

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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

Docket No. FIFRA-05-2007-0025

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**COMPLAINANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF JAMES LEROUX AND LARRY COOPER**

Complainant, through its undersigned attorney, files this Complainant's Motion in Limine to Exclude Testimony of James Leroux and Larry Cooper ("Motion") pursuant to the authority of Sections 22.16, 22.19, and 22.22 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits*, ("Consolidated Rules") 40 C.F.R. §§ 22.16, 22.19, and 22.22. As explained below, Complainant requests that this Honorable Court issue an Order at the beginning of the hearing to exclude testimony at hearing from Respondent's witnesses James Leroux and Larry Cooper because the testimony of each of these witnesses, as described by Respondent, purports to discuss subject matters that require the testimony of expert witnesses; Respondent has not provided a curriculum vitae (CV) or resume for either proposed witness; and because the testimony from these witnesses is irrelevant, immaterial and unduly repetitious of the testimony of other witnesses.

**I. Background**

On June 27, 2007, this Honorable Court issued a prehearing order pursuant to 40 C.F.R. §

22.19 directing, among other things, that the parties exchange prehearing information. Among the procedures directed by the order are: "Each party shall submit... the names of any expert or other witnesses it intends to call at the hearing.... *The exhibits should include a curriculum vitae or resume for each proposed expert witness.*" (emphasis added).

On March 13, 2008, Respondent filed a supplemental prehearing exchange in which, *inter alia*, it identified two additional witnesses. The narrative summaries of these witnesses' expected testimony demonstrates that each witness will be offered to cover complex areas, and to convey what actually are expert opinions. Complainant's office did not receive this supplemental prehearing exchange until the afternoon of March 14, 2008. Respondent's supplemental prehearing exchange was served on the last possible day to exchange prehearing information without showing good cause for the delay under 40 C.F.R. § 22.22(a)(1). Additionally the addition of the two witnesses at this late stage of the proceedings will unfairly prejudice Complainant. By failing to properly identify these witnesses as proposed experts, and by failing to provide a resume or CV for each, Respondent has failed to comply with the Consolidated Rules of Practice and the Order of this Court. Therefore, Complainant moves to exclude these two witnesses.

## **II. Legal Standards for Motion in Limine.**

The legal standard governing the admissibility of evidence in administrative hearings held under the Consolidated Rules is found at 40 C.F.R. § 22.22(a), which provides that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value" and that "if, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged

under 22.19(a),(e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information or had good cause for not doing so.”

### **III. Mr. Leroux**

In its Second Supplemental Prehearing Exchange, Respondent proposes to add the testimony of Mr. James Leroux. Respondent’s 2<sup>nd</sup> Supp. PHX, p. 2. Mr. Leroux’s testimony should be excluded because Respondent has failed to provide adequate information about Mr. Leroux’s qualifications to offer the expert opinion described in the narrative summary of his expected testimony, because Mr. Leroux’s proposed testimony is not relevant to any issue raised by the complaint and answer, and because his proposed testimony is unduly repetitious of the proffered testimony of other witnesses.

Respondent is proffering Mr. Leroux as an expert witness, despite Respondent’s failure to identify Mr. Leroux as such. Respondent’s Second Supplemental Prehearing Exchange describes Mr. Leroux’s “30 years experience in Maintenance Management,” states that he “must be knowledgeable,” and that he will testify to “the history and role [sic] HACCP safety precautions within the food processing industry after 1999.” *Id.* This last subject is clearly one requiring special expertise or knowledge, which makes this witness a proffered expert. Additionally, his proposed testimony as described in Respondent’s Second Supplemental Prehearing Exchange is strikingly similar to that proposed for two witnesses identified by Respondent as experts in Respondents Initial Prehearing Exchange, Mr. Shaun Beauchamp and Mr. Charles Goodale. All

