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[2]Delaware
[3]Illinois
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[6]Wisconsin

March 30, 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 one copy of the Respondent's Post-Hearing Brief, Affidavit of Douglas A. Donnell 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:

DOCKET NO: RCRA-05-2008-0007

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
_____/

RESPONDENT'S POST-HEARING BRIEF

Following the hearing conducted by the Court on February 23, 2010, the parties were invited, as provided in the administrative rules, to submit post-hearing briefs. Although the Court was clear that the parties were free to brief any issue they felt appropriate, the Court specifically requested briefing from Respondent regarding Respondent's entitlement to attorneys' fees, and in a subsequent phone conversation with the Court and the parties' counsel, the Court asked the parties to address the issue of whether or not EPA had introduced any *evidence* in support of its proposed penalty. This brief will address each of these two issues.

I. THE COURT SHOULD GRANT RESPONDENT'S MOTION FOR ENTRY OF DECISION BECAUSE EPA PRESENTED NO EVIDENCE WHATSOEVER IN SUPPORT OF ITS PROPOSED PENALTY AMOUNT. ALTERNATIVELY, THE COURT SHOULD ENTER AN AWARD OF ZERO PENALTY BASED ON THE PROOFS AT TRIAL, BECAUSE EPA INTRODUCED NO PROOFS AND FAILED TO ESTABLISH A PRIMA FACIE CASE WITH REGARD TO PENALTY.

The administrative rules set forth in 40 C.F.R Part 22 (the "Rules") provide the procedural framework for administrative proceedings such as this. According to § 22.24(a) of the Rules:

> (a) The ***complainant*** has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint ***and that the relief sought is***

> ***appropriate.*** Following complainant's ***establishment of a prima facie case,*** respondent shall have the burden of presenting any defense . . . (Emphasis added)

Subparagraph (b) of this rule goes on to state:

> (b) Each matter of controversy shall be decided by the Presiding Officer upon a ***preponderance of the evidence.*** (Emphasis added)

It is clear from the above that Complainant bears the burden of presentation and persuasion as to her prima facie case, including the appropriateness of the proposed penalty. Further, it is clear that this Court's decision must be based on a preponderance of the ***evidence.***

On February 23, 2010, this Court conducted a hearing regarding Complainant's proposed penalty amount for the Respondent's alleged violations of the Resource Conservation and Recovery Act of 1976 ("RCRA"). Prior to the hearing, counsel for Complainant stated that Complainant would participate in this hearing "under protest" and would deliberately refuse to produce any evidence or witness at the hearing, including the EPA penalty calculation witness the Court had previously ordered *must* be produced for cross-examination. *See* Complainant's Supp. Exchange p. 2. True to his word, Complainant's counsel did not introduce any evidence whatsoever at the hearing with respect to the proposed penalty amount. Presumably this decision to "protest" the hearing and present no proofs was based on counsel's belief that Respondent was not entitled to any evidentiary hearing regarding penalty, that the Court had no choice but to accept Complainant's penalty assessment, and that the above-cited administrative rules do not apply to a penalty determination because Complainant alone, not the Court, makes that call.

With the backdrop of Complainant's refusal to present a case, *any case*, at trial, the Court asked the parties to brief the issue of whether Complainant has introduced any evidence supporting the proposed penalty at any time during the administrative proceeding. The simple answer is "no," but in order to understand Complainant's failure in this regard, a brief history is helpful.

This administrative proceeding was commenced with the filing of a Complaint and Compliance Order which contained a series of numbered factual allegations, followed by a section entitled "Proposed Civil Penalty" in which Complainant cited to relevant statutes and a "Penalty Policy" (which could be obtained upon request). The "Proposed Civil Penalty" section contained no factual allegations regarding how the penalty was calculated or why the penalty amount was appropriate. Rather, it simply states, "The penalty amount determined appropriate for the violations alleged in this Complaint is $287,441. See attached Penalty Summary Sheet," (which was not actually attached to Respondent's copy of the Complaint). Respondent answered all of the factual allegations, and in response to Complainant's factually unsupported proposed penalty of $287,441, stated that the penalty was excessive. *See* Answer dated June 6, 2008.

