

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
)
BEHNKE LUBRICANTS, INC.) COMPLAINTANT'S MOTION FOR
MENOMONEE FALLS, WISCONSIN) ACCELERATED DECISION ON
) LIABILITY AND ON
AFFIRMATIVE) DEFENSES AND MEMORANDUM
) IN SUPPORT OF THE MOTION
Respondent.)
) Docket No. FIFRA-05-2007-0025

COMPLAINANT'S MOTION FOR ACCELERATED DECISION
ON LIABILITY AND ON AFFIRMATIVE DEFENSES
AND MEMORANDUM IN SUPPORT OF THE MOTION

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COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND
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MOTION

I. Introduction

Complainant, the United States Environmental Protection Agency, Region 5
(Complainant, U.S. EPA, or the Agency) files this Motion for Accelerated Decision on Liability
and on Affirmative Defenses and Memorandum in Support of the Motion. For the reasons set
forth below, Complainant's motions should be GRANTED.

II. Background

On May 7, 2007, the U.S. EPA filed a civil administrative Complaint against Behnke.
The Complaint alleges that Behnke violated the Federal Insecticide, Fungicide and Rodenticide
Act (FIFRA), 7 U.S.C. § 136 *et seq.* Specifically, the Complaint alleges that on at least eleven
different instances, Behnke distributed or sold the following unregistered pesticides in violation
of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A): **JAX Poly-
Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 74, and
JAX Magna Plate 78.**

The Complaint further alleges that Behnke's products are pesticides because Respondent

claimed, stated or implied, through labeling and advertising (both in literature that it distributed to its customers and through the internet) that its products could or should be used as pesticides. The Complaint further alleges that Behnke made both general pesticidal claims such as “JAX ... contains Micronox™, providing antimicrobial protection for the product,” and more specific public health claims such as “JAX Micronox™ has proven especially effective in protecting ... against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and *Salomella* (*Salomonella typhimurium*) over extended lubrication intervals.”

On or about June 8, 2007, Respondent filed its Answer to the Complaint. In its Answer, the Respondent raised seven affirmative defenses.

On July 21, 2007, Complainant filed its Notice of Complainant's Request for Voluntary Production of Information. Complainant specifically requested that Respondent voluntarily produce additional information to support each of its seven affirmative defenses. In support of its request, U.S. EPA pointed out that Section 22.15(b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) as codified at 40 C.F.R. Part 22 states that “the answer shall also state: The circumstances or arguments which constitute the grounds of any defense...” The affirmative defenses set forth in Respondent's answer merely state legal conclusions. The affirmative defenses are unsupported by facts or reasoning.

On October 4, 2007, Complainant filed its Initial Prehearing Exchange.

On or about November 10, 2007, Respondent submitted its Prehearing Exchange. Respondent failed to submit any of the information pertaining to its affirmative defenses that Complainant had requested months earlier in its Notice of Complainant's Request for Voluntary

Production of Information in its Prehearing Exchange. Not only did Respondent fail to state the circumstances or arguments which constitute the grounds of any of its affirmative defense in its Answer, it also failed to produce any specific facts or information in its Prehearing Exchange to support any of its affirmative defenses.

On or about November 15, 2007, Complainant filed its Rebuttal Prehearing Exchange. In that document, Complainant renewed its request for the information identified in its June 21, 2007, Notice of Complainant's Request for Voluntary Production of Information. See *Complainant's Rebuttal Prehearing Exchange*, p. 6.

To date, Respondent has not filed any additional information to support any of its affirmative defenses.

This Motion will request the Court to grant an accelerated decision on liability in favor of the Complainant for each of the eleven counts alleged in its Complaint and will provide a basis for which the Motion should be granted. The Motion will demonstrate that, even in a light most favorable to the Respondent, there is no genuine issue of material fact as to any of the elements necessary to prove that a violation of FIFRA occurred as to each of the eleven counts.

Complainant will show that there can be no genuine issue or dispute that (1) Respondent is a "person," (2) Respondent at all relevant times was doing business in the state of Wisconsin, (3) Respondent distributed or sold **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 74 b or JAX Magna-Plate 78** on 11 separate occasions, (4) **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 74** and **JAX Magna-Plate 78** were not registered as pesticides at the time Respondent distributed or sold them and (5) **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-**

Guard FG-LT, JAX Magna-Plate 74 and JAX Magna-Plate 78 are all pesticides as defined by FIFRA and its implementing regulations. To demonstrate that there are no genuine issues of material fact in this matter, Complainant will rely on Respondent's Answer, Respondent's Prehearing Exchange, the Declaration of Mr. R. Terence Bonace (Attachment A), the Declaration of Mr. Josh Rybicki (Attachment B), the Declaration of Mr. Greg Cremers (Attachment C), Respondent's United States Patent and Trademark (PTO) file for the Registration of its product Micronox™¹, and statements Behnke made about its products containing Micronox in a complaint it filed in a separate lawsuit against a private party.

This Motion will also request the Court to grant an accelerated decision in favor of the Complainant as to Respondent's affirmative defenses 1 through 7² and will provide a basis for which the Motion should be granted. In the arguments set forth below, Complainant will demonstrate that Respondent has failed to support its affirmative defenses 1, 2 and 7 with any facts or reasoning which show that there is a genuine issue for hearing, and that the law and interpretation of the law is so clear that a motion for accelerated decision must be granted as to each of these three affirmative defenses.

Complainant also incorporates by reference the arguments set forth in its January 16, 2008, Motion to Strike Respondent's affirmative defenses 3, 4, 5 and 6. As stated in the Motion to Strike, each of these asserted defenses is legally insufficient to defeat Respondent's liability

¹ Respondent asserts that Micronox™ is contained in all of the JAX products that are named in the Complaint.

² On January 16, 2008, U.S. EPA filed a separate motion entitled Complainant's Motion to Strike Respondent's Affirmative Defenses and Complainant's Motion for Discovery, in which it addressed Respondent's affirmative defenses 3, 4, 5 and 6. Complainant hereby incorporates by reference all of the arguments made in that motion with respect to Respondent's Affirmative Defenses, 3, 4, 5 and 6.

for the violations alleged in the Complaint. Even if all facts are viewed in a light most favorable to Respondent, each of these defenses is inadequate as a matter of law as a defense to liability. Should the Court believe that it is more appropriate to address these particular defenses in a motion for accelerated decision than in a motion to strike, the Court should GRANT Complainant an accelerated decision on these defenses as well.

III. Standard of Review for Motions for Accelerated Decision

Under the Consolidated Rules of Practice at 40 C.F.R. Part 22, an accelerated decision is appropriate “if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.” 40 C.F.R. § 22.20(a). The regulation specifically provides that:

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 CFR 22.20(a). As the Environmental Appeals Board (EAB or “the Board”) and Administrative Law Judges have explained, the standard for deciding motions for accelerated decision is similar to the standard for granting summary judgment set forth in Rule 56 of the Federal Rules of Civil Procedure. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997), 1997 WL 131973 (E.P.A.); *In Re Clarksburg Casket Company*, Docket No. EPCRA-III-165, EPCRA Appeal No. 98-8 1999 WL 504709 (E.P.A.) (July 16, 1999). The decisions of United States federal courts have clarified that summary judgment is “properly regarded” as “an integral part of the Federal Rules as a whole,” to be used whenever appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is appropriate “[w]here the moving party has carried its burden of showing that the pleadings, depositions, answers to

interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial.” *Kain v. Nesbitt*, 156 F.3d 669, 671 (6th Cir. 1998) (citation & internal quotations omitted); *Hudson v. Bloomfield Hills Public Schools*, 910 F. Supp. 1291, 1301 (E.D. Mich. 1995), aff’d, 108 F.3d 112 (6th Cir.), cert denied, 118 S. Ct. 78 (1997). No genuine issue of material fact exists “when the ‘record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.’” *Goins v. Ajax Metal Processing, Inc.*, 984 F. Supp. 1057, 1060 (E.D. Mich. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Although courts must resolve all evidentiary ambiguities and “must take the facts and all reasonable inferences from those facts in the light most favorable to the non-moving party,” *Association Benefit Services v. Caremark RX*, 493 F.3d 841, 849 (7th Cir. 2007), “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party “may not avoid summary judgment by resting on the allegations of its pleadings; it must come forward with specific facts showing that there is a genuine issue for trial.” *Association Benefit Services*, 493 F.3d at 849. *See also Kraft v. United States*, 991 F.2d 292, 296 (6th Cir. 1993) (the “non-moving party is not entitled to a trial merely on the basis of allegations.”). A “mere existence of some alleged factual dispute between the parties will not defeat the otherwise properly supported motion for summary judgment.” *Anderson.*, 477 U.S. at 247-48 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary

judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248.

As the United States Supreme Court has stated “when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (footnote omitted). *See also Scott v. Harris*, 127 S. Ct. 1769, 1776; 167 L. Ed. 2d 686, 694; 2007 U.S. LEXIS 4748; 75 U.S.L.W. 4297 (2007).

The EAB has adopted the position of federal courts with regard to motions for summary judgment/accelerated decision. The EAB has stated that:

A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. ... A factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. ... If so, summary judgment is inappropriate and the issue must be resolved by a finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the non-moving party, is such that no reasonable decision-maker could find for the non-moving party, summary judgment is appropriate.

In re Mayaguez Reg'l Sewage Treatment Plant, 4 E.A.D. 772, 781 (EAB 1993) (citations omitted), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995). In accordance with these precepts, the EAB has held that a party opposing summary disposition must “raise an issue of material fact” and demonstrate that the issue is “‘genuine’ by referencing probative evidence in the record, or by producing such evidence.” *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, at 793 (EAB 1997); *In re Dos Republicas Resources Co.*, 6 E.A.D. 643, 669-70 (EAB 1996); *Mayaguez*, 4 E.A.D. at 782.

Significantly, the EAB has held that “[s]ummary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up[,]” and “the mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party.” *Green Thumb*, 6 E.A.D. at 793, footnote 24.

IV. Statutory and Regulatory Background

Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), and 40 C.F.R. §152.15 state in pertinent part that no person in any state may distribute or sell to any person any pesticide that is not registered under FIFRA.

Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it is unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA.

The regulation at 40 C.F.R. § 152.15(a)(1) states that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance can or should be used as a pesticide.

The regulation at 40 C.F.R. § 168.22(a) states “FIFRA Sections 12(a)(1)(A) and (B) make it unlawful for any person to ‘offer for sale’ any pesticide if it is unregistered, or if claims made for it as part of its distribution or sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA section 3. EPA interprets these provisions as extending to advertisements on any advertising medium to which pesticide users or the general public have access.”

Section 2(s) of FIFRA, 7 U.S.C. § 136(s) defines a “person” as any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), and 40 C.F.R. § 152.3, in pertinent part, define “distribute and sell” as to “distribute, sell offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver.”

Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3, in pertinent part, define “pesticide” as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and 40 C.F.R. § 152.5(c), in pertinent part, define “pest” as “(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism.”

V. Motion for Accelerated Decision on Liability Should Be Granted As To Each of the Eleven Counts

Complainant alleges that Respondent has violated Section 3(a) and Section 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) by distributing or selling pesticides that are not registered under FIFRA. Therefore, in order to support the instant Motion for Accelerated Decision on Liability, the U.S. EPA must show through the record in this matter, together with any declarations, that there are no genuine issues of material fact and that U.S. EPA is entitled to a judgment as a matter of law.

As to each of the eleven counts, the U.S. EPA must therefore show that the following undisputed facts and evidence are already in the record: (1) U.S. EPA must show that Behnke is a “person,” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s); (2) in “any state;” (3)

Complainant must show that Behnke distributed and sold a product, as defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg); (4) Complaint must show that the product Behnke sold was a pesticide, as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u); and (5) Complainant must show that the product was not registered as a pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.

A. Behnke is a "person" "in any state"

In its Answer, Behnke admits that it is a corporation organized under the laws of the State of Wisconsin with a place of business located at W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin. *See ¶ 3 of the Answer.* Behnke further admits that it is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s). *See ¶ 13 of the Answer.* Therefore, there is no genuine issue of material fact with respect to this element of proof for any of the eleven counts alleged in the Complaint.

B. Behnke "distributed or sold" a product

In each of the eleven counts, Complainant alleges that Behnke distributed or sold a product to one of its customers. For ease, Complainant will analyze each count to establish that this particular element is not disputed with respect to any of the eleven counts.

1. Count I

In Count I, Complaint alleges that on August 3, 2006, Behnke distributed or sold **JAX Poly-Guard FG-2**. In its Answer, Behnke admits that on August 3, 2006, an inspector employed by the Wisconsin Department of Agriculture (WDA) conducted an inspection under FIFRA at Respondent's facility to inspect and collect samples of any pesticides packaged, labeled, and/or released for shipment by Respondent and to collect samples of any containers,

labeling and/or advertising literature for such pesticides as authorized under Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136(f) and 136(g). *See ¶ 14 of the Answer.* Respondent further admits that, 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. *See ¶30 of the Answer.* Therefore, it is undisputed that Behnke distributed or sold **JAX Poly-Guard FG-2** on August 3, 2006.

2. *Count II*

In Count II, Complainant alleges that on August 3, 2006, Behnke distributed or sold **JAX Halo-Guard FG-2**. In its Answer, Behnke admits that 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. *See ¶ 54 of the Answer.* Therefore, it is undisputed that Behnke distributed or sold **JAX Halo-Guard FG-2** on August 3, 2006.

3. *Count III*

In Count III, Complainant alleges that on December 19, 2006, Behnke distributed or sold **JAX Halo-Guard FG-2** to its customer, American Foods Group (American). In its Answer, Behnke admits that on or about December 19, 2006, Respondent distributed or sold **JAX Halo Guard FG-2** to American in Green Bay, Wisconsin. *See ¶ 101 of the Answer.*

4. *Count IV*

In Count IV, Complainant alleges that on December 19, 2006, Behnke distributed or sold **JAX Magna-Plate 78** to its customer, American. In its Answer, Behnke admits that on or about December 19, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green

Bay, Wisconsin. *See* ¶ 102 of the Answer.

5. *Count V*

In Count V, Complainant alleges that on March 5, 2007, Behnke distributed or sold **JAX Magna-Plate 78** to its customer, American. In its Answer, Behnke admits that on or about March 5, 2007, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green Bay, Wisconsin. *See* ¶ 103 of the Answer.

6. *Count VI*

In Count VI, Complainant alleges that on March 3, 2006, Behnke distributed or sold **JAX Magna-Plate 78** to its customer, American. In its Answer, Behnke admits that on or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green Bay, Wisconsin. *See* ¶ 104 of the Answer.

7. *Count VII*

In Count VII, Complainant alleges that on March 3, 2006, Behnke distributed or sold **JAX Magna-Plate 74** to its customer, American. In its Answer, Behnke admits that on or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 74** to American in Green Bay, Wisconsin. *See* ¶ 78 of the Answer. Behnke further admits to this allegation in ¶ 105 of its Answer.

8. *Count VIII*

In Count VIII, Complainant alleges that on September 18, 2006, Behnke distributed or sold **JAX Poly-Guard FG-2** to its customer, Badger Plastics & Supply Inc. (Badger). In its Answer, Behnke states that it lacks sufficient information to admit or deny that on or about September 18, 2006, it distributed or sold **JAX Poly-Guard FG-2** to its customer Badger.

