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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**In the Matter of:** )  
)  
**BEHNKE LUBRICANTS, INC.** ) **Proceeding to Assess a Civil Penalty**  
**MENOMONEE FALLS, WISCONSIN** ) **Under Section 14(a) of FIFRA,**  
) **7 U.S.C. §136l(a)**  
**Respondent** )  
) **Docket No. FIFRA-05-2007-0025**  
)  
)  
\_\_\_\_\_ )

**COMPLAINANT'S REPLY TO RESPONDENT'S POST-HEARING BRIEF**

In accordance with this Honorable Court's Order Setting Briefing Schedule, the United States Environmental Protection Agency, Region 5 (U.S. EPA), through its undersigned attorneys, files the instant Complainant's Reply to Respondent's Post-Hearing Brief, pursuant to the authority of Section 22.26 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (Consolidated Rules)* 40 C.F.R. § 22.26.

The U.S. EPA has filed extensive motions and a detailed Post-Hearing Brief to support the violations alleged in the Complaint against the Respondent, Behnke Lubricants, Inc. (Behnke). U.S. EPA predominantly relies on its previous filings to respond to Respondent's Post-Hearing Brief. The U.S. EPA does, however, wish to address a limited number of issues raised in Respondent's Post Hearing Brief in this Reply, which is therefore limited to a few substantive issues. Where appropriate, U.S. EPA respectfully refers the court directly to previous filings.

**I. Behnke's lubricants are pesticides as defined by Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)**

The evidence is overwhelming that Behnke's lubricants in question are indeed "pesticides" as defined by FIFRA. *See Complainant's Post-Hearing Brief, pages 32-87.*

In response to the overwhelming evidence, Respondent contends that the advertising associated with its lubricants was directed solely at the food and beverage processing market. First, this argument is irrelevant to a determination of whether a product is a "pesticide" under FIFRA. FIFRA does not allow an exception or exemption for registration of pesticides based on the market in which a pesticide is distributed or sold. U.S. EPA's expert, Mr. Dennis Edwards, clearly testified that FIFRA does not exempt Respondents such as Behnke merely because the company's advertising targets a specialized industry. *See Complainant's Post-Hearing Brief, pages 85-87.*

Second, even if this consideration were relevant, the Respondent fails to offer any evidence (either testimonial or otherwise) to support such an assertion. In fact, the record undercuts the persuasiveness of this argument. Mr. Peter, the President of Behnke, admitted on cross examination that he would readily sell the lubricants to non-food processing industries if presented with such opportunities. *See Complainant's Post-Hearing Brief, pages 42-51 and April 2 Tr., 0642-0645 and 0710-0711.* Additionally, there is nothing in Behnke's labeling, advertising and marketing literature that limits the sale and use of the lubricants to food processors only. *See Mr. Peter's own testimony, April 2 Tr., 0732-0734 and Complainant's Post-Hearing Brief, pages 86-87.*

Behnke also argues that it is not subject to FIFRA because the "reasonable customer" only intends the lubricants to control pests "on or in processed foods" and nowhere else. Behnke goes so far as to assert that the "sophisticated customer" is solely

interested in controlling microbes in or on processed foods or beverages. *See Respondent's Post-Hearing Brief, page 2.* However, Behnke failed to present any evidence at hearing to support such an argument.

On the contrary, Mr. Josh Rybicki, an employee of American Foods Group, Acme facility (Acme facility) testified that his facility switched to Behnke's lubricants because it was told and believed that the Micronox antimicrobial technology within the lubricants would control pests in the lubricants themselves and therefore would minimize cross contamination. *See Complainant's Post-Hearing Brief, pages 43-46.* Mr. Rybicki testified that deadly bacteria can be present anywhere in the facility including on the equipment, the people, the animals as they enter the facility, and on the product that is being handled. He also testified that the facility is concerned with all sources of bacteria because of the potential of cross contamination throughout the facility. *See March 31 Tr., 0083-0085, 0091.* He further testified that that the Acme facility was willing to do anything to minimize possible cross contamination and it believed that Behnke's lubricants would facilitate such an effort. *See March 31 Tr., 0085-0086, 0095, 0101.*

Therefore, Behnke is incorrect in its assertion that its customers were solely interested in controlling microbes in or on processed foods or beverages. Rather, based on Mr. Rybicki's testimony, it is apparent that Behnke's customers were most concerned with controlling bacteria throughout their facilities, in any way they could, to minimize any cross contamination that could potentially harm its customers.

