Mika Meyers Beckett & Jones PLC

900 Monroe Avenue NW Grand Rapids, MI 49503 Tel 616-632-8000 Fax 616-632-8002 Web mmbjlaw.com

Attorneys at Law

James R. Brown
Larry J. Gardner
Claude L. Vander Ploeg
John M. DeVries[3]
Michael C. Haines
John T. Sperla
David R. Fernstrum
Mark A. Kehoe
Fredric N. Goldberg
James K. White

Stephen J. Mulder
Douglas A. Donnell[3]
Scott E. Dwyer
William A. Horn[6]
Daniel R. Kubiak
Mark A. Van Allsburg
Elizabeth K. Bransdorfer
Neil L. Kimball
Ross A. Leisman
Neil P. Jansen

Eric S. Richards
Daniel J. Parmeter, Jr.
Mark E. Nettleton[3]
John C. Arndts
Andrea D. Crumback
Scott D. Broekstra
Jennifer A. Puplava
Nathaniel R. Wolf
Benjamin A. Zainea
Ronald M. Redick

James J. Rosloniec
Brian M. Andrew
Matthew E. Fink
Kimberly M. Large[2]
Nikole L. Canute[4]
Steffany J. Dunker
Amy L. VanDyke
Daniel J. Broxup

Of Counsel
Steven L. Dykema
Ronald J. Clark
Leonard M. Hoffius[1]
Scott S. Brinkmeyer
Daniel J. Kozera, Jr.
Timothy J. Tornga

Also Admitted In
[1]Colorado
[2]Delaware
[3]Illinois
[4]New York
[5]Ohio
[6]Wisconsin

August 11, 2009

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

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

Dear Clerk:

Enclosed for filing you will find the original and one copy of the following pleadings:

1. Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC's Reply to Complainant's Objection to Motion for Accelerated Decision of Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC

2. Certificate of Service indicating mailing of the above to opposing counsel in the above-referenced matter

Very truly yours,

Amy L. VanDyke

jeb
Enclosures

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
(Perrysburg Facility)

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

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

RESPONDENT

DOCKET NO: RCRA-05-2008-0007

RESPONDENTS JOHN A. BIEWER COMPANY, INC. AND BIEWER LUMBER, LLC'S REPLY TO COMPLAINANT'S OBJECTION TO MOTION FOR ACCELERATED DECISION OF RESPONDENTS JOHN A. BIEWER COMPANY, INC. AND BIEWER LUMBER LLC

INTRODUCTION

On July 2, 2009, Respondents filed a Motion titled Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC's Motion for Accelerated Decision ("Motion") and a Memorandum in support of the Motion ("Memorandum") respectfully requesting that this Court grant an accelerated decision on the issue of whether Respondents were liable for the alleged RCRA violations committed by John A. Biewer Company, Inc. of Ohio ("JAB Ohio") and John A. Biewer Company, Inc. of Toledo ("JAB Toledo"). Also on July 2, 2009, Complainant filed a Motion for Accelerated Decision on Derivative Liability ("Complainant's Motion") and a Memorandum ("Complainant's Memorandum") in support thereof.

Complainant did not substantively respond to Respondents' Motion and Memorandum and instead filed Complainant's Objection to Motion for Accelerated Decision of Respondents John A. Biewer Company, Inc. and Biewer Lumber LLC. ("Objection"). The Objection claims that Respondents should not have been able to file a motion for accelerated decision on the issues of derivative liability through piercing the corporate veil and direct operator liability because those issues are fact-specific. Complainant's argument is not supported by case law or the relevant language of the Consolidated Rules of Practice ("CROP") or the analogous Federal Rules of Civil Procedure ("FRCP"). In fact, the case law and the relevant language of CROP and FRCP are clear and demonstrate that a respondent may absolutely move for an accelerated decision regarding issues that are fact-specific and many courts have in fact granted such motions with respect to issues of derivative liability through piercing the corporate veil and direct operator liability. Complainant's version of federal and administrative procedure is unsupported and simply in error.

Moreover, Respondents' Motion and Memorandum were not only appropriate with respect to the ability of the Respondents to move for an accelerated decision on fact-specific liability issues, but also demonstrated that, after the close of discovery, there was an absence of evidence showing the liability of John A. Biewer Company, Inc. ("JAB Company") or Biewer Lumber LLC indirectly through piercing the corporate veil or directly through operator liability. As such, Complainants were required to provide this Presiding Judge ("Court") with specific facts demonstrating that there was a genuine issue of material fact regarding Complainant's ability to set forth a *prima facie* case against JAB Company or Biewer Lumber LLC. Complainant provided this Court with nothing in response. Therefore, Complainant's Objection is not sufficient to avoid an accelerated decision, and as a matter of law, this Court should grant Respondents' Motion.

