BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:

John A. Biewer Co. of Toledo, Inc.
Docket No. RCRA-05-2008-0006

and

John A. Biewer Co. of Ohio, Inc.
Docket No. RCRA-05-2008-0007

RCRA Appeal Nos. 10-01 and 10-02

SURREPLY BRIEF OF RESPONDENTS

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INTRODUCTION

By order of this Board dated November 10, 2010 ("Order"), Appellant Region 5 was granted the right to file a reply brief which was expressly limited by this Board as follows:

> The reply brief is limited to 15 pages and may not raise any new issues and must respond *only* to the allegedly new issues raised by the Respondents' appeal brief that the Region previously did not have the opportunity to address. (Emphasis added)

Despite this rather clear directive from the Board, Region 5 has chosen instead to largely re-argue issues that it not only had the *opportunity* to address in its earlier appeal brief, but in many cases, did in fact address in its earlier brief. For instance, the entirety of Arguments I, II, IV, V and VI are arguments that are not "new" or issues as to which Region 5 did not have the "opportunity" to brief before. Indeed, most of these arguments were addressed in Appellant's earlier brief. Thus, at the outset, Respondents object to Region 5's blatant disregard of the limitation in this Board's Order allowing a reply brief and urges the Board to reject and strike the brief for its non-compliance.

Given Region 5's non–compliance with this Board's Order, it is a bit more difficult for Respondents to determine the proper scope of their limited right to file a surreply brief, which was, by the same Order, "limited to 15 pages and must not raise any new issues and must respond only to matters raised in the reply brief that the Respondents previously did not have the opportunity to address." Recognizing that Region 5's Reply Brief goes well beyond the limitations allowed by the Board's Order, JAB Company will confine its argument in this Surreply Brief to those raised in Region 5's Reply Brief, recognizing that responses should not be required at all for arguments in Region 5's Reply Brief that were not authorized under the Board's Order.

I. REGION 5 HAS NOT MET ITS BURDEN OF PROOF REGARDING ITS CORPORATE VEIL PIERCING CLAIM

Region 5's Reply Brief does not further Region 5's attempt to prove its piercing the corporate veil claim. The various issues addressed in Region 5's Reply Brief can largely be reduced to the contention that there is something so inherently wrong with the transfers from sale of inventory that

JAB Ohio and JAB Toledo made to JAB Company as payment of legitimate debts owed by each to JAB Company that this Board should totally disregard the separate corporate entities. As demonstrated in Section I(A) below, Region 5's theory is simply unsupportable considering the fact that JAB Ohio and JAB Toledo had no other unpaid creditors at the time of the transfers in question. Even if Region 5 were a creditor of JAB Ohio and JAB Toledo, Region 5's arguments are so riddled with inaccuracies and unsupported leaps in logic, as demonstrated below in Sections I(B) and I(C), that Region 5's positions are simply untenable.

A. The Payment of Legitimate Pre-Existing Debt by JAB Ohio and JAB Toledo to JAB Company Did Not Prevent JAB Ohio and JAB Toledo from Providing Payment to any Other Competing Creditor

Region 5's attack on the transfers from JAB Ohio and JAB Toledo to JAB Company is based entirely on the premise that payment of legitimate debt to shareholders amounts to "siphoning" of assets or a "preference" where the transfers prevented the payment of debts to competing creditors. Reply Brief at 2-5. While Region 5 overstates and glosses over many requirements of the stated legal premise, the most fundamental flaw of this argument lies in Region 5's attempt to apply its premise to the facts at hand. Region 5 has not produced one shred of evidence that the transfers in question prevented *any* creditor of JAB Ohio or JAB Toledo from being paid. As such, whether Region 5 accurately recites the legal premise or not, Region 5's argument is fatally flawed and simply does not apply in the instant situation.

While Region 5 clearly states or implies otherwise in its Reply Brief, Region 5 was not a JAB Ohio or JAB Toledo creditor competing with JAB Company at the time of the disposition of unsold inventory. *See* Region 5 Reply Brief at 2-4; *see also* BLACK'S LAW DICTIONARY, 2nd. Pocket Edition at 161 (2001); *Stein v. Brown*, 18 Ohio St.3d 305, 308, 480 N.E.2d 1121(1985). Throughout its Reply Brief, Region 5 *assumes* it held creditor status at the time business operations ceased, and neglects to actually explain why it should be considered a creditor, or even cite factual or legal

support for its statements from which this Board could make such an inference. Perhaps the reason Region 5 avoids this discussion is because the pertinent case law demonstrates that Region 5 was *not* a creditor at the time of the questioned transfers.

Black's Law Dictionary defines a "creditor" as "one to whom a debt is owed" or "a person or entity with a definite claim against another, especially a claim that is capable of adjustment and liquidation." 2nd. Pocket Edition at 161 (2001). Ohio law, where these two companies are located, is consistent with this definition and adheres to the rule that a claimant does not become a creditor of the defendant until the claimant's cause of action or claim actually accrues. *See Stein v. Brown*, 18 Ohio St.3d 305, 308, 480 N.E.2d 1121(1985); *Dibert v. Watson*, 2009 WL 1200862, 4 (Ohio App. 2009). Where a party has a duty to perform certain activities, a cause of action does not accrue at the time the duty is incurred, but at the time the party is obligated to perform those duties *and* cannot or will not do so. According to Region 5's Amended Complaint in this matter, Region 5's cause of action against JAB Toledo did not arise until October 5, 2005, and the cause of action against JAB Ohio did not arise until May 3, 2005. First Am. Compl. (JAB Ohio and JAB Toledo) at ¶¶ 25-28; *see also* Region 5 Brief Supporting Accelerated Decision at 7 (JAB Toledo and JAB Ohio).

JAB Toledo ceased operations in 1997, sold its inventory, and began paying off its only remaining debt shortly thereafter. Ans. to Region 5 Am. Compl. (JAB Toledo) at ¶ 10; Region 5 Brief Supporting Accelerated Decision (JAB Toledo) at 6, 16, 17. The transfers of which Region 5 now complains were completed many years before Region 5 even claims its cause of action arose. Similarly, JAB Ohio ceased operations by the beginning of 2001 and sold its inventory shortly thereafter. Ans. to Region 5 Am. Compl. (JAB Ohio) at ¶ 10; Region 5 Brief Supporting Accelerated Decision (JAB Ohio) at 7, 16-18. Again, the transfers related to the sale of inventory were entirely or mostly completed well before Region 5's cause of action arose.

Pursuant to Ohio law and Region 5's own admission, Region 5 was not a creditor at the time of the transfers in question to JAB Company. *Nor did Region 5 provide evidence that JAB Ohio and JAB Toledo had any other unpaid creditors besides JAB Company at the time of the questioned transfers.* Since there were no competing creditors at the time of the questioned transfers, Region 5's attempt to use inapposite case law to characterize the legitimate payment of debt as the "siphoning" of assets necessarily fails. *See* Reply Brief at 2, *citing United States v. Thomas*, 515 F. Supp. 1351, 1358 (W.D. Tex. 1981); *Trs. of Nat'l Elev. Indus. Funds v. Lutyk*, 140 F. Supp. 2d 447, 457 (E.D. Pa. 2001); *Plumber's Pension Fund v. A'Best Plumbing & Sewer, Inc.* 1992 U.S. Dist. LEXIS 3110 (N.D. Ill. March 13, 1992); *State Bank of Cerro Gordo v. Benton*, 22 Ill. App. 3d 1007, 1007-1010, 317 N.E.2d 578 (1974).

In addition to its "siphoning" allegations, for reasons that remain unclear to JAB Company, Region 5 discusses various hypothetical scenarios and the predicted effects of federal bankruptcy law and state wind-down procedures on the post-closure actions of JAB Ohio and JAB Toledo. *See* Reply Brief at 3-4. The point of the discussion seems to be Region 5's erroneous supposition that if JAB Ohio or JAB Toledo had filed for bankruptcy or followed certain Ohio procedures for winding down a corporation, the transfers to JAB Company would not have been possible. *Id.* Region 5 notes that corporate property of an insolvent corporation "becomes a trust fund for the benefit of creditors" and that property is distributed to the creditors pro rata. *Id.* at 3, *quoting Cay Mach. Co. v. Firestone Tire & Rubber Co.*, 175 Ohio St. 295, 299 (1963). As already established, however, EPA could not have been a creditor of JAB Ohio or JAB Toledo under Ohio law until mid to late 2005 and the EPA has not demonstrated that there were any other creditors at the time of the questioned transfers.

Region 5 also argues that had JAB Toledo and JAB Ohio filed bankruptcy proceedings, federal bankruptcy law would have prevented the transfers to JAB Company or allowed the transfers

to be unwound because the transfers preferred one creditor over another. *Id.* at 4. Like Ohio law, however, Region 5 would not have been considered a creditor under federal bankruptcy law. *See U.S. v. Apex Oil Co.*, 579 F.3d 734, 736 -737 (7th Cir. 2009).[1] The Bankruptcy Code provides several definitions of a creditor. However, each definition requires the entity to have a "claim" against the debtor. 11 U.S.C. §101(10) In a case cited by Region 5, the *Apex Oil* court made it clear that RCRA actions do not result in money being owed by the debtor, therefore, do not result in a "claim" against a debtor by EPA. 579 F.3d at 736-738. The *Apex Oil* court was analyzing whether previous Chapter 11 proceedings resulted in a discharge of an injunction ordering a successor to the debtor corporation to perform environmental clean-up activities pursuant to RCRA. *Id.* at 738. In determining that the injunction was not discharged, the court reasoned that the Bankruptcy Code defines a "debt" as a "'liability on a claim,'" *Id.* at 735, *quoting* 11 U.S.C. §101(12). A "claim" is defined as either a "'right to payment,'" or a "'right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.'" *Id.*, *quoting* 11 U.S.C. § 101(5)(A) and (B). The *Apex Oil* court found that because RCRA does not allow a plaintiff to demand payment of clean-up costs in lieu of the defendant's performance of clean-up activities, the EPA did not have a "claim" that could be discharged. *Id.* at 736-738.[2]

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[1] For the purposes of this Surreply Brief, JAB Company is responding to Region 5's arguments using federal law because JAB Company comprehensively briefed Ohio law in Appellee's Brief and Region 5 only cites federal case law. JAB Company uses Ohio law to establish the definition of creditor outside of bankruptcy law, as this issue had not yet been briefed, and JAB Ohio maintains its argument that this Board should apply Ohio law to all of the issues.

[2] Region 5 also cites *Apex Oil* for the proposition that the obligation to comply with RCRA is not dischargeable in bankruptcy. Reply Brief p. 4. While this may be true, it is certainly irrelevant to the veil piercing claim since *Apex Oil* did not address the imposition of a subsidiary's RCRA liability on its parent corporation, and here, both JAB Ohio and JAB Toledo conceded liability, rendering dischargeability a moot point.

Like the plaintiff in *Apex Oil,* Region 5 is attempting to enforce RCRA regulations. As in *Apex Oil*, such regulatory actions are not considered a "claim" under bankruptcy law. JAB Ohio and JAB Toledo, therefore, would not have owed EPA a "debt" under bankruptcy law, and Region 5 (EPA) would not have been considered a "creditor" of JAB Ohio or JAB Toledo.

While JAB Company disputes the legal significance of Region 5's hypothetical scenarios[3], the fact that Region 5's scenarios rely on the false assumption that Region 5 was a creditor at the time of the questioned transfers renders the cited case law and related conclusions irrelevant to the present case. *See* Reply Brief at 3-4, *citing Cay Mach. Co. v. Firestone Tire & Rubber Co.*, 175 Ohio St. 295, 299 (1963); *United States v. Adams Bldg. Co.*, 531 F.2d 342, 346 (6th Cir. 1976). The bottom line is that Region 5 has not produced a single case that suggests there is anything improper about a subsidiary paying legitimate debts to its parent where such payments had zero effect on the subsidiary's ability to pay other debts owed to existing creditors.[4]

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[3] Throughout these proceedings, Region 5 has focused more on what Region 5 thinks JAB Ohio and JAB Toledo should have done rather than focusing on the ramifications of the actions actually taken by JAB Ohio and JAB Toledo. *See* Reply Brief at 3-4. Whether Region 5's renditions of "what could have been" are accurate or not, Region 5's comparison is entirely irrelevant to the issues at hand, as Region 5 has not demonstrated that JAB Ohio and JAB Toledo were obligated, by statute or otherwise, to take actions other than those that actually occurred. Nor has Region 5 provided support for its implication that legal significance can be ascribed to the course of action a plaintiff would rather have had a defendant take simply because the end result may have been more beneficial for that plaintiff. Moreover, Region 5's conclusions related to the hypothetical scenarios are wrong. Region 5 concludes that that the actions taken by JAB Ohio and JAB Toledo were "in contravention of the rule that environmental compliance comes before the discharge of obligations to unsecured creditors." Region 5 Reply Brief at 4. Simply put, Region 5 did not establish that such a rule exists in bankruptcy or otherwise. As such, even if Region 5's fictional scenarios had some legal significance, Region 5 did not demonstrate that the actions of JAB Ohio and JAB Toledo were in contravention of anything. Ultimately, Region 5's hypothetical scenarios and comparisons are red herrings because JAB Ohio and JAB Toledo were not obligated to proceed in any particular manner and the scenarios are based on the faulty assumption that Region 5 was a creditor at the time of the questioned transfers.

[4] Moreover, as already thoroughly explained in Respondent's Appeal Brief, the sale of the lumber inventory consisted, in essence, of an exchange of the lumber for a reduction in an intercompany payable. *See* Respondent's Appeal Brief at 48-51. Neither JAB Ohio nor JAB Toledo

B. Even if Region 5 Could be Considered a Creditor at the Time of the Questioned Transfers, Region 5's Corporate Veil Piercing Arguments are Riddled with Other Fundamental Flaws

In addition to the erroneous assumption that Region 5 was a creditor of JAB Ohio and JAB Toledo at the time of the questioned transfers or that other creditors were left unpaid, there are several other substantive flaws present in Region 5's varied attempts to prove the control prong of the corporate veil piercing test.

1. Region 5 Must Show JAB Company Controlled JAB Ohio and JAB Toledo at the Time the Alleged Contamination Occurred

Region 5 argues that when analyzing the control prong of the corporate veil piercing test, the analysis should focus on the time that the "acts" complained of occurred. Reply Brief at 1. Region 5 defines the "acts" of which it complains as "the continuing violations resulting from Respondents' ongoing failure to decontaminate the drip pads at the subsidiaries' facilities." *Id.* The violations of which Region 5 complains, however, simply cannot be equated to one "act." The violations are not "acts," but are the *result of a sequence of acts* (and "non-acts," as the case may be), beginning with the contamination of the JAB Ohio and JAB Toledo facilities.

While Region 5 relies on cases addressing a single discrete act (*See* Reply Brief, p. 1, *citing United States v. Wallace*, 961 F. Supp. 969, 979 (N.D. Tex. 1996)), in one case cited by Region 5, the Fifth Circuit explains that "[i]t is illogical...to hold a parent liable for controlling another corporation's debts when it had no control *at the time the debts were incurred.*" *Flouorine On Call Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 861-862 (5th Cir. 2004) (emphasis added). In other words, it is not enough that a parent is in control at the time the debt comes due and is not paid, but the parent must be in control at the time the debt is created.

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would have been in a better position to pay creditors, if such creditors existed, had the transfers not happened. *Id.*

In the present case, Region 5 has not even attempted to demonstrate that JAB Company was in control of JAB Ohio and JAB Toledo at the time the "debt" in question was incurred. The "debt" in question here was created at the time the facilities were operating and contaminated, if ever, and the "debt" (i.e., the alleged regulatory violation) became due after closure of operation. *See* First Am. Comp. at ¶¶ 25-28 (JAB Ohio and JAB Toledo). If there were no contamination, there would be nothing to clean up and no RCRA violation. Because the undisputed evidence demonstrates that JAB Company was not in control of JAB Ohio and JAB Toledo at the time any contamination allegedly occurred,[5] JAB Company cannot be responsible for the violation resulting from that alleged contamination simply because it refused to bail out the two subsidiary companies after they ceased operations. *See Flouorine On Call*, 380 F.3d at 861-862; *Riquelme Valdes v. Leisure Res. Group, Inc.*, 810 F.2d 1345, 1353 (5th Cir. 1987).

2. JAB Company Did Not Siphon Assets From JAB Ohio or JAB Toledo

Region 5's "siphoning" argument relies heavily on incomplete and erroneous statements of law. Region 5 states that "courts agree that the repayment of even a legitimate shareholder loan by an insolvent corporation *indicates* siphoning and supports veil piercing," yet immediately thereafter contradicts its statement by quoting a court stating that such a situation *may indicate* siphoning. Reply Brief at 2 (emphasis added). Indeed, examination of the case law cited by Region 5 reveals that those courts do not agree with Region 5's statement.[6] Region 5 neglects to explain that the

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[5] See affidavits and documents attached to Respondents' Brief Supporting Motion for Accelerated Decision.

[6] In fact, this case is more akin to *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1522-1523 (3rd Cir. 1994), and *Connors v. Peles*, 724 F. Supp. 1538, 1568 (W.D.Pa. 1989), both of which are cited in *Trs. of Nat'l Elev. Indus. Funds*, a case cited by Region 5. The *Kaplan* court placed much stock in the facts that the questioned loan payments were in consideration of legitimate loans, the subsidiaries were never "shams" intended to manipulate creditors, and there was no evidence that the shareholder regularly took profits from the subsidiary leaving creditors unpaid. 19 F.3d at 1522-1523. The *Connors* court made similar findings. 724 F. Supp. at 1568-1570.

reason such payments *may indicate* siphoning is that courts examine the *ratio* of loan amounts to the amount of equity investments before considering legitimate loan payments to be an indication of siphoning. *See Trs. of Nat'l Elev. Indus. Funds v. Lutyk*, 140 F. Supp. 2d 447, 458 (E.D. Pa. 2001); *see also United States v. Thomas*, 515 F. Supp. 1351, 1356 (W.D. Tex. 1981).[7]

Region 5 couples the above errors with unsupportable leaps in logic, rendering its "siphoning" argument without value. Region 5 leaps from the undisputed fact that JAB Ohio and JAB Toledo both had intercompany payables owed to JAB Company at the time each ceased operations to the assumption that JAB Ohio and JAB Toledo had a "need for a 'steady influx of cash loans.'" Region 5 Reply Brief at 2, n. 3, *quoting Laborers' Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 614 (7th Cir. 2009). Region 5 does not explain how the simple fact that JAB Ohio and JAB Toledo had intercompany payables equates to the "need for a steady influx of cash loans," especially since Region 5 did not provide this Board with any evidence that would establish the frequency of cash infusions or the reasons for the accounts payable incurred during the period that JAB Ohio and JAB Toledo were operational. Moreover, an overarching fact seemingly ignored by Region 5 is the fact that JAB Ohio and JAB Toledo operated successful businesses for 21 years and 14 years, respectively. The very fact that each subsidiary operated a successful business for so long indicates "a good faith use of the corporation to conduct a legitimate business enterprise." *See Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1113 (9th Cir. 1979); *see also Zubick v. Zubick*, 384 F.2d 267, 274 fn. 16 (3rd Cir. 1967); *Connors v. Peles*, 724 F.Supp. 1538,

[7] It is well established that Region 5's undercapitalization argument should be focusing on the capitalization of JAB Ohio and JAB Toledo at the time of creation and while operational. *See Laborers' Pension Fund v. Lay-Com*, 580 F.3d 602, 612 (7th Cir. 2009). Here, region 5 offered no evidence of any kind regarding the capitalization of JAB Toledo and JAB Ohio, preferring instead to rest on its "inescapable inference" that if the two subsidiaries went belly up, they must have been undercapitalized—a faulty conclusion that would, of course, apply to every failed business.

1570 (W.D.Pa. 1989). As such, it is clear, when an accurate summary of the case law and all relevant facts are considered, that no assets were "siphoned" from JAB Ohio or JAB Toledo.

Ultimately, Region 5 is impermissibly asking this Board to adopt the arguments related to corporate veil piercing in its Reply Brief by adopting misstatements of case law, inapposite case law, unproven facts, and unsupported leaps in logic, all the while ignoring pertinent facts and case law. Region 5 may not meet its burden of proof by ignoring facts and case law it deems inconvenient, and contorting other case law and facts to suit its arguments. As such, Region 5's piercing the corporate veil arguments fail.

C. Region 5's Direct Liability Claim Fails, as Brian Biewer was Acting on Behalf of JAB Ohio and JAB Toledo at all Relevant Times

Region 5 also ineffectively addresses its claim for direct liability. *See* Reply Brief at 4-5. It is clear from the guidance provided in *U.S. v. Bestfoods*, 524 U.S. 51, 70, n. 13, 118 S.Ct. 1876, 1889 (1998), that the presumption that Brian Biewer was acting on behalf of JAB Ohio and JAB Toledo must stand. While Region 5 claims *Bestfoods* supports its contrary supposition, the *Bestfoods* court provides the following guidance:

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

524 U.S. at 70, n. 13. It is clear from this statement that the proper analysis is whether Brian Biewer's actions were consistent with the norms of corporate behavior, or whether the actions taken were contrary to the interests of the subsidiary. It does not matter what actions Brian Biewer *could have taken* or what actions Region 5 believes would have been in the "best interest" of JAB Ohio and JAB Toledo. That is not the standard set forth by the Supreme Court, yet that is the standard Region 5 urges this Board to apply. *See* Reply Brief at 4-5. Simply put, Region 5 fails to explain how the payment of a legitimate debt, especially where there are no competing creditors, could be

contrary to the interests of JAB Ohio and JAB Toledo. As such, the presumption that Brian Biewer was acting on behalf of JAB Ohio and JAB Toledo at all pertinent times stands.

II. REGION 5'S ARGUMENTS REGARDING ACCELERATED DECISION ON PENALTY ARE SUBSTANTIVELY FLAWED, AND THEREFORE FAIL.

A. EPA is Barred From Appealing Judge Moran's Denial of Region 5's Motion for Accelerated Decision on Penalty.

EPA argues that the well-established rule that a denial of a motion for summary judgment may not be appealed following a trial on the merits does not apply to the EPA in the instant case. EPA contends that under the *Consolidated Rules*, an initial decision opens up for consideration a prior interlocutory order denying a motion for accelerated decision. Contrary to EPA's contentions, however, there is no plausible basis for the radical and illogical departure that EPA is seeking from the well-established rule that a denial of a motion for summary judgment is not reviewable following a trial on the merits.

Courts have considered arguments like the one being advanced by the EPA, and have roundly rejected them. *See, e.g., Lind v. United Parcel Service, Inc.*, 254 F.3d 1281 (2001). In *Lind* the appellant argued that "*review of the final judgment [following a bench trial] open[ed] for consideration prior interlocutory orders*", and that therefore, the appellant was entitled to appeal the denial of its motion for summary judgment. *Id.* at 1284, n. 4. The court disagreed with the appellant's argument, stating that while interlocutory orders *granting* motions for summary judgment may be appealed following a trial on the merits, the general rule is "that the denial of a motion for summary judgment is not reviewable after a trial on the merits has occurred." *Id.* at 1284. The court reasoned as follows:

> A Rule 56(d) order *granting* partial summary judgment from which no immediate appeal lies is merged into the final judgment and reviewable on appeal from that final judgment. . . . An order *granting* [summary judgment] on certain issues is a judgment on those issues. It forecloses further dispute on those issues at the trial stage. An order *denying* a motion for partial summary judgment, on the other hand, is merely a judge's determination that genuine issues of material fact exist. It is not a

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judgment, and it does not foreclose trial on the issues on which summary judgment was sought.

Id. at 1284, n. 4 (emphasis in original).

In support of its ruling in *Lind,* the Eleventh Circuit noted that its decision was in accord with the law in "at least 10 circuits." *Id.* at 1284-85[8] In surveying its sister circuits, the Eleventh Circuit might well have stated that its decision was in accord with the law in 11 circuits because, contrary to what EPA would have this Board believe, the D.C. Circuit has also adopted the general rule set forth above, albeit in an unpublished opinion.[9] *Robinson v. Garrett*, 966 F.2d 702 (1992)(Table)("In light of the district court's entry of judgment in favor of appellees after a full trial on the merits, we do not reach Robinson's claim that the district court erred in denying her motion for summary judgment.")(*citing Jarrett v. Epperly*, 896 F.2d 1013 (6th Cir. 1990); *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072 (1987)).

EPA also argues that the well-established rule set forth above does not apply in cases where the finder of fact was a judge, rather than a jury. Once again, however, EPA's argument is wide of

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[8] (citing "See *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 130 (2d Cir. 1999); *Chesapeake*, 51 F.3d at 1234 (4th Cir. 1995); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277-78 (7th Cir. 1994); *Black v. J.I. Case Co.*, 22 F.3d 568, 570-72 (5th Cir. 1994); *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994); *Lama v. Borras*, 16 F.3d 473, 476 n. 5 (1st Cir. 1994); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250-51 (10th Cir. 1992); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 & n. 14 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072 (1987).

[9] EPA's contention that the D.C. Circuit has rejected the general rule adopted by every other circuit is a blatant misrepresentation of the law in the D.C. circuit and of the holding in *I.A.M. National Pension Fund Benefit Plan A v. Cooper Industries Inc.*, 789 F.2d 21 (1986). In fact, it is difficult to understand why the EPA cited the *Cooper Industries* case at all because it does not discuss the relevant issue. In *Cooper Industries*, the defendant appealed an order by the district court *granting* the plaintiff's motion for an injunction pending resolution of the case. There is no discussion whatsoever in the *Cooper Industries* case regarding whether a *denial* of a motion for summary judgment may be appealed after a trial on the merits.

the mark. First, EPA cites no case law to support its argument. Second, EPA's argument is directly at odds with controlling Sixth Circuit precedent, as well as precedent in other circuits. *See, e.g.*, *Nat'l Eng'g & Contracting Co. Occupational Health & Safety Admin.*, 928 F.2d 762, 768 (6th Cir. 1991) ("Jarrett involved the appellate review of a jury verdict following a pretrial ruling denying a motion for summary judgment, not, as in the present case, 'an administrative hearing before an administrative law judge who had expressly reserved his ruling on the motion for summary judgment.' It is not clear to us, however, why these differences are significant. The decision in *Jarrett* rested on logic which seems applicable to this case."); *Lind*, 254 F.3d 1281 (holding that denial of motion for summary judgment cannot be appealed after bench trial); *Childress v. Georgia-Pacific Corp.*, 198 F.3d 249 (Table) (8th Cir. 1999)(same).[10]

B. Region 5 Is Incorrect that Respondent's Did Not Have Right to A Hearing on the EPA's Proposed Penalty and that Judge Moran Did Not Have Discretion to Order a Hearing on the Penalty Issue.

Respondents vigorously oppose EPA's argument that the exhibits to EPA's motion for accelerated decision on penalty did not raise genuine issues of material fact to support a hearing in the proceedings below. As Judge Moran correctly concluded, the exhibits raised genuine issues of

[10] The policy rationale that EPA offers in support of its argument is weak. EPA argues that not allowing such an appeal would result in "parties seeking interlocutory appeal in piecemeal fashion." In *Lind*, the Eleventh Circuit dispensed with the same argument, stating that "a party that believes the district court improperly denied summary judgment has adequate remedies", including the ability to "move the court to certify the denial of summary judgment for interlocutory appeal." Even if EPA's policy argument had any merit, which it plainly does not, there is an infinitely stronger policy argument that cuts the other way. Indeed, as stated by the *Lind* court:

> [s]ummary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal[.] . . . If we were routinely to hear post-trial appeals of summary judgment motion denials, we would provide an unwarranted incentive for trial judges to grant such motions in close cases. The only way for a district court to defuse the "bomb" of a denial's reversal following what would be a therefore superfluous trial would be to grant the motion, enter an appealable judgment dismissing the complaint, and await the outcome of the appeal. Then, only in the event of reversal, would the court and parties proceed to trial secure in the knowledge that one is necessary.

material fact as to Respondents good faith efforts to comply and Respondent's lack of willful noncompliance. This issue was briefed extensively in the first round of briefing in this appeal, so Respondent's will not, as EPA has done, disregard this Board's clear orders and re-plow the same ground in this second round of briefing.

In any event, re-plowing the same ground is unnecessary because even if EPA's argument had any merit, which it does not, EPA has failed to cite any authority whatsoever in its reply brief to support its position that Judge Moran did not have ***discretion*** to proceed to a hearing even in the absence of a genuine issue of material fact. The simple reason for EPA's failure to cite any authority is that all of the authority is amassed on Respondent's side of the argument. Indeed, as Respondents pointed out in their response brief, numerous provisions of the *Consolidated Rules* provided Judge Moran with discretionary authority to proceed to a hearing on the question of Region 5's proposed penalty – a clear question of discretion.

C. EPA is Incorrect that there is Evidence in the Record to Support a Penalty Against Respondents.

In EPA's reply brief, EPA continues in its attempts to create a trial record where none exists and in its attempts to belatedly admit evidence into the trial record through the back door (without the filter of evidentiary rules and procedures). Unfortunately for EPA, it is axiomatic that a trial record that is devoid of evidence because no evidence was introduced and admitted at trial cannot support an appeal of a judgment rendered following such trial. *See, e.g. Lind* 254 F.3d at 1284 ("[e]ven if summary judgment might have been granted at the time the motion was made, we examine the record to see 'if the evidence *at trial* was more favorable to the non moving party." . . . "the inquiry 'is directed to the sufficiency of the evidence as presented *at trial* . . . .'" (emphasis added)).

In its belated effort to create a trial record, Region 5 seeks to confuse and conflate the issues of liability and the appropriateness of the proposed penalty, when in reality each of these elements of

Region 5's case had to be proven before a penalty could be awarded. Region 5 correctly asserts that liability was established in the proceedings below because liability was conceded; however, it apparently fails to understand that no penalty could attach to such liability because Region 5 failed to introduce any evidence into the trial record on the element of penalty. Region 5 had the opportunity to prove the penalty element of its case at the hearing ordered by Judge Moran. The fact that Region 5 chose not to avail itself of that opportunity means that there is no record to support its appeal.

Respectfully submitted,

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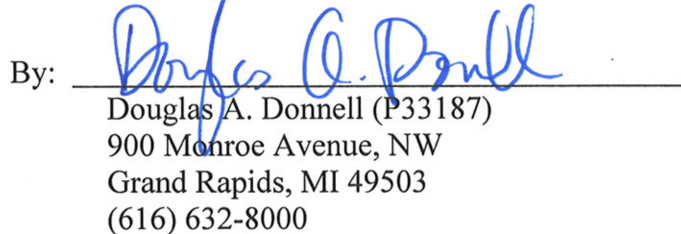
Dated: December 13, 2010

By: 

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