

1 back and ask them -- I'm sure they'll cooperate.

2 MR. DONNELL: Thank you, Your Honor. I
3 apologize for the inconvenience.

4 THE ADMINISTRATIVE LAW JUDGE: Okay. All
5 right. So, we'll see you all in about ten minutes.

6 MR. DONNELL: Thank you.

7 MR. WAGNER: Yes, Your Honor.

8 (Brief recess.)

9 THE ADMINISTRATIVE LAW JUDGE: Let's go on the
10 record, and you can mark them for purposes of
11 identification. First, we'll go on the record. Are we
12 ready to go on the record, folks? Are you ready,
13 Mr. Wagner?

14 MR. WAGNER: Yes, we are, Your Honor.

15 MR. DONNELL: Your Honor, for the record, I
16 would like to mark as Respondents exhibit -- are we doing
17 letters or numbers? would you prefer letters or numbers?

18 THE ADMINISTRATIVE LAW JUDGE: Your choice.

19 MR. DONNELL: Exhibit No. 1 one will be some
20 financial documents in connection with Biewer of Ohio.

21 THE ADMINISTRATIVE LAW JUDGE: Are these --
22 balance sheet does not adequately describe that, just the
23 top page though.

24 MR. DONNELL: It is the top page because I
25 think there may be -- there's a bit more. There's an

1 income statement and additional information.

2 (The document, referred to above,
3 was marked, for identification,
4 Respondent's Exhibit No. 1.)

5 THE ADMINISTRATIVE LAW JUDGE: Okay. You know,
6 I think it would be -- let's go off the record.

7 (Discussion off the record.)

8 (The document, referred to below,
9 was marked, for identification,
10 Respondent's Exhibit No. 2.)

11 THE ADMINISTRATIVE LAW JUDGE: All right.
12 We're ready to go on the record. We're on the record
13 now.

14 MR. DONNELL: Your Honor, I would like to call
15 Mr. Gary Olmstead to the stand.

16 THE ADMINISTRATIVE LAW JUDGE: Okay. And
17 you're going to offer some exhibits for purposes of
18 identification to begin with?

19 MR. DONNELL: I am, Your Honor. I was going to
20 actually have Mr. Olmstead explain what the exhibits are.

21 THE ADMINISTRATIVE LAW JUDGE: Okay, fine. I'm
22 going to swear you in, Mr. Olmstead. Please raise your
23 right hand.

24 okay. Have a seat. And would you spell your
25 name, please, Mr. Olmstead, for the court reporter.

1 THE WITNESS: Gary E. Olmstead,
2 O-L-M-S-T-E-A-D.

3 MR. DONNELL: Your Honor, would you prefer if I
4 stayed here or at the podium?

5 THE ADMINISTRATIVE LAW JUDGE: Wherever you
6 feel more comfortable.

7 MR. DONNELL: Thank you, Your Honor.
8 Whereupon,

9 GARY E. OLMSTEAD,
10 a witness of lawful age, having been first duly cautioned
11 or sworn, according to law, called for examination by
12 counsel on behalf of the Respondent, was examined, and
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. DONNELL:

16 Q Good morning, Mr. Olmstead.

17 A Good morning.

18 Q Can you please tell us, tell the Court, what
19 your position is in connection with John A Biewer Company
20 of Toledo and John A. Biewer of Ohio?

21 A I am the Chief Financial Officer for John A.
22 Biewer Company, Inc. And in that capacity, I prepare
23 financial statements for their subsidiaries, including
24 John A. Biewer Company of Toledo and John A. Biewer
25 Company of Ohio.

1 Q Let me show you, sir, a document which has been
2 marked as Respondent's Exhibit 1.

3 THE ADMINISTRATIVE LAW JUDGE: Thank you.

4 MR. DONNELL: And, Your Honor, for the record,
5 what I have done is on the upper right-hand corner of
6 Exhibit 1, I have numbered the pages from one to 12.

7 THE ADMINISTRATIVE LAW JUDGE: Mine has through
8 14.

9 MR. DONNELL: Oh, I'm sorry, one through 14.

10 BY MR. DONNELL:

11 Q Mr. Olmstead, can you tell us what is Exhibit
12 1?

13 A Exhibit 1 is balance sheets and income
14 statements for John A. Biewer Company of Ohio for the
15 periods from the year ending 12 -- or excuse me --
16 November 30, 2002 through the period ending December 31,
17 2006.

18 Q All right. And let me show you what our
19 reporter has marked as Respondent's Exhibit 2. Can you
20 tell us what that document is?

21 A Exhibit 2 is balance sheets and income
22 statements for John A. Biewer Company of Toledo for the
23 periods beginning November 30, 2002 through the period
24 ending December 31, 2006.

