ENVIRONMENTAL APPEALS BOARD

Re: Advanced Packaging and Products, Inc. 16131 Maple Avenue Gardena (Carson), California PJH Brands 8747 East Via de Commercio Scottsdale AZ 85258-3328 *Petitioner.*	EPA Docket #9-2006-0011A **Petition for Reimbursement of Costs Under CERCLA §106(b)(2)(C), 42 USC §9606(b)(2)(C)**

Petitioner PJH Brands, a Nevada corporation ("PJHB"), seeks reimbursement of no less than $256,636.67, the money that it spent in responding to the Unilateral Administrative Order for Removal ("Order"), Docket #9-2006-0011A (*see* **Exhibit A**) at the Advanced Packaging and Products, Inc.("APP"), a California corporation, facility (the "Site"), including PJHB's share of the EPA oversight costs as described in EPA's letter noticing the lien (*see* **Exhibit K**). PJHB complied with the Order, and the removal action was completed November 18, 2006 (*see* EPA Completion Letter, **Exhibit B**). PJHB seeks reimbursement of its costs because it is not "a responsible party" under CERCLA §107(a), 42 U.S.C. 9607(a), and is thus not liable for response costs under CERCLA. The January 9, 2006, explosion and fire at the APP facility, and the subsequent release of hazardous substances, was the result of an operational failure of APP's equipment, which was solely the responsibility of APP, and PJHB neither had nor could have had any involvement in such an internal operational failure of a wholly separate corporation. The costs for which PJHB seeks reimbursement are reasonable in light of the removal action required. Thus, PJHB seeks reimbursement pursuant to CERCLA §106(b)(2)(C).

Factual Allegations

EPA Order. EPA justified naming PJHB as a "responsible party" in the Order because of the following allegation (from page 5):

> ... PJHB, acting through APP and Renshaw, maintains operational control over the facilities, equipment, materials and vehicles at the Site. APP is the alter ego of Renshaw, as the shareholder and president of the inadequately capitalized corporation without liability insurance or other significant assets to satisfy corporate obligations; Renshaw used APP as a shell, instrumentality or conduit for the business of PJHB. Renshaw abandoned the facility in May 2006, leaving no contact information and failing to return messages from EPA. APP is also the alter ego of PJHB, which controlled virtually all aspects of APP's operations, including controlling decisions on worker safety equipment and protocol, excluding the titled APP management from operational decisions, and directly operating APP's facility since April 2004 in the absence of title APP management.

PJHB is an entirely separate corporation from APP, formed and operated for an entirely different purpose. Both corporations adhere to separate corporate norms in pursuit of separate corporate existences. APP is not now and has never been the "*alter ego*" of PJHB, and PJHB has never "controlled virtually all aspects of APP's operations." Because the two corporations are entirely distinct legal entities and have operated separately, though in a complementary fashion to satisfy the rigid expectations of ultimate customers, an injustice would occur if PJHB were saddled with the liability derived from an unexpected operational failure entirely within APP's control.

The Two Corporations.

APP, a manufacturer, formulator, and packager of specialty coatings and lubricants, is a California corporation and was in business from May 1989, when it acquired many of the assets of Sperex, until the January 9, 2006, fire completely destroyed its business. Its only customer was PJHB.

PJHB, a marketer and distributor of custom manufactured specialty products to customers in the aerospace industry, race track operators, specialized federal government contractors, and the automotive and motor-cycle performance and after-market industries, is a Nevada corporation; PJHB and its predecessor corporations have been conducting the same business since 1973. PJHB purchases its specialty products from other formulators and packagers in addition to APP. **Exhibit C** has two labels showing PJHB products that are specially formulated for distribution to its customers.

The Business of Custom Manufacturing.

In the business of providing custom and highly specialized coatings and lubricants to customers and end users, as opposed to pencils or widgets, PJHB must pay particular attention and carefully oversee the blending, packaging, and manufacturing of such products so that its customers' expectations are met. At risk is PJHB's 35 years of reputation for delivering high-quality specialized products to its customers, including highly technical and specific aerospace customers. In such a business, PJHB must be able to assure appropriate quality controls, meet regularly with the various packagers of the products, and be responsive to its customers regarding product satisfaction. This is the process that PJHB used with APP and its other manufacturing contractors, and still uses, in the blending, labeling, and packaging of its specialty coatings and lubricants. To be very clear, APP's customer was PJHB. PJHB purchased its specialty paint products, lubricants, and other adhesives from APP (as well as other formulators and packagers)

and then sold the finished product, under the PJH Brands label, to various regional distributors and retail customers.

PJHB has an intellectual property interest in numerous formulas for its various products. PJHB allows its packagers and manufacturers such as APP to have access to the formulas in order to manufacture the specialty products and consults with APP and other packagers on how to manufacture the products to meet the formula specifications. The packagers are responsible for control of their own operations, including the purchase and storage of raw materials, the blending and mixing of the product consistent with the formulas, the process of filling and pressurizing, labeling, and packaging of the containers, disposing of waste product, notifying PJHB that the product is packaged and ready for shipment, and invoicing PJHB for the product. PJHB is responsible to its customers for assuring that the specialty products meet its rigid specifications and high-performance expectations. In order to fulfill the expectations of its customers, PJHB must work closely with APP and its other packagers and manufacturers to assure quality control and uninterrupted product availability. In order to provide a high-quality specialty product, it is essential and necessary for PJHB's representatives to be on-site at the packaging and manufacturing locations on a regular basis to assure that the product meets specifications, to guarantee color and product consistency, and will, on occasion, meet with its customers at the various manufacturing facilities to demonstrate the quality control to its customers. PJHB dealt with APP the same as it dealt with its other packagers of its other products. APP was simply one of several formulators and packagers for PJHB, and APP formulated and packaged only a portion of PJHB's total product line.

Advanced Packaging and Products, Inc. APP was originally incorporated as PJH Group, a California corporation, in May 1989 to acquire equipment and materials from Sperex, an aerosols manufacturing subsidiary of Koala Industries. PJH Group began using the trade name Advanced Packaging and Products in about 1990 and formally

changed its name to APP on February 14, 1995. APP also assumed the lease (originally a 1961 lease; modified in the 1990s) to a Ginger Root-owned building and real estate at 16131 Maple Avenue, Gardena (Carson) CA. APP hired a number of Sperex employees, particularly the Plant Manager, the Chemist, and others with long-time specialized knowledge and experience in aerosols formulation, packaging, and manufacturing. Prior to 1989, Sperex had been formulating custom products for PJHB, and, after 1989, APP modified and expanded the aerosols specialty coatings and lubricants business that Sperex had been conducting in order to produce the products sold to PJHB. Although APP manufactured specialty products for customers other than PJHB in its early years, since 1992 its sole customer had been PJHB. The former Sperex and APP customers became PJHB customers because PJHB, as the sales and distribution specialist, was properly equipped to handle customer relations, and APP focused exclusively on formulating and packaging custom products for PJHB and operating the facility and production lines that produced the products that PJHB ultimately distributed.

Employee structure: Since it was incorporated in 1989, the operational decisions at APP have been made by its various Presidents (sequentially, Jim Borre [1989-91], Dennis Heckman [1991-93], Keith Moreman [1993-95], Michael Goldstein [1995-99], and Steven Renshaw [2/99-present]) and its Plant Managers (sequentially, Ron Golden [1995-98], Aaron Land [1998-2004], Dennis Heckman [2004-05], and Mike Littleton [2005-06]). In addition, the APP long-time Chemist, Dennis Heckman, a former Sperex employee, for most of the period from 1989 on, played a crucial role in technical decisions regarding product development and manufacture to specifications.

Operational procedures: As explained above, PJHB's prime concern was assuring that its customers expectations were met. A customer (and therefore PJHB) wanted no alteration in the color, consistency, quality, or even smell of the products that it purchased from PJHB. Thus, PJHB had to work closely with the APP Plant Manager and Chemist to insure quality control, consistency, and protection of PJHB's proprietary

interests. Similarly, if PJHB's customers advised that a new product was needed, or if PJHB determined the need for a new product, PJHB representatives worked closely with APP's Chemist to develop the specifications and production procedures that would assure that the product met the customers' expectations.

On the other hand, the actual operation of producing the product, the acquisition of raw materials and packaging that met PJHB's specifications, operating and maintaining the production line, assuring proper workplace conditions, disposal of wastes, etc. were solely the responsibility of APP's Plant Manager and APP employees. PJHB could not and did not interfere in the operations. Although PJHB representatives, as consultants looking out for quality control of the end product, periodically made suggestions, APP's Plant Manager was the final operational decision-maker and did not always follow such suggestions.

Management/decision-making structure: All significant operational decisions regarding manufacturing, mixing, formulation, and packaging processes, purchase of supplies, raw materials, and equipment, operation of production processes, pricing of products, disposal of wastes, etc. have always been made by the President or Plant Manager of APP.

Board of Directors: P.J. Harvey is a director of APP. Steven Renshaw has been an officer and director of APP since 1995.

Consultants: Employees of PJHB have periodically provided consulting assistance to APP to assure that APP's products meet the specifications and expectations required by PJHB and its customers. In addition, through separate agreements and for a monthly fee, APP contracted with PJHB for PJHB to handle back-office financial and accounting services for APP.

Capitalization and financial structure: APP was originally capitalized by the sale of stock. Over the years, PJHB has made loans to APP, which are secured by security interests in APP's assets. In order to assure APP's being able to continue to operate and

manufacture products for PJHB's customers, PJHB has restructured its loans with APP. In response to the Order, and because the January 9, 2006, fire completely destroyed APP's business, thereby terminating its ability to generate cash flow, PJHB initially loaned funds to APP to pay its proportionate share of the response costs. Subsequently, PJHB actually paid a portion of APP's unpaid proportionate share of the response costs pursuant to the formula set forth in the Contribution Agreement among APP, Ginger Root, and PJHB; the formula to split payment of any unpaid APP share was required by Ginger Root in order to get Ginger Root's participation in funding the response to the Order.

Exhibit D contains certain corporate documents for APP (1995 name change amendment to Articles of Incorporation and 1995-2004 California Statements of Information). We have requested the Articles of Incorporation and other corporate documents from Mr. Renshaw, APP's President, but we have not yet received them.

PJH Brands. PJHB's business of marketing and sales (but not manufacturing) of custom products had previously been conducted under the names of American PJ Company (a sole proprietorship)(1973-74) and Pjeff Corporation (a California corporation)(1974-77), which changed its name to PJ1 Corporation in1977, and changed its name again to PJH Brands on November 14, 1994. PJH Brands, a Nevada corporation, was formed December 27, 1995. On December 30, 1995, PJH Brands, the California corporation, was merged into PJH Brands, the Nevada corporation. For its entire existence, PJHB has been a marketer and distributor of specialty products for the aerospace industry, specialized federal government contractors, race track operators, the automotive and motor-cycle after-market, and other customers. Because PJHB's skills and 35 years of experience have been in sales, marketing, and distribution, rather than manufacturing, formulating, and packaging its specialty products, PJHB has always relied on outside third-party manufacturers, formulators, and packagers to create the products to meet the rigid expectations of its many customers. The customer expectations

and PJHB's specifications are based on trade-secret formulae and specifications owned by PJHB.

Formulators and packagers: APP was PJHB's sole supplier of aerosols and liquid fill products, which constituted 70-75% of PJHB's total business. As a result of the January 9, 2006, fire which destroyed APP's facility and eliminated its manufacturing capabilities, PJHB was forced to use new formulators and packagers for its aerosol and liquid fill products, such as Engineering Coating Technology (Vernon CA), Four Star Chemical Packaging (Vernon CA), Alchemco (Ontario CA), and others, both domestic and overseas. The loss of APP as PJHB's long-time formulator and packager of its custom aerosol and liquid fill products has had significant adverse impacts on PJHB's business, which adverse impacts will continue until the substitute formulators and packagers are able to develop the technical expertise to produce the precise products expected by PJHB's customers. The difficulties with the substitute formulators illustrate the important role that APP's specialized experience played in PJHB's ability to deliver high-quality products to its customers.

Officers: P.J. Harvey, President & CEO; Vicky L. Harvey, Secretary/Treasurer

Relationships with its manufacturers: The section *above* under the APP discussion titled "Operational procedures" accurately outlines how PJHB worked with its outside formulators and packagers.

Exhibit E contains PJHB's relevant corporate documents.

Legal Argument

PJHB is not a CERCLA §107(a) "responsible party" and is therefore not liable for response costs of the Order.

a. PJHB is not the "operator" of the APP facility pursuant to CERCLA.

The focus of the court decisions interpreting "operator" liability under CERCLA is that the alleged "operator" had to be involved in the day-to-day management

of the facility, specifically related to the handling of hazardous substances and decision-making authority with respect to waste disposal and potential pollution-causing activities.

In *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998), the Supreme Court held that, under CERCLA, "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." Similarly, the Ninth Circuit has stated that a CERCLA "operator" must "play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management." *Longbeach Unified School District v. Gowdin Living Trust,* 32 F.3d 1364, 1369 (9th Cir. 1994); *Kieser Aluminum and Chemical Corp. v. Catellus Dev. Corp.,* 976 F2d 1338, 1341 (9th Cir. 1992).

More recently, the federal court in the Eastern District of California, in *United States* v. *Atchison Topeka & Santa Fe Ry. Co.*, No. CV-F-92-5068, 2003 Dist. LEXIS 23130 (E.D. Cal July 14, 2003), laid out indicia of "operator" liability by including the following:

- Defendant's expertise and knowledge of the environmental dangers posed by hazardous waste
- Establishment and design of the facility
- Participation in the opening and closing of a facility
- Hiring and supervision of employees involved in activities related to pollution
- Determination of the facility's operational plan
- Monitoring of and control over hazardous waste disposal
- Public declarations of responsibility over the facility and/or its hazardous waste disposal

At issue in *Atchison* was whether the seller of hazardous substances to a manufacturing facility was a responsible party for spills during the delivery and improper

storage of the hazardous substance at the facility. The court determined that the seller arranged for the sale and delivery of the substance, but it did not actively participate in the daily management of the hazardous substances' delivery or storage at the facility. Further, although the seller inspected the facility and suggested increased environmental safeguards, these suggestions were voluntary and therefore did not put the seller in a management position. Thus, the court did not impose "operator" liability because the seller did not participate in the day-to-day management of the facility.

b. APP is not the *alter ego* of PJHB under California law.

It is well recognized under California law that a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. *Sonora Diamond Corp. vs. Superior Court,* 83 Cal.App.4th 523, 99 Cal.Rptr.2d 824 (Ct. App.2000); *Robbins vs. Blecher*, 52 Cal.App.4th 886, 60 Cal.Rptr.2d 815 (Ct. App. 1997); *Communist Party vs. Valencia, Inc.,* 35 Cal.App4th 980, 41 Cal.Rptr.2d 618 (Ct. App. 1995). The *alter ego* doctrine is considered to be a limited doctrine, an extreme remedy, and a remedy to be sparingly used, *Sonora Diamond Corp.,* supra; *Tomaselli vs. Transamerica Insurance Company*, 25 Cal.App.4th 1269, 31 Cal Rptr.2d 433 (1994), and does not guard every unsatisfied creditor of a corporation but instead affords protection only in such extreme cases where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. *Sonora Diamond Corp.,* supra; *Associated Vendors, Inc. vs. Oakland Meat Co.,* 210 Cal.App.2d 825, 26 Cal.Rptr. 806 (1962). Under the *alter ego* doctrine, the California courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organization actually controlling the corporation **only** when the corporate laws are being misused by the sham corporation to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose. *Sonora Diamond Corp.,* supra; *Robbins vs. Blecher*, supra; *Associated Vendors, Inc.,* supra.

In California, it is well established that before a third party can claim the benefit of the *alter ego* doctrine, it must show that (i) there is such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and its equitable owner ceases to exist, and (ii) there must be an inequitable result if the acts in question are treated as those of the corporation alone. *Sonora Diamond Corp.,* supra; *Tomaselli*, supra; *Associated Vendors, Inc.,* supra; *Hennessey's Tavern, Inc. vs. American Air Filter Co.*, 204 Cal.App.3rd 1351, 251 Cal.Rptr. 859 (1988). No one characteristic governs, but the courts must look to all the circumstances to determine whether the *alter ego* doctrine should be applied, *Sonora Diamond Corp.,* supra, and among the factors to be considered in applying the doctrine are (i) commingling of funds and other assets of the two entities, (ii) the holding out by one entity that it is liable for the debts of the other entity, (iii) use of the same offices and employees, (iv) use of one entity as a mere shell or conduit for the affairs of the other entity, and (v) commingling of corporate assets. *Sonora Diamond Corp.,* supra; *Associated Vendors, Inc.,* supra; *Tomaselli*, supra; *Roman Catholic Archibishop vs. Superior Court,* 15 Cal.App.3rd 405, 92 Cal.Rptr. 338 (1971). Only when the foregoing factors show a unity of interest and that honoring the corporate form would promote a fraud or injustice, will the California case law even consider the application of the *alter ego* doctrine.

c. Relevant facts applied to the legal standards under both CERCLA and California "veil piercing" law show that PJHB and APP operated and were managed independently and separately, notwithstanding the necessary close working relationship required for the creation, formulation, packaging, and distribution of specialty custom products designed to meet customers' rigid expectations.

i. Corporate norms were followed. As shown above, PJHB and APP were separately incorporated, adhered to separate and independent corporate

requirements, and operated pursuant to their separate purposes. Nonetheless, the nature of the business required that they work closely to meet the rigid expectations of PJHB's ultimate customers.

ii. Activities between PJHB personnel and APP personnel are consistent with the separate operation of independent corporations that rely on each other's complementary skills and expertise to formulate and market specialty products to meet the rigid expectations of ultimate customers. As described above and as shown in the attached affidavits of P.J. Harvey and Jeff Pinto and the declaration of Charley Patterson, PJHB worked closely with APP personnel to develop specialty products and to assure that the formulation and packaging of the specialty products met customers' rigid expectations. Nonetheless, PJHB representatives did not direct specific operational procedures to formulate and package the products sold under PJHB's name, nor did PJHB representatives interfere with other operational prerogatives of the APP President and Plant Manager, such as employee hiring or decisions regarding workplace safety. Because APP was such an important supplier for PJHB's business, and because the APP personnel were so technically competent in the product formulation and packaging areas of which PJHB was ignorant, PJHB naturally took steps to assure that APP could continue to produce products for PJHB, which included arm's-length financial assistance (including loans secured by APP equipment) and agreements to handle "back-office" financial and accounting activities, for which PJHB was paid a fair sum and was more competent than APP to handle. Although the specifics of PJHB's relationship with APP do not precisely parallel the relationship with other formulators and packagers, the important distinction of maintaining corporate separateness and allowing the manufacturer to control formulation and packaging operations and the seller to market and distribute was followed consistently with all of PJHB's formulators and packagers.

Exhibit F contains the affidavits of P.J. Harvey and Jeff Pinto and the declaration of Charley Patterson.

iii. No injustice results from the separate and independent corporate entities of PJHB and APP. As shown by the Order and the invoicing from the removal consultant, the action that precipitated EPA's Order was an explosion and fire at the APP facility that caused the release of hazardous materials; this release is what EPA wanted removed. The explosion and fire began at pipes and tanks that were part of the production process at the APP facility. PJHB had nothing to do with these details of the production line for formulating the products that PJHB marketed and distributed. PJHB and APP have maintained rigidly their corporate separateness and arm's-length financial relationships. CERCLA law does not make the ultimate seller of a product, when a release of hazardous substances occurred because of a failure of the valves at the bulk tanks and lines outside the building, which were owned and operated by a separate corporate entity, liable for such contamination. A grave injustice would occur if PJHB were liable for an operational failure and release of hazardous substances that was completely beyond its control.

Evidence of Costs Incurred

Exhibit G: Contribution Agreement among APP, Ginger Root, and PJHB. After EPA issued the Order, the respondents APP, Steven Renshaw personally as President of APP, Ginger Root Associates (the property owner of the APP facility), and PJHB agreed to cooperate to split the costs of the removal action pursuant to a specific formula. The formula required APP, Ginger Root, and PJHB to each pay one-third of the costs, but if APP was unable to pay any part of its share, Ginger Root and PJHB would split APP's share, one-third to be paid by Ginger Root and two-thirds to be paid by PJHB. This formula was a compromise and the only way that the parties would agree to share the costs. (**N.B.** The attached **Exhibit G** is unsigned; we have requested a copy of the signed document (July 19, 2006) from Ginger Root, but it has not yet been received. All parties signed the Contribution Agreement in the form of Exhibit G.)

Exhibit H: NRC Billings & Escrow Payments.

Attached are the weekly billings from NRC, the removal contractor. The total billing was $549,556.80. As shown by **Exhibit I**, the summary sheet from the escrow agent, PJHB paid $182,976.74 as its share under the Contribution Agreement and an additional $47,835.97 as its share of the unpaid APP share. In addition, PJHB is paying directly to EPA $16,447.66 for both its share and its allocation of APP's unpaid share of the EPA oversight costs, as described on the attached **Exhibit K**, the lien notice letter from EPA.

Exhibit J: evidence of payments by PJHB

Conclusion

The explosion and fire that lead to EPA's Order and the costs of removing the hazardous substances happened because of an operational failure at the APP facility. Such operations were entirely under the control of APP, which is an entirely separate corporation from PJHB. Furthermore, although PJHB and APP necessarily had to work closely in order to produce the custom specialty products to meet the rigid expectations of PJHB's customers, PJHB did not direct or order APP to conduct its formulation and packaging operations in a way that put PJHB in such control of APP's activities that PJHB should be liable for the costs of an accident that was entirely within APP's control. PJHB should be reimbursed for the money that it spent cleaning up APP's mess.

Respectfully submitted,

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cc: U.S. Environmental Protection Agency, Region IX