ARGUMENT

I. This Court Should Grant Respondents' Motion for Accelerated Decision

The Consolidated Rules of Practice ("CROP"), 40 C.F.R. Part 22, as amended by 64 Fed. Reg. 40176 (July 23, 1999), sets forth the burden of production for the Complainant regarding the alleged liability of JAB Company and Biewer Lumber LLC: "The complainant has the burden of presentation and persuasion that the violation occurred as set forth in the complaint and the relief sought is appropriate." 40 C.F.R. § 22.24. Moreover, section 22.20 of CROP provides the following:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20, as amended by 64 Reg. 40,176 (July 23, 1999). Therefore, according to CROP, a respondent is entitled to an accelerated decision where the respondent has demonstrated that the complainant will not be able to meet its burden of production as set forth above.

The language in CROP is similar to the language of Rule 56 of the Federal Rules of Civil Procedure, and courts have turned to Rule 56 jurisprudence for guidance in matters relating to accelerated decisions. *See In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501-502 (EAB 1999); *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781-782 (EAB 1993); *In re BWX Technologies*,[1] RCRA Appeal No. 97-5, April 5, 2000, p. 74. The Supreme Court has explained that to defeat a motion for summary judgment under Rule 56, the non-moving party must demonstrate that issues remain that are "material" and "genuine." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). Therefore, it is not just disputed facts that have to exist, but

[1] Respondents provided this Court with a copy of *In re BWX* as **Exhibit H** to Respondents John A. Biewer Company, Inc. and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability dated July 30, 2009.

disputed facts that are "material" and "genuine."[2] Moreover, "neither party can meet its burden of production by resting on mere allegations, or conclusions of evidence." *Id.*, *citing* James W. Moore et al., Moore's Federal Practice § 56.13[1], [2] (3d ed. 1999). Rule 56 (e) of the Federal Rules of Civil Procedure specifically states:

> [A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but *the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate,* ***shall*** *be entered against the adverse party.*

Emphasis added.

As demonstrated below, a respondent may move for summary judgment or an accelerated decision on fact-specific issues such as derivative liability through piercing the corporate veil and direct operator liability. Moreover, the content of Respondents' Motion and Memorandum demonstrated that there was an absence of evidence regarding Respondents' liability for the alleged RCRA violaions of JAB Ohio and JAB Toledo. As such, Complainant was obligated to provide this court with "*specific facts showing that there is a genuine issue for trial.*" *See* Fed. R. Civ. Proc. 56(e). Complainant did not do so, therefore, it is appropriate to, and this Court should, grant Respondents' Motion for Accelerated Decision.

A. Respondents May Move for and This Court May Grant an Accelerated Decision on Fact-Specific Issues Such as Derivative Liability Through Piercing the Corporate Veil and Direct Operator Liability

As an initial matter, the case law is crystal clear that it is perfectly appropriate to grant summary judgment to a respondent on factual issues, specifically piercing the corporate veil and direct operator liability issues. *See Transition Healthcare Associates, Inc. v. Tri-State Health*

[2] Courts have interpreted a "material" fact to be one that might affect the outcome of the proceeding. *In re BWX*, p. 75. Whether an issue is "genuine" depends on whether a court or other factfinder could reasonably find in favor of the non-moving party regarding the disputed material fact. *Id.* Since Complainant has not submitted *any* facts to this Court in response to the Motion, a detailed discussion of this issue is not necessary.

Investors, LLC, 306 Fed.Appx. 273, 281-282, 2009 WL 67869, 8 (6th Cir. 2009); *see also e.g., Central Ins. Co. v. Dana Corp.*, 900 F.2d 259, 1990 WL 47561 (6th Cir. Apr. 17, 1990) (holding that Rule 56 overrides Tennessee case law preventing summary judgment disposition for cases involving claims for piercing the corporate veil); *Corrigan v. U.S. Steel Corp.*, 478 F.3d 718, 726 (6th Cir. 2007) ("The plaintiffs have failed to satisfy the first prong of the Ohio piercing test and so no analysis of the other two prongs is necessary. The district court properly found that the plaintiffs could not pierce the corporate veil and properly granted summary judgment in favor of the defendants..."); *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 280 F.3d 175, 200-01 (2d Cir.2001) (affirming summary judgment and holding that plaintiff "has no grounds to pierce [parent's] corporate veil" where parent "wanted to limit its potential losses" by creating subsidiary "as a separate entity with only as much capital as then-currently needed," "declined to enter into any agreement with [plaintiff] or to guarantee [subsidiary's] obligations to [plaintiff] under the agreements [subsidiary] signed..."); *Datron, Inc. v. CRA Holdings, Inc.* 42 F.Supp.2d 736, 748 (W.D.Mich.,1999) (granting summary judgment to defendant regarding its liability as a direct operator under CERCLA).

In *Transition Healthcare*, the Sixth Circuit affirmed the District Court's grant of summary judgment to a defendant on the issue of piercing the corporate veil and summarized its reasoning as follows:

> Even if [the respondent] was the parent or sister company of the facilities, [complainant] must present sufficient evidence such that a reasonable jury could conclude that [respondent] was liable for their debt as their alter ego. The district court held that the only factor possibly present to support alter-ego status was [respondent's] diversion of funds from the nursing facilities and that this was insufficient to satisfy prong one on summary judgment. When viewed in the light most favorable to it, [complainant's] evidence suggests that: [parent] and [subsidiary] shared management and personnel; [parent] exerted some degree of control over the facilities' operation; [parent] had some involvement in the creation of the nursing facilities as limited liability corporations; [parent] entered into a pharmacy services agreement on behalf of the facilities; [parent] played a role in the facilities' strategic planning; [parent] made the decision whether to

> breach the contract at issue in this case; and [parent] was paid a percentage of the nursing facilities' revenue for its services. This court has made clear that "proof of some overlapping management between subsidiary and parent is an insufficient basis to pierce the corporate veil," and the evidence presented by [complainant] does little more than describe a management relationship. Thus we conclude that the district court did not err in granting summary judgment on the alter ego issue.

306 Fed.Appx. at 281-282. Likewise, the *Datron* court granted summary judgment to the defendant with regard to direct operator liability under CERCLA, stating that the plaintiff's "patchwork of examples fails to demonstrate [defendant] "operated" the facilities." 42 F.Supp.2d at 748.

The above case law demonstrates that it is appropriate for a respondent to set forth a claim in a motion for accelerated decision that the complainant will not be able to demonstrate a *prima facie* case of direct operator liability and indirect liability through piercing the corporate veil. In addition to the clarity of the above case law, Complainant's claim that Respondents may not move for accelerated judgment directly contradicts the language of CROP, which, as set forth above, asserts that this Court "may at any time render an accelerated decision in favor of *a party as to any or all parts of the proceeding*." This language is all-encompassing and demonstrates that *any party*, complainants or respondents, may move for an accelerated decision on *any issue*.

Complainant does not cite any case law contrary to that cited above. The only case law cited by Complainant simply states that the issues at hand require fact-specific inquiries.[3] That is not the issue at hand. The issue at hand is whether the fact-specific inquiries with respect to derivative liability through piercing the corporate veil and direct operator liability prevents a respondent from moving for an accelerated decision regarding those issues. The case law cited

[3] Yet again, Complainant cites federal law for the applicable standards of piercing the corporate veil. Complainant has yet to explain why federal common law would apply in this situation. Moreover, Complainant erroneously states that "[t]he Environmental Appeals Board ("the Board") adopted the Initial Decision in Safe & Sure Products as the Final Decision of the Administrator." Objection, p. 3, n. 1. However, the Environmental Appeals Board specifically declined "to decide whether the Presiding Officer's holding on the 'piercing the corporate veil' doctrine is also correct." *In re Safe & Sure Products*, 8 E.A.D. 517 (1999).

above clearly allows such a motion and Complainant has not produced any legal support for its contrary position. The cases cited by Complainant speak nothing of summary judgment or accelerated decision standards, and therefore are wholly irrelevant to the issue at hand.

While not supported by case law, Complainant implies that it is not possible for Respondents to move for an accelerated decision because Complainant has not yet set forth its *prima facie* case. Objection, p. 3-4. That was also the case for the respondents/defendants in the case law cited above. Moreover, Complainant has indicated that it does not have any witnesses and will rest solely on the documents already produced *by all of the Respondents*. Therefore, Respondents were perfectly aware of the potential contents of Complainant's *prima facie* case and were able to fully address the issues in their Motion and Memorandum. The fact that a defendant/respondent would not have the "analysis of the facts" by the plaintiff/complainant at the time a motion for accelerated decision would be filed was irrelevant in the case law cited above and should be equally irrelevant in the present case. "Complainant's analysis of the facts revealed in" the documents produced by all of the Respondents is only relevant to whether Complainant met its own burden with respect to Complainant's Motion for Accelerated Decision or in its response to Respondents' Motion for Accelerated Decision. *See* Objection, p. 3. Finally, Complainant also argues, without legal support, that Respondents' only opportunity to make its Motion would have been in response to Complainant's Motion for Accelerated Decision. Objection, p. 4. Complainant does not explain, however, how Respondents would have been able to make a cross-motion for a dispositive motion after the July 2, 2009 deadline set by this Court.

Because the case law and the language of CROP and FRCP confirm that a respondent may move for an accelerated decision and that the issue for accelerated decision may be a complainant's inability to demonstrate derivative liability through piercing the corporate veil or

direct operator liability, this Court should hold that Respondents Motion for Accelerated Decision is appropriate.

B. Respondents' Motion Met Respondents' Burden as Movants for an Accelerated Decision by "Showing" this Court the Absence of Evidence Supporting Complainant's Claims

The party moving for summary judgment or an accelerated decision has the initial burden of production on its claim, and must demonstrate to a court why it is entitled to summary judgment or an accelerated decision. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the movant does not carry the burden of persuasion on an issue at trial, that movant may meet the burden of persuasion for summary judgment by "showing" or "pointing out" the absence of evidence in the record to support the nonmoving party's case on that issue and that the movant is entitled to judgment in its favor as a matter of law. *Id.* at 323-324.

There is no case law suggesting that a movant's burden is anything different than that set forth above in the well-settled Supreme Court case law cited above simply because some of the issues at hand require a fact-specific inquiry. Nor does Complainant suggest anything to the contrary. As previously stated, under CROP, the Complainant has the burden of demonstrating a *prima facie* case of derivative liability through piercing the corporate veil or direct operator liability. Therefore, Respondents' burden with respect to its Motion consists only of "showing" or "pointing out" to this Court an absence of evidence supporting Complainant's claims regarding the liability of JAB Company and Biewer Lumber LLC. Respondent's Motion and Memorandum does exactly that and sets forth in great detail why it is not possible for Complainant to demonstrate a *prima facie* case for derivative liability through piercing the corporate veil or direct operator liability. As such, this Court should hold that Respondents' have met their burden as movants for an accelerated decision.

C. Complainant's Objection Did Not Meet Complainant's Burden of Production as Non-Movants of an Accelerated Decision Because Complainant Did not Provide This Court With any Specific Facts that Establish a Genuine Issue of Material Fact

Once the movant meets its burden, the burden of production shifts to the non-movant, whose burden is "considerably more demanding than the movant's with respect to the issues upon which the nonmovant bears the burden of persuasion at trial." *In re BMX*, p. 76. The non-movant's burden of production "*requires the nonmovant to identify specific facts* (with or without affidavits) from which a reasonable factfinder…could find in its favor on each essential element of its claim." *Id.*, *citing Anderson*, 477 U.S. at 252 (emphasis added).

Because Respondents' Motion for Accelerated Decision is appropriate and the contents of the Memorandum met Respondents' burden of production, the burden of production shifted to the Complainant. Complainant did not provide this Court with one specific fact in response to Respondents' Motion and Memorandum. Complainant did not even attempt to deny Respondents' allegations in the Motion and Memorandum or make additional allegations of its own. Complainant relied solely on its erroneous conclusion that Respondents could not move for an accelerated decision regarding the issues of direct operator liability and indirect liability through piercing the corporate veil. Therefore, it is an inescapable conclusion that the only way Complainant can avoid an accelerated decision is by meeting its burden of production. It is also an inescapable conclusion that Complainant did not meets its burden because it did not provide this Court with one specific fact that could possibly establish a genuine issue of material fact.

According to Rule 56(e), when a party does not respond appropriately to a motion for summary judgment (or accelerated decision), where appropriate, a court *shall* grant an accelerated decision. Because Complainant did not meet its burden as non-movant by neglecting to provide this Court with *any* specific facts, much less specific facts establishing a genuine issue

of material fact, and because Complainant agrees that it has no additional facts to present, this Court must grant Respondents' Motion for Accelerated Decision.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court grant their Motion for Accelerated Decision.

Respectfully Submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondent

Dated: August 11, 2009

By: _____

Amy L. VanDyke
900 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 632-8000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

DOCKET NO: RCRA-05-2008-0007

CERTIFICATE OF SERVICE

John A. Biewer Company of Ohio, Inc.
300 Oak Street
St. Clair, Michigan 48079-0497

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

I, Jane E. Blakemore, hereby state that I am an employee of Mika Meyers Beckett & Jones PLC, and that on August 11, 2009, I served a copy of:

> Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC's Reply to Complainant's Objection to Motion for Accelerated Decision of Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC

upon the following individual by 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: August 11, 2009

Jane E. Blakemore

Jane E. Blakemore