Liability, pp. 3-4, n. 2 (JAB Toledo) and p. 14, n. 10 (JAB Ohio). Region 5, however, does not properly consider the following facts established in the interrogatory responses:

1. JAB Toledo used a separate series of checks drawing from one bank account while still operating. After JAB Toledo closed, these checks were no longer used and JAB Company paid JAB Toledo's few ongoing expenses and charged JAB Toledo for the expenses through an intercompany payable. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 18.

2. While still operating, the internal financial statements of JAB Toledo were prepared separately by Gary Olmstead, the Chief Financial Officer of JAB Company, with the assistance of staff. JAB Toledo paid JAB Company a management fee for this service until JAB Toledo ceased operations. Plante & Moran prepared the audit records. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 20.

3. After JAB Toledo ceased operations, Brian Biewer was duly appointed to be the manager/director of JAB Toledo. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 16.

4. JAB Toledo sold the inventory it had on hand at the time it ceased operations to customers, or to other JAB Company subsidiaries at cost. Sales records for these sales no longer exist due to the fact that the sales occurred over 10 years before Region 5's discovery request. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 10.

Like the facts in the Affidavits, Region 5 did not contest any of the facts cited in the Responses to Region 5's Interrogatories. To the extent this Board determines any of the facts set forth in the Interrogatories were contested, because Judge Moran was addressing cross motions for accelerated decision and Region 5 had clearly stated it would not provide any additional evidence at trial, it was entirely appropriate for Judge Moran to accept the validity of these facts, just as this Board should. *See Tripp,* 189 F.2d at 200; *see also Wright et al., Federal Practice & Procedure,* § 2720 (1998); *In re BWX Tech., supra* at p. 69, n. 10.

c. Additional Documents

In addition to facts established through affidavits and interrogatory answers, JAB Company attached additional documents to its accelerated decision motion establishing the following facts:

1. The drip pad closure plan prepared in 2004 by the Mannik & Smith Group ("MSG") for the JAB Toledo facility was commissioned by Eckle Junction, Inc., which is simply the current name by which JAB Toledo is now known. *See* JAB Toledo Brief Supporting Motion for Accelerated Decision, Exhibits C, E; JAB Toledo Memorandum in Opposition, Exhibits E, F, G.

2. The drip pad closure plan prepared in 2005 by the Mannik & Smith Group ("MSG") for the JAB Ohio facility was commissioned by JAB Ohio. *See* JAB Ohio Brief Supporting Motion for Accelerated Decision, Exhibit E; JAB Ohio Memorandum in Opposition, Exhibit G.

3. Region 5 Did Not Produce Sufficient Evidence to Meet Its Burden of Proof With Respect to Its Motion for Accelerated Decision or JAB Company's Motion for Accelerated Decision.

Region 5 was required to demonstrate its *prima facie* case for the derivative liability of JAB Company through its Motion for Accelerated Decision. *See* Section I(A). In response to JAB Company's Motion for Accelerated Decision, Region 5 was also required to respond and demonstrate that it was either entitled to judgment as a matter of law or that there were disputed material facts by setting forth those specific contested facts through affidavits, documents, depositions, or answers to interrogatories. *See* Fed. R. Civ. P. 56(e)(2). The body of evidence produced by Region 5 is not sufficient to meet its burden in either situation, therefore Judge Moran properly denied Region 5's Motion for Accelerated Decision and properly granted JAB Company's Motion for Accelerated Decision.

With respect to JAB Company's Motion for Accelerated Decision, Region 5 did not substantively respond at all, thereby eliminating any possibility of establishing a disputed material fact. Even if this Board considers the evidence Region 5 set forth in its own Motion for Accelerated Decision as evidence in response to JAB Company's motion, Region 5's body of evidence falls woefully short of establishing a material fact dispute requiring a hearing. As demonstrated below, not only does the body of evidence in Region 5's Motion for Accelerated Decision fall short of establishing a disputed material fact requiring a hearing, it falls far short of establishing a *prima facie* case for the derivative liability of JAB Company.

Through its Region 5 Memorandum, Region 5 established the following facts: **(Finish by adding facts unique to JAB Toledo)**

1. JAB Company is the sole shareholder of JAB Toledo and JAB Ohio. Region 5 Memorandum, p. 11, Exhibit C at 5.

2. JAB Company owns other subsidiaries that treat wood products that used arsenic and chromium compounds at some point. Region 5 Memorandum, pp. 11-12, Exhibits A at 4, M at 3, O.

3. JAB Company's location is identified as the corporate headquarters. Region 5 Memorandum, pp. 11-12, Exhibit A at 5.

4. JAB Company and its subsidiaries both use the trademark "Biewer Lumber™" to generically refer to their business of producing treated wood products. Region 5 Memorandum, pp. 11-12, Exhibit A.

