UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: Reckitt Benckiser LLC, et al. EPA Reg. Nos. 3282-3, 3282-4, 3282-9, 3282-15, 3282-66, 3282-74, 3282-81, 3282-85, 3282-86, 3282-87, and 3282-88; Application Nos. 3282-RNU and 3282-RNL	FIFRA Docket No. 661

PETITIONER RECKITT BENCKISER'S ANSWER AND MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT-INTERVENORS' JOINT MOTION TO PRECLUDE TESTIMONY OF PETITIONER RECKITT BENCKISER'S PROPOSED WITNESSES

Petitioner Reckitt Benckiser LLC ("Petitioner"), by and through undersigned counsel, hereby submits its Answer and Memorandum of Law in Opposition to Respondent-Intervenors' ("Intervenors") Joint Motion to Preclude Testimony of Petitioner's Witnesses ("Motion to Preclude").

INTRODUCTION

The instant proceeding will be the first time in nearly 20 years that an EPA action to cancel a registered rodenticide has come to a full evidentiary hearing, and the first time since FIFRA was amended in 1996 that EPA has attempted to cancel a consumer use pesticide that controls pests of significant public health importance. Appropriately, the rules of procedure governing FIFRA cancellation hearings allow for the broad admissibility of evidence, even evidence inadmissible under the Federal Rules of Evidence, as long as the evidence is "relevant, competent and material." *See* 40 C.F.R. § 164.81(a). Indeed, rejection of testimony prior to a

hearing is "disfavored," and evidence is rejected only where it is "clearly inadmissible for any purpose." *See Carbon Injection Systems LLC*, Docket No. RCRA-05-2011-0009, 2012 WL 3068488 (E.P.A. May 31, 2012) (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)).

In this context, Intervenors have utterly failed to justify their Motion to Preclude the testimony of Petitioner's witnesses. Intervenors do not even contend that the testimony is not relevant, competent or material, and the testimony Intervenors seek to preclude is neither redundant nor "unduly repetitious." *See* 40 C.F.R. § 164.81(a). Intervenors, relying solely on necessarily succinct witness descriptions but failing to consider other documents in the record, erroneously conclude that testimony is repetitious merely because it addresses the same broad subject area. In fact, the witnesses Intervenors seek to preclude address different issues and from differing perspectives. Because they have singularly failed to meet the high standard for precluding testimony or evidence prior to a hearing, Intervenors' motion should be denied.

PROCEDURAL HISTORY

In accordance with 40 C.F.R. § 164.50, on February 10, 2014, this Tribunal issued an order ("Prehearing Order") directing the parties to engage in a prehearing exchange of primary discovery materials. Prehearing Order at 2. Among other things, the Prehearing Order directed the parties to exchange "a list of names of all expert and other witnesses [each party] intends to call at hearing," as well as "a brief narrative summary of each witnesses' expected testimony." *Id.* (emphasis added); *accord* 40 C.F.R. § 164.50(b). As provided by the Prehearing Order, Petitioner filed and served its initial and rebuttal prehearing exchanges, which included the required "brief summary" of each of its witness's expected testimony. Petitioner also included

as exhibits to the prehearing submissions a number of expert reports—several of which were prepared by witnesses whom Intervenors seek to exclude.

On April 11, 2014, Intervenors filed the Motion to Preclude, which alleges that certain of Petitioner's witnesses "will offer redundant testimony" and moves *in limine* to preclude the testimony of those witnesses. Motion to Preclude at 2. The Motion to Preclude concludes that the witnesses Petitioner identified will provide "redundant" testimony based solely upon Intervenors' comparison of the brief witness summaries included in Petitioner's prehearing submissions. *Id.* at 2-3, 6-7. The Motion to Preclude does not make reference to the expert reports or curricula vitae ("CVs") submitted with Petitioner's filings as Petitioner's Exhibits, notwithstanding the fact that the expert reports and CVs provide significantly more detail than do the brief witness summaries with respect to the area of expertise of the witnesses for whom such reports were submitted, and the expected testimony of those witnesses.

ARGUMENT

I. This Tribunal Should Deny Intervenors' Motion *In Limine*

A. Intervenors Fail to Meet the High Legal Standard Required to Preclude Evidence Prior to a Hearing

This Tribunal has emphasized that motions to preclude evidence prior to the start of a hearing are "generally disfavored" and should not be granted unless the evidence a movant seeks to exclude is "clearly inadmissible for any purpose." *Carbon Injection Systems LLC*, Docket No. RCRA-05-2011-0009, 2012 WL 3068488 (E.P.A. May 31, 2012) (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)).[1] Unless a movant can satisfy this "high standard,"

[1] *Carbon Injection Systems* was conducted in accordance with 40 C.F.R. part 22, as opposed to 40 C.F.R. part 164. However, because the evidentiary standards set forth in 40 C.F.R. parts 22 and 164 are essentially identical with respect to the treatment of "unduly repetitious" testimony, the holdings of *Carbon Injection Systems* and other administrative hearings cited herein apply with equal force to this hearing, or at the very least provide guidance. *Compare* 40 C.F.R.

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motions regarding evidentiary issues must be deferred until the hearing, where "questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id.*; *see also Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 WL 2626549 (E.P.A. June 2, 2011) (denying motion to exclude certain proposed testimony and deferring consideration until the hearing); *Aquakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 WL 2470250 (E.P.A. June 2, 2010) (denying motion *in limine* and stating " should be given the opportunity at the hearing to demonstrate the relevance and materiality of the documents at issue to liability or the determination of any penalty.").

This legal standard applies with full force to motions to preclude witness testimony based upon an assertion that the testimony may be redundant or cumulative. For example, in *Carbon Injection Systems*, Docket No. RCRA-05-2011-0009, 2012 WL 3068483 (E.P.A. May 31, 2012), this Tribunal denied a motion *in limine* seeking to preclude overlapping testimony of two witnesses, notwithstanding the fact that their proposed testimony and respective declarations "[were] remarkably similar in the language used and the topics covered." Instead, because the movant failed to demonstrate that the proposed testimony of either witnesses was clearly inadmissible for any purpose, this Tribunal held that it was "premature to enter an order barring one witness's testimony over another." *Id.*

Notwithstanding this clear precedent, the Motion to Preclude neither references the relevant legal standard, nor sets forth any basis to conclude that the evidence Intervenors seek to preclude is "clearly inadmissible." *In re Carbon Injection Systems LLC*, 2012 WL 3068488.

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§ 22.22 (evidence) and § 164.81 (evidence); *see Request to Reduce Pre-Harvest Interval for EBDC Fungicides on Potatoes*, Docket No. EPA-HQ-OPP-2007-0181 (Order Granting Extension of Time to File Pre-Hearing Exchanges and Deferring Pre-Hearing Conference, Oct. 29, 2007) (relying on Part 22 and Part 164 Subpart B rules for guidance in hearing governed by Part 164 Subpart D).

Instead, Intervenors simply assert that the evidence should be precluded because the Intervenors believe, based solely upon their inspection of brief witness summaries submitted by Petitioner, that several of Petitioner's witnesses "will offer redundant testimony." Motion to Preclude at 2. As set forth in this Tribunal's opinion in *Carbon Injection Systems*, a party's concern regarding potential redundant testimony does not provide a legal basis to preclude testimony prior to a hearing. *Carbon Injection Systems*, 2012 WL 3068483. Instead, the appropriate time for adjudication of evidentiary issues is during the hearing, where "questions of foundation, relevancy, and potential prejudice may be resolved in the proper context." *Id.* Here, because Intervenors have failed to satisfy the high legal standard necessary to preclude evidence prior to a hearing, Intervenors' Motion to Preclude should be denied, and any evidentiary issues should be deferred until the hearing.

B. The Cases Relied upon by Intervenors Are Inapposite and Support Denial of Intervenors' Motion

In addition to failing to recognize the appropriate legal standard, Intervenors' brief relies largely upon unpublished cases that are not only distinguishable from, but stand for propositions different than those asserted by Intervenors. For example, Intervenors cite *Engman v. City of Ontario*, 2011 WL 2463178, at *8 (C.D. Cal. June 20, 2011) to support the assertion that courts routinely preclude redundant testimony. Specifically, Intervenors claim that "the trial judge refused the defendants' proposal to have even [sic] two separate witnesses testify" because the "witnesses' opinions overlapped substantially." Motion to Preclude at 5. However, this description mischaracterizes the facts and the holding of the case. In *Engman*, plaintiffs designated two police officers to testify with respect to the same issue, and defendants moved *in limine* to exclude the testimony of one of those witnesses as cumulative. However, after plaintiffs stated at oral argument that they intended to call the second witness at trial only if the

first witness was unavailable, the court denied defendants' motion *in limine* as moot. Thus, contrary to Intervenors' assertion otherwise, the court did not "refuse[]" any proposal by plaintiffs with respect to those witnesses. *Id.* at *8. Moreover, the court in that case expressly recognized concerns regarding excluding evidence prior to trial, quoting another case from the same district stating that "the court is almost always better situated to rule on evidentiary issues in their factual context during trial." *Id.* at *2 (quoting *Colton Crane Co. v. Terex Cranes Wilmington, Inc.*, No. CV 08-8525 PSG (PJWx), 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010)).

Similarly, Intervenors cite *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987) to support their assertion that "[c]ourts regularly preclude the kind of redundant witnesses that Reckitt has identified." Motion to Preclude at 4. However, *Johnson* did not pertain to the preclusion of "redundant witnesses." Instead, in that case, the district court set time limits on both parties to prevent the trial from extending into a subsequently scheduled trial. *Johnson*, 808 F.2d at 677. Moreover, although the Eighth Circuit recognized that trial courts may place reasonable limits on testimony, it admonished the trial court for placing rigid hour limitations on the presentation of evidence "in advance of trial." *Id.* at 678. Notwithstanding this objection, the Eighth Circuit affirmed the decision below because the plaintiff did not object to the established limits during trial and therefore did not preserve the issue for appeal. *Id.* at 678-679.[2]

Finally, Intervenors rely heavily upon *McCabe v. Ramparts, Inc.*, No. 2:08-CV-01232-PMP-GWF, 2012 WL 2873842, at *1 (D. Nev. July 13, 2012) to assert that courts may bar

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[2] Intervenors' reliance upon three additional circuit court cases, *MCI Commc'ns Corp. v. Am Tel. & Tel. Co.*, 708 F.2d 1081, 1171 (7th Cir. 1983), *Sutkiewicz v. Monroe Cnty. Sheriff*, 110 F.3d 352, 361 (6th Cir. 1997), and *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994) is equally misplaced. In each of those cases, circuit courts affirmed district court decisions placing general time limits on both parties for trial. None of these case involved a motion to preclude certain witnesses or testimony due to redundancy.

"multiple witnesses from testifying on a single subject area even where those witnesses arguably could offer distinct perspectives on the subject at issue." Motion to Preclude at 5-6. However, in that case, the court determined the testimony would be cumulative only after holding an evidentiary hearing at which the court examined the subject matter and expertise of each expert. *McCabe*, 2012 WL 2873842, at *1. Here, the Intervenors ask the Judge to conclude that the testimony will be redundant based upon nothing more than the brief summaries of proposed testimony included in Petitioner's prehearing submissions. Similarly, the final two cases relied upon by Intervenor are inapposite, because in each of those cases the court granted motions *in limine* based upon information obtained in witness affidavits and disclosure statements—far more information than that underlying Intervenors' arguments here. *See Thorndike v. DaimlerChrysler Corp.*, 266 F. Supp. 2d 172, 185 (D. Me. 2003); *Direct Focus, Inc. v. Admiral Ins. Co.*, No. C00-5170FDB, 2002 WL 34364134, at *1 (W.D. Wash. Apr. 11, 2002). These cases reinforce the conclusion that Intervenors' motion is untimely, and that evidentiary issues should be deferred until the hearing.

