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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	FIFRA Docket No. 661
Reckitt Benckiser LLC, *et al.*	)	
	)	

RESPONDENT-INTERVENORS' JOINT MOTION TO PRECLUDE CUMULATIVE TESTIMONY OF RECKITT BENCKISER LLC'S PROPOSED WITNESSES

Petitioner Reckitt Benckiser LLC (Petitioner or Reckitt) expects to present thirty witnesses in this proceeding, many with significantly overlapping testimony. Allowing such cumulative testimony would disserve judicial economy and unnecessarily multiply this hearing. Respondent-Intervenors[1] therefore respectfully move the Administrative Law Judge to preclude Reckitt's witnesses who will present cumulative testimony and limit Reckitt to a single witness on each of the subject areas it has identified, pursuant to the Judge's broad authority to preclude evidence that is "unduly repetitious." 40 C.F.R. § 164.81(a). "Litigants are not entitled to burden the court with an unending stream of cumulative evidence. . . . 'limited only by [their] own judgment and whim.'" *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1171 (7th Cir. 1983) (citations omitted) (quoting 6 John Henry Wigmore, *Evidence in Trials at Common Law* § 1907 (James H. Chadbourne rev. ed. 1976)).

Respondent-Intervenors have consulted with the other parties regarding this motion. EPA intends to file a response to this motion. The Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do It Best Corp. oppose the motion.

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[1] West Harlem Environmental Action (WE ACT), Natural Resources Defense Council (NRDC), American Bird Conservancy, Center for Biological Diversity, Defenders of Wildlife, and Sierra Club (collectively, Respondent-Intervenors).

Reckitt indicated that it could not take a position without viewing a draft of the motion papers and reserved its right to oppose the motion.

I. Reckitt's Prehearing Exchange Reveals that Reckitt Intends to Proffer Cumulative Testimony from Its Proposed Witnesses

Petitioner's prehearing submissions indicate that many of its thirty witnesses, in multiple areas, will offer redundant testimony. *See generally* Pet'r's Report of Prehearing Exchange, Witness List and Brief Narrative Summaries of Testimony (Mar. 14, 2014) [hereinafter Reckitt's Prehearing Exchange]; Mot. to Supplement Pet'r's Report of Prehearing Exchange (Apr. 1, 2014) [hereinafter Reckitt's Mot. to Supplement]; Pet'r's Rebuttal Prehearing Exchange (Apr. 4, 2014) [hereinafter Reckitt's Rebuttal Exchange].

Reckitt has, for example, identified five experts who Reckitt expects to testify about the human health risks posed by exposures to rodenticide products: (1) Dr. James V. Hillman is "expected to testify regarding the risks . . . [to] children exposed to various types of rodenticides"; (2) Dr. James McCluskey is also expected to offer testimony on "typical exposure scenarios for children . . . [and] risks associated with anticoagulant and non-anticoagulant rodenticide products"; (3) Dr. Beth Mileson is similarly "expected to testify regarding the toxicity of various anticoagulant and non-anticoagulant rodenticides with respect to children"; (4) Dr. Peter Chyka is likewise "expected to testify regarding the risks (or lack thereof) to young children of consumer-use anticoagulant rodenticide products"; and (5) Dr. Richard Kingston is "expected to testify regarding the potential risks to children from the actions EPA has proposed in the NOIC" and "the risks of non-anticoagulant rodenticides to vulnerable populations." Reckitt's Prehearing Exchange 1-2.

Not only are these five experts expected to testify on predominantly overlapping topics, but, given their parallel qualifications, they apparently will do so from similar disciplinary

perspectives. For instance, a shared background in medical toxicology informs each of these experts' views on the human health risks associated with rodenticide exposures: (1) Dr. Hillman is "board certified in . . . medical toxicology"; (2) Dr. McCluskey "has significant experience in toxicology"; (3) Dr. Mileson is "a board-certified toxicologist with significant experience in toxicology"; (4) Dr. Chyka "is board-certified in clinical toxicology and has significant experience in clinical toxicology"; and (5) Dr. Kingston "has significant experience in the area[] of clinical toxicology." *Id.* Reckitt's witness descriptions provide scant basis for distinguishing these experts from one another.