25 MR. DONNELL: And again, Your Honor, for the

1 record, what I have done is placed numbers on the upper
2 right-hand corner of the pages of Exhibit 2, pages one
3 through I believe it's 14.

4 THE ADMINISTRATIVE LAW JUDGE: In this case, I
5 think it's through 12.

6 MR. DONNELL: Okay. I'm sorry, I'm going
7 backwards. My apologies.

8 BY MR. DONNELL:

9 Q Okay. Mr. Olmstead, have you had an
10 opportunity to review these financial statements?

11 A Yes, I have.

12 Q And can you describe -- well, first of all, are
13 you familiar with the time period in which we'll start
14 with Biewer Company of Ohio ceased operations?

15 A Yes.

16 Q And when was that?

17 A 2001.

18 Q And so, the financial documents that you have
19 before you as Exhibit 1 are financial documents that
20 postdate the closing of Biewer of Ohio's facility?

21 A That is correct.

22 Q Now, what are these documents contained in
23 Exhibit 1 tell you in terms of the financial condition of
24 Biewer of Ohio?

25 THE ADMINISTRATIVE LAW JUDGE: well, before --

1 counsel, before he does that, why don't you just ask him
2 a couple questions about that he's familiar with these
3 documents, that he personally knows of them, and then you
4 can move for its introduction.

5 MR. DONNELL: Very good.

6 THE ADMINISTRATIVE LAW JUDGE: And then, ask
7 him questions about the particulars and I'll see if
8 there's an objection, all right.

9 MR. DONNELL: We're there, Your Honor.

10 BY MR. DONNELL:

11 Q Mr. Olmstead, are you familiar with all the
12 documentation contained in Exhibit 1?

13 A Yes, I am.

14 Q To the best of your knowledge, does this
15 accurately reflect the financial condition of John A.
16 Biewer Company of Ohio for the time periods indicated on
17 these documents?

18 A Yes.

19 Q And you are competent to testify regarding that
20 financial condition?

21 A Yes, I feel I am.

22 MR. DONNELL: Your Honor, I'd like to move the
23 admission of Exhibit 1.

24 MR. WAGNER: Your Honor, we would object based
25 upon the arguments made in Complainant's objection to

1 Respondent's motion amended pre-hearing disclosure.

2 THE ADMINISTRATIVE LAW JUDGE: Okay. Having
3 heard your objection, the objection is overruled, and the
4 -- and Respondents Exhibit 1 is admitted.

5 (The document, previously marked,
6 for identification, Respondent's
7 Exhibit No. 1, was received in
8 evidence.)

9 MR. DONNELL: Thank you, Your Honor.

10 BY MR. DONNELL:

11 Q Now, Mr. Olmstead, could you tell the Court,
12 first of all, the types of documents that are contained
13 in Exhibit 1. What are these documents?

14 A These are income statements and balance sheets
15 prepared by my staff under my direction. There is the --
16 this is the annual income statement, and then the year
17 end balance sheet for John A. Biewer Company of Ohio for
18 each of the periods I've indicated.

19 Q And a balance sheet generally tells you what?

20 A It's a snapshot of the financial situation or
21 financial position of the company; assets, liabilities
22 and its equity.

23 Q And what does an income statement generally
24 tell you?

25 A Income statement is that statement of the

1 results of operation for the Corporation for a certain
2 period, indicating revenues less expenses.

3 Q All right. From these documents, sir, are you
4 able to tell the Court what was the financial condition
5 of John A. Biewer Company of Ohio beginning in the year
6 2004 and going through the year 2006?

7 A If I first look at the income statement for
8 that period, 2004, John A. Biewer Company of Ohio
9 incurred a net loss of \$25,568.

10 THE ADMINISTRATIVE LAW JUDGE: Can you all --
11 with the page you're referring to.

12 THE WITNESS: I'm sorry, on page ten.

13 THE ADMINISTRATIVE LAW JUDGE: Page ten.

14 THE WITNESS: It's the income statement for
15 2004, and actually, it's a comparative for 2004 and 2005.
16 Indicates a loss -- a net loss of \$25,568 in 2004, and a
17 net loss of \$19,499 in 2005.

18 THE ADMINISTRATIVE LAW JUDGE: Is that the
19 bottom line on that particular exhibit?

20 THE WITNESS: That's the bottom line, yes.

21 THE ADMINISTRATIVE LAW JUDGE: Okay. We mean
22 that in a literal sense.

23 THE WITNESS: Yes. The origin of the term, I
24 think. And then, page nine on the same exhibit indicates
25 a net loss of \$8,317.68 for 2006.

1 BY MR. DONNELL:

2 Q So, the company was losing money?

3 A The company lost money in all of those years.

4 Q And why don't we take a look at the balance
5 sheet. What does that tell us regarding the financial
6 condition of John A. Biewer Company of Ohio for those
7 years?

8 A If I refer to pages three and four of the
9 exhibit, it indicates that in -- as of December 2004, the
10 company had a negative -- a deficit in retained earnings
11 of approximately \$9500 in addition to a deficit for the
12 current year of 25,000.

13 THE ADMINISTRATIVE LAW JUDGE: What -- sir,
14 which page are you on now?

15 THE WITNESS: Page four.

16 THE ADMINISTRATIVE LAW JUDGE: Page four.

17 THE WITNESS: In the 2004 column.

18 THE ADMINISTRATIVE LAW JUDGE: Okay. And about
19 where on that?

20 THE WITNESS: At the bottom of the page.

21 THE ADMINISTRATIVE LAW JUDGE: At the bottom.
22 Okay. Would you repeat what you just said then for me
23 now that I'm oriented.

24 THE WITNESS: Sure. It indicates a deficit in
25 its retained earnings of \$9564.

1 THE ADMINISTRATIVE LAW JUDGE: I see, okay.

2 THE WITNESS: And in addition to the current
3 year's loss of 25,568.

4 THE ADMINISTRATIVE LAW JUDGE: Thank you.

5 THE WITNESS: Total owner's equity indicates an
6 accumulated deficit of \$34,634.

7 BY MR. DONNELL:

8 Q Is that another way of saying it had a negative
9 net worth?

10 A It had a negative net worth, yes. The same is
11 also true for 2005 and for 2006.

12 Q And sir, is there a reason that you selected
13 the financial reports for 2004, five, and six as opposed
14 to other years?

15 A Those financial statements, I believe, were the
16 ones during the period that was in question by the EPA.

17 Q And you're referring to the time period in the
18 amended complaint as to when the violations occurred?

19 A Yes.

20 Q Or the alleged violations occurred?

21 A Yes.

22 Q Based upon these financial documents, sir, was
23 John A. Biewer Company of Ohio able financially to
24 perform environmental cleanup and investigation at the
25 site?

1 A No, they were not.

2 Q Was it a question in your mind of unwillingness
3 or inability?

4 A It was a question of financial inability.

5 Q And if the Court wanted to take a look at the
6 financial condition of John A. Biewer of Ohio for
7 different time periods beyond 2004 and 2006, have those
8 documents been produced in this litigation?

9 A Yes.

10 Q And in fact, were they produced to EPA?

11 A Yes, they were.

12 Q Do you know whether or not those documents
13 were, in fact, attached as exhibits to EPA's brief in
14 support of a claim of liability as the parent company?

15 A Yes, they were.

16 MR. WAGNER: Your Honor, I would object to the
17 use of any documents at this exhibit that were not
18 included or identified in the pre-hearing exchange.

19 MR. DONNELL: Your Honor, I'm not -- it is at
20 least not my intent to introduce these as exhibits. What
21 my intent is that, in fact, the point is being made here
22 by Mr. Olmstead is a point that was actually made by EPA
23 in its own brief and its own attachments in connection
24 with the motion for derivative liability against the
25 parent corporation wherein they argued that the

1 subsidiaries did not have the financial wherewithal to
2 undertake the financial obligations.

3 And so, I was simply going to ask the witness
4 to identify what the exhibit was where EPA made that
5 claim and supported that claim.

6 THE ADMINISTRATIVE LAW JUDGE: Okay. And I
7 think I could take notice of it as well. But your answer
8 suffices.

9 BY MR. DONNELL:

10 Q Is exhibit -- I'm showing you know, sir,
11 Exhibit N, as in Nancy, which was an attachment to EPA's
12 motion for accelerated decision on derivative liability.
13 Are these the financial forms that would enable the
14 Court, if it chose to do so, to make a determination
15 regarding John A. Biewer Company of Ohio's financial
16 conditions for years other than the 2004 to 2006 time
17 frame?

18 A Yes, they are.

19 Q Thank you, sir.

20 Turning now to Exhibit 2, Mr. Olmstead.
21 Exhibit 2 is a collection of documents that pertains to
22 John A. Biewer Company of Ohio; is that correct?

23 A John A. Biewer Company of Toledo.

24 Q I'm sorry, Toledo. I misspoke. And can you
25 describe for the Court and for the record what is

1 contained or what kind of documents are contained in
2 Exhibit 2?

3 A These are the income statements and balance
4 sheets for John A. Biewer Company of Toledo for the
5 periods 2002 through 2006.

6 Q And do these contained the same types of
7 documentation that you described earlier in connection
8 with the financial forms for John A. Biewer Company of
9 Ohio?