5. Statements on the website www.biewerlumber.com refer generically to the "Biewer family" of companies. Region 5 Memorandum, p. 12, n. 6, Exhibit A.

6. Richard Biewer, Brian Biewer, and Timothy Biewer serve on the Board of Directors for JAB Company, JAB Ohio, and JAB Toledo. Region 5 Memorandum, p. 11, Exhibit C at 5.

7. Richard Biewer, Brian Biewer, and Timothy Biewer each serve as President, Secretary/Treasurer, and Vice-President, respectively, for JAB Company, JAB Ohio, and JAB Toledo. Region 5 Memorandum, p. 11, Exhibit C at 5.

8. JAB Company and its several subsidiaries are involved in the production and marketing of treated wood. Region 5 Memorandum, p. 13, n. 8, Exhibit N.

9. JAB Company litigated a lawsuit against the State of Michigan in the late 1970's regarding the occurrence of soil and groundwater contamination after a chemical spill occurred in a facility located in Schoolcraft, Michigan. Region 5 Memorandum, pp. 20-21, Exhibit B.

10. When JAB Ohio and JAB Toledo ceased operations, each subsidiary sold the inventory it could not sell to customers to related companies at cost. JAB Ohio and JAB Toledo were credited with an asset in the form of an intercompany receivable. The intercompany receivable (asset) was then used to correspondingly pay down pre-existing intercompany payables (liability).[16] Region 5 Memorandum, pp. 16-18, Exhibit N.

11. JAB Ohio was insolvent by 2001 and remained insolvent thereafter. JAB Ohio Region 5 Memorandum, pp. 19-20, Exhibit N.

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[16] In other words, the net worth of JAB Ohio and JAB Toledo did not change. Their liabilities decreased by the same amount as their assets.

12. JAB Company uses "Biewer Lumber™" letterhead for its correspondence with the www.biewerlumber.com website identified on the letterhead. Region 5 Memorandum, pp. 24,26, Attachments K, S, T, and U.

13. Plante & Moran, LLP submitted consolidated financial reports under the "Biewer Lumber™" logo. Region 5 Memorandum, p. 24, Exhibit L.

14. There are no minutes, notes, or resolutions documenting activity on behalf of the board of directors of JAB Ohio and JAB Toledo after 1997 except for two documents that appoint Brian Biewer as manager of JAB Ohio and JAB Toledo after each ceased operations. Region 5 Memorandum, pp. 24-25.

15. The two resolutions appointing Brian Biewer as manager of JAB Ohio and JAB Toledo state that JAB Toledo ceased activities on December 1, 2000, instead of the correct date of 1997, and the JAB Toledo document misidentifies JAB Ohio as the subject matter of the document instead of JAB Toledo. Region 5 Memorandum, p. 25, n. 13.

16. Brian Biewer instructed the Ohio EPA to contact him regarding JAB Toledo or JAB Ohio at bbiewer@biewerlumber.com" or call him at his JAB Company phone number. Region 5 Memorandum, p. 26, Exhibits A at 5, D.

17. The same attorney represents JAB Company, JAB Ohio, and JAB Toledo in these matters. Region 5 Memorandum, p. 30.

18. JAB Toledo was insolvent by 1997 and remained insolvent thereafter. JAB Toledo Region 5 Memorandum, pp. 15-18.

While Region 5 does its best to put a nefarious spin on the above facts, it does not provide this Board with any case law indicating that these facts are sufficient to warrant veil piercing, or that they evidence anything more than a normal parent/subsidiary relationship where the subsidiary has failed and ceased operations. As Judge Moran noted in the Order on Cross Motions, Region 5's conclusions based on the above facts at times leads to some "head scratching." *In re JAB Ohio,* 2009 WL 3496294 at 11.

An examination of the above facts put forth by Region 5 as the only factual support for its piercing the corporate veil claim establishes only that JAB Company functioned as a normal parent would with its subsidiaries. All of the facts listed above are entirely consistent with the parent/subsidiary norms established in *Bestfoods*. For instance, *Bestfoods* establishes that proof of

ownership and control is not enough to pierce the corporate veil. 524 U.S. at 61-62, 60. Specifically, interlocking directors and the sharing of administrative costs is expected and normal as between a parent and subsidiary. *Id.* Moreover, all actions taken by dual officers are presumed to be taken on behalf of the subsidiary. *Id.* at 69-70.

The fact of the matter is that the set of facts listed above are wholly innocuous, especially when considered in context with the facts established by JAB Company. These facts do not establish a prima facie case for piercing the corporate veil of JAB Ohio or JAB Toledo, nor do these facts establish a question of material fact requiring a hearing. Judge Moran recognized Region 5's failures and appropriately granted JAB Company's Motion for Accelerated Decision and denied Region 5's Motion for Accelerated Decision.

