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

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In re:

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

RCRA Appeal Nos. 10-01 and 10-02

and

John A. Biewer Co. of Ohio, Inc.
Docket No. RCRA-05-2008-0007
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# APPEAL BRIEF OF RESPONDENTS-APPELLEES

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**WASHINGTON, D.C.**

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In re:

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

and

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Docket No. RCRA-05-2008-0007
________________________________________/

RCRA Appeal Nos. 10-01 and 10-02

**APPELLEES' APPEAL BRIEF**

## APPELLEE'S COUNTER-STATEMENT OF FACTS[1]

This case was started by the filing of two separate Complaints by Region 5, one against John A. Biewer Co. of Toledo, Inc. (hereafter "JAB Toledo") and the other against John A. Biewer Co. of Ohio, Inc. (hereafter "JAB Ohio"). In each of these Complaints, Region 5 included a paragraph entitled "Proposed Civil Penalty" in which it stated that its proposed penalty was "based upon an analysis of relevant evidence known to the Complainant" and upon EPA's RCRA Civil Penalty Policy. Without any further factual explanation, Region 5's proposed penalty against JAB Ohio was $282,649 and its proposed penalty against JAB Toledo was $287,441. Although both of the Complaints stated that there was a penalty summary sheet attached, neither Complaint served upon Respondent had any attachments. In response to the conclusory allegation indicating Region 5's proposed penalty amount, Respondents each stated in their Answer that the asserted penalty was excessive.

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[1] The substantive facts relating to the merits of this case will be discussed where applicable in the Argument section of this Appeal Brief. This section of the brief deals only with the procedural history and is intended to point out a number of key omissions in Region 5's three-page Procedural Summary.

On September 29, 2008, Region 5 filed motions in each of the cases seeking to amend the Complaints to add as Respondent John A. Biewer Company, Inc. (hereafter "JAB Company") and Biewer Lumber, LLC. The motions sought to add these two parties on the asserted basis that they should be held liable for the RCRA violations of JAB Toledo and JAB Ohio as parent or affiliated companies. Both motions were opposed, but ultimately Judge Moran granted EPA's motion in a 12-page Order dated January 7, 2009. In his Order allowing the amendment, Judge Moran expressed clear and unambiguous reservations regarding Region 5's ability to prove its claims against the new Respondents, particularly against Biewer Lumber, LLC, which was not yet in existence at the time Region 5's alleged RCRA violations occurred.

Shortly before the Presiding Officer's ruling on the Motion to Amend, Region 5 filed Motions for Accelerated Decision on Liability and Penalty dated December 12, 2008. Also filed with each motion was a Memorandum in Support of the Penalty Amount Proposed, not authored by a witness competent to testify, but by EPA's trial counsel, Richard Wagner, explaining the basis of EPA's calculated penalty. Response briefs on the motions were deferred by agreement of the parties and order of the judge until the close of discovery.

During discovery, which was originally allotted 60 days, but was later extended, Region 5 submitted numerous interrogatories and requests for production of documents, all of which were answered and supplemented by Respondents. During the course of this discovery, several thousand pages of documents were produced by Respondents to Region 5 and numerous interrogatories were answered. Interestingly, Region 5's discovery focused entirely on the period of time following JAB Ohio's and JAB Toledo's cessation of business activities in 2001 and 1997, respectively. *See* Interrogatories and Document Requests dated January 20, 2009. Virtually no attempt was made by Region 5 to learn about the interrelationships between the parent company, JAB Company, and its

two subsidiaries, JAB Toledo and JAB Ohio, during the time period when JAB Toledo and JAB Ohio actually conducted wood treating operations at their respective locations. *Id.* Region 5 also conducted discovery regarding Biewer Lumber, LLC, which established without any doubt whatsoever that Biewer Lumber, LLC was neither a parent corporation of JAB Ohio or JAB Toledo and had no involvement whatsoever in any of their operations, either before or after they ceased business operations.

Following discovery, on July 2, 2009, both parties filed Cross-Motions for Accelerated Decision concerning the liability of JAB Company, the acknowledged parent of JAB Ohio and JAB Toledo, and the liability of Biewer Lumber, LLC. Both sides attached various documents to their briefs and both argued that the matter could be resolved without an evidentiary hearing.[2]

Remarkably, Region 5 persisted in its Motion for Accelerated Decision to argue that Biewer Lumber, LLC was liable for JAB Ohio's and JAB Toledo's violations even before Biewer Lumber, LLC was created. Respondents refuted these arguments, both in their own Motion for Accelerated Decision and in their Response Brief in Opposition to Region 5's Motion for Accelerated Decision. Only after Respondents had filed over 100 pages in briefs on the cross-motions did Region 5 in its Reply Brief in Support of its Motion for Accelerated Decision on Derivative Liability finally concede that it had no legitimate claim against Biewer Lumber, LLC. It did, however, continue to assert that JAB Company was liable for violations of JAB Ohio and JAB Toledo on a veil-piercing theory and on the theory that JAB Company was the actual "operator" of the two facilities.

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[2] This was consistent with Region 5's earlier Pre-Hearing Exchange which indicated that Region 5 did not intend to introduce at an evidentiary hearing the testimony of any witnesses or introduce any documents that were not attached to its Pre-Hearing Exchange. *See* Complainant's Pre-Hearing Exchange dated August 25, 2008. Thus, Region 5 would have nothing to add to the issue if an evidentiary hearing were held.

In a strange legal maneuver, Region 5 did not respond to the motions filed by JAB Company and Biewer Lumber, LLC for accelerated decision with an opposing brief. Rather, it filed a four-page "Objection to Motion for Accelerated Decision" arguing that Respondents' motion was premature because Respondents had not yet seen how Region 5 intended to establish its *prima facie* case of liability. Amazingly, Region 5 argued in its "Objection" that only Region 5 was entitled to file a Motion for Accelerated Decision on this issue. Such was the *only* response to Respondents' motion, and there was no effort made to challenge the merits of Respondents' motion or the factual matters established with the motion. Although Judge Moran probably could have granted Respondents' motion on that basis alone, he generously treated Region 5's own motion and supporting briefs as *de facto* responses to Respondents' motion. Ultimately, Judge Moran granted Respondents' motions and denied Region 5's motions in a lengthy Order and Opinion dated October 6, 2009 for JAB Ohio and December 23, 2009 for JAB Toledo, which forms the primary basis for Region 5's present appeal.

With respect to Region 5's Motion for Accelerated Decision on Liability and Penalty, (filed only against JAB Ohio and JAB Toledo) Respondents conceded liability but argued that there were disputed factual issues concerning any penalty which necessitated an evidentiary hearing, including facts relating to the "willfulness" of the violations and Respondents' good faith efforts to comply. *See* Respondents' Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty, dated July 30, 2009. Some of the facts supporting Respondents' position (i.e., JAB Ohio's and JAB Toledo's insolvency and financial inability to perform the required activities) had actually been argued and established by Region 5 in the context of Region 5's Motion for Accelerated Decision on Derivative Liability. Judge Moran denied Region 5's motion stating that there were disputed issues of fact, that he wanted to hear from Region 5's penalty calculation

witness (whom he ordered to appear at the evidentiary hearing) and that in the exercise of his discretion, the matter should be resolved following an evidentiary hearing as opposed to accelerated decision motions. *See* Order on EPA's Motion for Accelerated Decision on Liability and Penalty dated December 23, 2009 and Order on EPA's Motion to Strike, in Part, Respondents' Pre-Hearing Exchange dated December 23, 2009.

The evidentiary hearing was scheduled for February 23, 2010, at which the claims against JAB Toledo and JAB Ohio would both be tried. However, one month prior to the scheduled hearing, Region 5 filed, on January 22, 2010, a Supplemental Pre-Hearing Exchange, which contained yet another bizzare litigation strategy. In this document, Region 5 repeated its argument that the Presiding Officer should have granted Region 5's Motion for Accelerated Decision on Liability and Penalty and made the following statement:

> "In the interest of preserving her appeal rights, Complainant will present no evidence at the hearing, and will not make available for cross-examination any Agency personnel, or other witness."

Such position by Region 5 was a direct refusal to abide by the Presiding Officer's Order requiring Region 5 to produce its penalty calculation witness and was obviously a statement that Region 5 had no intention of satisfying its burden of presentation or persuasion at a hearing as required by 40 C.F.R. § 22.24. In light of Region 5's "boycott" of the evidentiary hearing, Respondents filed a Motion for Entry of Decision on February 8, 2010, requesting an order awarding zero penalty against JAB Ohio and JAB Toledo, and further awarding Respondents their attorneys' fees incurred in preparing for a trial that Region 5 no longer was willing to participate in, even though Region 5 was the party who started the administrative process in the first place.

Judge Moran withheld a decision on Respondents' Motion for Entry of Decision and the hearing was held as scheduled on February 23, 2010 in Toledo, Ohio. Region 5, represented by two attorneys at the hearing, reiterated its "boycott" position regarding the trial, again stating that it was

doing so to "preserve its appeal rights." *See* Hearing Transcript, pp. 63-64. Region 5 offered no testimony or exhibits, and in fact, at no time during the entire administrative process did Region 5 ever offer and ask to be admitted into evidence a single document, affidavit or testimony of any kind whatsoever. Although Respondents had no obligation to put on any defense at the hearing because of Region 5's default, they did preserve the testimony of Gary Olmstead, Chief Financial Officer, to establish that JAB Ohio and JAB Toledo failed to perform all the tasks required under RCRA, not because of an unwillingness to do so, but because of their financial inability to fund such an exercise. *See* Hearing Transcript, pp. 38-62. Prior to the close of the evidentiary hearing, Region 5 made no motion for entry of judgment as a matter of law or any other motion preserving its legal arguments regarding penalty.

On April 30, 2010, Judge Moran issued his Initial Decision reaching the only conclusion he was permitted to make under the *Consolidated Rules*, that a zero penalty was awarded because Region 5 had failed to present a *prima facie* case.

## ARGUMENT

### I. THE PRESIDING OFFICER CORRECTLY DECIDED THE PARTIES' CROSS-MOTIONS FOR ACCELERATED DECISION ON JAB COMPANY'S DERIVATIVE OR DIRECT LIABILITY.

With respect to Region 5's Motion for Accelerated Decision or JAB Company's Motion for Accelerated Decision, JAB Company demonstrates below that Region 5 has not met its burden of proof to establish that JAB Company is liable for the actions of JAB Ohio or JAB Toledo. The analysis begins in Section A with a summary of the applicable standards of review and burdens of presentation and persuasion for each party, particularly regarding burden of persuasion. Next, the brief sets forth a summary of the parent/subsidiary norms established by the U.S. Supreme Court in *U.S. v. Bestfoods*, 524 U.S. 51, 63, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), (Section B) followed by a demonstration that Ohio common law, rather than federal common law, must be used to determine

whether to pierce the corporate veil of JAB Ohio and JAB Toledo (Section C). The *Bestfoods* guidelines are established first because regardless of which body of law this Board uses to analyze the veil piercing argument, the analysis must incorporate the parent/subsidiary norms established in *Bestfoods*.

After establishing the legal context in which the facts must be placed, in Section D the Brief provides a summary of the uncontested facts, as established by JAB Company through its Motion for Accelerated Decision, as well as those set forth by Region 5 through its Motion for Accelerated Decision. The Brief next demonstrates the fundamental flaws of Region 5's analysis that ultimately render Region 5's conclusions untenable in Section E. Finally, all of the issues are tied together in Section F where it is clear that Region 5 did not meet its burden of proof through a comparison of what Region 5 actually proved with what it needed to prove regarding both motions for accelerated decision.

### A. Standard of Review and Burden of Persuasion

Region 5's right to appeal to the EAB is "limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction." 40 C.F.R. § 22.30(c). With regards to those issues properly under appeal, the EAB has authority to "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed". 40 C.F.R. § 22.30(f); *In re Billy Yee*, TSCA Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D. ______. In doing so, the EAB applies the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). *See In re The Bullen Companies, Inc.*, 9 E.A.D. 620, 632 (EAB, Feb. 1, 2001). The "preponderance of the evidence" standard requires that "a fact finder should believe that his factual conclusion is more likely than not." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

The EAB gives considerable deference to the presiding officer's factual conclusions based upon the testimony of witnesses, *In re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000), *citing In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994), to his decisions regarding the admissibility of evidence, *In re Great Lakes Div. of Nat. Steel Corp.*, 5 E.A.D. 355, 368 (EAB 1994), and his decisions regarding discovery, *In re Billy Yee*, *supra* at 13 .

Region 5 alone bears the burden of presenting evidence supporting the allegations in its complaint and persuading the presiding officer regarding questions of fact and law to establish JAB Company's direct or derivative liability. *See* 40 C.F.R. §22.24. In the context of Region 5's claim of veil piercing or direct liability, this burden means Region 5 must overcome the presumption that JAB Company, JAB Ohio and JAB Toledo are to be treated as separate corporate entities not responsible for the liabilities of the others. Respondents *do not* have the burden of proving the absence of veil piercing or direct liability factors – this is Region 5's claim and its proof rests solely on Region 5.

Pursuant to CROP, an accelerated decision is proper "if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Rogers Corp. v. E.P.A.*, 275 F.3d 1096, 1103 (D.C. Cir. 2002); *see* 40 C.F.R. § 22.20(a). An accelerated decision is viewed as a summary judgment, and in analyzing an accelerated decision, this Board relies on the Supreme Court's formulation of Fed. R. Civ. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *Rogers Corp. v. E.P.A.*, 275 F.3d at 1103 (*citing In re BWX Tech., Inc.*, RCRA (2008) Appeal No. 97-5, 2000 WL 365958 (E.P.A. Apr. 5, 2000).

Where JAB Company, as a party moving for accelerated decision, *does not* have the burden of persuasion on the issue of its direct or derivative liability, its burden is only to "show" or "point

out" to the reviewing tribunal that there is an absence of evidence in the record to support Region 5's case on that issue and that the JAB Company is entitled to judgment in its favor as a matter of law. *See Celotex*, 477 U.S. at 323-324 (1986).

In the context of JAB Company's accelerated decision motion, once its burden is met, the burden of production shifts to Region 5, and becomes "considerably more demanding than the movant's with respect to the issues upon which the nonmovant bears the burden of persuasion at trial." *Anderson*, 477 U.S. at 252. On each essential element of its claim, Region 5 must identify specific facts that allow a reasonable factfinder to find in its favor. *Id.* The evidence provided by Region 5 must be substantial, "more than a scintilla," and probative of a disputed factual issue to show that the nonmovant is entitled to a trial or hearing. *In re BWX Tech, Inc., supra.*

Where opposing parties file cross motions for accelerated decision, it is possible for the presiding officer to decide any outstanding issues where it determines that no further factual development would occur by a hearing or trial. *See Tripp v. May*, 189 F.2d 198, 200 (7th Cir, 1951); *Wright et al., Federal Practice & Procedure*, § 2720 (1998); *In re BWX Tech.*, p. 69, n. 10. Thus, to the extent it was necessary to decide any contested facts at issue during the accelerated decision phase, it was entirely appropriate for Judge Moran to do so where Region 5 had already announced in its pre-hearing exchange that it intended to call no witnesses or introduce any documents at trial that were not already attached to its motion. *See* Appellant's Brief, p. 25, fn. 17.

As discussed in more detail below, Region 5 artfully attempts to muddle the burden of persuasion issue and divert the Board's attention from its own evidentiary failures to evidence it claims JAB Company should have, but *failed* to produce. The burden of proof was and remains entirely on Region 5. This appeal is about the evidence produced or not produced by Region 5 to overcome the presumption of separate corporate boundaries between JAB Company and its

subsidiaries. Region 5 understandably ignores its burden of persuasion, and as demonostrated below, often implies a reversed burden of proof, and glosses over the multiple substantive inadequacies inherent in its evidence and argument.

### B. The Supreme Court in *Bestfoods* Established Several Guidelines Regarding Parent-Subsidiary Norms that Must be Maintained

The seminal case addressing the liability of a parent corporation for environmental contamination at a facility of its subsidiary, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), is *United States* v. *Bestfoods*, 524 U.S. 51 (1998). In *Bestfoods*, the U.S. Supreme Court reaffirmed the traditional bedrock principles of corporate law, holding that, as a general rule, a parent corporation cannot be held liable for the acts of its subsidiaries, and that CERCLA does nothing to alter that overriding presumption:

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.
>
> * * *
>
> [N]othing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible.

*Bestfoods, supra* at 524 U.S. 61, 62 (citations omitted).

The Court did recognize, however, two exceptions to the general rule, whereby a parent could be held liable for the acts of its subsidiary: (1) through traditional veil-piercing principles; or (2) when the parent incurs direct "operator" liability. Each of these exceptions is discussed below:

#### 1. Veil-Piercing Claim

In *Bestfoods*, the Supreme Court held that a parent company may be held liable under CERCLA through traditional "veil-piercing" principles, to wit, when "the corporate form [is] . . . misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id.* at 62. The Court was careful to explain, however, that CERCLA had not lowered the bar with

respect to proving a veil-piercing claim, and that mere control of a subsidiary by its parent is not nearly enough to support such a claim:

> [I]t is hornbook law that "the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal."
>
> *Id.* at 61-62 (citation omitted).

Nor is the sharing of common directors between a parent and subsidiary sufficient to support a veil-piercing claim: "[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *Id.* at 69 (citation omitted). Given that the sharing of directors between a parent and subsidiary is the commonly accepted norm, the Court further explained that the directors of a subsidiary are presumed to be acting on the subsidiary's behalf when making decisions affecting the subsidiary's business, despite their simultaneous director responsibilities for the parent:

> [T]hat the corporate personalities remain distinct has its corollary in the well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their common ownership . . . Since courts generally presume that the directors are wearing their "subsidiary hats" and not their "parent hats" when acting for the subsidiary, . . . it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the [subsidiary's] facility. The Government would have to show that, despite the general presumption to the contrary, the officers and directors were acting in their capacities as [parent] officers and directors, and not as [subsidiary] officers and directors.

*Id.* at 69-70 [internal quotations and citations omitted].

Putting a finer point of the types of proofs the government would have to adduce in order to use the actions of a dual officer in support of a veil-piercing claim, the Court explained that there must generally be evidence that the subsidiary's dual officer acted *contrary* to the interests of the subsidiary and simultaneously for the advantage of the parent:

> 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.

*Id.* at 70, n. 13.

Thus, while *Bestfoods* recognizes the possibility for parent-company liability under CERCLA, through veil-piercing principles, the overriding presumption of parental non-liability persists, in accordance with the common law.

**2. Direct "Operator" Liability**

As an alternative to a traditional veil-piercing claim, the Supreme Court also recognized that a parent corporation could be held directly liable, under CERCLA, for environmental contamination at a facility of its subsidiary, if the parent engages in direct "operation"[3] of the subsidiary's facility. *Id.* at 64. Such direct parent "operation" can be established by showing that the parent corporation exercised *exclusive control* of the facility or engaged in a *joint venture* with the subsidiary, or by showing that an agent or officer of the parent directly controlled the operation of the subsidiary's facility, *to the subsidiary's detriment*. *Id.* at 70-72. The question here is "not whether the parent operates the *subsidiary*, but rather whether it operates the [subsidiary's] *facility*." *Id.* at 68 (emphasis added). In addition, the Court was not speaking of the parent's generalized operation of any aspect of the subsidiary's facility, but rather it was speaking only of those types of operations dealing with pollution and environmental compliance:

> To sharpen the definition [of "operate"] for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

[3] *See* 42 U.S.C. § 9607(a)(2) ("CERCLA") (authorizing suit against "any person who at the time of disposal of any hazardous substance owned or *operated* the facility" [emphasis added]).

*Id.* at 66-67.

Thus, while *Bestfoods* recognizes the possibility for parent liability under CERCLA for a parent's direct operation of a subsidiary's facility, such liability can be predicated only upon evidence showing that the parent directed the operations of the subsidiary's facility specifically with respect to pollution control and environmental compliance.

### 3. Application of *Bestfoods* to the RCRA Liability Framework

Both sides agree that the *Bestfoods* framework for parent liability also applies under RCRA. Complainant's Brief in Support of Its Notice of Appeal (Appellant's Brief), p. 18. Just like CERCLA, RCRA says nothing about disturbing the bedrock corporate principles that prevent a parent from being liable for the acts of its subsidiaries, absent the extreme circumstances that would warrant a piercing of the corporate veil. Thus, a parent cannot be held indirectly liable under RCRA for the actions of its subsidiaries, unless the overriding presumption of parental non-liability is overcome through traditional veil-piercing principles.

The *Bestfoods* analysis also applies equally to direct liability issues under RCRA. In that regard, RCRA ostensibly authorizes suit against "any person [who] has violated or is in violation of any requirement of [RCRA]." 42 U.S.C. § 6928(a)(1). "Operators" of a facility are subject to RCRA regulation. 42 U.S.C. § 6924(a) and 42 U.S.C. § 6925(a). Therefore, in accordance with *Bestfoods*, a parent could be subject to direct "operator" liability under RCRA only upon a showing that the parent directed the operations of the subsidiary's facility with specific respect to pollution control and environmental compliance.

## C. Ohio Common Law Governs Veil-Piercing Determinations

At the outset, it should be noted that Judge Moran found that the facts presented by Region 5 in support of its claims did not warrant piercing the corporate veil of either JAB Ohio or JAB Toledo under either state or federal common law. *In re John A. Biewer Company of Ohio,* 2009 WL

3496294, 7-8, n. 14, Docket No. RCRA-05-2008-0007 (E.P.A. October 5, 2009) ("*In re JAB Ohio*"). Region 5 apparently perceives federal common law, at least the version used in the Third Circuit, to be the easier standard to meet. In its vigor to convince this Board it must use federal common law when determining whether to pierce the corporate veil of the two subsidiary corporations, Region 5 essentially "cherry-picks" the case law it would like this Board to apply, and ignores the many other federal cases that articulate a standard different than that in the Third Circuit, where none of the parties are located.[4] While JAB Company is in agreement with Judge Moran that Appellant fails under both Ohio and federal common law, JAB Company maintains that Ohio common law should be applied when analyzing the appropriateness of piercing either JAB Ohio's or JAB Toledo's corporate veil because this Board has found that state common law must be used to determine whether state regulations have been violated. Moreover, even if federal law were consulted, the common law in the Sixth Circuit, where JAB Ohio and JAB Toledo are located, requires the use of state common law to make such a determination.

### 1. Region 5 is Attempting to Enforce Ohio Regulations That Ohio Has Been Authorized to Administer in Lieu of the Federal Government.

This Board has held that state law must be used to determine whether a RCRA violation occurred where the State in question has been authorized to administer a state hazardous waste program in lieu of the federal government's RCRA program. *In re Brenntag Great Lakes, LLC*, No. RCRA 5-2002-0001 (E.A.B. June 2, 2004). Region 5 admits that the state of Ohio was given final authorization to administer the pertinent Hazardous and Solid Waste Amendments of 1984, and additional RCRA requirements (*See* Appellant's Brief, p. 5), and it is these Ohio regulations which

[4] While Region 5 claims the use of Ohio common law constitutes reversible error, Region 5 seems to waiver on that claim, later stating that the federal and state tests for piercing a corporate veil are nearly identical. Appellant's Brief, p. 27.

are alleged to have been violated in this case. (*See* Amended Complaint ¶¶ 4, 5, 11, 12, 22, 23, 28). The effective RCRA requirements governing drip pads that Region 5 is seeking to enforce are codified in Ohio Admin. Code § 3745-69-40 through § 3745-69-45. Appellant's Brief, p. 5.

Region 5 wholly ignores the fact that it is attempting to enforce Ohio regulations and, instead, spends pages in its Appeal Brief creating various arguments regarding the need to use federal common law when dealing with federal statutes. *See* Appellant's Brief, pp. 18-21. None of the cases cited by Region 5 as supporting the use of federal common law appear to have involved EPA's attempt to enforce state regulations. Thus, Region 5's analysis of the factors in *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) and related case law is entirely irrelevant. *See* discussion in Appellant's Brief, pp. 18-24.[5]

The claims Region 5 has made against JAB Company are that JAB Company is directly or derivatively responsible for its subsidiaries' alleged violations of Ohio regulations. JAB Company will only be liable for the violation of Ohio regulations if it is appropriate to pierce the corporate veils of JAB Ohio and JAB Toledo. According to this Board, therefore, Ohio law must be used to determine whether JAB Company is liable for violations of Ohio regulations. *See Brenntag, supra.* Because this Board has already provided clear guidance that Ohio common law should be used to determine whether to pierce the corporate veil of JAB Ohio and JAB Toledo, Region 5's analysis adopting the reasoning of courts addressing federal statutes is unnecessary and irrelevant.

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[5] Even if Region 5's analysis related to the *Kimbell* factors were relevant, the analysis contains serious flaws, as discussed in more detail below.

### 2. Sixth Circuit Law Likewise Requires Application of State law on the Issue of Veil Piercing Where All Pertinent Entities are Located and All Events Occurred Within the Sixth Circuit.

In addition to precedent established by this Board, Sixth Circuit federal common law also requires use of state common law tests for a claim to pierce a corporate veil.[6] *See Carter Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 747 n.1 (6th Cir. 2001)(*citing Donahey v. Bogle*, 129 F.3d 838, 843 (6th Cir.1997), vacated on other grounds, 524 U.S. 924 (1998), reinstated, 2000 WL 977376 (6th Cir. Jul. 7, 2000)); *AT & T Global Information Solutions Company et al. v. Union Tank Car Company, et al.*, 29 F.Supp. 2d 857, (S.D. Ohio 1998). If any federal common law is pertinent, it would be that of the Sixth Circuit where JAB Toledo and JAB Ohio are located and where all relevant events occurred.[7] This is particularly so where the Sixth Circuit has spoken directly on the precise choice of law question raised here involving veil-piercing. Thus, even if this Board does not believe its prior decision in *Brenntag* is controlling, federal common law in the Sixth Circuit directs the Board to the same state common law for resolving claims of veil piercing.