The cumulative nature of Reckitt's proffered witnesses is not confined to the subject area of human health risks from rodenticide exposures. Reckitt has, for instance, proffered three witnesses to testify about the potential public health impacts of EPA's Notice of Intent to Cancel, particularly with respect to rodent-borne and rodent-associated diseases (McCluskey, Gessner, Lipkin), *see id.* at 2, 5, 7-8; three witnesses to discuss the risks to pets posed by exposure to various rodenticides (Brutlag, Poppenga; Kashuba), *see id.* at 1, 3, 8; five witnesses to discuss the risks to wildlife posed by rodenticide exposures (Fairbrother, Brewer, Stroud, Kashuba, Reibach[2]), including two to testify on a specific study on the variation in the relative prevalence of brodifacoum, bromadiolone, and bromethalin in small mammals (Brewer, Reibach), *see id.* at 6-8; Reckitt's Mot. to Supplement 3; three witnesses to offer testimony on rodent resistance to anticoagulant rodenticides, *see* Reckitt's Prehearing Exchange 4-5, 7 (Pelz, Kohn, Meyer); two witnesses to opine on the comparative efficacy of different rodenticide bait types and formulations, *see id.* at 3-4 (Buckle, Prescott); two witnesses to discuss Reckitt's efforts to comply with EPA's requirements for rodenticide products (Ambuter, Watson), *id.* at 8-9; and

[2] Reckitt proposed Dr. Paul Reibach as an additional witness in its motion to supplement its prehearing exchange. *See* Reckitt's Mot. to Supplement.

two witnesses to testify on the place that Reckitt's products occupy in the consumer market (Ambuter, Scharer), *id.* at 8-9. Given that Petitioner has identified thirty separate witnesses, it is not surprising that their testimonies are redundant in several subject areas.

II. The Administrative Law Judge Should Exercise Discretion to Limit Cumulative Testimony from Reckitt's Witnesses

The Administrative Law Judge has broad discretion to preclude cumulative testimony. The Rules of Practice provide that "[t]he Administrative Law Judge shall admit all relevant, competent and material evidence, *except evidence that is unduly repetitious*." 40 C.F.R. § 164.81(a) (emphasis added). This standard is similar to that of Federal Rule of Evidence 403, which allows a federal court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of" "wasting time," "needlessly presenting cumulative evidence," or "unfair prejudice." Fed. R. Evid. 403; *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 230 (1940) ("Much of the refused testimony was merely cumulative in nature. A trial court has wide discretion in a situation of that kind."); *Sutkiewicz v. Monroe Cnty. Sheriff*, 110 F.3d 352, 361 (6th Cir. 1997) (explaining that a "court has broad discretion to place limits on the presentation of evidence to prevent delay, waste of time, and needless presentation of cumulative evidence"). The Administrative Law Judge should exercise this broad authority to prevent an unreasonably lengthy proceeding here.

A. Courts Routinely Preclude Redundant Testimony

Courts regularly preclude the kind of redundant witnesses that Reckitt has identified. "'[I]n this era of crowded . . . dockets . . . judges not only may but must exercise strict control over the length of trials.'" *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987) (alteration in original) (quoting *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984)). In light of a court's "wide discretion in the management of its docket and the presentation of evidence," "[a]

party is not entitled, as a matter of right, to put on every witness he may have." *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994) (citing *Manbeck v. Ostrowski,* 384 F.2d 970 (D.C. Cir. 1967)).

