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

In re:	)	
	)	
John A. Biewer Co. of Toledo, Inc.	)	
Docket No. RCRA-05-2008-0006,	)	
	)	
and	)	**RCRA Appeal Nos. 10-01 & 10-02**
	)	
John A. Biewer Co. of Ohio, Inc.	)	
Docket No. RCRA-05-2008-0007.	)	
_____	)	

COMPLAINANT'S REPLY BRIEF IN SUPPORT OF ITS APPEAL

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In response to the issues and arguments raised in Respondents' Appeal Brief, Complainant submits the following Reply:

I. The Facts and Law Support Veil Piercing Under Both the Federal and Ohio Common Law Tests

A. The Correct Time for Determining Whether JAB Co. Exercised Pervasive Control Was the Period Leading Up To and After the Subsidiaries Closed

Respondents contend that Complainant "erroneously focuses exclusively on the few events taking place after JAB Ohio and JAB Toledo ceased operations." Resps.' Br. 34. On the contrary, it is Respondents that unnecessarily focus on pre-closure activities for the purpose of analyzing the extent of JAB Co.'s control over its subsidiaries. "Under general corporate law principles, the relevant inquiry into the control focuses on the relationship between the parent and the subsidiary at the time the acts complained of took place." *United States v. Wallace*, 961 F. Supp. 969, 979 (N.D. Tex. 1996).[1] Here, the acts complained of are the continuing violations resulting from Respondents' ongoing failure to decontaminate the drip pads at the subsidiaries' facilities. The duty to decontaminate the drip pads only arose when the subsidiaries ceased wood treatment operations. OAC 3745-69-45. Noticeably absent from Respondents' Brief is a citation to any case or authority supporting the proposition that there can be no veil piercing when a parent corporation's control results in a subsidiaries' failure or inability to act, particularly where, as here, the subsidiaries' failure to act resulted in an environmental violation. Respondents' undue emphasis on their pre-closure relationships is inconsistent with case law[2] and nothing more than a transparent attempt to divert the Board's attention from, and diminish the significance of, JAB Co.'s conduct leading up to and after the subsidiaries ceased operations.

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[1] *See also Fluorine On Call Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 862 (5th Cir. 2004); 1 W.M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43.10 (2010).

[2] The third prong of the veil piercing test also requires a temporal nexus between the violation committed by the subsidiary that gives rise to the lawsuit and the control exercised by the parent. *See* Compl.'s Br. 27.

B. The Subsidiaries' Insolvency at the Time JAB Co. Siphoned Their Only Remaining Liquid Assets Warrants Veil Piercing

Respondents admit the subsidiaries were insolvent immediately prior to and remained as such after ceasing wood treatment operations. Resps.' Br. 40 n. 19. Nevertheless, Respondents contend there was nothing improper regarding the decision to transfer the subsidiaries' only remaining liquid assets, i.e., intercompany accounts receivables, to JAB Co. for the repayment of "loans" or "advances."[3] On the contrary, courts agree that the repayment of even a legitimate shareholder loan by an insolvent corporation indicates siphoning and supports veil piercing.

While repayment of a shareholder loan alone is not siphoning, "the repayment of loans from shareholders or other diversion of corporate assets at a time when the company's finances are troubled may strongly indicate siphoning." *Trs. of Nat'l Elev. Indus. Funds v. Lutyk*, 140 F. Supp. 2d 447, 458 (E.D. Pa. 2001); *see also United States v. Thomas*, 515 F. Supp. 1351, 1357 (W.D. Tex. 1981). Respondents concede that "[e]ach subsidiary was insolvent before the transfers [of the subsidiaries' receivables to JAB Co.] and remained equally insolvent afterward." Resps.' Br. 51. The subsidiaries' repayment of the "loans" or "advances," immediately prior to closure and while insolvent, leads to an "inescapable inference" that JAB Co. "drained money from [the subsidiaries] to avoid impending liabilit[ies]." *Plumber's Pension Fund v. A-Best Plumbing & Sewer, Inc.*, 1992 U.S. Dist. LEXIS 3110, at *14 (N.D. Ill. March 13, 1992) (citing *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981); *State Bank of Cerro Gordo v. Benton*,

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[3] In their Brief, Respondents assert that the "advances" from JAB Co. to the subsidiaries were "duly recorded" in "the hundreds of pages of ledgers produced to Region 5." Resps.' Br. 56. Although it is unclear how often these "loans" or "advances" occurred, Respondents admit the "vast majority of advances from related parties . . . amounted to intercompany accounts payable" that, by the time the subsidiaries ceased operations, had accumulated to significant sums. *Id.*; Compl.'s Br. 33-38. The fact that the subsidiaries needed these "loans" or "advances" from JAB Co. is evidence of control. In fact, courts have held that a subsidiary's need for a "steady influx of cash loans" from its parent demonstrates that the subsidiary was undercapitalized. *Laborers' Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 614 (7th Cir. 2009).

