UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BEHNKE LUBRICANTS, INC.,	)	DOCKET NO. FIFRA-05-2007-0025
	)	
	)	
RESPONDENT	)	

ORDER DENYING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES; ORDER GRANTING, IN PART, AND DENYING, IN PART, COMPLAINANT'S MOTION TO COMPEL DISCOVERY; ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND ON AFFIRMATIVE DEFENSES

On May 7, 2007, the United States Environmental Protection Agency ("the EPA"), Region V ("Complainant" or "the Region"), filed an eleven-count civil administrative Complaint against Behnke Lubricants, Inc. ("Respondent" or "Behnke") pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136*l*(a), for the assessment of a civil penalty. Complainant alleges that on at least eleven different instances, Respondent distributed or sold various unregistered pesticides in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A). Complainant proposes a civil administrative penalty of $50,050. Respondent filed its Answer and Request for Hearing ("Answer") on or about June 8, 2007. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-.32.

The undersigned entered a Prehearing Order on June 27, 2007, which, *inter alia*, set a schedule for the prehearing exchange. The parties have filed their prehearing exchange in this matter and reserved the right to supplement their prehearing exchange

and supplemental prehearing exchange.[1] The undersigned entered an Order Scheduling Hearing on January 14, 2008. The Hearing in this matter has been scheduled for Monday, March 31, 2008 commencing at 9:30 a.m. and to continue as found necessary through Friday, April 11, 2008, commencing at 8:30 a.m., excluding Wednesday, April 9, 2008, at the Waukesha County Courthouse in Waukesha County, Wisconsin. *See* 40 C.F.R. § 22.35(b).

I. Complainant's Motion to Strike Affirmative Defenses and Complainant's Motion to Compel Discovery

A. Procedural Background

On January 16, 2008, Complainant filed Complainant's Motion to Strike Affirmative Defenses ("Motion to Strike"), and Complainant's Motion to Compel Discovery ("Motion to Compel"). *See* 40 C.F.R. §§ 22.16(a) and 22.19(e).[2] Complainant's Motion to Strike requests that the undersigned strike four of the defenses Respondent lists as "affirmative defenses" on pages 27-28 of its Answer.[3] In particular, Respondent asserts the following as its "affirmative defenses": (1) Behnke's products are not "pesticides" within the meaning of 7 U.S.C. § 136(u); (2)

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[1] The parties are reminded that Sections 22.19(a) and 22.22(a) of the Rules of Practice provide that documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information.

[2] Although Complainant has submitted these two motions within a single motion, the arguments for each are presented in distinct and separate sections of the motion. Thus, for ease of reference I assign each motion its own shorthand designation.

[3] In this motion, Complainant notes that it is unclear whether each of Respondent's asserted defenses in fact meet the standard for "affirmative defenses," yet nevertheless states, "For simplicity, Complainant will refer to these defenses as 'affirmative defenses' in the instant motion." *See* Mot. to Strike at n.1. I decline to take the same approach and will instead hereafter refer to Respondent's purported "affirmative defenses" as "defenses/affirmative defenses."

Behnke's products do not contain a "pesticide" as defined by 7 U.S.C. § 136(u); (3) Behnke's products are not "antimicrobial pesticides" within the meaning of 7 U.S.C. § 136(mm); (4) Behnke's products are not "pesticide chemicals" within the meaning of 21 U.S.C. § 321(q)(1)(A); (5) Behnke's products are "food additives" pursuant to 21 U.S.C. § 321(s) that are approved as lubricants with incidental food contact pursuant to 21 C.F.R. § 178.3570, a regulation promulgated pursuant to 21 U.S.C. § 348(a), which means Behnke's products are strictly regulated by the Food and Drug Administration ("FDA") pursuant to Section 409 of the Federal Food, Drug and Cosmetic Act ("FFDCA"); (6) the intended use of Behnke's products is to protect components of equipment in food and beverage manufacturing plants from wear, corrosion, oxidation, and heat, so Behnke's products are formulated to protect themselves, by resisting internal degradation, from contaminants found in food processing environments; and (7) Behnke's products are not intended for a pesticidal purpose as set forth in 40 C.F.R. § 152.15, because a "pest" as defined in 40 C.F.R. § 152.5 does not include the microorganisms on or in processed food to which Behnke's products are exposed. Answer at 27-28.

Specifically, Complainant moves to strike Respondent's defenses/affirmative defenses 3, 4, 5, and 6 as legally insufficient defenses against liability. Mot. to Strike at 11. Thus, Complainant asserts that "[i]t is therefore unnecessary for this Court to engage in the time-consuming task of fact-finding in an evidentiary hearing on these defenses . . . [as they do not] have any legal affect on Respondent's liability for the violations of FIFRA alleged in the Complaint." *Id.* at 13.

