

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)

) **DOCKET NOs. RCRA-05-2008-0006**

**John A. Biewer Company of Toledo, Inc.)
300 Oak Street)
St. Clair, Michigan 48079-0497)
(Washington Courthouse Facility))**

RCRA-05-2008-0007

U.S. EPA ID #: OHD 081 281 412; and)

**John A. Biewer Company, Inc.)
812 South Riverside Street)
St. Clair, Michigan 48079; and)**

**RECEIVED
MAY 07 2009**

**Biewer Lumber LLC)
812 Riverside Street)
St. Clair, Michigan 48079)**

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY**

Respondents)

ORDER REGARDING EPA's MOTION FOR DISCOVERY

Complainant, EPA, has filed a motion for discovery seeking information identified in the "ADDITIONAL INFORMATION REQUEST" which accompanied the motion. A memorandum in support of the motion also was provided with the filing. The focus of EPA's memorandum in support pertains to the Respondent's contention that Biewer Lumber is a "recently established company, organized after the time period relevant to the documents sought in Complainant's discovery," an assertion which EPA maintains "is simply not true."¹ EPA Memorandum at 2. To back up its claim that Biewer Lumber was not in fact recently established, EPA points to "public admissions of Biewer Lumber" which it contends contradict that claim. Specifically, EPA notes that Biewer Lumber has a website, www.biewerlumber.com, that asserts it began "over 45 years ago" and that "Biewer Lumber™ is a third generation, family owned company[".]"

¹EPA notes however John A. Biewer of Toledo, Inc. asserted that "Biewer Lumber was created on February 9, 2006, (after all events and claimed violations alleged in the Complaint occurred)," and that, according to the affidavit of Brian R. Biewer, "Biewer Lumber has never been engaged in the business of treating or producing wood products . . . [and] is merely a sales company organized for the purpose of marketing and selling the various lumber products produced by other Biewer entities."

Id. at 4. EPA adds similar references which tout that “Biewer Lumber™” has been providing select cut lumber, that it remains an industry leader, has state-of-the-art treatment plants and so on. Last, EPA notes that “in responding to a request for balance sheets and income statements for Respondent John A. Biewer of Toledo, Inc., those statements were not provided by an officer or employee of that company, but, rather, by the Chief Financial Officer of Biewer Lumber. EPA Memorandum at 4, citing Attachment D.

Before addressing the Respondent’s response to EPA’s Motion, addressing the specific discovery requests in the 22 items set forth in that attachment, the Court will first note the broad responses contained in EPA’s Reply, the Respondent’s Sur-reply and EPA’s Response to the sur-reply, as this will inform the resolution of the specific discovery requests. In its Reply, EPA simply repeats its assertion that “Biewer Lumber” existed prior to 2006, citing its initial memorandum, but adds no additional substance to that contention.² EPA Reply at 2-3.

In its sur-reply, Respondent states that Biewer Lumber, LLC was created on February 9, 2006 and that “[d]ocumentation of this corporate formation has long ago been provided to Complainant, and is attached to this Brief as Exhibit 1.” The Court notes that, indeed, per that Exhibit 1, Biewer Lumber, LLC was created on February 9, 2006. Respondent also correctly observes that “[a]t no time during these administrative proceedings has Complainant offered any other corporate documentation which would suggest a different formation date . . . [for these] publicly available records maintained by the State of Michigan.” Sur-reply at 1. While Respondent acknowledges there are website references to “Biewer Lumber,” it contends that EPA has blurred the important distinction between those general website references to “Biewer Lumber” and the entity named in this litigation, “Biewer Lumber, LLC.” The point, of course, is that EPA sought to add *Biewer Lumber, LLC* as a named Respondent in the Complaint and this Court’s Order permitted just that. There was no request to add simply “Biewer Lumber” as a Respondent, nor did EPA make any suggestion that such a corporate or other business formation may exist. Respondent also notes that the website references are to “Biewer Lumber™” with the “TM” appendage signifying a trademark. Respondent’s point is that EPA has provided no basis to support its claim that Respondent Biewer Lumber, LLC, was created before February 2006.

