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[1]Colorado
[2]Delaware
[3]Illinois
[4]New York
[5]Ohio
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November 14, 2008

Regional Hearing Clerk (E-13J)
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590

Re: John A. Biewer of Ohio, Inc.
RCRA-05-2008-0007

Dear Clerk:

Enclosed are the original and one copy of Respondent's Memorandum in Opposition to Complainant's Motion to Amend Complaint and Compliance Order and Certificate of Service to be filed in the above-referenced matter.

Very truly yours,

Douglas A. Donnell

jeb
Enclosures

cc: Hon. William B. Moran
Richard R. Wagner
Douglas S. Touma, Sr.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

DOCKET NO: RCRA-05-2008-0007

John A. Biewer Company of Ohio, Inc.
300 Oak Street
St. Clair, Michigan 48079-0497
(Washington Courthouse Facility)

CERTIFICATE OF SERVICE

U.S. EPA ID #: OHD 081 281 412

RESPONDENT

/

I, Jane E. Blakemore, hereby state that I am the secretary for Douglas A. Donnell, and that on November 14, 2008, I served a copy of:

Respondent's Memorandum in Opposition to Complainant's Motion to Amend Complaint and Compliance Order

upon the following individuals by placing the same in the U. S. Mail, first-class postage prepaid:

Hon. William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Richard R. Wagner, Senior Attorney
Office of Regional Counsel (C-14J)
U. S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, IL 60604-3590

I declare that the statements above are true to the best of my information, knowledge and belief.

Dated: November 14, 2008

Jane E. Blakemore

Jane E. Blakemore

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

John A. Biewer Company of Ohio, Inc.
300 Oak Street
St. Clair, Michigan 48079-0497
(Washington Courthouse Facility)

U.S. EPA ID #: OHD 081 281 412

RESPONDENT
_____/

DOCKET NO: RCRA-05-2008-0007

MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION TO AMEND COMPLAINT AND COMPLIANCE ORDER

ORAL ARGUMENT REQUESTED

INTRODUCTION

The Administrative Complaint filed in this action alleges that John A. Biewer Company of Ohio, Inc. ("Biewer-Ohio") violated RCRA by failing to remove contaminated soils around a drip pad after closure at its Washington Courthouse Ohio facility, and otherwise did not carry out the cleanup steps outlined in a drip pad closure plan prepared for the same facility. On September 29, 2008, Complainant filed a Motion to Amend Complaint and Compliance Order, seeking to add John A. Biewer Company, Inc. ("JAB Company") and Biewer Lumber, LLC ("Biewer Lumber") as respondents.[1] For the reasons stated herein, the Motion should be denied.

COUNTER-STATEMENT OF FACTS

A. Pertinent Corporate Relationships

Based on certain inadmissible hearsay documents, Complainant feigns confusion over the corporate relationships (to the extent any exists) between Biewer-Ohio, JAB Company and

[1] As demonstrated, *infra*, JAB Company is the parent company of its wholly-owned subsidiary, Biewer-Ohio. However, Biewer Lumber does not have (and has never had) a parent-subsidiary relationship with Biewer-Ohio.

Biewer Lumber. In reality, these matters are undisputed, and have been known by Complainant for many months, as shown below:

1. Corporate Relationship Between JAB Company and Biewer-Ohio

It is undisputed that Biewer-Ohio is the wholly-owned subsidiary of its parent corporation, JAB Company. See Exhibit A, Affidavit of Brian R. Biewer, Secretary-Treasurer of Biewer-Ohio. This fact was clearly communicated to Complainant over a year ago, and several months before the Complaint was field. See Exhibit H. Since JAB Company owns 100% of the stock in Biewer-Ohio, it is thus impossible for any other business entity to share a parent-subsidiary relationship with Biewer-Ohio.

Biewer-Ohio was first created as a corporate entity on September 18, 1980 (see Exhibit B, Articles of Incorporation for Biewer-Ohio) and has remained a wholly-owned subsidiary of JAB Company since that time. Exhibit A, Affidavit of Brian Biewer. Biewer-Ohio ceased wood production operations in June 2001. See Exhibit H at p. 2. However, while Biewer-Ohio was operating prior to June 2001, the Biewer-Ohio facility was operated by a Biewer-Ohio hired plant manager, who in turn had and exercised full authority to hire, fire, train and discipline employees of Biewer-Ohio. See Affidavit of Richard Biewer, Exhibit K. The Biewer-Ohio plant manager hired his own inside and outside sales force, and employees were paid by checks issued by Biewer-Ohio. *Id.* Invoices for materials sold from the Biewer-Ohio facility were issued by Biewer-Ohio, and Biewer-Ohio maintained separate financial statements and separate profit sharing plans from its parent, JAB Company. *Id.*

2. No Corporate Relationship Between Biewer Lumber and Biewer-Ohio

It is undisputed that there is no corporate relationship whatsoever between Biewer Lumber and Biewer-Ohio. Biewer Lumber was created on February 9, 2006 (after all events and

claimed violations alleged in the Complaint occurred), upon the filing of its Articles of Organization (see Exhibit D) – a fact shared with Complainant over seven months prior to the filing of the Complaint (see Exhibit H). As shown by the Operating Agreement for Biewer Lumber (see Exhibit E), the sole Member of Biewer Lumber is a holding company known as BT Holdings, LLC. In turn, the sole Members of BT Holdings, LLC are Brian Biewer and Timothy Biewer. See Exhibit F, Affidavit of Brian Biewer. Thus, it cannot be disputed that Biewer Lumber has no corporate relationship with Respondent, Biewer-Ohio.

Furthermore, Biewer Lumber has never been engaged in the business of treating or producing wood products. Rather, Biewer Lumber is merely a sales company organized for the purpose of marketing and selling the various lumber products produced by other Biewer entities. See Exhibit C, Affidavit of Brian Biewer.

B. Response to Complainant's Other Allegations

Complainant's Motion makes certain other speculative allegations about the activities of Biewer-Ohio, JAB Company and/or Biewer Lumber, to which Respondent replies as follows:

1. Mannik & Smith Group Report

In its Motion and supporting memorandum, Complainant admits that the 2005 drip pad closure plan prepared by the Mannik & Smith Group ("MSG") for the Biewer-Ohio facility was commissioned directly by Biewer-Ohio. Memorandum at p. 4. Thus, Complainant admits that neither JAB Company nor Biewer Lumber had anything to do with commissioning the MSG report. Further, Complainant admits that, on its face, the MSG report was "prepared for John A. Biewer Company of Ohio," showing again that neither JAB Company nor Biewer Lumber had anything to do with this report. *Id.* at p. 5; see also, cover sheet of report, Exhibit J to Complainant's Memorandum.

Despite all of these undisputed facts, Complainant attempts to impute liability to JAB Company by pointing to a single, isolated phrase on page 3 of the MSG report, by which MSG (not JAB Company) generically states that "John A. Biewer Company" will "reassess" the remediation approach and provide the Ohio EPA with a contingent closure approach for concurrence. Taken in context, this general statement clearly refers to what Biewer-Ohio intended to do, inasmuch as this statement appears in a report undisputedly commissioned by Biewer-Ohio, and in which the Biewer-Ohio corporate name appears not less than 20 times (Complainant's Memorandum at Attach. J).

2. Financial Transactions

Complainant makes vague and speculative allegations suggesting that JAB Company is financially propping up Biewer-Ohio with donations of cash. This is simply untrue. To the extent that Biewer-Ohio has ever received money from JAB Company for the purpose of paying taxes or other debts, these types of loans are normal and commonplace between a parent and its subsidiary, and are reflected on the balance sheet of each of these companies as a debt and corresponding credit (see Exhibit A, Affidavit of Brian Biewer), such that Biewer-Ohio remains indebted to its parent for repayment, as would be the case with any separate businesses entities that engage in a lender/borrower relationship. No supported claim is even asserted that either JAB Company or Biewer Lumber paid for or directed environmental compliance while Biewer-Ohio was operating or directed any closure or post-closure activities at the Biewer-Ohio facility after operations ceased in June 2001.

3. Nature of Violations Being Alleged

An interesting aspect of Complainant's case is that it is alleging *inactivity* or *inaction* as the basis for the alleged RCRA violations. More specifically, the Complaint alleges that Biewer-

Ohio violated RCRA by (1) *failing* to remove contaminated soils around a drip pad after closure of its facility, and (2) *failing* to otherwise carry out the cleanup steps outlined in the MSG drip pad closure plan. In other words, Biewer-Ohio is being prosecuted, not because of something it did, but because of something it allegedly *did not do*.

This undisputed nature of the violations being alleged are of particular significance when considering Complainant's current Motion, inasmuch as the Motion seeks to add JAB Company and Biewer Lumber on the alleged basis that these separate business entities are the actual operators of the Biewer-Ohio facility. Thus, while Complainant claims that the violations arose because *nothing* was done (i.e., no cleanup activities were performed), it simultaneously claims that JAB Company and Biewer Lumber are the ones that did it. Apparently, therefore, Complainant's Motion is attempting to establish the novel and unsupportable legal theory that the liability of a parent corporation can be established through showing that the parent did *not* get involved with the environmental operation of its subsidiary's facilities.

4. Historical Schoolcraft Litigation

Complainant alleges that, in 1985, JAB Company was ordered to pay money damages as a result of environmental issues at the John A. Biewer of Schoolcraft, Inc. facility in Schoolcraft, Michigan. However, Complainant never attempts to explain how or why this 1985 litigation has any relevance to the Biewer-Ohio facility or any relevance to the corporate relationship between Biewer-Ohio and JAB Company. This is because this historical litigation has absolutely no relevance to these matters. This is just diversionary chaff that should be stricken from Complainant's Motion, as being immaterial.

5. Other Irrelevant Allegations

Complainant's Motion throws in a host of other miscellaneous allegations that have no relevance to the Biewer-Ohio facility or to the corporate relationship between Biewer-Ohio and either JAB Company or Biewer Lumber. For example, Complainant makes allegations about toxic inventory reports *properly* filed by subsidiaries of JAB Company; abbreviated URL addresses on the Internet; inaccurate hearsay from inadmissible D&B reports; normal overlapping officer relationships between parent and subsidiary; the number of companies having the word "Biewer" in their names; etc. Suffice to say, all of these allegations are wholly irrelevant, as demonstrated by the fact that Complainant cannot cite a single case or legal rule that ties these alleged facts to any of its theories for implicating JAB Company or Biewer Lumber. All of these allegations should this be stricken from the Motion, as being immaterial.

ARGUMENTS

I. The Motion to Amend is Defective and Incomplete, and Must be Dismissed

On its face, Complainant's Motion to Amend seeks nothing more than to add "JAB Company" and "Biewer Lumber" as respondents in the caption to this action. Stated as such, the Motion to Amend is defective and incomplete because amending the Complaint in this fashion would violate 40 C.F.R. § 22.14, in several respects.

In this regard, 40 C.F.R. § 22.14 requires that a Complaint (including any amendment thereto) include certain minimum information, such as, *inter alia*, a concise statement of the factual basis for each violation alleged and all relief sought. 40 C.F.R. § 22.14(a)(3)-(4). With respect to the existing Respondent, Biewer-Ohio, the Complaint satisfies these requirements. However, if JAB Company and Biewer Lumber were to be added as respondents, with nothing more being done, the Complaint would then violate 40 C.F.R. § 22.14(a)(3)-(4) because it would state no factual basis whatsoever for any claim asserted against these entities.

In particular, the "Amended" Complaint would include no factual basis for Complainant's very tentatively asserted position that JAB Company and/or Biewer Lumber should be held indirectly liable for the claim asserted against Biewer-Ohio, on a veil-piecing theory. The types of factual allegations necessary to support such a claim are spelled out in both Michigan and federal common law, and are nowhere to be found in the "Amended" Complaint, as proposed in the Motion. Likewise, the "Amended" Complaint would include no factual basis for Complainant's alternative position that JAB Company and/or Biewer Lumber should be held directly liable, as the entities that allegedly committed the violations described in the Complaint. Related to these fatal omissions, the Complaint would not seek any specific relief, of any type, against JAB Company and/or Biewer Lumber, on any legal theory.

In essence, what Complainant is attempting to accomplish is to bring claims directly against JAB Company and Biewer Lumber, but without being held to the usual pleading standards that require Complainant to allege facts in its Complaint that constitute a *prima facie* case and which must otherwise be pled only upon certification that such facts are well-grounded, and formed only after reasonable inquiry. This is not a mere "form over substance" defect, as it is the Complaint that must satisfy the prima facie requirements of a claim, and thus far, in the present Motion, Complainant has done nothing more than to suggest a number of possibilities, one or more of which it hopes to prove, but none of which it has been willing to state as an alleged fact in a pleading. To allow Complainant to sidestep these important requirements would be to open the door to allowing Complainant to engage in a speculative fishing expedition into the records of JAB Company and Biewer Lumber, without Complainant having even pled a cognizable claim against these entities and without any implicit certification by counsel that the

factual allegations in the Complaint are based on reasonable inquiry. This should not be tolerated, and so the Motion to Amend should be denied.