Accordingly, because Intervenors fail to demonstrate that the evidence Intervenors seek to preclude is "clearly inadmissible," the Motion to Preclude must be denied. *In re Carbon Injection Systems LLC*, 2012 WL 3068488.

II. Petitioner's Witnesses Whom Intervenors Seek to Preclude Are Not Cumulative and Their Testimony Will Not Be Unduly Repetitious

The Motion to Preclude should additionally be denied because the evidence Petitioner seeks to present is not unduly repetitious. Intervenors characterize several subject areas for which they claim Petitioner's witnesses will offer "redundant" testimony: human health risks from rodenticide exposures; public health implications of EPA's Notice of Intent to Cancel; risks to pets from rodenticide exposures; risks to wildlife from rodenticide exposures; rodent

resistance to anticoagulant rodenticides; the comparative efficacy of various methods of pest control and rodenticide products; Reckitt's efforts to comply with EPA's requirements for rodenticide products; and the position that Reckitt products occupy in the consumer market. Intervenors apparently misapprehend the substance of Petitioner's case. In fact, the witnesses Petitioner has identified in its prehearing exchange not only have unique areas of expertise, they are expected to testify on distinct topics, and their testimony has not been accurately characterized by Intervenors.

A. Human Health

Intervenors complain that Petitioner's human health experts are "expected to testify on predominantly overlapping topics" and have "parallel qualifications," including, "[f]or instance, a shared background in medical toxicology." In fact, a background in toxicology—which is itself unremarkable in a FIFRA cancellation hearing—is the only shared qualification of these experts. Their other qualifications range from expertise in identifying and responding to calls to poison control centers regarding incidents involving exposures to household products, to the uses and application of quantitative and regulatory risk assessment methodologies. The pertinence of their experiences and the differences among their respective areas of expertise are evident from their CVs and the summaries of their expected testimony, as well as from the exhibits they have authored. Nevertheless, set forth below is additional information that will make clear that the testimony they are expected to provide is not unduly repetitive and is clearly relevant; that the witnesses are competent; and that the testimony they will offer is material.

Each of these experts approaches the issues of human health and the potential effects of human exposures to rodenticides from a different perspective, and will address different aspects of this issue. Dr. Hillman, based on his nearly 40 years of clinical experience in emergency

medicine, will testify on the potential for adverse human health effects from inadvertent ingestion of second-generation anticoagulant rodenticides ("SGARs"); the difficulty and relative cost of diagnosing and treating exposures to the alternative ("non-SGAR") rodenticide active ingredients, such as the neurotoxin bromethalin, in the typical emergency department; and EPA's misguided emphasis on the incidents that can be attributed to intentional, symptomatic SGAR ingestions.

Dr. Chyka participated in the national consensus panel in which experts from academia, numerous government agencies (including EPA scientists) and practitioners reviewed over 30 years of medical literature and data on the outcomes of events involving reports of human exposures to SGARs and developed the most contemporary, peer-reviewed guideline that is used by poison control centers to respond to reported SGAR exposures. He will testify as to the research, conclusions, and recommendations of the consensus panel, including its determination that practically all unintentional ingestions of SGARs in children under six require no medical interventions and can be safely observed at home.

Dr. Kingston, who has more than 30 years of experience working in poison control centers, will testify that EPA's analysis of rodenticide risks reflects a mischaracterization of poison control center incident data. He also will testify that risks of injury or death to humans within certain vulnerable sub-populations (e.g., people with psychological or developmental disabilities, and depressed or suicidal individuals) are actually increased by EPA's proposed cancellation action.