10 A Yes, they do.

11 Q And do these documents enable you, sir, to
12 explain to the Court the financial condition of John A.
13 Biewer Company of Toledo for the years indicated in these
14 documents?

15 A Yes, they do. They indicate the net losses for
16 those periods as well as the accumulated deficit and
17 retained earnings for John A. Biewer Company of Toledo
18 for those periods.

19 Q Okay. And again, as we go through this, if
20 there are specific pages that you're referring to, if you
21 could make that clear so that Judge Moran can follow and
22 it's also clear for the record.

23 So, starting with the income statements, as you
24 did with John A. Biewer Company of Ohio, what does this -
25 - what do these documents tell us?

1 A If I begin with the income statement, page two
2 of the income statement, again starting with the year --
3 period ended December 2004, in the case of John A. Biewer
4 Company of Toledo, it indicates bottom line net income of
5 \$12,204 in 2004, and a bottom line net income of 18,193
6 in 2005.

7 Q Can you tell us what line you're looking at,
8 sir?

9 A The bottom line of the income statement on page
10 two.

11 Q Okay.

12 A Under the year to date column.

13 THE ADMINISTRATIVE LAW JUDGE: Now, that's very
14 helpful for clarity of the record. Thank you.

15 MR. DONNELL: There are a lot of numbers on
16 these pages.

17 THE WITNESS: Yes, sir.

18 MR. DONNELL: So, I just want to make sure.

19 BY MR. DONNELL:

20 Q Okay. Now, in connection with John A. Biewer
21 Company of Toledo, did it during this time period have
22 some form of income?

23 A It did.

24 Q What was that type of income?

25 A It was rental income from renting the facility

1 to a building supplier.

2 Q And at the time of these financials in 2004,
3 was John A. Biewer Company of Toledo closed -- were its
4 operations close?

5 A Yes, its operations were closed and it was
6 strictly a leased rental income to --

7 Q And when did John A. Biewer Company of Toledo
8 close its operations?

9 A 1997, I believe.

10 Q All right. And so, during this time period,
11 after it closed its operations, was John A. Biewer
12 Company of Toledo's income limited to rental income?

13 A Yes.

14 Q And that is reflected in these balance sheets -
15 - I'm sorry -- income statements?

16 A In the income statements, yes.

17 Q All right. And we can go through for each of
18 the years, and identify net positive or negative income
19 for each year for John A. Biewer Company of Toledo; is
20 that correct?

21 A That is correct, yeah.

22 Q Okay. What do the balance sheets tell us for
23 John A. Biewer Company of Toledo?

24 A Pages seven and eight of the exhibit are the
25 balance sheets for the period ended December 2005 and

1 December 2004. Page eight reflects a accumulated
2 deficit, retained earnings deficit, at the bottom of the
3 page of 24,000 of retained earnings less deficit plus the
4 current year's income. So, an accumulated deferred
5 deficit, a retained earnings deficit of about \$12,000.

6 Q All right. And that's for 2004?

7 A For 2004. That situation turned into a
8 positive retained earnings in 2005 as a result of the
9 income that was -- the rental income for 2005.

10 Q Now, in terms of the balance sheet -- the
11 balance sheet, whether it's 2004, 2005 or 2006, does it
12 indicate cash on hand or cash equivalents?

13 A It does not. The company had no cash on hand.
14 And in fact, its net position in terms of funds owed to
15 the parent company, as indicated in the accounts payable
16 intercompany on page eight.

17 Q All right. Now, during this time period --

18 THE ADMINISTRATIVE LAW JUDGE: why don't you
19 just -- don't let me throw you off, and what was that
20 amount?

21 THE WITNESS: The account payable to
22 intercompany at December 31, 2004 was 119,755.

23 BY MR. DONNELL:

24 Q And where are you finding that number, sir?

25 A That's on page eight.

1 Q Okay. In the right-hand column?

2 A The right-hand column, line indicating account
3 payable to intercompany. And then, the column next to it
4 for December 2005, the amount payable to the parent was
5 \$88,393.

6 Q Very good. Now, during the time period 2003,
7 four, five, six, that general time period, was John A.
8 Biewer Company of Toledo expending funds to perform
9 environmental investigation or remediation?

10 A Yes, they were, to the extent they had funds
11 available.

12 Q And was it possible for John A. Biewer Company
13 of Toledo to have performed greater environmental
14 investigation or remediation than it did based upon its
15 financial condition?

16 A No.

17 Q So, again, was its failure to perform more
18 investigation or more remediation a product of
19 unwillingness or a product of inability?