II. The Motion to Amend is Untimely

Respondent's Answer was filed in this matter on June 6, 2008. As such, Complainant may amend its Complaint only upon motion granted by the Presiding Officer, as provided by 40 C.F.R. § 22.14(c):

> The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise, the complainant may amend the complaint only upon motion granted by the Presiding Officer. 40 C.F.R. § 22.14(c).

The above-quoted rule provides no standard for when a proffered amendment to an administrative complaint should be allowed or denied, and so the EPA has applied Rule 15(a) of the Federal Rules of Civil Procedure by analogy. *In the Matter of: City of St. Charles, Illinois*, 2008 EPA ALJ LEXIS 15 (Docket No. CWA-04-2008-5192, April 8, 2008). Rule 15(a) provides that "leave [to amend a complaint] shall be freely given when justice so requires." The Supreme Court has interpreted Rule 15(a) to mean that leave to amend pleadings should be given freely in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Foman v. Davis,* 371 U.S. 178, 182 (1962).

The EPA has recognized that the most significant of the *Foman* factors is whether the amendment would unduly prejudice the opposing party. *Carroll Oil Co.,* 10 E.A.D. 635, 650, 2002 EPA App. LEXIS 14 (EAB 2002). Undue prejudice has been discussed as follows:

> [N]early every amendment results in some prejudice to the non-moving party. New discovery and some delay inevitably follow when a party significantly supplements its pleadings. The test in each case, then, must be whether *undue* prejudice would result. The district court, in exercising its discretion, must balance the general policy behind [Fed. R. Civ. P.] Rule 15 that controversies

> should be decided on the merits--against the prejudice that would result from permitting a particular amendment. Only where the prejudice outweighs the moving party's right to have the case decided on the merits should the amendments be prohibited.
>
> * * *
>
> In balancing these interests, the court will consider the position of both parties and the effect the request might have on them. Thus, **the court will inquire into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading,** and the injustice resulting to the party opposing the motion should it be granted.

McCann v. Frank B. Hall & Co., 109 F.R.D. 363, 365, 1986 U.S. Dist LEXIS 29844 (N.D. Ill. Jan. 30, 1986) (citing, *inter alia, Alberto-Culver Co. v. Gillette Co.,* 408 F. Supp. 1160, 1161 (N.D. Ill. 1976) and 6 Wright, Miller & Cooper, Federal Practice & Procedure § 1487 at p. 429 (2nd ed. 1990) [emphasis added].

Injustice resulting to the opposing party which weighs against granting a motion to amend may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs and burdens to the opposing party. *Carroll Oil Co.,* 2002 EPA App. LEXIS 14 * 42; *Block v. First Blood Associates,* 988 F.2d 344, 350 (2nd Cir. 1992). While "[t]he need for additional discovery does not conclusively establish [undue] prejudice" (*Nesselrotte v. Allegheny Energy, Inc.,* Civ. No. 06-01390 2007 U.S. Dist. LEXIS 79147 *14-15 (W.D. Pa., Oct. 25, 2007)), "undue" prejudice will nonetheless be found where granting the motion to amend would require opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay resolution of the dispute. *Stephenson v. Dow Chemical Co.,* 220 F.R.D. 22, 25 (E.D. NY 2004), citing *Block v. First Blood Associates,* 988 F.2d at 350. In addition, "the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation." *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.,* 690 F.2d 1157, 1163 (5th Cir. 1982).

Applying the above standards to the present Motion, Complainant's Motion must fail. Initially, there is no legitimate reason for Complainant having failed to include JAB Company and/or Biewer Lumber in its original Complaint, if indeed it felt there was a factual basis for such a claim. Rather, it becomes apparent that Complainant *chose* not to add JAB Company or Biewer Lumber as parties, notwithstanding knowledge at the time the Complaint was filed of their relationships (or lack of relationship) to Biewer-Ohio, and knowledge of the host of facts alleged in its brief supporting the present Motion. Indeed, counsel for EPA was engaged in back and forth dialogue with counsel for Respondent specifically regarding the relationship between the various corporate entities nearly one year prior to the filing of the Complaint. The following information was exchanged between the parties *prior* to the filing of the Complaint in this administrative action:

- On August 14, 2007, Mr. Wagner of the EPA wrote to Doug Touma, the attorney for Biewer-Ohio, stating that the financial information for Biewer-Toledo and Biewer-Ohio was insufficient because it failed to disclose financial information regarding the parent corporation. After citing the *Carroll Oil Co.* case, Mr. Wagner states: "I would note that John A. Biewer Company of Toledo, John A. Biewer Company of Ohio, John A. Biewer Co., Inc. and Biewer Lumber, LLC each have the same officers, Richard N. Biewer, and his two sons, Brian R. and Timothy J. Biewer. I would further note that neither of your clients is a functioning entity with any significant income and each must meet obligations with funds from the outside." The letter also contained an attachment requesting numerous financial documents, including tax returns and financial statements for JAB Company and Biewer Lumber. (See Exhibit G)
- On September 28, 2007, Mr. Touma wrote to Mr. Wagner in response to Mr. Wagner's August 14, 2007 correspondence providing detailed information regarding the relationship between Biewer-Toledo and both JAB Company and Biewer Lumber. With concise clarity, the letter states "The John A. Biewer Co. of Ohio, Inc. is a wholly owned subsidiary of John A. Biewer Co., Inc. and it has no relationship to Biewer Lumber, LLC . . . John A. Biewer Co. of Toledo, Inc. and John A. Biewer Co of Ohio, Inc. have continually from 1997 to present, been wholly owned subsidiaries of John A. Biewer Co., Inc." The letter goes on to reiterate information previously provided to Mr. Wagner that Biewer-Ohio ceased operations in June 2001 and has been inactive since that time. Mr. Touma even explained that there remains a substantial inter-company account payable from Biewer-Ohio owed to JAB Company. On behalf of Biewer-Toledo and Biewer-

Ohio, Mr. Touma stated "Each company is prepared to turn over to the EPA all of its current assets free of any claim by the parent company for un-reimbursed expenses," an offer later rejected by EPA. (See Exhibit H)

- In a letter dated April 8, 2008, Mr. Wagner made perfectly clear Complainant's position regarding JAB Company and Biewer Lumber's obligation in connection with EPA's asserted penalties: "While your clients may be of the opinion that the financial circumstances of John A. Biewer Co. and Biewer Lumber, LLC should have nothing to do with the payment of any penalty by John A. Biewer Company of Ohio, and John A. Biewer Company of Toledo, Inc., *it is our opinion that the law governing these proceedings is otherwise*." (Emphasis added). Attached to the April 8, 2008 correspondence was a report dated December 4, 2007 by Industrial Economics, Inc. (the author of Exhibit C to Complainant's Biewer-Ohio brief), the subject of which is the inter-relationship between Biewer-Ohio and JAB Company and the potential liability of JAB Company and Biewer Lumber for a penalty asserted against Biewer-Ohio. (See Exhibit I)
- Finally, in a letter dated April 18, 2008, three weeks before the filing of the Complaint, Mr. Touma wrote to Mr. Wagner reiterating that since Biewer-Ohio ceased operations, the only financial support that had been provided by JAB Company was the payment of taxes, with the hope that the premises could potential thereafter generate income through sale or lease. (See Exhibit J). Mr. Touma also reminded Complainant that Biewer Lumber was not even formed until February 2006, after all the events alleged in the Complaint occurred.

From just this abbreviated history of dialogue between the parties, which does not even include numerous oral conversations, it is apparent that Complainant was fully aware of the relationship between the various corporate entities; was of the apparent belief that the parent should be responsible for the subsidiary's liability; and even insisted that a subsidiary would not be entitled to assert an ability-to-pay defense without disclosing the financial records of the parent. The facts cited by Complainant in its brief contain no facts that were not available prior to the filing of the Complaint, and indeed the very theory now asserted by Complainant was articulated by Complainant before the original Complaint was ever filed.

Now, six months after the Complaint has been filed and after the parties have completed their various disclosures, witness lists, exhibit lists, and have agreed that no discovery is necessary, Complainant seeks to add to this case the same parties identified over a year and a half ago, based on corporate relationships disclosed to Complainant at that time. Complainant

did not inadvertently omit JAB Company or Biewer Lumber from this case – it chose to do so and allowed these proceedings to continue to the point where the only thing remaining to be done is a hearing, if a hearing will even be necessary, and without even offering an excuse for its undue delay.

Complainant also fails to assert that it will be denied the opportunity to litigate any potential liability of either JAB Company or Biewer Lumber if the present motion is denied. If Complainant were to obtain a judgment in this action, and depending on how a subsequent court complaint to enforce that judgment against the parent were framed, it might be possible for Complainant to litigate that issue against the parent. Suffice it to say that Complainant in this Motion has failed to state it will be forever barred and why.

Finally, as noted above, the only step remaining to be accomplished in this administrative action is a hearing. In contrast, if the proposed amendment were allowed, this case would essentially start all over from the beginning. An amended complaint (complete with factual allegations setting forth a basis of liability as to JAB Company and/or Biewer Lumber) would need to be filed, an answer would be required, discovery would be necessary (as acknowledged by Complainant), new witness and exhibit disclosures would be required, and, no doubt, various motions, including motions for accelerated decision would be filed and briefed. Such actions would dramatically increase the expense to Respondent and significantly delay resolution of this action for many months.

Given the lack of substantial reasons why JAB Company or Biewer Lumber were not named in the original Complaint, the fact that Complainant may still choose to litigate against the parent in an action filed in court to enforce a judgment, if one is obtained against Biewer-Ohio,

and the substantial prejudice and delay to Respondent caused by the amendment, the present Motion should be denied.

III. Amendment of the Complaint to Add JAB Company Would be Futile Because JAB Company Cannot be Held Liable for the RCRA Violations Allegedly Committed by Biewer-Ohio

Complainant seeks to add JAB Company on the theory that, as the admitted parent company of Biewer-Ohio, JAB Company can be held indirectly liable through means of veil-piercing. Alternatively, Complainant seeks to add JAB Company on the theory that it can be held directly liable as an actual "operator" of the Biewer-Ohio facility. As demonstrated below, the addition of JAB Company on either of these bases would be futile because, based on the undisputed facts, JAB Company cannot be held directly or indirectly liable for the RCRA violations allegedly committed by Biewer-Ohio.

A. Legal Standards for Parent Company Liability

1. Pertinent Case Law Under CERCLA

As Complainant has correctly pointed out, the seminal case addressing the liability of a parent corporation, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), for environmental contamination at a facility of its subsidiary, is *United States* v. *Bestfoods*, 524 U.S. 51 (1998). In *Bestfoods*, the U.S. Supreme Court reaffirmed the traditional bedrock principles of corporate law, holding that, as a general rule, a parent corporation cannot be held liable for the acts of its subsidiaries, and that CERCLA does nothing to alter that overriding presumption:

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. Douglas & Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L. J. 193 (1929) (hereinafter Douglas); see also, *e.g.*, *Buechner* v. *Farbenfabriken Bayer Aktiengesellschaft,* 38 Del. Ch. 490, 494, 154 A.2d 684, 687 (1959); *Berkey* v. *Third Ave. R. Co.*, 244 N.Y. 84, 85, 155 N.E. 58

> (1926) (Cardozo, J.); 1 W. Fletcher, Cyclopedia of Law of Private Corporations § 33, p. 568 (rev. ed. 1990) ("Neither does the mere fact that there exists a parent-subsidiary relationship between two corporations make the one liable for the torts of its affiliate"); Horton, Liability of Corporation for Torts of Subsidiary, 7 A. L. R. 3d 1343, 1349 (1966) ("Ordinarily, a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary will not be penalized by a judicial determination of liability for the legal obligations of the subsidiary"); cf. *Anderson* v. *Abbott,* 321 U.S. 349, 362, 88 L. Ed. 793, 64 S. Ct. 531 (1944) ("Limited liability is the rule, not the exception"); *Burnet* v. *Clark,* 287 U.S. 410, 415, 77 L. Ed. 397, 53 S. Ct. 207 (1932) ("A corporation and its stockholders are generally to be treated as separate entities").
>
> * * *
>
> [N]othing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible.

Bestfoods, supra at 524 U.S. 61, 62.

The Court did recognize, however, two exceptions to the general rule, whereby a parent could be held liable for the acts of its subsidiary: (1) through traditional veil-piercing principles; or (2) when the parent incurs direct "operator" liability. Each of these exceptions is discussed below:

a. Veil-Piercing Claim

In *Bestfoods*, the Supreme Court held that a parent company may be held liable under CERCLA through traditional "veil-piercing" principles, to wit, when "the corporate form [is] . . . misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id.* at 62. The Court was careful to explain, however, that CERCLA had not lowered the bar with respect to proving a veil-piercing claim, and that mere control of a subsidiary by its parent is not nearly enough to support such a claim:

> [I]t is hornbook law that "the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal." *Douglas* 196 (footnotes omitted).

Id. at 61-62.

Nor is the sharing of common directors between a parent and subsidiary sufficient to support a veil-piercing claim:

> "[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *American Protein Corp.* v. *AB Volvo*, 844 F.2d 56, 57 (CA2), cert. denied, 488 U.S. 852, 102 L. Ed. 2d 109, 109 S. Ct. 136 (1988); see also *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (CA2 1929) (L. Hand, J.) ("Control through the ownership of shares does not fuse the corporations, even when the directors are common to each"); Henn & Alexander 355 (noting that it is "normal" for a parent and subsidiary to "have identical directors and officers").

Id. at 69.

Given that the sharing of directors between a parent and subsidiary is the commonly accepted norm, the Court further explained that the directors of a subsidiary are presumed to be acting on the subsidiary's behalf when making decisions affecting the subsidiary's business, despite their simultaneous director responsibilities for the parent:

> [T]hat the corporate personalities remain distinct has its corollary in the well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their common ownership . . . Since courts generally presume that the directors are wearing their "subsidiary hats" and not their "parent hats" when acting for the subsidiary, . . . it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the [subsidiary's] facility. The Government would have to show that, despite the general presumption to the contrary, the officers and directors were acting in their capacities as [parent] officers and directors, and not as [subsidiary] officers and directors.

Id. at 69-70 [internal quotations and citations omitted].

Putting a finer point of the types of proofs that the government would have to adduce in order to use the actions of a dual officer in support of a veil-piercing claim, the Court explained that there must be evidence that the subsidiary's dual officer acted plainly *contrary* to the interests of the subsidiary and simultaneously for the advantage of the parent:

> Here, it is prudent to say only that the presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent.

Id. at 70, n13.

Thus, while *Bestfoods* recognizes the possibility for parent-company liability under CERCLA, through veil-piercing principles, the overriding presumption of parental non-liability persists, in accordance with the common law. Further, any party seeking to overcome that overriding presumption has a tremendous evidentiary burden to satisfy, and that burden cannot be satisfied with mere evidence that the common officers took actions for the subsidiary. Rather, it must be shown that the common officers acted "plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent." *Id.*

b. Direct "Operator" Liability

As an alternative to a traditional veil-piercing claim, the Supreme Court also recognized that a parent corporation could be held directly liable, under CERCLA, for environmental contamination at a facility of its subsidiary, if the parent engages in direct "operation"[2] of the subsidiary's facility. *Id.* at 64. Such direct parent "operation" can be established by showing that the parent corporation exercised exclusive control of the facility or engaged in a joint venture with the subsidiary, or by showing that an agent or officer of the parent directly controlled the operation of the subsidiary's facility, to the subsidiary's detriment. *Id.* at 70-72. The question here is "not whether the parent operates the subsidiary, but rather whether it operates the [subsidiary's] facility." *Id.* at 68. In addition, the Court was not speaking of the parent's

[2] *See* Section 107(a)(2) of CERCLA (authorizing suit against "any person who at the time of disposal of any hazardous substance owned or *operated* the facility" [emphasis added]).

generalized operation of any aspect of the subsidiary's facility, but rather it was speaking only of those types of operations dealing with pollution and environmental compliance:

> To sharpen the definition [of "operate"] for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67.

Thus, while *Bestfoods* recognizes the possibility for parental liability under CERCLA for a parent's direct operation of a subsidiary's facility, such liability can be predicated only upon evidence showing that the parent directed the operations of the subsidiary's facility with specific respect to pollution control and environmental compliance.

2. Application of *Bestfoods* to the RCRA Liability Framework

Complainant argues that the *Bestfoods* framework for parental liability also applies under RCRA and, despite the apparent dearth of published case law so holding, this seems to be the correct conclusion. Just like CERCLA, RCRA says nothing about disturbing the bedrock corporate principles that prevent a parent from being liable for the acts of its subsidiaries, absent the extreme circumstances that would warrant a piercing of the corporate veil. Thus, like under CERCLA, a parent cannot be held indirectly liable under RCRA, for the actions of its subsidiaries, unless the overriding presumption of parental non-liability is overcome through traditional veil-piercing principles.

Also, with regard to the potential for direct "operator" liability, the *Bestfoods* analysis should apply equally under RCRA. In that regard, RCRA ostensibly authorizes suit against "any person [who] has violated or is in violation of any requirement of [RCRA]." 42 U.S.C. § 6928(a)(1). The only type of "person" that is subject to RCRA, however, and who can therefore be alleged to have "violated" its requirements, are those persons who are "owners [or] *operators*

of facilities for the treatment, storage, or disposal of hazardous wastes." (42 U.S.C. § 6924(a); *see* also 42 U.S.C. § 6925(a)).[3] Therefore, in accordance with *Bestfoods*, a parent could be subject to direct "operator" liability under RCRA only upon a showing that the parent directed the operations of the subsidiary's facility with specific respect to pollution control and environmental compliance.

For the reasons stated below, JAB Company cannot be held liable for the actions of Biewer-Ohio on either a veil-piercing theory or a director "operator" theory, such that the addition of JAB Company as a respondent would be futile.

B. JAB Company Cannot be Held Indirectly Liable on a Veil-Piercing Theory

Under the long-established and daunting standards for establishing veil-piercing liability, as reaffirmed in *Bestfoods*, it is clear that the addition of JAB Company as a respondent would be futile because Complainant has failed to allege facts that would even come close to establishing a prima facie claim for veil-piercing.

While it is true that Biewer-Ohio is a wholly-owned subsidiary of JAB Company and that these separate corporations share common directors and officers, these facts represent the standard corporate norm in a parent-subsidiary relationship, and thus are simply irrelevant under controlling law, when considering a veil-piercing claim. *Bestfoods, supra* at 61-62, 69. Moreover, given that the law presumes that common officers/directors are acting on the subsidiary's behalf when making decisions affecting the subsidiary's business, despite their

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[3] Other types of RCRA permit holders, including "generators" and "transporters" of hazardous wastes, are also subject to RCRA, and could therefore be subject to civil liability for violating its provisions (*see*, e.g., 42 U.S.C. §6972). However, the violations alleged in this action relate only to operations at the Biewer-Ohio facility (specifically, post-closure cleanup operations at the facility), such that potential "operator" liability is all that is relevant in this action.

simultaneous officer/director responsibilities for the parent (*id.* at 69-70), Complainant must show that the common officers/directors of Biewer-Ohio and JAB Company acted "plainly contrary to the interests of [Biewer-Ohio] yet nonetheless advantageous to [JAB Company]" (*id.* at 70, n13) in order to establish veil-piercing liability. Complainant has adduced nothing, however, to show that any common officer/director ever took any action that could be remotely characterized in this manner.

Also, as pointed out in the Counterstatement of Facts, this is a very peculiar case in which to allege a veil-piercing claim, inasmuch as Biewer-Ohio is being prosecuted, not because of something it *did*, but because of something it allegedly *did not do* – that is, it allegedly did not remove contaminated soils around a drip pad after closure of its facility, and did not otherwise carry out the cleanup steps outlined in the MSG drip pad closure plan. When *inaction* is the alleged basis for Biewer-Ohio's liability, it is spurious for Complainant to attempt to impose liability on JAB Company, inasmuch as JAB Company's undisputed inaction (with respect to closure activities at Biewer-Ohio) is one the essential facts that actually defeats any claim of veil-piercing liability. How can Complainant allege on one hand that certain operations were *not* performed at the Biewer-Ohio facility, and on the other hand claim that JAB Company is the one who did it? The answer: it cannot. Complainant's admission that JAB Company failed to conduct the environmental cleanup operations of the Biewer-Ohio facility is, by itself, a complete admission that its corporate veil cannot be pierced.

Furthermore, there has been no attempt by Complainant to assert facts suggesting that "the corporate form [was] . . . misused to accomplish certain wrongful purposes, most notably fraud, on the shareholders' behalf." *Bestfoods* at 62. Indeed, nothing has been asserted in Complainant's Statement of Facts that describes anything other than a normal parent-subsidiary

relationship. And the only "wrongful purpose" or "fraud" implied is the fact that the parent has chosen not to bail out the subsidiary and pay the amounts owed by the subsidiary to EPA. Such corporate behavior is neither wrongful nor fraudulent – it is rather evidence that the separate corporate entities *were* respected by the two corporations.

Clearly, Complainant has mismatched the facts and the law. The Motion to add JAB Company should be denied.

C. JAB Company Cannot Be Held Directly Liable as an Alleged "Operator" of the Biewer-Ohio Facility

For many of the same reasons, Complainant cannot establish JAB Company's direct liability through alleged "operator" status. It is undisputed that Biewer-Ohio (not JAB Company) commissioned the closure report prepared by MSG, which ultimately gave rise to the Complaint, by virtue of the closure plan ultimately not being implemented. Given that *inaction*, by everyone, is the basis for the alleged violations, it is impossible for JAB Company to be implicated as an alleged "operator." Further, to the extent that any closure operations were performed prior to the alleged violations (i.e., by the preparation of the MSG report in the first instance), that activity benefited both Biewer-Ohio and JAB Company (it preserved the asset value of the Biewer-Ohio facility), and thus was consistent with the normal parent-subsidiary relationship.

The same can be said for the documented loans that JAB Company has given to Biewer-Ohio for the payment of taxes and insurance. The payment of taxes protects the value of Biewer-Ohio's asset (i.e., by ensuring it is not lost to a tax foreclosure sale), and so is wholly consistent with normal parent-subsidiary relationship.

Finally, Complainant has asserted no evidence suggesting that JAB Company controlled environmental decisions for Biewer-Ohio, or that JAB Company had <u>any</u> involvement with the

operations of the Biewer-Ohio facility, prior to the closure of its lumber producing operations in 2001 or thereafter. Rather, the Affidavit of Richard Biewer (Exhibit K) demonstrates the contrary: the corporate separateness of JAB Company and Biewer-Ohio was consistently maintained in all relevant respects. As such, there is no basis for asserting "operator" liability against JAB Company, and the Motion should therefore be denied.

IV. Amendment of the Complaint Would be Futile Because Biewer Lumber Cannot be Held Liable for the RCRA Violations Allegedly Committed by Biewer-Ohio

Complainant also seeks to add Biewer Lumber as a respondent, on the theory that Biewer Lumber can be held indirectly liable through means of veil-piercing. Alternatively, Complainant seeks to add Biewer Lumber on the theory that it can be held directly liable as an actual "operator" of the Biewer-Ohio facility. As demonstrated below, each of Complainant's liability theories as to Biewer Lumber is fatally incorrect, such that the addition of Biewer Lumber would be futile.

A. Biewer Lumber is Not the "Parent" of Biewer-Ohio

Though Complainant claims confusion on this point, despite unambiguous and clear statements by Mr. Touma, there can be no dispute that Biewer Lumber is not the "parent" of Biewer-Ohio. See Affidavit of Brian Biewer, Exhibit A, stating that JAB Company, at all relevant times, has owned 100% of the stock of Biewer-Ohio. Nor does Biewer Lumber have any other corporate relationship with Biewer-Ohio. See Exhibits E and F. In fact, nothing asserted in Complainant's Statement of Facts suggests that Biewer Lumber has ever acted through Biewer-Ohio or in any way disregarded the separate corporate status of the two companies. As such, Complainant's veil-piercing theory is wholly inapplicable, as a matter of law, because there is no veil to be pierced in the first instance.

Moreover, Biewer Lumber was not even in existence until February 2006, long after Biewer-Ohio ceased operations and even after the events (or more accurately inaction) alleged by Complainant as the basis for the claim occurred. See Biewer Lumber Articles of Organization, dated February 9, 2006 and Biewer Lumber Operating Agreement, dated April 4, 2006, attached as Exhibits D and E, respectively. This information was provided to Complainant seven months ago. See Exhibit J ("As to Biewer Lumber, LLC, this company was not even in existence at the time these issues arose. This company was formed in February 2006.") Complainant has advanced no plausible theory or explanation how a corporation could possibly be subject to a veil-piercing claim based on actions or inactions that *pre-date* its existence. Complainant's attempt to add Biewer Lumber on this basis must therefore be rejected.

B. Biewer Lumber, LLC Has Never "Operated" the Biewer-Ohio Facility

It is undisputed that Biewer Lumber did not even exist until February 2006, such that it would have been impossible for Biewer Lumber to have "operated" the Biewer-Ohio facility while it was in operation or at the time of the violations asserted in the Complaint, which are alleged in this Motion to have occurred in 2004-2005, and in reality would have occurred even earlier. Biewer-Ohio ceased operations by June 2001, approximately five years before Biewer Lumber existed. Moreover, Biewer Lumber is merely a sales company organized for the purpose of marketing and selling the various lumber products produced by other Biewer entities. See Exhibit C. As such, it has nothing to do with operation of *any* facility, let alone the Biewer-Ohio facility. There is no plausible basis on which Biewer Lumber could be held liable as "operator" of the Biewer-Ohio facility, thus making Complainant's attempt to add Biewer Lumber futile.

CONCLUSION AND REQUEST FOR RELIEF

There is no factual basis for adding JAB Company as a respondent to this action. Under clearly established and deeply ingrained principles of corporate law, a parent corporation is not liable for the acts of its subsidiaries, absent a showing that the corporate form has been misused to accomplish a wrongful act, such as fraud. While it is true and undisputed that JAB Company is the parent company of its wholly-owned subsidiary, Biewer-Ohio, nothing that Complainant has offered comes even remotely close to reaching the threshold necessary to ignore the separateness of these two corporations. All supervisory actions of JAB Company have been consistent with a normal parent-subsidiary relationship; and nothing has been presented by Complainant to show that the officers or directors of Biewer-Ohio ever acted contrary to the interests of Biewer-Ohio, but yet to the advantage of JAB Company. As such, the corporate veil cannot be pierced, as a matter of law, and amendment would be futile.

