

**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; 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)
_____)

DOCKET NO. RCRA-05-2008-0007

RECEIVED
FEB 26 2009

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY**

COMPLAINANT'S MOTION FOR DISCOVERY

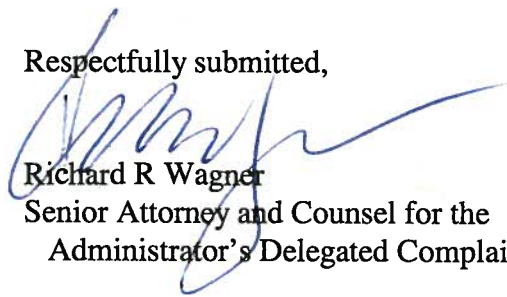
The Administrator's Delegated Complainant, pursuant to the Administrator's Rules, specifically 40 C.F.R. § 22.19(e), moves that the Presiding Officer enter an order directing that:

- (1) Respondents submit to Complainant the information identified in the attached Additional Information Request, by a date to be determined, and that Respondents specify their reasons for being unable to submit any specific item of information identified in the Additional Information Request.
- (2) In the event Respondents assert that specific information relevant to any request in the Additional Information Request has been destroyed pursuant to a record retention policy, with regard to the information subject to the assertion, Respondents shall produce the following:
 - (a) A copy of the records retention policy relied upon in destroying the information, including any transmission memorandum, or other message provided to personnel affected by the records retention policy.

- (b) An identification of the following:
 - (i) the physical location, by specific company, building address and room, where the information was stored at the time the decision was made to destroy the information, and the custodial officer or employee responsible for the information;
 - (ii) the name of all officers or employees participating in the decision to destroy the information and destruction of the information, and the specific company which employed any such officer or employee; and,
 - (b) the specific date and time the information was destroyed, and the physical location at which it was destroyed, by specific company, building, address and room.
- (c) A copy of any and all documents generated by any Respondent related to the destruction of the information, and the decision to destroy that information.
- (d) With regard to any specific information relevant to any request in the Additional Information Request which Respondents assert they have destroyed under their records retention policy, provide the name(s) of the accounting firm(s) used to prepare the information. With regard to any name(s) or firm(s) identified in response to this paragraph, provide a copy of the records retention policy of that individual(s) or firm(s).

In support of this motion, Complainant has filed a memorandum.

Respectfully submitted,



Richard R Wagner
Senior Attorney and Counsel for the
Administrator's Delegated Complainant

ADDITIONAL INFORMATION REQUEST

1. For John A. Biewer Co., Inc. and Biewer Lumber LLC, complete tax returns including all schedules and attachments for January 1, 1997 through the present;
2. For John A. Biewer Co., Inc. and Biewer Lumber LLC, complete year-end financial statements, including the auditor's letter, balance sheet, income statement, statement of cash flows and notes, for January 1, 1997 through the present.
3. For John A. Biewer Company of Ohio and John A. Biewer Company of Toledo, complete year-end financial statements, including the auditor's letter, balance sheet, income statement, statement of cash flows and notes for FY1997 (the oldest financial statements that you provided are dated November 1998, according to a hand-written note on the Income Statements).
4. Ownership and corporate management information:
 - a. For the Ohio and Toledo companies, John A. Biewer Company Inc., and Biewer Lumber LLC, a current corporate map, including detailed information on corporate ownership and officers, for all levels of corporate relationship. A corporate map showing the relationship of Toledo and Ohio companies with John A. Biewer Co., Inc, Biewer Lumber LLC and other related entities.
 - b. A history of the ownership of the Toledo and Ohio Companies, John A. Biewer Co., Inc. and Biewer Lumber LLC from January 1, 1997 to the present, including percentages of ownership if more than one shareholder, member or partner.
 - c. A history of the officers of the Toledo and Ohio Companies, John A. Biewer Co., Inc. and Biewer Lumber LLC from January 1, 1997 to the present.
 - d. A history of the Board of Directors of the Toledo and Ohio Companies, John A. Biewer Co., Inc. and Biewer Lumber LLC from January 1, 1997 to the present.
 - e. Copies of the Board of Directors' Meeting Minutes, Resolutions, or any other records of the Board for the four companies from January 1, 1997 to present.
5. For the Toledo company, a description of all related party transactions for the period of January 1, 1997 to the present. For the Ohio company, a description of all related party transactions for the period of January 1, 2001 to the present. A related party transaction includes, but is not limited to, sales, purchases, and transfers of realty and personal property; services received or furnished, for example, accounting, management, engineering, and legal services; use of property and equipment by lease or otherwise; borrowings and lendings; guarantees; maintenance of bank balances as compensating balances for the benefit of another; intercompany billings based on allocations of common costs; and filings of consolidated tax returns.

Statement No. 57 of the Financial Accounting Standards Board defines related parties as the following:

- Affiliates of the enterprise. An affiliate is a party that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with an enterprise.
- Entities for which investments are accounted for by the equity method by the enterprise.

- Trusts for the benefit of employees, such as pension and profit-sharing trusts that are managed by or under the trusteeship of management.
- Principal owners of the enterprise. Principal owners are owners of record or known beneficial owners of more than 10 percent of the voting interests of the enterprise.
- Management of the enterprise. Management includes persons who are responsible for achieving the objectives of the enterprise and who have the authority to establish policies and make decisions by which those objectives are to be pursued. Management normally includes members of the board of directors, the chief executive officer, chief operating officer, vice presidents in charge of principal business functions (such as sales, administration, or finance), and other persons who perform similar policymaking functions. Persons without formal titles also may be members of management.
- Members of the immediate families of principal owners of the enterprise and its management. Immediate family includes family members whom a principal owner or a member of management might control or influence or by whom they might be controlled or influenced because of the family relationship.
- Other parties with which the enterprise may deal if one party controls or can significantly influence the management or operating policies of the other to an extent that one of the transacting parties might be prevented from fully pursuing its own separate interests.
- Other parties that can significantly influence the management or operating policies of the transacting parties or that have an ownership interest in one of the transacting parties and can significantly influence the other to an extent that one or more of the transacting parties might be prevented from fully pursuing its own separate interests.