However, on March 8, 2007, Mr. R. Terrence Bonace of U.S. EPA, who is employed as a Life Scientist with the Pesticides/Toxics Compliance Section of the Chemicals Management Branch, Land Chemicals Division (LCD) at Region 5 of U.S. EPA, and who is assigned to the above captioned matter, conducted an investigation of Badger, located at 3451 Johnson Avenue, Plover, Wisconsin. Attached to this Motion (as Attachment A), is the Declaration of Mr. Bonace in which he declares that he conducted such an investigation. *See ¶ 30 of Mr. Bonace's Declaration.* As he testifies to in his Declaration, during the March 8, 2007, investigation, Mr. Bonace collected a shipping record from Badger which showed that Behnke had distributed or sold **JAX Poly-Guard FG-2** to Badger on September 18, 2006. Mr. Bonace's investigation report includes a copy of the September 18, 2006 shipping record at CX 9 in Complainant's Prehearing Exchange. *Also, see ¶ 34 of Mr. Bonace's Declaration.* Mr. Bonace authenticates this inspection report and the attached September 18, 2006, shipping record in his Declaration. *See ¶ 30 of Mr. Bonace's Declaration.* Respondent has failed to provide any evidence or proposed witness testimony to contradict Mr. Bonace's declaration-testimony or the documentary evidence that he collected to prove Behnke's distribution of **JAX Poly-Guard FG-2** to Badger on September 18, 2006. Therefore, Complainant is entitled to a finding that Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger on September 18, 2006. _

9. *Count IX*

In Count IX, Complainant alleges that on June 15, 2006, Behnke distributed or sold **JAX Poly-Guard FG-2** to one of its customers, Badger. In its Answer, Behnke admits that on or about June 15, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger located in Plover, Wisconsin. *See ¶ 29 of the Answer.* Behnke further admits to this allegation in ¶ 124

of its Answer.

10. Count X

In Count X, Complainant alleges that on June 27, 2006, Behnke distributed or sold **JAX Halo-Guard FG-LT** to one of its customers, Jennie - O Turkey Store (Jennie - O). In its Answer, Behnke admits that on or about June 27, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Jennie-O located in Wilmar, Minnesota. *See ¶ 64 of the Answer.* Behnke further admits to this allegation in ¶ 130 of its Answer.

11. Count XI

In Count XI, Complainant alleges that on March 3, 2006, Behnke distributed or sold **JAX Poly-Guard FG-2** to one of its customers, Perlick Corporation (Perlick). In its Answer, Behnke admits that on about March 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Perlick located in Milwaukee, Wisconsin. *See ¶ 28 of the Answer.* Behnke further admits to this allegation in ¶ 136 of its Answer.

Based on Respondents own admissions in its Answer with respect to Counts I through VII and IX through XI, there are no genuine issues of material facts that this element of proof is satisfied for each of these counts. Additionally, based on Mr. Bonace's Declaration and the documentary evidence that he collected from Badger showing that Behnke distributed or sold the product **JAX Poly-Guard FG-2** to Badger on September 18, 2006, there is no genuine issue of material fact that this element of proof is satisfied for Count VIII of the Complaint.

C. The Products that were Distributed or Sold by Behnke were not Registered as Pesticides Under FIFRA³

³ Note that the Motion first addresses the "not registered as a pesticide" element prior to the "pesticide" element. This is done because the discussion with respect to the "pesticide" element involves more facts and legal analysis. This Motion will address the "pesticide" element in the

In each of the eleven counts, Complainant alleges that the products that were distributed or sold by Behnke were not registered as pesticides under FIFRA. For ease, Complainant will analyze each product and the counts associated with that product to establish that this particular element is not disputed with respect to any of the eleven counts.

1. JAX Poly-Guard FG-2: Counts I, VIII, IX and XI

In Counts I, VIII, IX and XI, Complainant alleges that the product in question, **JAX Poly-Guard FG-2** is not registered under FIFRA. In its Answer, Behnke admits that **JAX Poly-Guard FG-2** is not registered under FIFRA. *See ¶ 27 of the Answer.*

2. JAX Halo-Guard FG-2: Counts II and III

In Counts II and III, Complainant alleges that the product in question, **JAX Halo-Guard FG-2** is not registered under FIFRA. In its Answer, Behnke admits that **JAX Halo-Guard FG-2** is not registered under FIFRA. *See ¶ 50 of the Answer.*

3. JAX Magna-Plate 78: Counts IV, V and VI

In Counts IV, V and VI, Complainant alleges that the product in question, **JAX Magna-Plate 78** is not registered under FIFRA. In its Answer, Behnke admits that **JAX Magna-Plate 78** is not registered under FIFRA. *See ¶ 100 of the Answer.*

4. JAX Magna-Plate 74: Count VII

In Count VII, Complainant alleges that the product in question, **JAX Magna-Plate 74** is not registered under FIFRA. In its Answer, Behnke admits that **JAX Magna-Plate 74** is not registered under FIFRA. *See ¶ 75 of the Answer.*

following section.

5. JAX Halo-Guard FG-LT: Count X

In Count X, Complainant alleges that the product in question, **JAX Halo-Guard FG-LT** is not registered under FIFRA. In its Answer, Behnke admits that **JAX Halo-Guard FG-LT** is not registered under FIFRA. *See ¶ 61 of the Answer.*

Based on Respondent's own Admissions in its Answer, there is no genuine issue of material fact with respect to this element of proof for any of the eleven counts alleged in the Complaint.

D. The Products that Behnke Distributed or Sold Were "pesticides" as Defined by FIFRA

In each of the eleven counts, Complainant alleges that the product that was distributed or sold was a "pesticide" as defined by FIFRA. This is the only element of proof that the Respondent has not admitted to in its Answer. However, the evidence in the record, which includes admissions by the Respondent, physical evidence that was collected by federal or state inspectors, together with the Declarations of Mr. Bonace, Mr. Josh Rybicki (who is employed in the Parts Inventory Control Division of American) and Mr. Greg Cremers, an Agricultural Chemical Investigator with the Pesticide and Fertilizer Management Division, State of Minnesota, Department of Agriculture (MDA) , all demonstrates that there is no genuine issue of matter fact with respect to this element.

1. Counts I, VIII, IX, XI, all of which pertain to JAX Poly-Guard FG-2

In Counts I, VIII, IX and XI, Complainant alleges that the product in question, **JAX Poly-Guard FG-2**, is a pesticide under FIFRA. While Respondent does not admit that **JAX Poly-Guard FG-2** is a pesticide, Respondent does admit that on August 3, 2006, an inspector employed by the WDA conducted an inspection under FIFRA at Respondent's facility to inspect

and collect samples of any pesticides packaged, labeled, and/or released for shipment by Respondent and to collect samples of any containers, labeling and/or advertising literature for such pesticides as authorized under Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136(f) and 136(g).

See ¶ 14 of the Answer.

Respondent admits that during the August 3, 2006 inspection, the inspector collected physical samples of **JAX Poly-Guard FG-2** and **JAX Halo-Guard FG-2**. *See ¶ 15 of the Answer.* Respondent admits that during August 3, 2006 inspection, Behnke gave the inspector from WDA copies of Behnke's Product Data Sheets for **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** and Behnke's full product line catalog. *See ¶ 16 of the Answer.* Respondent also admits that Respondent's literature 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.*

See ¶ 18 of the Answer.

Finally, the Respondent admits that 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.” See ¶ 20 of the Answer.

In addition, on June 9, 2006, Mr. Bonace conducted an investigation of Behnke on the Internet. During the course of this Internet investigation, he found the following claims, among others, on Respondent’s Internet site at www.jax.com:

“The introduction of JAX exclusive Micronox® Anti-Microbial Technology gives plants in search of tools for added micro organism control a powerful, extra weapon in their arsenal of protection!”

“JAX Poly-Guard FG and Halo-Guard FG greases contain Micronox®, the only truly effective, active microbial control agent in the food grade lubricant industry.”

“As of May 1, 2002 every food grade lubricant in the JAX Line incorporates our exclusive Micronox® Anti-Microbial Technology, providing true ‘knock-down’ performance against a wide range of bacteria and other micro organisms!”

“With the added benefit of Micronox®, JAX exclusive anti-microbial chemistry which independent testing has proven to be the most effective in industry, plants can achieve an extra measure of sanitation protection”

“JAX Poly-Guard FG grease contains Micronox® the only truly effective, active bacteria control agent in the food grade lubricant industry”

“Poly-Guard FG-2, FG-LT... Now contains Micronox® anti-microbial for true ‘knock-down’ performance against a broad spectrum of microbial contaminants.”

A true, accurate and complete copy of this print-out is included in Complainant’s Initial Prehearing Exchange as CX 3. See ¶ 12 of Mr. Bonace’s Declaration.

On November 17, 2006, Mr. Bonace conducted another Internet investigation of Behnke. During this investigation, he found the following claims, among others, on the Respondent’s Internet site at www.jax.com:

“With the added benefit of Micronox®, JAX exclusive anti-microbial chemistry which independent testing has proven to be the most effective in the industry, plants can achieve an extra degree of sanitation protection.”

“JAX Poly-Guard FG grease contains Micronox® the only truly effective, active bacteria control agent in the food grade lubricant industry.”

“JAX Poly-Guard FG and Halo-Guard FG greases contain Micronox®, the only truly effective, active microbial control agent in the food grade lubricant industry.”

“Now contains Micronox® anti-microbial for true ‘knockdown’ performance against a broad spectrum of microbial contaminants.”

“The introduction of JAX exclusive Micronox® Anti-Microbial Technology gives plants in search of tools for added micro-organism control a powerful, extra weapon in their arsenal of protection!”

“As of May 1, 2002 every food grade lubricant in the JAX line incorporates our exclusive Micronox® Anti-Microbial Technology, providing true ‘knock-down’ performance against a wide range of bacteria and other micro organisms.”

A true, accurate and complete copy of this print-out is included in Complainant’s Initial Prehearing Exchange as CX 4. *See ¶ 13 of Mr. Bonace’s Declaration.*

On February 26, 2007 Mr. Bonace conducted another Internet investigation. During this investigation, he observed that Respondent’s Internet site at www.jax.com continued to make many of the same claims that were found on its website on June 9, 2006. A true, accurate and complete copy of this print-out is included in Complainant’s Initial Prehearing Exchange as CX 5. *See ¶ 14 of Mr. Bonace’s Declaration.*

On March 21, 2007, Mr. Bonace conducted another Internet investigation in connection with Behnke’s products. During this investigation, he found several websites on the Internet that continued to advertise “JAX Micronox” as having antimicrobial properties. These sites included, but were not limited to, the following:

www.allbusiness.com/management/business-support-services/669676-1.html

<http://milwaukee.bizjournals.com/Milwaukee/stories/2001/11/19/smallb1.html>

www.jax.fr/pages

www.foodproc.com/ad-jax.shtml

www.ibtinc.com/primemover/archive/PM200507/lub01.html
www.lubripolo.com/GGAlimenticio/
www.jax.com/press/releases/prbottom2.html
www.foodmanufacturing.com/scripts/ShowPR.asp?PUBCODE=033&ACCT...
www.meatequip.com/supplierad/jax.htm
www.foodengineeringmag.com/CDA/Archives/543b8f4ab52f8010VgnVCM100000f932a8c0
www.gissa.com/en/jax.htm
www.ahi.dk/jax/micronox.htm

True, accurate and complete copies of these print-outs are included in Complainant's Initial Prehearing Exchange as CX 6a. *See ¶ 15 of Mr. Bonace's Declaration.*

On March 26, 2007, Mr. Bonace conducted another Internet investigation relating to Behnke's products. During this investigation he found the following website that continued to advertise "JAX Micronox" as having antimicrobial properties:

www.powercontrolresources.com/lub.html

A true, accurate and complete copy of this print-out is included in Complainant's Initial Prehearing Exchange as CX 6b. *See ¶ 16 of Mr. Bonace's Declaration.*

On April 10, 2007, Mr. Bonace conducted an additional Internet investigation relating to Behnke. During this Internet investigation, he found the following websites that continued to advertise "JAX Micronox" as having antimicrobial properties:

www.uark.edu/depts/ifse/ofpa/exhibits.htm
www.foodengineeringmag.com
www.foodengineeringmag.com/FE/2006/10/Files/PDFs/FEX/006p092.pdf
<http://filesibnpmedia.com/FE/Protected/Files/PDF/FEX1005p110.pdf>
www.foodengineeringmag.com/FE/2005/06/Files/PDFs/behnke.pdf
www.foodengineeringmag.com/FE/Home/Files/PDFs/FEX0107149.pdf
www.clfp.com/03EXPO/exhibit/CoDescriptions.pdf

True, accurate and complete copies of these print-outs are included in Complainant's Initial Prehearing Exchange as CX 6c. *See ¶ 17 of Mr. Bonace's Declaration.*

On September 6, 2007, Mr. Bonace conducted an additional Internet investigation relating to Behnke's products. On this date, he saw that the Internet contained the following website which continued to advertise "JAX Micronox" as having antimicrobial properties:

www.gissa.com/en/jax.htm

A true, accurate and complete copy of this print-out is included in Complainant's Initial Prehearing Exchange as CX 6d. *See ¶ 18 of Mr. Bonace's Declaration.*

Additionally, in the course of his continued investigation of the Behnke case, Mr. Bonace visited American located at 544 Acme Street, Green Bay, Wisconsin. *See ¶ 21 of Mr. Bonace's Declaration.* On or about March 16, 2007, Mr. Bonace received a package from American, which American had received from Behnke. The package contained a document entitled "JAX Lubricant Guide for Food, Beverage and Drug & Cosmetic Processing & Manufacturers." The document included the following materials and information:

(A) A cover letter addressed to the customer that stated: *"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) A page entitled "JAX Micronox® Technologies" which described in detail the "enhanced antimicrobial capabilities" of the Micronox® additive system, and which included a graph comparing Poly-Guard FG with competitors in efficacy against Listeria, E. coli, and Salmonella.

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

A true, accurate and complete copy of this piece of advertising literature is included in Complainant's Initial Prehearing Exchange as CX 8b. *See ¶ 27 of Mr. Bonace's Declaration.*

On or about March 29, 2007, Mr. Bonace received another package from American,

which American had received from Behnke. The package contained a document 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.” This literature included, 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** which made many claims regarding its antimicrobial capabilities and performance due to Micronox™.
- (C) Literature for **Magna Plate 78** which made many claims regarding its antimicrobial capabilities and performance due to Micronox™.
- (D) Literature entitled “Plant Microbial Knockdown Results” which included references to **JAX Poly-Guard FG-2** and its antimicrobial features.
- (E) Literature entitled “Major Food Processor Lab Test Results” which also made references to **JAX Poly-Guard FG-2** and its antimicrobial features.
- (F) Literature entitled “Independent Lab Results” which also made references to **JAX Poly-Guard FG-2** and its antimicrobial features.
- (G) Literature entitled “Food Industry Firsts” that stated, 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 such as Behnke’s telephone number, facsimile number, Internet address, distributor information and product ordering options.

A true, accurate and complete copy of this piece of advertising literature is included in Complainant’s Initial Prehearing Exchange as CX 8c. *See ¶ 29 of Mr. Bonace’s Declaration.*

With respect to CX 8b and 8c, the fact that this literature was received by American from Behnke is supported by the Declaration of Josh Rybicki (Attachment B of this Motion), who is employed by American. *See ¶¶ 30, 32-34 and 38-45 of Mr. Rybicki’s Declaration.*

In Mr. Bonace's continued investigation of the Behnke case, Mr. Bonace also visited Badger Plastic & Supply, Inc. (Badger). *See ¶30 of Mr. Bonace's Declaration.* During this visit, Mr. Bonace observed four boxes, each containing ten 14-ounce cartridge tubes of **JAX Poly-Guard FG-2**. He examined one tube from each of the four boxes in the supply area; all four cartridge tubes included the same language on the label, as follows:

“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.”