Accordingly, Respondent reiterates that, as the document requests made by EPA are directed to Biewer Lumber, LLC, that entity cannot provide documents predating its corporate creation. Conversely, the fact that John A. Biewer Company and its various subsidiaries have invoked the tradename “Biewer Lumber™” has no bearing on requests directed to the distinct entity, Biewer Lumber, LLC.³

²EPA’s specific responses in its Reply to the Respondents’ responses to the EPA motion for discovery will be addressed following this general discussion, but initially this Order outlines the broader disputes of EPA’s discovery motion.

³Respondent also refers to EPA’s assertions of other deficiencies in its responses to the discovery with the note that it is searching for some of the requested documents and intends to

Following Respondent's sur-reply, EPA filed a response. In that response, EPA asserts that "the question is whether a discovery order will issue against all three Respondents." Viewed in that light EPA believes that the objections posed by Biewer Lumber LLC can be easily resolved by the Respondent simply asserting that the specific information sought in the Motion does not exist. EPA Response to Sur-reply at 2. EPA believes that its discovery request is essential to determine if Biewer Lumber LLC functions as a corporation in fact.⁴ *Id.* EPA returns again to the Biewer Lumber website in support of its claim that Biewer Lumber™ is identified "as a family 'company' that has been in operation for three generations," and that Respondent's sur-reply itself admits that "Biewer Lumber™ has been used 'as a trademark name' by and for all Respondents" *Id.* at 3. EPA believes this is evidence that none of the Respondents functioned as independent corporations in fact. It also maintains that the fact all three Respondents have the same legal counsel shows the entities do not function as independent entities. *Id.* at 4.

Discussion and Resolution of Issues Regarding EPA's Motion for Discovery

EPA has erred in its failure to distinguish between the named Respondent entities in this litigation and references at a website to the trademark name Biewer Lumber™. Citing no cases to support the contention that such references can form the basis for concluding that Biewer Lumber LLC should be equated with a similar trademark name and from that to conclude that *Biewer Lumber LLC* has been in existence prior to February 9, 2006, the only document-supported date in the record, EPA's contention falls far short as a legal analysis. There are three specifically identified Respondents named in this proceeding. Discovery can be directed at those three entities but that is not a license to engage in a lay analysis and simply ignore dates of corporate creation based on general references to "Biewer Lumber™." It may or may not be the case that a different "Biewer Lumber" pre-dated the creation of *Biewer Lumber LLC* but this Court can only deal with the three entities named as Respondents in this case.

supplement its response to EPA by April 24, 2009. Sur-reply at 2-3.

⁴EPA then appears to shift its inquiry from Biewer Lumber LLC to "whether John A. Biewer of Toledo, Inc., operated as a 'corporation in fact' and continues to so operate, independent of John A. Biewer Company, Inc., and Biewer Lumber LLC" Whether EPA actually meant to refer to Biewer Lumber LLC, it reasserts that "it is necessary to review relevant corporate and financial information . . . of all three companies" to determine if they acted independently of one another.

The Court will now address the specific “Additional Information Request[s]” as attached to EPA’s Motion.

1. For John A. Biewer Co., Inc. and Biewer Lumber LLC, complete tax returns including all schedules and attachments for January 1, 1997 through the present.

EPA states that John A. Biewer Company, Inc. has provided the information requested. The Court sustains Respondent Biewer Lumber LLC’s objection insofar as EPA’s discovery request predates the creation of Biewer Lumber LLC. Thus, the Court rejects EPA’s contention that it has demonstrated that “Biewer Lumber” has been in existence. Far from having demonstrated such a prior existence, EPA’s very description presents a layman-like description which ignores the formal incorporation name and blurs important distinctions. As for EPA’s effort to determine “what happened to the transfer of assets of John A. Biewer Company of Toledo, Inc. and John A. Biewer Company of Ohio, Inc. after they closed, EPA is not prevented from inquiring about such transfers through questions posed to those (Toledo and Ohio) companies, to the extent that such records still exist. The same point (and the potential limitations about available records, as just mentioned) applies to EPA’s interest in learning about any payments “being made to, or on behalf of, those companies after they ceased operations and had limited rental income, with ongoing expenses for taxes and insurance on their property, the services of the environmental consultant, and its initial decontamination activities at their drip pad.” Nor does this ruling shut the door on EPA’s effort to determine if the Respondent companies “‘functioned’ as independent corporations in fact.” However, at least as to Biewer Lumber LLC, EPA is precluded from seeking information before that entity was created.