Two and one-half months later, as part of Complainant's Court-ordered pre-hearing exchange of witnesses and exhibits filed August 25, 2008, counsel for Complainant announced his decision to not call any witnesses at any hearing because it would "become apparent from a review of the Penalty Rationale included in this Pre-Hearing Exchange [that] *all* facts supporting . . . the appropriateness of the penalty amount proposed *are established by admissions made by Respondent in documents which it generated, and are admissible in evidence in this proceeding.*" (Emphasis added) *See* Complainant's Pre-Hearing Exchange filed August 25, 2008, p. 1. The so-called "Penalty Rationale" was more akin to a legal brief prepared by counsel without any statement of qualification or suggestion that the "Penalty Rationale" was supported by a witness who would be competent to testify at trial. This "Pre-Hearing Exchange" by Complainant's was not a "pleading" which had the effect of seeking admission of any evidence, and indeed the documents attached to the Pre-Hearing Exchange were, with three or four exceptions, not "admissions" by, or even authored by, Respondent and were patently *inadmissible* as evidence without additional foundation and, in

some cases, a witness who authored or received the document or affidavit from such person. Particularly, with respect to the "Penalty Rationale," the document was neither submitted to the Court as proffered "evidence" nor would it have been admissible had it been proffered because it was nothing more than a statement by trial counsel regarding what he thought the penalty should be and his method for calculating the amount.

It was upon the basis of this legal argument prepared by counsel, without introduction into evidence of any of the "admissions" referenced in her Pre-Hearing Exchange, that Complainant demanded this Court accept without any fact finding of its own the penalty amount proposed by Complainant.[1]

Subsequently, Complainant filed a Motion for Accelerated Decision on Liability and Penalty, together with a supporting Memorandum of Law on December 12, 2008. In the motion, Complainant acknowledged that accelerated decision is only appropriate if there is no genuine issue of material fact regarding any issues to be resolved (*see* "Complainant's December 12, 2008 Memorandum," p. 5). The Complainant's December 12, 2008 Memorandum also recited at page 16 that "Respondent has acknowledged 'the lack of adequate income or assets of John A. Biewer Company of Toledo, Inc. to perform action requested by Ohio EPA and/or USEPA,'" one of the arguments Respondent was advancing as a basis for reducing the proposed penalty, rather than increasing it as Mr. Wagner's calculation had done. Finally, in the one-page section entitled

[1] If consistency is a virtue, it at least must be acknowledged that this view by Complainant's counsel of the Court's role in determining an appropriate penalty is, in some respects, consistent with counsel's article referenced by the Court at the trial, found at 28 J. Nat'l. Asn'n. Admin. L. Judiciary 80 (2008) where counsel argues that EPA alone (in this case, Mr. Wagner alone) and not the Judge must determine the appropriate penalty amount to insure consistent application of EPA's penalty policy and to avoid "ad hoc [decisions], their contents determined by the personal views and predilections of whichever ALJ has been assigned the case." 28 JNAALJ at 80. If Mr. Wagner's view were the law, one could ask why administrative judge's would have any role at all with regard to penalty assessments.

"Proposed Civil Penalty" in Complainant's December 12, 2008 Memorandum, Complainant acknowledged that the Court is not bound by Complainant's assessment of the penalty amount, and is free to determine a different amount, either higher or lower, with explanation for the difference (*see* Complainant's December 12, 2008 Memorandum, p. 23). In other words, Complainant expressly acknowledged the right of the Court to conduct a hearing, to hear and consider evidence other than that presented by Complainant, or to evaluate differently the evidence presented by Complainant in determining an appropriate penalty.

Accompanying Complainant's December 12, 2008 Memorandum was a separate Memorandum in Support of the Penalty Amount Proposed, which, like the previously exchanged "Penalty Rationale," contained Mr. Wagner's argument in favor of the proposed penalty amount, and attached a variety of documents which, while arguably establishing liability, did not establish or prove the appropriate amount of a penalty. As was true with the previously exchanged "Penalty Rationale," the attachments to Complainant's Memorandum in Support of the Penalty Amount Proposed were not, with few exceptions, admissible evidence without additional foundation and supporting witnesses or affidavits. Nearly all of the attachments were hearsay statements, some of which were not even attributed to a particular author. The few documents which could be construed as "admissions" as forecasted in Complainant's Pre-Hearing Exchange, do not establish sufficient evidence to support a proposed penalty amount. In fact, some of the documents authored by Respondent or its consultant and attached to Complainant's Memorandum actually supported Respondent's contention that the proposed penalty amount was excessive. (*See*, e.g., Attachments A, B, C, D, L showing Respondent's efforts to comply). Moreover, even several of the attached hearsay documents supported Respondent's position. *See*, e.g., Attachments K and O, the latter of

which includes the statement by Ohio EPA that Respondent had "adequately demonstrated abatement of all violations discovered during my September 29, 1992 inspection."

Respondent opposed Complainant's Accelerated Decision Motion on a variety of grounds, including Respondent's good faith attempts to comply (demonstrated in part by Complainant's own attachments), and its financial inability to perform all necessary closure actions (acknowledged in Complainant's December 12, 2008 Memorandum at page 16 and supported by financial statements attached to Complainant's other Accelerated Decision Motion, which financial statements were not contested by Respondent). Respondent also argued that application of the policy considerations, even as articulated by Complainant, when applied to the facts of this case, did not support the proposed penalty. In response to Complainant's related Motion to Strike Respondent's Pre-Hearing Exchange, Respondent also argued that it was entitled by the Part 22 rules to cross-examine the EPA witness who actually calculated the penalty amount, based on what now appears to have been a faulty assumption that someone other than Mr. Wagner who would be competent to testify made such a factual determination.

The Court denied both of Complainant's Motions, indicating it wanted to hear evidence on the penalty issue and ruled that EPA must produce for cross-examination a witness to support the penalty calculation as proposed. Again, no "evidence" was admitted or even sought to be admitted, and had Complainant sought to admit any of the attachments to its December 12, 2008 Memorandum as "evidence," Respondent would have objected on a host of evidentiary grounds which would have necessitated a ruling on the objections and, Respondent believes, a trial during which Complainant would need to cure the evidentiary shortcomings regarding the substantial majority of Complainant's documentary "support."

Following denial of the motions, the matter was set for trial, and as was recited above, it was at this point in the proceedings that Complainant refused to abide by the Court's ruling regarding Respondent's right to cross-examine a penalty witness, refused to follow the Rules, which require presentation of a prima facie case, and essentially announced, ostensibly to preserve issues on appeal, that Complainant would no longer follow either the Rules or the Court's order in completion of a trial. Thus, at no stage in this administrative proceeding did Complainant introduce one single piece of admissible evidence to support any proposed penalty, and it was on that basis that Respondent filed its Motion for Entry of Decision, and urges the Court to now grant that motion.

As the above discussion demonstrates, EPA has not introduced any evidence to support its penalty calculation, and indeed by the filing of Complainant's Supplemental Pre-Hearing Exchange on January 22, 2010, Complainant foreclosed the possibility that the Court could receive or admit any evidence, given that Complainant stated unequivocally that "Complainant will present no evidence at the hearing, and will not make available for cross-examination any Agency personnel, or other witness." (Supplemental Pre-Hearing Exchange, p. 2) Based upon this Supplemental Pre-Hearing Exchange, Complainant eliminated any possibility that the Court could receive evidence from Complainant, as dictated by 40 C.F.R. § 22.22(a)(1) which provides:

> If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under section 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, *the Presiding Officer shall not admit the documents, exhibit or testimony into evidence. . .*" (Emphasis added)