317 N.E.2d 578, 580 (Ill. App. 1974)). Such siphoning is hardly innocuous and supports veil piercing. FLETCHER, *supra*, § 41.34 at 227 ("[A]ctivity conducted to strip a corporation of its assets in anticipation of impending legal liability may be considered in making the determination whether to disregard the corporate entity.").

C. JAB Co. Acted As "Supercreditor" When It Obtained the Subsidiaries' Only Remaining Liquid Assets Outside Established Legal Procedures

Respondents' Brief ignores the fact that separate and independent corporations that suffer financial setbacks typically wind down and dissolve under general corporate law or file for bankruptcy protection. Under these procedures, environmental obligations take precedence over obligations to unsecured creditors. Here, the subsidiaries did not avail themselves of either of these well established procedures. Instead, all of their liquid assets were transferred to JAB Co. immediately prior to closure. The transfers placed JAB Co.'s financial interests above the subsidiaries' environmental obligations and the interests of the subsidiaries' outside creditors.

Had the subsidiaries formally dissolved, as opposed to being reduced to mere holding companies for contaminated property, the transfers of the receivables obtained from the sale of their inventories to JAB Co. would not been authorized under Ohio law. In Ohio, it is well settled that "when a corporation becomes insolvent the corporate property becomes a trust fund for the benefit of creditors." *Cay Mach. Co. v. Firestone Tire & Rubber Co.*, 175 Ohio St. 295, 299 (Ohio 1963). Furthermore, "an insolvent corporation which has ceased to do business cannot by transfer of its property to one of its creditors in payment of antecedent debts create a valid preference to that creditor over its other creditors." *United States v. Adams Bldg. Co.*, 531 F.3d 342, 346 (6th Cir. 1976) (internal quotations and citation omitted). JAB Co. avoided the application of Ohio law by taking for itself the subsidiaries' liquid assets while they were insolvent and immediately prior to their closure.

Similarly, had the financially troubled subsidiaries availed themselves of federal bankruptcy procedures, Complainant's ability to obtain compliance with RCRA would not have been jeopardized. According to a recent case from the Seventh Circuit, the costs to obtain compliance with RCRA are not subject to discharge in bankruptcy. *United States v. Apex Oil, Co.*, 579 F.3d 734 (7th Cir. 2009). Furthermore, JAB Co.'s interest as the subsidiaries' sole shareholder would have been subordinated to that of other outside creditors. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) ("One of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors.").

By informally winding down the subsidiaries outside of established legal procedures and transferring to itself the subsidiaries' only remaining liquid assets, JAB Co. unilaterally decided that it was entitled to a preference and that its own financial interests trumped the legal obligation to decontaminate the drip pads. Thus, it was JAB Co. that proceeded as if it was a "supercreditor" in contravention of the rule that environmental compliance comes before the discharge of obligations to unsecured creditors.

D. JAB Co. Is Not Entitled To the Presumption That Brian Biewer Was Acting On Behalf of the Subsidiaries After He Was "Appointed" Manager

These cases are textbook examples of when a dual officer and director's actions must be attributed to the controlling parent corporation. *United States v. Bestfoods*, 524 U.S. 51, 71 n.3 (1998). Contrary to Respondents' arguments, the Board should hold that while ostensibly serving the interests of the subsidiaries, Brian Biewer acted only in the interests of the corporate parent. *Id.* at 71. Consequently, Brian Biewer's actions should be attributed to JAB Co., providing further support for Complainant's claims for JAB Co.'s derivative and direct liability.

