

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

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In the Matter of )  
 )  
Reckitt Benckiser LLC, et al., ) FIFRA Docket No. 661  
 )  
Petitioners. )

**USER PETITIONERS' OPPOSITION TO EPA'S MOTION  
FOR ADDITIONAL DISCOVERY**

Louisville Apartment Association and Greater Cincinnati Northern Kentucky Apartment Association ("User Petitioners") hereby oppose EPA's Motion for Additional Discovery because it attempts to compel production of documents which are not in User Petitioners possession, custody or control.

User Petitioners object to all the discovery requests because of the definition which EPA has used for "User and Retailer Petitioners" (see EPA Motion for Additional Discovery #16). First, EPA's definition includes "member(s)" of the Associations. 40 CFR section 164.51(a) clearly states that any decisions regarding discovery in this hearing "shall be guided by the procedures set forth in the Federal Rules of Civil Procedure." The Federal Rules make clear that if a party wishes to obtain documents in the possession of association members that are not themselves parties to the litigation, it must do so through non-party subpoena procedures. *See, e.g.* 9A Fed. Prac. & Proc. Civ. Section 2452 (3<sup>rd</sup> ed.) ("a subpoena is necessary to compel someone who is not a party to appear for the taking of a deposition or for the production of various material things and electronic information.") *N.H. Motor Trans. Ass'n v. Rowe*, 324 F. Supp. 2d 231, 234 – (D. Maine 2004) (stating that a party seeking to obtain discovery from non-party members of an association that is a party can only do so "through nonparty procedures");

*Lehman v. Kornblau*, 206 F.R.D. 356 (E.D.N.Y. Sept. 24, 2001) (“Discovery of non-parties must be conducted by subpoena pursuant to Fed.Civ.P.45, not the rules governing discovery of parties.”) Thus documents solely in the possession, custody and control of members of the Associations cannot be subject to this discovery request.

Similarly, documents that may be in the custody, control and possession of “*former* officers, directors, investors, employees, agents, managers, representatives, field representatives, personnel, attorneys, consultants,, experts, investigators, or other persons” (EPA definition 16) over whom Petitioners have no control are clearly not subject to discovery and Petitioners object to that aspect of the definition of “User and Retailer Petitioners.”

Petitioners also object generally to Respondent’s requests to the extent that any request calls for documents that are privileged and thus immune from discovery. Finally Petitioners object to Respondent’s request that in regard to any documents that are withheld on the basis of privilege, Petitioners “identify the date, author, addressee, persons receiving copies, type of document or information (letter, report, memorandum, etc.), title if any, description of the subject matter addressed in the document, number of pages, the specific privilege claimed and the factual basis therefore.” Respondents Motion at II. The regulations at 40 C.F.R. Part 164 do not require the exchange of this detailed information, nor do the Federal Rules of Civil Procedure at FRCP 26(b)(5)(A).

For these reasons, Petitioners object in full to EPA's Motion for Additional Discovery.

Respectfully submitted,

Dated: 5/15/14

By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing User Petitioners' Opposition to EPA's Motion for Additional Discovery dated May 15, 2014 was served at the addresses listed below in the manner indicated:

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Dated: May 15, 2014



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