2. For John A. Biewer Co., Inc. and Biewer Lumber LLC, complete year-end financial statements, including the auditor’s letter, balance sheet, income statement, statement of cash flows and notes, for January 1, 1997 through the present.

The Court sustains Respondent Biewer Lumber LLC’s objection insofar as EPA’s discovery request predates the creation of Biewer Lumber LLC.⁵ In this regard the Court notes that Biewer Lumber LLC states that “there are no responsive documents for Biewer Lumber LLC prior to February 9, 2006, when it was formed.” The Court will not routinely repeat the same point for each of the 22 additional information requests. Thus, the points made by the Court with regard to the ruling for Request #1 applies wherever the foundation of EPA’s request rests on inquiries pertaining to Biewer Lumber LLC but predating that entity’s creation.

⁵This ruling, sustaining the objection to documents prior to the creation of Biewer Lumber LLC, applies wherever it has been raised.

3. For John A. Biewer Company of Ohio and John A. Biewer Company of Toledo, complete year-end financial statements, including the auditor's letter, balance sheet, income statement, statement of cash flows and notes for FY 1997.

Respondent states that these documents have been provided and EPA agrees with this. Therefore this is no longer an issue in dispute.

4. Ownership and corporate management information:

- a. For the Ohio and Toledo companies, John A. Biewer Company Inc., and Biewer Lumber LLC, a current corporate map, including detailed information on corporate ownership and officers, for all levels of corporate relationship. A corporate map showing the relationship of Toledo and Ohio Companies with John A. Biewer Co., Inc, Biewer Lumber LLC and other related entities.

As made clear by the preceding rulings, the Court sustains Respondent Biewer Lumber LLC's objection to the extent that the discovery request pertains to ownership and relationships between Biewer Lumber LLC and other Biewer entities prior to the creation of Biewer Lumber LLC. The Court also notes the following response from Respondents that: "Exhibits E, F, and G of Respondents' Memorandum in Opposition to Complainant's Motion to Amend Complaint dated November 14, 2008 ("Memorandum") demonstrate that Biewer Lumber LLC is a limited liability company that was formed in February of 2006 and is neither owned by, nor does it own an interest in JAB Toledo, JAB Ohio, and JAB Company. Exhibit F clearly shows that BT Holdings, LLC is the only Member of Biewer Lumber, LLC and Exhibit G clearly shows that Brian Biewer and Timothy Biewer are the only members of BT Holdings, LLC. Exhibit A to the Memorandum filed in the respective cases against JAB Toledo and JAB Ohio is an Affidavit of Brian Biewer stating that JAB Company is the sole shareholder of JAB Toledo and JAB Ohio. Exhibit B to the Memorandum filed in the respective cases against JAB Toledo and JAB Ohio consists of the Articles of Incorporation of JAB Toledo and JAB Ohio demonstrating that JAB Company was the incorporator of each company. These documents delineate the corporate relationships between the Respondents: JAB Company is the parent company to the subsidiaries JAB Toledo and JAB Ohio and Biewer Lumber, LLC is entirely separately owned. Moreover, Respondents JAB Company, JAB Toledo, and JAB Ohio have previously informed the EPA that the President of each company is Richard Biewer, the Vice-President is Timothy J. Biewer, and

the Secretary/Treasurer is Brian Biewer. These roles have been held by the above-named individuals at all times relevant to these proceedings.”⁶

- b. A history of the ownership of the Toledo and Ohio Companies, John A. Biewer Co., Inc. and Biewer Lumber LLC from January 1, 1997 to present, including percentages of ownership if more than one shareholder, member or partner.

The Court sustains Respondent Biewer Lumber LLC’s objection to the extent that the discovery request pertains to ownership and relationships between Biewer Lumber LLC and other Biewer entities prior to the creation of Biewer Lumber LLC. The Court also notes that Respondents’ response includes the following: “there are two shareholder of JAB Company. The non-voting common shareholders are Brian Biewer, Timothy Biewer, and John B. Biewer. The voting preferred shareholders are Richard Biewer, Brian Biewer, and Timothy Biewer.”

- c. A history of the officers of the Toledo and Ohio companies, John A. Biewer Co., Inc. and Biewer Lumber LLC from January 1, 1997 to the present.