II. THIS COURT SHOULD AWARD RESPONDENT ITS COSTS AND ATTORNEY'S FEES

As stated above, the Consolidated Rules of Practice set forth in 40 C.F.R Part 22 ("the Rules") provide the procedural framework for this administrative proceeding. Those Rules provide this Court, as Presiding Officer, with the discretion to resolve issues not addressed in 40 C.F.R. as it deems appropriate. *See* 40 C.F.R. §§ 22.1(c), 22.4(c)(10); *see also In re Martex Farms, Inc*, Docket

No. FIFRA-02-2005-5301, at 3, n. 2 (August 16, 2005). When the Rules do not address a particular issue, the Environmental Appeals Board has stated that it is instructive to consider applicable federal procedure rules and court decisions. *See In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13 n. 10 (EAB, Feb. 24, 1993) (although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *In re Detroit Plastic Molding*, TSCA Appeal No. 87-7, at 7 (CJO, Mar. 1, 1990) (same). Since the Rules are silent regarding specifically the availability of an award of attorney's fees under 40 C.F.R. Part 22, it is appropriate for this Court to look for guidance outside of the Rules.

The Supreme Court has determined that attorney's fees may be shifted to the federal government where Congress has waived the federal government's sovereign immunity. *See Ruckelshaus v. Sierra Club,* 463 U.S. 680, 685, 103 S.Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983). Some courts have shifted the cost of attorney's fees to the federal government as a matter of course where dictated by the Federal Rules of Civil Procedure. *See Schanen v. United States DOJ,* 798 F.2d 348, 350 (9th Cir. 1985) (imposing monetary penalty against government under Fed. R. Civ. P. 60(b)); *United States v. National Medical Enters., Inc.,* 792 F.2d 906, 910-11 (9th Cir.1986) (upholding award of attorney's fees against government imposed under Fed. R. Civ. P. 37(b)). Two panels in the Ninth Circuit have provided explicit reasoning for shifting attorney's fees to the federal government, finding that the Rules of Civil Procedure themselves, having been authorized by Congress, provide the basis for a waiver of sovereign immunity where the government's actions warrant sanctions such as attorney's fees. *See Mattingly v. United States,* 939 F.2d 816, 818 (9th Cir. 1991) (discussing Fed.R.Civ.P. 11); *Barry v. Bowen,* 884 F.2d 442, 444 (9th Cir. 1989) (same).

In *Mattingly*, the court noted that it had previously decided that federal sanctions such as attorney's fees are appropriate to deter "future government misconduct" for violations of discovery

orders and further noted imposing such sanctions against the government is "in keeping with the principle that the government must conduct its litigation with the same degree of integrity as that expected of other litigants."[2] Therefore, it is appropriate for this Court to consider the standards set forth in the federal rules and applicable case law, and apply such standards to the facts before it.

Courts have awarded attorney's fees where a party had no reasonable basis for concluding that its positions were well grounded in fact and warranted by either existing law or a good faith argument for extension or modification of the existing law. *Westmoreland v. CBS*, 770 F.2d 1168, 1177 (D.C. Cir. 1985). The *Westmoreland* court stated:

> When groundless pleadings are permitted, the integrity of the judicial process is impaired. Additionally, as borne out by this case, litigation abuse embroils the judiciary in needless satellite litigation. The monetary award here may be small, but even such a humble investment in guaranteeing the proper functioning of our judicial process will reap great dividend.

770 F.2d at 1179-1180; *see also Clinton v. Jones*, 520 U.S. 681, 709, 117 S.Ct. 1636, 1652 (1997). Moreover, the application of such a standard is supported by the following statutory language with regards to the liability of attorneys that represent the government:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C.A. § 1927.[3]

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[2] The Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, dictates that an administrative agency ***shall*** provide qualified prevailing parties with their attorneys fees in certain situations. *See, e.g., M.A. Mortenson Co. v. United States,* 996 F.2d 1177, 1181-82 (Fed Cir. 1993). Neither the Consolidated Rules of Practice, nor the Administrative Procedures Act specifically address when a Presiding Officer or Environmental Appeals Board ***may*** use its discretion to award attorney's fees against the government. Therefore, Respondent argues that this Court ***may***, in its discretion, apply the standards used in the Federal Rules of Civil Procedure in deciding whether it is appropriate to award Respondent its attorney's fees.

