



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

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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)



Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40

C.F.R. Part 22;

(5) The Parties are not stipulating to the truthfulness of any particular statement in any Exhibit, to the credibility of the person(s) making any such statements in any Exhibit, or to the appropriate weight to be given to any Exhibit;

(6) The Parties may introduce such evidence as may otherwise be admissible to explain and/or place into context particular Exhibits; and

(7) The Parties move this Court to admit the following exhibits into evidence for all purposes in these proceedings.

Complainant's Exhibits

- CX 1. August 11, 2006 WDATCP Inspection Report of Behnke Lubricants, Inc.
- CX 2. December 22, 2006 Notice of Intent to File Civil Administrative Complaint.
- CX 16. Declaration of Mr. Josh Rybicki of American Foods Group.  
a. Shipping records showing the distribution or sale of Behnke lubricants from Behnke to American Foods, dated May 29, 2002 through May 7, 2007.
- CX 24. Curriculum vitae of Mr. Dennis Edward, U.S. EPA, Office of Pesticides Programs.
- CX 35. Trademark File for Micronox.
- CX 36. United States District Court, Eastern District of Wisconsin Record in case number 06-C-353, Behnke Lubricants v NSF International.
- CX 37. Circuit Court of Waukesha County, Wisconsin Record in Civil Action No. 06-CV-134.
- CX 38. Physical sample of **JAX Poly-Guard FG-2**.
- CX 39. Physical samples of **JAX Halo-Guard FG-2**.

- CX 45. "Microbiological Considerations for Antimicrobial Food Additive Submissions – Draft Guidance" issued by the U.S. Food and Drug Administration, dated September, 2007. This document may be introduced into evidence at the time of hearing by Mr. Dennis Edwards, U.S. EPA.
- CX 46. Advertising Literature submitted by Behnke entitled "Food –Grade X FACTOR – DISCOVER THE X-FACTOR." This document may be introduced into evidence at the time of hearing by Mr. Terence Bonace, U.S. EPA.
- CX 47. Curriculum Vitae of Dr. Tajah Blackburn

### **Respondent's Exhibits**

- RX 7. Material Data Safety Sheets for Halo Guard product line
- RX 11. Product description for overhead chain lubrication system for Jax lubricants
- RX 12. Overhead Chain Lubrication System (email)
- RX 13. Overhead Chain Lubrication System (email2)
- RX 53. FDA Proposed Guidance for Antimicrobial Food Additives published for comment 10-1-07
- RX 54. Behnke Publication regarding food grade lubricant certification

### **II. Stipulation Regarding Authenticity**

The Parties hereby stipulate as follows with respect to the exhibits listed below:

- (1) The following Exhibits and any constituent documents are true and accurate copies of the original documents;
- (2) The documents are genuine and authentic;
- (3) There are no circumstances that would make it unfair to rely on the Exhibits, as duplicates of the original documents, in lieu of the originals in this case;

(4) The Parties are not stipulating to the truthfulness of any particular statement in any Exhibit, to the credibility of the person(s) making any such statements in any Exhibit, or to the appropriate weight to be given to any Exhibit;

(5) The Parties may introduce such evidence as may otherwise be admissible to explain and/or place into context particular Exhibits to the extent they are admitted into evidence;  
and

(6) Except to the extent stipulated immediately above, the Parties reserve all objections to the admissibility of each of the following Exhibits under Section 22.22 and other applicable provisions 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, 40 C.F.R. Part 22, including without limitation objections on the grounds of relevance or materiality.

**Complainant's Exhibits**

- CX1a. June 23, 2006 website printout.
- CX 3. June 9, 2006 website printout.
- CX 4. November 17, 2006 website printout.
- CX 5. February 26, 2007 website printout.
- CX 6.
  - a. March 21, 2007 website printouts.
  - b. March 26, 2007 website printouts.
  - c. April 10, 2007 website printouts.
  - d. September 6, 2007 website printouts.
  - e. Declaration of Mr. Bonace regarding Internet investigations.
- CX 7. Conversation record of call to Behnke 800 number found on one of its advertising brochures.
- CX 8. March 8, 2007 Region 5 Investigation Report of American Foods Group.

