

February 21, 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 Response to Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses, with supporting documents.

The original and one copy of Response to Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses, with supporting documents were delivered to the Regional Hearing Clerk, Region 5, U.S.EPA via messenger on February 21, 2008. A true and accurate copy of same was delivered to Nidhi O'Meara via messenger on February 21, 2008.

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

Very truly yours,



Bruce A. McIlroy

BAM/dlp

Enclosures

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

BEHNKE LUBRICANTS INC.
MENOMONEE FALLS, WISCONSIN

Docket No. FIFRA-05-2007-0025

Respondent.

RESPONSE TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION
ON LIABILITY AND ON AFFIRMATIVE DEFENSES

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Respondent Behnke Lubricants, Inc., through its undersigned attorneys, McIlroy & Button, Ltd., hereby files its response to Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses ("EPA's Motion"). This case cannot appropriately be decided on a Motion for Accelerated Decision due to the existence of genuine issues of material fact. For the reasons stated below, EPA's Motion should be denied.

I. INTRODUCTION.

On May 7, 2007, Complainant United States Environmental Protection Agency ("EPA") filed a Complaint in this civil administrative penalty proceeding against Respondent Behnke Lubricants, Inc. ("Behnke") alleging eleven violations of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") §§3(a) and 12(a)(1)(A), 7 USC §§136a(a) and 136j(a)(1)(A). EPA alleges, in sum, that Behnke sold or distributed "pesticides" not registered under Section 3 of FIFRA. More specifically, Complainant contends Behnke's product literature and labeling and internet site constitute "advertisements" within the meaning of the FIFRA and the representations thereon regarding the benefits of Micronox® technology in Behnke's food grade lubricants JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, JAX Magna-Plate 74 and JAX Magna-Plate 78 (hereafter collectively referred to as the "Lubricants") "claims, states or implies" that the Lubricants are "pesticides" within the meaning of FIFRA. Behnke raised seven "affirmative defenses" to these allegations in its Answer.

II. ISSUES PRESENTED.

A. Do true statements made regarding the antimicrobial properties of the Lubricants, which are anticipated will become a part of processed food and, therefore, must be deemed to

be “food additives” and must be safe for human consumption, relate to “pests” as defined in 40 CFR §152.5?

B. If the answer to issue 1 is “no,” do the Lubricants fall within the definition of “pesticides” within the meaning of 40 CFR § 152.3?

1. *To answer issues 1 and 2, the Court must resolve genuine issues of material fact regarding the incorporation of the Lubricants into processed foods when used for their intended purpose.*

C. Under the circumstances presented here, where it cannot be disputed that the Lubricants are sold solely for use within the food and beverage processing industries, can it be determined as a matter of law that objectively “reasonable consumers” within that industry would interpret Behnke’s true statements regarding the antimicrobial properties of the Lubricants to suggest that the Lubricants “can or should” be used as pesticides within the meaning of 40 CFR § 152.15(a)(1).

1. *In order to resolve issue 3, the Court must resolve genuine issues of material fact regarding the market for, and intended use of, the Lubricants.*
2. *In order to resolve issue 3, the Court must also resolve genuine issues of material fact regarding the sophistication and understanding of the consumers within the relevant market for the Lubricants.*

III. APPLICABLE STANDARDS FOR ACCELERATED DECISION.

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *In the Matter of General Motors Automotive North America*, Docket No. RCRA-05-2004-001, 2004 EPA ALJ LEXIS 137 at *8 (October 27, 2004); *In the Matter of Belmont Plating Works*, Docket No.

RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (September 11, 2002). Rule 56(c) of the Federal Rules of Civil Procedure provides, in turn, that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue of material fact* and that the moving party is entitled to a judgment as a matter of law.” (emphasis added). Federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See In re CWM Chemical Service, Inc., Chemical Waste Mgmt., Inc., and Waste Mgmt., Inc.*, 1995 EPA App. LEXIS 20, 6 E.A.D. 1 (EAB 1995).

The burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the Presiding Officer must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hosp. Ass’n*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002); *Londrigan v. FBI*, 670 F.2d 1164, 1171 n.37 (D.C. Cir. 1981).

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing

that there is a genuine issue for trial.” However, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

A movant is entitled to an accelerated decision “only if it presents evidence so strong and persuasive that no reasonable [fact finder] is free to disregard it.” *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting *In re BWX Technologies, Inc.*, Docket No. RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 9 (EAB, April 5, 2000). See also *In the Matter of Chemtron Corp.*, Docket No. RCRA-05-2001-0017, 2002 EPA ALJ LEXIS 75 (December 2, 2002).

For the reasons stated below, EPA has failed to meet its initial burden of showing the absence of any disputed issues of material fact in this matter and, therefore, EPA’s Motion must fail. At a minimum, the affidavits Behnke submits with this response demonstrate the existence of genuine issues of material fact precluding the imposition of an accelerated decision.

IV. BEHNKE’S STATEMENT OF THE FACTS.

Behnke is a Wisconsin corporation with its principal place of business located in Menomonee Falls, Wisconsin, and has been in business since 1955. Eric Peter is president of Behnke and has worked for the company for more than 30 years. (Declaration of Eric J. Peter, Aff. ¶1). Behnke manufactures JAX[®] branded lubricants for industrial uses and employs approximately 50 people with primary locations in Wisconsin and California, and various sales representatives throughout the United States. (*Id.*, ¶2).

Behnke’s JAX lubricants were originally developed for use on heavy equipment, industrial machinery, heavy duty trucking, and farm and off highway construction machinery.

Behnke manufactures and distributes lubricants as varied as engine oils, hydraulic fluids, gear box oils, conveyor lubricants, greases, way lubricants, transmission fluids and compressor oils. Its products may be based upon mineral oil or high end synthetic chemistry depending upon the lubrication requirements of specific machinery and applications. (*Id.*, ¶3).

In or about 1961, Behnke was providing lubricants to numerous meat processors for their shop and processing equipment. These food processing plants were inspected by the United States Department of Agriculture (“USDA”). At that time, it was determined by USDA that the lubricants used on the food processing equipment within these plants -- often simply general industrial lubricants obtained from the truck shop or yard maintenance department -- posed actual or potential threats of contacting and becoming a part of the processed food product. With general industrial lubricants this could present a health hazard to consumers of the finished food product. (*Id.*, ¶4).

In addition to USDA, whose inspection authority included meat and poultry processors, the United States Food and Drug Administration (“FDA”) regulated other food and beverage processing plants. In the early 1960s, FDA and USDA jointly promulgated regulations specifying chemical formulation tolerances for the lubricants that could be used in the food and beverage processing plants. (*Id.*, ¶5).

Generally, under FDA/USDA regulations, if the lubricants were industrial in nature and did not contain any poisonous or lethal substances, such as lead, antimony and other components, they could be used in the food processing plants. If, however, the chance of incidental contact with the food product itself was determined to exist, the lubricant was required to meet new ingredient guidelines established by FDA with the finished product chemistry to be confirmed and approved for listing by the USDA. These “food grade” lubricants could only

contain up to the maximum levels of ingredients specified by FDA for use in lubricants with incidental food contact under what is now 21 CFR §178.3570. The acceptable ingredients and their specified levels or tolerances were designated in the regulations. (*Id.*, ¶6).

Also allowed (in the food grade lubricants) were 21 CFR §182 items “generally regarded as safe,” spawning the acronym “GRAS” to identify them. USDA developed a classification for food grade lubricants that was later designated as “H1.” (*Id.*). H1 lubricants must be used where food contact with the lubricant is probable and the lubricant may, therefore, become a component of the food product. H2 designated lubricants, on the other hand, can only be used in areas of a food processing plant where food contact is not an issue. (Declaration of Bill Bayliss, ¶2).

Many of Behnke’s customers at the time then demanded lubricants approved by USDA as H1 compliant. Behnke was fortunate to be one of the very first lubricant manufacturers to offer lubricants that met the new H1 requirements. Thus, Behnke’s experience producing these food grade lubricants dates back to the inception of FDA/USDA regulation of lubricants with incidental food contact. (Peter Declaration, ¶7).

As FDA continued to test ingredients and add to the list, Behnke remained intimately involved in development and formulation of improved lubrication products. As the lubrication performance of the H1 products improved, acceptance of their use in plants, even in areas where they were not required, increased. Thus, the improved performance of USDA H1 accepted lubricants was integral to improved food safety, because they allowed greater use in all areas of processing facilities. (*Id.*, ¶9).

Sometime in the late 1990’s, USDA started taking a new approach to processing plant inspections and oversight. USDA now required Behnke’s food processing clients to implement Hazardous Analysis and Critical Control Point (“HACCP”) food safety standards. USDA’s

Food Safety and Inspection Service (“FSIS”) reduced its plant inspections and discontinued the publication of its ‘White Book’ of approved products for use in processing plants, including H1 lubricants. (Peter Declaration, ¶11).

These changes were in the nature of enforcement strategy rather than relaxation of regulatory requirements. FDA requirements regarding formulation of food grade lubricants had not changed, but USDA no longer oversaw testing of finished formulations or publication of the approved H1 lubricants. Instead, the processors were now responsible for ensuring the materials used in their plants complied with FDA regulations. As a result, lubricant suppliers such as Behnke had to either certify compliance of their products or have its finished products certified by an independent nongovernmental organization (“NGO”) like NSF International (“NSF”) or Underwriters Laboratories. By the mid 2000’s, NSF had become the predominant NGO for H1 certification of lubricants. (*Id.*, ¶12).

All the Lubricants at issue in this case meet the tolerances required under 21 CFR §178.3570 and have been deemed acceptable by NSF International as lubricants with incidental food contact for use in and around food processing areas. (Declaration of Troy F. Paquette, ¶8).

Because it is reasonably foreseeable that the Lubricants may come in contact with and, therefore, a part of the foods during the processing of the food products, Behnke’s customers must use H1 classified lubricants. Microbes in or on the foods can be transferred to the Lubricants as used for their intended purpose, i.e., equipment lubrication. The Lubricants’ resistance to such contamination is beneficial to the customer’s HACCP efforts by limiting cross-contamination. (Declaration of Bill Bayliss, ¶¶3-4).

Behnke has deep and intimate knowledge of the machinery and processes that JAX food grade lubricants must address including wear protection, corrosion resistance, oxidation

prevention and other difficult issues in modern food processing equipment. Its sales representatives work hand-in-hand with plant engineers and maintenance personnel to find or develop solutions for specific applications, which can vary tremendously from one environment to the next. (Peter Declaraton, ¶13).

To succeed in the food and beverage processing market, Behnke must effectively address its customers' primary lubrication needs, yet the Lubricants must be safe for incidental consumption under FDA guidelines. Due to the proximity of the lubricants to processed foods, the lubricants, although not direct food additives, are expected to become a part of the processed food and to be ingested as part of the final food product. (*Id.*, ¶14).

In or around 2001, Behnke was approached by a multi-national food processing customer, Kraft Foods, with a request for help lubricating a bearing in a cream cheese manufacturing plant. The environment in this plant was particularly challenging as the process used a good deal of water, which mixed with the cream cheese and splashed onto the bearings in the ordinary operation of the processing equipment. These large bearings needed to be protected from wear and corrosion under very tough conditions. (*Id.*, ¶15).

Behnke's customer was also concerned that microbes contained in the cream cheese water mix would multiply within Behnke's lubricant and, then, as the lubricant further contacted the cream cheese, it would, contaminate the finished food product with undesirable levels of the microbes. Therefore, the customer asked whether Behnke could formulate an H1 lubricant that could reduce the risks of such cross-contamination, thus eliminating the lubricant as a "hot spot" for microbial contamination under Kraft's HACCP evaluation process. (*Id.*, ¶16).

Limited antimicrobial properties are inherent in some food grade greases, but Behnke's customer requested that Behnke try to improve on these properties. To this end, Behnke

reviewed FDA approved lists of ingredients to see if an ingredient or ingredients already approved for food processing use within their stated tolerances (under 21 CFR §178.3570) could be incorporated to improve both the lubricating properties of Behnke's products while also reducing the risk of microbial cross-contamination of processed food products. (*Id.*, ¶17).

Through extended research using several proprietary combinations of FDA and GRAS approved food grade lubricant additives; Behnke was able to improve upon the resistance of its lubricants to food borne microbes and, thereby reduce the risk of cross-contamination of processed foods of which the lubricants would become a part. (*Id.*, ¶18). Kraft performed detailed laboratory and field trial analysis of both the lubrication performance of Behnke's improved product and its ability to resist food borne microbes. Kraft's extensive testing showed that Behnke's products resisted food borne microbes while also complying with FDA regulations for lubricants intended for incidental food contact. (*Id.*, ¶19). (*See also* Paquette Declaration, ¶¶9-14).

This was a major benefit and breakthrough as the product achieved the customer's lubricant needs while also improving food safety by eliminating a host for the growth of undesirable levels of food borne microbes. As a result, Behnke reformulated much of its food-grade product line to incorporate this improved technology. Behnke registered the trademark Micronox[®] to identify food grade lubricants that incorporated this technology. Micronox[®] is not, however, a substance that exists separate from the lubricants that incorporate the technology. There is not a "formula" for Micronox[®] and one cannot purchase Micronox[®] as an additive for any other products. (Peter Declaration, ¶20).

Behnke undertook advertising and promotion of its food grade lubricants featuring the Micronox[®] technology in food and beverage processing plant machinery. Behnke believed the

industry would benefit in terms of food safety by being aware that these lubricants were available, and Behnke felt it would be advantageous to promote the benefits of its Micronox[®] technology. As Micronox[®] was only of particular interest where there was a need to reduce the risk of cross-contamination with food or beverage borne microbes, such advertising and promotional activities were aimed *exclusively* at the food and beverage processing markets. Behnke does not promote or sell lubricants incorporating the Micronox[®] technology to the general public or to industrial users outside the food and beverage processing markets. (*Id.*, ¶21). (See also Paquette Declaration, ¶18 and Declaration of Tracey Huebner, ¶¶3-6).

In or about 2003, NSF informed Behnke that it had received complaints from Behnke's competitors regarding the promotion of its Micronox[®] technology. Apparently under pressure from these competitors, NSF took the position that Behnke's promotional materials constituted "pesticidal" claims in violation of FIFRA. Behnke disputed NSF's interpretation because, among other reasons, microbes "in or on processed foods" are by definition not "pests" under FIFRA. Further, Behnke's products were, in fact, FDA and H1 compliant. Nevertheless, NFS threatened to withdraw its H1 certification of Behnke's products unless Behnke altered its advertising and promotional materials regarding Micronox[®] technology. (Peter Declaration, ¶22).

Faced with such strong-arm tactics, Behnke complied with NSF's first two demands until Behnke could get a clarifying interpretation of FIFRA and the Federal Food, Drug, and Cosmetic Act from a federal court. Finally, NSF took the indefensible position that Behnke could not even include the trademark Micronox[®] on its labeling as the name itself implied a pesticidal purpose. For this reason, in November 2006 Behnke commenced a declaratory judgment action in U.S. District Court for the Eastern District of Wisconsin against NSF seeking a judicial ruling on the

limitations, if any, on Behnke's labeling under FIFRA. Approximately five weeks later (in December of 2006), Behnke was first notified of EPA's intent to file this suit. (*Id.*, ¶¶23-24).

In the spring and summer of 2007, many of Behnke's customers were inspected by a representative of EPA's Chicago regional office. One such customer ceased buying from Behnke because they had been convinced by the EPA representative that Behnke was selling an unregistered "pesticide." Instead, the customer placed Behnke's competitor on its approved vendor list. Just recently, this same customer approached Behnke not because of the antimicrobial properties of its lubricants, but because, in their opinion, Behnke's lubricants perform better as lubricants than the competitor's. (*Id.*, ¶25).

V. UNDISPUTED FACTS.

For purposes of this Motion, Behnke does not dispute the following facts:

A. BEHNKE IS A "PERSON" "IN ANY STATE."

Behnke does not dispute it is a "person" "in any state" within the meaning of 7 U.S.C. §136(s). (Answer, ¶13).

B. DISTRIBUTION AND SALE OF THE LUBRICANTS.

Behnke also does not dispute it distributed, offered for sale, or sold:

- a. JAX Poly-Guard FG-2 on or about August 3, 2006 (Count I)(Compl. ¶194);
- b. JAX Halo-Guard FG-2 on or about August 3, 2006 (Count II)(Compl. ¶197);
- c. JAX Halo-Guard FG-2 to American Foods Group ("American") on or about December 19, 2006 (Count III) (Compl. ¶200);
- d. JAX Magna-Plate 78 to American on or about December 29, 2006 (Count IV)(Compl. ¶203);
- e. JAX Magna-Plate 78 to American on or about March 5, 2007 (Count V)(Comp. ¶206);

- f. JAX Magna-Plate 78 to American on or about March 3, 2006 (Count VI)(Compl. ¶209);
- g. JAX Magna-Plate 74 to American on or about March 3, 2006 (Count VII)(Compl. ¶212);
- h. JAX Poly-Guard FG-2 to Badger Plastics & Supply, Inc. (“Badger”) on or about September 18, 2006 (Count VIII)(Compl. ¶215);
- i. JAX Poly-Guard FG-2 to Badger on or about June 15, 2006 (Count IX)(Compl. ¶218);
- j. JAX Halo-Guard FG-LT to Jennie-O Turkey Store (“Jennie-O”) on or about June 27, 2006 (Count X)(Compl. ¶221); and
- k. JAX Poly-Guard FG-2 to Perlick Corporation (“Perlick”) on or about March 3, 2006 (Count XI)(Compl. ¶224).

C. BEHNKE’S LUBRICANTS ARE NOT REGISTERED AS PESTICIDES.

Behnke does not dispute the Lubricants are not “registered” as pesticides under FIFRA.

D. PRODUCT LITERATURE AND LABELING.

Behnke does not dispute the allegations in the Complaint as they relate to the Lubricants’ labels, Product Data Sheets, and literature that EPA discovered in its investigation¹: (See Complaint, JAX Poly-Guard FG-2 ¶¶18, 20, 134, 140; JAX Poly-Guard FG-LT ¶¶31, 128; JAX Halo-Guard FG-2 ¶¶41, 43; JAX Magna Plate 74 ¶¶65, 67; JAX Magna Plate 78 ¶¶83, 147; and, in general, ¶¶84, 86, 111, 115-16, 148, 149, 152, 153, 171-75).

VI. RELEVANT STATUTORY AND REGULATORY ANALYSIS.

This case, which creates issues of first impression for the Court, evidences the complicated, ambiguous, contradictory and ever-changing regulatory framework the federal government, FDA and EPA, in particular, have imposed on American businesses who, in good

¹. Behnke notes, however, that in response to pressure from NSF and EPA, it has ceased using even the trade name Micronox® in its labels or advertising. Micronox® is not mentioned in any of Behnke’s advertising in 2007 and in only one advertisement placed in 2006. (Huebner Declaration, Exhs. B-C).

faith, seek to provide products with safety enhancing features to the food and beverage industry without creating unnecessary hysteria associated with labeling its products as “pesticides.”²

A. FIFRA.

FIFRA §3(a), 7 USC §136a(a), provides that no person may “distribute or sell” any “pesticide” not registered under the Act with EPA. FIFRA §12(a)(1)(A), 7 USC §136j(a)(1)(A), more specifically states that “it shall be unlawful” to distribute or sell any “pesticide” that is not registered under §136a except to the extent authorized by the Administrator. The term “distribute or sell” means to “distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, ...” 7 USC §136(gg). *See also* 40 CFR 152.3.

The Complaint alleges violations of FIFRA §§3(a) and 12(a)(1)(A). Thus, the pivotal issue in this case is whether, in fact, Behnke distributed or sold (or offered for sale or distribution) unregistered “pesticides” within the meaning of FIFRA.

“*Pesticide*” under FIFRA means, in part:

- (1) any substance or mixture of substances *intended* for preventing, destroying, repelling, or mitigation any *pest*, ...

FIFRA §2(u), 7 USC §136(u)(emphasis added). *See also* 40 CFR §152.3.

“*Pest*” within the meaning of FIFRA is further defined, in relevant part, as:

- (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section 136w(c)(1)...

FIFRA §2(t), 7 USC §136(t).

² Before even filing this Complaint, EPA investigators implied to Behnke’s customers that the Lubricants were pesticides and at least one customer discontinued using Behnke’s lubricants as a result. (Peter Declaration ¶ 25).

EPA regulation 40 CFR §152.5(d) specifically excepts from the definition of a “pest” any “fungus, bacterium, fungus or other microorganism if it is “on or in living man or other living animals” and those “*on or in processed food* or processed animal feed, *beverages*, drugs, and cosmetics. “ (emphasis added).

Finally, 40 CFR §152.15(a)(1), provides in relevant part:

... A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:

(a) The person who distributes or sells the substance *claims, states, or implies* (by labeling or otherwise):

(1) That the substance (either by itself or in combination with any other substance) *can or should be used as a pesticide ...*

B. THE FEDERAL FOOD DRUG AND COSMETIC ACT (“FFDCA”) 21 U.S.C. 321, ET SEQ.

The key to interpreting the ambiguity in FIFRA at the bottom of this case is whether the Lubricants are “food additives” regulated under FFDCA. Under the FFDCA, Congress delegated to the Food and Drug Administration (“FDA”) regulatory authority over, among other things, adulterated foods (FFDCA §402, 21 U.S.C. 342) and food additives (FFDCA §409, 21 U.S.C. §348).

Under the authority delegated to it under the FFDCA, the FDA has promulgated regulations governing both adulterated foods and food additives. The food additive regulations adopted under authority of §409 of the FFDCA are of direct relevance to the instant case. These regulations are found in CFR Title 21, Chapter I -- Food and Drug Administration, Department of Health and Human Services, Subchapter B – Food for Human Consumption, beginning with Part 170 -- Food Additives. Relevant sections provide:

§ 170.3 Definitions.

For the purposes of this subchapter, the following definitions apply:

* * *

(c) Commissioner means the Commissioner of Food and Drugs.

(d) As used in this part, the term act means the Federal Food, Drug, and Cosmetic Act approved June 25, 1936, 52 Stat. 1040 et seq., as amended (21 U.S.C. 301-392).

(e)(1) Food additives includes all substances not exempted by section 201(s) of the act, *the intended use of which results or may reasonably be expected to result, directly or indirectly, either in their becoming a component of food or otherwise affecting the characteristics of food.*

* * *

(3) A food contact substance is any substance that is intended for use as a component of materials *used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food.*

* * *

(g) The word substance in the definition of the term "food additive" includes a food or food component consisting of one or more ingredients.

* * *

(i) Safe or safety means that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use. It is impossible in the present state of scientific knowledge to establish with complete certainty the absolute harmlessness of the use of any substance. Safety may be determined by scientific procedures or by general recognition of safety. In determining safety, the following factors shall be considered:

(1) The probable consumption of the substance and of any substance formed in or on food because of its use.

* * *

(m) Food includes human food, *substances migrating to food from food-contact articles*, pet food, and animal feed.

(Emphasis supplied).

§ 174.5 General provisions applicable to indirect food additives.

* * *

(c) The existence in this subchapter B of a regulation prescribing safe conditions for the use of a substance as an article or component of articles that contact food shall not be construed as implying that such substance may be safely used as a direct additive in food.

(d) Substances that under conditions of good manufacturing practice *may be safely used as components of articles that contact food include the following, subject to any prescribed limitations:*

(1) Substances generally recognized as *safe in or on food*.

* * *

(4) Substances permitted for use by regulations in this part and parts 175, 176, 177, 178 and § 179.45 of this chapter.

(5) Food contact substances used in accordance with an effective premarket notification for a food contact substance (FCN) submitted under section 409(h) of the act.

(Emphasis supplied).

§ 174.6 Threshold of regulation for substances used in food-contact articles.

Substances used in food-contact articles ... *that migrate, or that may be expected to migrate, into food* at negligible levels may be reviewed under § 170.39 of this chapter.

§ 178.3570 Lubricants with incidental food contact.

Lubricants with incidental food contact may be safely used on machinery used for producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food, subject to the provisions of this section:

(a) The lubricants are prepared from one or more of the following substances:

(1) Substances generally recognized as safe for use in food.

(2) Substances used in accordance with the provisions of a prior sanction or approval.

(3) Substances identified in this paragraph (a)(3).

* * *

C. THE FOOD QUALITY PROTECTION ACT ("FQPA").

On August 3, 1996, Congress enacted the Food Quality Protection Act ("FQPA"), modifying FIFRA and the FFDCA. *See Registration Requirements for Antimicrobial Pesticide Products and Other Pesticide Regulatory Changes*, 64 Fed. Reg. 50672, 50673 (September 17, 1999). Prior to FQPA, the division of jurisdiction between EPA and the Food and Drug Administration ("FDA") over pesticide residues in food was controlled by complicated

provisions of FFDCA. FQPA modified FFDCA to create clearer lines of jurisdiction. *Id.* at 50697.

When Congress enacted FQPA it expressly excluded the substances regulated under FFDCA from the definition of “antimicrobial pesticide,” leaving the regulation of substances acting on microbes “on or in” processed foods and beverages to the FDA. Congress perceived no benefit in two distinct agencies of the federal government testing and passing on the safety and efficacy of the same products used within a specified industry, namely, the food and beverage processing industry.

Accordingly, FQPA amended FIFRA, 7 USC §136(mm)(1), such that the term “antimicrobial pesticide” means a pesticide that:

(A) is intended to (i) disinfect, sanitize, reduce, or mitigate growth or development of microbial organisms; or (ii) protect inanimate objects, industrial processes or systems, surfaces, water, or other chemical substances from contamination, fouling, or deterioration caused by bacteria, viruses, fungi, protozoa, algae, or slime; *and*

(B) *in the intended use is exempt from, or otherwise not subject to, a tolerance under section 408 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a and 348) or a food additive regulations under section 409 of such Act [21 U.S.C. §348].*

(emphasis added).

D. FFDCA ANTIMICROBIAL REGULATION TECHNICAL CORRECTIONS ACT OF 1998 (“ARTCA”).

Subsequent to the joint FDA/EPA notice cited by EPA here proposing an allocation of jurisdiction over antimicrobial substances (EPA’s brief, pp. 51-52), Congress passed the “Antimicrobial Regulation Technical Corrections Act of 1998” (“ARTCA”) which supersedes the joint Policy Interpretation with regard to FFDCA regulatory authority over antimicrobial residues in food. 64 Fed. Reg. at 50698. ARTCA effectively transferred authority over a

number of pesticide residues to the FDA which had originally been transferred to EPA by FQPA. *Id.* at 50673.

In its discussion of its proposed rules to implement the FQPA and ARTCA amendments to FIFRA, the EPA acknowledged “[t]he practical consequences of being included or excluded as an ‘antimicrobial pesticide’ are significant for both pesticide producers and the Agency. FIFRA section 2(mm) defines the term ‘antimicrobial pesticide,’ carefully delineating its boundaries to mesh with the practical implementation of section 3(h) requirements.” 64 Fed. Reg. at 50677. When discussing the definition of “antimicrobial pesticide” adopted by Congress, the EPA stated:

Having identified the universe of substances that, based upon the intended pesticidal purpose, are antimicrobial pesticides, the definition goes on in paragraphs (1)(B) and (2) to exclude certain pesticides from the definition of antimicrobial pesticide. *These exclusions may be characterized as use-based, that is, a pesticide is excluded because of how or where it is used, and not because of the pests or purpose of use.*

Id. (emphasis added).

The first such use exclusion identified by the EPA is the “food use” exclusion: “FIFRA section 2(mm)(1)(B) excludes from ‘antimicrobial pesticide’ those pesticides whose intended antimicrobial use is such that residues in food requiring regulation under sections 408 or 409 of the FFDCA might result.” *Id.*

The EPA recognized Congress was, among other things, attempting to avoid duplicative efforts by two federal agencies:

In creating this exclusion, Congress recognized that applications for registration of food uses that require clearance under FFDCA require extensive data and relatively complex risk assessments that take longer to review. *Moreover, obtaining an FFDCA clearance is a formal regulatory procedure.* As discussed in Unit VIII.H., FIFRA section 3(h) establishes goals for completion of Agency review of an application for registration. *In EPA's view, Congress recognized the*

difficulty of requiring the review timeframes for registration to encompass the complexities of FFDCA clearance as well. Accordingly, EPA believes that Congress intended the statutory definition to allow exclusion of any antimicrobial pesticide that would require the extensive clearance process of the FFDCA.

Id. (emphasis added).

Given the food use exclusion, it is clear that the status of an antimicrobial product as an 'antimicrobial pesticide' within the meaning of FIFRA section 3(h) is not necessarily a permanent designation, but may shift according to its intended use. A product could be included or excluded from the definition if the intended use changes.

Id. at 50678. (emphasis added).

EPA acknowledged it retained FIFRA authority for antimicrobial products “other than those used on processed food.” *Id.* at 50698.

Despite its own Agency’s recognition that clear statutory language excludes products that “bear a food use” (*i.e.*, Behnke’s Lubricants) from FIFRA regulation and registration, EPA here has decidedly ignored the plain meaning of the statute by disavowing the food use exclusion as to “antimicrobial pesticides.” Contrarily, EPA now contends the definition of “antimicrobial pesticide” is irrelevant to this case.

VII. ARGUMENT.

Behnke disputes and strongly contests whether the Lubricants are, in the first instance, “pesticides” requiring registration under FIFRA. Behnke further disputes whether the statements contained within the Lubricant labels and related documents can, therefore, constitute pesticidal claims. Finally, there exists, at a minimum, a genuine issue of fact regarding what a reasonable consumer in the food and beverage processing industries, who are familiar with H1 lubricants, would conclude from such statements regarding the intended purpose of the Lubricants.

A. A GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER THE LUBRICANTS ARE “PESTICIDES” WITHIN THE MEANING OF FIFRA.

1. *Behnke’s Affirmative Defenses Are Tied Together to Raise the Defense That Under The Specific Facts of This Case The Lubricant’s Are Not Pesticides Within The Meaning of FIFRA.*

Although EPA appears to argue the issue separately, Behnke’s response to EPA’s Motion for Accelerated Decision as to Affirmative Defenses Nos. 1, 2 and 7 is interwoven into its response to the EPA’s motion specifically relating to liability. Behnke’s Affirmative Defenses Nos. 1, 2 and 7 are obviously interrelated; for example, as shown below, Behnke alleges affirmatively its products are not “pesticides” (Aff. Def. 1); do not contain a “pesticide” (Aff. Def. 2); and are not “intended for a pesticidal purpose” within the meaning of 40 CFR §152.15(a)(1) (Aff. Def. 7). The interrelationship of these three affirmative defenses is for obvious reasons; since microorganisms “on or in processed” food and beverages are not “pests” within the meaning of FIFRA, it necessarily follows that the ability of Behnke’s Lubricants to resist microorganism on or in processed food does not make the Lubricants “pesticides,” within the meaning of 40 CFR 152.3. Further, because the Lubricants are subject to tolerances under 21 CFR §178.3570, they are not “antimicrobial pesticides” or “pesticidal chemicals” within the meaning of FIFRA.

Although argued separately by EPA, Affirmative Defenses No. 1, 2 and 7 provide the framework for and are interwoven into Behnke’s defense in this matter as a whole. If the Court determines disputed issues of fact exist precluding accelerated decision in this matter, it logically follows it also cannot grant an accelerated decision as to the affirmative defenses.

At the outset, it is unclear whether, in fact, Affirmative Defenses No. 1, 2 and 7 are true affirmative defenses. As commonly understood an affirmative defense is a basis for denying liability even if the facts of a complaint are true, while a denial simply denies the facts of a

complaint. *Lifeblood Biomedical, Inc. Opt-In Trust v. Mann (In re Sender)*, 423 F. Supp. 2d 1155, 1163 (D. Colo. 2006). Behnke's affirmative defenses summarize the circumstances and arguments constituting the grounds for challenging portions of EPA's prima facie case as required by 40 CFR §22.15(b).

As explained below, Behnke has submitted affidavits supporting its claim for exemption from the definition "pest" such that disputed issues of material fact exist precluding accelerated decision. EPA wrongly claims Behnke must provide "substantial evidence" in support of its affirmative defenses at the accelerated decision stage. (EPA Brief p. 49). Rather, a party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22-23 (September 9, 2002); *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 EPA ALJ LEXIS 16 (November 28, 1994). Or as this Court has stated, "significant probative evidence tending to support" its defenses. *See In the Matter of General Motors*, 2004 EPA ALJ LEXIS 137 at *8. Here, the evidence submitted by Behnke, not only calls into question the EPA's evidence, but as it cannot reasonably be disputed by the EPA, may entitle Behnke to an accelerated decision the issue of whether the Lubricants are pesticides under FIFRA.

2. *The Lubricants Are Not Intended to Control or Mitigate "Pests" Within the Meaning of 40 CFR §152.5, Because Microbes "On or In Processed Foods" Are Excepted From EPA's Definition of Pests.*

40 CFR §152.5(d) excludes from the definition of "pest," any "fungus, bacterium, fungus or other microorganism if it is "on or in living man or other living animals" and those "*on or in processed food* or processed animal feed, *beverages*, drugs, and cosmetics." EPA contends

§152.5(d) is designed for instances when a product targeting microorganism is applied onto the processed food (such as a meat sanitizer) although it provides no support of its interpretation of the exemption. (EPA Brief. pp 50-51). Further, EPA attempts to argue that the Lubricants cannot possibly fall within this exception because the Lubricants are allegedly not edible food. (*Id.* at 51-53). The EPA is incorrect on both counts.

A genuine issue of material fact exists whether Behnke's Lubricants are "intended" for preventing, destroying, repelling, or mitigating any "pest" within the meaning of FIFRA §2u, 7 USC §136(u). EPA correctly understands that it is Behnke's position that the Lubricants cannot be pesticides because, to the extent the Lubricants have antimicrobial properties, the microbes intended to be controlled are solely those food borne microbes found "in or on processed foods." (EPA Brief at 51). EPA argues that such an interpretation would "result in an enormous and unintended loophole in the FIFRA registration process. The resulting loophole would obviate the need for the registration of all products making food borne public health claims and would not serve to effectuate the purpose of FIFRA and its implementing statutes." (*Id.* at 53).

The EPA's argument is without merit and relies on a false premise the Lubricants are not food. Although the EPA recognizes a distinction based upon whether the products at issue are foods is relevant, it fails to apply this distinction because of an unsubstantiated claim that "[c]learly it is commonly understood that a lubricant is not an edible food article or intended for human consumption." (*Id.* at 52).

Not only is this assertion incorrect, but is directly contradicted by the FDA's regulation in 21 C.F.R. 178.3570. Factually, the EPA itself concedes that "[i]n food processing facilities such microorganisms [Salmonella and E. Coli] can only originate from the processed meat." (*Id.* at 52-53). Further, the sworn declarations of Eric Peter, Troy Paquette, Bill Bayliss and William

Barden submitted herewith all support the conclusion that the microorganisms with which food and beverage processors are concerned are those that originate “on or in the processed foods.” These affidavits further dispute the EPA’s assertion that the Lubricants are not edible food articles by establishing, without counter evidence from EPA, that the Lubricants must be H1 certified precisely because “*the intended use of [the Lubricants]... results or may reasonably be expected to result, directly or indirectly, either in their becoming a component of food or otherwise affecting the characteristics of food... .*” See definition of “food additive,” 21 C.F.R. §170.3(e)(1).

Because Behnke’s affidavits establish the Lubricants in their intended use “may reasonably be expected to become a component of food,” it logically follows that the Lubricants also fall within the regulatory definition of “food” found in 21 CFR §170.3(m), *i.e.* “[f]ood includes human food [and] *substances migrating to food from food-contact articles*”

The crucial determination of whether the Lubricants constitute food additives and, therefore, “food” as those terms are defined in 21 CFR §173 (e)(1) and (m), closes the purported “enormous and unintended loophole in FIFRA” (EPA Brief at 53) in the FIFRA registration process because no one could claim that the “countless sanitizers, disinfectants and sterilents used in meat processing plants to clean floors, walls, work surfaces and equipment” (*id.* at 53) “may reasonably be expected to result, directly or indirectly, .., in their becoming components of food. ...” within the meaning of 21CFR §173(e)(1).

Behnke respectfully submits that the only conclusion to be drawn from the undisputed declarations submitted herewith is that the Lubricants are indeed edible food articles and are not, therefore, subject to the same FIFRA registration as floor cleaners or wall sanitizers. At a minimum, Behnke should be entitled to more fully present its evidence at hearing, *e.g.*, video

evidence showing the actual usage of the Lubricants, before this Court resolves this crucial issue of material fact.

EPA cites *Kenep* v. *American Edwards Labs.*, 859 F. Supp. 816 (E.D. Pa. 1994), in support of its motion for accelerated decision on Behnke's affirmative defense that its products are not pesticides because they are not intended for eradicating any "pest" under FIFRA because a pest under FIFRA does not include microorganisms "on or in processed food" under 40 C.F.R. § 152.5(d).

In *Kenep* a hospital employee sued various manufacturers of disinfectant solutions for injuries sustained as a result of exposure. When the defendants argued that the plaintiff's state law labeling claims were preempted by FIFRA, the plaintiff argued that the disinfectant solutions were not pesticides under FIFRA. Quoting the definitions of "pesticide" and "pest" under FIFRA, the court stated that the solutions at issue in *Kenep* were designed in part to kill the HIV virus on hospital instruments and, therefore, were "not for use 'on or in living man.'" *Id.* at 816 n.4. Thus, the court concluded that the defendants' solutions were "pesticides" under FIFRA. *Id.* Notably, this limited analysis of the terms "pesticide" and "pest" under FIFRA took place entirely within a short footnote and was by no means a focus of the court's attention. Further "on or in living man" is not at issue in this case. Thus, *Kenep*, is inapposite here where there is substantial evidence that the Lubricants become a part of the processed foods and the microbes in question are, therefore, "on or in processed foods."

3. *Because the Lubricants Are Not Intended to Control "Pests," It Follows That the Lubricants Are Not Pesticides Within the Meaning of 40 CFR §152.3.*

The definition of pesticide is found in 40 CFR 152.3, and states, in relevant part, "Pesticide means any substance or mixture of substances intended for preventing, destroying,

repelling, or mitigating any *pest*....” (Emphasis supplied). Since the microorganisms found “on or in processed food” are not pests within the meaning of FIFRA, it necessarily follows that the Lubricants are not pesticides within the meaning of 40 CFR 152.3.

4. *That the Lubricants Are Not Pesticides Is Further Supported By FIFRA’s “Food Use” Exception From The Definition of Antimicrobial Pesticides Subject to FIFRA Regulation.*

The EPA noticeably fails to argue the Lubricants are *antimicrobial pesticides* within the meaning of 7 USC §136. Further analysis of §136 demonstrates why EPA should not be allowed to circumvent the Congressional intent of 7 USC §136(mm)(1) by claiming instead that the Lubricants are simply *pesticides* under the broader definition discussed above. In relevant part, 7 USC §136 provides that an *antimicrobial pesticide* means a substance that:

- (A) is intended to (i) disinfect, sanitize, reduce, or mitigate growth or development of microbial organisms; or (ii) protect inanimate objects, industrial processes or systems, surfaces, water, or other chemical substances from contamination, fouling, or deterioration caused by bacteria, viruses, fungi, protozoa, algae, or slime; *and*
- (B) *in the intended use is exempt from, or otherwise not subject to, a tolerance under section 346a of title 21 or food additive regulations under section 348 of title 21.*

Apparently recognizing the logic of its position in this case is internally inconsistent if the Court applies the “food use” exclusion found in 7 USC §136(mm)(1)(B) cited above, EPA now claims that the Lubricants are not regulated as a food additive pursuant to section 348 of title 21 (§409 of the FFDCA). Behnke respectfully submits that a genuine issue of material fact exists as to whether the Lubricants are exempt from the food additive regulations under section 348 of title 21. Specifically, Behnke has demonstrated by the affidavits submitted herewith that its Lubricants are “food additives” subject to regulation under 21 USC §348, *et seq.* and, in fact, have been designated as such by the FDA.

As discussed at length above, the Lubricants must be FDA-approved for potential ingestion from incidental contact with processed foods or beverages. This means that the Lubricants are subject to tolerances in food additive regulations within the meaning of 21 USC §348, *et seq.*

Although EPA contends otherwise, there are issues of statutory ambiguity and consequential disputed issues of material fact and law at play in this case. The public safety purpose of regulating pesticide sales and distribution is served by subjecting “food use” products to the tolerances described in the exclusion of 7 USC §136(mm)(1)(B). Further, there is no efficacy need for pesticide regulation of these products. By definition, the Lubricants are sold only into the food and beverage processing industries. Unlike the typical consumer purchasing a disinfectant for home use, these are sophisticated buyers who are in a highly regulated industry subject to extraordinary liability if their products are contaminated. Indeed, Behnke contends EPA registration of its products as pesticides would have a chilling effect on their use in the food processing industry as it would imply the users were using a poison in food contact applications even though they met the tolerances established under §409 of the FFDCA.

The EPA recognized the logic of Congress’ regulatory scheme in the EPA’s discussion of its proposed rules to implement FQPA and the ARTCA:

On October 30, 1998, Congress enacted the Antimicrobial Regulation Technical Corrections Act (ARTCA), which modified the Federal Food, Drug, and Cosmetic Act (FFDCA) to effectively transfer authority over a number of pesticide residues to FDA. Regulatory authority over these residues had originally been transferred to EPA by FQPA.

64 Fed. Reg. 50672, at 50673-74 (September 17, 1999).

In creating this exclusion, Congress recognized that applications for registration of food uses that require clearance under FFDCA require extensive data and relatively complex risk assessments that take longer to review. *Moreover,*

obtaining an FFDCa clearance is a formal regulatory procedure. As discussed in Unit VIII.H., FIFRA section 3(h) establishes goals for completion of Agency review of an application for registration. In EPA's view, Congress recognized the difficulty of requiring the review timeframes for registration to encompass the complexities of FFDCa clearance as well. Accordingly, EPA believes that Congress intended the statutory definition to allow exclusion of any antimicrobial pesticide that would require the extensive clearance process of the FFDCa.

Id. at 50677(emphasis added).

The EPA clearly ignores this discussion because it contradicts its contention that the Lubricants must be pesticides because “[c]learly it is commonly understood that a lubricant is not an edible food article or intended for human consumption.” (EPA Brief p. 52). If, as it must, this Court determines that the Lubricants are food additives within the meaning of §409 of the FFDCa, then it logically follows that the Lubricants are neither *antimicrobial pesticides* specifically, nor *pesticides* more generally, because the antimicrobial properties of the Lubricants are intended to control or mitigate microorganisms “on or in processed foods” only. EPA should not be allowed to make an end run around the Congressional intent evident in the plain language of the food use exclusion contained in 7 USC §136(mm)(1)(B). Therefore, EPA’s instant motion should be denied.

B. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER STATEMENTS CONTAINED IN BEHNKE’S LABELING WOULD LEAD A REASONABLE CONSUMER OF THE LUBRICANTS TO CONCLUDE THAT THE LUBRICANTS CAN OR SHOULD BE USED AS A PESTICIDE.

The gravamen of the EPA’s complaint is that the information regarding the antimicrobial technology, Micronox[®], incorporated into the Lubricants “claims, states, or implies (by labeling or otherwise) that the substance [the Lubricants] can or should be used as pesticides” *See* 40 CFR 152.15(a)(1). (EPA brief at 8). With the benefit of 20:20 hindsight, perhaps Behnke could have avoided this entire litigation by prefacing all statements regarding its Micronox[®] technology with language such as:

The intended use of [insert name of product] *may result or may reasonably be expected to result, directly or indirectly, in [insert name of product] becoming a component of food.* When this happens, JAX Micronox[®] technology will mitigate or control the microbial population commonly found *on or in* the food undergoing processing in your plant.

By definition, as thoroughly discussed above, microorganisms “on or in processed food” do not constitute pests. It follows that specific information regarding the antimicrobial affects of the substance on microbes in processed foods where the substance may reasonably be expected to become a part of that food, does not “claim, state or imply that the product can or should be used as a pesticide.”

Behnke respectfully submits that it would not be responding to the present EPA complaint had it used more precise language as suggested above to inform customers of the benefits of its Micronox[®]. Behnke further submits, however, that such precise language is unnecessary within the context of this case because of the limited market for the Lubricants, the sophistication of the buyers of the Lubricants, and the knowledge within the food processing industry that “the intended use of [insert name of product] *may result or may reasonably be expected to result, directly or indirectly, in [insert name of product] becoming a component of food.*” There is, at the least, a genuine issue of material fact as to what a reasonable customer in this market would conclude about the pesticidal use of the Lubricants from the information of which the EPA now complains.

Behnke only markets and sells its Lubricants for usage by the food and beverage processing industry. By virtue of the sale of its Lubricants to food and beverage processors *only*, any antimicrobial properties they may exhibit only relate to microbes “on or in processed” food or beverages, which are expressly excluded from the definition of “pest” under FIFRA as interpreted by EPA in 40 CFR 152.5(d).

The cases relied upon by EPA to support this branch of its complaint are inapposite:

EPA claims that *In the Matter of Super Chem Corp.*, Docket No. FIFRA-9-2000-0021, 2002 EPA ALJ LEXIS 25 (April 24, 2002), is particularly illustrative of its assertion that Behnke's claims on its labeling and advertising that its products' antimicrobial properties are sufficient for it to be considered a pesticide under FIFRA. The court in *Super Chem* found that the product at issue (a disinfectant sanitizer for use in hospitals, schools and other institutional facilities) was a pesticide under FIFRA, in part, because of the pesticidal claims made on the product's label. *Id.* at *6. However, the EPA failed to note in its brief the additional factors the court in *Super Chem* considered in finding the product a pesticide, including: the intended purpose of the product; the use of the actual term "pesticide" on the product's label, and the fact that the product had been previously registered with the EPA as a pesticide. *Id.*

The *Microban* case cited by EPA in support of its broad argument "Courts have consistently found that claims such as those made by Behnke...are pesticidal claims" involved the sale of registered pesticides that were "substantially different" from claims made in the FIFRA registrations in violation of 7 USC §136j(a)(1)(B). (EPA brief, p. 38). This case is inapposite because §136j(a)(1)(B) is not at issue here; rather EPA's claims here are pursuant to §136j(a)(1)(A). The ALJ never even considered the issue whether the products were "pesticides" within the meaning of FIFRA because the products were already registered as "pesticides" and, therefore, the issue was not in dispute.

In *In the Matter of Pacific International Group, Inc.* 1999 EPA ALJ Lexis 27 (June 27, 1999) (also cited by EPA) the respondent admitted its pretreated cutting boards and wash cloths were pesticides within the meaning of FIFRA. The only issue presented was the amount of penalty to be assessed; therefore, this case, too, is inapplicable here. (EPA Brief, p. 38).

Finally, *In the Matter of William E. Comley, Inc., a/k/a WECCO and Belach Tek, Inc., c/b/a/ TEK*, 2003 EPA ALJ LEXIS 7 (January 31, 2003), also involved claims of misbranding and did not involve 136j(a)(1)(A) or the claimed exception under 40 CFR §178.7530. In fact, the product at issue was registered as a pesticide.

In citing to its own “Label Review Manual,” EPA noticeably ignores the section dealing with the exception in 40 CFR §152.5(d): “Antimicrobial products used solely in processed foods or feeds, in beverages, or in pharmaceuticals” are “*not* pesticides under FIFRA and are regulated by FDA, not EPA.” (CX50, EPA 924)(emphasis added)(EPA Brief, pp. 38-39).

It is unclear why EPA discusses the “treated articles exemption to Antimicrobial Pesticides” in 40 CFR §152.25(a) as this exemption has no applicability here. (EPA Brief, pp. 39-41). Behnke does not contend the “treated article exemption” applies in this situation. Further, the EPA Registration Notice in CX 21 does not even discuss the exemption in §152.25(d) at issue here.³

The appropriate issue here is what a reasonable consumer of the Lubricants in its limited market would understand about the intended use of the Lubricants from the information provided by Behnke. In *In the Matter of Caltech Indus., Inc.*, Docket No. 5-IFRA-97-006 ALJ EPA June 9, 1998, EPA filed a complaint charging the respondent with selling and distributing an unregistered pesticide in violation of FIFRA. The Court held legitimate issues of fact precluding accelerated decision were raised regarding the “intended use of” the alleged pesticidal product (“Hospital Cleaning Towels with Bleach”) and the proper legal standard from which to

³ EPA cites the registration of “benzoic acid” additive in Microl, again in reference to the “treated articles exemption.” (fn 5, p.39, EPA brief). Unlike Microl, however, Behnke’s Micronox[®] technology is not an additive, per se, but a “technology” implicit in the products themselves. (Peter and Paquette Declarations).

determine such intended use. The respondent argued, and the Court concluded, that the “intended use” of the product must be considered applying the “reasonable consumer” objective standard set forth in *N. Jonas v. U.S. EPA*, 666 F.2d 829 (3rd Cir. 1981), and that the “reasonable consumer” must be understood within the context of the market for the product, such as the health care industry in the *Caltech* case.

Citing *Jonas*, the *Caltech* court stated : “[w]hether a product is a pesticide, is to be determined by all claims made for the product on labels or otherwise, and the intent of the user, if the seller distributor has actual or constructive knowledge of the intent of the user.” (emphasis added)(citations omitted). See *in the matter of Predex Corp.*, 1997 FIFRA LEXIS 6 (June 18, 1997).

EPA makes no mention of the “intended use” or “reasonable consumer” standard in its brief. Neither does EPA offer any evidence to this Court regarding what a reasonable consumer within the food and beverage processing industries would likely conclude from the information provided by Behnke, other than the Declaration of Josh Rybicki, which clearly states that his employer’s concern was microbes “on or in processed foods” due to then recent recalls of beef contaminated with *E. coli*. (CX16 at ¶¶ 16-18). This evidence submitted by EPA supports Behnke’s position here that a reasonable consumer in this industry is concerned with microbes contaminating the processed food, of which the Lubricants may become a part.

Additionally, Behnke’s affidavits show that its Lubricants are, first and foremost, developed, intended and sold as commercial lubricants for usage in food and beverage processing plants. The antimicrobial properties the Lubricants possess are an incidental benefit that protects against the Lubricant’s cross-contamination of the food or beverages being processed.

In the Complaint, EPA makes various allegations regarding Behnke's internet site (www.jax.com) and other non-Behnke sites. (See Compl. ¶¶66, 67, 176 and 178) . EPA alleges these sites constitute "advertisement as referenced in 40 CFR §168.22(a)" and "claim, state or imply" Behnke's Lubricants are pesticides. (¶¶70-73, 179, 180).

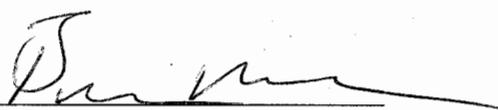
It is important for the Court to note EPA has alleged eleven counts on which Behnke sold or distributed unregistered "pesticides" on certain specified dates. None of the Internet site allegations in the Complaint involve the same dates the alleged eleven violations occurred. For this reason alone, these are irrelevant to this Court's inquiry into the eleven counts alleged against Behnke. Second, EPA has submitted no proof in support of the Motion that said Internet sites in any way related to the eleven sales or distributions at issue. Finally, there is no proof before the Court that any of Behnke's alleged customers were aware of these sites or its contents or, for that matter, aside from Behnke's own website, whether Behnke was aware of or responsible for the content on the dozen plus other websites alleged in the Complaint. Thus, this evidence is irrelevant to the claims at issue here.

VIII. CONCLUSION.

For the reasons stated herein, as well as the arguments contained in its response to EPA's prior Motion to Strike, Behnke respectfully requests that Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses be denied.

Dated: February 21, 2008.

McInay & Button, Ltd.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused a true and correct copy of foregoing RESPONSE TO COMPLAINTANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND ON AFFIRMATIVE DEFENSES together with true, accurate and complete copies of the Declarations of Eric J. Peter, Troy F. Paquette, Bill Bayliss, William Barden, Tracey Huebner, and Bruce A. McInay to be served upon the following on the date indicated below by either overnight mail or in person:

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

Dated: February 21, 2008



Bruce A. McInay

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

BEHNKE LUBRICANTS INC.
MENOMONEE FALLS, WISCONSIN

Docket No. FIFRA-05-2007-0025

Respondent.

DECLARATION OF ERIC J. PETER

STATE OF WISCONSIN)
) ss.
WAUKESHA COUNTY)

Eric J. Peter, being first duly sworn, on oath deposes and says:

1. I am president of Behnke Lubricants Inc. ("Behnke"), a Wisconsin corporation with its principal place of business located at W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin. Behnke has been in business since 1955. I joined Behnke as a truck driver in 1972, and have been continuously employed there ever since.

2. Behnke manufactures JAX® branded lubricants for industrial uses and employs approximately 50 people with primary locations in Wisconsin and California, and various sales representatives throughout the United States.

3. Behnke's JAX lubricants were originally developed for use on heavy equipment, industrial machinery, heavy duty trucking, and farm and off highway construction machinery. Behnke manufactures and distributes lubricants as varied as engine oils, hydraulic fluids, gear box oils, conveyor lubricants, greases, way lubricants, transmission fluids and compressor oils. Our products may be based upon mineral oil or high end synthetic chemistry depending upon the lubrication requirements of specific machinery and applications.

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4. In approximately 1961, Behnke was providing lubricants for processing machinery for Swift, Armour, Hormel and numerous other meat processors for their shop and processing equipment. These food processing plants were inspected by the United States Department of Agriculture (USDA). At that time, it was determined by USDA that the lubricants used on the food processing equipment within these plants -- often simply general industrial lubricants obtained from the truck shop or yard maintenance department -- posed an actual and potential threat of contacting and becoming a part of the processed food product. With general industrial lubricants this could present a health hazard to consumers of the finished food product.

5. In addition to the USDA, whose inspection authority included meat and poultry processors, the United States Food and Drug Administration ("FDA") regulated other food and beverage processing plants. In the early 1960s, the FDA and USDA jointly promulgated regulations specifying chemical formulation tolerances for the lubricants that could be used in the food and beverage processing plants.

6. Generally, under the FDA/USDA regulations, if the lubricants were industrial in nature and did not contain any poisonous or lethal substances, such as lead, antimony and other components, they could be used in the food processing plants. If, however, the chance of incidental contact with the food product itself was determined to exist, the lubricant was required to meet the new ingredient guidelines established by the FDA with the finished product chemistry to be confirmed and approved for listing by the USDA. These "food-grade" lubricants could only contain up to the maximum levels of ingredients specified by the FDA for use in lubricants in incidental food contact under what is now 21 CFR 178.3570. These ingredients at the specified levels or tolerances were designated in the regulations. Also allowed were 21 CFR

§182 items “generally regarded as safe,” spawning the acronym “GRAS” to identify them. The USDA developed a classification for food-grade lubricants that was later designated as “H1.”

7. Many of Behnke’s customers at the time then demanded lubricants approved by the USDA as H1 compliant. Behnke was fortunate to be one of the very first lubricant manufacturers to offer lubricants that met the new H1 requirements. Thus, Behnke’s experience producing these food-grade lubricants dates back to the inception of the FDA/USDA regulation of lubricants with incidental food contact.

8. By 1972, Behnke was growing its market for food-grade lubricants, but it was still a minor percentage of Behnke’s business. Early field experience with the H1 lubricants was not particularly favorable as the performance was inferior to standard industrial lubricants for protecting the customers’ expensive processing equipment. Equipment failures could mean costly downtime to the plants. Thus, many customers at that time used food-grade lubricants only where their use was mandated by the FDA/USDA. Slowly, however, the market grew as regulators became more stringent and our customers became more sensitive to potential liability claims arising from food contamination.

9. As the FDA continued to test ingredients and add to the list Behnke remained intimately involved in development and formulation of improved lubrication products. It was common practice to submit as many as 15-20 lubricants per year to the USDA laboratories for H1 certification. As the lubrication performance of the H1 products improved, acceptance of their use in plants, even in areas where they may not be required, increased. Thus the improvement in the USDA H1 accepted lubricants’ performance actually was integral in improving food safety, because it allowed greater use in all areas of processing facilities.

10. During the late 1970's and early 1980's my responsibilities at Behnke grew through back-office support, field sales and, ultimately corporate management. Under my stewardship, continued development of better H1 lubricants and their acceptance in the food and beverage processing market was one of Behnke's top priorities.

11. Sometime in the late 1990's, the USDA started taking a new approach to processing plant inspections and oversight. The USDA now required our food processing clients to implement Hazardous Analysis and Critical Control Point ("HACCP") food safety standards. The USDA's Food Safety and Inspection Service (FSIS) reduced its plant inspections and discontinued the publication of its 'White Book' of approved products for use in processing plants, including H1 lubricants.

12. These changes were in the nature of enforcement strategy rather than relaxation of regulatory requirements. The FDA requirements regarding formulation of food-grade lubricants had not changed, but the USDA no longer oversaw testing of finished formulations or publication of the approved H1 lubricants. Instead, the processors were now responsible for ensuring that the materials used in their plants complied with the FDA regulations. As a result, lubricant suppliers such as Behnke would have to certify compliance of their products and/or could have their finished products certified by an independent nongovernmental organization ("NGO") like NSF International or Underwriters Laboratories. By the mid 2000's, NSF had become the predominant NGO for H1 certification of lubricants.

13. Behnke has deep and intimate knowledge of the machinery and processes that JAX food grade lubricants must address including wear protection, corrosion resistance, oxidation prevention and other difficult issues in modern processing equipment. Our sales representatives carry the title of Lubrication Engineers because they work hand-in-hand with our

customers' plant engineers and maintenance personnel to find or develop solutions for specific applications, which can vary tremendously from one environment to the next. It is not uncommon for our personnel to work for hours or days at a time within our customers' plants to help insure a successful implementation of a machinery lubrication solution or plant program.

14. To succeed in the food and beverage processing market the customers' primary lubrications needs must be addressed effectively, yet the lubricants must be safe for incidental consumption under FDA guidelines, because, due to the proximity of the lubricants to processed foods, the lubricants, although not intended, are expected to become a part of the processed food and to be ingested as part of the final food product.

15. In about 2001, Behnke was approached by multi-national food processing customer, Kraft Foods, with a request for help lubricating a bearing in a cream cheese manufacturing plant. The environment in this plant was particularly challenging as the process used a good deal of water, which mixed with the cream cheese and splashed onto the bearings in the ordinary operation of the processing equipment. These large bearings needed to be protected from wear and corrosion under very tough conditions.

16. Our customer was also concerned that microbes contained in the cream cheese water mix would multiply within Behnke's lubricant and, then, as the lubricant further contacted the cream cheese, it would, contaminate the finished food product with undesirable levels of such microbes. Our customer asked whether Behnke could formulate a food grade H1 lubricant that could reduce the risks of such cross-contamination, thus eliminating the lubricant as a "hot spot" for microbial contamination under the processors HACCP evaluation process.

17. Limited antimicrobial properties are inherent in some food grade greases, but Behnke's customer requested that Behnke try to improve on these inherent properties. To this

end, Behnke reviewed FDA approved lists of ingredients to see if an ingredient or ingredients already approved for food processing use within their stated tolerances could be incorporated to improve both the lubricating properties of our products while also reducing the risk of microbial cross contamination of processed food products.

18. Through some extended research using several proprietary combinations of the FDA and GRAS approved food grade lubricant ingredients; Behnke was able to improve upon the resistance of our lubricants to food borne microbes and, therefore, reduce the risk of cross contamination of processed foods coming in contact with our lubricants.

19. In addition to Behnke's own research, a major food processor performed detailed laboratory and field trial analysis of both the lubrication performance of Behnke's improved product and the lubricant's ability to resist food borne microbes. This customer's extensive testing showed that Behnke's products resisted food borne microbes while also complying with FDA regulations for lubricants intended for incidental food contact.

20. This was a major benefit and breakthrough for Behnke's customer as the product achieved the customer's lubricant needs while also improving food safety as it eliminated a host for the growth of undesirable levels of food borne microbes. As a result, Behnke reformulated much of its food-grade product line to incorporate this improved technology. Behnke registered the trademark Micronox[®] to identify food-grade lubricants that incorporated this technology. Micronox[®] is not, however, a substance that exists separate from the lubricants that incorporate the technology. There is not a "formula" for Micronox[®] and one cannot purchase Micronox[®] as an additive for any other products.

21. Behnke undertook advertising and promotion of our food-grade lubricants featuring the Micronox[®] technology in food and beverage processing plant machinery. Behnke

felt the industry would benefit in terms of food safety by being aware that these lubricants were available, and Behnke felt it would be advantageous to promote the benefits of its Micronox[®] technology. As Micronox[®] was only of particular interest where there was a need to reduce the risk of cross contamination with food or beverage borne microbes, such advertising and promotional activities were aimed exclusively at the food and beverage processing markets. Behnke does not promote or sell lubricants incorporating the Micronox[®] technology to the general public, nor for that matter, to industrial users outside the food and beverage processing markets.

22. In approximately 2003, NSF informed Behnke that it had received complaints from Behnke's competitors regarding Behnke's promotion of its Micronox[®] technology. Apparently under pressure from these competitors, NSF took the position that Behnke's promotional materials constituted "pesticidal" claims in violation of FIFRA. Behnke disputed NSF's interpretation because, among other reasons, microbes "in or on processed foods" are by definition not pests under FIFRA. Further, Behnke's products were, in fact, FDA and H1 compliant. Nevertheless, NFS threatened to withdraw its H1 certification of Behnke's products unless Behnke altered its advertising and promotional materials regarding Micronox[®] technology.

23. Faced with such strong-arm tactics, Behnke complied with NSF's first two demands until Behnke could get a clarifying interpretation of FIFRA and the Federal Food, Drug, and Cosmetic Act from a federal court. Finally, NSF took the indefensible position that Behnke could not even include the trademark Micronox[®] on its labeling as the name itself implied a pesticidal purpose. For this reason, in November 2006, Behnke commenced a

declaratory judgment action in U.S. District Court for the Eastern District of Wisconsin against NSF seeking a judicial ruling on the limitations, if any, on Behnke's labeling under FIFRA.

24. By letter dated December 22, 2006, some five weeks after Behnke commenced its action against NSF, Behnke was first notified of the Environmental Protection Agency's intent to file this case. Interestingly, when I first met with anyone from the EPA regarding this matter, they presented me with evidence of a pesticide registration obtained by Petro-Canada, which is one of Behnke's major competitors in the food-grade lubricant market.

25. In the spring and summer of 2007, many of our customers were inspected by a representative of the EPA Chicago regional office. One of these customers ceased buying from Behnke because they had been convinced by the EPA representative that Behnke was selling an unregistered "pesticide." We were advised that the customer had instead placed Petro-Canada on its approved vendor list. Just this past week, this same customer reapproached Behnke not because of the antimicrobial properties of Behnke's lubricants, but because, in their opinion, they simply perform better as lubricants than Petro-Canada's product.

26. Behnke was fortunate to be on the forefront of the food-grade lubricant development and is now considered a world leader in lubrication technology for food and beverage processing equipment. Currently, Behnke's JAX brand is one of the most recognized brands in the industry domestically, and Behnke has a substantial and growing export market in all areas of the world. Virtually every one of the top 200 food processors in the world is using a JAX lubricant on some piece of processing machinery in their production facilities.

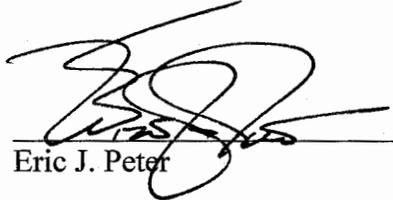
27. Behnke's market for its food-grade lubricants includes bottlers, canners, meat packers, poultry processors, baked goods manufacturers, freezing plant operations and dozens more. Although Behnke continues to concentrate on the formulation of lubricants for of all types

of industrial and mobile equipment, the food processing related portion of our business is now accounts for over fifty percent of our gross revenues.

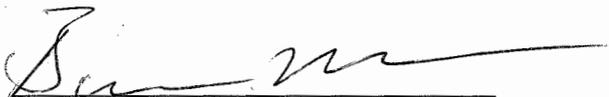
28. Behnke is a small United States based lubricant manufacturer. Through its initiative and formulation skills Behnke has developed products that out perform the competition which is international in scope. Behnke has endeavored to service an industry that is critical to food safety in not just United States, but worldwide. Our products are well known, distributed internationally and recognized for safety and compliance with all food grade lubricant regulations. Behnke has a longer track record of formulation and experience of FDA compliant lubricants for incidental food contact than any company in the world. Behnke takes its responsibility for food safety extremely seriously.

29. Behnke manufactures lubricants that provide real benefits to our customers' machinery. Behnke does not manufacture any products whose intended use is pesticidal in nature. Indeed, Behnke does not have any EPA registered pesticidal materials in its manufacturing facilities, as confirmed during an unannounced inspection by a representative of the Wisconsin Department of Natural Resources which inspection was made at the behest of the EPA.

30. This Affidavit is made in support of Behnke's Response to Complainant's Motion for Accelerated Decision on Liability and Affirmative Defenses.


Eric J. Peter

Sworn to and subscribed before me
this 17th day of February, 2008


Notary Public, State of Wisconsin
My commission expires:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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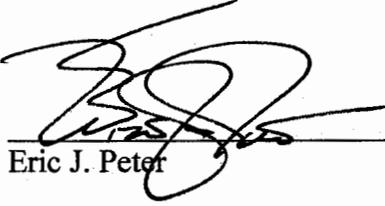
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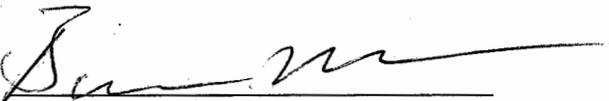
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Eric J. Peter

Sworn to and subscribed before me
this 17th day of February, 2008


Notary Public, State of Wisconsin
My commission expires:

applications where incidental food contact and potential human ingestion of the lubricant is anticipated.

5. Part of my responsibility with Behnke is to work with our customers and our sales representatives to provide customers with lubricating solutions designed to provide consistent, efficient protection for their processing equipment in a wide variety of environments and applications. Even within the same industries, plants can vary greatly in their lubrication needs and how they apply our products.

6. Most of our commercial customers are sophisticated consumers who are very demanding with regard to quality and performance. Our personnel frequently works hand-in-hand with customers' engineers and plant managers to implement solutions to their lubrication needs. My job includes formulation of lubricants that will exhibit the appropriate properties for the application and environment presented. Environmental concerns often include heat, humidity, and machine speed to name a few.

7. Lubricants are formulated using a base oil, whether mineral or synthetic, and other ingredients when that, combined, gives the finished products the unique properties required for a specific application. For food-grade applications, Behnke's formulations must be FDA compliant for incidental food contact. This requires that the additives and chemistry of the finished product be within tolerances requested under 21 CFR 178.3570. Behnke must then certify this compliance directly to the customer or through a third-party laboratory, such as NSF International.

8. All Behnke's food grade lubricants at issue in this matter meet the tolerances required under 21 CFR 178.3570 and, therefore, have been deemed acceptable by NSF International as lubricants with incidental food contact (H1) for use in and around food

processing areas. Attached hereto as Exhibit A are true and correct copies of acceptance letters to this effect from NSF.

9. In one instance, Kraft Foods needed a lubricant for bearings used in their soft cheese production, where cheese and water splashed onto the bearings. Kraft discovered bacterial colonies, yeasts or molds thriving in the bearing grease and was concerned with the health risk posed by the contaminated grease becoming incorporated into its cheese. Kraft was concerned that microbes in the processed product would multiply within the grease, drip back into the processed cheese and, thereby, increase the content of such microbes within the processed food to unacceptable levels or contaminate cheese that previously had not contained the microbes. It was anticipated in either case, however, that the microbes at issue would originate in the food product that was splashed onto the bearings.

10. In response to Kraft's concern, I researched how we might reduce the risk of the grease becoming a host for food borne microbes, which, in turn, could migrate back into the food product due to incidental contact with the food. My goal was to mitigate this possible cross-contamination by developing lubricants that served Kraft's primary lubrication needs, while continuing to comply with FDA requirements for incidental food contact or ingestion.

11. We worked with several food processors, and through discussions and our knowledge of the various food processing methods and technologies, arrived at a combination of common lubricant additives that could be utilized in a variety of lubricants and at levels below those allowed by the FDA.

12. Based on discussions with Kraft and other food processors, it was determined that *Listeria monocytogenes*, *E. coli O157:H7*, and *Salmonella* were the food borne bacterium of greatest concern in the meat and dairy processing industry.

13. Behnke provided Kraft with a modified sample of our Poly-Guard FG-2 grease which already contained an FDA authorized food preservative (propyl p-hydroxybenzoate also referred to as "propyl paraben") for evaluation. The modifications to the formula were derived by introducing additional 21 CFR 178.3570 authorized additives at FDA allowable treat rates in addition to food additives which the FDA deemed "Generally Recognized As Safe" (GRAS).

14. Kraft performed its own testing on this sample and was pleased with the results as to its lubrication performance and microbial resistance.

15. Following the success of the grease sample that was trialed and tested by Kraft, Behnke submitted formulations utilizing the same formula to independent laboratories for evaluation specifically looking at *Listeria monocytogenes*, *E. coli O157:H7* and *Salmonella*.

16. Based on the laboratory results, we incorporated the new additive formula into Behnke's food grade product line of products using the trade name "Micronox"® to identify the technology that reduced the threat of cross-contamination of processed foods through the medium of the lubricant.

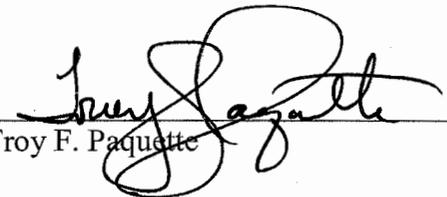
17. In all cases of which I am aware, the issue for our customers is not our lubricants as an original source of contamination, but rather as a medium for transfer of food borne microbes already found within the foods being processed. Therefore, the focus of the

Micronox® technology has always been on mitigation or containment of microbes found in or on the customers' processed foods.

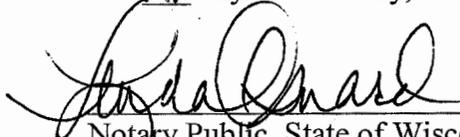
18. Behnke's food-grade lubricants are sold exclusively in the food and beverage processing industries. I can state from first-hand experience that our customers are sophisticated buyers who employ the services of scientists and physicians in their efforts to insure food safety. As evidenced by my experience with Kraft, many if not most of these customers are equipped to test for food borne microbes and identify potential "hot spots" for cross-contamination of their products. To my knowledge, none of our customers have assumed or concluded from our labeling that our lubricants can or should be used for as a pesticide. For that matter, their only concern as expressed to me is the containment or mitigation of microbes that may be found in or on their food and beverage products.

19. I make this declaration based on my personal experience and records of Behnke maintained in the ordinary course of our business and relied on by Behnke employees in operation Behnke's business.

20. This Affidavit is made in support of Behnke's Response to Complainant's Motion for Accelerated Decision on Liability and Affirmative Defenses.


Troy F. Paquette

Sworn to and subscribed before me
this 19th day of February, 2008


Notary Public, State of Wisconsin
My commission expires: is permanent.



March 04, 2003

Behnke Lubricants, Inc. JAX
Attn: Patty Riek
W134 N5373 Campbell Drive
Menomonee Falls, WI 53051

RE: JAX POLY-GUARD FG-2
Category Code: H1
NSF Registration No. 122699

Dear Patty Riek:

NSF has processed the application for Registration of **JAX POLY-GUARD FG-2** to *the NSF Registration Guidelines for Proprietary Substances and Nonfood Compounds (2002)*, which are available at www.nsf.org/usda. The NSF Nonfood Compounds Registration Program is a continuation of the USDA product approval and listing program, which is based on meeting regulatory requirements including FDA 21 CFR for appropriate use, ingredient and labeling.

This product is acceptable as a lubricant with incidental food contact (H1) for use in and around food processing areas. Such compounds may be used on food processing equipment as a protective anti-rust film, as a release agent on gaskets or seals of tank closures, and as a lubricant for machine parts and equipment in locations in which there is a potential exposure of the lubricated part to food. The amount used should be the minimum required to accomplish the desired technical effect on the equipment. If used as an anti-rust film, the compound must be removed from the equipment surface by washing or wiping, as required to leave the surface effectively free of any substance which could be transferred to food being processed.

NSF Registration of this product is current when the NSF Registration Number, Category Code, and Registration Mark appear on the NSF-approved product label, and the registered product name is included in the current NSF White Book Listing of Nonfood Compounds at the NSF website (<http://www.nsf.org/usda>). The NSF Registration Mark can be downloaded from the NSF website, at http://www.nsf.org/mark/download_marks.html.

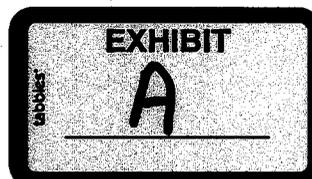
NSF Listing of all registered Nonfood compounds by NSF International is not an endorsement of those compounds, or of any performance or efficacy claims made by the manufacturer.

Registration status may be verified at any time via the NSF web site, at <http://www.nsf.org/usda>. Changes in formulation or label, without the prior written consent of NSF, will void registration, and will supersede the on-line listing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carmen Grindatti'.

Carmen Grindatti
NSF Nonfood Compounds Registration and listing program





June 9, 2005

Ms. Patty Riek
BEHNKE LUBRICANTS, INC. JAX
W134 N5373 CAMPBELL DRIVE
MENOMONEE FALLS, WI 53051
UNITED STATES

RE: JAX HALO-GUARD FG-2
Category Code: H1
NSF Registration No. 126100

Dear Ms. Patty Riek:

NSF has processed the application for Registration of **JAX HALO-GUARD FG-2** to the NSF Registration Guidelines for Proprietary Substances and Nonfood Compounds (2004), which are available at <http://www.nsf.org>. The NSF Nonfood Compounds Registration Program is a continuation of the USDA product approval and listing program, which is based on meeting regulatory requirements including FDA 21 CFR for appropriate use, ingredient and labeling.

This product is acceptable as a lubricant with incidental food contact (H1) for use in and around food processing areas. Such compounds may be used on food processing equipment as a protective anti-rust film, as a release agent on gaskets or seals of tank closures, and as a lubricant for machine parts and equipment in locations in which there is a potential exposure of the lubricated part to food. The amount used should be the minimum required to accomplish the desired technical effect on the equipment. If used as an anti-rust film, the compound must be removed from the equipment surface by washing or wiping, as required to leave the surface effectively free of any substance which could be transferred to food being processed.

NSF Registration of this product is current when the NSF Registration Number, Category Code, and Registration Mark appear on the NSF-approved product label, and the registered product name is included in the current NSF White Book Listing of Nonfood Compounds at the NSF website (<http://www.nsf.org>). The NSF Registration Mark can be downloaded from the NSF website, at [http://www.nsf.org/business/about NSF/nsf marks download.asp](http://www.nsf.org/business/about_NSF/nsf_marks_download.asp).

NSF Listing of all registered Nonfood compounds by NSF International is not an endorsement of those compounds, or of any performance or efficacy claims made by the manufacturer.

Registration status may be verified at any time via the NSF web site, at <http://www.nsf.org>. Changes in formulation or label, without the prior written consent of NSF, will void registration, and will supersede the on-line listing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carmen Grindatti', written over a light gray grid background.

Carmen Grindatti
NSF Nonfood Compounds Registration Program

Company No: N01723



June 13, 2005

Ms. Patty Riek
BEHNKE LUBRICANTS, INC. JAX
W134 N5373 CAMPBELL DRIVE
MENOMONEE FALLS, WI 53051
UNITED STATES

RE: JAX HALO-GUARD FG-LT
Category Code: H1
NSF Registration No. 128352

Dear Ms. Patty Riek:

NSF has processed the application for Registration of **JAX HALO-GUARD FG-LT** to the NSF Registration Guidelines for Proprietary Substances and Nonfood Compounds (2004), which are available at <http://www.nsf.org>. The NSF Nonfood Compounds Registration Program is a continuation of the USDA product approval and listing program, which is based on meeting regulatory requirements including FDA 21 CFR for appropriate use, ingredient and labeling.

This product is acceptable as a lubricant with incidental food contact (H1) for use in and around food processing areas. Such compounds may be used on food processing equipment as a protective anti-rust film, as a release agent on gaskets or seals of tank closures, and as a lubricant for machine parts and equipment in locations in which there is a potential exposure of the lubricated part to food. The amount used should be the minimum required to accomplish the desired technical effect on the equipment. If used as an anti-rust film, the compound must be removed from the equipment surface by washing or wiping, as required to leave the surface effectively free of any substance which could be transferred to food being processed.

NSF Registration of this product is current when the NSF Registration Number, Category Code, and Registration Mark appear on the NSF-approved product label, and the registered product name is included in the current NSF White Book Listing of Nonfood Compounds at the NSF website (<http://www.nsf.org>). The NSF Registration Mark can be downloaded from the NSF website, at [http://www.nsf.org/business/about NSF/nsf marks download.asp](http://www.nsf.org/business/about_NSF/nsf_marks_download.asp).

NSF Listing of all registered Nonfood compounds by NSF International is not an endorsement of those compounds, or of any performance or efficacy claims made by the manufacturer.

Registration status may be verified at any time via the NSF web site, at <http://www.nsf.org>. Changes in formulation or label, without the prior written consent of NSF, will void registration, and will supersede the on-line listing.

Sincerely,

Carmen Grindatti
NSF Nonfood Compounds Registration Program

Company No: N01723



March 04, 2003

Behnke Lubricants, Inc. JAX
Attn: Patty Riek
W134 N5373 Campbell Drive
Menomonee Falls, WI 53051

RE: JAX MAGNA-PLATE 74
Category Code: H1
NSF Registration No. 124536

Dear Patty Riek:

NSF has processed the application for Registration of **JAX MAGNA-PLATE 74** to the *NSF Registration Guidelines for Proprietary Substances and Nonfood Compounds (2002)*, which are available at www.nsf.org/usda. The NSF Nonfood Compounds Registration Program is a continuation of the USDA product approval and listing program, which is based on meeting regulatory requirements including FDA 21 CFR for appropriate use, ingredient and labeling.

This product is acceptable as a lubricant with incidental food contact (H1) for use in and around food processing areas. Such compounds may be used on food processing equipment as a protective anti-rust film, as a release agent on gaskets or seals of tank closures, and as a lubricant for machine parts and equipment in locations in which there is a potential exposure of the lubricated part to food. The amount used should be the minimum required to accomplish the desired technical effect on the equipment. If used as an anti-rust film, the compound must be removed from the equipment surface by washing or wiping, as required to leave the surface effectively free of any substance which could be transferred to food being processed.

NSF Registration of this product is current when the NSF Registration Number, Category Code, and Registration Mark appear on the NSF-approved product label, and the registered product name is included in the current NSF White Book Listing of Nonfood Compounds at the NSF website (<http://www.nsf.org/usda>). The NSF Registration Mark can be downloaded from the NSF website, at http://www.nsf.org/mark/download_marks.html.

NSF Listing of all registered Nonfood compounds by NSF International is not an endorsement of those compounds, or of any performance or efficacy claims made by the manufacturer.

Registration status may be verified at any time via the NSF web site, at <http://www.nsf.org/usda>. Changes in formulation or label, without the prior written consent of NSF, will void registration, and will supersede the on-line listing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carmen Grindatti', written in a cursive style.

Carmen Grindatti
NSF Nonfood Compounds Registration and listing program



NSF International / Nonfood Compounds Registration Program

January 25, 2002

Behnke Lubricants, Inc.
Attn: Patty Riek
W134 N5373 Campbell Drive
Menomonie Falls, WI 53051

RE: JAX MAGNA-PLATE 78
Category Code: H1
NSF Registration No. 124534

Dear Patty Riek:

NSF has processed the application for Registration of **JAX MAGNA-PLATE 78** to the *NSF Registration Guidelines for Proprietary Substances and Nonfood Compounds (2000)*, which are available at www.nsf.org/usda. The NSF Nonfood Compounds Registration Program is a continuation of the USDA product approval and listing program, which is based on meeting regulatory requirements for appropriate use, ingredient review and labeling verification.

This product is acceptable as a **lubricant with incidental food contact (H1)** for use in and around food processing areas. Such compounds may be used on food processing equipment as a protective anti-rust film, as a release agent on gaskets or seals of tank closures, and as a lubricant for machine parts and equipment in locations in which there is a potential exposure of the lubricated part to food. The amount used should be the minimum required to accomplish the desired technical effect on the equipment. If used as an anti-rust film, the compound must be removed from the equipment surface by washing or wiping, as required to leave the surface effectively free of any substance, which could be transferred, to food being processed.

This product is NSF Registered when the NSF Registration Number, Category Code, and Registration Mark appear on the NSF approved product label. The NSF Registration Mark can be downloaded from the NSF website, at http://www.nsf.org/mark/download_marks.html.

Registration of compounds by NSF International is in no way to be construed as an endorsement of the compounds, appropriate selection for use, or of any performance or efficacy claims made by the manufacturer.

Registration status may be verified at any time via the NSF website, at <http://www.nsf.org/usda>. Changes in the formulation or label, without prior written consent of NSF, will void registration, and will supersede the on-line listing.

Sincerely

A handwritten signature in black ink that reads 'Kenji Yano'.

Kenji Yano, Ph.D.
NSF Nonfood Compounds Registration and Listing Program

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

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

Docket No. FIFRA-05-2007-0025

Respondent.

RECEIVED
REGIONAL HEARING CLERK
US EPA REGION V
2008 FEB 21 PM 3:35

DECLARATION OF TRACEY HUEBNER

STATE OF WISCONSIN)
) ss.
WAUKESHA COUNTY)

Tracey Huebner, being first duly sworn, on oath deposes and says:

1. I am the Marketing Director for Behnke Lubricants Inc. ("Behnke"). Prior to taking the position of Marketing Director for Behnke, I was an Account Executive with the advertising firm of Core Creative, Inc. ("Core"). From 2001 until October 2007, when I left Core to take my current position with Behnke, I was the Account Executive at Core responsible for the Behnke account.

2. During the period of time that I was the Account Executive for Behnke, Core did the majority of the creative work for Behnke's advertising and made all of its media recommendations for placement of those advertisements.

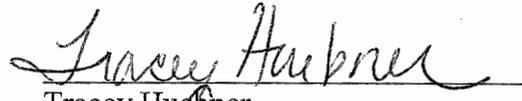
3. From at least 2005 to present, if not before, Behnke's media purchases were limited to print media and, more particularly, trade journals relevant to Behnke's target market.

4. Attached hereto as Exhibit A is a schedule of all media placements for Behnke advertising during the calendar year 2005. Attached to the schedule are copies of the advertisements identified in the 2005 schedule.

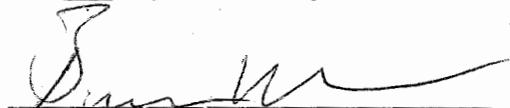
5. Attached hereto as Exhibit B is a schedule of all media placements for Behnke advertising during the calendar year 2006. Attached to the schedule are copies of the advertisements identified in the 2006 schedule.

6. Attached hereto as Exhibit C is a schedule for all media placements for Behnke advertising during the calendar year 2007. Attached to the schedule are copies of the advertisements identified in the 2007 schedule.

7. I make this affidavit of my own personal knowledge or based on records of either Core or Behnke, which records were maintained by both companies in the ordinary course of their business.


Tracey Huebner

Sworn to and subscribed before me
this 19 day of February, 2008


Notary Public, State of Wisconsin
My commission expires:

2005 Jax Ad Schedule

Publication	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
Food Engineering				Extreme Toughness, plus full page ad, web site locator	Ad lit Extreme Toughness	Knock-down, 1/2 supplier profile	Exterminate Bacteria, web site locator, listing in the supplier directory	Ad lit Product Showcase	Extreme Toughness	Expunge Listeria, Ad lit		
Meat & Poultry			Expunge Listeria	Product Showcase	Product Showcase	Product Showcase		Product Showcase	Knock-down	Product Showcase	Experience	
Baking & Snack			Product Showcase	Experience	Product Showcase	Exact	Extremely Clean, Profile	Product Showcase	Product Showcase	Exact		
Specialty Wood Journal	Extremely Clean				Extremely Clean				Extremely Clean			



Xpunge Listeria...

E.coli. Salmonella. And other airborne microbes from your processing plant compressed air lubricants. Use JAX Magna-Plate 74 NSF H1 airline oil to lubricate your air motors, cylinders, meat saws, knives, stun guns and any other air-operated equipment.

True, Magna-Plate 74 provides exceptional antiwear protection and prevents rust and corrosion in your operation. But the real kicker is, it also knocks down microbe growth and exhausts tramp moisture from your air system. That's because JAX Magna-Plate 74 is the only FDA-compliant, NSF H1 lubricant to feature Micronox® - our proven, proprietary anti-microbial agent.

For details, contact your nearest JAX distributor today.



**Now available in new quart bottle
packaging for easier dispensing!**

America's Finest Industrial Lubricants



1.800.782.8850 | www.jax.com

Xtreme toughness

Bring JAX your most demanding lubrication challenges. High temperatures. Extreme pressure. Exposure to water or highly acidic foods. Whatever the conditions... the new JAX Halo-Guard[®] HC Grease was built to take it.

Formulated with a revolutionary thickener technology, JAX Halo-Guard[®] provides the highest level of EP and antiwear properties ever reported for a food-grade grease. Not to mention outstanding rust and corrosion control capabilities.

Halo-Guard[®] is water-resistant, compatible with most other greases and ideal for virtually any food/beverage application. So chances are, this tough, multi-purpose lubricant is one of the only greases you'll need to keep in stock.

Questions? Contact your nearest JAX distributor today.



American's Finest Industrial Lubricants

1-800-782-8850 | www.jax.com

Xtremely clean

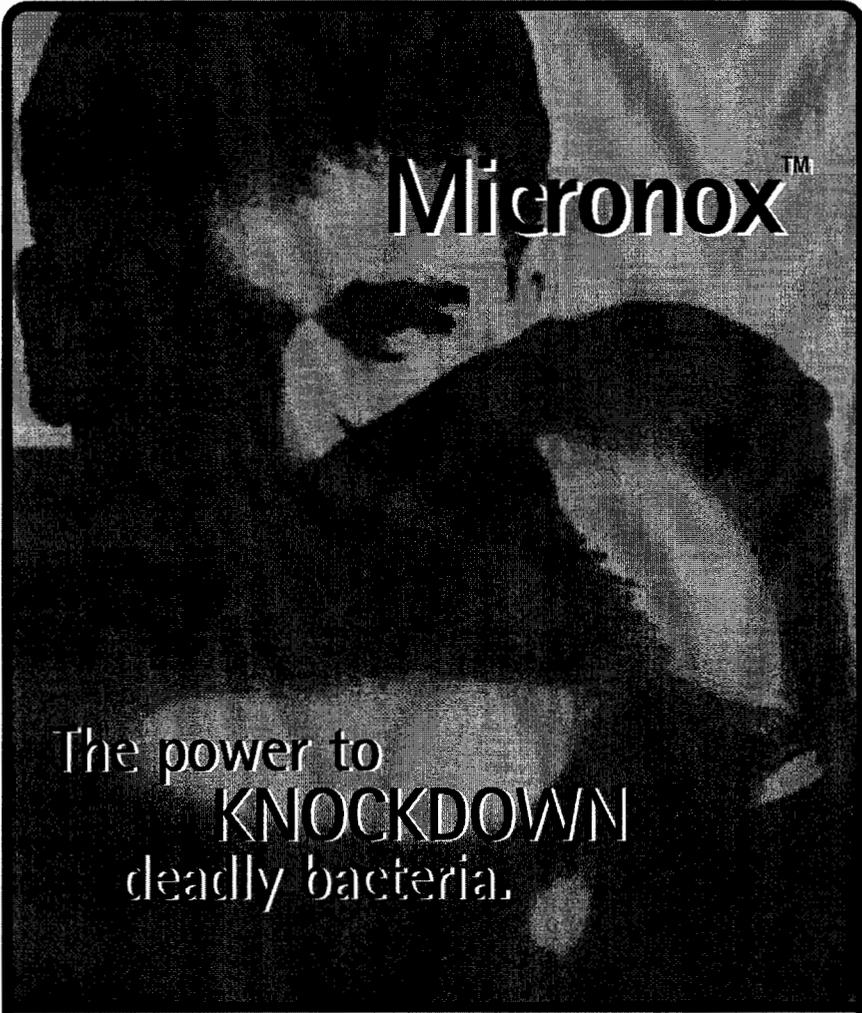
JAX has developed the world's most advanced, high-temperature synthetic esters for lubrication of high-speed, automated, commercial baking ovens. JAX Pyro-Kote Series fluids provide smokeless, deposit-free lubrication of this sophisticated, production machinery at performance levels that meet and exceed OEM performance standards. Reduced carbon deposits, smoke-free performance and superb antiwear protection make JAX Pyro-Kote Series the new standard in Xtreme, clean, high-temperature baking lubrication.

For details, contact your nearest JAX distributor today.

America's Finest Industrial Lubricants



1-800-782-8850 | www.jax.com



Micronox™

The power to
KNOCKDOWN
deadly bacteria.

JAX gives you the industry's only one-two punch to help knock-out E-coli, Listeria or Salmonella growing in your plant. Our revolutionary **Micronox™** antimicrobial agent is a safe, powerful additive technology formulated into JAX line of high-performance synthetic or conventional food-grade lubricants. While other agents simply inhibit bacterial growth, this undisputed champ knocks down food and beverage microbial contaminants for the full count. For details, contact your JAX distributor.

America's Finest Industrial Lubricants



1.800.782.8850 | www.jax.com

X terminate bacteria

Micronox® is a groundbreaking advance in food-grade technology that was developed by JAX with the intention of preserving and protecting food-grade lubricants from bacterial contamination in food-processing plants worldwide.

Independent laboratory tests show that sole use of lubricants containing Micronox® was shown to reduce the yeast and mold counts and prevent the formation of Listeria, E. coli and Salmonella.

Contact your JAX Distributor today and find out how Micronox® can make a difference in your food-processing facility.



1-800-782-8950
www.jax.com

TORO PETROLEUM
1234 Anywhere Street
Salinas, CA 98000
980-000-0000
www.toro.com

Xperience counts

JAX has been the leader in lubricating food processing machinery since the inception of food-grade lubricants over 40 years ago! Our experience with what works, and what does not, has led us to develop the highest performing, leading edge lubricants in the food and beverage processing industries. Talk to JAX about any machinery lubrication problem you may have. It's likely we have seen it and solved it already.

JAX Recent Landmark Developments in Food Plant Lubrication:

JAX Poly-Guard FG[®]

Greases with unsurpassed antiwear performance

JAX Pyro-Kote[®]

Ashless oven chain lubricants for ultimate oven chain cleanliness

JAX Halo-Guard[™] FG

Greases with the highest EP ratings ever in a food-grade grease

JAX Micronox[®]

Antimicrobial additive, and the only one to provide significant microbial knockdown performance in food-grade lubricants



America's Finest Industrial Lubricants

1.800.782.8850 | www.jax.com

Publication	Merchandising	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
Food Engineering	Two bonus 1/2 pages Product releases, press releases, direct mail support, website promotions, advertising readership studies, supplier profiles and all advertisers in the print version are included in the digital editions free of charge.		1/2 Page Horizontal - Harnessing the Power of RFID	1/2 Page Horizontal - Food Safety Series, Part One	1/2 Page Horizontal - 24th Annual New Plant of the Year, Dry processing Technology Special Section, as well as 2006 Food Catalog, published October 2006		1/2 Page Horizontal - Grease Gun Ad - 29th Annual New Food Plant Construction Survey, Site Selection Savvy, Food Automation & Manufacturing Conference Report, Tech Update	1/2 Page Horizontal - Chain Ad - Replacement Parts Directory, Replacement Parts Trends Survey, Technology Sourcebook	1/2 Page Horizontal - Corn Ad - 27th Annual State of Food Manufacturing	1/2 Page Horizontal - Corn Ad - 27th Annual State of Food Manufacturing	1/2 Page Horizontal - Chain Gun Ad - Trends Survey		1/2 Page Horizontal - Grease Ad - Energy Management Special Report, Project Scheduling Software, Special Supplement, 1/2 page bonus
Meat & Poultry	Product releases, press releases, direct mail support, website promotions, advertising readership studies, supplier profiles and all advertisers in the print version are included in the digital editions free of charge.			Food Safety Summit Issue			1/2 Page Horizontal - Grease Gun Ad - Conveyor Systems		1/2 Page Horizontal - Corn Ad - Machine Design for Food Safety		1/2 Page Horizontal - Chain Ad Food Safety regulatory review		1/2 Page Horizontal - Grease Gun Ad
Baking & Snack (Measuring Cup a)	Product releases, press releases, direct mail support, website promotions, advertising readership studies, supplier profiles and all advertisers in the print version are included in the digital editions free of charge.			Baxter Advertising Readership Study/ Wholesale Baker of the Year			1/2 Page Horizontal - Grease Gun Ad	Supplier Profiles Issue	1/2 Page Horizontal - Corn ad	Equipment Design for allergens/Annual construction report	1/2 Page Chain ad		1/2 Page Measuring Cup ad
Machinery Lubrication					1/2 Page Horizontal - Experience Ad		1/2 Page Horizontal - Grease Gun Ad		1/2 Page Horizontal - Chain Ad		1/2 Page Horizontal - Grease Gun ad		



1.800.782.8850 | www.jax.com

America's Finest Industrial Lubricants



Antimicrobial additive, and the only one to provide significant microbial knockdown performance in food-grade lubricants

JAX Micronox[®]

Greases with the highest EP ratings ever in a food-grade grease

JAX Halo-Guard[™] FG

Ashless oven chain lubricants for ultimate oven chain cleanliness

JAX Pyro-Kote[®]

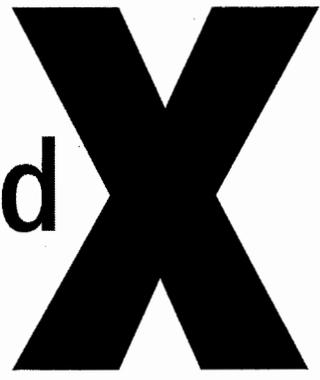
Greases with unsurpassed antiwear performance

JAX Poly-Guard FG[®]

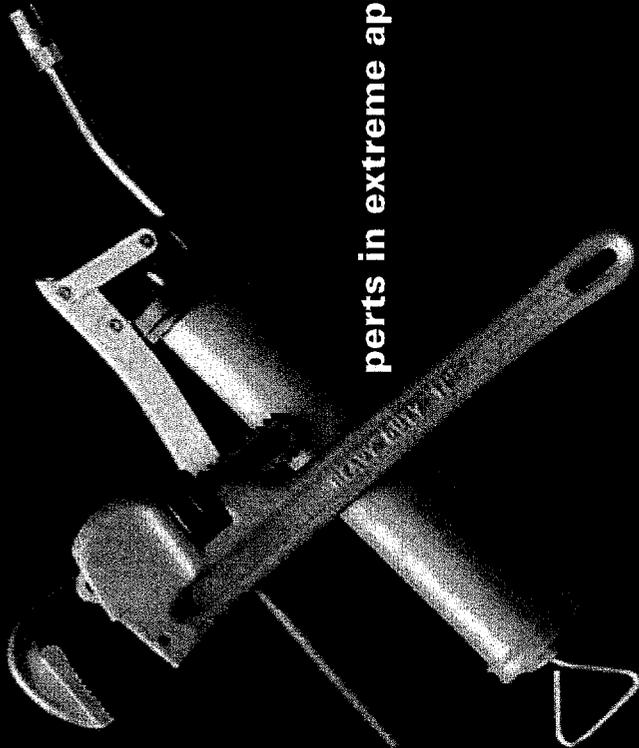
JAX Recent Landmark Developments in Food Plant Lubrication:

JAX has been the leader in lubricating food processing machinery since the inception of food-grade lubricants over 40 years ago! Our experience with what works, and what does not, has led us to develop the highest performing, leading edge lubricants in the food and beverage processing industries. Talk to JAX about any machinery lubrication problem you may have. It's likely we have seen it and solved it already.

experience counts



In our
look for
micronox
line

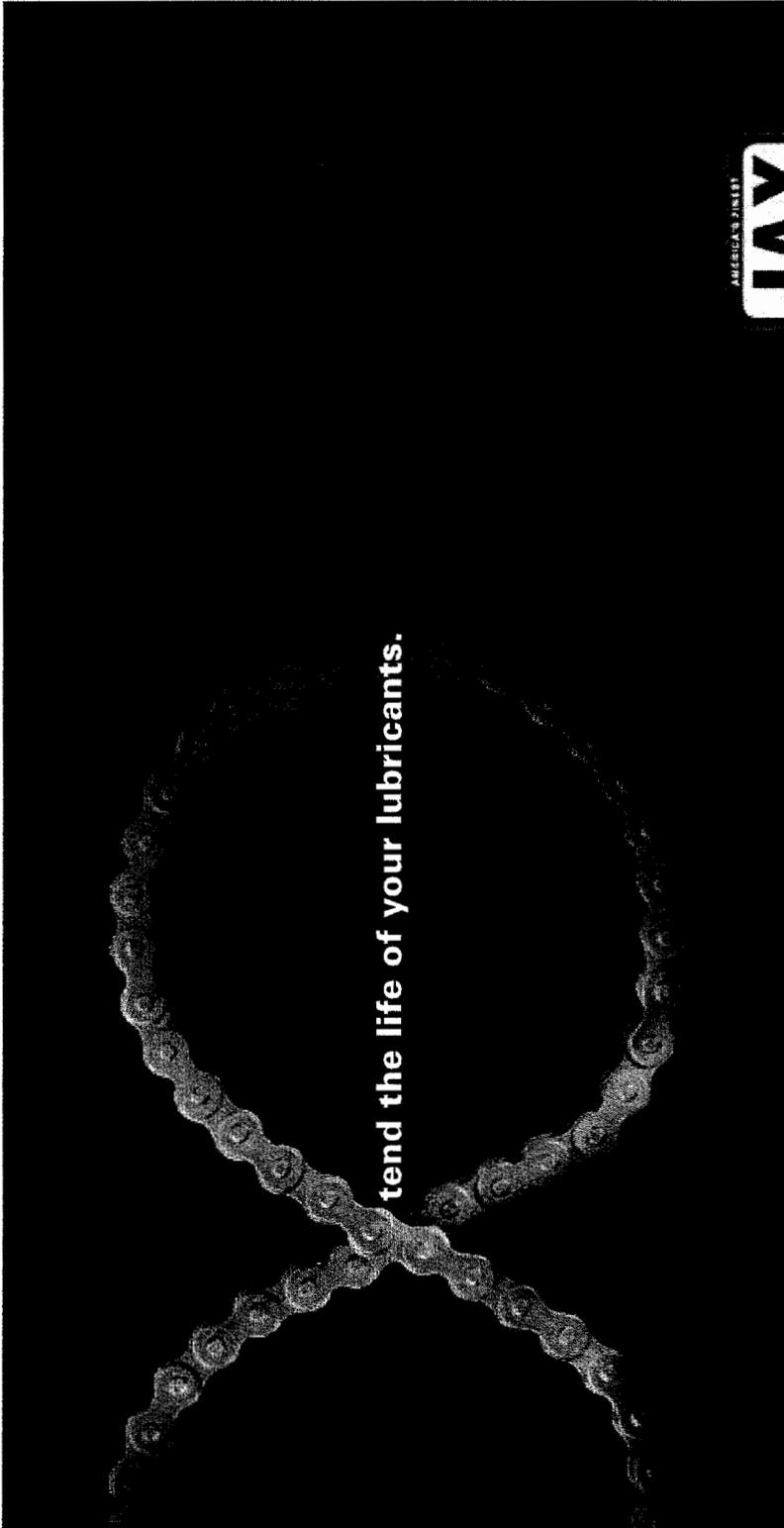


perts in extreme applications.



800.782.8850
www.jax.com

From high temperatures, contamination, water or even chemical assaults, your lubricated machine parts can take a beating day in and day out. When conditions are extreme, JAX expertise is the right tool for the job. With forward thinking, in-house solutions and constantly evolving R&D, we can help maintain and protect your valuable investments — no matter what industry you serve.

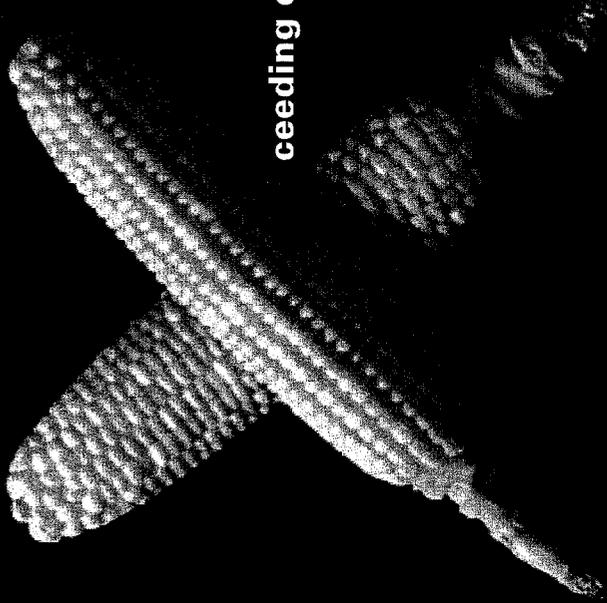


tend the life of your lubricants.



800.782.8850
www.jax.com

With oil prices soaring and the ever-present need to extend machinery protection, it's vital today to get the most out of your lubricants. From advanced base oils and the most recent 100% synthetic technology to innovative lab analysis services, JAX formulations help you slash replacement purchases by making your lubricants last beyond conventional limits. It's time to make every ounce count, and to count for as long as possible.



ceeding expectations in the food industry.



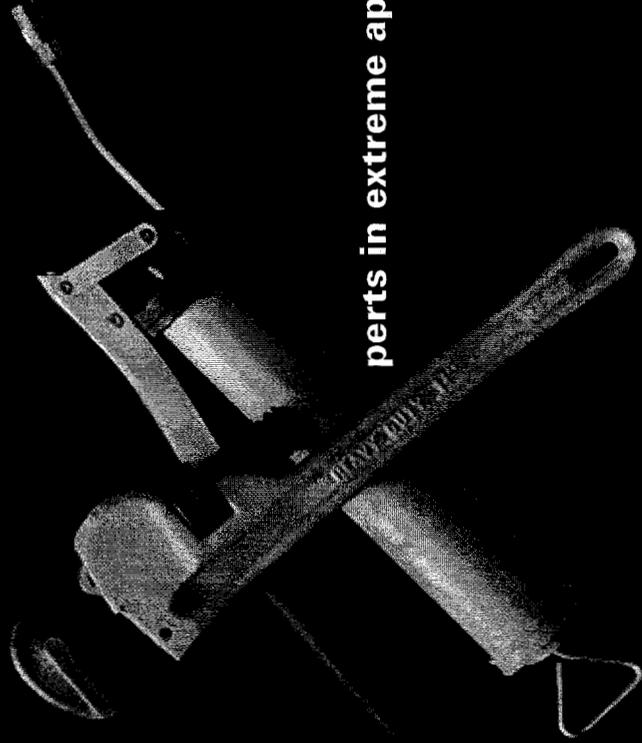
Since the inception of food machinery lubricants, JAX has been the pace-setter in meeting — and exceeding — lubrication needs. For more than 50 years, companies have relied on our expertise in not only product enhancement, but in our ability to help maintain and prolong the life of their machines through maintenance solutions tailored to each specific challenge. After all, there's no such thing as a cookie cutter answer — even in the food industry.

800.782.8850
www.jax.com

2007 Jax Ad Schedule

Publication	Contact	Frequency	Merchandising	Jan	Feb	March	April
Food Engineering	Paul Kelly 630-694-4336 kellyp@bnpmedia.com	9x 1/2 page insertions plus a full page ad	2 free ads - one in January if you run another ad in January, the other in November	CHAIN/GREASE GUN AD (2) 1/2 Page 4/C Closed 3/8/06		GREASE GUN AD 1/2 Page - 4/C Closed 2/9/07	GREASE GUN AD 1/2 Page - 4/C Closed 3/15 Full page - Catalog Closes 4/13
Meat & Poultry	Matt Feder 1-800-338-6201 mfeder@sosland.com	4x	product releases, press releases, web site promotions, direct mail support, technology related editorial coverage, supplier profiles and advertising readership studies				CHAIN AD 1/2 Page - 4/C Closes 4/3/07
Baking & Snack	Matt Feder 1-800-338-6201 mfeder@sosland.com	4x	Product releases, press releases, direct mail support, website readership studies, supplier profiles and all advertisers in the print version are included in the digital editions free of charge.				
Machinery Lubrication	Brett O'Kelley 800-597-5460x112 BOkelley@norfa.com	4x					CHAIN AD 1/2 Page - 4/C Closes 4/3/07
Engineered Wood Journal	Eric Henson www.naylor.com	1x					TBD 1/2 Page 4/C
Specialty Wood Journal	Beth Saltz bsaltz@aripub.com 847-509-9810	3x					





perts in extreme applications.



800.782.8850
www.jax.com

From high temperatures, contamination, water or even chemical assaults, your lubricated machine parts can take a beating day in and day out. When conditions are extreme, JAX expertise is the right tool for the job. With forward thinking, in-house solutions and constantly evolving R&D, we can help maintain and protect your valuable investments — no matter what industry you serve.



tend the life of your lubricants.



With oil prices soaring and the ever-present need to extend machinery protection, it's vital today to get the most out of your lubricants. From advanced base oils and the most recent 100% synthetic technology to innovative lab analysis services, JAX formulations help you slash replacement purchases by making your lubricants last beyond conventional limits. It's time to make every ounce count, and to count for as long as possible.

