UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

Rec'd OALJ 5/27/14 MS

In the Matter of:	)	
	)	
Reckitt Benckiser LLC, et al.	)	FIFRA Docket No. 661
	)	
EPA Reg. Nos. 3282-3, 3282-4, 3282-9, 3282-15, 3282-65, 3282-66, 3282-74, 3282-81, 3282-85, 3282-86, 3282-87, and 3282-88; Application Nos. 3282-RNU and 3282-RNL	)	

EPA'S REPLY TO RECKITT BENCKISER'S RESPONSE AND OPPOSITION TO EPA'S MOTION FOR ADDITIONAL DISCOVERY

The Assistant Administrator for Chemical Safety and Pollution Prevention ("Respondent") moves for leave to file this reply to the brief of petitioner Reckitt Benckiser LLC ("Reckitt") opposing Respondent's motion for additional discovery. Respondent believes that allowing this reply brief will help clarify and simplify issues relevant to the pending motion for additional discovery, and will not unfairly prejudice any party. Accordingly, Respondent urges the Tribunal to accept this filing pursuant to her discretion under 40 CFR § 164.60(b).

1. Respondent's Replies Regarding Objections to Specific Discovery Requests

Requests 1 and 2:

Reckitt objects that information about products not subject to the Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products ("NOIC") lack probative value with respect to facts at issue in this proceeding. Respondent

believes that the frequency and nature of non-target exposures to the different types of rodenticides will be contested issues in this proceeding, as will the effectiveness of the market segregation system articulated in EPA's 2008 Risk Management Decision ("RMD"). The products of Respondent's discovery requests 1 and 2 would have significant probative value regarding the quantities and types of rodenticide products that are used by residential consumers versus commercial and agricultural users, which in turn is relevant to the risks posed by rodenticide products at issue in this proceeding.

Respondent intends to present evidence about rodenticide exposure incidents involving non-target wildlife, children, and pets (collectively "non-target exposure") over the period of 1999 through 2013. The specific product that caused a particular non-target exposure is not always known in cases involving children and pets, virtually never known in wildlife incidents, and wholly absent in regard to unreported incidents. Consequently, comparative sales and usage data may provide the best way to identify the products most likely to be causing the non-target exposures.

Reckitt's proposal to provide sales volume data for only four of its rodenticide products is insufficient because it is unlikely to significantly improve our understanding of the rodenticide market. Reckitt has marketed other consumer rodenticide products over the 1999-2013 period. Products which are closely related to one or more of the twelve products subject to this proceeding are of interest as they may have influenced the 1999-2013 non-target exposure databases to a greater or lesser extent. Products that conform to the RMD (or are closely related to RMD-conforming products) are of interest both in regard to incident frequency and market acceptance. Information regarding sales of all rodenticide products by the predominant manufacturer and marketer of consumer rodenticides, itemized by product, by size, and

geographic location, represents a large enough portion of the market to allow a more refined analysis of the non-target exposure databases that could not be made using data on only four products.

The time period 1999 through 2013 specified in these discovery requests is appropriate because it corresponds to the period over which Respondent has analyzed non-target exposure incidents involving rodenticides. Reckitt's proposal to provide sales volume data for the last five years is also insufficient because publication of the 2008 RMD may well have altered Reckitt's practices, as well as those of its customers.[1]

Respondent maintains that this request would produce information of significant probative value on a material issue in the proceeding, but concedes that Reckitt is in a better position to assess which of its documents would most efficiently satisfy the discovery requests. As noted in Respondent's Motion for Additional Discovery, Respondent remains willing to discuss with Reckitt the acceptability of disclosures of subsets of, or alternatives to, the requested information that could reasonably be expected to achieve the objectives of these discovery requests. Motion at 2.

For the reasons stated above, Respondent maintains that its discovery requests 1 and 2 are reasonably expected to produce information that has significant probative value on material issues in this proceeding.