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[6] Region 5 implies that JAB Company chose to use Ohio state common law over Michigan common law without a basis and argues further that JAB Company ignored any differences between Michigan and Ohio common law. Appellant's Brief, p. 23. JAB Company, however, set forth in detail a choice of law analysis that dictated Ohio law should be applied rather than Michigan law. JAB Ohio Memorandum in Support of Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC's Motion for Accelerated Decision, pp. 27-29. In addition, Michigan and Ohio law are substantively the same with regard to veil-piercing, so the use of either would require that JAB Ohio's and JAB Toledo's corporate veils be maintained.

[7] Notably, Region 5 fails to cite a single Sixth Circuit case supporting its federal common law argument, but curiously seems to rely on a couple of cases from the Third Circuit. Comparing the Sixth Circuit cases cited above with the decisions from the cases from the Third Circuit cited at pp. 18, 19 of Appellant's Brief, it is quite clear that, contrary to the suggestion of Appellant, there is no unified body of federal common law regarding veil piercing. There is no reason why this Board should apply a standard used in the Third Circuit instead of law directly on point from the Sixth Circuit.

### 3. The Choice of Law Analysis Advanced by Region 5 is Fatally Flawed.

Even if the Board were to ignore the fact that Region 5 is attempting to enforce Ohio regulations and ignore the previous decisions of this Board and the Sixth Circuit Court of Appeals, the analysis advanced by Region 5 for applying "federal law" to veil-piercing fails for a host of reasons.

First, Region 5 argues in favor of application of *Kimbell* in cases where the federal statute is "ambiguous or incomplete" (Appellant's Brief, p. 18). Yet there is no indication in Appellant's Brief why RCRA is either ambiguous or incomplete, and indeed two pages later in Appellant's Brief, Region 5 refers to RCRA as "comprehensive." (Appellant's Brief, p. 20) The fact that RCRA is silent regarding a standard for veil-piercing hardly makes the statute incomplete. If that were the case, virtually every federal statute in existence that applies to corporations would be considered "incomplete."

RCRA has been described by courts as "comprehensive" regulation of the subject area, and is certainly not incomplete. *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331, 114 S. Ct. 1588 (1991); *Meghrig* v *KRC Western Inc.*, 516 U.S. 479, 483, 116 S. Ct. 1251 (1996). The Supreme Court has made clear that the congressional silence on issues tangential to a federal statute does not render a federal statute "incomplete." *See O'Melneny & Myers v. FDIC*, 512 U.S. 79, 114, S. Ct. 2048, 2054 (1999). This is certainly the case where the issue is *purely* a question of corporate law, an area traditionally governed by state law. *See Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991). Thus, application of the *Kimbell* factors simply does not come into play in this case.

Second, the fundamental basis of Region 5's argument in favor of application of a federal standard for veil-piercing is its claim that uniformity in the enforcement of RCRA is required nationwide, and cannot vary depending upon the location of the defendant. Ignored in Region 5's

analysis is the fact that this case does not involve questions regarding interpretation of RCRA. There has been no dispute regarding what was required by either RCRA or the Ohio regulations adopted to enforce RCRA, nor is there any dispute regarding whether or not there was a violation of the statute, as JAB Toledo and JAB Ohio have admitted liability. This question involved in this case is solely one of *corporate* law and whether a parent corporation may be held liable for the failings of its subsidiary. Corporate law is, perhaps like no other area of the law, clearly within the purview of state regulation and control, not federal regulation and control. *Id.* Region 5 bears a heavy burden in overcoming the strong presumption that state common law must be used to address corporate questions rather than use federally created law[8]. *See Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir.1998). The mere fact that a claim may arise under a federal statute does not open the door for a court or tribunal to scrap well-established principles of state corporate law. To the contrary, the U.S. Supreme Court in *Bestfoods* made it clear that "CERCLA is . . . like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." 524 U.S. at 63. Following the Supreme Court's caution in *Bestfoods*, the Sixth Circuit has applied state common law to claims of veil-piercing under CERCLA. *See Carter Jones Lumber Co. v. LTV Steel Co., supra*; *Donahey v. Bogle, supra*; *AT&T Global Information Solutions Company, et al v. Union Tank Car Company, et al, supra.*

Third, Region 5's quest for uniformity in the context of veil-piercing presumes that there is a uniform body of federal law regarding piercing of the corporate veil. Such could not be farther from

[8] The present case does not simply involve the meaning of a term contained in RCRA. *See United States v. General Battery Corp.*, 423 F.3d 294, 311 n. 14 (3rd Cir. 2005 ) (Rendell, CJ, concurring in part, dissenting in part) (noting that the use of federal common law to determine successor liability did not equate to defining a term in CERCLA). Region 5 is clearly asking this Board to use judicially created law, not simply define a term, which is an additional reason why the case law cited by Region 5 is not relevant to the present issues.

the truth, as evidenced by the contrast between the Sixth Circuit's treatment of the issue and the Third Circuit case cited by Appellant, *United States v. General Battery Corp.*, 423 F.3d 294 (3rd Cir. 2005) (*cited* at pp. 18, 19 Appellant's Brief). This false assumption of a uniform federal common law has lead some commentators to describe the development of federal law of corporate veil-piercing as "ad hoc" and "an even more unpredictable, confusing state of affairs than exists under state common law." *French, Peter,* PARENT CORPORATE LIABILITY: AN EVOLUTION OF THE CORPORATE VEIL PIERCING DOCTRINE AND ITS APPLICATION TO THE TOXIC TORT ARENA DOCTRINE, 5 TUL. ENV. L.J. 605, 617-625 (1992) (citing examples of various federal common law tests).

Fourth, Region 5's contention that application of Ohio veil-piercing law would somehow be contrary to the objectives of RCRA appears to ignore the fact that Region 5 has sought to enforce *Ohio's* regulations which were approved by EPA in implementing RCRA. Clearly, EPA's authorization of Ohio to administer its own regulations in lieu of federal implementation expresses EPA's belief that Ohio and the federal government have the same interest in administering and enforcing RCRA. How then can it be seriously argued that application of Ohio corporate law would undermine enforcement of Ohio's regulatory scheme?

Fifth, while the Supreme Court has not addressed whether state or federal common law should be used in determining whether to pierce a corporate veil, the Court did make it clear that courts could not expand established vicarious liability principles in the name of CERCLA. *Bestfoods*, 524 U.S. at 61-62. It follows that these same principles could not be expanded under RCRA. Region 5's argument that a uniform federal rule is needed to govern vicarious liability under RCRA is in actuality a request for this Board to expand corporate liability for RCRA violations beyond the normal bounds of state corporate law. *See Atchison*, 159 F.3d at 363 ("The argued 'need' for uniformity thus stems not from disarray among the various states, but from the alleged

need for a more expansive view of successor liability than state law currently provides — in other words, the notion that state law on this issue is inadequate for CERCLA's purposes."). Indeed, Region 5 chose a test that allows a corporate entity to be disregarded "in the interests of public convenience, fairness, and equity." Memorandum in Support of Motion for Accelerated Decision on Derivative Liability ("Region 5 Memorandum")[9], p. 8, *quoting In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 675 F. Supp. 22, 33 (D.C. Mass. 1987). As noted by Judge Moran in the Order on Cross Motions, "this perspective does not square with the Supreme Court's view in *Bestfoods*." *See In re JAB Ohio*, 2009 WL 3496294 at 5. Region 5's request for this Board to expand corporate liability for RCRA purposes is specifically prohibited by the Supreme Court in *Bestfoods*. *See* 524 U.S. at 61-62.

Last, Appellant references, throughout its Appeal Brief, a broad policy objective it claims is found in RCRA to hold parent corporations liable in order to ensure compliance with RCRA and protect the environment. Appellant uses this broad statement of public policy to justify a departure from well-established corporate law regarding parent liability to expand the reach of RCRA liability to parent companies. *No such policy is expressed or implied anywhere in RCRA.* RCRA imposes obligations on owners and operators, but says absolutely nothing about extending the reach of the statute beyond normal corporate limited liability principles embedded in state law.[10] Adhering to state corporate law regarding veil-piercing does not impinge in any way whatsoever on any express public policy objective articulated in RCRA. As noted by the Supreme Court in *Bestfoods*, there is nothing in CERCLA, or Respondents contend, in RCRA, giving any indication "that the entire

[9] When citing the Region 5 Memorandum, unless the JAB Toledo case is indicated, JAB Company will cite to the Memorandum filed in the JAB Ohio case. For the most part, Region 5 made the same arguments and attached the same documents in each Memorandum.

[10] Unlike the cases cited by Region 5 addressing the definition of "successor" under CERCLA, RCRA does not provide for the liability of a parent.

corpus of state corporate law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." Appellant's efforts to recast the policy objectives of RCRA must be recognized for what they are – an attempt to avoid troublesome controlling law that fails to support its claim against JAB Company.

### D. The Corporate Veils of JAB Ohio and JAB Toledo may not be Pierced Under Ohio Common Law, Federal Common Law, or Michigan Common Law

As discussed above, Region 5 bears the entire burden of presentation and persuasion supporting its claim that JAB Company is derivatively liable for the violations of JAB Company's subsidiaries. *See* 40 CFR § 22.24(b). Reading Region 5's appeal brief, one would get the impression that the burden of proof is exactly the opposite and rests with Respondents to *disprove* Region 5's veil piercing argument. Thus, time after time, Region 5 emphasizes documents *not produced* by Respondent to demonstrate the separateness of the two corporate entities, rather than pointing to evidence presented by Region 5 to actually prove the elements of veil piercing. Region 5 conducted extensive discovery and was provided thousands of pages of documents from Respondents during that discovery. Its failure to produce evidence sufficient to warrant veil piercing is not "cured" by assertions that Respondents did not produce all the documents they could have to disprove Region 5's claims.

#### 1. A Prima Facie Case for Piercing the Corporate Veil Requires Evidence that the Parent Exercised Complete Control Over the Subsidiary, Such Control Was Exercised to Commit a Fraud, Illegal Act, or Similar Unlawful Act, and an Injury or Unjust Loss Resulted From the Act

The Supreme Court has described the principle that a parent corporation is not liable for the acts of its subsidiaries as "a general principle of corporate law deeply 'ingrained in our economic and legal systems.'" *United States v. Bestfoods, supra* at 61. The *Bestfoods* Court further noted that "nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-

law backdrop, the congressional silence is audible." *Id.* at 62. Congress was similarly silent regarding limited liability issues in RCRA. Therefore, a parent may only be charged with derivative RCRA liability for its subsidiary's acts "when (but only when) the corporate veil may be pierced."[11] *Id.* at 64-65 (referring to similar CERCLA law). As established above, Ohio common law should be used when determining whether to pierce the corporate veil of JAB Ohio and JAB Toledo in the present situation.

Region 5 and JAB Company agree that, no matter which law is used, a corporate veil may not be pierced unless "the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another." *See In re JAB Ohio,* 2009 WL 3496294 at 5. "The leading Ohio case on veil-piercing is *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.,* 67 Ohio St.3d 274, 617 N.E.2d 1075 (1993)." *Carter Jones*, 237 F.3d at 748. "In *Belvedere*, the Ohio Supreme Court announced a three-pronged test to determine if a shareholder is liable for the wrongdoing of the corporation of which he is an owner." *Id.* Liability is imposed under the test when: (1) control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own; (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; *and* (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Id.* In proving that injustice would result from a failure to pierce the corporate veil, a plaintiff must demonstrate more than the "mere fact that the company ceased

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[11] As already noted above, RCRA says nothing about disturbing the bedrock corporate principles that prevent a parent from being liable for the acts of its subsidiaries, absent the extreme circumstances that would warrant a piercing of the corporate veil. Thus, like under CERCLA, a parent cannot be held indirectly liable under RCRA, for the actions of its subsidiaries, unless the overriding presumption of parental non-liability is overcome.

operation without being able to pay all of its debts." *Scarbrough v. Perez*, 870 F.2d 1079, 1084 (6th Cir. 1989).

The Ohio Supreme Court later clarified the boundaries of the second prong of the *Belvedere* test, stating that the proponent of piercing a corporate veil must "demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 895 N.E.2d 538, 544-545 (Ohio 2008). While the court seemingly expanded the second prong of the *Belvedere* test, the court cautioned that the corporate veil should be pierced "only in instances of extreme...misconduct." *Id.* In *Dombroski*, the court, considering a proposed expansion of the standard under the second prong of *Belvedere* to include "unjust or inequitable conduct", stated:

> [W]ere we to allow piercing every time a corporation under the complete control of a shareholder committed an unjust or inequitable act, virtually every close corporation could be pierced when sued, as nearly every lawsuit sets forth a form of unjust or inequitable action and close corporations are by definition controlled by an individual or small group of shareholders. *See* Black's Law Dictionary (8th Ed.2004) 365. Controlling shareholders in publicly traded corporations could also be subject to frequent piercing, regardless of the corporation's liability and its ability to pay for the plaintiff's injuries. Such expansive liability would run contrary to the concept of limited shareholder liability and upset the balance struck in *Belvedere*. Thus, the proposed expansion of the second prong of the *Belvedere* test to include unjust or inequitable conduct is simply too broad to survive exacting review.

*Id.*

Region 5 appears to be in agreement with the elements of the Ohio common law test, except that directly contrary to the Ohio Supreme Court's *Dombroski* ruling, Region 5 would have this Board expand the second prong to include unjust and inequitable acts, all but eliminating the concept of limited liability, particularly for closely held corporations. *See* Appellant's Brief, pp. 48-49.

It is through the lens of the case law discussed above that evidence put forth by Region 5 and JAB Company must be viewed. As demonstrated below, even if this Board were to adopt Region 5's radical view of the federal common law test, the evidence set forth during the accelerated

decision process and summarized below establishes that Region 5 did not meet its burden of proof for its Motions for Accelerated Decision. Therefore, it was appropriate and necessary for Judge Moran to grant JAB Company's Motion for Accelerated Decision and deny Region 5's Motion for Accelerated Decision.

### 2. JAB Company Has Established a Body of Uncontested Facts That Support its Argument That Region 5 is Unable to Demonstrate a *Prima Facie* Case For its Piercing the Corporate Veil Claim

JAB Company was not obligated to produce any evidence disproving Region 5's veil-piercing claim unless and until Region 5 established a *prima facie* case. Nonetheless, JAB Company, in support of its own motion for accelerated decision, provided affidavits, interrogatory responses and additional documents that showed Region 5 could not support its veil-piercing claim.

#### a. Affidavits

The affidavits submitted by JAB Company establish the following facts which were never disputed:

1. During the time JAB Ohio and JAB Toledo were operational, each subsidiary was operated by a Plant Manager hired by the subsidiary and the Plant Manager's duties included hiring, firing, disciplining, and training all employees for the respective company. JAB Ohio Motion for Accelerated Decision on Derivative Liability ("JAB Ohio Motion for Accelerated Decision"), Exhibit D; JAB Toledo Motion for Accelerated Decision on Derivative Liability ("JAB Toledo Motion for Accelerated Decision"), Exhibit D; JAB Ohio Memorandum In Opposition to EPA's Motion for Accelerated Decision on Derivative Liability ("JAB Ohio Memorandum in Opposition"), Exhibit D; JAB Toledo Memorandum In Opposition to EPA's Motion for Accelerated Decision on Derivative Liability ("JAB Toledo Memorandum in Opposition"), Exhibit D.

2. During the time JAB Ohio and JAB Toledo were operational, Plant Managers hired their own inside and outside sales forces for sales within their territories and set the pricing for their territories. JAB Ohio Motion for Accelerated Decision, Exhibit D; JAB Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

3. All employees of JAB Ohio and JAB Toledo were paid by payroll checks issued by the corresponding subsidiary. JAB Ohio Motion for Accelerated Decision, Exhibit D; JAB

Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

4. All billings for sales of merchandise were issued on invoices in the name of the JAB Ohio and JAB Toledo. JAB Ohio Motion for Accelerated Decision, Exhibit D; JAB Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

5. JAB Ohio and JAB Toledo had separate financial statements and profit sharing plans that were based solely on the success and profitability of each subsidiary. JAB Ohio Motion for Accelerated Decision, Exhibit D, JAB Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

6. JAB Company set general policy directions for its subsidiaries, but the policies were implemented by the Plant Managers and employees of JAB Ohio and JAB Toledo. JAB Ohio Motion for Accelerated Decision, Exhibit D, JAB Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

7. With the assistance of his staff, the Chief Financial Officer for JAB Company separately prepared the financial statements for JAB Ohio, and JAB Company was paid an annual management fee by the subsidiaries for performing that service. JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Memorandum in Opposition, Exhibit C.

8. All monies advanced to JAB Ohio from JAB Company were used to pay taxes and insurance after the subsidiary ceased operations and such advances were duly recorded as corresponding debits and credits on JAB Company's and JAB Ohio's balance sheets.[12] JAB

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[12] In its Reply Brief supporting Region 5's Motion for Accelerated Decision, Region 5 questioned the veracity of the statement that all transfers were accounted for as debits and credits in JAB Company and JAB Ohio's records, but produced no evidence or facts to support its suspicion that the facts as recited in Respondent's affidavit were inaccurate in any way. Region 5's response is limited to a complaint that JAB Company did not provide additional documentation to support the facts stated in the affidavit. This response does not sufficiently contest this fact under Rule 56. *See* Fed. R. Civ. P. 56(e)(2). Moreover, JAB Company provided Region 5 with thousands and thousands of pages of the general ledgers of JAB Ohio and JAB Toledo covering the years 1997 through 2009 that support this statement. Region 5 did not request the general ledgers of JAB Company and only requested information regarding related party transactions involving JAB Toledo for the period after January 1, 1997 and involving JAB Ohio for the period after January 1, 2001. As already established, JAB Toledo ceased operations in 1997 and JAB Ohio ceased operations in 2001. If Region 5 is unable to find proof that of the legitimacy of intercompany debts, it is likely because it did not ask for any records of the time that JAB Ohio and JAB Toledo were operational. Therefore, any claim that JAB Company did not produce documents demonstrating the legitimacy of the credits and debits existing at the time JAB Toledo and JAB Ohio closed is nothing more than an impermissible attempt to shift the burden of persuasion.

Ohio Motion for Accelerated Decision, Exhibit A; JAB Ohio Memorandum in Opposition, Exhibit A.

9. While operating, JAB Ohio used a bank account in the name of JAB Company, but used a separate, individualized series of checks that allows JAB Company and JAB Ohio to separately track and record JAB Ohio's debits. JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Memorandum in Opposition, Exhibit C.

10. JAB Ohio ceased all operations in 2001. JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Opposition to Motion, Exhibit C.

11. After JAB Ohio ceased operations in 2001, Brian Biewer was duly appointed manager/director of JAB Ohio and was not paid for his work at that position. JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Memorandum in Opposition, Exhibit C.

12. After JAB Ohio ceased operations, JAB Company paid its few ongoing expenses and accounted for these payments with a corresponding debit on JAB Ohio's books.[13] JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Memorandum in Opposition, Exhibit C.

13. After JAB Ohio ceased operations, JAB Ohio sold its inventory on hand to customers or, at cost, to JAB Lumber Company, John A. Biewer Co. of Illinois, and Biewer of Lansing LLC. JAB Ohio's account was properly credited with whatever amount was owed for the sale of inventory. JAB Ohio Motion for Accelerated Decision, Exhibit C.

14. JAB Toledo ceased production and treatment of wood products in 1997. JAB Toledo Motion for Accelerated Decision, Exhibit A; JAB Toledo Memorandum in Opposition, Exhibit A.

15. JAB Toledo's rental income produced after closure was used to pay for preparation of the MSG Drip Pad Closure reports, work, taxes, and insurance. JAB Toledo Motion for Accelerated Decision, Exhibit A.

16. All monies advanced to JAB Toledo from JAB Company were used to pay taxes and insurance after the subsidiary ceased operations and such advances were duly recorded as corresponding debits and credits on JAB Company's and JAB Toldeo's balance sheet.[14] JAB Toledo Motion for Accelerated Decision, Exhibit A; JAB Toledo Memorandum in Opposition, Exhibit A.

Rule 22.20(a) specifically provides for the use of affidavits in support of a party's motion for accelerated decision. Moreover, Region 5 admits in its Reply Brief regarding Region 5's Motion for

[13] See footnote 12.

[14] See footnote 12.

Accelerated Decision that an affidavit is an acceptable vehicle through which facts may be established to support a motion for accelerated decision. *See* 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, pp. 3-4, n. 2 (JAB Toledo) and p. 14, n. 10 (JAB Ohio), *citing Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985). Region 5 now seems to have changed its position and attempts to dismiss the facts established in the affidavits because it claims the facts must be further supported by documents. Appellant Brief, pp. 43-44. Notably, Region 5 does not provide any support for its supposition that the affidavits are invalid without attached documentary support.

The first problem with Region 5's unsupported challenge regarding the affidavits is that Region 5 did not preserve the issue for appeal. Instead of raising the issue or countering the facts established in the affidavits as required, *Galindo v. Precision American Corporation*, 754 F.2d 1212, 1216 (5th Cir. 1985), Region 5 filed an Objection to Motion for Accelerated Decision of Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC, which did not address the affidavits (or the merits of Respondents' motions) in any manner. As such, Region 5 may not now argue that JAB Company was obligated to support the facts set forth in the affidavits with additional documentation.[15]

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[15] Judge Moran seems to have generously considered Region 5's Reply Brief in support of its own Motion for Accelerated Decision as also a Response to JAB Company's Motion for Accelerated Decision. To the extent that Region 5 contested any of the facts set forth in the affidavits, JAB Company did not have a chance to reply as it would have had Region 5 properly responded to JAB Company's Motion for Accelerated Decision. Therefore, JAB Company did not have an opportunity to provide additional documentation if it were deemed necessary so that documentation would be part of this appeal record. If this Board allows Region 5 to now contest the facts set forth in the affidavits based on any statement in the Region 5's Reply, it will be rewarding Region 5 for its willful disregard of the briefing schedule established by Judge Moran for both sides' Motions for Accelerated Decision. The filing of the Objection rather than a Response was the first of many inexplicable actions taken by Region 5 that ultimately established a pattern of disregard and

Even if Region 5 had preserved the issue for appeal, JAB Company may indeed rest on the affidavits attached to its Motion for Accelerated Decision without providing any further proof of the facts established in the affidavits. *See Galindo v. Precision American Corporation, supra* at 1216. Affidavits may be used to establish the truth of the matter asserted therein as long as the affidavit does not contain conclusions of law or ultimate facts. *Id.* An "ultimate fact" is defined as "[a] fact essential to the claim or the defense." BLACK'S LAW DICTIONARY, 629 (8th ed. 2004). Moreover, after the moving party meets its burden using affidavits, the non-moving party must counter those affidavits "with opposing affidavits or other competent evidence setting forth specific facts to show that there is a genuine issue of material fact for trial." *Galindo*, 754 F.2d at 1216.

A review of the facts listed above demonstrates that there are no conclusions of law, nor ultimate facts, set forth in the affidavits attached to JAB Company's Motion for Accelerated Decision. The facts listed above are not conclusory or facts essential to any defense put forth by JAB Company; they are simply facts undercutting the veil piercing claims made by Region 5. Moreover, because Region 5 did not substantively respond to JAB Company's Motion for Accelerated Decision, and did not challenge these facts with documents or affidavits of its own, the facts established by the affidavits were uncontested.

**b. Interrogatory Responses**

In addition to affidavits, interrogatory responses are another accepted vehicle through which facts may be established to support a motion for an accelerated decision. *Martz*, 757 F.2d at 138; *see also* 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

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disrespect of the administrative process, Judge Moran, as well as the time and limited funds of the Respondents. JAB Company maintains that such actions should not be rewarded by this Board.

Liability, pp. 3-4, n. 2 (JAB Toledo) and p. 14, n. 10 (JAB Ohio). Region 5, however, does not properly consider the following facts established in the interrogatory responses:

1. JAB Toledo used a separate series of checks drawing from one bank account while still operating. After JAB Toledo closed, these checks were no longer used and JAB Company paid JAB Toledo's few ongoing expenses and charged JAB Toledo for the expenses through an intercompany payable. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 18.

2. While still operating, the internal financial statements of JAB Toledo were prepared separately by Gary Olmstead, the Chief Financial Officer of JAB Company, with the assistance of staff. JAB Toledo paid JAB Company a management fee for this service until JAB Toledo ceased operations. Plante & Moran prepared the audit records. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 20.

3. After JAB Toledo ceased operations, Brian Biewer was duly appointed to be the manager/director of JAB Toledo. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 16.

4. JAB Toledo sold the inventory it had on hand at the time it ceased operations to customers, or to other JAB Company subsidiaries at cost. Sales records for these sales no longer exist due to the fact that the sales occurred over 10 years before Region 5's discovery request. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 10.

Like the facts in the Affidavits, Region 5 did not contest any of the facts cited in the Responses to Region 5's Interrogatories. To the extent this Board determines any of the facts set forth in the Interrogatories were contested, because Judge Moran was addressing cross motions for accelerated decision and Region 5 had clearly stated it would not provide any additional evidence at trial, it was entirely appropriate for Judge Moran to accept the validity of these facts, just as this Board should. *See Tripp,* 189 F.2d at 200; *see also Wright et al., Federal Practice & Procedure,* § 2720 (1998); *In re BWX Tech., supra* at p. 69, n. 10.

**c. Additional Documents**

In addition to facts established through affidavits and interrogatory answers, JAB Company attached additional documents to its accelerated decision motion establishing the following facts:

1. The drip pad closure plan prepared in 2004 by the Mannik & Smith Group ("MSG") for the JAB Toledo facility was commissioned by Eckle Junction, Inc., which is simply the current name by which JAB Toledo is now known. *See* JAB Toledo Brief Supporting Motion for Accelerated Decision, Exhibits C, E; JAB Toledo Memorandum in Opposition, Exhibits E, F, G.

2. The drip pad closure plan prepared in 2005 by the Mannik & Smith Group ("MSG") for the JAB Ohio facility was commissioned by JAB Ohio. *See* JAB Ohio Brief Supporting Motion for Accelerated Decision, Exhibit E; JAB Ohio Memorandum in Opposition, Exhibit G.

### 3. Region 5 Did Not Produce Sufficient Evidence to Meet Its Burden of Proof With Respect to Its Motion for Accelerated Decision or JAB Company's Motion for Accelerated Decision.

Region 5 was required to demonstrate its *prima facie* case for the derivative liability of JAB Company through its Motion for Accelerated Decision. *See* Section I(A). In response to JAB Company's Motion for Accelerated Decision, Region 5 was also required to respond and demonstrate that it was either entitled to judgment as a matter of law or that there were disputed material facts by setting forth those specific contested facts through affidavits, documents, depositions, or answers to interrogatories. *See* Fed. R. Civ. P. 56(e)(2). The body of evidence produced by Region 5 is not sufficient to meet its burden in either situation, therefore Judge Moran properly denied Region 5's Motion for Accelerated Decision and properly granted JAB Company's Motion for Accelerated Decision.

With respect to JAB Company's Motion for Accelerated Decision, Region 5 did not substantively respond at all, thereby eliminating any possibility of establishing a disputed material fact. Even if this Board considers the evidence Region 5 set forth in its own Motion for Accelerated Decision as evidence in response to JAB Company's motion, Region 5's body of evidence falls woefully short of establishing a material fact dispute requiring a hearing. As demonstrated below, not only does the body of evidence in Region 5's Motion for Accelerated Decision fall short of establishing a disputed material fact requiring a hearing, it falls far short of establishing a *prima facie* case for the derivative liability of JAB Company.

Through its Region 5 Memorandum, Region 5 established the following facts: **(Finish by adding facts unique to JAB Toledo)**

1. JAB Company is the sole shareholder of JAB Toledo and JAB Ohio. Region 5 Memorandum, p. 11, Exhibit C at 5.

2. JAB Company owns other subsidiaries that treat wood products that used arsenic and chromium compounds at some point. Region 5 Memorandum, pp. 11-12, Exhibits A at 4, M at 3, O.

3. JAB Company's location is identified as the corporate headquarters. Region 5 Memorandum, pp. 11-12, Exhibit A at 5.

4. JAB Company and its subsidiaries both use the trademark "Biewer Lumber™" to generically refer to their business of producing treated wood products. Region 5 Memorandum, pp. 11-12, Exhibit A.

5. Statements on the website www.biewerlumber.com refer generically to the "Biewer family" of companies. Region 5 Memorandum, p. 12, n. 6, Exhibit A.

6. Richard Biewer, Brian Biewer, and Timothy Biewer serve on the Board of Directors for JAB Company, JAB Ohio, and JAB Toledo. Region 5 Memorandum, p. 11, Exhibit C at 5.

7. Richard Biewer, Brian Biewer, and Timothy Biewer each serve as President, Secretary/Treasurer, and Vice-President, respectively, for JAB Company, JAB Ohio, and JAB Toledo. Region 5 Memorandum, p. 11, Exhibit C at 5.

8. JAB Company and its several subsidiaries are involved in the production and marketing of treated wood. Region 5 Memorandum, p. 13, n. 8, Exhibit N.

9. JAB Company litigated a lawsuit against the State of Michigan in the late 1970's regarding the occurrence of soil and groundwater contamination after a chemical spill occurred in a facility located in Schoolcraft, Michigan. Region 5 Memorandum, pp. 20-21, Exhibit B.

10. When JAB Ohio and JAB Toledo ceased operations, each subsidiary sold the inventory it could not sell to customers to related companies at cost. JAB Ohio and JAB Toledo were credited with an asset in the form of an intercompany receivable. The intercompany receivable (asset) was then used to correspondingly pay down pre-existing intercompany payables (liability).[16] Region 5 Memorandum, pp. 16-18, Exhibit N.

11. JAB Ohio was insolvent by 2001 and remained insolvent thereafter. JAB Ohio Region 5 Memorandum, pp. 19-20, Exhibit N.

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[16] In other words, the net worth of JAB Ohio and JAB Toledo did not change. Their liabilities decreased by the same amount as their assets.

12. JAB Company uses "Biewer Lumber™" letterhead for its correspondence with the www.biewerlumber.com website identified on the letterhead. Region 5 Memorandum, pp. 24,26, Attachments K, S, T, and U.

13. Plante & Moran, LLP submitted consolidated financial reports under the "Biewer Lumber™" logo. Region 5 Memorandum, p. 24, Exhibit L.

14. There are no minutes, notes, or resolutions documenting activity on behalf of the board of directors of JAB Ohio and JAB Toledo after 1997 except for two documents that appoint Brian Biewer as manager of JAB Ohio and JAB Toledo after each ceased operations. Region 5 Memorandum, pp. 24-25.

15. The two resolutions appointing Brian Biewer as manager of JAB Ohio and JAB Toledo state that JAB Toledo ceased activities on December 1, 2000, instead of the correct date of 1997, and the JAB Toledo document misidentifies JAB Ohio as the subject matter of the document instead of JAB Toledo. Region 5 Memorandum, p. 25, n. 13.

16. Brian Biewer instructed the Ohio EPA to contact him regarding JAB Toledo or JAB Ohio at bbiewer@biewerlumber.com" or call him at his JAB Company phone number. Region 5 Memorandum, p. 26, Exhibits A at 5, D.

17. The same attorney represents JAB Company, JAB Ohio, and JAB Toledo in these matters. Region 5 Memorandum, p. 30.

18. JAB Toledo was insolvent by 1997 and remained insolvent thereafter. JAB Toledo Region 5 Memorandum, pp. 15-18.

While Region 5 does its best to put a nefarious spin on the above facts, it does not provide this Board with any case law indicating that these facts are sufficient to warrant veil piercing, or that they evidence anything more than a normal parent/subsidiary relationship where the subsidiary has failed and ceased operations. As Judge Moran noted in the Order on Cross Motions, Region 5's conclusions based on the above facts at times leads to some "head scratching." *In re JAB Ohio,* 2009 WL 3496294 at 11.

An examination of the above facts put forth by Region 5 as the only factual support for its piercing the corporate veil claim establishes only that JAB Company functioned as a normal parent would with its subsidiaries. All of the facts listed above are entirely consistent with the parent/subsidiary norms established in *Bestfoods*. For instance, *Bestfoods* establishes that proof of

ownership and control is not enough to pierce the corporate veil. 524 U.S. at 61-62, 60. Specifically, interlocking directors and the sharing of administrative costs is expected and normal as between a parent and subsidiary. *Id.* Moreover, all actions taken by dual officers are presumed to be taken on behalf of the subsidiary. *Id.* at 69-70.

The fact of the matter is that the set of facts listed above are wholly innocuous, especially when considered in context with the facts established by JAB Company. These facts do not establish a prima facie case for piercing the corporate veil of JAB Ohio or JAB Toledo, nor do these facts establish a question of material fact requiring a hearing. Judge Moran recognized Region 5's failures and appropriately granted JAB Company's Motion for Accelerated Decision and denied Region 5's Motion for Accelerated Decision.

### E. Region 5's Piercing the Corporate Veil Analysis is Fundamentally Flawed.

There are several significant shortcomings in the way Region 5 has analyzed JAB Company's alleged liability under a veil-piercing theory. First, Region 5 erroneously assumes that the only relevant time period for examining the parent/subsidiary relationship is during the period following JAB Toledo's and JAB Ohio's cessation of operations, since the RCRA violation is for failure to properly close the facilities of JAB Ohio and JAB Toledo after operations ceased. Appellant's Brief, p. 28, n. 19. Second, Region 5 refuses to acknowledge that the veil piercing analysis is altered when the relationship is between a parent corporation and its *failed non-operating* subsidiary. Finally, Region 5 attempts to contest or question the already established fact that JAB Ohio and JAB Toledo ceased operations because the businesses failed as opposed to some other non-economic motive.

### 1. The Analysis Should Focus on the Pre-Closure Relationship Between JAB Company and JAB Ohio and JAB Toledo.

Region 5 does not allege or attempt to prove that JAB Ohio and JAB Toledo were not legitimate separate corporations at the time they were created or that JAB Company exerted any improper control over either subsidiary during the entire time that each was operational. *See In re JAB Ohio,* 2009 WL 3496294 at 4; JAB Ohio Region 5 Memorandum, pp. 6-7. Thus, the Board must accept as undisputed fact the conclusion that there is no basis whatsoever for piercing the subsidiaries' corporate veil based on pre-shutdown events and that the parent and subsidiaries behaved as normal parents and subsidiaries behave during that time. Instead, Region 5 claims that JAB Company controlled JAB Ohio and JAB Toledo after operations ceased, and erroneously focuses exclusively on the few events taking place after JAB Ohio and JAB Toledo ceased operations, had no ongoing business or employees and essentially were dormant companies which still owned the business real estate. *See* Appellant's Brief, pp. 28, n. 19, 45-48. Region 5 claims that this post-closure time period is the pertinent time period because that is when the act/violation of which it complains (failure to do necessary cleanup and closure activities) occurred. *Id.* at 28, n. 19, *citing United States v. Wallace,* 961 F. Supp. 969, 979 (N.D. Tex. 1996). Seemingly overlooked in this analysis is how and when the soils became contaminated in the first place, which gave rise to the need for closure cleanup activities. Region 5 also does not provide this Board with one case that supports Region 5's conclusion that the act or violation complained of on the part of the parent company can actually be the *failure* of the parent to financially rescue the failed subsidiary and take over its obligations.[17]

[17] At the very least, an examination of the pre-closure relationship between JAB Company and its subsidiaries is necessary because it provides important context to the post-closure relationship. Such an examination establishes that JAB Ohio and JAB Toledo were legitimately created corporations that independently and successfully operated for many years. These facts make

It goes without saying that soil contamination for which JAB Toledo and/or JAB Ohio were responsible for cleaning up occurred *during* their wood treating operation days, not after wood treating stopped. Indeed, that is precisely what Region 5 alleges in its Amended Complaint. *See* Amended Complaint, pp. 10-20. As noted above, during this entire "operational" time period (25 years, from 1976 to 2001, for JAB Ohio and 14 years, from 1983 to 1997, for JAB Toledo) Region 5 makes no attempt at all to argue or prove that JAB Company controlled or dominated either JAB Ohio or JAB Toledo such that there would be any basis to pierce the corporate veil. Yet that is the time period where the "act" of polluting occurred, if, as Region 5 speculates, there is soil contamination at both sites. Absent the contamination, there is no need for cleanup, and thus Region 5 should have been arguing, if it thought it had any factual support, that JAB Company and JAB Toledo or JAB Ohio were to be treated as one company during the time the contamination occurred. Of course, the facts as summarized earlier demonstrate that there is no factual support for such claim, even if Region 5 had attempted it. Moreover, there is no *act* done by JAB Company that is alleged as the basis for the RCRA violation.

Region 5's Amended Complaint alleges that RCRA was violated by JAB Company and the subsidiaries by (1) *failing* to remove contaminated soils around a drip pad after closure of its facility, and (2) *failing* to otherwise carry out the cleanup steps outlined in the MSG drip pad closure plan. Amended Complaint, pp. 21-28. Region 5 does not explain how JAB Company's *failure to act* (i.e. behaving as a corporate entity separate and distinct from its subsidiary) can be considered an *act* of which Region 5 complains to establish veil piercing (i.e. behaving in disregard of their separate corporate entities). JAB Toledo and JAB Ohio were, by Region 5's acknowledgment, *incapable* of performing the specified cleanup activities, and the only "act" JAB Company undertook was making

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clear that JAB Company's relationship was necessarily altered by the fact that JAB Ohio and JAB Toledo had ceased operations, as established in more detail below.

the decision *not* to financially rescue its subsidiaries or to operate the subsidiaries' facilities, a decision totally consistent with respecting the subsidiaries' separate corporate status and the very opposite of what would be required for veil piercing.

Because the "acts" which caused the need for cleanup occurred prior to the time JAB Ohio and JAB Toledo ceased operations, and because JAB Company's decision not to operate the subsidiaries' facilities cannot constitute an action that could support veil piercing, a veil-piercing argument should have focused on the operational time frame, not the post-operation time frame.

**2. Any Analysis of the Post-Closure Relationship Between JAB Company and JAB Ohio or JAB Toledo Must Account for the Fact that JAB Ohio and JAB Toledo Were Not Operational.**

Even if the veil piercing analysis were to focus on the post-closure period, Region 5 inexplicably expects the analysis to require a comparison of the "norms" established for a relationship between a parent and an *operating* subsidiary with the actual relationship between a parent and a subsidiary that is no longer operational. Appellant's Brief, pp. 38-48. Region 5 refuses to acknowledge the economic reality that an active, operating corporation will look and act differently than a corporation that has ceased all operations, necessarily altering the "norms" of a parent-subsidiary relationship.

Courts have held as a matter of law that the "complete domination" necessary to justify piercing the corporate veil of a wholly owned subsidiary does not exist where the parent corporation's alleged domination and control relates solely to the period after the subsidiary has ceased doing business. *See, e.g., Pfohl Brothers Landfill Site Steering Committee v. Allied Waste Systems, Inc.*, 255 F. Supp.2d 134, 178-183 (W.D.N.Y. 2003). In *Pfohl Brothers*, the plaintiff brought a CERCLA contribution action against GSX Polymers ("GSX") and against the successor in interest to GSX's parent corporation. The plaintiff claimed, *inter alia*, that the parent corporation, and therefore its successor in interest, was liable under a veil piercing theory for the environmental

contamination caused by the subsidiary GSX because: (1) the parent caused GSX to transfer all of its assets to the parent in the form of dividend distributions, such that GSX could not satisfy its CERCLA obligations, and (2) the parent otherwise exercised control over GSX by forcing GSX to discontinue business operations and through its actions in the period following cessation of GSX's business operations. *Id.* On the parties' cross motions for summary judgment, the district court held that that although the distribution of dividends was fraudulent as to the plaintiff, thus satisfying the second prong of the veil piercing analysis, the parent corporation did not "completely dominate" GSX in the manner required to disregard corporate separateness. *Id.* at 180.

The *Pfohl Brothers* case is on all fours with the case at bar with respect to the issue of domination and control,[18] thus warranting the following lengthy discussion. In *Pfohl Brothers* the Plaintiff brought an action to recover a portion of the costs that it voluntarily incurred in connection with the removal of various hazardous substances from a landfill located in the town of Cheektowaga, New York. *Id.* at 143. The contamination at issue was allegedly caused by a company called U.S. Rubber, which was later purchased and renamed by the purchasing company as GSX Polymers. *Id.* at 143-44. The purchasing company subsequently sold GSX to a company called Laidlaw. *Id.* at 144-45. After dissolving GSX, Laidlaw was purchased by the Defendant Allied Waste Systems, Inc. ("Allied"). *Id.* at 146. The Plaintiff alleged that Allied was liable as the successor in interest to Laidlaw because if Laidlaw had still been in existence, it would have been liable under a veil piercing theory for the environmental contamination caused by its subsidiary GSX. *Id.* at 178-79.

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[18] The *Pfohl Brothers* case is obviously distinguishable from the case at bar with respect to the second prong of the veil piercing test because whereas the parent, Laidlaw, caused its subsidiary to transfer all of its assets to Laidlaw in the form of a corporate dividend thereby reducing GSX's net worth, which was plainly fraudulent as to Laidlaw's creditors, JAB Company simply received repayment for a legitimate pre-existing intercompany debt to the parent company for past advances by the parent.

The pertinent facts as they relate to Laidlaw's and GSX's parent-subsidiary relationship are as follows. Laidlaw purchased GSX in 1986, at approximately the same time that New York's Department of Conservation ("DEC") was investigating whether GSX should be considered a potentially responsible party under CERCLA for purposes of the Cheektowaga landfill remediation. *Id.* at 144-45. The DEC contacted GSX in April 1986, and Laidlaw in February 1987, requesting information pertaining to operations at U.S. Rubber's Cheektowaga rubber plant. *Id.* Shortly thereafter, Laidlaw sold all of GSX's assets, and forced GSX to discontinue active business operations. *Id.* at 145. By October, 1987, "all of [GSX's] assets [had been] sold and no employees were retained or hired." *Id.* GSX's "remaining financial transactions and legal matters were handled by Laidlaw employees." *Id.* In 1989 and 1990, Laidlaw employees authorized two dividend distributions to be issued by GSX to Laidlaw in an amount that corresponded to the total amount remaining on GSX's books, which included the proceeds of the above-referenced asset sales. *Id.* Over the course of several years following the dividend distributions, Laidlaw went about the process of dissolving GSX. *Id.* at 145-46. In the meantime, however, Laidlaw failed to mention to the DEC that GSX's assets had been liquidated and distributed, or that GSX was being dissolved. *Id.* at 146.

Addressing the Plaintiff's veil piercing claim, the court framed the issue as whether the Plaintiff could pierce GSX's corporate veil to hold Allied, through its merger with Laidlaw, liable for the CERCLA contribution costs at issue. *Id.* at 178-79. The court explained that as a general matter, it is appropriate to grant summary disposition on a veil piercing claim where the record fails to establish the existence of a triable issue of fact as to whether the corporate veil should be pierced. *Id.* at 179. The court then recited the standard under New York law, which the court noted was

substantively similar to federal law, for piercing the corporate veil of a subsidiary to hold a parent corporation liable. *Id.* at 179-80. The court stated as follows:

> Courts are reluctant under New York law to disregard the corporate form distinguishing two affiliated corporate entities. *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club International, Inc.*, 2 F.3d 24, 26 (2d Cir.1993). Rather, New York law permits a court to pierce the corporate veil of one corporation to reach the assets of an affiliated corporation only where the plaintiff demonstrates both "(i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *American Fuel Corporation v. Utah Energy Development Company*, 122 F.3d 130, 134 (2d Cir.1997). "While complete domination of the corporation is the key to piercing the corporate veil, ... such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward [the party seeking piercing] is required." *Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157, 1161 (1993) (citing *Walkovszky v. Carlton*, 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6, 8 (1966); and *Guptill Holding Corp. v. State*, 33 A.D.2d 362, 307 N.Y.S.2d 970, 972-73 (1970), aff'd, 31 N.Y.2d 897, 340 N.Y.S.2d 638, 292 N.E.2d 782 (1972)).

*Id.*

Turning to the case under consideration, the court began by stating that the dividend distributions authorized by Laidlaw's employees were constructively fraudulent, and that the second prong of the veil piercing test was therefore satisfied "provided such fraud resulted from Laidlaw's complete domination over [GSX] with regard to the distributions." *Id.* at 180. Turning to the "complete domination" prong of the veil-piercing test, the court stated that "whether one corporate entity completely dominates a subsidiary corporate entity depends on several factors." *Id.* The court then ranked the several factors "in approximate descending order of importance" as follows: "(1) inadequate capitalization in light of the purposes for which the corporation was organized; (2) extensive or pervasive control by the shareholder or shareholders; (3) intermingling of the corporation's properties or accounts with those of its owner; (4) failure to observe corporate formalities and separateness; (5) siphoning of funds from the corporation; (6) absence of corporate records; and, (7) nonfunctioning officers or directors." *Id.*

Applying the above-stated factors, the court determined that the record presented no material issues of fact on the "complete domination" issue and that the balance of the factors considered in the veil-piercing analysis reinforced the magistrate judge's prior ruling against piercing GSX's corporate veil. *Id.* at 180, 183. Specifically, the Court stated that "the record does not support finding that Laidlaw so completely dominated [GSX] as to satisfy the first prong of the veil-piercing analysis and permit the court to pierce [GSX's] corporate veil, thereby holding Laidlaw liable for [GSX's] CERCLA liabilities and to thus hold Allied, as Laidlaw's successor in interest, ultimately liable." *Id.* at 180.

Addressing the first factor identified above, the court rejected the Plaintiff's contention that "[GSX's] inadequate capitalization [was] evidenced by Laidlaw's decision to transfer all of [GSX's] funds to Laidlaw in the form of dividend distributions which left [GSX] insolvent and unable to pay any CERCLA liability debt."[19] *Id.* at 181. The Court explained that "the inadequate capitalization factor pertains only to capitalization 'in light of the purposes for which the corporation was organized,'" and that since "[GSX] was not organized to conduct remediation of Superfund sites, it was not required to be capitalized for that purpose." *Id.* Moreover, the court also stated that "*as a corporation in the process of dissolution by definition does not expect to conduct further business operations, the need of capital, adequate or not, [was] irrelevant.*" *Id.* (emphasis added). Based on the foregoing, the court held that the Plaintiff had failed to sustain its burden of proof as to the first factor. *Id.*

Addressing the second factor, the court began by stating that "the second factor requires extensive or pervasive control of the corporation by the shareholder, especially with regard to the

[19] In the case of GSX, it appears that the subsidiary GSX was solvent until the dividend distribution to the parent Laidlaw, which rendered GSX insolvent. Here, both Region 5 and Respondents agree that JAB Toledo and JAB Ohio were already insolvent when their business operations ceased.

corporation's daily operations." *Id.* Applying that standard, the court found that the Plaintiff had presented "no evidence that Laidlaw exercised any control over [GSX's] daily operations." The court explained that "*given that [GSX] had no daily operations following the sale of its assets in 1987 and continuing through its corporate dissolution in 1992, this factor does not support piercing the corporate veil.*" *Id.* (emphasis added). Addressing the Plaintiff's arguments to the contrary, the court reasoned that rather than provide evidence of control over daily operations, as was required, "[the Plaintiff's] argument . . . [was] limited to Laidlaw's role in the sale of [GSX's] assets and the subsequent winding up of GSX business affairs." *Id.* To illustrate this point, the court quoted the Plaintiff's allegation that "for five years following the asset sale, [GSX] had no independent existence apart from Laidlaw, and Laidlaw continued this corporation to further Laidlaw's own purpose." *Id.*

With respect to the third factor, the court held that the fact that Laidlaw and GSX shared the same office address following the sale of GSX's assets was irrelevant for purposes of the veil piercing analysis. *Id.* at 181-82. The court stated that the only significant fact was that "while [GSX] was an *active* company, it always maintained separate office space, address and telephone number with its headquarters located in the Vicksburg plant." *Id.* at 181. The court reasoned that "*[the Plaintiff] point[ed] to no authority requiring that a wholly-owned subsidiary maintain an office physically separate from its parent while its only operations were for the purpose of winding down its business affairs.*" *Id.* at 182 (emphasis added). In support of this point, the Court explained that it was "[s]ignificant[]" that GSX "had no employees after its assets were sold." *Id.* Based on the foregoing, the court held that the third factor also weighed against veil-piercing. *Id.*

With respect to the fifth factor,[20] pertaining to the siphoning of funds by the parent, the court stated that there was "no evidence that [GSX] corporate funds were *routinely* transferred to Laidlaw." *Id.* (emphasis added). The court clearly determined that the focus on its inquiry regarding whether corporate funds had been siphoned should be on whether the practice was routine or not. *Id.* Given that the practice was not routine, the court promptly concluded that the fifth factor weighed against piercing the corporate veil. *Id.*

With respect to the seventh factor,[21] the court held that there was "no evidence that [GSX] had nonfunctioning officers or directors." *Id.* The court stated that "although the record indicate[d] that Laidlaw and [GSX] had substantially the same officers and directors, even a complete overlap of corporate directors does not require piercing the corporate veil." *Id.* at 183. The court further stated that even though some of the GSX officers, who were also Laidlaw officers, had little recollection of performing duties for GSX, this was to be expected because the officers "were elected to their respective [GSX] officer position[s] when little business remained in which they could be expected to participate." *Id.*

A court within the Sixth Circuit has also provided guidance for a piercing the corporate veil analysis where a subsidiary has ceased operations. *ITT Corporation v. Borgwarner Inc.*, 2009 WL 2242904 (W.D. Mich. July 22, 2009). In *ITT*, the plaintiff's allegations are nearly identical to those of Region 5. *See* 2009 WL 2242904 at *6. The plaintiff argued that the corporate veil between a parent and a subsidiary should be pierced where: (1) the subsidiary had no employees, business

[20] The Court noted that even though there was evidence in the record establishing the fourth factor, a failure to observe corporate formalities and separateness, the fact that the Defendant's had "established this single factor [was] not dispositive of the veil-piercing issue."

[21] The Court's analysis with respect to the sixth factor was simply to state that the evidence established that GSX maintained complete books and records separate from Laidlaw, and that therefore the sixth factor weighed against piercing the corporate veil.

operations, or assets, and served as a holding company for the parent; (2) the subsidiary was undercapitalized; (3) the subsidiary did not observe corporate formalities; (4) the subsidiary was controlled and financed by its parent corporation; and (5) the parent was aware of the subsidiary's environmental obligations, but made no arrangements to address such liabilities. *Id.* A key factor in the court's analysis in *ITT* was that the subsidiary was no longer operational. *Id.* at *7. The *ITT* Court, in applying Michigan law that is virtually identical to Ohio law, noted that there was no legal authority for holding a parent liable for the subsidiary's environmental liabilities simply because the parent continued the corporate existence of the subsidiary with outstanding potential liabilities. *Id.* The court further explained that "[a] parent's mere control and ownership of a subsidiary corporation that lacks sufficient funds to meet its environmental obligations is not a sufficient basis for piercing the corporate veil." Indeed, a parent corporation is not legally required to "infuse money into a subsidiary corporation that cannot otherwise meet its financial obligations." *Id.* (emphasis added). As such, there is no legal implication for a parent who chooses or is unable to provide a constant flow of cash to cover all of a subsidiary's financial obligations.

In short, it is clear that a corporate veil piercing analysis is significantly altered where the parent is dealing with a subsidiary that is no longer operational. Judge Moran's recognition of the economic and practical realities of a parent dealing with a subsidiary that is insolvent and no longer operational is consistent with courts that have specifically addressed the issue. Region 5's analysis does not provide this Board with any case law contrary to the cases discussed above, and Region 5 instead chooses to ignore this issue entirely. As a result, the veil piercing analysis of Region 5 in the Appellant's Brief is fatally flawed and simply does not apply to the present case.

### 3. JAB Toledo and JAB Ohio Are Failed Businesses That Ceased Operations in 1997 and 2001, Respectively, Because they Failed Financially.

It is an uncontested fact that JAB Toledo and JAB Ohio ceased operations because each failed financially. While Region 5 seems to now find value in claiming that there is no evidence supporting the fact that JAB Ohio and JAB Toledo are failed corporations with liabilities that exceeded their assets, Region 5 did not raise that issue below, and indeed, argued exactly the opposite in its Motions for Accelerated Decision. For instance, with respect to JAB Toledo, Region 5 stated in its Reply Brief in Support of Motion for Accelerated Decision on Derivative Liability that "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." (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 (Toledo), p. 6, n. 4). Similar statements were made by Region 5 concerning JAB Ohio, including its conclusion that "the company [JAB Ohio] was insolvent between 2001 and 2007. Being without assets, the company could not cover its obligations independent." (Memorandum in Support of Motion for Accelerated Decision on Liability (Ohio), p. 19).[22]; Respondents and Judge Moran agreed. *In re JAB Ohio,* 2009 WL 3496294 at 12.

When Region 5's admissions of insolvency are considered in context with the fact that JAB Ohio and JAB Toledo were operational for many, many years before closing their doors, (25 years for JAB Ohio and 14 years for JAB Toledo) there is only one reasonable conclusion — JAB Ohio and JAB Toledo ultimately ceased their operations because they failed financially. Region 5 has not provided *any* evidence that JAB Company forced JAB Ohio or JAB Toledo to cease operations to

[22] For a more detailed discussion of Region 5's factual arguments supporting the contention that both JAB Toledo and JAB Ohio were insolvent, see pp. 87-89, *infra*.

avoid environmental liabilities for which JAB Company would have been responsible or that JAB Company even made the decision to shut down JAB Toledo and JAB Ohio.[23] Moreover, Region 5 has not provided even one realistic reason that JAB Ohio or JAB Toledo would voluntarily terminate their operations if such operations were profitable. In this regard, it must be remembered that JAB Ohio and JAB Toledo did not receive notice of any violation from Region 5 or Ohio EPA until **2004** and **2002** respectively, years after each subsidiary ceased operations.

Furthermore, Region 5 did not preserve the issue of whether JAB Ohio and JAB Toledo closed their doors because of their insolvency for appeal. Region 5 produced evidence supporting this fact and there is absolutely no evidence on the record that suggests or would allow the reasonable inference that JAB Ohio and JAB Toledo ceased operating for any reason other than financial failure.

The analytical flaws of Region 5's arguments discussed above render Region 5's factual and legal conclusions irrelevant. Regardless of these analytical flaws, as shown below, Region 5 did not produce evidence to meet its respective burdens of persuasion and proof for either Motion for Accelerated Decision.

### F. Region 5 Did Not Produce Sufficient Evidence to Establish The Elements Necessary to Pierce the Corporate Veil of JAB Ohio or JAB Toledo Under Ohio or Federal Common Law

#### 1. JAB Company Did Not Dominate JAB Ohio or JAB Toledo So Completely That the Corporations Had no Separate Mind, Will, or Existence of Their Own

To establish the first prong of the Ohio and federal common law test, Region 5 must demonstrate that that JAB Company had "taken over the day-to-day operations" of JAB Ohio and

[23] See discussion of *Bestfoods* at pp. 69-70 above where officers or directors are presumed to be acting for the subsidiary on matters pertinent to the subsidiary. Here, shutting down operations is surely one such type of action.

JAB Toledo." *Corrigan v. U.S. Steel Corp.,* 478 F.3d 718, 726 (6th Cir. 2007) (applying Ohio law). In order to ascertain whether the first prong of the *Belvedere* test has been met, Ohio courts examine whether the corporation is inadequately capitalized, whether the corporate formalities have been observed and corporate records have been kept, and whether corporate funds have been commingled with personal funds or corporate property was used for personal purposes. *Frechette v. Kavande,* 2001 WL 390069 (Ohio App. 2001); *Willoway Nurseries v. Curdes,* 1999 WL 820784 (Ohio App. 1999). *See also Barbee Concrete Const. V. Bachinski Builders, Inc.,* 1997 WL 723195 (Ohio App. 1997); *Waste Management, Inc. v. Danis Industries Corp.* 2004 WL 5345389, 14 (S.D. Ohio, 2004)

**a. JAB Ohio and JAB Toledo Were Not Undercapitalized**

As part of the control analysis, Ohio courts consider whether the corporation was inadequately capitalized. *Id.* Courts analyze the adequacy of capitalization at the inception of the corporation. 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations*, § 41.33 (2010) (citing cases); *Pharmacia Corporation v Motor Carrier Services Corp.*, 309 Fed. Appx. 666, 672 (3rd Cir. 2009); *see also State ex rel. Celebrezze v. Specialized Finishers, Inc.,* 62 Ohio Misc. 516, 604 N.E.2d 842 (1991); *Waste Management, Inc. v. Danis Industries Corp., supra* at 17. The only other time the capitalization of corporations may be analyzed is if the corporation "substantially expands the size or nature of its business" such that the change brings a "substantial increase in business risks." *Fletcher, supra* (citing cases). It is well-established that a "corporation that was adequately capitalized when formed but subsequently suffers financial reverses is not undercapitalized." *Id.*, (citing multiple cases); *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.,* 736 F.2d 516, 525 (9th Cir. 1984) (distinguishing, in *dicta,* the propriety of veil piercing when a subsidiary was undercapitalized at the outset from veil piercing when a subsidiary began with sufficient funds but subsequently fell upon hard times). Moreover, the *Pfohl* court determined that for a financially failed corporation that is no longer operating, adequacy

of capitalization is irrelevant, presumably since *all* failed companies are, by definition, undercapitalized. 255 F. Supp. 2d at 181.

Region 5 does not allege that JAB Ohio and JAB Toledo were inadequately capitalized at their inception and the fact that both operated for many years would belie such a claim, if it had been made. Instead, Region 5's argument is limited to an assertion that JAB Ohio and JAB Toledo were undercapitalized *after they had already failed financially and after closing operations.* Appellant's Brief, pp. 32-38. Since JAB Ohio and JAB Toledo did not expand the size or nature of their business when *closing* operations, the only appropriate time to analyze capitalization is at the inception of JAB Ohio and JAB Toledo.

Region 5 has implicitly acknowledged by its silence that JAB Ohio and JAB Toledo were adequately capitalized at inception and Region 5 did not even allege that either JAB Ohio's or JAB Toledo's business or business risks expanded when they shut down operations so as to possibly trigger a larger capitalization requirement. All pertinent case law unequivocally indicates JAB Ohio and JAB Toledo were not undercapitalized, as it is well-established that a corporation that has simply suffered financial trouble is not undercapitalized. Indeed, if the corporate veil could be pierced whenever a subsidiary corporation's business fails and the parent corporation decides not to bail out the subsidiary, the entire concept of limited shareholder liability would be a hoax and shareholders would be exposed to liability at the only time they need the corporate shield. The ultimate failure of JAB Ohio and JAB Toledo does not detract from the fact that the business ventures were successful for a significant period of time. Region 5's undercapitalization argument is completely without factual support.

### (1) After Operations Ceased, JAB Ohio and JAB Toledo Exchanged Their Inventory on Hand for an Equivalent Reduction in Liabilities

Region 5's "siphoning" argument adds nothing to the undercapitalization discussion because the event occurred only after JAB Ohio and JAB Toledo were failed businesses and there is absolutely no evidence that there is any wrongdoing attached to the transfer of JAB Ohio and JAB Toledo inventory to related parties *in exchange for equivalent consideration.* Region 5 does not challenge the fact that the exchange of inventory for a reduction of pre-existing intracorporate liabilities was properly accounted for.[24] Nor does Region 5 contest that with each transfer of inventory to a related entity also came an equal reduction in JAB Ohio's or JAB Toledo's liabilities. Yet, Region 5 inexplicably still argues that there was some wrongdoing related to the sale of inventory to related parties deserving of piercing the corporate veil of JAB Ohio and JAB Toledo. The gist of Region 5's claim is that these transfers somehow prevented JAB Ohio and JAB Toledo from meeting its environmental obligations under RCRA. Region 5's argument, however, relies on several unproven and false assumptions.

Prior to the sale of the inventory, the major asset of JAB Ohio and JAB Toledo was inventory and the business real estate/structures. Region 5 asserts that the assets transferred were needed "to comply with RCRA decontamination requirements," but it has not provided an explanation of how JAB Ohio and JAB Toledo would have been able to do any more clean-up if they had kept the inventory than they were able to do post-transfer. Moreover, after the transfers, JAB Ohio and JAB Toledo possessed an asset of equal value to the inventory, just in the form of an intercompany

[24]Region 5 argues, without a shred of evidence, that the pre-closing intercorporate liabilities of JAB Ohio and JAB Toledo owed to JAB Company which were reduced dollar for dollar by the subsidiaries' sale of inventory *may* not have been legitimate debts. Here again, Region 5 tries to reverse *its* burden of proof by claiming that JAB Company should have produced evidence of the nature of the liability showing it was legitimate, without Region 5 producing *any* evidence even suggesting the contrary.

receivable, which was then used to pay down a pre-existing liability to their parent company. The transfers did not make JAB Ohio and JAB Toledo insolvent or deepen their existing insolvency. In fact, the transfers had no effect at all on their net worth because the transfer ultimately decreased their assets and liabilities by exactly the same amount.

Region 5's complaint regarding this issue boils down to its unrealistic insistence that JAB Ohio and JAB Toledo should have received cash for the transfers of their inventory, ignored their existing liabilities, and kept the money to pay for a future unquantified liability preferred by Region 5 resulting in other prior creditors remaining unpaid. Appellant's Brief, p. 34. Region 5 fails to allege, much less demonstrate, that any of the related entities had the ability to provide cash and that JAB Ohio and JAB Toledo chose not to receive said funds. Nor does Region 5 cite any authority indicating that a company which pays a pre-existing debt to its parent exposes itself to veil piercing because it did not instead favor EPA over earlier creditors.

Region 5's argument also inherently relies on the erroneous presumption that the transfers were made by JAB Company, instead of JAB Ohio and JAB Toledo. As established in *Bestfoods,* courts *must* presume that directors wear their "subsidiary hats" rather than their "parent hats" when they act in a matter pertaining to the subsidiary. 524 U.S. at 69. Region 5, however, appears to be raising the argument that Brian Biewer was acting for JAB Company alone with regards to the transfers described above; however, Region 5 did not even attempt to meet its burden and provide an explanation with evidence that the transfers were not desired by JAB Ohio or JAB Toledo or were contrary to the interest of JAB Ohio and JAB Toledo. This obvious omission is particularly telling in light of the undisputed fact that each of the subsidiaries received consideration of equal value to the asset transferred. As such, the presumption that Brian Biewer was acting on behalf of JAB Ohio

and JAB Toledo must stand, thereby preventing an assertion or implication that JAB Company caused or forced the transfer of JAB Ohio and JAB Toledo assets.

Yet another flaw in Region 5's argument is its reliance on the supposition that JAB Company "knew or should have known" at the time of the transfers that the inventory or accounts receivable would be needed to meet the subsidiaries' RCRA requirements. Appellant's Brief, p. 32. As demonstrated above, the transfers of inventory were made by JAB Ohio and JAB Toledo, so what JAB Company knew or didn't know is irrelevant. Moreover, this "knowledge" supposedly is the result of a lawsuit JAB Company defended over two decades earlier related to an entirely different subsidiary and involving *a chemical spill* occurring at that subsidiary's facilities. *See Atty. Gen. v. John A. Biewer Co., Inc.*, 363 N.W.2d 712, 714-715 (Mich. Ct. App. 1985).

Not surprisingly, Region 5 does not provide any case law support for its theory that these transfers indicate wrong-doing. While Region 5 obliquely cites a couple of cases, the facts are easily distinguishable, which may explain why the specific "siphoning" discussion did not contain case law support. For example, in *U.S. v. Union Corp.*, 259 F. Supp. 2d 356 (E.D. Pa. 2003), the pertinent transfers occurred four years *after* a lawsuit was initiated and the parent simply deposited funds in the parent's account without providing any consideration to its subsidiary. *Id.* at 387-390. Moreover, the court found the parent had systematically drained the subsidiary of cash by charging severely inflated "corporate charges." *Id.*

In addressing the "siphoning" charge in *Pfohl*, the court found that there was no "siphoning" where the parent transferred the proceeds of a subsidiary's asset sale to the parent in the form of two dividends. The court reasoned that there was no evidence that funds were routinely transferred to the parent. Here, there is even less significance to the transfers at question, as JAB Company did not receive any asset for which it did not give equal consideration, and Region 5 does not even allege,

much less demonstrate with evidence, that there were routine transfers from JAB Ohio and JAB Toledo to JAB Company.

### (2) Region 5 Relies on Case Law that is Easily Distinguishable and Inapposite

Region 5 attempts to save its argument by analogizing the present facts with those in two cases where a court found a subsidiary was undercapitalized. *See* Appellant's Brief, p. 31, *citing AT&T Global Information Solutions v. Union Tank Car Company,* 29 F. Supp. 2d 857, 860 (S.D. Ohio 1998), *Pharmacia Corporation v. Motor Carrier Services Corporation*, 309 Fed. Appx. 666 (3d Cir. 2009) (unpublished). Unfortunately, these cases are easily distinguished from the present facts. In *AT & T*, the Ohio EPA introduced *evidence* in the form of depositions and corporate documents that demonstrated the following: (1) the subsidiary had minimally adequate capital; (2) the parent and subsidiary commingled funds; (3) the parent paid employee benefits and other expenses and losses of the subsidiary while the subsidiary was in operation; (4) the parent's employees "effectuated" the liquidation of the subsidiary; and (5) the parent received all of the funds from the subsidiary after liquidation. 29 F. Supp. 2d at 866-867. Region 5 produced no evidence of any of the above. Just because Region 5 makes some of the same allegations that the Ohio EPA *actually proved* does not make the present case analogous with *AT & T*.

First and foremost, as already established, Region 5 has not presented any evidence disputing the presumption that *JAB Ohio* and *JAB Toledo*, rather than JAB Company acted to cease their operations. Moreover, unlike the parent in *AT & T*, JAB Company did not receive a gratuitous transfer of cash. The transfers Region 5 questioned did not affect the net worth or ability of JAB Ohio or JAB Toledo to perform clean-up activities. Each subsidiary was insolvent before the transfers and remained equally insolvent afterward. Therefore, the *AT & T* court's decision has no

bearing on the present case because the court was dealing with an entirely different set of *supported* facts.

Like *AT & T*, *Pharmacia* is also easily distinguished. As established above, undercapitalization is examined at the inception of a corporation, unless the corporation changes the nature of, or significantly expands the magnitude of its business. In *Pharmacia*, the parent purchased the subsidiary and immediately "significantly" changed the nature of the subsidiary's business. 309 Fed. Appx. at 672. Prior to the purchase, the subsidiary was receiving annual revenues of over $1,000,000 from leases of its facilities to third parties, and after the purchase, the subsidiary stopped leasing the facilities so the parent could use the facility rent-free. *Id.* Moreover, four years before the parent bought the subsidiary, the subsidiary had acknowledged that it had some environmental clean-up liabilities. *Id.* at 668. Therefore, the *Pharmacia* court analyzed the capitalization of the subsidiary at the time the nature of the subsidiary's business changed and determined that it was purposefully undercapitalized by the parent's decision to stop leasing the facility given the known environmental liabilities at the time of purchase. *Id.* at 672-673.

Region 5's arguments regarding undercapitalization and "siphoning" are plainly contrary to case law and reason. Region 5 has provided no evidence to support its conclusions and the above examination of the only cases on which Region 5 relies demonstrates that neither case provides support for Region 5's "legal" arguments. Judge Moran appropriately considered the case law and facts associated with the transfers and necessarily concluded, as this Board should, that JAB Company did not "siphon" assets from its subsidiaries and neither JAB Ohio nor JAB Toledo were undercapitalized.

#### b. JAB Ohio and JAB Toledo Functioned As Normal Corporations Would After Shutting Down Operations

Yet again, Region 5 provides this Board with an argument that is fundamentally flawed. Region 5 does not allege that JAB Company controlled JAB Ohio and JAB Toledo prior to each subsidiary ceasing operations and plainly, such was not the case as shown by the uncontroverted affidavits. Region 5 essentially argues that JAB Company *must have* controlled JAB Ohio and JAB Toledo after each closed operations because there is no evidence that either subsidiary maintained corporate formalities after ceasing operations or that JAB Company maintained an arm's-length relationship with either subsidiary. Appellant's Brief, pp. 38-44. JAB Company has already thoroughly discussed the primary flaws in Region 5's argument, which are Region 5's refusal to acknowledge the significance of the pre-closure relationship between JAB Company and JAB Ohio and JAB Toledo, and Region 5's refusal to acknowledge that the piercing the corporate veil standards are altered when addressing a parent's interaction with a subsidiary that is no longer in business. In addition to those flaws, Region 5's argument is dependent on ignoring relevant uncontested evidence and an undeserved amount of significance placed on the absence of certain documents.

##### (1) There is Evidence in the Record that JAB Ohio and JAB Toledo Observed Corporate Formalities, Even Post-Closure

Region 5's argument that there is no evidence in the record that JAB Ohio and JAB Toledo observed corporate formalities is utterly false. Region 5 focuses entirely on the fact that JAB Ohio and JAB Toledo did not produce evidence of regular formal director's meetings after JAB Ohio and JAB Toledo ceased operations.[25] Appellant's Brief, p. 39. Region 5 conveniently ignores the fact

[25] Region 5 makes much of the errors contained in the consent resolutions appointing Brian Biewer manager of JAB Ohio and JAB Toledo after each ceased operations. Contrary to the claims of Region 5, JAB Company acknowledged that there were errors in the consent forms in its

there is evidence of other corporate formalities, such as the maintenance of corporate books, the maintenance of tax records, and the maintenance of financial statements during the post-closure period. *See* Section I(D)(2) and (3). Moreover, courts have determined that the lack of formal director's meeting where there is one shareholder and three directors is not dispositive, as informal meetings in such situations are common. *Mancorp, Inc. v. Culpepper,* 781 S.W.2d 618, 622 (Tex.App.Ct. 1989).

Region 5's implicit argument that a business that has shut down its operations must continue functioning as if it were operating in order to retain its legal status is simply not realistic. Since there were no day-to-day operations or decisions to be made, it is not clear that the Board of Directors should have met and what they should have discussed, or what JAB Ohio and JAB Toledo should have looked like in Region 5's version of corporate law. JAB Ohio and JAB Toledo continued to maintain their corporate books in the same manner as they always did, as evidenced by the hundreds of pages of ledgers produced to Region 5. *See* JAB Toledo Region 5 Memorandum, p. 26, Exhibit BB, CC; JAB Ohio Region 5 Memorandum, Exhibit BB, CC. Each corporation continued to generate financial statements, as produced to Region 5. *See* JAB Toledo Region 5 Memorandum, Exhibit N; JAB Ohio Region 5 Memorandum, Exhibit N. Each corporation continued to file tax returns, as produced to Region 5. *See* JAB Toledo Region 5 Memorandum, Exhibit N; JAB Ohio Region 5 Memorandum, Exhibit N. It is disingenuous, at best, for Region 5 to state that "[t]here is a complete absence of documentary evidence demonstrating that JAB Ohio and JAB Toledo observed basic corporate formalities." Appellant's Brief, p. 38.

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Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability (Toledo). See p. 3, n. 2. The errors in the documents are unfortunate, but do not take away from the fact that it is undisputed that Brian Biewer was appointed Manager of JAB Ohio and JAB Toledo. As such, no further explanation was or is necessary.

**(2) The Evidence on Record Supports an Arm's-Length Relationship Between JAB Company and JAB Ohio and JAB Toledo**

The evidence on record demonstrates that Brian Biewer was the only individual acting on behalf of JAB Ohio and JAB Toledo following their cessation of operations. *See* Section I(D)(2) and (3). This evidence is consistent with the resolutions produced to Region 5 appointing Brian Biewer as manager of JAB Ohio and JAB Toledo after their shut down. JAB Ohio Region 5 Memorandum, Exhibits A, ZZ; JAB Toledo Region 5 Memorandum, Exhibits A, ZZ. While the documents unfortunately contain several clerical errors, the substantive intent of the resolutions is clear. Brian Biewer was the manager of JAB Ohio and JAB Toledo, and also remained the Secretary/Treasurer. Region 5 offered no evidence tending to show that the actions he took were contrary to the interests of the two non-operational companies. Therefore, this Board must conclude that Brian Biewer was acting on behalf of JAB Ohio and JAB Toledo. *Bestfoods*, 524 U.S. at 70, n.13.

**(3) Region 5 Places an Unwarranted Amount of Significance Upon the Documents it Claims JAB Company was Obligated to, but did not Produce.**

Without providing this Board the context in which the "lack of documents" must be placed, Region 5 erroneously applies negative inferences to several categories of information. First, Region 5 suggests that the lack of documents regarding the advances from JAB Company to JAB Ohio and JAB Toledo requires a conclusion that JAB Company did not maintain an arm's-length relationship with its subsidiaries. Appellant's Brief, pp. 41-42. This conclusion is erroneous for several reasons. JAB Company has clearly characterized the transfers to its subsidiaries as being "in the nature of a loan." *See In re JAB Ohio,* 2009 WL 3496294 at 17-18, n. 40. The transfers to JAB Ohio and JAB Toledo were simply advances provided by JAB Company and were duly recorded as such on the books of both companies. *See* Section I(D)(2). It is consistent with a normal parent-subsidiary relationship for a parent to provide a subsidiary with funds when necessary and that fact certainly

doesn't render the subsidiary incapable of acting on its own behalf. *See Schiavone v. Pearce*, 77 F.Supp.2d 291-92 (D.Conn. 1999); *see also United States v. Friedland*, 173 F.Supp.2d 1077, 1097 (D. Colo. 2001). It is well established that absent evidence of "an improper purpose, financial assistance provided to a subsidiary by a parent does not support piercing the corporate veil." *Friedland*, 173 F.Supp.2d at 1097.

Since all advances were duly recorded, the hundreds of pages of ledgers produced to Region 5 evidence the legitimacy of the transfers. Moreover, the vast majority of advances from related parties that eventually amounted to the intercompany accounts payable on record at the time each subsidiary closed obviously occurred well before the company ceased operations. Notably, Region 5 did not request any documents related to third-party transactions occurring prior to the closure of JAB Ohio or JAB Toledo, so it would be no surprise that it had no documentation of the advances. *See* Memorandum in Support of Complainant's Motion for Discovery, Attachment A. Region 5 may not craft inadequate document requests and then assign significance to the fact that it did not receive that which was never requested. Moreover, Region 5's complaints regarding lack of documentation imply that JAB Company had the burden to demonstrate the legitimacy of the advances, but Region 5 is the only party with the burden of proof relating to that issue. Region 5 does not point to any evidence in the record that would indicate that the advances were not legitimate, and instead attempts to muddle the issue by assigning false significance to what it claims is lack of documentation.[26]

Region 5 also cites as improper the fact that JAB Company did not produce documentation of the cash management system utilized by itself and its subsidiaries. Appellant's Brief, p. 42. Such a

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[26] Perhaps more importantly, as already established above, Region 5 did not raise this issue below, so a challenge now to the legitimacy of these loans or advances should not be allowed. If Region 5 had challenged the legitimacy of the loans, JAB Company would have had a chance to provide additional documentation if necessary.

complaint certainly implies that Region 5 requested such information, but alas, no such request was ever made. *See* Memorandum in Support of Complainant's Motion for Discovery, Attachment A JAB Company established the use and general description of the cash management system through Interrogatory answers and uncontested affidavits. *See* Section I(G)(3) and Section I(G)(4). Region 5 acknowledges the facts set forth in the various affidavits and in the records, but posits without case law support that the affidavits must be supported with further documentary evidence. As already thoroughly discussed above, Region 5's arguments are baseless and yet another attempt to improperly shift the burden of presentation and persuasion to JAB Company in order to divert attention from its own lack of evidence.

**c. The Cash Management System Used by JAB Company and its Subsidiaries did not Commingle Funds and is Consistent with an Arm's Length Relationship**

The uncontested facts demonstrate that the cash management system used by JAB Company and its subsidiaries allowed JAB Ohio and JAB Toledo to have complete control of their own finances through their own separate series of checks with which to pay their obligations and to have the ability to deposit funds into the central account where each deposit was duly recorded and accounted for as a corresponding credit for the subsidiary making the deposit.[27] *See* Section I(D)(2)(a). Even after JAB Ohio and JAB Toledo discontinued active operations, the infrequent payments made by JAB Company on JAB Ohio's and JAB Toledo's behalf were accounted for as an Intercompany Payables. *Id.* JAB Company and its subsidiaries are required by the IRS to file a consolidated tax return and the use of a cash management system facilitates the record-keeping for the consolidated tax return. As such, there is nothing unusual or suspicious about JAB Company using a centralized cash management system, like the system described above, whereby its

[27] Region 5's argument regarding the cash management system seems to be the one pre-closure activity that Region 5 thinks is pertinent to a piercing the corporate veil analysis.

subsidiaries deposit their revenues into a centralized account. *See United States v. Bliss*, 108 F.R.D. 127, 132 (E.D.Mo. 1985) ("cash management system indicative of the usual parent-subsidiary relationship").

It is well-established that courts do not find the use of the type of cash management system described above as evidence supporting the piercing of a corporate veil. *Fletcher v. Atex Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995); *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec,* 529 F.3d 371, 380 (7th Cir. 2008) ("use of a cash management system alone is not evidence that funds were being improperly comingled"); *The Mall at IV Group Properties, LLC v. Roberts,* 2005 WL 3338369, at *6 (D. N.J. Dec. 8, 2005) (a cash management system is not indicative that a corporate veil should be pierced "if accurate books were kept for each individual club"); *Joiner v. Ryder Sys. Inc.,* 966 F.Supp. 1478, 1486 (C.D. Ill. 1996) (holding that the fact that parent required subsidiaries to pay a fee for centralized cash management services and allowed subsidiaries to obtain the services from another source *support parent's argument that it was not the alter ego of any of its subsidiaries*); *In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution,* 675 F.Supp. 22, 23 (D.Mass.1987) ("without 'considerably more' 'a centralized cash management system . . . where the accounting records always reflect the indebtedness of one entity to another, is not the equivalent of intermingling funds and is insufficient to justify disregarding the corporate form."); *Japan Petroleum Co. (Nigeria) v. Ashland Oil Inc.*, 456 F. Supp. 831, 846 (D. Del. 1978) ("finding segregation of subsidiaries accounts within parent's cash management system to be a function of administrative convenience and economy, rather than a manifestation of control").

In *Fletcher*, the court rejected the plaintiff's argument that a parent's centralized cash management system demonstrated that the parent had dominated one of its subsidiaries. *Fletcher*, 68 F.3d at 1459. Under the parent's centralized cash management system, the parent's domestic

subsidiaries maintained zero-balance bank accounts. *Id.* All funds transferred from the subsidiaries' accounts were recorded as credits to the subsidiaries. *Id.* When the subsidiaries needed funds a transfer was made. *Id.* At all times a strict accounting was kept of the subsidiaries' funds. *Id.* The *Fletcher* court upheld the district court's ruling that the subsidiary's "participation in the [parent's] cash management system was consistent with sound business practice and [did] not show undue domination or control." *Id.*

In this case, JAB Company used a cash management system that closely resembles that used by the parent in *Fletcher*. Like the system used in *Fletcher*, JAB Company's system requires that all subsidiary deposits go directly into a centralized account. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 18. Also, like the system used in *Fletcher*, JAB Company's system allows for subsidiaries to access their deposits when needed. *Id.* Under the system used in *Fletcher* this was accomplished by an account transfer; whereas, in this case, JAB Ohio and JAB Toledo were able to access their funds by using their corporate checkbooks. *Id.* It seems that JAB Company's system, if anything, offers significantly more autonomy to its subsidiaries than did the system in *Fletcher* because JAB Company's subsidiaries did not need to rely on JAB Company to transfer funds from its account; they could simply access their funds with their corporate checkbooks.

Region 5 attempts to muddle this widely recognized norm by citing a case where the defendant challenged a discovery request requesting information regarding the way the defendant's cash management system operated as irrelevant and a case that didn't even address a cash management system. Appellant's Brief, p. 44, *citing Wells Fargo Bank, N.A. v. Konover*, 2009 WL 585430, *9 (D.Conn., March 4, 2009) and *Ypsilanti Community Utilities Authority v. Meadwestvaco Air Systems, LLC*, 678 F. Supp. 2d 553, 574 (E.D.Mich. 2009). The *Konover* court addressed the

*Fletcher* case and other similar case law and did not disagree with these courts' conclusion that the defendant's use of the particular cash management system was not evidence supporting piercing the corporate veil. The court simply noted that these other courts obviously considered evidence of a common cash management system and found it relevant to the piercing the corporate veil claim. 2009 WL 585430 at *10. Moreover, the *Ypsilanti* court did not even address the *Fletcher* courts findings regarding a cash management system. *See generally* 678 F. Supp. 2d 553. Region 5 inexplicably attempts to distinguish *Fletcher* through *Ypsilanti*, then use *Ypsilanti* as support for Region 5's claims without any discussion at all of the facts in *Ypsilanti*. Ironically, the *Ypsilanti* court noted that "[a]s the court recognized in *Fletcher,* veil piercing claims are highly fact intensive and the question of domination is generally one of fact." 678 F. Supp. 2d at 574.

JAB Company has never made the argument that its use of a cash management system is irrelevant, but instead argues that a cash management system is not the equivalent of commingling funds as Region 5 suggests. Rather, it is a sound business practice that is widely used and consistent with an arm's length parent/subsidiary relationship. Judge Moran's finding that the cash management system used by JAB Company and its subsidiaries preserved the "financial division of transactions between the corporations" and did not weigh in favor of piercing the corporate veil of JAB Ohio or JAB Toledo was appropriate and consistent with all relevant case law. *See In re JAB Ohio,* 2009 WL 3496294 at 14. Region 5's discussion of *Konover* and *Ypsilanti* provide nothing to contradict JAB Company's argument or the case law supporting that argument.[28] Therefore, this

[28] It is interesting that Region 5 opts to summarize the cases cited by the *Konover* court with the phrase "citing cases." Appellant's Brief, p. 44. While Region 5 cherry-picks a quote from the *Acushnet* court, an examination of the cases cited by the *Konover* court (included in the string cite above) reveals that the cases all support the very point made by JAB Company, which is that the type of cash management system used in the present case supports *maintaining* the corporate veil of JAB Ohio and JAB Toledo.

Board should find, as did Judge Moran, that the cash management system used by JAB Company and its subsidiaries is not commingling of funds and is consistent with an arm's-length relationship.

**d. JAB Company did not Exhibit *Pervasive* Pre-Closure or Post-Closure Control Over JAB Ohio or JAB Toledo**

The facts cited by Region 5 as demonstrative of JAB Company's pervasive control over JAB Ohio and JAB Toledo fall far short of meeting the standards set forth in Ohio and federal law. In order to fulfill the first prong under Ohio or federal law, Region 5 must demonstrate that the control exerted was so pervasive and complete that JAB Ohio and JAB Toledo had no independent will. *In re JAB Ohio,* 2009 WL 3496294 at 5. It is not enough for Region 5 to demonstrate that JAB Company exhibited "some" control over JAB Ohio and JAB Toledo, as is fully expected by a normal parent over its wholly owned subsidiary. *Bestfoods* at 61-62. The control must be pervasive and must be over the day-to-day operations of JAB Ohio and JAB Toledo. *Corrigan*, 478 F.3d at 726. Ohio and federal law permit a parent corporation to own all of the stock of its subsidiaries, as well as employ common officers and directors and other personnel, without risking the destruction of the corporate veil. *See, e.g., Univ. Circle Research Ctr. Corp. v. Galbreath Co.* (1995), 106 Ohio App. 3d 835.

Region 5 does not even allege or attempt to prove that JAB Company pervasively controlled JAB Ohio's and JAB Toledo's pre-closure activities, only the post-closure activities. To the extent that the post-closure time frame is considered, the support for Region 5's claim appears to be limited to the fact that JAB Company advanced JAB Ohio and JAB Toledo the funds to pay their environmental consultant for the preparation of the Drip Pad Closure Activity Plans and correspondingly debited each subsidiary for such amounts, and the fact that JAB Company similarly advanced payments for other expenses, such as property taxes. Appellant's Brief, pp. 46-47.

Region 5's allegations are not sufficient to establish the pervasive control necessary to pierce the corporate veil. Piercing the corporate veil is not supported where a parent corporation advances funds for certain expenses to a subsidiary *and* the parent documents and accounts for any expenses paid on behalf of the subsidiary, as the fact that a parent company provides a subsidiary with capital in times of need is consistent with the parent corporation's protection of its investment. *See Id.* at 292; *Friedland,* 173 F.Supp.2d at 1091-1092; *Schiavone*, 77 F. Supp. 2d at 291-292. Moreover, where the subsidiary is no longer operational, the *Pfohl* court made clear that it is not enough for a plaintiff to demonstrate control over the sale of the subsidiary's assets and the subsequent winding up of the subsidiary's business affairs. *Id.*

Region 5 concludes, without case law support, that the fact JAB Company provided funds to JAB Ohio and JAB Toledo and debited those amounts accordingly demonstrates that JAB Company "exercised complete control over JAB Ohio's and JAB Toledo's finances after their closures." The first problem with Region 5's conclusion is that Region 5 doesn't even claim to have demonstrated pervasive control over the day-to-day activities of JAB Ohio and JAB Toledo. To the contrary, Region 5 seems to have acknowledged that all other activities occurring were controlled by JAB Ohio and JAB Toledo.[29]

The second flaw in Region 5's conclusion is the fact that JAB Company's payment for some subsidiary expenses which were debited from JAB Ohio's and JAB Toledo's account is demonstrative only of a normal managerial relationship between a parent and a subsidiary. *See*

[29] While JAB Ohio and JAB Toledo had ceased operations, there were still some activities occurring. Region 5 certainly does not allege or provide evidence that other activities were not occurring, nor does Region 5 address who controlled any of these other activities, such as renting the facilities, maintenance and upkeep of the facilities, or communications with the Ohio EPA and MSG regarding required closure activities. JAB Company has already established above that Region 5 has not produced evidence to overcome the presumption that all actions taken by Brian Biewer were taken on behalf of JAB Ohio and JAB Toledo.

*Transition Healthcare Associates, Inc.*, v *Tri-State Health Investors, LLC*, 306 Fed. Appx. 273, 280 (6th Cir. 2009); *see also Wilson* v *Superior Foundations, Inc.*, No. CA2007-03-043, 2008 WL 757525, at *3 (Ohio App. Mar. 24, 2008). Region 5's argument that JAB Company's "decision" not to pay for and perform closure activities for JAB Ohio and JAB Toledo was contrary to the subsidiaries' interest is nothing more than a repeat of its overall theme that anything short of the parent's financial bailout of the failed subsidiary is evidence compelling veil piercing. JAB Toledo and JAB Ohio were insolvent and out of business at the time Region 5 claims JAB Company should have fully paid for the subsidiaries' environmental obligations, and they would have remained insolvent and out of business even had JAB Company done as Region 5 assets was required. Either way, they remain insolvent, merely trading one liability (Ohio EPA) for another equal liability (debt to parent company). JAB Company's decision not to pump even more money into the failed businesses neither hurt nor benefitted JAB Toledo's or JAB Ohio's balance sheets. If such decision were a basis for piercing the corporate veil, the parent of every insolvent subsidiary unable to pay for its environmental liabilities would automatically be on the hook and the concept of limited corporate liability would evaporate.

**e. Under Ohio and Federal Law, Control Alone is Insufficient to Pierce the Corporate Veil**

Region 5's claim that demonstration of a parent corporation's control over its subsidiary is sufficient to pierce that subsidiary's corporate veil is utterly false. Under every version of state or federal law of which JAB Company is aware, there are at least two prongs: the first addressing the control of a parent over a subsidiary and the second addressing the use of that control to accomplish a fraud, illegal act, etc. A plaintiff is required to demonstrate each prong before a court will pierce a corporate veil. Indeed, the *Belvedere* court addressed this issue head on and found that "mere control over a corporation is not in itself a sufficient basis for shareholder liability. 671 N.E.2d at

1086-1087; *see also LeRoux's Billyle Supper Club v. MA*, 77 Ohio App.3d 417, 425; 602 N.E.2d 685, 690 (Ohio App. Ct. 1991); *Transition Healthcare*, 306 Fed.Appx. at 282.

Region 5 cites a Sixth Circuit case applying Ohio law as support for its claim that control alone is sufficient to justify piercing the corporate veil. Appellant's Brief, pp. 45-46, citing *Carter Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 749 (6th Cir. 2001). Region 5's reliance is wholly misplaced. In *Carter Jones*, the Sixth Circuit clearly stated that it was considering whether, "mere control of a corporation may be sufficient to satisfy ***the first prong*** of *Belvedere*." *Id.* at 750 (emphasis added). Moreover, the case that Region 5 claims is applying "federal" law is actually determining whether the court can exercise jurisdiction over the parent corporation of a local subsidiary, not whether the court should pierce the subsidiary's corporate veil. *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (Puerto Rico Cir. 1980)(cited at p. 45 of Appellant's Brief). Therefore, the court's analysis was limited to a control analysis, not because the court found that that is the only thing necessary to pierce a corporate veil, but because, unlike a veil piercing analysis, the jurisdiction analysis only required proof of control.[30] *Id.*

It is incredible to JAB Company that Region 5 relies on the above two cases as support for its supposition that Judge Moran erroneously "believed that control alone is insufficient to justify piercing the corporate veil." Judge Moran was absolutely correct in his belief. Nevertheless, as demonstrated above, the evidence produced by Region 5 falls far short of meeting its burden of proof regarding prong one of the piercing the corporate veil analysis, under Ohio or federal common law.

[30] Region 5 also did not accurately quote the *Escude Cruz* case, which in fact stated that "[t]here is a presumption of corporate separateness that *must* be overcome by clear evidence that the parent in fact controls the activities of the subsidiary." 619 F.2d at 905 *(emphasis added).*

### 2. Even If This Court Were to Conclude that the First *Belvedere* Prong Could Be Met, Complainant Has Not Demonstrated That JAB Company Used Its Control to Commit Fraud, an Illegal Act, or Similarly Unlawful Acts .

#### a. Ohio Common Law

Region 5 has not demonstrated that JAB Company exercised control over JAB Ohio and JAB Toledo to commit fraud, an illegal act, or a similarly unlawful act. *See Dombroski v. WellPoint, Inc.* 119 Ohio St.3d 506, 895 N.E.2d 538, 544-545 (Ohio 2008). Region 5 claims it is necessary to find an Ohio case that has applied *Dombroski*, however, Region 5 need look no further than *Dombroski* itself for appropriate guidance. *See* Appellant's Brief, pp.50-51. While *Dombroski* clarified that the second prong of *Belvedere* encompassed more than fraud and illegal acts, the court cautioned that the corporate veil should be pierced "only in instances of extreme…misconduct" where complete control was used to commit "specific egregious acts." 895 N.E. 2d at 544. Moreover, as discussed in detail in Section I(D) above, the *Dombroski* court made it clear that the second prong of *Belvedere* did *not* include "unjust or inequitable conduct." *Id.*

In *ITT*, the court addressed claims very similar to those made by Region 5, albeit applying Michigan law, which requires control to be used "to commit a wrong or fraud." 2009 WL 2242904 at *6. The plaintiff in *ITT* alleged that the parent corporation used its control to commit a wrong or fraud where the undisputed facts demonstrate that the parent maintained a subsidiary in its post-operational status and did not provide the subsidiary with funds to meet its environmental liabilities. *Id.* at *7. The plaintiff argued, as Region 5 does here, that the parent used the subsidiary as a "shell" company to shield the parent from environmental liabilities. *Id.* at *7. The *ITT* Court disagreed and found that no wrong was committed, as there is no legal duty that requires a parent to discontinue the corporate existence of a non-operational subsidiary with outstanding potential liabilities, environmental or otherwise, nor to infuse cash into a failed subsidiary. *Id.*

Like the plaintiff in *ITT*, the gravamen of Region 5's argument is that JAB Company's failure to pay for JAB Ohio and JAB Toledo's closure costs under RCRA should be considered "extreme misconduct" and an "egregious," "unlawful act." Appellant's Brief, pp. 49-52. It is an undisputed fact that the reason JAB Ohio and JAB Toledo could not follow through with closure plans under RCRA is because both were failed businesses that simply lacked the cash assets to perform the closure obligations. JAB Company did not cause the inability of JAB Ohio and JAB Toledo to pay. All that Region 5 alleges is that JAB Company did not bail out its failed subsidiary.

As demonstrated in *ITT*, a parent's choice not to bail out a failed subsidiary is not even wrongful conduct, much less the type of "egregious," "extreme misconduct" required under *Dombroski*. *See* 2009 WL 2242904 at *7. *See also LeRoux's*, 602 N.E.2d 685, 689 (1991) (a pre-*Dombroski* case holding that "liability cannot be imposed upon a shareholder simply because he invests in an unsuccessful venture...[E]ven though [the creditor's] inability to collect... may appear "unjust" or "inequitable", it is not the kind of inequity or injustice which merits the imposition of liability for a corporate debt on a shareholder.").[31]

Region 5 also implies that there is something inherently wrong with JAB Company paying the taxes and insurance or other legally incurred expenses of JAB Ohio and JAB Toledo but not providing funds for clean-up activities. The fact that RCRA imposes duties on JAB Ohio and JAB Toledo that neither subsidiary is able to meet, however, does not transform Region 5 into a "supercreditor" that has a right to be paid before all other creditors with legally incurred debts. Region 5 has not produced a shred of legal support for such a theory. Moreover, to argue that the parent's duty to pay *all* of a subsidiary's debts somehow arises because the parent opted to pay for

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[31] *Dombroski* further cements the conclusions of the *LeRoux's* court, as *Dombroski* makes clear that actions rising only to the level of "unjust" or "inequitable" are not enough to satisfy the second prong of *Belvedere*.

*some* of the subsidiary's obligations would deter parents from paying *any* of a failed subsidiary's debts for fear that the parent will later be forced to pay all of the debts. Public policy considerations weigh against imposing such a standard.

Region 5 acknowledges that there is no Ohio or comparable case law support for its claim that JAB Company's *failure to act* is somehow "egregious" and "extreme misconduct" that amounts to an "illegal" or "similarly unlawful act." Appellant's Brief, p. 50. Instead, Region 5 makes rather vague attempts at invoking the "policies" of RCRA to establish that JAB Company had some sort of duty to act. Appellant's Brief, pp. 51-52. Contrary to Region 5's claims, however, the subsidiaries, as owners and operators, are the only entities that had positive duties under RCRA—not JAB Company.[32] JAB Company did not prevent either JAB Ohio or JAB Toledo from fulfilling their duties -- JAB Ohio and JAB Toledo simply did not have the funds to do so. Region 5's attempt to establish a duty for JAB Company by classifying JAB Company as an "owner" of JAB Ohio's and JAB Toledo's facilities puts the cart before the horse and invokes circular reasoning. Whether JAB Company should be considered an "owner" of JAB Ohio and JAB Toledo facilities is exactly the issue that this Board must decide. Region 5 may not prove JAB Company is an "owner" of JAB Ohio and JAB Toledo's facilities by invoking an argument that is only applicable if in fact this Board finds that JAB Company is the "owner" of JAB Ohio and JAB Toledo. Moreover, nothing in RCRA indicates a public policy to alter established state law on issues such as the "operator's" parent's liability.

**b. Federal Common Law**

For the same reasons Region 5 fails to meet the second prong of Ohio common law, Region 5 also fails to meet the second prong of federal common law. No matter which version of federal

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[32] The subsidiaries are also the only entities that admitted liability under RCRA—not JAB Company.

common law is applied, it is axiomatic that "'[t]here is nothing fraudulent or against public policy in limiting one's liability by the appropriate use of corporate insulation.'" *Acushnet*, 675 F. Supp. at 34, *quoting Miller v Honda Motor Co.*, 779 F.2d 769, 773 (1st Cir. 1985). In *Acushnet*, the government argued that a subsidiary's veil should be pierced where the parent corporation's intent in forming a subsidiary was with an eye towards limiting its environmental liability. *Id.* The court noted that this "remarkable" argument would convert the "very purpose for which the law enables investors to incorporate into an impermissible evil." *Id.* Therefore, "avoiding liability through the corporate form is not a wrong that equity's hand must right." *Id.*

Region 5's argument is essentially that JAB Company formed a subsidiary and because the subsidiary owns the facilities, not JAB Company, JAB Company is able to avoid the environmental liabilities attached to those facilities. As demonstrated above, such an allegation, even if proved true, is not sufficient to pierce a corporate veil.

While Region 5 summarily concludes that the second prong of federal common law is obviously met by the failure of JAB Ohio and JAB Toledo to meet the duties established in RCRA, as demonstrated above, RCRA imposes no duties on JAB Company. Region 5 must hang its hat on the simple fact that two failed subsidiaries do not have the financial means to pay their debts and the parent has not bailed out those subsidiaries. JAB Company's inaction is not unjust, inequitable, wrongful, or even unexpected.

Ultimately, it is very instructive that Region 5 cites a case authored by Judge Moran as being demonstrative of federal common law on piercing the corporate veil, yet the author himself unequivocally held that Region 5 did not meet the federal common law standards to pierce the corporate veil of JAB Ohio and JAB Toledo. *In re JAB Ohio,* 2009 WL 3496294 at 5. Judge Moran's thorough and well-reasoned opinion determined that Region 5 did not meet its burden of

proof regarding its piercing the corporate veil claims under Ohio or federal common law. *Id.* at 19. Region 5 has not demonstrated to this Board that Judge Moran committed any reversible error, therefore, this Board must maintain Judge Moran's decision to grant JAB Company's Motion for Accelerated Decision and deny Region 5's Motion for Accelerated Decision.

### G. JAB Company is not Subject to Direct Operator Liability as a Matter of Law

Region 5 also seeks to assign liability to JAB Company on the theory that it can be held directly liable as an actual "operator" of the JAB Ohio and JAB Toledo facilities. As established above, *Bestfoods* recognizes the possibility for parental liability under CERCLA for a parent's direct operation of a subsidiary's facility, however, such liability can be predicated only upon evidence showing that the parent directed the operations of the subsidiary's facility with specific respect to pollution control and environmental compliance.[33] The Court noted that it might be "easy" to claim a parent is an "operator" of a subsidiary's facility, however, "the difficulty comes in defining actions sufficient to constitute direct parental 'operation.'" *Id.* at 66. The Court then provided three alternatives for demonstrating the direct liability of a parent as an operator: (1) when "a dual officer or director depart[s] so far from the norms of parental influence exercised through dual office holding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility;" (2) when "an agent of the parent with no hat to wear but the parent's hat manage[s] or direct[s] activities at the facility;" and (3) "when the parent operates the *facility* instead of its

[33] RCRA authorizes suit against "any person [who] has violated or is in violation of any requirement of [RCRA]." 42 U.S.C. § 6928(a)(1). The only type of "person" relevant to this case that is subject to RCRA, however, and who can therefore be alleged to have "violated" its requirements, are those persons who are "owners [or] *operators* of facilities for the treatment, storage, or disposal of hazardous wastes." (42 U.S.C. §6924(a); *see* also 42 U.S.C. § 6925(a)). Therefore, in accordance with *Bestfoods*, a parent could be subject to direct "operator" liability under RCRA only upon a showing that the parent directed the operations of the subsidiary's facility with specific respect to pollution control and environmental compliance.

*subsidiary* or alongside the subsidiary in some sort of joint venture." *Id.* at 71 (emphasis added). Region 5's claim is that JAB Company can be held directly liable under the first and second scenario. Appellant's Brief, p. 55. As demonstrated below, Region 5's arguments fail.

#### 1. Brian Biewer is a Dual Officer of JAB Company and JAB Ohio and Region 5 did not Demonstrate that His Actions Were Contrary to JAB Ohio or JAB Toledo.

As previously discussed, Region 5 must demonstrate that JAB Company operated the JAB Ohio and JAB Toledo facilities with regards to decisions about pollution control or environmental compliance. *See Bestfoods*, 524 U.S. at 66-67. Moreover, since Region 5 only questions actions taken by Brian Biewer, an officer of JAB Company, JAB Ohio, and JAB Toledo, Region 5 *must* address the standards set forth by the Supreme Court for the first scenario. Specifically, Region 5 must demonstrate that Brian Biewer's actions were contrary to the interests of JAB Ohio and JAB Toledo, yet advantageous to JAB Company. *See Bestfoods*, 524 U.S. at 70. Region 5 does not meet its burden, as most of the facts Region 5 cites as supporting its allegation that JAB Company was an operator of the JAB Ohio and JAB Toledo facility have nothing to do with pollution control or environmental compliance and those that do are not contrary to the interests of JAB Ohio. *See* Appellant's Brief, pp. 57-59.

This Board must presume that all actions taken by Brian Biewer, because he is a dual officer, were taken on behalf of JAB Ohio and JAB Toledo unless Region 5 demonstrates that Brian Biewer was acting in his capacity as an officer of JAB Company at the time of the acts. *See Bestfoods*, 524 U.S. at 70. When determining whether a dual officer is acting in his or her capacity as a parent officer or director, rather than his or her capacity as a subsidiary officer or director, the Court in *Bestfoods* provided the following guidance:

> [T]he 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.

*Id.* at 70, n.13. In other words, the presumption that Brian Biewer is acting for JAB Ohio and JAB Toledo cannot be overcome by mere evidence that he engaged in decision making regarding JAB Ohio's and JAB Toledo's facility. *Raytheon Constructors, Inc. v. Asarco Inc.*, 368 F.3d 1214, 1218-19 (10th Cir. 2003); *Consol. Edison Co. v. UGI Utilities*, 310 F.Supp.2d 592, 605 (S.D.N.Y. 2004), affirmed in relevant part, 153 Fed.Appx. 749 (2d Cir. 2005); *Friedland*, 173 F.Supp.2d at 1095-96; *Schiavone*, 77 F.Supp.2d at 291-92 (holding that overlapping and intertwined management structure of parent and subsidiary was consistent with that of an ordinary parent-subsidiary relationship); *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, No. 3:03-cv-614-J-20MMH, 2005 WL 5660478, at *8 (M.D.Fla. Mar. 22, 2005).

In *Atlanta Gas Light Co.,* the court granted summary judgment in favor of a parent corporation notwithstanding undisputed evidence that dual officers and directors of the parent and its subsidiary had made decisions for the subsidiary or completed physical work at the subsidiary's facility. 2005 WL 56604786 at *8. The plaintiff alleged that the overlapping officers and directors of the parent and subsidiary supported the finding of operator liability. *Id.* The court noted that the simple fact that a parent and subsidiary have overlapping officers and directors and intertwined management "does not create operator liability for a parent or investor corporation." *Id., citing Bestfoods*, 524 U.S. at 69-70.

Although it was undisputed that dual officers and directors made decisions for the subsidiary and completed physical work, the court ruled that the actions of the dual officers and directors had been consistent with "corporate norms regarding a parent/subsidiary relationship and [were] the exact behavior embodied by the *Bestfoods* presumption." *Id.* The fact that dual officers and employees appointed the parent as a purchasing agent, took part in negotiating contracts, and

"practically rebuilt" the subsidiary's facility did not rebut the presumption that all of those actions were taken on behalf of the subsidiary as all of the actions benefitted the subsidiary. *Id.* The court further stated that "[t]here ha[d] simply been no showing that dual position-holders acted in any capacity other than Board members or employees of [the subsidiary]." *Id.* On this basis, the court held that no reasonable jury could conclude that the parent was subject to operator liability for its involvement with the subsidiary's facility. *Id.* at *12.

The *Raytheon* court held that the *Bestfoods* presumption was not overcome by a showing that a dual officer had engaged in *environmental* decision-making at the subsidiary's facility. 368 F.3d at 1218-1219. In *Raytheon*, the president of the parent company and president and chairman of the board of the subsidiary company participated in the purchase of land used to store the environmental waste at issue. In addition, that dual officer also took the following actions: (1) wrote a letter to the stockholders of the subsidiary regarding its financial and operating conditions; (2) negotiated a contract for the subsidiary; (3) submitted licenses and agreements to the board and had the board's approval to sign contracts; (4) ordered and took on a mortgage for new equipment for the subsidiary; and (5) helped supervise and replace the on-site facility manager of the subsidiary. *Id.* at 1219. After listing these activities, the *Raytheon* court held that the evidence listed above was insufficient to support the conclusion that the parent company was an operator of the subsidiary facility, noting:

> [T]he critical point, however, is that nothing indicates [the dual officer] undertook any of these actions while wearing any hat other than his [subsidiary] president hat. The crucial consideration here is not what [the dual officer] did, but what [the parent company] did. As long as [the dual officer] acted as an executive and board member of [the subsidiary], *Bestfoods* tell [sic] us that his actions cannot be attributed to the [parent]. While the district court believed that [the dual officer] himself was an operator of [the subsidiary's] facilities, that does not suffice to make [the parent]...an operator. The suit here is against the company, not [the dual officer] personally.

*Id.* Essentially, "there was no evidence to rebut the presumption that [the dual officer's] involvement . . . was undertaken in any capacity other than as president of [the subsidiary] and a

member of its board." *Id* at 1219. The court also stated that the fact that the dual officer had served as the "primary liaison" between the parent and its subsidiary did not "rebut the presumption of wearing separate hats in separate corporate roles." *Id.* at 1218.

In this case, Region 5 does not allege that JAB Company exerted any control over the JAB Ohio or JAB Toledo facilities with regards to the activities that *caused* the pollution; rather Region 5 alleges that JAB Company exerted control over the decontamination process that should have occurred after JAB Ohio and JAB Toledo ceased operations. Appellant's Brief, pp. 45-48. In an attempt to demonstrate this control, Region 5 throws out the following laundry list of factors it claims are relevant: (1) the interlocking officers and directors between JAB Company, JAB Ohio and JAB Toledo; (2) the use of a cash management system; (3) the advances provided to JAB Ohio and JAB Toledo by JAB Company and recorded as corresponding debits; (4) the transfers of inventory to related parties and subsequent 1:1 reduction in accounts payable and accounts receivable; (5) the elimination of JAB Ohio and JAB Toledo individualized checks; (6) the lack of JAB Ohio and JAB Toledo corporate meetings after each ceased operations; (7) the lack of employees and business after operations ceased; (8) the appointment of Brian Biewer as manager without compensation; and (9) the failure of JAB Ohio and JAB Toledo to perform closure activities.

As the *Raytheon* court noted, the suit is against the parent company, not the dual officer. 368 F.3d at 1219. Therefore, the real question is, whether the actions of a dual officer were contrary to the interests of JAB Ohio and JAB Toledo, but advantageous for JAB Company.

The only action taken by Brian Biewer that Region 5 even alleges is contrary to the interests of JAB Ohio and JAB Toledo is Brian Biewer's alleged "decision" not to proceed further with closure activities. Appellant's Brief, p. 58. This argument is easily dismissed. As already thoroughly established above, the only evidence on record demonstrates that JAB Ohio and JAB

Toledo did not have the financial ability to proceed with the closure activities. Region 5 may not simply pronounce its unsupported conclusions to be true to meet its burden of proof here. Region 5 has not provided any evidence that anyone made any "decision" related to the closure activities. The subsidiaries were broke and could not perform closure activities, therefore, there was no decision to be made.

Region 5 simply cannot and does not provide this Board with any evidence that Brian Biewer, or any dual officer, ever took action contrary to the interests of JAB Ohio and JAB Toledo. Therefore the presumption that all actions taken by dual officers were taken on behalf of JAB Ohio and JAB Toledo must stand thereby preventing the imposition of direct liability on JAB Company.

### 2. Region 5 Offered no Evidence at all Supporting the Second *Bestfoods* Scenerio where "an Agent of the Parent with No Hat to Wear but the Parent's Hat Manages or Directs Activities at the Facility."

Though Region 5 clearly states that it claims direct operator liability against JAB Company on the basis of the "agent with only a parent's hat to wear" scenario, (Appellant's Brief, p. 55), it disproves its own contention by identifying only Brian Biewer as the "agent" of the parent, who also is acknowledged as a director, officer and manager of JAB Ohio and JAB Toledo after they closed. Brian Biewer could and did wear the JAB Toledo and JAB Ohio hats, and this argument by Region 5 is simply baseless. Even though the test is clearly not applicable in the present case, JAB Company demonstrates below that even if it were, Region 5 comes up woefully short of demonstrating the test has been met.

When an agent of a parent corporation "with no hat to wear but the parent's hat" directs or manages activities at a facility that "are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures," that agent's actions "should

not give rise to direct liability." *Bestfoods*, 524 U.S. at 72. The Court further stated that "the critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." *Id.*

Where the evidence merely establishes that there was close parental control of a subsidiary's expenditures, that a parent acted as a "purchasing agent" for a subsidiary, or that a parent made capital contributions to a subsidiary during times of financial difficulty, courts will not grant summary judgment motions. *Consolidated Edison Co.*, 310 F.Supp.2d at 608-09 (holding that evidence of parental control of subsidiary's expenditures and evidence that parent acted as "purchasing agent" and consultant for subsidiary was insufficient for reasonable jury to find that parent was operator); *Friedland*, 173 F. Supp. 2d at 1097 (recognizing that it is entirely consistent with the typical relationship between a parent corporation and a subsidiary for the parent to keep "the subsidiary operating during times of financial difficulties"); *Schiavone,* 77 F. Supp. 2d at 290 (holding that approval of capital expenditures, including those for pollution control equipment was consistent with typical relationship between parent and subsidiary); *see also Datron Inc. v. CRA Holdings Inc*, 42 F. Supp. 2d 736, 747-48 (W.D. Mich. 1999).

In *Datron*, the parent was alleged to be an operator of several subsidiary facilities based on the following evidence: (1) the parent's corporate policy referred to the subsidiaries as divisions; (2) the parent's corporate safety director conducted semi-annual safety inspections of the Facility; (3) the parent's corporate policy required all employees and subsidiaries to comply with RCRA; (4) there were overlapping officers of the parent and subsidiary; (5) the subsidiaries had to obtain the parent's approval for credit arrangements beyond a certain amount; (6) an employee of the parent bought environmental liability coverage for the subsidiary; and (7) the parent's general counsel found outside counsel and was involved in the resolution of the EPA's complaint against the

subsidiary. 42 F. Supp. 2d at 747-748. The *Datron* court granted summary judgment in favor of the parent corporation, holding that its involvement with the subsidiary facilities listed above "falls soundly within the parameters of normal oversight by a parent corporation." *Id.* at 748. "Referring to subsidiaries as divisions, obtaining insurance, establishing corporate policies and conducting sporadic safety inspections are the kind of activities 'which are consistent with the parent's investor status.'" *Id.*

The *Schiavone* court reached a conclusion similar to the above, stating that the "essential question here is whether there is enough evidence for a reasonable jury to find that [the parent] managed, directed, or conducted operations specifically related to the pollution at the [subsidiary] plant, that is, operations having to do with the leakage or disposal of creosote, or decisions about compliance with environmental regulations. 77 F.Supp.2d at 290. In *Schiavone*, the defendant parent company created a subsidiary to purchase assets from a third company. *Id.* at 285. The third company leased property from New Haven and Hartford Railroad Company and that property was eventually contaminated with creosote. *Id.* at 286. The undisputed evidence put forth in *Schiavone* as demonstrating that the parent company was an operator of the subsidiary's facility was as follows: (1) the parent and subsidiary shared the same board of directors; (2) the subsidiary's president, general counsel, assistant comptroller, and assistant treasurer were also employed by the parent; (3) the parent's legal department provided services to the subsidiary; (4) the "interlocking" parent-subsidiary board of directors examined and approved capital expenditures, including pollution-control equipment; (5) the parent supplied capital to the subsidiary to buy the third company that allegedly caused the pollution; (6) the parent agreed to assume and perform all obligations of the third company under the lease with the Railroad; (7) the parent played an extremely active role in managing the subsidiary; (8) some parent officials were copied on

correspondence related to contract negotiations with the Railroad; (9) some parent officials were involved in the subsidiary's accounting and corporate affairs; (10) the subsidiary submitted all contracts to the parent for review; (11) one of the parent's in-house lawyers participated in the contract negotiations with the Railroad and assisted in the sale of the subsidiary's assets; and (12) an employee of the parent guided the contract renewal negotiations between the subsidiary and the Railroad and played a role in keeping the subsidiary's facility open during financial difficulties. *Id.* at 290-291.

The *Schiavone* court considered the above evidence and determined that it was insufficient to create a genuine issue of material fact under *Bestfoods*, as the actions cited above were "consistent with the traditional and typical relationship between a parent and a subsidiary." *Id.* at 291. The fact that a parent company provides a subsidiary with capital in times of need is typical of a parent corporation's investment. *See Id.* at 292. Moreover, overlapping and intertwined management structures are also consistent with an ordinary parent-subsidiary relationship. *Id.* at 291-292. Essentially, the court held that the compilation of cited actions did not establish that the parent's actions "directed to the [subsidiary] plant's pollution control were 'eccentric under accepted norms of parental oversight.'" *Id.* at 293, *quoting Bestfoods*, 524 U.S. at 72.

As listed above, Region 5 has set forth various factors it deems relevant to the direct operator liability analysis and somehow demonstrative of JAB Company's "eccentric" oversight. Appellant's Brief, pp. 57-58. Courts have made clear that interlocking officers and directors are demonstrative of nothing more than a normal parent-subsidiary relationship. *Bestfoods*, 524 U.S. at 61-62, 69. The use of cash management system like the one used by JAB Company and its subsidiaries also supports a normal parent-subsidiary relationship. It is entirely proper and expected that a parent would provide funds to help a struggling or failed subsidiary to protect the parent's investment.

*Schiavone*, 77 F. Supp. 2d at 291-292. Moreover, Region 5's argument that it would be eccentric for failed subsidiaries *that have ceased operations* to have no employees, sales, or their own individualized checks and to appoint a manager receiving no compensation is ridiculous. Of course, Region 5 does not provide any discussion regarding what its version of a "normal" failed subsidiary would look like, much less provide any case law to support its contention that JAB Ohio and JAB Toledo were not "normal" failed subsidiaries.

The bottom line is that, instead of evidence and case law support, Region 5 has only provided this Board with much rhetoric and many conclusory statements. Even a cursory examination of the the relevant facts produced by Region 5 establish that all actions were consistent with the accepted norms of parental oversight of JAB Ohio's and JAB Toledo's facilities. Therefore, even if Brian Biewer were an agent of only JAB Company, Region 5's claims fail.

**3. As a Matter of Law, JAB Company is not Subject to Direct Operator Liability Because the Word "Operate" Means Something Other than the Mere Failure to Act or to Cease Acting.**

Another problem facing Region 5 is the fact that Region 5 actually relies on the alleged *inactivity* or *inaction* of Brian Biewer as the basis for holding JAB Company liable for the alleged RCRA violations of JAB Ohio and JAB Toledo. As previously discussed, JAB Ohio and JAB Toledo are being prosecuted, not because of something they did, but because of something they *did not do*.[34] Then, Region 5 takes it one step further and contends that the parent, JAB Company, also did not do what the subsidiaries did not do. Thus, while Region 5 claims that the violations arose because *nothing* was done (i.e., no cleanup activities were performed), it simultaneously claims that

[34] If Region 5 were to attempt to shift gears and claim JAB Toledo and JAB Ohio are being sued because of their *actions* in *causing* contamination, it would merely support Respondents' contention that the veil piercing and direct liability analysis would then need to focus on the pre-closure time period, an analysis for which Region 5 has zero factual support.

JAB Company is the one that "did" it. Apparently, therefore, Region 5 is attempting to establish the novel and untested legal theory that the direct liability of a parent corporation can be established not by showing that it *acted* to take control of the subsidiary's facility, but by showing that the parent did *not* get involved with the environmental operation of its subsidiary's facilities, a theory that would hang every parent company in a legitimate parent-subsidiary relationship.

There is a clear basis in semantics and case law for concluding that the word "operate" means something other than the mere failure to act or to cease acting. In *Bestfoods* the Court stated that "when [Congress] used the verb 'to operate,' . . . the statute obviously meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities." *Bestfoods*, 524 U.S. at 71. In *U.S. v. Township of Brighton,* 153 F.3d 307, 314 (1998), the Sixth Circuit further expounded on the word by stating that "[b]efore one can be considered an "operator" for CERCLA purposes, one must perform affirmative acts." Conversely stated, "[t]he failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator." *Id.*[35]

In this case, the aspect of JAB Company's involvement at the facilities of JAB Ohio and JAB Toledo that is being challenged is JAB Company's *failure* to implement MSG's drip pad closure plan—in other words JAB Company's failure to act. Appellant's Brief, p. 11. Region 5 has presented no evidence suggesting that JAB Company affirmatively acted and controlled environmental decisions in a manner contrary to JAB Ohio and JAB Toledo's interests, such that this Board could consider the actions of the dual officer to be the actions of JAB Company. Region 5 also does not demonstrate that JAB Company had <u>any</u> involvement with the operations of JAB Ohio

[35] While Region 5 attempts to lessen the effect of this case law by arguing the cases are inapplicable because the courts were addressing CERCLA, this argument flies in the face of Region 5's previous argument that this Board should apply *Bestfoods* to the direct liability arguments under RCRA, even though the *Bestfoods* court addressed CERCLA.

and JAB Toledo prior to the closure of its lumber producing operations, when contamination, if any, occurred. As such, there is no basis for asserting direct "operator" liability against JAB Company.

#### 4. Even if JAB Company were an Operator, as a Matter of Law, JAB Company was Not an Operator During The Relevant Time Period.

Operator liability has a temporal aspect, which means that an operator who operates a facility prior to, or after, but not during the relevant time period cannot be subject to operator liability. *See, e.g., Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F.3d 917 (5th Cir. 2000). Some courts have grounded this rule in the definition of operator and in the standards for operator liability that have developed through case law. *Id.* Other courts have grounded this rule in the broader principles of causation. *Township of Brighton*, 153 F.3d at 317-320. Whatever the rationale, it is clear that operator liability does not attach to a defendant when the factual circumstances underlying a plaintiff's claim (in this case, failure to properly close the facility) occurred outside the scope of the defendant's operator status.

As mentioned above, in *Bestfoods*, the Court defined an operator as "someone who directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods*, 524 U.S. at 66. The Court sharpened this definition by stating that "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67. In applying this definition, courts have held that "[f]or one to be considered an operator . . . there must be some nexus between that person's or entity's control and the hazardous waste contained in the facility." *See, e.g., Geraghty*, 234 F.3d at 929.

"This nexus has been described as a 'well-settled rule' that 'operator' liability...only attaches if the defendant had authority to control the *cause* of the contamination *at the time* the hazardous substances were released into the environment." *Id.* (emphasis added); *see also, Bob's Beverage Inc.*

*v. Acme Inc.*, 169 F. Supp. 2d 695, 723 (N.D. Ohio. 1999) ("[a] person who affirmatively acts to cause a release of hazardous waste becomes an operator"); *CPC Int'l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989) ("[t]he most commonly adopted yardstick for determining whether a party is an owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution"). It follows then, that where this nexus is missing, operator liability cannot attach. *See Id.*

In this case, Region 5 has argued that operator liability should attach to JAB Company; however, in doing so, Region 5 has disregarded the temporal aspect of operator liability. Region 5 has made no allegation and has presented zero evidence that JAB Company operated the Facility *at the time of the alleged pollution events* while JAB Toledo and JAB Ohio were operating. Instead, all of Region 5's allegations center around events occurring *after* JAB Ohio and JAB Toledo ceased operations. In fact, Region 5 did not even seek discovery regarding JAB Company's involvement with JAB Ohio and JAB Toledo at the time of the alleged pollution events. *See* Region 5's Motion for Discovery dated February 26, 2009. Therefore, if this Court were to conclude that JAB Company ever became an operator of the Facility, it should further conclude that, as a matter of law, JAB Company was *not* an operator during the relevant time period, namely the period during which hazardous waste was released at the Facility.

## II. THE PRESIDING OFFICER PROPERLY DENIED APPELLANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY, AND BECAUSE OF APPELLANT'S REFUSAL TO PRESENT ANY EVIDENCE WHATSOEVER AT TRIAL, HAD NO CHOICE BUT TO AWARD ZERO PENALTY.

Appellant argues that Judge Moran's decision to deny Region 5's Motion for Accelerated Decision on Liability and Penalty, as it relates to the penalty component,[36] was reversible error

[36] As noted earlier, JAB – Ohio and JAB - Toledo did not contest liability, so the only issue for resolution was the penalty.

because there were no factual issues raised by Respondents with respect to assessing the amount of penalty and Judge Moran had no *right* to hold a hearing, even though he clearly wanted more information and evidence in order to properly exercise his discretion in determining an appropriate amount of penalty. Reading only Region 5's Appeal Brief, one would not recognize that disputed factual issues were raised by Respondents, were acknowledged as fact issues in Region 5's prior briefing and were demonstrated by the attachments included with Region 5's own motion. These omissions from Appellant's factual statement do not seem inadvertent, but in any event clearly undercut the basis for its present appeal.

Perhaps even more surprisingly, Appellant is essentially arguing that although Judge Moran was called upon to make what Region 5 acknowledges is a *discretionary* decision in determining a penalty, he lacked the authority or right to call for an evidentiary hearing, the purpose of which would be to provide him evidence regarding how to properly exercise his acknowledged discretion.

### A. When a Motion for Summary Judgment is Denied, and the Movant then Loses at Trial, the Movant Cannot Appeal the Denial of the Motion for Summary Judgment.

Before this Board considers the merits of Region 5's contention that Judge Moran was required to grant its Motion for Accelerated Decision on Liability and Penalty, it must first determine if Appellant has even preserved this issue for appeal. As discussed below, Region 5 lost its ability to appeal this issue when it lost at trial following denial of its motion and failed to make a motion for judgment as a matter of law at the end of the hearing.

Where "summary judgment [has been] denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed." *Jarrett v. Epperly*, 896 F.2d at 1016 (6th Cir. 1990); see also *Lind v. United Parcel Service, Inc.*, 254 F.3d 1281, 1286 (11th Cir. 2001) (holding that court will "not review the pretrial denial of a motion for summary judgment after a full trial and judgment on the merits."); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274. 277-78

(7th Cir. 1994); *Black v. J.I. Case Co.*, 22 F.3d 568, 569-70 (5th Cir.), cert. denied, 513 U.S. 1017 (1994); *Johnson International Co. v. Jackson National Life Ins. Co.*, 19 F.3d 431, 435 (8th Cir. 1994); *Lama v. Borras*, 16 F.3d 473, 477, n.5(1st Cir. 1994); *Whalen v. Unit Rig Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992), cert. denied, 507 U.S. 973 (1993); *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1358 (9th Cir. 1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1570 (Fed. Cir. 1986), cert. den., 479 U.S. 1072 (1987).

The above-stated rule, which appears to have been adopted by every circuit that has considered its application, has been applied to agency decisions denying summary judgment. *See National Engineering & Contracting Co. v. Occupational Safety & Health Admin., U.S. Dept. of Labor*, 928 F.2d 762, 768 (6th Cir. 1991). In *National Engineering*, the appellants contended that the Occupational Safety and Health Review Commission had erred by denying their pre-hearing motion for summary judgment. *Id.* The Sixth Circuit held that review of the denial was mooted by the subsequent trial of the matter. *Id.* The Court explained that in *Jarrett*, "our circuit held that 'where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed.'" *Id.* (citing *Jarrett,* 896 F.2d at 1016). The Sixth Circuit noted that the case under consideration differed somewhat from *Jarrett* in that "*Jarrett* involved the appellate review of a jury verdict following a pretrial ruling denying a motion for summary judgment," and not "an administrative hearing before an administrative law judge who had expressly reserved his ruling on the motion for summary judgment.'" *Id.* The Court then held that the factual distinction was not significant, however, and that the decision in *Jarrett* rested on logic that applied equally to administrative proceedings, stating that it "would be . . . unjust to deprive a party of a [judgment] after the evidence was fully presented, on the basis of an

appellate court's review of whether the pleadings and affidavits at the time of the summary judgment demonstrated the need for a trial." *Id.* (citing *Jarrett,* 896 F.2d at 1016).

In addition to the reasoning set forth in *Jarrett,* the Sixth Circuit has also stated that a deviation from the above-stated rule would "undo the carefully calibrated structure of the rules of civil and appellate procedure." *Barber v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 295 Fed. Appx. 786, 789 (6th Cir. 2008). Expounding on this point, the Circuit Court explained as follows:

> [A]fter trial, a judgment as a matter of law may be rendered only on a directed verdict motion or by motion at the end of trial. Absent the appropriate motions, judgment as a matter of law may not be granted. Review of a pretrial summary judgment motion would circumvent that rule; review of a denial of a directed verdict or judgment as a matter of law motion obviates the need for review of a denial of a pre-trial summary judgment.

*Id.* (quoting 19 Moore's Federal Practice § 205.08[2] (3d ed.2007)). The Tenth Circuit has similarly held that summary judgment is a pretrial matter that "ends at trial," and that after a trial, the proper mode of redress is by motion for judgment as a matter of law.[37] *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir. 1994). Consistent with the Sixth Circuit's and Tenth Circuit's reasoning, the Ninth Circuit has held that appellate review of a denial of summary judgment after a trial on the merits would "undermine the district court's discretion to send a case to trial 'if the judge ha[d] doubt as to the wisdom of terminating the case before trial.'" *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1507 (9th Cir. 1995), cert. denied, 516 U.S. 1146 (1996).

In the instant case and as discussed more fully below, Judge Moran properly exercised his discretion to deny the Region 5's Motion for Accelerated Decision on Liability and Penalty as it related to the penalty component, feeling that the better course was to proceed to a full hearing on

[37] Region 5 made no motion for directed verdict or judgment as a matter of law at the close of the evidentiary hearing in this case.

the merits. Region 5 refused to present any evidence at the hearing on the merits, with the result being that it did not satisfy its burden of presentation or persuasion required under Rule 22.24, and that the Respondents' burden of presentation and persuasion was never triggered. Under these circumstances, the rule adopted by the Sixth Circuit in *Jarrett* should be applied, such that this Board should hold that Region 5 is now foreclosed from appealing Judge Moran's opinion and order denying accelerated decision.

The fact that Region 5 refused to offer any evidence at the hearing does not justify a deviation from the rule adopted in *Jarrett*. Region 5 was afforded every opportunity to present evidence at the hearing and to have a "full trial on the merits," but chose not to do so. It would be a peculiar system of justice indeed if a party's deliberate refusal to participate in a trial or hearing, in direct contravention of judicial orders and applicable law, could serve as a basis for an exception to the rule in *Jarrett* expanding that party's appeal rights. Having failed to participate in any meaningful fashion at the hearing (with two counsel present representing Region 5), Region 5 cannot now be permitted to turn the applicable rules of civil and appellate procedure on their head in order to atone for its earlier error.

### B. The Presiding Officer Properly Ruled That There Were Disputed Factual Issues Relevant to Determination of Penalty Amount That Warranted Denial of the Motion for Accelerated Decision and the Holding of an Evidentiary Hearing.

There is no dispute between the parties that under the *Consolidated Rules*, a respondent has a right to a hearing on the merits if there is a genuine issue of material fact. (See, Appellant's Brief, p. 64) Nor is there any dispute that under EPA's adopted RCRA Civil Penalty Policy, the respondent's good faith efforts to comply, as well as the respondent's willfulness (or lack thereof) in committing the violation are two factors relevant for consideration in determining an appropriate penalty. (Appellant's Brief, p. 80; RCRA Civil Penalty Policy, pp. 35, 36) Finally, neither side disputes that

the Presiding Officer's decision on penalty amount is discretionary and that he is not bound to accept Region 5's proposed penalty, or Respondents' proposed penalty, so long as the penalty is based on facts as applied to EPA's Penalty Policy. (See, Appellant's Brief, p. 63)

What the parties do dispute, however, is whether the Presiding Officer was correct in holding that there were genuine issues of material fact pertinent to assessment of a penalty which warranted an evidentiary hearing for further development. (See, Appellant's Brief, at pp. 62-63) Region 5 argues that the Presiding Officer's ruling was in error because Respondents did not specifically cite to evidence in the pre-hearing record or attach any documentary evidence to their Response to Region 5's Motion for Accelerated Decision. *Id.* at p. 69. Region 5's argument is flawed, however, because facts which had already been *acknowledged* by Region 5 suggested error in Region 5's method of calculating penalty, and furthermore, the attachments to Region 5's own Motion for Accelerated Decision on Liability and Penalty mitigated against its own penalty calculation. On these bases, Judge Moran correctly held that there remained disputed factual issues relating to proper assessment of penalty amount under the Penalty Policy that should be resolved through an evidentiary hearing.

In order to understand the factual issues which Judge Moran found were in dispute, it is first important to understand how Region 5, solely through its trial counsel, justified the penalty amount proposed in this proceeding. As part of Region 5's submission in support of its Motion for Accelerated Decision on Liability and Penalty, Region 5 submitted a document entitled Memorandum in Support of Penalty Amount Proposed ("Penalty Memorandum"), authored solely by Richard Wagner, who also served as Region 5's counsel of record throughout the proceedings

below.[38] In Mr. Wagner's legal memorandum, he gave zero adjustment to the penalty calculation for Respondents JAB Ohio's and JAB Toledo's good faith efforts to comply with the law (see, Penalty Memorandum, p. 22) and actually *increased* the calculated penalty amount by 10% because, in the Attorney Wagner's view, the violation was willful (Penalty Memorandum, p. 23). Indeed, counsel's legal memorandum states:

> "An upward adjustment is warranted in Respondents' penalty for its degree of willfulness and/or negligence, *as there is no apparent reason that it could not comply with the law*." (Emphasis added)

Respondents JAB Ohio and JAB Toledo have, from the outset of these proceedings, argued that the proposed penalty was excessive because there were good faith attempts to comply with the law and the violations were not "willful." In support of the latter point, Respondents' pre-hearing exchanges made it clear that JAB Ohio's and JAB Toledo's inability to pay for closure activities was the reason various actions required under RCRA were not *able* to be performed, directly contradicting Mr. Wagner's statement that "there is no apparent reason that it could not comply." (See, Respondents' Supplemental Prehearing Exchange)[39]

Following the filing of Region 5's Motion for Accelerated Decision on Liability and Penalty, Region 5 filed lengthy briefs on July 2, 2009 in support of a separate Motion for Accelerated

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[38] As trial counsel, Mr. Wagner was barred by the Rules of Professional Conduct for both Illinois, where he is licensed, and Ohio, where the hearing was held, from testifying as a witness, and hence his "Memorandum" cannot possibly be construed as "evidence" in the record. *See* Illinois Rules of Professional Conduct, Rule 3.7 "Lawyer as Witness" and Ohio Rules of Professional Conduct, Rule 3.7 "Lawyer as Witness."

[39] Appellant attempts to obfuscate this factual assertion made by Respondents by arguing that neither JAB Toledo nor JAB Ohio asserted an "inability to pay penalty" defense, thus proving that they *could* afford to pay for remediation measures. (Appellant's Brief, pp. 93, 94) This argument misses the point. The fact that neither Respondent asserted what amounted to an affirmative defense regarding ability to pay a *penalty* does not *prove* anything, much less that these Respondents had the financial resources to do the required work. Furthermore, the defense, had it been asserted, only goes to payment of the *penalty* ultimately awarded by the ALJ, not to the financial ability of the Respondent to have performed remedial activities prior to filing of the Complaint.

Decision on Derivative Liability in the JAB Ohio and JAB Toledo cases. In those briefs, Region 5 made it perfectly clear that it did not contest the inability of the two subsidiary corporations to pay for compliance measures, and indeed argued with documentary support that such was the case. For instance, at page 18 in Region 5's brief in support of the motion in the JAB Toledo case, it stated:

> "The data summarized in Table 1 also shows that JAB Toledo in many years had a balance of zero in current assets, and thus had no cash or cash equivalents to carry on its activities and responsibilities, such as remediation of the site." (Region 5 Memorandum, p. 18)

On page 32, Region 5 went further and stated:

> "Simply put, assuming the violation alleged in the Administrative Complaint and Compliance Order is found proven, should only JAB Toledo be found liable, no penalty will be paid, or Compliance Order carried out, as JAB Toledo has no ability to do either." (Id. at 32)

Likewise, in Appellant's Briefs in Support of its Motion for Accelerated Decision on Derivative Liability in the JAB Ohio case, similar statements were made:

> "A conclusion is warranted that JAB Ohio's assets were likely below its liabilities in all years for which data are available, and the company was insolvent between 2001 and 2007. Being without assets, the company could not cover its obligations independently." (Region 5 Memorandum, p. 19)

In both the JAB Ohio and JAB Toledo Briefs, Region 5 proposed factual findings by the Presiding Officer that included, "JAB Toledo, on closing its facility in 1997 was not a viable company, . . ." and "JAB Ohio, on closing its facility in 2001, was not a viable company. . . ." (JAB Toledo Region 5 Memorandum, p. 50; JAB Ohio Region 5 Memorandum, p. 52) Leaving no doubt as to the inability of either JAB Ohio or JAB Toledo to perform necessary remediation activities at their respective sites, Region 5 attached to these accelerated decision motion briefs as Exhibit N the audited financials for JAB Ohio and JAB Toledo supporting these statements of insolvency.

It was thus in the context of this factually supported argument already advanced by Region 5 that JAB Ohio and JAB Toledo responded to Appellant's Motion for Accelerated Decision on

Liability and Penalty on July 30, 2009 asserting that the violations were not willful because Respondents lacked the financial resources (Respondents' Memorandum in Opposition to Motion for Accelerated Decision on Liability and Penalty, pp. 2-4). Neither JAB Ohio nor JAB Toledo attached the financial reports showing their insolvency upon cessation of their operations because Region 5 had already presented these documents to the Presiding Officer in connection with their other Motions for Accelerated Decision and had advocated and argued the very point articulated by Respondents that it was not a lack of willingness to perform remedial activities, but rather a lack of financial ability which resulted in the companies being unable to comply with all of the legal requirements under RCRA.

At a time when it was obvious that *both* parties were in agreement regarding JAB Ohio's and JAB Toledo's inability to fund remediation activities, it was surprising indeed to read in Region 5's August 12, 2009 Reply Brief in Support of its Motion for Accelerated Decision on Liability and Penalty the following at pp. 4-5:

> "In urging a reduction in the penalty amount for an 'inability' to comply with the RCRA requirement violated, on grounds that it was a 'lack of funds' that caused it to be unable to follow through on the drip pad closure plan, have cited no evidence [sic]. *Respondent's statement that it lacked funds to perform the tasks necessary to comply with RCRA is nothing more than an 'unsupported allegation,' a 'conclusion,' and as such cannot defeat a motion for accelerated decision.*" (Emphasis added)

Adding to Region 5's contradictions and inconsistencies which pervaded its briefing on the separate accelerated decision motions, Region 5 filed another reply brief one week later, on August 19, 2009, in support of its Motion for Accelerated Decision on Derivative Liability, answering its own challenge regarding a lack of evidence of JAB Ohio and JAB Toledo's inability to pay:

> "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." (Reply Brief at p. ___)

Leaving no doubt as to its position on this issue, Region 5 further noted at page 5 of its Reply Brief that:

> "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 *insufficient funds* to pay for this work. JAB Toledo had *no funds whatsoever*." (Emphasis in original)

Thus, both before Respondents filed their briefs in opposition to the Motions for Accelerated Decision on Liability and Penalty, and after the filing of those briefs, Region 5 argued and documented with audited financials one of the very facts which Respondents used to oppose the Motion for Accelerated Decision on Penalty Amount – their insolvency. This insolvency goes directly to the issue of willfulness and directly contradicts trial counsel's statement in his Penalty Memorandum proposed that "there is no apparent reason that it [JAB Toledo and JAB Ohio] could not comply with the law." In the context of these inconsistent positions asserted by Region 5, the following statement by the Presiding Officer is hardly surprising:

> "While EPA then contends that the 'Respondent cited no evidence in the record to support its assertions' that financial inability was the source of its inability to comply with the cited regulation, this claim is beyond disingenuous because EPA well knows that the Respondent had become insolvent." (Initial Decision Regarding Penalty at p. 3)[40]

Essentially, Region 5 argued below, and argues now to this Board, that Judge Moran and the Board are supposed to turn a blind eye to arguments made and documents provided *by Region 5* in connection with one of its motions, in order to allow Region 5 to argue an opposite factual position in support of another of its motions. The facts are the facts, and Region 5 cannot have the subsidiary Respondents be indisputably insolvent for purposes of one motion, but indisputably able to pay for

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[40] See also, Order on EPA's Motion for Accelerated Decision on Liability and Penalty (JAB Ohio case) at p. 7: "EPA contends, contrary to the facts, 'there is no apparent reason that [Respondent] could not comply with the law.' *Id.* at 23. This is disingenuous, as it ignores that the Respondent went out of business and lacked the funds to carry out the drip pad closure."

closure activities in another of its motions. Both parties agreed that the subsidiaries were financially unable to perform actions that were required, but Region 5 increased its proposed penalty by 10%, while Respondents argued that the penalty should be reduced substantially because of the lack of willfulness. Judge Moran was correct in recognizing this as a material factual dispute.

### C. Region 5 Failed to Satisfy Its Initial Burden of Establishing That There Was No Genuine Issue of Material Fact for Trial Because the Attachments to the Region 5's Motion Created Genuine Issues of Material Fact.

As noted above, Region 5 claims that the Presiding Officer erred in not granting its Motion for Accelerated Decision on Liability and Penalty because Respondents did not specifically site to "evidence" in opposing the motion. The truth of the matter, however, as recognized by the Presiding Officer, was that the "evidentiary matter" submitted by Region 5 with its own Motion for Accelerated Decision on Liability and Penalty established some of the very factual disputes upon which the Presiding Officer based his decision to deny the motion.

"Where the evidentiary matter in support of [a] motion [for summary judgment] does not establish the absence of a genuine issue, *summary judgment must be denied even if no opposing evidentiary matter is presented.*" *Stepanischen v. Merchant's Dispatch Transp Corp.*, 722 F.2d 922, 929 (1st Cir. 1993) (emphasis in original). A similar ruling was made in *John v. State of Louisiana*, 757 F.2d 698, 711-714 (5th Cir. 1985). In *John*, the Fifth Circuit reversed the district court's grant of a partial summary judgment in favor of the defendants where "the very evidence cited by defendants in their motion for summary judgment reveal[ed] a question of fact." *Id.* The court explained that "[a]lthough Rule 56(e) does not allow a party to 'rest upon the mere allegations or denials of his pleading,' when his adversary moves for summary judgment, the Rule does not relieve the movant of his duty to establish the absence of a genuine issue as to material facts." *Id.* at 708-709. Based on the foregoing, the court held that the plaintiff was entitled to rely on materials in the

record that raised a genuine issue of material fact even though it was the moving party who drew the district court's attention to these materials in the proceedings below. *Id.* at 712.

In the instant case, Judge Moran properly denied Region 5's Motion for Accelerated Decision on Liability and Penalty because Judge Moran concluded that there were documents attached to Region 5's own motion that created genuine issues of material fact as to the appropriateness of its proposed penalty. Judge Moran specifically noted in his Initial Decision that "some of the documents . . . attached to [the Penalty Memorandum] actually supported Respondent's contention that the penalty amount was excessive." (Initial Decision, p. 7) Judge Moran correctly pointed out that attachments A, B, C, D, L, K and O to the Region 5 Memorandum all tend to show that Respondents made a good faith effort to comply with their remedial obligations under RCRA. *Id.* Attachment O, for example, which is a letter authored by Ohio EPA, states that Respondents had "adequately demonstrated abatement of all violations discovered" during his prior inspection.

Thus, Judge Moran correctly found that there was evidence supplied by Region 5 tending to show that Respondents acted in "good faith." Region 5 obviously disputed this fact, (i.e. there was a genuine issue as to this fact) because even though the RCRA Civil Penalty Policy states that "good faith" is a mitigating factor, and that the penalty maybe reduced by as much as 40% for good faith, Region 5 did not reduce the proposed penalty against Respondents at all on account of Respondents' good faith. Furthermore, this fact (a potential penalty reduction of up to 40%) was obviously material, and not, as Region 5 now suggests, merely something to "quibble" over. (Appellant's Brief, p. 80) It was, therefore, eminently reasonable for Judge Moran to find that, on the face of Region 5's motion and supporting papers, there were questions of fact as to the appropriateness of the proposed penalty, and to proceed to a hearing on the merits. This conclusion is bolstered by case law holding that issues of intent like good faith are ill-suited for summary judgment, and should be

left to the finder of fact. See, e.g., *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 318 (3d Cir. 1999) ("where there is a genuine dispute about whether the employer acted in good faith, summary judgment will typically be precluded"); *Lang v. Retirement Living Publ'g Co.*, 949 F.2d 576, 583 (2d Cir. 1991) ("[i]ssues of good faith are generally ill-suited for disposition on summary judgment").

### D. Even if the Presiding Officer Could Have Decided the Issue of Penalty Amount on the Accelerated Decision Motion Briefs, He Had the Discretion to Deny the Motion and Hold an Evidentiary Hearing.

If the Board concludes, as Respondents have, that Judge Moran properly found that there were disputed fact issues regarding application of EPA's Penalty Policy in determining an appropriate penalty, then his decision to deny the motion for accelerated decision was correct and Region 5 was obligated to present its case at an evidentiary hearing as was ordered and scheduled. Even if, however, Judge Moran would have been *entitled* to decide the penalty amount on the parties' motion briefs and attached documents, the law is quite clear that he nonetheless had the discretion to hold a hearing if he felt such a hearing would be necessary or even useful in deciding this issue. Ironically, even though Region 5 acknowledges that determination of the appropriate penalty is a discretionary decision to be made by the Presiding Officer and that the Presiding Officer is under no obligation to accept EPA's proposed penalty amount, they implicitly argue that the Presiding Officer has no discretion to say "I have some of the information I need in the briefs, but I need more evidence to properly exercise my discretion." In other words, even if the Presiding Officer wants to hear more evidence in exercising his discretion, Region 5 contends he simply cannot do so by holding a hearing.

The analysis supporting the Presiding Officer's discretion to hold an evidentiary hearing begins with 40 C.F.R. § 22.4. Subsection (c), which defines the duties and powers of the presiding officer states that "the presiding officer shall conduct a fair and impartial proceeding, *assure that the*

*facts are fully elicited*, adjudicate all issues and avoid delay." (Emphasis added) The rule goes on to specify various powers of the presiding officer, including:

> "(1) Conduct administrative hearings under these Consolidated Rules of Practice;
>
> * * *
>
> (5) Order a party, or an officer or agent thereof to produce testimony, documents or other non-privileged evidence . . .
>
> (6) Admit or exclude evidence;
>
> (7) Hear and decide questions of facts, law or discretion;"

In the proceedings below, Judge Moran could not have made it more clear that he felt an evidentiary hearing was necessary and appropriate "to assure that the facts are fully elicited" and in doing so, ordered Region 5 to produce its penalty calculation witness at the hearing so that he could hear an explanation of how various factual factors included in EPA's Penalty Policy should be applied in exercising his discretion to award an appropriate penalty amount.[41] Equally clear was the

[41] The EPA asserts that Judge Moran erred in ordering Region 5 to produce its penalty calculation witness to be cross examined at the hearing . The EPA sets forth various arguments to support this assertion, all of which are completely without merit, and even if accepted, should not affect the outcome of this appeal for the other reasons set forth herein.

Notably ignored in Region 5's argument is the fact that 40 C.F.R. § 22.4(c) expressly authorizes an ALJ to "order a party, or an officer or agent thereof to produce testimony, documents or other non-privileged evidence. . . ." Even more remarkable is Region 5's failure to acknowledge the fact that the RCRA Civil Penalty Policy itself expressly contemplates the testimony of EPA's penalty calculation witness at the hearing: "*Enforcement personnel must be prepared to present at the pre-hearing conference or evidentiary hearing more detailed information reflecting the specific factors weighed in calculating the penalty proposed in the complaint.*" Penalty Policy, p. 8. (Emphasis added) How then, can Region 5 seriously question the Presiding Officer's authority to do precisely what is contemplated by the Rules and the Penalty Policy itself?

Region 5 argues that Judge Moran "misse[d] the critical distinction between factual testimony and legal argument." (Appeal Brief, p. 70) Region 5 follows up this statement by stating that whether it had "in fact faithfully adhered to the penalty policies' instructions" was not a question of fact, such that it could not possibly require further factual development. *Id.* Based on the foregoing statements, Region 5 appears to be suggesting that if Respondent's counsel directed a question to the Region 5's penalty witness such as, "did the EPA properly consider this piece of

evidence [showing Respondent's good faith] in deciding not to adjust the penalty downward, and if not why not?", this question could not elicit any factual response whatsoever with respect to the appropriateness of the proposed penalty. Region 5's suggestion is ludicrous. What if the response to that question were, "no the EPA ignored that evidence when determining whether respondents acted in good faith"? Would that response not provide Judge Moran with valuable factual information regarding the "appropriateness" of the Region 5's proposed penalty?

As any person who has reviewed the Penalty Policy and its Assessment Matrix knows, the Policy and Matrix is a complicated document consisting of roughly 100 pages. The Matrix sets forth numerous factors that can influence where on the Matrix a proposed penalty should fit. Judge Moran was entitled to order cross examination of the EPA penalty calculation witness so that the Respondents, and if necessary, Judge Moran himself, could elicit factual information from the witness with respect to exactly how Region 5's proposed penalty ended up where it did.

Region 5's second argument as to why Judge Moran erred in ordering cross examination of the EPA's penalty witness is that "the *principal reason* to take testimony and allow for cross examination of witnesses regarding factual issues is to allow the trier of fact to determine witness credibility and demeanor," and witness credibility and demeanor are irrelevant to the appropriateness of the EPA's proposed penalty. *Id.* at p. 70. Having set forth this argument, Region 5 then proceeds to act as if determining witness credibility and demeanor is the *only* reason for cross examination. *Id.* at pp. 71-72. In doing so, Region 5 ignores Judge Moran's stated reason for ordering cross examination, which was to give the Respondents, and presumably Judge Moran himself, the opportunity to elicit facts that were peculiarly within the knowledge and possession of the EPA. (Order on Motion for Accelerated Decision, p. 13) Judge Moran's stated purpose for ordering cross examination comports with case law holding that "[f]or purposes of evidentiary hearing, the parties are free to use all customary avenues, including the right to subpoena witnesses and conduct direct and cross examination, *in order to explore and elicit the relevant facts for consideration by the court.*" *Lewis v. Secretary of Health and Human Services*, 707 F.2d 246, 250 (6th Cir. 1983) (emphasis added).

Finally, Region 5 argues that although ALJs have routinely "express[ed] a preference for a live witness to present a proposed penalty calculation" in the past, the only reason that they have been allowed to hear such testimony in the past is that the EPA wished to avoid "conflict with the presiding officer by providing such a witness." *Id.* at pp. 72-73. Region 5's argument continues that "the decision of the Agency's enforcement staff not to mount a fight against such a requirement in other cases does not make that requirement any more reasonable or legally acceptable." *Id.* Perhaps the more plausible reason why this issue has never been raised by the EPA's enforcement staff in the past, however, is that, unlike Mr. Wagner, most of the EPA's enforcement staff respect the authority of ALJs to order a hearing on the merits where, as here, there is a distinct need for further factual development with respect to the "appropriateness" of a proposed penalty. It defies belief that Region 5 would try and characterize Judge Moran's order for cross examination of a penalty witness as not being "reasonable" where Judge Moran alone was charged with assessing the "appropriateness" of the EPA's proposed penalty, and where Judge Moran believed that witness testimony would help him in making that assessment. In summary then, Region 5's arguments as to why Judge Moran erred in ordering cross examination of the EPA's penalty witness hold no water and are nothing but a

fact that he felt that the bits of information in documents provided by Region 5 in the form of attachments to its brief were not enough to "fully elicit" the facts needed in exercising his discretion. Moreover, Judge Moran properly recognized that the document entitled "Memorandum in Support of Penalty Amount Proposed" was not "evidence," but simply a legal brief authored by trial counsel and unsupported by a witness competent to testify. As will be discussed in greater detail below, Region 5 refused to produce a witness competent to testify or any evidence whatsoever at the hearing properly scheduled by the presiding officer, despite being ordered to do so.

Further support for the conclusion that Judge Moran had the discretion to conduct an evidentiary hearing is found in 40 C.F.R. § 22.15(c), where the rules provide that *even if the respondent does not request a hearing*, "the presiding officer may hold a hearing if issues appropriate for adjudication are raised in the answer." The excessiveness of Region 5's proposed penalty was expressly raised in Respondent's answer.

Finally, even the rule cited by Appellant for the proposition that Judge Moran was obligated to decide the penalty amount solely on the basis of the motion papers, fails to support the contention asserted. Rule 22.20(a) states:

> "The Presiding Officer ***may*** at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." (Emphasis added)

The rule does not state that the Presiding Officer "must" render accelerated decision if there are no genuine issues of material fact and furthermore states that such order "may" be granted if a party is entitled to judgment "as a matter of law" without mention whatsoever of a decision not made as a

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thinly-veiled attempt to hide the fact that what Mr. Wagner really wanted in the proceedings below was for Judge Moran to simply rubber stamp his proposed penalty.

matter of law, but rather, as Region 5 concedes here, as a matter of discretion.[42] Based on the foregoing, it is clear that the *Consolidated Rules* support Judge Moran's exercise of discretion in denying Region 5's motion and proceeding to a hearing.

This conclusion is also compelled under this Board's precedent in *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997). In *In re Green Thumb*, this Board held that at the accelerated decision stage, "Green Thumb did not put into issue, before the Presiding Officer, a single genuine issue of material fact." This Board concluded, therefore, that Green Thumb had no *right* to a hearing under FIFRA or under the due process clause of the Constitution. Notwithstanding the foregoing, this Board held that "the Presiding Officer [still] retained *discretion* to hold a hearing in his *informed discretion,*" and that it was, therefore, "appropriate for [the Board] to review his exercise of discretion." *Id.* at 792 (emphasis added). The court ultimately concluded that "the Presiding Officer's *election* not to hold an evidentiary hearing was neither erroneous nor unreasonable." *Id.* at 794 (emphasis added). Thus, in *In re Green Thumb*, this Board clearly held that even in the absence of a genuine issue of material fact, a Presiding Officer still has discretion to deny a motion for accelerated decision and to proceed to a hearing.[43]

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[42] The distinction between a decision made "as a matter of law" and a decision made by exercise of discretion is important here, where Appellant acknowledges that the latter is the type of decision Judge Moran had to make with regard to penalty amount. A result compelled as a matter of law can be, as the label suggests, only *one* outcome (i.e. the law dictates that X must be the result, not Y or Z). Yet here, Region 5 admits that the Presiding Officer was *not* obligated to accept Region 5's proposed penalty amount but was "free to exercise his discretion in determining appropriate penalties." (Appeal Brief, p. 63) Given the Presiding Officer's latitude in determining the appropriate amount of penalty, how can it be seriously argued that he is powerless to ask for additional factual development beyond that supplied with motion papers?

[43] Region 5 cites extensively to this Board's opinion in *In re Green Thumb* in its brief on appeal; however, quite astonishingly, it ignores the only portions of this Board's opinion that address the issue of the ALJ's discretion. Region 5 repeatedly cites *In re Green Thumb* to support the proposition that a party loses its *right* to a hearing if that party fails to present a genuine issue of material fact for trial. (See, e.g., Appellant's Brief, p. 64) Region 5 then states that in *In re Green Thumb*, this Board held that "a party waives its *right* to an adjudicatory hearing where it fails to

The foregoing conclusion is also bolstered by case law and commentary interpreting the summary judgment provisions of the Federal Rules of Civil Procedure, which, as Region 5 notes in its appeal brief, is persuasive precedent with respect to issues arising under the *Consolidated Rules*. (See Appellant's Brief, p. 64, citing *In re Green Thumb, supra*). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), for example, the U.S. Supreme Court held that even where a party is technically entitled to summary judgment, a trial judge has discretion to deny summary judgment and to proceed to trial. The Court stated, in pertinent part, as follows: "[n]either do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Id.* (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

In *Veillon v. Exploration Services*, 876 F.2d 1197, 1200 (5th Cir. 1989), the Fifth Circuit held that a district court judge did not err in refusing to grant the plaintiff's unopposed motion for summary disposition and in ruling that the case should proceed to trial. *Id.* The Fifth Circuit reasoned that "[a] district judge has the discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof *if the judge has doubt as to the wisdom of terminating the case before a full trial.*" *Id.*[44] (emphasis added).

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dispute the material facts upon which an agency's decision rests" and that "the *constitutional right* to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute." *Id.* (emphasis added). Certainly, the Respondents do not dispute that a party may waive its *right* to a hearing by failing to present a genuine issue of material fact in response to a properly supported motion for summary judgment; however, this rule in no way supports the conclusion that Region 5 leaps to, which is that where a party fails to present a genuine issue of material fact, "the Presiding Officer simply does not have the discretion to . . . hold[] a hearing. . . ." (Appellant Brief, p. 67)

[44] The Appellant also relies heavily on *Newell Recycling Company, Inc. v. U.S. E.P.A.*, 8 E.A.D. 598 (EAB 1999), a case which is completely inapposite with respect to the issue of a Presiding Officer's discretion. The issue in *Newell Recycling* was simply whether "it was per se impermissible for the Presiding Officer to assess a penalty . . . without first conducting an evidentiary hearing." *Newell Recycling*, 8 E.A.D. at 625. The Board held that in *In re Green*

In addition to the foregoing cases, the following authorities have either relied on or recognized the rule that a judge has discretion to deny an unopposed motion for summary judgment for a variety of prudential reasons: *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir. 1984) ("[e]ven where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it"); *Johns v. International Business Machines Corporation*, 361 F. Supp. 2d 184, 190-91 (2005) ("[d]enial of summary judgment is addressed to the discretion of the Court, in a case that would benefit from a full trial"); Moore's Federal Practice, § 56.41 [3][d] (Mathew Bender 3d ed.) ("[t]he trial court has the right to exercise its discretion to deny a motion for summary judgment, even if it determines that a party is entitled to it, if, in the court's opinion, the case would benefit from a full hearing."); C. Wright, A. Miller and M. Kane, 10A Fed. Prac. & Proc. Civ. § 2725 (3d ed.).

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*Thumb*, it had previously ruled that "an oral hearing . . . is *required* only if the party requesting the hearing raises a genuine issue of material fact." *Id.* (emphasis added). The Board's decision in *Newell Recycling* was appealed to the Fifth Circuit. *Newell Recycling v. U.S. E.P.A.*, 231 F.2d 204, (5th Cir. 2000). The Fifth's Circuit's opinion is also completely inapposite with respect to the issue of judicial discretion. The Fifth Circuit simply held that because Newell Recycling had failed to raise a genuine issue of material fact, Newell Recycling had not been deprived of a *due process right* to a hearing.

The flaw in Region 5's analysis of *Newell Recycling* was clearly recognized by Judge Moran who discussed the case at page 4 of his Initial Decision. Judge Moran emphasized that *Newell Recycling* supported the proposition that a presiding officer has the discretion to hold an evidentiary hearing on the amount of a penalty, even where, as in *Newell Recycling*, there was no dispute of material facts. In Judge Moran's words:

> "While the Court may not be under an *obligation* to hold a hearing, it still has the discretion to do so. It is the Court's view that such discretion should almost always be exercised to grant a respondent the opportunity to cross-examine EPA's penalty proposal. The reasons for this are plain. In the Court's experience of nearly 13 years of presiding in EPA administrative litigation, far more often than not, cross-examination has disclosed flaws in EPA's penalty calculation, which flaws were not apparent on the face of the document supporting it." Initial Decision, p. 4. (emphasis in original).

The instant case was clearly a case where the Presiding Officer had doubts as to the wisdom of terminating the case before a full trial, and where he believed that the best course would be to proceed to a hearing on the merits. Indeed, in the very first paragraph of the discussion section of his Order on Region 5's Motion for Accelerated Decision on Liability and Penalty at page 9, Judge Moran stated, "[t]he Court finds that there are material facts in dispute as to the appropriate penalty *and in addition to that finding, the Court, in the exercise of its discretion, finds that a hearing on the penalty issues is otherwise warranted.*" (emphasis added) Judge Moran cited the fact that in his experience "a respondent will not know, until the process of cross examination has been afforded, if the [Region 5] has in fact faithfully adhered to the penalty policies' instructions." *Id.* Judge Moran explained that "while a respondent is apt to be on equal footing as to knowledge of the facts surrounding an alleged violation, the same is not true where the issue is the Agency's application of its penalty policy to such alleged violations." *Id.* Based on the foregoing, Judge Moran clearly had doubts as to the wisdom of granting an accelerated decision where the facts relating to the appropriateness of the proposed penalty were peculiarly within the Region 5's knowledge and possession and where documents attached to Region 5's own motions called into question Region 5's application of the facts to the EPA Penalty Policy. Judge Moran obviously felt that the better course was to give Region 5 a chance to present whatever evidence it chose to support its proposed penalty and to give the Respondents the opportunity to present its evidence and cross examine the EPA agent responsible for calculating the proposed penalty so that the Respondents could have a full and fair opportunity to elicit these facts.

Since the Presiding Officer here had the discretion to hold an evidentiary hearing, his decision to do so must be reviewed on an abuse of discretion standard. "A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial

court," but rather, "will look for reasons to sustain a trial court's discretionary decision." 5 Am. Jur. 2d Appellate Review § 623 (2010) (citing numerous cases). "A discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion." *Id.*

"A determination that a trial court has abused its discretion involves far more than a difference in judicial opinion." *Id.* It requires a finding that the trial court's decision in the proceedings below was "arbitrary, unreasonable, or unconscionable," or "exercised on untenable grounds or for untenable reasons, or one with which no reasonable person could . . . agree." *Id.* "It has been held that to demonstrate an abuse of discretion, the complaining party must show the trial court's decision was so arbitrary and unreasonable as to shock one's sense of justice." *Id.*

Region 5 makes no credible argument that Judge Moran's decision to hold a hearing was arbitrary, unreasonable or one with which no reasonable person would agree. Thus, Region 5's Motion for Accelerated Decision on Liability and Penalty was properly denied and Region 5 was properly ordered to present its penalty case at the evidentiary hearing.

**E. Region 5's Refusal to Participate in the February 23, 2010 Evidentiary Hearing Means that there is No Evidentiary Record to Support Anything Other than a Zero Penalty Award.**

Normally, when a party loses a summary judgment motion, it obeys the Court's scheduling orders, appears at trial with counsel, offers either testimony or documents or both into evidence, cross examines the other side's witnesses and awaits a decision by the judge. There is no reason Region 5 could not have done that in this case where it was represented at the hearing by not one, but two attorneys, and in over 30 years of practice, Respondents' counsel has never seen a party pout about an adverse summary judgment decision to the point of refusing to present a case at trial. Judge Moran likewise found Region 5's conduct rather bizarre, particularly since it was ostensibly done for

the purpose of "preserving" its appeal rights.[45] [46] Nonetheless, that is what happened, and in light of Region 5's failure to present any evidence at the hearing, the Presiding Officer had absolutely no choice but to award zero for the penalty award.

In an obvious attempt to undue a fatally flawed strategy decision, Region 5 now argues, without support, that the documents that were attached to its earlier Motion for Accelerated Decision on Liability and Penalty should be considered "evidence" in the record for purposes of an appeal of the Initial Decision[47] (Appellant's Brief, p. 85), contrary to the ruling of the Presiding Officer (Initial Decision pp. 3, 4, 8). Indeed, Region 5 even goes further and argues, again without support, that documents attached to its Pre-Hearing Exchange with Respondents early in the case should likewise be considered "evidence" in the record. Appellant's Brief, p. 89. There can be no dispute that neither the documents exchanged in Appellant's Pre-Hearing Exchange nor documents attached to

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[45] *See* Supplemental Pre-hearing Exchange of the Administrator's Delegated Complainant, Docket #68, p. 2.

[46] It was only because of Mr. Wagner's defiant strategy to refuse introduction of any evidence at trial that Judge Moran explored the possible reasons for such strange behavior by Mr. Wagner (*see* Initial Decision, p. 9). While Region 5 now tries to portray Judge Moran's dicta comments regarding Mr. Wagner as some sort of witch hunt, the fact is that the Judge's bewilderment was understandable and his commentary on Mr. Wagner's unique views of the limited role of ALJ's is irrelevant to the outcome of the case, both below and with this Board.

[47] Region 5 also argues, beginning on page 74 of its brief, that Respondents presented no evidence to support the Respondents' argument that the proposed penalty was excessive. As stated above, given Region 5's refusal to participate in the February 23, 2010 hearing, and its concomitant failure to carry its burden of presentation and persuasion on its *prima facie* case, the burden of presentation and persuasion *never shifted to the Respondents*. In other words, the Respondents were not required to present *any* evidence at the hearing because no *prima facie* case was presented requiring rebuttal. Notwithstanding this fact, the Respondents elected to present some evidence showing that even if Region 5 had carried its burden of showing the existence and amount of environmental contamination at the Respondents' sites, as well as how the statutory and policy penalty factors had been or should be applied, the proposed penalty would still have been excessive because the Respondents made a good faith effort to remediate the contamination and any failure to remediate was not willful.

its accelerated decision briefs were ever "offered" or "admitted" into evidence as required to establish an evidentiary record for appeal.

Although conveniently ignored by Appellant, the *Consolidated Rules* repeatedly observe that "evidence" must be *presented* and *admitted* in order for it to become "evidence" in the record upon which the Presiding Officer's decision *must* be based. In 40 C.F.R. § 22.22 of the Rules entitled "Evidence," the words "admit," "admitted," "admission," or "introduced into evidence" are used no less than eight times in reference to the procedure for including "evidence" in the record. Moreover, 40 C.F.R. § 22.23(b) addresses a situation where the Presiding Officer refuses to admit into evidence testimony or documents offered by one party or the other, making it clear that not all evidence offered will necessarily be admitted. The concept of offering evidence and admitting the evidence is unambiguously embraced by the *Consolidated Rules*, just as it is in the Federal Rules of Evidence. And, as noted earlier, the Presiding Officer's decision must be based upon "a preponderance of the evidence." 40 C.F.R. § 22.24(b).

The above-referenced Sections of the *Consolidated Rules*, when read in their proper context as rules relating to "Hearing Procedures," compel the conclusion that the "evidence" upon which a post-hearing decision must be made is limited to oral and written evidence that was offered at the hearing and admitted by the presiding judge. Indeed, such was the conclusion by the EPA's Chief ALJ, Susan L. Biro, in a case where the respondent challenged the appropriateness of the EPA's proposed penalty for 166 violations of FIFRA. *In the Matter of: 99 Cents Only Stores,* 2010 WL 2787749 (June 24, 2010). In rendering her initial decision, Judge Biro refused to consider "[t]wo demonstrative exhibits" that were "marked for identification and used during the course of the hearing" because "neither was offered or admitted into the record as evidence." *Id.* Based on the foregoing, it would be incongruous for this Board to conclude that it can go beyond the hearing

record when deciding this appeal by relying on documents that were attached to the parties' prehearing motions but not even "used during the course of the hearing." If the drafters of the *Consolidated Rules* had intended for documents and affidavits from outside the hearing record to form the basis of a post-hearing decision, then the drafters would have given Presiding Officers the authority to consider such evidence and would have dispensed with the requirement for *admission* of evidence by the Presiding Officer.[48]

In addition to the foregoing, courts in a variety of jurisdictions, including federal courts, have consistently held that if summary judgment affidavits and documents are not *admitted at trial*, an appellate court cannot consider such documents as "evidence" in an appeal from a trial on the merits. See, e.g. *Irving v. U.S.*, 49 F.3d 830, 836, (1st Cir. 1995) ("documents attached to summary judgment motions are not evidence unless admitted at trial"); *Ernst v. Child and Youth Services of Chester County*, 108 F.3d 486, 488-89 (3d Cir. 1997), cert denied, 522 U.S. 850 (1997) (finding no reversible error where trial court refused "to consider the substance of . . . statements [in affidavit supporting summary judgment motion] when the contents of the affidavit were never offered into evidence during the trial"); *Johnson Intern.*, 19 F.3d at 434 ("[a] ruling by a district court denying summary judgment is interlocutory in nature and not appealable after a full trial on the merits. The final judgment from which an appeal lies is the judgment on the verdict. *The judgment on the verdict, in turn, is based not on the pretrial filings under Federal Rule of Civil Procedure 56(c), but on the evidence adduced at trial.*")(emphasis added); *Noble Exploration, Inc. v. Nixon Drilling Co,*

[48] With respect to the EPA's argument that documents in Complainant's Prehearing Exchange should be considered part of the hearing record, the EPA has ignored contrary precedent in case law that the EPA cited in its own brief on appeal. In *Titan Wheel Corp. of Iowa v. U.S.E.P.A.*, 291 F.Supp.2d 899 (S.D. Iowa 2003), (cited in Appellant's Brief p. 19) the district court cited the following statement from the ALJ's opinion in *In re Dr. Robert Schattner*, No. FIFRA-92-H-02, 1993 EPA ALJ LEXIS 460, at *2 (February 11, 1993): "[b]eing in the nature of discovery, pre-hearing exchange exhibits are, of course, not in evidence unless offered and admitted at the hearing."

*Inc.*, 794 S.W.2d 942, 944 (Tex App. 1990) ("[a]lthough the contract was attached to Nixon's reply to Anthony's motion for partial summary judgment, *it was not introduced into evidence at trial on the merits, and we may not consider it on appeal*")(emphasis added); *State Farm Life Insurance Co. v. Smith*, 29 Ill. App. 3d 942, 949; 331 N.E.2d 275 (1975), reversed in part on other grounds, 66 Ill.2d 591, 363 N.E.2d 785 (1977) ("no evidence of a no bill was offered at trial. The defendant had previously filed a motion for summary judgment [and] . . . one of the exhibits which was attached was 'a determination by a Grand Jury that no true bill lies.' We know of no authority for the proposition that all matters heard on a motion for a summary judgment must be considered later by the trial factfinder."); see also *White v. Vathally*, 732 F.2d 1037 (1st Cir. 1984), cert. denied, 469 U.S. 933 (1984) (holding (1) that "we look to the evidence actually introduced at trial to determine whether the district court's finding is adequately supported," and (2) that "it would have been improper for the district court to rely on . . . extra-evidentiary documents in weighing the merits of the case.").[49]

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[49] Support for the contrary argument advanced by Region 5 appears to be confined to a bankruptcy court decision issued by a bankruptcy court in California. (Appellant's Brief, p. 85) See *Official Committee of Creditors v. Shearson Lehman Brothers Holdings (In re First Capitol Holdings Corp)*, 179 B.R. 902 (Bankr. C.D. Cal. 1995). Indeed, while Region 5 cites several other cases, none of these cases go into any kind of analysis whatsoever of the pertinent issue. With respect to the bankruptcy court's decision in *First Capitol*, even if the court's reasoning were sound, which is doubtful at best, Region 5's reliance on this decision would still be misplaced because this decision deals with a situation where a trial court judge actually exercised his discretion to *admit* summary judgment evidence into the trial record under an alternate procedure arguably authorized under Federal Rules of Civil Procedure 42, 43, and 56. *Id.* at 906. The bankruptcy court stated that "[g]iven the complexity of th[e] case, the Court ha[d] decided to proceed as [putatively] authorized in Rules 42(b), 43(e) and 56(d) . . . ." *Id.* at 906. The court concluded that "*[u]nder this procedure*, the evidence and argument presented in the summary judgment record is fully before the court in connection with the trial." *Id.* (emphasis added).

With respect to the instant case, the *First Capitol* decision is completely inapposite. First, Federal Rule of Civil Procedure 43 has no counterpart or equivalent in the *Consolidated Rules* that govern this administrative proceeding. To the contrary, Subpart D of the *Consolidated Rules* compels the conclusion that a post-hearing decision must be made upon a preponderance of the "evidence" actually offered at the hearing and *admitted* by the presiding judge.

In the instant case, it would have been simple for Region 5 to offer evidence for admission at trial, and had it done so, it is very possible Judge Moran may have awarded a penalty acceptable to Region 5. Instead, it chose not to do so in a manner that can only be described as defiant. As a result, there was zero evidence in the hearing record relating to the proposed penalty for Judge Moran or this Board to review and consider in deciding an appropriate penalty. Even if Region 5 had a leg to stand on with its argument that Judge Moran had the authority to consider as "evidence" documents that were attached to accelerated decision motion briefs, Region 5 did not make this argument or request in the proceedings below, and cannot raise it for the first time on appeal. Based on the foregoing, this Board can reach but one conclusion: there is no evidence in the record to support anything other than a zero penalty award.[50]

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Furthermore, even assuming that Judge Moran had any authority to adopt an alternative procedure for admission of evidence, it is abundantly clear that Region 5 did not move or request the Presiding Officer to follow such an alternate procedure, evidenced by its Supplemental Pre-Hearing Exchange (Docket #69) in which it stated "Complainant will present no evidence at the hearing. . ." (Supp. Exchg., p. 2). It is equally clear that Judge Moran did not exercise whatever discretion he may have had to receive into evidence the entire accelerated decision motion attachments, and therefore did not procedurally incorporate the summary judgment record into the hearing record. Rather, Judge Moran held that "EPA has not introduced any evidence to support its penalty rationale . . . ." and that "*[t]here [are] no exhibits from EPA nor did it provide any testimony.*" (Initial Decision, p. 37, emphasis in original). In short, Judge Moran followed the traditional procedure, and the only one available to him under the *Consolidated Rules*, which is to make a decision based upon the preponderance of the evidence actually offered and admitted at that trial.

[50] The EPA also argues, albeit briefly, in its brief on appeal that when Judge Moran granted accelerated decision on liability based on Respondents' concession on liability, the factual allegations in the unverified pleadings became the facts of the case. *Id.* at pp. 84. Even assuming *arguendo* that Judge Moran could have considered factual allegations relating to liability, Judge Moran still could not have considered allegations, or portions of allegations, that would have established the EPA's *prima facie* case with respect to the "appropriateness" of the EPA's proposed penalty without evidence offered and admitted at the hearing. Respondents conceded liability, not specific facts that would be used to prove the penalty amount.

## III. THE BOARD SHOULD AWARD COSTS AND ATTORNEY'S FEES TO RESPONDENTS.

The Presiding Officer did not rule on Respondents' request for costs and attorney's fees, believing that this Board must first decide whether costs and attorney's fees can be awarded. Initial Decision, pp. 17, 18. He did, however, acknowledge what he perceived to be abuses by Region 5's pursuit of frivolous claims. *Id.* at 18, 19.

The *Consolidated Rules* provide the Presiding Officer and this Board with the discretion to resolve issues not addressed in the rules as it deems appropriate. 40 C.F.R. § 22.1(c) and § 22.4(c)(10). Respondents submit that these rules include awarding costs and attorney's fees when Region 5 pursues frivolous claims to unreasonable lengths and flaunts orders of the Presiding Officer.

The Supreme Court has determined that attorney's fees may be shifted to the federal government where Congress has waived the federal government's sovereign immunity. *See Ruckelshaus v. Sierra Club,* 463 U.S. 680, 685, 103 S.Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983). Some courts have shifted the cost of attorney's fees to the federal government as a matter of course where dictated by the Federal Rules of Civil Procedure. *See Schanen v. United States DOJ,* 798 F.2d 348, 350 (9th Cir. 1985) (imposing monetary penalty against government under Fed. R. Civ. P. 60(b)); *United States v. National Medical Enters., Inc.,* 792 F.2d 906, 910-11 (9th Cir.1986) (upholding award of attorney's fees against government imposed under Fed. R. Civ. P. 37(b)); *Mattingly v. United States,* 939 F.2d 816, 818 (9th Cir. 1991) (discussing Fed.R.Civ.P. 11); *Barry v. Bowen,* 884 F.2d 442, 444 (9th Cir. 1989) (same).

In *Mattingly*, the court noted that it had previously decided that federal sanctions such as attorney's fees are appropriate to deter "future government misconduct" for violations of discovery orders and further noted imposing such sanctions against the government is "in keeping with the

principle that the government must conduct its litigation with the same degree of integrity as that expected of other litigants."[51] Therefore, it is appropriate for this Board to consider the standards set forth in the federal rules and applicable case law, and apply such standards to the facts before it.

Courts have awarded attorney's fees where a party had no reasonable basis for concluding that its positions were well grounded in fact and warranted by either existing law or a good faith argument for extension or modification of the existing law. *Westmoreland v. CBS*, 770 F.2d 1168, 1177 (D.C. Cir. 1985). The *Westmoreland* court stated:

> When groundless pleadings are permitted, the integrity of the judicial process is impaired. Additionally, as borne out by this case, litigation abuse embroils the judiciary in needless satellite litigation. The monetary award here may be small, but even such a humble investment in guaranteeing the proper functioning of our judicial process will reap great dividend.

770 F.2d at 1179-1180; *see also Clinton v. Jones*, 520 U.S. 681, 709, 117 S.Ct. 1636, 1652 (1997). Moreover, the application of such a standard is supported by the following statutory language with regards to the liability of attorneys that represent the government:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.[52]

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[51] The Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, dictates that an administrative agency ***shall*** provide qualified prevailing parties with their attorneys fees in certain situations. *See, e.g., M.A. Mortenson Co. v. United States,* 996 F.2d 1177, 1181-82 (Fed Cir. 1993). Neither the Consolidated Rules of Practice, nor the Administrative Procedures Act specifically address when a Presiding Officer or Environmental Appeals Board ***may*** use its discretion to award attorney's fees against the government. Therefore, Respondent argues that this Board ***may***, in its discretion, apply the standards used in the Federal Rules of Civil Procedure in deciding whether it is appropriate to award Respondent its attorney's fees.

[52] If sanctions are awarded pursuant to this statute, sovereign immunity is not an issue.

The Board should award some of Respondents' attorney's fees and costs for two reasons. First, Region 5 pursued its claim against Biewer Lumber, LLC well beyond the time it was patently obvious that there was no legitimate claim, a fact conceded by Region 5 much later. Even before discovery began, Respondents supplied to Region 5 the incorporation documents for Biewer Lumber, LLC clearly showing that Biewer Lumber, LLC *did not even exist* until well after the violations alleged by Region 5 occurred. How can a company that does not exist be the parent of another, or pervasively control another or "operate" a facility? The claim was absurd, yet Region 5 forced Biewer Lumber, LLC to brief its own Motion for Accelerated Decision and respond to Region 5's cross-motion before throwing in the towel on a claim that defines the term frivolous.

Second, if Respondents had known that following the briefing on the various Motions for Accelerated Decision, Region 5 would simply boycott the hearing if it lost the motions, Respondents would have stopped incurring fees and simply waited for the decisions. Instead, it was forced to prepare for trial, file a Motion for Entry of Decision, appear for trial in Toledo, Ohio with its witness, and file another post-hearing brief. Moreover, the "boycott" was in direct violation of Judge Moran's order on Region 5's motion to present Region 5's enforcement witness who could testify regarding Region 5's application of the RCRA Civil Penalty Policy to the facts of this case.[53] This type of conduct, in utter disregard for its costs to Respondents and its effect on the integrity of the entire process simply should not be tolerated.

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[53] Despite the fact that this Court had stated on January 9, 2009 that Respondents had the right to cross-examine the author of the proposed penalty amount at a hearing, and providing the same in its Order on Region 5's Motion for Accelerated Decision on Liability and Penalty and Order on Motion to Strike, in part, Respondents' Prehearing Exchange (*See* p. 20 of each Order), Region 5's attorney declared that Region 5 would not offer any evidence or make any witness available for cross-examination regarding the proposed penalty amount. Supplemental Pre-Hearing Exchange of the Adminstrator's Delegated Complainant, p. 2. It seems that Region 5 decided that it no longer had to meaningfully participate in the adjudicatory process *that it started* after this Court dismissed the derivative liability claims against JAB Company and Biewer Lumber, LLC.

For these reasons, Respondents request the Board to award their costs and attorney's fees in defending the frivolous claim against Biewer Lumber, LLC and the costs and fees incurred in going through the evidentiary hearing which was made a farce by Region 5's stubborn refusal to even present a case. A detailed itemization of Respondents' attorney's fees were submitted to the Presiding Officer in the Affidavit of Douglas A. Donnell, filed with Respondents' Post-Hearing Brief, dated March 30, 2010.

## IV. RELIEF REQUESTED

Respondents request that the decision of Judge Moran be affirmed, and that costs and attorney's fees be awarded.

Respectfully submitted,

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Dated: Oct. 18, 2010

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