E. Region 5's Piercing the Corporate Veil Analysis is Fundamentally Flawed.

There are several significant shortcomings in the way Region 5 has analyzed JAB Company's alleged liability under a veil-piercing theory. First, Region 5 erroneously assumes that the only relevant time period for examining the parent/subsidiary relationship is during the period following JAB Toledo's and JAB Ohio's cessation of operations, since the RCRA violation is for failure to properly close the facilities of JAB Ohio and JAB Toledo after operations ceased. Appellant's Brief, p. 28, n. 19. Second, Region 5 refuses to acknowledge that the veil piercing analysis is altered when the relationship is between a parent corporation and its *failed non-operating* subsidiary. Finally, Region 5 attempts to contest or question the already established fact that JAB Ohio and JAB Toledo ceased operations because the businesses failed as opposed to some other non-economic motive.

1. The Analysis Should Focus on the Pre-Closure Relationship Between JAB Company and JAB Ohio and JAB Toledo.

Region 5 does not allege or attempt to prove that JAB Ohio and JAB Toledo were not legitimate separate corporations at the time they were created or that JAB Company exerted any improper control over either subsidiary during the entire time that each was operational. *See In re JAB Ohio,* 2009 WL 3496294 at 4; JAB Ohio Region 5 Memorandum, pp. 6-7. Thus, the Board must accept as undisputed fact the conclusion that there is no basis whatsoever for piercing the subsidiaries' corporate veil based on pre-shutdown events and that the parent and subsidiaries behaved as normal parents and subsidiaries behave during that time. Instead, Region 5 claims that JAB Company controlled JAB Ohio and JAB Toledo after operations ceased, and erroneously focuses exclusively on the few events taking place after JAB Ohio and JAB Toledo ceased operations, had no ongoing business or employees and essentially were dormant companies which still owned the business real estate. *See* Appellant's Brief, pp. 28, n. 19, 45-48. Region 5 claims that this post-closure time period is the pertinent time period because that is when the act/violation of which it complains (failure to do necessary cleanup and closure activities) occurred. *Id.* at 28, n. 19, *citing United States v. Wallace,* 961 F. Supp. 969, 979 (N.D. Tex. 1996). Seemingly overlooked in this analysis is how and when the soils became contaminated in the first place, which gave rise to the need for closure cleanup activities. Region 5 also does not provide this Board with one case that supports Region 5's conclusion that the act or violation complained of on the part of the parent company can actually be the *failure* of the parent to financially rescue the failed subsidiary and take over its obligations.[17]

[17] At the very least, an examination of the pre-closure relationship between JAB Company and its subsidiaries is necessary because it provides important context to the post-closure relationship. Such an examination establishes that JAB Ohio and JAB Toledo were legitimately created corporations that independently and successfully operated for many years. These facts make

It goes without saying that soil contamination for which JAB Toledo and/or JAB Ohio were responsible for cleaning up occurred *during* their wood treating operation days, not after wood treating stopped. Indeed, that is precisely what Region 5 alleges in its Amended Complaint. *See* Amended Complaint, pp. 10-20. As noted above, during this entire "operational" time period (25 years, from 1976 to 2001, for JAB Ohio and 14 years, from 1983 to 1997, for JAB Toledo) Region 5 makes no attempt at all to argue or prove that JAB Company controlled or dominated either JAB Ohio or JAB Toledo such that there would be any basis to pierce the corporate veil. Yet that is the time period where the "act" of polluting occurred, if, as Region 5 speculates, there is soil contamination at both sites. Absent the contamination, there is no need for cleanup, and thus Region 5 should have been arguing, if it thought it had any factual support, that JAB Company and JAB Toledo or JAB Ohio were to be treated as one company during the time the contamination occurred. Of course, the facts as summarized earlier demonstrate that there is no factual support for such claim, even if Region 5 had attempted it. Moreover, there is no *act* done by JAB Company that is alleged as the basis for the RCRA violation.

Region 5's Amended Complaint alleges that RCRA was violated by JAB Company and the subsidiaries by (1) *failing* to remove contaminated soils around a drip pad after closure of its facility, and (2) *failing* to otherwise carry out the cleanup steps outlined in the MSG drip pad closure plan. Amended Complaint, pp. 21-28. Region 5 does not explain how JAB Company's *failure to act* (i.e. behaving as a corporate entity separate and distinct from its subsidiary) can be considered an *act* of which Region 5 complains to establish veil piercing (i.e. behaving in disregard of their separate corporate entities). JAB Toledo and JAB Ohio were, by Region 5's acknowledgment, *incapable* of performing the specified cleanup activities, and the only "act" JAB Company undertook was making

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clear that JAB Company's relationship was necessarily altered by the fact that JAB Ohio and JAB Toledo had ceased operations, as established in more detail below.

the decision *not* to financially rescue its subsidiaries or to operate the subsidiaries' facilities, a decision totally consistent with respecting the subsidiaries' separate corporate status and the very opposite of what would be required for veil piercing.