[1] Reckitt concedes this point in its Response and Opposition: "The 2008 Risk Mitigation Decision (RMD) changed the rodent control market." *Id.* at 9 and *passim*.

Requests 3 and 4:

Reckitt offered to produce information responsive to Respondent's discovery requests 3 and 4 but only for four of the twelve products subject to this proceeding, and only its current specifications as to size and dimensions of those products' pellets, bits or granules.. Respondent's proposal to provide information on only four products is insufficient because Reckitt claims all twelve products are eligible for registration, and the sizes and masses of pellets, bits, granules, etc., of each rodenticide product has significant probative value regarding the likelihood and consequences of consumption of that product, which in turn is relevant to that product's risks and benefits.

Reckitt's offer to produce information only for four products is also insufficient because the size, dimensions and mass of products both subject and not subject to the NOIC is likely to have significant probative value relevant to this proceeding. As discussed above, these four products are not the only consumer rodenticide products that Reckitt has been marketing, and if different sizes and masses of pellets, bits, granules, etc., increase or decrease the frequency of non-target exposures, that information would have significant probative value.

Reckitt's offer to produce information on only the current sizes and masses of pellets, bits, granules, etc., is insufficient because it is products from 1999 through 20013 that are represented in the non-target exposure databases. The requested information would have significant probative value on material issues in this proceeding by allowing comparison of the 1999-2013 non-target exposure databases to different sizes and masses of rodenticide pellets, bits, granules, etc. Respondent would be willing to accept current specifications as to size, dimensions and mass if accompanied by reasonable assurances that the current specifications are reasonably reflective of past production of products subject to the NOIC and of Reckitt's other products.

Respondent maintains that this request would produce information of significant probative value on a material issue in the proceeding, but concedes that Reckitt is in a better position to assess which of its documents would most efficiently satisfy the discovery requests. Respondent remains willing to discuss with Reckitt the acceptability of disclosures of subsets of, or alternatives to, the requested information that could reasonably be expected to achieve the objectives of discovery requests 3 and 4.

Request 5: Respondent withdraws its discovery request 5.

Requests 6 and 7:

Reckitt offers to produce "documents sufficient to identify all retail establishments where products are currently sold, by SKU number, for products subject to the NOIC." This is insufficient in that it only addresses *current* retail outlets, will not indicate quantities sold at those retail establishments, and only applies to a small subset of the Reckitt rodenticide products which have influenced the 1999-2013 non-target exposure database.

Respondent anticipates that one disputed issue in this proceeding will be the extent to which residential consumer use of second generation anticoagulants products adversely affect non-target wildlife, versus use by other users. As the predominant manufacturer and marketer of second generation anticoagulant products in the United States, Reckitt's sales and distribution patterns for all its rodenticide products are highly relevant to this issue. The products of these discovery requests would have significant probative value regarding the quantities of rodenticide products relevant to this proceeding that are used by residential consumers versus commercial and agricultural users, which in turn is relevant to the risks posed by rodenticide products at issue in this proceeding.

Respondent proposes that its discovery requests 6 and 7 be read as limited to the years 1999 through 2013. Respondent intends to present information about non-target exposures to rodenticides over the period of 1999 through 2013. The specific products that caused particular non-target exposure incidents are not always known in cases involving children and pets, virtually never known in wildlife incidents, and wholly absent in regard to unreported incidents. Reckitt has marketed many rodenticide products over the 1999-2013 period, most of which are closely related to one or more of the twelve products subject to this proceeding, and which have influenced the non-target exposure database. Information regarding sales of all products by the predominant manufacturer and marketer of consumer rodenticides, itemized by product, by size, and geographic location, will allow a more refined analysis of the non-target exposure databases. Because the non-target exposure databases at issue in this proceeding cover the period of 1999 through 2013, sales of rodenticide products over the whole of that period will be much more informative than a mere listing of Reckitt's the current retail outlets, especially because publication of the 2008 RMD and the initiation of this cancellation proceeding may well have altered Reckitt's practices, as well as those of its customers.

