UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

POUCH MAIL

February 11, 2008

Honorable Barbara A. Gunning
Administrative Law Judge
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

Re: *In the Matter of Behnke Lubricants, Inc.*
Docket No. FIFRA-05-2007-0025
Complainant's Reply to Respondent's Response to Complainant's Motion to Strike Respondent's Affirmative Defenses and Complainant's Motion to Compel Discovery, and Request for Order Requiring Respondent to Comply with Prehearing Order

Dear Judge Gunning:

Enclosed, please find a true, accurate and complete copy of Complainant's Reply to Respondent's Response to Complainant's Motion to Strike Respondent's Affirmative Defenses, and Complainant's Motion to Compel Discovery, and Request for Order Requiring Respondent to Comply with Prehearing Order. The original and one true, accurate and complete copy of this document were filed with the Regional Hearing Clerk, Region 5, U.S. EPA, on February 11, 2008. A true, accurate and complete copy of this document was delivered to Respondent's counsel via Federal Express on February 11, 2008.

Should the Court have any questions, please do not hesitate to have your staff contact the undersigned at (312) 886-0813.

Sincerely,

James J. Cha
Associate Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
	)	
BEHNKE LUBRICANTS, INC.	)	**COMPLAINANT'S REPLY TO**
MENOMONEE FALLS, WISCONSIN	)	**RESPONDENT'S RESPONSE TO**
	)	**COMPLAINANT'S MOTION TO**
Respondent.	)	**STRIKE RESPONDENT'S**
	)	**AFFIRMATIVE DEFENSES**
	)	**AND COMPLAINANT'S**
	)	**MOTION TO COMPEL**
	)	**DISCOVERY**
	)	
	)	**Docket No. FIFRA-05-2007-0025**

COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES AND COMPLAINANT'S MOTION TO COMPEL DISCOVERY
AND
REQUEST FOR ORDER REQUIRING RESPONDENT TO COMPLY WITH PREHEARING ORDER

Complainant, through its undersigned attorneys, files the instant Complainant's Reply to Respondent's Response to Complainant's Motion to Strike Respondent's Affirmative Defenses and Complainant's Motion to Compel Discovery ("Complainant's Motion") pursuant to the authority of Section 22.16(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, ("Consolidated Rules" or "CROP") 40 C.F.R. § 22.16(b).[1] In addition,

[1] Complainant notes that Behnke's Response appears to have been filed past the applicable deadline. Under 40 C.F.R. § 22.16(b), responses to motions must be filed within fifteen days after service of the motion. Service of Complainant's Motion to Strike Affirmative Defenses and Motion to Compel Discovery was complete as of January 17, 2008, the date on which the motion was "placed in the custody of a reliable commercial delivery service." See 40 C.F.R. § 22.7(c). Therefore, Respondent's Response was required to be filed on Friday, February 1, 2008. See 40 C.F.R. § 22.16(b), and § 22.7(a). Respondent did not file its Response until Monday, February 4, 2008 (the date on which the Response was delivered), which appears to be three days past the 15-day deadline for responses to motions. However, Complainant believes that the issues raised in its Motion to Strike and Motion to Compel Discovery should be decided

Complainant requests that this Court order Respondent to comply with the Prehearing Order with respect to Behnke's recent arguments concerning the penalty.

I. Motion to Strike

Nothing in Behnke Lubricant, Inc.'s ("Behnke's") Response to Complainant's Motion ("Response") provides justification for denial of Complainant's Motion. Complainant has established that, as a matter of law, each of Respondent's affirmative defenses 3, 4, 5 and 6 fails to provide a legal basis for denial of liability, and each should be stricken as a legally insufficient defense. Affirmative Defenses 3, 4 and 5 are all legal conclusions that, even if assumed to be true, fail to establish a defense to Respondent's liability for the sale and/or distribution of unregistered pesticides as alleged in the Complaint. Complainant respectfully requests a ruling from this Honorable Court that none of these defenses serve to relieve Respondent of its liability, and that, therefore, the defenses are stricken.

