companionship,
6 comfort, care, assistance, protection, affection, society, financial support, and moral support, and thereby
7 proximately causing Plaintiffs grief, sorrow, mental anguish, pain and suffering, all to Plaintiffs'
8 damages according to proof. As a further proximate result of the conduct of Defendant, Plaintiffs have
9 incurred expenses for funeral, burial, and other related costs pertaining to Decedent's deaths in an
10 amount to be ascertained.

11 **FOURTH CAUSE OF ACTION: BREACH OF IMPLIED WARRANTY**

12 **(BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

13 85. Each Plaintiff repeats and re-alleges the allegations set forth in the foregoing paragraphs as
14 though fully stated herein.

15 86. Prior to the time that Botox® was used by each of the Plaintiffs and their Decedents,
16 Allergan, through its agents, employees, subsidiaries, representatives and affiliates, impliedly warranted
17 to each of the Plaintiffs and their health care providers that Botox® was a merchantable quality and safe
18 and fit for the use for which it was intended.

19 87. Each of the users and their health care providers were, and remain, unskilled in the research,
20 design, and manufacture of Botox® and reasonably relied entirely on the skill, judgment, and implied
21 warranty of Allergan in using the aforementioned Botox®.

22 88. Allergan knew or had reason to know that each of the users and their physicians relied upon
23 the skill and judgment of the Defendant as a leader in the pharmaceutical industry to create, market, test,
24 and sell a suitable and safe product.

25 89. Botox® was neither safe for its intended use nor of merchantable quality, as warranted by
26 Allergan, in that Botox® had dangerous propensities when put to its intended use and would cause severe
27 injuries to the user.

1 90. At the time it was manufactured and at all subsequent times, Botox® was not as warranted,
2 but was unfit for the particular purpose for which it was intended in that it was defective, causing each of
3 the Plaintiffs to suffer damages and consequential damages in an amount in excess of the minimum
4 jurisdictional limits of the Court that are more fully set forth herein.

5 91. As a result of Allergan's breach of the implied warranty of fitness for a particular purpose and
6 the resulting dangers associated with the use of Botox®, each of the Plaintiffs suffered the injuries and
7 damages set forth above.

8 **FIFTH CAUSE OF ACTION: BREACH OF EXPRESS WARRANTY**

9 **(BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

10 92. Each Plaintiff repeats and re-alleges the allegations set forth in the foregoing paragraphs as
11 though fully stated herein.

12 93. Allergan expressly warranted to the public and each of the Plaintiffs and their Decedents
13 through their physicians that Botox® was safe, effective, fit, and proper for its intended use through its
14 advertising and marketing. Allergan also expressly warranted to each user that Botox® was fit for off-
15 label uses. Allergan did so through statements that it and its authorized agents and representatives –
16 often through contract-marketer NTI – made orally and in publications, through Allergan-sponsored
17 Botox® conventions for medical professionals, package inserts, promotional and other written, oral, and
18 electronically disseminated statements and materials provided to the medical trade journals and to mass-
19 market publications.

20 94. Each user relied on the skill, judgment, representations, and foregoing express warranties of
21 Allergan when he/she decided to use Botox®. These warranties and representations were false since
22 Botox® was not safe and was unfit for the uses for which it was intended, among other things.

23 95. As a result of Allergan's breaches of warranty, Plaintiffs have suffered the injuries and
24 damages as set forth above.

25 ////

1 numerous other ailments. Allergan represents that Botox® is “safe” and “well-tolerated” for all of these
2 purposes, despite knowing that said representations are unsubstantiated and often false, and, meanwhile,
3 conceals from physicians and the general public, and ultimately each of these Plaintiffs, their Decedents
4 and their physicians that Botox® has a serious propensity to cause injuries to users.

5
6 101. Defendant intentionally concealed and suppressed the true facts concerning Botox® with
7 the intent to defraud each user, in that Defendant knew that each of the users’ physicians would not have
8 prescribed Botox®, and Plaintiffs and their Decedents would not have used, and their physicians would
9 not have prescribed, Botox® if they had known the true facts concerning the dangers of Botox®.

10 102. As a result of Defendant’s deceit by concealment, each of the Plaintiffs suffered the
11 injuries and damages set forth above, including exemplary damages.

12 **SEVENTH CAUSE OF ACTION: NEGLIGENT MISREPRESENTATION**

13 **(BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

14 103. Each Plaintiff repeats and re-alleges the allegations set forth in the foregoing paragraphs
15 as though fully stated herein.

16 104. Defendant, from the time that Botox® was first tested, studied, researched, first
17 manufactured, marketed and distributed, and up to the present, made false representations, as previously
18 set forth herein, to Plaintiffs, their Decedents, their health care providers, and the general public,
19 including but not limited to the misrepresentation that Botox® was safe, fit, and effective for human
20 consumption.