As noted above, Respondent also believes that the effectiveness of the market segregation system articulated in the 2008 RMD will also be a contested issue. The products of Respondent's discovery requests 6 and 7 would have significant probative value regarding the quantities and types of rodenticide products that are purchased by residential consumers versus commercial and agricultural users, and the types of retail establishments where they purchase them.

For all of the above reasons, Respondent maintains that its discovery requests 6 and 7 are reasonably expected to produce information that has significant probative value on material

issues in this proceeding, but concedes that Reckitt is in a better position to assess which of its documents would most efficiently satisfy the discovery requests. Respondent remains willing to discuss with Reckitt the acceptability of disclosures of subsets of, or alternatives to, the requested information that could reasonably be expected to achieve the objectives of discovery requests 6 and 7.

Requests 8-12:

Reckitt objects that requests 8 through 12 are overbroad and unduly burdensome because they lack temporal boundaries and use the abbreviation "etc." to render their scope indefinite. Respondent would agree to substitute "or other market research" in place of "etc." in discovery requests 8-12. Respondent would also agree that its discovery requests 8 through 12 may be read as limited to the years 2004 through 2013, in order to provide a reliable characterization of the pre- and post-RMD market.

Reckitt objects that documents predating the 2008 RMD "cannot possibly have significant probative value" (Response and Objections at 9) owing to the changes in the rodenticide market occasioned by the 2008 RMD. Respondent believes that the nature and extent of such changes are highly relevant to the proper interpretation of the non-target incident databases and the effectiveness of the market segregation system articulated in the 2008 RMD.

For the reasons stated, Respondent maintains that its discovery requests 8 through 12 are reasonably expected to produce information that has significant probative value on material issues in this proceeding, but concedes that Reckitt is in a better position to assess which of its documents would most efficiently satisfy the discovery requests. Respondent remains willing to discuss with Reckitt the acceptability of disclosures of subsets of, or alternatives to, the requested

information that could reasonably be expected to achieve the objectives of discovery requests 8 through 12.

Requests 13-18:

Reckitt objects that requests 13 through 18 are overbroad and unduly burdensome because they lack temporal boundaries and use the abbreviation "etc." renders these discovery requests indefinite. Respondent would agree to substitute "or other market research" in place of "etc." in discovery requests 13-18. Respondent would also agree that its discovery requests 13 through 18 may be read as limited to the years 2004 through 2013, in order to provide a reliable characterization of the pre- and post-RMD market.

Reckitt objects that documents predating the 2008 RMD "cannot possibly have significant probative value" (Response and Objections at 11) owing to the changes in the rodenticide market occasioned by the 2008 RMD. Respondent believes that the nature and extent of such changes are highly relevant to the proper interpretation of the non-target incident databases and the accurate understanding of users' rodent control practices.

For the reasons stated, Respondent maintains that its discovery requests 13 through 18 are reasonably expected to produce information that has significant probative value on material issues in this proceeding, but concedes that Reckitt is in a better position to assess which of its documents would most efficiently satisfy the discovery requests. Respondent remains willing to discuss with Reckitt the acceptability of disclosures of subsets of, or alternatives to, the requested information that could reasonably be expected to achieve the objectives of discovery requests 13 through 18.

Requests 19 and 20:

Reckitt objects to the lack of temporal boundaries of requests 19 and 20, and objects that documents predating the 2008 RMD "cannot possibly have significant probative value" (Response and Objections at 13) owing to the changes in the rodenticide market occasioned by the 2008 RMD. Respondent believes that the nature and extent of such changes are highly relevant to the proper interpretation of the non-target incident databases and the accurate understanding of users' rodent control practices. For these reasons, Respondent maintains that its discovery requests 19 and 20 are reasonably expected to produce information that has significant probative value on material issues in this proceeding. Respondent would agree that its discovery requests 19 and 20 could reasonably be limited to the years 2004 through 2013, in order to provide a reliable characterization of the pre- and post-RMD market.

