

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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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 RESPONSE AND OPPOSITION TO RESPONDENT-INTERVENORS' MOTION FOR ADDITIONAL DISCOVERY

Petitioner Reckitt Benckiser LLC ("Petitioner" or "Reckitt"), by and through undersigned counsel, hereby submits its Response and Opposition to Respondent-Intervenors' Motion for Additional Discovery.

INTRODUCTION

This Tribunal's Prehearing Order, dated February 10, 2014, directed the parties to conduct a prehearing exchange of primary discovery materials, pursuant to 40 C.F.R. § 164.50. Petitioner's initial, supplemental, and rebuttal exchanges contained more than 600 exhibits, totaling over 20,000 pages. Nevertheless, on May 5, 2014, several Parties¹ filed motions for additional discovery.

¹ Petitioner, Respondent EPA, and Respondent-Intervenors NRDC and WE ACT (collectively "Parties") filed motions for additional discovery. Petitioners Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do It Best Corporation, and Respondent-Intervenors American Bird Conservancy, Center for Biological Diversity, Defenders of Wildlife, and Sierra Club did not file motions for additional discovery.

The standard for discovery is “more restrictive” under the Rules of Practice than under the Federal Rules of Civil Procedure (“FRCP”), although the FRCP do provide guidance. *See Motiva Enterprises LLC*, Docket No. RCRA-3-2000-004, 2001 WL 1557780 (E.P.A. Aug. 17, 2001) (discussing the 40 C.F.R. Part 22 rules, which have a very similar provision for additional discovery as in 40 C.F.R Part 164); 40 C.F.R. § 164.51(a). There is no constitutional right to pretrial discovery in an administrative proceeding, and an administrative agency must grant discovery only if “a refusal to do so would so prejudice a party as to deny him due process.” *Tiger Shipyard, Inc.*, CERCLA 106(B) Petition No. 96-3, 1999 WL 1631889 (E.A.B. Apr. 21, 1999) (quoting *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979)). Consistent with these principles, the regulations at 40 C.F.R. § 164.51 provide for additional discovery in limited circumstances; such discovery is permitted only when the Administrative Law Judge determines “(1) that such discovery shall not in any way unreasonably delay the proceeding, (2) that the information to be obtained is not otherwise obtainable and (3) that such information has significant probative value.” “Evidence has significant probative value when it goes to prove a fact of consequence in a case.” *Motiva*, 2001 WL 1557780 (citing *Chautauqua Hardware Corp.*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622 (EAB, June 24, 1991, Interlocutory Order)).

In administrative proceedings like this one, “[i]n general, the information provided through the prehearing exchange and the ability to cross-examine witnesses at the hearing is sufficient.” *See Motiva*, 2001 WL 1557780. Where documents and information responsive to discovery requests already have been provided or substantially provided in the prehearing exchange, those requests should be denied. *See Acierno et al.*, Docket No. CWA-03-20005-0376, 2008 WL 483488 (E.P.A. Feb. 15, 2008) (interrogatories requesting the facts, opinions, factual basis for opinions, and qualifications of witnesses were denied as “duplicative and

burdensome” because “[t]hese questions [we]re answered or substantially [answered] in Complainant’s Prehearing Exchange”). In addition, in accordance with the “more restrictive” nature of additional discovery, overbroad and unduly burdensome requests also should be denied. *See id.* (rejecting interrogatories requesting descriptions of communications and conversations as “unduly burdensome”); *see also Motiva*, 2001 WL 1557780 (rejecting requests for all non-privileged documents responsive to 12 interrogatories as “overly broad”).

Applying these principles here, it is clear that Respondent-Intervenors’ discovery requests as served are excessive. As specified in the responses below, Petitioner has identified a substantial number of non-privileged documents that are responsive to the Respondent-Intervenors’ broad discovery requests and that can be reasonably located by Petitioner without undue burden. Should the Tribunal conclude that any additional discovery of Petitioner is appropriate, that discovery should be limited as described below. Petitioner responds and/or objects to Respondent-Intervenors’ requests as follows:

GENERAL OBJECTIONS

1. Petitioner objects generally to Respondent-Intervenors’ requests to the extent that any request calls for information or documents that are privileged, that were prepared in anticipation of litigation, trial, or hearing, which constitute attorney work product, that constitute attorney-client communication, or that are otherwise immune from discovery. Inadvertent disclosure of any such document or information shall not constitute a waiver of any privilege or any other ground for objecting to discovery with respect to a document or information, or other documents or information, and shall not waive the right of Petitioner to object to the use of any such document or information contained therein during this action or in any other proceeding. To the extent that responsive documents contain responsive confidential business information,

Petitioner will provide redacted copies and confidential, un-redacted copies pursuant to this Tribunal's Protective Order.

