

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

In the Matter of:

BEHNKE LUBRICANTS, INC.,
MENOMONEE FALLS, WISCONSIN,

Respondent,

Docket No. FIFRA-05-2007-0025.

**ORIGINAL
TRANSCRIPT**

VOLUME IV

4/3/08

Proceedings had and evidence taken,
beginning at 9:16 a.m., April 3, 2008, and
concluding at 3:17 p.m., at the Waukesha County
Courthouse, 515 West Moreland Boulevard, Room 350,
Waukesha, Wisconsin, before MS. BARBARA GUNNING,
Administrative Law Judge, before me, MARY LORENTZ,
Registered Professional Reporter and Notary Public
in and for the State of Wisconsin, to whom the
matter in difference between the parties has been
submitted.

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US EPA REGION V

1 A P P E A R A N C E S

2 MS. BARBARA GUNNING, Administrative Law Judge

3 1200 Pennsylvania Avenue, N.W.

4 Washington, D.C. 20460

5

6 FOR THE COMPLAINANT:

7 U.S. EPA, Associate Regional Counsel,

8 Region 5, 77 West Jackson Boulevard, Chicago,

9 Illinois 60604-3590, by MS. NIDHI O'MEARA,

10 MR. JAMES J. CHA and MR. ERIC H. OLSON.

11

12 FOR THE RESPONDENT:

13 McILNAY & BUTTON, LTD.,

14 1150 Washington Street, Grafton, Wisconsin

15 53024-1916, by MR. BRUCE A. McILNAY.

16

17

18

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5 Redirect by Mr. McIlnay 810

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LARRY D. COOPER

7

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8 Cross by Mr. Olson 850

Redirect by Mr. McIlnay 857

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10 CARTER L. ANDERSON

11 Direct by Mr. McIlnay 860

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1 P R O C E E D I N G S

2 JUDGE GUNNING: Would you like to bring
3 your witness up?

4 MR. McILNAY: Thank you, Your Honor.
5 Troy, would you take the stand here.

6 JUDGE GUNNING: Sir, I just remind you you
7 are still under oath.

8 DIRECT EXAMINATION (cont.)

9 BY MR. McILNAY:

10 Q Good morning, Mr. Paquette. I think where we left
11 off yesterday we had indicated that Micronox
12 technology was eventually incorporated in the oils
13 and greases, and I'd ask you a few questions about
14 the ingredients.

15 I have put on the witness stand in front of you
16 an envelope that should be marked on the outside as
17 containing Respondent's Exhibit 68; do you see that?
18 It may not say Exhibit 68. We'll have to correct
19 that. Okay. You're holding in your hand a Manila
20 envelope?

21 A Yes, I am.

22 Q All right. Would you remove the contents? It's
23 actually two envelopes.

24 A (Witness complies.)

25 Q And you may remove the contents of the second

1 envelope.

2 A (Witness complies.)

3 Q And I hope, Mr. Paquette, it says RX-68 on that
4 somewhere?

5 A Yes, it does.

6 Q All right. Would you take a moment to review RX-68?

7 A (Witness complies.)

8 Q Okay. Generically -- and I'll state for the record
9 this is a piece of evidence that Behnke Lubricants,
10 the Respondent, has designated as business
11 confidential information. So I want to caution you.
12 I'm not going to ask you to read into detail the
13 contents of this exhibit, but having reviewed the
14 exhibit, do you recognize it?

15 A Yes, I do.

16 Q And I want to focus on the first page of the exhibit
17 for the record that was Bate-stamped Respondent 283.
18 Generally, can you tell the court what that page,
19 238, is?

20 A This page is a breakdown and a listing of materials
21 utilized in the manufacture of the products in
22 question.

23 Q And when you say the products in question, you're
24 talking about the JAX POLY-Guard, HALO-Guard that we
25 went through yesterday as the products that are the

1 subject of this case?

2 A Correct.

3 Q And that list is all of the ingredients? Let me
4 rephrase that.

5 It's not limited to the active ingredients in
6 the technology that's come to be known as Micronox?

7 A Correct.

8 Q So that includes the ingredients that are in there
9 for their lubricating or other properties beyond the
10 Micronox properties?

11 A Correct.

12 Q However, are the active ingredients for Micronox
13 also included in that list?

14 A Yes, they are.

15 Q All right. Did you help prepare that list?

16 A Yes, I did.

17 Q And it's true and accurate, to the best of your
18 knowledge, to be inclusive in all the ingredients?

19 A Yes, it is.

20 Q All right. And you prepared that list based on your
21 personal knowledge of the ingredients?

22 A That's correct.

23 Q Or records kept by JAX in the ordinary course of
24 business such as your recipes?

25 A Correct.

- 1 Q Could you turn to the second page of the exhibit?
- 2 A (Witness complies.)
- 3 Q Do you recognize what that is?
- 4 A Yes, I do.
- 5 Q What is that?
- 6 A It's a letter that is provided by NSF Corporation in
7 reference to the product meeting the requirements as
8 they have laid out as an HX-1 product.
- 9 Q And what product in particular are you referring to?
- 10 A The NALCO EC5427A.
- 11 Q Okay. For the record, the NALCO EC5427A is a
12 proprietary name?
- 13 A The CAS information is proprietary.
- 14 Q I'm sorry.
- 15 A The NALCO is the brand name for the material.
- 16 Q Right. Let's take it a little bit at a time then.
17 If you go back to the first page, there's a
18 list of chemicals that have a CAS number?
- 19 A (Witness nods head.)
- 20 Q What is the CAS number?
- 21 A The CAS stands for the chemical abstract number.
- 22 Q All right. The NALCO that you just made reference
23 to does not have a CAS number associated with it on
24 page 1 but states that it's proprietary?
- 25 A Correct.

1 Q And NALCO, as you indicated, is a brand name meant
2 for a chemistry?

3 A Correct.

4 Q And the reference to it being proprietary, whoever
5 manufactures NALCO has somehow made arrangements to
6 keep secret of the CAS for that particular product;
7 is --

8 A Correct.

9 Q Nevertheless, NSF, through whatever process and
10 agreements they have, have looked at it and issued
11 the letter that is page 2 of 68, Exhibit 68?

12 A Correct.

13 Q Indicating that NALCO is food-grade compliant?

14 A Correct.

15 Q All right.

16 MR. McILNAY: Your Honor, at this time I
17 would move the admission of Respondent's Exhibit 68.

18 JUDGE GUNNING: Okay.

19 MS. O'MEARA: No objection, Your Honor.

20 MR. McILNAY: Thank you.

21 JUDGE GUNNING: Please mark as received
22 Respondent's -- was it 68?

23 THE WITNESS: Yes.

24 JUDGE GUNNING: Okay.

25

1 BY MR. McILNAY:

2 Q Now, Mr. Paquette, for the record, would put it back
3 in the envelope. We won't do it now, but I will
4 seal those and those would be given to the court
5 reporter for the official record.

6 A (Witness complies.)

7 MR. McILNAY: May I approach?

8 JUDGE GUNNING: Yes.

9 MR. McILNAY: I'm just going to put this
10 on counsel's table for the time being.

11 BY MR. McILNAY:

12 Q Mr. Paquette, you described yesterday some of your
13 job duties for Behnke. Does it ever occur that you
14 have contact with Behnke's customers directly?

15 A Yes.

16 Q And in what kind of situations might you have
17 customer contact?

18 A I work with customers both on -- in training
19 sessions as far as working through lubricant
20 training programs. I work with customers in plants
21 looking at new applications, pieces of equipment,
22 areas of concern, situations where whether it's been
23 equipment failure or whether it's a product
24 condition of not performing, so I spend time both
25 with our customer base, training distributors as

1 well as working with our direct end-user accounts at
2 the plant level.

3 Q And could you remind the Court, you've been doing
4 this since 1999?

5 A Correct.

6 Q In that nine years' time, have you observed -- made
7 any observations of what kinds of resources your
8 food processing customers in particular have for
9 performing tests on your product?

10 A Yes, I have.

11 Q And in general, can you describe the nature of --
12 the kind of testing your customer might perform on
13 your lubricants?

14 MS. O'MEARA: Objection, Your Honor. I
15 don't see the foundation here or, in fact, even the
16 relevance with respect to what testing is done by
17 the customers. We have nothing in the record
18 regarding any of this testing, so there's no
19 foundation with respect to the relevance or
20 immateriality, actually, is that we're not talking
21 about efficacy really. Whether these products are
22 efficacious or not, we've already heard that it's
23 not relevant -- what's relevant to the claims.

24 MR. McILNAY: Your Honor, the point of
25 this is under the Cal Tech decision, the issue

1 whether or not the consumer would be led to believe
2 that the product should be used for -- as to serve a
3 purpose is an objective one, not to be determined by
4 the industry at issue. And when I am -- I will
5 narrow this done.

6 I'm trying broadly to lay the foundation for
7 his knowledge and have him describe what that is,
8 but what I'm getting into is that within this
9 industry, we're not talking about retail consumers
10 but rather sophisticated consumers in our
11 marketplace. That's the relevance, Your Honor.

12 MS. O'MEARA: May I respond, Your Honor?

13 JUDGE GUNNING: Yes.

14 MS. O'MEARA: I'm holding Cal Tech right
15 now, and what I see in Cal Tech is it was a motion
16 for accelerated decision on liability, which we've
17 denied, based on the fact that there was information
18 that wasn't known at that time and Judge McGuire
19 felt it was appropriate to have a hearing, and I'm
20 not sure how that has a bearing on what is happening
21 here.

22 JUDGE GUNNING: Well, as you both know,
23 administrative law judge decisions are not
24 precedent. They're good guidance, though, some of
25 us would like to think at least, but the value of

1 that decision is clearly limited, but I'll allow
2 some testimony concerning this to at least get it
3 into the record with the caveat it may have very
4 little weight.

5 MR. McILNAY: I understand.

6 JUDGE GUNNING: But I think it would be
7 wise to allow some testimony concerning this.

8 MR. McILNAY: Thank you.

9 MS. O'MEARA: Thank you, Your Honor.

10 JUDGE GUNNING: So the objection is noted
11 but overruled.

12 MS. O'MEARA: Thank you.

13 MR. McILNAY: Let me withdraw the question
14 and lay a little bit more foundation.

15 BY MR. McILNAY:

16 Q Have you had occasion in your nine years with
17 Behnke Lubricants to have customers share results of
18 laboratory testing that they've done on your
19 lubricants with you?

20 A Yes.

21 Q And we do want to keep this brief, so I don't want
22 every detail, but generally, what kinds of data and
23 test results have you been provided with -- and I
24 want you to focus on the food-grade lubricants -- in
25 that nine years time period?

1 A I've had fairly extensive information provided to me
2 by several food processors, most notably Kraft, when
3 we were working on the development of the product,
4 in particular to its use when it was concerns of
5 being involved with the pathogens that have been
6 previously discussed in their food product.

7 Q Okay. And Kraft shared those results with you?

8 A That's correct.

9 Q Was any of the literature that was provided -- and
10 you know what? I'm going to be more specific.

11 I believe -- and I may be wrong, but if you
12 could look for the book up there, one of the white
13 binders that is Claimant's Exhibit -- I want to say
14 18. No. Actually, I am wrong. I should know it by
15 heart. 16. Again, I apologize. I don't --

16 MR. McILNAY: Could I have a moment,
17 Your Honor, just so I don't keep having everyone
18 turn to the wrong exhibit here? A, B and C. Thank
19 you.

20 BY MR. McILNAY:

21 Q What might be -- let me put this on the record.
22 I'll ask you a question. We all seem to know it's
23 in Exhibit 8-A, B or C. Could you briefly --

24 MS. O'MEARA: Here. Excuse me.

25 MR. McILNAY: Ah, thank you. 8-C. Page

- 1 8-C.
- 2 BY MR. McILNAY:
- 3 Q Mr. Paquette --
- 4 MR. McILNAY: And thank you. I appreciate
- 5 Counsel's assistance.
- 6 BY MR. McILNAY:
- 7 Q I would like you to turn to Exhibit 8-C,
- 8 specifically EPA page 0271.
- 9 A (Witness complies.)
- 10 Q Can you take a moment to read through the document?
- 11 A (Witness complies.)
- 12 Q Have you had a chance to look at that, Mr. Paquette?
- 13 A Yes.
- 14 Q And there's reference at the top of that page, the
- 15 first paragraph to a major food lubricant or food
- 16 manufacturer, processor --
- 17 A Yes.
- 18 Q -- to obtain certain test results?
- 19 A Yes.
- 20 Q Is that Kraft test results?
- 21 A Yes, it is.
- 22 Q So in that document that you're looking at now, do
- 23 you know, was that used in some of JAX promotional
- 24 materials at some point in time?
- 25 A Yes, it was.

1 Q Do you know if it's still in use today?

2 A I honestly don't know.

3 Q Mr. Paquette, with regard to the food-grade
4 lubricants, you said this was probably the -- this
5 being the Kraft test results, sharing the most
6 substantial or sticks out in your mind. Have there
7 been other -- and let me stick specifically with the
8 food-grade lubricants and in particular test results
9 relating to microorganisms, test results that you
10 have had occasion to review from any of JAX
11 customers in the last nine years?

12 A Yes, I have.

13 MR. McILNAY: Your Honor, I don't foresee
14 any objection, but I would like to -- well, let me
15 ask you a foundation question for the record first.

16 BY MR. McILNAY:

17 Q Have you had occasion to tour customer plants?

18 A Yes.

19 Q Is it common practice for them to have you sign
20 confidentiality agreements before you tour those
21 plants?

22 A Frequently, yes.

23 Q All right.

24 MS. O'MEARA: Your Honor, I'm about to ask
25 the witness to name some of the customers other than

1 Kraft who have provided test data. I'd like to have
2 the court reporter mark it and designate that
3 portion of the testimony as confidential business
4 information, and I will when I'm finished indicate
5 to the court reporter when I feel we've gone beyond
6 that.

7 JUDGE GUNNING: Yes.

8 MS. O'MEARA: No objection.

9 JUDGE GUNNING: And let the record reflect
10 that the courtroom does not contain any noncertified
11 confidential business information recipient.

12 MR. McILNAY: Thank you.

13 (Page 782 was designated Confidential
14 Business Information.)

15 * * *

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1 BY MR. McILNAY:

2 Q Could you turn to Respondent's Exhibit 62. That
3 would be found in the bound book, the second volume
4 of that. Generally, can you identify
5 Respondent's 2 -- 62?

6 A The document is my declaration.

7 Q Okay. Now, I would like you to turn to what has
8 been Bate-stamped as page 00149, Resp 00149.

9 A (Witness complies.)

10 Q Mr. Paquette, would you take a moment and review
11 page 00149 through the end of the exhibit, please?
12 That would be through 00153.

13 A (Witness complies.)

14 JUDGE GUNNING: Have we left confidential
15 business information?

16 MR. McILNAY: Oh, yes. I'm sorry. Thank
17 you, Your Honor.

18 JUDGE GUNNING: Okay. So let the record
19 reflect that references to Exhibit -- Respondent's
20 Exhibit 62 is no longer confidential business
21 information.

22 MR. McILNAY: Thank you.

23 BY MR. McILNAY:

24 Q Generally, would you identify for the record what
25 pages 149 through 153 are?

- 1 A The pages are reproductions of approval letters
2 obtained from NSF for Behnke Lubricants.
- 3 Q Okay. And these are produced and in each instance
4 addressed to Behnke Lubricants in every instance; is
5 that correct?
- 6 A That's correct.
- 7 Q And are these documents kept as business records in
8 the ordinary course of Behnke Lubricants' business?
- 9 A Yes, they are.
- 10 Q And I noticed that in some instances it's Attention:
11 Patty Riek. Who is Patty Riek?
- 12 A Patty Riek is an employee of Behnke who I have
13 supervision of. She handles the different agency
14 submissions, whether it's for NSF H1 or Canadian,
15 et cetera.
- 16 Q Okay. In the instance of page 149, the product that
17 received the H1 certification was what?
- 18 A POLY-Guard FG-2.
- 19 Q In the instance of 150, the product that received H1
20 certification was that?
- 21 A HALO-Guard FG-2.
- 22 Q Same question with respect to page 151.
- 23 A HALO-Guard FG-LT.
- 24 Q With regard to page 152?
- 25 A Magna-Plate 74.

1 Q Page 153?

2 A Magna-Plate 78.

3 Q Are those all of the products that we discussed
4 yesterday that are at issue in this case?

5 A That's correct.

6 Q Turning back to the first five pages of Respondent's
7 Exhibit 62, do you recognize that document,
8 Mr. Paquette?

9 A My declaration?

10 Q All right. And could you take a look at page 148?

11 A (Witness complies.)

12 Q Is that an accurate copy of your signature that
13 appears on page 148?

14 A Yes, it is.

15 Q And you did, in fact, sign the original of this
16 document?

17 A Yes, I did.

18 Q Okay. And the matter stated in the preceding pages
19 are all true and correct, to the best of your
20 knowledge?

21 A That's correct.

22 Q And you understood when you signed that you were
23 signing it under oath?

24 A Yes, I did.

25 MR. McILNAY: Your Honor, at this point I

1 would move the admission of RX -- Respondent's
2 Exhibit 62.

3 MS. O'MEARA: No objection.

4 JUDGE GUNNING: Okay. Please mark
5 Respondent's 62 as received.

6 MR. McILNAY: Attorney O'Meara just
7 informed me that she would have no objection to the
8 admission of Respondent's Exhibit 61 as well, which
9 is the declaration of Mr. Eric Peter, and I would
10 offer it.

11 MS. O'MEARA: I have no objection.

12 JUDGE GUNNING: Okay. Please mark
13 Respondent's Exhibit 61 as received.

14 MR. McILNAY: Could I have one moment,
15 Your Honor?

16 JUDGE GUNNING: Yes.

17 MR. McILNAY: Thank you. Your Honor, I do
18 have no more questions for this witness at this
19 time.

20 MS. O'MEARA: Your Honor, if I could take
21 a five-minute break before I --

22 JUDGE GUNNING: Yes.

23 MS. O'MEARA: Thank you.

24 MR. McILNAY: Just so the Court and
25 counsel know, my next witness, I instructed him to

1 be back here at 11:00. I don't know how much time
2 counsel expects to take, but I can even suggest that
3 maybe ten minutes would --

4 JUDGE GUNNING: Okay.

5 MS. O'MEARA: I don't have an objection
6 with that.

7 JUDGE GUNNING: Okay. Ten minutes it is.
8 (Short break taken.)

9 MS. O'MEARA: May I proceed, Your Honor?

10 JUDGE GUNNING: Please.

11 MS. O'MEARA: Thank you.

12 CROSS-EXAMINATION

13 BY MS. O'MEARA:

14 Q Good morning, Mr. Paquette.

15 A Good morning, Attorney O'Meara.

16 Q I want to talk to you about the ingredients, but
17 again, I will not name any of the ingredients so
18 that we are safeguarded. I just want to understand
19 a couple of things.

