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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	)
(Washington Courthouse Facility)	)
	)
	)
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	)
	)

COMPLAINANT'S REPLY TO RESPONDENTS JOHN A. BIEWER COMPANY, INC, AND BIEWER LUMBER LLC'S MEMORANDUM IN OPPOSITION TO EPA'S MOTION FOR ACCELERATED DECISION ON DERIVATIVE LIABILITY

This is Complainant's reply to Respondents John A. Biewer Company, Inc. and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability ("Respondents' Opposition-Toledo"), submitted on July 30, 2009.

In Respondents' Opposition-Toledo, at 2, Respondents "incorporate all principles and arguments set forth in Respondents' Memorandum in Opposition of Complainant's Motion for Accelerated Decision on Derivative Liability filed in the JAB Ohio case." Consequently, Complainant's Reply will incorporate by reference Complainant's Response to Respondent's Memorandum in Opposition to EPA' Motion for Accelerated Decision on Derivative Liability in

In Re John A. Biewer Company of Ohio, Inc., No. RCRA-05-2008-0007, and Complainant will reply here to specific matters raised in Respondents' Opposition-Toledo.[1]

For some clarity, Complainant here lists the pleadings which will be referred to in this Reply:

(1) Motion for Accelerated Decision on Derivative Liability ("Complainant's Motion").

(2) Complainant's Memorandum in Support of Motion for Accelerated Decision on Derivative Liability ("Complainant's Memorandum").

(3) Respondents John A. Biewer Company, Inc. and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability ("Respondents' Opposition-Toledo").

(4) Respondents John A. Biewer Company, Inc. and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability, in In Re John A. Biewer Company of Ohio, Inc., No. RCRA-05-2008-006 ("Respondents' Opposition-Ohio").

(5) Complainant's Reply to Respondents John A. Biewer Company, Inc. and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability, in In Re John A. Biewer Company of Ohio, Inc., No. RCRA-05-2008-006 ("Complainant's Reply-Ohio").

I. LAW AND ANALYSIS ON "PIERCING THE CORPORATE VEIL"

(a) Applicable Law

In Complainant's Memorandum, Complainant sets out her case for "piercing the corporate veil" and a finding that the John A. Biewer Company, Inc., and Biewer Lumber LLC,

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[1]Since the Amended Complainant and Compliance Order was filed in this matter, discovery has been conducted on information relevant to the issues of the derivative and direct liability of JAB-Co and Biewer Lumber LLC. Having reviewed the documents provided by Respondents in discovery, as well as their responses to the Motion for Accelerated Decision on Derivative Liability, Complainant is of the opinion that the evidence and applicable law do not support a finding that Biewer Lumber LLC is either derivatively liable, or directly liable, for the violation alleged in the Amended Complaint and Compliance Order. Consequently, Complainant will no longer pursue Biewer Lumber LLC as a respondent in this case.

are liable for the violation of John A. Biewer Company of Toledo, Inc. ("JAB-Toledo"), alleged in the Amended Complaint and Compliance Order, citing various factors to be considered in making that determination. Those factors relating to the parent and subsidiary are as follows:

(a) nature of corporate ownership and control;

(b) absence of corporate assets and undercapitalization;

(c) failure to observe legal formalities and commingling of funds; and

(d) the necessity of "piercing the corporate veil" to defend public and prevent an injustice.

This law is discussed in Complainant's Reply-Ohio, at 3-7.

(b) Analysis of Evidence and Applicable Criteria

Nature of Corporate Ownership and Control

While Respondents set out a "counter-statement of facts," Respondents' Opposition-Toledo, at 2-5, a review of their "counter-statement of facts" reveals that Respondents do not challenge or otherwise place at issue any evidence cited by Complainant under "Nature of Corporate Ownership and Control." Complainant's Memorandum, at 10-15. In response to a motion for accelerated decision, it is the burden of the non-movant to demonstrate that there are facts at issue requiring trial.[2]

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[2]The Administrator, by the Board, has held that, accelerated decision is analogous to summary judgment, and that to oppose an accelerated decision, a party must do so by "referencing probative evidence in the record, or by producing such evidence." In Re Green Thumb Nusery, Inc., 6 E.A.D. 782, at 793 (March 6, 1997). See also, General Office Products v. A.M. Capen's Sons, Inc., 780 F.2d 1077, at 1078 (1st Cir. 1986) (an "opposing party cannot defeat summary judgment by mere allegations but must bring 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial"); and Galindo v. Precision American Corporation, 754 F.2d 1212 (5th Cir. 1985) ("unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment"). Moreover,

Respondents do note two factual circumstances regarding JAB-Toledo which do not appear in the JAB-Ohio case, only one of which is relevant to the issue of "derivative" and "direct liability." In contrast to JAB-Ohio, JAB-Toledo has had limited income of $53,500 annually, and JAB-Toledo did perform some work required by the MSG drip pad closure plan. JAB-Toledo's income does not change the fact that JAB-Co was operating JAB-Toledo's business, as set out by Complainant in Complainant's Memorandum, at 14-15. Respondents fail to challenge any evidentiary facts identified by Complainant to support her conclusions therein.

Respondents acknowledge that JAB-Co, not JAB-Toledo, paid MSG for services rendered for JAB-Toledo. Respondents' Opposition, at 5. While Respondents go on to state that the amounts paid by JAB-Co for those services "were properly debited from the JAB Toledo account," Id., Respondents earlier admitted that JAB-Toledo had no account. Complainant's Memorandum, Attachment I. at 15. Moreover, Respondents neither identify in the record, nor submit in response to Complainant's Motion, any evidence to support its claim that JAB-Co paid MSG, and that those payments "were properly debited" from any account of JAB-Toledo. See fn. 2. Nor do Respondents identify any business records to support a claim that JAB-Toledo, without any account of its own, was paying JAB-Co for any services related to collecting JAB-Toledo's income and paying its financial obligations.

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for purposes of prevailing on summary judgment "facts must be established through one of the vehicles designed to ensure reliability and veracty -- depositions, answers to interrogatories, admissions and affidavits." Martz v. Union "Labor Life Ins. Co., 757 F.2d 135, at 138 (7th Cir. 1985), and "legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid summary judgment." Estrella v. Brandt, 682 F.2d 814, at 819-20 (9th Cir. 1982) (").

Consequently, the fact that a portion of JAB-Toledo's property was rented, and a $53,500 annual income realized, does not diminish the thrust of the evidence supporting a finding that JAB-Co controlled JAB-Toledo. That income was deposited in an account of JAB-Co, and JAB-Co "paid all expenses" of JAB-Toledo. Respondents' Opposition-Toledo, at 4.[3]

Absence of Corporate Assets and Undercapitalization

In addressing the JAB-Toledo's "absence of corporate assets and undercapitalization," Complainant provided an analysis of JAB-Toledo's financial data, with a chart reciting its assets and liabilities between 1997, when it closed its wood-treating operations, and 2007. This analysis and chart is supported by cited source material in financial and corporate records provided by JAB-Toledo. Complainant's Memorandum, at 15-18. In the "counter-statement of facts" in Respondents' Opposition-Toledo, Respondents do not challenge or otherwise contest

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[3]The second factual distinction identified by Respondents is that, in contrast to Ohio, some work was carried out pursuant to the drip pad closure plan prepared by MSG for the JAB-Toledo facility. Respondents' Opposition-Toledo, at 5. However, the results of the work performed on the original plan revealed that concentrations of arsenic and chrome at the drip pad "were still about four to 17 times the remediation standards contained in the Plan." Complainant's Memorandum, Attachment V, at 2. Moreover, in transmitting this information to Ohio EPA, copying Brian Biewer, MSG informed Ohio EPA that JAB-Toledo "has asked [MSG] for assistance in developing supplemental procedures for achieving acceptable closure of the drip pad[,]" and that JAB-Toledo "is nearing completion of its reassessment of the remediation approach and intends to provide a contingent closure approach to Ohio EPA by December 31, 2005, for agency concurrence." Id. Though Respondents assert that "JAB Toledo did not have the funds to pay" for the additional closure work, they offer no analysis explaining how this circumstance affects the issue of "derivative" or "direct" liability. The fact is, JAB-Toledo did not have <u>insufficient</u> <u>funds</u> to pay for this work. JAB-Toledo had <u>no</u> <u>funds</u> whatsoever. JAB-Co held and controlled all funds of JAB-Toledo. Respondents admit that JAB-Co "paid all expenses" of JAB-Toledo, Respondents' Opposition-Toledo, at 4, and it did so when JAB-Co found those payment of those expense to be "necessary." Respondents' Opposition-Ohio, at 18. If anything, these circumstances demonstrate that JAB-Co's control over JAB-Toledo's finances and JAB-Toledo's payment on its obligations has been complete.

the accuracy of the evidence cited by Complainant.[4] Consequently, this evidence is not at issue. See fn.1. Nor do Respondents challenge, either in Respondents' Opposition-Toledo, or Respondents' Opposition-Ohio, Complainant's recitation of JAB-Co's experience of having caused soil and ground-water contamination with arsenic and chromium at its Schoolcraft, Michigan, wood-treating facility in the late 1970s.[5]

Regarding the "absence of corporate assets and undercapitalization" factors, Respondents do acknowledge that, after JAB-Toledo ceased operations, it

> sold any inventory on hand to customers of John A. Biewer Lumber Company, John A. Biewer Co. of Illinois, and Biewer of Lansing LLC, and paid the proceeds, or assigned the rights thereto, to JAB Company in partial satisfaction of debts owed to the same.

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[4]Respondents do make the following argument:

> Complainant's own chart demonstrates that JAB Toledo has had more total assets than total liabilities since 2003. Complainant does not explain why that would be if JAB Company was purposefully stripping JAB Toledo of its assets.

Respondent Opposition-Toledo, at 5. While Respondents do not challenge the accuracy of the chart, they attempt to challenge Complainant's interpretation of the information documented in the chart. However, a review of Complainant's Memorandum, at 16-18, reveals that Respondents have misconstrued the purpose of the chart provided by Complainant and the point being made by Complainant. JAB-Toledo's total assets were less than its total liabilities in years 1998 through 2002, rendering the company insolvent in those years. Attachment N. In years 2003 through 2007, indeed, JAB-Toledo has had more total assets than total liabilities on the books, Id., and did not meet the definition of technical insolvency. Complainant's Memorandum, at 16. However, in September 2007, Respondents admitted that "[i]t is doubtful that at the current rental value, there is any substantial net equity in the Toledo property, although without completing the investigation as to remaining radiation [sic: arsenic and chromium contamination], the company is not able to determine the market value." Id., Attachment J, at 2. A conclusion is then warranted that JAB-Toledo's land and buildings are likely overvalued on the books. Therefore, JAB-Toledo's assets were below its liabilities in all years for which data are available, and the company was insolvent in all years between 1997 and 2007. See Complainant's Memorandum, at 16-18.

[5]See Complainant's Reply-Ohio, at 16-17, for Complainant's Reply on this matter in the JAB-Ohio case.

Respondents' Opposition, at 4. Similar assertions are made by Respondents with regard to JAB-Ohio, which Complainant addresses in her Reply in that matter. Complainant's Reply, at 18-19. However, Respondents here do not cite any evidence in the record, nor submit any evidence, to support their assertion that JAB-Toledo was indebted to JAB-Co prior to the sale of the JAB-Toledo inventory. Respondents have produced no records documenting the amount of any indebtedness, or repayment terms on the indebtedness.[6] Respondents assertions regarding any intercompany indebtedness of JAB-Toledo are supported by nothing other than statements of counsel in argument and such statements are insufficient to put at issue any fact, or otherwise defeat a motion for accelerated decision. See fn.2.

The $459,503 by which JAB-Toledo's Accounts Payable Intercompany were reduced between 1997 and 2007, the $53,500 annual income earlier noted, see above, at 4, and the proceeds from the sale of the inventory -- amount unknown -- were three sources from which JAB-Toledo could have funded the completion of the drip pad closure plan prepared by MSG.

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[6]In Complainant's Motion for Discovery, filed February 26, 2009, Complainant specifically sought the following:

> 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 the the information subject to the assertion, Respondents shall produce the following: . . . ."

Complainant's Motion for Discovery, at 1. Complainant then identified specific information that she sought relevant to the destruction of any record of the Respondents. Neither in any discovery response, nor in response to Complainant's Motion, have Respondents made any assertion that any record relating to the intercompany transfer of funds from JAB-Toledo or JAB-Ohio to a related company has been destroyed by any of Respondents.

However, all of these assets were removed from JAB-Toledo by those who controlled it -- those persons being Richard, Timothy and Brian Biewer -- who moved those assets into accounts of related companies, also controlled by the same three people. Complainant's Memorandum, Attachment R. Again, as with JAB-Ohio, Respondents have provided no records to support the basis for these amounts of money being removed from JAB-Toledo to JAB-Co., or other related companies. See fn.1. The net result of this movement of funds from JAB-Toledo to JAB-Co, or other related companies, is that JAB-Toledo was left without sufficient assets and undercapitalized, resulting in it being unable to comply with legal requirements applying to all wood-treating operations. See Complainant's Memorandum, at 15-20.

Respondents Failure to Observe Legal Formalities and the Commingling of Funds

Complainant has addressed Respondents' failure to observe legal formalities and their commingling of funds. Complainant's Memorandum, at 21-29. Again, a review of Respondents "counter-statement of facts," Respondents' Opposition-Toledo, at 2-4, reveals that Respondents have not challenged any evidence that Complainant has identified for consideration under these factors.

Much of the evidence already identified regarding the "nature of corporate ownership and control" and "absence of corporate assets and undercapitalization" is equally relevant in considering whether there was a "failure to observe legal formalities and commingling of funds." This evidence has been identified and analyzed by Complainant in detail, Complainant's Memorandum, at 21-29, and, again, in their "counter-statement of facts," Respondents do not challenge or otherwise contest any of this evidence.

Facts supporting a finding that Respondents failed to maintain adequate corporate records or minutes, failed to observe corporate formalities, disregarded legal formalities and failed to maintain an arms-length relationship, and commingled funds, is as follows:

(1) As of 1997, when JAB-Toledo ceased operating, JAB-Toledo had no bank account, and JAB-Co paid all expenses of JAB-Toledo. Respondents Opposition-Toledo, at 4.

(2) Though JAB-Co "paid all expenses" of JAB-Toledo, Respondents claim that JAB-Toledo "paid JAB Company an annual management fee" for bookkeeping services. Id., at 3-4. There are no records documenting any such intercompany transfer of funds, such as contracts or other formal documentation.

(3) After it shut down operations, JAB-Toledo, controlled by Richard, Timothy and Brian Biewer, sold its inventory and deposited the proceeds in the account of JAB-Co. Id., at 4. Though Respondents claim that this intercompany movement of funds was the payment on a debt, Respondents provide no records documenting any debt, the amount of the debt, and interest rates and repayment terms.

(4) There are no records, such as meeting minutes, resolutions, or other corporate papers, documenting that the Board of Directors of JAB-Toledo conducted any meetings or made any decisions on behalf of JAB-Toledo after January 1, 1997.[7]

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[7]Complainant noted that, when asked to produce documentation of meetings and actions of the JAB-Toledo Board of Directors, Respondents could only produce one such document, and that "there are no other Board of Directors' Meeting Minutes, Resolutions, or any other records of the Board [from January 1, 1997 to the present] that pertain in any way to JAB Toledo, JAB Ohio, or Biewer Lumber that have not already been produced to EPA." Id., at 22. Complainant then demonstrated that the record produced by Respondents documenting the one Board meeting was not credible on its face. In the document, dated December 1, 2000, JAB-Toledo acknowledges that "it ceased active treating and sales of lumber and that the only activity remaining is leasing the premises which the Company owns[,]" and that "[t]here will be no further activity anticipated for the coming years." Id. In fact, JAB-Toledo had shut down three and a half years earlier, in 1997, Amended Answer, Paragraph 10, at which time one would have expected the document and acknowledgment of December 1, 2000, to have been made. Id., at 22, fn.12. In response to this evidence and observation of Complainant, Respondents say this:

> The Board of Directors document appointing Brian Biewer manager cited by Complainant on page 22 of its Memorandum (Attachment Z of that Memorandum) does indeed contain an error. JAB Ohio first shut down its operations in 2001, and JAB-Toledo shut down its operations in 1997.

(5) Respondents have produced no records documenting any indebtedness of JAB-Toledo to JAB-Co.

(6) In communicating with Ohio EPA and MSG regarding arsenic and chromium contamination at the closed facility of JAB-Toledo, Brian Biewer, Secretary/Treasurer of both JAB-Toledo and JAB-Co, and manager of Biewer Lumber LLC, used the names "John A. Biewer Company of Toledo, Inc." and "Biewer Lumber" and "John A. Biewer Company" and "Eckel Junction, Inc." interchangeably. Complainant's Memorandum, at 24-26

Further evidence supporting a finding that corporate formalities have not been observed and there has been a commingling of funds is the fact that, though served with a notice of the original complaint and Complainant's motion to amend that complaint, adding JAB-Co and Biewer Lumber LLC as respondents, JAB-Co and Biewer Lumber LLC failed to intervene to object to the motion, as allowed by rule, and left it to JAB-Ohio to present any objection they had

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Respondents' Opposition-Toledo, at 3, fn.2. Nothing more is said about this matter either in Respondents' Opposition-Toledo or Respondents' Opposition-Ohio. However, the point being made by Complainant is not affected. That point is that businessmen meeting on December 1, 1997, for the purpose of designating a manager on the closure of their company, are not going to erroneously date the document December 1, 2000, three and a half years in the future. The claim that this was a simple mistake is not credible. Moreover, no explanation is provided by Respondents to explain why, in the certification of the JAB-Toledo document, "John A. Biewer Company of Ohio, Inc.," is identified as the subject company. Complainant's Memorandum, Attachment Z, at 2. Again, businessmen meeting to designate a manger on the closure of their company are not going to sign a certification identifying a business as closing which the same businessmen will continue to operate for an additional three and a half years. It is much more probable than not that both this JAB-Toledo document, Complainant's Memorandum, Attachment Z, and a similar document regarding the JAB-Ohio company, Id., Attachment AA, were both created at the same time, well after the fact, and that, in their execution, Richard, Timothy and Brian Biewer got the two documents mixed-up. This is a particularly compelling conclusion as Respondents have not attempted to explain the discrepancies noted by Complainant.

to the motion. See Complainant's Memorandum, at 30, fn.17. Respondents' Memorandum is silent as to this evidence.

This evidence clearly supports a finding that, in operating the affairs of JAB-Toledo, Richard, Timothy and Brian Biewer, also in control of JAB-Toledo's parent, JAB-Co, failed to maintain adequate corporate records or minutes documenting the affairs of JAB-Toledo; they failed to observe corporate formalities in conducting the affairs of JAB-Toledo and JAB-Co; they disregarded legal formalities and failed to maintain an arms-length relationship in conducting the affairs of both companies; and they commingled the funds of both companies.

"Piercing the Corporate Veil" of JAB-Toledo is Necessary to Defend Public Policy and Prevent an Injustice

In Complainant's Memorandum, at 29-35, Complainant sets out her support for the proposition that "piercing the corporate veil" is necessary in this instance to defend public policy and prevent an injustice. As the analysis of the evidence regarding this factor is the same in both this matter and in In Re John A. Biewer Company of Ohio, Inc., No. RCRA-05-2008-0007. Complainant incorporates by reference the analysis and argument made in Complainant's Reply-Ohio, at 24-29.

II. LAW AND ANALYSIS UNDER U.S. v. BESTFOODS

Respondents make no direct response to Complainant's analysis of the evidence and argument on direct liability under the Bestfoods doctrine, set out at 35-42. Instead, Respondents state that, with regard to the enforcement action against JAB-Toledo, Complainant "is essentially relying on the same facts relied upon in JAB-Ohio[,]" and that it would "incorporate all principles and arguments set forth in" Respondents' Opposition-Ohio. Respondent's Opposition-

Toledo, at 2. However, while many of the facts in each case are the same, there are some differences. While Complainant will incorporate by reference its analysis of the evidence and argument made in Complainant's Reply-Ohio regarding the issue of direct liability, it will here address some distinctions in the evidence in the JAB-Toledo matter.

There are two evidentiary facts in the JAB-Toledo matter which are not in the record in the JAB-Ohio matter. First, JAB-Toledo does have a limited income of $53,500; JAB-Ohio had no income. Consequently, JAB-Toledo, theoretically, could afford to pay or to meet some of its obligations. Second, on shutting down operations in 1997, the inventory of JAB-Toledo was sold, but Respondents have not disclosed the amount of that inventory; JAB-Ohio's inventory was listed by JAB-Ohio as having a value of $1.4 million. Notwithstanding these factual differences, the case for holding JAB-Co directly liable for JAB-Toledo's violation is as compelling as the case for holding JAB-Co liable for JAB-Ohio's violation.

On shutting down its wood-treating operations, in 1997, JAB-Toledo's only business activities were renting a portion of its property, and meeting its ongoing legal obligations. However, JAB-Toledo had no control over these activities. JAB-Toledo's income did not go into an account of its own, it had no account, Respondents' Opposition, at 4, and with no JAB-Toledo account out of which to draw funds, JAB-Toledo could not act independently and make payments to satisfy its legal obligations. The proceeds of the sale of JAB-Toledo's inventory did not go into an account of JAB-Toledo, they went into an account of JAB-Co. As with JAB-Ohio, when JAB-Toledo had obligations to be met, JAB-Co paid for those obligations out of its own account, provided JAB-Co judged funding any JAB-Toledo obligation to be "necessary." Respondents' Opposition, at 18. While JAB-Co apparently found taxes, insurance, and the

preparation of a drip pad closure plan for JAB-Toledo's closed facility "necessary," it apparently did not consider the implementation of a drip pad closure plan to remove arsenic and chromium contamination from JAB-Toledo's facility to be "necessary." Respondents make no claim that JAB-Co was without adequate funds to pay for the implementation of the drip pad closure plan, and provide no reason JAB-Co could not release funds from JAB-Co's account to pay for the implementation of that plan, as it paid out of its account for JAB-Toledo's taxes and insurance.[8]

This evidence reveals that JAB-Co dominance over the JAB-Toledo facility was complete, a finding that is further supported by the fact that there is no record of the JAB-Toledo Board of Directors having ever met, after January 1, 1997. See above, at 7. It reveals a parent "operating the facility in the stead of its subsidiary," and Richard, Timothy and Brian Biewer, controlling both JAB-Toledo and JAB-Co, acting with the "hat of the parent" in operating the JAB-Toledo facility, and not the "hat of the subsidiary." See Bestfoods, 524 U.S., at 71.[9]

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[8]While Respondents state that "JAB Toledo paid JAB Company an annual management fee for performing" financial services, Respondents Opposition-Toledo, at 3, at the same time Respondents acknowledge that JAB-Toledo had no account, in which case, it had no source of funds to actually pay for those financial services. Respondents have not provided any records documenting JAB-Toledo's payment to JAB-Co for financial services. Consequently, no finding can be made that JAB-Toledo was ever charged by, or paid to, JAB-Co such a fee. Moreover, as there are no records provided by Respondents that "all expenses" of JAB-Toledo paid by JAB-Co "were accounted for through an intercompany payable and chargeable to JAB-Toledo," as claimed by Respondents, Respondents' Opposition, at 4, no finding can be made that JAB-Toledo was ever charged for any JAB-Toledo expense paid by JAB-Co.

[9]It is also noted that, those in control of both JAB-Toledo and JAB-Co cannot be considered as acting in the "best interest" of JAB-Toledo, in that, after it was shut-down in 1997, and a legal obligation to remove arsenic and chromium contamination attached to its facility, those responsible divested JAB-Toledo of its assets -- proceeds from the sale of its inventory -- and income, thereby leaving JAB-Toledo in violation with the law and without resources to come into compliance. Moreover, by leaving JAB-Toledo without the means to remove the arsenic and chromium contamination at its facility, JAB-Toledo's property value is diminished in the real estate market because of the presence of the arsenic and chromium contamination. Indeed,

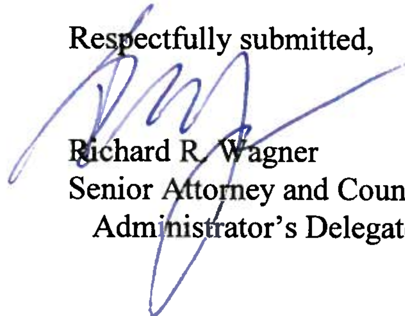
Consequently, as a matter of law, Complainant is entitled to a finding that JAB- Co is directly liable for the violations of JAB-Toledo alleged in the Complaint and Compliance Order.

CONCLUSION

Complainant requests that a finding be entered that Biewer Lumber LLC is not liable under any legal theory for the violation of JAB-Toledo alleged in the Complaint and Compliance Order.

With regard to JAB-Co, in response to Complainant's Motion for Accelerated Decision on Derivative Liability, Respondents have failed to raise any genuine issue of material fact, as Complainant has herein demonstrated. Moreover, for the reasons stated in Complainant's Memorandum in Support of Motion for Accelerated Decision on Derivative Liability, and the reasons stated herein, as a matter of law, Complainant is entitled to the relief sought in Complainant's Motion for Accelerated Decision on Derivative Liability against JAB-Co.

Respectfully submitted,



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

Respondents admit that "[i]t is doubtful that at the current rental value, there is any substantial net equity in the Toledo property, although without completing the investigation as to remaining radiation [sic: arsenic and chromium contamination], the company is not able to determine the market value." Id., Attachment J, at 2.

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In Re John A. Biewer Company of Toledo, Inc.
No. RCRA-05-2008-0006

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of **Complainant's Reply to Respondents John A. Biewer Company, Inc., and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decsion on Derivative Liability**, in the office of the Regional Hearing Clerk (E-19J), 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
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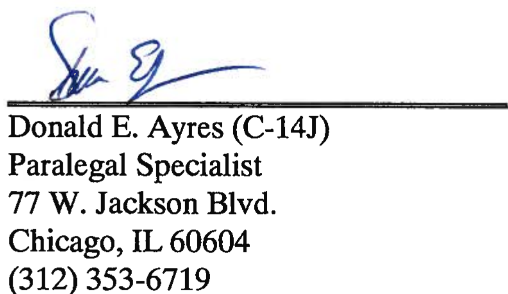

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