

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	
)	
BEHNKE LUBRICANTS, INC.)	COMPLAINANT'S INITIAL
MENOMONEE FALLS, WISCONSIN)	PREHEARING EXCHANGE
)	
Respondent.)	
_____)	Docket No. FIFRA-05-2007-0025

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COMPLAINANT'S INITIAL PREHEARING EXCHANGE

In accordance with the Prehearing Order issued by this Honorable Court on June 27, 2007, Complainant, the Director, Land and Chemical Division¹, Region 5, United States Environmental Protection Agency (U.S. EPA, Complainant or Agency), through her undersigned attorneys, hereby files this Complainant's Initial Prehearing Exchange pursuant to Section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), codified at 40 C.F.R. § 22.19.

I. The names of any expert or other witnesses that Complainant intends to call at the hearing, together with a brief narrative summary of each witness's expected testimony.

A. Fact Witnesses

Complainant may call the following individuals to testify as fact witnesses in the hearing in this matter:

¹ The Land and Chemicals Division was formerly known as the Waste, Pesticides and Toxics Division. The Chemicals Management Branch was formerly known as the Pesticides and Toxics Branch, and the Pesticides/Toxics Compliance Section was formerly known as the Pesticides and Toxics Enforcement Section.

1. Mr. Jeff C. Saatkamp
Environmental Enforcement Specialist
Bureau of Agrichemical Management
Division of Agricultural Resource Management
Wisconsin Department of Agriculture, Trade & Consumer Protection
P.O. Box 8911
Madison, Wisconsin 53708

Mr. Saatkamp is an Environmental Enforcement Specialist with the Bureau of Agrichemical Management, Division of Agricultural Resource Management, of the Wisconsin Department of Agriculture, Trade and Consumer Protection (WDATCP). Mr. Saatkamp's testimony may include, but may not be limited to, the matters described in the following paragraphs.

Mr. Saatkamp may be called as a witness to testify that he was assigned to conduct an inspection at Behnke Lubricants, Inc. (Behnke or Respondent). He may testify that on or about June 23, 2006, he conducted an Internet investigation and found an Internet site at www.meatpoultry.com which featured a promotional story on one of Behnke's products, "Magna Plate 74." A printout of this Internet site is found in Complainant's Exhibit (CX) 1a, which Mr. Saatkamp is prepared to authenticate at the hearing in this matter. Mr. Saatkamp may testify that this promotional story included the following statements:

"In an effort to combat Listeria and other harmful microbial agents in air-operated equipment, Behnke Lubricants Inc/JAX has introduced Magna Plate-74 with Micronox®..."

"Magna-Plate 74 contains JAX's Micronox® technology, a revolutionary food-grade antimicrobial agent that provides unsurpassed protection against potentially deadly bacterial contamination such as E-coli, Listeria and Salmonella."

"Magna-Plate 74 provides various benefits to food and beverage processing plants, including: longer bearing and air operated equipment life; Micronox® antimicrobial technology to knockdown and prevent growth in the air system..."

Mr. Saatkamp also noted that the article made the following statements:

“JAX lubrication products are distributed worldwide. For information about JAX products, consumers can call toll-free 1-800-782-8850, or email requests to info@jax.com.”

In addition, Mr. Saatkamp may testify that he conducted an inspection at Behnke’s Menomonee Falls, Wisconsin, establishment on August 3, 2006, and conducted a follow up inspection on August 11, 2006. He may testify about what he observed, collected and learned at each of these inspections. Mr. Saatkamp may testify that he conducted the August 3, 2006, inspection at Respondent’s establishment to inspect and collect samples of pesticides that were packaged, labeled, and/or released for distribution or shipment by Respondent, and to collect samples of containers, labeling and/or advertising literature for such pesticides.

He may further testify that, during the August 3, 2006, inspection, he collected physical samples of **JAX Poly-Guard FG-2** and **JAX Halo-Guard FG-2**, which were packaged, labeled and ready for distribution or sale. See CX 38 and 39. The label on the container of **JAX Poly-Guard FG-2** that Mr. Saatkamp observed and collected on August 3, 2006, included the following claims:

“Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial,” “The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”

The label on the container of **JAX Halo-Guard FG-2** that Mr. Saatkamp observed and collected on August 3, 2006, included the following claims:

“JAX HALO-GUARD FG-2 provides Micronox® microbial knockdown performance.”

Mr. Saatkamp may also testify that, after the August 3, 2006, inspection at Behnke, he directed his office to deliver the two physical samples that he had collected during the inspection to Mr. Terence Bonace of U.S. EPA. Mr. Saatkamp may identify these samples, or photographs of these samples, at the hearing in this matter.

Mr. Saatkamp may also testify that he collected advertising literature for the following Behnke products: **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.** He may further testify as to the claims made in the literature that he collected.

He may further testify that, during the August 3, 2006, inspection, he collected invoices which demonstrated the distribution or sale of **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** to certain businesses identified in those invoices. More specifically, the invoices demonstrated that Behnke distributed or sold **JAX Poly-Guard FG-2** and **JAX Halo-Guard FG-2** to Badger Plastics & Supply Co. in Plover, Wisconsin on or about June 15, 2006; that Behnke distributed or sold **JAX Poly-Guard FG-2** to Perlick Corporation in Milwaukee, Wisconsin on or about March 3, 2006; that Behnke distributed or sold **JAX Poly-Guard FG-LT** to Faribault Foods Co. in Cokato, Minnesota, on or about February 11, 2005; that Behnke distributed or sold **JAX Poly-Guard FG-LT** to Pepsi Cola in Sacramento, California on or about June 6, 2006; that Behnke distributed or sold **JAX Halo-Guard FG-LT** to KHS, Inc., in Waukesha, Wisconsin on or about April 7, 2006; that Behnke distributed or sold **JAX Halo-Guard FG-LT** to Jennie-O Turkey Store in Wilmar, Minnesota on or about June 27, 2006; that Behnke distributed or sold **JAX Halo-Guard FG-2** to Seneca Foods, in Clyman, Wisconsin on or about July 14, 2006; that

Behnke distributed or sold **JAX Halo-Guard FG-2** to B-Way Corporation in Sturtevant, Wisconsin on or about March 14, 2006; that Behnke distributed or sold **JAX Magna-Plate 74** to Sara Lee Foods (Hillshire Farm) in New London, Wisconsin on or about July 11, 2006; and that Behnke distributed or sold **JAX Magna-Plate 74** to American Foods Group in Green Bay, Wisconsin on or about March 3, 2006.

Mr. Saatkamp may further testify that, during his August 3, 2006, inspection at Behnke, he met with a Behnke employee, Troy Paquette, and that he discussed with Mr. Paquette certain language in Behnke's advertising literature, which claimed that the "JAX Micronox technology" provided protection against, Escherichia coli, (E. coli), Lysteria monocytogenes, (Lysteria), and Salmonella typhimurium, (Salmonella). Mr. Saatkamp may further testify that he inspected the warehouse of the establishment, and that he observed and photographed the **Poly-Guard FG-2** and **Halo-Guard FG-2** products in the warehouse.

Mr. Saatkamp may also testify that, on August 11, 2006, he returned to Behnke's establishment and obtained copies of the fact and technical sheets for the "Conveyor Glide Series" product line.

Mr. Saatkamp's August 3, 2006, inspection report of Behnke's Menomonee Falls, Wisconsin establishment, and of his August 11, 2006, return visit, including all attachments, is attached to Complainant's Initial Prehearing Exchange as Complainant's Exhibit (CX) 1. To the extent deemed necessary by the Court, Mr. Saatkamp will provide testimony sufficient to authenticate the contents of the inspection report found in CX 1, as well as the physical samples of **JAX Poly-Guard FG-2** and **JAX Halo-Guard FG-2** that Mr. Saatkamp collected during the inspection.

Mr. Saatkamp may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent.

2. Terence Bonace
Life Scientist
Pesticides/Toxics Compliance Section
Chemicals Management Branch
Land and Chemicals Division
Region 5
United States Environmental Protection Agency

Mr. Bonace is a Life Scientist with the Pesticides/Toxics Compliance Section of the Chemicals Management Branch, Land and Chemicals Division (LCD), U.S. EPA, Region 5. Mr. Bonace may testify about what he observed, collected and learned during his investigation of Behnke. Mr. Bonace's testimony may include, but may not be limited to, the matters described in the following paragraphs.

Mr. Bonace may testify that Region 5 of U.S. EPA requested that the WDATCP conduct an inspection at Behnke. He may further testify that, once the inspection at Behnke had been completed on or about August 3, 2006, and August 11, 2006, WDATCP referred suspected violations of FIFRA to U.S. EPA, Region 5.

Mr. Bonace may further testify that, on or about November 22, 2006, he received the two physical samples of Behnke products (**JAX Polyguard FG-2** and **JAX Halo-Guard FG-2**) (CX 30 and 40) in the mail which had been collected by Mr. Saatkamp during the August 3, 2006, inspection.

Mr. Bonace may further testify that on December 22, 2006, the U.S. EPA issued a Notice of Intent to File Civil Administrative Complaint to Behnke (CX 2). Mr. Bonace will provide testimony sufficient to authenticate this document.

Mr. Bonace may also testify that on June 9, 2006, he found the following claims, amongst others, on Respondent's Internet site at www.jax.com:

"The introduction of JAX exclusive Micronox® Anti-Microbial Technology gives plants in search of tools for added micro organism control a powerful, extra weapon in their arsenal of protection!"

"JAX Poly-Guard FG and Halo-Guard FG greases contain Micronox®, the only truly effective, active microbial control agent in the food grade lubricant industry."

"As of May 1, 2002 every food grade lubricant in the JAX Line incorporates our exclusive Micronox® Anti-Microbial Technology, providing true 'knock-down' performance against a wide range of bacteria and other micro organisms!"

"With the added benefit of Micronox®, JAX exclusive anti-microbial chemistry which independent testing has proven to be the most effective in industry, plants can achieve an extra measure of sanitation protection"

"JAX Poly-Guard FG grease contains Micronox® the only truly effective, active bacteria control agent in the food grade lubricant industry"

"Poly-Guard FG-2, FG-LT... Now contains Micronox® anti-microbial for true 'knock-down' performance against a broad spectrum of microbial contaminants."

A print-out of this webpage is included as CX 3. Mr. Bonace will provide testimony sufficient to authenticate this document.

Mr. Bonace may testify that, on November 17, 2006, he found the following claims, amongst others, on the Respondent's Internet site at www.jax.com:

"With the added benefit of Micronox®, JAX exclusive anti-microbial chemistry which independent testing has proven to be the most effective in the industry, plants can achieve an extra degree of sanitation protection."

"JAX Poly-Guard FG grease contains Micronox® the only truly effective, active bacteria control agent in the food grade lubricant industry."

"JAX Poly-Guard FG and Halo-Guard FG greases contain Micronox®, the only truly effective, active microbial control agent in the food grade lubricant industry."

“Now contains Micronox® anti-microbial for true ‘knockdown’ performance against a broad spectrum of microbial contaminants.”

“The introduction of JAX exclusive Micronox® Anti-Microbial Technology gives plants in search of tools for added micro-organism control a powerful, extra weapon in their arsenal of protection!”

“As of May 1, 2002 every food grade lubricant in the JAX line incorporates our exclusive Micronox® Anti-Microbial Technology, providing true ‘knock-down’ performance against a wide range of bacteria and other micro organisms.”

A print-out of this webpage is included as CX 4. Mr. Bonace will provide testimony sufficient to authenticate this document.

In addition, Mr. Bonace may testify about an Internet investigation that he conducted on or about February 26, 2007, during which he observed that Respondent’s Internet site at www.jax.com continued to make many of the same claims that were found on its website on June 9, 2006. A print-out of this webpage is included as CX 5. Mr. Bonace will provide testimony sufficient to authenticate this document.

Mr. Bonace may also testify that, on March 21, 2007, he conducted another Internet investigation in connection with Behnke’s products. He may testify that, on that date, the Internet contained many websites that continued to advertise JAX Micronox as having antimicrobial properties. These sites included, but were not limited to, the following:

www.allbusiness.com/management/business-support-services/669676-1.html
<http://milwaukee.bizjournals.com/Milwaukee/stories/2001/11/19/smallb1.html>
www.jax.fr/pages
www.foodproc.com/ad-jax.shtml
www.ibtinc.com/primemover/archive/PM200507/lub01.html
www.lubripolo.com/GGAlimenticio/
www.jax.com/press_releases/pr_bottom2.html
www.food_manufacturing.com/scripts/ShowPR.asp?PUBCODE=033&ACCT...
www.meatequip.com/supplierad/jax.htm
www.foodengineeringmag.com/CDA/Archives/543b8f4ab52f8010VgnVCM100000f932a8c0

www.gissa.com/en/jax.htm
www.ahi.dk/jax/micronox.htm

Print outs of these websites can be found at CX 6a. Mr. Bonace will provide testimony sufficient to authenticate this exhibit.

Mr. Bonace may further testify that on March 26, 2007, he conducted an additional Internet investigation relating to Behnke products. He may testify that, on that date, he found the following website that continued to advertise JAX Micronox as having antimicrobial properties (See CX 6b):

www.powercontrolresources.com/lub.html

A printout of this website is found in CX 6b. Mr. Bonace will provide testimony sufficient to authenticate this exhibit.

Mr. Bonace may further testify that on April 10, 2007, he conducted an additional Internet investigation relating to Behnke products. He may testify that, on that date, he found the following websites that continued to advertise JAX Micronox as having antimicrobial properties:

www.uark.edu/depts/ifse/ofpa/exhibits.htm
www.foodengineeringmag.com
www.foodengineeringmag.com/FE/2006/10/Files/PDFs/FEX/006p_092.pdf
http://filesibnpmedia.com/FE/Protected/Files/PDF/FEX1005p_110.pdf
www.foodengineeringmag.com/FE/2005/06/Files/PDFs/behnke.pdf
www.foodengineeringmag.com/FE/Home/Files/PDFs/FEX0107_149.pdf
www.clfp.com/03EXPO/exhibit/CoDescriptions.pdf

Print outs of these websites can be found at CX 6c. Mr. Bonace will provide testimony sufficient to authenticate this exhibit.

Mr. Bonace may further testify that on September 6, 2007, he conducted an additional Internet investigation relating to Behnke products. He may testify that, on that date, the Internet contained the following website that continued to advertise JAX Micronox as having antimicrobial properties (See CX 6d):

www.gissa.com/en/jax.htm

A printout of this website is found in CX 6d. Mr. Bonace will provide testimony sufficient to authenticate this exhibit.

A declaration by Mr. Bonace of all the Internet investigations discussed above is included as CX 6e, and Mr. Bonace is prepared to swear to or affirm the testimony contained in this exhibit.

Mr. Bonace may also testify that on May 2, 2007, he called one of the toll free numbers printed on the Behnke brochures at 8:35 am. He may testify that the number he dialed was 800-972-8850. When the woman answered the phone as "JAX," Mr. Bonace asked if this was the correct number for ordering JAX products. The woman answering as "JAX" verified that she could help him with his order. Mr. Bonace then documented this conversation record immediately after the phone call ended. This telephone conversation record is included as CX 7. Mr. Bonace will provide testimony sufficient to authenticate the record of this telephone conversation.

In addition, Mr. Bonace may testify that on March 8, 2007, he conducted an investigation at American Foods Group (American) located at 544 Acme Street, Green Bay, Wisconsin. He may testify that the purpose of the investigation was to verify that certain advertising and labeling claims were made by Respondent to American with respect to the distribution or sale of

Behnke's product, **JAX Magna-Plate 74**.

Mr. Bonace may testify that during this investigation, he obtained copies of two purchase orders dated March 5, 2007, and December 19, 2006.

During the March 8, 2007, inspection at American, Mr. Bonace may testify about a conversation he had with Mr. Josh Rybicki, an American employee responsible for "Parts Inventory Control," about the products in question and their antimicrobial properties. Mr. Rybicki agreed to locate some promotional advertising literature that American had received from Behnke and to mail it to Mr. Bonace.

Mr. Bonace's March 8, 2007, investigation report of American, including all attachments, is included as CX 8. To the extent deemed necessary by the Court, Mr. Bonace will provide testimony sufficient to authenticate CX 8 and the attachments thereto.

Mr. Bonace may also testify that, on or about March 16, 2007, he received two pieces of literature in the mail in two envelopes addressed from Mr. Josh Rybicki of American.

The first piece of advertising literature was entitled "American Foods Group, JAX Lube-Guard Program." (CX 8a) and included advertising literature for **Magna-Plate 78** which stated, among other things:

"Antimicrobial Performance: Both products incorporate JAX new, proprietary antimicrobial additive technology, Micronox™ for enhanced product protection against a wide variety of microbial agents, including yeasts, molds, gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox™ provides significant knockdown performance and has proven especially effective against lysteria (Lysteria monocytogenes), E. coli (Escherichia coli) and salmonella (Salmonella typhimurium) on contact and over extended lubrication intervals."

Mr. Bonace may testify that this "American Foods Group, JAX Lube-Guard Program" advertising literature for Magna-Plate 78 also included the Respondent's contact information,

such as a telephone number, facsimile number and Internet address.

Mr. Bonace may also testify that the “American Foods Group, JAX Lube-Guard Program” packet also included advertising literature for **Magna-Plate 74** which stated, among other things:

“Antimicrobial Performance: JAX Magna-Plate 74 incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeasts, molds, and gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox® provides significant knockdown performance and has proven especially effective against lysteria (Lysteria monocytogenes), E. coli (Escherichia coli) and salmonella (Salmonella typhimurium) on contact and over extended lubrication intervals.”

Mr. Bonace will testify that the “American Foods Group, JAX Lube-Guard Program” advertising literature for **Magna-Plate 74** also included the Respondent’s contact information such as phone number, facsimile number and Internet address. He will further testify that The “American Foods Group, JAX Lube-Guard Program” packet also included advertising literature for **Halo-Guard FG** which stated, among other things:

“JAX Halo-Guard FG provides Micronox® microbial knockdown performance.”

Mr. Bonace will testify that he received the second piece of advertising literature on or about March 16, 2007, and that this document was entitled “JAX Lubricant Guide for Food, Beverage and Drug & Cosmetic Processing & Manufacturers” (CX 8b), and included, among other things, the following:

(A) A cover letter addressed to the customer which stated: *“First and foremost is Micronox®, JAX advanced antimicrobial technology that provides immediate and significant knockdown performance on a wide spectrum of microbial contaminants. This development alone is providing HACCP programs a powerful new weapon in their ongoing battle against microorganisms.”*

(B) A sheet entitled “JAX Micronox® Technologies” which described in detail the enhanced antimicrobial capabilities of the Micronox® additive system, and which

included a graph comparing Poly-Guard FG with competitors in efficacy against Listeria, E. coli, and Salmonella.

(C) The advertising literature also included the Respondent's contact information such as telephone number, facsimile number and Internet address.

Mr. Bonace may also testify that, after receiving the first set of mailings from Mr. Rybicki, Mr. Bonace received a telephone call from Mr. Rybicki. Mr. Rybicki wanted to know if Mr. Bonace wished to receive any more literature relating to Behnke products. Mr. Bonace indicated that he wanted to see any additional material that Mr. Rybicki may have located. On or about March 29, 2007, Mr. Bonace received a third piece of advertising literature from American. The literature was entitled "Technology Focus, JAX Micronox™ Technology, Introducing Micronox™ Technology in JAX Food-Grade Lubricants for Microbial Knockdown Performance against Listeria, E.coli, Salmonella and other microorganisms" (CX 8c) and included, among other things:

(A) A letter from the Behnke Technical Director entitled: "What is JAX Micronox™ Technology: Re: Antimicrobial Usage in JAX Food-Grade Products."

(B) Literature for **Poly-Guard Greases** which made many claims regarding its antimicrobial capabilities and performance due to Micronox™.

(C) Literature for **Magna Plate 78** which made many claims regarding its antimicrobial capabilities and performance due to Micronox™.

(D) Literature entitled "Plant Microbial Knockdown Results" which included references to **JAX Poly-Guard FG-2** and its antimicrobial features.

(E) Literature entitled "Major Food Processor Lab Test Results" which also made references to **JAX Poly-Guard FG-2** and its antimicrobial features.

(F) Literature entitled "Independent Lab Results" which also made references to **JAX Poly-Guard FG-2** and its antimicrobial features.

(G) Literature entitled "Food Industry Firsts" that stated, among other things: "The first effective food-grade antimicrobial additive for lubricants with knockdown capabilities,

effectively partnering lubricants into plant sanitation programs.”

(H) The literature also included contact information for Respondent such as Behnke’s telephone number, facsimile number, Internet address, distributor information and product ordering options.

Mr. Bonace may also testify that on March 8, 2007, he conducted an investigation at Badger Plastic & Supply, Inc. (Badger), located at 3451 Johnson Avenue, Plover, Wisconsin. He may testify that the purpose of the investigation was to verify that certain advertising and labeling claims were made by Respondent to Badger with respect to the distribution or sale of Behnke’s products, **JAX Halo-Guard FG-2** and **JAX Poly-Guard FG-2**.

During the investigation on March 8, 2007, Badger employees took Mr. Bonace to a supply area, where Mr. Bonace observed four boxes, each containing ten 14-ounce cartridge tubes of **JAX Poly-Guard FG-2**. Mr. Bonace examined one tube from each of the four boxes in the supply area; all four cartridge tubes included the same language on the label, as follows:

“Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial,” “The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”

Mr. Bonace noted that the four tubes of **JAX Poly-Guard FG-2** which he observed at Badger were identical to the physical sample of **JAX Poly-Guard FG-2** that had been obtained during the August 3, 2006 inspection of Behnke’s establishment. Mr. Bonace photographed one of the containers of **JAX Poly-Guard FG-2**.

Mr. Bonace may testify further that, during the investigation of Badger on March 8, 2007, the President of Badger, Mr. Bill Barden, provided Mr. Bonace with a brochure that had been given to Badger by Behnke. The brochure was entitled “Food Grade Lubricants with

Micronox™.” The brochure included a document entitled “What is JAX Micronox™ Technology? Re: Antimicrobial Usage in JAX Food-Grade Products,” and described the antimicrobial capabilities of the Micronox™ technology found in Respondent’s lubricants. This brochure was signed by Troy Paquette, Technical Director for Behnke Lubricants. The brochure also included tables and a graph illustrating the “antimicrobial properties” of **Poly-Gard FG-2** “antimicrobial grease” and its efficacy against Listeria, E. coli and Salmonella. The final page of the brochure included contact information for Behnke’s establishments, which included Respondent’s telephone numbers, facsimile numbers, and Internet website, distributor information and product ordering options.

Mr. Bonace may also testify that, during the March 8, 2007 investigation, Mr. Barden gave Mr. Bonace a copy of a shipping record which showed that Behnke had distributed or sold **JAX Halo-Guard FG-2** and **JAX Poly-Guard FG-2** to Badger on September 18, 2006.

Mr. Bonace’s March 8, 2007, investigation report of Badger, including all attachments, is included as CX 9. To the extent deemed necessary by the Court, Mr. Bonace will provide testimony sufficient to authenticate CX 9 and the attachments thereto.

Mr. Bonace may also testify that on March 7, 2007, he conducted an investigation at Perlick Corporation, located at 8300 West Good Hope Road, Milwaukee, Wisconsin. He may testify that the purpose of the investigation was to verify that certain advertising and labeling claims were made by Respondent to Perlick with respect to the distribution or sale of Behnke’s product, **JAX Poly-Guard FG-2**. During the investigation on March 7, 2007, Mr. Bonace observed a 14-ounce cartridge of **JAX Poly-Guard FG-2**. Mr. Bonace photographed a container of **JAX Poly-Guard FG-2**. The label on the cartridge included the following

language:

“Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial,” “The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”

Mr. Bonace may testify that the cartridge of **JAX Poly-Guard FG-2** which he observed at Perlick was identical to the physical sample of **JAX Poly-Guard FG-2** that had been collected by the WDATCP during the August 3, 2006, inspection of Behnke’s establishment.

Mr. Bonace’s March 7, 2007, investigation report of Perlick, including all attachments, is included as CX 10. To the extent deemed necessary by the Court, Mr. Bonace will provide testimony sufficient to authenticate CX 10 and the attachments thereto.

Mr. Bonace may also testify that, on March 8, 2007, he conducted an investigation at Sara Lee Corp. (Sara Lee), located at N3620 County Road D, New London, Wisconsin. He may testify that the purpose of the investigation was to verify that certain advertising and labeling claims were made by Respondent to Sara Lee with respect to the distribution or sale of Behnke’s product, **JAX Magna-Plate 74**.

Mr. Bonace may testify that, during the investigation on March 8, 2007, he observed a 14-ounce cartridge of **JAX Poly-Guard FG-2**. Mr. Bonace photographed a container of **JAX Poly-Guard FG-2**. The label on the cartridge included the following language:

“Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial,” “The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”

Mr. Bonace may further testify that the cartridge of **JAX Poly-Guard FG-2** which he observed at Sara Lee was identical to the physical sample of **JAX Poly-Guard FG-2** that had

been collected by the WDATCP during the August 3, 2006, inspection of Behnke's establishment, and which had been sent to Mr. Bonace.

Finally, Mr. Bonace may testify that, during the March 8, 2007, investigation, Sara Lee representatives gave him a copy of a purchase order for the purchase of **JAX Poly-Guard FG-2**, with an order date of February 12, 2007.

Mr. Bonace's March 7, 2007, investigation report of Sara Lee, including all attachments, is included as CX 11. To the extent deemed necessary by the Court, Mr. Bonace will provide testimony sufficient to authenticate CX 11 and each of the attachments thereto.

On March 7, 2007, Mr. Bonace conducted an investigation at Seneca Foods Corporation (Seneca), located at 640 Caughlin Road, Clyman, Wisconsin. He may testify that the purpose of the investigation was to verify that certain advertising and labeling claims were made by Respondent to Seneca with respect to the distribution or sale of Behnke's product, **JAX Halo-Guard FG-2**.

He will testify that, during the investigation on March 7, 2007, a representative of Seneca provided him with advertising sheets that Seneca had received from Behnke. The first advertising sheet was entitled: "JAX MAGNA-PLATE 72, USDA H1-AUTHORIZED AIR LINE LUBE WITH ANTIRUST AND ANTIWEAR ADDITIVES NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY" and included the following language:

"Antimicrobial Performance: JAX MAGNA-PLATE 72 incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, molds, gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox® provides significant knockdown performance and has proven especially effective against (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals."

The second advertising sheet was entitled: "JAX MAGNA-PLATE 78 USDA H1-AUTHORIZED EXTREME - PRESSURE FOOD MACHINERY OIL WITH ENHANCED ANTIWEAR PROPERTIES NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY" and included the following language:

"Antimicrobial Performance: JAX MAGNA-PLATE 78 incorporates JAX new, proprietary antimicrobial additive technology, Micronox™, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, molds, gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox™ provides significant knockdown performance and has proven especially effective against (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals."

The third advertising sheet was entitled: "HALO-GUARD FG GREASES" and included the following language:

"JAX Halo-Guard FG provides Micronox® microbial knockdown performance."

The fourth advertising sheet was entitled "JAX POLY-GUARD FG, A REVOLUTIONARY USDA-H1 FOOD-GRADE GREASE W/PTFE FOR LUBRICATION OF HIGH-SPEED/HIGH-TEMP FOOD AND BEVERAGE PROCESSING MACHINERY NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY" and included the following language:

"Antimicrobial Performance: JAX POLY-GUARD FG incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, molds, gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox® provides significant knockdown performance and has proven especially effective against Listeria (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals."

Mr. Bonace may also testify that, during the inspection, he met a Seneca employee, Mr. Jerry Perzichilli. Mr. Bonace asked this employee whether Seneca Foods had received

advertising brochures with antimicrobial claims from Behnke. Mr. Perzichilli told Mr. Bonace that he had some advertising brochures in his Cumberland, Wisconsin office. Mr. Perzichilli agreed to send Mr. Bonace a copy of the brochures when he returned to his Cumberland office. Mr. Bonace may testify that, later that same day, Mr. Perzichilli sent him, by e-mail, copies of advertising sheets for the Halo-Guard and Poly-Guard greases. These advertising sheets were sent to Mr. Perzichilli on October 26, 2006 by Mr. Chris Foti of Behnke. Printouts of these email messages and the attached electronic copies of documents are included in CX 12a. The October 26, 2006 email message from Behnke to Seneca was entitled "Halo Guard and Poly Guard Data Sheets," and included two advertising data sheets attached to it, one for **JAX Halo-Guard FG Series**, and the other for **JAX Poly-Guard Series Greases**. The first sheet was entitled "HALO-GUARD FG GREASES" and included the following language:

"Antimicrobial Performance: JAX Halo-Guard FG Greases incorporate JAX new, proprietary antimicrobial additive technology, Micronox®, to provide antimicrobial protection for the product. A first in food-grade lubricants, JAX Micronox® has proven especially effective in protecting JAX Halo-Guard FG Greases against Listeria (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals."

The second sheet was entitled "POLY-GUARD FG-LT, FG-2" and included the following language:

"Since June 1, 2001 JAX Poly-Guard FG contains Micronox®, providing antimicrobial protection for the product. JAX Micronox® has proven especially effective in protecting JAX Poly-Guard Greases against Listeria (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals."

Mr. Bonace may also testify that during the March 7, 2007 investigation, representatives of Seneca gave him copies of seven invoices / shipping records from Behnke to Seneca which showed the distribution and sale of the products **JAX Halo-Guard FG-2**, **JAX Halo-Guard**

FG-LT, and **JAX Magna-Plate 78**. These records show the following: on or about October 23, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Seneca Foods; on or about October 18, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Seneca Foods; on or about October 17, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca Foods; on or about September 29, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca Foods; on or about September 7, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca Foods; on or about September 7, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to Seneca Foods; on or about August 18, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca Foods.

Mr. Bonace's March 7, 2007, investigation report of Seneca, including all attachments, is included as CX 12 and 12a. To the extent deemed necessary by the Court, Mr. Bonace will provide testimony sufficient to authenticate CX 12 and 12a and the attachments thereto.

Mr. Bonace may also testify that on March 7, 2007, he went to KHS, Inc., (KHS) which is located at 800 Bahcall Court, Waukesha, Wisconsin. At the door he was told that he would have to speak with a KHS representative, who was not available at the time. On March 14, 2007, Mr. Bonace spoke with Mr. Dick Sexton of KHS on the telephone. Mr. Sexton told Mr. Bonace that he would send Mr. Bonace some advertising literature that KHS had received from Behnke.

Mr. Bonace may also testify that, on March 19, 2007, he received a copy of an advertising brochure from KHS. The back cover of the brochure was marked "JAX Products Distributed by: Behnke Lubricants, Inc. – JAX." The back cover of this brochure also included Behnke Lubricants' telephone numbers and facsimile numbers for both the Menomonee Falls, Wisconsin establishment and a Behnke facility located in Sacramento, California. The title of

the brochure was “JAX: Lubricant Guide For Food, Beverage, Drug & Cosmetic Processing & Manufacturing.” The brochure included a letter from Behnke Lubricants to its customers, which contained the following language:

“Micronox®, JAX advanced antimicrobial additive technology that provides immediate and significant knockdown performance on a wide spectrum of microbial contaminants. This development alone is providing HACCP programs a powerful weapon in their ongoing battle against microorganisms.” “JAX Poly-Guard® FG is a new concept in food-grade greases, providing the highest level of antiwear performance of any competitor, and the benefits of Micronox®.”

The advertising brochure included a table of contents which had a section entitled “Micronox® Antimicrobial Technology.” This section described in detail the enhanced antimicrobial capabilities of Micronox® technology.

A copy of the advertising brochure entitled “JAX: Lubricant Guide For Food, Beverage, Drug & Cosmetic Processing & Manufacturing” is included as CX 13. To the extent deemed necessary by the Court, Mr. Bonace will provide testimony sufficient to authenticate CX 13.

Other Matters

Mr. Bonace may also testify as to his calculation of the penalty proposed in the Complaint, using the applicable penalty policy. Copies of the FIFRA civil penalty calculation worksheet and the Penalty Calculation Narrative are included as CX 14a and CX 14b. To the extent deemed necessary by the Court, Mr. Bonace will provide testimony sufficient to authenticate CX 14 a and 14 b.

Mr. Bonace may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent.

3. Mr. Greg Cremers
Agricultural Chemical Investigator
Pesticide and Fertilizer Management Division
State of Minnesota Department of Agriculture
4318 Plaza Lane
St. Cloud, Minnesota 56303

Mr. Cremers is an Agricultural Chemical Investigator with the Pesticide and Fertilizer Management Division, State of Minnesota, Department of Agriculture. Mr. Cremers may testify as to what he observed, collected and learned during the investigation described below. Mr. Cremers' testimony may include, but may not be limited to, the matters described in the following paragraphs.

Mr. Cremers may testify that, on March 7, 2007, he conducted an investigation at Jennie-O Turkey Store (Jennie-O), located at 1530 30th Street SW, Wilmar, Minnesota. He may testify that the purpose of the investigation was to verify that certain advertising and labeling claims were made by the Respondent to Jennie-O with respect to the distribution or sale of Behnke's product, **JAX Halo-Guard FG-LT**. He may testify that, during the March 7, 2007 inspection, he observed and photographed a cartridge tube of **JAX Halo-Guard FG-LT**. He observed that the labeling on the cartridge included the following language:

"JAX Halo-Guard FG-LT provides Micronox® microbial knockdown performance."

Mr. Cremers may also testify that, during the investigation, Paul Bolle, a representative of Jennie-O, confirmed that the Behnke product, **JAX Halo-Guard FG-LT**, had been ordered by Jennie-O from Behnke on or about June 2006.

Mr. Cremers' March 7, 2007, investigation report of Jennie-O, including all attachments, is included as CX 15. Mr. Cremers may provide testimony sufficient to authenticate CX 15 and

the attachments thereto. Mr. Cremers may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent.

4. James Freilinger
Agricultural Chemical Investigator
Pesticide and Fertilizer Management Division
State of Minnesota Department of Agriculture
702 W Main Street
Paynesville, Minnesota 56362

Mr. Freilinger is an Agricultural Chemical Investigator with the Pesticide and Fertilizer Management Division, State of Minnesota, Department of Agriculture. Mr. Freilinger may testify as to what he observed, collected and learned during the investigation described below. Mr. Freilinger's testimony may include, but may not be limited to, the matters described in the following paragraphs.

Mr. Freilinger may testify that, on March 7, 2007, he accompanied Mr. Cremers on an inspection at Jennie-O. He may testify that the purpose of the investigation was to verify that certain advertising and labeling claims were made by the Respondent to Jennie-O with respect to the distribution or sale of Behnke's product, **JAX Halo-Guard FG-LT**. He may testify that, during the March 7, 2007 inspection, he observed a cartridge tube of **JAX Halo-Guard FG-LT**. He observed that the labeling on the cartridge included the following language:

"JAX Halo-Guard FG-LT provides Micronox® microbial knockdown performance."

Mr. Freilinger may also testify that, during the investigation, Paul Bolle, a representative of Jennie-O, confirmed that the Behnke product, **JAX Halo-Guard FG-LT**, had been ordered by Jennie-O from Behnke in or about June 2006.

Mr. Freilinger may provide testimony sufficient to authenticate CX 15 and the attachments thereto. Mr. Freilinger may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent.

5. Josh Rybicki
American Foods Group
544 Acme Street
Green Bay, Wisconsin

Mr. Rybicki is employed by American at its Green Bay Dressed Beef facility, located at 544 Acme Street, Green Bay, Wisconsin (Acme facility) and works in the Parts Inventory Control Division of the Acme facility. His testimony may include, but not be limited to, the matters discussed in the following paragraphs.

Mr. Rybicki may testify that as part of his duties at the American, Green Bay Dressed Beef, he assists in purchasing day-to-day products for the Acme facility, including greases and oils for the facility. He may testify that several years ago he spoke with a Behnke sales person, Mr. Mike Keller. Mr. Rybicki may testify that Mr. Keller came to the Acme facility to meet with Inventory Control in an effort to sell Behnke lubricant products to American. During that discussion, Mr. Keller left behind advertising literature for American to review.

Mr. Rybicki may further testify that he reviewed the literature and conferred with Dr. Ali Mohseni, who is also employed by American as the Technical Director of Food Safety. He may testify that he recalls that the advertising literature which Behnke presented to American, through its sales person, Mike Keller, showed growth plates that compared the antimicrobial effectiveness of the Behnke products with other lubricant products sold by other companies. The literature claimed that the colony counts of bacteria claimed to be associated with the Behnke

lubricant products were extremely low. The advertising literature also made numerous antimicrobial claims throughout and claimed to be effective against Listeria, E.coli and Salmonella, in particular.

Mr. Rybicki may testify that these claims were very timely because, at the time of Behnke's visit to the Acme facility, there was an increased level of concern over food security and food sanitization. At the time of Behnke's visit, United States Department of Agriculture (USDA) inspectors were carefully monitoring the meat and poultry industry to ensure that federal Hazardous Analysis and Critical Control Point (HACCP) food safety standards were being met at meat and poultry facilities such as American's Acme facility. Also at this time, there was great concern over food safety and sanitization due to the outbreak of bovine spongiform encephalopathy (BSE), commonly known as "mad cow disease," as well as instances of E.coli outbreaks.

Mr. Rybicki may testify that after conferring with Dr Mohseni, they both agreed that American should start using Behnke lubricant products, such as **JAX Halo-Guard FG-2**, **JAX Magna-Plate 74** and **JAX Magna-Plate 78** because, based on the claims made by Behnke, these lubricants could reduce colony counts of bacteria and therefore increase food safety at the Acme facility and help manage any cross contamination at the facility.

He may testify that America decided that, although the Behnke lubricants would be more expensive than the competitor's product (approximately 20% to 30% more) that American had been using up until that time, changing to Behnke's lubricant products would be worth the additional cost because American wanted the least amount of bacteria it could possibly get at the Acme facility.

Mr. Rybicki may testify that American then began to purchase, among other Behnke products, **JAX Halo-Guard FG-2, JAX Magna-Plate 74 and JAX Magna-Plate 78** lubricants from Behnke and, to large extent, began to replace the competitor's products with Behnke lubricants.

He may testify that on average, American reorders a combination of these products from Behnke on a monthly basis for its Acme facility, with an approximate purchase cost of \$3,500 per month and that American has been purchasing these lubricants from Behnke since about 2001. He may testify that he is certain that at least one of American's other facilities purchases Behnke lubricants as well. Further, he may testify that to date, American continues to purchase these lubricants from Behnke, at a premium cost (between 20% to 30% higher than the cost of the competitor's product which American had been using previously).

He may testify that on March 8, 2007, Mr. Terence Bonace of U.S. EPA visited the American facility. He may testify that he informed Mr. Bonace that American used **JAX Magna- Plate 78 and Halo-Guard FG-2** lubricants at the facility and was using these lubricants at the time of Mr. Bonace's visit. He may also testify that he confirmed that these lubricants were sold to American by Behnke.

Mr. Rybicki may testify that he told Mr. Bonace that he recalled seeing advertising literature, which Behnke had sent to American, that showed growth plates comparing Behnke products with others and purported to demonstrate that the Behnke products had antimicrobial capabilities and advantages. He may testify that he also told Mr. Bonace that the antimicrobial properties promoted by Behnke were a major deciding factor for American in selecting Behnke products.

He may testify that he promised Mr. Bonace that he would try to locate some of this advertising literature that American received from Behnke and mail it to Mr. Bonace. Shortly thereafter, he went to a filing cabinet in his office and retrieved two different pieces of advertising literature that he had received from Mike Keller of Behnke. He mailed these two different pieces of advertising literature to Mr. Bonace in two separate mailings.

Mr. Rybicki may testify that the first piece of advertising literature was entitled “American Foods Group, JAX Lube-Guard Program.” (CX 8a). He may testify that this advertising literature contained several references to “MICRONOX,” antimicrobial additive technology, and references to the claim that JAX MICRONOX provides “significant knockdown performance” and has been proven especially effective against Listeria, E.coli and Salmonella.

He may testify that the second piece of advertising literature was entitled “JAX Lubricant Guide for Food, Beverage and Drug & Cosmetic Processing & Manufacturers.” (Cx 8b). He may testify that this advertising literature contains several references to “MICRONOX,” antimicrobial additive technology, and references to the claim that JAX MICRONOX provides “significant knockdown performance” and has been proven especially effective against Listeria, E.coli and Salmonella.

Mr. Rybicki may testify that, sometime after he mailed these two pieces of advertising literature to Mr. Bonace, he called Mr. Bonace and told him that he had found some additional advertising literature that American had previously received from Behnke for the Behnke lubricant products. Mr. Rybicki may testify that, at the time of his telephone call to Mr. Bonace, he asked Mr. Bonace if he wanted this additional advertising literature and Mr. Bonace indicated that he did.

Mr. Rybicki may testify that on or about the third week of March, 2007, he sent Mr. Bonance a third piece of advertising literature entitled “Technology Focus, JAX Micronox Technology.” This advertising literature also contained several references to “MICRONOX,” antimicrobial additive technology, and references to the claim that JAX MICRONOX provides “significant knockdown performance” and has been proven especially effective against Listeria, E.coli and Salmonella.

Mr. Rybicki may testify that it was these very types of advertising claims, made by Behnke either through advertising literature or otherwise, that were a major deciding factor contributing to American’s decision to purchase the lubricant products from Behnke, products including but not limited to: **JAX Halo-Guard FG-2**, **JAX Magna-Plate 74**, and **JAX Magna-Plate 78**.

Mr. Rybicki may further testify that to date, he has never been contacted by any Behnke representative to redact, destroy or replace any of the advertising literature that Behnke previously presented to American. To date, he has never been contacted by any Behnke representative to discuss the antimicrobial representations that Behnke made in connection with the lubricants that American purchased and continues to purchase from Behnke. To the best of his knowledge, no one else in American has been contacted by Behnke regarding these matters.

Mr. Rybicki may provide testimony sufficient to authenticate CX 8a, 8b and 8c and the attachments thereto. Mr. Rybicki may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. See Mr. Rybicki’s Declaration at CX 16. He may also provide sufficient testimony to authenticate invoices that demonstrate that Behnke distributed or sold the following lubricants to American from May 29, 2002 through May 7, 2009: **JAX Poly-Guard FG-2**, **JAX Poly-Guard FG-LT**, **JAX Halo-Guard FG-2**, and **JAX**

Magna-Plate 74. CX 16a.

B. Expert Witnesses

Complainant may call the following individuals to testify as expert witnesses or mixed fact and expert witnesses.

1. Dennis Edwards
Office of Pesticides Programs
United States Environmental Protection Agency

Mr. Dennis Edwards is the Chief of the Regulatory Management Branch in the Antimicrobial Division at the U.S. EPA. Mr. Edwards' testimony may include, but may not be limited to, the following:

He may testify to the role of his branch in the antimicrobial division. He may testify to his duties as chief of the Regulatory Management Branch and his experience at the U.S. EPA in handling antimicrobial registrations. He may also testify to his educational background.

Mr. Edwards may describe what microorganisms are, why they are considered to be "pests," and what the functions of antimicrobials are. Mr. Edwards may also describe the steps taken by his branch when someone wants to register an antimicrobial pesticide under FIFRA. He may further describe how an antimicrobial pesticide is then registered with the U.S. EPA. He may also describe the information that must be submitted by the applicant for the registration process. He may also explain why this information is necessary to make registration decisions such as intended use and efficacy. Mr. Edwards may describe what "public health claims" are, and he may further discuss why efficacy data must be submitted through the registration process if "public health claims" are being made, and why this information is so critical.

Mr. Edwards may further explain why certain products may be subject to FIFRA requirements even if they are also subject to FDA requirements. Mr. Edwards may provide examples of such products, which may include a discussion of coatings and slimicides that are subject to both FIFRA requirements and FDA requirements. He may refer to examples of such pesticide registrations. See CX 18a through 18d. He may refer to CX 18e and 18f to demonstrate that there is at least one registered antimicrobial pesticide that can be used to preserve a lubricant that will come into contact with food. He may discuss the circumstances under which a product is exempted out of the FIFRA requirements under the definition of “pest.” He may further offer testimony as to why these exemptions do not apply to the Behnke lubricants that are the subject of this enforcement case. In doing so, he may refer to U.S. EPA and U.S. FDA documentation. See CX 19 and 20.

Mr. Edwards may also discuss the “treated article exemption” under FIFRA and when an antimicrobial pesticide qualifies for a “treated article exemption.” He may refer to the U.S. EPA guidance which discusses the treated article exemption. See CX 21.

