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October 18, 2010

Clerk of the Board, Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, NW, Suite 600
Washington, DC 20005

In re: RCRA Appeal Nos. 10-01 and 10-02
John A. Biewer Co. of Toledo, Inc., Docket No. RCRA-05-2008-0006
John A. Biewer Co. of Ohio, Inc., Docket No. RCRA-05-2008-0007

Dear Clerk:

The Appellee's Appeal Brief was filed on October 18, 2010 through the CDX portal. Because Appellee's Appeal Brief exceeds 50 pages, we are submitting the enclosed paper copy in compliance with the Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Under 40 C.F.R. Part 22 dated January 28, 2010.

Also enclosed is a Certificate Regarding Paper Filing and Certificate of Service which are also being filed pursuant to the above-referenced Order.

If you have any questions regarding this filing, please call me.

Sincerely,

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jeb
Enclosures

cc: Karen L. Peaceman
La Dawn Whitehead

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:

John A. Biewer Co. of Toledo, Inc.
Docket No. RCRA-05-2008-0006

and

John A. Biewer Co. of Ohio, Inc.
Docket No. RCRA-05-2008-0007

RCRA Appeal Nos. 10-01 and 10-02

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing Appellee's Appeal Brief was filed with the Environmental Appeals Board electronically, via the CDX portal. I certify that on this date the foregoing was also served on the following person:

Appellee's Appeal Brief

by Federal Express overnight mail:

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

Dated: October 18, 2010

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondents/Appellees

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RCRA Appeal Nos. 10-01 and 10-02

CERTIFICATE REGARDING PAPER FILING

Douglas A. Donnell, Attorney for Respondents/Appellees, hereby certifies that the attached paper copy of Appellee's Appeal Brief, which exceeds 50 pages, is identical to the pdf version of Appellee's Appeal Brief which was filed electronically through the Central Data Exchange ("CDX") on October 18, 2010.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondents/Appellees

Dated: October 18, 2010

By: _____

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
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_____/

APPEAL BRIEF OF RESPONDENTS-APPELLEES

ORAL ARGUMENT REQUESTED

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
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APPELLEES' APPEAL BRIEF

APPELLEE'S COUNTER-STATEMENT OF FACTS[1]

This case was started by the filing of two separate Complaints by Region 5, one against John A. Biewer Co. of Toledo, Inc. (hereafter "JAB Toledo") and the other against John A. Biewer Co. of Ohio, Inc. (hereafter "JAB Ohio"). In each of these Complaints, Region 5 included a paragraph entitled "Proposed Civil Penalty" in which it stated that its proposed penalty was "based upon an analysis of relevant evidence known to the Complainant" and upon EPA's RCRA Civil Penalty Policy. Without any further factual explanation, Region 5's proposed penalty against JAB Ohio was $282,649 and its proposed penalty against JAB Toledo was $287,441. Although both of the Complaints stated that there was a penalty summary sheet attached, neither Complaint served upon Respondent had any attachments. In response to the conclusory allegation indicating Region 5's proposed penalty amount, Respondents each stated in their Answer that the asserted penalty was excessive.

[1] The substantive facts relating to the merits of this case will be discussed where applicable in the Argument section of this Appeal Brief. This section of the brief deals only with the procedural history and is intended to point out a number of key omissions in Region 5's three-page Procedural Summary.

On September 29, 2008, Region 5 filed motions in each of the cases seeking to amend the Complaints to add as Respondent John A. Biewer Company, Inc. (hereafter "JAB Company") and Biewer Lumber, LLC. The motions sought to add these two parties on the asserted basis that they should be held liable for the RCRA violations of JAB Toledo and JAB Ohio as parent or affiliated companies. Both motions were opposed, but ultimately Judge Moran granted EPA's motion in a 12-page Order dated January 7, 2009. In his Order allowing the amendment, Judge Moran expressed clear and unambiguous reservations regarding Region 5's ability to prove its claims against the new Respondents, particularly against Biewer Lumber, LLC, which was not yet in existence at the time Region 5's alleged RCRA violations occurred.

Shortly before the Presiding Officer's ruling on the Motion to Amend, Region 5 filed Motions for Accelerated Decision on Liability and Penalty dated December 12, 2008. Also filed with each motion was a Memorandum in Support of the Penalty Amount Proposed, not authored by a witness competent to testify, but by EPA's trial counsel, Richard Wagner, explaining the basis of EPA's calculated penalty. Response briefs on the motions were deferred by agreement of the parties and order of the judge until the close of discovery.

During discovery, which was originally allotted 60 days, but was later extended, Region 5 submitted numerous interrogatories and requests for production of documents, all of which were answered and supplemented by Respondents. During the course of this discovery, several thousand pages of documents were produced by Respondents to Region 5 and numerous interrogatories were answered. Interestingly, Region 5's discovery focused entirely on the period of time following JAB Ohio's and JAB Toledo's cessation of business activities in 2001 and 1997, respectively. *See* Interrogatories and Document Requests dated January 20, 2009. Virtually no attempt was made by Region 5 to learn about the interrelationships between the parent company, JAB Company, and its

two subsidiaries, JAB Toledo and JAB Ohio, during the time period when JAB Toledo and JAB Ohio actually conducted wood treating operations at their respective locations. *Id.* Region 5 also conducted discovery regarding Biewer Lumber, LLC, which established without any doubt whatsoever that Biewer Lumber, LLC was neither a parent corporation of JAB Ohio or JAB Toledo and had no involvement whatsoever in any of their operations, either before or after they ceased business operations.

Following discovery, on July 2, 2009, both parties filed Cross-Motions for Accelerated Decision concerning the liability of JAB Company, the acknowledged parent of JAB Ohio and JAB Toledo, and the liability of Biewer Lumber, LLC. Both sides attached various documents to their briefs and both argued that the matter could be resolved without an evidentiary hearing.[2]

Remarkably, Region 5 persisted in its Motion for Accelerated Decision to argue that Biewer Lumber, LLC was liable for JAB Ohio's and JAB Toledo's violations even before Biewer Lumber, LLC was created. Respondents refuted these arguments, both in their own Motion for Accelerated Decision and in their Response Brief in Opposition to Region 5's Motion for Accelerated Decision. Only after Respondents had filed over 100 pages in briefs on the cross-motions did Region 5 in its Reply Brief in Support of its Motion for Accelerated Decision on Derivative Liability finally concede that it had no legitimate claim against Biewer Lumber, LLC. It did, however, continue to assert that JAB Company was liable for violations of JAB Ohio and JAB Toledo on a veil-piercing theory and on the theory that JAB Company was the actual "operator" of the two facilities.