Respondent also incorrectly relies on caselaw that discusses the "reasonable consumer" standard when determining if a particular product is a pesticide. However, the cases Behnke cites are distinguishable from the facts in the matter before this Honorable

Court. In *N. Jonas & Co., Inc. v. United States Environmental Protection Agency*, 666 F. 2d 829 (3<sup>rd</sup> Cir. 1981), the question was whether a product that had no pesticidal labeling claims associated with it was in fact a pesticide. The Court rejected Respondent's argument that it must look at Respondent's subjective intent to determine if the product was a pesticide. The Court accepted U.S. EPA's argument that the "*product is a pesticide if a reasonable consumer - given the label, accompanying circulars, advertising representations and the collectivity of the circumstances - would use it as a pesticide. The fact that the product may also have other uses does not affect the need to register,*" 666 F. 2d at 832. In this context, the court held that in "*determining intent objectively, the inquiry cannot be restricted to a product's label [which was absent of pesticidal claims] and to the producer's representations. Industry claims and general public knowledge can make a product pesticidal notwithstanding the lack of express pesticidal claims by the producer itself. Labeling, industry representations, advertising materials, effectiveness and the collectivity of all the circumstances are therefore relevant.*" 666 F. 2d at 833. See also, *In the Matter of: FRM Chem, Inc. A.K.A. Industrial Specialties*, Docket No. FIFRA-07-2004-0041, 2005 WL 528482 (E.P.A.) (February 16, 2005), *In the Matter of Hing Mau, Inc.*, Docket No. FIFRA-9-2001-0017, 2002 WL 2005523 (E.P.A.) (August 13, 2002), *In Re Matter of Rug Doctor, Inc.*, FIFRA-09-0375-C-84-8, 1985 WL 57117 (E.P.A.) (June 6, 1985), *In Re: The Bullen Companies, Inc.* 2001 WL 185489 (E.P.A.), 9 E.A.D. 620 (February 1, 2001) ("*when a person who distributes or sells a product explicitly or implicitly claims that the product is a pesticide, FIFRA requires that product to be registered as a pesticide*"), and *In The Matter of Chemo. Industries, Inc.*, 1984 WL 50057 (E.P.A.) (January 24, 1984).

Unlike in *Jonas*, the facts in the Behnke matter regarding claims and intent are clear. See *April 2 Tr., 0266-0310 and 0503*. Given the extensive implicit and explicit claims made by Behnke in its labeling, advertising and marketing, there is no need to impute intent from the “reasonable customer.” See also 40 C.F.R. § 152.15, which discusses “intent.” Further, as stated in Mr. Josh Rybicki’s sworn testimony and declaration, it is evident that at least some of Respondent’s “reasonable customers” understood Behnke’s implicit and explicit claims to mean that the lubricants in and of themselves contained antimicrobial properties that controlled pests in the lubricant and on the equipment it touched, thereby reducing the chances of cross contamination. See *Complainant’s Post-Hearing Brief, pages 43-46 and CX 16*.

Additionally, in *In re Contact Industries, Inc.*, 1978 EPA ALJ LEXIS 11, \*8 (September 25, 1978), in discussing intent, the court provides this insight:

*In interpreting broad remedial legislation, the consumer is not assumed to be an expert or one possessing special knowledge or ability, and includes “the ignorant, the unthinking, and the credulous.”*

Applied to the case before this Honorable Court, *Contact Industries* argues against interpreting FIFRA to include some exemption for products marketed to sophisticated consumers.

