UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**DOCKET NO. RCRA-05-2008-0007**
John A. Biewer Company of Ohio, Inc.	)	
300 Oak Street	)	
St. Clair, Michigan 48079-0497	)	
(Washington Courthouse Facility)	)	
	)	
John A. Biewer Company, Inc.	)	
812 South Riverside Street	)	
St. Clair, Michigan 48079; and	)	
	)	
Biewer Lumber LLC	)	
812 Riverside Street	)	
St. Clair, Michigan 48079	)	
	)	
Respondents	)	
	)	

COMPLAINANT'S REPLY TO RESPONDENTS MEMORANDUM IN OPPOSITION TO EPA'S MOTION FOR ACCELERATED DECISION ON DERIVATIVE LIABILITY

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INTRODUCTION

In their Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability ("Respondent's Memorandum"), Respondents John A. Biewer Company ("JAB-Co"), Inc., and Biewer Lumber LLC, attack various items of evidence, set out in attachments to Complainant's Memorandum in Support of Motion for Accelerated Decision on Derivative Liability ("Complainant's Memorandum"), identified by Complainant to support a finding of derivative liability against them under the legal theory of "piercing the corporate veil," and direct liability under the doctrine announced by the U.S. Supreme Court in United States v. Bestfoods, et al., 524 U.S. 51 (1998).[1]

Respondents do not attack any item of evidence by raising any objection to its reliability, or otherwise claim any item of evidence is inadmissible, they attack the interpretation and weight given to it by Complainant. They do so by citing case law to support the proposition that particular items of evidence cited by Complainant are not sufficient to support any such finding. However, as will be demonstrated, they fail to address the totality of the evidence, and its cumulative impact. Moreover, they have both misstated certain facts, and incompletely cited the law.

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[1]Since the Amended Complainant and Compliance Order was filed in this matter, discovery has been conducted on information relevant to the issues of the derivative and direct liability of JAB-Co and Biewer Lumber LLC. Having reviewed the documents provided by Respondents in discovery, as well as their responses to the Motion for Accelerated Decision on Derivative Liability, Complainant is of the opinion that the evidence and applicable law do not support a finding that Biewer Lumber LLC is either derivatively liable, or directly liable, for the violation alleged in the Amended Complaint and Compliance Order, and will no longer pursue Biewer Lumber LLC as a respondent in this case.

The issue to be determined is not whether the records of the State of Ohio reveal that JAB-Ohio was established as a subsidiary of JAB-Co, independent of JAB-Co. Complainant acknowledges that that is what is disclosed in the corporate filings. There are two issues. The first issue is whether JAB-Ohio "function[ed] as a corporation in fact," and an analysis of the evidence in consideration of certain criteria supports a finding that the corporate veil be pierced between JAB-Ohio and JAB-Co, and JAB-Co be found liable for the violation alleged in the Complaint and Compliance Order. In Re Safe & Sure Products and Lester Workman, No. I.F. & R., 04-907003, Initial Decision, at 22 (June 26, 1998). The second issue is whether the evidence supports a finding that JAB-Co is directly liable for the violation alleged under the Bestfoods doctrine. To determine those issues, one must evaluate the totality of the evidence in consideration of all relevant criteria together, rather than isolate each criteria so as to diminish its significance. As the evidence is not contested, a determination of whether Respondents JAB-Co is liable for the violation alleged in the Complaint and Compliance Order is appropriate for accelerated decision. See Cody v. Aktiebolaget Flymo, 452 F.2d 1274 (D.C. Cir. 1971), cited more fully in Complainant's Memorandum, at fn.3.

Complainant will now review its case in consideration of the points raised and arguments made in Respondents' Memorandum.

I. LAW AND ANALYSIS ON "PIERCING THE CORPORATE VEIL"

(a) Applicable Law

In presenting her case in this matter for "piercing the corporate veil," Complainant has relied on the criteria identified in the Initial Decision in Safe & Sure Products, Inc., which cites

relevant federal case law.[2] Respondent, on the other hand, asserts that "the Sixth Circuit, in which both Michigan and Ohio are located, has determined that state common law must be applied to veil-piercing claims under CERCLA[,]" citing Carter Jones Lumber Co. v. LTV Steel Co., 237 F.2d 745, at 747, fn.1 (6th Cir. 2001). Respondents' Memorandum, at 8 (emphasis added). However, Respondents misstate what the Court actually said in Carter Jones Lumber Co. In its decision, the Court recognized that " [i]n **Bestfoods**, the Supreme Court left open the question whether state common law or federal common law should apply to veil-piercing claims in actions to enforce CERCLA's indirect liability provisions." Id. It then noted that "the parties to this case have not argued the question." Id. Citing Donahey v. Bogle, 129 F.3d 838 (6th Cir. 1997), the Court went on: "[a]t least one of our cases prior to **Bestfoods** favors the application of state common law in veil-piercing claims under CERCLA[,]" and, "[b]ecause our [prior] opinion remanding the case suggested that Ohio law should govern, **see Carter-Jones Lumber Co. V. Dixie Distributing Co.,** 166 F.3d at 847, we find no reason to depart from our holding." Carter-Jones Lumber Co., 237 F.3d, at 747, fn.1 (bold in original). It is difficult to see how that quoted passage can be transformed into a doctrine of law that the Sixth Circuit requires that the Administrator, in exercising her authority to assess administrative penalties, apply Ohio common law in determining whether to "pierce the corporate veil" between Ohio corporations. The Court recognized that the parties "have not argued the question" of whether state common law or

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[2]Complainant -- or, rather, Complainant's counsel -- recognizes that he had erroneously stated that JAB-Ohio was a Michigan corporation. Complainant further acknowledges that, on appeal of the initial decision in Safe & Sure Products, Inc., while the Board adopted the initial decision as the final decision of the Administrator, it found it "unnecessary to reach the question whether it is appropriate to pierce the corporate veil[.]" In Re Safe & Sure Products, et al, 8 E.A.D. 517, at 528 (1999).

federal common law applies, noted only that "at least one of our cases prior to **Bestfoods** favors the application of state common law in veil-piercing claims under CERCLA[,]" and "[b]ecause our opinion remanding the case suggested that Ohio law should govern . . . we find no reason to depart from our holding" in that one case. To have a court's statements which are not informed by argument on an issue, with the court "suggesting" a particular standard should apply and finding "no reason to depart from" the standard, is hardly the stuff of sound legal doctrine setting forth a requirement.