20 The formula or recipe for Magna-Plate 74 is
21 different than that of Magna-Plate 78, correct?

22 A Correct.

23 Q All right. Because it has different usage, right,
24 one is for air-operated equipment and the other one
25 is for overhead chains, correct?

- 1 A Correct.
- 2 Q And the greases are then different than the liquids;
3 meaning, the POLY-Guard and the HALO-Guard are the
4 greases, correct?
- 5 A That's correct.
- 6 Q And those ingredients or recipe or formula is
7 different than the Magna-Plate 74 or 78, right?
- 8 A That is correct.
- 9 Q Is the HALO-Guard ingredients different than the
10 POLY-Guard ingredients or -- let me restate that.
11 It HALO-Guard FG-2 and POLY-Guard FG-2, do they
12 have the same set of ingredients?
- 13 A Not all of the ingredients are the same.
- 14 Q Okay. Does HALO-Guard FG-2 and HALO-Guard FG-LT
15 have the same set of ingredients?
- 16 A Yes.
- 17 Q Okay. So from what I can glean, POLY-Guard FG-2 has
18 a different set of ingredients, correct, than
19 HALO-Guard FG-2?
- 20 A Correct.
- 21 Q And HALO-Guard has a different set from HALO-Guard
22 FG-LT or no?
- 23 A No. The ingredients would be the same, but their
24 concentrations could be different.
- 25 Q Oh, so the concentrations are important for the

- 1 recipe, correct?
- 2 A Correct.
- 3 Q In fact, do you have chemists that -- do you
4 formulate them yourself or do you have chemists that
5 formulate them for you?
- 6 A It's a combination of myself and my chief chemist.
- 7 Q So you need to give them the recipe, correct, of how
8 much -- what composition to put of each ingredient
9 into a particular lubricant, correct?
- 10 A Yes. We have to arrive at the ingredients and
11 concentrations, that's correct.
- 12 Q Okay. All right. But the list that was provided
13 pursuant to the Judge's order, that's just a list of
14 ingredients without a compositions on it, correct?
- 15 A It's a list of compositions, but not a list of
16 concentrations.
- 17 Q Not a list of concentrations. And those are very
18 important in making any sort of a lubricant,
19 probably any sort of anything, correct?
- 20 A Correct.
- 21 Q And that list that you provided, does it pertain to
22 one specific lubricant?
- 23 A No.
- 24 Q It pertains to all of the lubricants?
- 25 A No.

- 1 Q It doesn't pertain -- what does it pertain to?
- 2 A It pertains to the five lubricants that are in
3 question that we've been discussing.
- 4 Q Okay. So it's a list that is a combination of all
5 of the lubricants and ingredients, correct?
- 6 A Correct.
- 7 Q Okay. But it doesn't indicate which ingredient is
8 associated with which lubricant, correct?
- 9 A Correct.
- 10 Q And it doesn't indicate which concentration is
11 associated with which lubricant, correct?
- 12 A Could that be one read back, please?
- 13 Q The list doesn't tell us which ingredient is
14 associated with which lubricant, correct?
- 15 A Correct.
- 16 Q And it doesn't tell us how much of a concentration
17 is associated with each ingredient for each
18 lubricant, correct?
- 19 A Correct.
- 20 Q Okay. And the NALCO product, as I understand that,
21 is not the -- the name is not CBI?
- 22 A (Witness nods head.)
- 23 Q You had to provide the context of that NALCO product
24 to NSF, correct, for certification?
- 25 A That's not correct.

1 Q Okay. Did NSF require you to show them what the
2 ingredients were in the NALCO proprietary --

3 A No.

4 Q They didn't?

5 A No.

6 Q Okay. Perhaps I'm confused by the testimony then,
7 and let me just turn to that page, if I may.

8 You said the ingredients -- the CAS information
9 is proprietary, correct, on the NALCO?

10 A Correct.

11 Q Okay. And NSF had to look at it, correct?

12 A Correct.

13 Q It just looked at the NALCO without looking at the
14 proprietary components of the NALCO ingredients?

15 A For our submission or for NALCO's submission?

16 Q No. For your submission, for your five lubricant
17 submissions.

18 A Could you repeat the question?

19 Q Sure. I'd be happy to.

20 I'm trying to find out when you submitted
21 information to NSF for your five lubricants, did
22 they require you to tell them what was in the NALCO
23 component or portion of your lubricant?

24 A No, they did not.

25 Q Okay. Now, you're aware that if you had provided

1 that to the Court, we would have treated it as
2 confidential business information as we have with
3 all the rest of the ingredients, correct?

4 A Correct.

5 Q Okay. Just a couple of brief questions.

6 Did POLY-Guard FG-2 exist before the Micronox
7 technology went in?

8 A Yes, it did.

9 Q And then you invented Micronox technology, right?

10 A I did the work on the additization, correct.

11 Q It's pretty impressive. So you had to figure out
12 how to keep POLY-Guard as a lubricant, doing what it
13 needs to do as a lubricant, but add something in
14 there to meet Kraft's needs, right?

15 A Correct.

16 Q And that's what was called the Micronox technology
17 eventually, correct?

18 A Correct.

19 Q So you had to add additional ingredients into the
20 POLY-Guard?

21 A That's correct.

22 Q So you could perhaps then, if you wanted, determine
23 what the recipe for the Micronox antimicrobial
24 technology is, too, correct?

25 A In the POLY-Guard?

- 1 Q Yes. I understand they're different in the
2 different --
- 3 A Yes. That's correct.
- 4 Q And you could do that for the HALO-Guard FG-2 as
5 well, correct?
- 6 A Correct.
- 7 Q And the HALO-Guard FG-LT?
- 8 A Correct.
- 9 Q And Magna-Plate 74?
- 10 A Correct.
- 11 Q And Magna-Plate 78?
- 12 A Correct.
- 13 Q Let's talk about the testing, if we can for a
14 second. Kraft -- did you test the Micronox for
15 POLY-Guard FG-2 when you were creating it for Kraft,
16 did you test it yourself?
- 17 A We did some basic preliminary work in the laboratory
18 and then provided the materials to Kraft for their
19 evaluation.
- 20 Q Okay. And when you say in the laboratory, do you
21 mean in your own laboratory?
- 22 A We did some simple Bug Check tests in the laboratory
23 at our facility.
- 24 Q Okay. Okay. And then Kraft did it?
- 25 A Correct.

- 1 Q Okay. Did you provide a protocol for Kraft to do
2 that testing?
- 3 A No, I did not.
- 4 Q You did not. So you don't know exactly what sort of
5 an inoculum they tested with; is that correct?
- 6 A That's correct.
- 7 Q You don't know if they used good laboratory
8 practices; is that correct?
- 9 A I'm not knowledgeable on their practices, no.
- 10 Q Okay. You don't have any idea on how they conducted
11 those tests, correct?
- 12 A Correct.
- 13 Q Did you then do some independent testing on it after
14 Kraft said, You know what? This is a great product.
15 It works. We want to buy it?
- 16 A Yes, we did.
- 17 Q You did. And did that testing take place by you
18 yourself personally?
- 19 A No, it did not.
- 20 Q Did it go to Sommer & Frey?
- 21 A Correct.
- 22 Q In Milwaukee, correct?
- 23 A Correct.
- 24 Q And when you sent the testing to Sommer & Frey, was
25 it just for POLY-Guard FG-2 or was it for the other

- 1 four lubricants we've also been talking about?
- 2 A Initially it was on the POLY-Guard.
- 3 Q Did it eventually then also get sent there for the
- 4 HALO-Guard FG-2?
- 5 A Correct.
- 6 Q And the HALO-Guard FG-LT?
- 7 A I would have to review the documents on the -- I
- 8 don't remember. We sent multiple samples there over
- 9 time.
- 10 Q Okay. What about the Magna-Plate 74?
- 11 A 74, off the top of my head, I don't remember seeing
- 12 the results. 78, yes.
- 13 Q Okay. So you're unsure about whether 74 was tested
- 14 or Magna-Plate FG- T was tested, correct?
- 15 A Correct.
- 16 Q Did Mr. McIlnay ask you to provide him with any of
- 17 the lab reports, the underlying data for these
- 18 tests?
- 19 A I don't remember being asked for the data.
- 20 Q Okay. Did you personally observe any of these
- 21 tests?
- 22 A No, I did not.
- 23 Q Did you establish the protocol for any of these
- 24 tests?
- 25 A No. We actually requested the laboratory to

- 1 determine the protocol they felt should be used
2 because they are an accredited USDA laboratory.
- 3 Q Okay. Did you review that protocol?
- 4 A No, I did not.
- 5 Q So you're not sure what they did; is that correct?
- 6 A That would be correct.
- 7 Q Did Mr. McIlroy ask -- did they provide you with the
8 protocol eventually, Sommer & Frey, on these tests?
- 9 A I do not have documented --
- 10 Q So you --
- 11 A I do not have documents from Sommer & Frey detailing
12 the protocol.
- 13 Q Okay. I'm going to ask you to turn to Complainant's
14 Exhibit 6 -- I'm sorry -- Complainant's Exhibit 8,
15 page 187, please. And I have a blown-up version for
16 everybody to follow along, whatever is easiest for
17 you, Mr. Paquette.
- 18 A (Witness complies.)
- 19 Q So you had this major advance, this major
20 break-through, but you didn't review the protocol
21 yourself, correct?
- 22 A Correct.
- 23 Q And you didn't observe the testing, correct?
- 24 A Correct.
- 25 Q Now, are you aware of whether the test had a

1 five-log reduction as EPA requires for its
2 sanitizers?

3 A I have no idea if it was conducted to EPA
4 requirement.

5 Q Do you understand -- are you aware what five-log
6 reduction means?

7 A Yes, I am.

8 Q Okay. Are you aware that when you're trying to
9 determining five-log reduction, you actually have to
10 go up to six-log reduction so you have something to
11 quantify at the end of that test?

12 A I would believe you.

13 Q Okay. Are you personally aware of that, though?

14 A No, I'm not.

15 Q Okay. Are you aware that in order to achieve a
16 five-log reduction -- I'm sorry -- a six-log
17 reduction so you have something to quantify at the
18 end of the test, that you were talking about at
19 least 75 to 125 million colony units --
20 colony-forming units?

21 A I will take your math as being accurate.

22 Q Okay. Let's look at this chart then. Can you read,
23 please, for me at the bottom of this chart right
24 here starting with, Listeria was inoculated at?

25 A Listeria was inoculated at a level of 80,000 CFU per

- 1 gram, E-coli was inoculated at a level of
2 100,000 CFU per gram, and salmonella was inoculated
3 at a level of 120,000 CFU per gram. Colony-forming
4 units per gram are not measurable below 10.
- 5 Q Okay. So CFU means colony-forming units, correct?
- 6 A Correct.
- 7 Q Okay. So based on what you just read -- this is one
8 of your advertisements on Magna-Plate 78 -- would
9 you say that it achieved the six-log reduction that
10 EPA requires?
- 11 A I would not say it achieves the six-log reduction
12 that EPA requires.
- 13 Q Okay. And I know I moved this back. I just want
14 Mr. Bonace to be able to see everything. If you
15 would take a look at your paper copy. Is there
16 anywhere in this chart here that identifies the
17 method that was used for doing this testing?
- 18 A No, there does not.
- 19 Q Okay. Are you aware that when good laboratory
20 practices are being used, it's an advertising
21 benefit and it's usually marked somewhere on the
22 data that's being advertised?
- 23 A Yes.
- 24 Q Okay. Is there anywhere on this exhibit that it's
25 marked good laboratory practices or GLP, which is

1 the acronym?

2 A It is not.

3 Q Okay. Now, are you aware of the source of the
4 inoculums, by the way, on any of these testing,
5 where they got the listeria or the salmonella or the
6 E-coli so they can determine that -- whether it's
7 being mitigated or not?

8 A I'm not aware, and that's why we used an accredited
9 USDA laboratory.

10 MS. O'MEARA: Okay. May I have a moment,
11 Your Honor?

12 JUDGE GUNNING: Yes.

13 MS. O'MEARA: Thank you.

14 BY MS. O'MEARA:

15 Q Are you aware that Summer-Frey -- I had a chance to
16 look it up last night -- doesn't advertise on their
17 Web site that they use good laboratory practices?

18 A I'm not aware of it.

19 Q Okay. Are you aware of where the most reliable
20 source for microorganisms are for testing? There's
21 sort of a housing of these microorganisms so that
22 when you test for them, that you have a reliable,
23 viable bacteria so you can test for it accurately;
24 are you aware of that source?

25 A I'm only aware of it being mentioned in testimony

1 here this week.

2 Q Okay. The American Tissue Collection Culture?

3 A Correct.

4 Q Okay. Are you aware that Sommer-Frey doesn't
5 advertise that they get their bacteria, E-coli,
6 salmonella or listeria from the American Tissue
7 Culture Collection?

8 A I am not aware of that.

9 Q Okay. Were you aware of what contact time they
10 might have tested for when they were testing these
11 products?

12 A I've got lab reports from them that I can reference
13 back to, but off the top of my head, I don't
14 particularly remember right now what the -- what the
15 duration was at this time, no. No.

16 Q Okay. Oh, one further question on that. When the
17 testing was done, was it done in the lubricant
18 itself?

19 A That is correct.

20 Q So the test represented how well the Micronox
21 technology controlled E-coli, salmonella and
22 listeria within the lubricant itself, correct?

23 A That is correct.

24 Q And perhaps it may have even tested how it was
25 controlled on the equipment or no?

1 A I'm sorry. I don't understand the question.

2 Q Was the testing ever done in the lubricant while it
3 was on the equipment or was it just on the lubricant
4 itself?

5 A At Sommer-Frey?

6 Q Yes.

7 A I would assume just on the lubricant itself.

8 Q Okay. Was there ever an instance where it was
9 tested while it was on equipment?

10 A Not that I know of by Sommer-Frey.

11 Q Okay.

12 (Discussion off the record.)

13 BY MS. O'MEARA:

14 Q You testified earlier that there were a couple of --
15 three companies, I believe, in particular in
16 addition, outside of Kraft, that tested the
17 lubricant independently in use at their facilities,
18 correct?

19 A Correct.

20 Q Do you know if that testing was done on the
21 equipment in its actual application with the
22 lubricant?

23 A Some of it was, yes.

24 Q Okay. So did it then -- did the results then show
25 how effective the Micronox technology was in

- 1 controlling E-coli, salmonella and listeria on the
2 equipment in those instances?
- 3 A Yes, it did.
- 4 Q Did it also show how effective it was in controlling
5 the same organisms in the lubricant in those
6 instances?
- 7 A In the equipment applications, the testing that they
8 did was inherent to looking at the lubricant
9 operation and with the contaminant potential based
10 on operation in the food processing application for
11 which it was being utilized.
- 12 Q So if I could help you -- if I could interpret that,
13 that means on the equipment, correct?
- 14 A On the equipment operation during food processing.
- 15 Q Okay. With respect to the three companies that you
16 talked about earlier, were you familiar with the
17 protocol they used?
- 18 A No, I was not.
- 19 Q Do you know if they used -- do you know what -- they
20 used it in practice, so they didn't create an
21 inoculum; is that correct? They didn't infuse or --
22 I think you call it a cocktail of listeria. They
23 didn't infuse an inoculum into anything, did they?
- 24 A Not during production.
- 25 Q Did they do it at some other time?

- 1 A Testing was conducted in their QATC laboratories
2 where they do standardized testing for those
3 packages in their normal --
- 4 Q I understand.
- 5 A -- operation.
- 6 Q Do you know what inoculums they started at?
- 7 A No, I do not.
- 8 Q Do you know if they used ATCC sources for those --
- 9 A I do -- I do not.
- 10 Q Do they know if they checked for contact time?
- 11 A That's beyond the scope of my knowledge with their
12 operation.
- 13 Q Do you know how they neutralized the test?
- 14 A I do not have that knowledge.
- 15 Q Okay. Now, you said that the Kraft testing was not
16 confidential, right, they shared it with you?
- 17 A That's correct.
- 18 Q Did Mr. McIlnay ask you to provide the Kraft testing
19 to him, the underlying data, not the results, but
20 the underlying data?
- 21 A No, he did not.
- 22 Q And it's not in the record here anywhere referred
23 to, is it?
- 24 A Not to my knowledge.
- 25 Q I'm going to ask you to turn to Respondent's

1 Exhibit 62, which is your declaration.

2 A (Witness complies.)

3 Q And could you please turn to Respondent 00149, which
4 is Exhibit A of that exhibit?

5 A (Witness complies.)

6 Q And this is -- have you had a chance to review it?

7 A Yes, I have.

8 Q Okay. And this is the certification letters -- the
9 NSF certification letters of the five different
10 lubricants we're talking about today, correct?

11 A Correct.

12 Q Okay. And the first one is for POLY-Guard FG-2,
13 correct?

14 A Correct.

15 Q And the other four, just for purposes of brevity,
16 are identical in the body of the language, correct?

17 A Correct.

18 Q Okay. So let's just work with the one that's for
19 POLY-Guard FG-2, if we could. Could you confirm
20 that the NSF registration guidelines for the
21 substances was under their Nonfood Compounds
22 Program? If you look at the first paragraph --
23 actually, why don't I read the sentence to you.

24 The NSF Nonfood Compounds Registration Program
25 is a continuation of USDA. Is that what the

- 1 POLY-Guard was being certified under, that Nonfood
2 Compound Program?
- 3 A Correct.
- 4 Q And I'm going to read you the last sentence in the
5 second paragraph. It says, If used as an anti-rust
6 film, the compound must be removed from the
7 equipment surface by washing or wiping as required
8 to leave the surface effectively free of any
9 substances, which could be transferred to food being
10 processed, correct?
- 11 A I didn't understand what the question was.
- 12 Q I'm just confirming. Did I read that properly for
13 you; is --
- 14 A Yes.
- 15 Q -- it accurate?
- 16 A Correct.
- 17 Q Okay. And the implication being that this product
18 should not get into processed foods the best of your
19 ability, correct?
- 20 A The product should not normally be introduced into
21 the food.
- 22 Q Oh, I understand that trace amounts can, of course,
23 get in, but it's not intended to be put into the
24 processed food, correct?
- 25 A Correct.