According to Respondents, Brian Biewer's only task after he was "appointed" manager of the subsidiaries was to prepare the subsidiaries' facilities for lease or sale. Resps.' Br. 55 (citing Dkt. Index No. 56, Attachments AA, Z). Because they were insolvent and had outstanding environmental obligations, it was in the subsidiaries' best interest to retain assets sufficient to cover known or potential liabilities. It was also in the subsidiaries' best interest to assess and remediate the contamination at their facilities, as this would be consistent with preparing property for future sale or lease. Furthermore, it was in the subsidiaries' best interest to use their assets to decontaminate the drip pads to avoid the imposition of civil penalties for failing to comply with a clear environmental obligation.[4] Instead, Brian Biewer, acting only in the interest of JAB Co., transferred all of the subsidiaries' liquid assets to JAB Co. for repayment of what Respondents claim were "loans" or "advances." Under these circumstances, Brian Biewer's actions must be attributed to JAB Co.

E. The Cases Respondents Rely On Are Readily Distinguishable

Respondents devote much of their Brief to a discussion of the report and recommendation in *Pfohl Bros. v. Allied Waste Sys., Inc.*, 255 F. Supp. 134 (W.D.N.Y. 2003).[5] Respondents' reliance on *Pfohl Bros.* is misplaced. *Pfohl Bros.* is distinguishable from this case, because the subsidiaries in this case are not "dead and buried." *Id.* at 159. Rather, the subsidiaries are corporate shells being kept them on perpetual "life support" by JAB Co. through its payment of taxes and insurance, and nothing else. Furthermore, the subsidiaries in this case did not merely send hazardous waste off-site to a landfill for disposal. *See id.* Instead, a critical part of the

[4] Instead of avoiding the imposition of penalties through compliance, the subsidiaries argued against such penalties by claiming that their self-inflicted lack of funds made compliance impossible.

[5] In *Pfohl Bros.*, the Magistrate Judge recommended, and the district court judge adopted the finding, that the plaintiff be entitled to summary judgment against the parent corporation on claims of corporate successor liability and fraudulent transfer, significantly reducing the importance of the plaintiff's veil piercing claim. *Id.* at 141.

subsidiaries' pre-closure, day-to-day operations consisted of utilizing on-site drip pads for wood treatment. Thus, the subsidiaries' continuous obligation to remain capitalized to account for the risks attendant to the daily operations on their property included adequate capitalization for the purpose of decontaminating their drip pads upon closure. *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1105 (D. Del. 1988) (describing capitalization as an "ongoing duty"). Finally, Respondents' attempt to universalize *Pfohl Bros.* for the proposition that routine transfers are required to demonstrate siphoning must be rejected. *See supra* section I.B. for cases finding siphoning when transfers are not routine.

Respondents' reliance on *ITT Corp. v. Borgwarner, Inc.*, 2009 U.S. Dist. LEXIS 62792 (W.D. Mich. July 22, 2009) likewise is misplaced. Unlike this case, the court in *ITT* specifically noted that there was a lack of evidence permitting an inference that the parent corporation removed the assets from the subsidiary for the purpose of avoiding environmental liabilities "for [its] own or for some other wrongful purpose." *Id.* at *26. As the court in *ITT* expressly acknowledged, "[e]vidence that a parent corporation drained a subsidiary of its assets so that the subsidiary could not meet its known environmental liabilities might well provide for a basis for piercing the corporate veil." *Id.* at *25.

II. In the Alternative, Genuine Issues of Material Fact Exist as to JAB Co.'s Liability

Complainant contends that JAB Co.'s liability is clear from the paper trail showing its activities, including the improper transfer of the subsidiaries' remaining liquid assets at the expense of environmental obligations. Nevertheless, if the Board does not believe Complainant was entitled to accelerated decision with respect to JAB Co.'s liability, the Board should remand these cases for a hearing on JAB Co.'s liability. If the Board believes the limited evidence offered by Respondents is sufficient to prevent the entry of accelerated decision in favor of

Complainant, Complainant should be allowed to bolster its already strong case regarding JAB Co.'s liability by addressing Respondents' factual claims more directly at a hearing.

Respondents are incorrect in suggesting that Complainant's prehearing exchanges acknowledged there could be no further factual development regarding JAB Co.'s liability. The prehearing exchanges to which Respondents refer were filed over two months before Complainant was granted leave to add JAB Co. as a party. Furthermore, Complainant's Objections to Respondents' motions for accelerated decision referenced its own motions for accelerated decision and requested that Respondents' motions be denied. Dkt. Index No. 58. Thus, Complainant did not waive the right to argue that the ALJ erred in granting Respondents' motions for accelerated decision regarding JAB Co.'s liability.