The Supreme Court has left open the issue of whether "courts should borrow state law, or instead apply a federal common law of veil piercing." Bestfoods, 524 U.S., at 63, fn.9. The Board has also left that question open, finding it "unnecessary to reach the question whether it is appropriate to pierce the corporate veil[.]" In Re Safe & Sure Products, et al, 8 E.A.D. 517, at 528 (1999). Before one can accept the language of Carter-Jones Lumber Co. as binding precedent on the issue in this matter before the Administrator, an issue must be considered which was not addressed in any of these three decisions.

Both the Carter-Jones Lumber Co. and the Bestfoods decisions addressed a review of orders entered by lower Article III courts; the matter on review did not involve an order of an Article II administrative agency. The U.S. Supreme Court has warned that an appellate court review of a lower court order is not the same as an appellate court's review of administrative action, and a direct analogy cannot be made.[3] The matter now before the Administrator is a

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[3]"[T]his court has recognized that bodies like the Interstate Commerce Commission, into whose mold Congress has cast more recent administrative agencies, 'would not be too narrowly constrained by technical rules as to the admissibility of proof,' [citation omitted], should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. [footnote omitted] [citation omitted] To be sure,

proceeding governed by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq. See 63 Fed. Reg. 9464, at 9464 (February 25, 1998). Under Section 706 of the APA , 5 U.S.C. § 706, Congress provides that, on judicial review of any final order of an agency, should the reviewing court determine that the Administrator's final order is not consistent with other similar orders, but "arbitrary" or "capricious," the court must find the Administrator's action "unlawful" and set it aside. An agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways[.]" Garrett v. FCC, 513 F. 2d 1056, at 1061 (D.D. Cir. 1974).[4] Consequently, the

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the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the court to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134, at 142-44 (1940). The distinctions between the federal courts and administrative agencies, and the observations made by the Court in Pottsville Broadcasting Company, have been affirmed by the Court through the years. Matthews v. Eldridge, 424 U.S. 319, 348-49 (1976) ("[w]e reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 US 519, 543-544 (1978) ("But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"); Shepard v. National Labor Relations Board, et al., 459 U.S. 344, 351 (1983) ("The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws."); and Sims v. Commissioner of Social Security, 530 U.S. 103, 110 (2000) ("it is well settled that there are wide differences between administrative agencies and the courts[.]").

[4]The Court of Appeals for the District of Columbia has held that:

> The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. [Footnote omitted.] This calls for insistence that the

Administrator cannot apply one standard for determining the derivative liability of a respondent from North Dakota, another of a respondent from Florida, another of a respondent from Maine, and another of a respondent from Ohio.

The analysis of the law on derivative liability provided in the Initial Decision in Safe & Sure Products, Inc., is soundly based upon principles followed in many federal court decisions addressing the issue of "piercing the corporate veil," which are cited therein. Moreover, the specific criteria to be considered on the issue, identified in the Initial Decision in Safe & Sure Products, Inc.-- addressed in Complainant's Memorandum, at 9-10 -- though different in number, are virtually identical in substance to the seven "piercing" criteria identified in Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 675 F. Supp 22, at 33 (D.C.Mass. 1987), a decision cited on numerous occasions throughout Respondents' Memorandum.

In Acushnet River, the Court noted that "[t]he federal common law in this area emerges from the general principle that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity[,]'" Id., 675 F.Supp., at 33, and that "courts have articulated more specifically the variety of factors which, when viewed together, sharpen the focus of the inquiry." Id. The Court then identified those factors as follows: "(1) inadequate capitalization

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> agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. [Footnote omitted.]

Greater Boston Television Corporation v. FCC, 444 F.2d 841, at 851 (D.C. Cir. 1970). The Court emphasized that it has maintained a "rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even handed application of law, rather than impermissible whim, improper influence, or misplaced zeal." Id. at 852.

in light of the purposes for which the corporation was organized, (2) extensive or pervasive control by the shareholder or shareholders, (3) intermingling of the corporation's properties or accounts with those of its owner, (4) failure to observe corporate formalities and separateness, (5) siphoning of funds from the corporation, (6) absence of corporate records, and (7) nonfunctioning officers or directors." Id. The Court went on: "No one of these factors is either necessary or sufficient to disregard corporate separateness. The equitable decision to pierce the veil is dependent on the facts peculiar to each case." Id.

Consequently, there is no authority to support Respondents' proposition that Ohio common law must be applied by the Administrator in determining whether to "pierce the corporate veil" in this matter. Moreover, there are compelling reasons, given the Administrator's nationwide jurisdiction and obligations under the APA, for her adoption of the federal common law on derivative liability, as set out in both Acushnet River and the Initial Decision of Safe & Sure Products, Inc.

(b) Analysis of Evidence and Applicable Criteria

(ii) Nature of Corporate Ownership and Control

Factors which shed light on whether there was a substantial disregard for any separate corporate identity between Respondents include the nature of the corporations' ownership and control, and other shareholder acts or conduct, including ignoring, controlling or manipulating the corporate form. Complainant's Memorandum, at 9-10, citing Safe & Sure Products, Inc. For the purpose of determining "substantial disregard," Complainant cited the www.biewerlumber.com website, which identifies "John A. Biewer Company, Inc.," and "Biewer Lumber LLC" as "corporate headquarters[,]" at the same address and telephone number. The website describes

"Biewer Lumber™" as a "45 year old . . . third generation family owned company" that both "manufactures and distributes products for a wide variety of building applications," and was a "pioneer" in the wood treating industry, and, today is a "leader" in the wood treating industry. Id., at 12-13. These statements are not assertions of Complainant, they are assertions of the Biewer family the history and organization of the Biewer family's long-time enterprise producing and marketing treated wood products.[5] Respondents do not challenge the accuracy of any statement made at the web-site. Indeed, Respondents acknowledge the integrated structure of the Biewer family enterprise described at the web-site, stating that "[e]ssentially, JAB Company *and* its subsidiaries use 'Biewer Lumber™' to generically refer to their business of producing treated wood products." Respondents' Memorandum, at 4.

Respondents denigrate the probative value of the description of the Biewer family operations at the website. Respondent's cite Fletcher, et al. v. Atex, Inc., 68 F.3d 1459 (2nd Cir. 1995), and American Trading and Production Corporation v. Fischbach and Moore, Inc., 311 F.Supp 412 (N.D. Ill. 1970), to support their assertion that that description should carry no weight in determining the derivative or direct liability of Respondents in this matter. Respondent's Memorandum, at 30-32. However, neither of these cases support the proposition that a corporate entity's public statements regarding its organization and production and marketing activities cannot be considered in determining the "nature of corporate ownership and control" of its various corporate components.