2. Petitioner objects generally to Respondent-Intervenors' requests insofar as any request calls for information or documents that are irrelevant to the subject matter of this proceeding or that are inadmissible and lack "significant probative value" such that they do not tend to prove a fact of consequence in this case. *See Motiva*, 2001 WL 1557780, and *Chautauqua Hardware*, 3 E.A.D. 616 (defining "probative value" to mean "the tendency of a piece of information to prove a fact that is of consequence in the case." (emphasis in original)).

3. Petitioner objects generally to Respondent-Intervenors' requests to the extent that they are unbounded with respect to scope and time. Most of Respondent-Intervenors' requests lack a time period for which the request applies, and several of Intervenors' requests use the phrase "all documents concerning . . ." to remove any bounds on the scope of the request. In addition, there is no limitation in the requests that the documents be in the possession, custody, or control of Petitioner, which suggests that Respondent-Intervenors are asking Petitioner to engage in a global search for documents in all media. These requests also could be interpreted to sweep in a massive number of tangential documents, electronically stored information ("ESI"), and other information. These requests are therefore overbroad, burdensome, and lack sufficient specificity to support a claim of significant probative value. *See Motiva*, 2001 WL 1557780 (explaining that the prehearing exchange and opportunity to cross-examine witnesses is sufficient, and denying requests as overly broad and unduly burdensome). In addition, as for ESI, FRCP 26(b)(2)(B) states: "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Petitioner objects to Respondent-Intervenors' requests that seek ESI that is not

reasonably accessible due to burden or cost, especially when the request covers a long or unbounded period of time. Should this Tribunal allow any further discovery, Petitioner respectfully requests that this Tribunal accept the narrower set of responsive documents that Petitioner has agreed to provide, as described in the specific responses below.

4. Petitioner objects to Respondent-Intervenors definition of “document” to the extent that it includes drafts. Drafts of expert reports are exempt from disclosure pursuant to Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure, and production of other drafts, particularly those found in ESI, would be unduly burdensome.

5. Petitioner objects generally to Respondent-Intervenors’ interrogatories and requests that they be denied. Petitioner provided extensive information and documents in its prehearing exchange, and will make its witnesses available for cross-examination. This is generally sufficient in administrative proceedings. *See Motiva*, 2001 WL 1557780. Additional discovery is extremely restrictive, as discussed above. However, in an attempt to help expedite the discovery process, Petitioner has agreed to pursue and provide document discovery described below in order to further enable all of the Parties to prepare for the hearing. Petitioner and Respondent EPA agree that interrogatories are premature at this time because prehearing procedures regarding witness statements and written testimony have not yet been determined. In the event that the prehearing procedures do not provide sufficient information or time to adequately prepare for witness examination, interrogatories may then be appropriate. Respondent-Intervenors’ request for interrogatories should be denied.

6. Petitioner’s document productions shall not be deemed a waiver of its rights to object on any ground to the relevance or admissibility of any portion of the information or documents contained or referenced in these documents, and Petitioner expressly reserves all such

objections. Petitioner's response to Respondents-Intervenors' requests also shall not be deemed a waiver of any of these general objections or of the specific objections set forth below, and Petitioner expressly reserves all such objections. All documents produced in response to discovery requests will be the result of a reasonably diligent search, and Petitioner expressly reserves the right to supplement, amend, or correct its responses.

RESPONSES TO SPECIFIC DOCUMENT REQUESTS

Request 1:

All documents identified in response to Respondent-Intervenors' First Set of Interrogatories to Petitioner Reckitt Benckiser, LLC.

Response:

As discussed in General Objection 5, Petitioner objects to Respondent-Intervenors' request for interrogatories on the grounds that they are inappropriate and premature. Additional objections and responses to each interrogatory are provided in the next section.

Request 2:

All documents concerning the rodent control efficacy of any Conforming Product.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad and unduly burdensome. To compile "documents concerning" the rodent control efficacy of any Conforming Product would require a resource-intensive search of the hard copy and ESI of Petitioner's employees and contractors -- ESI that is not reasonably accessible because of undue burden and cost. *See* FRCP 26(b)(2)(B) .

