

April 17, 2013

VIA HAND DELIVERY

The Honorable Susan Biro
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mailcode 1900L
1200 Pennsylvania Avenue, NW
Washington D.C. 20460

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2013 APR 17 AM 11:09

Re: *In re: Reckitt Benckiser LLC*, FIFRA Docket # 661: Filing of Petition for Review and Motion to Stay in the Tenth Circuit Court of Appeals

Dear Judge Biro:

We represent Reckitt Benckiser LLC (“Reckitt”) in the above-referenced proceeding. I am writing to provide some important background regarding a protective Petition for Review and Motion for a Stay that Reckitt filed April 12, 2013 in the United States Court of Appeals for the Tenth Circuit that is related to this proceeding.

As you are aware, EPA in its Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait products (“Notice”), asserted that the issue of sell-through of existing stocks of Reckitt’s products is not an issue in this Hearing (“EPA’s Existing Stocks Determination”). 78 Fed. Reg. 8123, 8126 (Feb. 5, 2013). On April 12, 2013, Reckitt filed a Motion for an Expedited Determination in this proceeding challenging EPA’s Existing Stocks Determination, and seeking a ruling from Your Honor that the issue of the sell-through of existing stocks is properly part of this Hearing (but not seeking disposition of this issue on its merits at this time). *See* Motion for an Expedited Determination that EPA’s Existing Stocks Decision is Within the Scope of the Hearing.

In an abundance of caution, and due to ambiguous case law as to whether EPA’s assertion in the Notice regarding the sell through of existing stocks might constitute an “order . . . following a public hearing” under 7 U.S.C. § 136n(b) (FIFRA § 16(b)), Reckitt filed a Petition for Review of EPA’s Existing Stocks Determination with the Tenth Circuit Court of Appeals on April 12, 2013. Reckitt considers this proceeding to

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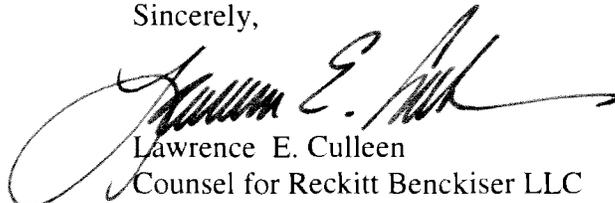
be the proper forum for disposition of EPA's Existing Stocks Determination. However, given the position taken in EPA's Existing Stocks Determination, and because any appeal under FIFRA 16(b) must be filed "within 60 days after entry of such order," Reckitt felt obliged to file a protective Petition for Review to protect its rights. At the same time, since Reckitt acted only to protect its rights in the face of the potential deadlines provided in FIFRA §16(b), we also filed in the Tenth Circuit a Motion to Stay Consideration of Petitioner's Protective Petition for Review, pending the outcome of the disposition of Reckitt's motion in this proceeding. EPA did not oppose this motion (but did not waive its rights to contest jurisdiction).

On April 15, 2013, the Tenth Circuit issued an Order suspending briefing on the merits of the Petition for Review, and establishing a briefing schedule on the "jurisdictional" issue of "whether a final agency action which is subject to judicial review has been issued." *See* Exhibit 1 (attached). Reckitt is still considering our response to the Tenth Circuit's Order, and we also are consulting with counsel for EPA to determine whether or to what extent we and EPA have a substantive difference of opinion on this issue of appellate jurisdiction.

It remains Reckitt's intent to address and resolve EPA's Existing Stocks Determination before Your Honor in this proceeding. Our filings before the Tenth Circuit were intended solely to protect against a cutoff of our right to appeal in the event that the EPA Existing Stocks Determination was found to be a final agency action subject to the 60-day appeal deadline of FIFRA § 16(b).

Thank you very much.

Sincerely,



Lawrence E. Culleen
Counsel for Reckitt Benckiser LLC

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

CERTIFICATE OF SERVICE

I certify that the foregoing letter, dated April 17, 2013, was served at the addresses listed below in the manner indicated.



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Dated: **April 17, 2013**

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Exhibit 1

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

April 15, 2013

FOR THE TENTH CIRCUIT

**Elisabeth A. Shumaker
Clerk of Court**

RECKITT BENCKISER LLC,

Petitioner,

v.

No. 13-9543

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

ORDER

Briefing on the merits is **SUSPENDED** pending further order of this court.

However, the preliminary documents must still be filed.

The court is considering summary dismissal of this appeal for lack of appellate jurisdiction. The petitioner shall file a memorandum brief within 21 days of the date of this order addressing the following jurisdictional issue.

Whether a final agency action which is subject to judicial review has been issued?

The respondent shall file a memorandum brief in response within 21 days of the date of service of the petitioner's memorandum.

The court reserves judgment on the petitioner's motion to stay consideration.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in cursive script that reads "Ellen Rich Reiter".

by: Ellen Rich Reiter
Jurisdictional Attorney