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[5]As noted in her memorandum, Complainant has not herself concocted the term "Biewer family," it is a term used by the Biewer family itself to describe its operations consisting of the manufacture and marketing of treated wood products. Complainant's Memorandum, at 12, fn.6.

In Fletcher, the Court noted that the trial judge "properly rejected plaintiffs' argument that the descriptions of the relationship between Atex [subsidiary] and Kodak [parent] and the presence of the Kodak logo in Atex's promotional literature justify piercing the corporate veil." Fletcher, 68 F.3d, at 1460. Complainant here does not take the position that statements of the Biewer's operations at the www.biewerlumber.com "justify piercing the corporate veil." Complainant's position is that, as one item of evidence, statements at that web-site regarding the structure and operation of the Biewer family companies are relevant and probative to an inquiry into the "nature of corporate ownership and control" of JAB-Ohio and JAB-Co and Biewer Lumber LLC. Nothing at the website is determinative on the issue, but statements made at that website are one item of evidence, among many, that warrant consideration on the issue of "piercing the corporate veil."[6]

In American Trading, after identifying numerous efforts made by a parent and its subsidiary to "scrupulously maintain" separate operations, which precluded a finding being made that the parent corporation should not be held liable for acts of its subsidiary, the Court stated: "Nor does the Parent's boastful advertising show in any way that corporate identities were otherwise ignored by the participants in the conduct of their enterprises." 311 F.Supp., at 415-416.

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[6]The Court in Fletcher identifies numerous other circumstances in the case before it which precluded any finding that there should be a piercing of the corporate veil:

> the plaintiffs have not challenged Kodak's assertions that Atex's board of directors held regular meetings, that minutes from those meeting were routinely prepared and maintained in corporate minute books, that appropriate financial records and other files were maintained by Atex, that Atex filed its own tax returns and paid its own taxes, and that Atex had its own employees and management executives who were responsible for the corporation's day-to-day business.

Fletcher, 68 F.3d, at 33. This evidence weighing against "piercing the corporate veil" is not present in the "piercing" case made by Complainant against Respondents.

The Court also concluded that "[n]one of the elements of injustice relied on in earlier cases exist here." Id., at 416. While the "boastful advertising" is not identified in American Trading, one can hardly consider the information provided at the Biewer website as "boastful advertising." The website language cited by Complainant provides the Biewer family's own description of its history and organizational structure in producing and marketing treated wood products for 45 years. Moreover, the Court in American Trading was clearly determining that, given that in the case before it "separate corporate identities are scrupulously maintained[,]" plaintiff could not save its case by citing "boastful" advertising.[7]

Also relevant to the "nature and control" of JAB-Ohio, Complainant cited admissions of Respondent that: (1) JAB-Ohio had no separate checking account; (2) after it shut-down its wood-treating operations in 2001, JAB-Ohio had no income, its expenses were paid by JAB-Co which charged JAB-Ohio through an inter-company payable, and it had no employees or paid officers; and (3) its financial records were kept by the Chief Financial Officer of JAB-Co. Complainant's Memorandum, at 14. Again, Respondents do not contest any of these allegations, rather they attempt to characterize JAB-Co's support of JAB-Ohio as consistent with JAB-Ohio functioning as an independent corporation. Respondents' Memorandum, at 18-20.

Respondents state that:

> in this case JAB Company was not providing unconditional assistance to JAB Ohio; rather, all transactions between JAB Company and JAB Ohio were properly accounted for and in the nature of a loan, whereby JAB Ohio was and is expected to repay JAB Company.

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[7]In contrast to Respondents, in American Trading, the parent and subsidiary "maintain[ed] separate offices and conduct[ed] separate directors' meetings[,]" 311 F.Supp., at 414, and the "physical locations of the corporations [were] different[,]" and "the records of each [were] separately maintained[.]" Id., at 415-16.

Id., at 19.

However, Respondents cite no evidence in the record, such as "loan" documents, identifying the transfer of funds from JAB-Co to JAB-Ohio as a "loan," setting out the amounts of any loan and the repayment terms of any loan, nor do they submit any such evidence in response to Complainant's Motion.[8] Respondents support their assertion that there were such loans with nothing more than conclusions, stated by counsel in argument, that JAB-Co's funding of JAB-Ohio was "in the nature of a loan[,]" and that "it is consistent with a normal parent-subsidiary relationship for a parent to provide a subsidiary with funds when necessary and certainly doesn't render the subsidiary incapable of acting on its own behalf." Respondents' Memorandum, at 18.[9]

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[8]In Complainant's Motion for Discovery, filed February 26, 2009, Complainant specifically sought the following:

> In the event Respondents assert that specific information relevant to any request in the Additional Information Request has been destroyed pursuant to a record retention policy, with regard the information subject to the assertion, Respondents shall produce the following: . . . .

Complainant's Motion for Discovery, at 1. Complainant then identified specific information that she sought relevant to the destruction of any record of the Respondents. Neither in any discovery response, nor in response to Complainant's Motion, have Respondents made any assertion that any record relating to this matter has been destroyed by Respondents, or anyone on their behalf.

[9]Respondents assert that the "loans" were necessary as "JAB Ohio's wood treatment operation failed," Respondent's Memorandum, at 24, and attempt to characterize JAB-Ohio as a company whose "operations had become unprofitable; its business had failed." Id., at 39. However, Respondents again fail to cite any evidence in the record, or submit evidence in response to Complainant's Motion, to support their assertion that JAB-Ohio's business failed. This assertion is supported by nothing other than conclusions, stated by counsel in argument. Complainant would note that, after Richard, Timothy and Brian Biewer shut down wood-treating operations at JAB-Ohio's facility, they continued to operate wood treatment facilities, as revealed in Toxics Inventory Release forms they submitted to U.S. EPA, documenting their operations and use of toxic chemicals, after 2001. Complainant's Memorandum, Attachment O, at 1-18, and 49-56. Moreover, they continue to operate three wood treating facilities under three different company names. Id., Attachment A, at 3-4.

The law is clear: in responding to a motion for accelerated decision, or the analogous summary judgment, Respondents must identify evidence in the record to support their assertions, or submit that evidence in response to the motion, and that evidence must be reliable.[10] As Respondents have identified no evidence of record, or submitted evidence in response to Complainant's Motion, to support their claim that JAB-Co's funding of JAB-Ohio consisted of loans, there can be no finding that JAB-Co's funding of JAB-Ohio was a "loan" or series of "loans." As Respondents have identified no evidence of record, or submitted evidence in response to Complainant's Motion, to support their claim that JAB-Ohio's business failed, there can be no finding that JAB-Ohio's business failed. As Respondents' evidence will not support a finding of either of those facts, Respondents claims cannot demonstrate that there is any material issue of fact regarding those claims.

The evidence is quite clear that JAB-Co's funding of JAB-Ohio was not a "loan," but, contrary to Respondents' assertions, JAB-Co was funding JAB-Ohio without conditions, and JAB-

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[10]The Administrator, by the Board, has held that, accelerated decision is analogous to summary judgment, and that to oppose an accelerated decision, a party must do so by "referencing probative evidence in the record, or by producing such evidence." In Re Green Thumb Nusery, Inc., 6 E.A.D. 782, at 793 (March 6, 1997). See also, General Office Products v. A.M. Capen's Sons, Inc., 780 F.2d 1077, at 1078 (1st Cir. 1986) (an "opposing party cannot defeat summary judgment by mere allegations but must bring 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial"); and Galindo v. Precision American Corporation, 754 F.2d 1212 (5th Cir. 1985) ("unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment"). Moreover, for purposes of prevailing on summary judgment "facts must be established through one of the vehicles designed to ensure reliability and veracity -- depositions, answers to interrogatories, admissions and affidavits." Martz v. Union Labor Life Ins. Co., 757 F.2d 135, at 138 (7th Cir. 1985); and "legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid summary judgment." Estrella v. Brandt, 682 F.2d 814, at 819-20 (9th Cir. 1982).

Co had simply taken over JAB-Ohio. In controlling JAB-Ohio's activities, JAB-Co would provide JAB-Ohio financial resources when JAB-Co found it "necessary[,]" Respondents Memorandum, at 18, and, presumably, would not provide JAB-Ohio financial resources when JAB-Co found it not "necessary[.]" The fact that Respondents have failed to produce any record documenting any meeting or action taken by the JAB-Ohio Board of Directors, since January 1997, corroborates a finding that JAB-Ohio had no independent existence and was not in control of JAB-Ohio.[11]

Finally, Complainant submitted a chart of the Biewer Companies organizational structure, Complainant's Memorandum, Attachment R, based upon admissions made by Respondents, which are cited in the chart. In Respondents' Memorandum, Respondents do not challenge the accuracy of this chart, or the credibility of the source material cited. The chart clearly shows that, on the information provided by Respondents in discovery, Richard Biewer, Brian Biewer, and Timothy Biewer control JAB-Co and its subsidiaries, including JAB-Ohio. And, all of the companies identified are involved in the same business: the production and marketing of treated wood. See Complainant's Memorandum, at 13, fn.8.

Again, Complainant does not contend that each of the items of evidence identified herein, relating to the nature of corporate ownership and control of JAB-Ohio, in and of themselves, warrant a finding that "piercing the corporate veil" of JAB-Ohio is appropriate. However, they are

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[11]In Complainant's Memorandum, at 24-25, Complainant noted that Respondents have been able to provide only one record purporting to document one meeting of the JAB-Ohio Board of Directors since 1997. Complainant then demonstrated that, when read in conjunction with a similar document Respondents submitted regarding John A. Biewer Company of Toledo, Inc. ("JAB-Toledo"), neither of the two documents could be accepted as credible. In their memorandum in this matter, Respondents fail to make any response to Complainant's characterization of these two documents as tainted and lacking credibility, or provide in response to Complainant's Motion any additional records documenting any meetings or decisionmaking of the JAB-Ohio Board of Directors.

all relevant and warrant consideration with any other relevant evidence in determining whether a finding of derivative liability is warranted. To summarize the evidence presented relevant to the nature and control of JAB-Ohio:

(1) JAB-Co has 6 subsidiaries, including JAB-Ohio, and each of the subsidiaries have been producers of chemically treated wood for sale by the Biewer family enterprise operating under the name "Biewer Lumber™," with John A. Biewer Company and Biewer Lumber LLC listed at www.biewerlumber.com as "corporate headquarters of the enterprise.

(2) JAB-Co and its 6 subsidiaries are controlled by Richard, Timothy and Brian Biewer.

(3) Since 2001, when its wood treating operations were shut down, JAB-Ohio has had no income, employees, and checking account, and its only source of funding is JAB-Co, when JAB-Co finds it "necessary."

(4) Though asked to produce such records in discovery, and though such records are relevant and probative to factors to be considered on the issue of derivative liability in this matter, Respondents have produced no records documenting:

(a) the movement of funds from JAB-Co to JAB-Ohio and the movement of funds from JAB-Ohio to JAB-Co;

(b) the sale of JAB-Ohio's $1.4 million inventory after 2001, and the distribution of the proceeds from that sale; and

(c) meetings and actions taken by the JAB-Ohio Board of Directors regarding JAB-Ohio.

This evidence, considered in its totality, supports a finding that, though JAB-Ohio may have been incorporated as an independent subsidiary of JAB-Co, subsequent to 2001, in reality, they both operated as one company, under one ownership and control.

(ii) Absence of Corporate Assets and Undercapitalization

In her memorandum, Complainant discloses that, in the late 1970s, JAB-Co was served by the State of Michigan with notice that its operations treating wood with a chemical solution

containing arsenic and chrome, in Schoolcraft, Michigan, had caused pollution, was illegal, and that the violating conduct should cease. Complainant's Memorandum, at 20-21 and Attachment B. JAB-Co admitted that it had caused the soil and groundwater contamination, and a Michigan court imposed an $85,000 penalty on JAB-Co. Id. It was after JAB-Co was served with the State notice that it organized its wood-treating operations in separate companies, including JAB-Ohio, in September 1980. Complainant also noted that, from 1987 until its operations were shut-down in 2001, Brian Biewer filed on behalf of JAB-Ohio annual Toxics Release Inventory forms, reporting JAB-Ohio's use of arsenic, chromium and copper compounds, each a toxic substance. Id., at 21. Finally, it was in 1988 that the Administrator published her findings regarding the environmental threat presented by the mismanagement of hazardous waste at wood treating facilities, and proposed rules to regulate wood treating operations. Respondent does not contest any of these facts.[12]

The significance of these items of evidence is that, as of 1979, JAB-Co had direct knowledge that its wood-treating operations were "dirty" and that those operations exposed it to