[3] If sanctions are awarded pursuant to this statute, sovereign immunity is not an issue. **Cite.**

Courts also have the inherent power to manage their own proceedings and to control the conduct of the parties appearing before them, including the inherent power to punish those who abuse the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42-43 (1991). In *Chambers*, the Supreme Court stated that courts could assess attorney's fees when a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 45-46. Specifically, attorney's fees may be assessed to correct an injustice such as the bad faith delay or disruption of litigation or hindering of the enforcement of a court order. *Id.* Bad faith is present where the claims advanced had no merit, the attorneys knew or should have known there was no merit, and the motive in proceeding was improper. *Smith v. Detroit Fed'n of Teachers, Local 231,* 829 F.2d 1370, 1375 (6th Cir.1987). In such situations, a court has the ability to make the party whole for the expenses caused by the opponent. *Chambers*, 501 U.S. at 45-46. It follows that the ability to require those who abuse the adjudicative process to reimburse the opposing party subjected to that process would be included as part of this Court's ability to manage the proceedings set forth in the Rules. *See* 40 C.F.R. §§ 22.1(c), 22.4(c)(10).

Pursuant to any of the standards set forth above, this Court should award Respondents John A. Biewer Company ("JAB Company") and Biewer Lumber, LLC the attorney's fees they incurred in defending the derivative liability actions brought by the Environmental Protection Agency ("EPA") and its attorneys. Respondents incurred unnecessary and very substantial attorney's fees in three general areas: (1) responding to EPA's Motion to Amend Complaint and Compliance Order to add JAB Company and Biewer Lumber, LLC; (2) EPA's discovery process focusing entirely on JAB Company's and Biewer Lumber, LLC's finances and their relationship with John A. Biewer Company, Inc. of Toledo ("JAB Toledo") and John A. Biewer Company, Inc. of Ohio ("JAB Ohio"); and (3) the preparation of Respondents JAB Company's and Biewer Lumber, LLC's Motion

for Accelerated Decision and responding to the EPA's Motion for Accelerated Decision on Derivative Liability. The claims put forth by the EPA and its attorneys in these three general areas were not grounded in fact, warranted by existing law, and were pursued in bad faith. The pursuit of such claims was unreasonable and vexatious, caused the all Respondents to incur unnecessary attorney's fees, and multiplied and delayed the proceedings.

On September 29, 2008, the EPA filed a Motion to Amend Complaint and Compliance Order seeking to add JAB Company and Biewer Lumber, LLC as Respondents and add derivative liability claims against each Respondent. The EPA had evidence for at least a year that Biewer Lumber, LLC was wholly unrelated to JAB Ohio and JAB Toledo, and was formed many years after JAB Ohio and JAB Toledo ceased operations. *See* Complainant's Memorandum in Support of Motion for Accelerated Decision on Derivative Liability dated July 2 2009 ("Complainant's July 2, 2009 Memorandum")[4], Attachment J. Moreover, the EPA was in receipt of financial statements and income statements for JAB Ohio and JAB Toledo from 1997 through 2006, as well as explanations of all its questions regarding the parent/subsidiary relationship between JAB Company and JAB Ohio/JAB Toledo, including descriptions of how the entities functioned before and after JAB Ohio and JAB Toledo stopped operations. *Id.*; Memorandum in Opposition to Complainant's Motion to Amend Complaint and Compliance Order dated November 14 2008 ("Opposition to Complainant's Motion to Amend"), pp. 10-12. Respondent Biewer Lumber, LLC argued that because it was wholly unrelated to JAB Ohio and JAB Toledo and the relevant actions of JAB Ohio and JAB Toledo all occurred before Biewer Lumber, LLC was in existence, it would be impossible for Biewer Lumber,

[4] For the ease of this Court, Respondent will give one citation to both JAB Ohio and JAB Toledo dockets where the citation is the same. Where the citations differ, the Respondent will indicate said difference.

LLC to be derivatively liable for such actions. Opposition to Complainant's Motion to Amend, pp. 21-22 (JAB Ohio) and pp. 19-21 (JAB Toledo).