With regard to Respondent's third defense/affirmative defense, Complainant argues that whether or not Behnke's products meet the definition of "antimicrobial pesticide" under FIFRA Section 2(mm) has no bearing on whether such products are "pesticides" within the meaning of FIFRA because "antimicrobial pesticides" are still subject to FIFRA registration; the potential designation of a product as an "antimicrobial pesticide" simply expedites review of the product's FIFRA registration application under FIFRA Section 3(h). *Id.* at 15-21. With regard to Respondent's fourth defense/affirmative defense, Complainant argues that whether or not Behnke's products are "pesticide chemicals" within the meaning of 21 U.S.C. § 321(q)(1)(A) has absolutely no bearing on whether the products are "pesticides" under FIFRA because the EPA's jurisdiction under the FFDCA is separate and distinct from the EPA's jurisdiction under FIFRA. *Id.* at 21-26. With regard to Respondent's fifth defense/affirmative defense, Complainant argues that, like the

"pesticide chemical" argument asserted in Respondent's fourth defense/affirmative defense, whether or not Behnke's products are "food additives" within the meaning of 21 U.S.C. § 321(s) that are regulated under the FFDCA does not affect whether the products are likewise "pesticides" regulated under FIFRA. Mot. to Strike at 26-29. Finally, with regard to Respondent's sixth defense/affirmative defense, Complainant interprets Respondent's language as implying that Behnke's products fall within the "Treated articles or substances" exemption set forth in FIFRA's implementing regulations at 40 C.F.R. § 152.25(a), and Complainant argues that even if this exemption applies, Behnke's Lubricants are still subject to FIFRA registration because the exemption requires that the article or substance at issue must contain, or have been treated with, a pesticide that has been registered under FIFRA for use in protecting the article or substance. *Id.* at 29-30.

Complainant's Motion to Compel seeks discovery in connection with Respondent's defenses/affirmative defenses 1, 2, and 7. Mot. to Compel at 30. Additionally, the Motion to Compel instructs that should the Motion to Strike be denied, Complainant moves in the alternative for discovery in connection with Respondent's defenses/affirmative defenses 5 and 6.[4] *Id.* Complainant argues that the undersigned should grant the discovery requests because the information sought is "required for Respondent to support its affirmative defenses." *Id.*

Specifically, Complainant requests eighteen categories of information, simplified in summary form as follows:

> (1) true, accurate and complete copies of all documentation or communication from and/or to any federal, state or local agency or authority relating to Behnke's lubricants, 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 ("Behnke's Lubricants"), or concerning any lubricant containing Micronox;
> (2) a complete and accurate list of the chemical components of Behnke's Lubricants, by chemical name and by C.A.S. number;

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[4] Complainant is not seeking discovery of the information that it previously requested on June 21, 2007, in connection with Respondent's Affirmative Defenses 3 and 4. Mot. to Compel at n.8. Complainant maintains that information relating to these defenses cannot have any relevance to the issues presented in the instant case. *Id.*

(3) true, accurate and complete copies of all documents that specifically describe the intended uses of Behnke's products;
(4) a complete and detailed explanation, with substantiating documents, supporting Respondent's assertion that Behnke's products are strictly regulated by the Food & Drug Administration;
(5) true, accurate and complete copies of all documents containing evidence that any of Behnke's products at issue in this case were approved as lubricants with incidental food contact, including all notifications submitted to FDA or the Department of Health and Human Services ("DHHS") regarding Behnke's Lubricants;
(6) true, accurate and complete copies of all documents containing information about the identity and intended use of the lubricant/food contact substance, and Behnke's determination that such intended use was safe in accordance with Section 409(c)(3)(A) of the FFDCA;
(7) a complete and accurate statement explaining how Behnke's Lubricants can be safely used on machinery that is used for packing, manufacturing, processing, preparing, treating, packaging, transporting, or holding food;
(8) A statement specifying whether each of Behnke's Lubricants can be used safely because the lubricants are prepared from substances that are either generally recognized as safe for use in food, that are used in accordance with the provisions of a prior sanction or approval, or that are identified in 21 C.F.R. Section 178.3570(a)(3);
(9) a statement identifying the specific substance in each lubricant that fall in each category listed in the previous category of information requested, category 8;
(10) true, accurate and complete copies of all documentation and communications between Behnke and NSF International regarding any Behnke lubricants containing Micronox, and true, accurate and complete copies of all documents submitted by or on behalf of Behnke to NSF in connection with NSF's completion of its evaluation requirements for Behnke's Lubricants;
(11) a statement identifying how Behnke's Lubricants are formulated to resist internal degradation from contaminants found in food processing environments;
(12) a statement specifically identifying the contaminants that Behnke is referring to in its defense/affirmative defense number 6, and if such contaminants are microorganisms, an explanation as to how Behnke complied with the treated article exemption pursuant to 40 C.F.R. Section 152.25;