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[12]The only reference Respondent makes to its Schoolcraft, Michigan, experience, alludes to some apparent deficiency it finds in Complainant citing the Schoolcraft, Michigan case, stating "Complainant has not even attempted to present evidence comparing the environmental risks at Schoolcraft, Michigan to a different operation in Washington Courthouse." Respondents' Memorandum, at 26. However, as noted by Complainant, in proposing RCRA rules to govern the operation of drip pads in the wood preserving industry, the Administrator found that "[w]astes from the preservation of wood with inorganic formulations or arsenic and/or chromium typically contain high concentrations of these toxic metals, as well as lead." 53 Fed. Reg. 53282, 53284 (December 30, 1988). She further found that "[p]ast mismanagement of these wastes has led to off-site contamination of ground water, surface water, and soils[,]" and recognized the "known toxicity and/or carcinogenicity of these metals[.]" Id. Clearly, the Administrator was finding that all operations treating wood with arsenic and chrome presented a potential risk to the environment and public health, and that would include both JAB-Ohio's operations, as well as JAB-Co's Schoolcraft operations, which both treated wood with a chemical solution containing arsenic and chrome.

potential costs for environmental contamination and the clean-up of that contamination, and as of 1988, JAB-Co and JAB-Ohio were on notice of the Administrator's findings. JAB-Co was on notice that reasonably expected costs of operating a wood treating facility would include being able to pay for cleaning up arsenic and chromium that might escape wood-treating operations. From a purely business standpoint, it is not surprising that after 1979 JAB-Co would create separate "independent" subsidiary companies, including JAB-Ohio, to do the "dirty work" of its enterprise, which consisted of the production and sale of treated wood products, limiting funding of the subsidiaries so as to leave them without the funds to pay for any clean-up required. Nor is it surprising that, on Richard, Timothy and Brian Biewer shutting down the wood treating operations of JAB-Ohio, one of the six subsidiary companies of JAB-Co, also operated by Richard, Timothy and Brian Biewer, they would move assets out of the subsidiary to the parent in an effort to reserve those assets for the use in JAB-Co's overall wood-treating operations, rather than have those assets available to JAB-Ohio to spend on removing arsenic and chromium contamination at the JAB-Ohio facility, and complying with the law.

In discussing the absence of corporate assets and undercapitalization, Complainant identified and discussed JAB-Ohio's financial statements for the years 2001, the year it closed its operations, through 2007. Complainant's Memorandum, at 15-20. Complainant also provided a chart documenting, between 2001 and 2007, JAB-Ohio's Accounts Receivable Intercompany and Accounts Payable Intercompany, and, for the same years, a chart documenting JAB-Ohio's assets and liabilities. Id., 18-20. In their response to the adequacy of capitalization issue addressed by Complainant, Respondents make no challenge to the accuracy of Complainant's presentation of JAB-Ohio's financial records, nor of the charts Complainant has provided. Respondents'

Memorandum, at 21-28. Respondents objections are to the characterization one gives this information.

Respondents state that "Complainant suggests that the sale of JAB-Ohio's inventory to related parties was nefarious in that it depleted JAB-Ohio's assets and that these transfers should result in this Court piercing the corporate veil." Id., at 24. However, Respondent misstates the issue and misstates Complainant's position. The issue is not who the JAB-Ohio inventory was sold to, but what happened to the proceeds from the sale of that inventory. Complainant's position is that, while JAB-Ohio's relinquishment of the proceeds from the sale of its inventory after shutting down should not, in and of itself, result in a determination to "pierce the corporate veil," that is a factual circumstance which should be considered with many other factual circumstances in determining whether JAB-Ohio has been undercapitalized.

If JAB-Ohio had itself kept the proceeds from the sale of its own inventory as cash, rather than crediting related parties payables, it would have had those proceeds available to comply with its legal obligation to rid its facility of any arsenic and chromium contamination left behind by its operations, and would not have on its hands a facility which, in the words of Respondents' counsel, "appears to have no value," Complainant's Memorandum, Attachment JJ, at 2, a result that is hardly in JAB-Ohio's interest.

Respondents assert that:

> JAB Ohio did nothing more than sell its inventory and use the proceeds to pay down a legitimate and existing debt. The fact that the debt was to a related party does not make the transaction illegitimate, fraudulent or for less than fair value.

Respondents' Memorandum, at 25. However, as with the alleged JAB-Co to JAB-Ohio loans, and the alleged failure of JAB-Ohio's business, Respondents neither cite nor produce any

documentary evidence to support their claim that after it closed, JAB-Ohio was indebted to related companies for $1.4 million, and that the proceeds from the sale of that inventory were used to pay off indebtedness of JAB-Ohio. There is no documentation of any claimed debt, any interest on any debt, and any terms of the repayment of any debt. Consequently, Respondents have no evidence to support their assertion that JAB-Ohio was indebted to JAB-Co, or that the proceeds of the sale of JAB-Ohio's inventory went to pay off any such debt of JAB-Ohio, and there can be no genuine issue of material fact concerning Respondents' assertions. See fn.9.

Moreover, though JAB-Ohio, controlled by Richard, Timothy and Brian Biewer, transferred the proceeds from the sale of JAB-Ohio's $1.4 million inventory to JAB-Co. and related companies, also controlled by Richard, Timothy and Brian Biewer, Respondents' Memorandum, at 25, JAB-Co turned around and would provide funding to JAB-Ohio "when necessary." Id., at 18. This was JAB-Co's chosen method for funding its subsidiary. JAB-Co did find it "necessary" to provide payment for the taxes and insurance bills of JAB-Ohio, and to provide payment to the Mannik & Smith Group, Inc. ("MSG"), environmental consultants, for the preparation of a "plan which identifies the closure activities to be undertaken in regard to clean closing the drip pad" at JAB-Ohio's facility. Complainant's Memorandum, Attachment KK, at 1.[13] However, JAB-Co

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[13]The plan called for pressure washing the drip pad, and sampling the rinseate from the power washing to determine whether remedial standards have been met for concentrations of arsenic and chromium. Complainant's Memorandum, Attachment KK, at 5. If the sampling data indicated concentrations above the remedial standards, "John A. Biewer Company" was to "reassess the remediation approach and provide the Ohio EPA with a contingent closure approach for concurrence." Id., at 6.

apparently did not find it "necessary" to provide funding for JAB-Ohio to comply with the law and implement and complete the drip pad closure plan prepared by MSG.[14]

Given the method by which JAB-Co chose to fund its subsidiary, JAB-Ohio, to determine whether JAB-Ohio was left by its parent without corporate assets and, therefore, undercapitalized, the question becomes: is compliance with RCRA, requiring the removal of arsenic and chromium contamination from JAB-Ohio's facility, a "necessary" expense of doing business, such as paying taxes, or providing insurance, or is compliance with the law optional, at the discretion of JAB-Co? If compliance with RCRA is "necessary," then, given the funding arrangement JAB-Co had with its subsidiary, JAB-Ohio, JAB-Co's failure to provide funding for the decontamination of the drip pad at JAB-Ohio's facility left JAB-Ohio undercapitalized and unable to meet its obligations.