- 1 Q And directing your attention to the fourth
2 paragraph, could you read that one out loud to me?
3 It's just one sentence. Starting with, NSF listing
4 of all registered?
- 5 A NSF listing of all registered nonfood components by
6 NSF International is not an endorsement of those
7 compounds or of any performance or efficacy claims
8 made by the manufacturer.
- 9 Q Okay. Thank you. So NSF never actually endorsed
10 any of the efficacy claims that Behnke made,
11 correct?
- 12 A NSF doesn't endorse any products or efficacy claims
13 of anyone's products.
- 14 Q Okay. Thank you. I just want to confirm with you,
15 Mr. Paquette, these lubricants are considered
16 indirect food additives under FDA, correct?
- 17 A Correct.
- 18 Q And the lubricants are not intended to be added
19 directly to any food, correct?
- 20 A Correct.
- 21 Q And they're not actually intended to be added
22 directly to any beverage; is that correct?
- 23 A Correct.
- 24 Q And they're not intended to become a component of
25 any food; is that correct?

- 1 A I'm sorry. Would you repeat that one, please?
- 2 Q Are they intended to become a component of any food?
- 3 A They are not.
- 4 Q Okay. Any beverage?
- 5 A No.
- 6 Q Are the lubricants intended to have any technical
7 effect on any food?
- 8 A When they are in food or when they are not --
- 9 Q When they are being used for their intended purpose,
10 which is lubrication, are they intended to have any
11 technical effect on food?
- 12 A No, they are not.
- 13 Q And on beverages?
- 14 A No.
- 15 Q And in fact, the Micronox technology was put into
16 the lubricants to control E-coli, salmonella and
17 listeria in the lubricants before
18 cross-contamination occurred, correct?
- 19 A Not correct.
- 20 Q Okay. Were they -- the Micronox technology was put
21 into the lubricant, correct?
- 22 A Correct.
- 23 Q And it controlled E-coli, salmonella and listeria in
24 the lubricant, correct?
- 25 A Correct.

- 1 Q But they weren't controlled -- they weren't put in
2 there to control cross-contamination?
- 3 A I guess I would need a better definition of what
4 you're using for cross-contamination.
- 5 Q Well, let's do this. If you could turn back to your
6 declaration. I believe it's 62.
- 7 A (Witness complies.)
- 8 Q And this is written in -- it says My goal in one of
9 the paragraphs. It was written as if you were
10 speaking, correct?
- 11 A Correct.
- 12 Q Okay. Can you read -- on page 3 of your
13 declaration, paragraph 10, can you read the second
14 sentence starting with, My goal was to mitigate?
- 15 A My goal was to mitigate this possible
16 cross-contamination by developing lubricants that
17 served Kraft's primary lubrication needs while
18 continuing to comply with -- comply with FDA
19 requirements for incidental food contact or
20 ingestion.
- 21 Q Okay. So you were trying to stop
22 cross-contamination before it got to the food,
23 correct?
- 24 A Cross-contamination of the lubricant can be caused
25 by the food.

- 1 Q I understand that.
- 2 A That's --
- 3 Q That's from the food to the lubricant, right?
- 4 A Correct.
- 5 Q Now, we're talking from the lubricant back to the
6 food, correct?
- 7 A Correct.
- 8 Q Were you trying to control the microorganisms in the
9 lubricant so that they wouldn't get back into the
10 food and multiply further?
- 11 A Trying to do that also, yes.
- 12 Q Okay. And I'm going to ask you to look at
13 paragraph 10 again, and let's put this into context.
14 If you could read the first sentence. I'm sorry. I
15 should have probably done it in reverse, but if you
16 could read the first sentence in paragraph 10 out
17 loud?
- 18 A In response to Kraft's concerns, I researched how we
19 might reduce the risk of the grease becoming a host
20 for food borne microbes, which, in turn, could
21 migrate back into the food product due to incidental
22 contact with the food.
- 23 Q Okay. Thank you. By the way, this testing data,
24 has any of it been submitted to EPA?
- 25 A No, it has not.

1 MS. O'MEARA: May I have one minute,
2 Your Honor, please?

3 JUDGE GUNNING: Yes.

4 MS. O'MEARA: Thank you. I have just a
5 couple of further questions.

6 BY MS. O'MEARA:

7 Q Did you do any research yourself on the EPA
8 requirements for purposes of registration for these
9 lubricants?

10 A Yes, I did.

11 Q Okay. And were you -- did you find the definition
12 of label and labeling like we discussed yesterday in
13 your research?

14 A In my research my focus was on whether or not we
15 were mitigating pests. I did not go through the
16 sections as far as definitions of what EPA considers
17 to be labeling. I guess I'm not understanding the
18 question.

19 Q No. I think you answered it. Thank you.

20 MS. O'MEARA: I have no further questions.

21 JUDGE GUNNING: Okay.

22 MR. McILNAY: Just a few, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. McILNAY:

25 Q Mr. Paquette, I just want to make sure the record is

- 1 clear. You were asked some questions about whether
2 or not NSF had required you to disclose the
3 ingredients -- is it NALCO?
- 4 A Correct.
- 5 Q NALCO is not a Behnke Lubricants product; is that
6 correct?
- 7 A Correct.
- 8 Q So the whole idea there is you don't know what the
9 ingredients are?
- 10 A That's correct.
- 11 Q And the NSF certification is that they have looked
12 at it, by whoever its producer is, being confirmed
13 that it's safe for use?
- 14 A That's correct.
- 15 Q When's the last time you used Sommer-Frey for
16 anything?
- 17 A I honestly don't know. Three to six months ago,
18 something like that. I don't know.
- 19 Q Did you look at their Web site to see if they're a
20 USDA certified laboratory before you used them the
21 last time?
- 22 A No, I did not.
- 23 Q Do you know what their advertising says with regard
24 to USDA certification?
- 25 A I don't use their Web site.

- 1 Q Well, do you know whether any of their advertising,
2 Web site or otherwise, talks about USDA
3 certification as we sit here today?
- 4 A When I receive results or I receive information, on
5 their letterhead, it states on the bottom of their
6 letterhead what accreditations they have from which
7 organization. USDA's the one that's listed.
- 8 Q Did you happen to know whether or not they used GLP
9 on that?
- 10 A I did not notice.
- 11 Q You don't know, you just didn't --
- 12 A I don't know.
- 13 Q Okay. Mr. Paquette, on the NSF certification for
14 these products that are attached to your
15 declaration -- I believe it's Respondent's
16 Exhibit 62 -- you were asked some questions by
17 Attorney O'Meara regarding when used as a rust --
18 please give me the language. Do you know what I'm
19 referring to?
- 20 A I believe the question was if used as an anti-rust
21 film, the compound must be removed from the
22 equipment surface by washing or wiping as required
23 to leave the surface effectively free of any
24 substance which could be transferred to food being
25 processed.

1 Q The anti-rust film application, is that done during
2 processing, to your knowledge?

3 A No, it's not.

4 Q Okay. So this is one of the things that happens
5 when the plant shut down as part of this
6 sanitization process?

7 A Correct.

8 MR. McILNAY: Thank you. Nothing further.

9 MS. O'MEARA: Your Honor, I do not have
10 any direct -- I mean, recross.

11 JUDGE GUNNING: Would you like to reserve
12 this witness?

13 MR. McILNAY: Yes, please.

14 JUDGE GUNNING: Okay. Now, you're not
15 excused.

16 THE WITNESS: I know.

17 JUDGE GUNNING: Okay. But thank you for
18 your testimony.

19 MR. McILNAY: Your Honor, I'm not sure
20 whether my witness is here or not. His testimony
21 will be very short. I'm quite sure that direct will
22 be finished by noon. It might be a good time for a
23 short break.

24 JUDGE GUNNING: Okay.

25 (Short break taken.)

1 JUDGE GUNNING: Mr. McIlnay, if you would
2 like to call your next witness, please.

3 MR. McILNAY: Thank you, Your Honor. May
4 it please the Court, Respondent's call Mr. Larry
5 Cooper at this point.

6 MR. OLSON: Your Honor, if I may?

7 JUDGE GUNNING: Yes.

8 MR. OLSON: There is a motion in limine
9 that has not yet been ruled on to bar the testimony
10 of Mr. Cooper.

11 JUDGE GUNNING: Okay. Let's examine that
12 then. Okay. The basis for the motion in limine, as
13 I recall, one was the date or the alleged lateness?

14 MR. OLSON: That's correct, Your Honor.
15 We received information that Mr. Cooper was going to
16 be testifying the final day that Respondent could
17 give notice to EPA that new witnesses or new
18 evidence would be supplemented to the prehearing
19 exchange.

20 That information listed, among other things,
21 that Mr. Cooper was going to testify to what is, in
22 fact, a legal conclusion, and as it matched almost
23 exactly the language that some of its other
24 witnesses -- its expert witnesses were going to
25 testify, we believed that he was going to be offered

1 as an expert witness, but there was no curriculum
2 vitae offered with Mr. Cooper. We didn't find out
3 that Respondent was going to call Mr. Cooper
4 specifically as a fact witness until the Thursday
5 before hearing.

6 Now, we recognize that Mr. Cooper has flown in
7 from Tennessee and that you indicated earlier that
8 you were inclined to let him testify. We would ask,
9 however, that -- if you do not grant our motion,
10 that you do please limit his testimony not to
11 discuss legal conclusions.

12 Additionally, Respondent has suggested that
13 Mr. Cooper may discuss some results of biological
14 testing at the former facility that he worked at.
15 There's been no submission of any data supporting
16 those tests. There's been no submission of a CV
17 that Mr. Cooper is qualified to discuss those tests.
18 So we would ask you to limit his testimony and
19 exclude any information about those particular
20 issues.

21 JUDGE GUNNING: Okay.

22 MR. McILNAY: Your Honor, first of all, as
23 indicated in the submission, which was filed timely,
24 we did not designate him as an expert witness, but
25 it was clear then that he would be a fact witness.

1 And indeed that is -- and when the Court hears
2 Mr. Cooper's testimony, it will become apparent he
3 is not being offered as an expert.

4 JUDGE GUNNING: He is or is not?

5 MR. McILNAY: Is not. The issue of
6 testing is not to go to -- let me put it this way.

7 If I were to make an offer of proof, Mr. Cooper
8 was a plant maintenance operator that will testify
9 that -- among other things, that he would ask to
10 look for sources of contamination because in the
11 ordinary course of the plant's business, they had
12 found an unusual count of listeria, and he looked
13 for the source of that but not that he performed any
14 testing. It was how he was notified that was the
15 source of the notification, Go look for how it's
16 getting on the food, and discovered it was grease or
17 oil.

18 JUDGE GUNNING: All right. Well, as I
19 suggested earlier, I will allow the testimony for
20 limited fact purposes. If anything is raised,
21 Counsel should renew his objection, and we can
22 address it at the time of the specific question
23 that's being asked.

24 MR. OLSON: Thank you, Your Honor.

25 JUDGE GUNNING: Okay. That means you can

1 take the stand.

2 LARRY D. COOPER, called as a witness
3 herein by the Respondent, after having first been
4 duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. McILNAY:

7 Q Mr. Cooper, before I start my questioning, your
8 accent's going to sound a little foreign to most of
9 our Midwestern ears, but particularly to the young
10 lady taking your testimony. For that reason --
11 we've had difficulty throughout the course of the
12 hearing -- I put the mic, taken it out of the stand.
13 Could I ask you to hold it up close to you so
14 everyone can hear you clearly and admonish you
15 please to talk slowly. And don't be offended if we
16 stop and ask you to repeat.

17 A (Witness complies.)

18 Q Thank you.

19 Could you state your full name for the record?

20 A Larry Duane Cooper.

21 Q And, Mr. Cooper, how do you spell your last name?

22 A C-O-O-P-E-R.

23 Q Mr. Cooper, where do you presently reside?

24 A Holiday, Tennessee.

25 Q And how are you currently employed?

- 1 A Self-employed.
- 2 Q Do you have a business?
- 3 A Yes, sir.
- 4 Q And does your business have a name?
- 5 A Yes, sir.
- 6 Q What is it?
- 7 A Tri City Supply.
- 8 Q And what is the business of Tri City Supply?
- 9 A We're an industrial sales and repair company.
- 10 Q And how long have you been self-employed?
- 11 A Two years.
- 12 Q All right. I want to go back a little bit. Do you
- 13 hold any post-high school degrees or certifications?
- 14 A High school diploma, industrial electronics speech
- 15 tester certification, State of Tennessee Vocational
- 16 School, and also I went through a journeyman at
- 17 Camden Casting, five-year journeyman, for
- 18 industrial maintenance.
- 19 Q Your employment background, can you briefly tell the
- 20 Court how you've been employed since leaving high
- 21 school?
- 22 A I worked construction a little bit, stuff, and then
- 23 my first full job, I worked at Camden Casting for
- 24 13 years, industrial maintenance, left there, went
- 25 to Quaker Oats.

- 1 Q Let me stop you there. Camden Casting -- the name
2 implies it, but I just want to make sure -- had
3 nothing to do with food processing?
- 4 A That is correct. It was ductile iron casting.
- 5 Q Okay. But while at Camden Casting, you took some
6 kind of journeymanship?
- 7 A Yes, sir.
- 8 Q And what did that entail?
- 9 A We was trying to get top pay, some of the -- we felt
10 like we deserved it, so it was a union plan. We
11 filed a grievance. They come back and --
- 12 Q I don't need that kind of history.
- 13 A Okay. Well --
- 14 Q Was there a subject of --
- 15 A They offered us a program, which was a state -- they
16 brought in a state certified instructor. They
17 offered us a program of 22, 24 classes that covered
18 all aspects of industrial maintenance. You was
19 required to take that to then take the journeyman's
20 test and receive the certificate.
- 21 Q Did any of that -- did any of those classes deal
22 with lubrication?
- 23 A Yes, sir.
- 24 Q Did any of those classes deal with food-grade
25 lubrication?

- 1 A It was brought to our attention, but it was not
2 stressed because that was not in our field of work.
- 3 Q Very good. So I'm sorry I interrupted. So the
4 record's clear, you left Camden Casting in
5 approximately what year?
- 6 A 1990.
- 7 Q And were you then employed somewhere else?
- 8 A Quaker Oats.
- 9 Q Okay. And specifically, when you were hired at
10 Quaker Oats, what position were you hired for?
- 11 A Industrial maintenance mechanic.
- 12 Q Okay. And where was that?
- 13 A Jackson, Tennessee.
- 14 Q And the Jackson, Tennessee facility that you were
15 hired at, did it make a product?
- 16 A Yes, sir.
- 17 Q What was the product?
- 18 A We made Aunt Jemima brand waffles, pancakes,
19 French toast and Mama Celeste Pizza at the time.
- 20 Q And I'm sorry. Could you tell me again what was
21 your title?
- 22 A Industrial maintenance mechanic.
- 23 Q And what were your duties and responsibilities
24 generally as an industrial maintenance mechanic at
25 the Quaker Oats plant in Jackson, Tennessee?

1 A Maintained those products that I just mentioned,
2 their processing equipment, packaging equipment. We
3 maintained and repaired and lubricated them, PM'd
4 them.

5 Q PM'd them?

6 A Yeah, preventive maintenance program.

7 Q Okay. When you started at Quaker Oats, you
8 mentioned -- strike that.

9 You mentioned that lubrication was part of your
10 responsibilities?

11 A Yes.

12 Q Okay. When you started at Quaker Oats, were you
13 given any training with regard to your lubrication
14 responsibilities?

15 A Yes. You went through an orientation due to the
16 fact that it was a food processing company, and they
17 explained the USDA guidelines, the procedures that
18 you had was required to follow as an employee.

19 Q Okay. How long did you -- well, let me go back.

20 As an industrial maintenance mechanic, were you
21 assigned to one or the other of the products, the
22 Mama Celeste Pizza or Aunt Jemima?

23 A I started in Aunt Jemima the first year.

24 Q Did you stay in the Aunt Jemima side?

25 A No. I transferred to the Mama Celeste area as a

- 1 lead mechanic on third shift.
- 2 Q In approximately 1991?
- 3 A Yes.
- 4 Q So not only did you transfer departments, but you
5 got a promotion, too?
- 6 A Yes, sir.
- 7 Q Okay. The Aunt Jemima products that were -- are --
8 or were produced in Jackson, Mississippi --
9 Jackson, Tennessee.
- 10 Q -- Jackson, Tennessee -- I apologize -- are these
11 frozen foods?
- 12 A Yes, sir.
- 13 Q Are you familiar with the terminology ready-to-eat?
- 14 A Yes, sir.
- 15 Q Were these considered ready-to-eat products?
- 16 A Yes, sir.
- 17 Q And the Mama Celeste Pizzas, were those frozen
18 pizzas?
- 19 A Yes, sir.
- 20 Q Are those ready-to-eat as well?
- 21 A They had to be microwaved. I mean, I would think
22 so, you know. I don't really remember. I remember
23 them talking about the Aunt Jemima ready-to-eat
24 waffles, pancakes and French toast. The pizza, I
25 can't recall. You know, you had to microwave them

- 1 or bake them.
- 2 Q Okay. As a lead mechanic, is that the new title you
3 had when you transferred from the Aunt Jemima
4 division to the Mama Celeste Pizza department?
- 5 A Yeah, it was like a promotion --
- 6 Q Okay.
- 7 A -- the way I looked at it. It was an increase in
8 pay.
- 9 Q And what were your duties and responsibilities as a
10 lead mechanic versus a maintenance -- I forget what
11 your prior title --
- 12 A Mechanic.
- 13 Q Mechanic. Did your duties and responsibilities
14 change?
- 15 A Yes. I was the leader of the crew, team leader on
16 the crew. I had two to three mechanics work for me
17 directly under my direction. I worked on
18 third-shift pizza. That's where we did the
19 cleaning. We done the PM work because the
20 production was down, but we also started the lines
21 up for day shift. We usually cranked up -- started
22 production, you know, prior -- 30 to 45 minutes
23 prior to the day shift starting so we could get a
24 good jump on the day, was our department manager's
25 philosophy.

1 Q All right. Part of that testimony was you were part
2 of the cleaning process; was that --

3 A I worked with them.

4 Q Okay. Can you describe for the Court what you meant
5 by the cleaning process?

6 A Well, they run two-shift production. They shut done
7 at approximately 11 o'clock, 10:30, 11 o'clock.
8 They would do a rough cleanup, which we call, they
9 cleaned up all the pizza pies, or anything that was
10 laying, discarded product items off the line, they
11 cleaned it up. Then they high-pressure-washed with
12 150, 60-degree water a caustic, and then they
13 sanitized the line.