For the reasons stated, Respondent maintains that its discovery requests 19 and 20 are reasonably expected to produce information that has significant probative value on material issues in this proceeding, but concedes that Reckitt is in a better position to assess which of its documents would most efficiently satisfy the discovery requests. Respondent remains willing to discuss with Reckitt the acceptability of disclosures of subsets of, or alternatives to, the requested information that could reasonably be expected to achieve the objectives of discovery requests 19 and 20.

Requests 21-26: Reckitt states that information about its profits and production costs associated with rodenticide production "are irrelevant to the matter at hand." Response and Objections at 12-13. Accordingly, Respondent withdraws its discovery requests 21 through 26.

Requests 27-30:

Reckitt asserts that "as a matter of policy, Respondent has already established the threshold requirements for such information to contain probative value: its FIFRA section 6(a)(2) regulations, which set forth the conditions under which registrants are required to submit adverse effects reports to EPA." Response and Opposition at 14-15. However, those regulations presuppose that there are different reporting thresholds depending on context, such that information that would not otherwise have been reportable must be reported when a pesticide enters any Formal Review (defined in § 159.153(b) to include FIFRA section 6(b) cancellation proceedings).

As EPA explained in the preamble to the proposed rule Reporting Requirements for Risk/Benefit Information, "When a particular pesticide is or was involved [in a] 'Formal Review,' EPA's need for information is considerably greater. In such circumstances, the ultimate status of the pesticide depends on a comprehensive Agency reevaluation of the pesticide's risks and benefits, including an assessment of the reliability of previously submitted material and the extent to which it has been corroborated." 57 Fed. Reg. 44290, 44293-94 (Sept. 24, 1992). While this statement specifically addressed the need for toxicological studies beyond those that must routinely be reported, the principle applies identically to other types of information, such as efficacy studies and incident reports.

Consistent with the principle that the Agency's information needs are greater during proceedings such as this one, 40 CFR § 159.165(c) expressly requires registrants to report additional toxicity studies upon commencement of the proceeding: "Results from a study that demonstrates any toxic effect (even if corroborative of information already known to the Agency), must be submitted if the pesticide is or has been the subject of a Formal Review based

on that effect within 5 years of the time the results are received. Within 30 calendar days of the publication of a Notice of Commencement of a Formal Review in the Federal Register, all information which has become reportable due to the commencement of the Formal Review must be submitted."

Similarly, the thresholds for reporting adverse effects incidents become lower when a pesticide enters a Formal Review. Pursuant to § 159.184(e), only summary information must be reported, in aggregate form, for wildlife incidents categorized as "W-B" under § 159.184(c)(5)(iii). Thus, under ordinary circumstances, registrants would be required to submit the full § 159.184(c) reports for incidents involving adverse effects to wild birds (other than listed threatened or endangered species) only where "200 or more individuals of a flocking species, or 50 or more individuals of a songbird species, or 5 or more individuals of a predatory species" are affected. § 159.184(c)(5)(iii)(B). For all other bird incidents, registrants are ordinarily required to report only the summary information specified in § 159.184(e). In contrast, pursuant to § 159.184(c)(5)(iii)(A), full reports are required for *any* wildlife incident caused by a pesticide in a Formal Review.

The part 159 regulations do not mandate lower reporting thresholds for specific types of information other than toxicological studies and wildlife incidents, but instead provide in § 159.195(c) that "[t]he registrant shall submit to the Administrator information other than that described in §§159.165 through 159.188 if the registrant has been informed by EPA that such additional information has the potential to raise questions about the continued registration of a product or about the appropriate terms and conditions of registration of a product." The Agency had considered, but rejected, specifying lowered reporting thresholds for other information regarding Formal Review products, in favor of the more flexible thresholds available under the

newly added § 159.195: "The Agency has decided not to differentiate in this provision between pesticide uses that were once the subject of a special review or cancellation or suspension hearing and all other pesticide uses. If the Agency determines that it needs additional information concerning possible failure of performance of any pesticide, including one that was the subject of a special review or cancellation or suspension hearing, the Agency can request that information pursuant to § 159.195 of this final rule." 62 Fed. Reg. 49370, 49385 (Sept. 19, 1997).