In support of its Motion, Complainant has explicated the relevant statutory provisions and their associated legislative history to demonstrate that each of these defenses fails as a matter of law. *See Complainant's Motion to Strike*, at 14-30. While Respondent appears to argue that Complainant may not cite to legislative history, Federal Register Notices, or any other legal authorities, characterizing the same as "matters outside of the pleadings" (*see Response*, at 16), this objection is misplaced. Complainant has cited appropriately to legal authorities that demonstrate why, on the face of the pleadings, Respondent's affirmative defenses 3, 4, 5 and 6 are insufficient as a matter of law. *See Fabrica Italiana Lavorazione Materie Organiche, S.A.S. v. Kaiser Aluminum*,

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on the merits; Complainant further acknowledges that it has suffered no prejudice from the delay in the filing of Respondent's Response. Complainant therefore waives any objection to the Court's consideration of Behnke's Response based on the 15 day deadline for responses to motions.

684 F.2d 776, at 779-80 (11th Cir. 1982) (in a contract dispute, Court of Appeals affirmed lower court's decision to strike affirmative defense of impossibility of performance as "legally insufficient"; Court of Appeals cited to applicable provisions of the U.C.C., and discussed the legal effect of these statutory provisions).

Respondent largely fails to address the legal arguments advanced by Complainant, and the arguments advanced by Behnke are unsupported by the statutory language or legislative history of the laws cited by Respondent. For example, Respondent fails to make the correct observation that, in defining the term "antimicrobial pesticide" in Section 2(mm) of FIFRA, Congress was addressing the delays in registration of antimicrobial products used for sanitization of hospitals, institutions, restaurants and similar facilities. As explained in Complainant's Motion (see pp. 14-20), the plain language of Section 2(mm) and Section 3(h) of FIFRA, 7 U.S.C. §§ 136(mm) and 136a(h), and the legislative history of the Food Quality Protection Act (FQPA), clearly demonstrate that the purpose of the amendment which added Section 2(mm) (the definition of "antimicrobial pesticide") to FIFRA was to create an expedited process for U.S. EPA's review of FIFRA registration applications for certain antimicrobial products: "The registration of antimicrobial pesticides have been plagued with inefficiencies and unnecessary delays. In order to improve upon the registration of antimicrobial pesticides and how those registrations are managed, the bill provides a definition for these important products and improves the registration efficiency by recognizing their unique purpose compared to that of other pesticide products. ..." *See 1996 Committee Reports, July 11, 1996, 104 H. Rpt. 669, reprinted in 1996 U.S. Code Cong. & Adm. News, p. 1214.* The relevant statutory language and legislative history show that Congress created a special

category of "antimicrobial pesticides" defined in Section 2(mm) of FIFRA only to establish an expedited registration process for these particular pesticides. In no way was the inclusion of this definition intended to limit the definition of "pesticide" or the scope of FIFRA. Congress never created an exclusion from all FIFRA regulation for those antimicrobial products that failed to meet the definition of "antimicrobial pesticides" under Section 2(mm) of FIFRA because they were also subject to a tolerance or food additive regulation under the Federal Food Drug and Cosmetic Act. There is simply no legal authority to support Respondent's argument that "food additives" can never be "pesticides" under FIFRA because "food additives" are excluded from the definition of "antimicrobial pesticides" found in Section 2(mm) of FIFRA. The exclusion only means that "food additives" which make pesticidal claims (such as the antimicrobial claims made by Behnke) will be treated as regular pesticides under FIFRA for purposes of the pesticide registration process, and that the expedited deadlines for review of applications for registration of "Section 2(mm) antimicrobial pesticides" that were established in Section 3(h) of FIFRA will not apply. This interpretation is consistent with the Food and Drug Administration's handling of such "food additive" pesticides. *See Complainant's Motion to Strike*, discussion at 27-29.