The Court sustains Respondent Biewer Lumber LLC’s objection to the extent that the discovery request pertains to ownership and relationships between Biewer Lumber LLC and other Biewer entities prior to the creation of Biewer Lumber LLC. The Court also notes that the Respondents also stated in response to this request that there are no responsive documents for Biewer Lumber LLC prior to February 9, 2006, when it was formed.

- d. A history of the Board of Directors of the Toledo and Ohio Companies, John A. Biewer Co., Inc. and Biewer Lumber LLC from January 1, 1997 to the present.

The Court sustains Respondent Biewer Lumber LLC’s objection to the extent that the discovery request pertains to ownership and relationships between Biewer Lumber LLC and other Biewer entities prior to the creation of Biewer Lumber LLC. The Court also notes that Respondents have stated that “there are no responsive documents for Biewer Lumber LLC prior to February 9, 2006, when it was formed. In addition, as a limited liability company, Biewer Lumber LLC has never had a Board of Directors. Respondents JAB Company, JAB Toledo, and

⁶It is interesting to observe that EPA complains that the Respondents’ have provided their answer “by rote,” by which it means mechanical repetition of responses. Ironically, having objected to rote answers, EPA then provides what is essentially its own rote reply to the issue. In fact EPA engages in its own rote responses throughout its Reply.

JAB Ohio have already communicated to the EPA that the Board of Directors for all three companies currently, and at all times relevant to these proceedings, consisted of Richard Biewer, Timothy Biewer, and Brian Biewer.”

- e. Copies of the Board of Directors’ Meeting Minutes, Resolutions, or any other records of the Board for the four companies from January 1, 1997 to present.

The Court sustains Respondent Biewer Lumber LLC’s objection to the extent that the discovery request pertains to ownership and relationships between Biewer Lumber LLC and other Biewer entities prior to the creation of Biewer Lumber LLC. It also notes that Respondents have stated: there are no other Board of Directors’ Meeting Minutes, Resolutions, or any other records of the Board for the stated time period that pertain in any way to JAB Toledo, JAB Ohio, or Biewer Lumber LLC that have not already been produced to the EPA. Respondents JAB Toledo and JAB Ohio have already produced all responsive documents to the EPA.

- 5. For the Toledo company, a description of all related party transactions for the period of January 1, 1997 to the present. For the Ohio company, a description of all related party transactions for the period of January 1, 2001 to the present. (The EPA additional request defines a “related party transaction” and notes that Statement No. 57 of the Financial Accounting Standards Board defines related parties, which definition it included in its request. The request adds that “the description should include, but not be limited to, the specific nature of the transaction, the related parties’ names, the date of the transaction, and the dollar amount of the transaction.”

The Court notes that the Respondents have stated that “[t]o the extent that the requested information exists, Respondents JAB Toledo and JAB Ohio attached the responsive information as Attachment D in Respondents’ Responses to EPA Discovery Requests. Respondents JAB Toledo and JAB Ohio have again attached the same information as Attachment A and note that the information provided begins in fiscal year 1997 and goes through 2009. The Court sustains the Respondents’ objection to the extent that any further information would require “JAB Toledo and JAB Ohio to create documents not in existence and extensively search through every transaction occurring during the last eight or twelve years” as being unreasonable, and unduly burdensome.

- 5. a. For all transactions of \$5,000 or more involving transfer or sale of an item or asset from Toledo or Ohio company to a related party, provide all documentation developed by Toledo or Ohio company to assure that the asset transfer or sale was consistent with a third-party market transaction.

The Court notes that Respondents have stated that to the extent that the requested information exists it has been provided as Attachment D. The Court sustains

Respondents' objections to the extent that any further information would require "JAB Toledo and JAB Ohio to create documents not in existence and extensively search through every transaction occurring during the last eight or twelve years"

5. b For all loans or other financing transactions between Toledo and Ohio companies and related parties, provide copies of the agreements between the parties.

The Court notes that the Respondents have stated that "[t]here are no loans or other financing transactions between Respondent JAB Toledo, Respondent JAB Ohio, or a related party." This would appear to resolve this additional information request. Further, EPA's argument that it is somehow entitled to more because "the Biewer family [] intentionally chose to set up . . . a complicated structure . . . with numerous "John A. Biewer" companies . . . [those actions created] a burden the Biewer family has brought upon itself," is again the type of argument that a layperson might make but that does not it is cognizable in a legal proceeding. Again, EPA cites no authority for its apparent contention that discovery may be wide open, completely untethered to the named Respondents and consequently the Court sees no basis to accede to such a request.

