UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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	)	

RESPONDENT'S SURREPLY REGARDING RECKITT BENCKISER'S MOTION FOR AN EXPEDITED DETERMINATION ON EXISTING STOCKS

On May 31, 2013, Reckitt Benckiser LLC ("Reckitt") filed a Reply Brief ("Reckitt's Reply Brief") in support of its April 12, 2013 Motion for an Expedited Determination That EPA's Existing Stocks Decision Is Within The Scope of The Hearing ("Reckitt's Motion"). The Assistant Administrator for Chemical Safety and Pollution Prevention ("Respondent") submits that the arguments advanced in Reckitt's Reply Brief do not justify the granting of Reckitt's Motion.

Reckitt's Reply Brief incorporates by reference all the arguments advanced in the various briefs that have been filed in support of Reckitt's motion. Reckitt's Reply Brief at 2 n.1. Although the arguments advanced by Reckitt, the other petitioners and amici are numerous and kaleidoscopic, Respondent believes each of the arguments is a variation on one of four main arguments:

(1) As a matter of law, the disposition of existing stocks of cancelled products must be included in the issues for resolution in a cancellation proceeding if registrants or their allies wish to have such issues included in the proceeding.

(2) Respondent has made the disposition of existing stocks of cancelled products an issue for resolution in this particular cancellation hearing by addressing existing stocks in the February 5, 2013 Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products ("NOIC").

(3) The NOIC does not establish the outer boundaries of the proceeding, and the authority to determine whether the disposition of existing stocks of cancelled products should (or must) be included an issue in this proceeding rests with the Administrative Law Judge (ALJ).

(4) The ALJ should (or must) conduct a hearing on the disposition of existing stocks of cancelled products to prevent a miscarriage of justice owing to allegedly arbitrary and capricious actions by Respondent in the past or yet to come.

Respondent submits that resolution of these four main arguments advanced in support of Reckitt's Motion would provide an appropriate basis for ruling on the motion. Respondent has addressed these issues in the April 25, 2013 *Respondent's Response To Motion Regarding Whether Disposition Of Existing Stocks Of Cancelled Products Is Within The Scope Of The Proceeding* ("Response Brief"), in the May 6, 2013 *Respondent's Conditional Opposition To CropLife America's Motion To File An Amicus Curiae Brief Regarding Existing Stocks Of Cancelled Products* ("Response to CropLife"), in the May 31, 2013 *Respondent's Response To The Brief Of The Greater Cincinnati Northern Kentucky Apartment Association, Louisville Apartment Association, And Do It Best Corporation In Support Of Reckitt's Motion For An Expedited Determination On Existing Stocks* ("May 31 Brief"), and the present brief. As explained in these filings, the arguments in support of Reckitt's Motion are unfounded:

(1) FIFRA does not create any right to a hearing on the disposition of existing stocks of cancelled product; see *In the Matter of Cedar Chemical Co., et al.*, 2 E.A.D. 584, 1988 WL 525242 (June 9, 1988), and *Northwest Food Processors Ass'n v. Reilly*, 886 F. 2d 1075 (9th Cir. 1989) *cert. denied* 497 U.S. 1004, 110 S.Ct. 3239, 111 L.Ed.2d 750 (1990). See *infra* pages 7-9; Response Brief at 2-5; Response to CropLife at 2-5; May 31 Brief at 8-9.

(2) The NOIC clearly states that existing stocks are not an issue in this proceeding, and cannot reasonably be read to the contrary; see 78 Fed.Reg. 8123, 8126 (Feb. 5, 2013). See *infra* pages 9-13; Response Brief at 11-12; May 31 Brief at 4.

(3) The scope of a FIFRA section 6(b) cancellation hearing is no broader than the scope established in the NOIC; see *In the Matter of Shell Oil Company, et al.*, 1 E.A.D. 517, 1979 WL 52074 (April 9, 1979)("matters falling outside the scope of the notice ... are of no relevance to the proceeding." 1 E.A.D. at 523-24). See *infra* pages 3-7; Response Brief at 6-11; May 31 Brief at 9-10.

