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REPLY TO THE ATTENTION OF:

Via Pouch Mail

C-14J

March 12, 2008

Honorable Barbara A. Gunning  
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

Dear Judge Gunning:

On March 7, 2008, we filed with the Regional Hearing Clerk fax originals of the Joint Stipulated Facts and Joint Set of Stipulated Exhibits and Joint Motion to Admit Exhibits Into Evidence, to comply with your January 14, 2008, Scheduling Order, in which you directed the parties to file a joint set of stipulated facts and exhibits on or before March 7, 2008.

Enclosed are signed, non-fax originals, which may be easier to read, which we filed with the Regional Hearing Clerk today, March 12, 2008 to supplement the record.

Sincerely,

Erik H. Olson  
Associate Regional Counsel

cc: N. O'Meara (C-14J)  
T. Bonace (DT-8J)  
J. Cha (C-14J)  
B. McIlroy (by Federal Express)

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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In the Matter of: )  
)  
BEHNKE LUBRICANTS, INC. ) JOINT STIPULATED FACTS  
MENOMONEE FALLS, WISCONSIN )  
)  
Respondent. )  
\_\_\_\_\_ ) Docket No. FIFRA-05-2007-0025

JOINT STIPULATED FACTS

Pursuant to the Presiding Officer's January 14, 2008, Order Scheduling Hearing in the above referenced matter, and Rule 22.19(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. § 22.19(b)(2), Complainant, United States Environmental Protection Agency (U.S. EPA) and Respondent, Behnke Lubricants, Inc. (Behnke), hereby file the instant Joint Stipulated Facts.

On behalf of the Parties, the undersigned counsels of record for U.S. EPA and Behnke hereby stipulate to the following set of facts:

1. Respondent, Behnke owns and operates a place of business located at W 134 N5373 Campbell Drive, Menomonee Falls, Wisconsin 53051.
2. On August 3, 2006, an inspector employed by the Wisconsin Department of Agriculture conducted an inspection under FIFRA at Respondent's establishment.
3. During the August 3, 2006 inspection, the inspector collected physical samples of **JAX Poly-Guard FG-2** and **JAX Halo-Guard FG-2**, which were packaged, labeled and ready for shipment or sale.

4. During the August 3, 2006 inspection, the inspector also collected sample literature for the following Behnke products: **JAX Poly-Guard FG-2, JAX Poly-Guard FG-LT, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, and JAX Magna-Plate 74.**

5. During the August 3, 2006 inspection, the inspector also collected invoices showing the shipment of **JAX Poly-Guard FG-2, JAX Poly-Guard FG-LT, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, and JAX Magna-Plate 74,** which were offered for sale by Respondent.

***JAX Poly-Guard FG-2***

6. Respondent's literature that was obtained by the inspector on August 3, 2006, for **JAX Poly-Guard FG-2** states, among other things:

(A) "Since June 1, 2001, JAX Poly-Guard FG contains Micronox®, providing antimicrobial protection for the product. JAX Micronox® has proven especially effective in protecting JAX Poly-Guard Greases against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals."

(B) "Powerful Antimicrobial Performance"

(C) "Added Step in Microbial Protection Programs"

(D) The literature also included the Respondent's contact information such as phone number, facsimile number and Internet address.

7. The label on the **JAX Poly-Guard FG-2** container, observed and collected by the inspector on August 3, 2006, states: "Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial," "The bonus is an H1 lubricating

grease with Micronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities,”

“powerful antimicrobial performance” and “added step in microbial protection programs”

8. **JAX Poly-Guard FG-2** is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

9. On or about March 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Perlick Corporation (Perlick) located in Milwaukee, Wisconsin.

10. On or about June 15, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger Plastics & Supply, Inc. (Badger) located in Plover, Wisconsin.

11. On or about August 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** by having **JAX Poly-Guard FG-2** packaged, labeled and ready for shipment or sale at its location of W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin.

***JAX Halo-Guard FG-2***

12. Respondent’s literature that was obtained by the inspector on August 3, 2006, for **JAX Halo-Guard FG-2** states, among other things:

(A) “JAX Halo-Guard FG greases incorporate JAX new, proprietary antimicrobial additive technology, Micronox®, to provide antimicrobial protection for the product. A first in food-grade lubricants, JAX Micronox has proven especially effective in protecting JAX Halo-Guard Greases against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals.”

(B) The literature also included the Respondent’s contact information such as phone number, facsimile number and Internet address.

13. The label on the **JAX Halo-Guard FG-2** container, observed and collected by the inspector on August 3, 2006, states: "JAX HALO-GUARD FG-2 provides Micronox® microbial knockdown performance."