Because the "acts" which caused the need for cleanup occurred prior to the time JAB Ohio and JAB Toledo ceased operations, and because JAB Company's decision not to operate the subsidiaries' facilities cannot constitute an action that could support veil piercing, a veil-piercing argument should have focused on the operational time frame, not the post-operation time frame.

2. Any Analysis of the Post-Closure Relationship Between JAB Company and JAB Ohio or JAB Toledo Must Account for the Fact that JAB Ohio and JAB Toledo Were Not Operational.

Even if the veil piercing analysis were to focus on the post-closure period, Region 5 inexplicably expects the analysis to require a comparison of the "norms" established for a relationship between a parent and an *operating* subsidiary with the actual relationship between a parent and a subsidiary that is no longer operational. Appellant's Brief, pp. 38-48. Region 5 refuses to acknowledge the economic reality that an active, operating corporation will look and act differently than a corporation that has ceased all operations, necessarily altering the "norms" of a parent-subsidiary relationship.

Courts have held as a matter of law that the "complete domination" necessary to justify piercing the corporate veil of a wholly owned subsidiary does not exist where the parent corporation's alleged domination and control relates solely to the period after the subsidiary has ceased doing business. *See, e.g., Pfohl Brothers Landfill Site Steering Committee v. Allied Waste Systems, Inc.*, 255 F. Supp.2d 134, 178-183 (W.D.N.Y. 2003). In *Pfohl Brothers*, the plaintiff brought a CERCLA contribution action against GSX Polymers ("GSX") and against the successor in interest to GSX's parent corporation. The plaintiff claimed, *inter alia*, that the parent corporation, and therefore its successor in interest, was liable under a veil piercing theory for the environmental

contamination caused by the subsidiary GSX because: (1) the parent caused GSX to transfer all of its assets to the parent in the form of dividend distributions, such that GSX could not satisfy its CERCLA obligations, and (2) the parent otherwise exercised control over GSX by forcing GSX to discontinue business operations and through its actions in the period following cessation of GSX's business operations. *Id.* On the parties' cross motions for summary judgment, the district court held that that although the distribution of dividends was fraudulent as to the plaintiff, thus satisfying the second prong of the veil piercing analysis, the parent corporation did not "completely dominate" GSX in the manner required to disregard corporate separateness. *Id.* at 180.

The *Pfohl Brothers* case is on all fours with the case at bar with respect to the issue of domination and control,[18] thus warranting the following lengthy discussion. In *Pfohl Brothers* the Plaintiff brought an action to recover a portion of the costs that it voluntarily incurred in connection with the removal of various hazardous substances from a landfill located in the town of Cheektowaga, New York. *Id.* at 143. The contamination at issue was allegedly caused by a company called U.S. Rubber, which was later purchased and renamed by the purchasing company as GSX Polymers. *Id.* at 143-44. The purchasing company subsequently sold GSX to a company called Laidlaw. *Id.* at 144-45. After dissolving GSX, Laidlaw was purchased by the Defendant Allied Waste Systems, Inc. ("Allied"). *Id.* at 146. The Plaintiff alleged that Allied was liable as the successor in interest to Laidlaw because if Laidlaw had still been in existence, it would have been liable under a veil piercing theory for the environmental contamination caused by its subsidiary GSX. *Id.* at 178-79.

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[18] The *Pfohl Brothers* case is obviously distinguishable from the case at bar with respect to the second prong of the veil piercing test because whereas the parent, Laidlaw, caused its subsidiary to transfer all of its assets to Laidlaw in the form of a corporate dividend thereby reducing GSX's net worth, which was plainly fraudulent as to Laidlaw's creditors, JAB Company simply received repayment for a legitimate pre-existing intercompany debt to the parent company for past advances by the parent.

The pertinent facts as they relate to Laidlaw's and GSX's parent-subsidiary relationship are as follows. Laidlaw purchased GSX in 1986, at approximately the same time that New York's Department of Conservation ("DEC") was investigating whether GSX should be considered a potentially responsible party under CERCLA for purposes of the Cheektowaga landfill remediation. *Id.* at 144-45. The DEC contacted GSX in April 1986, and Laidlaw in February 1987, requesting information pertaining to operations at U.S. Rubber's Cheektowaga rubber plant. *Id.* Shortly thereafter, Laidlaw sold all of GSX's assets, and forced GSX to discontinue active business operations. *Id.* at 145. By October, 1987, "all of [GSX's] assets [had been] sold and no employees were retained or hired." *Id.* GSX's "remaining financial transactions and legal matters were handled by Laidlaw employees." *Id.* In 1989 and 1990, Laidlaw employees authorized two dividend distributions to be issued by GSX to Laidlaw in an amount that corresponded to the total amount remaining on GSX's books, which included the proceeds of the above-referenced asset sales. *Id.* Over the course of several years following the dividend distributions, Laidlaw went about the process of dissolving GSX. *Id.* at 145-46. In the meantime, however, Laidlaw failed to mention to the DEC that GSX's assets had been liquidated and distributed, or that GSX was being dissolved. *Id.* at 146.