Likewise, Complainant has offered no competent evidence to show that JAB Company operated the Biewer-Ohio facility, such that Complainant's theory of direct "operator" liability must also be rejected, as a matter of law.

With regard to Biewer Lumber, Complainant's attempt to add this particular business entity is wholly misdirected. Biewer Lumber is indisputably *not* the parent company of Biewer-Ohio, and so there is no basis in fact or law for seeking to add Biewer Lumber on a veil-piercing theory. Moreover, it is undisputed that Biewer Lumber did not even exist until February 2006, and has never engaged in any type of operations at the Biewer-Ohio facility, thus making it impossible to impose direct "operator" liability against it.

Complainant's Motion to add JAB Company and Biewer Lumber is fatally defective, unduly delayed and is otherwise futile. Respondent respectfully requests, therefore, that this Honorable Tribunal deny Complainant's Motion To Amend.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondent

Dated: November 14, 2008

By: _____

Douglas A. Donnell
900 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 632-8000

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EXHIBIT A

AFFIDAVIT

STATE OF MICHIGAN

-ss-

County of St. Clair

Brian R. Biewer, being first duly sworn, deposes and says:

1. He is the Secretary-Treasurer of John A. Biewer Company of Ohio, Inc. and the keeper of the records.

2. John A. Biewer Co., Inc. is the sole shareholder of John A. Biewer Company of Ohio, Inc. and the holder of all of the issued stock thereof.

3. That the wholly owned subsidiary status of the Company has not changed from its inception at the time of this Affidavit.

4. Any and all loans from the parent company to John A. Biewer Company of Ohio, Inc. were used to pay for taxes or insurance and are reflected as a corresponding debits or credits on the Company balance sheet.

Further, deponent saith not.

Brian R. Biewer

Brian R. Biewer

SUBSCRIBED and sworn to before me this 14 day of November, 2008.

Carrie Sue McIntyre

Notary Public, St. Clair County, Michigan
Acting in St. Clair County, Michigan
My comm. exp.: July 21, 2014

CARRIE SUE McINTYRE
Notary Public, St. Clair County, MI
My Commission Expires, July 21, 2014

EXHIBIT B

C-101 Prescribed by Secretary of State — Anthony J. Celebrezze, Jr.

FC 813-1463

By MK
Date 9-24-10
Amount 125.00

Articles of Incorporation

— OF —

JOHN A. BIEMER COMPANY OF OHIO
(Name of Corporation)

The undersigned a majority of whom are citizens of the United States, desiring to form a corporation, for profit, under Sections 1701.01 et seq. of the Revised Code of Ohio, do hereby certify:

FIRST. The name of said corporation shall be

JOHN A. BIEMER COMPANY OF OHIO

SECOND. The place in Ohio where its principal office is to be located is 649 Landmark

Washington, Fayette County.
(City, Village or Township)

THIRD. The purposes for which it is formed are:

To engage in any lawful activity within the purposes for which corporations for profit may be formed under the Ohio General Corporation Law

1-813-1469

FOURTH: The number of shares which the corporation is authorized to have outstanding is

Five Hundred (500), all of which are common shares
without par value

FIFTH: The amount of stated capital with which the corporation shall begin business is

Five Hundred Dollars ($ 500.00).

IN WITNESS WHEREOF, We have hereunto subscribed our names this 2nd day

of September, 1952.

JOHN A. BIEWER COMPANY OF OHIO
(Name of Corporation)

x Richard N. Biewer
Richard N. Biewer

(INCORPORATORS' NAMES SHOULD BE TYPED OR PRINTED BENEATH SIGNATURES)

N. B. Articles will be returned unless accompanied by form designating statutory agent. See Section 1701.07, Revised Code of Ohio.

FC 813-1470

CONSENT FOR USE
OF SIMILAR NAME

On the 1st day of September, 19 60

the Board of Directors of JOHN A. BIEWER COMPANY
(Name of Corporation)
a Michigan corporation

passed the following resolution:

Resolved that JOHN A. BIEWER COMPANY, a Michigan
(Name of Corporation)
corporation

gives its consent to JOHN A. BIEWER COMPANY OF OHIO
(Name of New Company)

to the use of the name JOHN A. BIEWER COMPANY OF OHIO
(Name of New Company)

Signed Richard M Bruce
(Secretary or Assistant Secretary)

EF 813-1471

Original Appointment of Statutory Agent

The undersigned, being at least a majority of the incorporators of JOHN A. BIEWER COMPANY OF OHIO (Name of Corporation), hereby appoint Dennis Melczarczyk (Name of Agent) to be statutory agent upon whom any process, notice or demand required or permitted by statute to be served upon the corporation may be served.

The complete address of the agent is: 649 Landmark (Street),

Washington (City or Village) Fayette County, Ohio 43160 (Zip Code)

Date: September 18, 1980

x Richard N. Biewer (Incorporator)
Richard N. Biewer

(Incorporator)

(Incorporator)

(Incorporator)

Instructions

1) Profit and non-profit articles of incorporation must be accompanied by an original appointment of agent. R.C. 1701.04(C), 1702.04(C).

2) The statutory agent for a corporation may be (a) a natural person who is a resident of Ohio, or (b) an Ohio corporation or a foreign corporation licensed in Ohio which has a business address in this state and is explicitly authorized by its articles of incorporation to act as a statutory agent. R.C. 1701.07(A), 1702.06(A)

3) The agent's complete street address must be given; a post office box number is not acceptable. R.C. 1701.07(C), 1702.06(C).

4) An original appointment of agent form must be signed by at least a majority of the incorporators of the corporation. R.C. 1701.07(B), 1702.06(B)

Form C/AGO Appt. 1980
Prescribed by Secretary of State Anthony J. Celebrezze

EXHIBIT C

AFFIDAVIT

STATE OF MICHIGAN
-ss-
County of St. Clair

Brian R. Biewer, being first duly sworn, deposes and says:

1. He is a Manager of Biewer Lumber, LLC and the Company's sole responsibility is for marketing and sales of lumber products and that it does not engage in the treatment or production of lumber products.

Further, deponent saith not.

Brian R. Biewer
Brian R. Biewer

SUBSCRIBED and sworn to before me this 14 day of November, 2008.

Carrie Sue McIntyre
Notary Public, St. Clair County, Michigan
Acting in St. Clair County, Michigan
My comm. exp.: July 21, 2014

CARRIE SUE McINTYRE
Notary Public, St. Clair County, MI
My Commission Expires, July 21, 2014

EXHIBIT D

C&S 700 (3/93)

MICHIGAN DEPARTMENT OF COMMERCE - CORPORATION AND SECURITIES BUREAU

Date Received		(FOR BUREAU USE ONLY)

Name
Douglas S. Touma

Address
316 McMorran Boulevard

City State Zip
Port Huron, Michigan 48060

Tran Info:1 11392499-1 01/26/06
Cnk#: 24384 Amt: $50.00
ID: TOUMA WATSON WHALING COURY & CASTEL

FILED

EFFECTIVE DATE: FEB 09 2006

Administrator
BUREAU OF COMMERCIAL SERVICES

DOCUMENT WILL BE RETURNED TO NAME AND ADDRESS INDICATED ABOVE

B85516

ARTICLES OF ORGANIZATION

For use by Domestic Limited Liability Companies

(Please read information and instructions on last page)

Pursuant to the provisions of Act 23, Public Acts of 1993, the undersigned execute the following Articles:

ARTICLE I

The name of the limited liability company is: **Biewer Lumber, LLC**

ARTICLE II

The purpose or purposes for which the limited liability company is formed is to engage in any activity within the purposes for which a limited liability company may be formed under the Limited Liability Company Act in Michigan.

ARTICLE III

The duration of the limited liability company is: **Perpetual**

ARTICLE IV

1. The address of the registered office is:
   300 Oak Street (Street Address) **St. Clair** (City), **Michigan** **48079** (ZIP Code)
2. The mailing address of the registered office if different than above:
   P.O. Box 497 (P.O. Box) **St. Clair** (City), **Michigan** **48079** (ZIP Code)
3. The name of the resident agent at the registered office is: **Timothy J. Biewer**

Signed this 24th day of January, 2006

BT Holdings, LLC, a Michigan Limited Liability Company

By: _____
Timothy J. Biewer, Member

EXHIBIT E

OPERATING AGREEMENT
FOR
Biewer Lumber, LLC

A Michigan Limited Liability Company

THIS OPERATING AGREEMENT is made and entered into as of APRIL 4, 2006 by and among Biewer Lumber, LLC, a Michigan Limited Liability Company (the "Company") and the persons executing this Operating Agreement as members of the Company and all of those who shall hereafter be admitted as members (individually, a "Member" and collectively, the "Members") who agree as follows:

ARTICLE I

ORGANIZATION

1.1 **Formation**. The Company has been organized as a Michigan Limited Liability Company under and pursuant to the Michigan Limited Liability Company Act, being Act No. 23, Public Acts of 1993, as amended, (the "Act") by the filing of Articles of Organization ("Articles") with the Department of Commerce of the State of Michigan as required by the Act.

1.2 **Name**. The name of the Company shall be Biewer Lumber, LLC. The Company may also conduct its business under one or more assumed names.

1.3 **Purposes**. The purposes of the Company are to engage in any activity for which Limited Liability Companies may be formed under the Act. The Company shall have all the powers necessary or convenient to effect any purpose for which it is formed, including all powers granted by the Act.

1.4 **Duration**. The Company shall continue in existence for the period fixed in the Articles for the duration of the Company or until the Company shall be sooner dissolved and its affairs wound up in accordance with the Act or this Operating Agreement.

1.5 **Registered Office and Resident Agent**. The Registered Office and Resident Agent of the Company shall be as designated in the initial Articles or any amendment thereof. The Registered Office and/or Resident Agent may be changed from time to time. Any such change shall be made in accordance with the Act. If the Resident Agent shall ever resign, the Company shall promptly appoint a successor.

1.6 **Intention for Company**. The Members have formed the Company as a Limited Liability Company under and pursuant to the Act. The Members specifically intend and agree that the Company not be a partnership (including, a limited partnership) or any other venture, but a Limited Liability Company under and pursuant to the Act. No Member or Manager shall

be construed to be a partner in the Company or a partner of any other Member, Manager or person and the Articles, this Operating Agreement and the relationships created thereby and arising therefrom shall not be construed to suggest otherwise.

ARTICLE II

BOOKS, RECORDS AND ACCOUNTING

2.1 **Books and Records**. The Company shall maintain complete and accurate books and records of the Company's business and affairs as required by the Act and such books and records shall be kept at the Company's Registered Office or such other place as the Company may direct.

2.2 **Fiscal Year; Accounting**. The Company's fiscal year shall be the calendar year. The particular accounting methods and principles to be followed by the Company shall be selected by the Members from time to time.

2.3 **Reports**. The Members shall provide reports concerning the financial condition and results of operation of the Company and the Capital Accounts of the Members to the Members in the time, manner and form as the Members determine. Such reports shall be provided at least annually as soon as practicable after the end of each calendar year and shall include a statement of each Member's share of profits and other items of income, gain, loss, deduction and credit.

2.4 **Member's Accounts**. Separate Capital Accounts for each Member shall be maintained by the Company. Each Member's Capital Account shall reflect the Member's capital contributions and increases for the Member's share of any net income or gain of the Company. Each Member's Capital Account shall also reflect decreases for distributions made to the Member and the Member's share of any losses and deductions of the Company.

ARTICLE III

CAPITAL CONTRIBUTIONS

3.1 **Initial Commitments and Contributions**. By the execution of this Operating Agreement, the initial Members hereby agree to make the capital contributions set forth in the attached Exhibit A. The interests of the respective Members in the total capital of the Company (their respective "Sharing Ratios") shall remain as set forth in Exhibit A and shall not be adjusted. Any additional Member (other than an assignee of a membership interest who has been admitted as a Member) shall make the capital contribution set forth in an Admission Agreement. No interest shall accrue on any capital contribution and no Member shall have any right to withdraw or to be repaid any capital contribution except as provided in this Operating Agreement.

3.2 **Additional Contributions**. In addition to the initial capital contributions, the Members may determine from time to time that additional capital contributions are needed to enable the Company to conduct its business and affairs. Upon making such a determination, notice thereof shall be given to all Members in writing at least ten (10) business days prior to the date on which such additional contributions are due. Such notice shall describe in reasonable detail, the purposes and uses of such additional capital, the amounts of additional capital required, and the date by which payment of the additional capital is required. Each Member shall be obligated to make such additional capital contribution to the extent of any unfulfilled commitment needed to maintain that Member's Sharing Ratio.