In *McCabe v. Ramparts, Inc.*, for example, the court barred three out of the plaintiff's four proposed experts from testifying on a pool's safety, where "all four experts tendered by Plaintiff overlap[ped] significantly with respect to their testimony concerning the adequacy of swimming pool warning and safety signs, and pool depth marking." No. 2:08-CV-01232-PMP-GWF, 2012 WL 2873842, at *1 (D. Nev. July 13, 2012). Similarly, in *Engman v. City of Ontario*, the trial judge refused the defendants' proposal to have even two separate witnesses testify about the defendant officers' use of force; in doing so, the court reasoned that the witnesses' opinions "overlap[ped] substantially." No. EDCV 10-284 CAS (PLAx), 2011 WL 2463178, at *8 (C.D. Cal. June 20, 2011). And in *Direct Focus, Inc. v. Admiral Ins. Co.*, the court required the defendant to choose between just two proffered experts to testify on defendant's handling of plaintiff's insurance claim, where "a review of the disclosure statements reveal[ed] that these experts offer[ed] the same opinions on the same subject." No. C00-5170FDB, 2002 WL 34364134, at *1 (W.D. Wash. Apr. 11, 2002); *see also Thorndike v. DaimlerChrysler Corp.*, 266 F. Supp. 2d 172, 185 (D. Me. 2003) ("[A]mong the several opinions that DaimlerChrysler would have Mr. Weiman offer at trial are various opinions that clearly fall into the territory of accident reconstruction, occupant kinematics, biomechanics and medical causation, territories already occupied by other DaimlerChrysler experts. Many of the challenged opinions are unnecessarily duplicative.").

Indeed, courts may bar multiple witnesses from testifying on a single subject area even where those witnesses arguably could offer distinct perspectives on the subject at issue. In

McCabe, for example, the court considered four "pool safety experts," each of whom could have opined from one of the following "perspective[s]": "pool design and construction . . . , safety engineering and human factors . . . , aquatic safety and aquatic risk management . . . , and safety in connection with the construction and operation of swimming pools and amusement and water parks." 2012 WL 2873842, at *1. In concluding that the experts were "redundant and cumulative with respect to the areas of inquiry that the Court finds may be helpful to the tri[e]r of fact," the court reasoned, "[S]imply because . . . the testimony of each of Plaintiff's proposed four experts concerning the adequacy of pool safety warning signs and pool depth markers is offered from the perspective of their particular fields of expertise, does not alter the fact that it is unnecessarily and impermissibly commutative . . . ." *Id.*; *accord Direct Focus, Inc.*, 2002 WL 34364134, at *1 (refusing to admit the testimony of multiple witnesses on the same subject "in order for there to be a circumspect resolution of the case," despite the fact that "in theory the[] witnesses' approaches from different perspectives could be helpful in fully explicating the issues").

Here, likewise, the redundancy of Reckitt's witnesses cannot be justified by the arguably different perspectives that they bring to substantially overlapping subject areas. Reckitt has not explained why it needs five witnesses with a specialty in toxicology to testify concerning human health impacts, for example. Nor has it justified calling multiple witnesses to testify concerning relative efficacy of different rodenticide products. Granted, Dr. Alan Buckle was employed by "several departments of the government of the United Kingdom" and has had "various roles in the chemical industry." Reckitt's Prehearing Exchange 3. But that does little to distinguish his testimony on "the comparative efficacy of different forms of rodenticide bait type, formulation, and presentation," *id.*, from the substantially similar testimony of Dr. Colin Prescott, of the University of Reading, who Reckitt intends to present testimony on "the comparative efficacy of

different forms of bait and different active ingredients," *id.* at 4. Like the courts in *McCabe*, *Engman*, and *Direct Focus, Inc.*, the Administrative Law Judge should limit Reckitt's presentation to a single witness on each subject area.