20 A It was a product of inability, financial
21 inability.

22 THE ADMINISTRATIVE LAW JUDGE: Let me just
23 interject with one question. If you'd help me out, when
24 I look at page one of Respondent's Exhibit 2, and the net
25 income for the year 2006, that indicates, you tell me if

1 I've got this right or wrong, that Biewer of Toledo had a
2 net income of \$33,790.58?

3 THE WITNESS: That's correct.

4 THE ADMINISTRATIVE LAW JUDGE: Okay. And so,
5 my question to you would be you just stated they did not
6 have the financial wherewithal to take any additional
7 steps. Doesn't the \$33,790 indicate otherwise? And if
8 not, why?

9 THE WITNESS: It indicates -- the \$33,790
10 indicates an excess of revenue over expense for the
11 current year. If we refer to page six of the exhibit --

12 THE ADMINISTRATIVE LAW JUDGE: Let me get
13 there. Okay.

14 THE WITNESS: You'll see that there's still an
15 intercompany -- and accounts payable intercompany at the
16 end of the year of \$53,361.

17 THE ADMINISTRATIVE LAW JUDGE: Okay.

18 THE WITNESS: And that indicates the net
19 position that John A. Biewer of Toledo still owes the
20 parent. So, basically, their current years income merely
21 worked off that debt to a small amount.

22 THE ADMINISTRATIVE LAW JUDGE: I see. So,
23 you're telling me that the \$33,790 was applied towards
24 the previous debt of 88,000, reducing it to approximately
25 53,000?

1 THE WITNESS: Yes.

2 THE ADMINISTRATIVE LAW JUDGE: Yes?

3 THE WITNESS: Yes.

4 THE ADMINISTRATIVE LAW JUDGE: Okay. Just need
5 to understand this.

6 BY MR. DONNELL:

7 Q Just to be clear, sir, were there other
8 expenses that were incurred during the general time
9 period that we're talking about on environmental work, in
10 other words, payments toward consultants for remediation
11 activity?

12 A I believe so, yes.

13 MR. DONNELL: Your Honor, I can't remember if I
14 moved the admission of Exhibit 2. But if I did not, I
15 would move the admission of Exhibit 2.

16 MR. WAGNER: Your Honor, I'd make the same
17 objection --

18 THE ADMINISTRATIVE LAW JUDGE: Okay,
19 Mr. Wagner --

20 MR. WAGNER: -- as Exhibit 1.

21 THE ADMINISTRATIVE LAW JUDGE: Yes. And that's
22 overruled. So, Respondent's Exhibit 1 and now
23 Respondent's Exhibit 2 are admitted in the record.

24 (The document, previously marked,
25 for identification, Respondent's

1 Exhibit No. 2, was received in
2 evidence.)

3 BY MR. DONNELL:

4 Q And Mr. Olmstead, I'm going to ask you the same
5 question that I asked in connection with John A. Biewer
6 Company of Ohio, but this time in connection with John A.
7 Biewer Company of Toledo. Has -- have the financial
8 documents consisting of balance sheets and income
9 statements been provided in this litigation to EPA for
10 years other than those shown on Exhibit 2?

11 A Yes, they have.

12 Q And just showing you, again, Exhibit N to
13 Complainant's brief or motion for accelerated decision on
14 derivative liability, are those the documents?

15 MR. WAGNER: Your Honor, I would make the same
16 objection as I made on the earlier documents relating to
17 Ohio.

18 THE ADMINISTRATIVE LAW JUDGE: Yes, Mr. Wagner.
19 Thank you.

20 THE WITNESS: Yes, those are the documents.

21 THE ADMINISTRATIVE LAW JUDGE: Okay. And the
22 Court rules for the same reasons that -- in fact, I
23 believe that I overruled the objection. But I believe
24 you also could take notice of that as it was included as
25 part of EPA's argument.

1 MR. DONNELL: I agree, Your Honor. And to be
2 truthful, there's maybe a little belt and suspenders here
3 because I appreciated the Court's intent to try to make
4 sure that everything that we needed to be on the record
5 was on the record. This I candidly believe is belt and
6 suspenders, but I just wanted the record to be clear as
7 to what records that the EPA had introduced as undisputed
8 facts and that we did not dispute are, in fact, in the
9 record.

10 (The document, referred to below,
11 was marked, for identification,
12 Respondent's Exhibit No. 3.)

13 BY MR. DONNELL:

14 Q Mr. Olmsted, well, let me start this way, and
15 I'm not sure if this will work or not. Let me show you a
16 document that has been marked as Exhibit 3.

17 THE ADMINISTRATIVE LAW JUDGE: Thank you.

18 MR. DONNELL: You're welcome.

19 BY MR. DONNELL:

20 Q Exhibit 3 consists of two letters; one dated
21 November 22 of 2006, the other dated January 29, 2008.
22 Have you seen these letters before, sir?