Behnke also incorrectly cites to *In the Matter of Caltech Industries, Inc.*, Docket No. 5-FIFRA-97-006 ALJ EPA June 9, 1998, as support for its “reasonable consumer” argument. Despite what Respondent suggests, the dicta of the *Caltech* case offers little to this Court to help determine liability in this case. Rather, the Court in *Caltech* merely denied a motion for accelerated decision without addressing the merits of each party’s underlying defenses and arguments. In *Caltech*, the Court concluded that the arguments

of each party could only be properly measured against the backdrop of an evidentiary hearing on the merits, which the Court felt was necessary to fully develop the genuine issues of fact and law that were presented in that case. Thereafter, the parties reached an agreement in *Caltech* eliminating the need for the Court to issue a Decision based on the arguments presented by the parties. Therefore, *Caltech* offers little if any instructive value in the context of the matter before this Court.

Further, Behnke argues that the lubricants were only intended to control microbes “on or in processed food.” However, Mr. Peter confirmed at hearing that Behnke’s labeling, advertising and marketing of the lubricants claimed that the Micronox antimicrobial technology controlled pests such as E.coli, Salmonella and Listeria in the lubricants themselves. Behnke’s expert Mr. Troy Paquette, testified at hearing that testing of the lubricants was done to determine how well the Micronox antimicrobial technology controlled pests such as E.coli, Salmonella and Listeria within the lubricant itself (*April 3 Tr., 0800*) or on the equipment where the lubricant was applied (*April 3, Tr., 0801-0802*) to minimize cross-contamination. This undermines Behnke’s assertion that the lubricants were only intended to control microbes “on or in processed foods.” The testimony and documentary evidence in the record provides compelling support for U.S. EPA’s position: that that the Micronox antimicrobial technology in the lubricant was intended to control microbes within itself and perhaps on anything else it may have come into contact with (such as the equipment upon which it was applied).

## **II. Whether Behnke’s lubricants are “food additives” under the FFDCA is irrelevant in this matter**

This issue has been fully briefed in previous filings. *See Complainant’s Post-Hearing Brief, pages 78-84, Complainant’s Motion to Strike Respondent’s Affirmative*

*Defenses, and Complainant's Motion to Compel Discovery, pages 21-29 and Complainant's Reply to Respondent's Response to Complainant's Motion For Accelerated Decision on Liability and on Affirmative Defenses, pages 1-6.*

**III. Section 2(mm) of FIFRA does not remove Behnke's lubricants from FIFRA jurisdiction and FIFRA's registration requirements**

This issue has also been discussed extensively in previous filings. Further, the Mr. Edward's testimony at hearing clearly demonstrates that Section 2(mm) of FIFRA in no way exempts Behnke from FIFRA registration requirements for the lubricants in question. *See Complainant's Post Hearing Brief at pages 62-63, Complainant's Motion to Strike Respondent's Affirmative Defenses, and Complainant's Motion to Compel Discovery, pages 14-20, and Complainant's Reply to Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses, pages 4-5* for a detailed discussion of why Section 2(mm) of FIFRA does not in any way limit FIFRA jurisdiction.

**IV. The Food Quality Protection Act (FQPA), the Antimicrobial Regulation Technical Corrections Act (ARTCA) and the Federal Food Drug and Cosmetics Act (FFDCA) do not affect FIFRA jurisdiction over Respondent's products**

Behnke continues to argue that the FQPA, ARTCA and the FFDCA somehow exempt its lubricants out of FIFRA requirements. These issues have been addressed by U.S. EPA at length in our previous filings. *See Complainant's Post-Hearing Brief, pages 77-84, Complainant's Motion to Strike Respondent's Affirmative Defenses, and Complainant's Motion to Compel Discovery, pages 21-29, and Complainant's Reply to Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses, pages 1-5.*

Further, at hearing, Mr. Edwards testified that the FQPA, ARTCA and the FFDCA did not have any affect on whether Behnke's lubricants are subject to FIFRA requirements. *See April 1 Tr., 0383-0409 and 0426-0436.* To date, Behnke still fails to recognize that much of the FQPA and ARTCA pertains to delineating U.S. EPA jurisdiction under Section 408 of the FFDCA and FDA jurisdiction under Section 409 of the FFDCA rather than impacting U.S. EPA's jurisdiction under FIFRA. *See April 1 Tr., 0426-0427.*