(13) a statement identifying the antimicrobial additive that is in each of Behnke's Lubricants, by chemical name, C.A.S. number, and EPA Registration number;
(14) a statement providing context for Respondent's prehearing exchange exhibit number 54 ("Behnke Publication regarding food grade lubricant certification");
(15) a statement as to whether Respondent intends to contest the amount of the proposed penalty, and if so, explaining in detail why and how Respondent believes the proposed penalty should be reduced or eliminated;
(16) true, accurate and complete copies of documents that show the actual gross sales or revenues of Behnke Lubricants, Inc., or a statement expressly waiving any objection to the penalty based on the "size of business" statutory penalty factor in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4);
(17) a statement clarifying the relationship between Xact Fluid Solutions and Behnke; and
(18) revised narrative summaries of the expected testimony of Respondent's witnesses, inclusive of information and documents specifically requested in connection with each witness.

Mot. to Compel at 36-50. Complainant asserts that it makes the instant motion for this additional discovery in response to Respondent's failure to provide substantial evidence in support of its affirmative defenses in its prehearing exchange. *Id.* at 32-33.

On February 5, 2008, Respondent filed Respondent's Response to Complainant's Motion to Strike Respondent's Affirmative Defenses and Motion to Compel Discovery ("Response to Motions to Strike and Compel"). *See* 40 C.F.R. § 22.16(b). In support of its defenses/affirmative defenses, Respondent sets forth its contention that there are, among other disputed issues of fact, four primary issues of disputed fact in this matter: (1) whether its products are, in fact, "pesticides" within the meaning of FIFRA § 2u, 7 U.S.C. § 136(u), or are otherwise exempt from FIFRA regulation; (2) whether Behnke's Lubricants are "intended" for preventing, destroying, repelling, or mitigating any pest within the meaning of FIFRA § 2u; (3) whether Behnke's Lubricants "destroy, repel or mitigate" any "pest" within the meaning of FIFRA and its implementing regulations; and (4) whether Behnke's Lubricants are "food additives" subject to regulation under 21 U.S.C. § 348, *et seq.*, designated as such by the FDA. Resp. to Mots. to Strike and Compel at 3-7. In essence, Respondent argues that Behnke's Lubricants are intended to protect components of equipment in food and beverage manufacturing plants and are

formulated to have antimicrobial properties as to microorganisms generally found on or in processed foods and beverages. *Id.* at 9. As such, Respondent argues, the microbes to which Behnke's Lubricants are subjected are not "pests" and thus Respondent's claims regarding such microbes are not pesticidal claims. *Id.* at 9-10. Further, in its Response, Respondent argues that its seven defenses/affirmative defenses interrelate and, thus, should not be stricken separately. *Id.* at 8.

In response to Complainant's Motion to Compel, Respondent argues that it has complied with the disclosure requirements set forth in the undersigned's Orders and under the Rules of Practice, making the additional discovery sought by the Complainant unwarranted. Resp. to Mots. to Strike and Compel at 17. Moreover, Respondent suggests that Complainant's discovery requests are overly broad and unreasonably burdensome, and Respondent points out the timing issues that would arise should Complainant's Motion to Compel be granted.[5] *Id.* at 18-19, 21-22. Additionally, Respondent refutes Complainant's assertion that it is required to produce "substantial evidence" in the prehearing exchange to support its defenses, noting that much of the evidence it will use to support its defenses in this matter will be in the form of oral testimony. *Id.* at 20; *see* Mot. to Compel at 32-33. Respondent contends this proceeding is better served by EPA inquiring into specific matters of interest by cross-examination at the hearing, asserting, "Behnke understands that the introduction of documents at hearing not included in its prehearing exchange will not be allowed. EPA, therefore, has everything in its possession Behnke believes at the present time will support its case including exhibits and witness identities." Resp. to Mots. to Strike and Compel at 22-23.

Respondent admitted in its prehearing exchange that it would be able to pay the proposed penalty and specifically waived any objection to the civil penalties proposed in the Complaint based on its inability to pay or the effect on Behnke's ability to continue in business. *See* Resp. to Mots. to Strike and Compel at 24. In Respondent's Response to Motions to Strike and Compel, Respondent reiterates this and elaborates by asserting, "While not expressly stated [in the prehearing exchange], by implication, it is Behnke's intention to challenge the remaining factor in Complainant's calculation of a proposed penalty; namely, 'gravity of harm.'" *Id.* at 24.