14 After they sanitized the line, we'd crank the
15 line back up, PM'd it, as what I'm calling
16 preventive maintenance. We looked over to make sure
17 we couldn't see a problem physically, you know,
18 identify a problem, and usually we always
19 lubricated. I had one mechanic designated on the
20 processing line where the extensive washing took
21 place. We always lubricated to push the water out
22 of the bearings.

23 Q Just so the Court understands -- we've not been
24 through this. We're not all that familiar with the
25 industry. This happened every day every shift?

- 1 A Unless we run cheese. If we run cheese, they would
2 let us run free one night a week. It happened four
3 nights a week.
- 4 Q Okay. And after every cleanup, including the
5 sanitization, you would relube the equipment?
- 6 A It was necessary to get the equipment to operate.
- 7 Q All right. In total, how long were you employed by
8 Quaker Oats?
- 9 A From 1990 to 2006.
- 10 Q Now, in 1991 you've testified you were promoted to
11 lead mechanic in the pizza department. Did you have
12 any other promotions during your employment with
13 Quaker Oats?
- 14 A Yes. In approximately 2000 -- maybe it was late
15 2000, I accepted a position as maintenance
16 coordinator in the Aunt Jemima department.
- 17 Q So you're back to the pancakes, waffles and
18 French toast?
- 19 A (Witness nods head.)
- 20 Q Is that a yes?
- 21 A Yes, sir.
- 22 Q And you have a new title. Did your duties and
23 responsibilities change --
- 24 A Yes, sir --
- 25 Q -- with your new title?

- 1 A -- they did.
- 2 Q How did they change?
- 3 A Well, the maintenance coordinator's job title was
4 wherever there was a problem, you was to go to that,
5 and I had to show what they felt like a real
6 interest in the operation. So I worked hand and
7 hand with contractors on new product, equipment
8 modifications. Any product that was introduced to
9 the company, I was the one that done the MSDS
10 sheets, got them approved through the quality
11 assurance department before they was ever brought in
12 the plant. That was one of the procedures that was
13 required in the plant.
- 14 Q Let's talk about that in a little more detail. The
15 products brought into the plant, what are you
16 referring to?
- 17 A Any lubricants, cleaners, anything, you know, I was
18 the one that they had to come through because I had
19 to do the MSDS and make sure it met the USDA
20 guidelines that we had before it went any further.
- 21 Q All right. So if a vendor wanted to sell their
22 product to Quaker Oats for use in the processing
23 plant, they had to get through you?
- 24 A That's correct.
- 25 Q And you took on that responsibility in late '99 or

- 1 early 2000 you say?
- 2 A Yeah, 2000 -- late 2000 --
- 3 Q Okay.
- 4 A -- 2001.
- 5 Q And I interrupted you. I'm not sure you got
6 through. You mentioned you worked with contractors
7 on new equipment. You worked with the vendors that
8 wanted to sell product into the plant. Did you have
9 other duties and responsibilities?
- 10 A Well, if there was a problem, that's where I was
11 used as the go-to guy, that's what they said. QA
12 come to me. You know, I worked hand and hand with
13 QA. You know, if I had a product that I looked at
14 and I felt like it would benefit the process, then I
15 had to contact QA, let them look at it, give them
16 the details, at times invite the vendor in, let the
17 vendor do his sales speech to them, see what they
18 thought. Then collectively we made a decision, do
19 the MSDS and try the product. We would not bring a
20 product into the plant, sample nothing, until we had
21 an MSDS on file. That was what I was held
22 accountable for.
- 23 Q Okay. I thought the government and particularly the
24 military was known for acronyms. Let me ask you.
25 You've used a couple. QA?

- 1 A Quality assurance.
- 2 Q And was that a particular department --
- 3 A Yes, sir.
- 4 Q -- within Quaker Oats?
- 5 A They was the food safety department.
- 6 Q All right.
- 7 A They managed the tests, inspections and everything.
- 8 Q And MSDS; did I say it right?
- 9 A Material safety data sheet, yes.
- 10 Q Thank you.
- 11 A I think I got it right.
- 12 Q All right. Have we covered all of what your duties
13 and responsibilities were as the maintenance
14 coordinator?
- 15 A Well, as maintenance coordinator, like I said, you
16 know, QA would come to me, mechanics would come to
17 me, production would come to me. If we had a
18 problem or had an issue, you know, I was the person
19 that collected data, you know.
- 20 I mean, there was an incidence where we had
21 grease on product, you know? I had to identify who
22 done the lubrication for the work order, who done
23 the work order, because I was responsible for the
24 training on the lubrication, you know, and in the
25 department we worked through it because we was

1 having some issues with it, and I done the training
2 on each of the mechanics, hands-on, or some
3 production people that was assigned to us as weekend
4 helpers.

5 Q Okay. When you were initially promoted to
6 maintenance coordinator, which department -- what
7 departments were you responsible for?

8 A I had AJ, Aunt Jemima, AJ, Aunt Jemima, for
9 approximately a year and a half to two years, and
10 then -- we had two coordinators in the plant. The
11 other coordinator took the supervisor job, so they
12 reassigned me to complete plant maintenance
13 coordinator.

14 Q So at that point in time, you became responsible
15 for -- as the maintenance coordinator, for not only
16 the Aunt Jemima department but the pizza department?

17 A That's correct.

18 Q Prior to your departure from Quaker Oats in 2006,
19 were there any additional food products added to
20 production at that plant?

21 A Yes. We added Mrs. Paul's Fish. We moved the plant
22 from Erie, Pennsylvania to Jackson in the process.

23 Q All right. For the fish?

24 A Yes, sir.

25 Q And when the Mrs. Paul's Fish was added to the

1 production in Jackson, Tennessee, were you, as
2 maintenance coordinator, also responsible for that
3 department?

4 A Yes, sir.

5 Q All right. In some testimony just a moment ago, you
6 mentioned when a lubricant was found on food
7 product, one of your jobs was to go find out why and
8 when or how it happened?

9 A I was the one to count on. I was the implementer
10 when we put our software program in, so I could run
11 the reports, find pretty quickly who done the PM on
12 that line, which was preventive maintenance order,
13 and get with them, see what the issue was. If they
14 wasn't properly trained, retrained them. Of course,
15 I had a few I retrained several times. But it was,
16 you know, find out the facts, get with QA, make a
17 report, because the one thing that we had to do was
18 try to prevent it from happening in the future --

19 Q Okay.

20 A -- because that was a no-no.

21 Q So your goal was to not allow the lubricant to come
22 in contact with the food?

23 A That is correct.

24 Q When it did come in contact with the food, did you
25 have a terminology you used for that?

- 1 A Well, we called it incidental contact.
- 2 Q All right. And once you were made the maintenance
3 coordinator for both departments and then eventually
4 the Mrs. Paul's Fish, to your knowledge, were you
5 notified of all incidences of incidental contact?
- 6 A As far as I know.
- 7 Q And you became a maintenance coordinator, first of
8 all, just in the Aunt Jemima department, correct?
- 9 A That's correct.
- 10 Q Eventually you became the maintenance coordinator
11 for the Aunt Jemima and Celeste Pizza?
- 12 A The complete plant.
- 13 Q How long were you the maintenance coordinator for
14 the complete plant?
- 15 A Five years.
- 16 Q Five years. And during that five-year period, can
17 you give an estimate of the number of times per
18 month that you would be notified of an incidental
19 contact incident with lubricant in a food product?
- 20 A When I first started?
- 21 Q Yes. Well, when you first started, what do you
22 mean --
- 23 A When I had the complete plant, where I had all
24 departments.
- 25 Q Right.

- 1 A It was, I would say, a minimum of a couple times a
2 month, you know. Of course, through training it got
3 better. Then we'd get -- we had personnel changes.
4 Mechanics would leave. We'd get new mechanics. It
5 seemed like whenever we had personnel change, then
6 we had the issue come alive again or come back to
7 us, and we'd have to train and retrain and really
8 specify through orientation that, you know, this is
9 not to happen. Over-lubrication was a problem.
- 10 Q Over-lubrication --
- 11 A Over-lubrication, too much lubricant was used.
- 12 Q And that's one way that the incidental contact would
13 occur, somebody didn't follow standard operating
14 procedure?
- 15 A Yes, sir. I mean, Dennis and I was --
- 16 Q Okay. Dennis was?
- 17 A Oh, he was the QA -- he was the sanitization
18 manager/QA supervisor, that, you know, me and him
19 worked together, I thought, real well. He would
20 come to me, you know, say, Hey, I got a customer
21 complaint. It's on this line. What caused it? Can
22 you tell me why it happened, you know.
- 23 Q Okay.
- 24 A And Dennis would usually come to me if he had an
25 incident in the plant or a customer complaint or --

1 you know, if he thought I could help him
2 mechanically with the problem or lubrication
3 procedure, something like that, Dennis would come to
4 me because I was the person that was having to do
5 with the training and getting the data together,
6 because somebody always wanted answers, why did it
7 happen, who caused it, who we going to get rid of?

8 Q Well, thank goodness they didn't get rid of you.

9 A No.

10 Q Mr. Cooper, your testimony was when you started as
11 maintenance coordinator, it was a minimum of two
12 times a month that you would be asked to investigate
13 an incidental food contact -- food/lubricant
14 contact. Did it change over time?

15 A Well, as we got -- we kept people stable in their
16 positions with proper training, yes, it got better.
17 And like I said, when we would have personnel change
18 or, you know, we was shorthanded in maintenance and
19 they would pull production people. They wanted the
20 overtime. And sometimes the maintenance
21 supervisors, without me knowing it, would take
22 somebody that was untrained in lubrication, and they
23 thought pumping the grease guns was what they had to
24 do. So they pumped the grease, you know, they
25 wasted more than they should have used, but that was

- 1 just the way it happened, you know? When it
2 happened, usually we would have an incident.
- 3 Q Did you ever get it down to no incidences over a
4 period of time?
- 5 A Oh, we might go three, four, five months there, you
6 know, where I felt like I was accomplishing
7 something. We'd go through three, four, five months
8 sometimes, you know, without a major, you know,
9 where it really brought attention to it.
- 10 Q Without a major, what do you --
- 11 A A major, actually having a real physical clump of
12 grease or an oil drip or something where it was the
13 people that was inspecting the product before it
14 went into packaging would take notice on it.
- 15 Q Okay.
- 16 A I mean, it was real obvious, I guess would be the
17 way I would explain it, real obvious.
- 18 Q So you might go four or five months, six months
19 without a major --
- 20 A Yeah, there was a period we did that.
- 21 Q Okay. Very good. Now, you mentioned the QA
22 inspectors. What was the job of the QA inspectors?
- 23 A I never was one, but they monitored the lines. They
24 pull tests. They pull samples. They check for
25 bacteria. You know, they monitored the cleaning

1 process. If maintenance -- if we had to do -- we
2 had to do a work order. If we had to work on a line
3 that was in production with product only, we had a
4 procedure we had to go through. Afterwards we would
5 have to tag it. The mechanic filled out a tag. The
6 operator cleaned the line.

7 QA come back, inspected the line. When they
8 removed the tag, they would sign off, send a copy
9 back to maintenance for their records. They would
10 keep a copy in QA, and they would note it on their
11 records that we had had a possible contamination
12 condition, but they had inspected and okayed for
13 reproduction, start production back up.

14 Q All right. You've used the terminology line several
15 times. Am I correct that's the production line?

16 A Yes, sir. Our lines, we had six waffle lines, you
17 know. Well, I'm saying you know. I shouldn't. But
18 we had different lines in the departments, and a
19 line was from start with raw ingredients to out the
20 door in a case. That's what I call a line. It was
21 a complete process of whatever the product was.

22 Q Okay. And let's take just the Aunt Jemima line then
23 for the time being. That consisted of waffles,
24 pancakes and French toast.

25 A Yes, sir.

- 1 Q When you talk about raw material, I just want to
2 make it clear you weren't bringing the wheat from
3 the field to grind into the flour?
- 4 A No.
- 5 Q Okay. What did you start with?
- 6 A We started with the flour, the ingredients just like
7 mixing up a batter.
- 8 Q All right.
- 9 A We start with flour, eggs, milk, sugar, vitamins,
10 whatever they put into it.
- 11 Q And the bread in the --
- 12 A In the French toast, now, we slice the bread -- we
13 bought the bread, and we sliced the bread, and we
14 dunked it on a depositor. We dunked it in a
15 milk/egg/sugar solution before we cooked it.
- 16 Q All right. But the flour, eggs and milk, they were
17 actually mixed into the batter at the plant?
- 18 A Yes.
- 19 Q And when you say packaging was the other end, it
20 went out the plant packaged, was that the
21 packaging -- I understand it was maybe put into a
22 larger container, but the individual packaging that
23 the consumer might be expected to find in their
24 grocery store?
- 25 A Yes, sir.

- 1 Q Thank you. With the pizza, what kind of raw
2 ingredients were?
- 3 A Basically the same. We started out with flour. We
4 made the crust. We cooked the crust there. We
5 bought the tomato paste, but we mixed it and put our
6 spices and stuff in it for a certain taste, and we
7 topped it with different vegetables, meats,
8 pepperoni, cheeses --
- 9 Q Okay.
- 10 A -- froze it, wrapped it, boxed it, shipped it.
- 11 Q Okay. Thank you. And finally, the Mrs. Paul's?
- 12 A We bought the fish in blocks, sliced it, dipped it,
13 fried it, froze it, packaged it, boxed it, shipped
14 it.
- 15 Q Okay. From the start of the line, production line,
16 as you've talked about it, to the end, were there
17 lubricants used throughout those processes?
- 18 A Yes.
- 19 Q In those processes in the production line, were
20 there any restrictions on the types of lubricants
21 you used on that production line when it was up and
22 running?
- 23 A On the process there, which I'm calling raw
24 ingredients where you're mixing it, batter, putting
25 it on an oven or putting it on a topping conveyor,

1 freezing it, till it got in the cart itself,
2 everything had to be H1 or H3.

3 Q Okay. Now, H1 we've heard a lot about. I'm not
4 going to ask you much about that. But just briefly,
5 what was your understanding of H1?

6 A It was incidental contact, was what my
7 understanding, and, you know, when I got in the job
8 as coordinator, I did some self-study because I
9 wanted to understand what I was dealing with, what I
10 was accountable for. I like to know what's going
11 on.

12 Q And you mentioned H3. What was your understanding
13 of H3?

14 A That's full contact, what I understood.

15 Q All right.

16 A We used it for the pump assemblies.

17 Q I'm sorry? Pump assemblies?

18 A Pump assemblies, yes.

19 Q All right. And I want to go back now and ask you a
20 little bit more about the incidental contact
21 incidents that you testified about earlier. As
22 maintenance coordinator, how would you become aware
23 that there had been an incidental food contact
24 incident?

25 A If a -- I worked day shift.

- 1 Q Yes.
- 2 A If I was there in the plant, they would come up to
3 get me and say, Hey, you know, we got a problem out
4 here. We need some help.
- 5 Q Okay. Are there different ways that the problems
6 might have been found?
- 7 A Yes. Like the problem we found on the toast line,
8 at that time we had a bearing lock up. It was a
9 production run. We'd run about an hour and a half
10 from startup, and it went down. Of course, if I was
11 there handy, they'd say, Hey, get me the bearing
12 quick. We're taking it off. And I went out there
13 on the line, and that's where we discovered -- we
14 was trying to figure out why would it start up clean
15 and two to three hours into the process, we'd have a
16 bacteria hold, and Dennis and I approached -- which
17 was QA supervisor --
- 18 Q Okay. Slow down just a tad.
- 19 A Okay. Dennis and I was the QA supervisor, and he
20 worked nights, and he had come to me, he said, Help
21 me out here. He said, I got a problem. He said,
22 We're cranking up clean. We're starting production.
23 Starting production --
- 24 Q That's what you talked about, keep going --
- 25 A Run the product.

1 Q -- third shift --

2 A We're running product.

3 Q Okay.

4 A Starting up day shift. And he said, I'm getting two
5 to three hours into the line, and I'm getting
6 product hold. He said, It's not always on all four
7 lines. It might just be on one. He said, Help me
8 out here. What are you all doing in maintenance?

9 So I come in early a few times and observed
10 what the mechanics was doing on the depositors, on
11 the ovens, on the conveyors. That particular
12 morning we had a bearing lockup, because the lead
13 mechanic had actually took the crew that I had used
14 to have. We worked real well together. He called
15 me on the radio and he said, Larry, get me a
16 bearing. I got a toast conveyor down, you know. We
17 was really trying to run some good numbers in, you
18 know, everything was --

19 Q Production numbers?

20 A Production numbers because it had been tight. We
21 was trying to work as a team to really get the
22 numbers up. So I run out and looked at the line.
23 We broke the conveyor, and I was looking at it
24 trying to get the number, and I laid my hand on the
25 conveyor, and I felt a greasy -- greasy like

1 surface. Well, Dennis was there, and I had come in
2 early in the morning. So I called Dennis up,
3 Dennis, come out here. I may have found your
4 problem. He come out and swabbed the line. We was
5 using a food-grade grease at the time that's
6 supposed to encapsulate bacteria.

7 Q Okay. The greasy feeling then you felt on the
8 conveyor belt was what, caused by what?

9 A I think it was caused when they washed the grease
10 out of the bearings and it just smeared on the pan
11 and it just left a film on it.

12 Q Okay.

13 A And even after they sanitized it, it didn't remove
14 it.

15 Q Okay. So this was what kind of lubricant, H1, H3?

16 A It was H1.

17 Q Okay.

18 A Yeah, we had -- from the time I started there, we
19 used H1 in the process there.

20 Q Okay. And so you discovered that there was this
21 incidental contact going on between the lubricant
22 and the food?

23 A Dennis come out and swabbed the line and went and
24 done the -- he called. He went and done some
25 slides, cultures or something. He come back and he

1 said, We got to do something. He said, I think we
2 found something, you know.

3 Q What did you do?

4 A Well, we -- I brought a contractor in immediately
5 from J&J Couples, which is next door, a contractor.
6 And we put a pneumatic takeup and added about 3 feet
7 to the belt so we could release the tension on the
8 belt and raise the belt up and make sure and wipe it
9 where the shafts was on the conveyors, make sure we
10 cleaned that, you know, better than the procedure we
11 had been doing.