Mr. Bonace noted that the four tubes of **JAX Poly-Guard FG-2** which he observed at Badger were identical to the physical sample of **JAX Poly-Guard FG-2** that he had received from the WDA inspector (which had been obtained by that WDA inspector during his August 3, 2006 inspection of Behnke's establishment). He photographed one of the tubes of **JAX Poly-Guard FG-2**. A true, accurate and complete copy of this photograph is included in Complainant's Initial Prehearing Exchange as an attachment to CX 9, as part of his investigation report of Badger. *See ¶¶ 31 through 32 of Mr. Bonace's Declaration.*

During the investigation of Badger on March 8, 2007, the President of Badger, Mr. Bill Barden, provided Mr. Bonace with a brochure that was given to Badger by Behnke. The brochure was entitled “Food Grade Lubricants with Micronox™.” The brochure included a document entitled “What is JAX Micronox™ Technology? Re: Antimicrobial Usage in JAX Food-Grade Products,” and described the antimicrobial capabilities of the Micronox™ technology found in Respondent's lubricants. This brochure was signed by Troy Paquette, Technical Director for Behnke Lubricants. The brochure also included tables and a graph illustrating the “antimicrobial properties” of **Poly-Guard FG-2** “antimicrobial grease” and its

efficacy against Listeria, E. coli and Salmonella. The final page of the brochure included contact information for Behnke's establishments, which included Respondent's telephone numbers, facsimile numbers, and Internet website, distributor information and product ordering options. A true, accurate and complete copy of this brochure is included in Complainant's Initial Prehearing Exchange as an attachment to CX 9, as part of Mr. Bonace's investigation report of Badger. *See ¶ 33 of Mr. Bonace's Declaration.*

In Mr. Bonace's continued investigation of the Behnke case, Mr. Bonace also visited Perlick. *See ¶ 35 of Mr. Bonace's Declaration.* During the investigation of Perlick on March 7, 2007, Mr. Bonace observed a 14-ounce cartridge of **JAX Poly-Guard FG-2**. He took a photograph of a container of **JAX Poly-Guard FG-2**. The label on 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.”

A true, accurate and complete copy of this photograph is included as an attachment to Mr. Bonace's investigation report (CX 10). The cartridge of **JAX Poly-Guard FG-2** which Mr. Bonace observed at Perlick was identical to the physical sample of **JAX Poly-Guard FG-2** that had been collected by the WDA during the August 3, 2006, inspection of Behnke's establishment. *See ¶¶ 36 through 37 of Mr. Bonace's Declaration.*

In Mr. Bonace's continued investigation of the Behnke case, Mr. Bonace also visited Sara Lee Corp (Sara Lee). *See ¶ 38 of Mr. Bonace's Declaration.* During the investigation on March 8, 2007, he observed a 14-ounce cartridge of **JAX Poly-Guard FG-2**. He photographed a container of **JAX Poly-Guard FG-2**. The label on 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.”

A true, accurate and complete copy of this photograph is included as an attachment to Mr. Bonace’s investigation report for Sara Lee (CX 11). The cartridge of **JAX Poly-Guard FG-2** which he observed at Sara Lee was identical to the physical sample of **JAX Poly-Guard FG-2** that had been collected by the WDA during the August 3, 2006, inspection of Behnke’s establishment. *See ¶¶ 39 through 40 of Mr. Bonace’s Declaration.*

In Mr. Bonace’s continued investigation of the Behnke case, Mr. Bonace also visited Seneca Foods Corporation (Seneca). *See ¶ 42 of Mr. Bonace’s Declaration.* During Mr. Bonace’s investigation on March 7, 2007, a representative of Seneca provided him with advertising sheets that Seneca had received from Behnke. The first advertising sheet was entitled: “**JAX MAGNA-PLATE 72, USDA H1-AUTHORIZED AIR LINE LUBE WITH ANTIRUST AND ANTIWEAR ADDITIVES NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY**” and included the following language:

“Antimicrobial Performance: JAX MAGNA-PLATE 72 incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals.”

The second advertising sheet was entitled: “**JAX MAGNA-PLATE 78 USDA H1-AUTHORIZED EXTREME - PRESSURE FOOD MACHINERY OIL WITH ENHANCED ANTIWEAR PROPERTIES NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY**” and included the following language:

“Antimicrobial Performance: JAX MAGNA-PLATE 78 incorporates JAX new, proprietary antimicrobial additive technology, Micronox™, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals.”

The third advertising sheet was entitled: “HALO-GUARD FG GREASES” and included the following language:

“JAX Halo-Guard FG provides Micronox® microbial knockdown performance.”

The fourth advertising sheet was entitled “JAX POLY-GUARD FG, A REVOLUTIONARY USDA-HI FOOD-GRADE GREASE W/PTFE FOR LUBRICATION OF HIGH-SPEED/HIGH-TEMP FOOD AND BEVERAGE PROCESSING MACHINERY NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY” and included the following language:

“Antimicrobial Performance: JAX POLY-GUARD FG incorporates JAX new, proprietary antimicrobial additive technology, Micronox™, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 Listeria (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals.”

True, accurate and complete copies of these documents are included as attachments to Mr. Bonace’s investigation report for Seneca (CX 12). *See ¶ 43 of Mr. Bonace’s Declaration.*

Later that same day, Seneca provided additional literature that they had received from Behnke, to Mr. Bonace, via electronic mail. These advertising sheets had been sent to Mr. Perzichilli of Seneca on October 26, 2006 by Mr. Chris Foti of Behnke. True, accurate and complete copies of these documents are included in Complainant’s Initial Prehearing Exchange

as CX 12a. The October 26, 2006 email message from Behnke to Seneca was entitled "Halo Guard and Poly Guard Data Sheets," and included two advertising data sheets attached to it, one for **JAX Halo-Guard FG Series**, and the other for **JAX Poly-Guard Series Greases**. The first sheet was entitled "HALO-GUARD FG GREASES" and included the following language:

"Antimicrobial Performance: 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 FG Greases against Listeria (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals."

The second sheet was entitled "POLY-GUARD FG-LT, FG-2" and included the following language:

"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."

See ¶¶ 44 through 46 of Mr. Bonace's Declaration.

Finally, in Mr. Bonace's continued investigation of the Behnke case, Mr. Bonace also visited KHS, Inc (KHS). See ¶48 of Mr. Bonace's Declaration. On March 19, 2007, he received a copy of an advertising brochure from KHS. The back cover of the brochure was marked "JAX Products Distributed by: Behnke Lubricants, Inc. – JAX." The back cover of this brochure also included Behnke Lubricants' telephone numbers and facsimile numbers for both the Menomonee Falls, Wisconsin establishment and a Behnke facility located in Sacramento, California. The title of the brochure was "JAX: Lubricant Guide For Food, Beverage, Drug & Cosmetic Processing & Manufacturing." The brochure included a letter from Behnke Lubricants to its customers, which contained the following language:

“First and Foremost is Micronox™, JAX advanced antimicrobial additive technology that provides immediate and significant knockdown performance on a wide spectrum of microbial contaminants. This development alone is providing HACCP programs a powerful weapon in their ongoing battle against microorganisms.” “JAX Poly-Guard® FG is a new concept in food-grade greases, providing the highest level of antiwear performance of any competitor, and the benefits of Micronox®.”

The advertising brochure included a table of contents which had a section entitled “Micronox® Antimicrobial Technology.” This section described in detail the purported antimicrobial capabilities of Micronox® technology. A true, accurate and complete copy of the advertising brochure entitled “JAX: Lubricant Guide For Food, Beverage, Drug & Cosmetic Processing & Manufacturing” is included in Complainant’s Initial Prehearing Exchange as CX 13. See ¶¶ 49 through 50 of Mr. Bonace’s Declaration.

2. Counts II and III, both of which pertain to JAX Halo-Guard FG-2

In Counts II and III, Complainant alleges that the product in question, **JAX Halo-Guard FG-2** is a pesticide under FIFRA. While the Respondent does not admit that this product is a pesticide, Respondent does admit that on August 3, 2006, WDA conducted an inspection under FIFRA at Respondent’s facility. See ¶ 14 of the Answer. Respondent also admits that during this inspection, the inspector collected physical samples of **JAX Poly-Guard FG-2** and **JAX Halo-Guard FG-2**. See ¶ 15 of the Answer. Respondent further admits that during the inspection, Behnke gave the WDA inspector copies of Behnke’s Product Data Sheets for **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** and Behnke’s full product line catalog. See ¶ 16 of the Answer.

Respondent admits that Respondent’s literature obtained during the August 3, 2006 inspection, 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.

See ¶ 41 of the Answer.

Respondent also admits that 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.” See ¶ 43 of the Answer.

Additionally, all the internet investigations that Mr. Bonace conducted as discussed in Section IV. D. 1 above also made claims relating to **JAX Halo-Guard FG-2** or made generic claims pertaining to “JAX Micronox™,” which can be found in all the products that are the subject of the underlying Complaint in this matter.

During the course of Mr. Bonace’s investigation of the Behnke case at American, Mr. Bonace received a package from American that American had received from Behnke. The package included a document entitled the “American Foods Group, JAX Lube-Guard Program” which also included advertising literature for **Halo-Guard FG** which stated, among other things:

“JAX Halo-Guard FG provides Micronox® microbial knockdown performance.”

A true, accurate and complete copy of this piece of advertising literature is included in Complainant’s Initial Prehearing Exchange as CX 8a. See ¶ 26 of Mr. Bonace’s Declaration. See also ¶¶ 32 through 37 of Mr. Rybicki’s Declaration.

As discussed in Section IV.D. 1. above, much of Behnke’s advertising literature in the record also makes generic and specific claims regarding JAX Micronox® that apply to all Behnke products containing JAX Micronox® such as **JAX Halo-Guard FG-2**. See ¶¶ 27, 29,

33, 43, 46 and 49 of Mr. Bonace's Declaration.

3. Counts IV through VI, all of which pertain to **JAX Magna-Plate 78**

In Counts IV through VI, Complainant alleges that the product in question, **JAX Magna-Plate 78**, is a pesticide under FIFRA. Many of the internet investigations that Mr. Bonace conducted, as discussed in Section IV. D. 1 above, also made claims relating to **JAX Magna-Plate 78** and/or made generic claims pertaining to "JAX Micronox®," which can be found in all the products that are the subject of the underlying Complaint in this matter. As discussed in Section IV.D. 1. above, many of the documents given to Mr. Bonace during his continued investigation of this matter also made generic and specific claims regarding JAX Micronox™ that apply to all Behnke products containing JAX Micronox™ such as **JAX Magna-Plate 78**. See ¶¶ 27, 29, 33, 43 and 49 of Mr. Bonace's Declaration.

Additionally, on or about March 16, 2007, Mr. Bonace received two separate envelopes addressed from Mr. Josh Rybicki of American. Inside each envelope was advertising literature pertaining to Behnke's products. The first piece of advertising literature was entitled "American Foods Group, JAX Lube-Guard Program," and included advertising literature for **Magna-Plate 78** which stated, 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."

This "American Foods Group, JAX Lube-Guard Program" advertising literature for Magna-Plate 78 also included the Respondent's contact information, such as a telephone

number, facsimile number and Internet address. (CX 8a) *See ¶ 24 of Mr. Bonace's Declaration. See also ¶32 through 36 of Mr. Rybicki's Declaration.*

4. Count VII, which pertains to JAX Magna-Plate 74

In Count VII, Complainant alleges that the product in question, **JAX Magna-Plate 74**, is a pesticide under FIFRA. While the Respondent does not admit that this product is a pesticide, Respondent does admit Respondent's literature that was given to the inspector during the August 3, 2006 inspection, 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.*

See ¶ 65 of the Answer.

Additionally, many of the internet investigations that Mr. Bonace conducted as discussed in Section IV. D. 1 above also show that Behnke made claims relating to **JAX Magna-Plate 74** and/or made generic claims pertaining to "JAX Micronox®," which can be found in all the products that are the subject of the underlying Complaint in this matter. As discussed in Sections IV.D. 1. and 2. above, many of the documents given to Mr. Bonace during his continued investigation of the matter which are discussed above also made generic and specific claims regarding JAX Micronox® that apply to all Behnke products containing JAX Micronox®

such as **JAX Magna-Plate 74** . See ¶¶ 26, 27, 29, 33 and 49 of Mr. Bonace's Declaration.

Finally, the March 16, 2007 packet that Mr. Bonace received from American included, literature entitled "American Foods Group, JAX Lube-Guard Program," advertising literature for **Magna-Plate 74** which stated, 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 (Listeria monocytogenes), E. coli (Escherichia coli) and salmonella (Salmonella typhimurium) on contact and over extended lubrication intervals."

CX 8a See ¶ 25 of Mr. Bonace's Declaration. See also ¶ 32 through 36 of Mr. Rybicki's Declaration. These are all pesticidal claims, which cause the products discussed in this document to be a pesticide under FIFRA.

5. *Count X, which pertains to JAX Halo-Guard FG-LT*

In Count X, Complainant alleges that the product in question, **JAX Halo-Guard FG-LT** is a pesticide under FIFRA. While the Respondent does not admit that this product is a pesticide, Respondent does admit Respondent's literature that was given to the inspector during the August 3, 2006 inspection, 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.*

See ¶ 55 of the Answer.

Additionally, on March 7, 2007, an inspector from the MDA went to the Jennie - O

Turkey Store (Jennie - O), located at 1530 30th Street SW, Wilmar, Minnesota. During that inspection, the inspector from MDA viewed and photographed a cartridge tube of **JAX Halo-Guard FG-LT**, which stated on the label "JAX Halo-Guard FG-LT provides Micronox™ microbial knockdown performance." See ¶¶ 4 through 6 of Mr. Cremer's Declaration.

Many of the internet investigations that Mr. Bonace conducted, as discussed in Section IV. D. 1 above also, made claims relating to **JAX Halo-Guard FG-LT** and/or made generic claims pertaining to "JAX Micronox®," which can be found in all the products that are the subject of the underlying Complaint in this matter. As discussed in Sections IV.D. 1. and 2. above, many of the documents given to Mr. Bonace during his continued investigation of the matter which are discussed above also made generic and specific claims regarding JAX Micronox® that apply to all Behnke products containing JAX Micronox® such as **JAX Halo-Guard FG-LT**. See ¶¶ 26, 27, 29, 33, 43 and 49 of Mr. Bonace's Declaration.

6. Further evidence that JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74 are pesticides.

Respondent submits an exhibit in its own prehearing exchange that consists of advertising literature for JAX products:

JAX Micronox® Technology is groundbreaking advance in food-grade technology developed with unsurpassed performance in preserving and protecting food-grade lubricants from microbial contamination in meat and poultry plants worldwide.

See RX54, at page 2 of the exhibit.

The advertising literature goes on to say:

Poly-Guard® FG provides the highest level of antiwear performance in an NSF H-1 grease and incorporates Micronox® antimicrobial technology.

See RX 54, at page 6 of the exhibit (Note it is labeled as page 4 of the product catalog).

The advertising literature further states:

JAX Micronox® Technology

Independently engineered and field tested by JAX, Micronox® additive system is a groundbreaking advance that was developed with the intention of preserving and protecting food-grade lubricants from bacterial contamination in meat, poultry and fresh food processing plants worldwide. In independent laboratory testing, the use of lubricants containing Micronox® was shown to reduce the yeast and mold counts and prevent the formation of Listeria, E. coli and Salmonella.