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[5] The Motion to Compel was filed after the undersigned's January 14, 2008 Order setting the matter for hearing beginning March 31, 2008.

On February 11, 2008, Complainant filed Complainant's Reply to Respondent's Response to Complainant's Motion to Strike Respondent's Affirmative Defenses and Motion to Compel Discovery ("Reply to Response to Motions to Strike and Compel") and a Request for Order Requiring Respondent to Comply with Prehearing Order.[6] *See* 40 C.F.R. § 22.16(b). Concerning Respondent's Response to the Motion to Strike, Complainant reiterates its original arguments and avers that Respondent "largely fails to address the legal arguments advanced by Complainant, and the arguments advanced by Behnke are unsupported by the statutory language or legislative history of the laws cited by Respondent."[7] Reply to Resp. to Mots. to Strike and Compel at 3. Concerning Respondent's Response to the Motion to Compel, Complainant argues that Respondent has not been genuinely cooperative with respect to Complainant's stated need for additional documentary evidence, and that Complainant's Request for Voluntary Production of Information, filed on June 21, 2007 and renewed on November 15, 2007 in Complainant's Rebuttal Prehearing Exchange, gave Respondent and its legal counsel ample notice of the information Complainant would seek in discovery in this case should it not be provided voluntarily. *Id.* at 9-10. Complainant insists that Respondent's opposition to the Motion to Compel consists of "self-serving assertions . . . devoid of factual or legal support . . . [that] do not merit further response." *Id.* at 11. Additionally, Complainant takes particular issue with Respondent's narrative summaries of its witnesses' expected testimony, arguing they fail to provide basic factual information. *Id.* at 12-14. Finally, Complainant asserts that Respondent's arguments with respect to the proposed penalty in the Complaint are untimely and must be made in a supplemental prehearing exchange. *Id.* at 14-16.

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[6] Complainant's Request for Order Requiring Respondent to Comply with the Prehearing Order is received as a renewal of the requests Complainant made in its Motion to Compel and is thus incorporated into Complainant's Motion to Compel, which, as discussed, *infra*, is denied.

[7] Indeed, in Respondent's Response to Complainant's Motions to Strike and Compel, Respondent has not addressed the Region's extensive arguments concerning its position that the definition of "antimicrobial pesticide," under Section 2(mm) of FIFRA, exists only for purposes of Section 3(h) of FIFRA, a position which the Region supports with copious references to legislative history and guidance. *See* Reply to Resp. to Mots. to Strike and Compel at 3-4, citing Mot. to Strike at 14-20.

B. Standards for Adjudicating a Motion to Strike and a Motion to Compel Discovery

As a general principle, "administrative pleadings are liberally construed and easily amended." *In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 7 E.A.D. 318, 334 (EAB 1997). The objective of pleading is to facilitate a decision based on the merits of a controversy. *Id.* at 333-34. Regarding motions to strike, such "are the appropriate remedy for the elimination of impertinent or redundant matter in any pleading, and are the primary procedure for objecting to an insufficient defense." *In re Dearborn Refining Co.*, Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at *6 (EPA ALJ, Jan. 3, 2003). However, "motions to strike are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." *Id.* at 7 (internal quotation marks omitted).

In an administrative proceeding under 40 C.F.R. part 22, discovery does not take place automatically as a matter of right. Instead, most discovery, as it is typically thought of under the Federal Rules of Civil Procedure, occurs in an administrative proceeding through the prehearing information exchange. 40 C.F.R. § 22.19(a). The Rules of Practice do, however, provide that after the occurrence of the prehearing exchange provided for in 40 C.F.R. § 22.19(a), a party may seek additional discovery by way of written motion. 40 C.F.R. § 22.19(e). Section 22.19(e) of the Rules of Practice specifies that such "other discovery" may be ordered if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; *and*
> (iii) Seeks information that has *significant* probative value on a disputed issue of material fact relevant to liability or the relief sought.

Id. (emphasis added).