(4) The allegations of arbitrary and capricious agency action are (i) irrelevant to whether disposition of existing stocks of cancelled products are within the scope of this proceeding, and (ii) inaccurate. See *infra* pages 13-14; Response Brief at 16-22;May 31 Brief at 6-7.

Reckitt's May 31, 2013 Reply Brief presents the following arguments, each of which is a variation on a theme previously advanced by Reckitt or others: (1) The ALJ has the authority determine the scope of a FIFRA section 6(b) hearing and is not bound by Respondent's declarations or interpretations; (2) The disposition of existing stocks of cancelled products is relevant to a section 6(b) cancellation proceeding; (3) Section 6 does not permit Respondent to exclude the disposition of existing stocks of cancelled product; and (4) Respondent's announced intentions regarding the disposition of existing stocks of cancelled products is arbitrary and capricious. None of these arguments offers meaningful support for Reckitt's Motion, which is without merit and should be denied.

I. THE ALJ'S AUTHORITY TO ADJUDICATE DISPUTES ABOUT THE SCOPE OF A SECTION 6(b) HEARING IS BOUNDED BY THE NOIC AND THE OBJECTIONS

Reckitt argues that the ALJ has the authority to determine the scope of a section 6(b) cancellation proceeding and is not bound by Respondent's declarations or interpretations. Respondent agrees that the ALJ is generally not bound by Respondent's declarations or

interpretations, but disagrees with Reckitt's overextension of this proposition as it applies to the scope of this proceeding. The ALJ has the authority and responsibility to *adjudicate* disputes regarding the scope of a section 6(b) cancellation proceeding, but this is not the same as saying the ALJ has unlimited authority to *choose* the scope of a section 6(b) cancellation proceeding.

The implication of Reckitt's argument is that the ALJ has unlimited authority to choose the scope of a proceeding, and that the NOIC has no jurisdictional significance. By Reckitt's reasoning, the ALJ might choose to expand the scope of this cancellation proceeding to include cancellation of other registrants' rodenticide products, rodenticides containing other active ingredients, rodenticides approved for agricultural uses, rodenticides registered only for restricted use, or even pesticides other than rodenticides. Similarly, by Reckitt's reasoning, any person adversely affected by a proposed cancellation (including, apparently, the scope of the cancellation notice itself) would also have the same power, putting anything at issue simply by including it among the objections filed with a request for hearing.[1] The Chief Judicial Officer expressly rejected such contentions in *Shell Oil*, which is discussed in detail in Respondent's Response Brief at 6-8 and will not be repeated here.

In the jurisdictional framework articulated in *Shell Oil*, contrary to Reckitt's conception, the NOIC establishes the outermost bounds of a cancellation proceeding. Although an NOIC is itself neither a rule nor an order – and its contents therefore cannot be said to have "binding legal effect" – its issuance does have concrete legal effects as it triggers certain legal rights and obligations that are enforceable at law. Some of the effects of issuing the NOIC are jurisdictional, as it "set[s] a standard of relevance which shall govern the proceedings at the

[1] This slippery slope might be avoided by positing that expansions of scope must be relevant or reasonable, however, this invites the question, relevant or reasonable compared to what? Any plausible answer must give significant weight to the NOIC, and thereby concede that the NOIC has jurisdictional significance constraining the authority of the ALJ and petitioners.

hearing." *Shell Oil* at 523-24 (footnotes and internal quotation marks omitted). The Administrator has delegated to Respondent the authority to issue NOICs, and therewith, the authority to decide the products and issues contained therein.[2] The fact that Respondent has on other occasions chosen to put the disposition of existing stocks of cancelled products at issue does not deprive Respondent of the discretion not to do so in the present NOIC.

Petitioners' objections also have jurisdictional effects, as the ultimate scope of the cancellation proceeding is the intersection of the set of issues raised in the NOIC and the set of issues raised in the objections. Thus the petitioners may attenuate the scope of the proceeding, but they cannot expand it beyond the scope set forth in the NOIC: "[M]atters falling outside the scope of the notice of intent to cancel are of no relevance to the proceeding." *Shell Oil* at 523-24 (footnotes and internal quotation marks omitted).