6. Provide an explanation of the companies' treatment of dividends on the balance sheet.

EPA notes in this request that "Both companies show negative dividends . . . on their 1998 and 1999 balance sheets. Starting in 2000, these values are removed from the balance sheet." The request asks that the Respondents "clarify the nature of these balance sheet entries, whether they represent actual cash in or out, . . . the reason for their disappearance in 2000 . . . [and to] identify with which entity these dividend transactions occurred."

The Court notes that the Respondents responded as follows: "The dividend amounts carried on the balance sheets of the respective companies are dividends that were paid to John A. Biewer Co., Inc. at some point prior to 1996. The amounts were carried in "dividends" general ledger account which is contra-retained earnings account. During fiscal 2000, the 'dividends' general ledger account was closed out to retained earnings. This explains why 'dividends' do not appear in the 2000 balance sheet. When the dividends were paid in prior years, no actual exchange of cash took place between the subsidiary and parent. The transaction was recorded through intercompany accounts receivable and accounts payable between the subsidiaries and the parent.

EPA's Reply indicates this inquiry has been answered, resolving this issue.

7. Provide all documents related in any way to the detail of the “Accounts Receivable Intercompany” and “Accounts Payable Intercompany” entries appearing on the Toledo company’s balance sheets. The documentation should include, but not be limited to, the related parties associated with these transactions, the date of the transaction, and the services that were provided and received in association with these transactions. List the year end balances for these accounts for each related party for the years ending 1997 to present.

The Court notes that the Respondent has stated that: “JAB Toledo has been unable to locate any of the requested documents except for those included in Attachment A, and is currently continuing to search for responsive documents and will produce said documents, to the extent they exist, to the EPA by May 11, 2009 . . . [and that] some of the requested information is available in the documents attached as Attachment A because this request is somewhat duplicative of Request No. 5.” The Respondents also have objected to the extent that the request “requires Respondent JAB Toledo to create documents not in existence and extensively search through every transaction occurring in the last twelve years . . . [as that] would be unreasonable, oppressive and unduly burdensome.” However, Respondent added that “to the extent that the requested information exists and is in the possession of JAB Toledo, it [was] attached as Attachment D.”

EPA’s Reply simply says that such intercompany records have not been provided and, as with its earlier Reply, suggests that if it is burdensome to create this information, the Biewer family has only itself to blame. The Court’s earlier ruling in this Order speaks to this.

8. Provide all documents related to in any way to the detail of the “Accounts Receivable Intercompany” and “Accounts Payable Intercompany” entries appearing on the Ohio company’s balance sheets. The documentation should include, but not be limited to, the related parties associated with these transactions, the date of the transaction, and the services that were provided and received in association with these transactions. List the year end balances for these accounts for each related party for the years ending 2001 to present.

Respondents’ Response states that “Respondent JAB Ohio has been unable to locate any of the requested documents except for those included in Attachment A, and is currently continuing to search for responsive documents and will produce said documents, to the extent they exist, to the EPA by May 11, 2009 [and that] [a]s noted above, some of the requested information is available in the documents attached as Attachment A because this request is somewhat duplicative of Request No. 5.” The Court’s statement for this question, applying to Biewer Toledo, applies equally to Biewer Ohio.

9. For the Ohio company, describe in detail the transaction or transactions that occurred when \$1.4 million in inventory appearing on the company's balance sheet in November 2001, became \$0 on the November 2002 balance sheet. Provide detailed information on the items included in the inventory as of November 2001, including, but not limited to, their book value and their estimated market value at the time. If the inventory was sold, provide the contract of sale of the inventory, the parties to which it was sold, and the value the company received from the sale, and whether this consideration was in the form of a note receivable or cash payment. Provide all documentation related to the reduction of the inventory from \$1.4 million to 0, including, but not limited to, any contracts, checks, and bank transfers.