For each transaction, the description should include, but not be limited to, the specific nature of the transaction, the related parties' names, the date of the transaction, and the dollar amount of the transaction.

- a. For all transactions of \$5,000 or more involving transfer or sale of an item or asset from Toledo or Ohio company to a related party, provide all documentation developed by Toledo or Ohio company to assure that the asset transfer or sale was consistent with a third-party market transaction.
 - b. For all loans or other financing transactions between Toledo or Ohio companies and related parties, provide copies of the agreements between the parties.
6. Provide an 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. Also identify with which entity these dividend transactions occurred.
 7. Provide all documents related to in any way to the detail of the "Accounts Receivable Intercompany" and "Accounts Payable Intercompany" entries appearing on the Toledo company's balance sheets. The documentation should include, but not be limited to, the related parties associated with these transactions, the date of the transaction, and the services that were

provided and received in association with these transactions. List the year end balances for these accounts for each related party for the years ending 1997 to present.

8. Provide all documents related to in any way to the detail of the "Accounts Receivable Intercompany" and "Accounts Payable Intercompany" entries appearing on the Ohio company's balance sheets. The documentation should include, but not be limited to, the related parties associated with these transactions, the date of the transaction, and the services that were provided and received in association with these transactions. List the year end balances for these accounts for each related party for the years ending 2001 to present.
9. For the Ohio company, describe in detail the transaction or transactions that occurred when \$1.4 million in inventory appearing on the company's balance sheet in November 2001 became \$0 on the November 2002 balance sheet. Provide detailed information on the items included in the inventory as of November 2001, including, but not limited to, their book value and their estimated market value at the time. If the inventory was sold, provide the contract of sale of the inventory, the parties to which it was sold, and the value the company received from the sale, and whether this consideration was in the form of a note receivable or cash payment. Provide all documentation related to the reduction of the inventory from \$1.4 million to 0, including, but not limited to, any contracts, checks, and bank transfers.
10. Did the Toledo company sell inventory or other assets after it stopped operating? If so, provide detail on the transaction similar to that provided in Request 8 above.
11. Provide an itemization of the fixed assets currently owned by the Ohio and Toledo companies (e.g. an asset ledger) that shows a brief description of the asset, the year it was put in service, the original cost, the accumulated depreciation and an estimate of the current market value.
12. Provide estimates of the current market value for each parcel of land, improvements, and equipment owned by the Ohio and Toledo companies.
13. Provide the general ledgers from January 1, 1997 to present for the Ohio and Toledo companies. Provide the chart of accounts for both companies.
14. Provide copies of contracts between Mannik & Smith Group and Toledo and Ohio companies (or a representing party). Provide all payment documents associated with this contract(s), including, but not limited to, copies of invoices, proof of bank transfers and all other payment documents with regard to payments made to Mannik & Smith Group by the parties for the services rendered by Mannik & Smith Group at the Ohio and Toledo sites (in particular, the Closure Plan prepared by Mannik & Smith Group).
15. Provide all documents in possession of the Ohio and Toledo companies, as well as Biewer Lumber and John A. Biewer Co. Inc., discussing the closure and closure costs at the Ohio and Toledo companies' facilities, as well as all documents discussing the extent of contamination at each company and the associated decontamination activities required to remove the contamination.
16. For the Ohio and Toledo companies, provide the number of officers and employees employed after the shut-down (2001 and 1997, respectively). For each officer and employee, provide name, position, a brief job description and annual gross pay. Provide copies of pay stubs and all other documentation confirming the payments made by the Ohio and Toledo companies to these officers and employees during the period since the closure and until the present.

17. For the Ohio and Toledo companies, provide the names of any individual acting on behalf of each company after the shut-down (2001 and 1997, respectively). For each individual, provide name, corporate affiliation, position(s), and nature of compensation for work performed on behalf of Ohio or Toledo. Provide all documentation confirming the payments made by the Ohio and Toledo companies to these individuals during the period since the closure and until the present.
18. Provide the name and account number of the checking account(s) for Ohio and Toledo companies, as well as the name of the bank where this checking account is open, and the name of the primary holder of the account. If the checking account(s) have been closed, advise as to when the account was closed, and describe how the Ohio and/or Toledo companies make payments in the absence of a checking account.
19. With regard to the Repair and Maintenance expense appearing on the Ohio and Toledo companies' income statements and the Legal and Accounting expense appearing on the Toledo company's income statement since the closure (2001 and 1997, respectively), provide the following information:
 - a. Identify the specific services associated with these expenses.
 - b. Identify who performed the services associated with these expenses. If the services were performed by an Ohio or Toledo employee, provide name, position and brief job description of the employee, as well as the gross annual compensation and copies of the associated pay stubs. If the services were performed by a third party or a related entity, provide a service contract, the list of services performed, and the associated payment information (any checks, payment stubs and other payment documentation).
20. Identify the individual and company that prepare the financial data for the Ohio and Toledo companies. If the financial data are prepared by an employee(s), provide the name(s), position and brief job description of the employee(s), as well as the gross annual compensation and copies of the associated pay stubs. If the services are performed by a third party or a related entity, provide all documentation regarding the services including any contract or agreement, the list of services performed, and the associated payment information, including, but not limited to, any checks, payment stubs and other payment documentation.
21. With regard to all property, income or other tax and insurance payments made by the Ohio and Toledo companies since the closure, provide all documents confirming the payments made by the Ohio and Toledo companies (including, but not limited to, copies of the checks covering the tax and insurance payments, electronic transfer information, etc.).
22. With regard to the rental income received by the Toledo company, provide all documents related to the rental, including, but not limited to: rental agreement(s), and rent payments (i.e., copies of checks received by the Toledo company from the renter, electronic transfer documentation, etc.), documentation regarding the deposit of the rent payments (including the account number, holder of the account, and the name of the bank where the account is open), and any related correspondence.

In Re John A. Biewer Company of Ohio, Inc.
No. RCRA-05-2008-0007

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FEB 26 2009

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PROTECTION AGENCY

CERTIFICATE OF SERVICE


I hereby certify that today I filed the original of the **Complainant's Motion for Discovery and Memorandum in Support of Complainant's Motion for Discovery** in the office of the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this Certificate of Service.

I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Douglas A. Donnell
Mika Meyers Beckett & Jones, PLC
900 Monroe Avenue, NW
Grand Rapids, MI 49503-1423

February 26, 2009



Donald E. Ayres (C-14J)
Paralegal Specialist
77 W. Jackson Blvd.
Chicago, IL 60604
(312) 353-6719

**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))
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U.S. EPA ID #: OHD 081 281 412; and)
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John A. Biewer Company, Inc.)
812 South Riverside Street)
St. Clair, Michigan 48079; and)
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**MEMORANDUM IN SUPPORT OF COMPLAINANT'S
MOTION FOR DISCOVERY**

The Administrator's Delegated Complainant, by undersigned counsel, has filed Complainant's Motion for Other Discovery, requesting that, pursuant to the Administrator's Rules, specifically 40 C.F.R. § 22.19(e), the Presiding Officer enter an order directing that Respondents submit to Complainant the information identified in the Motion. This memorandum is presented in support of the Motion.

On January 7, 2009, the Presiding Officer entered an order allowing Complainant to add Biewer Lumber LLC and John A. Biewer Company, Inc., as respondents in the Complaint and Compliance Order (Complaint) earlier filed in this matter, for the purpose of conducting discovery to determine the liability of one or both for violations of John A. Biewer Company of

Ohio, Inc., a related company, under the holding of United States v. Best Foods, et al., 524 U.S. 51 (1998) and traditional standards for “piercing the corporate veil.” Order on EPA’s Motion to Amend Complaint and Compliance Order and Notice of Hearing Postponement (January 7, 2009). The Order directed Complainant “to file an amended complaint, adding as respondents JAB and Biewer Lumber, along with the inclusion in that complaint of the necessary essential allegations against those entities.” Id., at 10-11.¹ The Order provided that, “[f]ollowing that, discovery is to commence promptly with the goal of completing it within sixty days.” Id., at 11. The Order specifically provided that Complainant “is entitled to learn through discovery of the nature of the relationship of [BiewerLumber] with JAB and Respondent.” Id. The Order stated that “appropriate areas of inquiry” would include details of contracts between any of those companies and Mannik & Smith Group; “inquiries into those who were directing and operating Biewer Ohio, and the entity for which they were acting as officers when engaged in such actions”; and “the movement of funds in and among these entities[.]” Id.

Given the goal of completing discovery within 60 days, Complainant sent a letter on January 20, 2009, by FedEx, to counsel for Respondent John A. Biewer of Ohio, Inc., with specific items sought by Complainant in discovery identified in the letter. Attachment A. As explicitly stated in the letter, in consideration of the time frame contemplated, Complainant was attempting to initiate discovery on a voluntary basis, asking Respondent(s) to submit the

¹Complainant filed the Amended Complainant in this matter on January 30, 2009. The the Amended Complaint was not filed until January 30, 2009, although the Order was entered on January 7, 2009, in that a similar order was anticipated in a companion case, In Re John A. Biewer Company of Toledo, Inc., RCRA-05-2008-0007. That order was issued on January 23, 2009. Had amended complaints been filed in each of these cases on different dates, each case would be on a separate scheduling track, and the opportunity would be ripe for confusion in subsequent filings.

information sought, or identify those items of information which Respondents objected to submitting. The new language of the paragraphs of the Complaint to be affected by the amendment of the Complaint also was provided, and a request made that counsel for John A. Biewer Company, Inc., and Biewer Lumber LLC be identified.

As Complainant had heard nothing from anyone regarding the January 20th letter, Complainant sent an e-mail message to counsel for Respondent John A. Biewer of Ohio, Inc., on February 18, 2009, at 4:03pm. Attachment B. On February 19, 2009, at approximately 9:30am, counsel for Respondent John A. Biewer of Ohio, Inc., contacted the undersigned by telephone acknowledging his earlier receipt of the January 20th letter. He stated that he would give it his immediate attention and get back with Complainant's counsel the next day.

The undersigned next heard from counsel for Respondent John A. Biewer of Ohio, Inc., in a phone message left on the undersigned's answering machine on the morning of February 23, 2009. In this message, counsel informed the undersigned that a second attorney, Douglas Touma, would be collecting documents from Respondent(s) and providing them to Complainant. He made two specific points: (1) that there would not be much from Biewer Lumber, as the time period covered by the discovery request pre-dated the existence of Biewer Lumber; and (2) Respondent(s) had an 8 year record retention policy, which pre-date this litigation, and, as Respondent John A. Biewer Company of Ohio, Inc., ceased operations in 2001, he anticipated that it was likely not much would be found.

Given that Respondent John A. Biewer of Ohio, Inc., and, presumably, the remaining two respondents, are contemplating that records relevant to the discovery request may have been destroyed under a records retention policy, and that Biewer Lumber, as an allegedly newer

corporation formed after Respondent ceased operations, likely will not have much relevant to the discovery request, it is not possible to credibly resolve discovery issues in this matter voluntarily, casually, and over-the-telephone. It is imperative that a record be made of discovery attempts by Complainant. This is especially so given the delay by Respondent John A. Biewer of Ohio, Inc., in responding to an attempt to accomplish discovery objectives voluntarily. Moreover, while Respondent(s) are informing Complainant that Biewer Lumber is a recently established company, organized after the time period relevant to the documents sought in Complainant's discovery, there are public admissions of Biewer Lumber demonstrating that the current claim of Respondent(s) is simply not true.

At Biewer Lumber's web-site, www.biewerlumber.com, Biewer Lumber informs the world of its operations, starting off by stating that "[s]ince our beginning over 45 years ago. . . ." Attachment C. It goes on: "Biewer Lumber™ is a third generation, family owned company[.]" Id. (Emphasis added). It states that "[f]or more than 45 years Biewer Lumber™ has been supplying its Select Cut to building professionals seeking the highest quality." Id. Finally, it states that "Biewer Lumber™ was a pioneer in the treating industry, and remains a leader today[.]" and that "Biewer Lumber™ processing facilities include three state-of-the-art treatment plants that process and treat a capacity of 300 million board feet annually." Id.² Moreover, in

²It must be recalled that, in its Memorandum in Opposition to Complainant's Motion to Amend Complaint and Compliance Order, at 2-3, Respondent John A. Biewer Company of Ohio, Inc., asserted that "Biewer Lumber was created on February 9, 2006 (after all events and claimed violations alleged in the Complaint occurred)," and, citing an affidavit of Brian R. Biewer, that:

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.

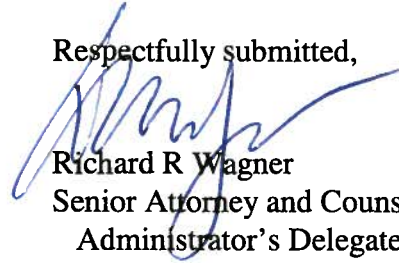
responding to a request for balance sheets and income statements for Respondent John A. Biewer of Toledo, Inc., those statements were not provided by an officer or employee of that company, but, rather, by the Chief Financial Officer of Biewer Lumber. Attachment D.

Twenty-seven of the sixty days contemplated for discovery have already past, and notwithstanding the attempt made by Complainant to initiate voluntary discovery on January 20, 2009, not a single document has been provided Complainant, nor, to Complainant's knowledge, was any attention being given to the matter by Respondent(s) until the past couple of days. To assure the integrity of decisionmaking in this matter, and to expedite discovery as contemplated in the Order of January 7th, a discovery order is necessary requiring that, in addition to producing information identified in the discovery motion, Respondent(s) provide an accounting of why information relevant to the discovery request will not, or cannot, be produced.³ Consequently, the Motion should be granted, and an order entered directing that Respondent(s), within a

³As a failure of a corporation to maintain adequate corporate records and minutes, and a failure of a corporation to produce financial information, may be considered evidence in favor of a finding that the corporate veil should be pierced, In Re Safe & Sure Products, Inc., and Lester J. Workman, No. I.F. & R. 04-907003, Initial Decision, at 23-24 (June 26, 1998), documentation of the reasons given by the Respondents in this matter for failing to maintain or produce the records sought herein in discovery can be relevant evidence, in and of itself, on the issue of "piercing the corporate veil."

reasonable time to be determined, answer in writing each of the discovery requests made by Complainant in the Motion.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Richard R. Wagner", is written over the typed name and title.

Richard R Wagner
Senior Attorney and Counsel for the
Administrator's Delegated Complainant



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

REPLY TO THE ATTENTION OF:

January 20, 2009

Douglas A. Donnell
Mika Meyers Beckett & Jones, PLC
900 Monroe Avenue, NW
Grand Rapids, MI 49503-1423

Sent by Fed Ex

RE: John A. Biewer Company of Ohio, Inc., No. RCRA-05-2008-0007
John A. Biewer Company of Toledo, Inc., No. RCRA-05-2008-0006

Dear Doug:

Given that the Presiding Officer in these matters has granted motions to amend in each case, allowing the Administrator's Delegated Complainant to file amended complaints including John A. Biewer Company, Inc., and Biewer Lumber LLC as respondents, I would like to address the matter of further discovery.

I would note that John A. Biewer Company of Toledo, Inc., and John A. Biewer Company of Ohio, Inc., have already made three pre-hearing exchange filings, as follows:

- (1) Respondent's Witness Disclosure, dated August 27, 2008;
- (2) Respondent's Supplemental Witness Disclosure, dated September 15, 2008; and
- (3) Respondent's Pre-Hearing Exchange, dated November 20, 2008.

The Administrator's Rules provide that further discovery may be allowed, if requested by motion which:

specif[ies] the method of discovery sought, provide[s] the proposed discovery instruments, and describe[s] in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted)."

40 C.F.R. § 22.19(e). The rules further identify three criteria which are to be applied by the Presiding Officer in determining whether a motion for further discovery shall be allowed. Those three criteria are: (1) that further discovery will not unreasonably delay the proceeding or burden the non-moving party; (2) the information sought is most reasonably obtained from the

non-moving party; and (3) the information sought has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. Id.

In his order granting the motion to amend concerning Biewer of Ohio, the Presiding Officer has held that, after the filing of an amended complaint, "discovery is to commence promptly with the goal of completing it within sixty days[.]" and that Complainant "is entitled to learn through discovery of the nature of the relationship of [Biewer Lumber LLC] with [John A. Biewer Company, Inc.] and the Respondent." Order on Motion to Amend Complaint and Compliance Order and Notice of Hearing Postponement, at 11. The Presiding Officer further held that:

[o]ther matters, such as the details of contract(s) and contact(s) between the respondents and the Mannik & Smith Group, inquiries into those who were directing and operating Biewer Ohio, and the entity for which they were acting as officers when engaged in such actions, and the movement of funds in and among these entities would all seem to be examples of appropriate areas of inquiry.

Id.

Consequently, Complainant has prepared an attachment to this letter, identifying the information that it is seeking from your clients by further discovery. It is my opinion that all information identified in the attachment meets the criteria of the Administrator's Rules, specifically 40 C.F.R. § 22.19(e), and the scope of discovery set out in the Presiding Officer's order.

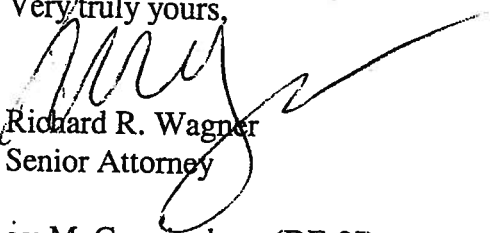
Given that the Presiding Officer contemplates our completing additional discovery within 60 days, we would ask that your clients voluntarily collect the information identified and submit copies of it to me no later than February 10, 2009. With regard to any item of information which your clients object to submitting to Complainant, we would ask that, at your earliest convenience, you identify the item to us, and state the basis of the objection to that item. While it is our hope that we can conduct further discovery efficiently and expeditiously on a voluntary basis, given the short time frame we are working under, Complainant reserves her right under the Administrator's Rules to file a motion for further discovery with regard to any item of information not provided expeditiously by your client.

I would add that amended complainants and compliance orders have been prepared and are ready to be filed. I will be filing those documents with the Region 5 Hearing Clerk, and making appropriate service, as soon as I receive a copy of the Presiding Officer's order allowing amendment in the case of John A. Biewer Company of Toledo, Inc. In the interest of saving time, and for your convenience, I am including with this letter a copy of the new language which will be in the amended complaint. Only the caption and Paragraphs 8 and 9 of the complaints are effected. In all other respects, the remainder of the amended complaints will be exactly the same as the original complaints, including all paragraph numbers. I will, of course, be providing you with a file-stamped copy of the documents once they are filed.

One request: could you please let me know, in writing, when you determine whether you will represent John A. Biewer Company, Inc, and Biewer Lumber LLC, or whether someone else will be representing them?

Please do not hesitate to contact me at (312) 886-7947 in this matter should you have any questions. Thank you very much for your assistance in this matter.

Very truly yours,



Richard R. Wagner
Senior Attorney

cc: M. Cunningham (DE-9J)
K. Smirnova

ADDITIONAL INFORMATION REQUEST

1. For John A. Biewer Co., Inc. and Biewer Lumber LLC, complete tax returns including all schedules and attachments for January 1, 1997 through the present;
2. For John A. Biewer Co., Inc. and Biewer Lumber LLC, complete year-end financial statements, including the auditor's letter, balance sheet, income statement, statement of cash flows and notes, for January 1, 1997 through the present.
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 - d. A history of the Board of Directors of the Toledo and Ohio Companies, John A. Biewer Co., Inc. and Biewer Lumber LLC from January 1, 1997 to the present.
 - e. Copies of the Board of Directors' Meeting Minutes, Resolutions, or any other records of the Board for the four companies from January 1, 1997 to present.
5. For the Toledo company, a description of all related party transactions for the period of January 1, 1997 to the present. For the Ohio company, a description of all related party transactions for the period of January 1, 2001 to the present. A related party transaction includes, but is not limited to, sales, purchases, and transfers of realty and personal property; services received or furnished, for example, accounting, management, engineering, and legal services; use of property and equipment by lease or otherwise; borrowings and lendings; guarantees; maintenance of bank balances as compensating balances for the benefit of another; intercompany billings based on allocations of common costs; and filings of consolidated tax returns.

Statement No. 57 of the Financial Accounting Standards Board defines related parties as the following:

- Affiliates of the enterprise. An affiliate is a party that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with an enterprise.
- Entities for which investments are accounted for by the equity method by the enterprise.

- Trusts for the benefit of employees, such as pension and profit-sharing trusts that are managed by or under the trusteeship of management.
- Principal owners of the enterprise. Principal owners are owners of record or known beneficial owners of more than 10 percent of the voting interests of the enterprise.
- Management of the enterprise. Management includes persons who are responsible for achieving the objectives of the enterprise and who have the authority to establish policies and make decisions by which those objectives are to be pursued. Management normally includes members of the board of directors, the chief executive officer, chief operating officer, vice presidents in charge of principal business functions (such as sales, administration, or finance), and other persons who perform similar policymaking functions. Persons without formal titles also may be members of management.
- Members of the immediate families of principal owners of the enterprise and its management. Immediate family includes family members whom a principal owner or a member of management might control or influence or by whom they might be controlled or influenced because of the family relationship.
- Other parties with which the enterprise may deal if one party controls or can significantly influence the management or operating policies of the other to an extent that one of the transacting parties might be prevented from fully pursuing its own separate interests.
- Other parties that can significantly influence the management or operating policies of the transacting parties or that have an ownership interest in one of the transacting parties and can significantly influence the other to an extent that one or more of the transacting parties might be prevented from fully pursuing its own separate interests.

For each transaction, the description should include, but not be limited to, the specific nature of the transaction, the related parties' names, the date of the transaction, and the dollar amount of the transaction.

- a. For all transactions of \$5,000 or more involving transfer or sale of an item or asset from Toledo or Ohio company to a related party, provide all documentation developed by Toledo or Ohio company to assure that the asset transfer or sale was consistent with a third-party market transaction.
 - b. For all loans or other financing transactions between Toledo or Ohio companies and related parties, provide copies of the agreements between the parties.
6. Provide an 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. Also identify with which entity these dividend transactions occurred.
 7. Provide all documents related to in any way to the detail of the "Accounts Receivable Intercompany" and "Accounts Payable Intercompany" entries appearing on the Toledo company's balance sheets. The documentation should include, but not be limited to, the related parties associated with these transactions, the date of the transaction, and the services that were

provided and received in association with these transactions. List the year end balances for these accounts for each related party for the years ending 1997 to present.

8. Provide all documents related to in any way to the detail of the "Accounts Receivable Intercompany" and "Accounts Payable Intercompany" entries appearing on the Ohio company's balance sheets. The documentation should include, but not be limited to, the related parties associated with these transactions, the date of the transaction, and the services that were provided and received in association with these transactions. List the year end balances for these accounts for each related party for the years ending 2001 to present.
9. For the Ohio company, describe in detail the transaction or transactions that occurred when \$1.4 million in inventory appearing on the company's balance sheet in November 2001 became \$0 on the November 2002 balance sheet. Provide detailed information on the items included in the inventory as of November 2001, including, but not limited to, their book value and their estimated market value at the time. If the inventory was sold, provide the contract of sale of the inventory, the parties to which it was sold, and the value the company received from the sale, and whether this consideration was in the form of a note receivable or cash payment. Provide all documentation related to the reduction of the inventory from \$1.4 million to 0, including, but not limited to, any contracts, checks, and bank transfers.
10. Did the Toledo company sell inventory or other assets after it stopped operating? If so, provide detail on the transaction similar to that provided in Request 8 above.
11. Provide an itemization of the fixed assets currently owned by the Ohio and Toledo companies (e.g. an asset ledger) that shows a brief description of the asset, the year it was put in service, the original cost, the accumulated depreciation and an estimate of the current market value.
12. Provide estimates of the current market value for each parcel of land, improvements, and equipment owned by the Ohio and Toledo companies.
13. Provide the general ledgers from January 1, 1997 to present for the Ohio and Toledo companies. Provide the chart of accounts for both companies.
14. Provide copies of contracts between Mannik & Smith Group and Toledo and Ohio companies (or a representing party). Provide all payment documents associated with this contract(s), including, but not limited to, copies of invoices, proof of bank transfers and all other payment documents with regard to payments made to Mannik & Smith Group by the parties for the services rendered by Mannik & Smith Group at the Ohio and Toledo sites (in particular, the Closure Plan prepared by Mannik & Smith Group).
15. Provide all documents in possession of the Ohio and Toledo companies, as well as Biewer Lumber and John A. Biewer Co. Inc., discussing the closure and closure costs at the Ohio and Toledo companies' facilities, as well as all documents discussing the extent of contamination at each company and the associated decontamination activities required to remove the contamination.
16. For the Ohio and Toledo companies, provide the number of officers and employees employed after the shut-down (2001 and 1997, respectively). For each officer and employee, provide name, position, a brief job description and annual gross pay. Provide copies of pay stubs and all other documentation confirming the payments made by the Ohio and Toledo companies to these officers and employees during the period since the closure and until the present.