As the precise scope of a cancellation proceeding cannot be defined except by comparing at least two documents produced by contesting parties, it is necessarily the ALJ's responsibility to determine the scope of a cancellation proceeding. But the ALJ does not have the authority to establish the scope of the proceeding without reference to the NOIC and objections; instead, the ALJ must interpret those documents consistent with reason and the canons of construction. And where, as here, the NOIC expressly and unambiguously excludes from its scope an issue that need not be decided in order to decide whether the licenses at issue should or should not terminate, the ALJ does not have the discretion to expand the scope of the proceeding to include it.

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[2] Respondent does not claim the authority to limit the issue in a section 6 proceeding in a manner that precludes the ALJ from considering evidence or issues relevant to the risks or benefits of the pesticide registration decision at issue. Respondent simply disputes Reckitt's contention that the disposition of existing stocks of cancelled product relevant to the merits of the licensing decision that is the subject of a section 6(b) cancellation proceeding. See *infra* section II.

Reckitt also argues that Respondent's May 28, 2013 brief (Attachment 1 in Reckitt's Reply Brief) in a case Reckitt recently filed in the 10th Circuit, *Reckitt Benckiser v. US EPA*, No. 13-9543 (10th Cir. filed April 13, 2013) shows that "Respondent appears to concur that this Tribunal has the authority to decide the validity of Respondent's sell-through ban." (Reckitt Reply Brief at 10). Respondent's 10th Circuit brief, of course, suggested no such thing. Reckitt commenced the 10th Circuit case to challenge EPA's position on existing stocks in this proceeding. In response to an order from that court asking the parties to brief whether the court had jurisdiction to hear the case, Reckitt opined in its brief that it did not believe the case it had brought was ripe for federal court review. In its response to Reckitt's brief, Respondent agreed with Reckitt that the case could not be brought to the 10th Circuit at this time. In the language quoted by Reckitt in its brief, Respondent did no more than state its position that EPA does not believe that *any* issue arising from the NOIC, including issues related to the proper scope of the hearing, will be final for judicial review purposes until the proceeding is completed, which will occur when "the Administrative Law Judge issues an initial decision that becomes final pursuant to 40 CFR § 164.90(b), or the Environmental Appeals Board issues a final decision, concluding the administrative hearing process." Respondent was not "acknowledging" or suggesting anything about who determines the scope of the proceeding; Respondent was merely advancing the unremarkable proposition that the scope of the administrative proceeding, and every other issue related to that proceeding, will not be reviewable in the United States Courts of Appeal until the administrative hearing process is fully completed.

II. THE DISPOSITION OF EXISTING STOCKS OF CANCELLED PRODUCTS IS NOT RELEVANT TO A SECTION 6(b) CANCELLATION PROCEEDING

Reckitt argues that the disposition of existing stocks is an important part of the risk-benefit analysis in a section 6(b) proceeding because: "First, the risks of immediately prohibiting the sale and use of a product upon cancellation inform the risks of cancelling the products in the first place. Second, the risk-benefit calculus might change depending on whether there is a reasonable regime for transitioning to alternative products (if any)." Reckitt's Reply Brief at 11. Reckitt's contention that the disposition of existing stocks "is inextricably linked with the merits of a Section 6(b) hearing" (Reckitt's Reply Brief at 3) is erroneous because the issues can be easily separated, and logically must be separated. This section 6(b) cancellation proceeding is a licensing action, whose purpose is to determine whether the continued production, distribution, and use of a pesticide product meets the FIFRA registration criteria or whether the license should be terminated. The transition issues Reckitt raises could conceivably be relevant to how long a pesticide product should remain registered and under what conditions (e.g., whether production should be phased out, whether distribution should be limited to certain regions), in cases where it is determined that a pesticide will generally cause unreasonable risks in the future, but these are not "existing stocks" issues – they are reasons why a license should be allowed to continue in effect for a short-term "transitional" period of continued registration (with or without additional conditions).[3] If Reckitt or another person presents compelling evidence

[3] In the present case, Respondent has already taken such transitional issues into account, and refrained from initiating cancellation until appropriate alternative products became available. In the 2008 Risk Management Decision for Ten Rodenticides ("RMD"), EPA determined that, over the long term, certain changes were needed to prevent rodenticides from causing unreasonable risks. At the same time, EPA recognized that the changes (which involved, among other things, reformulating certain products and packaging others in protective bait stations that first had to be designed, tested, reviewed, and approved) could not be implemented immediately and provided for a three-year "transition" period before it would commence any cancellation actions. While transition periods can prevent disruption to manufacturers, sellers, and users, transition periods also reflect a temporal difference in the cost-benefit balancing that is at the heart of FIFRA registration and cancellation decisions. In 2008, when the RMD

that over a finite transition period the benefits of a particular use of a pesticide product justify the risks, then that use of the product would meet the FIFRA registration criteria for that transition period, so it is properly addressed in the section 6(b) cancellation proceeding as an aspect of the question of how long (and under what conditions) the license should remain in effect, and not as a question of what should become of existing stocks of cancelled products.

But the disposition of existing stocks of cancelled products is quite a different issue. Existing stocks only come into existence when a pesticide registration is cancelled (if the products are not cancelled, the issue of existing stocks never becomes ripe). After cancellation, further production for sale and distribution in the United States is prohibited (because the resulting products would simply be "unregistered pesticides" that may not generally be sold or distributed (FIFRA section 3(a)). The decision on what to do with products produced before cancellation (*i.e.*, the existing stocks) is simply not relevant to the question of whether that pesticide does or does not meet the FIFRA section 3(c)(5) registration criteria, because no facts pertaining to them owing to their status as "existing stocks of a cancelled pesticide" can have a causal effect on the risks or benefits associated with the license to produce, distribute and sell the pesticide. In a similar vein, the risks and benefits of various sentencing options have no influence on the determination of whether a person has or has not committed a crime. Once an ALJ has determined that use of a pesticide product causes unreasonable risk, there are no conceivable facts related solely to the disposition of a quantity of existing stocks *after* cancellation that could justify a decision to allow the license to continue (and the consequent introduction of more of that pesticide product into commerce). See May 31 Brief at 8-9.

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was issued, rodenticides that met the risk reduction goals of the RMD were not widely available; today, a number of alternatives that meet the goals of the RMD are registered and commercially available. The "costs" associated with cancelling a particular pesticide's license are almost always impacted, and sometimes significantly so, by the nature and availability of alternatives.

Whether one manner of transitioning away from an unreasonable risk status established in a cancellation proceeding is preferable to another one is an important question, but it does not bear on the question at issue in a section 6(b) cancellation proceeding, which is whether the ongoing benefits associated with a pesticide's license justify the corresponding ongoing risks. In essence, the key question is whether society is better off continuing to accept the risks and benefits of Reckitt's products than it would be if it accepted neither. Reckitt insists that one cannot judge this question without also taking into account the benefits offered by the products *after* they have been cancelled (and, though Reckitt does not seem to insist on this aspect, taking into account the length of time *after* the products have been cancelled that society and the environment should continue to be subjected the unreasonable risks established in the hearing). That is plainly untrue.

III. RESPONDENT HAS NOT MADE THE DISPOSITION OF EXISTING STOCKS OF CANCELLED PRODUCTS AN ISSUE FOR RESOLUTION IN THIS PROCEEDING, SO OBJECTIONS CONCERNING THE DISPOSITION OF EXISTING STOCKS OF CANCELLED PRODUCTS ARE OUTSIDE THE SCOPE OF THIS PROCEEDING

The core of the third argument in Reckitt's Reply Brief is that because Respondent "announced the sell-through ban in an NOIC issued under Section 6(b)[, t]hat determination therefore was subject to objections raised by the registrant or other adversely affected parties... [and is therefore] within the scope of the Section 6(b) hearing." Reckitt's Reply Brief at 13. Reckitt's argument is based on a mischaracterization: Respondent has not "banned" the sale and distribution of existing stocks of products cancelled in this proceeding; it has merely announced its intentions with respect to a potential future action. It is reasonable to infer that Reckitt understands this perfectly, because Reckitt has not made the obvious and irrefutable argument

that statements in the NOIC regarding existing stocks are neither rules nor orders and therefore cannot prevent sale or distribution of any product. But Reckitt must manufacture a "ban" to support its contention that Respondent has put the disposition of existing stocks of cancelled products within the scope of the NOIC. The reality is that the NOIC does not make the disposition of existing stocks of cancelled products an issue in this proceeding, as explained in Respondent's Response Brief at 11-12, and May 31 Brief at 4.