14. **JAX Halo-Guard FG-2** is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

15. On or about August 3, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** by having **JAX Halo-Guard FG-2** packaged, labeled and ready for shipment or sale at its location of W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin.

***JAX Halo-Guard FG-LT***

16. Respondent's literature that was obtained by the inspector on August 3, 2006, for **JAX Halo-Guard FG-LT** states, among other things:

(A) "JAX Halo-Guard FG greases incorporate JAX new, proprietary antimicrobial additive technology, Micronox®, to provide antimicrobial protection for the product. A first in food-grade lubricants, JAX Micronox has proven especially effective in protecting JAX Halo-Guard Greases against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals."

(B) The literature also included the Respondent's contact information such as phone number, facsimile number and Internet address.

17. **JAX Halo-Guard FG-LT** is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

18. On or about June 27, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Jennie-O Turkey Store (Jennie-O) located in Willmar, Minnesota.

***JAX Magna Plate 74***

19. Respondent's literature that was obtained by the inspector on August 3, 2006, for **JAX Magna Plate 74** states, among other things:

(A) "JAX Magna-Plate 74 incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection for the product against a wide variety of microbial agents, including yeasts, molds, and gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox® has proven especially effective in protecting the product against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*)."

(B) "JAX Magna-Plate 74 provides three major benefits to food and beverage processing plants ... Micronox® anti-microbial technology to provide antimicrobial protection for the product..."

(C) "Powerful Antimicrobial Performance"

(D) "Added Step in Microbial Protection Programs"

(E) The literature includes container sizes and part numbers in addition to Respondent's contact information which includes a phone number, facsimile number and Internet address.

20. **JAX Magna-Plate 74** is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

21. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 74** to American Foods Group (American) in Green Bay, Wisconsin.

**March 8, 2007 Investigation at American Foods Group**

22. On March 8, 2007, U.S.EPA conducted an investigation at American, located at 544 Acme Street, Green Bay, Wisconsin.

23. During the March 8, 2007 investigation, American gave the inspector copies of two purchase orders showing that American had ordered **JAX Halo-Guard FG-2** and **JAX Magna-Plate 78** from the Respondent, dated December 19, 2006 and March 3, 2006.

24. On March 16, 2007, the inspector received two pieces of literature (via mail) from American which were given to American by the Respondent.

25. The first piece of literature was entitled "American Foods Group, JAX Lube-Guard Program" and included, among other things, the following language:

(A) The packet included literature for **Magna-Plate 78 Fluids** which states, among other things: "Antimicrobial Performance: Both products incorporate JAX new, proprietary antimicrobial additive technology, Micronox™ for enhanced product protection against a wide variety of microbial agents, including yeasts, molds, gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox™ provides significant knockdown performance and has proven especially effective against lysteria (Lysteria monocytogenes), E. coli (Escherichia coli) and salmonella (Salmonella typhimurium) on contact and over extended lubrication intervals."

(B) This literature also included the Respondent's contact information such as phone number, facsimile number and Internet address.

(C) The packet also included literature for **Magna-Plate 74** which states, among other things: "Antimicrobial Performance: JAX Magna-Plate 74 incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeasts, molds, and gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox® provides significant knockdown performance and has proven especially effective against lysteria (*Lysteria monocytogenes*), E. coli (*Escherichia coli*) and salmonella (*Salmonella typhimurium*) on contact and over extended lubrication intervals."

(D) This literature also included the Respondent's contact information such as phone number, facsimile number and Internet address.

(E) The packet also included literature for **Halo-Guard FG** which states, "JAX Halo-Guard FG provides Micronox® microbial knockdown performance."

26. The second piece of literature was entitled "JAX Lubricant Guide for Food, Beverage and Drug" and included, among other things, the following language:

(A) A cover letter addressed to the customer which states: "First and foremost is Micronox®, JAX advanced antimicrobial technology that provides immediate and significant knockdown performance on a wide spectrum of microbial contaminants. This development alone is providing



HACCP programs a powerful new weapon in their ongoing battle against microorganisms.”

(B) The packet also included a sheet entitled “JAX Micronox® Technologies” which describes in detail the enhanced antimicrobial capabilities of the Micronox® additive system including a graph comparing Poly-Guard FG with competitors in efficacy against Listeria, E. Coli, and Salmonella.

(C) The literature also included the Respondent’s contact information such as phone number, facsimile number and Internet address.

27. On March 29, 2007, the inspector received another piece of literature from American which was given to American by the Respondent.