C. Discussion

As discussed, *supra*, Complainant moves to strike Respondent's defenses/affirmative defenses 3, 4, 5, and 6 as legally insufficient defenses against liability, arguing that engaging in time-consuming fact-finding in an evidentiary hearing on these defenses is therefore unnecessary. Mot. to Strike at 11-13. I note that in deciding on a motion to strike, all adverse inferences must be drawn in favor of the non-moving party. Without determining the validity or invalidity of Respondent's defenses/affirmative defenses at this time, it is possible that these defenses/affirmative defenses and the facts they place into genuine dispute may inform other aspects of the decision, namely the appropriateness of the proposed penalty,[8] and thus these defenses/affirmative defenses must be viewed in their entirety. Moreover, as pointed out by Respondent and acknowledged by Complainant, motions to strike are drastic and harsh remedies that are rarely used and typically viewed with disfavor by courts. Resp. to Mots. to Strike and Compel at 11-12; Mot. to Strike at 11-12. As such, I find it more appropriate to rule on the validity of Respondent's defenses/affirmative defenses within the context of an evidentiary hearing. Therefore, Complainant's Motion to Strike is **DENIED**.

Complainant's Motion to Compel is extensive. The Rules of Practice provide that I may only order such additional discovery if, *inter alia*, the information sought has "significant probative value" on a disputed issue of material fact. 40 C.F.R. § 22.19(e). It is questionable whether information potentially supporting the majority of Respondent's arguments, including its witness narratives, has significant probative value or relevance to the allegations in the Complaint. Thus, although I am not granting Complainant's Motion to Compel a revision/extension of Respondent's witness narratives, this instant ruling does not reflect on the merit of the narratives nor does it preclude EPA from objecting to the witness testimony at the hearing. A finding of the testimony's relevance and materiality may be more appropriately made at that time.

However, I find that Complainant has shown additional discovery is warranted under the standards of 40 C.F.R. § 22.19(e) with regard to two categories of information, namely Complainant's requests to obtain: (1) a complete and accurate

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[8] As pointed out by Complainant, Respondent's arguments with respect to the proposed penalty should not be made by implication; they should be made in a supplemental prehearing exchange. *See* Reply to Resp. to Mots. to Strike and Compel at 14; *See also* Resp. to Mots. to Strike and Compel at 24.

list of the chemical components of Behnke's Lubricants, by chemical name and by C.A.S. number;[9] and (2) true, accurate and complete copies of all documents that specifically describe the intended uses of Behnke's products. For purposes of this Order, these categories of information have been described, *supra*, as requests numbers 2 and 3 in the Motion to Compel. Thus, with respect to these two requests, Complainant's Motion to Compel is **GRANTED, IN PART.**

Before discussing my ruling on the remaining categories of information that Complainant seeks in its Motion to Compel, I remark on Complainant's discovery request for documents that show Behnke's actual gross sales or a statement from Respondent expressly waiving any objection to the penalty based on the "size of business" statutory penalty factor, which is summarized above as categorical request number 16 (*supra* p. 6). *See* Mot. to Compel at 47. As noted, *supra*, Respondent admitted in its prehearing exchange that it would be able to pay the total penalty proposed in the Complaint and specifically waived any objection to the proposed penalty based on its inability to pay or the effect on Behnke's ability to continue in business. *See* Resp. to Mots. to Strike and Compel at 24. Also, as noted, *supra*, in Respondent's Response to Motions to Strike and Compel, Respondent indicated that it intends to challenge the proposed penalty only on the basis of a single statutory penalty factor: the gravity of harm. *See Id.* and 7 U.S.C. § 136*l*(4). That is, Respondent has not indicated that it is challenging the Region's characterization of its "size of business." *See* 7 U.S.C. § 136*l*(4).

I note that the Region has not shown that it is unable to otherwise obtain documents or other information pertaining to Respondent's size of business. I observe that the Region need only show that it considered the "size of the business" statutory penalty factor, and it need not prove this factor unequivocally. *Cf. In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 541 (EAB 1994) (Complainant has the burdens of production and persuasion to show that it considered the Respondent's ability to pay). Thus, as generally discussed immediately *infra*, Complainant's request to compel Respondent's production of

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[9] Should Respondent wish to have this information protected as trade secrets or confidential business information, Respondent need only identify this information as such and appropriate safeguards against unauthorized disclosure will be implemented in accordance with Section 10 of FIFRA, 7 U.S.C. § 136h, and 40 C.F.R. part 2.

information relating to the size of its business is not warranted.

With regard to all remaining categories of information that Complainant seeks in its Motion to Compel,[10] the Motion is **DENIED, IN PART.** In view of the parties' contrasting arguments, it has not been shown that this discovery will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party, that this information is most reasonably obtained from the non-moving party, nor that this information has *significant* probative value on a disputed issue of material fact. Moreover, at present, I do not perceive much of this remaining information to be relevant, material, or of much probative value in the resolution of the instant matter. 40 C.F.R. § 22.22(a).

