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 OPPOSITION TO UNTIMELY SUBMISSION OF THE GREATER CINCINNATI NORTHERN KENTUCKY APARTMENT ASSOCIATION, LOUISVILLE APARTMENT ASSOCIATION, AND DO IT BEST CORPORATION FOR LEAVE TO FILE A BRIEF IN SUPPORT OF RECKITT'S MOTION FOR AN EXPEDITED DETERMINATION ON EXISTING STOCKS

The Assistant Administrator for Chemical Safety and Pollution Prevention ("Respondent") opposes as untimely the joint motion, filed on May 13, 2013, of Greater Cincinnati Northern Kentucky Apartment Association, Louisville Apartment Association, Do It Best Corporation ("Joint Movants") to file a brief in support of the April 12, 2013, Reckitt Benckiser LLC ("Reckitt") Motion for an Expedited Determination That EPA's Existing Stocks Decision Is Within The Scope of The Hearing ("Reckitt's Motion"). Joint Movants recognize that their motion, and the brief that accompanied it, are untimely, but argue that it should nonetheless be accepted for three reasons:

1) Joint Movants did not retain counsel until May 7, 2013;

2) The issue of existing stocks is "of greater concern" to Joint Movants than the issue of whether Reckitt's registrations should be cancelled; and

3) Joint Movants have a "unique perspective" on existing stocks.

Joint Movant's Motion at pp. 1-2. Respondent submits that none of the reasons advanced by Joint Movants in support of their motion come close to constituting good cause for their failure to either file a timely brief or, at the very least, a timely request for an extension of time, and Joint Movants' untimely motion should therefore be denied.

BACKGROUND

The Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products ("NOIC") giving rise to this proceeding was published in the Federal Register on February 5, 2013. Interested parties had thirty days from the date of publication to request an adjudicatory hearing on whether the registrations and applications identified in the NOIC meet the standard for registration under FIFRA or should be cancelled and/or denied. The NOIC also informed interested persons of EPA's intentions concerning existing stocks if the products subject to the hearing are cancelled at the conclusion of the proceeding. Each of the three Joint Movants, apparently without retaining counsel, individually filed timely requests for hearing; each of the three identified existing stocks as an issue of special concern.

Reckitt filed its motion for an expedited determination on existing stocks on April 12, 2013. It is unclear whether Reckitt discussed its motion with any of the Joint Movants prior to filing, but the Certificate of Service attached to Reckitt's Motion indicates that the motion was e-mailed (and mailed) to each of the Joint Movants the day it was filed. Responses in support of,

or opposition to, Reckitt's Motion were due on April 25, 2013; only Respondent filed a response on that date. Respondent's response was also sent to each of the Joint Movant's by both regular mail and e-mail.

On April 30, 2013, Reckitt filed a motion for leave to file a reply to Respondent's response to Reckitt's Motion. On May 6, 2013, Respondent filed a response objecting to Reckitt's motion to file a reply brief. The Joint Movants state they retained counsel the next day. Then, on May 13, 2013, Joint Movants filed their motion for leave to file an untimely brief in support of Reckitt's Motion and, along with the motion, their brief in support of Reckitt's motion. While Respondent will not here address the arguments contained in Joint Movants' brief, Respondent does note that the untimely brief is not at all the brief that Joint Movants could have filed had they filed a timely brief (which would have been due the day Respondent filed its response). Instead, Joint Movants have filed what is essentially a reply to Respondent's response to Reckitt's Motion. And despite Joint Movants' assertion that they bring a "unique" perspective to the existing stocks issue, Respondent suspects that the Joint Movants intend their brief to serve the function of a Reckitt reply brief.

ARGUMENT

The Rules of Practice governing this proceeding are quite clear on this point: 40 C.F.R. § 164.60(b) provides that "[w]ithin 10 days after service of any motion filed pursuant to this part, ... any party may serve and file an answer to the motion." Each of the Joint Movants was a full party to this proceeding on April 12, 2013, when Reckitt filed its motion. Even accounting for additional time allowed under § 164.6(a) or § 164.6(c), the Joint Movants' May 13, 2013 filing

is weeks beyond the time allotted pursuant to § 164.60(b) for parties to respond to Reckitt's Motion. Accordingly, the Joint Movant's brief should be disregarded as untimely.