The Administrator, the public officer charged with administering and enforcing the Nation's environmental law, cannot take the position that compliance with those law is optional, and not a necessary cost for those doing business in the regulated community. That is evident in that Congress provides for strict liability for violators of these laws, including RCRA. U.S. v. Production Plated Plastics, Inc., 742 F. Supp. 956, at 960 (W.D. Mich. 1990) ("RCRA is a remedial strict liability statute which is construed liberally"). Here, those responsible for JAB-Ohio after it shut down, in 2001, removed the value of its $1.4 million inventory from the assets of JAB-Ohio, leaving it destitute -- except as JAB-Co chose to provide it funding -- and unable to meet its legal obligation to remove the arsenic and chromium contamination, and in violation of

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[14]JAB-Ohio cites "its financial inability, not unwillingness, to perform the drip pad closure plan" as the reason it did not implement and complete the drip pad closure plan prepared by MSG for its facility. Respondent John A. Biewer Company of Ohio, Inc.'s Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty, at 3.

the law. JAB-Co refused to find the removal of that contamination "necessary" and provide JAB-Ohio funding for it, consistent with its method of otherwise funding JAB-Ohio. As JAB-Ohio was unable to met a legal obligation, and a necessary aspect of its wood-treating business, JAB-Ohio was undercapitalized. In Re Lifschultz Fast Freight, 132 F.3d 339, 345 (7th Cir. 1997) ("Under any definition, undercapitalization just means that a company does not have enough funds on its balance sheet or in the till"), cited in Complainant's Memorandum, at 19, fn.11.

(iii) Respondents' Failure to Observe Legal Formalities and the Commingling of Funds

In Complainant's Memorandum, Complainant cited four factors which are relevant to a determination that a parent should be held liable for conduct of its subsidiary:

(1) the failure to maintain, or the absence of, adequate corporate records or minutes;

(2) the failure to observe the required corporate formalities;

(3) the disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and

(4) the commingling of funds of the entities.

Much of the evidence already identified regarding the "nature of corporate ownership and control" and "absence of corporate assets and undercapitalization" is equally relevant in considering whether there was a "failure to observe legal formalities and commingling of funds." This evidence is as follows:

(1) After 2001 JAB-Ohio had no income, no checking account, JAB-Co paid all of its expenses, and its financial records were kept by JAB-Co.

(2) In communicating with Ohio EPA and MSG regarding arsenic and chromium contamination at the closed facility of JAB-Ohio, Brian Biewer, Secretary/Treasurer of both JAB-Ohio and JAB-Co, used the names "John A. Biewer Company of Ohio, Inc.," "Biewer Lumber" and "John A. Biewer Company" interchangeably.

(3) There are no records, such as meeting minutes, resolutions, or other corporate papers, documenting that the Board of Directors of JAB-Ohio conducted any meetings or made any decisions on behalf of JAB-Ohio after January 1, 1997.

(4) Though Respondents claim that, at the time JAB-Ohio shut-down its operations in 2001, JAB-Ohio's $1.4 million in inventory was sold and the proceeds of that sale were used by JAB-Ohio to pay an existing debt it had to JAB-Co. and related parties, there are no records documenting the amount of debt, the interest, or the terms of repayment. Nor do Respondents provide any other business records documenting the transfer of the proceeds from JAB-Ohio to JAB-Co, or a related company.

(5) Though Respondents claim that, since 2001, when JAB-Ohio shut-down its operations, JAB-Co has been providing continuing financial support to JAB-Ohio in the form of loans, on which it expects repayment, there are no records documenting the amount of any loan, the interest on the loan, or the terms of repayment. Nor do Respondents provide any other business records documenting the transfer of funds from JAB-Ohio to JAB-Co.

Moreover, the decision to strip JAB-Ohio of the proceeds from the sale of its inventory after JAB-Ohio's operations were shut down in 2001, and distribute the proceeds of that sale to JAB-Co or related parties, was not an act in the interest of JAB-Ohio. The decision to distribute the proceeds of the sale of JAB-Ohio's inventory prior to removing the arsenic and chromium contamination at JAB-Ohio's facility, left JAB-Ohio with a facility which, "in the company's opinion, appears to have no value," Complainant's Memorandum, Attachment JJ, at 2, and in violation of the law. Such actions did not benefit JAB-Ohio. In contrast, such actions did benefit JAB-Co and any other related company receiving the proceeds from the sale of JAB-Ohio's inventory, in that they had the use of those proceeds.

Finally, further evidence supporting a finding that corporate formalities have not been observed and there has been a commingling of funds is the fact that, though served with a notice of the original complaint and Complainant's motion to amend that complaint, adding JAB-Co and

Biewer Lumber LLC as respondents, JAB-Co and Biewer Lumber LLC failed to intervene to object to the motion, as allowed by rule, and left it to JAB-Ohio to present any objection they had to the motion. See Complainant's Memorandum, at 30, fn.17. Respondents' Memorandum is silent as to this evidence.

While each of these items of evidence, standing alone, might not support a determination that piercing the corporate veil between JAB-Ohio and JAB-Co is warranted, the totality of this evidence clearly supports a finding that those controlling both of these companies -- Richard Biewer, Timothy Biewer and Brian Biewer -- failed to observe corporate and legal formalities between JAB-Ohio and JAB-Co; failed to maintain an arms-length relationship between the companies; and commingled the funds of the companies.

(iv) "Piercing the Corporate Veil" of JAB-Ohio is Necessary to Defend Public Policy and Prevent an Injustice

In Complainant's Memorandum, at 31 to 37, Complainant sets out her support for the proposition that "piercing the corporate veil" is necessary in this instance to defend public policy and prevent an injustice. In addressing this criteria in Respondents' Memorandum, at 40-44, Respondents contest no issue of fact put forth by Complainant, but, again, direct their challenge to Complainant's interpretation of the facts, mis-construe Complainant's position, and misstate the federal court decisions they cite.

In an earlier matter before the Administrator it was clearly recognized that, under American law, "a corporation is a separate and distinct entity from its stockholders, shareholders, directors and officers," and that "Courts are reluctant to disregard the corporate entity [and] will do so to prevent fraud or unfairness." In Re Safe & Sure Products, Inc., et al., No. I.F. & R. 04-907003, at

22, Initial Decision, at 21 (1998). However, it also was recognized that, under certain circumstances, this principle could be set aside, and a finding of derivative liability made:

> The burden of proof falls on the party seeking to pierce the corporate veil. To meet the burden the proponent must establish that the 'corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that allowing its use would constitute a fraud or promote injustice.'