3.3 **Failure to Contribute**. If any Member fails to make a capital contribution when required, the Company may, in addition to the other rights and remedies the Company may have under the Act or applicable law, take such enforcement action (including, the commencement and prosecution of court proceedings) against such Member as the Members consider appropriate. Moreover, the remaining Members may elect to contribute the amount of such required capital themselves according to their respective Sharing Ratios. In such an event, the remaining Members shall be entitled to treat such amounts as an extension of credit to such defaulting Member, payable upon demand, with interest accruing thereon at the rate of seven (7%) per annum until paid, all of which shall be secured by such defaulting Member's interest in the Company, each Member who may hereafter default, hereby granting to each Member who may hereafter grant such an extension of credit, a security interest in such defaulting Member's interest in the Company.

ARTICLE IV

ALLOCATIONS AND DISTRIBUTIONS

4.1 **Allocations**. Except as may be required by the Internal Revenue Code of 1986 as amended or this Operating Agreement, net profits, net losses, and other items of income, gain, loss, deduction and credit of the Company shall be allocated among the Members in accordance with their Sharing Ratios.

4.2 **Regulatory Allocations**. The following regulatory allocations apply:

A. **Minimum-Gain Chargeback**. To the extent and in the manner required by the Treas Reg 1.704-2(f), if there is a net decrease in Company Minimum Gain for any fiscal year, each Member shall be allocated items of Company income or gain for such fiscal year (and, if necessary, succeeding fiscal years) equal to such Member's share of the net decrease in Company Minimum Gain determined under Treas Reg 1.704-2(g). This Section 4.2(A) shall be interpreted and applied in a manner consistent with the minimum-gain chargeback requirements of Treas Reg 1.704-2(f).

B. **Member Minimum-Gain Chargeback**. To the extent and in the manner required by Treas Reg 1.704-2(i)(4), if there is a net decrease in Member Minimum Gain, each

Member with a share of Member Minimum Gain shall be allocated items of Company income and gain for such fiscal year (and, if necessary, succeeding fiscal years) in an amount equal to the Member's share of the net decrease in Member Minimum Gain. The items to be allocated shall be determined in accordance with Treas Reg 1.704-2(f)(6). This section 4.2(B) shall be interpreted and applied in a manner consistent with the minimum-gain chargeback requirement of Treas Reg 1.704-2(i)(4).

C. **Qualified Income Offset.** Any Member who unexpectedly receives any adjustment, allocation, or distribution described in Treas Reg 1.704-1(b)(2)(ii)(d)(4) and (5), or (6) shall be allocated items of Company income and gain (consistent with a pro rata portion of each item of income, including gross income, and gain for such fiscal year) in an amount and manner sufficient to eliminate, as quickly as possible, any deficit in the Member's Capital Account.

D. **Company Nonrecourse Deductions.** Any Company Nonrecourse Deductions shall be allocated among the Members in accordance with Treas Reg 1.704-2(e).

E. **Member Nonrecourse Deductions.** Member Nonrecourse Deductions shall be allocated to the Members who bear the economic risk of loss with respect to the Member Nonrecourse Debt to which Member Nonrecourse Deductions are attributable. This Section 4.2(E) shall be interpreted and applied in a manner consistent with Treas Reg 1.704-2(i)(1).

4.3 **Allocations Regarding Contributed Property.** Items of income, gain, loss, and deduction with respect to any property contributed to the Company by any Member shall be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for federal income tax purposes and its value for Capital Account purposes, in accordance with IRC 704(c) and the Treasury Regulations promulgated thereunder. If the value of the property is later adjusted, subsequent allocations of income, gain, loss, and deduction with respect to the property shall be made in accordance with any method permitted by IRC 704(c) and the Treasury Regulations promulgated under it.

4.4 **Definitions.** For purposes of this Operating Agreement, the following definitions shall apply:

A. **Company Nonrecourse Deductions** has the same meaning as that term in Treas Reg 1.704-2(b)(1).

B. **Member Nonrecourse Deductions** has the same meaning as that term in Treas Reg 1.704-2(i)(2).

C. **Member Nonrecourse Debt** has the same meaning as that term in Treas Reg 1.704-2(b)(4).

D. **Member Minimum Gain** means an amount, with respect to any Member Nonrecourse Debt, as determined in accordance with Treas Reg 1.704-2(i)(3).

F. **Company Minimum Gain** has the same meaning as that term in Treas Reg 1.704-2(b)(2) and (d).

4.5 **Interpretation**. The Members intend that the allocations of the Company's profits and losses shall be applied in a manner consistent with IRC 704 and the Treasury Regulations promulgated under it. The provisions of this Article IV shall be interpreted in a manner consistent with IRC 704 and the Treasury Regulations promulgated under it.

4.6 **Distributions**. The Company may make distributions to the Members from time to time. Distributions may be made only after the Members determine in their reasonable judgment, that the Company has sufficient cash on hand which exceeds the current and the anticipated needs of the Company to fulfill its business purposes (including, needs for operating expenses, debt service, acquisitions, reserves and mandatory distributions, if any). All distributions shall be made to the Members in accordance with their Sharing Ratios. Distributions shall be in cash or property or partially in both, as determined by the Members. No distribution shall be declared or made if, after giving it effect, the Company would not be able to pay its debts as they become due in the usual course of business or the Company's total assets would be less than the sum of its total liabilities plus, the amount that would be needed if the Company were to be dissolved at the time of the distribution, to satisfy the preferential rights of other Members upon dissolution that are superior to the rights of the Members receiving the distribution.

ARTICLE V

DISPOSITION OF MEMBERSHIP INTERESTS

5.1 Membership interest of each Member shall be subject to and governed by the Business Entity Cross Purchase Agreement executed by the Members covering their respective interests in the Company and other entities.

ARTICLE VI

MEETINGS OF MEMBERS

6.1 **Voting**. All Members shall be entitled to vote on any matter submitted to a vote of the Members. Notwithstanding the foregoing, the Members shall have the right to vote on all of the following: (a) the dissolution of the Company pursuant to Paragraph 9.1(c) of this operating Agreement; (b) the merger of the Company; (c) a transaction involving an actual or potential conflict of interest between a Member and the Company; (d) an amendment to the Articles; or (e) the sale,

exchange, lease or other transfer of all or substantially all of the assets of the Company other than in the ordinary course of business.

6.2 **Required Vote**. Unless a greater vote is required by the Act or the Articles, the affirmative vote or consent of a majority of the Sharing Ratios of all the Members entitled to vote or consent on such matter shall be required.

6.3 **Meetings**. Meeting of Members for the transaction of such business as may properly come before the Members, shall be held at such place, on such date and at such time as the Members shall determine. Special meetings of Members for any proper purpose or purposes may be called at any time by the Members or the holders of at least ten percent (10%) of the Sharing Ratios of all Members. The Company shall deliver or mail written notice stating the date, time, place and purposes of any meeting to each Member entitled to vote at the meeting. Such notice shall be given not less than ten (10) no more than sixty (60) days before the date of the meeting. All meetings of Members shall be presided over by a Chairperson who shall be a Member so designated by the Members.

6.4 **Consent**. Any action required or permitted to be taken at a meeting of the Members may be taken without a meeting, without prior notice, and without a vote, if consents in writing, setting form the action so taken, are signed by the Members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all membership interests entitled to vote on the action were present and voted. Every written consent shall bear the date and signature of each Member who signs the consent. Prompt notice of the taking of action without a meeting by less than unanimous written consent shall be given to all Members who have not consented in writing to such action.

ARTICLE VII

MANAGEMENT

7.1 **Management of Business**. The Company shall be managed by persons ("Managers") who shall be designated by resolutions by the Members. The terms, duties, compensation and benefits, if any, of the Mangers shall be determined by the Members. The Managers shall serve at the will and pleasure of the Members.

7.2 **Designation of Manager**. The Members for the purposes of this Agreement designate Timothy J. Biewer and Brian R. Biewer as the initial Managers.

7.3 **General Powers of Managers**. Except as may otherwise be provided in this Operating Agreement, the ordinary and usual decisions concerning the business and affairs of the Company shall be made by the Managers. Each Manager has the power, on behalf of the Company, to do all things necessary or convenient to carry out the business and affairs of the Company, including, the power to: (a) purchase, lease or otherwise acquire any real or personal property; (b)

sell, convey, mortgage, grant a security interest in, pledge, lease, exchange or otherwise dispose or encumber any real or personal property; (c) open one or more depository accounts and make deposits into and checks and withdrawals against such accounts; (d) borrow money, incur liabilities, and other obligations; (e) enter into any and all agreements and execute any and all contracts, documents and instruments; (f) engage employees and agents, define their respective duties, and establish their compensation or remuneration; (g) establish pension plans, trusts, profit sharing plans and other benefit and incentive plans for Members, employees and agents of the Company; (h) obtain insurance covering the business and affairs of the Company and its property and on the lives and well being of its Member employees and agents; (i) commence prosecute or defend any proceeding in the Company's name; and (j) participate with others in partnerships, joint ventures and other associations and strategic alliances.

7.4 **Limitations**. Notwithstanding the foregoing and any other provision contained in this Operating Agreement to the contrary, no act shall be taken, sum expended, decision made, obligation incurred or power exercised by any Manager on behalf of the Company except by the unanimous consent of all Members with respect to (a) any significant and material purchase, receipt, lease, exchange or other acquisition of any real or personal property or business; (b) the sale of all or substantially all of the assets and property of the Company; (c) any mortgage, grant of security interest, pledge or encumbrance upon all or substantially all of the assets and property of the Company; (d) any merger; (e) any amendment or restatement of these Articles or this Operating Agreement; (f) any mater which could result in a change in the amount or character of the Company's capital; (g) any change in the character of the business and affairs of the Company (h) the commission of any act which would make it impossible for the Company to carry on its ordinary business and affairs; or (i) any act that would contravene any provision of the Articles of this Operating Agreement or the Act.

7.5 **Standard of Care; Liability**. Every Manager shall discharge his or her duties as a manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the Company. A Manager shall not be liable for any monetary damages to the Company for any breach of such duties except for receipt of a financial benefit to which the manager is not entitled; voting for or assenting to a distribution to Members in violation of this Operating Agreement or the Act; or a knowing violation of the law.

ARTICLE VIII

EXCULPATION OF LIABILITY; INDEMNIFICATION

8.1 **Exculpation of Liability**. Unless otherwise provided by law or expressly assumed, a person who is a Member or Manager, or both, shall not be liable for the acts, debts or liabilities of the Company.

8.2 **Indemnification**. Except as otherwise provided in this Article, the Company shall indemnify any Member and may indemnify any employee or agent of the Company who was or is a party or is threatened to be made a party to a threatened, pending or completed action, suit or

proceeding, whether civil, criminal, administrative, or investigative, and whether formal or informal, other than an action by or in the right of the Company, by reason of the fact that such person is or was a Member, employee or agent of the Company against expenses, including attorneys fees, judgments, penalties, fees and amounts paid in settlement actually and reasonably incurred by such person in connection with the action, suit or proceeding, if the person acted in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner that such person reasonably believed to be in the best interests of the Company and with respect to a criminal action or proceeding, if such person had no reasonable cause to believe such person's conduct was unlawful. To the extent that a Member, employee or agent of the Company has been successful on the merits or otherwise in defense of an action, suit or proceeding or in defense of any claim, issue or other matter in the action, suit or proceeding, such person shall be indemnified against actual and reasonable expenses, including attorneys fees, incurred by such person in connection with the action, suit or proceeding and any action, suit or proceeding brought to enforce the mandatory indemnification provided herein. Any indemnification permitted under this Article, unless ordered by a court, shall be made by the Company only as authorized in the specific case upon a determination that the indemnification is proper under the circumstances because the person to be indemnified has met the applicable standard of conduct and upon an evaluation of the reasonableness of expenses and amounts paid in settlement. This determination and evaluation shall be made by a majority vote of the Members who are not parties or threatened to be made parties to the action, suit or proceeding. Notwithstanding the foregoing to the contrary, no indemnification shall be provided any Member, employee or agent of the Company for or in connection with the receipt of a financial benefit to which such person is not entitled, voting for or assenting to a distribution to Members in violation of this Operating Agreement or the Act, or a knowing violation of law.

ARTICLE IX

DISSOLUTION AND WINDING UP; CONTINUATION OF BUSINESS

9.1 **Dissolution**. The Company shall dissolve and its affairs shall be wound up on the first to occur of the following events: (a) at any time specified in the Articles or this Operating Agreement; (b) upon the happening of any event specified in the Articles or this Operating Agreement; or (c) by the unanimous consent of all of the Members.

9.2 **Winding Up**. Upon dissolution, the Company shall cease carrying on its business and affairs and shall commence the winding up of the Company's business and affairs and complete the winding up as soon as practicable. Upon the winding up of the Company, the assets of the Company shall be distributed first to creditors to the extent permitted by law, in satisfaction of Company debts, liabilities and obligations and then to Members and former Members first, in satisfaction of liabilities for distributions and then, in accordance with Section 9.3. Such proceeds shall be paid to such Members within ninety (90) days after the date of winding up.

9.3 **Liquidating Distributions**. If the Company is dissolved or is liquidated within the

meaning of Treas Reg 1.704-1(b)(2)(ii)(g), then in compliance with Treas Reg 1.704-1(b)(2)(ii)(b)(2), all liquidating distributions shall be made to the Members who have positive Capital Accounts, in accordance with such positive Capital Account balances, but only after the Capital accounts have been adjusted for all prior contributions and distributions and all allocations under Article IV for all periods.