12 Q Was there anything else you did?

13 A Well, at the time Dennis and I was testing JAX
14 products. We was using it on the depositor.

15 Q On the depositor?

16 A Yes. We was testing HALO-Guard. We had got
17 MSDS-approved, and I had Jeff Milam bring in some
18 grease, and we was -- what we was doing --

19 Q Let me interrupt you a moment. Jeff Milam's not
20 somebody we're familiar with. Who is he?

21 A He was a JAX -- he was working for a JAX distributor
22 in Tennessee at the time. And he brought in the
23 HALO-Guard, and we actually took new bearings and
24 put them on the depositor because we was getting
25 bacteria counts from the overflow of grease on the

- 1 depositor. Dennis had found it, and he asked me
2 could we solve it? And I said, Well, I'm looking at
3 this lubricant that's supposed to terminate, you
4 know, solve this problem on bacteria, so --
- 5 Q All right. Let me stop you there. Now, you didn't
6 do any of the testing?
- 7 A No, sir. Dennis did, QA department did.
- 8 Q All right. And you didn't do any of the swabbing
9 itself?
- 10 A No.
- 11 Q So what you know about the bacteria count is simply
12 based on what Dennis told you?
- 13 A Yes. He was the qualified personnel who did it.
- 14 Q Okay. Following that incident where you discovered
15 the contact, did the Quaker Oats plant change its
16 lubricant?
- 17 A Yes. We went to the JAX product in AJ to start
18 with. That's where I was at right then working on
19 the problem.
- 20 Q AJ again --
- 21 A Aunt Jemima, waffles, pancakes, French toast.
- 22 Q Thank you. Were there other ways in which you might
23 learn about incidental contact between lubricants
24 and foods?
- 25 A Well, if I was going to put my position on the line

1 for a new product, I wanted to make sure it worked.
2 So that's where me and Dennis partnered up, and we
3 was going to make sure we had a good quality
4 lubricant, because I had heard, you know, bad things
5 about food-grade lubricants. We used --

6 Q I think you misunderstood my question.

7 A I'm sorry.

8 Q In this particular case that you just described,
9 Dennis had alerted you to be on the lookout for a
10 potential problem, and potentially the bearing
11 turned out to be the problem. Were there other
12 types of incidents or occasions that alerted you to
13 hey, we may have a problem?

14 A Well, we had a -- we had a consumer complaint on
15 waffles over taste --

16 Q Okay.

17 A -- and was trying to figure it out. So they sent it
18 to what they call a corporate lab. I think at that
19 time it was in Barrington. And they come back and
20 it was an air line hole on the product.

21 Q Air line --

22 A Air line hole. What they was doing in the
23 application was we was using an air line. It was a
24 piece underneath the waffle grills to help release
25 the waffles from the griddle.

1 Q Okay.

2 A And we was using plant air, but we had a filtration
3 system on it, but some of the lubrication had got
4 onto the --

5 Q Onto the --

6 A -- product, on the waffles, and we had a consumer
7 complaint over taste.

8 Q So in this instance, the lubricant actually made it
9 out of the plant and into the consumer's hands?

10 A That's what Dennis told me.

11 Q Were there other types of incidents that -- or
12 occasions wherein someone would make you -- put you
13 on alert that we have an incidental contact?

14 A Well, I mean, I seen it a few times, you know. You
15 get people spraying all that stuff. I guess one of
16 the -- one of the major things that I always had a
17 problem with was exhaust air because -- I mean, it's
18 not like hydraulics. You don't reuse air. You use
19 it; you exhaust it in the atmosphere. And we was
20 having some problem with an oil mist, you know.
21 Actually, it would get on the machines, and dust
22 would show up, and -- it was the cleaning aspect is
23 what brought it to our attention, but we done some
24 different things to try to eliminate that factor.

25 Q Within the Quaker Oats plant in Jackson, Tennessee,

1 were you -- did you write up any kinds of standard
2 operating procedures?

3 A I wrote the lubrication on the machine, the PM,
4 wrote the PM -- rewrote the PM from a previous
5 software system we had. We was in Chant. When we
6 went to MP2, which is Datastream. They sent me to
7 Greenfield, South Carolina, took a class on it, and
8 I come back and implemented the program, the
9 preventive maintenance program.

10 Q All right. Thank you. Just a few more questions,
11 Mr. Cooper.

12 Your current business -- I'm looking for the
13 name. What's the name of your business?

14 A Tri City Supply.

15 Q Do you market or distribute any lubricants?

16 A Food-grade lubricant -- I'm a distributor in
17 Arkansas for JAX products. That's the only
18 lubricants that I sell.

19 Q Is that the sole source of revenue for your current
20 business?

21 A No.

22 Q Okay. And for how long have you been a JAX
23 distributor?

24 A 13 months.

25 Q All right. How did it come about that you became

1 a -- strike that.

2 Am I correct that when you started your
3 business, you didn't start it and immediately become
4 a JAX distributor?

5 A We was doing -- we was selling shop grades, truck
6 wash sales, doing industrial repairs, electrical,
7 mechanical. I was doing some consulting because I
8 had a lot of background in hydraulics and --

9 Q Okay. How was it that you -- how did it come about
10 then that you became a JAX distributor?

11 A I had a buddy that took a maintenance manager's job
12 in Arkansas. He called me. We went over, started
13 doing business with them. He had a mess. He told
14 me, he said, Can you get JAX product?

15 Q What kind of business did he have a mess in?

16 A It's a fresh chicken products.

17 Q Okay.

18 A Fresh meats.

19 Q Okay. And what -- now, before you ever talked about
20 JAX, you said he had a mess. How you would describe
21 the mess?

22 A He had bacteria problems. He was constantly having
23 to deal with QA. He was QC or quality control. He
24 brought us in to talk to him after I had spoke with
25 Harry about getting a distributorship.

- 1 Q All right. And the processing of the chickens, I
2 guess it was?
- 3 A Live chickens. It's live chickens to fresh meat.
- 4 Q To fresh meat. There's lubricants used in the
5 process?
- 6 A Yes.
- 7 Q And when you looked at the problem, what did you
8 discover?
- 9 A They was using DW-40 out on the processing line. If
10 you know what DW-40 is --
- 11 Q I think we all do.
- 12 A -- that's a --
- 13 Q In what application?
- 14 A They was spraying their chains right on their
15 processing line.
- 16 Q Okay. Now, tell the Court where these chains are
17 located.
- 18 A That's where the chicken meat's traveling down the
19 plant for packaging.
- 20 Q Above or below the chicken?
- 21 A It's level with it.
- 22 Q All right. So the DW-40, that's not H1?
- 23 A That's the first thing I noticed. I said, You need
24 to do something here. This is dangerous.
- 25 Q All right. I won't ask you where these chickens

1 are.

2 A I can't disclose that. I signed I wouldn't.

3 Q All right. In any event, you got in touch with
4 somebody from JAX?

5 A Yes, I called Carter Anderson.

6 Q All right.

7 A And talked to him and told him what I wanted to do.
8 I said, I've got a plant that I can implement. I
9 said, I've got them sold on going straight H1 across
10 the plant, but I need to be a distributor for JAX
11 product. And he said, Well, you need to talk to
12 Harry.

13 Q All right.

14 A So --

15 Q So that was -- that was the genesis of you becoming
16 a distributor of JAX?

17 A Yes, sir.

18 Q All right. And that was approximately a few months
19 ago?

20 A 13 months.

21 Q 13 months ago.

22 MR. McILNAY: I have nothing further on
23 direct, Your Honor.

24 JUDGE GUNNING: Counsel, do you need a few
25 minutes or are you ready to proceed?

1 MR. OLSON: If we could have five minutes.

2 JUDGE GUNNING: Okay.

3 MR. OLSON: I think we'll be done before
4 lunch.

5 JUDGE GUNNING: Excellent. That will be
6 perfect timing.

7 (Short break taken.)

8 JUDGE GUNNING: And I remind the witness
9 that you are still under oath.

10 THE WITNESS: Yes, sir, Your Honor.

11 JUDGE GUNNING: Okay.

12 CROSS-EXAMINATION

13 BY MR. OLSON:

14 Q Good afternoon, Mr. Cooper, by a few minutes anyway.

15 A Yes.

16 Q I don't have too many questions for you. I just
17 want to let you know at the beginning that I grew up
18 in southern Colorado, which a lot of people called
19 north Texas when I was there, and I used to have an
20 accent that didn't sound exactly like yours, but it
21 was close. I've been in the Midwest for a long
22 time, but if I slip back into this today like
23 sometimes I do when I go home, I don't mean anything
24 by it. It's just -- it's 15 years ago that's what I
25 was used to.

1 A That's fine.

2 Q And when I nervous, that's even worse.

3 I think you'll agree if you talk to some of the
4 other witnesses for Respondent, Eric or Troy, that
5 you sort of won the lawyer lottery today? I'll be
6 very nice.

7 A Lottery? You said lottery?

8 Q You just didn't get cross-examined by Nidhi.

9 Just quickly to begin with, is Quaker Oats a
10 part of Pinnacle Foods?

11 A It is now.

12 Q Okay.

13 A Yeah, it was Quaker Oats, but everybody refers to it
14 as Quaker Oats brand. It went through four
15 different names while I was there. I think it's
16 changed again now.

17 Q Okay.

18 A I think Blackstone bought it out since I left.

19 Q Okay. Now, you testified that when grease got on a
20 product, it was a problem --

21 A Yes.

22 Q -- is that correct?

23 A (Witness nods head.)

24 Q And as a maintenance coordinator, you had to find
25 out whose fault it was; is that correct?

- 1 A That is correct.
- 2 Q And that was because you didn't want to get any of
3 the grease on the food?
- 4 A That's correct.
- 5 Q Okay. Forgive me if some of these questions silly.
6 It is what it is, but --
- 7 You didn't keep the food that got grease on it,
8 did you?
- 9 A Oh, no.
- 10 Q It didn't go into production?
- 11 A No. We tried -- you know, if you caught it, you
12 eliminate it. I mean, we got some back on consumer
13 complaints --
- 14 Q Sure.
- 15 A -- like the grease on the waffles, you know. And
16 the thing with that was it took us ten, eleven days
17 before we found out the problem. We had a cracked
18 grease line going to the bearing. We was pumping
19 grease right straight on top of the product.
- 20 Q But when you found product on the food, you did your
21 best to make sure that food didn't go out of the
22 plant?
- 23 A Only high quality product as you can. That was our
24 goal. I mean, I wouldn't want my family to eat it.
- 25 Q And you conducted a fair bit of training as the

- 1 maintenance coordinator?
- 2 A Yes.
- 3 Q And that training -- or at least one of the purposes
- 4 of that training was to teach people how to keep the
- 5 lubricant off the food, right?
- 6 A How to maintain and lubricate the equipment to
- 7 prevent the lubricant from getting on it.
- 8 Q That's much better. Okay.
- 9 A That's the way it was wrote on my job title.
- 10 Q Okay.
- 11 A Close. It might not be perfect, but it's close.
- 12 Q Now, you talked about the fact that Quaker Oats made
- 13 pancakes, I believe, at the facility, correct?
- 14 A Pancakes, waffles, French toast.
- 15 Q And some pizza?
- 16 A Mama Celeste Pizza, Mrs. Fall's Fish.
- 17 Q And were the foods -- you mentioned that they were
- 18 packaged for sale to the customer when they left
- 19 your facility?
- 20 A In a case.
- 21 Q In a case?
- 22 A That's right.
- 23 Q And as they were packaged, they had labeling on
- 24 them; is that correct?
- 25 A On the cartons.

1 Q The individual units to be sold to the customers?

2 A Yes. I mean, if it was waffles, it had Aunt Jemima
3 Waffles, and we run on several different flavors of
4 waffles, buttermilk, original, cinnamon, blueberry.

5 Q And the labels that were on the boxes, they
6 identified ingredients in the products?

7 A If you look below the bottom part, it would have the
8 ingredients wrote in the product.

9 Q Okay. Did the boxes have nutritional information on
10 them?

11 A It seemed like it did. I mean, I -- that wasn't
12 something I paid a whole lot of attention to.

13 Q Sure. And again, forgive me if some of these
14 questions might seem kind of silly.

15 But Pinnacle never listed -- or Quaker Oats
16 never listed grease as an ingredient on any of those
17 labels, correct?

18 A I wouldn't think so because their plan was incident.

19 Q Okay. And the nutritional information didn't have
20 anything about grease on there, how many calories
21 are in grease?

22 A I think it did have the calories on it. Seemed like
23 I remember it had the calories, fat content.

24 Q Not the calories from the grease, though, correct?

25 A Well, the cooking oils they used, you know, that

1 they incorporated into the batter, I'm sure that was
2 in there.

3 Q But not the calories from lubricating greases that
4 you used in the plant, the H1 products?

5 A Well, we tried not to get that in. I mean, that was
6 the plan.

7 Q Right. And you added Behnke's products after you
8 switched two bearings, correct?

9 A We added it across the plant. We implemented it
10 across the plant. We used all the grease.

11 Q You used -- you mentioned HALO-Guard, correct?

12 A HALO-Guard is a grease, bearing grease.

13 Q And what oil did you use?

14 A We used an agency's oil, Magna-Plate 86, in our
15 freezer, which is a low temperature gear box oil.
16 We also used it on the lubricators on the chains,
17 the drive chains in the freezer. We used a
18 Magna-Plate 85-W-40 in the reducers on all the
19 drives.

20 Q And those are all H1 food-grade --

21 A Yes, sir.

22 Q -- lubricants?

23 A We used air line oil, the 74 oil in air lines,
24 especially after we had that, you know, consumer
25 complaint. We had a major hole because of that.

1 They lost several thousand cases, and we did a lot
2 of work. It was a high priority of mine for several
3 weeks.

4 Q So it was really, really important that you keep the
5 grease off the food?

6 A That was the plan. The ideal situation is the plan
7 not to do it, you know. If you do get some on it,
8 you want the best protection you can get, and that's
9 why we went to the particular product.

10 Q And the items that you just listed that you put the
11 lubricants on, were all equipment, correct?

12 A Yes.

13 Q The bearings are metal equipment, correct?

14 A Motion support, load support.

15 Q But they're equipment?

16 A Yes.

17 Q They're not food?

18 A They're not food, no.

19 Q Okay. And the air lines are equipment, not food?

20 A That's correct.

21 Q And the chains are equipment and not food?

22 A That's correct.

23 Q I just have a couple of questions more for you, and
24 then we can hopefully go to lunch.

25 We talked briefly about the food in the plant

1 that got grease on it. That contaminated product,
2 once contaminated, was no longer considered food,
3 right?

4 A If we caught it.

5 Q If you caught it.

6 MR. OLSON: Your Honor, I have no further
7 questions.

8 JUDGE GUNNING: Anything further on
9 redirect?

10 MR. McILNAY: Just a little bit of
11 redirect. They're having chicken in the cafeteria
12 today.

13 REDIRECT EXAMINATION

14 BY MR. McILNAY:

15 Q Mr. Cooper, you talked about the waffle incident and
16 how long it took you to discover the problem that
17 led to the consumer complaint, and I think you said
18 ten days or something?

19 A Yes, from when Dennis brought it to my attention,
20 which was a consumer complaint, till we actually
21 found where -- we found the solution to the problem,
22 we felt like we had a cracked grease line, that when
23 it would get the right pressures on it, it would
24 actually dunk a gob of grease directly on the
25 product.

1 Q And from the time that you received the consumer
2 complaint until that was fixed, was that processing
3 line shut down?

4 A No.

5 MR. OLSON: Objection, Your Honor. This
6 is beyond the scope of cross.

7 JUDGE GUNNING: I'll allow it.

8 BY MR. McILNAY:

9 Q Your answer was?

10 A Can you ask that question again, please?

11 Q From the time that you received the consumer
12 complaint until you found the problem, was that line
13 shut down?

14 A No.

15 Q So it stayed in production?

16 A Yes, sir.

17 MR. McILNAY: Thank you.

18 MR. OLSON: No further questions,
19 Your Honor.

20 JUDGE GUNNING: Okay. Is this witness
21 excused?

22 MR. McILNAY: This witness is excused,
23 Your Honor.

24 JUDGE GUNNING: Thank you very much for
25 your testimony today.

1 THE WITNESS: Thank you, Your Honor.

2 (Witness excused.)

3 MR. McILNAY: Your Honor, I will notify
4 the Court officially we talked with opposing counsel
5 present, obviously, informally. We have one other
6 witness as part of the Respondent's case in chief,
7 so -- and he is available, but given the time -- and
8 his testimony, I would anticipate, to be about as
9 lengthy -- maybe a little bit lengthier than
10 Mr. Cooper's, so this would be a good time to break.

11 MS. O'MEARA: I don't have any objection
12 with that. I just want to figure out some
13 logistics, if we may. Are we limited to 5 o'clock
14 in the courtroom today?

15 JUDGE GUNNING: I believe we are.

16 MS. O'MEARA: Okay.

17 JUDGE GUNNING: And then my assumption is
18 after this witness, that is the conclusion?

19 MR. McILNAY: Of the Respondent's case in
20 chief --

21 JUDGE GUNNING: Yes.

22 MR. McILNAY: -- yes.

23 JUDGE GUNNING: And then EPA anticipates
24 rebuttal?

25 MS. O'MEARA: I don't anticipate a

1 rebuttal unless something happens in the next two
2 hours.

3 JUDGE GUNNING: Oh. So there is a
4 possibility that we can conclude today?

5 MS. O'MEARA: Yes.

6 JUDGE GUNNING: Okay. That would be
7 excellent. We're here, though. If we need the
8 time, we can go until tomorrow.

9 MR. McILNAY: Thank you.

10 JUDGE GUNNING: Okay? Thank you.

11 (Whereupon, a lunch break was taken at
12 12:17 p.m. to 1:11 p.m.)

13 JUDGE GUNNING: Mr. McIlnay, would you
14 call your next witness, please?

15 MR. McILNAY: Thank you, Your Honor. May
16 it please the Court, Respondent calls Carter
17 Anderson.

18 CARTER L. ANDERSON, called as a witness
19 herein by the Respondent, after having first been
20 duly sworn, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. McILNAY:

23 Q Thank you, Mr. Anderson. It never fails, second to
24 the last witness. I figured out it seems to work
25 better if you could hold the mic and not use the

- 1 stand for it.
- 2 A Okay.
- 3 Q Okay. Could you state your full name for the
4 record?
- 5 A Yes. Carter L. Anderson.
- 6 Q And is Anderson O-N or E-N?
- 7 A O-N.
- 8 Q Thank you. Where do you reside, Mr. Anderson?
- 9 A Oklahoma City, Oklahoma.
- 10 Q And what's the highest level of formal education
11 that you've completed?
- 12 A High school.
- 13 Q Very briefly, your vocational history since high
14 school, have you been constantly employed since high
15 school?
- 16 A Yes.
- 17 Q All right. What did you start out doing?
- 18 A Started out in my family's industrial safety supply
19 business at a very early age, and actually, in the
20 last couple years of high school, got my academic
21 requirements and was able to take a coeducational
22 education, half a day of school, half a day of work,
23 for the last couple of years and worked in that
24 after I graduated until 1981.
- 25 Q All right. And in 1981 you changed jobs?