17. For the Ohio and Toledo companies, provide the names of any individual acting on behalf of each company after the shut-down (2001 and 1997, respectively). For each individual, provide name, corporate affiliation, position(s), and nature of compensation for work performed on behalf of Ohio or Toledo. Provide all documentation confirming the payments made by the Ohio and Toledo companies to these individuals during the period since the closure and until the present.
18. Provide the name and account number of the checking account(s) for Ohio and Toledo companies, as well as the name of the bank where this checking account is open, and the name of the primary holder of the account. If the checking account(s) have been closed, advise as to when the account was closed, and describe how the Ohio and/or Toledo companies make payments in the absence of a checking account.
19. With regard to the Repair and Maintenance expense appearing on the Ohio and Toledo companies' income statements and the Legal and Accounting expense appearing on the Toledo company's income statement since the closure (2001 and 1997, respectively), provide the following information:
 - a. Identify the specific services associated with these expenses.
 - b. Identify who performed the services associated with these expenses. If the services were performed by an Ohio or Toledo employee, provide name, position and brief job description of the employee, as well as the gross annual compensation and copies of the associated pay stubs. If the services were performed by a third party or a related entity, provide a service contract, the list of services performed, and the associated payment information (any checks, payment stubs and other payment documentation).
20. Identify the individual and company that prepare the financial data for the Ohio and Toledo companies. If the financial data are prepared by an employee(s), provide the name(s), position and brief job description of the employee(s), as well as the gross annual compensation and copies of the associated pay stubs. If the services are performed by a third party or a related entity, provide all documentation regarding the services including any contract or agreement, the list of services performed, and the associated payment information, including, but not limited to, any checks, payment stubs and other payment documentation.
21. With regard to all property, income or other tax and insurance payments made by the Ohio and Toledo companies since the closure, provide all documents confirming the payments made by the Ohio and Toledo companies (including, but not limited to, copies of the checks covering the tax and insurance payments, electronic transfer information, etc.).
22. With regard to the rental income received by the Toledo company, provide all documents related to the rental, including, but not limited to: rental agreement(s), and rent payments (i.e., copies of checks received by the Toledo company from the renter, electronic transfer documentation, etc.), documentation regarding the deposit of the rent payments (including the account number, holder of the account, and the name of the bank where the account is open), and any related correspondence.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

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)

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

and)

John A. Biewer Company, Inc.)
812 S. Riverside St.)
St. Clair, Michigan 48079)

and)

Biewer Lumber LLC)
812 Riverside St.)
St. Clair, Michigan 48-79)

Respondents)
_____)

AMENDED COMPLAINT AND COMPLIANCE ORDER

AMENDED COMPLAINT

.....

8. That Respondent John A. Biewer Company of Toledo, Inc., Respondent John A. Biewer Company, Inc., and Respondent Biewer Lumber LLC, were each, at all times relevant to this Complaint, corporations incorporated under the laws of Michigan. Respondent John A. Biewer Company, Inc., or Respondent Biewer Lumber LLC, at all times relevant to the violations alleged in this Complaint, was the parent corporation of John A. Biewer Company of Toledo, Inc., and:

- (a) Respondent John A. Biewer Company, Inc., and/or Respondent Biewer Lumber LLC, managed or directed activities of Respondent John A. Biewer Company of Toledo, Inc., relevant to the violations alleged in this Complaint, so as to be liable for those violations under United States v. Bestfoods, et al., 524 U.S. 51 (1998);
- (b) Respondent John A. Biewer Company, Inc., and/or Respondent Biewer Lumber LLC, controlled the activities of Respondent John A. Biewer Company of Toledo, Inc., relevant to the violations alleged in this Complaint, under circumstances warranting a “piercing of the corporate” veil pursuant to the law of the State of Michigan, and a finding, thereunder, that the parent corporation is liable for those violations;
- (c) On September 29, 2008, Complainant filed a Motion to Amend Complaint and Compliance Order in this matter, seeking to add as respondents John A. Biewer Company, Inc., and Biewer Lumber LLC, serving both those parties, as well as John A. Biewer Company of Toledo, Inc., with a copy of the motion and a memorandum in support of that motion; and
- (d) On January __, 2009, the Presiding Officer issued an order granting the motion: (1) finding, without determining any ultimate issue, that Complainant had put forth a sufficient basis to warrant the inclusion of those entities as named respondents for purposes of pleading; (2) directing that Complainant file an amended complaint adding as parties John A. Biewer Company, Inc., and Biewer Lumber LLC; and (3) directing that discovery will commence promptly to determine the relationship and common activities of all three Biewer entities.

9. That Respondent, John A. Biewer Company of Toledo, Inc., Respondent John A. Biewer Company, Inc., and Respondent Biewer Lumber LLC, are each a “person” as defined by Section 1004(15) of RCRA, 42 U.S.C. §6903(15), and OAC 3745-50-10.

**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

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

and

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

and

Biewer Lumber LLC
812 Riverside St.
St. Clair, Michigan 48-79

Respondents

AMENDED COMPLAINT AND COMPLIANCE ORDER

AMENDED COMPLAINT

....