800.782.8850
www.jax.com

1-800-282-8850 | www.jax.com

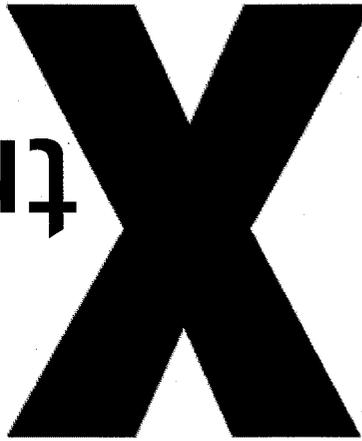
America's Finest Industrial Lubricants

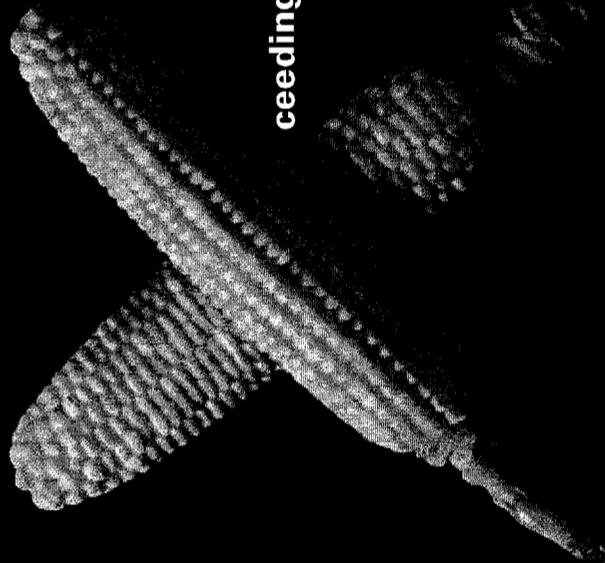


For details, contact your nearest JAX distributor today.

JAX has developed the world's most advanced, high-temperature synthetic esters for lubrication of high-speed, automated, commercial baking ovens. JAX Pyro-Kote Series fluids provide smokeless, deposit-free lubrication of this sophisticated, production machinery at performance levels that meet and exceed OEM performance standards. Reduced carbon deposits, smoke-free performance and superb antiwear protection make JAX Pyro-Kote Series the new standard in Xtreme, clean, high-temperature baking lubrication.

**Xtremely
clean**





ceeding expectations in the food industry.



Since the inception of food machinery lubricants, JAX has been the pace-setter in meeting — and exceeding — lubrication needs. For more than 50 years companies have relied on our expertise in not only product enhancement, but in our ability to help maintain and prolong the life of their machines through maintenance solutions tailored to each specific challenge. After all, there's no such thing as a cookie cutter answer — even in the food industry.

800.782.8850
www.jax.com

Solutions for you and you alone. No

ceptions.



800.782.8850
www.jax.com

If there is one thing our 50 years of industry experience have taught us, it's that products which may have worked in the past may not be sufficient to provide adequate lubrication in the future. At JAX, we are relentless in our quest to provide you with the most innovative and individualized lubricant solutions to extend the life of your machinery, reduce downtime and increase production. Just as your needs are ever-changing, so is our line of industrial lubricants -- because after all, there is no such thing as a cookie-cutter solution.

No other lubricant measures up to our acting standards.



800.782.8850
www.jax.com

For over 50 years, companies have relied on our expertise in lubricant technology and our commitment to research and development of innovative lubrication solutions. It's for these reasons that all JAX lubricants are compounded with the finest raw materials and formulated by the industry's foremost engineers to not only exceed our own high standards, but also surpass your expectations for performance and value. When it comes to your business, you demand excellence - it's our responsibility to deliver nothing less.



tend the life of your lubricants.



800-782-8850
www.jax.com

With oil prices soaring and the ever-present need to extend machinery protection, it's vital today to get the most out of your lubricants. From advanced base oils and the most recent 100% synthetic technology to innovative lab analysis services, JAX formulations help you slash replacement purchases by making your lubricants last beyond conventional limits. It's time to make every ounce count, and to count for as long as possible.

X terminate bacteria

Micronox® is a groundbreaking advance in food-grade technology that was developed by JAX with the intention of preserving and protecting food-grade lubricants from bacterial contamination in food-processing plants worldwide.

Independent laboratory tests show that sole use of lubricants containing Micronox® was shown to reduce the yeast and mold counts and prevent the formation of Listeria, E. coli and Salmonella.

Contact your JAX Distributor today and find out how Micronox® can make a difference in your food-processing facility.



1-800-782-8850
www.jax.com

TORO PETROLEUM
1234 Anywhere Street
Salinas, CA 98000
980-000-0000
www.toro.com

Xtreme toughness

Bring JAX your most demanding lubrication challenges. High temperatures. Extreme pressure. Exposure to water or highly acidic foods. Whatever the conditions ... the new JAX Halo-Guard™ FG Grease was built to take it.

Formulated with a revolutionary thickener technology, JAX Halo-Guard™ provides the highest level of E.P. and anti-wear properties ever reported for a food-grade grease. Not to mention outstanding rust and corrosion-control capabilities.

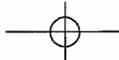
Halo-Guard™ is water-resistant, compatible with most other greases and ideal for virtually any food/beverage application. So chances are, this tough, multi-purpose lubricant is one of the only greases you'll need to keep in stock.

Questions? Contact your nearest JAX distributor today.

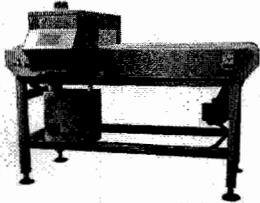


America's Finest Industrial Lubricants

1.800.782.8850 | www.jax.com



SOURCEBOOK



Metal detector

The Cintex Sentry VF variable frequency metal detector from Loma automatically analyzes product affect (temperature, moisture, salt content, speed and packaging material), reviews a band of frequencies and selects the right one for the specific application. Because the frequencies are not present when the unit is manufactured, packagers can run a variety of products through the same unit.

Loma Systems, Inc.; 630-681-2050 ◀

**terminate
bacteria**

Leave it to JAX to find an X-tra way to kill E-coli, Listeria or Salmonella growing in your plant. While other lubricant additives simply inhibit bacterial growth, our revolutionary Micronox® antimicrobial technology provides immediate and significant knockdown capabilities against a broad spectrum of microbes, yeast and mold. Ask how this X-terminator can be added to your next order of JAX high-performance synthetic or conventional food-grade lubricants. Contact your JAX distributor today.

JAX

America's Finest Industrial Lubricants

See Food Master, p. 108 1.800.782.8850 | www.jax.com



Resealable pouch

Zip-Pak's resealable quad-seal pouch is made from four registered webs and allows graphics and materials to be changed on any of the four webs. The gusseted pouches incorporate Zip-Pak zippers to allow resealable packaging for frozen foods, salty snacks and fresh cut produce. The package is produced on a gearless RiteBag Plus machine, which allows converters to make two-side seal, three-side seal, bottom-folded, stand-up and quad-seal gusseted pouches on a single machine.

**Zip-Pak; 815-468-6500;
www.zippak.com ▲**

Inspection tool

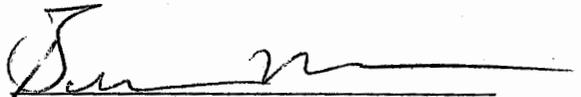
DVT's Legend LS Line Scan vision system incorporates a Texas Instruments DSP processor and has a 2K linear sensor yielding images up to 18,000 lines per second. The unit is suitable for unwrapping cylindrical objects for label inspection and scanning an object to obtain a high-resolution image.

DVT Machine Vision; 770-814-7920; www.dvtsensors.com



micro-organisms. She further states that the definition of "pests" in Section 2(s) of FIFRA, 7 U.S.C. §136(s), includes bacteria or other micro-organisms. She goes on to say that "FIFRA regulations at 40 C.F.R. 152.15(a)(1) further states that a substance is a pesticide requiring registration if a person who distributes or sells the substance claims, states or implies, by labeling or otherwise, that the substance can or should be used as a pesticide."

5. Ms. Gade fails to address, however, that the same regulations she cites exclude any "fungus, bacterium, fungus or other micro-organism" if it is "on or in living man or other living animals" and those "on or in processed food or processed animal feed, beverages, drugs and cosmetics." *See*, 40 C.F.R. §152.5(d).


Bruce A. McInay

Subscribed and sworn before me
this 4th day of February, 2008.


Notary Public, State of Wisconsin
My commission expires: 6-28-2009

F. JAMES SENSENBRENNER, JR.
FIFTH DISTRICT, WISCONSIN
COMMITTEE ON THE JUDICIARY
CHAIRMAN



Congress of the United States
House of Representatives
Washington, DC 20515-4905

WASHINGTON OFFICE:
ROOM 2449
RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4905
202-225-5101

DISTRICT OFFICE:
120 BISHOPS WAY, ROOM 154
BROOKFIELD, WI 53005-6294
262-784-1111

OUTSIDE MILWAUKEE METRO
CALLING AREA
1-800-242-1119

February 9, 2007

Mr. Eric Peter
Behnke Lubricants, Inc.
W134 N5373 Campbell Drive
Menomonee Falls, WI 53051

Dear Mr. Peter:

In response to your inquiry regarding the U.S Environmental Protection Agency's (EPA) Notice of Intent to File a Civil Administrative Complaint against Behnke Lubricants, Inc., I am enclosing a copy of the reply I recently received from the EPA.

I am hopeful the comprehensive response is helpful to your concerns. Should you have any questions regarding this response, please contact my district office at (262) 784-1111.

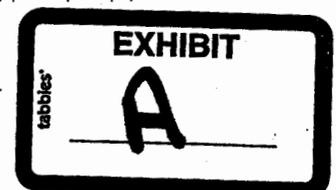
If I may ever be of service in the future, do not hesitate to contact either my Washington Office or District Office in Wisconsin. In any event, continue to keep me informed of your views on issues and concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "F. James Sensenbrenner, Jr.", written over a large, stylized circular flourish.

F. JAMES SENSENBRENNER, JR.
Member of Congress

FJS:bas
Enclosure





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB - 1 2007

REPLY TO THE ATTENTION OF:

R-19J

Honorable F. James Sensenbrenner, Jr.
Member, U.S. House of Representatives
120 Bishops Way, #154
Brookfield, Wisconsin 53005

Dear Congressman Sensenbrenner:

Thank you for your letter dated January 22, 2007, on behalf of Mr. Eric Peter of Behnke Lubricants, Inc. in Menomonee Falls, Wisconsin, which referenced our December 22, 2006 Notice of Intent to File a Civil Administrative Complaint against Behnke Lubricants for the sale and distribution of the unregistered pesticides, JAX Poly-Guard FG-2, JAX Poly-Guard FG-LT, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, and JAX Magna-Plate 74. Attached to your letter was a memorandum from Mr. Peter and his attorney, Mr. Bruce McInay, in which they question the inclusion of the Behnke Lubricants products listed above within the Federal Insecticide, Fungicide and Rodenticide (FIFRA) definition of "antimicrobial pesticides," 7 U.S.C. § 136(mm). Your letter asked us to review Mr. Peter's concerns and to address which portion of FIFRA gives the U.S. EPA regulatory authority over the Behnke Lubricants' products mentioned above.

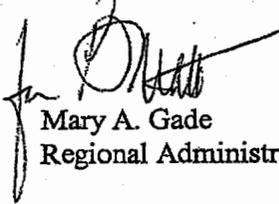
Behnke Lubricants' products fall under the definition of "pesticides" in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), because the company, in its advertising and on its labels, makes claims concerning control of micro-organisms relating to each product. The definition of "pest" in Section 2(s) of FIFRA, 7 U.S.C. § 136(s), includes bacteria or other micro-organisms. A pesticide is any substance or mixture of substances that is intended to prevent, destroy, repel or mitigate any organism that fits the FIFRA definition of pest. FIFRA regulations at 40 C.F.R. § 152.15(a)(1) further state that a substance is a pesticide requiring registration if a person who distributes or sells the substance claims, states or implies, by labeling or otherwise, that the substance can or should be used as a pesticide.

The definition of "antimicrobial pesticides," referenced in Mr. Peter's memorandum, is a subset of the definition of "pesticide." The definition of "antimicrobial pesticides" was added to FIFRA to allow for an expedited review process for the registration of subject antimicrobial pesticides. It was not intended to exclude any class of pesticides from registration. This revised review period is further referenced in Section 3(h) of FIFRA, Registration Requirements for Antimicrobial Pesticides, 7 U.S.C. § 136a(h). Regulations for implementation of this revised registration process, proposed in the September 17, 1999 Federal Register, have not yet become final. To date the U.S. EPA has insufficient information from Behnke Lubricants to determine if their products are "antimicrobial pesticides," but my staff is currently engaged in discussions with your constituents to review this and other issues. Regardless of whether the Behnke

Lubricants' products fall under the narrow definition of "antimicrobial pesticides," they are pesticides under the much broader definition of "pesticides" and are subject to FIFRA.

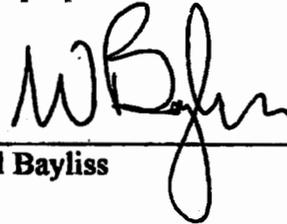
Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Mary Canavan or Phil Hoffinan, the Region 5 Congressional Liaisons, at 312-886-3000.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary A. Gade", with a long horizontal flourish extending to the right.

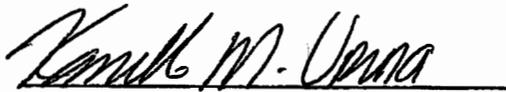
Mary A. Gade
Regional Administrator

used for their intended purpose. That JAX products resist contamination from such food borne microbes is beneficial to our HACCP efforts in that it could limit the risk of cross-contamination. In no way, however, does this property of the JAX products, or any representations contained in JAX labeling or other literature, lead me to believe that the JAX products are pesticides or should be used for such a purpose.



Bill Bayliss

Subscribed and sworn before me
this 19 day of February, 2008.


Notary Public, State of California

My commission expires: June 30, 2011



EB

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:

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

Docket No. FIFRA-05-2007-0025

Respondent.

RECEIVED
REGIONAL HEARING CLERK
US EPA REGION V
2008 FEB 21 PM 3:35

DECLARATION OF WILLIAM BARDEN

STATE OF WISCONSIN)
) ss.
PORTAGE COUNTY)

William Barden, being first duly sworn, on oath deposes and says:

1. I am one of the principals of Badger Plastics and Supply, Inc. ("Badger"). Badger is in the business of selling supplies and equipment into, among others, the food processing industry. Badger has a history of purchasing certain food-grade lubricants under the JAX brand name for resale to our food processing customers from Behnke Lubricants, Inc. of Menomonee Falls, Wisconsin.

2. I am among the personnel at Badger responsible for making the decision to purchase food-grade lubricants from Behnke. Such products are resold in the food processing industry. My principal purpose in selecting Behnke's JAX products is their performance as lubricants for our customers' equipment. If these products did not meet the customers' performance requirements as lubricants, Badger would not want to distribute them to our customers.

3. I was supplied information from Behnke Lubricants regarding certain antimicrobial properties of some of its food-grade lubricants. In no way did the

information that I received, or any representations contained in JAX labeling or other literature lead me to believe that the JAX products are pesticides or should be used for a pesticidal purpose.

William Barden

William Barden

Subscribed and sworn before me
this 18th day of February, 2008.

Jeanine D. Corner

Notary Public, State of Wisconsin
My commission expires: 8/30/09