- 1 A Yes. I joined a management team. One of my
2 suppliers at the time asked me to join a management
3 team on a company very similar to my parents' that
4 was much larger in Colorado, and I was to lead the
5 sales marketing efforts with them.
- 6 Q Okay. And how long did you remain in that position?
- 7 A Till 1984.
- 8 Q And in 1984 did you get a different job?
- 9 A Yes.
- 10 Q And where did you go to work?
- 11 A I went to work for Behnke Lubricants, Eric Peter.
- 12 Q Prior to 1984 had you had any occasion to do
13 business with Behnke Lubricants?
- 14 A Yes.
- 15 Q In what capacity?
- 16 A One of the product lines that the particular company
17 I worked for in Colorado distributed and represented
18 JAX and a few plants in and around the immediate
19 Colorado area.
- 20 Q Okay. And we've become very accustomed during the
21 course of this hearing to using JAX and Behnke
22 interchangeably. When you use JAX throughout your
23 testimony today, you're referring to
24 Behnke Lubricants?
- 25 A Yes.

1 Q Mr. Anderson, when you were initially hired by
2 Behnke Lubricants, what was your position?

3 A When I first started with Eric -- and he was general
4 manager at the time of his father's business -- and
5 throughout the many opportunities to interact, he
6 came out and worked with me and so forth, said, You
7 know, I really got a neat business that I'm running,
8 and part of that business includes this food
9 processing industry, and I think it's got tremendous
10 opportunity for growth and development in future
11 years. And I had been doing some work and actually
12 had taken the product line from Colorado and
13 expanded it down into Texas and --

14 Q Let me interrupt you for a minute. The product
15 line?

16 A The JAX product line --

17 Q Okay.

18 A -- that we had -- already had at my previous
19 employment and found an infinity to -- to the type
20 of work it was. It was a little different than the
21 sales I was used to, and it gave me the opportunity
22 to expand my horizons in much more technical sales,
23 so I enjoyed it. So I saw the opportunity with many
24 people. When we sat down and visited, he said, you
25 know, Geez, I'd like to really focus on this food

- 1 processing industry. Would you be interested in
2 joining us? And I said, Sure. And we sat down and
3 really evaluated a lot of what they were doing.
- 4 Q Let me interrupt you a minute. My question was what
5 was your position when you started?
- 6 A My original position was salesman.
- 7 Q Okay. And I take it from your testimony that as a
8 salesman in 1984, you were focusing on the food
9 processing industry as a marketplace?
- 10 A Yes.
- 11 Q Okay. And in 1984 you -- after being hired at
12 Behnke as a salesman, can you tell the Court what
13 the marketplace was for food-grade lubricants in
14 general?
- 15 A Yes. Primarily we were heavily involved in the meat
16 processing, meatpacking industry along with
17 vegetable canning in our core area market, which was
18 a four-state regional area in and around the
19 Minnesota, Wisconsin, Illinois, Michigan area.
- 20 Q Okay. And that was in your experience specifically
21 with Behnke Lubricants; is that correct?
- 22 A Yes.
- 23 Q All right. Do you have a -- based on -- let me
24 withdraw that question.
- 25 Are you still employed with Behnke Lubricants?

1 A Yes.

2 Q And have you been continuously employed with
3 Behnke Lubricants since 1984?

4 A With the exception of a 14-month sabbatical I took
5 in 1999 through early 2000 when I went to work for a
6 major national oil company, Chevron.

7 Q Okay. When you were with Chevron for that brief
8 period of time, what was your position?

9 A I was business manager for all lubricants in the
10 state of Kansas and Oklahoma.

11 Q Since joining Behnke in -- strike that. Let me
12 withdraw it.

13 Do you currently have a title with
14 Behnke Lubricants?

15 A Yes.

16 Q What is your title?

17 A Vice-president.

18 Q And what are your job duties and responsibilities as
19 vice-president?

20 A I oversee and help with the sales marketing,
21 distribution, OEM equipment relationships and
22 multinational accounts.

23 Q For a particular product line or all products?

24 A 90 percent of my time is spent in the food
25 processing industry.

- 1 Q And you have sales and marketing people that report
2 to you?
- 3 A Yes.
- 4 Q Do you have -- strike that.
5 To whom do you report?
- 6 A I report to Eric Peter at the present.
- 7 Q Is Behnke's marketing arm divided into regions at
8 all?
- 9 A Yes.
- 10 Q Are there other marketing managers besides yourself?
- 11 A Yes. We have three regional managers.
- 12 Q And those three regional managers, one of them is
13 you?
- 14 A No. I oversee the three regional managers.
- 15 Q So the three regional managers, they report to you?
- 16 A Yes.
- 17 Q All right. And these direct reports, they're
18 actually employees of Behnke Lubricants?
- 19 A Yes.
- 20 Q And so those people, they call directly on end-users
21 of the Behnke Lubricants products?
- 22 A Yes.
- 23 Q Are they focused as well on the food processing
24 market?
- 25 A Majority of the time.

- 1 Q And the regional managers, do they have direct
2 employee salespeople underneath them that report to
3 them?
- 4 A Yes.
- 5 Q All right. And those sales employed people, they
6 also call directly on end-users of the
7 Behnke Lubricants products?
- 8 A Yes.
- 9 Q Are there other marketing channels that you at
10 Behnke Lubricants use to market and sell your
11 product?
- 12 A Yes. We have a few manufacturer representatives
13 that primarily focus on specific industries that
14 most of the time have some relation to the food
15 processing industry such as a container
16 manufacturer.
- 17 Q All right. With the manufacturer's representatives,
18 are they exclusive to Behnke Lubricants?
- 19 A No.
- 20 Q So they market other products as well?
- 21 A Correct.
- 22 Q I take it, however, they don't market competitive
23 products?
- 24 A Correct.
- 25 Q Other than the manufacturer's representatives and

1 the direct salespeople, do you have other marketing
2 channels at Behnke Lubricants?

3 A Not that I can think of.

4 Q All right. How would you classify private-label
5 customers?

6 A That generally falls under original equipment
7 manufacturers or people that we do specific products
8 with, so -- and they are usually handled by our
9 sales force and so forth.

10 Q So they're actually customers as opposed to
11 distributors?

12 A Correct.

13 Q And the word distributor has been used a number of
14 times during the hearing. Can you explain to the
15 Court as used within Behnke what you mean by a
16 distributor?

17 A A distributor would be a vehicle to get our products
18 into plants in geographical or specific areas around
19 where we cannot service them.

20 Q All right. Is a manufacturer's rep an example of a
21 distributor or is there a distinction?

22 A Manufacturer's rep generally will not have product
23 in inventory on a close basis. They generally --
24 it's something that they're just accommodating to
25 sell the product to the consumer.

1 Q Okay. And let's take a little time to talk about
2 the marketplace in that way. You talked -- you
3 mentioned during your testimony OEMs. What are
4 OEMs?

5 A Original equipment manufacturers.

6 Q All right. And there was testimony early in the
7 case about an FMC -- I'm sorry. I may have the name
8 wrong.

9 MS. O'MEARA: You have it right.

10 BY MR. McILNAY:

11 Q Okay. Are you familiar with FMC?

12 A Yes.

13 Q Is that an original equipment manufacturer?

14 A Yes.

15 Q All right. And what does FMC manufacture?

16 A Food processing machinery.

17 Q All right. And is FMC a customer of
18 Behnke Lubricants?

19 A Yes.

20 Q All right. FMC is not a food processor?

21 A No.

22 Q Why would FMC purchase your lubricants?

23 A They have an opportunity to sell major issues with
24 their equipment that -- they have aftermarket parts
25 and so forth, but the biggest single reason that

1 most original equipment manufacturers use our
2 product, it helps them validate and keep their
3 equipment running efficiently and effectively
4 because it's truly made for the application.

5 Q So let me make sure I understand this. The
6 equipment manufacturer hopefully is selling its
7 equipment to a food processor?

8 A Correct.

9 Q And so the actual use of the lubricant is not in
10 manufacturing their equipment but in servicing their
11 equipment in food processing?

12 A Correct.

13 Q All right. Since you joined Behnke in 1984, have
14 you seen changes in the food processing marketplace,
15 specifically for a lubricant?

16 A Yes.

17 Q And can you in a very succinct fashion kind of
18 describe the major changes you've observed over the
19 last 24 years?

20 A With the heightened awareness of food safety being
21 paramount and people no longer take chances and
22 risks that they used to take and as the industry has
23 propelled in several different directions that used
24 to really be focused on like meat and vegetable
25 canning and things of that nature, but people are

1 very, very concerned with food safety being uno
2 numero so that they protect the integrity of the
3 brand of their products.

4 So people that might have used food grade and
5 nonfood grade in two different areas, one above
6 line, one below line, today, don't want to take any
7 chance of that happening. So consequently, they get
8 their plants 100 percent H1 to eliminate expensive
9 down call -- downtime and recalls that can be
10 associated with getting lubricant.

11 Q If I could interpret a little bit, H1, first of all,
12 it means what?

13 A Incidental contact.

14 Q And is that food-grade lubricant?

15 A Yes.

16 Q And you said in the past, some of these people were
17 using nonfood-grade lubricants in certain
18 applications?

19 A Correct.

20 Q And that's no longer the case?

21 A Most major food processing customers, large food
22 processing entities with major brand names are
23 90 percent food grade and 10 percent nonfood grade
24 or H2 products, and in the early '80s, it might have
25 been exactly opposite of that.

1 Q Okay. Is it a fair statement that the market has
2 grown with H1 in that 24-year period?

3 A Yes.

4 Q Now, you are currently in a management position, as
5 you described. You have three people that report to
6 you. Do you still have today and within the last
7 five to ten years direct sales responsibilities
8 where you're interacting directly with your
9 customers?

10 A Yes.

11 Q And is that something that you do on a weekly basis,
12 a monthly basis, a daily basis?

13 A Daily basis.

14 Q All right. I want to try to focus your attention
15 on -- because we have had changes in the
16 marketplace, so let's use the last five to eight
17 years and focus your attention on that, and I want
18 to focus on for purposes of this question the direct
19 sales as opposed to through a distributor or a
20 manufacturer's rep.

21 Is there a typical sales cycle that you see
22 when you have a new customer?

23 A Yes.

24 Q And can you sort of generalize how that typical
25 sales cycle might work with a new customer?

1 A Generally with a new customer, we've been called for
2 a specific issue or a problem they may be having
3 with a piece of machinery or contamination with
4 their products, and we get all the details we can on
5 the original call, what are you lubricating, how are
6 you lubricating, what are you doing with it, is it
7 NSF H1, is it H2, what are the temperatures, what
8 are the speeds, what are the loads, what are the
9 factors involved in it? Most times those issues
10 cannot be resolved on the telephone call, and they
11 ask for a plant visit, at which time we generally go
12 straight into the plant.

13 Q Let me stop you there for just a second. I know
14 you're using the royal we. Do you actually do this
15 yourself?

16 A Yes.

17 Q Okay. I'm sorry. I interrupted you. Would you
18 continue then -- so you're up to the point where you
19 make an initial plant visit?

20 A Correct.

21 Q All right.

22 A On that plant visit, we will actually go in and sign
23 a waiver that says that we will gown up, drop all
24 jewelry, do everything as the safety rules and
25 precautions do. We will go out with them onto the

1 floor, and at that time we will visually inspect the
2 areas and try to help them decipher what is wrong
3 and what needs to be done to correct the issue and
4 problem.

5 Q Okay. And these problems can run the gamut from
6 excessive wear to you used the word contamination,
7 correct?

8 A Correct.

9 Q What did mean when you used that word?

10 A Many types lubricants come in contact with the food
11 product. Everybody does everything they can to
12 prevent that from happening, but with the nature of
13 the rotating, sliding products that come in very,
14 very close contact, hydraulic systems, you have hose
15 spray, you have leaks, you have fittings, many, many
16 things can happen. Mechanical seals can wear on the
17 inside pieces of machinery that leakage can go on
18 for days before it's discovered.

19 Q So just to -- by contamination, you're talking about
20 contact between food product and lubricant?

21 A Correct.

22 Q All right. Are there -- I mentioned excessive wear
23 and tear, contaminations. Are there other kinds of
24 issues that you routinely encounter that cause
25 potential customers to call you in?

1 A Yes. Generally speaking, we have many, many times
2 when people are having severe component failure of
3 products, and they know that they have an
4 alternative or an answer in calling us because they
5 have a sister operation or whatever that might have
6 had a similar problem, and they'll say, you know,
7 Give these guys a call. They helped us out with a
8 specific problem. But we have a lot of just pure
9 mechanical wear and tear on machinery where it's not
10 making its intended expected line beyond
11 contamination issues.

12 Q Okay. You use the terminology sister operation.
13 What did you mean by that?

14 A We have many, many plants nationwide that we start
15 out with one plant or two plants and go in and solve
16 a specific problem, and the next thing you know,
17 we're working with all operations maybe in
18 North America. It could be, you know, ten plant
19 operations, 20 plant operations, so --

20 Q Okay. And specifically when you're talking about a
21 sister operation, does that suggest that those
22 various plants are owned by the same conglomerate,
23 if you will, or --

24 A Correct.

25 Q All right. So they're under one umbrella, but not

1 all of the plants necessarily use all of the same
2 products in all of the plants?

3 A Correct.

4 Q Okay. So one means of entering the market is these
5 people are talking to each other between plants,
6 say, We've got a solution here, and you're called
7 out to help elsewhere?

8 A Correct.

9 Q All right. And we kind of got you out on the plant
10 floor looking at the problems, potentially offering
11 solutions. What happens generally next in the sales
12 segment?

13 A Generally we go through and we will make a
14 recommendation, put a product in on a trial basis.
15 We will help monitor the product, make sure it's
16 working, make sure it's doing what it was intended
17 to do. And there's times when we're there for a
18 day, we might be there for multiple days, and
19 there's been times where we've been there for weeks
20 helping them resolve the issue.

21 Q Now, when you refer to them, I understand you're
22 referring to your end-user customer. However, are
23 there a typical group of people that you work with;
24 I mean, are you out there generally with the
25 president of the company or who are you usually

1 dealing with?

2 A Generally we work with engineering, maintenance
3 superintendents, quality control, HACCP
4 coordinators, plant management and lubrication
5 personnel.

6 Q Okay. Since we're on it, HACCP is an acronym?

7 A Yes.

8 Q Do you know what the acronym stands for?

9 A Yes.

10 Q What is it?

11 A Hazardous analysis of a critical control point.

12 Q And you use the terminology HACCP coordinator?

13 A Correct.

14 Q And is that a title that you find common in the food
15 processing industry?

16 A Yes.

17 Q All right. And do you have a common understanding
18 of what the role of a HACCP coordinator is in the
19 food processing industry?

20 MR. CHA: Objection. Foundation. It's
21 also relevance, Your Honor.

22 MR. McILNAY: I'll just wait for your
23 rule. I think I've --

24 JUDGE GUNNING: Could you read back --

25 (Question read.)

1 JUDGE GUNNING: I'll allow the question.

2 THE WITNESS: Our interaction with the
3 HAACP coordinator, part of the duty is to actually
4 look at the critical control point where they can
5 have food contamination issues at the highest risk
6 and make a decision on whether it needs to be food
7 grade or nonfood grade, and basically there's a
8 sign-off on that that I have evaluated that
9 application, and yes, it does need to be food grade,
10 or no, it does not need to be food grade.

11 BY MR. McILNAY:

12 Q Very good. So you're out there on the plant floor.
13 We now know generally the kinds of people that
14 you're working with on the problems, and it might
15 take days, it might take weeks.

16 What happens next in the typical sales cycle
17 when you view customers?

18 A Generally when we solve the problem, we're there,
19 we're interacting, they ask about other things. If
20 we go in on one problem, they generally become
21 100 percent customer or a very large customer within
22 a six-month, year time frame. After we solve one
23 problem, they hand us another problem, and we just
24 continue to help them solve the issues and problems
25 as we go along.

1 Q Okay. Do you sometimes use the term partnering with
2 your customers?

3 A Yes.

4 Q What does that mean to you?

5 A When we partner, we put forward all of the assets we
6 can to go forward and help them do total evaluation,
7 what we call Lube Guard Total Lubrication Program.

8 Q And what does that entail?

9 A Lube Guard is a very comprehensive organization
10 consolidation of all the lubricants that are being
11 used completely throughout the plant. To do a Lube
12 Guard program, we start with a very extensive audit
13 of the machinery and equipment. We start that audit
14 where the raw materials come into the plant, where
15 the containers come into the plant, and we generally
16 walk that audit through each and every piece of
17 equipment from front to back, including the
18 powerhouse or the energy source and the wastewater
19 treatment facilities.

20 We get our arms around all the lubricants that
21 are in the plant. We make sure we document what
22 lubricants are going to what applications and why
23 they're there, whether they're ours or someone
24 else's lubricants. We try to organize it so that we
25 help eliminate the human error possibilities that

1 exist with cross-contamination.

2 Typically we see when we go into a medium to
3 large size plant 40 to 50 different lubricants being
4 used throughout the entire facility, and when we're
5 done with our analysis of the machinery and the
6 equipment and what the actual needs are, we help
7 them set intervals for not only what is the right
8 lubricant to use, but how often to do it and the
9 best method of getting that lubricant to the point
10 of lubrication so that we minimize opportunities and
11 risk for over-greasing, under-greasing.

12 We use the original equipment manufacturer's
13 recommendations to build the equipment as a
14 guideline to some degree on how often to do it and
15 what to do with it if we don't already know it
16 and --

17 Q Okay.

18 A -- have not worked with it in the past.

19 Q Okay. Would it -- so part of this is preventive
20 maintenance?

21 A Correct.

22 Q Some of it is to create greater efficiencies?

23 A It's to help them create greater efficiencies,
24 making sure that the lubricant is doing what it was
25 intended to do and they're not having downtime as a

1 result of inferior or improper lubrication and/or
2 product holds because we're getting lubricants on or
3 into products.

4 Q Okay.

5 A Also, I might add with that --

6 Q Well -- go ahead.

7 A Before we leave Lube Guard, we don't stop with just
8 the equipment and machinery aspect. When we take
9 this back, we develop wall charts that really help
10 them understand. We go back all the way to the
11 storage and the handling of the product from the
12 time it's new until the time it's applied, including
13 helping them not cross-contaminate the lubricants
14 with using nonfood-grade containers one day and then
15 using food-grade containers the next and immediately
16 putting them into application.

17 So we help make sure they're labeled properly
18 and effectively and we lay down all the
19 applications. Then we do training with the
20 personnel that's involved -- any personnel that
21 touches lubrication is generally involved in the
22 training process.

23 Q All right. So you've kind of taken us from a cold
24 call to complete audit of the plant, recommendations
25 and implementation, including this wall chart; is

1 that a fair statement?

2 A Yes.

3 Q On average, from initial contact to this end -- is
4 there an average time period, turn-around period?

5 A Typically six months to a year.

6 Q Since we talked about sister companies, that sales
7 cycle that you suggested there, is that
8 plant-specific, in your experience, versus
9 company-wide?

10 A I'm sorry. Would you repeat that?

11 Q Sure. What I'm trying to get at is the cycle that
12 you've described for the Court, and I want everybody
13 here to understand. Is that generally limited to a
14 specific plant, even though it might be part of a
15 larger organization that has several plants?

16 A Many times part of what I do as well is work with
17 corporate operations engineering at many of our
18 national customers that may have started out with
19 one plant, and they have an interest to make sure
20 that the equipment runs very efficiently, very
21 effectively with the most uptime as possible.

22 Q Okay.

23 A They want to make sure it's maintained correctly.
24 So when we work with the corporate operations group
25 and quality control and so forth, many times they

1 will move us to other plants where they need help.

2 Q All right. You testified that in this sales cycle
3 with a new customer, one of the things that might
4 get you in the door initially is a problem with
5 contact between the lubricants and the food, and
6 they're looking for a solution to that.

7 Do you have occasion with existing customers
8 where they might call you in with a similar problem?

9 A Yes.

10 Q And let's focus on the time period I've said.
11 Within the last five to eight years, does that
12 happen on a frequent, infrequent, how would you
13 describe the frequency in which you might get calls
14 about incidental food contact?

15 A I would say at least, myself personally, one to two
16 calls per month.

17 Q All right. And that could be from any customer?

18 A Correct.

19 Q All right. I want to ask you about some specific
20 incidences, just two, but many, if not all, of your
21 customers make you sign a confidentiality agreements
22 when you go inside plants to deal with these issues?

23 A Yes.

24 MR. McILNAY: I'd request that the next
25 little bit of testimony, to the extent it refers to

1 the specific customer names, be considered BCI --

2 MR. CHA: CBI.

3 JUDGE GUNNING: CBI.

4 MR. McILNAY: CBI, confidential business
5 information.

6 MS. O'MEARA: I don't have any objection.

7 JUDGE GUNNING: All right. So at that
8 time, we'll ask the court reporter to note this is
9 CBI. Thank you.

10 (Pages 885 through 891 were designated
11 Confidential Business Information.)

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1 MR. McILNAY: Okay. And that would
2 conclude the questions with respect to the
3 confidential business information, Your Honor.

4 JUDGE GUNNING: Okay.

5 MR. McILNAY: It would also conclude my
6 direct examination of Mr. Anderson.

7 MR. CHA: Your Honor, could I have five
8 minutes, please?

9 JUDGE GUNNING: Yes.

10 MR. CHA: Thank you.

11 (Short break taken.)

12 JUDGE GUNNING: I'll just remind the
13 witness that he's still under oath. Okay.

14 CROSS-EXAMINATION

15 BY MR. CHA:

16 Q This is going to be brief, Mr. Anderson.

17 JUDGE GUNNING: Mr. Cha, if I could just
18 remind you to keep up your voice a little.

19 MR. CHA: I apologize, Your Honor.

20 JUDGE GUNNING: Thank you.

21 BY MR. CHA:

22 Q Mr. Anderson, there are over 60 original equipment
23 manufacturers who use Behnke's lubricant products?

24 A I don't have the exact number, but could be.

25 Q Would you say there are more than 40?

1 A Could you define use?

2 Q Well, original equipment manufacturers who either
3 purchase or in some fashion make use of Behnke's
4 lubricant.

5 A Would that also include recommending our products?

6 Q I'll approach it another way, sir.

7 Could you look at the exhibits -- these are
8 Respondent's exhibits. I think they're the exhibits
9 in front of you. If you could look in the second
10 volume that has exhibits that are labeled RX-51 to
11 71, and if you could look specifically at
12 Respondent's Exhibit 54, and I'll give you the page
13 number. It's on the lower left-hand corner of the
14 page. It's Bate-stamped Resp 00094.

15 A (Witness complies.)

16 Q Do you see that page, sir?

17 A Yes.

18 Q And I guess the lower third of the page, there's a
19 heading OEM Relationships & Approvals?

20 A Yes.

21 Q Would the companies listed there be the original
22 equipment manufacturers with whom Behnke has a
23 business relationship?

24 A Some, yes.

25 Q Okay. Do you know how many are not?

1 A We don't list every single one that we have some
2 form of a relationship with. Not every one of these
3 recommends our products. And when we say we have
4 relationships with them, we have helped them solve
5 issues, solve problems. They may recommend our
6 product; they may not. They may put it on their
7 approval list; sometimes they don't.

8 Q Do you know how many original equipment
9 manufacturers actually use Behnke's lubricants in
10 the machinery that they manufacture?

11 A 20.

12 Q Thank you, sir.

13 MR. CHA: I'm going to advise the court
14 reporter, the Court and opposing counsel that just
15 to be safe, I'm going to -- what I'm going to
16 discuss next should be protected as confidential
17 business information.

18 JUDGE GUNNING: Okay.

19 MR. CHA: So this portion of the
20 transcript should be identified as CBI.

21 (Pages 895 through 897 were designated
22 Confidential Business Information.)

23 * * *

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25

1 MR. CHA: Could I have just one moment,
2 Your Honor?

3 JUDGE GUNNING: Okay.

4 MR. CHA: Thank you, Mr. Anderson.
5 Your Honor, I have no further questions.

6 JUDGE GUNNING: Okay. Thank you.

7 MR. McILNAY: Nothing further, Your Honor.

8 JUDGE GUNNING: You are excused. Thank
9 you for your testimony today.

10 THE WITNESS: Thank you.

11 (Witness excused.)

12 MR. McILNAY: Your Honor, I believe that I
13 have taken care of all my documentary submissions
14 during the course of the testimony, but subject to
15 reviewing that with counsel -- we've tried to keep
16 track as we've gone along, but subject to reviewing
17 that with counsel for the EPA -- and I would extend
18 to her the same courtesy -- I rest on behalf of the
19 Respondent.

20 JUDGE GUNNING: Okay. Thank you. Now,
21 there were a couple documents in Respondent's
22 exhibit books that were difficult to read because of
23 the photocopying.

24 MR. McILNAY: Yes.

25 JUDGE GUNNING: Has that been resolved?

1 MR. McILNAY: I apologize, Your Honor. It
2 has not. I do have a legal assistant here. I don't
3 know how we want to handle that. We do have much
4 better copies. Do you happen to remember what
5 exhibit that was? It was attached to someone's
6 affidavit.

7 JUDGE GUNNING: In particular, I would
8 like the official court record to have the better
9 copy.

10 MR. McILNAY: Exactly.

11 JUDGE GUNNING: The record shows what it
12 states, and --

13 MR. McILNAY: Sure.

14 JUDGE GUNNING: -- we all can work off of
15 the transcript, but the actual exhibits that the
16 court reporter has must be complete.

17 MR. McILNAY: What I would offer,
18 Your Honor, is since it is our exhibit and I know we
19 have a better copy and I'm also familiar with the
20 firm that is doing the court reporting, if I could
21 reproduce that in my office tomorrow, send it to the
22 firm with copies to the clerk and opposing counsel?

23 MS. O'MEARA: I don't have an objection to
24 that. Just for the record, it is Exhibit --
25 Respondent's Exhibit 65, and it's Bates Stamp --

1 Respondent's Bate Stamp 00158 through 00182.

2 JUDGE GUNNING: Okay. And I think it
3 would also be a good idea if counsel after the
4 hearing is over huddle for a very short time just to
5 agree on what documents have been received into the
6 record, and that way -- because we have not had the
7 court reporter note that the exhibits are received,
8 labeled, and as such, that can be done after the
9 hearing.

10 MR. McILNAY: Agree.

11 JUDGE GUNNING: Okay. Now, closing
12 statements, they are strictly optional. I'll leave
13 it up to you, discretionary. You choose. If you
14 would like to, that's fine, and if you don't, that's
15 fine also.

16 MR. McILNAY: Thank you.

17 MS. O'MEARA: Your Honor, I will make a
18 short closing statement.

19 JUDGE GUNNING: Okay.

20 MR. McILNAY: I'm almost compelled to now,
21 but I'll keep it brief.

22 JUDGE GUNNING: Okay. Now, there's no
23 rebuttal, correct?

24 MS. O'MEARA: That's correct.

25 JUDGE GUNNING: Okay. Thank you.

1 MS. O'MEARA: Do you want to start with
2 closing statements right now, Your Honor?

3 JUDGE GUNNING: Unless you need a few
4 minutes.

5 MS. O'MEARA: I would like a few minutes.

6 JUDGE GUNNING: Okay. That will be fine.
7 Will there be any other housekeeping matters,
8 because things happen quickly at the end of the
9 hearing, people want to get going. And what I am
10 going to do is I usually get a box from the EPA and
11 then seal my documents, and then if they're kind
12 enough, they send it through the mail system for me;
13 if not, I have to drive all over town looking for
14 the post office. However, I'd be very happy to turn
15 the box over to the Respondent if they would like to
16 perform that administrative duty. It costs a fair
17 amount of money, so I --

18 MS. O'MEARA: The EPA will be happy to do
19 it.

20 JUDGE GUNNING: Thank you. Usually I
21 don't get any objections from the Respondent.

22 MR. McILNAY: No, we wouldn't.

23 JUDGE GUNNING: Okay.

24 MR. McILNAY: I'm sorry.

25 JUDGE GUNNING: No. That's fine. I just

1 want to make sure everyone is aware of how things
2 are transported.

3 MR. McILNAY: One final -- well, I don't
4 know if it's final. One housekeeping matter is the
5 official CBI of -- it's of Respondent's Exhibit 68,
6 Your Honor.

7 JUDGE GUNNING: Is that -- oh, the one
8 that was removed.

9 MR. McILNAY: The one that's removed. The
10 sealed copy the Court has received. It's sealed.

11 JUDGE GUNNING: Right. I gave it to the
12 EPA for them to forward on.

13 MS. O'MEARA: And Ms. Harwell will do
14 that.

15 JUDGE GUNNING: Okay. Thank you.

16 MR. McILNAY: This is the official copy
17 that would normally have been with the documents
18 supplied to the court reporter, as I understand
19 procedure. It is marked on the outside with the
20 case caption and the designation pursuant to
21 7 U.S.C. Section 136(h) and CFR Part 2; however, it
22 does not have an exhibit sticker on the outside of
23 the envelope as of yet.

24 JUDGE GUNNING: Okay.

25 MR. McILNAY: And I guess we should make

1 that part of the --

2 JUDGE GUNNING: Well, it would be
3 preferable if we could have the court reporter -- do
4 you have any labels with you? Okay. If we could
5 mark that as -- is that Respondent's or --

6 MR. McILNAY: Respondent's exhibit.

7 MS. O'MEARA: Respondent's Exhibit
8 Number 68.

9 MR. McILNAY: 68. And my understanding is
10 the court reporting firm will be responsible for
11 transmitting this to the --

12 JUDGE GUNNING: On CBI, I don't -- how
13 does that work?

14 MR. CHA: I'm sorry, Your Honor. What was
15 the question?

16 JUDGE GUNNING: What happens to the
17 official court reporter's copy of the CBI?

18 MR. CHA: It will be -- it should be
19 with -- now, yeah, this one should be with the
20 regional hearing clerk, and she will -- the regional
21 hearing clerk will handle it as CBI. Either the
22 court reporter can take it and send it or we could
23 from the courthouse send it. I really don't have a
24 preference.

25 JUDGE GUNNING: I mean, my preference

1 would be to send it on to the regional hearing clerk
2 directly; therefore, not putting the burden on the
3 court reporter.

4 MR. CHA: We'd be happy to create a
5 Federal Express label --

6 MR. McILNAY: We have no objection.

7 JUDGE GUNNING: Okay. Thank you.

8 MR. McILNAY: I just wanted to know what
9 we're doing with --

10 JUDGE GUNNING: Right.

11 MR. CHA: If counsel prefer, we could also
12 hand-deliver it to ensure --

13 JUDGE GUNNING: That would also be
14 acceptable.

15 MR. McILNAY: That's acceptable.

16 JUDGE GUNNING: Okay.

17 MS. O'MEARA: We'd be happy to do that.

18 MR. McILNAY: All right. One last thing,
19 I have not dealt with CBI, and I doubt much that
20 every court reporter here has. I understand that
21 you routinely transcribe the hearings, so it's not
22 as though this is not going to get transcribed if
23 it's appealed. Have they been instructed in any
24 fashion about those portions that have been
25 designated CBI, how to deal with that?

1 JUDGE GUNNING: I assume the contracts
2 that are executed --

3 MR. CHA: It's supposed to be. We had a
4 problem with the contracts, obviously. There might
5 be a way to check on that. The contract is not with
6 our office. It's the regional hearing clerk is
7 supposed to handle that, and we're really supposed
8 to be out of that. This unusual situation arose
9 because someone in the finance office didn't forward
10 the paperwork, you know, and that happens, I guess.

11 We can check with Sonja Brooks-Woodard, the
12 regional hearing clerk for Region 5, because she
13 would have the contract, I believe, access to the
14 contract, and we would check with her to find
15 whether there are any provisions in there --

16 MS. O'MEARA: Just to be clear, because
17 when Ms. Harwell makes that call she knows what
18 questions to ask, the question is how has the court
19 reporter been instructed to handle CBI --

20 MS. HARWELL: Okay.

21 MS. O'MEARA: -- the appropriate manner
22 and system with EPA requirements?

23 MR. McILNAY: And I am not concerned that
24 it will happen. I just want it understood that
25 somebody's going to take responsibility for

1 instructing them on that. Okay. I'm very familiar
2 with this firm, free-lance court reporting firm in
3 Milwaukee, and I don't know whether or not they know
4 how to do this or what CBI means.

5 JUDGE GUNNING: Okay. In the absence of
6 such, at least I'll make an instruction that any
7 information that has been imparted today that's been
8 designated as CBI, confidential business
9 information, is to remain secret, and there are
10 federal penalties for divulging such information.
11 So at minimum, on the record I can do that much.

12 MR. CHA: As I believe is done typically,
13 Your Honor, is there are a couple different versions
14 of the transcript, one is a redacted version where
15 all of the testimony which was identified as being
16 confidential business information has to be
17 essentially stricken from the text of the
18 transcript. Then those pages are to be generated
19 separately, and that needs to be sealed in an
20 envelope which is marked either Confidential or with
21 the acronym CBI or the full name -- full term
22 Confidential Business Information, and then that
23 envelope is then placed in another envelope, which
24 is used to mail or Federal Express, however the
25 package is delivered. I believe that all goes to

1 the regional hearing clerk, and she will handle --

2 JUDGE GUNNING: Right. We keep it
3 separate. Of course, when a decision is issued,
4 it's issued with a redacted section, but for
5 appellate purposes that gets locked up, and then if
6 it goes up on appeal, the entire transcript and
7 decision with the redacted material is available to
8 the appellate bodies.

9 MR. McILNAY: Very good. Very good. I
10 appreciate that. At this time then I will ask the
11 court reporter to mark the sealed version of
12 Respondent's Exhibit 68 as such, and then I will
13 deliver it to counsel for the EPA.

14 JUDGE GUNNING: Okay.

15 (Deposition Exhibit Number 68 marked for
16 identification.)

17 MR. McILNAY: For the record, it has been
18 marked as Respondent's Exhibit 68, and I'm also
19 handing it to Mr. Olson for delivery to the regional
20 hearing --

21 MS. O'MEARA: Clerk.

22 MR. McILNAY: -- clerk. I can't think of
23 any other housekeeping matters.

24 JUDGE GUNNING: Okay. Well, like I asked,
25 if you all could huddle afterwards and just make

1 sure you're on the same page as to the documents
2 received so that the court reporters could add the
3 actual stickers to the document.

4 MS. O'MEARA: Yes, we'll do that.

5 JUDGE GUNNING: Okay.

6 MS. O'MEARA: Can we take --

7 JUDGE GUNNING: Yes.

8 MS. O'MEARA: -- five or ten minutes?

9 JUDGE GUNNING: Yes. That would be fine.

10 MS. O'MEARA: Okay. Thank you.

11 (Short break taken.)

12 JUDGE GUNNING: Now, the other one
13 matter -- I don't want to press the parties too hard
14 on this, but I assume settlement discussions are at
15 a close or will they be ongoing?

16 MS. O'MEARA: My understanding is that --
17 correct me if I'm wrong --

18 MR. McILNAY: I will.

19 MS. O'MEARA: -- that settlement
20 discussions are closed. What's continuing to be
21 discussed and what I'd like to discuss afterwards is
22 compliance.

23 MR. McILNAY: I don't know if I would
24 characterize them as closed.

25 MS. O'MEARA: Okay.

1 MR. McILNAY: We'll talk further. But at
2 this point we haven't had a meeting of the minds
3 that would alleviate the need for closing arguments.
4 I hope, Your Honor, that if there is a meeting of
5 the minds, it takes place before you are --

6 JUDGE GUNNING: That was going to be my
7 request. If the transcript is prepared, it's
8 considerable energy and expense, and then if the
9 parties start briefing, additional time and expense,
10 and then if I start writing, additional time and
11 expense. So if you do have a meeting of the minds,
12 the sooner the better.

13 MR. McILNAY: Thank you.

14 MS. O'MEARA: May I proceed, Your Honor?

15 JUDGE GUNNING: Please.

16 MS. O'MEARA: Thank you. I will try to
17 make this as brief as possible, just want to hit
18 some high points, Your Honor, Counsels.

19 Four days ago we talked about what you would
20 hear, and I just want to quickly summarize what it
21 is that we did hear. Again, the question -- there
22 were three questions. One is are the five
23 lubricants pesticides? In answering that question,
24 you have to answer the question, Is the Micronox
25 technology in the lubricants actually targeting a

1 pest? And in answering that question, you have to
2 ask the question and answer, Is the Micronox
3 technology targeting the pest on food -- on
4 processed food in particular or elsewhere?

5 Your Honor, I submit that you heard testimony
6 in the last three or four days that all of these
7 questions have been answered. The five lubricants
8 are targeting pests, E-coli, salmonella and
9 listeria, that we know they are pests.