21 105. At all times relevant hereto, Allergan conducted a sales and marketing campaign to
22 promote the sale of Botox® and willfully deceived Plaintiffs, Plaintiffs’ Decedents, their health care
23 providers, and the general public as to the health risks and consequences of the use of Botox®.
24 Defendant made the following misrepresentations without any reasonable ground for believing them to
25 be true:

26 a. Representing to each user, their physicians, and the general public that Botox®
27 was safe, fit, and effective for human consumption, knowing that said representations were false,
28

1 and concealing from each user, their physicians, and the general public that Botox® had a serious
2 propensity to cause injuries to users;

3 b. Engaging in an advertising program and media campaign designed to create the
4 image, impression and belief by consumers and physicians that the use of Botox® was safe for a
5 variety of therapeutic and cosmetic uses and concealing its poisonous properties, even though the
6 Defendant knew these to be representations to be false, and even though the Defendant had no
7 reasonable grounds to believe Botox® was safe for the general public;

8 c. Purposely downplaying and understating the health hazards and risks associated
9 with Botox®; and

10 d. Issuing promotional literature and commercials and conducting mass-media and
11 news promotional interviews deceiving potential users of Botox® by relaying positive
12 information, including manipulating and/or omitting statistics to suggest widespread acceptability
13 and safety, while downplaying the known adverse and serious health effects and concealing
14 material relevant information regarding the safety of Botox®.

15 106. These misrepresentations were made directly by Defendant, by sales representatives and
16 other authorized agents of said Defendant, and in publications, mass media outlets, and other written
17 materials directed to physicians, patients, and the general public, with the intention of inducing reliance
18 and the prescription, purchase, and use of Botox®. Allergan has previously represented in its
19 advertisements to the general public that Botox® has a 25-year track record of safety and likening the
20 toxin to the discovery of penicillin. In addition, Defendant's most recent advertising campaign regarding
21 Botox®, "Express Yourself," fails to mention the topic of safety. Allergan refers to its product as
22 "purified," which is intended to misrepresent that Botox® is in actuality a highly lethal poison that can
23 cause botulism and/or botulism-like symptoms.

24 107. Allergan sponsors Botox® conferences for physicians and medical professionals
25 numerous times every year. At these conferences, Allergan heavily promotes Botox® for the following
26 off-label uses: back pain, neck pain and whiplash, myofascial pain syndrome, headache, spasticity,
27 Parkinson's Disease, hemifacial spasm, focal dystonias, spasmodic dysphonia, Cerebral Palsy, and
28

1 numerous other ailments. Allergan represents that Botox® is “safe” and “well-tolerated” for all of these
2 purposes, despite knowing that said representations are unsubstantiated and often false, and, meanwhile,
3 conceals from physicians and the general public, and ultimately each user, that Botox® has serious
4 propensity to cause injuries to users.

5 108. The foregoing representations by Defendant were in fact false, in that Botox® is not safe,
6 fit, and effective for human consumption, the use of Botox® is hazardous to health, and Botox® has
7 significant propensity to cause serious injuries to users, including but not limited to the injuries suffered
8 by each of the Plaintiffs as described above. The foregoing misrepresentations by Defendant were made
9 with the intention of inducing reliance and the prescription, purchase, and use of Botox®.

10 109. In reliance on the misrepresentations by Defendant, each of the Plaintiffs and their
11 Decedents were induced to purchase and use Botox®, and their health care providers were induced to
12 prescribe it. If each of them had known of the true facts and the facts concealed by Defendant, Plaintiffs
13 and their Decedents would not have used Botox® and their health care providers would not have
14 prescribed it. Their reliance upon Defendant’s misrepresentations was justified because such
15 misrepresentations were made and conducted by individuals and entities that were in a position to know
16 the true facts.

17 110. As a result of the foregoing negligent misrepresentations by Defendant, each of the
18 Plaintiffs suffered injuries and damages as described above.

19 **EIGHTH CAUSE OF ACTION: SURVIVAL**

20 **(BY PLAINTIFFS BRYANT, SPEARS, SODY, AND UNDERWOOD-BOSWELL**
21 **AGAINST ALL DEFENDANTS)**

22 111. Plaintiffs Lynne Bryant and Bryan Kramer, individually and as personal representatives of
23 Sondra Bryant, Plaintiff Dee Spears, individually and as personal representative of Kristen Spears,
24 Plaintiff Jerald Sody, individually and as successors in interest to the Estate of Stanford Sody, and
25 Plaintiffs Joanne Underwood-Boswell and John Robert Boswell, III, individually and as successors in
26 interest to the Estate of Robert Underwood-Boswell, repeat and re-allege the allegations set forth in the
27 above paragraphs as though fully stated herein.
28

3. Loss of earnings and impaired earning capacity according to proof at the time of trial;
4. Medical expenses, past and future, according to proof at the time of trial;
5. For past and future mental and emotional distress, according to proof;
6. Punitive or exemplary damages according to proof at the time of trial;
7. For costs of suit incurred herein;
8. For pre-judgment interest as provided by law; and
9. For such other and further relief as the Court may deem just and proper.

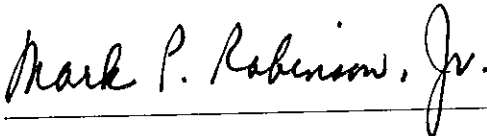
DEMAND FOR JURY TRIAL

Plaintiffs, by their undersigned counsel, hereby demand a trial by jury on all counts in this Complaint and all issues so triable.

RESPECTFULLY SUBMITTED,

Dated: July 9, 2008

**ROBINSON, CALCAGNIE &
ROBINSON, INC.**



Mark P. Robinson, Jr. (SBN: 054426)
Kevin F. Calcagnie (SBN: 108994)
Karen L. Karavatos (SBN: 131718)

and

**MCGINNIS, LOCHRIDGE & KILGORE,
L.L.P.**

Ray Chester (*pro hac vice* pending)
Amy Clark Meachum (*pro hac vice* pending)
Jessica Palvino (*pro hac vice* pending)

MARK & ASSOCIATES, P.C.
Jason Mark (*pro hac vice* application pending)