- a. Advertising literature entitled "American Foods Group, JAX Lube-Guard Program."
  - b. Advertising literature entitled "JAX Lubricant Guide for Food, Beverage and Drug & Cosmetic Processing & Manufacturers"
  - c. Advertising literature entitled "Technology Focus, JAX Micronox Technology."
- CX 9. March 8, 2007 Region 5 Investigation Report of Badger Plastics & Supply Inc.
- CX 10. March 7, 2007 Region 5 Investigation Report of Perlick Corporation.
- CX 11. March 8, 2007 Region 5 Investigation Report of Sara Lee Corporation.
- CX 12. March 7, 2007 Region 5 Investigation Report of Seneca Foods Corporation.
- a. March 7, 2007 electronic mail from Seneca Foods.
- CX 13. KHS mailing received by Mr. Bonace on March 19, 2007.
- CX 14.
- a. FIFRA Civil Penalty Calculation worksheet.
  - b. Penalty Calculation Narrative.
- CX 15. March 7, 2007 Minnesota Department of Agriculture Investigation Report at Jennie-O Turkey Stores.
- CX 17. Reserved.
- CX 18.
- a. EPA Accepted Label, with Comments for Antimicrobial AlphaScan RC 5000, EPA Reg. No. 11631-2, dated April 21, 2006 and April 30, 2007.
  - b. Printout from U.S. FDA website showing that the same product received FDA approval via FDA's Food Contact Substance Notification program.
  - c. EPA Accepted Label, with Comments for Tolicide® PS352C, EPA Reg No. 33677-5, dated July 7, 2004.
  - d. "Indirect Food Additives: Paper and Paperboard Components." 64 Fed. Reg. 46129 (August 24, 1999).
  - e. Notice of Pesticide Registration for MICROL preservative, EPA Registration Number 82076-1, dated December 22, 2005.
  - f. Listing of Specific Substances Affirmed as Gras, Benzoic Acid, 21 CFR 184.1201.
- CX 19. "Legal and Policy Interpretation of the Jurisdiction Under the Federal Food, Drug, and Cosmetic Act of the Food and Drug Administration and

the Environmental Protection Agency Over the Use of Certain Antimicrobial Substances; Notice," 63 Federal Register 53531 (October 9, 1998).

- CX 20. "Antimicrobial Food Additives - Guidance," issued by U.S. Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition, dated July 1999.
- CX 21. Pesticide Registration Notice 2000-1, dated March 6, 2000.
- CX 22. "Guidance on the Processing of Applications for Registration of Antimicrobial Products Intended to Mitigate Food Borne Pathogens," dated September 20, 2001.
- CX 23. "Registration Requirements for Antimicrobial Pesticide Products and Other Pesticide Regulatory Changes; Proposed Rule," 64 Federal Register 50671 (September 17, 1999).
- CX 27. Dun & Bradstreet dated March 30, 2006.
- CX 28. Experian Credit Report, dated January 15, 2007.
- CX 29. Experian Credit Report for Respondent's Sacramento, California facility, dated September 4, 2006.
- CX 30. Tax Bill from Waukesha County, Wisconsin.
- CX 31. Curriculum Vitae of Mark Ewen, Industrial Economics.
- CX 32. Declaration of Mark Ewen, Industrial Economics.
- CX 33. Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), July 2, 1990.
- CX 34. June 5, 2006, EPA Memorandum, "Penalty Policy Supplements Pursuant to the 2004 civil Monetary Penalty Inflation Adjustment Rule."
- CX 40. Decision tree
- CX 41. FIFRA Delegation No. 5-14.
- CX 42. FIFRA Region 5 Delegation No. 5-14/15-A.
- CX 43. Declaration of Richard T. Westlund.
- CX 44. Declaration of Mark Hepp