III. Complainant Is Not Barred from Appealing the ALJ's Denial of its Motion for Accelerated Decision on Penalty

Citing cases interpreting the Federal Rules of Civil Procedure, Respondents claim Complainant lost its right to appeal the denial of the motions for accelerated decision on penalty because it failed to make motion for judgment as a matter of law at the end of the hearing. Resps.' Br. 82. However, the rules governing this appeal are found in 40 C.F.R. Part 22, Subpart F of the *Consolidated Rules* and those rules simply do not provide for such a motion.[6] Instead, 40 C.F.R. § 22.30 provides that "[w]ithin 30 days after the initial decision is served, any party may appeal *any* adverse order or ruling" of the ALJ. (emphasis added). The plain meaning of the language is simple: once the initial decision is served, any party can appeal any order or other adverse ruling entered by the ALJ.

[6] In any event, Complainant argued in its Post-Hearing Briefs that it should have been granted accelerated decision regarding penalty. Dkt. Index No. 81. Those arguments, made to the ALJ after the hearing, amount to the functional equivalent of a motion for judgment as a matter of law.

Such an interpretation is also consistent with the *Consolidated Rules'* treatment of interlocutory appeals. The *Consolidated Rules* provide that interlocutory appeals from orders other than an initial decision shall only be allowed at the discretion of the Board. 40 C.F.R. § 22.29(a). A party seeking an interlocutory appeal must ask the ALJ to forward the order to the Board for review and the *Consolidated Rules* delineate the circumstances which must exist to justify an ALJ's recommendation for interlocutory appeal. *Id.* § 22.29(b). Finally, the *Consolidated Rules* provide that if the ALJ does not recommend review, the order may still be appealed after the initial decision is issued, unless extraordinary circumstances exist requiring immediate Board review. *Id.* § 22.29(c). In *In re Wego Chem. & Mineral Corp.*, the Board held "[g]iven the discretionary nature of interlocutory appeals under 40 C.F.R. § 22.29, a party does not ordinarily waive an objection by failing to seek interlocutory review. Rather, the issue will be preserved for review in the appeal from the initial decision, under 40. C.F.R. § 22.30(a)." 4 E.A.D. 513, 529–30 (EAB 1993). The right to appeal adverse rulings after the initial decision reserves interlocutory appeal for cases truly needing immediate appellate intervention, without curtailing the rights of parties to seek Board review of orders clearly granted in error, such as the orders appealed from in this case. Otherwise, parties would seek interlocutory appeal in piecemeal fashion, rather than give up their right to Board review. *See Ernst v. Child and Youth Servs.*, 108 F.3d 486, 493 (3d Cir. 1997).

Furthermore, the cases Respondents cite on pages 82–84 of their Brief are, with only one exception, cases in which a full jury trial followed the denial of summary judgment.[7] Those

[7] *See e.g., Lama v. Borras*, 16 F.3d 473, 477 n.5 (1st Cir. 1994); *Black v. J.I. Case Co., Inc.*, 22 F.3d 568, 572 (5th Cir. 1994); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 n.1 (6th Cir. 1990); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 278 (7th Cir. 1994) (appeal of verdict of a five-day jury trial); *Johnson Intern. Co. v. Jackson Nat. Life Ins. Co.*, 19 F.3d 431, 435 (8th Cir. 1993); *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1358 & n.3 (9th 1987); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250–51 (10th Cir. 1992).

cases recognize the general rule that interlocutory orders merge into the final judgment (and may be appealed after the final judgment), and they note the injustice of not being able to appeal a motion improperly denied. The cases created a limited exception to the general rule when summary judgment is denied because it "would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented." *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987); *see also Jarrett v. Epperly*, 896 F.2d 1013, 1016 n.1 (6th Cir. 1990).

Significantly, unlike the cases relied on by Respondents, the D.C. Circuit has not carved out this same exception. *See I.A.M. Nat. Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir. 1986). Clearly, the strong policy rationale against nullifying a jury verdict does not apply to Part 22 administrative proceedings. The one non-jury case Respondents rely on, *Nat'l Eng'g & Contracting Co. v. Occupational Health & Safety Admin.*, 928 F.2d 762, 768 (6th Cir. 1991), is an appeal of an administrative case which was not decided under Part 22 of the Consolidated Rules and it does not control here.