three of these witnesses will testify, according to Respondent, that Respondent's products may reasonably become part of the food. Mr. Beauchamp will testify that the products "in their intended use...may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food." Respondent's Initial PHX, p. 8. Mr. Goodale will testify that "in their intended use respondent's products at issue in this matter may reasonably be expected to result, directly or indirectly, in their becoming a component or otherwise affecting the characteristics of the food." *Id.* If allowed, Mr. Leroux will testify that the products "become, or may reasonably be expected to become, a part of the food being processed." Respondent's 2<sup>nd</sup> Supp PHX, p. 2. Despite proffering him as an expert witness to offer opinion testimony at hearing, Respondent has not filed as part of the prehearing exchange a resume or CV for Mr. Leroux, in violation of the Presiding Officer's Prehearing Order. In contrast, Respondent has provided CVs for other expert witnesses it intends to call, including Mr. Beauchamp and Mr. Goodale.

If Respondent calls Mr. Leroux as an expert witness, Complainant would be unduly prejudiced for two reasons: Complainant would not be given sufficient opportunity to review Mr. Leroux's stated qualifications for competency, accuracy, completeness, and relevance; and Complainant's ability to conduct voir dire, cross-examination, and/or prepare for a rebuttal case would be substantially impaired. Complainant is entitled to prepare for hearing and not be the subject of surprise. *See Housing Authority of the City of Moundsville, et al., Order on Motion in Limine and Alternative Motion to Compel*, 2004 EPA ALJ LEXIS 116 (OALJ 2004) (Where Respondent lists in prehearing exchange a witness as providing opinion testimony without identifying such witness as an expert, and without submitting resume or curriculum vitae for the

witness, Respondent ordered to supplement prehearing exchange to specifically identify witness as expert and provide resume or curriculum vitae for witness listed if Respondent intends to call witness as an expert).

Additionally, Mr. Leroux's testimony is not relevant to any issue at hearing. Even if this Honorable Court was to allow his testimony, Mr. Leroux's experience, upon which he will rely to testify, is with facilities in Canada, not the United States, and therefore outside the jurisdiction of EPA and FIFRA.<sup>1</sup> Additionally, Mr. Leroux is testifying to a legal standard relevant to the classification of Behnke's products under the Federal Food, Drug, and Cosmetic Act, specifically whether it is a "food additive" as defined in 21 U.S.C. § 321(s). As Complainant has previously briefed in detail, whether or not Respondent's products are food additives is irrelevant to whether or not those products are subject to the FIFRA registration requirements. See Complainant's Motion to Strike Respondent's Affirmative Defenses and Motion to Compel Discovery, pp. 27-29.

Finally, if Mr. Leroux is not being offered as an expert witness, his testimony is cumulative. Respondent has identified twelve other fact witnesses that will discuss the use of Respondent's products at food or beverage processing facilities, including Carter Anderson, Mike Keller, Josh Rybicki, Larry Bradstreet, Mike Pike, Bill Brown, Ken Deroin, Gary Hagerstrom, James Drahein, Craig Hoffman, Roger Nelson, and Eddie Chancellor. Respondent's Initial PHX, p. 2-7. Respondent has not removed any of those witnesses from the list of witnesses it intends to call.

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<sup>1</sup> Complainant also notes that while Respondent has identified Mr. Leroux's current employer, Mosure Machine Company, Respondent has not disclosed that Mosur Machine Company is the Exclusive Eastern Canadian Distributor for Behnke's Products.

#### IV. Mr. Cooper

In its Second Supplemental Prehearing Exchange, Respondent also proposes to add the testimony of Mr. Larry Cooper. Mr. Cooper's testimony should be excluded because Respondent has provided neither adequate information about Mr. Cooper's qualifications to offer an expert opinion, nor the data on which he will need to rely in order to testify about the subjects identified by Respondent, and because his proposed testimony is unduly repetitious.

