

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

COMPLAINANT'S MOTION TO SUPPLEMENT PREHEARING EXCHANGE

By this motion, Complainant, the United States Environmental Protection Agency, Region 5 (U.S. EPA or Complainant), moves to supplement its Prehearing Exchange pursuant to Sections 22.16(a) and 22.19(f) 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"), codified at 40 C.F.R. §§ 22.16(a) and 22.19(f). Complainant moves the Presiding Administrative Law Judge to allow Complainant to add the additional exhibits identified below to its Prehearing Exchange.

Background

On March 13, 2008, Respondent filed its Second Supplemental Prehearing Exchange, in part to comply, at the last moment possible, with this Court's March 5, 2008 Order, in which this Honorable Court ordered Respondent to provide Complainant with a list of the chemical components of Respondent's lubricants and with documents that describe the intended uses of its lubricants. Complainant is now moving to supplement its Prehearing Exchange to update the testimony of its expert witnesses, Dr. Tajah L. Blackburn and Mr. Dennis Edwards, to potentially cover Respondent's products' chemical constituents.

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Respondent also identified in its Second Supplemental Prehearing Exchange, at the last moment possible, two additional witnesses, Mr. James Leroux and Mr. Larry Cooper. Complainant moves to supplement its Prehearing Exchange with the following documents for possible use in cross examination of Mr. Leroux.

- CX 73 Website printout from JAX.com re: JAX international distributors and current anti-microbial claims for Respondent's products
- CX 74 Website printout from Mosur Machine website describing business relationship with Respondent.
- CX 75 Website printouts from Global Industrial Services Website describing business relationship with Respondent
- CX 76 January 11, 2006 approved label amendments for Lysol Brand All Purpose Cleaner

Complainant is filing concurrently with this Motion Complainant's Motion in Limine to Exclude Testimony of James LeRoux and Larry Cooper. Should the Presiding Officer grant Complainant's Motion in Limine, Complainant's Exhibits 73 and 74 will become moot, and Complainant may not reference Complainant's Exhibits 73 or 74 at hearing. Complainant's Exhibit 75 is being added because Respondent has not stipulated to website print outs bearing the same internet address. Complainant is adding Complainant's Exhibit 76 in response to Respondent's reference to Lysol in its Second Supplemental Prehearing Exchange.

Complainant's Fifth Supplemental Prehearing Exchange is being filed contemporaneously with this motion.

Governing Legal Standard

The regulation governing supplementation of prehearing exchanges is found at 40 C.F.R. § 22.19(f), which provides as follows:

(f) Supplementing prior exchanges. A party who has made an information exchange under paragraph (a) of this section [22.19], ... shall promptly supplement or correct the exchange when the party learns that the information exchanged ... is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

In addition, the rules on the admission of evidence that govern administrative hearings under the Consolidated Rules of Practice allow for supplementation of prehearing exchanges at least fifteen days prior to the scheduled hearing, subject to the discretion of the Presiding Administrative Law Judge. The rule at 40 C.F.R. § 22.22(a)(1) provides that “[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, of little probative value, ... If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.” In essence, this regulation embodies a policy favoring the admission of all relevant and material evidence, and only prohibits the inclusion of such evidence if it has not been provided to all parties at least 15 days prior to the hearing unless good cause is shown.

Discussion

In the case at bar, Complainant is supplying the additional evidence less than fifteen days of the hearing date of March 31, 2008. However, there is good cause for not doing so earlier. Complainant could not have supplied this information any earlier in time, because these exhibits are needed solely to respond to new witnesses, new exhibits,

and new positions proposed by Respondent in its Second Supplemental Prehearing Exchange, which Respondent filed on the last possible day to avoid the fifteen day rule in 40 C.F.R. § 22.22(a).

First, Complainant is supplementing its Prehearing Exchange with updated descriptions of expected testimony from its two expert witnesses, Dr. Tajah Blackburn and Mr. Dennis Edwards. The new testimony from both witnesses may detail their expert opinions on the chemical components of Respondent's products in their respective areas of expertise. Because Complainant did not have this information prior to fifteen days before hearing, Complainant could not previously have updated the narrative summaries of these witnesses' testimony. Therefore Complainant has good cause for supplementing its Prehearing Exchange less than 15 days before hearing.

Second, if this Court ultimately rules that the testimony of one of Respondent's two new witnesses, James Leroux, is relevant and material to any issue in this case, Complainant may rely on the documents identified above during its examination of Mr. Leroux. Because Respondent has refused to provide much detail on the substance of the witness's expected testimony, whether or not the exhibits identified above will prove to be relevant cannot be determined with certainty at this time. However, the documents were either obtained from the websites of the businesses of Respondent's witnesses or through Respondent's website, and relate to the credibility of Mr. Leroux. These printouts also evidence the continuing anti-microbial claims made by Respondent for its products, despite claims by Respondent that it is no longer making such claims in its advertising campaign. *See* Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses, p. 12, footnote 1:

“Behnke notes, however, that in response to pressure from ... EPA, it has ceased using even the trade name Micronox® in its labels or advertising.”


Complainant is also submitting the approved label amendments for Lysol Brand All Purpose Cleaner in response to Respondent’s inclusion of a photocopy of a Lysol bottle in Respondent’s Second Supplemental Prehearing Exchange as Respondent’s Exhibit (RX) 71. Respondent has not provided any explanation for the inclusion of RX 71 in its Prehearing Exchange. Complainant provides the approved label amendments to this product to provide context for whatever testimony Respondent attempts to put on at hearing regarding Lysol Brand All Purpose Cleaner.

Inclusion of this evidence in the prehearing exchange will not unfairly prejudice Respondent. Except for the Lysol information, the documents in the exhibits identified above are easily accessible by Respondent, as they were either generated and made public by Respondent, by Respondent’s international distributors, or by Respondent’s own witnesses, (or their employers).

Conclusion

For all of the reasons set forth above, Complainant respectfully requests that this Honorable Court GRANT the instant *Complainant’s Motion to Supplement Prehearing Exchange*.

Respectfully Submitted,



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

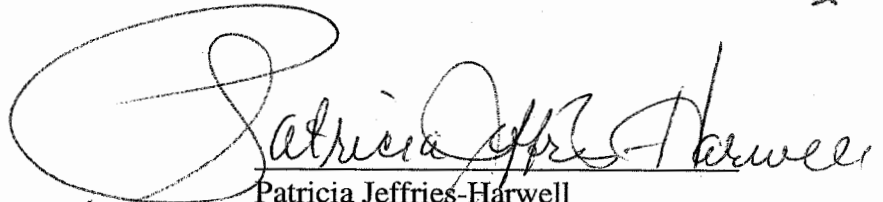
3/19/08
Date

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 Motion to Supplement Prehearing Exchange 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 Motion to Supplemental Prehearing Exchange 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 19 day of March, 2008.


Patricia Jeffries-Harwell
Legal Technician

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