Respondent-Intervenors expect Reckitt will argue that it should be permitted to present thirty witnesses, notwithstanding the redundancy of many of those witnesses' proposed subject matter, because WE ACT and NRDC disclosed two witnesses, Allison Taisey and Luis Agurto, Jr., to testify on topics that Reckitt claims also overlap. *See* Reckitt's Mot. to Supplement 2. Ms. Taisey is a board-certified entomologist based at Cornell University who works with affordable housing providers to implement integrated pest management (IPM) theory and research. Natural Resources Defense Council and West Harlem Environmental Action's Report of Prehearing Exchange 1 (Mar. 21, 2014). In contrast, Mr. Agurto is a structural pest control operator whose company provides professional pest management services to residential, commercial, and municipal properties. *Id.* Ms. Taisey's expected testimony on translating IPM research into practice is different from Mr. Agurto's anticipated testimony on the "the continued availability and relative cost, following the proposed cancellation, of effective and affordable rodent management tools" in a variety of settings. *See id.* at 1-2. Ms. Taisey and Mr. Agurto's contrasting qualifications, disciplines, and expected testimonies do not justify the repetitive testimony offered by Reckitt. Nonetheless, Respondent-Intervenors would not object to reasonable limits on the number of witnesses if they are applicable equally to all parties.

B. Permitting Cumulative Testimony from Reckitt's Witnesses Would Waste Time and Cause Respondent-Intervenors Unfair Prejudice

Reckitt has expressed its preliminary intent to call thirty witnesses, whose testimony in Petitioners' direct case alone is estimated to consume as many as 81 hours. *See* Pet'r's Report of Prehearing Exchange 2 (Mar. 14, 2014). Allowing the cumulative testimony of Reckitt's

witnesses would waste a significant amount of both the Administrative Law Judge and the parties' time at the hearing and in preparing for it. It would also result in undue prejudice to the other parties. Without greater clarity as to which witnesses Reckitt will ultimately call at trial, or whether the testimonies of Petitioner's witnesses may ultimately be limited, Respondent-Intervenors face potential discovery related to each of these thirty witnesses, including possible deposition testimony and document requests, or independent investigation of these witnesses to prepare for the hearing if discovery does not proceed.

CONCLUSION

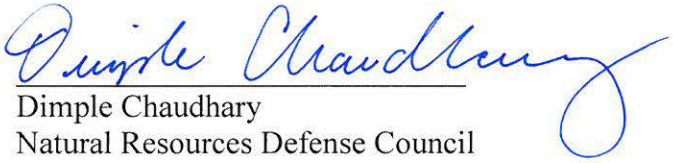
For the foregoing reasons, Respondent-Intervenors respectfully seek an order requiring Reckitt to limit the apparently cumulative testimony of its witnesses. Specifically, Reckitt should be restricted to presenting a single witness on each of the following subject areas it has identified: human health risks from rodenticide exposures; public health implications of EPA's Notice of Intent to Cancel; risks to pets from rodenticide exposures; risks to wildlife from rodenticide exposures; rodent resistance to anticoagulant rodenticides; the comparative efficacy of various methods of pest control and rodenticide products; Reckitt's efforts to comply with EPA's requirements for rodenticide products; and the position that Reckitt products occupy in the consumer market. Such an order would still allow Reckitt to present witnesses in each of the areas in which it wishes to proffer testimony, but would prevent cumulative testimony that would burden the Administrative Law Judge and the other parties while doing little if anything to improve the accuracy of the Judge's ultimate ruling. Such an order would also facilitate more focused discovery and increase the efficiency of the hearing.

To the extent that the Administrative Law Judge determines that a portion of a witness's testimony would be cumulative, Respondent-Intervenors request that the Administrative Law Judge limit the redundant portion of that testimony.

Should the Administrative Law Judge determine that Reckitt's prehearing disclosures are insufficiently clear to allow her to determine whether a particular witness's testimony would be cumulative, Respondent-Intervenors respectfully request that the Administrative Law Judge order Reckitt to provide a more definite statement of that witness's testimony.

Respondent-Intervenors further request that the Administrative Law Judge extend the time in which to seek discovery of Reckitt's witnesses until after a decision on whether to limit cumulative testimony.

Respectfully submitted,



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Dated: April 11, 2014

CERTIFICATE OF SERVICE

I certify that, on this 11th day of April, 2014, the foregoing document was served to the addresses listed below in the manner indicated.

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