Even if Reckitt's contention that Respondent "incorporated the [existing stocks] determination in a Section 6(b) notice" (Reckitt's Reply Brief at 3) is broader than just the chimerical "ban," the contention has no merit. Respondent confesses that it continues to have some difficulty in this area discerning whether Reckitt and its allies are arguing that the mere mention of existing stocks being outside the scope of the hearing is sufficient mention of existing stocks to make them an issue in the proceeding, or whether their arguments are dependent on the inclusion in the NOIC of language disclosing Respondent's intentions with respect to the treatment of existing stocks if Reckitt's products are cancelled. The NOIC addresses the disposition of existing stocks of cancelled products in two respects: (1) The determination that existing stocks should not be at issue in this proceeding; and (2) Respondent's intentions regarding disposition of existing stocks upon cancellation through this proceeding. The first is an exercise of Respondent's authority pursuant to *Cedar Chemical*, *Northwest Food Processors*, and *Shell Oil* to exclude from the scope of this section 6(b) cancellation proceeding the disposition of existing stocks of cancelled products. The second derives from the authority of section 6(a)(1) and is consistent with *Cedar Chemical*, *Northwest Food Processors*, and *Shell Oil*. Both are issues that were of significant interest to Reckitt, and others, before issuance of the NOIC, and Respondent had notified Reckitt of its intentions regarding the disposition of existing

stocks in advance of issuing the NOIC. The public interest in transparency strongly supports Respondent's disclosure of its decision and intentions to a broader, potentially affected audience, and there is no more appropriate place for it to do so than in the NOIC. See Response Brief at 11-12.

The remainder of Reckitt's third argument should be moot, because Reckitt claims in footnote 8 of its Reply Brief that it does not argue that a statement of objections can expand the scope of a proceeding beyond the issues contained in a NOIC, and Respondent has demonstrated that the NOIC does not include the disposition of existing stocks of cancelled products among the issues in the proceeding. However, pages 13-14 of Reckitt's Reply Brief appear instead to be an argument for the position that section 6 provides a right to include in a section 6(b) hearing the disposition of existing stocks that trumps Respondent's decision not to include this issue in the NOIC. *Cedar Chemical* and *Northwest Food Processors* clearly establish that there is no such right, as discussed in Respondent's Response Brief at 2-5.

Reckitt argues that limitations on the scope of proceedings under section 3(c)(2)(B) and 6(e) show that Congress knows how to limit the scope of a proceeding where it chooses, and in the absence of an existing stocks limitation on section 6(b) proceedings, the disposition of existing stocks of cancelled products should be included. Respondent has addressed this issue in detail in its Response to Croplife at 2-5. Existing stocks of products suspended or cancelled pursuant to sections 3(c)(2)(B) and 6(e) differ from existing stocks of products cancelled pursuant to section 6(b) in one critical respect: Existing stocks of products cancelled pursuant to section 6(b) have already been determined, through a formal adjudication, to cause unreasonable risks to health or the environment before they ever become "existing stocks," whereas products suspended or cancelled solely for failures to meet data requirements have not. See Response to

CropLife at 4 n.2. The need to alleviate unreasonable risks by expeditiously removing cancelled products from the market simply does not pertain to products suspended or cancelled pursuant to sections 3(c)(2)(B) and 6(e). In contrast, given that the existing stocks remaining after a section 6(b) cancellation proceeding have already been adjudicated as causing risks that require cancellation of the underlying registration, and given the additional risks that would be presented during the course of a more protracted hearing, it seems reasonable that Congress would choose not to provide the same right to a hearing that it provided for products that have been suspended or cancelled for reasons other than risk. Such a choice is not in conflict with Congress' recognition that proceedings under section 3(c)(2)(B) and 6(e) present issues that are significantly simpler than those in a section 6(b) proceeding, resulting in hearings that are expedited relative to section 6(b) proceedings.