Respondent JAB Company argued that the information given to the EPA over a year earlier clearly showed a normal parent/subsidiary relationship between JAB Company and JAB Ohio/Toledo, both before and after each subsidiary stopped operating. *Id.* at 18-21 (JAB Ohio) and 19-20 (JAB Toledo). Despite the information in its possession, EPA continued to seek to add JAB Company and Biewer Lumber, LLC as Respondents. While this Court did allow the EPA to add Biewer Lumber LLC and JAB Company as Respondents, the Court noted that the EPA's support for liability "rests on very little," such as the "use of the 'Biewer Lumber' letterhead." Order on EPA's Motion to Amend Complaint and Compliance Order and Notice of Hearing Postponement dated January 7, 2009 ("Motion to Amend Order"), pp. 3 n. 6, 6 n. 9. (JAB Ohio); see, also pp. 2 n. 4, 3 n. 5 & 6 (JAB Toledo)

After the EPA added JAB Company and Biewer Lumber, LLC as Respondents, it presented Respondents with multiple huge discovery requests resulting in multiple productions of several thousand documents. Respondents incurred significant attorney's fees (approximately $20,000) responding to these requests, many of which were questions already asked and answered over a year before. In response to Respondent Biewer Lumber, LLC's insistence that it could not produce documents before the company existed, the EPA actually filed a Motion for Discovery, essentially asking this Court to compel the production of such documents. The EPA and its attorneys argued that, despite the documentation showing otherwise, Biewer Lumber, LLC *was* in existence before 2006. Complainant's Motion for Discovery dated February 26, 2009, pp. 2-4 (JAB Ohio), pp. 3-4 (JAB Toledo). The EPA did not provide any case law to support its claims, and the only "evidence" put forth by the EPA was the pre-2006 use of the trademark "Biewer Lumber" on JAB Company's

letterhead and in its website. *Id.* In its response, Biewer Lumber, LLC reiterated that it was wholly unrelated to JAB Ohio and JAB Toledo and that it was not yet in existence at the time the events in question occurred, providing the EPA once again with such evidence. Respondent's Sur-Reply Brief dated April 17, 2009. This Court found that the EPA had failed, without case law support, to distinguish between the legal entities, the Respondents, and the generic use of a trademark, and therefore, the EPA's claim that Biewer Lumber, LLC existed before the date on its Articles of Incorporation was totally unfounded. Order Regarding EPA's Motion for Discovery dated May 6, 2009 ("Discovery Order"), p. 3.

After discovery was complete, the EPA was not in possession of any information suggesting that all of the original information and explanations provided by the Respondents was not accurate. Given the thousands of pages of documents that the Respondents produced to the EPA that only confirmed the impossibility of derivative liability for both JAB Company and Biewer Lumber, LLC, the EPA knew or should have known that there was no legal basis to impose derivative liability on Biewer Lumber, LLC of JAB Company for the actions of JAB of Ohio and JAB Toledo. Instead of dropping the derivative liability claim against Biewer Lumber, LLC and JAB Company, the EPA unreasonably pushed forward with a frivolous Motion for Accelerated Decision on Derivative Liability. In its July 2, 2009 Memorandum, the EPA continued to argue that Biewer Lumber, LLC and JAB Company should be derivatively liable for the actions of JAB Ohio and JAB Toledo, using the same arguments this Court had previously rejected that were not based in fact and unsupported by case law. July 2, 2009 Memorandum, pp. 10-37, 40-44 (JAB Ohio), pp. 10-42 (JAB Toledo). Even those arguments that this Court had not yet dismissed entirely remained unsupported by case law. *Id.* It was not until after the Respondents filed their own Motion for Accelerated Decision, responded to the EPA's Motion for Accelerated Decision, and replied to the EPA's Response to

Respondent's Motion for Accelerated Decision that the EPA *finally* dropped its claims against Biewer Lumber, LLC. *See* Complainant's Reply to Respondents' Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability, p. 3, n. 1 (JAB Ohio), p. 2 n. 1 (JAB Toledo). Moreover, this Court granted Respondent JAB Company's Motion for Accelerated Decision with regards to its derivative liability, noting that the EPA continued to put forth arguments that this Court had already rejected as immaterial, unsupported by legal principles or case law. Order on Cross Motions for Accelerated Decision on Derivative Liability dated October 9, 2009 ("Cross Motion Order"). pp. 12-31 (JAB Ohio).