Dr. Mileson will testify about accepted methodologies used in regulatory risk assessments concerning pesticide exposures, including certain technical aspects of EPA's human health risk assessment in this matter. Dr. Mileson also will testify about the Agency's reliance

on certain data, toxicity endpoints, and uncertainty factors. Dr. Mileson will also provide an alternative risk assessment (PRX 529), using her professional judgment, experience, and methods commonly and repeatedly accepted in regulatory contexts. Dr. Mileson's risk assessment considers the comparative risks of the active ingredients used in certain of Petitioner's products relative to the risks of bromethalin and other non-anticoagulant rodenticides.

Finally, Dr. McCluskey's testimony will present the results of an extensive literature review concerning human health, rodent-associated diseases, rodenticides, and alternative methods of rodent control, which will assist in evaluating the overarching risk-benefit analysis that is considered in a FIFRA cancellation action.

Far from being cumulative, these experts will testify on different issues, based on varied experiences and perspectives.

B. Public Health

The Intervenors' contention that the testimony of Petitioner's public health witnesses will be cumulative are also misplaced. Dr. Gessner will testify concerning the rodent-associated and rodent-borne illnesses and injuries that afflict millions of Americans. He will also testify that low-income and minority communities disproportionately bear this burden; that mouse-related asthma causes tens of thousands of emergency room visits and hospitalizations each year; and that hundreds of Americans annually — mostly children — seek medical treatment for rat bites; and that rodents transmit dozens of infectious diseases. Dr. Lipkin's testimony will focus specifically on his investigations into novel pathogens being carried actively by rodents living in New York City. Such novel pathogens are, by definition, distinct from the better-recognized rodent-borne diseases that Dr. Gessner will discuss.

C. Pets

Intervenors contend that "three witnesses [will] discuss the risks to pets posed by exposure to various rodenticides." In fact—as is evident from her expert report, submitted March 14, 2014 as PRX 531—Dr. Kashuba's testimony is exclusive to wildlife. Only Drs. Brutlag and Poppenga will address risks to pets from rodenticides.

Dr. Brutlag, a practicing veterinarian and Associate Director of Veterinary Services at Pet Poison Helpline and SafetyCall International, PLLC, will testify that EPA's cancellation of Reckitt's products would create a market for consumer-use rodenticides, such as bromethalin and cholecalciferol, that pose an unreasonable risk to domestic animals. These rodenticides are generally more toxic than anticoagulant rodenticides to both dogs and cats, have no antidote, and are more expensive to treat. Dr. Brutlag also will discuss recent data comparing trends in pet exposure to SGARs and to non-anticoagulant rodenticides.

Dr. Poppenga is Head of the Toxicology Section of the California Animal Health and Food Safety Laboratory System, and directs the only laboratory in the country with the expertise and resources to perform certain veterinary diagnostics. His testimony will focus primarily on the limited availability and cost of diagnostic tests to detect intoxication by non-anticoagulant rodenticides; the frequency of malicious use of rodenticides and the enhanced dangers associated with non-anticoagulants; and the inconsistencies in EPA's mitigation strategies for rodenticides and other products that present risks to pets. Dr. Poppenga's testimony is highly relevant and not cumulative.

D. Wildlife

Intervenors seek to exclude several of Petitioner's witnesses testifying on the broad area of risk to wildlife. Apparently, Intervenors believe these witnesses' testimony is cumulative

solely because each witness proposes to address some aspect of EPA's voluminous assertions regarding the risk d-CON products pose to wildlife. ' In fact, Intervenors' characterization of the testimony of these witnesses ignores the unambiguous differences in the areas of their testimony, as well as their training and credentials.