Mr. Edwards may also discuss the time frames in which the antimicrobial division must complete its registration review and make a determination of registration for antimicrobial pesticides. He may further discuss why these time frames do not apply to antimicrobial pesticides that are already subject to U.S. FDA requirements. He may refer to U.S. EPA guidance on this issue (CX 22) and a U.S. EPA Federal Register notice that speaks to this issue (CX23). He may further testify that, despite the time frames that have to be followed for antimicrobial pesticides, certain antimicrobial pesticides can still be subject to both FIFRA registration requirements and Federal Food, Drug and Cosmetic Act (FFDCA) requirements.

Mr. Edwards may testify that he conferred with Region 5 on this particular matter as the case was being developed. He may further testify that, based on the claims that Behnke has made with respect to its products, **JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Magna-Plate 78, JAX Magna Plate 74, JAX Halo-Guard FG-LT and JAX Poly-Guard FG-LT**, it is his opinion that these products are required to be registered as pesticides under FIFRA. He may refer to a decision tree to explain why these products are subject to FIFRA registrations requirements. See CX 40.

Mr. Edwards may also testify to additional facts or opinions as necessary to respond to assertions or arguments raised by Respondent. Mr. Edwards' curriculum vitae is attached as CX 24. To the extent deemed necessary by the Court, Mr. Edwards will provide testimony sufficient to authenticate the documents to which he refers to during his testimony at the hearing in this matter.

2. Dr. Christopher Weis
Senior Toxicologist
National Enforcement Investigations Center
United States Environmental Protection Agency

Dr. Weis is a Senior Toxicologist at the National Enforcement Investigations Center (NEIC) in Denver, Colorado. If necessary, Dr. Weis may be called as an expert witness to testify about the toxicity of biotoxins produced by pathogens such as Salmonella, Listeria and E-coli (the pathogens which Behnke claimed its MICRONOX technology to be effective against). As reflected in his Bibliography (CX 25), Dr. Weis has studied and published articles in this area. In addition, he may testify about the analyses used to determine the toxicity of pesticides, including antimicrobial pesticides. Dr. Weis may testify about his review of records and other information that Respondent may submit in its prehearing exchange. Dr. Weis' Personal

Qualification Statement (i.e., his curriculum vitae) is attached. (CX 26)

Dr. Weis may also testify to additional opinions as necessary to respond to assertions or arguments raised by Respondent.

3. Mr. Mark Ewen
Principal
Industrial Economics, Inc.
2067 Massachusetts Avenue
Cambridge, MA 02140

Mr. Ewen is a Principal of Industrial Economics, Inc., a consulting firm located at 2067 Massachusetts Avenue, Cambridge, Massachusetts 02140. Mr. Ewen may be called to testify as an expert witness in the areas of the forensic analysis of financial information and the analysis of ability to pay (or, the effect of a penalty on a person's ability to continue in business). Mr. Ewen has been qualified as an expert in these areas in both administrative hearings before the Office of Administrative Law Judges, and in trials before federal district courts. Mr. Ewen may testify about his review of the limited financial information available to U.S. EPA relating to Behnke, which includes: a Dun & Bradstreet dated March 30, 2006 (CX 27); an Experian Credit Report, dated January 15, 2007 (CX 28); an Experian Credit Report for Respondent's Sacramento, California facility, dated September 4, 2006 (CX 29); and a Tax Bill from Waukesha County, Wisconsin, relating to the real estate on which the Behnke facility is located (CX 30). He may testify about his assessment of the sufficiency or reliability of any financial information that Respondent may submit in its prehearing exchange, and he may identify other categories of information or areas of inquiry that are relevant to an assessment of Respondent's ability to pay. Mr. Ewen may also provide his expert opinions and conclusions as to Respondent's financial status and ability to pay the penalty proposed in the Complaint.

More specifically, if called to testify as an expert witness at the hearing in this matter, Mr. Ewen may testify about the work of Industrial Economics, Inc., as an economics and environmental consulting firm which provides consulting work on various subjects, including (but not limited to) evaluating economic damages and losses sustained in breach of contract cases; providing expert witness services in environmental enforcement litigation; performing regulatory impact analyses for a variety of governmental agencies; performing natural resource damage assessments for trustees and international bodies; assessing lost profits in economic damage cases; performing financial analyses in enforcement cases to determine economic benefit from noncompliance; and assessing the ability to pay of corporations, partnerships and individuals in enforcement cases. He may also testify as to his experience in evaluating the financial situation and ability to pay of various types of entities for cases litigated before administrative tribunals and federal district courts. Mr. Ewen has performed analyses of ability to pay in more than 150 cases during his tenure with Industrial Economics, Inc. He has assessed the ability to pay of many different types of entities, ranging in size from large multinational corporations to small businesses to individuals, and involving all types of business activities (e.g., chemical companies, pulp and paper companies, dry-cleaning businesses, petroleum refineries, and car dealerships). Mr. Ewen has testified regarding ability to pay in cases before federal district courts, and in cases before the United States Environmental Protection Agency's Office of Administrative Law Judges. These cases are identified in his Curriculum Vitae, which is attached as CX 31.

Mr. Ewen may also testify about his efforts to analyze the financial status and ability to pay of the Respondent in this case. He may testify about the standard methodology used by

professionals in his field to evaluate the financial status and ability to pay of individuals, corporations or partnerships. Mr. Ewen may testify about the different types of financial documentation, and the extent of such financial data, that are necessary to conduct any reasonably accurate assessment of a respondent's financial condition and ability to pay, including the reasons why at least three to five years of complete tax returns and complete financial statements are needed to begin any meaningful evaluation of a corporation's ability to pay. Mr. Ewen may also testify about the relevance of the financial evidence requested by Complainant on June 19, 2007, in Complainant's Notice of Complainant's Request for Voluntary Production of Financial Information. He may testify about the need in any ability to pay analysis to identify potential sources of funds available to the subject of the analysis, and about the need to fully and accurately identify that party's expenses and assess whether or not all such expenses are reasonable. Mr. Ewen may testify that analyzing ability to pay also necessarily involves an analysis of the net worth of the party, which entails an accurate and complete identification of all assets (including real estate and personal property) and liabilities. He may testify about his assessment of the sufficiency or reliability of financial information which may be submitted by Respondent in its prehearing exchange, and he may identify other categories of information or areas of inquiry that are relevant to an assessment of Respondent's ability to pay. The basic substance of most, but not necessarily all, of Mr. Ewen's currently expected testimony is set forth in his Declaration, which is included as CX 32; this Declaration was originally provided to the Court and to Respondent as an attachment to Complainant's Notice of Complainant's Request for Voluntary Production of Financial Information, which was filed with the Regional Hearing Clerk and served on Respondent on June 19, 2007. Mr. Ewen's testimony may be

expanded to cover far more subjects, depending on whether or not Respondent provides any financial data to support a claim that it is unable to pay the penalty proposed in the Complaint, depending on the nature and extent of any financial information provided by Respondent in its prehearing exchange, and depending on the results of any further investigation of Respondent's financial situation.

Mr. Ewen may also testify to additional facts or opinions as necessary to respond to assertions or arguments raised by Respondent.

II. Copies of all documents and exhibits which Complainant intends to introduce into evidence at the hearing.

Complainant expects to offer the following documents/exhibits into evidence either during or prior to the hearing. All original photos will be provided to the court on a CD. Complainant may also make reference to these documents in any post hearing briefs or arguments. The exhibits are numbered as CX 1 through 43:

A. *Documents that May be Introduced at the Time of Hearing*

- CX 1. August 11, 2006 WDATCP Inspection Report of Behnke Lubricants, Inc.
 - a. June 23, 2006 website printout.
- CX 2. December 22, 2006 Notice of Intent to File Civil Administrative Complaint.
- CX 3. June 9, 2006 website printout.
- CX 4. November 17, 2006 website printout.
- CX 5. February 26, 2007 website printout.
- CX 6.
 - a. March 21, 2007 website printouts.
 - b. March 26, 2007 website printouts.
 - c. April 10, 2007 website printouts.
 - d. September 6, 2007 website printouts.

- e. Declaration of Mr. Bonace regarding Internet investigations.
- CX 7. Conversation record of call to Behnke 800 number found on one of its advertising brochures.
- CX 8. March 8, 2007 Region 5 Investigation Report of American Foods Group.
 - a. Advertising literature entitled “American Foods Group, JAX Lube-Guard Program.”
 - b. Advertising literature entitled “JAX Lubricant Guide for Food, Beverage and Drug & Cosmetic Processing & Manufacturers”
 - c. Advertising literature entitled “Technology Focus, JAX Micronox Technology.”
- CX 9. March 8, 2007 Region 5 Investigation Report of Badger Plastics & Supply Inc.
- CX 10. March 7, 2007 Region 5 Investigation Report of Perlick Corporation.
- CX 11. March 8, 2007 Region 5 Investigation Report of Sara Lee Corporation.
- CX 12. March 7, 2007 Region 5 Investigation Report of Seneca Foods Corporation.
 - a. March 7, 2007 electronic mail from Seneca Foods.
- CX 13. KHS mailing received by Mr. Bonace on March 19, 2007.
- CX 14.
 - a. FIFRA Civil Penalty Calculation worksheet.
 - b. Penalty Calculation Narrative.
- CX 15. March 7, 2007 Minnesota Department of Agriculture Investigation Report at Jennie-O Turkey Stores.
- CX 16. Declaration of Mr. Josh Rybicki of American Foods Group.
 - a. Shipping records showing the distribution or sale of Behnke lubricants from Behnke to American Foods, dated May 29, 2002 through May 7, 2007.
- CX 17. Reserved.
- CX 18.
 - a. EPA Accepted Label, with Comments for Antimicrobial AlphaScan RC 5000, EPA Reg. No. 11631-2, dated April 21, 2006 and April 30, 2007.
 - b. Printout from U.S. FDA website showing that the same product received FDA approval via FDA’s Food Contact Substance Notification program.
 - c. EPA Accepted Label, with Comments for Tolicide® PS352C, EPA Reg No. 33677-5, dated July 7, 2004.
 - d. “Indirect Food Additives: Paper and Paperboard Components.” 64 Fed. Reg.