This is followed by a graph chart showing the use of **JAX Poly-Guard FG** as compared to two of Behnke's competitors. The results show that colony forming units of Listeria, E. coli and Salmonella over a four week period were significantly less (almost minimal) when using Behnke's **JAX Poly-Guard FG** product. See RX 54 at page 16 of the exhibit (labeled as page 14 of the product catalog). The advertising literature also states:

Micronox®, the first effective food-grade antimicrobial additive for protecting lubricants with knock-down capabilities, effectively partnering lubricants into plant HACCP programs.

See RX 54, at page 17 of the exhibit labeled as page 15 of the product catalog).

Furthermore, Behnke registered its trade name, Micronox, with the PTO. A certified copy of the PTO file, dated June 18, 2002, is included in Complainant's Initial Prehearing Exchange as CX 35 and is self authenticating. See *Federal Rule of Evidence 902*. The file includes Behnke's Trademark Application which is accompanied with samples of labeling and literature discussing Behnke's JAX products that contain Micronox™. It also contains a declaration by the president of Behnke, Mr. Eric J. Peter, regarding the truthfulness of the application. The PTO files contains numerous statements such as "antimicrobial additive for industrial lubricants and greases," "...now contains Micronox™, JAX proprietary anti-microbial

additive package for microbial knock-down performance,” “new antimicrobial additive lubrication,” “Now, for the first time in a food-grade lubricant, JAX Poly-Guard FG with Micronox™ provides significant knockdown capabilities with all common forms of bacterial contamination including *Listeria* (*listeria monocytogenes*), *E-coli* (*escherichia coli*) and *Salmonella* (*salmonellas typhimurium*).” See pages 2,3,6,8,10 and 11 of CX 35.

Finally, CX 36 of Complainant’s Initial Prehearing Exchange consists of a certified copy of a civil suit originally filed by Behnke on January 13, 2006, in the Circuit Court of Waukesha County, Wisconsin, which is self authenticating. In its Complaint, Behnke makes these relevant statements:

Behnke also formulates an antimicrobial additive for industrial lubricants identified as “Micronox®” which Behnke incorporates into some of its food-grade lubricants. All of the ingredients in the Micronox® product meet all relevant regulatory guidelines, including those of the United States Food and Drug Administration and the United States Department of Agriculture. The Micronox® product has antimicrobial properties which no competing product contains. These properties extend the useful lives of the food-grade lubricants containing Micronox®. It does this by retarding bacterial growth in the lubricants, which bacterial growth otherwise would degrade the lubricants and make them potential harbors for bacteria. The composition of the Micronox® product is a trade secret owned and maintained by Behnke. The formula for the Micronox® product is proprietary to Behnke. Behnke’s ability to sell food-grade lubricants identified as containing Micronox® gives Behnke a competitive advantage over the sellers of other food-grade lubricants.

See ¶ 5 of this Complaint at CX 36.

Therefore, it is clear that there can be no dispute as to what claims Behnke made in the course of marketing, distributing and selling all of its JAX products containing Micronox®, including every product that is the subject of this dispute. The only two questions that remain are (1) were these claims made by Behnke pesticidal claims and (2) were claims made as a part of each product’s distribution and sale.

7. There is not a genuine issue of material fact that JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74 are pesticides under FIFRA

One would not have to go beyond the face of the statute and regulations to conclude that **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74** are pesticides under the definition of FIFRA. Section 2(u) of FIFRA and 40 C.F.R. § 152.3, define a “pesticide” as any substance or mixture of substance intended for preventing, destroying, repelling, or mitigating a pest. Section 2(t) of FIFRA defines “pest,” in pertinent part, as any form of virus, bacteria, or other microorganism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals). This definition is further qualified by the definition of “pests” found at 40 C.F.R. § 152.5(d) which, in pertinent part states, that an organism is declared to be a pest under circumstances that make it deleterious to man or the environment, if it is “any fungus, bacterium, virus, or other microorganisms, except for those on or in living man or other living animals and those on or in processed food or processed animal feed, beverage, or drugs⁴.” Finally, 40 C.F.R. § 152.15(a)(1) states that a pesticide is any substance (or mixture of substances) intended for a pesticidal purpose; i.e. use for the purpose of preventing, destroying, repelling, or mitigating any pest. It further states, in pertinent part, that a substance is considered to be intended for a pesticidal purpose, and thus requiring registration, if a person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance can or should be used as a pesticide or the person who distributes or sells the substance has actual or constructive

⁴ Although, the Complainant does not believe Respondent’s products in anyway qualify Respondent for an exemption under 40 C.F.R. § 152.5(d), Respondent has asserted that its products are exempt as pesticides under this section as one of its affirmative defenses.

knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose. See also 40 C.F.R. § 168.22 (a).

It is abundantly clear that the claims Behnke makes with respect to **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74**, either on the actual labeling of the product, and/or on Behnke's advertising literature (both in print and on the internet) claim, state, or imply that **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74** are indeed pesticides as that term is defined in FIFRA. Overt public health claims such as "providing antimicrobial protection," "especially effective in protecting JAX Poly-Guard Greases against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salomella (*Salomonella typhimurium*)," "Powerful Antimicrobial Performance," "Added Step in Microbial Protection Program," and "exclusive antimicrobial chemistry possessing true knockdown capabilities," which are found with great ease in Behnke's labeling of the product, in many of its advertising literature and peppered all over the internet, make it apparent that Behnke intended for **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74** to be used for pesticidal proposes.

Furthermore, with the heightened awareness of public health concerns that have ensued as a result of bovine spongiform encephalopathy (BSE), commonly known as mad cow disease, E. coli breakouts such as the spinach contamination outbreak and countless recalls of contaminated meats, it is now common knowledge among the public that bacteria such as Listeria, E. coli and Salomella are deleterious and infectious to man. Therefore, Behnke would

Complainant will address Respondent's affirmative defenses in a later portion of this Motion.

be hard pressed to argue that the claims it has made, through its labeling, advertising literature and the internet, are not pesticidal claims and particularly public health claims.

This issue is further clarified in the case law. In *In the Matter of Microban Products Company*, 1998 EPA ALJ LEXIS 47, June 29, 1998, the Court issued an order reaffirming its April 3, 1998, Order in which it took “judicial notice of the fact that E. Coli [Escherichia coli], Salmonella, Staph. [Staphylococci] are widely recognized as microorganisms infectious to man.” Courts have consistently found that claims such as those made by Behnke in association with all of the **JAX** products that are the subject of the Complaint, are pesticidal claims and thus are pesticides requiring registration under FIFRA. See *In Re Microban Products Company*, 11 E.A.D. 425 (EAB 2004) (*Microban II*), *In the Matter of Microban Products Company*, 1998 EPA ALJ LEXIS 135, September 18, 1998 (*Microban I*); *In the Matter of Pacific International Group, Inc.*, 1999 EPA ALJ LEXIS 27, June 27, 1999; and *In the Matter of William E. Comley, Inc., a/k/a WECCO and Belach Tek, Inc., d/b/a/ TEK*, 2003 PA ALJ LEXIS 7, January 31, 2003.

Equally as important is the manner in which U.S. EPA historically has interpreted the definition of “pesticide” in FIFRA. Chapter 2 of U.S. EPA’s Label Review Manual (3rd Edition)(LRM) (See CX 50) contains a section entitled “What is a Pesticide” which proves to be instructive on this issue. This chapter discusses the statutory and regulatory criteria used to determine whether or not a product is a “pesticide” requiring registration. The LRM explains that:

*One of the most important words in the FIFRA definition of “pesticide” is “intended.” One of the analytical steps to determining whether a product is a “pesticide” is to consider whether the product is “intended” to be used as a pesticide. Products are generally considered to be pesticides if they are intended for preventing, destroying, repelling, or mitigating any pest... OPP [Office of Pesticides Program] determines **intent** by examining claims on the label, advertising; composition/use; and/or mode of action of*

the product as distributed or sold. Section 40 C.F.R. 152.15 sets forth the criteria to help establish intent.

See CX 50 at Chapter 2, pages 4 through 5. Clearly, the unmistakable intent on the part of the Respondent was to persuade its customers that these lubricants had the ability to prevent, destroy, repel or mitigate bacteria and microorganisms associated with food processing facilities such as Listeria, E. coli and Salomella .

Furthermore, Pesticide Registration Notice 2000-1 (PR Notice), March 6, 2000 at CX 21, is also instructive on the issue of what is considered a “pesticide” under FIFRA and what claims are appropriate. PR Notice 2000-1 addresses the “Applicability of the Treated Articles Exemption to Antimicrobial Pesticides,” as set forth in 40 C.F.R. § 152.25(a). The PR Notice clarifies U.S. EPA policy with respect to the scope of the “treated articles exemption” which can be found at 40 C.F.R. § 152.25(a). The exemption covers treated articles and substances that bear claims to protect the article itself. In such an instance, the treated article itself must be registered for use under FIFRA⁵. The PR Notice specifically notes that U.S. EPA does not regard the treated articles exemption as including substances that bear implicit or explicit public health claims against human pathogens, such as Listeria, E. coli and Salomella. The PR Notice also identifies types of claims that are not permitted for antimicrobial pesticide products even if such products qualify for the treated articles exemption under 40 C.F.R. § 152.25(a).

Because consumers have long associated the following widely used claims and references to microorganisms harmful to humans with products providing public health protection, EPA considers an article or substance to make a public health claim if any of the

⁵ U.S. EPA has recently registered an antimicrobial additive for a company that sells a food grade industrial lubricant, much like Behnke’s JAX products. This company is able to enjoy the umbrella of the “treat articles exemption” because the additive in its food grade lubricant is registered under FIFRA, its intended use is to protect itself and all labeling and advertising claims comply with the requirements of the PR Notice 2000-1. See CX 18e.

following claims are made either explicitly or implicitly:

- 1. A claim for control of specific microorganisms or classes of microorganisms that are directly or indirectly infectious or pathogenic to man (or both man and animals).
Examples of specific microorganisms include Mycobacterium tuberculosis, Pseudomonas aeruginosa, E. coli, HIV, Streptococcus and Staphylococcus aureus.*
- 2. A claim for the product as a sterilant, disinfectant, virucide or sanitizer, regardless of the site of use of the product, and regardless of whether specific microorganisms are identified.*
- 3. A claim of “antibacterial,” “bactericidal,” or “germicidal” activity or references in any context to activity against germs or human pathogenic organisms implying public health related protection is made.*
- 4. A claim for the product as a fungicide against fungi infections or fungi pathogenic to man, or the product does not clearly indicate it is intended for use against non-public health fungi.*
- 5. A claim to control the spread of allergens through the inhibition or removal of microorganisms such as mold or mildew.*
- 6. A non-specific claim that the product will beneficially impact or affect public health by pesticidal means at the site of use or in the environment in which applied.*
- 7. An unqualified claim of “antimicrobial” activity.*

See CX 21 at pages 2 and 3.

The PR Notice further provides examples of labeling claims that U.S. EPA is likely to consider unacceptable under the “treated articles exemption.” It provides a list that is not exhaustive and specifically invites persons who are unsure if their claim is acceptable to request a written opinion of the Antimicrobials Division⁶. It states:

These examples represent claims or types of claims for a treated article that would lead to a requirement to register the article as a pesticide product.

o Antibacterial

⁶ Such an opinion, to the best of U.S. EPA’s knowledge, has never been sought by Behnke.

- o Bactericidal*
- o Germicidal*
- o Kills pathogenic bacteria.*
- o Effective against E. coli and Staphylococcus.*
- o Reduces the risk of food-borne illness from bacteria.*
- o Provides a germ-resistant surface.*
- o Provides a bacteria-resistant surface.*
- o Surface kills common gram positive and negative bacteria.*
- o Surface controls both gram positive and negative bacteria.*
- o Surface minimizes the growth of both gram positive and negative bacteria.*
- o Reduces risk of cross-contamination from bacteria.*
- o Controls allergy causing microorganisms.*
- o Improves indoor air quality through the reduction of microorganisms.*

See CX 21 at page 5⁷.

The PR Notice goes on to clarify that registration is needed when substances with implied or explicit public health claims (such as those that are made in Behnke's labeling, advertising literature and internet claims) are made.

Treated articles or substances with implied or explicit public health claims or which otherwise fail to qualify for exemption are pesticide products subject to all requirements of FIFRA. They may not be legally sold or distributed unless they are registered with EPA or unless such claims have been removed and the article otherwise qualifies for exemption. To obtain a registration, an applicant must submit acceptable data supporting all the proposed claims under which the product will be marketed and meet all other applicable registration requirements. Refer to 40 CFR Parts 152, 156, and 158.

See CX 21 at page 8.

The evidence is overwhelming that Respondent claims, states, or implies that its products, **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74** are "pesticides." Looking at the totality of Respondent's Answer, Mr. Bonace's Declaration, Mr. Josh Rybicki's Declaration, Mr. Cremer's Declaration,

⁷ It should be noted that it is undisputed that many of these types of claims have been made by Behnke in association with the distribution and sale of **JAX Poly-Guard FG, JAX Halo-Guard FG and JAX Magna-Plate 74 and 78** products. Additionally, Behnke has also made claims

Respondent's own exhibits in its prehearing exchange, Respondent's statements made in its Trademark application to PTO for its additive Micronox™, the statements made by Respondent in a Complaint it filed in a separate and distinct civil law suit, the plain language of the definition of "pesticide" in FIFRA and its implementing regulations, and the clear interpretation of that definition through case law, and U.S. EPA's LRM and U.S. EPA's PR Notice 2000-1, it is clear there is no genuine issue as to the material fact that Behnke's **JAX Poly-Guard FG, JAX Halo-Guard FG- 2, and JAX Halo-Guard FG-LT, Magna-Plate 74 and 78** products are "pesticides," as that term is defined by FIFRA.

8. *There is no genuine issue of material fact that the claims, statements and implications made regarding **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74** were made as a part of each product's distribution and sale*

The only remaining issue that must be addressed is if the claims, statements and implications made regarding **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 78 and JAX Magna-Plate 74** were made as a part of each product's distribution and sale. The following discussion establishes that no genuine issue of material fact exists with respect to this issue in any of the eleven counts.

- a. Count I

With respect to Count I, Respondent made pesticidal claims on the actual tube of **JAX Poly-Guard FG-2** itself, as observed by both the WDA inspector and Mr. Bonace. *See CX 1, 38 and 39 and see ¶ 9 of Mr. Bonace's Declaration.* Therefore, there can be no dispute that the claims made by Behnke were made as part of the product's distribution or sale.