Furthermore, at this late stage in the proceeding, ordering Respondent to respond to Complainant's voluminous discovery requests appears unreasonably burdensome and prejudicial. As correctly noted by Complainant, Respondent has the burden of proving its defenses/affirmative defenses, and if the information necessary to prove such is not in Respondent's prehearing exchange, Respondent cannot rely on such information at the hearing. Respondent has in fact explicitly recognized that it is confined in the hearing to using only documents and witness testimony that it has previously disclosed in its prehearing information exchange and supplements thereto, so Respondent's failure to comply with the Complainant's prior information requests and current discovery requests will not prejudice Complainant.

II. Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses

A. Procedural Background

On January 22, 2008, Complainant filed Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses ("Motion for Accelerated Decision") concerning all eleven counts in the Complaint. *See* 40 C.F.R. § 22.20.[11] Complainant

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[10] Described, *supra*, as requests numbers 1 and 4-18 in the Motion to Compel.

[11] Several declarations in support thereof are attached to this Motion.

expresses its position that even in a light most favorable to Respondent, there is no genuine issue of material fact as to any of the elements necessary to prove that a violation of FIFRA occurred as to each of the eleven counts. Mot. for Acc. Dec. at 3. Moreover, Complainant moves for accelerated decision as to Respondent's defenses/affirmative defenses 1, 2, and 7, arguing that Respondent has simply stated legal conclusions and failed to support these defenses/affirmative defenses with any facts or reasoning which show that there is a genuine issue for hearing. *Id.* at 4, 47. Complainant also requests that its arguments against Respondent's defenses/affirmative defenses 3, 4, 5, and 6 set forth in the Motion to Strike be incorporated by reference should the undersigned find it more appropriate to address these defenses/affirmative defenses in the context of accelerated decision. *Id.* at 4-5.

Complainant asserts that the record in this matter, together with any declarations, demonstrates that there are no genuine issues of material fact concerning the following with respect to each of the eleven counts alleged in the Complaint: that Respondent is a "person," as defined by Section 2(s) of FIFRA, in "any state," who distributed or sold a product, as defined by Section 2(gg) of FIFRA, that was a "pesticide," as defined by Section 2(u) of FIFRA, yet was not registered as a pesticide under Section 3 of FIFRA. Mot. for Acc. Dec. at 9-46. Thus, Complainant argues that it is entitled to judgment as a matter of law and accelerated decision on all eleven separate counts as alleged in the Complaint. *Id.* at 9.

Concerning Respondent's defenses/affirmative defenses, Complainant argues that "Respondent must provide substantial evidence in support of its affirmative defenses" as part of its prehearing exchange. Complainant asserts that "Respondent has provided very little information to support its [defenses/] affirmative defenses 1 and 7, and it seems these two defenses are closely interrelated," as Respondent asserts its products are not "pesticides" within the meaning of FIFRA in defense/affirmative defense 1 and then asserts in defense/affirmative defense 2 that its products are not intended for a pesticidal purpose because they do not target a "pest" as defined by 40 C.F.R. § 152.5. Mot. for Acc. Dec. at 50. Complainant then explains its interpretations of what "Respondent seems to be asserting" and the arguments that "Behnke could be making." *Id.* at 50-54.

With regard to Respondent's defense/affirmative defense 2, Complainant insists that Respondent's position that "Behnke's products do not contain a 'pesticide' as defined by FIFRA . . . misses the point entirely . . . [because while] products that

contain pesticides might require registration under FIFRA before these products can be distributed or sold, it is not the single means by which such products might require registration under FIFRA." Mot. for Acc. Dec. at 54. Complainant argues that the word "intended" in the definition of "pesticide" in FIFRA is critical, and Respondent "clearly claimed, stated and implied by its labeling and advertising . . . that its lubricants had antimicrobial properties and could or should be used as a pesticide." *Id.* at 54-55.

On January 28, 2008, Respondent submitted Respondent's Motion Requesting an Extension of Time to File Opposition to Complainant's Motion for Accelerated Decision ("Request for Extension of Time"), in which Respondent requested an extension of time not to exceed fifteen (15) days to file a response to the Motion for Accelerated Decision. Given the length and breadth of Complainant's pending above-described motions, on January 29, 2008, the undersigned found good cause and orally granted Respondent's Request for Extension of Time, extending the due date for Respondent's response to the Motion for Accelerated Decision to February 21, 2008. 40 C.F.R. § 22.7(b). On February 21, 2008, Respondent filed Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses ("Response to Motion for Accelerated Decision").