- 46129 (August 24, 1999).
- e. Notice of Pesticide Registration for MICROL preservative, EPA Registration Number 82076-1, dated December 22, 2005.
 - f. Listing of Specific Substances Affirmed as Gras, Benzoic Acid, 21 CFR 184.1201.
- CX 19. “Legal and Policy Interpretation of the Jurisdiction Under the Federal Food, Drug, and Cosmetic Act of the Food and Drug Administration and the Environmental Protection Agency Over the Use of Certain Antimicrobial Substances; Notice,” 63 Federal Register 53531 (October 9, 1998).
 - CX 20. “Antimicrobial Food Additives - Guidance,” issued by U.S. Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition, dated July 1999.
 - CX 21. Pesticide Registration Notice 2000-1, dated March 6, 2000.
 - CX 22. “Guidance on the Processing of Applications for Registration of Antimicrobial Products Intended to Mitigate Food Borne Pathogens,” dated September 20, 2001.
 - CX 23. “Registration Requirements for Antimicrobial Pesticide Products and Other Pesticide Regulatory Changes; Proposed Rule,” 64 Federal Register 50671 (September 17, 1999).
 - CX 24. Curriculum vitae of Mr. Dennis Edward, U.S. EPA, Office of Pesticides Programs.
 - CX 25. Bibliography of Dr. Christopher Weis, U.S. EPA, National Enforcement Investigations Center
 - CX 26. Curriculum vitae of Dr. Christopher Weis, U.S. EPA, National Enforcement Investigations Center.
 - CX 27. Dun & Bradstreet dated March 30, 2006.
 - CX 28. Experian Credit Report, dated January 15, 2007.
 - CX 29. Experian Credit Report for Respondent’s Sacramento, California facility, dated September 4, 2006.
 - CX 30. Tax Bill from Waukesha County, Wisconsin.
 - CX 31. Curriculum Vitae of Mark Ewen, Industrial Economics.

- CX 32. Declaration of Mark Ewen, Industrial Economics.
- CX 33. Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), July 2, 1990.
- CX 34. June 5, 2006 EPA Memorandum, “Penalty Policy Supplements Pursuant to the 2004 civil Monetary Penalty Inflation Adjustment Rule.”
- CX 41. FIFRA Delegation No. 5-14.
- CX 42. FIFRA Region 5 Delegation No. 5-14/15-A.
- CX 43. Declaration of Richard T. Westlund.
- B. *Documents which may be Referred to in Post Hearing Briefs and are Self-Authenticated:*
- CX 35. Trademark File for Micronox.
- CX 36. United States District Court, Eastern District of Wisconsin Record in case number 06-C-353, Behnke Lubricants v NSF International.
- CX 37. Circuit Court of Waukesha County, Wisconsin Record in Civil Action No. 06-CV-134.
- C. *Physical Evidence that May be Introduced at the Time of Hearing*
- CX 38. Physical sample of **JAX Poly-Guard FG-2**.
- CX 39. Physical samples of **JAX Halo-Guard FG-2**.
- D. *Demonstrative Evidence that May be Introduced at the Time of Hearing*
- CX 40. Decision tree

III. Complainant’s statement explaining how the proposed penalty was determined, including a description of how the specific provisions of the FIFRA Enforcement Policy were used in calculating the penalty.

Complaint alleges that Respondent violated certain requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.* Based on the information in

U.S. EPA's possession at the time, Complainant has calculated a proposed penalty in the amount of Fifty-Thousand Fifty Dollars (\$50,050). A narrative justification of this proposed penalty is included as CX 14b. The penalty calculation worksheet is included as CX 14a.

IV. Complainant's statement regarding whether the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. § 3501, *et seq.*, applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein, and whether the provisions of Section 3512 of the PRA are applicable in this case.

The Court has directed Complainant to provide a position regarding the applicability of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3501 *et seq.*, to this proceeding, including whether there is a current Office of Management and Budget (OMB) control number involved and whether the provisions of Section 3512 of the PRA may apply to this case. Complainant's position is that the provisions of the Paperwork Reduction Act (PRA), including Section 3512 of the PRA, do not apply to this proceeding, because the legal requirements alleged to have been violated in this matter do not involve the collection of information. The Complaint alleges that Respondent sold or distributed, or offered for sale or distribution, pesticides that were not registered under FIFRA, in violation of Section 3(a) of FIFRA, 7 U.S.C. § 136a(a). This statutory violation does not involve the collection of information.

Nonetheless, Complainant has identified all regulations involving information collection requests that relate to the pesticide registration requirements of FIFRA. Even if the PRA were found to apply to this case, Complainant's investigation has revealed that there have been no lapses in the OMB control numbers applicable to those FIFRA regulations that require the collection of information in connection with pesticide registration. OMB control numbers that apply to regulatory information collection requests (ICRs) are listed at 40 C.F.R. § 9.1.

According to that regulation, the OMB control numbers governing ICRs that would have come into play had Behnke applied for FIFRA registration of its products are as follows: 2070-0024; 2070-0028; 2070-0040; 2070-0052; 2070-0053; 2070-0057; 2070-0060; 2070-0078; and 2070-0107.

U.S. EPA has investigated the status of OMB's approval of the ICRs covered by these numbers, and the investigation has revealed no lapses in OMB approval. A sworn declaration from the U.S. EPA official who researched the status of OMB approval for these ICRs and found no lapses is attached as CX 43.

Therefore, the provisions of the PRA do not affect this case.

V. Complainant's views as to the appropriate place of hearing, and an estimate of the time needed to present its direct case.

The supplemental rules governing administrative penalty actions filed under the authority of FIFRA provide that "[t]he prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties." 40 C.F.R. § 22.35(b). Respondent is a corporation, and its business is located in Waukesha County, Wisconsin. Therefore, the hearing in this matter should be held in Waukesha County, Wisconsin.

However, Complainant believes that Milwaukee, Wisconsin, would be a better location of the hearing. The City of Milwaukee is the location of a federal courthouse, the United States District Court for the Eastern District of Wisconsin, which is located at 362 United States Courthouse, 517 East Wisconsin Avenue, Milwaukee, Wisconsin 53202. The City also has a Milwaukee County courthouse located at 901 North 9th Street, Milwaukee, Wisconsin 53233.

Complainant requests Respondent's written agreement that, assuming availability of a courthouse, the hearing may be held in Milwaukee, Wisconsin.

Complainant estimates that its case-in-chief will be presented within three to four full business days.

VI. Ability to Pay or Effect of Penalty on Behnke's Ability to Continue in Business

Respondent appears to have made an issue of its "ability to pay" or the statutory penalty factor of "the effect [of the penalty] on the person's ability to continue in business" set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4).² See *Answer and Request for Hearing*, ¶¶ 190, 191 and 192.

On June 19, 2007, Complainant filed with the Regional Hearing Clerk and served on Respondent's counsel a document entitled "Notice of Complainant's Request for Voluntary Production of Financial Information." In that document, Complainant specifically requested that Respondent produce in its prehearing exchange the following types of financial information which U.S. EPA and its expert financial analyst believe to be relevant to and probative of Behnke's ability to pay:

(1) Provide true, accurate and complete copies of the signed and filed U.S. corporate income tax returns of Behnke, including all schedules, forms, balance sheets and other attachments, for the most recent three tax years, 2004, 2005 and 2006.

(2) Provide true, accurate and complete copies of Behnke's complete financial statements, preferably audited, including all balance sheets, income statements, statements of operations, statements of retained earnings, statements of cash flows, and all notes to each financial statement, for the years 2004, 2005 and 2006. In addition, provide monthly or quarterly financial reports, if maintained by the company, for year-to-date 2007.

(3) Provide true, accurate and complete copies of all company asset depreciation schedules for Behnke, cumulative for the most recent year (2006 or 2007).