---

[2] This was consistent with Region 5's earlier Pre-Hearing Exchange which indicated that Region 5 did not intend to introduce at an evidentiary hearing the testimony of any witnesses or introduce any documents that were not attached to its Pre-Hearing Exchange. *See* Complainant's Pre-Hearing Exchange dated August 25, 2008. Thus, Region 5 would have nothing to add to the issue if an evidentiary hearing were held.

In a strange legal maneuver, Region 5 did not respond to the motions filed by JAB Company and Biewer Lumber, LLC for accelerated decision with an opposing brief. Rather, it filed a four-page "Objection to Motion for Accelerated Decision" arguing that Respondents' motion was premature because Respondents had not yet seen how Region 5 intended to establish its *prima facie* case of liability. Amazingly, Region 5 argued in its "Objection" that only Region 5 was entitled to file a Motion for Accelerated Decision on this issue. Such was the *only* response to Respondents' motion, and there was no effort made to challenge the merits of Respondents' motion or the factual matters established with the motion. Although Judge Moran probably could have granted Respondents' motion on that basis alone, he generously treated Region 5's own motion and supporting briefs as *de facto* responses to Respondents' motion. Ultimately, Judge Moran granted Respondents' motions and denied Region 5's motions in a lengthy Order and Opinion dated October 6, 2009 for JAB Ohio and December 23, 2009 for JAB Toledo, which forms the primary basis for Region 5's present appeal.

With respect to Region 5's Motion for Accelerated Decision on Liability and Penalty, (filed only against JAB Ohio and JAB Toledo) Respondents conceded liability but argued that there were disputed factual issues concerning any penalty which necessitated an evidentiary hearing, including facts relating to the "willfulness" of the violations and Respondents' good faith efforts to comply. *See* Respondents' Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty, dated July 30, 2009. Some of the facts supporting Respondents' position (i.e., JAB Ohio's and JAB Toledo's insolvency and financial inability to perform the required activities) had actually been argued and established by Region 5 in the context of Region 5's Motion for Accelerated Decision on Derivative Liability. Judge Moran denied Region 5's motion stating that there were disputed issues of fact, that he wanted to hear from Region 5's penalty calculation

witness (whom he ordered to appear at the evidentiary hearing) and that in the exercise of his discretion, the matter should be resolved following an evidentiary hearing as opposed to accelerated decision motions. *See* Order on EPA's Motion for Accelerated Decision on Liability and Penalty dated December 23, 2009 and Order on EPA's Motion to Strike, in Part, Respondents' Pre-Hearing Exchange dated December 23, 2009.

The evidentiary hearing was scheduled for February 23, 2010, at which the claims against JAB Toledo and JAB Ohio would both be tried. However, one month prior to the scheduled hearing, Region 5 filed, on January 22, 2010, a Supplemental Pre-Hearing Exchange, which contained yet another bizzare litigation strategy. In this document, Region 5 repeated its argument that the Presiding Officer should have granted Region 5's Motion for Accelerated Decision on Liability and Penalty and made the following statement:

> "In the interest of preserving her appeal rights, Complainant will present no evidence at the hearing, and will not make available for cross-examination any Agency personnel, or other witness."

Such position by Region 5 was a direct refusal to abide by the Presiding Officer's Order requiring Region 5 to produce its penalty calculation witness and was obviously a statement that Region 5 had no intention of satisfying its burden of presentation or persuasion at a hearing as required by 40 C.F.R. § 22.24. In light of Region 5's "boycott" of the evidentiary hearing, Respondents filed a Motion for Entry of Decision on February 8, 2010, requesting an order awarding zero penalty against JAB Ohio and JAB Toledo, and further awarding Respondents their attorneys' fees incurred in preparing for a trial that Region 5 no longer was willing to participate in, even though Region 5 was the party who started the administrative process in the first place.

Judge Moran withheld a decision on Respondents' Motion for Entry of Decision and the hearing was held as scheduled on February 23, 2010 in Toledo, Ohio. Region 5, represented by two attorneys at the hearing, reiterated its "boycott" position regarding the trial, again stating that it was

doing so to "preserve its appeal rights." *See* Hearing Transcript, pp. 63-64. Region 5 offered no testimony or exhibits, and in fact, at no time during the entire administrative process did Region 5 ever offer and ask to be admitted into evidence a single document, affidavit or testimony of any kind whatsoever. Although Respondents had no obligation to put on any defense at the hearing because of Region 5's default, they did preserve the testimony of Gary Olmstead, Chief Financial Officer, to establish that JAB Ohio and JAB Toledo failed to perform all the tasks required under RCRA, not because of an unwillingness to do so, but because of their financial inability to fund such an exercise. *See* Hearing Transcript, pp. 38-62. Prior to the close of the evidentiary hearing, Region 5 made no motion for entry of judgment as a matter of law or any other motion preserving its legal arguments regarding penalty.

On April 30, 2010, Judge Moran issued his Initial Decision reaching the only conclusion he was permitted to make under the *Consolidated Rules*, that a zero penalty was awarded because Region 5 had failed to present a *prima facie* case.

ARGUMENT

I. THE PRESIDING OFFICER CORRECTLY DECIDED THE PARTIES' CROSS-MOTIONS FOR ACCELERATED DECISION ON JAB COMPANY'S DERIVATIVE OR DIRECT LIABILITY.

With respect to Region 5's Motion for Accelerated Decision or JAB Company's Motion for Accelerated Decision, JAB Company demonstrates below that Region 5 has not met its burden of proof to establish that JAB Company is liable for the actions of JAB Ohio or JAB Toledo. The analysis begins in Section A with a summary of the applicable standards of review and burdens of presentation and persuasion for each party, particularly regarding burden of persuasion. Next, the brief sets forth a summary of the parent/subsidiary norms established by the U.S. Supreme Court in *U.S. v. Bestfoods*, 524 U.S. 51, 63, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), (Section B) followed by a demonstration that Ohio common law, rather than federal common law, must be used to determine

whether to pierce the corporate veil of JAB Ohio and JAB Toledo (Section C). The *Bestfoods* guidelines are established first because regardless of which body of law this Board uses to analyze the veil piercing argument, the analysis must incorporate the parent/subsidiary norms established in *Bestfoods*.

After establishing the legal context in which the facts must be placed, in Section D the Brief provides a summary of the uncontested facts, as established by JAB Company through its Motion for Accelerated Decision, as well as those set forth by Region 5 through its Motion for Accelerated Decision. The Brief next demonstrates the fundamental flaws of Region 5's analysis that ultimately render Region 5's conclusions untenable in Section E. Finally, all of the issues are tied together in Section F where it is clear that Region 5 did not meet its burden of proof through a comparison of what Region 5 actually proved with what it needed to prove regarding both motions for accelerated decision.

A. Standard of Review and Burden of Persuasion

Region 5's right to appeal to the EAB is "limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction." 40 C.F.R. § 22.30(c). With regards to those issues properly under appeal, the EAB has authority to "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed". 40 C.F.R. § 22.30(f); *In re Billy Yee*, TSCA Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D. _____. In doing so, the EAB applies the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). *See In re The Bullen Companies, Inc.*, 9 E.A.D. 620, 632 (EAB, Feb. 1, 2001). The "preponderance of the evidence" standard requires that "a fact finder should believe that his factual conclusion is more likely than not." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

The EAB gives considerable deference to the presiding officer's factual conclusions based upon the testimony of witnesses, *In re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000), *citing In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994), to his decisions regarding the admissibility of evidence, *In re Great Lakes Div. of Nat. Steel Corp.*, 5 E.A.D. 355, 368 (EAB 1994), and his decisions regarding discovery, *In re Billy Yee*, *supra* at 13 .

Region 5 alone bears the burden of presenting evidence supporting the allegations in its complaint and persuading the presiding officer regarding questions of fact and law to establish JAB Company's direct or derivative liability. *See* 40 C.F.R. §22.24. In the context of Region 5's claim of veil piercing or direct liability, this burden means Region 5 must overcome the presumption that JAB Company, JAB Ohio and JAB Toledo are to be treated as separate corporate entities not responsible for the liabilities of the others. Respondents *do not* have the burden of proving the absence of veil piercing or direct liability factors – this is Region 5's claim and its proof rests solely on Region 5.

Pursuant to CROP, an accelerated decision is proper "if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Rogers Corp. v. E.P.A.*, 275 F.3d 1096, 1103 (D.C. Cir. 2002); *see* 40 C.F.R. § 22.20(a). An accelerated decision is viewed as a summary judgment, and in analyzing an accelerated decision, this Board relies on the Supreme Court's formulation of Fed. R. Civ. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *Rogers Corp. v. E.P.A.*, 275 F.3d at 1103 (*citing In re BWX Tech., Inc.*, RCRA (2008) Appeal No. 97-5, 2000 WL 365958 (E.P.A. Apr. 5, 2000).

Where JAB Company, as a party moving for accelerated decision, *does not* have the burden of persuasion on the issue of its direct or derivative liability, its burden is only to "show" or "point

out" to the reviewing tribunal that there is an absence of evidence in the record to support Region 5's case on that issue and that the JAB Company is entitled to judgment in its favor as a matter of law. *See Celotex*, 477 U.S. at 323-324 (1986).

In the context of JAB Company's accelerated decision motion, once its burden is met, the burden of production shifts to Region 5, and becomes "considerably more demanding than the movant's with respect to the issues upon which the nonmovant bears the burden of persuasion at trial." *Anderson*, 477 U.S. at 252. On each essential element of its claim, Region 5 must identify specific facts that allow a reasonable factfinder to find in its favor. *Id.* The evidence provided by Region 5 must be substantial, "more than a scintilla," and probative of a disputed factual issue to show that the nonmovant is entitled to a trial or hearing. *In re BWX Tech, Inc., supra.*

Where opposing parties file cross motions for accelerated decision, it is possible for the presiding officer to decide any outstanding issues where it determines that no further factual development would occur by a hearing or trial. *See Tripp v. May*, 189 F.2d 198, 200 (7th Cir, 1951); *Wright et al., Federal Practice & Procedure*, § 2720 (1998); *In re BWX Tech.*, p. 69, n. 10. Thus, to the extent it was necessary to decide any contested facts at issue during the accelerated decision phase, it was entirely appropriate for Judge Moran to do so where Region 5 had already announced in its pre-hearing exchange that it intended to call no witnesses or introduce any documents at trial that were not already attached to its motion. *See* Appellant's Brief, p. 25, fn. 17.

As discussed in more detail below, Region 5 artfully attempts to muddle the burden of persuasion issue and divert the Board's attention from its own evidentiary failures to evidence it claims JAB Company should have, but *failed* to produce. The burden of proof was and remains entirely on Region 5. This appeal is about the evidence produced or not produced by Region 5 to overcome the presumption of separate corporate boundaries between JAB Company and its

subsidiaries. Region 5 understandably ignores its burden of persuasion, and as demonostrated below, often implies a reversed burden of proof, and glosses over the multiple substantive inadequacies inherent in its evidence and argument.

B. The Supreme Court in *Bestfoods* Established Several Guidelines Regarding Parent-Subsidiary Norms that Must be Maintained

The seminal case addressing the liability of a parent corporation for environmental contamination at a facility of its subsidiary, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), is *United States* v. *Bestfoods*, 524 U.S. 51 (1998). In *Bestfoods*, the U.S. Supreme Court reaffirmed the traditional bedrock principles of corporate law, holding that, as a general rule, a parent corporation cannot be held liable for the acts of its subsidiaries, and that CERCLA does nothing to alter that overriding presumption:

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.
>
> * * *
>
> [N]othing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible.

Bestfoods, supra at 524 U.S. 61, 62 (citations omitted).

The Court did recognize, however, two exceptions to the general rule, whereby a parent could be held liable for the acts of its subsidiary: (1) through traditional veil-piercing principles; or (2) when the parent incurs direct "operator" liability. Each of these exceptions is discussed below:

1. Veil-Piercing Claim

In *Bestfoods*, the Supreme Court held that a parent company may be held liable under CERCLA through traditional "veil-piercing" principles, to wit, when "the corporate form [is] . . . misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id.* at 62. The Court was careful to explain, however, that CERCLA had not lowered the bar with

respect to proving a veil-piercing claim, and that mere control of a subsidiary by its parent is not nearly enough to support such a claim:

> [I]t is hornbook law that "the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal."

Id. at 61-62 (citation omitted).

Nor is the sharing of common directors between a parent and subsidiary sufficient to support a veil-piercing claim: "[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *Id.* at 69 (citation omitted). Given that the sharing of directors between a parent and subsidiary is the commonly accepted norm, the Court further explained that the directors of a subsidiary are presumed to be acting on the subsidiary's behalf when making decisions affecting the subsidiary's business, despite their simultaneous director responsibilities for the parent:

> [T]hat the corporate personalities remain distinct has its corollary in the well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their common ownership . . . Since courts generally presume that the directors are wearing their "subsidiary hats" and not their "parent hats" when acting for the subsidiary, . . . it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the [subsidiary's] facility. The Government would have to show that, despite the general presumption to the contrary, the officers and directors were acting in their capacities as [parent] officers and directors, and not as [subsidiary] officers and directors.

Id. at 69-70 [internal quotations and citations omitted].

Putting a finer point of the types of proofs the government would have to adduce in order to use the actions of a dual officer in support of a veil-piercing claim, the Court explained that there must generally be evidence that the subsidiary's dual officer acted *contrary* to the interests of the subsidiary and simultaneously for the advantage of the parent:

> Here, it is prudent to say only that the presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent.

Id. at 70, n. 13.

Thus, while *Bestfoods* recognizes the possibility for parent-company liability under CERCLA, through veil-piercing principles, the overriding presumption of parental non-liability persists, in accordance with the common law.

2. Direct "Operator" Liability

As an alternative to a traditional veil-piercing claim, the Supreme Court also recognized that a parent corporation could be held directly liable, under CERCLA, for environmental contamination at a facility of its subsidiary, if the parent engages in direct "operation"[3] of the subsidiary's facility. *Id.* at 64. Such direct parent "operation" can be established by showing that the parent corporation exercised *exclusive control* of the facility or engaged in a *joint venture* with the subsidiary, or by showing that an agent or officer of the parent directly controlled the operation of the subsidiary's facility, *to the subsidiary's detriment*. *Id.* at 70-72. The question here is "not whether the parent operates the *subsidiary*, but rather whether it operates the [subsidiary's] *facility*." *Id.* at 68 (emphasis added). In addition, the Court was not speaking of the parent's generalized operation of any aspect of the subsidiary's facility, but rather it was speaking only of those types of operations dealing with pollution and environmental compliance:

> To sharpen the definition [of "operate"] for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

---

[3] *See* 42 U.S.C. § 9607(a)(2) ("CERCLA") (authorizing suit against "any person who at the time of disposal of any hazardous substance owned or *operated* the facility" [emphasis added]).

Id. at 66-67.

Thus, while *Bestfoods* recognizes the possibility for parent liability under CERCLA for a parent's direct operation of a subsidiary's facility, such liability can be predicated only upon evidence showing that the parent directed the operations of the subsidiary's facility specifically with respect to pollution control and environmental compliance.

3. Application of *Bestfoods* to the RCRA Liability Framework

Both sides agree that the *Bestfoods* framework for parent liability also applies under RCRA. Complainant's Brief in Support of Its Notice of Appeal (Appellant's Brief), p. 18. Just like CERCLA, RCRA says nothing about disturbing the bedrock corporate principles that prevent a parent from being liable for the acts of its subsidiaries, absent the extreme circumstances that would warrant a piercing of the corporate veil. Thus, a parent cannot be held indirectly liable under RCRA for the actions of its subsidiaries, unless the overriding presumption of parental non-liability is overcome through traditional veil-piercing principles.

The *Bestfoods* analysis also applies equally to direct liability issues under RCRA. In that regard, RCRA ostensibly authorizes suit against "any person [who] has violated or is in violation of any requirement of [RCRA]." 42 U.S.C. § 6928(a)(1). "Operators" of a facility are subject to RCRA regulation. 42 U.S.C. § 6924(a) and 42 U.S.C. § 6925(a). Therefore, in accordance with *Bestfoods*, a parent could be subject to direct "operator" liability under RCRA only upon a showing that the parent directed the operations of the subsidiary's facility with specific respect to pollution control and environmental compliance.

C. Ohio Common Law Governs Veil-Piercing Determinations

At the outset, it should be noted that Judge Moran found that the facts presented by Region 5 in support of its claims did not warrant piercing the corporate veil of either JAB Ohio or JAB Toledo under either state or federal common law. *In re John A. Biewer Company of Ohio,* 2009 WL

3496294, 7-8, n. 14, Docket No. RCRA-05-2008-0007 (E.P.A. October 5, 2009) ("*In re JAB Ohio*"). Region 5 apparently perceives federal common law, at least the version used in the Third Circuit, to be the easier standard to meet. In its vigor to convince this Board it must use federal common law when determining whether to pierce the corporate veil of the two subsidiary corporations, Region 5 essentially "cherry-picks" the case law it would like this Board to apply, and ignores the many other federal cases that articulate a standard different than that in the Third Circuit, where none of the parties are located.[4] While JAB Company is in agreement with Judge Moran that Appellant fails under both Ohio and federal common law, JAB Company maintains that Ohio common law should be applied when analyzing the appropriateness of piercing either JAB Ohio's or JAB Toledo's corporate veil because this Board has found that state common law must be used to determine whether state regulations have been violated. Moreover, even if federal law were consulted, the common law in the Sixth Circuit, where JAB Ohio and JAB Toledo are located, requires the use of state common law to make such a determination.

1. Region 5 is Attempting to Enforce Ohio Regulations That Ohio Has Been Authorized to Administer in Lieu of the Federal Government.

This Board has held that state law must be used to determine whether a RCRA violation occurred where the State in question has been authorized to administer a state hazardous waste program in lieu of the federal government's RCRA program. *In re Brenntag Great Lakes, LLC*, No. RCRA 5-2002-0001 (E.A.B. June 2, 2004). Region 5 admits that the state of Ohio was given final authorization to administer the pertinent Hazardous and Solid Waste Amendments of 1984, and additional RCRA requirements (*See* Appellant's Brief, p. 5), and it is these Ohio regulations which

[4] While Region 5 claims the use of Ohio common law constitutes reversible error, Region 5 seems to waiver on that claim, later stating that the federal and state tests for piercing a corporate veil are nearly identical. Appellant's Brief, p. 27.

are alleged to have been violated in this case. (*See* Amended Complaint ¶¶ 4, 5, 11, 12, 22, 23, 28). The effective RCRA requirements governing drip pads that Region 5 is seeking to enforce are codified in Ohio Admin. Code § 3745-69-40 through § 3745-69-45. Appellant's Brief, p. 5.

Region 5 wholly ignores the fact that it is attempting to enforce Ohio regulations and, instead, spends pages in its Appeal Brief creating various arguments regarding the need to use federal common law when dealing with federal statutes. *See* Appellant's Brief, pp. 18-21. None of the cases cited by Region 5 as supporting the use of federal common law appear to have involved EPA's attempt to enforce state regulations. Thus, Region 5's analysis of the factors in *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) and related case law is entirely irrelevant. *See* discussion in Appellant's Brief, pp. 18-24.[5]

The claims Region 5 has made against JAB Company are that JAB Company is directly or derivatively responsible for its subsidiaries' alleged violations of Ohio regulations. JAB Company will only be liable for the violation of Ohio regulations if it is appropriate to pierce the corporate veils of JAB Ohio and JAB Toledo. According to this Board, therefore, Ohio law must be used to determine whether JAB Company is liable for violations of Ohio regulations. *See Brenntag, supra.* Because this Board has already provided clear guidance that Ohio common law should be used to determine whether to pierce the corporate veil of JAB Ohio and JAB Toledo, Region 5's analysis adopting the reasoning of courts addressing federal statutes is unnecessary and irrelevant.

[5] Even if Region 5's analysis related to the *Kimbell* factors were relevant, the analysis contains serious flaws, as discussed in more detail below.

2. Sixth Circuit Law Likewise Requires Application of State law on the Issue of Veil Piercing Where All Pertinent Entities are Located and All Events Occurred Within the Sixth Circuit.

In addition to precedent established by this Board, Sixth Circuit federal common law also requires use of state common law tests for a claim to pierce a corporate veil.[6] *See Carter Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 747 n.1 (6th Cir. 2001)(*citing Donahey v. Bogle*, 129 F.3d 838, 843 (6th Cir.1997), vacated on other grounds, 524 U.S. 924 (1998), reinstated, 2000 WL 977376 (6th Cir. Jul. 7, 2000)); *AT & T Global Information Solutions Company et al. v. Union Tank Car Company, et al.*, 29 F.Supp. 2d 857, (S.D. Ohio 1998). If any federal common law is pertinent, it would be that of the Sixth Circuit where JAB Toledo and JAB Ohio are located and where all relevant events occurred.[7] This is particularly so where the Sixth Circuit has spoken directly on the precise choice of law question raised here involving veil-piercing. Thus, even if this Board does not believe its prior decision in *Brenntag* is controlling, federal common law in the Sixth Circuit directs the Board to the same state common law for resolving claims of veil piercing.

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[6] Region 5 implies that JAB Company chose to use Ohio state common law over Michigan common law without a basis and argues further that JAB Company ignored any differences between Michigan and Ohio common law. Appellant's Brief, p. 23. JAB Company, however, set forth in detail a choice of law analysis that dictated Ohio law should be applied rather than Michigan law. JAB Ohio Memorandum in Support of Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC's Motion for Accelerated Decision, pp. 27-29. In addition, Michigan and Ohio law are substantively the same with regard to veil-piercing, so the use of either would require that JAB Ohio's and JAB Toledo's corporate veils be maintained.

[7] Notably, Region 5 fails to cite a single Sixth Circuit case supporting its federal common law argument, but curiously seems to rely on a couple of cases from the Third Circuit. Comparing the Sixth Circuit cases cited above with the decisions from the cases from the Third Circuit cited at pp. 18, 19 of Appellant's Brief, it is quite clear that, contrary to the suggestion of Appellant, there is no unified body of federal common law regarding veil piercing. There is no reason why this Board should apply a standard used in the Third Circuit instead of law directly on point from the Sixth Circuit.

3. The Choice of Law Analysis Advanced by Region 5 is Fatally Flawed.

Even if the Board were to ignore the fact that Region 5 is attempting to enforce Ohio regulations and ignore the previous decisions of this Board and the Sixth Circuit Court of Appeals, the analysis advanced by Region 5 for applying "federal law" to veil-piercing fails for a host of reasons.

First, Region 5 argues in favor of application of *Kimbell* in cases where the federal statute is "ambiguous or incomplete" (Appellant's Brief, p. 18). Yet there is no indication in Appellant's Brief why RCRA is either ambiguous or incomplete, and indeed two pages later in Appellant's Brief, Region 5 refers to RCRA as "comprehensive." (Appellant's Brief, p. 20) The fact that RCRA is silent regarding a standard for veil-piercing hardly makes the statute incomplete. If that were the case, virtually every federal statute in existence that applies to corporations would be considered "incomplete."

RCRA has been described by courts as "comprehensive" regulation of the subject area, and is certainly not incomplete. *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331, 114 S. Ct. 1588 (1991); *Meghrig* v *KRC Western Inc.*, 516 U.S. 479, 483, 116 S. Ct. 1251 (1996). The Supreme Court has made clear that the congressional silence on issues tangential to a federal statute does not render a federal statute "incomplete." *See O'Melneny & Myers v. FDIC*, 512 U.S. 79, 114, S. Ct. 2048, 2054 (1999). This is certainly the case where the issue is *purely* a question of corporate law, an area traditionally governed by state law. *See Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991). Thus, application of the *Kimbell* factors simply does not come into play in this case.

Second, the fundamental basis of Region 5's argument in favor of application of a federal standard for veil-piercing is its claim that uniformity in the enforcement of RCRA is required nationwide, and cannot vary depending upon the location of the defendant. Ignored in Region 5's

analysis is the fact that this case does not involve questions regarding interpretation of RCRA. There has been no dispute regarding what was required by either RCRA or the Ohio regulations adopted to enforce RCRA, nor is there any dispute regarding whether or not there was a violation of the statute, as JAB Toledo and JAB Ohio have admitted liability. This question involved in this case is solely one of *corporate* law and whether a parent corporation may be held liable for the failings of its subsidiary. Corporate law is, perhaps like no other area of the law, clearly within the purview of state regulation and control, not federal regulation and control. *Id.* Region 5 bears a heavy burden in overcoming the strong presumption that state common law must be used to address corporate questions rather than use federally created law[8]. *See Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir.1998). The mere fact that a claim may arise under a federal statute does not open the door for a court or tribunal to scrap well-established principles of state corporate law. To the contrary, the U.S. Supreme Court in *Bestfoods* made it clear that "CERCLA is . . . like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." 524 U.S. at 63. Following the Supreme Court's caution in *Bestfoods*, the Sixth Circuit has applied state common law to claims of veil-piercing under CERCLA. *See Carter Jones Lumber Co. v. LTV Steel Co., supra*; *Donahey v. Bogle, supra*; *AT&T Global Information Solutions Company, et al v. Union Tank Car Company, et al, supra.*

Third, Region 5's quest for uniformity in the context of veil-piercing presumes that there is a uniform body of federal law regarding piercing of the corporate veil. Such could not be farther from

[8] The present case does not simply involve the meaning of a term contained in RCRA. *See United States v. General Battery Corp.*, 423 F.3d 294, 311 n. 14 (3rd Cir. 2005) (Rendell, CJ, concurring in part, dissenting in part) (noting that the use of federal common law to determine successor liability did not equate to defining a term in CERCLA). Region 5 is clearly asking this Board to use judicially created law, not simply define a term, which is an additional reason why the case law cited by Region 5 is not relevant to the present issues.

the truth, as evidenced by the contrast between the Sixth Circuit's treatment of the issue and the Third Circuit case cited by Appellant, *United States v. General Battery Corp.*, 423 F.3d 294 (3rd Cir. 2005) (*cited* at pp. 18, 19 Appellant's Brief). This false assumption of a uniform federal common law has lead some commentators to describe the development of federal law of corporate veil-piercing as "ad hoc" and "an even more unpredictable, confusing state of affairs than exists under state common law." *French, Peter,* PARENT CORPORATE LIABILITY: AN EVOLUTION OF THE CORPORATE VEIL PIERCING DOCTRINE AND ITS APPLICATION TO THE TOXIC TORT ARENA DOCTRINE, 5 TUL. ENV. L.J. 605, 617-625 (1992) (citing examples of various federal common law tests).

Fourth, Region 5's contention that application of Ohio veil-piercing law would somehow be contrary to the objectives of RCRA appears to ignore the fact that Region 5 has sought to enforce *Ohio's* regulations which were approved by EPA in implementing RCRA. Clearly, EPA's authorization of Ohio to administer its own regulations in lieu of federal implementation expresses EPA's belief that Ohio and the federal government have the same interest in administering and enforcing RCRA. How then can it be seriously argued that application of Ohio corporate law would undermine enforcement of Ohio's regulatory scheme?

Fifth, while the Supreme Court has not addressed whether state or federal common law should be used in determining whether to pierce a corporate veil, the Court did make it clear that courts could not expand established vicarious liability principles in the name of CERCLA. *Bestfoods*, 524 U.S. at 61-62. It follows that these same principles could not be expanded under RCRA. Region 5's argument that a uniform federal rule is needed to govern vicarious liability under RCRA is in actuality a request for this Board to expand corporate liability for RCRA violations beyond the normal bounds of state corporate law. *See Atchison*, 159 F.3d at 363 ("The argued 'need' for uniformity thus stems not from disarray among the various states, but from the alleged

need for a more expansive view of successor liability than state law currently provides — in other words, the notion that state law on this issue is inadequate for CERCLA's purposes."). Indeed, Region 5 chose a test that allows a corporate entity to be disregarded "in the interests of public convenience, fairness, and equity." Memorandum in Support of Motion for Accelerated Decision on Derivative Liability ("Region 5 Memorandum")[9], p. 8, *quoting In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 675 F. Supp. 22, 33 (D.C. Mass. 1987). As noted by Judge Moran in the Order on Cross Motions, "this perspective does not square with the Supreme Court's view in *Bestfoods*." *See In re JAB Ohio,* 2009 WL 3496294 at 5. Region 5's request for this Board to expand corporate liability for RCRA purposes is specifically prohibited by the Supreme Court in *Bestfoods*. *See* 524 U.S. at 61-62.

Last, Appellant references, throughout its Appeal Brief, a broad policy objective it claims is found in RCRA to hold parent corporations liable in order to ensure compliance with RCRA and protect the environment. Appellant uses this broad statement of public policy to justify a departure from well-established corporate law regarding parent liability to expand the reach of RCRA liability to parent companies. *No such policy is expressed or implied anywhere in RCRA.* RCRA imposes obligations on owners and operators, but says absolutely nothing about extending the reach of the statute beyond normal corporate limited liability principles embedded in state law.[10] Adhering to state corporate law regarding veil-piercing does not impinge in any way whatsoever on any express public policy objective articulated in RCRA. As noted by the Supreme Court in *Bestfoods*, there is nothing in CERCLA, or Respondents contend, in RCRA, giving any indication "that the entire

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[9] When citing the Region 5 Memorandum, unless the JAB Toledo case is indicated, JAB Company will cite to the Memorandum filed in the JAB Ohio case. For the most part, Region 5 made the same arguments and attached the same documents in each Memorandum.

[10] Unlike the cases cited by Region 5 addressing the definition of "successor" under CERCLA, RCRA does not provide for the liability of a parent.

corpus of state corporate law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." Appellant's efforts to recast the policy objectives of RCRA must be recognized for what they are – an attempt to avoid troublesome controlling law that fails to support its claim against JAB Company.

D. The Corporate Veils of JAB Ohio and JAB Toledo may not be Pierced Under Ohio Common Law, Federal Common Law, or Michigan Common Law

As discussed above, Region 5 bears the entire burden of presentation and persuasion supporting its claim that JAB Company is derivatively liable for the violations of JAB Company's subsidiaries. *See* 40 CFR § 22.24(b). Reading Region 5's appeal brief, one would get the impression that the burden of proof is exactly the opposite and rests with Respondents to *disprove* Region 5's veil piercing argument. Thus, time after time, Region 5 emphasizes documents *not produced* by Respondent to demonstrate the separateness of the two corporate entities, rather than pointing to evidence presented by Region 5 to actually prove the elements of veil piercing. Region 5 conducted extensive discovery and was provided thousands of pages of documents from Respondents during that discovery. Its failure to produce evidence sufficient to warrant veil piercing is not "cured" by assertions that Respondents did not produce all the documents they could have to disprove Region 5's claims.

1. A Prima Facie Case for Piercing the Corporate Veil Requires Evidence that the Parent Exercised Complete Control Over the Subsidiary, Such Control Was Exercised to Commit a Fraud, Illegal Act, or Similar Unlawful Act, and an Injury or Unjust Loss Resulted From the Act

The Supreme Court has described the principle that a parent corporation is not liable for the acts of its subsidiaries as "a general principle of corporate law deeply 'ingrained in our economic and legal systems.'" *United States v. Bestfoods*, *supra* at 61. The *Bestfoods* Court further noted that "nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-

law backdrop, the congressional silence is audible." *Id.* at 62. Congress was similarly silent regarding limited liability issues in RCRA. Therefore, a parent may only be charged with derivative RCRA liability for its subsidiary's acts "when (but only when) the corporate veil may be pierced."[11] *Id.* at 64-65 (referring to similar CERCLA law). As established above, Ohio common law should be used when determining whether to pierce the corporate veil of JAB Ohio and JAB Toledo in the present situation.

Region 5 and JAB Company agree that, no matter which law is used, a corporate veil may not be pierced unless "the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another." *See In re JAB Ohio,* 2009 WL 3496294 at 5. "The leading Ohio case on veil-piercing is *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.,* 67 Ohio St.3d 274, 617 N.E.2d 1075 (1993)." *Carter Jones*, 237 F.3d at 748. "In *Belvedere*, the Ohio Supreme Court announced a three-pronged test to determine if a shareholder is liable for the wrongdoing of the corporation of which he is an owner." *Id.* Liability is imposed under the test when: (1) control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own; (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; *and* (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Id.* In proving that injustice would result from a failure to pierce the corporate veil, a plaintiff must demonstrate more than the "mere fact that the company ceased

[11] As already noted above, RCRA says nothing about disturbing the bedrock corporate principles that prevent a parent from being liable for the acts of its subsidiaries, absent the extreme circumstances that would warrant a piercing of the corporate veil. Thus, like under CERCLA, a parent cannot be held indirectly liable under RCRA, for the actions of its subsidiaries, unless the overriding presumption of parental non-liability is overcome.

operation without being able to pay all of its debts." *Scarbrough v. Perez*, 870 F.2d 1079, 1084 (6th Cir. 1989).

The Ohio Supreme Court later clarified the boundaries of the second prong of the *Belvedere* test, stating that the proponent of piercing a corporate veil must "demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 895 N.E.2d 538, 544-545 (Ohio 2008). While the court seemingly expanded the second prong of the *Belvedere* test, the court cautioned that the corporate veil should be pierced "only in instances of extreme...misconduct." *Id.* In *Dombroski*, the court, considering a proposed expansion of the standard under the second prong of *Belvedere* to include "unjust or inequitable conduct", stated:

> [W]ere we to allow piercing every time a corporation under the complete control of a shareholder committed an unjust or inequitable act, virtually every close corporation could be pierced when sued, as nearly every lawsuit sets forth a form of unjust or inequitable action and close corporations are by definition controlled by an individual or small group of shareholders. *See* Black's Law Dictionary (8th Ed.2004) 365. Controlling shareholders in publicly traded corporations could also be subject to frequent piercing, regardless of the corporation's liability and its ability to pay for the plaintiff's injuries. Such expansive liability would run contrary to the concept of limited shareholder liability and upset the balance struck in *Belvedere*. Thus, the proposed expansion of the second prong of the *Belvedere* test to include unjust or inequitable conduct is simply too broad to survive exacting review.

Id.

Region 5 appears to be in agreement with the elements of the Ohio common law test, except that directly contrary to the Ohio Supreme Court's *Dombroski* ruling, Region 5 would have this Board expand the second prong to include unjust and inequitable acts, all but eliminating the concept of limited liability, particularly for closely held corporations. *See* Appellant's Brief, pp. 48-49.

It is through the lens of the case law discussed above that evidence put forth by Region 5 and JAB Company must be viewed. As demonstrated below, even if this Board were to adopt Region 5's radical view of the federal common law test, the evidence set forth during the accelerated

decision process and summarized below establishes that Region 5 did not meet its burden of proof for its Motions for Accelerated Decision. Therefore, it was appropriate and necessary for Judge Moran to grant JAB Company's Motion for Accelerated Decision and deny Region 5's Motion for Accelerated Decision.

2. JAB Company Has Established a Body of Uncontested Facts That Support its Argument That Region 5 is Unable to Demonstrate a *Prima Facie* Case For its Piercing the Corporate Veil Claim

JAB Company was not obligated to produce any evidence disproving Region 5's veil-piercing claim unless and until Region 5 established a *prima facie* case. Nonetheless, JAB Company, in support of its own motion for accelerated decision, provided affidavits, interrogatory responses and additional documents that showed Region 5 could not support its veil-piercing claim.

a. Affidavits

The affidavits submitted by JAB Company establish the following facts which were never disputed:

1. During the time JAB Ohio and JAB Toledo were operational, each subsidiary was operated by a Plant Manager hired by the subsidiary and the Plant Manager's duties included hiring, firing, disciplining, and training all employees for the respective company. JAB Ohio Motion for Accelerated Decision on Derivative Liability ("JAB Ohio Motion for Accelerated Decision"), Exhibit D; JAB Toledo Motion for Accelerated Decision on Derivative Liability ("JAB Toledo Motion for Accelerated Decision"), Exhibit D; JAB Ohio Memorandum In Opposition to EPA's Motion for Accelerated Decision on Derivative Liability ("JAB Ohio Memorandum in Opposition"), Exhibit D; JAB Toledo Memorandum In Opposition to EPA's Motion for Accelerated Decision on Derivative Liability ("JAB Toledo Memorandum in Opposition"), Exhibit D.

2. During the time JAB Ohio and JAB Toledo were operational, Plant Managers hired their own inside and outside sales forces for sales within their territories and set the pricing for their territories. JAB Ohio Motion for Accelerated Decision, Exhibit D; JAB Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

3. All employees of JAB Ohio and JAB Toledo were paid by payroll checks issued by the corresponding subsidiary. JAB Ohio Motion for Accelerated Decision, Exhibit D; JAB

Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

4. All billings for sales of merchandise were issued on invoices in the name of the JAB Ohio and JAB Toledo. JAB Ohio Motion for Accelerated Decision, Exhibit D; JAB Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

5. JAB Ohio and JAB Toledo had separate financial statements and profit sharing plans that were based solely on the success and profitability of each subsidiary. JAB Ohio Motion for Accelerated Decision, Exhibit D, JAB Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

6. JAB Company set general policy directions for its subsidiaries, but the policies were implemented by the Plant Managers and employees of JAB Ohio and JAB Toledo. JAB Ohio Motion for Accelerated Decision, Exhibit D, JAB Toledo Motion for Accelerated Decision, Exhibit D; JAB Ohio Memorandum in Opposition, Exhibit D; JAB Toledo Memorandum in Opposition, Exhibit D.

7. With the assistance of his staff, the Chief Financial Officer for JAB Company separately prepared the financial statements for JAB Ohio, and JAB Company was paid an annual management fee by the subsidiaries for performing that service. JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Memorandum in Opposition, Exhibit C.

8. All monies advanced to JAB Ohio from JAB Company were used to pay taxes and insurance after the subsidiary ceased operations and such advances were duly recorded as corresponding debits and credits on JAB Company's and JAB Ohio's balance sheets.[12] JAB

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[12] In its Reply Brief supporting Region 5's Motion for Accelerated Decision, Region 5 questioned the veracity of the statement that all transfers were accounted for as debits and credits in JAB Company and JAB Ohio's records, but produced no evidence or facts to support its suspicion that the facts as recited in Respondent's affidavit were inaccurate in any way. Region 5's response is limited to a complaint that JAB Company did not provide additional documentation to support the facts stated in the affidavit. This response does not sufficiently contest this fact under Rule 56. *See* Fed. R. Civ. P. 56(e)(2). Moreover, JAB Company provided Region 5 with thousands and thousands of pages of the general ledgers of JAB Ohio and JAB Toledo covering the years 1997 through 2009 that support this statement. Region 5 did not request the general ledgers of JAB Company and only requested information regarding related party transactions involving JAB Toledo for the period after January 1, 1997 and involving JAB Ohio for the period after January 1, 2001. As already established, JAB Toledo ceased operations in 1997 and JAB Ohio ceased operations in 2001. If Region 5 is unable to find proof that of the legitimacy of intercompany debts, it is likely because it did not ask for any records of the time that JAB Ohio and JAB Toledo were operational. Therefore, any claim that JAB Company did not produce documents demonstrating the legitimacy of the credits and debits existing at the time JAB Toledo and JAB Ohio closed is nothing more than an impermissible attempt to shift the burden of persuasion.

Ohio Motion for Accelerated Decision, Exhibit A; JAB Ohio Memorandum in Opposition, Exhibit A.

9. While operating, JAB Ohio used a bank account in the name of JAB Company, but used a separate, individualized series of checks that allows JAB Company and JAB Ohio to separately track and record JAB Ohio's debits. JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Memorandum in Opposition, Exhibit C.

10. JAB Ohio ceased all operations in 2001. JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Opposition to Motion, Exhibit C.

11. After JAB Ohio ceased operations in 2001, Brian Biewer was duly appointed manager/director of JAB Ohio and was not paid for his work at that position. JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Memorandum in Opposition, Exhibit C.

12. After JAB Ohio ceased operations, JAB Company paid its few ongoing expenses and accounted for these payments with a corresponding debit on JAB Ohio's books.[13] JAB Ohio Motion for Accelerated Decision, Exhibit C; JAB Ohio Memorandum in Opposition, Exhibit C.

13. After JAB Ohio ceased operations, JAB Ohio sold its inventory on hand to customers or, at cost, to JAB Lumber Company, John A. Biewer Co. of Illinois, and Biewer of Lansing LLC. JAB Ohio's account was properly credited with whatever amount was owed for the sale of inventory. JAB Ohio Motion for Accelerated Decision, Exhibit C.

14. JAB Toledo ceased production and treatment of wood products in 1997. JAB Toledo Motion for Accelerated Decision, Exhibit A; JAB Toledo Memorandum in Opposition, Exhibit A.

15. JAB Toledo's rental income produced after closure was used to pay for preparation of the MSG Drip Pad Closure reports, work, taxes, and insurance. JAB Toledo Motion for Accelerated Decision, Exhibit A.

16. All monies advanced to JAB Toledo from JAB Company were used to pay taxes and insurance after the subsidiary ceased operations and such advances were duly recorded as corresponding debits and credits on JAB Company's and JAB Toldeo's balance sheet.[14] JAB Toledo Motion for Accelerated Decision, Exhibit A; JAB Toledo Memorandum in Opposition, Exhibit A.

Rule 22.20(a) specifically provides for the use of affidavits in support of a party's motion for accelerated decision. Moreover, Region 5 admits in its Reply Brief regarding Region 5's Motion for

[13] See footnote 12.

[14] See footnote 12.

Accelerated Decision that an affidavit is an acceptable vehicle through which facts may be established to support a motion for accelerated decision. *See* Complainant's Reply 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, pp. 3-4, n. 2 (JAB Toledo) and p. 14, n. 10 (JAB Ohio), *citing Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985). Region 5 now seems to have changed its position and attempts to dismiss the facts established in the affidavits because it claims the facts must be further supported by documents. Appellant Brief, pp. 43-44. Notably, Region 5 does not provide any support for its supposition that the affidavits are invalid without attached documentary support.

The first problem with Region 5's unsupported challenge regarding the affidavits is that Region 5 did not preserve the issue for appeal. Instead of raising the issue or countering the facts established in the affidavits as required, *Galindo v. Precision American Corporation*, 754 F.2d 1212, 1216 (5th Cir. 1985), Region 5 filed an Objection to Motion for Accelerated Decision of Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC, which did not address the affidavits (or the merits of Respondents' motions) in any manner. As such, Region 5 may not now argue that JAB Company was obligated to support the facts set forth in the affidavits with additional documentation.[15]

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[15] Judge Moran seems to have generously considered Region 5's Reply Brief in support of its own Motion for Accelerated Decision as also a Response to JAB Company's Motion for Accelerated Decision. To the extent that Region 5 contested any of the facts set forth in the affidavits, JAB Company did not have a chance to reply as it would have had Region 5 properly responded to JAB Company's Motion for Accelerated Decision. Therefore, JAB Company did not have an opportunity to provide additional documentation if it were deemed necessary so that documentation would be part of this appeal record. If this Board allows Region 5 to now contest the facts set forth in the affidavits based on any statement in the Region 5's Reply, it will be rewarding Region 5 for its willful disregard of the briefing schedule established by Judge Moran for both sides' Motions for Accelerated Decision. The filing of the Objection rather than a Response was the first of many inexplicable actions taken by Region 5 that ultimately established a pattern of disregard and

Even if Region 5 had preserved the issue for appeal, JAB Company may indeed rest on the affidavits attached to its Motion for Accelerated Decision without providing any further proof of the facts established in the affidavits. *See Galindo v. Precision American Corporation, supra* at 1216. Affidavits may be used to establish the truth of the matter asserted therein as long as the affidavit does not contain conclusions of law or ultimate facts. *Id.* An "ultimate fact" is defined as "[a] fact essential to the claim or the defense." BLACK'S LAW DICTIONARY, 629 (8th ed. 2004). Moreover, after the moving party meets its burden using affidavits, the non-moving party must counter those affidavits "with opposing affidavits or other competent evidence setting forth specific facts to show that there is a genuine issue of material fact for trial." *Galindo*, 754 F.2d at 1216.

A review of the facts listed above demonstrates that there are no conclusions of law, nor ultimate facts, set forth in the affidavits attached to JAB Company's Motion for Accelerated Decision. The facts listed above are not conclusory or facts essential to any defense put forth by JAB Company; they are simply facts undercutting the veil piercing claims made by Region 5. Moreover, because Region 5 did not substantively respond to JAB Company's Motion for Accelerated Decision, and did not challenge these facts with documents or affidavits of its own, the facts established by the affidavits were uncontested.

b. Interrogatory Responses

In addition to affidavits, interrogatory responses are another accepted vehicle through which facts may be established to support a motion for an accelerated decision. *Martz*, 757 F.2d at 138; *see also* Complainant's Reply to Respondents John A. Biewer Company, Inc, and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative

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disrespect of the administrative process, Judge Moran, as well as the time and limited funds of the Respondents. JAB Company maintains that such actions should not be rewarded by this Board.