The Joint Movants are not entitled to an enlargement of the time allotted for responding to Reckitt's Motion. The Rules of Practice at § 164.6(b) permits enlargement after the expiration of a deadline only "where the failure to act was the result of excusable neglect." Each of the Joint Movants individually requested commencement of this hearing, and must accept responsibility for attending to the progress of the hearing they called into being. Each of the requests for hearing individually filed by the Joint Movants was in response to the February 5, 2013 Notice Of Intent to Cancel ("NOIC"), which identified the Part 164 Rules of Practice and explained their applicability to subsequent proceedings too clearly for any hearing requestor to reasonably plead ignorance.[1] Each of the Joint Movants expressly identified the treatment of existing stocks of cancelled product as a principal reason for its individual hearing request,[2] and Joint Movants emphasize this interest again in their request for leave to file their untimely brief. Given the very clear focus of Reckitt's Motion and Joint Movants expressed interest in the existing stocks issue, it is hard to imagine that any one of the Joint Movants would have failed to appreciate the significance of Reckitt's Motion. While it is clear that Joint Movants knew of

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[1] *See, e.g.*, 78 Fed.Reg. 8123, 8123 ("All persons who request a hearing must comply with the Agency's Rules of Practice Governing Hearings, 40 CFR part 164."); *Id.* at 8127 ("All persons who request a hearing must comply with the Agency's Rules of Practice Governing Hearings, 40 CFR Part 164."); *Id.* ("If a hearing concerning any product affected by this Notice is requested in a timely and effective manner, the hearing will be governed by the Agency's Rules of Practice Governing Hearings, 40 CFR Part 164, and the procedures set forth in Unit VI.")

[2] *See* Greater Cincinnati Northern Kentucky Apartment Association, Hearing Request at 2 (March 5, 2013)(" I understand that the EPA not only intends to ban d-CON, but also will not allow stores to [sic] sell these products to sell off any stocks they currently have on their shelves once the ban takes effect."); Louisville Apartment Association, Hearing Request at 2 (March 5, 2013)("I understand that the EPA not only intends to ban d-CON, but also will not allow stores to [sic] sell these products to sell off any stocks they currently have on their shelves once the ban takes effect."); Do It Best Corp., Hearing Request at 2 (March 5, 2013)("Even more concerning, I understand that if EPA does ban these products, EPA does not intend to allow stores such as ours to sell their existing stocks of the d-CON products that we already have on hand. ... If EPA is indeed moving in this direction, we respectfully request a hearing to consider the particular hardship and damage this would cause to retailers and distributors in the channels of trade.").

Reckitt's Motion on the date it was filed, it is worth noting that Reckitt contacted counsel for Respondent regarding its motion in advance of its filing, and it seems likely that Reckitt would have given its allies advance notice of its intentions as well. But whether Joint Movants knew about Reckitt's Motion in advance, or only on April 13th, Joint Movants must have known that the other parties were about to engage in what could reasonably be foreseen to be dispositive litigation of a principal issue purportedly motivating each of the Joint Movants to request this hearing. Under the circumstances, Joint Movants cannot reasonably be excused for missing by two weeks the deadline for responding. At the very least, Joint Movants should have timely notified the Administrative Law Judge and the other parties of their interest in participating in the briefing of the existing stocks issue and requested an extension of time. Indeed, the Joint Movants' failure to attend to, and actively engage in, the litigation of the principal issue purportedly motivating each of their requests for a hearing raises serious questions about the sincerity of their request for hearing.

Neither should the Joint Movants' neglect of filing deadlines be excused on the grounds that they had not retained counsel. Parties are not required to be represented by counsel, but may appear in person or by other representative. § 164.30. However, they are in any case held to the standards of ethical conduct required of attorneys practicing before the federal courts, which includes a duty of reasonable diligence. *See* Model Rules of Professional Conduct R. 1.3 (2012). Furthermore, Joint Movants do not even have the weak claim that, due to surprise, they lacked the opportunity to timely retain counsel capable of representing their interests. Here, each of the Joint Movants individually invited the commencement of this proceeding, and they have had since February 5, 2013, to engage counsel to the extent they felt it necessary to have counsel represent their interests.

For the aforementioned reasons, the Joint Movants have failed to show any good cause for their untimeliness, and their brief should be disregarded as untimely filed and therefore not properly before the Administrative Law Judge.

Respectfully submitted,

May 21, 2013
Date

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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of *Respondent's Opposition To Untimely Submission Of The Greater Cincinnati Northern Kentucky Apartment Association, Louisville Apartment Association, And Do It Best Corporation For Leave To File A Brief In Support Of Reckitt'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:

The Honorable Susan L. Biro
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I further certify that true and correct copies were sent by first class mail and e-mail to:

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