Dr. Fairbrother is a veterinarian and a Ph.D. toxicologist with extensive experience in ecotoxicology and wildlife toxicology. She will testify that EPA's ecological risk assessment and risk mitigation measures are based on flawed premises and methodologies. Specifically, Dr. Fairbrother will testify, *inter alia*, on whether consumer users are a primary or even significant source of wildlife exposure to rodenticides compared to professional, agricultural, and agricultural rodenticide users; the extent to which rodenticide exposure is a source of wildlife mortality, particularly in the context of other causes of death; and whether EPA has sufficiently addressed risks to wildlife from alternative rodenticides.

The testimony of Dr. Stroud, who served as a diagnostic and forensic veterinary pathologist for the U.S. Fish and Wildlife Service for over 27 years, will focus on reported wildlife incidents involving rodenticides. Dr. Stroud will testify concerning the complexities of diagnosing anticoagulant rodenticide exposure as a cause of death, and will critically assess the conclusions EPA has reached regarding the incidence of brodifacoum-involved wildlife incidents based on the Agency's database of incident reports.

Dr. Kashuba specializes in the development and application of modeling techniques such as probabilistic risk assessment, decision analysis, and multilevel hierarchical modeling. She will critically assess EPA's wildlife risk assessment model. Dr. Kashuba will discuss her own probabilistic risk assessment, which uses real-world data and bounded assumptions to model the

risk of brodifacoum to three representative predator species, and reaches conclusions significantly different from those reached by EPA.

Finally, as Petitioner previously explained in its April 1, 2014 Motion to Supplement Prehearing Exchange, Intervenors' objection to "including two [witnesses] to testify on a specific study" is unfounded. Mr. Brewer, who is trained as a wildlife biologist and ecotoxicologist, designed and implemented the fieldwork aspect of the study in question. Dr. Reibach, who is an expert in analytical chemistry methodologies, supervised the laboratory analysis of tissues from animals trapped by Mr. Brewer's team. Both will testify to the extent necessary to validate and provide an evidentiary foundation for the study. If the other parties are willing to stipulate to the validity and admissibility of this study, Petitioner is open to not calling Dr. Reibach and Mr. Brewer as witnesses on that issue. However, Petitioner notes that Dr. Reibach may also testify, in his expert capacity, as to the validity of analytical methods used in other studies relied on by the parties, while Mr. Brewer may also testify to the testing methodologies and implementation of certain studies of rodent resistance and rodenticide efficacy.

E. Rodenticide Resistance

Intervenors have also characterized the testimony of three of Petitioner's witnesses, putatively pertaining to rodent resistance to first-generation anticoagulant rodenticides ("FGARs"), as cumulative. This reflects an inadequate understanding of the evidence each will proffer. While Dr. Meyer's testimony will touch on the likelihood that some percentage of the U.S. rodent population is or will be resistant, this is not her expertise or the focus of her expected testimony and the document she has produced. In fact, the word "resistance" appears nowhere in her witness description. Dr. Meyer is trained as a biologist and an ecologist, and she is an expert in population biology and modeling. She will testify, based on her modeling work (*see* PRX

618) that in the event that EPA's proposed cancellation and denial actions go forward, the number and duration of commensal rodent infestation will increase—perhaps dramatically—as consumers turn to less-effective alternatives.

In contrast to Dr. Meyer, Dr. Kohn is an evolutionary biologist who specializes in the evolutionary dynamics of resistance in mice and rats. He will discuss the genetic signature and dynamics of commensal rodent resistance in the United States, his own recent studies finding genetic resistance among rat and mouse populations in the U.S. (*see* Exhibit 538), and the potential impact on the incidence and distribution of resistant strains of commensal rodents in the event that EPA removes SGARs from the consumer market.