- CX 48. Guidance for Pre-Application Meetings on New Active Ingredients, Major New Uses and Other Registration Actions.
  - CX 49. Consumer Products Treated with Pesticides
  - CX 50. EPA Label Review Manual, 3rd Edition
  - CX 51. Series 91: Product Performance/Efficacy Test Guidelines; Subseries 91A: Public Health Use Antimicrobial Agent Product Performance Test Guidelines
  - CX 52. Subdivision H: Labeling Guidelines for Pesticide Use Directions
  - CX 53. Antimicrobial Policy & Guidance Documents
  - CX 54. Antimicrobial Science Polices, Disinfectant Technical Section (DIS/TSS)
  - CX 55. The Efficacy Evaluation Team of the Antimicrobial Division SOP
  - CX 56. AOAC Official Method 955.11, Testing Disinfectants against Salmonella typhl. (revised)
  - CX 57. July 25, 1986 letter to Registrants of Antimicrobial Products Used as Food Contact Surface Substances.
  - CX 58. Pesticide Registration Kit
  - CX 59. Registration Service Fees; Pesticide Registration Improvement Renewal Act
  - CX 60. Regulatory Action Fact Sheets with Antimicrobial Pesticide Products attached.
  - CX 61. Pesticide Registration (PR) Notices Relating to Antimicrobials listed with PR Notice 2002-X and PR Notice 2000-5 attached.
  - CX 62. Federal Register Notice, Dept. of Health and Human Services, Food and Drug Administration, amended rule entitled "Secondary Direct Food Additives Permitted in Food for Human Consumption," 64 Fed. Reg. 38563 (Monday, July 19, 1999).
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- CX 63. Federal Register Notice, Dept. of Health and Human Services, Food and Drug Administration, amended rule entitled "Secondary Direct Food Additives Permitted in Food for Human Consumption," 64 Fed. Reg. 49981 (Wednesday, September 15, 1999).
- CX 64. Federal Register Notice, Dept. of Health and Human Services, Food and Drug Administration, amended rule entitled "Indirect Food Additives: Adhesives and Components of Coatings," 65 Fed. Reg. 6889 (Friday, February 11, 2000).

**Respondent's Exhibits**

- RX 1. Quote for Overhead Slide Chain Lubricating System in American Foods Beef Processing Plant in Green Bay, Wisconsin
- RX 2. Video showing overhead slide chain system in operation and demonstrating application of magna Plate 78 in beef processing environment
- RX 3. Photograph of conveyor system to which Magna Plate 78 is applied in beef processing environment
- RX 4. Email from Beauchamp to Gary Hagerstrom regarding Jax lubricants for use in AFG processing plant in Green Bay, Wisconsin
- RX 5. Email from Beauchamp to Gary Hagerstrom regarding Jax lubricants for use in AFG processing plant in Green Bay, Wisconsin
- RX 6. Product description and specifications [sic] for Halo Guard Food Grade Greases from Jax
- RX 8. Product description and specifications for Magna Plate 74 Food Grade oil from Jax
- RX 9. Product description and specifications for Magna Plate 78 Food Grade oil from Jax
- RX 10. Material Data Safety Sheets for Magna Plate product line
- RX 14. Product description for Union Chain system to which Jax lubricants are applied
- RX 15. Correspondence from Beauchamp to Anderson regarding success of lubricating system within Tyson Beef Processing Plant

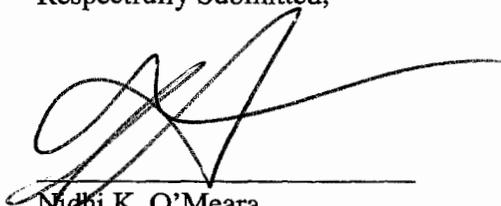
- RX 16. Quote for Overhead slide chain system
  - RX 17. Quote for DS Series Chain Lubrication package for use in AFG Beef Processing Plant in Green Bay, Wisconsin
  - RX 18. Quote for Overhead Slide Chain Lubricating System in American Foods Beef Processing Plant in Green Bay, Wisconsin
  - RX 19. Photograph of installed chain application equipment
  - RX 20. Photograph of Chainlube applicator controls
  - RX 21. Video of chain lubrication equipment in use
  - RX 22. Photograph of chain lubrication equipment parts
  - RX 23. Brochure re chain lubrication application system demonstration
  - RX 24. Brochure regarding Tray Oven Lubrication System
  - RX 25. Brochure regarding track lube application system
  - RX 26. Brochure regarding forming chain oiler (air spray) system
  - RX 27. Photograph depicting nozzle for application of lubricant on chain
  - RX 28. Product information for Sniper Lubrication system
  - RX 29. Product information regarding Sniper Lubrication system depicting chain application
  - RX 30. Photograph depicting application of oil to chain showing some overspray
  - RX 31. Brochure regarding grease application system
  - RX 32. Photograph of grease application system on bearing block
  - RX 33. Photograph of bearing block grease application system
  - RX 34. Case study regarding implementation of lubrication system for Farmland Foods
  - RX 35. Schematic of installed grease lubrication system at Farmland Foods
  - RX 36. Quick guide to specifications for grease application system
-

- RX 37. Return on investment analysis for implementation of grease application system
- RX 38. Brochure for Xcessible Lubrication system for application of greases
- RX 39. Correspondence to Farmland Foods regarding installation of grease application system
- RX 40. Trip report regarding visit to Farmland Foods processing plant to evaluate needs and solutions for lubricant application equipment
- RX 41. Photograph of hog's head on conveyor lubricated with respondent's lubricants
- RX 42. Photograph of washing apparatus for conveyor hooks lubricated with respondent's products
- RX 43. Photograph of washing apparatus for conveyor hooks lubricated with respondent's products
- RX 44. Photograph of hog processing chain in use
- RX 45. Photograph of hot dog conveyor chain lubrication system
- RX 46. Photograph of hot dog conveyor chain second application point on chain
- RX 47. Brochure regarding J-Con Chain lubrication system
- RX 48. Specifications for grease applications to Thermoforming machines
- RX 49. Brochure regarding lubrication system for application of grease to Thermoforming machines
- RX 50. Photograph of chain conveyor lubricated by respondent's products in poultry processing plant
- RX 51. Photograph of trolley lubrication system for use in poultry processing
- RX 52. Photograph of overhead chain lubrication system for use poultry processing plant depicting location of lubrication system relative to processed birds
- RX 55. CV of Charles D. Goodale
- RX 56. CV of Shaun Beauchamp

- RX 57. CV of Troy Paquette
- RX 58. List of NSF Classification including H-1
- RX 59. Correspondence from NSF to Behnke certifying six products as meeting H-1 specifications

This Joint Set of Stipulated Exhibits and Joint Motion To Admit Exhibits Into Evidence for In the Matter of Behnke Lubricants, Inc., is hereby respectfully submitted.

Respectfully Submitted,



Nichi K. O'Meara  
James J. Cha  
Erik H. Olson  
Associate Regional Counsels  
United States EPA - ORC Region 5  
77 W. Jackson Blvd., C-14J  
Chicago, IL 60604

For Complainant, U.S. EPA Region 5

Dated: 3/12/08



Bruce A. McInay  
Linda S. Isnard  
McInay & Button, LTD  
1150 Washington Street  
Grafton, WI 53024-1916

For Respondent, Behnke Lubricants, Inc.

Dated: 3-8-08

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**Docket No. FIFRA-05-2007-0025**

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CERTIFICATE OF SERVICE

I hereby certify that on the 12<sup>th</sup> day of March, 2008, I filed the original and one copy of the Joint Set of Stipulated Exhibits and Joint Motion To Admit Exhibits Into Evidence with Sonja Brooks-Woodard, Regional Hearing Clerk, EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois 60604, and placed for pickup to be delivered by Pouch Mail a copy of the Joint Set of Stipulated Exhibits and Joint Motion To Admit Exhibits Into Evidence to:

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

and placed for pickup to be delivered by Federal Express a copy of the Joint Set of Stipulated Exhibits and Joint Motion To Admit Exhibits Into Evidence to:

Bruce McIlnay, Esq.  
McIlnay & Button, LTD  
1150 Washington Street  
Grafton, WI 53024-1916



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Erik H. Olson  
Associate Regional Counsel  
United States Environmental  
Protection Agency  
Region 5  
77 West Jackson Blvd.  
Chicago, Illinois 60604  
(312) 353-7464