It is striking that despite the fact that the discovery period had long closed and all of the evidence indicated that Biewer Lumber, LLC was wholly unrelated to JAB Ohio and JAB Toledo, and that Biewer Lumber, LLC did not exist while JAB Ohio and JAB Toledo were operating, the EPA continued to force Respondent Biewer Lumber, LLC to defend the government's derivative liability claims at an expense of over $46,000. (*See* Affidavit of Douglas A. Donnell, filed herewith) Moreover, the EPA also forced JAB Company to defend derivative liability claims that were not well grounded in fact, warranted by existing case law, or put forth in good faith. Notably absent from EPA's briefs were legal authority supporting EPA's claims that *these facts* warranted a finding that the Court should pierce the corporate veil and extend liability to either JAB Company or Biewer Lumber, LLC. The claim was simply baseless, as recognized by the Court in its lengthy decision.

But even after the dismissal of JAB Company and Biewer Lumber, LLC, Complainant pursued its claim against JAB Toledo and JAB Ohio. Respondents JAB Ohio and JAB Toledo were thus forced to incur more unnecessary attorney's fees over $6,000 as a direct result of the unreasonable actions of the EPA and its attorneys. Despite the fact that this Court had stated on January 9, 2009 that Respondents had the right to cross-examine the author of the proposed penalty

amount at a hearing, and providing the same in its Order on EPA's Motion for Accelerated Decision on Liability and Penalty and Order on Motion to Strike, in part, Respondents' Prehearing Exchange (*See* p. 20 of each Order), the EPA's attorney declared that the EPA would not offer any evidence or make any witness available for cross-examination regarding the proposed penalty amount. Supplemental Pre-Hearing Exchange of the Adminstrator's Delegated Complainant, p. 2. It seems that the EPA decided that it no longer had to meaningfully participate in the adjudicatory process *that it started* after this Court dropped the derivative liability claims against JAB Company and Biewer Lumber, LLC. JAB Ohio and JAB Toledo, however, were forced to incur additional attorney's fees in order to prepare for and attend the February 23, 2010 hearing including bringing a witness to testify. The EPA should not be able to defy this Court's order, refuse to follow the Part 22 rules and "run Respondents through the mill" at Respondent's continued expense when it has no intent to participate in the trial Complainant had previously sought!

No matter what standard is used, the actions of the EPA and its attorneys caused Respondents to incur substantial attorney's fees for which they should be reimbursed. Those fees, including detailed descriptions of the services performed, are detailed and summarized in the Affidavit of Douglas A. Donnell. The EPA and its attorneys unreasonably pursued frivolous derivative liability claims against Respondents Biewer Lumber, LLC and JAB Company that were not founded in fact, supported by case law, or put forth in good faith. Then, the EPA and its attorneys defied this Court's order and refused to produce a witness for cross-examination regarding the proposed penalty amount.[5] These actions unreasonably delayed and served to erode the integrity of the process set forth in the Rules, thereby equating to an abuse of said process. As the government must conduct itself with the same degree of integrity as other parties to the process, the fact that the abuse has been

[5] During the hearing, this Court noted that it seemed that the reason the EPA defied its order was in pursuit of a personal crusade by the EPA attorney.

committed by the EPA and its attorneys should be immaterial to this Court's decision. Because the Respondents were forced to incur unnecessary attorney's fees and costs as a result of the actions taken by the EPA and its attorneys, this Court, in its discretion, should require the government to reimburse the Respondents for all unnecessary attorney's fees.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondent

Dated: March 30, 2010

By: _____

Douglas A. Donnell (P33187)
900 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 632-8000

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

AFFIDAVIT OF DOUGLAS A. DONNELL

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

I, Douglas A. Donnell, being first duly sworn, depose and state as follows:

1. I am the primary attorney handling the above-captioned matter for John A. Biewer Company, Inc.; Biewer Lumber, LLC; and John A. Biewer Company of Ohio, Inc.; and make this Affidavit of my own personal knowledge.