Addressing the Plaintiff's veil piercing claim, the court framed the issue as whether the Plaintiff could pierce GSX's corporate veil to hold Allied, through its merger with Laidlaw, liable for the CERCLA contribution costs at issue. *Id.* at 178-79. The court explained that as a general matter, it is appropriate to grant summary disposition on a veil piercing claim where the record fails to establish the existence of a triable issue of fact as to whether the corporate veil should be pierced. *Id.* at 179. The court then recited the standard under New York law, which the court noted was

substantively similar to federal law, for piercing the corporate veil of a subsidiary to hold a parent corporation liable. *Id.* at 179-80. The court stated as follows:

> Courts are reluctant under New York law to disregard the corporate form distinguishing two affiliated corporate entities. *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club International, Inc.*, 2 F.3d 24, 26 (2d Cir.1993). Rather, New York law permits a court to pierce the corporate veil of one corporation to reach the assets of an affiliated corporation only where the plaintiff demonstrates both "(i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *American Fuel Corporation v. Utah Energy Development Company*, 122 F.3d 130, 134 (2d Cir.1997). "While complete domination of the corporation is the key to piercing the corporate veil, ... such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward [the party seeking piercing] is required." *Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157, 1161 (1993) (citing *Walkovszky v. Carlton*, 18 N.Y.2d 414, 276 N.Y.S.2d 585, 223 N.E.2d 6, 8 (1966); and *Guptill Holding Corp. v. State*, 33 A.D.2d 362, 307 N.Y.S.2d 970, 972-73 (1970), aff'd, 31 N.Y.2d 897, 340 N.Y.S.2d 638, 292 N.E.2d 782 (1972)).

Id.

Turning to the case under consideration, the court began by stating that the dividend distributions authorized by Laidlaw's employees were constructively fraudulent, and that the second prong of the veil piercing test was therefore satisfied "provided such fraud resulted from Laidlaw's complete domination over [GSX] with regard to the distributions." *Id.* at 180. Turning to the "complete domination" prong of the veil-piercing test, the court stated that "whether one corporate entity completely dominates a subsidiary corporate entity depends on several factors." *Id.* The court then ranked the several factors "in approximate descending order of importance" as follows: "(1) inadequate capitalization in light of the purposes for which the corporation was organized; (2) extensive or pervasive control by the shareholder or shareholders; (3) intermingling of the corporation's properties or accounts with those of its owner; (4) failure to observe corporate formalities and separateness; (5) siphoning of funds from the corporation; (6) absence of corporate records; and, (7) nonfunctioning officers or directors." *Id.*

Applying the above-stated factors, the court determined that the record presented no material issues of fact on the "complete domination" issue and that the balance of the factors considered in the veil-piercing analysis reinforced the magistrate judge's prior ruling against piercing GSX's corporate veil. *Id.* at 180, 183. Specifically, the Court stated that "the record does not support finding that Laidlaw so completely dominated [GSX] as to satisfy the first prong of the veil-piercing analysis and permit the court to pierce [GSX's] corporate veil, thereby holding Laidlaw liable for [GSX's] CERCLA liabilities and to thus hold Allied, as Laidlaw's successor in interest, ultimately liable." *Id.* at 180.

Addressing the first factor identified above, the court rejected the Plaintiff's contention that "[GSX's] inadequate capitalization [was] evidenced by Laidlaw's decision to transfer all of [GSX's] funds to Laidlaw in the form of dividend distributions which left [GSX] insolvent and unable to pay any CERCLA liability debt."[19] *Id.* at 181. The Court explained that "the inadequate capitalization factor pertains only to capitalization 'in light of the purposes for which the corporation was organized,'" and that since "[GSX] was not organized to conduct remediation of Superfund sites, it was not required to be capitalized for that purpose." *Id.* Moreover, the court also stated that "*as a corporation in the process of dissolution by definition does not expect to conduct further business operations, the need of capital, adequate or not, [was] irrelevant.*" *Id.* (emphasis added). Based on the foregoing, the court held that the Plaintiff had failed to sustain its burden of proof as to the first factor. *Id.*

Addressing the second factor, the court began by stating that "the second factor requires extensive or pervasive control of the corporation by the shareholder, especially with regard to the

[19] In the case of GSX, it appears that the subsidiary GSX was solvent until the dividend distribution to the parent Laidlaw, which rendered GSX insolvent. Here, both Region 5 and Respondents agree that JAB Toledo and JAB Ohio were already insolvent when their business operations ceased.