Subject to these objections and to the extent that such documents exist and are in Petitioner's possession, custody, or control, Petitioner agrees to produce final studies, protocols,

tests, and analyses of the efficacy of Conforming Products conducted by or on behalf of
Petitioner.

Request 3:

All documents concerning the rodent control efficacy of any mechanical control device presently available for sale.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is unduly broad and is not even limited to *Petitioner's* mechanical control devices. *See Motiva*, 2001 WL 1557780 (denying requests as overly broad and unduly burdensome). Moreover, to compile "documents concerning" the rodent control efficacy of any mechanical control device presently available for sale would require a resource-intensive search of the hard copy and ESI of Petitioner's employees and contractors -- ESI that is not reasonably accessible because of undue burden and cost. *See* FRCP 26(b)(2)(B) .

Subject to these objections and, to the extent that such documents exist and are in Petitioner's possession, custody or control, Petitioner agrees to produce final studies, protocols, tests, and analyses of the efficacy of mechanical rodent control devices conducted by or on behalf of Petitioner within the last five years for Petitioner's own products that are currently on the market.

Request 4:

All documents concerning the comparative rodent control efficacy of any Affected Product and any Conforming Product.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad and unduly burdensome. To compile "documents concerning" the comparative rodent control efficacy of any Affected Product and any Conforming Product would require a resource-

intensive search of the hard copy and ESI of Petitioner's employees and contractors -- ESI that is not reasonably accessible because of undue burden and cost. *See* FRCP 26(b)(2)(B). Subject to these objections and to the extent that such documents exist and are in Petitioner's possession, custody, or control, Petitioner agrees to produce final studies, protocols, tests, and analyses of the comparative rodent control efficacy of any Affected Product and any Conforming Product conducted by or on behalf of Petitioner for Petitioner's products that are currently on the market.

Request 5:

All documents concerning the comparative rodent control efficacy of any Affected Product and any mechanical rodent control device.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad and unduly burdensome. To compile "documents concerning" the comparative rodent control efficacy of any Affected Product and any mechanical rodent control device would require a resource-intensive search of the hard copy and ESI of Petitioner's employees and contractors -- ESI that is not reasonably accessible because of undue burden and cost. *See* FRCP 26(b)(2)(B). Subject to these objections and to the extent that such documents exist and are in Petitioner's possession, custody, or control, Petitioner agrees to produce final studies, protocols, tests, and analyses of the comparative rodent control efficacy of any Affected Product and any mechanical rodent control device conducted by or on behalf of Petitioner for Petitioner's products that are currently on the market.

Request 6:

All documents concerning any decision by Reckitt to make available for sale, or to decline to make available for sale, any Conforming Product.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad and unduly burdensome. In addition, Petitioner's decision regarding whether to place its Conforming Products on the market is irrelevant in this proceeding and lacks significant probative value. Respondent-Intervenors argue that "To the extent that Petitioner has registered conforming products but chosen not to market them, information on its reasons for doing so are highly probative as to the company's ability to furnish commercially viable alternatives to the Affected Products." "Commercial viability" has no bearing on whether the Affected Products cause "unreasonable adverse effects on the environment" considering the "economic, social, and environmental costs and benefits." 7 U.S.C. § 136(bb). This request lacks any probative value, and must be denied for failing to meet the requirements of 40 C.F.R. § 164.51(a).

Request 7:

All documents concerning the pricing (current or projected) of any Conforming Product.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad and unduly burdensome, and is also ambiguous with respect to the definition of "pricing." The only pricing information that is relevant and probative of facts at issue in this proceeding are the retail prices that consumers pay to purchase the products that are on the market. The retail pricing of the Conforming Products on the market is available to the public and to Respondent-Intervenors. This request therefore does not meet the requirement of 40 C.F.R. § 164.51(a)(2), "that the information to be obtained is not otherwise obtainable."

Projected pricing is speculative, and the price of products in specific retail establishments is not determined by Petitioner, so this request should be denied in its entirety.

Request 8:

All documents concerning the pricing of any Affected Product as compared to the pricing (current or projected) of any Conforming Product.

Response:

Petitioner reiterates its General Objections and notes that this request is ambiguous with respect to the definition of “pricing.” The only pricing relevant and probative of facts at issue in this proceeding is the retail price that consumers pay to purchase the products that are on the market. The retail pricing of the Affected Products and the Conforming Products on the market is available to the public and to Respondent-Intervenors. This request therefore does not meet the requirement of 40 C.F.R. § 164.51(a)(2), “that the information to be obtained is not otherwise obtainable.”

As noted above, projected pricing is speculative, and the price of products in specific retail establishments is not determined by Petitioner, so this request should be denied in its entirety

Request 9:

All documents concerning the pricing of any Affected Product as compared to the pricing (current or projected) of any mechanical rodent control device.

Response:

Petitioner reiterates its General Objections and notes that this request is ambiguous with respect to the definition of “pricing.” The only pricing relevant and probative of facts at issue in this proceeding is the retail price that consumers pay to purchase the products that are on the market. The pricing of the Affected Products and of mechanical rodent control devices that are available on the market is available to the public and to Respondent-Intervenors. This request therefore does not meet the requirement of 40 C.F.R. § 164.51(a)(2), “that the information to be obtained is not otherwise obtainable.”

As noted above, projected pricing of mechanical rodent control devices is speculative and determined by individual retail establishments, not by Petitioner. This request therefore should be denied in its entirety.

Request 10:

All documents concerning the selection and application of rodent control products (including mechanical rodent control devices) by residential consumers, including but not limited to any research, questionnaires, surveys, and studies.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad, unduly burdensome, and requests documents that are not in Petitioner's possession, custody, or control. The 2008 Risk Mitigation Decision (RMD) changed the rodent control market. This change means that documents from prior to EPA's 2008 RMD cannot possibly have significant probative value with respect to the alternatives and opinions in the market today -- the market in which the risk-benefit analysis required by FIFRA is taking place. Accordingly, subject to the objections above and to the extent that such documents exist and are in Petitioner's possession, custody, or control, Petitioner agrees to provide post-RMD final reports of any research, questionnaires, surveys, and studies that are responsive to this request.

Request 11:

All documents concerning selection and application of rodent control products (including mechanical control devices) by owners or managers of multi-unit housings or dwellings, including but not limited to any research, questionnaires, surveys, and studies.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad, unduly burdensome, and requests documents that are not in Petitioner's possession,

custody, or control. As noted above, the 2008 Risk Mitigation Decision (RMD) changed the rodent control market. This change means that documents from prior to EPA's 2008 RMD cannot possibly have significant probative value with respect to the alternatives and opinions in the market today -- the market in which the risk-benefit analysis required by FIFRA is taking place. Motion at 7. Accordingly, subject to the objections above and to the extent that such documents exist and are in Petitioner's possession, custody, or control, Petitioner agrees to provide post-RMD final reports of any research, questionnaires, surveys, and studies that are responsive to this request.

Request 12:

All documents concerning selection and application of rodent control products (including mechanical rodent control devices) in residential settings by pest control operators or professionals, including but not limited to any research, questionnaires, surveys, and studies.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad, unduly burdensome, and requests documents that are not in Petitioner's possession, custody, or control. As noted above, the 2008 Risk Mitigation Decision (RMD) changed the rodent control market. This change means that documents from prior to EPA's 2008 RMD cannot possibly have significant probative value with respect to the alternatives and opinions in the market today -- the market in which the risk-benefit analysis required by FIFRA is taking place. Accordingly, subject to the objections above and to the extent that such documents exist and are in Petitioner's possession, custody, or control, Petitioner agrees to provide post-RMD final reports of any research, questionnaires, surveys, and studies that are responsive to this request.

Request 13:

All documents concerning (a) any increases in pricing for rodenticide products that may arise from conformance to the 2008 RMD, and (b) any impacts that those price increases may have on the use of rodent control products (including mechanical rodent control devices) by residential consumers.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad, unduly burdensome, and requests documents that are not in Petitioner's possession, custody, or control. In addition, this request is so ambiguous and vague that Petitioner cannot attempt to interpret its meaning. It therefore should be denied in its entirety.

Request 14:

All documents concerning the likelihood that residential consumers would misuse rodenticide products that conform to the 2008 RMD by deploying bait blocks without bait stations.

Response:

Petitioner reiterates its General Objections and notes in particular that this request is overbroad, unduly burdensome, and requests documents that are not in Petitioner's possession, custody, or control. In addition, Petitioner objects to this request on the ground that it is duplicative of Petitioner's prehearing exchange, which provides information regarding evidence of misuse of RMD-compliant products. *See Acierno*, 2008 WL 483488. In addition, at least one witness will discuss evidence of misuse in her testimony and will be available for cross-examination, which is the most reasonable and least burdensome way to inquire about this topic. *See Motiva*, 2001 WL 1557780 (denying discovery requests where information sought was "most reasonably obtained at hearing during cross-examination").