28. This literature was entitled “Technology Focus, JAX Micronox™ Technology, Introducing Micronox™ Technology in JAX Food-Grade Lubricants for Microbial Knockdown Performance against Listeria, E.coli, Salmonella and other microorganisms” and includes, among other things:

(A) A letter from the Behnke Technical Director entitled: “What is JAX Micronox™ Technology: Re: Antimicrobial Usage in JAX Food-Grade Products.”

(B) Literature for **Poly-Guard Greases.**

(C) Literature for **Magna Plate 78.**

(D) Literature entitled “Plant Microbial Knockdown Results” which includes references to **JAX Poly-Guard FG-2.**

(E) Literature entitled "Major Food Processor Lab Test Results" which also makes references to **JAX Poly-Guard FG-2**.

(F) Literature entitled "Independent Lab Results" which also makes references to **JAX Poly-Guard FG-2**.

(G) Literature entitled "Food Industry Firsts" that states, among other things: "The first effective food-grade antimicrobial additive for lubricants with knockdown capabilities, effectively partnering lubricants into plant sanitation programs."

(H) The literature also included contact information for Respondent including Respondent's phone number, facsimile number, Internet address, distributor information and product ordering options.

29. **JAX Magna-Plate 78** is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

30. On or about December 19, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to American in Green Bay, Wisconsin.

31. On or about December 19, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green Bay, Wisconsin.

32. On or about March 5, 2007, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green Bay, Wisconsin.

33. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green Bay, Wisconsin.

**March 8, 2007 Investigation at Badger Plastics & Supply Inc.**

34. On March 8, 2006, U.S. EPA conducted an investigation at Badger, located at 3451 Johnson Avenue, Plover, Wisconsin.
35. During the investigation on March 8, 2007, the inspector was taken to a supply area by Badger employees.
36. The inspector observed four boxes, each containing ten 14-ounce cartridge tubes of **JAX Poly-Guard FG-2** in the storage area.
37. The inspector viewed a single tube from each of the four boxes in the storage room.
38. All four cartridge tubes bore the same language: "Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial," "The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities," "powerful antimicrobial performance" and "added step in microbial protection programs."
39. The four tubes of **JAX Poly-Guard FG-2** observed by the inspector at Badger were identical to the physical sample of **JAX Poly-Guard FG-2** that was obtained on August 3, 2006 during the Behnke inspection.
40. During the visit on March 8, 2007, Badger also provided the inspector with a brochure.
41. The brochure was entitled "Food Grade Lubricants with Micronox™."
42. The brochure included a document entitled "What is JAX Micronox™ Technology? Re: Antimicrobial Usage in JAX Food-Grade Products."
43. The brochure also included tables and a graph.

44. The brochure also included contact information for Respondent including Respondent's phone number, facsimile number, Internet, distributor information and product ordering options.

45. On or about September 18, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger in Plover, Wisconsin.

**March 7, 2007 Inspection at Jennie-O Turkey Store**

46. On March 7, 2006, the State of Minnesota Department of Agriculture conducted an inspection at Jennie-O, located at 1530 30<sup>th</sup> Street SW, Willmar, Minnesota.

47. During the March 7, 2007 inspection, the inspector viewed and photographed a cartridge tube of **JAX Halo-Guard FG-LT**.

48. The labeling on the tube stated "JAX Halo-Guard FG-LT provides Micronox® microbial knockdown performance"

49. During the investigation, Jennie-O confirmed that the **JAX Halo-Guard FG-LT** was ordered on or about June 2006.

**March 7, 2007 Investigation at Perlick Corporation**

50. On March 7, 2007, U.S. EPA conducted an investigation at Perlick, located at 8300 West Good Hope Road, Milwaukee, Wisconsin.

51. During the investigation on March 7, 2007, the inspector viewed a 14-ounce cartridge of **JAX Poly-Guard FG-2**.


52. The cartridge included the following language: "Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial," "The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing

true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”

53. The cartridge of **JAX Poly-Guard FG-2** observed by the inspector at Perlick was identical to the physical sample of **JAX Poly-Guard FG-2** that was obtained on August 3, 2006 during the Behnke inspection.

Respectfully Submitted,

Dated: 3/12/08

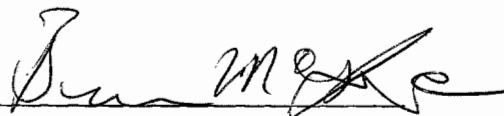


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For Complainant, U.S. EPA Region 5

Dated: 3-7-08



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1150 Washington Street  
Grafton, WI 53024-1916

For Respondent, Behnke Lubricants, Inc.

**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 the Joint Stipulated Facts 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 the Joint Stipulated Facts 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 12<sup>th</sup> day of March, 2008.



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Erik H. Olson  
Associate Regional Counsel

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