Thus, contrary to Reckitt's premise, the Agency's regulations *do* envision a lower threshold for reporting information concerning the risks and benefits of a pesticide involved in a cancellation proceeding. By the express terms of part 159, Reckitt is already required to report toxicological studies and wildlife incidents that it was not previously required to report. Moreover, § 159.195 was expressly intended to (among other things) allow EPA to obtain for the purpose of a cancellation hearing information that registrants would not otherwise be required to report under part 159. Clearly, the ordinary reporting thresholds of part 159 are not, as Reckitt contends, the absolute threshold for probative value.

As previously noted "EPA's need for information is considerably greater" (57 Fed. Reg. at 44293-94) in a cancellation proceeding than in ordinary circumstances. Respondent explained in its Motion For Additional Discovery of Reckitt Benckiser, Reckitt is likely to possess additional information that falls outside the routine reporting criteria of part 159 that may provide additional detail that would have significant probative value regarding rodenticide exposures and the adverse effects caused by rodenticide products at issue in this proceeding. Respondent's Motion at 11. Respondent's discovery requests 27 through 29 target this information.

Respondent's discovery request 27 is as broad as FIFRA section 6(a)(2) itself and should encompass requests 28 and 29. However, in anticipation that Reckitt might attempt to construe request 27 as limited to the scope of part 159, Respondent included requests 28 and 29. Request 29 seeks all available information on those rodenticide incidents that were reported in aggregate form, as discussed above. Request 28 seeks information regarding pesticide *exposures* among non-target organisms, which in the absence of observed adverse effects, is not expressly required to be reported under part 159. Such exposure information can be extremely valuable for understanding the potential risks to non-target organisms, and is particularly relevant in this case, where key issues are whether and how non-target organisms become exposed. Request 28 seeks exposure information because the types and numbers of organisms exposed can provide information regarding how widespread non-target exposure is (e.g., is it occurring in geographically limited areas, across the whole country, to several individuals, to only a few individuals, to a few species of non-targets, to many species, to children, etc.); and how non-targets are being exposed (e.g., from primary exposure, secondary exposure, indoor uses, outdoor uses, urban uses, rural uses, etc.).

Request 30 seeks information regarding Reckitt's procedures and practices regarding adverse effects information is received and recorded and how the company responds to such information. This information is important for understanding what type(s) of incidents are being reported and which ones are not. Conversely, the absence of formal guidelines on handling adverse effects information would be probative in regard to the reliability of the incident data reported to the Agency.

Respondent proposes that its discovery requests 27 through 30 be read as limited to the years 1999 through 2013, corresponding to the non-target exposure databases at issue in this

proceeding. In regard to request 30, Respondent would be willing to a statement of current practices if accompanied by reasonable assurances that the current specifications are reasonably reflective of past practices.

For all of the above reasons, Respondent maintains that its discovery requests 27 through 30 are reasonably expected to produce information that has significant probative value on material issues in this proceeding, but concedes that Reckitt is in a better position to assess which of its documents would most efficiently satisfy the discovery requests. Respondent remains willing to discuss with Reckitt the acceptability of disclosures of subsets of, or alternatives to, the requested information that could reasonably be expected to achieve the objectives of discovery requests 27 through 30.

Requests 31 and 32:

Reckitt cites *Motiva Enterprises*, 2001 EPA ALJ LEXIS 159 (EPA ALJ 2001) for the proposition that cross-examination would be a more suitable mechanism than document discovery for Respondent to obtain information on the key specifications and starting assumptions of Reckitt's rodenticide resistance models. But the decision in *Motiva*, in relevant part, was with respect to interrogatories "dealing with the specific allegations of each [EPA] count." Id. at *10. Here, here Respondent is seeking the production of probative documents, not to quiz Reckitt's witnesses respecting their specific allegations. Furthermore, Reckitt has not asserted that there has already been a sufficient exchange of substantive information respecting the rodent population and rodenticide resistance models on which it presumably intends to rely. Reckitt instead argues that either the information has already been supplied, or (if not) such information will be provided at an unspecified point prior to the hearing.