Subject to these objections, Petitioner agrees to produce non-privileged documents responsive to this request, to the extent that such documents exist, are not duplicative of its prehearing exchange, and are in Petitioner's possession, custody, or control.

Request 15:

All documents concerning any communications between Reckitt or its counsel and the following of its expert witnesses relating to (i) compensation for an expert's study or testimony; (ii) facts or data that Reckitt's counsel provided that an expert considered in forming the opinions to be expressed; and (iii) assumptions that Reckitt's counsel provided and that an expert relied on in forming the opinions to be expressed, *see* Fed. R. Civ. P. 26(b)(4)(C):

- a. Dr. James McCluskey;
- b. Dr. Alan Buckle;
- c. Dr. Colin Prescott;
- d. Dr. Robin Cantor;
- e. Dr. Brad Gessner;
- f. Dr. Carolyn Meyer;
- g. Dr. Edwin Tinsworth;
- h. Mr. Hal Ambuter;
- i. Ms. Christina Scharer;
- j. Mr. Vincent Ford; and
- k. Mr. Forrest St. Aubin.

These include, but are not limited to, documents concerning any financial relationships between Reckitt and its witnesses.

Response:

Petitioner reiterates its General Objections and notes that the Federal Rules of Civil Procedure provide guidance but do not govern discovery in this proceeding. 40 C.F.R. § 164.51. Subject to these objections, Petitioner agrees to produce non-privileged documents responsive to this request, to the extent that such documents exist and are reasonably accessible.

Request 16:

The "sensitivity analysis" referenced in footnote 40 on page 27 of PRX 544.

Response:

Subject to the General Objections above, Petitioner agrees to produce non-privileged documents responsive to this request, to the extent that such documents exist.

Request 17:

The following publications and major presented papers by Mr. Forrest St. Aubin, *see* PRX 581:

- a. January 1963. *3 Simple Steps [to] Control Rodents*. Food Engineering Magazine.
- b. 1989. *Pest Management in Health Care Facilities*. Technical Information Manual #20. Armed Forces Pest Management Board, Department of Defense.
- c. May and June 1990. *Pest Management in Supermarkets*. Pest Control Magazine.
- d. June, July and August 1991. *Pest Management in Nursing Homes*. Pest Control Magazine.
- e. Choosing the Right Formulation for the Right Job. Symposium on Pest Control for Health Care Managers, Vanderbilt University, Nashville, Tennessee, 1981.
- f. Trends in Insect and Rodent Control. Four-State Food Sanitation Symposium (under auspices of Missouri Health Department), Lake Ozark, Missouri 1989.
- g. PCO's [sic] and Public Health. Annual Missouri Milk, Food and Environmental Health Association, Columbia, Missouri, 1989.
- h. Advances in Rodent Control, Metro Chapter, Food and Drug Officials, Kansas City, Kansas, 1989.
- i. Integrated Pest Management in the Food Processing and Health Care Setting. Food and Drug Administration, Kansas City, Missouri. September, 1990.
- j. Non-Traditional Pest Management Methods. Annual Meeting of the Missouri Pest Control Association, Columbia, Missouri, October, 1991.
- k. Non-Traditional Pest Management Methods. Annual Meeting of the Kansas Termite and Pest Control Association, Wichita, Kansas. December, 1991.
- l. Non-Traditional Pest Management Methods. Iowa State University, Ames, Iowa. March, 1992.
- m. Non-Traditional Pest Management Methods. Illinois Pest Control Association, Peoria, Illinois. October, 1992.
- n. Non-Traditional Pest Management Methods. Annual Meeting of the Missouri Pest Control Association, Branson, Missouri. November 1992.

Response:

Subject to the General Objections above, Petitioner agrees to produce non-privileged documents responsive to this request, to the extent that such documents exist and are reasonably accessible.

RESPONSES TO SPECIFIC INTERROGATORIES

Petitioner's General Objection 4 describes the reasons why Respondent-Intervenors' interrogatories are inappropriate, premature, and unduly burdensome at this time. In the event that this Tribunal disagrees with Petitioner's General Objections, Petitioner makes the following additional objections and responds to specific interrogatories:

Interrogatory 1:

Identify all Conforming Products that Reckitt has made available for sale to consumers.

Response:

Subject to the General Objections above, Petitioner agrees to provide non-privileged information responsive to this request.

Interrogatory 2:

Identify all Conforming Products that Reckitt has registered but has not made available for sale to consumers.