- b. Count II

regarding pram positive and gram negative. *See CX 8a through 8c and CX 12.*

With respect to Count II, Respondent made pesticidal claims on the actual tube of **JAX Halo-Guard FG-2** itself, as observed by both the WDA inspector and Mr. Bonace. *See CX I, 38 and 39 and see ¶ 9 of Mr. Bonace's Declaration.* Therefore, there can be no dispute that the claims made by Behnke were made as part of the product's distribution or sale.

c. Count III

With respect to Count III, Respondent made pesticidal claims with respect to **JAX Halo-Guard FG-2**, as discussed in detail above. In addition, it is critical to note that at least some of the literature that was given to American by Behnke contained pesticidal claims and predated the distribution or sale of this count. Particularly, the advertising literature entitled "American Foods Group, JAX Lube-Guard Program," was dated June 20, 2003. *See CX 8a, see ¶ 26 of Mr. Bonace's Declaration and ¶¶ 34 through 36 of Mr. Rybicki's Declaration.* The advertising literature entitled "Technology Focus, JAX MicronoxTM Technology, Introducing MicronoxTM Technology in JAX Food-Grade Lubricants for Microbial Knockdown Performance against Listeria, E. coli, Salmonella and other microorganisms," was dated December, 2001. *See CX 8c and see ¶ 29 of Mr. Bonace's Declaration and ¶¶ 41 through 44 of Mr. Rybicki's Declaration.* Finally, Mr. Rybicki confirms in his declaration that the antimicrobial claims made by Behnke were one of the reasons that American decided to purchase the lubricants and that American was never contacted by Behnke to redact, destroy, or replace any of the advertising literature that Behnke had previously presented to American. *See ¶¶ 19, 21, and 46 through 50 of Mr. Rybicki's Declaration.*

Further, the EAB has addressed the issue of when a pesticidal claim is part of its distribution and sale in *Microban II*, at 444, in which the Board responds to Microban's

argument that the claims made were not part of the distribution or sale of its products. The

Board states:

This argument is contrary to the conclusions in In re Sporicidin International, Inc., 3 E.A.D. 589 (CJO 1991). As the Chief Judicial Officer in that case explained, FIFRA is a remedial statute and, as such, “should be construed liberally so as to effectuate its purposes.” Id. At 640. Therefore, “[b]roadly construing the phrase ‘part of its distribution or sale’ so not to require contemporaneous sale or distribution furthers the overall purposes of FIFRA.” Id. Here as in Sporicidin, “[c]ommon sense suggests that a claim followed by a sale evinces nothing more than a normal cause-and-effect relationship, and that a time interval spanning the two events is common.

Therefore, the court concluded that there was a sufficiently close link between the claims and the distribution or sale. Looking at the totality of the evidence in the Behnke case, it is apparent that as was in the cases *Microban II* and *Sporicidin*, there is a sufficiently close link here to conclude that the claims made regarding **JAX Halo-Guard FG-2** did in fact induce the subsequent distribution or sale to American as set forth in Count III. Therefore, there can be no dispute that the claims made by Behnke were made as part of the product’s distribution or sale.

d. Counts IV and VI

With respect to Counts IV and Count VI, Respondent made pesticidal claims with respect to **JAX Magna-Plate 78**, as discussed above in detail. In addition, it is critical to note that at least some of the literature that was given to American by Behnke contained pesticidal claims and predated the distribution or sale of this count. Particularly, the advertising literature entitled “American Foods Group, JAX Lube-Guard Program,” was dated June 20, 2003. *See CX 8a and see ¶ 26 of Mr. Bonace’s Declaration and ¶¶ 34 through 36 of Mr. Rybicki’s Declaration.* The advertising literature 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,” was dated December, 2001. *See*

CX 8c and see ¶ 29 of Mr. Bonace's Declaration and ¶¶ 41 through 44 of Mr. Rybicki's Declaration. Finally, Mr. Rybicki confirms in his declaration that these antimicrobial claims made by Behnke were one of the reasons that American decided to purchase the lubricant and that American was never contacted by Behnke to redact, destroy, or replace any of the advertising literature that Behnke had previously presented to American. *See ¶¶ 19, 21, and 46 through 50 of Mr. Rybicki's Declaration.*

Further, the EAB has addressed the issue as discussed above. Looking at the totality of the evidence in the Behnke case, it is apparent that, as was the case in *Microban II* and *Sporicidin*, there is a sufficiently close link here to conclude that the claims made regarding **JAX Magna-Plate 78** did in fact induce the subsequent distribution or sale to American as set forth in Count IV and Count VI. Therefore, there can be no dispute that the claims made by Behnke were made as part of the product's distribution or sale.

e. Count V

With respect to Count V, Respondent made pesticidal claims with respect to **JAX Magna-Plate 78**, as described in detail above. Additionally, it is important to note that the date of distribution or sale that took place in Count V (March 7, 2007) clearly post-dates all of the labeling and advertising literature (both print and internet) in the record. Therefore, there can be no dispute that the claims made by Behnke were made as part of the product's distribution or sale.

f. Count VII

With respect to Count VII, Respondent made pesticidal claims with respect to **JAX Magna-Plate 74**, as discussed in detail above. In addition, it is critical to note that at least some

of the literature that was given to American by Behnke contained pesticidal claims and predated the distribution or sale of this count. Particularly, the advertising literature entitled “American Foods Group, JAX Lube-Guard Program,” was dated June 20, 2003. *See CX 8a and see ¶ 26 of Mr. Bonace’s Declaration and ¶¶ 34 through 36 of Mr. Rybicki’s Declaration.* The advertising literature 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,” was dated December, 2001. *See CX 8c and see ¶ 29 of Mr. Bonace’s Declaration and ¶¶ 41 through 44 of Mr. Rybicki’s Declaration.* Finally, Mr. Rybicki confirms in his declaration that these antimicrobial claims made by Behnke were one of the reasons that American decided to purchase the lubricant and that American was never contacted by Behnke to redact, destroy, or replace any of the advertising literature that Behnke had previously presented to American. *See ¶¶ 19, 21, and 46 through 50.*

Further, the EAB has addressed the issue as discussed above. Looking at the totality of the evidence in the Behnke case, it is apparent that, as was the case in *Microban II* and *Sporicidin*, there is a sufficiently close link here to conclude that the claims made regarding **JAX Magna-Plate 74** did in fact induce the subsequent distribution or sale to American as set forth in Count IV and Count VI. Therefore, there can be no dispute that the claims made by Behnke were made as part of the product’s distribution or sale.

g. Counts VII, IX and XI

With respect to Count VII, IX and XI, Respondent made pesticidal claims on the actual tube of **JAX Poly-Guard FG-2** itself, as observed by both the WDA inspector and Mr. Bonace. *See CX 1, 38 and 39 and see ¶ 9 of Mr. Bonace’s Declaration.* Mr. Bonace also observed that

the tubes of **JAX Poly-Guard FG-2** at Badger and Perlick were identical to the ones collected at the Behnke facility on August 3, 2006. *See ¶¶ 31-32 and 36-37 of Mr. Bonace's Declaration.* Therefore, there can be no dispute that the claims made by Behnke were made as part of the product's distribution or sale.

h. Count X

With respect to Count X, Respondent made pesticidal claims on the actual tube of **JAX Halo-Guard FG-LT**, as observed by Mr. Cremers of MDA at the Jennie-O facility. *See CX 15 and see ¶¶ 4 through 6 of Mr. Cremer's Declaration.* Therefore, there can be no dispute that the claims made by Behnke were made as part of the product's distribution or sale.

Given the all the information in the record, there is no genuine issue of material fact that Behnke violated FIFRA on eleven separate counts as alleged in the complaint by distributing or selling a pesticide that was unregistered on eleven different instances. As a result, Complainant respectfully requests that this Court grant this Motion for Accelerated Decision on Liability.

VI. Motion for Accelerated Decision as to Affirmative Defenses 1, 2, and 7 Should be Granted

On January 16, 2008, Complainant moved for discovery in connection with Respondents Affirmative Defenses 1, 2 and 7. In the event that this Honorable Court grants the instant Motion for Accelerated Decision as to Affirmative Defenses 1, 2 and 7, Complainant's renewed request for discovery to support Affirmative Defenses 1, 2 and 7 should be deemed moot.

Despite repeated requests by the Complainant, the Respondent has failed to provide any factual or legal support for its affirmative defenses to date. The affirmative defenses set forth in Respondent's answer merely state legal conclusions, and are unsupported by facts or reasoning. Section 22.15(b) of the Consolidated Rules of Practice states that "the answer shall also state:

the circumstances or arguments which constitute the grounds of any defense...” 40 C.F.R. § 22.15(b). Thus, under the applicable rules of practice, Respondent is required to state the “circumstances or arguments” which support the grounds of its affirmative defenses in its answer to the complaint.

Federal courts also recognize that, as a general matter, a defense that is based on an exemption to regulatory coverage is an affirmative defense. See *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (“where one claims the benefits of an exception to the prohibition of a statute,” one generally carries the burden of proving that it falls within the exception); *In re: J. Phillip Adams*, 13 E.A.D. ____ (EAB 2007), 2007 EPA App. LEXIS 24 (“One who asserts an affirmative defense bears the burdens of producing evidence as to the defense and demonstrating, by a preponderance of the evidence, that the defense applies.”); *In re Capozzi*, 11 E.A.D. 10, at 19, n. 16 (EAB 2003); *In re Rybond, Inc.*, 6 E.A.D. 614, 637 & n. 33 (EAB 1996); *In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272 (CJO 1990) (“Generally, a statutory exception (or exemption) must be raised as an affirmative defense, with the burden of persuasion and the initial burden of production upon the party that seeks to invoke the exception.”).

In affirmative defenses 1, 2 and 7, Respondent seems to rely on certain exemptions or exceptions to FIFRA regulatory coverage set forth in the FIFRA statute or its implementing regulations. Affirmative defenses 1 and 2 imply that Behnke’s lubricant products somehow meet an exception to the definition of “pesticide” found in Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Affirmative defense 7 states that Behnke’s products are not intended for pesticidal purposes because they target microorganisms that do not meet the definition of “pest” as defined in 40

C.F.R. § 152.5. Therefore, Respondent bears the burden of production and the burden of persuasion to substantiate these affirmative defenses.

As the Chief Administrative Law Judge has stated: “[f]or the EPA to prevail on a motion for accelerated decision on an affirmative defense, as to which Respondent ultimately bears such burdens, EPA initially must show that there is an absence of evidence in the record for the affirmative defense.” *In the Matter of Minnesota Metal Finishing*, Docket No. RCRA-05-2005-0013, 2007 EPA ALJ LEXIS 1, at 8 (Order on Complainant’s Motion for Accelerated Decision, January 9, 2007), *citing Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). If Complainant makes this requisite showing, “then Respondent ‘as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying ‘specific facts’ from which a reasonable factfinder could find in its favor by a preponderance of the evidence.’” *Id.*, *citing Rogers Corporation*. Respondent cannot “meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence.” *Minnesota Metal Finishing*, 2007 EPA ALJ LEXIS 1, at 8-9, *citing BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000).

Therefore, as part of its prehearing exchange submittal, Respondent must provide substantial evidence in support of its affirmative defenses. The Chief Judge also noted, in the context of a motion for an accelerated decision on an affirmative defense, “[w]hile submissions [of information supporting an affirmative defense] must be viewed in [a] light most favorable to the nonmovant, including one who bears the burden of persuasion on the issue, and such evidence is to be taken as true, Respondent must provide ‘more than a scintilla of evidence on a disputed factual issue to show [its] entitlement to a trial or evidentiary hearing; the evidence

must be substantial and probative in light of the appropriate evidentiary standard of the case.”
Minnesota Metal Finishing, 2007 EPA ALJ LEXIS 1, at 9, citing *BWX Technologies, Inc.*, 9
E.A.D. at 76.

A. Respondent's Affirmative Defenses 1 and 7

Although the Respondent has provided very little information to support its affirmative defenses 1 and 7, it seems that these two defenses are closely interrelated. Respondent asserts that Behnke's products are not pesticides within the meaning of FIFRA in affirmative defense 1. Behnke then asserts that its “products are not intended for a pesticidal purpose as set forth in 40 CFR § 152.15, i.e., they are not intended to be used for the purpose of preventing, destroying, repelling or mitigating any pest. A “pest” as defined in 40 CFR § 152.5, does not include microorganisms on or in processed food, which are the environmental contaminants to which Behnke's products are exposed” in affirmative defense 7.

Respondent seems to be asserting that the **JAX** products identified in the Complaint are not “pesticides” because they do not target a “pest” as that term is defined in 40 CFR § 152.5. Although Respondent has not expanded upon or supported this argument, the Complainant can envision only two arguments that Behnke could be making, neither of which would exempt the lubricants from the FIFRA registration requirements.

The first argument Behnke could be to making is that it lubricants fit into the definition of “on or in processed food” as that term is used in 40 CFR 152.5(d). The “on or in processed food” exemption set forth in the definition of “pests” at 40 CFR 152.5 (d), is designed for instances when a product targeting microorganisms is applied onto the processed food (such as a meat sanitizer that is intended to be sprayed directly on to processed meat products on a

harvesting floor). The exemption is similar to the exemption for products used to kill or mitigate microorganisms “on or in living man,” such as a hand sanitizer that is intended to be used to kill bacteria on human hands. The application of the Behnke lubricants (i.e., as lubricating agents applied to equipment) does not fit into such an exemption.

To argue that the lubricants are targeting microorganisms “on or in processed food” is strained and unsupportable by agency intent, interpretation, case law and common sense. U.S. EPA discusses the “on or in processed food” exemption in its *“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,”* 63 Fed. Reg. 54533 (October 9, 1998)(CX 19) and states:

Further, EPA has broadened this statutory exclusion in its FIFRA regulations at 40 CFR 152.5(d). Specifically, under this rule, an organism is not considered a “pest” if it is a “fungus, bacterium, virus, or other microorganisms [sic] . . . on or in processed food or processed animal feed, beverages, drugs, . . . or cosmetics” In applying this exclusion, EPA has historically interpreted the words “processed food” and “processed animal feed” as they are commonly understood--food that has undergone processing and is intended to be consumed immediately or after some further processing or preparation. Because the commonly understood meaning of these terms applies to edible food articles, EPA has not considered food-contact items (such as paperboard and ceramic ware) to be “processed food” within the meaning of that term in FIFRA and EPA's implementing regulations. Thus, EPA has regarded any antimicrobial substance used in or on paper, paperboard, or other food- contact items as a “pesticide” under FIFRA.

In the footnote it states:

The discussion in the paragraph above, however, does not purport to interpret the FFDCFA definition, but rather to address the meaning of the terms “processed food” and “processed animal feed” used in FIFRA and EPA's implementing regulations.

See 63 FR 54532, 53533.

The LRM (CX 50) also speaks to this issue and states:

Antimicrobial products used solely in processed foods or feeds, in beverages, or in

pharmaceuticals.

Cracking, milling grinding and other process that cause the physical changes in the commodity are methods that meet the definition of "processed." Substances used in these processes against microbes in or on the processed food are not pesticides under FIFRA...

Products that are not intended to prevent, destroy, repel or mitigate a pest, or to defoliate desiccate, or regulate growth of plants are not considered to be pesticides. Some of these products may appear to be pesticides, but are not considered as such unless pesticidal claims are made on their labeling or in connection with their sale and distribution.

See LRM, at Page 2-4.

Clearly, it is commonly understood that a lubricant is not an edible food article or intended for human consumption. Therefore, the Respondent would be hard pressed to argue that its lubricants are "processed foods" or that the antimicrobial agents in its products are "on or in processed foods."

The second possible argument Behnke might be making is that because the microorganisms its lubricants are targeting originate from a "processed food," the lubricants are exempt under the definition of "pest" at 40 CFR § 152.25(a) and therefore exempt from the definition of "pesticide" under FIFRA. In affirmative defense 7, Respondent seems to argue that microorganisms which originate from "processed" foods (such as the environmental contaminants which Behnke's products are exposed to during the food processing operations) are exempt under the definition of "pest" at 40 CFR § 152.25(a).