23 A Yes, I have.

24 Q And all I would ask you is to the best of your
25 knowledge, were these letters sent to EPA, either

1 Mr. Cunningham or Mr. Wagner on the dates indicated?

2 A Yes.

3 MR. DONNELL: Your Honor, I would move the
4 admission of Exhibit 3.

5 MR. WAGNER: No objection --

6 THE ADMINISTRATIVE LAW JUDGE: Okay. With no
7 objection, Respondent's Exhibit 3, consisting of two
8 pages, is admitted.

9 (The document, previously marked,
10 for identification, Respondent's
11 Exhibit No. 3, was received in
12 evidence.)

13 BY MR. DONNELL:

14 Q And the documents contained in Exhibit 3
15 pertain to John A. Biewer Company of Toledo; is that
16 correct?

17 A That's correct.

18 Q And they deal in part with the environmental
19 work in connection with cleanup of that site; is that
20 correct?

21 A That's correct.

22 Q This would be reflective of some of the type of
23 environment work that was, in fact, funded by John A.
24 Biewer Company of Toledo?

25 A Yes.

1 MR. DONNELL: Thank you. Your Honor, that's
2 all I have for this witness.

3 THE ADMINISTRATIVE LAW JUDGE: Okay. Thank
4 you.

5 MR. DONNELL: I certainly encourage the Court
6 if the Court has questions of the witness beyond what
7 I've asked, feel free.

8 THE ADMINISTRATIVE LAW JUDGE: Okay. Thank
9 you. And I did ask some questions the record will note,
10 including the helpful explanation as to the \$33,790.58
11 reflected on Respondent's Exhibit 2 for the net income,
12 and that was helpful for me to understand at least
13 Mr. Olmstead's respective on that.

14 Cross examination?

15 MR. WAGNER: Just a couple questions, Your
16 Honor.

17 CROSS EXAMINATION

18 BY MR. WAGNER:

19 Q Mr. Olmstead, as you look at Respondent's
20 Exhibit No. 1, and the financial documents that appear in
21 that exhibit, and Respondent's Exhibit No. 2 and the
22 financial documents as they appear in that exhibit, these
23 documents are not audited, are they?

24 A These specific documents are not audited.

25 Q Correct. Now, Biewer Company, who you work for

1 and you and your staff have prepared financial documents
2 for Biewer of Ohio and Biewer of Toledo. They do have
3 audited financial documents statements; do they not?

4 A There is an audited financial statement for
5 John A. Biewer Company, Inc. on a consolidated basis,
6 which includes John A. Biewer Company of Toledo and John
7 A. Biewer Company of Ohio. And those are the financial
8 statements that were included in the exhibit that
9 Mr. Donnell referred to earlier.

10 Q Those are not in front of you today admitted
11 into evidence?

12 A No. These numbers, however, are consistent
13 with the numbers that were in the financial statements --

14 Q Okay. Are you personally familiar with all of
15 the numbers that are in those documents?

16 THE ADMINISTRATIVE LAW JUDGE: Which documents,
17 counsel?

18 MR. WAGNER: Exhibit No. 1 and Exhibit No. 2.

19 THE WITNESS: Yes.

20 BY MR. WAGNER:

21 Q Okay. Could you testify to that net income of
22 Biewer of Ohio, for instance, in December 2005 without
23 referring to that document?

24 A No, I can't.

25 Q And you could not independently recite any

1 other numbers as far as --

2 A without looking at them, no.

3 Q Correct.

4 MR. WAGNER: I have no further questions, Your
5 Honor.

6 THE ADMINISTRATIVE LAW JUDGE: Nothing on
7 redirect? No.

8 MR. DONNELL: No, Your Honor.

9 THE ADMINISTRATIVE LAW JUDGE: Okay.
10 Mr. Olmstead, thank you for your testimony, sir.

11 THE WITNESS: Thank you, Your Honor.
12 (Witness excused.)

13 THE ADMINISTRATIVE LAW JUDGE: Counsel, I --
14 this is directed at both parties, but in the first
15 instance to counsel for the Respondent, if you have case
16 authority or a basis to support the Court's consideration
17 of the attachments which were part of EPA's Exhibit N and
18 the authority considering that, I would appreciate that
19 being included in post hearing briefs.

20 MR. DONNELL: Thank you, Your Honor. I'll do
21 that.

22 THE ADMINISTRATIVE LAW JUDGE: And by the same
23 token, Mr. Wagner, anything that says that I should not
24 consider that, I'll hope to hear from you about that.

25 MR. WAGNER: And you're referring to the

1 exhibits that were earlier submitted in the pleadings of
2 the Agency?