corporation's daily operations." *Id.* Applying that standard, the court found that the Plaintiff had presented "no evidence that Laidlaw exercised any control over [GSX's] daily operations." The court explained that "*given that [GSX] had no daily operations following the sale of its assets in 1987 and continuing through its corporate dissolution in 1992, this factor does not support piercing the corporate veil.*" *Id.* (emphasis added). Addressing the Plaintiff's arguments to the contrary, the court reasoned that rather than provide evidence of control over daily operations, as was required, "[the Plaintiff's] argument . . . [was] limited to Laidlaw's role in the sale of [GSX's] assets and the subsequent winding up of GSX business affairs." *Id.* To illustrate this point, the court quoted the Plaintiff's allegation that "for five years following the asset sale, [GSX] had no independent existence apart from Laidlaw, and Laidlaw continued this corporation to further Laidlaw's own purpose." *Id.*

With respect to the third factor, the court held that the fact that Laidlaw and GSX shared the same office address following the sale of GSX's assets was irrelevant for purposes of the veil piercing analysis. *Id.* at 181-82. The court stated that the only significant fact was that "while [GSX] was an *active* company, it always maintained separate office space, address and telephone number with its headquarters located in the Vicksburg plant." *Id.* at 181. The court reasoned that "*[the Plaintiff] point[ed] to no authority requiring that a wholly-owned subsidiary maintain an office physically separate from its parent while its only operations were for the purpose of winding down its business affairs.*" *Id.* at 182 (emphasis added). In support of this point, the Court explained that it was "[s]ignificant[]" that GSX "had no employees after its assets were sold." *Id.* Based on the foregoing, the court held that the third factor also weighed against veil-piercing. *Id.*

With respect to the fifth factor,[20] pertaining to the siphoning of funds by the parent, the court stated that there was "no evidence that [GSX] corporate funds were *routinely* transferred to Laidlaw." *Id.* (emphasis added). The court clearly determined that the focus on its inquiry regarding whether corporate funds had been siphoned should be on whether the practice was routine or not. *Id.* Given that the practice was not routine, the court promptly concluded that the fifth factor weighed against piercing the corporate veil. *Id.*

With respect to the seventh factor,[21] the court held that there was "no evidence that [GSX] had nonfunctioning officers or directors." *Id.* The court stated that "although the record indicate[d] that Laidlaw and [GSX] had substantially the same officers and directors, even a complete overlap of corporate directors does not require piercing the corporate veil." *Id.* at 183. The court further stated that even though some of the GSX officers, who were also Laidlaw officers, had little recollection of performing duties for GSX, this was to be expected because the officers "were elected to their respective [GSX] officer position[s] when little business remained in which they could be expected to participate." *Id.*

A court within the Sixth Circuit has also provided guidance for a piercing the corporate veil analysis where a subsidiary has ceased operations. *ITT Corporation v. Borgwarner Inc.*, 2009 WL 2242904 (W.D. Mich. July 22, 2009). In *ITT*, the plaintiff's allegations are nearly identical to those of Region 5. *See* 2009 WL 2242904 at *6. The plaintiff argued that the corporate veil between a parent and a subsidiary should be pierced where: (1) the subsidiary had no employees, business

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[20] The Court noted that even though there was evidence in the record establishing the fourth factor, a failure to observe corporate formalities and separateness, the fact that the Defendant's had "established this single factor [was] not dispositive of the veil-piercing issue."

[21] The Court's analysis with respect to the sixth factor was simply to state that the evidence established that GSX maintained complete books and records separate from Laidlaw, and that therefore the sixth factor weighed against piercing the corporate veil.

operations, or assets, and served as a holding company for the parent; (2) the subsidiary was undercapitalized; (3) the subsidiary did not observe corporate formalities; (4) the subsidiary was controlled and financed by its parent corporation; and (5) the parent was aware of the subsidiary's environmental obligations, but made no arrangements to address such liabilities. *Id.* A key factor in the court's analysis in *ITT* was that the subsidiary was no longer operational. *Id.* at *7. The *ITT* Court, in applying Michigan law that is virtually identical to Ohio law, noted that there was no legal authority for holding a parent liable for the subsidiary's environmental liabilities simply because the parent continued the corporate existence of the subsidiary with outstanding potential liabilities. *Id.* The court further explained that "[a] parent's mere control and ownership of a subsidiary corporation that lacks sufficient funds to meet its environmental obligations is not a sufficient basis for piercing the corporate veil." Indeed, a parent corporation is not legally required to "infuse money into a subsidiary corporation that cannot otherwise meet its financial obligations." *Id.* (emphasis added). As such, there is no legal implication for a parent who chooses or is unable to provide a constant flow of cash to cover all of a subsidiary's financial obligations.