Respondent criticizes EPA's decision to move to strike Behnke's affirmative defenses 3 through 6, but not moving to strike Respondent's defenses 1, 2 or 7. *See Response*, at 8. However, Complainant has already explained that those latter defenses are more appropriately dealt with in a motion for accelerated decision. *See Complainant's Motion to Strike*, at 13-14, note 5. Complainant has filed such a motion in

this matter. As for Respondent's argument that all of its defenses are "interrelated,"[2] it was Behnke who decided to identify all seven of its affirmative defenses as separate grounds for denial of liability. Behnke cannot now attempt to conflate these distinct conclusions of law into a single defense and simultaneously argue that the Motion to Strike should be denied.[3]

Behnke appears to confuse legal arguments with factual assertions, arguing that it "should have the opportunity to support its contentions at hearing." *See Response*, at 12. Yet the affirmative defenses which Complainant seeks to have stricken are purely conclusions of law that, even if accurate, cannot relieve Behnke of its liability for the FIFRA violations alleged in the Complaint. As explained in Complainant's Motion (see discussion at 14-20), and reiterated above, even if Behnke's products are not "antimicrobial pesticides" within the meaning of Section 2(mm) of FIFRA, the products are still "pesticides" under Section 2(u) of FIFRA by virtue of the pesticidal claims that Behnke admits it made (*see Response*, at 10-11). If the products are not "antimicrobial pesticides" within the meaning of Section 2(mm) of FIFRA, the only consequence will be that, should Behke apply to EPA for FIFRA registration of these products, the Agency's review of Behnkes's application for registration will not be subject to the strict deadlines established under Section 3(h) of FIFRA for the completion of the registration process.

As explained in Complainant's Motion (see discussion at 21-26), even if Behnke's products are not "pesticide chemicals" within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321(q)(1)(A), they are still "pesticides" under Section 2(u) of FIFRA because of the pesticidal claims made for these products. Under

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[2] *See Response to Complainant's Motion*, at 7.

[3] *See Response to Complainant's Motion*, at 8.

the statutory definition of the term "pesticide chemical" found in 21 U.S.C. §321(q)(1), the fact that a product is not a "pesticide chemical" only affects the status of a product under the Federal Food, Drug and Cosmetic Act, not its status under FIFRA. The final sentence of the definition of "pesticide chemical" found in 21 U.S.C. § 321(q)(1) expressly states that the statutory clause which exempts/excepts certain "food contact substances" from the definition of "pesticide chemical" "does not exclude any substance [from the] definition of the term 'pesticide' that is applicable to the Federal Insecticide, Fungicide and Rodenticide Act." *See 21 U.S.C. §321(q)(1) (last sentence).* Therefore, the definition of "pesticide chemical" cited by Respondent has no applicability to whether or not a product is a "pesticide" within the meaning of FIFRA.

As discussed on page 26-30 of Complainant's Motion, even if Behnke's products are "food additives" within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321(s), they are still "pesticides" under Section 2(u) of FIFRA due to the fact that the claims associated with these products were pesticidal claims. As discussed in Complainant's Motion, the legislative history of the statutory provision on which Behnke relies (21 U.S.C. §321(s)) demonstrates that a product's status as a "food additive" will not exempt that product from regulatory coverage under FIFRA, for Congress clearly envisioned that "food additives" could also be pesticides regulated under FIFRA. As stated by Rep. Clayton in connection with the passage of the Antimicrobial Registration Technical Correction Act of 1998, Pub.L. 105-324, "[a]ntimicrobials will still be subject to registration under FIFRA and standard FDA review for food additives." 144 Cong Rec E 2197. This expression of legislative intent demonstrates that Congress understood that a product could be subject to regulation as a pesticide under FIFRA and as a "food