As with Mr. Leroux, Respondent appears to be offering Mr. Cooper as an expert witness. Like Mr. Leroux and Messrs. Beauchamp and Goodale, Mr. Cooper may testify that Respondent's products "may reasonably be expected to become, [sic] a component or otherwise affect the characteristics of the food during processing." Respondent's Second Supplemental Prehearing Exchange, p. 3. For the same reasons as outlined above, Mr. Cooper should not be allowed to testify. Additionally, Respondent has indicated that Mr. Cooper may discuss how bacteria counts in the bearings (equipment) at the Pinnacle Foods facility were reduced after implementation of Behnke's lubricant products. *Id.* However, Respondent has not identified Mr. Cooper as an expert in microbiology, food safety, or any other field from which an expert might testify on this matter. He is not qualified to testify at all about "bacterial counts" at the facility in which he worked. Additionally, Respondent has not provided as evidence any of the testing data from which Mr. Cooper might be expected to testify regarding bacterial counts at the Pinnacle Foods plant, nor has Respondent provided any information about the accuracy of any data Mr. Cooper may have relied upon in determining the "bacterial counts." In order to evaluate the probative value of Mr. Cooper's testimony, this Honorable Court would need to have such information, including the test methods used to determine the "bacterial counts," the protocols

for conducting such tests, the laboratory used to analyze “bacterial counts,” the quality assurance and quality control measures implemented by the laboratory which analyzed the “bacterial counts,” the sample collection protocol employed during the collection of the bacteria samples, and the chain of custody of any samples that were collected for testing. None of this information has been provided, and without such corroborating documentary evidence, even the oral testimony of a qualified expert would be insufficient to establish that the “bacterial counts” were based on reliable sampling and analysis. In the instant matter, there is absolutely no indication that Respondent’s proffered witness is even remotely qualified to provide such critical testimony.

As with Mr. Leroux, to the extent that Mr. Cooper might offer factual testimony as to the use of Respondent’s lubricants in food or beverage processing facilities, that testimony is unduly repetitious, given the other twelve (or thirteen, if Mr. Leroux is allowed to testify to these facts) witnesses Respondent has identified to give such testimony.

#### **V. Conclusion**

Respondent cannot, at this late date, provide to Complainant resumes or CVs for Mr. Leroux or Mr. Cooper, because the hearing will take place in less than fifteen days. 40 C.F.R. § 22.22(a)(1). There has been no demonstration of any good cause for Respondent’s failure to identify these witnesses earlier in the prehearing process. Respondent should have notified this Court and Complainant of its intent to call these witnesses long before March 14, 2008, the last possible day for supplementing prehearing exchanges; instead, Respondent chose to wait until the last possible moment, and therefore cannot now cure its failure to include resumes or CVs for these witnesses. An Order to bar Mr. Leroux’s and Mr. Cooper’s testimony, issued at the start of the hearing, is appropriate in this case to ensure that the Consolidated Rules and this Court’s

previous orders are correctly followed.

For all of these reasons, Complainant respectfully requests that its Motion be GRANTED.

Respectfully submitted,



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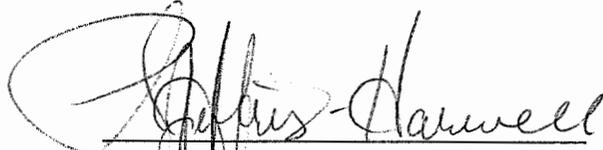
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**CERTIFICATE OF SERVICE**

I hereby certify that the original and one true, accurate and complete copy of Complainant's Motion in Limine to Exclude Testimony of James Leroux and Larry Cooper, were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below, and that a true, accurate and complete copy of Complainant's Motion in Limine to Exclude Testimony of James Leroux and Larry Cooper, were served on the Honorable Barbara Gunning, Administrative Law Judge (service by Pouch Mail), and Mr. Bruce McIlroy, Esq., Counsel for Respondent Behnke Lubricants, Inc. (service by Federal Express), on the date indicated below:

Dated in Chicago, Illinois, this 19 day of March, 2008.

  
Patricia Jeffries-Harwell  
Legal Technician

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