8. That Respondent John A. Biewer Company of Toledo, Inc., Respondent John A. Biewer Company, Inc., and Respondent Biewer Lumber LLC, were each, at all times relevant to this Complaint, corporations incorporated under the laws of Michigan. Respondent John A. Biewer Company, Inc., or Respondent Biewer Lumber LLC, at all times relevant to the violations alleged in this Complaint, was the parent corporation of John A. Biewer Company of Toledo, Inc., and:

- (a) Respondent John A. Biewer Company, Inc., and/or Respondent Biewer Lumber LLC, managed or directed activities of Respondent John A. Biewer Company of Toledo, Inc., relevant to the violations alleged in this Complaint, so as to be liable for those violations under United States v. Bestfoods, et al., 524 U.S. 51 (1998);
- (b) Respondent John A. Biewer Company, Inc., and/or Respondent Biewer Lumber LLC, controlled the activities of Respondent John A. Biewer Company of Toledo, Inc., relevant to the violations alleged in this Complaint, under circumstances warranting a “piercing of the corporate” veil pursuant to the law of the State of Michigan, and a finding, thereunder, that the parent corporation is liable for those violations;
- (c) On September 29, 2008, Complainant filed a Motion to Amend Complaint and Compliance Order in this matter, seeking to add as respondents John A. Biewer Company, Inc., and Biewer Lumber LLC, serving both those parties, as well as John A. Biewer Company of Toledo, Inc., with a copy of the motion and a memorandum in support of that motion; and
- (d) On January __, 2009, the Presiding Officer issued an order granting the motion: (1) finding, without determining any ultimate issue, that Complainant had put forth a sufficient basis to warrant the inclusion of those entities as named respondents for purposes of pleading; (2) directing that Complainant file an amended complaint adding as parties John A. Biewer Company, Inc., and Biewer Lumber LLC; and (3) directing that discovery will commence promptly to determine the relationship and common activities of all three Biewer entities.

9. That Respondent, John A. Biewer Company of Toledo, Inc., Respondent John A. Biewer Company, Inc., and Respondent Biewer Lumber LLC, are each a “person” as defined by Section 1004(15) of RCRA, 42 U.S.C. §6903(15), and OAC 3745-50-10.

Richard
Wagner/R5/USEPA/US
02/18/2009 04:03 PM

To ddonnell@mmbjlaw.com
cc
bcc

Subject John A. Biewer Company of Toledo, Inc., et al.

Dear Doug:

On January 20, 2009, I sent you a letter regarding John A. Biewer Company of Ohio, Inc., and John A. Biewer Company of Toledo, Inc., and the discovery which the Presiding Officer in these matters expected would occur within 60 days of the Complainant filing amended complaints in each of the above entitled cases, adding John A. Biewer Company, Inc., and Biewer Lumber LLC as respondents. With that letter I identified a number of specific discovery requests that the Administrator's Delegated Complainant was making of these parties. Though the amended complaints could not be appropriately filed until the Presiding Officer ruled on the Motion to Amend in the Toledo case -- he did so rule on January 23th -- I asked that your clients respond to our discovery requests voluntarily, given the 60 day time frame the Presiding Officer intended to allow for discovery. I further asked that you inform me whether your clients objected to any item Complainant was seeking in discovery. In addition, I asked that you inform me whether you would be representing John A. Biewer Company, Inc., and Biewer Lumber LLC. I asked that you respond no later than February 10, 2009, and invited you to contact me if you had any questions.

As of this message, I have not heard anything from you. I left a phone message on your answering machine yesterday morning asking you to call me about the matter, but think that it is probably more prudent to express my concerns in writing. To my knowledge there is no movement whatsoever toward completing the contemplated discovery.

Complainant filed the amended complaints on January 30, 2009. Consequently, under the Presiding Officer's orders granting Complainant's Motion to Amend Complaint and Compliance Order in each case, the 60 days contemplated for discovery will run on April 2, 2009.

Not having had a response of any kind to my letter of January 20th, I think it is necessary that I get back to you to inquire of the position of your clients on this discovery. Given the discussion during our January 9, 2009, conference call with the Presiding Officer, I had hoped that we would be able to resolve discovery without his intervention. However, time is passing by quickly -- 20 of the 60 days are gone already -- and unless I hear of your clients' intention, I will very soon have to file a motion asking the Presiding Officer to order your clients to submit the information Complainant is seeking.

Could you please contact me about this matter at your earliest convenience?

Thank you very much for your consideration.

Attachment B



HOME COMPANY PRODUCTS DIVISIONS DEALERS CONTACT

Q- Enter your zip code

OUR COMPANY

Overview

Locations

Career Opportunities

Why We Are Green

Contact Us



Overview

Since our beginning over 45 years ago, one simple principle has served Biewer Lumber™ well: **deliver the best products and services to our customers.** This is a commitment that has kept our business growing, and a philosophy we intend to keep.



Biewer Lumber™ is a third generation, family owned company that is committed to the environment and sound forest practices. We take pride in our family of employees and we make it our goal to operate the safest and most effective facilities. These facilities include three pressure-treated lumber and distribution facilities, two modern sawmills and a state of the art composite plant.



Biewer Lumber™ manufactures and distributes products for a wide variety of building applications. Our signature Select Cut® is an example of the high quality standards we have set for our organization. This hand selected, appearance-grade lumber is the leading choice for contractors and builders in the Midwest.

Our products are of the highest quality for use in appearance and traditional construction markets. We are committed to upgrading our equipment and operating systems in our facilities to be responsive to new market trends and the growing needs of our customers.

At Biewer Lumber™, we've worked hard to earn the respect of our customers, and we're dedicated to keeping it.