**V. Respondent's lubricants are not exempt from FIFRA via the "on or in processed food" exemption**

It is obvious that Behnke's analysis of the matter before this Court is based on a faulty premise: that its lubricants fit into the "on or in processed food" exemption found at 40 C.F.R. Section 152.5(d). Even Behnke's own witnesses, Mr. Peter and Mr. Paquette, testified that the lubricants are not designed to be applied onto or added into processed foods. *See April 2 Tr., 0711-0712, 0717-0720 and April 3 Tr., 0805-0807.*

Behnke continues to argue that the lubricants are not pests because "the microbes intended to be controlled are solely those food borne microbes found 'in or on processed foods.'" However, the testimony confirms that the microbes intended to be targeted by Behnke, such as E.coli, Salmonella and Listeria, neither originate in processed food nor are they limited to being found only on processed foods. U.S. EPA's expert, Dr. Blackburn testified that deadly bacteria such as E.coli, Salmonella and Listeria originate from animals or humans (*April 2 Tr., 0469-0480*) and can cross contaminate processed foods such as bread dough/yeast, cheeses<sup>1</sup> and vegetables (*April 2 Tr., 0455 and 0476-*

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<sup>1</sup> Clearly, customers such as Kraft Foods (the customer that requested that Behnke develop a lubricant that would minimize cross contamination by killing bacteria in the lubricants before they made any contact with

0480). The testimony is clear that these microbes can be found virtually anywhere in a facility (*March 31 Tr., 0084-0085 and April 2 Tr., 00478*) due to cross contamination.

There is no dispute that Behnke's lubricants can migrate into processed food (or unprocessed foods or even non foods). This fact is irrelevant to an analysis of whether the lubricants are exempt from FIFRA requirements. The critical question is whether the lubricants are intended to be placed directly and intentionally "on or in processed foods." Clearly, they are not.

Further, accepting Behnke's logic that the lubricants are exempt under the "on or in processed food" because they may migrate into processed foods would create unintended loops holes in the FIFRA requirements. For example, manufactures of food grade sanitizers would be able to argue that their sanitizers are also exempt from FIFRA requirements because such sanitizers could potentially migrate into food as well. *See April 1 Tr., 0261-0262*. Clearly, this is not the intent of FIFRA.

Alternatively, Behnke takes the absurd position that the lubricants are food themselves because they can become a part of processed food. Both Mr. Peter and Mr. Paquette testified that the lubricants are not food, are not intended to become a component of food, are not intended have a technical effect on food and are not intended to be added to food (*April 2 Tr., 0711-0712, 0719-0720 and 0806-0807*). Mr. Rybicki and Mr. Cooper testified that it is undesirable to get the lubricants into processed foods. So undesirable that the product contaminated with the lubricant would have to be discarded. *See March 31 Tr. 0119 and April 3 Tr., 0856-0857*.

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food) were concerned with deadly bacteria in the facility that did not originate in the cheeses produced at the Kraft facility.

**VI. Conclusion**

The record clearly supports the fact the Behnke's lubricants are pesticides under FIFRA and do not fit into the "on or in process food" exemption or any other exemption under FIFRA. Further, the record clearly supports U.S. EPA's position that Behnke distributed or sold the five lubricants which are the subject of the underlying Complaint on at least eleven different occasions in violation of FIFRA.

U.S. EPA respectfully request that this Honorable Court find Behnke liable for all violations alleged in the Complaint and impose the penalty proposed in the Complaint.

Respectfully Submitted,



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7/14/08  
Date

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**In the Matter of Behnke Lubricants, Inc.**

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

**CERTIFICATE OF SERVICE**

I hereby certify that the original and one true, accurate and complete copy of Complainant's Reply to Respondent's Post-Hearing Brief was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below, and that true, accurate and complete copies of Complainant's Reply to Respondent's Post-Hearing Brief, were served on the Honorable Barbara Gunning, Administrative Law Judge (service by Pouch Mail), and Mr. Bruce McInay, Esq., Counsel for Respondent Behnke Lubricants, Inc. (service by Federal Express), on the date indicated below:

Dated in Chicago, Illinois, this 14<sup>th</sup> day of July, 2008.

