

# Mika Meyers Beckett & Jones PLC

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April 17, 2009

Hon. William B. Moran  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
1099 – 14th Street, N.W., Suite 350  
Washington, DC 20005

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APR 21 2009

REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY

Re: John A. Biewer Company of Toledo, Inc.  
RCRA-05-2008-0006

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

Dear Judge Moran:

I am writing this letter in connection with the above-referenced administrative action for two reasons: First, to provide an explanation of what might appear as inattentiveness to this file on my part, and second, to seek permission to file a two-page Sur-Reply Brief in connection with the pending discovery motion.

As Amy VanDyke of my office may or may not have communicated during the recent conference call with your office, I was recently diagnosed with cancer which has necessitated two extended absences from the office, the last of which overlapped the time period in which we were to respond to Complainant's Motion for Discovery. During this time when I was reviewing treatment options and later pursuing one of them, there were, admittedly, periods when I was not fully focused on various work issues. Prior to my absence, we were working with the client to obtain the documents and information requested, but my absence from the office was longer than expected and resulted in a less than ideal temporary transfer of file responsibility to Amy VanDyke while I was unavailable. I am pleased to note that I was diagnosed early and that the treatment appears to have been fully successful. All this having been said, I should have done a better job in insuring that all of the proper responses and pleadings were filed and received by you, and I apologize for any failings on our part.

Hon. William B. Moran  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
April 17, 2009  
Page 2

Rather than filing a response to the Motion for Discovery, we submitted responses to the discovery requests which, for reasons that still elude me, were apparently not received by your office, though our records show they were sent to the address we had previously confirmed with Knolyn Jones. As suggested during the recent conference call, from this time forward, we will send hard copies of materials to you by Federal Express, using the Fed Ex address provided by your office.

Judging from Complainant's Reply Brief, there remain unresolved issues which I have addressed briefly in the Sur-Reply Brief enclosed herewith. The enclosed Sur-Reply Brief addresses what I believe to be the largest and certainly most recurring issue in connection with the pending Motion for Discovery, that relating to Biewer Lumber, LLC. I felt it was important for you to understand these basic facts, before issuing an order or decision on the motion.

Thank you for your consideration of this matter. Certainly, if Mr. Wagner feels a need to respond to my brief, if it is accepted, I have no objection.

Very truly yours,



Douglas A. Donnell

jeb  
Enclosures  
cc: Richard R. Wagner

By Federal Express mail and e-mail

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

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IN THE MATTER OF:

DOCKET NO: RCRA-05-2008-0006

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

**RESPONDENT'S SUR-REPLY BRIEF**

U.S. EPA ID #: OHD 106 483 522  
and

John A. Biewer Company, Inc.  
812 South Riverside Street  
St. Clair, Michigan 48079

and

Biewer Lumber LLC  
812 Riverside Street  
St. Clair, Michigan 48079

Respondents

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Respondent Biewer Lumber, LLC was created on February 9, 2006. Documentation of this corporate formation has long ago been provided to Complainant, and is attached to this Brief as Exhibit 1. At no time during these administrative proceedings has Complainant offered any other corporate documentation which would suggest a different formation date, and these records are publicly available records maintained by the State of Michigan.

Notwithstanding this unequivocal proof of formation of Biewer Lumber, LLC, Complainant states in his Reply Brief that “[t]he contention of Biewer Lumber [LLC] did not exist until February 9, 2006 is simply not true.” Reply Brief, p. 2. The sole support for this statement is Complainant’s reference to the “Biewer Lumber” website ([www.biewerlumber.com](http://www.biewerlumber.com))

in which the term “Biewer Lumber” is used as describing a company that began 45 years ago. Importantly, at the very top of this website, the name “Biewer Lumber” is followed by “TM” signifying a trademark. Indeed, the letterhead cited in Complainant’s Reply Brief likewise reads “Biewer Lumber <sup>TM</sup>.” Complainant has not produced a single document or piece of paper indicating that “Biewer Lumber, LLC” has ever purported to exist prior to February 9, 2006, or that it was formed at any time other than that shown on the formation documents attached as Exhibit 1.

What is demonstrated by the attachments to Complainant’s Reply Brief is the fact that John A. Biewer Company, Inc. and its subsidiaries have used the trademark name “Biewer Lumber” well before “Biewer Lumber, LLC” was formed (see Exhibit 2, letter dated November 18, 2004).

It is very significant that the document requests submitted by Complainant are directed very specifically to “Biewer Lumber, LLC” who has responded to the requests. Biewer Lumber, LLC, as noted above, did not exist prior to February 9, 2006, and thus cannot produce documents relating to Biewer Lumber, LLC pre-dating February 9, 2006. “Biewer Lumber <sup>TM</sup>,” used as a trademark name for John A. Biewer Co., Inc. and its subsidiaries is not identified in a single document request, and responses for John A. Biewer Co., Inc, John A. Biewer Company of Toledo, Inc. and John A. Biewer Company of Ohio, Inc. have been provided, and as noted below, are being supplemented. Thus, the objection by Biewer Lumber, LLC to producing documents predating its creation is not only a legitimate objection, but a practical limitation on the ability of that entity to produce documents which are applicable to that entity.