In point of fact, such information has not been provided, and Respondent's current lack of access to the relevant documentation of Reckitt's models impairs meaningful review and critique. Reckitt has disclosed documentation reflecting the view of one of its witnesses that "use [of products containing chlorophacinone] would be anticipated to promote the spread and to increase the severity of anticoagulant-resistance in house mice in the United States." Buckle, PRX 491 at 15. And Reckitt has furthermore disclosed documentation reflecting efforts to model such an effect quantitatively. PRX 2-76, PRX 618. Yet Reckitt has, to date, declined to disclose the computational specifications, or the starting assumptions, intrinsic to such models. By withholding the relevant parameters and assumptions used in its model, Reckitt makes it impossible for Respondent to present at the hearing results of our own model using the same inputs, which will complicate the Tribunal's task of assessing the merits of the parties' respective positions.

Requests 33 and 34:

Reckitt objects that the information requested is obtainable through cross-examination, and that EPA already has more efficacy and product performance studies than Reckitt has. Respondent's requests 33 and 34 were prompted by the efficacy trials that Reckitt appears to have commissioned to be conducted on rodenticide products other than their own, such as those discussed in the PRX 2-71 and its attachments. These reports naturally raise questions about whether other, unreported studies show how Reckitt's products perform when tested under the similar conditions, and whether there are other studies showing superior performance by competitors' products. The results of such studies – or the absence of similar studies on Reckitt's own products – would have probative value on a material issue in this proceeding.

Respondent proposes that its discovery requests 33 and 34 be read as limited to the years 2008 through the present, thus reflecting the post-RMD market.

For all of the above reasons, Respondent maintains that its discovery requests 33 and 34 are reasonably expected to produce information that has significant probative value on material issues in this proceeding, but concedes that Reckitt is in a better position to assess which of its documents would most efficiently satisfy the discovery requests. Respondent remains willing to discuss with Reckitt the acceptability of disclosures of subsets of, or alternatives to, the requested information that could reasonably be expected to achieve the objectives of discovery requests 33 and 34.

Requests 35 and 36: Respondent proposes to stay its discovery requests 35 and 36 in response to Reckitt's agreement to voluntarily provide the requested documents.

Request 37:

Reckitt objects to discovery request 37 as seeking a document that would be exempt from disclosure pursuant to Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure ("FRCP"), which protects drafts of the expert reports required to be disclosed under Rule 26(a)(2). Respondent notes that Reckitt has not made available Dr. Gessner's final report, but Reckitt and its experts nevertheless appear to consider Dr. Gessner's work complete enough for use in this proceeding. Rule 26(b)(4)(B) is intended to protect attorney work product, so if the basis of Reckitt's objection is the protection of attorney work product information, Respondent would readily waive its request for this particular draft of Dr. Gessner's report if Reckitt would provide a final version of Dr. Gessner's report, or even a current draft in which "[t]he relevant material ... will be substantively unchanged from the draft on which PRX 544 relies." Petitioner's Response and

Opposition at 18-19. But a refusal to provide *any* version of Dr. Gessner's report while using the draft in its own trial preparation and as the foundation for other experts' reports would be a misuse of the FRCP Rule 26(b)(4)(B).