2. Attached as Exhibit 1 is a detailed itemization of attorneys' fees and costs billed to John A. Biewer Company of Toledo, Inc.; John A. Biewer Company of Ohio, Inc.; John A. Biewer Company, Inc.; and Biewer Lumber, LLC, in connection with the two administrative actions filed in connection with the John A. Biewer Company of Ohio facility and the John A. Biewer Company of Toledo facility. For each entry, in the "Amount" column, the first number represents the amount of attorneys' fees worked in connection with the described activity, and the second number represents the amount billed to the client. In some cases, there was a write-down from the amount worked to the amount billed, not because the work was not performed as described, but rather because the attorneys' fees in this case were substantial and growing rapidly with time.

3. The amount of attorneys' fees on the attached Exhibit 1 have been divided into four color-coded categories. The first category represents time expended in connection with the motion filed by EPA to amend the Complaint adding John A. Biewer Company, Inc. and Biewer Lumber, LLC. Entries in that category have been highlighted in yellow and the total amount billed in this category, as shown on the summary sheet attached as Exhibit 2, is $19,039. The second category represents time expended in connection with responding to EPA's discovery requests relating to John A. Biewer Company, Inc. and Biewer Lumber, LLC, including the time to assemble the thousands of pages of documents produced and defending against EPA's discovery motions regarding such production. These entries are highlighted in green, and total $19,236.

4. The third category of time shown on Exhibit 1, highlighted in blue, represents time expended in drafting and briefing Respondent's Motion for Accelerated Decision regarding the liability of John A. Biewer Company, Inc. and Biewer Lumber, LLC, and responding to EPA's Motion for Accelerated Judgment regarding derivative and/or direct liability of John A. Biewer Company, Inc. and Biewer Lumber, LLC. These entries include time for research and drafting the initial brief with Respondents' motion, response briefs and reply briefs, as well as review of the Court's decision on these motions. As the Court may recall, these briefs were lengthy, the research was extensive, and the total amount billed in this category was $46,254.

5. The final category of time entries, highlighted in pink, represents time preparing for and attending trial of this matter at which counsel for EPA refused to present any evidence for a prima facie case. These entries also include time involved in drafting the Motion for Entry of Decision based on EPA's refusal to present evidence or produce a penalty calculation witness for cross-examination. The fees billed in this category totaled $6,222.

6. In each of the highlighted categories, where a time entry includes both time expended in the highlighted category and time not included in that category, I have allocated the time for both hours and amount, and have handwritten the hours and amount applicable to the highlighted activity on Exhibit 1.

7. The amounts shown as having been invoiced on Exhibit 1 have been paid by the clients. In addition, the amounts shown as out-of-pocket costs at the end of Exhibit 1, totaling $4,442, have also been paid by the clients. Exhibit 1 represents billings for both the Biewer – Toledo case and the Biewer – Ohio case.

8. I have drafted and reviewed the Post-Hearing Brief filed with this Affidavit, and the factual statements in that Brief are, to the best of my knowledge and belief, true and accurate.

Douglas A. Donnell

Subscribed and sworn to before me, a Notary Public in and for said County, this 30th day of March, 2010.

Jane E. Blakemore
Notary Public, Kent County, Michigan
Acting in Kent County, Michigan
My commission expires: 01/02/14

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

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

Respondents

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CERTIFICATE OF SERVICE

I, Jane E. Blakemore, hereby state that I am an employee of Mika Meyers Beckett & Jones PLC, and that on March 30, 2010, I served a copy of:

Respondent's Post-Hearing Brief and Affidavit of Douglas A. Donnell

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: March 30, 2010

Jane E. Blakemore

Jane E. Blakemore