10 I think the testimony you've heard, Your Honor,
11 from our expert witnesses and actually from Behnke's
12 own witnesses is that they are targeting those pests
13 within the lubricant itself as they are intended to
14 preserve the lubricant, that they're targeting the
15 pests on the equipment that touches the lubricant,
16 that they're targeting the pests in the environment
17 in which they are being used, but certainly there
18 was nothing -- no testimony here that they were
19 actually targeting the pests on food.

20 I would be remiss in stating that I believe
21 Behnke is a very impressive company that has grown
22 in impressive proportions, and all we're asking the
23 company to do is comply with the law, with the EPA's
24 laws, and indeed we do want good products to get out
25 there. We're just asking that when products make

1 the types of claims that are being made here, and in
2 particular public health claims, we have to make
3 sure that what they claim the products are doing are
4 actually being done. Are they actually successfully
5 controlling E-coli, salmonella, and listeria?

6 And you heard, Your Honor, Mr. Paquette -- you
7 heard from Dr. Blackburn first and then Mr. Paquette
8 tell you what the EPA standards were. Dr. Blackburn
9 told you there were certain standards, five-log
10 reduction. You have to start at a six-log reduction
11 to determine what the standards were.

12 And you heard Mr. Paquette tell you that he did
13 not know what sorts of testing was done here, and it
14 was apparent from the actual exhibits that EPA
15 standards were not met. And having said that, I
16 want to be clear that whether they were met or not
17 is not the issue. Indeed it is the advertising,
18 labeling and marketing claims that were made.

19 You heard from our expert, Mr. Edwards, who's
20 been working with the agency for over 32 years and
21 does this on a daily basis, and you heard him say
22 indeed these five lubricants are pests, as that is
23 defined under FIFRA, and that they need to be
24 registered. And the reason that they need to be
25 registered is because they don't fit into any

1 exemption that exists under FIFRA, certainly not the
2 on or in the process food exemption, certainly not
3 any other exemption that counsel tried to imply
4 existed under FIFRA such as that they're only
5 selling to the food grade -- the food and beverage
6 industry. There's no such exemption that considers
7 that.

8 And you heard Mr. Edwards say that there were
9 explicit and implicit claims made on these labels,
10 and therefore, there's no reason to compute what a
11 customer might expect to get out of this product
12 because the claims were so implicit and explicit.

13 But indeed you heard from Mr. Rybicki, from
14 American Foods, and he told you he uses --
15 American Foods uses the product, and they bought it
16 because they believed it had antimicrobial
17 properties in it, and they bought it thinking that
18 it would inhibit the growth of E-coli, salmonella
19 and listeria in the lubricant itself or on the
20 equipment that the lubricant touched, not on the
21 food, and you even heard him say that if he knew it
22 was supposed to be touching food, they wouldn't have
23 recommended to purchase the product.

24 You also heard testimony from Behnke's own
25 witnesses that the lubricants are not intended to be

1 put into food, become a component of food or have
2 any technical effect on food.

3 You also heard, Your Honor, from Mr. Peter, the
4 president of the company, who told you he made a
5 calculated business decision not to proactively seek
6 out information on whether EPA regulations applied
7 to him and the statutes to his lubricants. And you
8 also heard him say that if a toy company came to him
9 and said, We want your food-grade lubricant because
10 the toy might get contaminated by the lubricant, he
11 would sell that product to, let's say, a Hasbro.

12 You also heard him say he'd sell it to someone
13 who wanted to put the lubricant on a hamster wheel
14 in a pet store. You also heard him say that if
15 Paper Mate came to him or Silk Craft, that he would
16 sell the product to them as well. You also heard
17 him say that if a company that handled shelled nuts,
18 which is a raw agricultural commodity, it is not on
19 or in processed food, he would sell it to them, too,
20 and that was a business decision he would make.

21 And perhaps it's a fine product, and I hope we
22 find out that it is. I suspect that it is. But as
23 it stands right now, they have to register with EPA
24 based on those claims.

25 You also heard from Mr. Peter that he had some

1 red flags go up many, many years ago by NSF, and he
2 did not pursue those flags relating to whether EPA
3 had any jurisdiction over the lubricants, and that
4 was a business decision. But you also heard him say
5 that he's responsible for everything that his
6 company does. And you heard him say that he expects
7 these lubricants to evolve. I suspect they will as
8 well. It's foreseeable that they could be used in
9 the applications I suggested to him in my
10 hypotheticals.

11 I won't belabor the point. We've gone through
12 all the witnesses. We know from Mr. Paquette and
13 Dr. Blackburn. We don't know if good laboratory
14 practices were used in testing these or the correct
15 inoculums or the correct sources for the inoculums.
16 What we do know right now, Your Honor, is there is
17 an unfair competitive edge. It is not to Behnke.
18 It is to everybody else who is complying with the
19 law, and the unfair competitive edge is because of
20 Behnke because they are not complying with the law.
21 And they made that business decision, and we are
22 here today.

23 And what I'm asking at this point is, Your
24 Honor, enter an order of liability for at least
25 11 counts and for responsibility, as Mr. Peter would

1 say himself, for at least the penalty we imposed
2 initially, which was \$50,050. Thank you,
3 Your Honor.

4 JUDGE GUNNING: Thank you.

5 MR. McILNAY: May it please the Court,
6 Counsel, all the other participants, let me start by
7 commending counsel for the EPA as well as their
8 professional staff on what I think was a very
9 professional and well-organized, presented case.
10 And I appreciate Your Honor's time and attention
11 under sometimes difficult circumstances. I, too,
12 will try to be brief.

13 I'm fond of telling the story of Professor Ted
14 Finnan, my civil procedures professor at the
15 University of Wisconsin, who asked us all in
16 first-year civil pro is a tomato a fruit or a
17 vegetable, and we debated it and debated it, as all
18 aspiring law students would and should. And one
19 fine day, I raised my hand, It depends. He says, On
20 what? Why you're asking the question. That's it.
21 That's the answer I'm looking for.

22 As lawyers we're all trained to understand and
23 know that there's ambiguities in the law. And in
24 resolving those ambiguities, what we want to do is
25 look to what the purpose of the regulation or

1 statute under discussion is.

2 In this case we have two regulatory bodies that
3 touch on the industry in which this product was
4 sold, potentially EPA, clearly FDA under any
5 circumstances, and yet a third, USDA food safety
6 inspection. We have two different regulations to
7 interpret, Your Honor.

8 One of those regulations found in 21 CFR is the
9 definition of food additives, which reads, Food
10 additives include all substances not exempted under
11 Section 20(s). That would be of the Federal Food,
12 Drug and Cosmetic Act. The intended use of which
13 results may reasonably be expected to result,
14 directly or indirectly, either in their becoming a
15 component of food or otherwise affecting the
16 characteristics of food. That's ambiguous. What
17 is -- we all learn in law school, too, is what is it
18 reasonable? Reasonable is in the eye of the
19 beholder and very often is difficult to define.

20 In the context that we heard throughout this
21 hearing, the food industry, the issue is can it
22 reasonably be anticipated that these lubricants
23 become part of the food? Well, we heard some
24 evidence that suggests, Your Honor, that yes, indeed
25 that is the case. First of all, the industry is

1 willing to spend more money for H1 food-grade
2 lubricants to use in their processing plants than if
3 they bought the nonfood-grade lubricants. Why?

4 (Page 918 was designated Confidential
5 Business Information.)

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1 MR. McILNAY: Why? Because when it's not
2 caught, there's a danger to the public.

3 And there's a whole set of regulations that our
4 government spent a good deal of money, good deal of
5 time and, I'm sure, a good deal of effort to lay
6 down as to what ingredients are acceptable and
7 unacceptable and in what concentrations within
8 food-grade lubricants, and those are set forth in
9 21 CFR. There's been no evidence provided or
10 suggesting that any claims that Behnke has made on
11 its labels or advertising that their products are H1
12 food-grade compliant are untrue.

13 The second ambiguity in the law that arises in
14 this case is the definition of pesticides, which is
15 defined, 40 CFR of the EPA regulations at
16 Section 152.5, as an organism is declared to be a
17 pest under circumstances that make it deleterious to
18 man and/or the environment if it is -- sub D says,
19 Any fungus, bacterium, virus or other microorganism,
20 except those on or in living man or other living
21 animals and those on or in processed foods,
22 processed animal feed, beverages and drugs.

23 Now, Your Honor, I suggest in this context
24 mitigating microbes on or in processed food is
25 ambiguous. And we heard plenty of testimony that

1 one of the reasons for purchasing our client's
2 product is to keep listeria, salmonella and E-coli
3 out of their food. We also heard that the
4 marketplace for these products, regardless of any
5 hypothetical speculative questions that Mr. Peter
6 was asked about what he would do had a toy
7 manufacturer or a pen manufacturer, a nonfood
8 processing plant wanted to buy his product, is the
9 food industry.

10 Why do they care about salmonella, listeria,
11 E. coli? Why does the very large, well-known local
12 companies that we heard about that are customers of
13 this client care about those pathogens? We heard
14 from EPA's own expert and Mr. Paquette it's not
15 because they're deleterious to the grease. It's not
16 because they cause an odor in the grease. It's
17 because if they get into the food, it makes it
18 dangerous to consumers.

19 Does that happen? We hope not. We don't want
20 it to. But Mr. Cooper testified that in his five or
21 six years of experience with Quaker Oats, it
22 happened approximately twice a month that he knew
23 of, and at least in one instance, he learned of it
24 because that product ended up on a consumer's plate
25 and they complained.

1 We heard from Mr. Anderson that on average, he
2 gets two calls a month from customers that are
3 having a problem with contamination of the food
4 product with the lubricant. We heard from
5 Mr. Anderson that at least on one occasion, the
6 customer called and had discovered the problem
7 because there were salmonella counts that were
8 unusually high in the product, and they wanted to
9 discover where it came from.

10 Your Honor, in light of that evidence and in
11 light of the purpose behind that definition, I
12 respectfully submit that the policies and purposes
13 of 21 CFR and 40 CFR are both met by interpreting
14 152.5, the interpretation of pests, such that
15 products used that are likely to come into contact
16 with food contain an antimicrobial to mitigate the
17 pests in or on the food.

18 Now, you might suggest, Well, what does
19 mitigate control mean, because that's the definition
20 of a pesticide. Pesticide means a substance or
21 mixture of substances intended for the preventing,
22 destroying, repelling or mitigating named pests or
23 intended to use as a plant regulator or --

24 What does mitigate mean? That has a lot of
25 different meanings as well, especially in common

1 parlance. It might be applying something directly
2 to the food that kills the pests that are already in
3 it. It may mean applying something to the food to
4 prevent it from growing bacteria once it comes in
5 contact with food. It might also mean putting an
6 antimicrobial in a substance that is reasonably and
7 likely to come in contact with the food, to
8 mitigate, that -- those bacteria in or on the food.
9 Mitigation is often used as preventive. I want to
10 prevent or reduce the number of bacteria that are on
11 the food.

12 In the context of the evidence in this case,
13 Your Honor, Micronox, I respectfully submit, is not
14 sold and targeted as a pesticide because it's not
15 put in the lubricant to do anything but mitigate
16 microbes in or on processed food, otherwise the food
17 processor wouldn't care.

18 Then we have the labeling claims, which is at
19 the heart of this case. In that regard, Your Honor,
20 my client would agree with me this has been an
21 educational experience. And one thing that happens
22 to all of us is we put on blinders because of the
23 industry we're in or because of the case we've taken
24 on, sometimes we don't look at the other side's
25 point of view.

1 And I listened to the testimony of Mr. Edwards,
2 Mr. Bonace, Dr. Blackburn, and I saw the big blowups
3 of the advertising, and I sat back and said, You
4 know what? I understand now why they were bothered.
5 And had those ads run in Time Magazine for a
6 consumer product, had those ads run in the
7 Wall Street Journal, the New York Times, USA Today,
8 I would have packed my bag and gone home. But
9 that's not where they ran, Your Honor.

10 They ran in trade magazines for food processors
11 and equipment suppliers in the food processing
12 industry. They were delivered to ACME Foods. They
13 were delivered to the other customers identified in
14 complainant's complaint that bought POLY-Guard, that
15 bought HALO-Guard.

16 I referred earlier to the CalChem decision, and
17 I understand it is not binding authority, but the
18 reason being motion for expedited hearing was denied
19 in part was that the court wanted to hear evidence
20 of what the reasonable consumer within the target
21 market would understand reading the labeling, what
22 the purpose of, in that case, what a disinfectant
23 was.

24 And again, going back to the policy purposes
25 behind these two regulations and the interpretation

1 and resolution of the ambiguities that exist within
2 each, we heard testimony, Your Honor, that these
3 customers are very, very concerned and sensitive
4 about the safety of their products. They do swab
5 testing. Does it meet the standards of the EPA for
6 products sold to consumers, unsophisticated
7 customers? I don't know. We didn't get that
8 evidence in, Your Honor.

9 But I do know this, they do it frequently, and
10 when they've done it, they've been satisfied, as
11 Mr. Rybicki testified, that we're willing to pay a
12 little bit more for this product because it does the
13 job that it is claimed to have done. They are
14 charged by USDA regulations, FDA regulations, they,
15 the consumers of these products, that's been
16 undisputed, Your Honor, the food processors, the
17 beverage processors of producing safe food through
18 their HACCP programs.

19 This is not your average case, Your Honor, and
20 I don't think for a moment that any of them ran out
21 and bought this product without doing their own
22 quality testing.

23 (Page 925 was designated Confidential
24 Business Information.)

25 * * *

1 MR. McILNAY: The USDA, FDA regulations
2 meet the policy needs of public health safety, that
3 efficacy testing that is served by -- efficacy
4 testing by the EPA in other contexts with other
5 applications of pesticides -- products claiming to
6 have pesticidal or antimicrobial properties and
7 qualities.

8 Given this evidence, Your Honor, even the
9 claims are not understood by the customer from a
10 pesticidal point of view. They know where they're
11 going to use them. They know the purpose of using
12 them is to mitigate these bacteria in or on their
13 food products. They are sophisticated. They're
14 capable of doing their own testing. They have an
15 economic incentive to make sure that what they're
16 spending money on works.

17 I respectfully submit, Your Honor, they're not
18 in need of the EPA's efficacy testing in this
19 marketplace. Thank you.

20 JUDGE GUNNING: Thank you. Now, during
21 the course of Mr. McIlNay's closing, there were some
22 references to CBI, so we need to mark that in the
23 transcript.

24 MR. McILNAY: Did I use -- the city.

25 JUDGE GUNNING: Yes, the city for the one.

1 MR. McILNAY: Oh.

2 JUDGE GUNNING: And the other one was the
3 actual identification of the lithium. So we need to
4 go back and identify that in the closing statement.
5 So if you could get together with the court
6 reporter --

7 MR. McILNAY: I will.

8 JUDGE GUNNING: -- that will be
9 appreciated.

10 MR. McILNAY: Thank you, Your Honor.

11 JUDGE GUNNING: Okay. After the hearing
12 is closed, the transcript will be prepared by the
13 court reporter, and the transcript will be prepared
14 verbatim, and I'm referring to 40 CFR Section 22.25.
15 After the regional hearing clerk has the transcript,
16 the original and copies will be made available to
17 Respondent and to whoever wants it.

18 Usually we have motions, if the parties wish,
19 to conform the transcript; in other words, to go
20 back with the transcript and see if there are any
21 typos, small mistakes, and that can be corrected. I
22 usually start -- begin with a briefing schedule, and
23 I don't know if you all have any particular needs,
24 and I don't, of course, know how long it will take
25 to prepare the transcript. That's many times about

1 a month, somewhere in that range. And then I set a
2 briefing schedule.

3 Both parties may submit proposed findings of
4 fact, conclusions of law and a proposed order along
5 with a supporting brief, and that must be filed in
6 accordance with 22.26, which means that everything
7 must be served on the opposing party. Again, it's
8 not required. It's discretionary language.

9 And my request is that all submissions, as I
10 mentioned before, must be served on all parties and
11 should contain adequate references to the record and
12 authorities relied on. Fifteen days later, any type
13 of responses are due, and then if reply briefs,
14 strictly optional, another ten days later beyond
15 that.

16 And finally, I want to just note on the record
17 that the court reporter has custody of the original
18 record in this case and has the responsibility to
19 transfer such record to the regional hearing clerk
20 of the United States Environmental Protection
21 Agency. Any questions, any --

22 MR. McILNAY: Since we don't know when the
23 transcript will be prepared, I take it you set the
24 briefing schedule --

25 JUDGE GUNNING: When it becomes available.

1 MR. McILNAY: Thank you. Thank you.

2 JUDGE GUNNING: But if someone has a
3 particular extended trip planned or something of
4 that nature, I'd be happy to take that into account.
5 So we're probably talking a month from now, and then
6 the schedule would be set at that stage. So if you
7 have something in about a month, let me know.

8 MS. O'MEARA: Your Honor, just to get some
9 clarification, once the transcript is available, is
10 it roughly a month later that the briefs are due; is
11 that correct?

12 JUDGE GUNNING: A month usually is
13 standard. I'm amenable to six weeks. It's your
14 preference.

15 MS. O'MEARA: I'm just trying to stay out
16 of the end part of July and into August, and I think
17 that I can do that, according to what you've just
18 described on the time frame. It sounds like June.

19 JUDGE GUNNING: Okay. Now, that is all
20 assuming that the transcript is prepared in a timely
21 manner.

22 MR. McILNAY: I'm not aware of anything
23 that would create an issue, Your Honor.

24 JUDGE GUNNING: Okay. Very good. As
25 mentioned by counsel, I appreciate the

1 professionalism that was exhibited during the
2 hearing and courtesy that was displayed. I'm always
3 appreciative of that. Thank you very much.

4 MR. McILNAY: Thank you.

5 JUDGE GUNNING: And if there's nothing
6 else, the hearing is closed.

7 MR. McILNAY: Thank you, Your Honor.

8 MS. O'MEARA: Thank you, Your Honor.

9 (Whereupon, the proceedings concluded at
10 3:17 p.m.)

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1 STATE OF WISCONSIN)
2 MILWAUKEE COUNTY) ss.
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4 I, Mary Lorentz, a Registered Professional
5 Reporter and Notary Public in and for the State of
6 Wisconsin, do hereby certify that I reported the
7 foregoing proceedings at the time and place specified
8 on the title page of said transcript, and that the
9 foregoing is a full, true and correct transcription of
10 my stenographic notes thereof.

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Mary Lorentz
Notary Public in and for the
State of Wisconsin

Dated this 22nd day of April, 2008
Milwaukee, Wisconsin.

My Commission Expires January 22, 2012.

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