Respondent implies that if the microorganism in question originates from a "processed food," U.S. EPA loses jurisdiction over the product under FIFRA. Such a proposition is absurd. As discussed earlier in this Motion, U.S. EPA requires the registration of pesticidal products that prevent, destroy, repel or mitigate microorganisms such as Salmonella and E. Coli. In food processing facilities, such microorganisms can only originate from the processed meat (or the

humans working in the processing facilities). U.S. EPA requires the registration of countless sanitizers, disinfectants and sterilants used in meat processing plants to clean the floors, walls, work surfaces and equipment handling processed meats, even though the pests that these products are designed to address originate from the processed meats at such facilities. Under Respondents interpretation of the definition of “pest,” all of these products would be exempt from registration because they would be preventing, destroying, repelling or mitigating microorganisms that could have only come from the processed meats in such facilities. Accepting such a contorted interpretation of the FIFRA statute and regulations would result in an enormous and unintended loophole in the FIFRA registration process. The resulting loophole would obviate the need for the registration of all products making food borne public health claims and would not serve to effectuate the purpose of FIFRA and its implementing statutes. CX 18a through d contain just a small sampling of these very types of products that U.S. EPA has registered as pesticides.

Further, Courts have addressed the meaning of “on or in” as well. In *Kenepp v. American Edwards Laboratories*, 859 F. Supp. 809, at 816, n. 4 (E.D. PA 1994) the district court rejected the argument that because an antimicrobial product targeted the Human Immunodeficiency Virus, it was not a pesticide under FIFRA. The court held that “[t]he defendants’ products are designed in part to kill Human Immunodeficiency Virus (Type 1) on hospital instruments, and are not for use ‘on or in living man.’ Accordingly, the court finds that the defendants’ products are ‘pesticides’ within the meaning of FIFRA.” In other words, simply because the targeted microorganism originates from a human being does not mean that that microorganism is always considered “on or in living man.” Therefore, when the microorganism contaminates an object

such as a hospital instrument, the microorganism is no longer “on or in” the human (i.e., it is no longer “on or in living man”), and the sanitizer intended to target such microorganisms when they are on instruments is a pesticide requiring FIFRA. By logical extension of this sound judicial reasoning, if a microorganism originates from processed meat, but comes to contaminate food processing equipment or the lubricant on that equipment, that microorganism is no longer “on or in processed food,” and an antimicrobial product that targets that microorganism on the equipment or in the lubricant on that equipment is a pesticide under FIFRA. Behnke has stated in its Answer that the antimicrobial properties of its lubricant products are intended to protect the lubricants themselves and the equipment to which the lubricants are applied. *See Answer at Affirmative Defense 6.* The antimicrobial properties are not intended to kill or mitigate bacteria or other microorganisms while they are on the processed food itself, and Behnke has neither claimed otherwise nor provided any evidence suggesting otherwise.

The Respondent has failed to submit any evidence or argument that support affirmative defense 1 and 7. The defenses are improperly pled. The defenses also lack any necessary support and both are therefore ripe for accelerated decisions.

B. Respondent’s Affirmative Defenses 2

Respondent’s affirmative defense 2 states that Behnke’s products do not contain a “pesticide” as defined by FIFRA. Respondent misses the point entirely on this affirmative defense. While it is correct that many products that contain pesticides might require registration under FIFRA before these products can be distributed or sold, it is not the single means by which such products might require registration under FIFRA. As discussed in detail in Section V.D. 7. of this Motion, the word “intended” in the definition of “pesticide” in FIFRA is critical. See

also 40 CFR § 152.15(a)(1). In this case, Respondent clearly claimed, stated and implied by its labeling and advertising (in its literature and on the internet) that its lubricants had antimicrobial properties and could or should be used as a pesticide.

The ALJ's decision in *In the Matter of Super Chem Corporation*, Dkt. No. FIFRA-9-2000-0021, 2002 EPA ALJ LEXIS 25, Slip. Op. (April 24, 2002) is illustrative in this situation. In *Super Chem*, the ALJ stated "[t]he record evidence in this case overwhelmingly shows that [Respondent's product] is [a pesticide....]" *Id.* at 11. Here the ALJ found that product held itself out to be a pesticide because its label stated that product was a "Disinfectant-Sanitizer," that it was "to be used for disinfection in hospitals, nursing homes and schools," and that it was "effective against the bacteria *Escherichia coli*." *Id.*

The Respondent has failed to submit any evidence or argument that support affirmative defense 2. The defense is improperly pled. The defense also lack any necessary support and is ripe for accelerated decision.

Complainant respectfully requests that this Court grant Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses.

VII. Proposed Findings of Facts and Conclusions of Law

A. Proposed Finding of Facts

1. Respondent, Behnke owns and operates a place of business located at W 134 N5375 Campbell Drive, Menomonee Falls, Wisconsin 53051.
2. Respondent's product, **JAX Poly-Guard FG-2** is not registered as a pesticide under FIFRA.
3. Respondent's product, **JAX Halo-Guard FG-2** is not registered as a pesticide

under FIFRA.

4. Respondent's product, **JAX Halo-Guard FG-LT** is not registered as a pesticide under FIFRA.

5. Respondent's product, **JAX Magna-Plate 78** is not registered as a pesticide under FIFRA.

6. Respondent's product, **JAX Magna-Plate 74** is not registered as a pesticide under FIFRA.

7. On or about August 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** by having it packaged, labeled and ready for shipment or sale at its location of W 134 N5373 Campbell Drive, Menomonee Falls, Wisconsin.

8. On or about August 3, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** by having it packaged, labeled and ready for shipment or sale at its location of W 134 N5373 Campbell Drive, Menomonee Falls, Wisconsin.

9. On or about December 19, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to American.

10. On or about December 19, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American.

11. On or about March 5, 2007, Respondent distributed or sold **JAX Magna-Plate 78** to American.

12. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American.

13. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-**

Plate 74 to American.

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

15. On or about June 15, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger.

16. On or about June 27, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Jennie-O.

17. On or about March 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Perlick.

B. Proposed Conclusions of Law

1. Respondent, a Wisconsin corporation, is a “person” as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

2. Respondent claimed, stated or implied, through labeling and advertising (both through print and on the internet), that each of Behnke’s products were pesticides: **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Magna-Plate 78, JAX Magna-Plate 74** and **JAX Halo-Guard FG-LT**.

3. **JAX Poly-Guard FG-2** is a “pesticide” as the term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

4. **JAX Halo-Guard FG-2** is a “pesticide” as the term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

5. **JAX Magna-Plate 78** is a “pesticide” as the term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

6. **JAX Magna-Plate 74** is a “pesticide” as the term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

7. **JAX Halo-Guard FG-LT** is a “pesticide” as the term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

8. On or about August 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2**, which was an unregistered pesticide.

9. On or about August 3, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2**, which was an unregistered pesticide.

10. On or about December 19, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to American, which was an unregistered pesticide.

11. On or about December 19, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American, which was an unregistered pesticide.

12. On or about March 5, 2007, Respondent distributed or sold **JAX Magna-Plate 78** to American, which was an unregistered pesticide.

13. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American, which was an unregistered pesticide.

14. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 74** to American, which was an unregistered pesticide.

15. On or about September 18, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger, which was an unregistered pesticide.

16. On or about June 15, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger, which was an unregistered pesticide.

17. On or about June 27, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Jennie-O, which was an unregistered pesticide.
18. On or about March 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Perlick, which was an unregistered pesticide.
19. On or about August 3, 2006, Respondent's distribution or sale of **JAX Poly-Guard FG-2**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
20. On or about August 3, 2006, Respondent's distribution or sale of **JAX Halo-Guard FG-2**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
21. On or about December 19, 2006, Respondent's distribution or sale of **JAX Halo-Guard FG-2**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
22. On or about December 19, 2006, Respondent's distribution or sale of **JAX Magna-Plate 78**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
23. On or about March 5, 2007, Respondent's distribution or sale of **JAX Magna-Plate 78**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
24. On or about March 3, 2006, Respondent's distribution or sale of **JAX Magna-Plate 78**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
25. On or about March 3, 2006, Respondent's distribution or sale of **JAX Magna-Plate 74**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
26. On or about September 18, 2006, Respondent's distribution or sale of **JAX Poly-Guard FG-2**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
27. On or about June 15, 2006, Respondent's distribution or sale of **JAX Poly-Guard FG-2**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

28. On or about June 27, 2006, Respondent's distribution or sale of **JAX Halo-Guard FG-LT**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

29. On or about March 3, 2006, Respondent's distribution or sale of **JAX Poly-Guard FG-2**, was a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

VIII. Conclusion

Complainant respectfully requests that this Court Grant this Motion for Accelerated Decision on Liability and on Affirmative Defenses. Based on the current pleadings, admissions and declarations on file, there are no genuine issues of any material fact as to Respondent's liability for the alleged violations. The Complainant is therefore, entitled to judgment as a matter of law as to liability for all eleven counts alleged in the Complaint. In the alternative, should such relief not be granted, Complainant requests an accelerated decision resolving any of the issues in this case, which will aid in narrowing the scope of the hearing and allow for an efficient use of resources among all parties. Complainant also seeks an accelerated decision on affirmative defenses 1, 2 and 7 on the basis that they lack necessary support or raise issues of pure law that are ripe for accelerated decision.

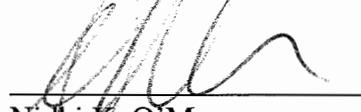
IX. List of Attachments

A Declaration of Mr. R. Terence Bonace

B Declaration of Mr. Josh Rybicki

C Declaration of Mr. Greg Cremers

Respectfully Submitted,



Nidhi K. O'Meara

James J. Cha

Erik H. Olson

Associate Regional Counsels

U.S. EPA, Region 5

1/27/08

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 Motion for Accelerated Decision on Liability and on Affirmative Defenses, together with true, accurate and complete copies of Attachments A, B and C, 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 Motion for Accelerated Decision on Liability and on Affirmative Defenses, together with true, accurate and complete copies of Attachments A, B and C, 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 22nd day of January, 2008.


James J. Cha
Assistant Regional Counsel

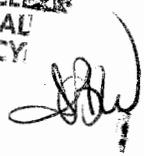
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U.S. EPA REGION 5

Attachment A

Declaration of R. Terence Bonace

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REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

DECLARATION OF R. TERENCE BONACE

State of Illinois
County of Cook

I, R. Terence Bonace, declare and state as follows:

1. The statements made in this declaration (which consists of twenty-one pages) are based on my personal knowledge.

2. In 1980, I received a Bachelor of Science degree in Zoology from Ohio State University (and in 1983 I received a Master of Arts degree in Zoology from Southern Illinois University.)

3. I am currently employed as a Life Scientist with the Pesticides/Toxics Compliance Section of the Chemicals Management Branch, Land and Chemicals Division (LCD), U.S. EPA, Region 5. The Pesticides/Toxics Compliance Section was formerly known as the Pesticides & Toxics Enforcement Section. I have been employed as a Life Scientist in this capacity since 1996.

4. As a Life Scientist in the Pesticides/Toxics Compliance Section, my duties include conducting inspections and other investigative work to determine compliance

with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as well as other environmental statutes. I have conducted approximately 75 inspections under FIFRA.

5. It is the regular practice of the Pesticides/Toxics Compliance Section to have written reports prepared following an investigation, and to retain such reports. In accordance with this regular practice, I prepared a written report for each investigation that I conducted. It is my practice as an inspector to begin the process of writing the report as soon as possible, while the details of the inspection are fresh in my memory.

6. My involvement with the case of *In the Matter of Behnke Lubricants, Inc.*, began in May of 2005 when I received a tip/complaint concerning Behnke Lubricant products making pesticidal claims without registration. In August of 2005, I submitted an Enforcement Case Review to the Toxics and Pesticides Enforcement Division, Office of Enforcement and Compliance Assurance, U.S. EPA Headquarters in Washington, D.C. to obtain a confirmation of the suspected violations provided in the tip/complaint. In June of 2006, I drafted an Investigation Request that was submitted to Dave Frederickson of Wisconsin Department of Agriculture, Trade and Consumer Protection (WDA).

7. Since at least 1988, U.S. EPA, Region 5, has entered into a continuing Cooperative Agreement with the WDA, (as permitted under Section 23 of FIFRA), under which WDA conducts inspections and other investigations of suspected violations of FIFRA on behalf of U.S. EPA within the State of Wisconsin. Following the June 2006 Investigation Request to the WDA, WDA conducted an inspection of the Behnke Lubricants (Behnke) establishment located at W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin. That inspection took place on August 3 and 11, 2006.

8. In November of 2006, after the inspection at Behnke had been completed,

WDA referred suspected violations of FIFRA to U.S. EPA, Region 5, by mailing the report and associated photographs and other evidence to my attention.

9. On or about November 22, 2006, I received the two physical samples of Behnke products (**JAX Poly-Guard FG-2** and **JAX Halo-Guard FG-2**) (which are identified as Complainant's Exhibits (CX) 38 and 39 in Complainant's Initial Prehearing Exchange) in the mail. These samples had been collected by Mr. Saatkamp during the August 3, 2006, inspection.

10. On December 22, 2006, U.S. EPA issued a Notice of Intent to File Civil Administrative Complaint to Behnke. I was personally involved in preparing and mailing this document.

11. I was personally involved in assisting with the preparation of Complainant's Initial Prehearing Exchange. A true, accurate and complete copy of the Notice of Intent to File Civil Administrative Complaint that was issued to Behnke is included in Complainant's Initial Prehearing Exchange as Complainant's Exhibit (CX) 2.

12. On June 9, 2006, I conducted an investigation of Behnke on the Internet. During the course of this Internet investigation, I found the following claims, among others, on Respondent's Internet site at www.jax.com:

"The introduction of JAX exclusive Micronox® Anti-Microbial Technology gives plants in search of tools for added micro organism control a powerful, extra weapon in their arsenal of protection!"

"JAX Poly-Guard FG and Halo-Guard FG greases contain Micronox®, the only truly effective, active microbial control agent in the food grade lubricant industry."

"As of May 1, 2002 every food grade lubricant in the JAX Line incorporates our exclusive Micronox® Anti-Microbial Technology, providing true 'knock-down' performance against a wide range of bacteria and other micro organisms!"

“With the added benefit of Micronox® , JAX exclusive anti-microbial chemistry which independent testing has proven to be the most effective in industry, plants can achieve an extra measure of sanitation protection”

“JAX Poly-Guard FG grease contains Micronox® the only truly effective, active bacteria control agent in the food grade lubricant industry”

“Poly-Guard FG-2, FG-LT... Now contains Micronox® anti-microbial for true ‘knock-down’ performance against a broad spectrum of microbial contaminants.”

I generated a print-out of this webpage. A true, accurate and complete copy of this print-out is included in Complainant’s Initial Prehearing Exchange as CX 3.

13. On November 17, 2006, I conducted another Internet investigation of Behnke. During this investigation, I found the following claims, among others, on the Respondent’s Internet site at www.jax.com:

“With the added benefit of Micronox® , JAX exclusive anti-microbial chemistry which independent testing has proven to be the most effective in the industry, plants can achieve an extra degree of sanitation protection.”

“JAX Poly-Guard FG grease contains Micronox® the only truly effective, active bacteria control agent in the food grade lubricant industry.”

“JAX Poly-Guard FG and Halo-Guard FG greases contain Micronox® , the only truly effective, active microbial control agent in the food grade lubricant industry.”

“Now contains Micronox® anti-microbial for true ‘knockdown’ performance against a broad spectrum of microbial contaminants.”

“The introduction of JAX exclusive Micronox® Anti-Microbial Technology gives plants in search of tools for added micro-organism control a powerful, extra weapon in their arsenal of protection!”

“As of May 1, 2002 every food grade lubricant in the JAX line incorporates our exclusive Micronox® Anti-Microbial Technology, providing true ‘knock-down’ performance against a wide range of bacteria and other micro organisms.”