(4) Provide true, accurate and complete copies of all records that reflect the fair market

value of each parcel of real estate that is (1) owned by Behnke; (2) owned by any shareholder, director or officer of Behnke; (3) owned by any company or other business entity that is owned by a shareholder, director or officer of Behnke; or (4) owned by any trust naming Behnke, or any shareholder, director or officer of Behnke, as a beneficiary. Such records should include, but not be limited to, the following: all real estate appraisals; all loan applications or loan documents which Behnke or any officer, director or shareholder of Behnke has prepared, received or signed within the last five years in connection with such real estate (including but not limited to all mortgage or real estate financing documents, Real Estate Procedures Act Statements, disbursement forms and other closing documents; and all applications where Behnke or any officer, director or shareholder of Behnke was signing as a guarantor); and the most recent county assessor statements for each such parcel of real estate, including such information for all real property assets owned by any trusts, corporations, partnerships or other business entities, where Behnke or any shareholder, director or officer of Behnke, has been identified an owner and/or beneficiary.

(5) Provide true, accurate and complete copies of all loan applications prepared by or on behalf of Behnke within the last three years.

(6) Provide true, accurate and complete copies of all documents that describe or otherwise contain information about the relationship between Behnke and an entity called "Evergreen-Peter, LLC." (These documents were requested because Tax Bills from Waukesha County, Wisconsin, indicate that Evergreen-Peter, LLC, shares the same mailing address as Behnke (W134N5373 Campbell Drive, Menomonee, Wisconsin), and that Evergreen-Peter, LLC, appears to be the taxpayer for this address for purposes of paying county taxes. See CX 30).

See Notice of Complainant's Request for Voluntary Production of Financial Information, pp. 3-4. Complainant hereby renews its request that Respondent produce the financial information described above when Respondent files its initial prehearing exchange.

In the alternative, Complainant requests that Respondent explicitly waive the issue of its ability to pay or "the effect of the penalty on its ability to continue in business." If Respondent does not intend to make this statutory factor an issue in this case, Respondent should state in the narrative portion of its prehearing exchange that Respondent's ability to pay the penalty proposed in the Complaint, or the effect of the penalty on Behnke's ability to continue in business, is not in issue, *and that Behnke expressly waives any objection to the penalty based on*

its ability to pay or the effect of the penalty on Behnke's ability to continue in business.

If Respondent does not expressly waive any objection to the penalty based on its ability to pay or the effect of the penalty on Behnke's ability to continue in business, and if Respondent also fails to provide each item of financial documentation described above and in Complainant's June 19, 2007, *Notice of Complainant's Request for Voluntary Production of Financial Information*, Complainant will file a motion to compel discovery, and/or a motion for declaratory judgment that Respondent has waived any objection to the penalty based on considerations of ability to pay or "the effect of the penalty on Behnke's ability to continue in business." Complainant may also move for an accelerated decision on the issue of Respondent's ability to pay or the effect of the penalty on Respondent's ability to continue in business. As held by the Environmental Appeals Board (EAB) in *In re: New Waterbury*, 5 E.A.D. 529 (EAB 1994), to fulfill the obligation to "take into account" the statutory penalty factor of "ability to pay" in a specific case, "a respondent's ability to pay may be presumed" and that presumption can continue until the respondent's "ability to pay" the proposed penalty "is put at issue by a respondent." *New Waterbury*, 5 E.A.D., at 541 (emphasis in original). Not only do the regulations require a respondent to include in its answer the "basis for opposing any proposed relief" (such as a claim that it has an "inability to pay" the proposed penalty), but the EAB has instructed that, where the respondent does raise a claim of inability to pay, the complainant "must be given access to the respondent's financial records before the start of [any] hearing." *New Waterbury*, 5 E.A.D. at 542. If the respondent does not "raise its ability to pay as an issue in its answer," or if, after having raised the claim, it "fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process," it

may be concluded that “any objection to the penalty based upon ability to pay has been waived under the Agency’s procedural rules.” *New Waterbury*, 5 E.A.D. at 542. For this reason, unless Behnke provides complete and probative evidence of its actual financial condition, Complainant will ask this Court to rule that any objection to the penalty based on Behnke’s ability to pay or the effect of the penalty on Behnke’s ability to continue in business has been waived.

VII. Size of Business

It is not clear whether or not Respondent intends to make an issue of the size of its business, another penalty factor in Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4). Under the applicable penalty policy, a company’s “size of business” is determined from its gross revenues from all revenue sources during the prior calendar year. A review of a Dun & Bradstreet Report concerning Behnke indicates that Behnke Lubricants, Inc. had a sales volume of over \$7,900,000, and an Experian Credit Report indicated gross sales of \$3 million. See CX 27 and CX 28. These documents represent the best publicly-available evidence that Complainant can locate concerning Behnke’s “size of business.” Complainant therefore requests that Respondent either produce complete and reliable evidence of its actual gross sales, or expressly waive any objection to the penalty based on the “size of business” statutory penalty factor.

VIII. Designation of Agency Representative for Purposes of the Hearing

Complainant requests that all witnesses who have not been designated as expert witnesses be excluded from the courtroom in which the hearing takes place while other witnesses are testifying, with the following exceptions:

1. Expert witnesses should be allowed to remain in the courtroom and listen to testimony.
2. A witness designated by counsel for either party as a representative of a party who is a

non-natural person should be allowed to remain in the courtroom at all times and to listen to testimony.

While there is no specific provision in the Consolidated Rules that governs the circumstances of whether and when the Presiding Administrative Law Judge should exclude fact witnesses, guidance can be found in the Federal Rules of Evidence. Specifically, Federal Rule of Evidence (FRE) 615 provides as follows:

Rule 615. Exclusion of Witnesses

At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

Both Complainant and Respondent are parties who are not natural persons. Complainant U.S. EPA is a federal agency, and therefore is not a natural person. Under FRE 615(2), an officer or employee of U.S. EPA is not required to be excluded from the hearing during the testimony of other witnesses, even if that officer or employee will testify as a witness; the only requirement is that the officer or employee be designated as the representative of Complainant U.S. EPA by Complainant's attorney(s). The decisions of federal courts are instructive regarding this issue. *See generally, U.S. v. Martin*, C.A.6 (Tenn.) 1990, 920 F.2d 393; *U.S. v. Gonzalez*, C.A.3 (N.J.) 1990, 918 F.2d 1129, *rehearing denied, certiorari denied* 111 S.Ct. 1015, 498 U.S. 1107, 112 L.Ed.2d 1097, *certiorari denied* 111 S.Ct. 1604, 499 U.S. 968, 113 L.Ed.2d 667, *certiorari denied* 111 S.Ct. 1637, 499 U.S. 982, 113 L.Ed.2d 733; *U.S. v. Adamo*, C.A.7 (Ill.) 1989, 882 F.2d 1218; *U.S. v. Thomas*, C.A.9 (Nev.) 1987, 835 F.2d 219, *certiorari denied* 108

S.Ct. 1741, 486 U.S. 1010, 100 L.Ed.2d 204; *U. S. v. Jones*, C.A.8 (Mo.) 1982, 687 F.2d 1265.

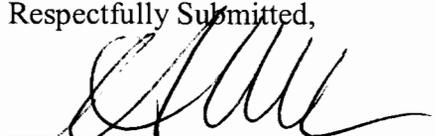
The undersigned attorneys hereby designate Mr. Terence Bonace as Complainant U.S. EPA's representative for purposes of the hearing in this matter, within the meaning of FRE 615(2). Complainant respectfully requests that Mr. Bonace be allowed to remain in the courtroom during the testimony of Complainant's other witnesses, and during the testimony of Respondent's witnesses.

IX. Reservation of Rights.

Complainant respectfully reserves the right to supplement its list of witnesses and/or its list of exhibits upon reasonable notice to Respondent, or by order of this Honorable Court.

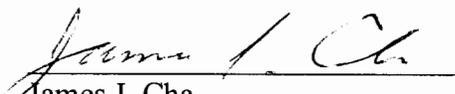
Complainant's Initial Prehearing Exchange for In the Matter of Behnke Lubricants, Inc.,
is hereby respectfully submitted.

Respectfully Submitted,



Nidhi K. O'Meara

10/2/07
Date



James J. Cha

10/4/07
Date

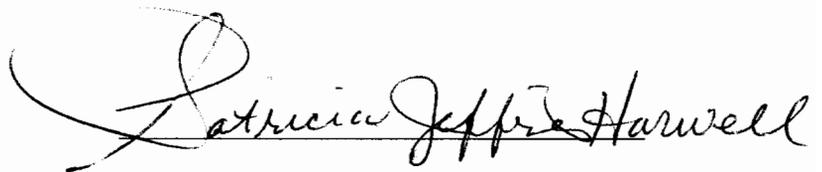
Associate Regional Counsels
U.S. EPA, Region 5

In the Matter of Behnke Lubricants, Inc.
Docket No. FIFRA-05-2007-0025

CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of Complainant's Initial Prehearing Exchange, together with true, accurate and complete copies of Complainant's Exhibits 1 through 43, were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below, and that true, accurate and complete copies of Complainant's Initial Prehearing Exchange and Complainant's Exhibits 1 through 43, were served on the Honorable Barbara Gunning, Administrative Law Judge (service by Pouch Mail), and Mr. Bruce McIlroy, Esq., Counsel for Respondent Behnke Lubricants, Inc. (service by Federal Express), on the date indicated below:

Dated in Chicago, Illinois, this 4 day of October, 2007.



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FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE