

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

RECEIVED
REGIONAL HEARING CLERK
U.S. EPA REGION 5
2009 JUL 31 AM 10:34

IN THE MATTER OF:) DOCKET NO. RCRA-05-2008-0006
)
John A. Biewer Company of Toledo, Inc.)
300 Oak Street)
St. Clair, Michigan 48079-0497)
(Perrysburg, Ohio, Facility))
)
U.S. EPA ID # OHD: 106 483 522; and)
)
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 OBJECTION TO MOTION FOR ACCELERATED
DECISION OF RESPONDENTS JOHN A. BIEWER COMPANY, INC.,
AND BIEWER LUMBER, LLC**

The Administrator's Delegated Complainant hereby raises an objection to Respondents John A Biewer Company, Inc. ("JAB-Co") and Biewer Lumber LLC's Motion for Accelerated Decision ("Respondents' Motion"), submitted in this matter on July 2, 2009, and asks that specific motion be denied.

LAW RELEVANT TO COMPLAINANT'S OBJECTION

In determining whether a party has cited sufficient evidence to warrant "piercing the corporate veil" and finding an entity liable for violations of a related entity, a presiding officer, or other examiner or court, "engages in a 'highly fact-sensitive inquiry,' examining" whether the party attempting to "pierce the corporate veil" has produced evidence to support a finding to

“pierce the corporate veil.” In the Matter of Safe & Sure Products, Inc., et al., No. IF & R 04-907003-C, Initial Decision, at 22 (June 26, 1998).¹ Circumstances to be considered in making such a determination include an absence of corporate assets and undercapitalization in the company; a failure to maintain adequate corporate records; commingling of funds and other assets or affairs; failure to observe corporate formalities; and disregard of legal formalities and the failure to maintain an arms-length relationship among related entities. *Id.* “[I]t is not enough to simply have the requisite papers for incorporation drawn up and filed[]”; “[*t*]he entity must then function as a corporation in fact.” *Id.*, at 24 (italics in original). To conduct an analysis of the “piercing “ issue consistent with this legal standard adopted by the Administrator requires that evidence relevant to the circumstances identified in Safe & Sure Products be considered. A determination of a party’s direct liability under U.S. v. Bestfoods, et al., 524 U.S. 51 (1998), will likewise turn on specific facts in the record.

In granting Complainant’s Motion to Amend the Complaint and Compliance Order, and adding both John A. Biewer Company, Inc., and Biewer Lumber LLC as respondents in this matter, the Presiding Officer agreed with Complainant’s “expression of its burden,” that being that, on the motion to amend, Complainant “need not conclusively establish that JAB and/or Biewer Lumber are liable for any violations” under any particular theory, but must merely “put

¹The initial decision cited, including the analysis of the Presiding Officer on the issue of “piercing the corporate veil,” was adopted by the Environmental Appeals Board as the final published decision of the Administrator. 8 E.A.D. 517 (1999). Consequently, the determination methodology set out in Safe & Sure Products is “controlling precedent” in this matter. See Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993) (“precedents” governing an Administrative Law Judge’s decisionmaking “include the applicable statutes and agency regulations, the agency’s policies as laid down in its published decisions, and applicable court decisions”).

forth a sufficient basis to warrant the inclusion of those entities as named respondents on the Complaint.” Order on EPA’s Motion to Amend Complaint and Compliance Order and Notice of Hearing Postponement, at 10. The Presiding Officer further noted that, “after discovery is completed, there must be sufficient facts to establish a *prima facie* showing of parental liability.” Id.

ANALYSIS OF RESPONDENTS’ MOTION UNDER THE LAW

Respondents’ Motion cannot be relevant to a “highly fact-sensitive inquiry” on whether Complainant has “established a prima facie showing of parental liability” on the part of JAB-Co and Biewer Lumber LLC, as Respondents’ Motion is made prior to Complainant having had any opportunity to demonstrate that, based upon the facts of record in this matter, she has “established a prima facie showing of parental liability” with regard to those two Respondents. Complaint has made that showing in Complainant’s Motion for Accelerated Decision on Derivative Liability, filed, consistent with an earlier order of the Presiding Officer, on July 2, 2009, the same date that Respondents’ Motion was filed.

Between the entry of the January 7, 2009, order adding JAB-Co and Biewer Lumber LLC as respondents in this matter, and June 12, 2009, discovery was conducted and Respondents tendered four separate boxes of their financial and corporate records. Complainant’s Motion for Accelerated Decision on Derivative Liability setting out its effort to “establish a prima facie showing of parental liability” incorporates an analysis of those records. As Respondents’ Motion was made without regard to Complainant’s analysis of the facts revealed in those records, and an application of the legal precedents governing a determination to “pierce of the corporate veil” or to find direct liability under Bestfoods, et al., Respondents’ Motion cannot have any relevance to

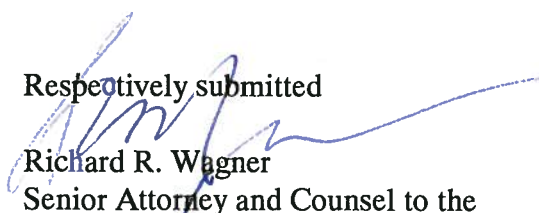
the “highly fact-sensitive inquiry” on whether Complainant has met her burden to prove JAB-Co. and Biewer Lumber LLC liable for the violation alleged, under those legal theories.

Pursuant to order of the Presiding Officer, Respondents, on July 31, 2009, will have the opportunity to file a response to Complainant’s Motion for Accelerated Decision on Derivative Liability. In that response, Respondents will have an opportunity to attack the findings and conclusions Complainant believes are warranted by the evidence cited to support a prima facie case that JAB-Co and Biewer Lumber LLC are liable for the violations for John A. Biewer Company of Ohio, Inc., alleged in the Amended Complaint and Compliance Order. Moreover, at that time Respondents can themselves make a cross-motion for accelerated decision, arguing that there is no genuine issue of material fact regarding the potential liability of JAB-Co and Biewer Lumber LLC, but that on those facts, as a matter of law, JAB-Co and Biewer Lumber LLC are entitled to a finding that they are not liable for the violation alleged in the Amended Complaint and Compliance Order. However, Respondent’s Motion, submitted on July 2, 2009, is premature, and cannot warrant consideration.

CONCLUSION

For the reasons stated herein, Respondents’ Motion must be denied, recognizing that Respondents may so move again in response to Complainant’s Motion for Accelerated Decision on Derivative Liability.

Respectively submitted


Richard R. Wagner
Senior Attorney and Counsel to the
Administrator’s Delegated Complainant

In Re John A. Biewer Company of Toledo, Inc.
No. RCRA-05-2008-0006

RECEIVED
REGIONAL HEARING CLERK
U.S. EPA REGION 5

2009 JUL 31 AM 10:34

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original, and one copy, of Complainant's Objection to Motion for Accelerated Decision of Respondents John A. Biewer Company, Inc., and Biewer Lumber LLC 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:

Hon. William B. Moran
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Franklin Court, Suite 350
1099 14th St. NW
Washington, DC 20005

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

July 31, 2009



Donald E. Ayres (C-14J)
Paralegal Specialist
77 W. Jackson Blvd.
Chicago, IL 60604
(312) 353-6719