I generated a print-out of this webpage. A true, accurate and complete copy of this print-out is included in Complainant’s Initial Prehearing Exchange as CX 4.

14. I conducted another Internet investigation on February 26, 2007. During this investigation, I observed that Respondent's Internet site at www.jax.com continued to make many of the same claims that were found on its website on June 9, 2006. I generated a print-out of this webpage. A true, accurate and complete copy of this print-out is included in Complainant's Initial Prehearing Exchange as CX 5.

15. On March 21, 2007, I conducted another Internet investigation in connection with Behnke's products. During this investigation, I found several websites on the Internet that continued to advertise "JAX Micronox" as having antimicrobial properties. These sites included, but were not limited to, the following:

www.allbusiness.com/management/business-support-services/669676-1.html
<http://milwaukee.bizjournals.com/Milwaukee/stories/2001/11/19/smallb1.html>
www.jax.fr/pages
www.foodproc.com/ad-jax.shtml
www.ibtinc.com/primemover/archive/PM200507/lub01.html
www.lubripolo.com/GGAlimenticio/
www.jax.com/press_releases/pr_bottom2.html
www.foodmanufacturing.com/scripts/ShowPR.asp?PUBCODE=033&ACCT...
www.meatequip.com/supplierad/jax.htm
www.foodengineeringmag.com/CDA/Archives/543b8f4ab52f8010VgnVCM100000f932a8c0
www.gissa.com/en/jax.htm
www.ahi.dk/jax/micronox.htm

I generated print-outs from each of these websites; true, accurate and complete copies of these print-outs are included in Complainant's Initial Prehearing Exchange as CX 6a.

16. On March 26, 2007, I conducted another Internet investigation relating to Behnke's products. During this investigation I found the following website that continued to advertise "JAX Micronox" as having antimicrobial properties:

www.powercontrolresources.com/lub.html

I generated a printout of this website; a true, accurate and complete copy of this print-out

is included in Complainant's Initial Prehearing Exchange as CX 6b.

17. On April 10, 2007, I conducted an additional Internet investigation relating to Behnke. During this Internet investigation, I found the following websites that continued to advertise "JAX Micronox" as having antimicrobial properties:

www.uark.edu/depts/ifse/ofpa/exhibits.htm (This one was partly printed out on 4/10 and the partly on 3/21)

www.foodengineeringmag.com

www.foodengineeringmag.com/FE/2006/10/Files/PDFs/FEX/006p_092.pdf

http://filesibnpmedia.com/FE/Protected/Files/PDF/FEX1005p_110.pdf

www.foodengineeringmag.com/FE/2005/06/Files/PDFs/behnke.pdf

www.foodengineeringmag.com/FE/Home/Files/PDFs/FEX0107_149.pdf

www.clfp.com/03EXPO/exhibit/CoDescriptions.pdf

I generated print-outs of these websites. True, accurate and complete copies of these print-outs are included in Complainant's Initial Prehearing Exchange as CX 6c.

18. On September 6, 2007, I conducted an additional Internet investigation relating to Behnke's products. On this date, I saw that the Internet contained the following website which continued to advertise "JAX Micronox" as having antimicrobial properties:

www.gissa.com/en/jax.htm

I generated a printout of this website. A true, accurate and complete copy of this print-out is included in Complainant's Initial Prehearing Exchange as CX 6d.

19. On May 2, 2007, at approximately 8:35 a.m., I made a telephone call to one of the toll free numbers printed on the Behnke brochures which had been obtained by the WDA inspector, Mr. Jeff Saatkamp, during his August 2006 inspection of Behnke's establishment. The telephone number which I dialed was "800-972-8850." A woman answered the telephone and identified the business as "JAX." I asked her whether this was the correct telephone number for ordering JAX products. The woman answering as

“JAX” verified that she could help me with my order. I documented this conversation record immediately after the telephone call ended. A true, accurate and complete copy of this telephone conversation record is included in Complainant’s Initial Prehearing Exchange as CX 7.

20. Among the documents collected by the WDA inspector at Behnke’s establishment were shipping records which identified several companies to whom Behnke had sold or distributed its products.

21. On March 8, 2007, I conducted an investigation at American Foods Group (American) located at 544 Acme Street, Green Bay, Wisconsin. The purpose of the investigation was to verify that certain advertising and labeling claims had been made by Respondent to American with respect to the distribution or sale of Behnke’s product, **JAX Magna-Plate 74**. Following this investigation, I wrote a report documenting the events of the investigation and the observations that I had made during the investigation. I wrote this report while the events of the inspection and my observations were still fresh in my memory. A true, accurate and complete copy of my March 8, 2007, investigation report of American, including all attachments, is included as CX 8 in Complainant’s Initial Prehearing Exchange.

22. During the March 8, 2007, investigation of American, I obtained copies of two purchase orders dated March 5, 2007, and December 19, 2006, which indicated that American had ordered **JAX Magna-Plate 78** and **JAX Halo-Guard FG-2** from Behnke Lubricants. True, accurate and complete copies of these two purchase orders are included as attachments to my investigation report of American (CX 8).

23. During the March 8, 2007, investigation at American, I spoke with Mr. Josh

Rybicki, an American employee responsible for "Parts Inventory Control." We discussed Behnke's products and Behnke's claims that the products had antimicrobial properties. Mr. Rybicki agreed to locate some promotional advertising literature that American had received from Behnke and to mail it to Mr. Bonace.

24. On or about March 16, 2007, I received two separate envelopes addressed from Mr. Josh Rybicki of American. Inside each envelope was advertising literature pertaining to Behnke's products. The first piece of advertising literature was entitled "American Foods Group, JAX Lube-Guard Program," and included advertising literature for **Magna-Plate 78** which stated, 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."

This "American Foods Group, JAX Lube-Guard Program" advertising literature for Magna-Plate 78 also included the Respondent's contact information, such as a telephone number, facsimile number and Internet address.

25. The "American Foods Group, JAX Lube-Guard Program" packet also included advertising literature for **Magna-Plate 74** which stated, 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."

26. The “American Foods Group, JAX Lube-Guard Program” advertising literature for **Magna-Plate 74** included the Respondent’s contact information such as phone number, facsimile number and Internet address. The “American Foods Group, JAX Lube-Guard Program” packet also included advertising literature for **Halo-Guard FG** which stated, among other things:

“JAX Halo-Guard FG provides Micronox® microbial knockdown performance.”

A true, accurate and complete copy of this piece of advertising literature is included in Complainant’s Initial Prehearing Exchange as CX 8a.

27. I received the second piece of advertising literature also on or about March 16, 2007, and this document was entitled “JAX Lubricant Guide for Food, Beverage and Drug & Cosmetic Processing & Manufacturers.” The document included the following materials and information:

(A) A cover letter addressed to the customer which stated: *“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) A page entitled “JAX Micronox® Technologies” which described in detail the “enhanced antimicrobial capabilities” of the Micronox® additive system, and which included a graph comparing Poly-Guard FG with competitors in efficacy against Listeria, E. coli, and Salmonella.

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

A true, accurate and complete copy of this piece of advertising literature is included in Complainant’s Initial Prehearing Exchange as CX 8b.

28. After receiving the first set of mailings from Mr. Rybicki, I received a telephone call from Mr. Rybicki. Mr. Rybicki wanted to know if I wished to receive any

more literature relating to Behnke products. I told Mr. Rybicki that I was interested in seeing any additional material that he may have located.

29. On or about March 29, 2007, I received in the mail a third piece of advertising literature in an envelope addressed from American. The 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." This literature included, 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** which made many claims regarding its antimicrobial capabilities and performance due to Micronox™.
- (C) Literature for **Magna Plate 78** which made many claims regarding its antimicrobial capabilities and performance due to Micronox™.
- (D) Literature entitled "Plant Microbial Knockdown Results" which included references to **JAX Poly-Guard FG-2** and its antimicrobial features.
- (E) Literature entitled "Major Food Processor Lab Test Results" which also made references to **JAX Poly-Guard FG-2** and its antimicrobial features.
- (F) Literature entitled "Independent Lab Results" which also made references to **JAX Poly-Guard FG-2** and its antimicrobial features.
- (G) Literature entitled "Food Industry Firsts" that stated, 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 such as Behnke's telephone number, facsimile number, Internet address, distributor information and product ordering options.

A true, accurate and complete copy of this piece of advertising literature is included in

Complainant's Initial Prehearing Exchange as CX 8c.

30. On March 8, 2007, I conducted an investigation at Badger Plastic & Supply, Inc. (Badger), located at 3451 Johnson Avenue, Plover, Wisconsin. The purpose of the investigation was to verify that certain advertising and labeling claims had been made by Respondent to Badger with respect to the distribution or sale of Behnke's products, **JAX Halo-Guard FG-2** and **JAX Poly-Guard FG-2**. Following this investigation, I wrote a report documenting the events of the investigation and the observations that I had made during the investigation. I wrote this report while the events of the inspection and my observations were still fresh in my memory. A true, accurate and complete copy of my March 8, 2007, investigation report of Badger, including all attachments, is included as CX 9 in Complainant's Initial Prehearing Exchange.

31. During the investigation on March 8, 2007, Badger employees took me to a supply area, where I observed four boxes, each containing ten 14-ounce cartridge tubes of **JAX Poly-Guard FG-2**. I examined one tube from each of the four boxes in the supply area; all four cartridge tubes included the same language on the label, as follows:

“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.”

32. I noted that the four tubes of **JAX Poly-Guard FG-2** which I observed at Badger were identical to the physical sample of **JAX Poly-Guard FG-2** that I had received from the WDA inspector (and which had been obtained by that inspector during his August 3, 2006 inspection of Behnke's establishment). I photographed one of the tubes of **JAX Poly-Guard FG-2**. A true, accurate and complete copy of this photograph

is included in Complainant's Initial Prehearing Exchange as an attachment to CX 9, my investigation report of Badger.

33. During the investigation of Badger on March 8, 2007, the President of Badger, Mr. Bill Barden, provided me with a brochure that he said had been given to Badger by Behnke. The brochure was entitled "Food Grade Lubricants with Micronox™." The brochure included a document entitled "What is JAX Micronox™ Technology? Re: Antimicrobial Usage in JAX Food-Grade Products," and described the antimicrobial capabilities of the Micronox™ technology found in Respondent's lubricants. This brochure was signed by Troy Paquette, Technical Director for Behnke Lubricants. The brochure also included tables and a graph illustrating the "antimicrobial properties" of **Poly-Guard FG-2** "antimicrobial grease" and its efficacy against Listeria, E. coli and Salmonella. The final page of the brochure included contact information for Behnke's establishments, which included Respondent's telephone numbers, facsimile numbers, and Internet website, distributor information and product ordering options. A true, accurate and complete copy of this brochure is included in Complainant's Initial Prehearing Exchange as an attachment to CX 9, my investigation report of Badger.

34. During the March 8, 2007 investigation of Badger, Mr. Barden gave me a copy of a shipping record which showed that Behnke had distributed or sold **JAX Halo-Guard FG-2** and **JAX Poly-Guard FG-2** to Badger on September 18, 2006. A true, accurate and complete copy of this brochure is included in Complainant's Initial Prehearing Exchange as an attachment to CX 9, my investigation report of Badger.

35. On March 7, 2007, I conducted an investigation at Perlick Corporation (Perlick), located at 8300 West Good Hope Road, Milwaukee, Wisconsin. The purpose

of the investigation was to verify that certain advertising and labeling claims were made by Respondent to Perlick with respect to the distribution or sale of Behnke's product, **JAX Poly-Guard FG-2**. Following this investigation, I wrote a report documenting the events of the investigation and the observations that I had made during the investigation. I wrote this report while the events of the inspection and my observations were still fresh in my memory. A true, accurate and complete copy of my March 7, 2007, investigation report of Perlick, including all attachments, is included as CX 10 in Complainant's Initial Prehearing Exchange.

36. During the investigation of Perlick on March 7, 2007, I observed a 14-ounce cartridge of **JAX Poly-Guard FG-2**. I took a photograph of a container of **JAX Poly-Guard FG-2**. The label on 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."

A true, accurate and complete copy of this photograph is included as an attachment to my investigation report (CX 10).

37. The cartridge of **JAX Poly-Guard FG-2** which I observed at Perlick was identical to the physical sample of **JAX Poly-Guard FG-2** that had been collected by the WDA during the August 3, 2006, inspection of Behnke's establishment.

38. On March 8, 2007, I conducted an investigation at Sara Lee Corp. (Sara Lee), located at N3620 County Road D, New London, Wisconsin. The purpose of the investigation was to verify that certain advertising and labeling claims had been made by Respondent to Sara Lee with respect to the distribution or sale of Behnke's product, **JAX**

Magna-Plate 74. Following this investigation, I wrote a report documenting the events of the investigation and the observations that I had made during the investigation. I wrote this report while the events of the inspection and my observations were still fresh in my memory. A true, accurate and complete copy of my March 8, 2007, investigation report of Sara Lee, including all attachments, is included as CX 11 in Complainant's Initial Prehearing Exchange.

39. During the investigation on March 8, 2007, I observed a 14-ounce cartridge of **JAX Poly-Guard FG-2**. I photographed a container of **JAX Poly-Guard FG-2**. The label on 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."

A true, accurate and complete copy of this photograph is included as an attachment to my investigation report for Sara Lee (CX 11).

40. The cartridge of **JAX Poly-Guard FG-2** which I observed at Sara Lee was identical to the physical sample of **JAX Poly-Guard FG-2** that had been collected by the WDA during the August 3, 2006, inspection of Behnke's establishment, and which had been sent to me by the WDA inspector.

41. During the March 8, 2007, investigation, Sara Lee representatives gave me a copy of a purchase order for the purchase of **JAX Poly-Guard FG-2**, with an order date of February 12, 2007. A true, accurate and complete copy of this purchase order is included as an attachment to my investigation report for Sara Lee (CX 11).

42. On March 7, 2007, I conducted an investigation at Seneca Foods Corporation

(Seneca), located at 640 Caughlin Road, Clyman, Wisconsin. The purpose of the investigation was to verify that certain advertising and labeling claims had been made by Respondent to Seneca with respect to the distribution or sale of Behnke's product, **JAX Halo-Guard FG-2**. Following this investigation, I wrote a report documenting the events of the investigation and the observations that I had made during the investigation. I wrote this report while the events of the inspection and my observations were still fresh in my memory. A true, accurate and complete copy of my March 7, 2007, investigation report of Seneca, including all attachments, is included as CX 12 in Complainant's Initial Prehearing Exchange.

43. During the investigation on March 7, 2007, a representative of Seneca provided me with advertising sheets that Seneca had received from Behnke. The first advertising sheet was entitled: "JAX MAGNA-PLATE 72, USDA H1-AUTHORIZED AIR LINE LUBE WITH ANTIRUST AND ANTIWEAR ADDITIVES NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY" and included the following language:

"Antimicrobial Performance: JAX MAGNA-PLATE 72 incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals."

The second advertising sheet was entitled: "JAX MAGNA-PLATE 78 USDA H1-AUTHORIZED EXTREME - PRESSURE FOOD MACHINERY OIL WITH ENHANCED ANTIWEAR PROPERTIES NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY" and included the following language:

“Antimicrobial Performance: JAX MAGNA-PLATE 78 incorporates JAX new, proprietary antimicrobial additive technology, Micronox™, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals.”

The third advertising sheet was entitled: “HALO-GUARD FG GREASES” and included the following language:

“JAX Halo-Guard FG provides Micronox® microbial knockdown performance.”

