

March 24, 2008

VIA FEDERAL EXPRESS

Judge Barbara A. Gunning  
Administrative Law Judge  
US EPA  
Mail Code 1900L  
1200 Pennsylvania Ave., NW  
Washington, DC 20460-2001

Re: *Behnke Lubricants, Inc.*  
*Docket No. FIFRA-05-2007-0025*

Dear Judge Gunning:

Enclosed please find a true and correct copy of Respondent's Response to Complainant's Motion in Limine and Affidavit of Eric J. Peter.

The original and one copy of Respondent's Response to Complainant's Motion in Limine and Affidavit of Eric J. Peter were delivered to the Regional Hearing Clerk, Region 5, U.S. EPA via overnight mail on March 24, 2008. A true and accurate copy of same was delivered to Nidhi O'Meara via overnight mail on March 24, 2008.

Kindly acknowledge receipt of the enclosed by date stamping the extra copy of this letter and forwarding same to the undersigned in the envelope provided.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Bruce A. McIlnay

BAM/dlp

Enclosures

cc:  Regional Hearing Clerk, w/encl. (via federal express)  
Nidhi O'Meara, w/encl. (via federal express)  
Eric Peter, w/encl.

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**In the Matter of:**

**BEHNKE LUBRICANTS, INC.  
MENOMONEE FALLS, WISCONSIN**

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

**Respondent.**

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

Respondent, Behnke Lubricants, Inc. ("Behnke") files this response to the Complainant's Motion in Limine apparently filed in this matter on March 19, 2008, but not received by Behnke's counsel until March 24, 2008. In short, Complainant misperceives the nature and purpose of the testimony to be provided by both Messrs. Leroux and Cooper. Behnke does not intend to illicit opinion testimony from either Messrs. Leroux or Cooper, but rather factual testimony regarding the actual use of Behnke's lubricants in the food and beverage industries, and their observations regarding the incidental introduction of those products into processed foods and beverage during actual usage. This was made clear in Behnke's second supplemental exchange:

- A. Mr. James Leroux  
377 Rose Street  
Otterburn Park, Quebec CN J3H1M6**

Mr. Leroux has more than 30 years experience in Maintenance Management for Molson's Breweries in Montreal, Canada. Mr. Leroux has worked with Respondent's Lubricants at Molson's for the last 20 years. Mr. Leroux currently works for Mosure Machine Company, Mississauga, ON Canada, which is a seller of food processing machinery and related parts, accessories and supplies. In this capacity, Mr. Leroux must be knowledgeable about the

lubrication of the equipment he sells, the intended purpose of the lubricants that he sells, and their qualification for use within an environment where they become, or may reasonably be expected to become, a part of the food being processed with the machinery that he sells.

Mr. Leroux' testimony will be relevant to the issues of the intended purpose of Respondent's lubricants, his experience in the use of those lubricants within the beverage and food processing industry and the history and role HACCP safety precautions within the food processing industry after 1999. Mr. Leroux may testify to his understanding that H1 lubricants *must be* used where incidental food contact of the lubricant, as used for its intended purpose, is reasonably foreseeable.

**B. Larry Cooper**  
**4775 Old Union Church Road**  
**Holladay, TN 38341**

Mr. Cooper is the present owner of Tri-Cities Supply. Between 1990 and 2006, Mr. Cooper was employed by Pinnacle Foods. For the seven years prior to his leaving Pinnacle, Mr. Cooper served as Mechanic Coordinator. In this position he implemented Respondent's products in coordination with the company's Food Safety Manager.

He may testify as to his first hand experience with Respondent's Lubricants and his implementation of usage of the Lubricants at Pinnacle. He may testify as to the actual use of food grade lubricants within the plant and that when in use the lubricants may become, or may reasonably be expected to become, a component or otherwise affect the characteristics of the food during processing. He may testify that, as a result of usage of Respondent's Lubricants, the bacteria counts in and around bearings was dramatically decreased.

Mr. Leroux and/or Mr. Cooper may be proffered in addition to or in lieu of industry professionals previously identified in Respondent's Initial Prehearing Exchange who are otherwise unavailable for hearing.