In short, it is clear that a corporate veil piercing analysis is significantly altered where the parent is dealing with a subsidiary that is no longer operational. Judge Moran's recognition of the economic and practical realities of a parent dealing with a subsidiary that is insolvent and no longer operational is consistent with courts that have specifically addressed the issue. Region 5's analysis does not provide this Board with any case law contrary to the cases discussed above, and Region 5 instead chooses to ignore this issue entirely. As a result, the veil piercing analysis of Region 5 in the Appellant's Brief is fatally flawed and simply does not apply to the present case.

3. JAB Toledo and JAB Ohio Are Failed Businesses That Ceased Operations in 1997 and 2001, Respectively, Because they Failed Financially.

It is an uncontested fact that JAB Toledo and JAB Ohio ceased operations because each failed financially. While Region 5 seems to now find value in claiming that there is no evidence supporting the fact that JAB Ohio and JAB Toledo are failed corporations with liabilities that exceeded their assets, Region 5 did not raise that issue below, and indeed, argued exactly the opposite in its Motions for Accelerated Decision. For instance, with respect to JAB Toledo, Region 5 stated in its Reply Brief in Support of Motion for Accelerated Decision on Derivative Liability that "JAB Toledo's assets were below its liabilities in all years for which data are available, and the company was insolvent in all years between 1997 and 2007." (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 (Toledo), p. 6, n. 4). Similar statements were made by Region 5 concerning JAB Ohio, including its conclusion that "the company [JAB Ohio] was insolvent between 2001 and 2007. Being without assets, the company could not cover its obligations independent." (Memorandum in Support of Motion for Accelerated Decision on Liability (Ohio), p. 19).[22]; Respondents and Judge Moran agreed. *In re JAB Ohio,* 2009 WL 3496294 at 12.

When Region 5's admissions of insolvency are considered in context with the fact that JAB Ohio and JAB Toledo were operational for many, many years before closing their doors, (25 years for JAB Ohio and 14 years for JAB Toledo) there is only one reasonable conclusion — JAB Ohio and JAB Toledo ultimately ceased their operations because they failed financially. Region 5 has not provided *any* evidence that JAB Company forced JAB Ohio or JAB Toledo to cease operations to

[22] For a more detailed discussion of Region 5's factual arguments supporting the contention that both JAB Toledo and JAB Ohio were insolvent, see pp. 87-89, *infra.*

avoid environmental liabilities for which JAB Company would have been responsible or that JAB Company even made the decision to shut down JAB Toledo and JAB Ohio.[23] Moreover, Region 5 has not provided even one realistic reason that JAB Ohio or JAB Toledo would voluntarily terminate their operations if such operations were profitable. In this regard, it must be remembered that JAB Ohio and JAB Toledo did not receive notice of any violation from Region 5 or Ohio EPA until **2004** and **2002** respectively, years after each subsidiary ceased operations.

Furthermore, Region 5 did not preserve the issue of whether JAB Ohio and JAB Toledo closed their doors because of their insolvency for appeal. Region 5 produced evidence supporting this fact and there is absolutely no evidence on the record that suggests or would allow the reasonable inference that JAB Ohio and JAB Toledo ceased operating for any reason other than financial failure.

The analytical flaws of Region 5's arguments discussed above render Region 5's factual and legal conclusions irrelevant. Regardless of these analytical flaws, as shown below, Region 5 did not produce evidence to meet its respective burdens of persuasion and proof for either Motion for Accelerated Decision.

F. Region 5 Did Not Produce Sufficient Evidence to Establish The Elements Necessary to Pierce the Corporate Veil of JAB Ohio or JAB Toledo Under Ohio or Federal Common Law

1. JAB Company Did Not Dominate JAB Ohio or JAB Toledo So Completely That the Corporations Had no Separate Mind, Will, or Existence of Their Own

To establish the first prong of the Ohio and federal common law test, Region 5 must demonstrate that that JAB Company had "taken over the day-to-day operations" of JAB Ohio and

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[23] See discussion of *Bestfoods* at pp. 69-70 above where officers or directors are presumed to be acting for the subsidiary on matters pertinent to the subsidiary. Here, shutting down operations is surely one such type of action.