3 THE ADMINISTRATIVE LAW JUDGE: I'm referring
4 to, for example, Exhibit N, which was identified twice to
5 Mr. Olmstead. It's the same Exhibit N, is that right?

6 MR. DONNELL: It is, Your Honor.

7 THE ADMINISTRATIVE LAW JUDGE: Okay.

8 MR. DONNELL: It is -- the same documents were
9 submitted in both cases.

10 THE ADMINISTRATIVE LAW JUDGE: In both cases.
11 So, there are two Exhibit N's, one for Toledo and one for
12 Ohio?

13 MR. DONNELL: Yes.

14 THE ADMINISTRATIVE LAW JUDGE: Okay. Do you
15 have any other testimony, counsel for the Respondent?

16 MR. DONNELL: I do not, Your Honor. The only
17 other examination I was going to do or would have done
18 would have been the EPA penalty calculation witness, and
19 that person is not present. So, I have no other.

20 THE ADMINISTRATIVE LAW JUDGE: Right. Well,
21 for the record, I believe that it's true, I presumed it
22 to be the case and noted it in one of my orders, but you
23 were the person who did the penalty calculation and
24 applied the policy, is that true, Mr. Wagner?

25 MR. WAGNER: That is correct, Your Honor, with

1 the input of the program, the RCRA program in Region 5.
2 We worked together on that. Since it's a pleading in the
3 case, I signed it as an attorney.

4 THE ADMINISTRATIVE LAW JUDGE: Okay. Then that
5 concludes the evidentiary portion of this hearing. And
6 with the evidentiary portion now terminated, we can talk
7 in terms of any post hearing briefs unless there's some
8 other matter that the parties want to raise to my
9 attention at this point.

10 MR. DONNELL: Not here, Your Honor.

11 MR. WAGNER: I'm sorry, Your Honor.

12 THE ADMINISTRATIVE LAW JUDGE: Yes, I knew you
13 weren't paying attention. You're busy doing something
14 else, but that's fine. No offense taken. I asked if
15 there's anything else that you need to raise at this
16 time, Mr. Wagner, other than us dealing with the
17 housekeeping or administrative matters about post hearing
18 briefs.

19 MR. WAGNER: No, Your Honor, that's correct.

20 THE ADMINISTRATIVE LAW JUDGE: Okay. Now, you
21 tell me what you people want to do. And I do want this
22 on the record as well. And I would like to dispose of
23 this matter in as rapid a manner as possible because this
24 case has been going on a long time.

25 However, 40 CFR 22.26 provides that the parties

1 have the option of filing proposed findings of fact,
2 conclusions of law and a proposed order together with
3 briefs in support thereof. The problem is that a party
4 has 30 days after receipt of the transcript to file a
5 motion to conform the transcript to the testimony, and it
6 can be as long as 45 days after the parties are notified
7 that the transcript is available for the clock to start
8 running for the filing of proposed findings of fact,
9 conclusions of law.

10 The upshot of that means that we're talking 45
11 days from now before I can roll up my sleeves and deal
12 with arguments. Or the parties can stipulate that
13 arguments have been made to the Nth degree in this
14 matter, and that as soon as I receive the transcript I
15 can be about issuing my initial decision. I'm not trying
16 to force anyone's hand on that, but I'd like to hear your
17 perspectives and whether you want to waive -- let's say
18 well, waive filing of post hearing briefs or waiving this
19 time period clock running from the 30 days after the
20 receipt of the transcript business.

21 MR. DONNELL: Your Honor, speaking on behalf of
22 the Respondents, I would most assuredly waive submission
23 of proposed findings of fact, conclusions of law.

24 The only thing that I would proposed doing, at
25 least from the Respondent's side of things, is submitting

1 a very short brief addressing the two issues that you
2 identified this morning, the one being entitlement to
3 attorney's fees, the other being the Court's authority to
4 consider, if it chooses to do so, documentation that was
5 filed in connection with EPA's motion for accelerated
6 decision.

7 THE ADMINISTRATIVE LAW JUDGE: Okay. And
8 that --

9 MR. DONNELL: And that would be the limit of my
10 brief.

11 THE ADMINISTRATIVE LAW JUDGE: Okay. What is
12 your perspective, Mr. Wagner, on this issue?

13 MR. WAGNER: Your Honor, if your decision is
14 going to be based upon what the testimony of
15 Mr. Olmstead was here today, we would want to be able to
16 discuss that testimony with the court report and the
17 record of that testimony.

18 On the other hand, there's still this
19 outstanding matter of the motion for early decision, and
20 you had indicated, and you can correct me if I'm wrong,
21 you had indicated earlier you were inclined to grant
22 that. And if you were to grant that --

23 THE ADMINISTRATIVE LAW JUDGE: No, but it's not
24 -- as I said, it's not an either/or thing. It's going to
25 -- my decision will deal with both such as in the

1 alternative.