Finally, Complainant’s Reply Brief addresses several other perceived deficiencies in Respondent’s response to the document request, and some of those responses indicated that a

search is ongoing for additional documents. Respondents intend to supplement their response to these document requests not later than April 24, 2009.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC  
Attorneys for Respondent

Dated: April 17, 2009

By:   
Douglas A. Donnell (P33187)  
900 Monroe Avenue, NW  
Grand Rapids, MI 49503  
(616) 632-8000

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# **EXHIBIT 1**

<b>MICHIGAN DEPARTMENT OF COMMERCE - CORPORATION AND SECURITIES BUREAU</b>		
<small>Date Received</small>		<b>(FOR BUREAU USE ONLY)</b>
<small>Name</small> <b>Douglas S. Touma</b>		<small>Tran Info#1</small> 11392499-1 01/26/06 <small>Chk#:</small> 24384 <small>Amt:</small> \$50.00 <small>ID:</small> TOUMA WATSON WHALING COURY & CASTEL
<small>Address</small> <b>316 McMorran Boulevard</b>		<b>FILED</b>
<small>City</small>	<small>State</small>	<small>Zip</small>
<b>Port Huron, Michigan</b>	<b>48060</b>	<b>EFFECTIVE DATE: FEB 09 2006</b>

DOCUMENT WILL BE RETURNED TO NAME AND ADDRESS INDICATED ABOVE

Administrator  
**BUREAU OF COMMERCIAL SERVICES**

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** St. Clair , Michigan **48079**  
(Street Address) (City) (ZIP Code)

2. The mailing address of the registered office if different than above:  
**P.O. Box 497** St. Clair , Michigan **48079**  
(P.O. Box) (City) (ZIP Code)

3. The name of the resident agent at the registered office is: **Timothy J. Biewer**

Signed this 24<sup>th</sup> day of January, 2006

BY **Holdings, LLC, a Michigan Limited Liability Company**

By: Timothy J. Biewer  
 Timothy J. Biewer, Member

*OB*

**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 forth 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 Managers 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 matter 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 19<sup>th</sup> 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.

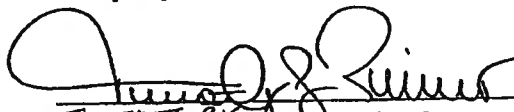
10.8 **Binding Effect.** Subject to the provisions of this Operating Agreement relating to transferability, this Operating Agreement will be binding upon and shall inure to the benefit of the parties, and their respective distributees, heirs, successors and assigns.

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.

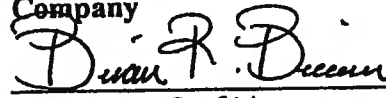
**IN WITNESS WHEREOF**, the parties hereto make and execute this Operating Agreement on the dates set below their names, to be effective on the date first above written.

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**

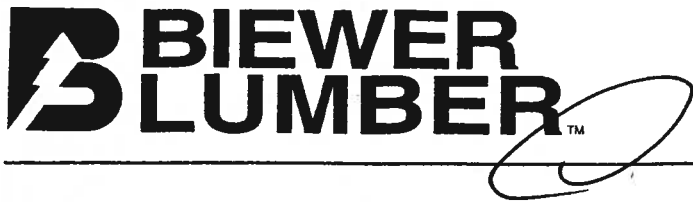
**Member**

**Interest in Capital**

**BT Holdings, LLC**

**100%**

# **EXHIBIT 2**



300 Oak Street  
St. Clair, MI 48079  
800.482.5717  
Fax: 810.329.6220  
[www.biewerlumber.com](http://www.biewerlumber.com)

November 18, 2004

Elizabeth D. Lamerson  
Ohio EPA  
Central District Office  
3232 Alum Creek Drive  
Columbus, OH 43207-3417

Dear Elizabeth,

Enclosed are the Material Safety Data Sheets (MSDS) for the chemicals you requested.  
If you have any questions, please contact me at the number above.

Sincerely,

Brian R. Biewer  
Secretary/Treasurer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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IN THE MATTER OF:

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

DOCKET NO: RCRA-05-2008-0006

**CERTIFICATE OF SERVICE**

U.S. EPA ID #: OHD 106 483 522  
and

John A. Biewer Company, Inc.  
812 South Riverside Street  
St. Clair, Michigan 48079

RECEIVED  
APR 21 2009

REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY

and

Biewer Lumber LLC  
812 Riverside Street  
St. Clair, Michigan 48079

Respondents  
\_\_\_\_\_ /

I, Jane E. Blakemore, hereby state that I am the secretary for Douglas A. Donnell, and that on April 17, 2009, I served a copy of:

Respondents' Sur-Reply Brief

upon the following individuals by U.S. first-class mail, postage prepaid:

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: April 17, 2009

  
\_\_\_\_\_  
Jane E. Blakemore