Id., at 22, citing National Soffit v. Superior Systems, 98 F.3d 262, 265 (7th Cir. 1996).

Respondents characterize Complainant as arguing that "based on the public policy underlying RCRA . . . JAB Company and Biewer Lumber LLC should be held liable for the acts of JAB Ohio," and Respondents themselves argue that "the policies underlying federal environmental laws were never intended to override the long standing principles of corporate liability," citing Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 675 F.Supp. 22 (Dist Mass. 1987). Respondents' Memorandum, at 40. However, Respondents mis-construe Complainant's position, and misapply the decision in Acushnet River. Respondents cite Acushnet River as holding the following: "courts should not 'summarily disregard the corporate fiction under the guise of furthering some unspoken congressional intent.'" Id. However, what the court in Acushnet actually said was this:

> Avoiding liability through the corporate form, without more, is not a wrong that equity's hand must right. In addition, there must be evidence of undercapitalization, pervasive control, fraud, or any of the other specific criteria already discussed.

Acushnet River, 675 F.Supp., at 34. The court characterized the governments' argument in that case as follows: "In the sovereigns' view the purposes behind CERCLA are so important that the most punctilious and complete corporate separateness must be observed and the point of piercing occurs just as soon as the parent's contact with the subsidiary transcends a 'pure investment relationship." Id., at 31-32.

Contrary to the statements of Respondents, Complainant has not adopted the government's position in Acushnet River, nor does Complainant contend that JAB-Co should be held liable based upon the public policy underlying RCRA. Again, a "violation of public policy" or a resulting "injustice" is but one component in determining whether the evidence warrants "piercing the corporate veil." A decisionmaker must also evaluate the parent-subsidiary working relationship in consideration of all of the criteria identified in Acushnet River and Safe & Sure Products, Inc.[15]

Other than misstating Complainant's position, and mis-construing the decision in Acushnet River, the only point made in response to Complainant's argument on the necessity of "piercing the corporate veil," on the evidence in this case, to defend public policy and prevent an injustice is this: "Complainant also argues that public policy is somehow offended because the 'Biewer Family boasts of the wood-treating experience and expertise that is has gained over 45 years" while 'shirking' the legal obligations that accompany such activities." Respondents' Memorandum, at 43. However, again, Respondents have mis-construed Complainant's argument. Complainant

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[15]In Acushnet River, the Court found substantial evidence that precluded any determination to "pierce the corporate veil," evidence that went well beyond a mere inclination of businessmen to avoid liability. The Court found that "there can be no suggestions that [the subsidiary] is in any way a 'shell' corporations[,]" noting that the subsidiary's net worth was just over $17 million -- five times what it was when the company was purchased by the parent -- and that the subsidiary "negotiates its own contract, develops its own customers, arranges its own loans, develops its own budgets, creates its own marketing and sales program, hires and fires its own employees, maintains its own financial records and accounts, and regularly conducts board of directors meetings." Id., at 35. Finally, the court noted that there was no evidence that the subsidiary "is making some component vital to [the parent's] product line, the manufacture of which necessarily involves generating hazardous substances." Given the uncontested evidence identified in Complainant's Memorandum, there is a world of difference between the condition of the subsidiary reviewed in Acushnet River and JAB-Ohio.

argues that , "[h]aving profited between 1983 and 2001 from the wood-treating operations at the JAB-Ohio facility, now closed, the Biewer family walks away from the facility refusing to pay the costs of removing the arsenic and chrome contamination left behind by that operation," but "continue to operate [] three wood treatment facilities as it operated JAB-Ohio" and "boasts of the wood-treating experience and expertise it has gained over 45 years." Complainant's Memorandum, at 34-35. Complainant goes on to note that, if neither JAB-Co or Biewer Lumber LLC are held liable in this matter, the Biewer family enterprise will avoid liability for arsenic and chromium contamination at JAB-Ohio's facility because JAB-Ohio was organized, on paper, as an independent subsidiary, and JAB-Ohio's four other wood-treating facilities could likewise avoid liability, by liquidating their assets and moving the proceeds to JAB-Co. Id., at 35. Respondents do not challenge any factual statement made by Complainant, the only challenge they make is for the proposition that "boastful advertising" did not constitute the type of misrepresentation, deception or mistake that would justify imposition of indirect derivative liability.

Complainant makes two responses. First, Complainant's assertion of facts to support her position that piercing the corporate veil is necessary to defend public policy and prevent an injustice go well beyond an assertion that the Biewer family was "boastful." Respondents have acknowledged that the JAB-Ohio site is contaminated and not in compliance with the law, and they do not contest any factual allegation made by Complainant regarding what has happened. Respondent John A. Biewer Company of Ohio, Inc.'s Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty, at 2. Second, as earlier noted, in American Trading, after identifying numerous efforts made by a parent and its subsidiary to "scrupulously maintain" separate operations, which precluded a finding being made that the

parent corporation should not be held liable for acts of its subsidiary, the Court stated: "Nor does the Parent's boastful advertising show in any way that corporate identities were otherwise ignored by the participants in the conduct of their enterprises." American Trading, 311 F.Supp., at 415-16. Id., at 415-416. The Court also concluded that "[n]one of the elements of injustice relied on in earlier cases exist here." Id., at 416. In contrast, here Complainant has demonstrated that Respondents have not "scrupulously maintained" separate operations, and Complainant has demonstrated that an "injustice" will result.

In her memorandum, Complainant has identified sound evidence, in the form of findings made by the Administrator as to the environmental and public health hazards presented by wood-treating operations, and the resultant risk of arsenic and chromium contamination in the soil and groundwater if these toxic substances are not properly handled, including their removal from drip pad areas of closed wood-treating facilities. Complainant's Memorandum, at 31-33. Respondents make no challenge to this evidence. Complainant points out that the arsenic and chromium at JAB-Ohio's facility is a threat to migrate into the soil and groundwater near its facility, as did the arsenic and chrome waste at JAB-Co's Schoolcraft, Michigan, facility. Id., at 32-33. Respondents make no challenge to this statement of environmental risk. Complainant cites evidence to support a finding that, notwithstanding JAB-Ohio's level of resources, Respondents JAB-Co "do[es] have the resources to fulfill" the legal obligation to remove the arsenic and chromium contamination from the JAB-Ohio facility. Complainant's Memorandum, at 33, fn. 21. Respondents make no challenge to this evidence.