Reckitt offers to provide the portion of the draft report containing the conclusions referenced in PRX 544, n.56, Table 12, but it appears improbable that Dr. Gessner's conclusions are the only portion of the report that has been finalized. Dr. Cantor's final report evidences pervasive reliance on the analysis found in "the expert report of Dr. Bradford D. Gessner." PRX 544 at 31. Dr. Cantor's report does not refer to Dr. Gessner's report as a draft document, nor does she render her own opinions in a tentative fashion, as one would be reasonably expected to do if one were rendering opinions predicated on another's draft opinion. Nor do PRX 385 through PRX 419, figures apparently extracted from a March 2014 report prepared by Dr. Gessner, signify that they were extracted from a draft document.

Moreover, Reckitt has not set forth a principled basis to limit disclosure of Dr. Gessner's report to just the portion of the report containing the "conclusions referenced in PRX 544, n. 56, Table 12." (Report of Dr. Robin Cantor). Evidence of the basis for Dr. Gessner's conclusions is as likely to be probative as the conclusions themselves. Thus Respondent requests disclosure of all finalized content from Dr. Gessner's report, consistent with Petitioner's admission that "[t]he relevant material in Dr. Gessner's final report will be substantively unchanged from the draft on which PRX 544 relies." Petitioner's Response and Opposition at 18-19.

For the reasons stated, Respondent requests that the Tribunal order Reckitt to disclose in full either Dr. Gessner's final expert report, the expert report of Dr. Gessner cited in PRX 544, or a penultimate version in which "[t]he relevant material ... will be substantively unchanged from the draft on which PRX 544 relies."

Request 38: Respondent proposes to stay its discovery request 38 in response to Reckitt's agreement to voluntarily provide the portion of the draft report of Dr. Meyers cited in PRX 544.

Request 39: Respondent withdraws its discovery request 39.

Request 40: Respondent withdraws its discovery request 40 based upon Reckitt's representation that the substance of the requested information is contained in PRX 491.

Request 41:

In this request, EPA is seeking the production of documents that are cited in the Meyer report, currently unavailable to EPA, and that are probative of the validity of a claim contained in the Meyer report at page 21. EPA is not seeking to quiz Drs. Kohn or Meyer respecting any specific allegation, as in *Motiva*. Furthermore, Petitioner's assertion that there has already been a sufficient exchange of "the relevant information" respecting the claim is unsupported. The Meyer report merely asserts that "[t]he 75% assumed estimate represents the potential level of resistance in the future." As for why the claim is true, the reader is directed to a parenthetical reference: "Dr. Michael Kohn, personal communication." EPA disagrees that it would serve the interests of judicial economy for it to forgo current opportunities to examine relevant documentary evidence of the basis for a claim, based on the future opportunities to acquire such information by cross-examination of the witnesses.

Request 42: Respondent withdraws its discovery request 42.

2. Claims of Discovery Privileges

Reckitt objected to Respondent's requests to the extent that they call for discovery of privileged documents. It is not apparent to Respondent why the potential existence of documents which might be withheld from discovery pursuant to claims of privilege should be grounds for a general objection to the motion for additional discovery. If Respondent's motion is granted, Respondent fully expects that Reckitt will withhold responsive documents where it has legitimate claims that the documents would be privileged from discovery under the FRCP. But the fact that some of the documents sought in discovery might be eligible to be withheld as privileged is not a reason to deny Respondent's motion.

3. Identification of documents withheld as privileged

Reckitt objected to Respondent's proposed criteria for identifying documents withheld as privileged. Respondent proposes to stay this provision of its motion for additional discovery, while reserving the right to renew this portion of its motion if future circumstances warrant it.

4. Conclusion

For the reasons discussed above, Respondent's motion for additional discovery should be granted, subject to the exceptions noted above withdrawing requests (requests 5, 21-26, 39, 40 and 42), staying requests (requests 35, 36 and 38), adopting temporal limits (requests 6, 7, 8-20, 27-30, 33 and 34), adopting limiting language (requests 8-18), and staying the request for identifying documents withheld as privileged.

Respectfully submitted,

5/27/2014
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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of *EPA's Reply To Reckitt Benckiser's Response And Opposition To EPA's Motion For Additional Discovery* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

The Honorable Susan L. Biro
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