The Court notes that the Respondents' Response advises that "JAB Ohio did sell the inventory it had on hand at the time it ceased operations. Respondent JAB Ohio has attached a detailed listing inventory as of November 30, 2000 as Attachment B. Between November 30, 2000 and November 30, 2001, the company's inventory was sold. JAB Ohio is identified as Branch 73. Detailed sales records for that period are no longer available. When operations were discontinued at the facility in 2001, any inventory that was not sold to customers was sold, at cost, to JAB Company, John A. Biewer Co. of Illinois, and Biewer of Lansing LLC and JAB Ohio's account was credited those amounts." The Court is uncertain if EPA considers this request now resolved. However, if not already supplied to EPA, the Respondents are to provide records to support the assertion that remaining inventory was sold at cost to JAB Company, John A. Biewer Co. of Illinois, and Biewer of Lansing LLC and supportive records to show that JAB Ohio's account was credited those amounts.

10. Did the Toledo company sell inventory or other assets after it stopped operating? If so, provide detail on the transaction similar to that provided in Request 8 above.

The Court notes that Respondents state that "Respondent JAB Ohio did sell the inventory it had on hand at the time it ceased operations. When operations were discontinued, any inventory that was not sold to customers was sold to affiliated companies at cost. Detailed sales records for this period are no longer available." This response appears to update Respondents' initial response. It would appear that, consistent with earlier rulings in this Order, given that Respondents declare such records are no longer available, this matter is resolved.

11. Provide an itemization of the fixed assets currently owned by the Ohio and Toledo companies [] that shows a brief description of the asset, the year it was put in service, the original cost, the accumulated depreciation and an estimate of the current market value.

EPA's Reply indicates this request appears to have been answered.

12. Provide estimates of the current market value for each parcel of land, improvements, and equipment owned by the Ohio and Toledo companies.

The Court notes that the Respondents have stated that “JAB Ohio and JAB Toledo have already provided the EPA with the tax assessment values for each parcel of land. Respondents JAB Ohio and JAB Toledo do not possess any other information related to the market value of the parcels of land, improvements, or equipment owned by each of them.” The Court considers this matter resolved, based on the Respondents’ representation and the information it states it has already provided to EPA.

13. Provide the general ledgers from January 1, 1997 to present for the Ohio and Toledo companies. Provide the chart of accounts for both companies.

The Court notes that the Respondents have stated that “JAB Ohio and JAB Toledo are in the process of compiling a monthly summary of general ledger transactions that will be produced to the EPA by May 11, 2009. There is no formal chart of accounts, but all accounts will be listed by providing the EPA with the general ledger.”

The Court considers this matter resolved, based on the Respondents’ representation, as stated above, and its promise to provide the general ledger.

14. Provide copies of contracts between Mannik & Smith Group and Toledo and Ohio companies (or a representing party). Provide all payment documents associated with this contract(s), including, but not limited to, copies of invoices, proof of bank transfers and all other payment documents with regard to payments made to Mannik & Smith Group by the parties for the services rendered by Mannik & Smith Group at the Ohio and Toledo sites (in particular, the Closure Plan prepared by Mannik & Smith Group).

The Court notes that the Respondents have stated that “[t]he requested contracts and Closure Plan were attached to Respondents’ Responses to EPA’s Discovery Requests as Attachment F[and that] JAB Toledo and JAB Ohio is currently compiling additional payment information and will provide the requested documents to the EPA by May 11, 2009. Based on this response, including the representation of providing the additional information by May 11th, the Court considers this matter resolved.

15. Provide all documents in possession of the Ohio and Toledo companies, as well as Biewer Lumber LLC and John A. Biewer Co. Inc., discussing the closure and closure costs at the Ohio and Toledo companies’ facilities, as well as all documents discussing the extent of contamination at each company and the associated decontamination activities required to remove the contamination.