The fourth advertising sheet was entitled “JAX POLY-GUARD FG, A REVOLUTIONARY USDA-H1 FOOD-GRADE GREASE W/PTFE FOR LUBRICATION OF HIGH-SPEED/HIGH-TEMP FOOD AND BEVERAGE PROCESSING MACHINERY NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY” and included the following language:

“Antimicrobial Performance: JAX POLY-GUARD FG incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 Listeria (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals.”

True, accurate and complete copies of these documents are included as attachments to my investigation report for Seneca (CX 12).

44. During the investigation of Seneca, I met a Seneca employee, Mr. Jerry Perzichilli. I asked Mr. Perzichilli whether Seneca Foods had received advertising brochures with antimicrobial claims from Behnke. Mr. Perzichilli told me that he had some advertising brochures in his Cumberland, Wisconsin office. Mr. Perzichilli agreed

to send me a copy of these brochures when he returned to his Cumberland office.

45. Later that same day (March 7, 2007), Mr. Perzichilli sent me, by e-mail, copies of advertising sheets for the Halo-Guard and Poly-Guard greases. These advertising sheets had been sent to Mr. Perzichilli on October 26, 2006 by Mr. Chris Foti of Behnke. I generated print-outs of these email messages and the attached electronic copies of documents; true, accurate and complete copies of these documents are included in Complainant's Initial Prehearing Exchange as CX 12a.

46. The October 26, 2006 email message from Behnke to Seneca was entitled "Halo Guard and Poly Guard Data Sheets," and included two advertising data sheets attached to it, one for **JAX Halo-Guard FG Series**, and the other for **JAX Poly-Guard Series Greases**. The first sheet was entitled "HALO-GUARD FG GREASES" and included the following language:

"Antimicrobial Performance: 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 FG Greases against Listeria (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals."

The second sheet was entitled "POLY-GUARD FG-LT, FG-2" and included the following language:

"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."

47. During the March 7, 2007 investigation, representatives of Seneca gave me copies of seven invoices / shipping records from Behnke to Seneca which showed the distribution and sale of the products **JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT,**

and **JAX Magna-Plate 78**. These records show the following: on or about October 23, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Seneca Foods; on or about October 18, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Seneca Foods; on or about October 17, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca Foods; on or about September 29, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca Foods; on or about September 7, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca Foods; on or about September 7, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to Seneca Foods; on or about August 18, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca Foods. True, accurate and complete copies of these invoices are included as attachments to my investigation report for Seneca (CX 12).

48. On March 7, 2007, I went to KHS, Inc., (KHS) which is located at 800 Bahcall Court, Waukesha, Wisconsin. At the door, I was told that I would have to speak with a KHS representative, who was not available at the time. On March 14, 2007, I spoke with Mr. Dick Sexton of KHS on the telephone. Mr. Sexton told me that he would send me some advertising literature that KHS had received from Behnke.

49. On March 19, 2007, I received a copy of an advertising brochure from KHS. The back cover of the brochure was marked "JAX Products Distributed by: Behnke Lubricants, Inc. – JAX." The back cover of this brochure also included Behnke Lubricants' telephone numbers and facsimile numbers for both the Menomonee Falls, Wisconsin establishment and a Behnke facility located in Sacramento, California. The title of the brochure was "JAX: Lubricant Guide For Food, Beverage, Drug & Cosmetic Processing & Manufacturing." The brochure included a letter from Behnke Lubricants to

its customers, which contained the following language:

“First and Foremost is Micronox®, JAX advanced antimicrobial additive technology that provides immediate and significant knockdown performance on a wide spectrum of microbial contaminants. This development alone is providing HACCP programs a powerful weapon in their ongoing battle against microorganisms.” “JAX Poly-Guard® FG is a new concept in food-grade greases, providing the highest level of antiwear performance of any competitor, and the benefits of Micronox®.”

The advertising brochure included a table of contents which had a section entitled “Micronox® Antimicrobial Technology.” This section described in detail the purported antimicrobial capabilities of Micronox® technology.

50. A true, accurate and complete copy of the advertising brochure entitled “JAX: Lubricant Guide For Food, Beverage, Drug & Cosmetic Processing & Manufacturing” is included in Complainant’s Initial Prehearing Exchange as CX 13.

51. I have personally calculated proposed penalties for violations of FIFRA using the “Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), July 2, 1990.” A true, accurate and complete copy of this policy is included in Complainant’s Initial Prehearing Exchange as CX 33. I have calculated penalties for violations of FIFRA using this policy on over 100 occasions.

52. For the case against Behnke, I personally calculated the proposed penalty of \$50,050, using the “Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), July 2, 1990.” I documented the penalty calculation on a FIFRA civil penalty calculation worksheet. In preparation of Complainant’s Initial Prehearing Exchange, I developed a Penalty Calculation Narrative. True, accurate and complete copies of the FIFRA civil penalty calculation worksheet and the Penalty Calculation Narrative are included in Complainant’s Initial Prehearing Exchange as CX

14a and CX 14b. These documents accurately describe how I calculated the penalty of \$50,050 proposed in the Complaint.

53. The assertions I make in this declaration are truthful, and, if called to testify as a witness, I am prepared to testify under oath to the accuracy of the observations and statements contained in this declaration, based on my personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: January 22, 2008

By: *R. Terence Bonace*
R. Terence Bonace
Life Scientist

Attachment B

Declaration of Josh Rybicki

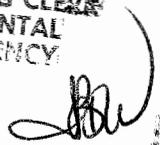
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

RECEIVED
JAN 22 2008

In the Matter of:)
)
BEHNKE LUBRICANTS INC.)
MENOMONEE FALLS, WISCONSIN)
)
Respondent.)
_____)

Docket No. FIFRA-05-2007-0029

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY



DECLARATION of JOSH RYBICKI

State of Wisconsin
County of Brown

I, Josh Rybicki, declare and state as follows:

1. The statements made in this declaration, which consists of five pages, are based on my personal knowledge.
2. My name is Josh Rybicki and I am employed by American Foods Group (American Foods), at its Green Bay Dressed Beef facility located at 544 Acme Street, Green Bay, Wisconsin (Acme facility).
3. The Acme facility is one of five beef harvesting and processing facilities owned by American Foods.
4. American Foods also owns two ground beef facilities and two case-ready processing facilities.
5. All of these facilities are located in Minnesota, South Dakota, Nebraska, Wisconsin or Ohio.
6. My title is Inventory Control at the Acme facility.
7. I have been with American Foods for nine years.
8. As part of my duties at the American Foods, Green Bay Dressed Beef, I assist in purchasing day-to-day products for the Acme facility, including greases and oils for the facility.
9. Several years ago, I recall talking with a Behnke Lubricants, Inc. (Behnke) sales person, Mr. Mike Keller.

10. He came to the Acme facility to meet with Inventory Control in an effort to sell Behnke lubricant products to American Foods.
11. During that discussion, Mr. Keller left behind advertising literature for American Foods to review.
12. Once I reviewed the literature, I conferred with Dr. Ali Mohseni, who is also employed by American Foods as the Technical Director of Food Safety.
13. I recall that the advertising literature which Behnke presented to American Foods, through its sales person, Mike Keller, showed growth plates that compared the antimicrobial effectiveness of the Behnke products with other lubricant products sold by other companies.
14. The colony counts of bacteria claimed to be associated with the Behnke lubricant products were extremely low as depicted in the advertising literature.
15. The advertising literature also made numerous antimicrobial claims throughout and claimed to be effective against Listeria, E.coli and Salmonella, in particular.
16. These claims were very timely because, at the time of Behnke's visit to the Acme facility, there was an increased level of concern over food security and food sanitization.
17. At the time of Behnke's visit, USDA inspectors were carefully monitoring the meat and poultry industry to ensure that federal Hazardous Analysis and Critical Control Point (HACCP) food safety standards were being met at meat and poultry facilities such as American Food's Acme facility.
18. Also at this time, there was great concern over food safety and sanitization due to the outbreak of bovine spongiform encephalopathy (BSE), commonly known as "mad cow disease," and E.coli cases.
19. After conferring with Dr Mohseni, we both agreed that American Foods should start using Behnke lubricant products, such as **JAX Halo-Guard FG-2, JAX Magna-Plate 74 and JAX Magna-Plate 78** because, based on the claims made by Behnke, these lubricants could reduce colony counts of bacteria and therefore increase food safety at the Acme facility and help manage any cross contamination at the facility.
20. We decided that although the Behnke lubricants would be more expensive than the competitor's product (approximately 20% to 30% more) which we had been using up until that time, changing to Behnke's lubricant products would be worth the additional cost because we wanted the least amount of bacteria we could possibly get at the Acme facility.

21. American Foods then began to purchase, among other Behnke products, **JAX Halo-Guard FG-2, JAX Magna-Plate 74 and JAX Magna-Plate 78** lubricants from Behnke and, to large extent, began to replace the competitor's products with Behnke lubricants.
22. On average, American Foods reorders a combination of these products from Behnke on a monthly basis for its Acme facility, with an approximate purchase cost of \$3,500 per month.
23. American Foods has been purchasing these lubricants from Behnke since about 2001.
24. I am also certain that at least one of our other facilities purchases Behnke lubricants as well.
25. To date, American Foods continues to purchase these lubricants from Behnke, at a premium cost (between 20% to 30% higher than the cost of the competitor's product which American Foods had been using previously).
26. On March 8, 2007, Mr. Terence Bonace of U.S. EPA visited the American Foods facility.
27. On March 8, 2007, I was introduced to Mr. Bonace by Dan Ortscheid, the Director of Safety and the Environment at American Foods Group.
28. I informed Mr. Bonace that American Foods Group used **JAX Magna- Plate 78 and Halo-Guard FG-2** lubricants at the facility and was using these lubricants at the time of Mr. Bonace's visit.
29. I also confirmed that these lubricants were sold to American Foods by Behnke.
30. I told Mr. Bonace that I recalled seeing advertising literature, which Behnke sent to American Foods, that showed growth plates comparing Behnke products with others and purported to demonstrate that the Behnke products had antimicrobial capabilities and advantages.
31. I also told him that the antimicrobial properties promoted by Behnke were a major deciding factor for American Foods in selecting Behnke products.
32. I promised Mr. Bonace that I would try to locate some of this advertising literature that American Foods received from Behnke and mail it to him.
33. Shortly thereafter, I went to my filing cabinet in my office and retrieved two different pieces of advertising literature that I received from Mike Keller at Behnke foods.
34. I mailed these two different pieces of advertising literature to Mr. Bonace in two separate mailings.

35. I have reviewed Complainant's Exhibit (CX) 8a which is entitled "American Foods Group, JAX Lube-Guard Program."
36. CX 8a is a true, accurate and complete copy of the first advertising literature I sent to Mr. Bonace shortly after March 8, 2007.
37. This advertising literature contains several references to "MICRONOX," antimicrobial additive technology, and references to the claim that JAX MICRONOX provides "significant knockdown performance" and has been proven especially effective against Listeria, E.coli and Salmonella.
38. I have reviewed CX 8b which is entitled "JAX Lubricant Guide for Food, Beverage and Drug & Cosmetic Processing & Manufacturers"
39. CX 8b is a true, accurate and complete copy of the second advertising literature I sent to Mr. Bonace shortly after March 8, 2007.
40. This advertising literature contains several references to "MICRONOX," antimicrobial additive technology, and references to the claim that JAX MICRONOX provides "significant knockdown performance" and has been proven especially effective against Listeria, E.coli and Salmonella.
41. Sometime after I mailed the above two pieces of advertising literature to Mr. Bonace, I called Mr. Bonace and told him I found some additional advertising literature that American Foods had previously received from Behnke for the Behnke lubricant products.
42. I asked him if he wanted me to send him this additional advertising literature and Mr. Bonace indicated that he did.
43. I have reviewed CX 8c which is entitled "Technology Focus, JAX Micronox Technology."
44. CX 8c is a true, accurate and complete copy of the advertising literature I sent to Mr. Bonace on or about the third week of March, 2007.
45. This advertising literature also contained several references to "MICRONOX," antimicrobial additive technology, and references to the claim that JAX MICRONOX provides "significant knockdown performance" and has been proven especially effective against Listeria, E.coli and Salmonella.
46. It is these very types of advertising claims, made by Behnke either through advertising literature or otherwise, that were a major deciding factor contributing to American Food's decision to purchase the lubricant products from Behnke including but not limited to: **JAX Halo-Guard FG-2, JAX Magna-Plate 74, and JAX Magna-Plate 78.**

47. To date, I have never been contacted by any Behnke representative to redact, destroy or replace any of the advertising literature that Behnke previously presented to American Foods.
48. To date, I have never been contacted by any Behnke representative to discuss the antimicrobial representations that Behnke made in connection with the lubricants that American Foods purchased and continues to purchase from Behnke.
49. To date, Behnke has not offered American Foods any sort of a refund or rebate in connection with the lubricant products that it has sold to American Foods.
50. To the best of my knowledge, no one else in American Foods has been contacted by Behnke regarding these matters.

Pursuant to 28 U.S.C. § 1746, I declare under penalties of perjury that the foregoing is true and correct.



Josh Rybicki,
Parts Inventory Control
American Foods Group

9/20/2007
Date

Attachment C

Declaration of Greg Cremers

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 5

In the Matter of:)
)
BEHNKE LUBRICANTS, INC.)
MENOMONEE FALLS, WISCONSIN)
)
Respondent.)

Docket No. FIFRA-05-2007-0025

RECEIVED
JAN 22 2008
REGIONAL HEARING CLERK
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PROTECTION AGENCY



DECLARATION OF GREG CREMERS

State of Minnesota
County of Stearns

I, Greg Cremers, declare and state as follows:

1. The statements made in this declaration (which consists of two pages) are based on my personal knowledge.
2. I am employed as an Agricultural Consultant with the Pesticide and Fertilizer Management Division, State of Minnesota, Department of Agriculture. In this position I act as an Agricultural Chemical Investigator for the State of Minnesota Department of Agriculture. I have acted as an Agricultural Chemical Investigator since April of 1990.
3. On March 7, 2007, I conducted an investigation at the Jennie-O Turkey Store (Jennie-O), located at 1530 30th Street SW, in Willmar, Minnesota. The purpose of the investigation was to verify whether certain advertising and labeling claims were being made by Behnke Lubricants, Inc. (Behnke), to Jennie-O with respect to the distribution or sale of Behnke's product, **JAX Halo-Guard FG-LT**.
4. During the March 7, 2007 inspection, I observed and photographed a cartridge tube of **JAX Halo-Guard FG-LT**. I observed that the labeling on the cartridge included the following language:

"JAX Halo-Guard FG-LT provides Micronox® microbial knockdown performance."

5. During the investigation, I spoke with Paul Bolle, a representative of Jennie-O, who confirmed that the Behnke product, **JAX Halo-Guard FG-LT**, had been ordered by Jennie-O from Behnke on or about June 2006.

6. Following the March 7, 2007, investigation at Jennie-O, I wrote a report documenting the results of this investigation. The document identified as Complainant's Exhibit 15, attached to this Declaration, is a true, accurate and complete copy of this report, including all attachments.

7. The assertions I make in this declaration are truthful, and, if called to testify as a witness, I am prepared to testify under oath to the accuracy of the observations and statements contained in this declaration, based on my personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: January 22, 2008

By:


Gregory Creemers
Agricultural Consultant
Pesticide and Fertilizer
Management Division
Department of Agriculture
State of Minnesota