It is clear that granting Reckitt's Motion would necessarily result in a longer proceeding by injecting additional factual and decisional issues irrelevant to the ultimate question of whether the products identified in the NOIC should have their licenses terminated. This would have the effect of prolonging the production (as well as sale and use) of a pesticide that poses unreasonable adverse effects on the environment while it is debated and determined what to do with the detritus of that product after cancellation.[4] Nothing in FIFRA requires such an outcome, and Respondent submits it would be bad public policy as well.

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[4] Bifurcating the proceeding to address issues related to existing stocks only after a decision is made on whether the registrations should be cancelled (which, as noted earlier, is a necessary pre-condition to the existing stocks issue becoming relevant) could shorten a proceeding, but only if the products are found to meet the registration criteria. In all other cases the net result will be a delay in a final Agency decision with the perverse result that the registrant could continue to produce, sell and distribute a product adjudicated and found to cause unreasonable risks for as long as it takes to decide how to deal with an ever-increasing quantity of product that will become existing stocks upon issuance of the final decision. If the proceeding is not bifurcated, the delay would be the same, although the consequent increase in risk would be obscured.

IV. RECKITT'S ASSERTIONS OF ARBITRARY AND CAPRICIOUS ACTION ARE IRRELEVANT TO WHETHER THE DISPOSITION OF EXISTING STOCKS OF CANCELLED PRODUCTS FROM THE SCOPE OF THIS SECTION 6(b) CANCELLATION PROCEEDING, AND ARE INACCURATE

Reckitt contends that "the existing stocks determinations set forth in the NOIC are without a proper substantive foundation and therefore is [sic] arbitrary and capricious" (Reckitt's Reply Brief at 14-15). Judging from the examples Reckitt has presented in support of this contention, this fourth argument does not appear to be contesting Respondent's determination that it has the authority to define the scope of a cancellation proceeding, Respondent's decision to exclude the disposition of existing stocks of cancelled products from the scope of this particular proceeding, or Respondent's decision to announce in the NOIC its intentions regarding the disposition of existing stocks of cancelled products once they are cancelled. Instead, Reckitt argues that it is "the sell-through ban" itself, or perhaps more generally Respondent's substantive intentions regarding the disposition of existing stocks, that is arbitrary and capricious.

First, the agency action that Reckitt contests as arbitrary and capricious does not exist: As explained in the preceding section and in the May 31 Brief at 6-7, there is no "ban", and thus Reckitt's various contentions regarding supposed substantive and procedural prerequisites for a ban are irrelevant. Likewise, there are no substantive or procedural prerequisites to Respondent forming intentions regarding future actions. Because Reckitt's allegations of arbitrary and capricious action do not apply to agency actions pertinent to this section 6(b) cancellation proceeding, they require no further response.[5]

Second, the actions Reckitt presents as examples of arbitrary and capricious action have no bearing on whether Reckitt or others have a right to a section 6(b) proceeding regarding the

[5] Nevertheless, Respondent's previous filings have addressed allegations of arbitrary and capricious action to the extent appropriate to minimize their potential to prejudice the ALJ or other readers.

disposition of existing stocks of cancelled products, or on whether Respondent included the disposition of existing stocks of cancelled products within the scope of this proceeding. As discussed above, there is no such right to a hearing and the NOIC clearly puts the disposition of existing stocks of cancelled products outside the scope of this proceeding. Accordingly, even if Respondent's actions were arbitrary and capricious (which they are not, for reasons discussed in the Response Brief at 16-22 and the May 31 Brief at 6-7), it would not change the fact that there is no basis for Reckitt's Motion and that it should be denied.

V. CONCLUSION

For the reasons discussed above, neither Reckitt's Reply Brief nor other filings by the petitioners and amici offer any persuasive authority or rationale for the position that the disposition of existing stocks of cancelled products should be considered within the scope of this proceeding, and Reckitt's Motion should be denied.

Respectfully submitted,

6/7/2013
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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of *Respondent's Respondent's Surreply Regarding Reckitt Benckiser's Motion For An Expedited Determination On Existing Stocks* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

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