9.4 **Continuation of Company After Disassociation**. Notwithstanding the death, withdrawal, expulsion, bankruptcy or dissolution of a Member or the occurrence of any other event that terminates the continued membership of a Member in the Company, the business and affairs of the Company shall continue. Upon any such event, the Company shall purchase and the holder thereof shall sell, the disassociating Member's interest in the Company in accordance with the Cross Purchase Agreement between the Members dated this 19th day of November, 2001, covering this and other items.

ARTICLE X

MISCELLANEOUS PROVISIONS

10.1 **Terms**. Nouns and pronouns will be deemed to refer to the masculine, feminine, neuter, singular and plural, as the identity of the person or persons, firm or corporation may in the context require.

10.2 **Article Headings**. The Article headings contained in this Operating Agreement have been inserted only as a manner of convenience and for reference, and in no way shall be construed to define, limit or describe the scope or intent of any provision of this Operating Agreement.

10.3 **Counterparts**. This Operating Agreement may be executed in several counterparts, each of which will be deemed an original but all of which will constitute one and the same.

10.4 **Entire Agreement**. This Operating Agreement constitutes the entire agreement among the parties hereto and contains all of the agreements among said parties with respect to the subject matter hereof. This Operating Agreement supersedes any and all other agreements, either oral or written, between said parties with respect to the subject matter hereof.

10.5 **Severability**. The invalidity or unenforceability of any particular provision of this Operating Agreement shall not affect the other provisions hereof, and this Operating Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

10.6 **Amendment**. This Operating Agreement may be amended or revoked at any time by a written agreement executed by not less than seventy-five (75%) percent in interest of the Members

to this Operating Agreement. No change or modification to this Operating Agreement shall be valid unless in writing and signed by all of the parties to this Operating Agreement.

10.7 **Notices.** Any notice permitted or required under this Operating Agreement shall be conveyed to the party at the address reflected in this Operating Agreement and will be deemed to have been given, when deposited in the United States mail, postage paid, or when delivered in person, or by courier or by facsimile transmission.

10.8 **Binding Effect.** Subject to the provisions of this Operating Agreement relating to transferability, this Operating Agreement will be binding upon and shall inure to the benefit of the parties, and their respective distributees, heirs, successors and assigns.

10.9 **Governing Law.** This Operating Agreement is being executed and delivered in the State of Michigan and shall be governed by, construed and enforced in accordance with the laws of the State of Michigan.

IN WITNESS WHEREOF, the parties hereto make and execute this Operating Agreement on the dates set below their names, to be effective on the date first above written.

WITNESSETH:

THE COMPANY
BT Holdings, LLC, a Michigan Limited Liability Company

TIMOTHY J. BIGNER, **Member**
Date: 4/4/06

MEMBER:
BT Holdings, LLC, a Michigan Limited Liability Company

By: BRIAN R. BIGNER, **Member**
Date: 4/4/06

EXHIBIT A

Member	Interest in Capital
BT Holdings, LLC	**100%**

EXHIBIT F

AFFIDAVIT

STATE OF MICHIGAN

-ss-

County of St. Clair

Brian R. Biewer, being first duly sworn, deposes and says:

1. That BT Holdings, LLC is a Michigan Limited Liability Company and that he is a member of that Limited Liability Company.

2. That the Michigan Limited Liability Company has only two members, Brian R. Biewer and Timothy J. Biewer.

Further, deponent saith not.

_____

Brian R. Biewer

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2008.

_____

Notary Public, St. Clair County, Michigan
Acting in St. Clair County, Michigan
My comm. exp.: _____

EXHIBIT G

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

REPLY TO THE ATTENTION OF:

August 14, 2007

Douglas S. Tuma, Sr.
Tuma Watson Whaling Law Office
316 McMorran Boulevard
Port Huron, Michigan 48060

RE: John A. Biewer Company of Ohio, Inc.
John A. Biewer Company of Toledo, Inc.
Resource Conservation and Recovery Act ("RCRA") Violations

Dear Mr. Tuma:

I would like to thank you and your clients for the submission of information relative to their financial circumstances, by your letter of May 23, 2007. Michael Cunningham (Region 5, RCRA Program) and I now have had an opportunity to review this information with financial analysts from Industrial Economics, Incorporated, in Cambridge, Massachusetts, which is under contract with the Agency to provide expert analysis regarding financial issues raised in enforcement cases before the Administrator.

We are of the opinion that, standing alone, the information provided on May 23, 2007, is insufficient for the purpose of either of your clients supporting a claim of their "inability to pay" the penalty amounts proposed for their alleged violations of RCRA. I will take a moment to explain the issue, and put it within the context of the Administrator's civil penalty assessment process.

The Administrator's enforcement staff has evidence which it believes will support a finding of liability against each of your clients for their continuing violation of the Resource Conservation and Recovery Act ("RCRA"). The violations, which involve the closure of drips pads at each of their facilities, were identified in letters sent to each of your clients, dated March 14, 2007. As a consequence of these circumstances, enforcement staff is prepared to file an administrative complaint against each of your clients alleging the violations identified, and proposing that the Administrator assess a civil penalty against your clients for those violations. Any such proceeding will be governed by the Administrative Procedure Act, and the Administrator's Rules, policy, and precedent established in the published decisions of the Environmental Appeals Board ("the Board"). See Iran Air v. Kugleman, 996 F.2d 1253, 1260 (D.C. Cir. 1993). The Administrator has delegated his final decisionmaking authority in these matters to the Board.

Board ("the Board"). See Iran Air v. Kugleman, 996 F.2d 1253, 1260 (D.C. Cir. 1993). The Administrator has delegated his final decisionmaking authority in these matters to the Board. The Board has addressed the issue of "ability to pay" in the Administrator's RCRA civil penalty assessment process. In Re Carroll Oil Company, 10 E.A.D. 635 (July 31, 2002). This decision is available electronically on the Board's website, or, on your request, I can mail you a hard copy of the decision. In this decision, the Board ruled on enforcement staff's appeal from an initial decision of an Administrative Law Judge ("ALJ"). Enforcement staff argued that:

> the ALJ erred by finding in favor of Carroll Oil's claims that it was unable to pay a penalty and return the facility to compliance [footnote omitted] because 'Carroll Oil failed to sustain its burden of proof and provide substantial evidence in the record to support any such finding.'

Id. 661. The Board noted that "ability to pay" is not a statutory penalty criteria identified in RCRA, and "considering 'ability to pay' is not part of [enforcement staff's] prima facie burden in determining a penalty amount." Id. 662. The Board ruled that, in order to be considered in a RCRA penalty assessment proceeding, the "ability to pay" issue "must be raised and proven as an affirmative defense by the respondent." Id. 663. Consequently, the Board analyzed the evidence Carroll Oil Company presented at hearing, to determine if it was sufficient to support such a claim.

The Board reviewed a record "consisting primarily of tax records, a mortgage deed, and tax liens," as well as "Carroll Oil's close affiliation with other entities as this bears upon the company's ability to pay[.]" Id. The Board re-iterated the Administrator's position that:

> the Agency may look at the financial condition of a related company to determine whether the related company may be a legitimate source of funds affecting the respondent's ability to pay or the economic impact of the penalty.

Id. 665. The Board noted that Carroll Oil Company had not been forthcoming in responding to enforcement staff's pre-hearing inquiries concerning its financial arrangements. Id. 666. It ultimately found that Carroll Oil Company failed to provide sufficient information in the record to fairly evaluate its relationship with another company, and, consequently, that its claim of "ability to pay" was not supported and would not be considered in determining an appropriate penalty amount to assess against Carroll Oil Company. Id. 668.

Though your clients alone have the burden of raising the issue of "ability to pay," and, in the pre-hearing process and at hearing, submitting as evidence information relevant to any such claim, we are very interested in evaluating any such claim your clients may have prior to filing an administrative complaint and initiating the formal litigation process. The earlier we have this information, the earlier the opportunity both parties will have to resolve this matter without the cost and risk of litigation. Consequently, we are now asking that your clients provide further financial information so that we may evaluate their claim of "inability to pay." It is

our preference that they provide such information at this time, however, if they chose not to so, we will be filing administrative complaints, thereby invoking the litigation process.

I would note that John A. Biewer Company of Toledo, John A. Biewer Company of Ohio, John A. Biewer Co., Inc., and Biewer Lumber LCC, each have the same officers, Richard N. Biewer and his two sons, Brian R. and Timothy J. Biewer. I would further note that neither of your clients is a functioning entity with any significant income, and each must meet obligations with funds from the outside. Moreover, the real estate and equipment of each of your clients are assets which, though currently not being put to productive use, may very well have value.

Consequently, with regard to each of the companies identified in the preceding paragraph, I would ask that you provide all information requested in the attachment to this letter, no later than September 21, 2007.

Thank you very much for your assistance in this matter. Please feel free to call me at (312) 886-7947 should you have any questions.

Very truly yours,

Richard R. Wagner
Senior Attorney

ATTACHMENT

cc: M. Cunningham (DE-9J)
G. Coad, Industrial Economics, Incorporated

C:\EPAWork\Documents\Biewer-attyltr-abpay2.wpd

ATTACHMENT

(August 14, 2007, Wagner-Tuma Letter)

To allow the U.S. EPA Administrator's enforcement staff to further assess the financial capability of the John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, please submit the following information:

1. For John A. Biewer Company of Toledo and John A. Biewer Company of Ohio provide complete tax returns including all schedules and attachments for 1997, 1998, 1999, 2000 and 2001.
2. For John A. Biewer Co., Inc., and Biewer Lumber LCC, provide complete tax returns including all schedules and attachments for 1997 to present.
3. For each company, complete year-end financial statements, including the auditor's letter, balance sheet, income statement, statement of cash flows and notes, for 1997 through the present. (Note that the financial statements submitted to date are incomplete, and include no notes or statement of cash flows. If such detail does not exist, please advise.)
4. An explanation of the current ownership of John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, including a corporate map showing the relationship of each of these companies with John A. Biewer Co., Inc., Biewer Lumber LLC, and all other related entities.
5. A history of the ownership of John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, from 1997 to the present.
6. A history of the officers of John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, from 1997 to the present.
7. A history of the Board of Directors of John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, from 1997 to the present.
8. Copies of the Board of Directors' Meeting Minutes, Resolutions, or any other records of the Board's decisions for John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, for January 1, 1997 to present.
9. A history of the individuals responsible for the management and operation of John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, for January 1, 1997 to the present.
10. For John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, identify and describe all related party transactions for the period of January 1, 1997 to the present.
    a. For each transaction, the description should include the nature of the transaction, the related party name, the date of the transaction, and the amount of the transaction.
    b. For loan or other financing transactions, provide copies of the agreements with the third party.

11. An itemization of the fixed assets currently owned by John A. Biewer Company of Toledo and John A. Biewer Company of Ohio (e.g. an asset ledger) that shows a brief description of the asset, the year it was put in service, original cost, the accumulated depreciation and an estimate of the current market value.

12. With respect to any real estate assets of John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, if the marketability of the asset is impaired by environmental contamination, provide an estimate of the costs of and plans for remediation and clean-up. Provide an estimate of the market value of the property after remediation.

13. With respect to all real estate assets owned by John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, provide all documentation regarding the appraised or assessed value of the property.

14. With respect to the rental income reported by John A. Biewer Company of Toledo, Inc. in 2006, explain the specific nature of this arrangement, including the specific property that is rented, who rents the property, and the amount of rent paid per month. If the renter is a related party, please provide a copy of the lease agreement.

EXHIBIT H

September 28, 2007

Mr. Richard R. Wagner
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Re: John A. Biewer Company of Ohio, Inc.
John A. Biewer Company of Toledo, Inc.

Dear Mr. Wagner:

I have had an opportunity to review your letter of August 14, 2007 in connection with the above two companies and would respond as follows:

These companies are wholly owned subsidiaries and do not file separate income tax returns.

Biewer Lumber, LLC was established on May 1, 2007 substantially after both of the companies ceased activities.

John A. Biewer Co., Inc. is the parent of the above two listed companies. It is the position of John A. Biewer Co., Inc. that it is not liable for the fines claimed against its subsidiary and, therefore, any information as to its assets is not relevant. See State of Michigan vs. John A. Biewer Co., Inc., 1993 Westlaw, 186557, Western District of Michigan.

We are providing financial statements and income statements for each company for the periods 1997 through December 31, 2006.

John A. Biewer Co. of Toledo, Inc. is a wholly owned subsidiary of John A. Biewer Co., Inc. and it has no relationship to Biewer Lumber, LLC. The John A. Biewer Co. of Ohio, Inc. is a wholly owned subsidiary of John A. Biewer Co., Inc. and it has no relationship to Biewer Lumber, LLC.

John A. Biewer Co. of Toledo, Inc. and John A. Biewer Co. of Ohio, Inc. have continually from 1997 to present, been wholly owned subsidiaries of John A. Biewer Co., Inc. John A.

Biewer Company of Toledo, Inc. last treated any lumber or had any operations in October of 1997 at which time, Jason Garrett was the plant manager. Since October of 1997, the company had been inactive except for the rental of the real estate as previously discussed and disclosed in the attached information.

As to John A. Biewer Co. of Ohio, Inc. it last treated lumber when it was in operation in June of 2001 and the plant manager at that time was Jim Anderson. John A. Biewer Co. of Ohio, Inc. has had no operational activity since June of 2001 and has remained inactive. As I previously indicated, although there has been attempts since 2001 to sell or lease all or any part of the property. There has been no activity on that site since June of 2001. Attached is a list of the assets of each company indicating the book value of the remaining assets. It is highly unlikely that there is much, if any, cash value to the Court House assets.

Each company is prepared to turn over to the EPA all of its current assets free of any claim by the parent company for un-reimbursed expenses.

As to John A. Biewer Co. of Toledo, Inc. some remediation has been undertaken. There remains some unknown remediation requirements for potential underground lines. The company was in the process of looking into that potential remediation in the spring of 2007 when the claim notices were filed by the EPA. The company did not build that plant and, therefore, is not sure of any underground lines. They have not been able to determine whether or not it would be any value to the property if remediation could be taken and completed. It is doubtful that at the current rental value, there is any substantial net equity in the Toledo property, although without completing the investigation as to the remaining radiation, the company is not able to determine the market value. The current tenant is not willing to purchase the property in its current condition. The Toledo assets as shown, are net book value and probably do not reflect a current market value.

Neither Toledo nor Ohio sites have had any appraisals or assessments by outside parties as to value. The current rental rate for the Toledo property is $6,300 per month which, after expenses, provides approximately $53,500 in net income. The Lessee is an unrelated party.

As to the Washington Court House facility, the parent company has been paying the taxes and insurance since the time that it ceased operations and is shown on the information previously submitted as a substantial inter-company accounts payable from Washington Court House to the parent company for these unreimbursed costs.

As to Toledo, because of past expenses paid by the company that the parent company were not reimbursed by Toledo, there currently remains an inter-company account payable from Toledo to the parent company as of close of 2006 of $53,361. See attached statement.

If you have any questions, please let me know.

Very truly yours,

TOUMA, WATSON, WHALING,
COURY & CASTELLO, P.C.

Douglas S. Touma

DST/mbw
Enclosures
CC: Mr. Gary E. Olmstead, Biewer Lumber

EPA

U.S. Environmental Protection Agency, Region IX

Financial Statement for Businesses *

(If additional space is needed, attach a separate sheet)

1. Your name and address (including zipcode and county)	1a. Business name and address (including zipcode and county)	2. Business phone number
Gary E. Olmstead 812 S. Riverside St. Clair, MI 48079	John A. Biewer Co. of Ohio 649 Lakdmark Boulevard Washington Courthouse, OH	(810) 329-4789

4. (Check appropriate box)

- [ ] Sole proprietor
- [ ] Trust
- [ ] Partnership
- [ ] Other (specify) _____
- [XX] Corporation

3. Name and address of registered agent (including zipcode and county)

Brian R. Biewer
812 S. Riverside
St. Clair, MI 48079

5. State of incorporation (or country if foreign)	5a. Employer Identification Number	6. Date of incorporation	7a. Type of business / 7b. SIC Code
Ohio	31-0988266	September 26, 1980	

8. Information about owner, partners, officers, directors, major shareholder (5% or more stock ownership), other holders of more than 5% equity interest, holders of rights to purchase more than equity interest and other persons with an ability to control.

Name and Title	Effective Date	Home Address	Social Security Number (optional)	Phone Number	Total Shares or Interest
John A. Biewer Co., Inc.	9/26/80	812 S. Riverside St. Clair, MI 48079		810-329-4789	100%

Section I General Financial Information

9. Last three years Federal and state income tax returns	Forms Filed	Tax Years ended	Net income before taxes
▶			

10. Bank accounts (List all types of accounts including checking, savings, certificates of deposit, etc.)

Name of Institution	Address	Type of Account	Account No.	Balance
None				
		Total (Enter in item 19) ▶		

11. Bank Credit available (Lines of credit, etc.)

Name of Institution	Address	Credit Limit	Amount Owed	Credit Available	Monthly
None					
Totals ▶					

12. Location, box number, and contents of all safe deposit boxes rented or accessed

* This information is requested pursuant to Section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604, and is not subject to approval of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501, et seq.

Section I - *continued* General Financial Information

13. Real property

	Brief Description and Type of Ownership	Address *(Include county, state and parcel number)*
a.	Plant Site	649 Landmark Boulevard Washington Courthouse, Ohio
b.		
c.		

14. Insurance policies owned with business as beneficiary

Name Insured	Company	Policy Number	Type	Face Amount	Available Loan Value
None					
		Total *(Enter in item 21)* ▶			

15. Additional Information *(Court and administrative proceedings by or against the business, settlement agreements, agreements to purchase or sell tangible or financial assets other than in the ordinary course of business, legal claims (whether asserted or not), bankruptcies, repossessions, recent transfers of assets for less than full value, anticipated increases in income, options to buy or sell real or personal property, real or personal property being purchased under contract, real or personal property being held on behalf of the business).*

15a. List all subsidiaries owned, joint ventures, partnerships and other entities controlled by the business. Provide current market value of the business' interest in such subsidiary or other entity.

16. Federal government departments or agencies with whom you have a contract for payment of goods or services

Agency Name	Address	Contract No.	Amount to be Received	Payment Due Date

16a. Federal government departments or agencies that have extended or given the business loans, grants or assistance, or to which you have applied (or anticipate applying for any loan, grant, or assistance) in the past 5 years.

17. Accounts/Notes receivable *(Include loans to stockholders, officers, partners, etc.)*

Agency Name	Address	Amount Due	Due Date	Status
	Total *(Enter in item 20)* ▶			

Section II. Asset and Liability Analysis See Attached 5 Year Data

Description (a)			Cur. Mkt Value (b)	Liabilities Bal. Due (c)	Equity in Asset (d)	Amount of Mo. Pymt. (e)	Name and Address of Lien/Note Holder/Obligee (f)	Date Pledged (g)	Date of Final Pymt. (h)
18. Cash on hand									
19. Bank accounts									
19a. Securities and other financial assets owned									
20. Accounts/Notes receivable									
21. Insurance Loan Value									
22. Real property *(from item 13)*		a.							
		b.							
		c.							
		d.							
23. Vehicles *(Model, year, license)*		a.							
		b.							
		c.							
24. Machinery and equipment *(Specify)*		a.							
		b.							
		c.							
25. Merchandise Inventory *(Specify)*		a.							
		b.							
26. Other Assets (including permits, licenses, tax loss carry forwards, agreements not to compete, other contracts) *(Specify)*		a.							
		b.							
		c.							
		d.							
27. Other Liabilities *(Include judgements, notes, tax liens, etc.)*		a.							
		b.							
		c.							
		d.							
		e.							
28. Federal & State Taxes Owed									
29. Totals									

Section III. Income and Expense Analysis - ATTACHED 5YR DATA

The following information applies to income and expenses during a one year period: _____ to _____	Accounting method used

Income		Expenses	
30. Gross receipts from sales, services, etc.	$	36. Materials purchased	$
31. Gross rental income		37. Wages and salaries of employees	
32. Interest		38. Wages/salaries/bonuses for officers, directors and stockholders	
33. Dividends		39. Rent	
34. Other income *(Specify)*		40. Installment payments *(from line 29)*	
		41. Supplies	
		42. Utilities / Telephone	
		43. Gasoline / Oil	
		44. Repairs and maintenance	
		45. Insurance	
		46. Current taxes	
		47. Other , including fees paid for services *(Specify)*	
35. Total ▶	$	48. Total ▶	$
		49. Net difference ▶	$

50. List all transferred real & personal property, including cash (by gift; by loan that was not at fair market terms; by sale for less than fair market value or made outside the normal course of business, etc.) that was made within the last 3 years (items of $3,000.00 or more):

Date	Amount	Property Transferred	To Whom	Conditions of Transfer
			(Indicate any relationship to business or its partners, directors, stockholders, or other controlling persons)	

Certification

Under penalties of perjury, I declare that to the best of my knowledge and belief this statement of assets, liabilities, and other information is true, correct, and complete.

51. Signature	52. Print Name / Title	53. Date
Daryl Olmstead	GARY E. OLMSTEAD CFO	5/14/07

EXHIBIT I

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

REPLY TO THE ATTENTION OF:

April 8, 2008

Douglas S. Tuma, Sr.
Tuma Watson Whaling Law Office
316 McMorran Boulevard
Port Huron, Michigan 48060

RE: John A. Biewer Company of Ohio, Inc.
John A. Biewer Company of Toledo, Inc.

Dear Mr. Tuma:

We are in receipt of the financial analysis of your clients conducted by Industrial Economics, Inc. (IE), on behalf of U.S. Environmental Protection Agency Administrator's enforcement staff. Should this matter proceed to a hearing, and your clients' "ability to pay" a penalty amount be found at issue, the IE's financial analysts will be our expert witness on the issue.

The conclusion of IE is that the companies identified above have not provided sufficient information for any financial analyst to conduct a credible "ability to pay" determination. To conduct such an analysis, additional information will be needed from both of these companies, as well as from John A. Biewer Co., Inc. and Biewer Lumber LLC. I am attaching a copy of the Memorandum, prepared by IE, on December 4, 2007, which explains in detail the deficiencies in the "ability to pay" claim made by your clients, and identifies the additional information needed.

While your clients may be of the opinion that the financial circumstances of John A. Biewer Co. and Biewer Lumber LLC should have nothing to do with the payment of any penalty by John A. Biewer Company of Ohio, Inc., and John A. Biewer Company of Toledo, Inc., it is our opinion that the law governing these proceedings is otherwise.

I earlier cited *In Re Carroll Oil Company*, 10 EAD 635 (2002), a final decision of the Administrator, issued by the Environmental Appeals Board (the Board). In this decision, the Board makes clear that, as to penalty amounts assessed under the Resource Conservation and Recovery Act ("RCRA"), the burden of presentation and persuasion regarding the defense of "ability to pay" is on the respondent who is challenging the amount of penalty proposed. Id. 662-663, and 668. The Board re-iterated the Administrator's position: "the Agency may look at the financial condition of a related company to determine whether the related company may be a legitimate source of funds affecting the respondent's ability to pay or the economic impact of the penalty." Id. 665. The Board noted that Carroll Oil "has frustrated efforts to develop a more comprehensive understanding of its financial situation," and stated that its "concern in this regard

is heightened when we consider Carroll Oil's affiliation with other entities, an area we regard as relevant." Id.

We continue to invite your clients to provide us the additional information needed to conduct a credible financial analysis in this matter. Should they submit this information to us, we will have it reviewed, and, if warranted on the evidence, adjust the amount of penalty proposed. However, on the present state of the record, it is our position that your clients' cannot meet their burdens to prove a claim of "inability to pay" the penalty amounts proposed given the information they have provided.

Notwithstanding our invitation, we will be going forward and issuing the Administrative Complaints now. Once we have filed the Administrative Complaints, we will be laboring under the timelines of the Administrator's Rules, and whichever Administrative Law Judge is assigned the matter. That proceeding will be governed by the Administrative Procedure Act, and the Administrator's Rules, policy, and precedent established in the published decisions of the Administrator. See Iran Air v. Kugleman, 996 F.2d 1253, 1260 (D.C. Cir. 1993). The Administrator has delegated his final decisionmaking authority in these matters to the Board.

On another matter, we note your letter of January 29, 2008, on behalf of the John A. Biewer Company of Toledo, Inc. ("Biewer-Toledo"). It included the following sentence: "Because of our correspondence with you and the status of that, we did not proceed to work on that plant closure." I would point out that, since October 2005 Biewer-Toledo has failed to take actions necessary to complete closure of its drip pad at its Perrysburg, Ohio, facility as required by RCRA. In March 2007, U.S. EPA informed Brian Biewer that Biewer-Toledo was in violation of RCRA in that it had "failed to complete the closure requirements for a hazardous waste drip pad as required by OAC 3745-69-45 (40 CFR § 265.445)," and that U.S. EPA intended to bring a civil penalty enforcement action for that violation. Nothing in that letter from U.S. EPA, nor in any other communication from U.S. EPA, informed Biewer-Toledo that the contemplated enforcement action excused the company from complying with the ongoing RCRA requirement that closure of the Toledo facility drip pad be conducted as required by law. As Biewer-Toleldo is under a continuing requirement to complete closure of its drip pad as required by RCRA, it must immediately take all steps to achieve this result so as to come into compliance. The pending civil penalty enforcement action does not excuse Biewer-Toledo from this legal obligation.

Thank you very much for your assistance in this matter. Please feel free to call me at (312) 886-7947 should you have any questions.