The Court notes that the Respondents have again noted that “Respondent Biewer Lumber LLC did not exist until February 9, 2006, (see Attachment A), [and

consequently that] Respondent Biewer Lumber LLC objects to this Discovery Request to the extent it requests Biewer Lumber LLC to produce documents created prior to its existence. The Court, as noted above, has already agreed with the Respondents on this point. The Court also notes that Respondents have represented that “there are no responsive documents for Biewer Lumber LLC prior to February 9, 2006, when it was formed.” Respondent adds that “JAB Ohio does not believe that an estimate of closure costs pertaining to its facilities exists or that the extent of contamination has been fully defined. Respondents JAB Company and JAB Toledo have produced responsive documents, to the extent the requested documents exist and have been located, as Attachment F to the Responses to EPA’s Discovery Requests dated March 25, 2009. Respondent JAB Toledo believes that more information existed at one time, and is currently still trying to locate said information Respondent JAB Toledo will provide the EPA with a response by May 11, 2009.” The Court believes that EPA’s request for documents “discussing the closure and closure costs at the Ohio and Toledo companies’ facilities, as well as all documents discussing the extent of contamination at each company and the associated decontamination activities required to remove the contamination” is sufficiently clear and the Respondents are directed to provide this information. Therefore, Respondents are to provide this information, “regarding the costs to properly close the facilities in conformance with the law, as proposed in the plans” and as set forth above in EPA’s request number 15.

16. For the Ohio and Toledo companies, provide the number of officers and employees employed after the shut-down (2001 and 1997, respectively). For each officer and employee, provide name, position, a brief job description and annual gross pay. Provide copies of pay stubs and all other documentation confirming the payments made by the Ohio and Toledo companies to these officers and employees during the period since the closure and until the present.

The Court notes that the Respondents have stated that: “Respondents JAB Toledo and JAB Ohio have previously informed the EPA that there was no one employed at either company after each was shut-down [and that] Brian Biewer was duly appointed to be the manager/director of each company and was not paid for his work at that position.” Based on Respondents’ representations, this matter would appear to be resolved.

17. For the Ohio and Toledo companies, provide the names of any individual acting on behalf of each company after the shut-down (2001 and 1997, respectively). For each individual, provide name, corporate affiliation, position(s), and nature of compensation for work performed on behalf of Ohio or Toledo. Provide all documentation confirming the payments made by the Ohio and Toledo companies to these individuals during the period since the closure and until the present.

The Court notes that the Respondents rely upon their response to the previous inquiry, that is, their response to inquiry number 16. Based on the Respondents' response, it would appear that this has been answered. However, EPA seeks information as to Brian Biewer's corporate affiliations, position(s) and information identifying him as acting on behalf of Biewer Toledo and Ohio and substantiation that he was acting as its sole representative. The issue of Brian Biewer's compensation appears to have been answered. Respondents shall provide additional information, consistent with this comment for this requested information.

18. Provide the name and account number of the checking account(s) for Ohio and Toledo companies, as well as the name of the bank where this checking account is open, and the name of the primary holder of the account. If the checking account(s) have been closed, advise as to when the account was closed, and describe how the Ohio and/or Toledo companies make payments in the absence of a checking account.

The Court notes that the Respondents have stated that "[e]ach subsidiary used a separate series of checks drawing from one bank account in the name of JAB Company. The bank account is with Bank of America and the account number is 2770706519. After JAB Toledo and JAB Ohio closed, the checks were no longer used and JAB Company paid all expenses and charged JAB Toledo or JAB Ohio through an intercompany payable." No further objection has been asserted by EPA, and the Court deduces that this matter is now resolved.

19. With regard to the Repair and Maintenance expense appearing on the Ohio and Toledo companies' income statements and the Legal and the Accounting expense appearing on the Toledo company's income statement since the closure (2001 and 1997, respectively), provide the following information:

a. Identify the specific services associated with these expenses.

The Court notes that the Respondents have stated that "[t]o date, Respondents JAB Toledo and JAB Ohio have been unable to locate information or documents responsive to this request. To the extent the information can be located, Respondents JAB Ohio and JAB Toledo will provide the requested information by May 11, 2009. EPA has not raised any further objection to this, and therefore the Court deduces that issue is now resolved.

b. Identify who performed the services associated with these expenses. If the services were performed by an Ohio or Toledo employee, provide name, position and brief job description of the employee, as well as the gross annual compensation and copies of the associated pay stubs. If the services were performed by a third party or a related entity, provide a service contract, the list of the services performed, and the associated payment information (any checks, payment stubs and other payment documentation).

The Court notes that the Respondents have stated their objection to this request to the extent that it seeks confidential and personal information related to individual employees. However, the Court directs the parties to work out an arrangement so that this information, should it become part of the record evidence, will remain confidential. For example, the information could be designated as confidential and any decision the Court may issue referring to such information would be redacted from a public copy of that decision.