IV. Respondents Are Incorrect When They Assert That Complainant's Documents Demonstrate the Existence of a Genuine Issue of Material Fact as to the Appropriate Penalty In This Case

On pages 85–93 of their Brief, Respondents argue Complainant knew Respondents were insolvent when they ceased operations and that exhibits attached to Complainant's Motions for Accelerated Decision on Liability and Penalty raise genuine issues of material fact as to whether Respondents had made "good faith efforts to comply" with RCRA.[8] When the Board reviews the record, it will become readily apparent that Respondents are wrong: Respondents' insolvency and the evidence supporting Complainant's motions for accelerated decision on penalty do not,

[8] When Respondents responded to Complainant's Motions for Accelerated Decision on Liability and Penalty, they failed to provide *any* probative evidence supporting their position, and they did not refer to any specific evidence in these proceedings. Their argument that Complainant's own documents raised genuine issues of material fact came much later.

in themselves, raise genuine issues of material fact relevant to "good faith efforts to comply" or a "lack of willfulness" as contemplated by the Penalty Policy. The ALJ erred to the extent he relied on Complainant's exhibits in determining there was a genuine issue of material fact requiring a hearing.

In the context of a RCRA civil penalty, "good faith efforts to comply" are generally defined as affirmative actions taken to come into compliance before the violation is detected.[9] Penalty Policy at 36; *see also, Rocky Well Service, Inc.*, EAB slip opinion at 42. There is no evidence of Respondents making any effort at all to decontaminate the drip pads *before* being caught by the State of Ohio. Both Respondents and the ALJ pay special attention to Complainant's Attachment O, asserting it, somehow, evidences "good faith" on the part of Respondents.[10] Attachment O is a 1992 letter from Ohio EPA to JAB Toledo regarding RCRA violations that are not at issue in this case and which JAB Toledo only corrected after notification of the violations. It is absurd to argue that letter demonstrates "good faith" of any kind, let alone serves as a basis to reduce the penalty in this case.

Just as Complainant's evidence does not demonstrate Respondents' "good faith efforts to comply," the Respondents' insolvency at the time operations ceased does not establish "good faith" or "lack of willful noncompliance." Again, the Penalty Policy is instructive. It makes clear that the factors for consideration in evaluating "willfulness" include foreseeability of the violations, whether reasonable precautions were taken, and whether the violation was within

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[9] There is a distinction between "good faith efforts to comply" which can be an adjustment factor in a RCRA civil penalty and the more general standard of "good faith." Respondents mistakenly rely on employment discrimination cases in which courts held evidence of "good faith" is uniquely within the knowledge of the employer and that those cases are not well suited for disposition on summary judgment. Resps.' Br. 91-93. Here, however, any facts which might exist regarding Respondents' "good faith efforts to comply" are within the knowledge of Respondents, not Complainant. It is telling that Respondents could produce no such facts.

[10] Neither Respondents nor the ALJ ever detail how this document supports Respondents' position; they simply assert this conclusion without explanation.

Respondents' control. Penalty Policy at 36–37. Respondents' lack of resources when operations ceased does not negate the degree of "willfulness." Respondents knew they were regulated by RCRA and knew they were obligated to decontaminate their drip pads when they ceased operations. They should have put aside funds to meet those obligations when the decision was made to wind down (if not before). Indeed, funds *were* available to decontaminate the drip pads, but these funds were instead used to repay "loans" or "advances" to the parent corporation, leaving the contaminated drip pads unaddressed. *See, e.g.,* Resps.'s Br. 63. Moreover, even if the subsidiaries were unable to fund the decontamination, Complainant has always maintained that they could and should have received funds to do so from their parent, JAB Co.[11] *See* Compl.'s Br. 95; *In re Carroll Oil, Co.*, 10 E.A.D. 635 (EAB 2002).

Complainant clearly satisfied its initial burden of establishing there was no genuine issue of material fact regarding penalty. In response to Complainant's Motions, Respondents did not come forward with any probative evidence of their own, nor did they point to any evidence of Complainant's supporting their conclusions. Respondents admit as much on page 86 of their Brief. Therefore, Complainant was entitled to summary disposition on penalty in both cases.