2 MR. WAGNER: Okay. Well --

3 THE ADMINISTRATIVE LAW JUDGE: That way, I'm
4 avoiding remand issues, and the Board will have
5 everything in a nice package to deal with.

6 MR. WAGNER: Yeah.

7 THE ADMINISTRATIVE LAW JUDGE: So, but it
8 sounds like you want the time. So, that means that I'm
9 going to have to require whatever briefs want to be
10 submitted, what, 30 days after the -- let's go off the
11 record for a moment.

12 (Discussion off the record.)

13 THE ADMINISTRATIVE LAW JUDGE: Are you willing
14 to have your initial briefs submitted by the 31st of
15 March, Mr. Wagner and Mr. Donnell?

16 MR. WAGNER: Yes, Your Honor.

17 MR. DONNELL: Yes, Your Honor. Mine's not
18 going to take that long.

19 THE ADMINISTRATIVE LAW JUDGE: Okay. So, I'm
20 noting that the initial briefs will be due March 31st.
21 And I would advise, since we are having briefs, any
22 issues the parties feel are important to brief, be sure
23 you brief them. Don't limit yourself to a narrow view.
24 This is your opportunity to -- and maybe somewhat of a
25 reiteration of things that have been said before, but you

1 ought to make a judgment about whether either cite to or
2 incorporate by reference previously arguments.

3 Now, one thing that's very important from my
4 perspective is after these initial briefs are due, it's
5 very informative when reply briefs are filed. And so,
6 those -- these are all due simultaneously. So, what I
7 would suggest is that the reply brief be submitted by
8 April 9th. Does that work for everyone?

9 MR. DONNELL: It does.

10 MR. WAGNER: Yes, Your Honor.

11 THE ADMINISTRATIVE LAW JUDGE: And, you know,
12 it goes without saying that the reply brief is not to
13 raise new issues. They're only to respond to issues
14 raised by the other side as gleaned from their initial
15 brief submission. All right. So, there's no attempt to,
16 you know, surprise attack and raise some issues that the
17 other side hasn't already brought to the attention of the
18 Court through its initial brief.

19 All right. Anything else, folks, that we need
20 to talk about today?

21 MR. DONNELL: Your Honor, just a point of
22 clarification, you are not requesting from us, I hope,
23 findings of fact and conclusions of law?

24 THE ADMINISTRATIVE LAW JUDGE: I'm not, no.
25 I'll make my own.

1 MR. DONNELL: I just wanted to make sure that
2 you were not expecting something from me that I wasn't
3 planning on.

4 THE ADMINISTRATIVE LAW JUDGE: That's true.

5 MR. DONNELL: Thank you.

6 THE ADMINISTRATIVE LAW JUDGE: Mr. Wagner,
7 anything else?

8 MR. WAGNER: Nothing further, Your Honor.

9 THE ADMINISTRATIVE LAW JUDGE: Okay. Now, I do
10 want to state that, and I mean this, you know, there's
11 simply a very strong difference in point of view as to
12 EPA's position and tack it's approach in this case.

13 I like you personally, Mr. Wagner. You seem
14 like a nice fellow, but we disagree very strongly as to
15 your perspective and how this case has been conducted.

16 But again, that's done in a dispassionate way,
17 and I wish you well.

18 All right. With that, this proceeding will
19 come to a close.

20 MR. DONNELL: Thank you, Your Honor.

21 MR. WAGNER: Thank you, Your Honor.

22 * * * * *

23 (Whereupon, at approximately 10:57 o'clock
24 a.m., the hearing in the above-entitled matter was
25 concluded.)

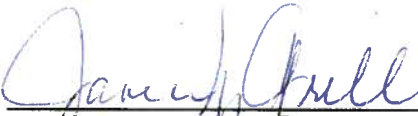
REPORTER'S CERTIFICATE

IN THE MATTER OF: John Biewer of Toledo
John Biewer of Ohio

DOCKET NUMBERS: RCRA-05-2008-0006
RCRA-05-2008-0007

I, Janice M. Grill, a fully trained, qualified and certified court reporter, do hereby certify that I was present at and reported the proceedings in the foregoing proceeding; that I transcribed the proceedings; and that the foregoing contains a true and correct verbatim transcription of all portions of the proceedings in the above action on the date indicated.

I certify that I am not related by either blood or marriage to any of the parties or their representatives, that I have not acted as counsel to or for any of the parties; nor am I otherwise interested in the outcome of this matter.



Janice M. Grill, CVR

March 5, 2010

My commission expires:
March 17, 2012