20. Identify the individual and company that prepare the financial data for the Ohio and Toledo companies. If the financial data are prepared by an employee(s), provide the name(s), position and brief job description of the employee(s), as well as the gross annual compensation and copies of the associated pay stubs. If the services are performed by a third party or a related entity, provide all documentation regarding the services including any contract or agreement, the list of services performed, and the associated payment information, including, but not limited to, any checks, payment stubs and other payment documentation.

The Court notes that “Respondents JAB Ohio and JAB Toledo [have] objected to this Discovery Request to the extent that it seeks confidential and personal information related to individual employees and is neither relevant to the issues at hand nor reasonably calculated to lead to the discovery of admissible evidence. Further, Respondents JAB Ohio and JAB Toledo object to this Discovery Request as it is vague and ambiguous. Subject to the foregoing objections and without waiving said objections, the internal financial statements for Respondents JAB Ohio and JAB Toledo are prepared separately by Gary Olmstead, who is the Chief Financial Officer of JAB Company, with the assistance of staff. The audit records are currently prepared by Plante & Moran. Historically, each subsidiary paid a management fee to JAB Company for performing the above services. Since JAB Toledo and JAB Ohio have discontinued operations, JAB Company has been performing the above services without collecting a management fee.

EPA states that Respondents have yet to provide “documentation regarding payment for services in the preparation of financial statements of these companies.” EPA is entitled to this information and Respondents are directed to provide it.

21. With regard to all that property, income or other tax and insurance payments made by the Ohio and Toledo companies since the closure, provide all documents confirming the payments made by the Ohio and Toledo companies (including, but not limited to, copies of the checks covering the tax and insurance payments, electronic transfer information, etc.).

The Court notes that the Respondents have stated that “[t]o date, Respondents JAB Toledo and JAB Ohio have been unable to locate information or documents responsive to this request. To the extent the information can be located, Respondents JAB Ohio and JAB Toledo will provide the requested information by May 11, 2009.” Therefore, this matter

would appear to be resolved, dependent upon the information to be supplied. It would appear that this information should be available.

22. EPA states that Respondents "appear to have answered this particular request" and therefore the Court concludes that this matter has been resolved.

Conclusion:

The Court is aware that EPA has not received all the information it sought. However, as explained above, some of the information it requested was outside of the recognizable boundaries for discovery, such as the Agency's blurring of corporate entities with trade names or general references to a business. If there are any outstanding disputes that the Court has not already resolved, either specifically or by virtue of its broader rulings in this Order, the parties are directed to confer promptly regarding such issues and to identify with precision any such remaining issues. This is not to be construed as an invitation to reargue matters already addressed by this Order.

Given the length of submissions in this matter, the Court also directs that all future motions, briefs, etc. be accompanied with a CD in Word or Word Perfect format so that the Court may expeditiously react to such submissions. Further, for any Responses and Replies, the parties are to update their original submissions to highlight outstanding matters, rather than require the Court to wade through subsequent submissions in order to determine this. Finally, the Court realizes that it *may* be the case that EPA has simply overlooked the possibility that other Biewer entities were created in the past and then became defunct and were dissolved. However, there was nothing to prevent EPA from scouring the Michigan Secretary of State's Records for any such possible incorporations. Additionally, it is noted that EPA will have the opportunity to subpoena appropriate corporate officers for the named Respondents and question them under oath at the hearing.

At this point, the Court has allowed ample time for discovery and the case needs to proceed to hearing. A conference call will be arranged shortly for this purpose and the parties should confer promptly and have agreed hearing dates in mind for July, August and September 2009.

So ordered.

William B. Moran

William B. Moran
United States Administrative Law Judge

May 6, 2009
Washington, D.C

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CERTIFICATE OF SERVICE

I certify that the foregoing **Order Regarding EPA's Motion for Discovery** dated, May 6, 2009, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to: LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA - Region 5
77 W. Jackson Blvd., E-19J
Chicago, IL 60604-3590

Copy by Regular Mail and facsimile to:

Attorney for Complainant:

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Office of Regional Counsel
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Attorney for Respondent:

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Mika Meyers Beckett & Jones, PLC
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Knolyn R. Jones
Legal Assistant

Dated: May 6, 2009

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