additive" under the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. § 301 *et. seq.* In addition, the Food and Drug Administration has repeatedly cautioned that, although substances may be regulated by the FDA as "food additives" under Section 409 of the FFDCA, and not by U.S. EPA as "pesticide chemicals" under Section 408 of the FFDCA, the intended use of these substances nevertheless may subject these products to regulation as pesticides under FIFRA. Even Respondent's own Exhibit 53, a "Draft Guidance for Industry" distributed by the Food and Drug Administration regarding "Microbial Considerations for Antimicrobial Food Additive Submissions," states unequivocally that a product's status as a "food additive" under the Food, Drug and Cosmetic Act has no effect on whether it is also subject to regulation under FIFRA: "It is important to note that, depending on the proposed use, *an antimicrobial food additive may also be a pesticide under the Federal Insecticide, Fungicide and Rodenticide Act* (FIFRA). As such, it may be subject to registration as a pesticide by the EPA as well as regulation as a food additive." *See RX 53*, at page 5 of 11 (*emphasis added*).

Affirmative Defenses 3, 4 and 5 contain nothing more than legal conclusions that have no effect on Respondent's liability for the violations alleged in the Complaint. As a matter of law, each of these defenses must fail, and should be stricken.

While Respondent characterizes its Affirmative Defense No. 6 as a "factual claim that will be supported by testimony and documents at hearing,"[4] the description of this defense strongly suggests that Behnke is raising the "Treated articles or substances" exemption set forth in FIFRA's implementing regulations, at 40 C.F.R. § 152.25(a). While "[t]reated articles or substances" are considered to be "of a character not requiring regulation under FIFRA, and are therefore exempt from all provisions of FIFRA when

[4] *Response*, at 8.

intended for use, and used, only in the manner specified," an article or substance cannot qualify for the "treated articles or substances" exemption, unless it satisfies the following definition: "[a]n article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), *if the pesticide is registered for such use*." 40 C.F.R. § 152.25(a) (emphasis added). Most importantly, the article or substance at issue must contain, or must have been treated with, a pesticide that has been registered under FIFRA for use in protecting the article or substance. As Complainant has already pointed out, Behnke has failed to produce any evidence that the lubricant products at issue in this case either contain or have been treated with a pesticide that has been registered under FIFRA for use as an antimicrobial designed to protect the lubricants. Therefore, Behnke cannot avail itself of the "treated articles or substances" exemption, and this affirmative defense is also legally insufficient and should be stricken. In the alternative, review of Affirmative Defense No. 6 should be resolved in the context of Complainant's Motion for Accelerated Decision; if Behnke persists in its refusal to provide probative evidence that its lubricant products contain or have been treated with a registered pesticide, Complainant should be granted an accelerated decision on this particular issue.

II. <u>Discovery Motion</u>

Largely as an alternative prayer for relief, Complainant also requested discovery of information relating to Respondent's Affirmative Defenses 5 and 6; Complainant also requested discovery of information relevant to Behnke's defenses 1, 2 and 7. Respondent opposes that motion, and by such opposition has indicated that Behnke will refuse to

provide the information necessary to accurately evaluate its contentions. Behnke's opposition to providing this information adds further support to the argument that the Court should strike these affirmative defenses. *See In the Matter of 1836 Realty Corp.*, Dkt. No. CWA-2-I-9, 1999 EPA ALJ LEXIS 113 (April 8, 1999) (Order Granting Complainant's Motion to Strike) (holding that, under 40 C.F.R. § 22.19(f)(4), failure to comply with a discovery order for information relevant to a defense may lead to the inference that the information to be discovered would have been adverse to the party from whom the information was sought, and precluding Respondent from raising the defense).