In contrast, Dr. Pelz will testify on the experience of European countries in addressing the growth of genetic resistance among commensal rodents, and apply these experiences to EPA's proposal to ban consumer use of SGARs. Dr. Pelz has spent 35 years as a researcher in applied rodent ecology and rodent control, and has been instrumental in the development of control strategies for resistant rodents in Europe and worldwide. He will provide historical context for the development of resistant rodent populations around the world, and will testify on EPA's assumptions regarding the severity and the consequences of the development of resistance to FGARs in the U.S.

F. Rodenticide Efficacy

Although Intervenors assert that the testimony of Drs. Prescott and Buckle will be redundant, in fact they will offer distinct expertise. Dr. Prescott is a laboratory researcher whose recent work—some of which is ongoing—has contributed to the literature on the relative efficacy of different rodenticide active ingredients and formulations, as they relate to both resistant and non-resistant rodents. He will testify, *inter alia*, on his research demonstrating that

rodenticides presented in a wax block formulation have substantially lower acceptance rates than pellet formulations. Dr. Prescott will also testify on the feeding studies and resistance factors studies he has conducted that provide a specific quantitative measure of the reduced efficacy of certain rodenticides when used against resistant strains of house mice.

Over the course of his 40-year career, primarily in public service, Dr. Buckle has been a leader in the development of European policy on rodenticide use. Dr. Buckle will testify about the extensive body of published scientific literature demonstrating that applications of SGARs are the most reliably efficient method for the control of commensal rodents, especially of house mice; that block formulations are less readily accepted by rodents than are particulate formulations, such as pellets; and that tamper-resistant bait stations may significantly deter consumption of rodenticide baits by rodents. He will also testify about regulatory approaches to rodenticides in the U.K., where educational campaigns directed at professional and agricultural users have succeeded in reducing wildlife exposures.

G. Petitioner's Company Representatives

Finally, Intervenors object to testimony by three of Petitioner's company representatives, attempting to reduce several paragraphs of witness description to two topics: Petitioner's "efforts to comply with EPA's requirements for rodenticide products," and "the place that [Petitioner's] products occupy in the consumer market." In fact, as one might expect given their disparate job titles, each witness will address different issues. .

Mr. Ambuter, Director of Regulatory and Government Affairs for North America, will testify that Petitioner has revised its rodenticide formulation and labeling and sought amendments and new registrations in an effort improve upon the safety of its products and arrive at alternative risk mitigation measures to address EPA concerns. Additionally, Mr. Ambuter will

provide the recent history of rodenticide regulation from the perspective of a registrant. To the extent necessary, he will also provide factual testimony concerning the rate of incidents involving various rodenticides.

Ms. Scharer, the Senior Brand Manager for Petitioner's d-CON product line, will testify about the consumer rodent control product market, as well as pricing, market share, and sales volume for these products.

Dr. Watson, Scientific Services Group Manager for North America, will provide testimony on the many efficacy and safety studies undertaken by Petitioner in support of its rodenticide registrations, and on how EPA, as a practical matter, does and does not assess the efficacy of consumer rodenticide products.

Intervenors' Motion to Preclude attempts to lend the appearance of redundancy to Petitioner's witnesses by sorting them into broad categories—in many cases, without regard to information in the record demonstrating their distinct expertise. The reality is that the evidence to be presented by Petitioner's witnesses reflects the complexity of the issues in this case, and is not cumulative.[3]

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[3] This memorandum addresses only the witnesses alleged by Respondents to be redundant. Petitioner stands ready to provide additional information or offers of proof, in accordance with 40 C.F.R. § 164.81(f), in regard to any witness identified in Petitioner's Pre-Hearing Exchange or Supplement, or to provide a verified witness statement as an offer of proof.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that the Judge deny Intervenors' Motion.

Dated: April 21, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Petitioner Reckitt Benckiser's Answer and Memorandum of Law in Opposition to Respondent-Intervenors' Joint Motion to Preclude Testimony of Petitioner Reckitt Benckiser's Proposed Witnesses dated April 21, 2014, was served at the addresses listed below in the manner indicated.

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