HOME :: COMPANY :: PRODUCTS :: DIVISIONS :: DEALERS :: CONTACT

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Attachment C



HOME COMPANY PRODUCTS DIVISIONS DEALERS CONTACT

Enter your zip code

OUR PRODUCTS

Select Cut

- Un-Treated
- Treated
- Deck Essentials
- Appearance Grade Fencing

Everguard

Monarch

Fire-Retardant Wood

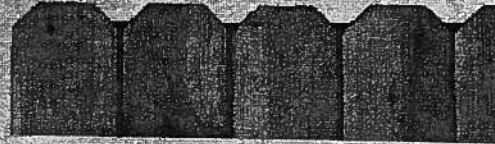
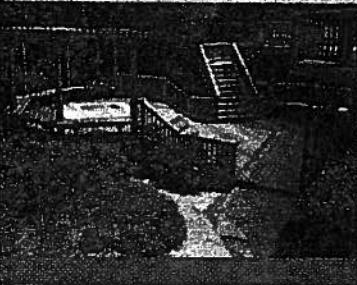
Standard Grade Lumber

Industrial Grade Lumber

Commercial Products

PWF

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We choose each board...by hand

When only the best will do, we offer Select Cut™, our high-quality line of appearance-grade lumber. Select Cut Lumber is hand-selected for quality and appearance, and each individual board undergoes multiple inspections. Available both treated and un-treated, each board is graded to assure that, from Forest to Framework™, we bring you the ultimate wood for lasting beauty and quality.

The Select Cut® Difference

Biewer Lumber™ Select Cut lumber is straighter and has less wane than typical standard construction-grade lumber, and is smooth on all four sides. To produce Select Cut we begin with the best raw lumber. Red Pine boasts superior strength, stability and durability. With minimal twisting and cupping, it's easy to work with. You'll appreciate the natural beauty of Red Pine, too—the wood boasts a distinctive knot and grain pattern.



For contractors and builders

For more than 45 years, Biewer Lumber™ has been supplying its signature Select Cut to building professionals seeking the highest quality. We appreciate the time and commitment you invest in each of your projects, and we understand how important the right materials are to building it right the first time. Reliable, practical, exceptionally strong and striking in appearance, Select Cut allows for project flexibility and is accepted for use by all major building codes. That means higher customer satisfaction, few customer call backs, and the satisfaction of knowing you used the best quality product available.

For homeowners

When you want enduring quality for home improvement projects, Biewer Lumber™'s Select Cut is the ideal product. When you choose our signature Select Cut lumber, you'll have the peace of mind that comes with knowing you are using the most dependable materials available, and the pride of building beautiful, premium projects that will last for years to come.

So to have your next project be a cut above, the choice is simple...Select Cut Appearance-Grade Lumber





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🔍 - Enter your zip code

OUR PRODUCTS

Select Cut

[Everguard](#)

[Monarch](#)

[Fire-Retardant Wood](#)

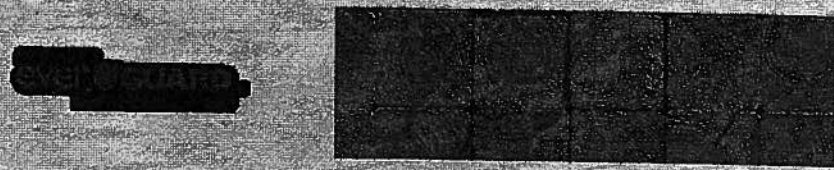
[Standard Grade Lumber](#)

[Industrial Grade Lumber](#)

[Commercial Products](#)

[PWF](#)

Visit our gallery of projects for home improvement ideas



Biewer Lumber™ was a pioneer in the treating industry, and remains a leader today. Our commitment to safe, productive treating facilities has made our company one of the most reliable and respected treaters in the country.

In addition to using high-quality lumber from our sawmills in McBain, MI and Brantford, ON, we also source lumber from other mills in the region.

[Click here for a product chart](#)



HOME COMPANY PRODUCTS DIVISIONS DEALERS CONTACT

Enter your zip code

OUR DIVISIONS

Saw Mills

Treating & Distribution

Land Owners

Industrial

Logistics

Commercial

Green Tree Composites

Treating & Distribution

Biewer Lumber™ processing facilities include three state-of-the-art treatment plants that process and treat a capacity of 300 million board feet annually

Lansing, Michigan – Biewer Lumber™'s flagship treatment and distribution center began production in 2000. Biewer of Lansing LLC is the largest pressure-treated lumber facility in the Midwest. Two 90-foot cylinders, both utilizing a completely mechanized handling system, process all retention levels of Everguard™, as well as Dricon® fire-retardant treated wood and Permanent Wood Foundation wood. Many products are kiln-dried after treatment and stored in the 185,000 square feet of dry inside storage.

Seneca, Illinois – Located just west of Chicago, John A. Biewer Co. of Illinois is the largest producer in the United States of Dricon FRT wood. Our production facility operates two 80-foot cylinders and two direct fired natural gas dry kilns. The facility also produces Everguard pressure-treated lumber and plywood, and carries a complete inventory of FRX exterior fire-retardant treated wood.

Prentice, Wisconsin – John A. Biewer Co. of Wisconsin is adjacent to the Biewer Wisconsin sawmill. The facility produces Everguard pressure-treated lumber and plywood for distribution throughout Wisconsin, Minnesota and Iowa.





300 Oak Street
St. Clair, MI 48079
800.482.5717
Fax: 810.329.6220
www.biewerlumber.com

September 25, 2007

Douglas S. Touma
Touma, Watson, Whaling,
Cory & Castello, P.C.
316 McMorran Blvd
Port Huron MI 48060

Dear Doug:

Attached are balance sheets and income statements for John A. Biewer Co of Ohio and John A. Biewer Co. of Toledo for each of the following periods.

Balance sheets

- November 30, 1998
- November 30, 1999
- November 30, 2000
- November 30, 2001
- November 30, 2002
- December 31, 2002
- December 31, 2003
- December 31, 2004
- December 31, 2005
- December 31, 2006

Comparative Income Statements

- 12 months ended November 30, 1998 and 1997
- 12 months ended November 30, 1999 and 1998
- 12 months ended November 30, 2000 and 1999
- 12 months ended November 30, 2001 and 2000
- 12 months ended November 30, 2002 and 2001
- 1 month period December 2002
- 12 months ended December 31, 2003 and 2002
- 12 months ended December 31, 2004 and 2003
- 12 months ended December 31, 2005 and 2004
- 12 months ended December 31, 2006 and 2005

Sincerely

Gary E. Olmstead
Chief Financial Officer

PROTECTED COPY

Attachment D