In addition, Respondent raises objections to the discovery motions as being overbroad, and even argues that, when the information sought in discovery was originally requested in June 2007 (more than seven months ago), "a response would have been costly and time-consuming for Behnke to prepare to the extent requested by EPA." *See Response*, at 18-19. Respondent also insists that it has "cooperated with Complainant to the extent reasonably possible." *See Response*, at 17. These objections are without merit, and Complainant does not believe that Respondent has been genuinely cooperative with respect to Complainant's stated need for additional documentary evidence. First, contrary to Respondent's apparent implications and assertions, at no time did Behnke or its attorneys ever "invite" a request for formal discovery; nor did Respondent ever offer to provide the information requested in Complainant's discovery motion.[5] Respondent's objection that responding to EPA's requests for voluntary production of the information "would have been costly and time-consuming" is without merit. Respondent and its legal counsel have had more than seven months notice of Complainant's request for the vast

[5] *See Response*, at 17.

majority of the discovery sought in this case. As the record in this case demonstrates, on June 21, 2007, Complainant filed with the Regional Hearing Clerk and served on Respondent's counsel a document entitled *Notice of Complainant's Request for Voluntary Production of Information*. In this document, Complainant specifically requested the information and documents that Complainant's discovery motion identifies at pages 36-47. Despite receiving advance notice that Complainant requested this information, Respondent produced no responsive documentation in its prehearing exchange. Nor has Respondent ever offered even a limited portion of the requested information, despite the obvious relevance and materiality of the requested information.

Complainant renewed its request on November 15, 2007, in its Rebuttal Prehearing Exchange, and even advised Respondent that a discovery motion could be expected if no responsive information was produced. *Complainant's Rebuttal Prehearing Exchange*, at 6. Behnke did not submit any of the requested information, and Complainant's discovery motion followed.

The record demonstrates that Behnke has consistently failed to provide the requested information concerning its affirmative defenses. Knowing that Complainant was requesting this information since June 2007, and after being advised of the likelihood of a discovery motion in November 2007, Respondent cannot now raise unsubstantiated claims that it will be prejudiced if ordered to produce the requested information. Furthermore, Respondent offers no persuasive legal argument to explain why it should not be ordered to produce the information sought by Complainant. Instead, Respondent simply asks the Court to agree with Respondent's conclusory and self-serving assertions that providing the requested information "would have been costly and time-consuming."

The requested information should be easily accessible to Behnke, and the information would be most easily obtained from Respondent as opposed to any third party.

Complainant has already explained in detail the basis for its discovery motion, and has satisfied the standard for additional discovery set forth in 40 C.F.R. 22.19. Respondent's self-serving assertions to the contrary are devoid of factual or legal support, and do not merit further response.

Respondent has also failed to adequately respond to Complainant's request for additional detail in the summaries of Respondent's witnesses and their anticipated testimony. Respondent mistakenly relies on the initial disclosure requirements of F.R.C.P. 26(a) and asserts that it is in compliance with the prehearing order, rather than addressing the applicable requirements of 40 C.F.R. 22.19(a)(2). The two provisions cannot be considered equivalent; F.R.C.P. 26 contemplates extensive discovery in the form of interrogatories, requests for admission, and requests for production of documents. See F.R.C.P. 26(a)(4). In an administrative proceeding under 40 C.F.R. Part 22, discovery does not take place automatically and as a matter of right; rather, a party seeking discovery must file a written motion for discovery and demonstrate, *inter alia*, that the additional information sought has significant probative value on a disputed issue of material fact. See 40 C.F.R. § 22.19(e). Given that discovery cannot be presumed in an administrative proceeding under 40 C.F.R. Part 22, the prehearing exchange is the primary vehicle for the exchange of information, and, at the very least, each party must provide sufficient detail in its narrative summaries of the expected testimony of its witnesses to enable the other party to adequately prepare for hearing. *See In the Matter of Gerald Strubinger and Gregory Strubinger*, Dkt. No. CWA-3-2001-001, 2002 EPA