Unlike Respondent, Behnke will not presume to offer opinion testimony on what amounts to legal conclusions regarding the implications of the facts to be established through Messrs. Leroux' and Cooper's respective observations on floors of real food and beverage processing plants actually using Behnke's lubricants. Such is the providence of the Court, not Behnke's witnesses.

As to the claim that such testimony shall be cumulative, Behnke's counsel does intend to trim its witness list and some of the witnesses named in its initial Prehearing Exchange are

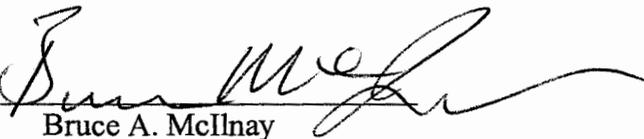
simply unavailable at the time set for the hearing. Such unavailability of witnesses was only known to Behnke after the date of the hearing was known and Behnke's counsel as well as Behnke personnel began to contact witnesses with the actual date. Such is the reason that Behnke was unable to identify Messrs. Leroux and Cooper as witnesses prior to the date of its supplemental Prehearing Exchange. It should be further noted that many witnesses were reluctant to "testify against the EPA" for fear of reprisals.<sup>1</sup> As many of the proposed witnesses are decision makers with Behnke's customers, Behnke is not in a position to argue with these individuals regarding the merits of their fears.

Inasmuch as neither Messrs. Leroux or Cooper are specially trained in a technical field, but shall base their testimony on their years of actual use of Behnke's lubricants, it would seem that the summary of that experience contained in the disclosures quoted above should be sufficient to permit an adequate cross examination of the witnesses. If Complainant would prefer, it is possible that Behnke could make the witnesses available for telephone depositions later this week or during the introduction of Complainant's case.<sup>2</sup>

For the reasons discussed above, Behnke respectfully requests that Complainant's Motion in Limine to Exclude Testimony of Messrs. Leroux and Cooper be denied.

Dated: March 24, 2008

Counsel for Behnke Lubricants, Inc.

By:   
Bruce A. McInay

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<sup>1</sup> See Affidavit of Eric J. Peter submitted herewith. While Behnke takes no position of the appropriateness of such perceptions of the EPA, it should be noted the difficult position in which it places Behnke when essentially seeking an inconvenient consideration from its customers.

<sup>2</sup> Apparently, Complainant has three attorneys quite familiar with the narrow issues raised in the case. It would not seem too burdensome to have one briefly absent from the actual hearing.

CERTIFICATE OF SERVICE

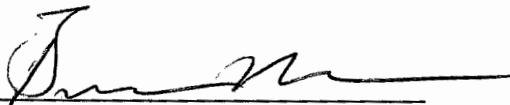
The undersigned hereby certifies that he has caused a true and correct copy of the foregoing RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION IN LIMINE and AFFIDAVIT OF ERIC J. PETER to be served upon the following on the date indicated below by overnight mail:

Regional Hearing Clerk (E-13J) (Original and one copy)  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

Judge Barbara A. Gunning  
Office of the Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-2001

Nidhi O'Meara (C-14J), Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

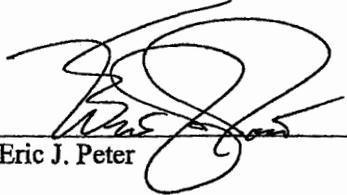
Dated: March 24, 2008

  
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Bruce A. McIlroy

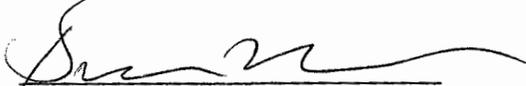
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3. I personally know that Messrs. Leroux and Cooper have worked with Behnke's lubricants in a number of settings within the food and beverage processing industries and are very knowledgeable about actual use of our products in a wide variety of applications.

  
Eric J. Peter

Sworn to and subscribed before me  
this 24 day of March, 2008

  
Notary Public, State of Wisconsin  
My commission expires: