**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
(Perrysburg Facility)

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

RESPONDENT

DOCKET NO: RCRA-05-2008-0007

**RESPONDENT'S SURREPLY TO COMPLAINANT'S REPLY TO RESPONDENT'S OPPOSITION TO COMPLAINANT'S MOTION TO AMEND COMPLAINT AND COMPLIANCE ORDER**

Complainant's Reply to Respondent's Opposition to Complainant's Motion to Amend Complaint and Compliance Order ("Reply") does not address the legal deficiencies in its Motion to Amend Complaint and Compliance Order ("Motion") with any legal support suggesting its Motion is sufficient, but once again, focuses on a compilation of "facts" Complainant believes demonstrate the necessity for an amended complaint. The heart of the matter before this Presiding Officer is that even if Complainant could demonstrate all of the speculation contained in its Motion and Reply is indeed based on facts, Complainant's Motion would still fail for two reasons. First, as a matter of law, the Motion is defective because Complainant did not attach a proposed amended complaint as required by 40 C.F.R. § 22.16. Second, Complainant's Motion is futile because, as a matter of law, Complainant's compilation of speculated facts does not meet the requirements to pierce the corporate veil or hold JAB Company or Biewer Lumber liable as operator of the Washington Courthouse, Ohio facility. As such, Complainant's Motion must be denied.

## ARGUMENTS

### I. Complainant's Motion to Amend Must Be Denied Because It Is Defective As A Matter Of Law.

Under 40 C.F.R. § 22.16(a)(2), a motion must "[s]tate the grounds therefore, with particularity." This language is nearly identical to Fed. R. Civ. P. 7(b), which also requires that a motion "state with particularity the grounds for seeking the order." While the Federal Rules of Civil Procedure do not expressly require the submission of a proposed amended complaint, there is substantial authority that Fed. R. Civ. P. 7(b) and 15(a), which are comparable to 40 C.F.R. § 22.16(a)(2) and § 22.14(c), require submission of the proposed amended pleading with the motion to amend. *See Nation v. United States Government*, 512 F. Supp. 121, 124 (S.D. Ohio 1981). Such a particularity requirement is not met where a proposed amended complaint is not attached to a motion to amend so that opposing parties and courts may "understand the exact changes sought." *Smith v. Planas*, 151 F.R.D. 547, 550 (S.D.N.Y. 1993); *VR Global Partners, L.P. v. Bennett (In re Refco Capital Mkts.)*, 2008 U.S. Dist. LEXIS 97016, 9-11 (S.D.N.Y. Nov. 20, 2008); *Wright v. Ohio*, 2006 U.S. Dist. LEXIS 73397, 6-7 (S.D. Ohio, Sept. 29, 2006). In addition to the substantial authority cited above, "common sense dictates that a party requesting leave to file an amended pleading must accompany his motion with a copy of the proposed amended complaint that complies with the general rules of pleading in Fed. R. Civ. P. 8(a)." *Bownes v. Gary*, 112 F.R.D. 424, 425 (N.D. Ind. 1986).

Without a proposed amended complaint, it is impossible to evaluate the merits of the new claims and determine if the amendment would be in the interest of justice.[1] *Bankr. Trust of Gerard Sillam v. Refco Group, LLC*, 2006 U.S. Dist. LEXIS 54245 (S.D.N.Y. July 28, 2006).

[1] Indeed, as demonstrated in section II, it is difficult for the Respondent or the Presiding Officer to address or analyze the futility of a proposed amended complaint where there exists no amended complaint and only hypothetical speculation contained in the motion papers concerning the contents of an amended complaint.

Moreover, such deficiencies are not cured by the hypothetical sketches contained in a brief supporting a motion to amend. *Bownes v. Gary,* 112 F.R.D. 424, 425 (N.D. Ind. 1986); *VR Global Partners, L.P. v. Bennett (In re Refco Capital Mkts.), supra,* (determining that "hypothetical sketches are a meagre basis" for ruling on a motion to amend). Reliance on a hypothetical version of an amended complaint may involve "special peril" as, essentially, plaintiffs are speculating that they may be able to meet the particularity requirement. *Id.* Therefore, a motion to amend a complaint that is not accompanied by a proposed amended complaint must be denied. *Wright v. Ohio, supra* at 6-7. ("Plaintiff's motion for leave to amend does not satisfy the particularity requirements of Rule 7(b) and should be denied.); *Smith v. Planas*, *supra* at 550 ("Plaintiff's motion to amend must include a copy of the proposed amended complaint before it will be considered.")

Complainant does not deny a proposed amended complaint was not attached to the Motion and argues without citing any supporting authority that it is unnecessary to attach a proposed amended complaint. Comp. Reply, pp. 1-3. Moreover, Complainant infers that the speculations contained in the Memorandum in Support of Complainant's Motion to Amend Complaint and Compliance Order ("Memorandum") meet whatever requirement may exist. Comp. Reply, p. 2, n. 1. However, as demonstrated above, common sense and authority dictate otherwise. Complainant's quest to add JAB Company and Biewer Lumber as defendants to the Complaint most definitely sets forth a theory of liability that is different from that asserted against Biewer-Ohio. Therefore, Respondent's objection is not "purely formal" or "of a character which does not affect the issues." *See Nation v. United States Gov't, supra* at 124. As such, the Presiding Officer must deny Complainant's Motion to Amend because, as a matter of law, the Motion is defective, and no attempt has been made to cure the defect.

## II. Complainant's Motion To Amend Must Be Denied Because It Is Futile.

A complaint may not be amended where the amendments cause undue prejudice to the opposing party, undue delay, bad faith, or are futile. *Weisbord v. Michigan State University*, 495 F. Supp. 1347, 1350 (W.D. Mich. 1980), *citing Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed.2d 222 (1962). A proposed amendment is futile if the amended complaint could not withstand a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules. *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 518 (6th Cir. 2001).[2]

Complainant is attempting to add JAB Company and Biewer Lumber as defendants to the claim against JAB Company's subsidiary Biewer-Ohio. According to the U. S. Supreme Court, a parent corporation may only be held liable for the actions of a subsidiary if the requirements of piercing the corporate veil are present or if the parent corporation exercised control over operations of the subsidiary's facility, not just the subsidiary. *United States v. Bestfoods*, 524 U.S. 51, 62-64 (1998). Therefore, Complainant may only add JAB Company or Biewer Lumber as defendants if the requirements necessary to pierce the corporate veil between the current defendant and JAB Company or Biewer Lumber are present, or if Complainant can demonstrate that JAB Company or Biewer Lumber operated the facility in Washington Courthouse, Ohio. As demonstrated below, the compilation of the speculations contained in Complainant's motion do not fulfill the requirements to pierce a corporate veil or find JAB Company or Biewer Lumber an operator of the Washington Courthouse facility.

[2] As Complainant has not attached a proposed amended complaint, Respondent will attempt to demonstrate futility by cobbling together Complainants allegations contained in its Memorandum and Reply.

### A. The "Facts" and Speculations in Complainant's Motion and Memorandum Do Not Demonstrate or Even Address All Elements Necessary To Pierce The Corporate Veil of Either JAB Company or Biewer Lumber.

A corporate veil may be pierced if the court finds "substantial reasons for doing so" after considering three general factors: (1) "the amount of respect given to the separate identity of the corporation by its shareholders;" (2) "the degree of injustice visited on the litigants by recognition of the corporate entity," and (3) "the fraudulent intent of the incorporators." *Int'l Union, UAW v. Aguirre*, 410 F.3d 297, 302 (6th Cir. Mich. 2005), quoting *Mich. Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376, 384 (6th Cir. 1991). Courts will only pierce the corporate veil where, in addition to a complete identity between the parent and subsidiary corporations, there is evidence that the use of the corporation was improper such that "adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 580 (6th Cir. 1997), *vacated on other grounds, sub nom Michigan Dep't of Envtl. Quality v. Bestfoods*, 524 U.S. 924, 141 L. Ed. 2d 692, 118 S. Ct. 2317 (1998); *United States v. Bestfoods*, 524 U.S. 51, 62 (U.S. 1998). Moreover, in alleging or proving that injustice would result from a failure to pierce the corporate veil, a plaintiff must demonstrate more than the "mere fact that the company ceased operation without being able to pay all of its debts." *Scarbrough v. Perez*, 870 F.2d 1079, 1084 (6th Cir. 1989).

Contrary to the requirements cited above, Complainants spend the entirety of their Memorandum and Reply speculating on the facts that may be relevant to the first part of the tests cited above. Nowhere does Complainant allege that use of the subsidiaries by the parent was improper, nor does Complainant allege that maintaining a separate corporate existence would sanction a fraud or promote injustice. It seems that Complainant contends that the simple fact

that the parent has not bailed out the subsidiary and that there is not enough money in the subsidiary to pay the proposed EPA penalty or complete all closure requirements is enough to show both injustice and fraudulent intent. No law is cited for this proposition because none exists.

Lacking authority suggesting that Complainant's suspicions and facts are sufficient, Complainant states only that "the Administrator's process clearly recognizes that a 'corporate veil' can be pierced..." Comp. Reply, p. 18. While this may be true in certain circumstances, such a recognition is only possible upon properly alleging and proving the necessary elements. Complainant mistakenly believes that providing a compilation of speculations, even if proven to be fact, and declaring them to be suspicious fulfills the pleading obligations clearly set forth in the case law cited above.

Plaintiff relies on the following facts to be demonstrative of the need to add JAB Company and Biewer Lumber as defendants to its Complaint:

- The Biewer Lumber website informs the public that "it has been servicing the public for more than 45 years" (Comp. Reply, p. 6);
- There have been two different companies for which the Biewer's have used the name "John A. Biewer Company, Inc." (Comp. Reply, p. 6, n. 3);
- There is no separate entry in Dun & Bradstreet for a "John A. Biewer Company, Inc." (Id.);
- Several pieces of correspondence have been provided to Complainant, but none have been on John A. Biewer Company, Inc. letterhead (Id.);
- The Respondent did not provide Articles of Incorporation for the John A. Biewer Company, Inc. (Id.);[3]
- Respondent used the Biewer Lumber e-mail address rather than its own address (Id.);
- The Chief Financial Officer of Biewer Lumber, on Biewer Lumber letterhead, submitted Respondent's balance sheets and income statements for Respondent (Comp. Reply, p. 7);

[3] See Attached Exhibit A.

- The "Biewers" have operated 18 companies under the name "Biewer" or "John A. Biewer" (Id.);
- At least six of the 18 Biewer companies conducted operations involving coating wood products with a chrome, copper, and arsenate solution (Id.);
- Biewer Lumber includes three pressure-treated lumber and distribution facilities (Comp. Reply, p. 8);
- Complainant has identified information in certain financial documents that indicates Respondent has been paying its debt to its parent corporation (Id.);
- Information is contained in Respondent's financial records indicate that Respondent's inventory may have been transferred to another company (Id.).

Complainant spends much time lamenting that the Respondent has not "responded" to all of the above allegations and speculating over what that lack of response may or may not mean. See Comp. Reply, pp. 8-9. Complainant misses the point entirely by focusing so intently on the allegations listed above. The point is that taken as a whole, the above speculations, even if true, do not suggest that JAB Company or Biewer Lumber had complete control over Biewer-Ohio and certainly do not allege that that such control was used to commit a fraud or other injustice. As such, any amended complaint based on the allegations contained in Complainant's Memorandum or Reply would not survive a Fed. R. Civ. P. 12(b)(6) motion with regards to piercing the corporate veil of either JAB Company or Biewer Lumber.

### B Complainant's "Facts" Asserted in the Motion and Memorandum Do Not Demonstrate a Prima Facie Case That JAB Company Or Biewer Lumber Operated The Toledo Facility.

Under *Bestfoods*, the Supreme Court made clear that a parent will only be considered an "operator" if the parent controls the facility of the subsidiary where the pollution in question is located. 524 U.S. at 68. Such operator control is evidenced by "participation in the ***activities*** of the facility, not the subsidiary." Id. (emphasis added). Moreover, the activities may be further defined as managing, directing, or conducting operations specifically related to pollution. *United*

*States v. Bestfoods*, 524 U.S. 51, 66-67 (U.S. 1998). Thus, activities that involve the subsidiary's facility, but which are consistent with the parent's investor status, such as "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability." *Id.* at 71-72. "The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." *Id.*

Like Complainant's piercing the corporate veil allegations, Complainant relies on the same compilation of factual allegations to demonstrate that an amended complaint would adequately allege that JAB Company or Biewer Lumber served as the "operator" of the Biewer-Ohio facility, as defined by *Bestfoods*. Like Complainant's piercing the corporate veil allegations, Complainant's allegations regarding "operator" liability are wholly insufficient. While Complainant's list of "allegations" may pertain to parts of the tests employed to determine whether a corporate veil should be pierced, not one of the allegations pertains to any action that JAB Company or Biewer Lumber took that relates to managing, directing, or conducting operations specifically related to pollution at the Washington Courthouse facility. Indeed, it may be difficult for the Complainant to sufficiently allege the *activities* that JAB Company or Biewer Lumber performed that would render either susceptible to "operator liability" where the subsidiary is accused of *failing* to clean up pollution and *failing* to take action. Such allegations are especially difficult regarding Biewer Lumber, as it is uncontested that the company did not

even exist until two years after the alleged violations occurred. Complainant makes no attempt to explain how a company that did not exist at the time of the alleged violations could be susceptible to "operator liability."

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondent

Dated: December 4, 2008

By: _____

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

C & S 101 (12-79) (Please do not write in spaces below—for Department use)

MICHIGAN DEPARTMENT OF COMMERCE — CORPORATION AND SECURITIES BUREAU

| EFFECTIVE DATE If different than date of filing: DECEMBER 1, 1980 | FILED Michigan Department of Commerce DEC 1 1980 DIRECTOR | Date Received DEC 1 1980 |
|---|---|---|
| Corporation Number | 153-853 | |

(SEE INSTRUCTIONS ON REVERSE SIDE)

# ARTICLES OF INCORPORATION

(Domestic Profit Corporation)

These Articles of Incorporation are signed by the incorporator(s) for the purpose of forming a profit corporation pursuant to the provisions of Act 284, Public Acts of 1972, as amended, as follows:

**ARTICLE I** (See Part 1 of instructions on Page 4.)

The name of the corporation is JOHN A. BIEWER CO., INC.

**ARTICLE II** (See Part 2 of instructions on Page 4.) (If space below is insufficient, continue on Page 3.)

The purpose or purposes for which the corporation is organized is to engage in any activity within the purposes for which corporations may be organized under the Business Corporation Act of Michigan.

**ARTICLE III**

The total authorized capital stock is:

1. Common Shares 50,000 Par Value Per Share $ 1.00
   Preferred Shares None Par Value Per Share $

and/or shares without par value as follows (See Part 3 of instructions on Page 4.)

2. Common Shares None Stated Value Per Share $
   Preferred Shares None Stated Value Per Share $

3. A statement of all or any of the relative rights, preferences and limitations of the shares of each class is as follows: (If space below is insufficient, continue on Page 3.)

All shares shall be equal in all respects whatsoever.

**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 December 4, 2008, I served a copy of:

Respondent's Surreply to Complainant's Reply to Respondent's 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: December 4, 2008

Jane E. Blakemore
Jane E. Blakemore