ALJ LEXIS 44 (July 12, 2002). For the most part, Respondent's narrative summaries fail to provide even the most basic factual information that the witnesses' testimony is expected to cover. For example, the narrative summaries for witnesses Larry Bradstreet and Eddie Chancellor provide no more indication of their expected testimony than the statement that each witness "may testify regarding the actual intended use and application of respondent's products." *See Respondent's Initial Prehearing Exchange*, at 4, 7. For witness Bill Brown, the description of the anticipated testimony says only that the witness "may testify as to the actual use of food grade lubricants [in the relevant industry] and that when in use they may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food"; the descriptions of the expected testimony of witnesses James Draheim, Craig Hoffman and Roger Nelson say only that each witness "may testify regarding the use to which respondent's products were put within that facility," and/or "the potential for such products to become a part of the processed foods." *See Respondent's Initial Prehearing Exchange*, at 5 and 6. Even the descriptions of the expert testimony to be provided by witnesses Shaun Beauchamp and Charles Goodale offer little substance other than the statement that the products at issue "may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of the food." *See Respondent's Initial Prehearing Exchange*, at 8. These descriptions of the expected testimony quoted above merely paraphrase the definition of "food additive" found in 21 U.S.C. § 321(s).[6] As such, these narrative summaries provide no more information than would a description of an EPA inspector's testimony that stated "the

[6] This statutory provision states in pertinent part: "The term 'food additive' means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food..." 21 U.S.C. § 321(s).

witness will testify that respondent's products were pesticides that are required to be registered." Such terse, vague descriptions that merely parrot the language of federal statutes are clearly deficient.

Contrary to Behnke's arguments, Respondent must provide more than the "identity of lay and expert witnesses and copies of documents that a party may be used [sic.] to support its claims or defenses." Respondent is required to provide "a brief narrative summary of [the witnesses'] expected testimony." 40 C.F.R. 22.19(a)(2)(i). As interpreted by Administrative Law Judges, this rule requires more than the vague descriptions provided by Respondent for its witnesses. *See In the Matter of Henry Velleman, Individually, and d/b/a Progressive Poletown Properties*, Docket No. 5-CAA-97-008, 1998 EPA ALJ LEXIS 27 (March 18, 1998). Complainant has already pointed out the deficiencies in Respondent's narrative summaries of its expected witness testimony, and will not restate those arguments.

Behnke's further claim that it would have allowed oral depositions of its witnesses is unsupported (Respondent never made any such offer to Complainant, and will be unable to produce evidence of having done so), and in any event, is immaterial. The costs associated with an oral deposition (e.g., court reporter, transcript) make it an expensive discovery tool, and a deposition will not supplant a party's obligation to include sufficient detail in its narrative summaries of witness testimony to enable the opposing party to adequately prepare for hearing. As explained in Complainant's discovery motion, the narrative summaries provided by Respondent do not even approximate the level of detail necessary to comply with 40 C.F.R. 22.19(a)(2). And contrary to Behnke's arguments, the opportunity to cross examine Respondent's

witnesses does not obviate the need for Respondent to identify the basic substance of its witnesses' testimony prior to hearing. For several witnesses, all Behnke has done is essentially copy the definition of "food additive" found in the FFDCA (21 U.S.C. 321(s)), and state that the witness will testify that Respondent's products fit that definition. This provides virtually no information on the substance of these witnesses' expected testimony. Absent supplementation of these narrative summaries, Complainant will have virtually no information on the substance of the expected testimony of Respondent's witnesses, and will most assuredly be prejudiced in its efforts to prepare for hearing.

III. Reply to Behnke's Position on the Proposed Penalty

Respondent has also raised an untimely argument with respect to the penalty proposed in the Complaint. As this Court specifically directed in its June 27, 2007, Prehearing Order, Behnke was required to "submit a statement explaining why the proposed penalty should be reduced or eliminated." *See Prehearing Order*, at 3. Respondent failed to submit such a statement in its Initial Prehearing Exchange, and did not include such a statement in its supplemental prehearing exchange. In addition, the Consolidated Rules of Practice require that Respondent's answer to the complaint shall state "the basis for opposing any proposed relief." *See* 40 C.F.R. § 22.15(b). Respondent's Answer only states that Behnke requests a hearing, *inter alia*, "to contest the appropriateness of the amount of any proposed penalty." The basis for such opposition to the penalty was not provided in the Answer, nor do Respondent's prehearing exchanges provide such information. Rather, Behnke has used the

inappropriate means of a response to Complainant's Motion in order to raise untimely arguments against the penalty.

