# Mika Meyers Beckett & Jones PLC

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April 12, 2010



Regional Hearing Clerk (E-19J)
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590

Re: John A. Biewer of Ohio, Inc.; RCRA-05-2008-0007

Dear Clerk:

Enclosed for filing you will find the original and two copies of the Respondent's Post-Hearing Reply Brief and Proof of Service.

Sincerely,

Douglas A. Donnell


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jeb
Enclosures
By Overnight Mail
cc: Hon. William B. Moran (by Fed Ex and e-mail)
Richard R. Wagner (by Fed Ex and e-mail)
Douglas S. Touma, Sr. (by First Class Mail)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 5**

IN THE MATTER OF:

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

U.S. EPA ID #: OHD 081 281 412

Respondent
_____/

DOCKET NO: RCRA-05-2008-0007

**RESPONDENT'S POST-HEARING REPLY BRIEF**



As requested by the Court, both Complainant and Respondent have filed Post-Hearing Briefs, though the issues addressed in those briefs differ substantially in several respects. This Reply Brief is submitted to address two issues covered in Complainant's Post-Hearing Brief which were not addressed in Respondent's Post-Hearing Brief.

First, the primary issue addressed in Complainant's Post-Hearing Brief is more in the nature of a motion for re-hearing on Complainant's earlier filed Motion for Accelerated Decision on Liability and Penalty, which was denied by the Court. Suffice it to say that Respondent believes that the Court correctly decided that motion, and points to a significant omission in Complainant's legal argument. Specifically, Complainant argues that Respondent presented no evidence to establish that there was a dispute of material fact regarding the penalty calculation prepared by Mr. Wagner, counsel for Complainant. Setting aside the fact that Mr. Wagner's own calculations are themselves not evidence, nor are they admissible as evidence in support of his motion, Complainant further ignores the fact that the *evidence* submitted by Complainant in support of *Complainant's* motion for Accelerated Decision on Derivative Liability against John A. Biewer Company and Biewer Lumber LLC, already included the evidence Respondent referenced in opposition to the Motion for

Accelerated Decision on Liability and Penalty. More particularly Complainant argued that the two subsidiaries were essentially without funds to perform necessary closure activities, and supported that allegation with attached financial reports prepared by Respondent and furnished to Complainant during discovery. This is the *evidence* that proved Respondent's contention, and for Complainant to now argue that no evidence was presented demonstrating a factual dispute seems rather disingenuous when it was Complainant herself that supplied the evidence to the Court. Thus, Respondent contends that the Court correctly decided Complainant's Motion for Accelerated Decision, and Complainant's effort to reargue the motion under the guise of a post-hearing brief should fail.

Interestingly, Complainant's Post-Hearing Brief almost completely fails to address the issue which the Court requested the parties to address in their briefs – namely, whether or not Complainant had submitted *evidence* in support of its claimed penalty amount. That issue appears to be addressed in a single paragraph on page 3 of Complainant's Post-Hearing Brief where Complainant again relies on Mr. Wagner's multi-page statement of how the penalty was calculated, none of which is evidence, none of which is admissible, and none of which was even factually supported by an affidavit. Essentially, Mr. Wagner comes to the Court asking the Court to treat trial counsel's statements as "evidence." Such an interpretation of the term "evidence" is novel to say the least, and utterly unsupported by either the Federal Rules of Evidence or any of the Administrative Rules governing the conduct of administrative proceedings, both prior to the evidentiary hearing and during the evidentiary hearing. Thus, Respondent believes that its contention stated in its earlier Post-Hearing Brief is correct – Complainant presented no *evidence* supporting its penalty calculation.

Finally, Complainant devotes several pages in its Post-Hearing Brief to the testimony of Mr. Olmstead at trial, contending that the documents upon which he relied for his testimony were not

reliable because they were not "audited" financials, and further contending that Mr. Olmstead, the author of the financial reports, was not qualified as an expert witness and thus could not testify as to the financial condition of Respondent. This argument fails for two reasons. First and foremost, the Court need not even reach the issue of the quality of Respondent's evidence presented at trial, because Complainant presented no evidence at all, and thus Respondent's Motion for Entry of Decision should be granted. Secondly, the testimony introduced by Respondent at the evidentiary hearing was indeed fact testimony, rather than expert testimony. The essential gist of Mr. Olmstead's testimony was that Respondent was "belly-up" and financially incapable, rather than unwilling, to perform various remedial activities requested by EPA. A simple examination of the financial reports discloses this fact, which, interestingly, was the very same conclusion Complainant reached when examining the financial records at the time Complainant filed her Motion for Accelerated Decision on Derivative Liability many months before the evidentiary hearing. No one has ever disputed that Respondent, after it ceased operations, had a negative value with insufficient assets to perform the actions required by EPA. Thus, the testimony of Mr. Olmstead was admissible and Complainant had more than ample notice of what the substance of his testimony was going to be.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondents

Dated: April 9, 2010

By: _____

Douglas A. Donnell (P33187)
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Grand Rapids, MI 49503
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**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

**CERTIFICATE OF SERVICE**

U.S. EPA ID #: OHD 081 281 412

Respondent
_____/



I, Jane E. Blakemore, hereby state that I am an employee of Mika Meyers Beckett & Jones PLC, and that on April 12, 2010, I served a copy of:

Respondent's Post-Hearing Reply Brief

upon the following individual by email and Federal Express overnight mail:

Richard R. Wagner, Senior Attorney
Office of Regional Counsel (C-14J)
U. S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, IL 60604-3590

I declare that the statements above are true to the best of my information, knowledge and belief.

Dated: April 12, 2010

Jane E. Blakemore

Jane E. Blakemore