In its Response, Respondent contends that it is inappropriate to decide the merits of the instant matter on a motion for accelerated decision due to the existence of genuine issues of material fact. Resp. to Mot. for Acc. Dec. at 1. Respondent presents its opposition to Complainant's interpretation of the facts in the instant matter by summarizing what Respondent believes are the three main issues in controversy: (1) Whether Behnke's Lubricants relate to "pests," as defined in 40 C.F.R. § 152.3, if Behnke's Lubricants are anticipated as becoming part of processed food and deemed as "food additives" safe for human consumption pursuant to Section 409 of the FFDCA; (2) whether Behnke's Lubricants fall within the definition of "pesticides" requiring registration under FIFRA within the meaning of 40 C.F.R. § 152.3; and (3) whether "reasonable consumers" within the food and beverage processing industries would interpret Behnke's statements regarding the antimicrobial properties of the Lubricants as suggesting that the Lubricants "can or should" be used as pesticides within the meaning of 40 C.F.R. § 152.15(a)(1), so as to construe Behnke's statements as "pesticidal claims." *Id.* at 1-2, 19. Thus, Respondent argues there are genuine issues of material fact regarding the incorporation of Behnke's Lubricants into processed foods when used for their intended purpose, regarding the market

for, and intended use of, Behnke's Lubricants, and regarding the sophistication and understanding of the consumers within the relevant market for Behnke's Lubricants. *Id.* at 1-2, 20-32.

Respondent further argues that its defenses/affirmative defenses 1, 2, and 7 are interrelated and collectively raise the issue of whether Behnke's Lubricants are pesticides within the meaning of FIFRA, interweaving these defenses/affirmative defenses into Respondent's defense in this matter as a whole. Therefore, Respondent asserts, if accelerated decision on liability is denied in this matter, then an accelerated decision on the affirmative defenses must be similarly denied. Resp. to Mot. for Acc. Dec. at 20. Respondent also takes issue with Complainant's claim that it must provide "substantial evidence" in support of its affirmative defenses at the accelerated decision stage, arguing instead that a party responding to a motion for accelerated decision need only produce "some evidence" to place the moving party's evidence in question and raise a question of fact for an adjudicatory hearing. *Id.* at 21(citations omitted).

On February 27, 2008, Complainant filed Complainant's Reply to Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and on Affirmative Defenses("Reply to Response to Motion for Accelerated Decision").[12] *See* 40 C.F.R. § 22.16(b). In this Reply, Complainant reiterates its previous arguments concerning accelerated decision in this matter and reveals that the focal point of dispute concerns the parties' contentions regarding the processed food exemption.[13]

Specifically, Complainant makes three main arguments in its Reply to Respondent's Response to Motion for Accelerated Decision. First, Complainant argues that Respondent fails to recognize that the controlling statute in this case is FIFRA, not

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[12] The undersigned's office received a facsimile copy on March 3, 2003.

[13] In addition setting forth arguments in its Reply, Complainant also raises the objection that "Behnke refers to numerous additional witnesses and documentation [in Respondent's Response to Motion for Accelerated Decision] that it had not submitted in its Prehearing Exchange." Reply to Resp. to Mot. for Acc. Dec. at 16. Despite its demonstrated proficiency with the record in this matter, Complainant fails to specify the purported additional witnesses and documentation to which it refers. *Id. See, e.g., id.* at 6-7.

the FFDCA. Reply to Resp. to Mot. for Acc. Dec. at 1-5. In this regard, Complainant asserts that all discussions concerning the FFDCA are "red herrings" because FFDCA and FDA Guidance state that the FFDCA does not affect FIFRA jurisdiction and because whether Behnke's Lubricants are "food additives" under the FFDCA is of no consequence to whether Behnke's Lubricants are "pesticides" under Section 2(u) of FIFRA, 7 U.S.C. § 136(u). *Id.* Second, Complainant argues that Respondent does not become exempt from FIFRA by shifting its position on the "intended use" of Behnke's Lubricants, a question that is critical in determining Respondent's liability in this matter. *Id.* at 5-12. In particular, Complainant asserts that Respondent cannot escape the implicit and explicit claims it has made in advertising Micronox antimicrobial technology in Behnke's Lubricants, that Complainant does not consider Behnke's Lubricants to be "processed foods," and that Complainant does not consider Behnke's Lubricants as intended to treat "processed foods." *Id.* Finally, Complainant argues that Respondent's contentions concerning the sophistication of Behnke's buyers are irrelevant because FIFRA and its implementing regulations do not include a pesticide registration exemption for instances when a product is being sold exclusively to a particular industry. *Id.*. at 12-16. Complainant elaborates by noting that FIFRA requires registration of pesticides regardless of the identity of the buyer and that FIFRA jurisdiction is not dictated by how pesticide registration may affect a registrant's sale of its products. *Id.*

B. Standard for Adjudicating a Motion for Accelerated Decision

Section 22.20(a) of the Consolidated Rules of Practice authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

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 ("FRCP"). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, Sept. 11, 2002). Rule 56(c) of the FRCP provides 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 any material fact and that the moving party is entitled to a judgment as a matter of law."

Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that 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 Tribunal 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 Hospital Assoc.*, 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).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Supreme Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the non-moving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the non-moving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

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." The Supreme Court has found that the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *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 (ALJ, September 9, 2002). 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. *Id.* at 22-23; *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994) (emphasis added).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, 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.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the non-moving party under the "preponderance of the evidence" standard.

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by

a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

C. Discussion

At first blush, I see little merit to Respondent's legal arguments concerning its seven defenses/affirmative defenses. Nevertheless, in the context of an accelerated decision, I must view the evidentiary material and all reasonable inferences therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526 at 528. Here, there is a genuine dispute as to the facts presented and the inferences drawn therefrom. Indeed, Complainant indirectly acknowledges competing interpretations of the facts in this matter, when Complainant summarizes its views of the interpretations "Respondent seems to be asserting" and the arguments that "Behnke could be making." *See* Mot. for Acc. Dec. at 50-54.

Moreover, contrary to Complainant's assertions, at the accelerated decision stage, Respondent need not support its defenses/affirmative defenses under a substantial evidence standard; rather, Respondent may demonstrate a genuine issue of material fact by proffering *some* material, relevant and probative evidence, which places the moving party's evidence in question and allows me to reasonably conclude by a preponderance of the evidence that a question of fact exists for an adjudicatory hearing. Mot. to Compel at 32; Resp. to Mot. for Acc. Dec. at 21. *See 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 (ALJ, September 9, 2002); *In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994). *See also* 40 C.F.R. § 22.24. To defeat a motion for accelerated decision, the non-moving party must show more than a scintilla of evidence that could allow a reasonable fact-finder to rule in the non-movant's favor. *See Rogers Corporation v. EPA*, 275 F.3d 1096 (D.C. Cir. 2002) (To prevail on a motion for accelerated decision, the EPA initially must show that it has established the elements of liability and that there is an absence of evidence in the record for a respondent's affirmative defense; the respondent may then defeat EPA's motion by identifying specific facts that could allow a reasonable fact-

finder to find in Respondent's favor). Here, Respondent has provided some evidence and supporting affidavits to show the existence of a genuine issue of material fact warranting an evidentiary hearing. While it may be that Respondent barely meets this standard, it meets it nonetheless.

Thus, I find that a genuine issue of material fact exists in the instant matter and that fully developing the issues within the context of a hearing is more appropriate than accelerated decision.[14] Thus, Complainant's Motion for Accelerated Decision is **DENIED** as to all eleven counts alleged in the Complaint and as to Respondent's defenses/affirmative defenses.

I note that Respondent has made several admissions that will lessen Complainant's burdens at the hearing and likewise expedite the hearing. For instance, Respondent has admitted Behnke is a "person" "in any state" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Answer ¶ 13; Resp. to Mot. for Acc. Dec. at 11. Additionally, Respondent has admitted that it distributed, offered for sale, or sold, its products on the dates respectively alleged in each of the eleven counts of the Complaint. Resp. to Mot. for Acc. Dec. at 11-12. Respondent has also admitted that Behnke's Lubricants are not "registered" as pesticides under FIFRA, and that it does not dispute the allegations in the Complaint as they relate to the Lubricants' labels, Product Data Sheets, and literature that the Region discovered in its investigation. *Id.* at 12. Therefore, Complainant need not submit any additional evidence on these matters at the hearing. *See* Mot. for Acc. Dec. at 3.

Conclusion

To summarize, I rule as follows:

Complainant's Motion to Strike: DENIED

Complainant's Motion to Compel: GRANTED, IN PART, DENIED, IN PART

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[14] As noted, *supra*, even if I were to find that accelerated decision is technically proper upon review of the evidence in this case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528 at 536.

Complainant's Motion for Accelerated Decision: DENIED

With regard to the Order on Complainant's Motion for Accelerated Decision, I emphasize that such denial does not decide the ultimate truth of the matter, but represents a threshold determination that an evidentiary hearing is shown to be warranted.

Barbara A. Gunning
Administrative Law Judge

Dated: March 5, 2008
Washington, DC

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

CERTIFICATE OF SERVICE

I certify that the foregoing **ORDER DENYING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES; ORDER GRANTING, IN PART, AND DENYING, IN PART, COMPLAINANT'S MOTION TO COMPEL DISCOVERY; ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND ON AFFIRMATIVE DEFENSES**, dated March 5, 2008, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

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Dated: March 5, 2008
Washington, D.C.