Response:

Petitioner reiterates its General Objections. The list of registered products that conform to the RMD is equally available to the public and to Respondent-Intervenors. It therefore fails to meet the requirement of 40 C.F.R. § 164.51(a)(2) "that the information to be obtained is not otherwise obtainable." Subject to these objections, Petitioner agrees to advise Respondent-Intervenors of the Conforming Products that are not currently on the market.

Interrogatory 3:

PRX 420 identifies a product with the EPA Registration number of 7173-236-3282 that does not conform to the 2008 RMD. Describe the current registration status of that product.

Response:

Petitioner reiterates its General Objections. The current registration status of products registered with EPA is a matter of public record and is equally available to the public and to Respondent-Intervenors. It therefore fails to meet the requirement of 40 C.F.R. § 164.51(a)(2) “that the information to be obtained is not otherwise obtainable.” Subject to these objections, Petitioner agrees to provide non-privileged information responsive to this request that is reasonably accessible to Petitioner.

Interrogatory 4:

Identify the twelve Affected Products among the rodenticide bait products listed in PRX 465.

Response:

Subject to the General Objections above, Petitioner agrees to provide non-privileged information responsive to this request.

Interrogatory 5:

Identify the single-use traps listed in PRX 465.

Response:

Subject to the General Objections above, Petitioner agrees to provide non-privileged information responsive to this request with respect to Petitioner’s products.

Interrogatory 6:

Identify the reusable traps listed in PRX 465.

Response:

Subject to the General Objections above, Petitioner agrees to provide non-privileged information responsive to this request with respect to Petitioner's products.

Interrogatory 7:

List all publications authored by the following expert witnesses in the previous 10 years, *cf.* Fed. R. Civ. P. (a)(2)(B)(iv) [sic].

- a. Dr. Edwin Tinsworth; and
- b. Mr. Vincent Ford.

Response:

Petitioner reiterates its General Objections and notes that the Federal Rules of Civil Procedure provide guidance but do not govern discovery in this proceeding. 40 C.F.R. § 164.51. Subject to these objections, Petitioner agrees to provide non-privileged information responsive to this request that is reasonably accessible.

Interrogatory 8:

List all other cases in which, during the previous four years, the following witnesses testified as experts at trial or by deposition, *cf.* Fed. R. Civ. P. (a)(2)(B)(v) [sic].

- c. Dr. James McCluskey;
- d. Dr. Alan Buckle;
- e. Dr. Colin Prescott;
- f. Dr. Robin Cantor;
- g. Dr. Brad Gessner;
- h. Dr. Carolyn Meyer;
- i. Dr. Edwin Tinsworth;
- j. Mr. Hal Ambuter;
- k. Ms. Christina Scharer;
- l. Mr. Vincent Ford; and
- m. Mr. Forrest St. Aubin

Response:

Petitioner reiterates its General Objections and notes that the Federal Rules of Civil Procedure provide guidance but do not govern discovery in this proceeding. 40 C.F.R. § 164.51.

Subject to these objections, Petitioner agrees to provide non-privileged information responsive to this request.

Interrogatory 9:

Describe the compensation to be paid to each of the following witnesses for the study and testimony in this case, *cf.* Fed. R. Civ. P. (a)(2)(B)(vi) [sic]:

- a. Dr. James McCluskey;
- b. Dr. Alan Buckle;
- c. Dr. Colin Prescott;
- d. Dr. Robin Cantor;
- e. Dr. Brad Gessner;
- f. Dr. Carolyn Meyer;
- g. Dr. Edwin Tinsworth;
- h. Mr. Hal Ambuter;
- i. Ms. Christina Scharer;
- j. Mr. Vincent Ford; and
- k. Mr. Forrest St. Aubin

Response:

Petitioner reiterates its General Objections and notes that the Federal Rules of Civil Procedure provide guidance but do not govern discovery in this proceeding. 40 C.F.R. § 164.51. Subject to these objections, Petitioner agrees to provide non-privileged information responsive to this request.

Interrogatory 10:

Describe all financial relationships, including but not limited to donations, gifts, payments, stipends, and sponsorships, between Reckitt and:

- a. Pastor Robert Jones;
- b. The Oak Park United Methodist Church in Sacramento, California;
and
- c. The California Association of Black Pastors.

Response:

Subject to the General Objections above, Petitioner agrees to provide non-privileged information responsive to this request.

Interrogatory 11:

Describe all facts that Reckitt expects Pastor Robert Jones to present that support the assertion that cancellation of the affected products would have detrimental effects on low-income and minority communities.

Response:

Petitioner reiterates its General Objections. Pastor Jones will testify via written or oral direct testimony in accordance with the hearing schedule and will be available for cross-examination. Respondent-Intervenors' attempt to discover the substance of Pastor Jones' testimony beyond the narrative statement already provided in Petitioner's prehearing exchange is inappropriate and must be denied. *See Motiva*, 2001 WL 1557780 (denying interrogatories where information sought was "most reasonably obtained at hearing during cross-examination").

Interrogatory 12:

Page 14 of PRX 2-22 (James McCluskey, *Analysis of Human Health Effects of Rodenticides and Responses to the 2011 Draft Notice of Intent to Cancel and Denial*) states Dr. McCluskey's "belie[f]" that "it is fair to assume that the vast majority of incidents related to rat trap closure on children's fingers require some type of emergent care." Identify all evidence that supports this belief.

Response:

Petitioner reiterates its General Objections and notes in particular that this interrogatory is unduly burdensome and premature. Dr. McCluskey will be made available for cross examination, and witness testimony is the least burdensome and most efficient means of obtaining this information. This inquiry about his 2011 report should be directed to him at that

time. *See Motiva*, 2001 WL 1557780 (denying interrogatories where information sought was “most reasonably obtained at hearing during cross-examination”).

Interrogatory 13:

Page 13 of PRX 2-22 states, “[M]ost rodent ‘infestations’ occur in farm/rural settings . . . and inner-city neighborhoods. While it is mentioned that many residential rodent problems can be adequately controlled with the use of traps, the key word in this equation is ‘suburban’. In suburban situations where there is a single rodent in a home, trapping is most likely adequate. However, the situation in urban settings is quite different and deserves discussion. Urban housing, particularly public housing is a hotspot for rodent infestation problems.”

- a. Define “infestations.”
- b. Describe the proportion of residential rodent problems that are comprised of “infestations” that cannot be effectively controlled through the use of traps.
- c. Identify all evidence concerning the proportion of residential rodent problems that are comprised of “infestations” that cannot be effectively controlled through the use of traps.

Response:

Petitioner reiterates its General Objections and notes in particular that this interrogatory is unduly burdensome and premature. Dr. McCluskey will be made available for cross examination, and witness testimony is the least burdensome and most efficient means of obtaining this information. These inquiries about his 2011 report should be directed to him at that time. *See Motiva*, 2001 WL 1557780 (denying interrogatories where information sought was “most reasonably obtained at hearing during cross-examination”).

Interrogatory 14:

Page 13 of PRX 2-22 states the following: “[O]ccupants [of urban housing] . . . have no control over general building conditions . . . [and] openings in the building envelope that permit rodent entry”

- a. Describe all evidence, and identify all exhibits showing, that occupants of urban housing have control over conditions that permit rodent entry into their buildings and individual residential units.
- b. Describe all evidence, and identify all exhibits showing, that

occupants of urban housing lack control over conditions that permit rodent entry into their individual residential units.

Response:

Petitioner reiterates its General Objections and notes in particular that this interrogatory is unduly burdensome and premature. Dr. McCluskey will be made available for cross examination, and witness testimony is the least burdensome and most efficient means of obtaining this information. These inquiries about his 2011 report should be directed to him at that time. *See Motiva*, 2001 WL 1557780 (denying interrogatories where information sought was “most reasonably obtained at hearing during cross-examination”).

Interrogatory 15:

Page 21 of PRX 2-71 (Alan Buckle, *Comparative Efficacy of Rodenticides*) states that “most professional applicators apply rodenticide baits in preventative (or maintenance) rodent control programs” and that “[u]sually these treatments do not involve actual infestations but are merely applied to prevent rodent ingress.” Identify all evidence that supports these statements.

Response:

Petitioner reiterates its General Objections and notes in particular that this interrogatory is unduly burdensome and premature. Dr. Buckle will be made available for cross examination, and witness testimony is the least burdensome and most efficient means of obtaining this information. This inquiry should be directed to him at that time. *See Motiva*, 2001 WL 1557780 (denying interrogatories where information sought was “most reasonably obtained at hearing during cross-examination”).

Interrogatory 16:

Identify all evidence that supports the assertion that the increased cost of rodenticide products that conform to the 2008 RMD will lead some residential consumers to abandon rodent control efforts entirely. *See* Request for Hearing and Statement of Objections of Reckitt Benckiser LLC 25.

Response:

Petitioner reiterates its General Objections. Petitioner will provide witnesses who will address the impacts of the increased cost of rodenticide products on rodent control efforts. Those witnesses will be made available for cross examination, and witness testimony is the least burdensome and most efficient means of obtaining this information. *See Motiva*, 2001 WL 1557780 (denying interrogatories where information sought was “most reasonably obtained at hearing during cross-examination”).

Interrogatory 17:

Identify all evidence that supports the assertion that the increased cost of rodenticide products that conform to the 2008 RMD will lead some residential consumers to deploy unprotected bait blocks. *See id.* at 28.

Response:

Petitioner reiterates its General Objections. Petitioner will provide witnesses who will address the issue of consumers deploying unprotected bait blocks. Those witnesses will be made available for cross examination, and witness testimony is the least burdensome and most efficient means of obtaining this information. *See Motiva*, 2001 WL 1557780 (denying interrogatories where information sought was “most reasonably obtained at hearing during cross-examination”).

Interrogatory 18:

Identify all evidence that support [sic] the assertion that few residential consumers use mechanical rodent control devices effectively. *See* PRX 2-71, at 25.

Response:

Petitioner reiterates its General Objections, and notes in particular that the author of this document, Dr. Alan Buckle, will be available for testimony and cross examination. This question may be directed to him at that time. *See Motiva*, 2001 WL 1557780 (denying interrogatories where information sought was “most reasonably obtained at hearing during cross-examination”). Petitioner also notes that the statement in Interrogatory 18 is not an exact quote from the cited document. Dr. Buckle will be prepared to address questions related to the actual statements he authored in this document.

CLARIFICATION OF PETITIONER’S DISCOVERY REQUESTS

The parties have engaged in discussions regarding the discovery requests and the voluntary disclosure of certain documents. The results of those discussions are reflected in the above responses. In addition, Petitioner would like to provide additional clarification regarding its requests. Specifically, Petitioner would like to add the following definitions and instructions to its Motion for Additional Discovery:

1. “And,” “and/or” and “or” each refer to their conjunctive and disjunctive meanings, being construed as necessary to bring within the scope of the discovery request all information and documents which would otherwise be construed as being outside the request.
2. “Any” means “each and every,” “all,” and “any one.” “All” means “any and all.”
3. “Concerning,” “relates to” and “relating to” are synonyms and include the following terms: regards or regarding, describes, involves, compares, correlates, mentions, connected to, refers to, pertains to, contradicts, or compromises.
4. “Correspondence” means communications in electronic or hard copy form, including e-mails, faxes, letters, and notes.
5. “Data set” means original data. Where data is drawn from a larger database using a search, pull, and/or sorting function, “data set” means the results of that inquiry.

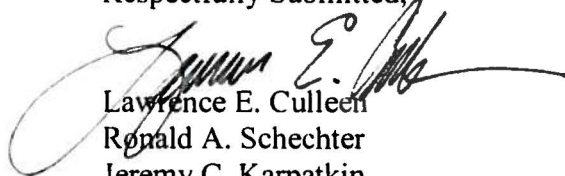
6. "Document" means information in any form, including but not limited to electronic or hard copy papers, records, correspondence, data, figures, spreadsheets, photographs, and recordings.
7. "Nature" as in "nature of the database" means documents and information describing the database, including but not limited to: how it works, who owns and/or manages it, who inputs information, for what the database is used, how the data in the database is gathered and/or generated, what information is in the database, how terms in the database are defined, and any and all procedures or protocols relating to the database.
8. "Underlying" with respect to data or information in a particular figure or exhibit means the data or information reflected in, illustrated by, leading to, shown in, and/ or supporting the particular figure or exhibit.
9. Words in the singular include the plural, and vice versa.
10. Petitioner seeks all documents in Respondent's possession, custody, or control.
11. Documents that contain confidential information will be treated in accordance with this Tribunal's Protective Order.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Tribunal deny Document Requests 1, 6-9, and 13 in their entirety and deny Respondent-Intervenors' document requests to the extent that they request documents that are outside of the scope of what Petitioner has agreed to provide. Petitioner also respectfully requests that this Tribunal deny Respondent-Intervenors' request for interrogatories in its entirety.

Dated: May 15, 2014

Respectfully Submitted,

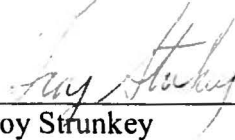


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CERTIFICATE OF SERVICE

I certify that the foregoing Petitioner Reckitt Benckiser's Response and Opposition to Respondent-Intervenors' 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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