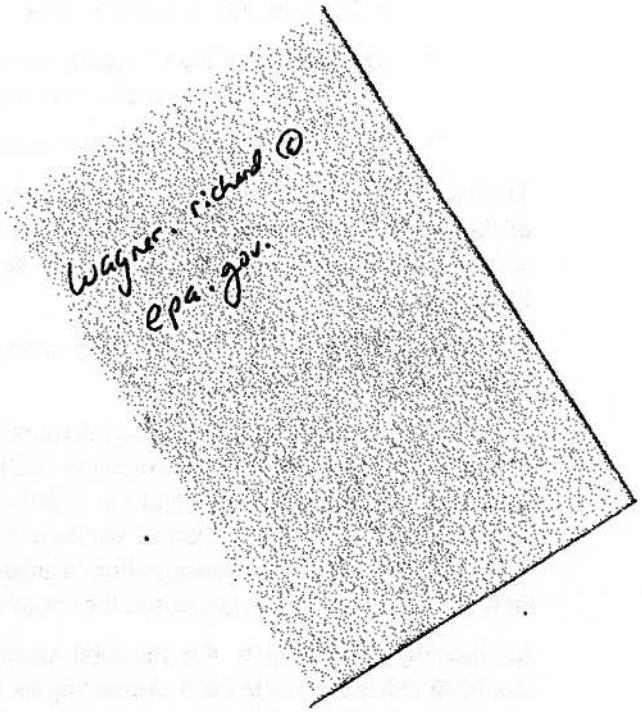
Very truly yours,

Richard R. Wagner
Senior Attorney

ATTACHMENT

cc: M. Cunningham (DE-9J)
G. Coad, Industrial Economics, Incorporated

Biewer-attyltr-4



MEMORANDUM | December 4, 2007

TO Richard Wagner, U.S. EPA

COPY Jonathan Libber, U.S. EPA

FROM Gail Coad and Katya Smirnova, Industrial Economics, Inc.

SUBJECT John A. Biewer Company of Toledo and John A. Biewer Company of Ohio ATP, Response to Additional Information (TD # 29)

OVERVIEW

We have reviewed Biewer's response to the U.S. EPA's information request, including the following documents:

- Letter from Douglas S. Touma of Touma, Watson, Whaling, Coury, Castello & Stremers, P.C. to the U.S. EPA, dated September 28, 2007;
- Detailed List of Fixed Assets, valued as of 12/31/06, for John A. Biewer Co. of Ohio and John A. Biewer Co. of Toledo;
- Financial statements for both companies for years 1998 – 2006.

The company's response is not sufficient to allow us to expand our ability to pay analysis of the proposed penalty ($287,441 for the Toledo company and $282,649 for the Ohio company) provided in our previous memo to you. A brief review of the companies' financial situation is provided below.

The companies have not produced any sales revenue nor had income from primary business operations since early 2000.

Both companies are supported by the parent company, John A. Biewer Co., Inc., and are accruing Accounts Payable Intercompany (AP) due to the parent. As of 2006, the Ohio company had $154,123 in AP and the Toledo company had $53,361. According to the letter from the companies' attorney enclosed to the Ohio company financial statements, "[t]he parent company had been putting in sufficient funds to pay the taxes and insurance on the property and that is the reason for the substantial inter-company liability".

Additionally, according to the financial statements, the Toledo company had around $6,000 in Other Income in 2006. According to the letter from the attorney, this is the "net income received from the rents" that has been "used to assist in paying the cleanup costs in connection with the attempted closure of the facility." According to another letter from the companies' attorney, "[t]he current rental rate for the Toledo property is $6,300 per month which, after expenses, provides approximately $53,500 in net income." It is not clear from the company's response, what property is rented.

Below we discuss Biewer's response to your information request in more detail. At the end of the document we also provide another additional information request.

$953,000 original cost of land, buildings, machinery and equipment net of depreciation of $789,000). The Ohio company's holdings of fixed assets is slightly under $100,000 (about $1.2 million original cost of land, buildings, machinery and equipment net of depreciation of $1.1 million).

We recommend you request the company explain the above discrepancy. Note that the company claimed inability to answer Questions 12 and 13 of the additional information request regarding estimates of the costs of and plans for remediation and clean-up, and the appraised or assessed value of real estate assets of the Toledo and Ohio companies. We suggest that you again ask for any documentation available regarding the market value of the property.

In addition, the companies' attorney states in his letter, "[e]ach company is prepared to turn over to the EPA all of its current assets free of any claim by the parent company for un-reimbursed expenses." Based on the available information, we cannot estimate the current market value of the above-mentioned assets and whether they would be sufficient to cover all or a portion of the total penalty. However, the companies' assets appear to be highly depreciated and might not have market value sufficient to cover a significant portion of the penalty. In addition, EPA may not wish to hold real property. An option would be for EPA to place a lien on the real estate.

OTHER QUESTIONS

The company also failed to provide documentation that you request in the additional information request, namely:

- Complete tax returns for 1997 to present for John A. Biewer Co., Inc. and Biewer Lumber LLC.
- A corporate map showing the relationship of Toledo and Ohio companies with John A. Biewer Co., Inc, Biewer Lumber LLC and other related entities.
- A history of the Board of Directors for the Toledo and Ohio Companies, copies of the Board of Directors' Meeting Minutes, Resolutions, or any other records of the Board's decisions from January 1, 1997 to the present.
- Description of all related party transactions for the period of January 1, 1997 to the present.
- With respect to the rental income reported by the Toledo company in 2006, the company failed to explain the nature of this arrangement, specifically describe the property that is being rented.

ADDITIONAL INFORMATION REQUEST

- For John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, provide financial statements for 1997. The oldest financial statements that you provided are dated November 1998 (according to a hand-written note on the Income Statements).
- Provide explanation of the companies' treatment of dividends on the balance sheet. Both companies show negative dividends ($150,000 for the Toledo company and $300,000 for the Ohio company) on their 1998 and 1999 balance sheets. Starting in 2000, these values are removed from the balance sheet. Please clarify the nature of these balance sheet entries, whether they represent actual cash in or out, and the reason for their disappearance in 2000.
- For the assets that both companies own (as listed on the Detailed List of Fixed Assets that you submitted), provide an estimate of current market value.
- With regard to the fixed assets listed on the Detailed List of Fixed Assets and on the 2006 balance sheet, provide an explanation of the discrepancy between the 2006 net book value according to the Detailed List of Fixed Assets ($13,161 for Ohio company and $96,449 for Toledo company) and the net fixed assets as calculated from the companies' 2006 balance sheets (original cost of land, buildings, machinery and equipment net of depreciation: slightly under $100,000 for Ohio company and $163,738 for Toledo company).

As we mention above, the company also failed to answer a number of other questions from the Additional Information Request. These included:

- Complete tax returns for 1997 to present for John A. Biewer Co., Inc. and Biewer Lumber LLC.
- A corporate map showing the relationship of Toledo and Ohio companies with John A. Biewer Co., Inc, Biewer Lumber LLC and other related entities.
- A history of the Board of Directors for the Toledo and Ohio Companies, copies of the Board of Directors' Meeting Minutes, Resolutions, or any other records of the Board's decisions from January 1, 1997 to the present.
- Description of all related party transactions for the period of January 1, 1997 to the present.
- With respect to the rental income reported by the Toledo company in 2006, explain the nature of this arrangement, specifically describe the property that is rented.

We suggest that you ask for a further explanation of why these questions cannot be answered.

ADDITIONAL INFORMATION REQUEST

To allow the U.S. EPA Administrator's enforcement staff to further assess the financial capability of the John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, please submit the following information:

1. Complete tax returns for 1997 to present for John A. Biewer Co., Inc. and Biewer Lumber LLC.
2. A corporate map showing the relationship of Toledo and Ohio companies with John A. Biewer Co., Inc, Biewer Lumber LLC and other related entities.
3. A history of the Board of Directors for the Toledo and Ohio Companies, copies of the Board of Directors' Meeting Minutes, Resolutions, or any other records of the Board's decisions from January 1, 1997 to the present.
4. Description of all related party transactions for the period of January 1, 1997 to the present.
5. With respect to the rental income reported by the Toledo company in 2006, explain the nature of this arrangement, specifically describe the property that is rented.
6. For John A. Biewer Company of Toledo and John A. Biewer Company of Ohio, provide financial statements for 1997. The oldest financial statements that you provided are dated November 1998 (according to a hand-written note on the Income Statements).
7. Provide explanation of the companies' treatment of dividends on the balance sheet. Both companies show negative dividends ($150,000 for the Toledo company and $300,000 for the Ohio company) on their 1998 and 1999 balance sheets. Starting in 2000, these values are removed from the balance sheet. Please clarify the nature of these balance sheet entries, whether they represent actual cash in or out, and the reason for their disappearance in 2000.
8. For the assets that both companies own (as listed on the Detailed List of Fixed Assets that you submitted), provide an estimate of current market value.
9. With regard to the fixed assets listed on the Detailed List of Fixed Assets and on the 2006 balance sheet, provide an explanation of the discrepancy between the 2006 net book value according to the Detailed List of Fixed Assets ($13,161 for Ohio company and $96,449 for Toledo company) and the net fixed assets as calculated from the companies' 2006 balance sheets (original cost of land, buildings, machinery and equipment net of depreciation: slightly under $100,000 for Ohio company and $163,738 for Toledo company).

EXHIBIT J

April 18, 2008

Mr. Richard R. Wagner
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Re: **John A. Biewer Company of Ohio, Inc.**
John A. Biewer Company of Toledo, Inc.

Dear Mr. Wagner:

I received your letter of April 8, 2008. I understand the position you have taken in connection with John A. Biewer Co., Inc., although we certainly do not agree that your position is correct. As to Biewer Lumber, LLC, this company was not even in existence at the time that these issues arose. This company was formed in February of 2006. It is a company involved in selling other products with the John A. Biewer Co., Inc. As you know, the two companies involved in Ohio ceased all operations in the early 2000 and, therefore, Biewer Lumber, LLC had no relationship with those companies and it did not do any business on behalf of either of those companies.

Because of our discussions of the claim of the inability to pay, we never discussed the basis of either penalties. Would you please provide for us how the penalty for Toledo in the amount of $287,441 was calculated and how the penalty for Ohio in the amount of $282,649 was calculated.

For the record, the John A. Biewer Co. of Toledo, Inc. has been supported in recent years not by the parent company, but by the lease that it has for the premises. We have indicated to you that those funds are available, however, we prefer to use those funds for the purposes of trying to complete the closure of the plant rather than the payment of a fine.

The only support given by the parent company to the John A. Biewer Co. of Ohio had been the payment of taxes and this was done with the hopes that there would be the potential for the sale or lease of the premises.

I did review the memorandum from Industrial Economics, Inc. If some of the questions they raised are really relevant, I would be happy to answer most of them.

At the Toledo site, the tenant is using the property, other than the building. If an exact description of the portion being used is necessary, we can certainly provide it. I believe there is absolutely no question from the financial information we sent that the John A. Biewer Co. of Ohio, Inc. has not been in operation since 2001 and has no income of any kind. I am not sure what additional information that could be provided for that company or what information will be needed to make a determination that the company does not have any ability to pay.

As to the John A. Biewer Co. Toledo, Inc., we have fully acknowledged that since the company ceased treating, its only income is lease income and not from operations of the facility and we fully disclosed the use of those funds and acknowledge the current lease. We were also confused by their indication of the need of an asset ledger. The Biewer of Ohio facility, in the company's opinion, appears to have no value. They have attempted to both lease it or sell it for several years without any prospect for either. We would be more than happy to turn over all of the assets of the John A. Biewer Co. of Ohio to the EPA in full settlement of the claims. As to Toledo, the value of the company would have to be based on the current lease. We are working on completing that plant closure with the hope of being able to sell it, but if the EPA desires, we would be willing to turn over all of the assets of that company, including the real estate and the lease as a full settlement of the claims.

We would appreciate a response to the questions and the calculation of the penalties.

Very truly yours,

TOUMA, WATSON, WHALING,
COURY & CASTELLO, P.C.

Douglas S. Touma

DST/mbw
CC: Mr. Brian R. Biewer
BCC: Mr. Timothy J. Biewer
Mr. Gary E. Olmstead

EXHIBIT K

AFFIDAVIT

STATE OF MICHIGAN

-ss-

County of St. Clair

Richard N. Biewer, being duly sworn, deposes and says:

1. That I was President of the parent company for John A. Biewer of Ohio, Inc. and the John A. Biewer of Toledo, Inc. from their formation through the period until they ceased operations at their respective sites.

2. During said time period each of the locations was operated by the Plant Manager hired by the local corporation and it was the duty of the Plant Manager to hire, fire, discipline and train all employees for the respective company.

3. During said time period, the Plant Managers hired their own inside and outside sale forces for sales within their territories and set the pricing for terms for sale for their territories.

4. All employees of their respective companies were paid by payroll checks issued on behalf of each company.

5. All billings for sales of merchandise were issued on invoices in the name of the respective companies.

6. Each company had separate financial statements and profit sharing plans and were solely based on the success and profitability of each subsidiary.

7. That the parent company set general policy directions with the implementation of all policies being conducted by the employees of the subsidiary corporation, including the Plant Managers.

Further, deponent saith not.

Richard N. Biewer

SUBSCRIBED AND SWORN to before me this 3 day of November, 2008.

Carrie Sue McIntyre
Notary Public
St. Clair County, Michigan
My comm.. exp.: July 21, 2014

CARRIE SUE McINTYRE
Notary Public, St. Clair County, MI
My Commission Expires, July 21, 2014