Consequently, based on a fair analysis of the evidence in this matter, in consideration of the criteria relevant to a determination of whether the corporate veil of a subsidiary ought to be

pierced, as set forth in Safe & Sure Products, at 22, and Ancushnet River, 675 F. Supp., at 33, a finding that JAB-Co and Biewer Lumber LLC are not liable because, on paper, JAB-Ohio was organized as an independent subsidiary, would sanction a fraud, promote injustice, and lead to an evasion of legal obligations by Richard Biewer, Timothy Biewer and Brian Biewer, officers of JAB-Ohio and JAB-Co. Those responsible for JAB-Ohio will have succeeded in evading a responsibility under law, as they kept resources of JAB-Ohio necessary for JAB-Ohio to comply with the law safely in the confines of a related company.

II. THE LAW AND ANALYSIS UNDER U.S. v. BESTFOODS

The U.S. Supreme Court, in U.S. v. Bestfoods, et al., 524 U.S. 51 (1998), recognized that a parent corporation could be "directly" liable for a violation of its subsidiary's facility if the evidence revealed that the parent directly operated the subsidiary's facility. Complainant has provided an analysis of the application of this doctrine to this action. Complainant's Memorandum, at 37-44. There is really no dispute here between the parties as to what it is that Bestfoods stands for, but, rather, there is a dispute as to its application to this action.

Evidence already addressed in this memorandum is relevant to a determination of direct liability under Bestfoods. JAB-Ohio consisted of only one facility, a wood-treating facility, which was shut down in 2001. It was a subsidiary of JAB-Co, both companies controlled by Richard, Timothy and Brian Biewer. After closing down in 2001, JAB-Ohio had no income, employees, or checking account. Other than the facility and the property on which it stood, which, "in the company's opinion, appears to have no value[,]" Complainant's Memorandum, Attachment JJ, at 2, JAB-Ohio had no assets other than inventory in valued at $1.4 million. Those in control of JAB-Ohio sold the inventory of JAB-Ohio, distributing the proceeds to JAB-Co and related parties,

Respondents' Memorandum, at 25, and provided funding to JAB-Ohio when JAB-Co considered the funding "necessary." Id., at 18. JAB-Co found such funding "necessary" for "paying taxes, insurance and the like." Id.

In Bestfoods, the Court recognized that, in determining whether a parent is directly liable for the "operation" of a subsidiary's facility, "something more than mere mechanical activation of pumps and valves" must appear of record, and there must be a consideration of the "exercise of direction over the facility's activities." 524 U.S., at 71. One "possibility" for holding a parent directly liable is "when the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of a joint venture." Id. Another "possibility" is "when an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility." Id.

Here, JAB-Ohio was left with nothing by its parent, JAB-Co, with which to operate its facility. As JAB-Ohio had ceased operating its wood-treatment business, and had no employees, the only activity or "operations" of JAB-Ohio consisted of meeting its legal obligations, and attempting to preserve whatever value there was to its facility. Toward this end, taxes needed to be paid and JAB-Ohio's property insured. Neither of these tasks could have been performed by JAB-Ohio as it had no funds to pay for them. These obligations were paid out of an account of its parent, JAB-Co, by employees or officers who were paid, not by JAB-Ohio, but by someone else. Moreover, though JAB-Ohio had no funds of its own to operate its facility and meet its obligations, JAB-Co would provide funding to JAB-Ohio when JAB-Co found such funding "necessary."

JAB-Ohio was helpless to direct any activities involving its facility, as it had no money to do anything. JAB-Ohio could meet its facility's obligations only when JAB-Co found it "necessary" to provide JAB-Ohio funding to meet the obligations, such as "to pay taxes, insurance

and the like," and retain an environmental consultant to prepare a drip pad closure plan for the JAB-Ohio facility. However, JAB-Ohio could not meet other obligations, such as implementing the drip pad closure plan prepared by the environmental consultant so as to comply with the law and remove the arsenic and chromium contamination at its facility. JAB-Ohio could not do this because JAB-Co would not provide funding for JAB-Ohio to do so, apparently considering it not "necessary" that JAB-Ohio implement the drip pad closure plan. Whether the JAB-Ohio facility would or would not meet its obligations depended entirely on whether JAB-Co found it necessary that JAB-Ohio do so. This is complete dominance of the JAB-Ohio facility. It evidences a parent "operating the facility in the stead of its subsidiary," and those actually taking steps to pay for the JAB-Ohio's taxes and insurance, and for the production of a drip pad closure plan, acting with the "hat of the parent" in operating the facility, and not the "hat of the subsidiary." See Bestfoods, 524 U.S., at 71.[16]

Consequently, JAB-Co is directly liable for JAB-Ohio's failure to decontaminate its drip pad of arsenic and chromium contamination under the Bestfoods doctrine.

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[16]As earlier noted that, those in control of JAB-Ohio cannot be considered as acting in the "best interest" of JAB-Ohio, in that, after it was shut-down in 2001, and a legal obligation to remove arsenic and chormium contamination attached to its facility, those responsible divested JAB-Ohio of its assets -- proceeds from the sale of its $1.4 million inventory -- thereby leaving JAB-Ohio in violation with the law, and without resources to come into compliance. Moreover, by leaving JAB-Ohio without the means to remove the arsenic and chromium contamination at its facility, JAB-Ohio's property was diminished in value in the real estate market, as the property was contaminated with arsenic and chromium, toxic materials.

III. CONCLUSION

Complainant requests that a finding be entered that Biewer Lumber LLC is not liable under any legal theory for the violation of JAB-Toledo alleged in the Complaint and Compliance Order.

In response to Complainant's Motion for Accelerated Decision on Derivative Liability, Respondent JAB-Co has failed to raise any genuine issue of material fact, as Complainant has herein demonstrated. Moreover, for the reasons stated in Complainant's Memorandum in Support of Motion for Accelerated Decision on Derivative Liability, and the reasons stated herein, as a matter of law, Complainant is entitled to the relief sought in Complainant's Motion for Accelerated Decision on Derivative Liability against JAB-Co.

Respectfully submitted,

Richard R. Wagner
Senior Attorney and Counsel for the
Administrator's Delegated Complainant

TABLE OF AUTHORITIES

Supreme Court Cases

Other Federal Cases

Administrative Adjudications

Federal Statutes

Federal Register Notices

In Re John A. Biewer Company of Ohio, Inc.
No. RCRA-05-2008-0007

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of **Complainant's Reply to Respondents John A. Biewer Company, Inc., and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decsion on Derivative Liability**, in the office of the Regional Hearing Clerk (E-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this Certificate of Service.

I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

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