Respondent should be required to supplement its prehearing exchange with this penalty-argument, identify the witnesses whom Respondent believes can provide the facts necessary to prove Respondent's allegations as set forth on pages 24-26 of Behnke's Response, and describe the testimony of such witnesses that purportedly will demonstrate "that any violations were neither 'knowing nor willful' or resulting from 'negligence,' but were based on a good faith belief that its products were not 'pesticides' within the meaning of FIFRA." *Response*, at 25-26. Complainant respectfully requests that the Court order Respondent to produce this information.

In addition, Behnke's arguments as to the penalty require a response. Complainant does not agree that the value assigned for "culpability" in the penalty calculation should be "0" (i.e., that "the violation was neither knowing or willful and did not result in negligence"). Indeed, Complainant's witness, Mr. Terence Bonace, will testify that he followed routine practice and assigned a culpability value of "2" (principally because, at the time he originally calculated the penalty, the extent of Respondent's culpability was unknown). Additionally, the evidence compiled by Complainant suggests, at times well before the dates on which U.S. EPA found pesticidal claims on Behnke's website and on the labels and advertising literature associated with Behnke's products, Behnke was aware that there was a possibility that its products were subject to the registration requirements of FIFRA. For example, in a complaint that Behnke filed in state and federal court against NSF (CX 36 and 37), Respondent itself alleged that from 2003 through 2005, Behnke was told by NSF that Behnke had to

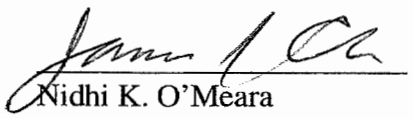
remove the antimicrobial and public health claims from its products, and that the JAX MICRONOX products needed to be registered with U.S. EPA. See CX 36, at EPA-0755 to EPA-0756. This should have been a "red flag" to Behnke, which should have prompted dialogue with the U.S. EPA to clarify if registration was required. No such inquiry was made of the U.S. EPA. Rather, Behnke waited for U.S. EPA to contact them almost three years later, when U.S EPA became aware of the potential violations and initiated it enforcement process.

Based on the above, the value assigned for "culpability" could not possibly have been "0."

IV. Conclusion

For all of the reasons set forth above, Complainant respectfully requests that the Presiding Administrative Law Judge GRANT Complainant's Motion to Strike Respondent's Affirmative Defenses, or in the alternative, that the Court GRANT Complainant's Motion to Compel Discovery. Complainant also respectfully requests that the Court GRANT Complainant's Request for Additional Documents and Information.

Respectfully Submitted,



2/11/08

Nidhi K. O'Meara
James J. Cha
Erik H. Olson
Associate Regional Counsels
U.S. EPA, Region 5

Date

In the Matter of Behnke Lubricants, Inc.
Docket No. FIFRA-05-2007-0025

CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of Complainant's Reply to Respondent's Response to Complainant's Motion to Strike Respondent's Affirmative Defenses and Complainant's Motion to Compel Discovery, and Request for Order Requiring Respondent to Comply with Prehearing Order were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below, and that true, accurate and complete copies of Complainant's Reply to Respondent's Response to Complainant's Motion to Strike Respondent's Affirmative Defenses and Complainant's Motion to Compel Discovery, and Request for Order Requiring Respondent to Comply with Prehearing Order were served on the Honorable Barbara Gunning, Administrative Law Judge (service by Pouch Mail), and Mr. Bruce McIlnay, Esq., Counsel for Respondent Behnke Lubricants, Inc. (service by Federal Express), on the date indicated below:

Dated in Chicago, Illinois, this 11 day of February, 2008.

Patricia Jeffries-Harwell
Legal Technician