V. The ALJ Does Not Have Unfettered Discretion to Hold a Hearing

Complainant recognizes that ALJs are accorded considerable discretion under the *Consolidated Rules*. However, this discretion is not without bounds. 40 C.F.R. § 22.15 clearly states that the ALJ may require a hearing "if issues appropriate for adjudication are raised in the answer." The Board has unequivocally stated that a party seeking a hearing must first raise a dispute regarding a relevant matter. *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB

[11] JAB Co. admits that it "loaned" or "advanced" funds to its subsidiaries for business purposes in the past but declined to do so to enable them to complete their environmental obligations. Resps.' Br. 63.

1997).[12] Compl.'s Br. 64–67. Nevertheless, Respondents and the ALJ seem to take the position that in any case involving a penalty assessment, Respondents have an automatic and unqualified right to a hearing. Resps.' Br. 93-101; Dkt. Index No. 86 at 10.[13]

The ALJ takes this position to the extreme, holding that a hearing must be held so that an individual EPA employee can be cross-examined *to determine if a dispute as to the penalty calculation comes up.* This is clearly wrong. As Complainant has explained, Complainant's proposal of a penalty is argument, not factual testimony, and there is no free standing right to cross examine a penalty witness. Compl.'s Br. 71–74.[14] The ALJ cannot deny an accelerated decision motion where there is no genuine dispute in the hope that cross-examination of an EPA witness will uncover a dispute which is not demonstrated at the time of the motion. The Board should, therefore, rule that the ALJ abused his discretion by convening a hearing in this case.

VI. The Evidence in the Record after the Hearing Supported the Award of a Significant Penalty and a Compliance Order against Both Respondents

Respondents, on pages 103–05 of their Brief, argue that documents used in support of motions for summary judgment may not be relied on at trial unless they are introduced into

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[12] This Board has ruled that not only must Respondents raise genuine issues of material fact in order to "earn" the right to a hearing, but they must raise those genuine issues of material fact in a timely manner. *Id.* Here, the Respondents did not raise any issues regarding their "good faith efforts to comply" or their lack of "willfulness" in their Answers (they merely allege the proposed penalty was "excessive"), they did not raise these issues in their prehearing exchanges (any financial information they supplied did not relate to "good faith efforts to comply" or "willfulness") and they provided no evidence in response to Complainant's Motions for Accelerated Decision on Liability and Penalty. Indeed, Respondents thought they could simply demand a hearing and see if they could make out their case then. Raising a genuine issue of material fact for the first time at a hearing is not what the *Consolidated Rules*, or this Board, has ever permitted.

[13] Respondents completely misstate *Green Thumb Nursery*. Contrary to their assertion, *Green Thumb Nursery* does not stand for the proposition that "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." Resps.' Br. 97. Rather, *Green Thumb Nursery* holds that if Respondents fail to raise a genuine issue of material fact, *the ALJ can hold a hearing if he determines a genuine issue of material fact* requires a hearing. *Id.* at 792-94.

[14] Respondents blur the line between a fact dispute and policy application. On page 100 of their Brief, Respondents seem to admit there were no factual disputes between the parties, asserting instead that they were entitled to cross examine the penalty calculator apparently just so the calculator could explain his thought process. This is not a genuine dispute of a material fact requiring a live hearing.

evidence. However, in most of the cases Respondents cite, the evidence at issue was attached to a *losing* motion for summary judgment.[15] In contrast, Complainant argues that the exhibits to its Motions for Accelerated Decision on Liability and Penalty, *which it won*, (and the facts those exhibits prove) have now become the facts of the case. *See Griffin v. Griffin*, 327 U.S. 220, 225–26 (1946). Certainly neither Respondents nor the ALJ would have expected EPA to relitigate the facts demonstrating liability at a penalty hearing. Given that Respondents did not take issue with Complainant's detailed proposed Findings of Fact and the ALJ found liability and offered no alternative findings of fact, Complainant's facts, and documents supporting those facts, are now the facts of this case. After the hearing, the ALJ should have relied on those facts to establish a penalty and issue a compliance order.

Respondents are incorrect in claiming that Complainant has waived its argument that the ALJ had the authority to consider as "evidence" documents that were attached to the Motions for Accelerated Decision. In its Post-Hearing Brief, Complainant cited its original penalty calculation as evidence in support of its proposed penalty and unambiguously reminded the ALJ that Respondents' challenge to that calculation was limited to two components of the total penalty calculation. Dkt. Index No. 81 at 3-5. As the EAB explained in *In re Spitzer Great Lakes Ltd.*, the rationale behind the waiver of new issues on appeal is that a "'Presiding Officer cannot issue an adverse order or ruling on an issue that was never raised during the proceedings below . . . .'" 9 E.A.D. 302 (EAB 2000) (quoting *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994)). Here, the evidence submitted with Complainant's accelerated decision motions was clearly the

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[15] *See e.g., Johnson Intern.*, 19 F.3d 431 (8th Cir. 1994); *White v. Vathally*, 732 F.2d 1037 (1st Cir. 1984); *State Farm Life Ins. Co. v. Smith*, 331 N.E.2d 275 (Ill. App. 1975). Furthermore, one case Respondents rely upon, *Irving v. United States*, 49 F.3d 830 (1st Cir. 1995), did not reach the issue, but simply dispatches it by citing *Secretary of Labor v. DeSisto*, 929 F.2d 789, 796-97 (1st Cir. 1991). The First Circuit found error in *DeSisto* because the trial court considered hearsay evidence that not admitted at trial. However there is no such prohibition on hearsay evidence in an administrative proceeding. *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 675(EAB 2004).

basis for the penalty calculations referenced in Complainant's Post-Hearing Briefs. Respondents had ample opportunity to contest Complainant's evidence but chose not to do so.

VII. Respondents Are Not Entitled to Attorney's Fees

Respondents ask the Board to exercise its discretion and award attorney's fees in order to penalize EPA for: 1) pursing liability for Biewer Lumber, LLC in its derivative liability claim and 2) for declining to present a penalty witness for cross-examination at the February 23, 2010 hearing. There has been no award of attorney's fees in this matter and there is nothing for this Board to review on this issue. Respondents' plea is not ripe for adjudication. Under the Equal Access to Justice Act, 5 U.S.C. § 504a(2), and 40 C.F.R. § 17.14(b), parties may only file an application for an award of attorney's fees after final disposition of an adversary adjudication.[16] There has been no final disposition in this matter and Respondents have not submitted an application for attorney's fees pursuant to 40 C.F.R. Part 17. Moreover, once this matter has been finally resolved, Respondents will only be entitled to attorney's fees if they are "prevailing parties" and if Complainant's positions were not "substantially justified." 5 U.S.C. § 504a(1). Complainant reserves the right to argue any procedural or substantive deficiencies in any application for attorney's fees that Respondents may make in the future.

VIII. Conclusion

For all of the foregoing reasons, and the reasons stated in Complainant's initial appeal brief, Complainant respectfully requests that the Board reverse the ALJ's order granting accelerated decision in JAB Co.'s favor on liability and grant Complainant's motions for accelerated decision against JAB Co. or, in the alternative, remand the issues of JAB Co.'s liability to the ALJ for further proceedings. In addition, the Board should assess an appropriate

[16] *Ryan v. United States*, 71 Fed. Cl. 740, 743 (2006).

civil penalty against Respondents and enter a Compliance Order requiring Respondents to comply with the drip pad closure requirements of RCRA or remand the matter for the determination of an appropriate penalty based on all of the evidence in the record at the time of the Initial Decisions.

RESPECTFULLY SUBMITTED,

Karen L Peaceman

Karen L. Peaceman
Associate Regional Counsel
Gary E. Steinbauer
Assistant Regional Counsel
U.S. Environmental Protection Agency (C-14J)
77 W. Jackson Blvd.
Chicago, IL 60604-3590

OF COUNSEL:
Benjamin D. Fields
Acting National Coordinator
Cross-Cutting Administrative Litigation Issues
U.S. Environmental Protection Agency
1650 Arch Street (3RC30)
Philadelphia, PA 19103

Pete Raack
Attorney Advisor
OECA-OCE-WCED
Ariel Rios South Mail Code 2249A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

CERTIFICATE OF SERVICE

I certify that a true copy of **Complainant's Reply Brief In Support Of Its Appeal**, dated November 23, 2010, was filed with the Environmental Appeals Board electronically, via the CDX portal. In addition, a copy was **hand delivered** to:

Ms. La Dawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency – ORC Region 5
77 W. Jackson Blvd. (E-19J)
Chicago, IL 60604-3590

and a copy was sent by **UPS overnight delivery to:**

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

DATE: November 23, 2010

Karen L. Peaceman

Karen L. Peaceman
Associate Regional Counsel (C-14J)
U.S. EPA, Region 5
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