JAB Toledo." *Corrigan v. U.S. Steel Corp.*, 478 F.3d 718, 726 (6th Cir. 2007) (applying Ohio law). In order to ascertain whether the first prong of the *Belvedere* test has been met, Ohio courts examine whether the corporation is inadequately capitalized, whether the corporate formalities have been observed and corporate records have been kept, and whether corporate funds have been commingled with personal funds or corporate property was used for personal purposes. *Frechette v. Kavande,* 2001 WL 390069 (Ohio App. 2001); *Willoway Nurseries v. Curdes,* 1999 WL 820784 (Ohio App. 1999). *See also Barbee Concrete Const. V. Bachinski Builders, Inc.*, 1997 WL 723195 (Ohio App. 1997); *Waste Management, Inc. v. Danis Industries Corp.* 2004 WL 5345389, 14 (S.D. Ohio, 2004)

a. JAB Ohio and JAB Toledo Were Not Undercapitalized

As part of the control analysis, Ohio courts consider whether the corporation was inadequately capitalized. *Id.* Courts analyze the adequacy of capitalization at the inception of the corporation. 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations*, § 41.33 (2010) (citing cases); *Pharmacia Corporation v Motor Carrier Services Corp.*, 309 Fed. Appx. 666, 672 (3rd Cir. 2009); *see also State ex rel. Celebrezze v. Specialized Finishers, Inc.*, 62 Ohio Misc. 516, 604 N.E.2d 842 (1991); *Waste Management, Inc. v. Danis Industries Corp.*, *supra* at 17. The only other time the capitalization of corporations may be analyzed is if the corporation "substantially expands the size or nature of its business" such that the change brings a "substantial increase in business risks." *Fletcher*, *supra* (citing cases). It is well-established that a "corporation that was adequately capitalized when formed but subsequently suffers financial reverses is not undercapitalized." *Id.*, (citing multiple cases); *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 525 (9th Cir. 1984) (distinguishing, in *dicta,* the propriety of veil piercing when a subsidiary was undercapitalized at the outset from veil piercing when a subsidiary began with sufficient funds but subsequently fell upon hard times). Moreover, the *Pfohl* court determined that for a financially failed corporation that is no longer operating, adequacy

of capitalization is irrelevant, presumably since *all* failed companies are, by definition, undercapitalized. 255 F. Supp. 2d at 181.

Region 5 does not allege that JAB Ohio and JAB Toledo were inadequately capitalized at their inception and the fact that both operated for many years would belie such a claim, if it had been made. Instead, Region 5's argument is limited to an assertion that JAB Ohio and JAB Toledo were undercapitalized *after they had already failed financially and after closing operations*. Appellant's Brief, pp. 32-38. Since JAB Ohio and JAB Toledo did not expand the size or nature of their business when *closing* operations, the only appropriate time to analyze capitalization is at the inception of JAB Ohio and JAB Toledo.

Region 5 has implicitly acknowledged by its silence that JAB Ohio and JAB Toledo were adequately capitalized at inception and Region 5 did not even allege that either JAB Ohio's or JAB Toledo's business or business risks expanded when they shut down operations so as to possibly trigger a larger capitalization requirement. All pertinent case law unequivocally indicates JAB Ohio and JAB Toledo were not undercapitalized, as it is well-established that a corporation that has simply suffered financial trouble is not undercapitalized. Indeed, if the corporate veil could be pierced whenever a subsidiary corporation's business fails and the parent corporation decides not to bail out the subsidiary, the entire concept of limited shareholder liability would be a hoax and shareholders would be exposed to liability at the only time they need the corporate shield. The ultimate failure of JAB Ohio and JAB Toledo does not detract from the fact that the business ventures were successful for a significant period of time. Region 5's undercapitalization argument is completely without factual support.

(1) After Operations Ceased, JAB Ohio and JAB Toledo Exchanged Their Inventory on Hand for an Equivalent Reduction in Liabilities

Region 5's "siphoning" argument adds nothing to the undercapitalization discussion because the event occurred only after JAB Ohio and JAB Toledo were failed businesses and there is absolutely no evidence that there is any wrongdoing attached to the transfer of JAB Ohio and JAB Toledo inventory to related parties *in exchange for equivalent consideration.* Region 5 does not challenge the fact that the exchange of inventory for a reduction of pre-existing intracorporate liabilities was properly accounted for.[24] Nor does Region 5 contest that with each transfer of inventory to a related entity also came an equal reduction in JAB Ohio's or JAB Toledo's liabilities. Yet, Region 5 inexplicably still argues that there was some wrongdoing related to the sale of inventory to related parties deserving of piercing the corporate veil of JAB Ohio and JAB Toledo. The gist of Region 5's claim is that these transfers somehow prevented JAB Ohio and JAB Toledo from meeting its environmental obligations under RCRA. Region 5's argument, however, relies on several unproven and false assumptions.

Prior to the sale of the inventory, the major asset of JAB Ohio and JAB Toledo was inventory and the business real estate/structures. Region 5 asserts that the assets transferred were needed "to comply with RCRA decontamination requirements," but it has not provided an explanation of how JAB Ohio and JAB Toledo would have been able to do any more clean-up if they had kept the inventory than they were able to do post-transfer. Moreover, after the transfers, JAB Ohio and JAB Toledo possessed an asset of equal value to the inventory, just in the form of an intercompany

[24]Region 5 argues, without a shred of evidence, that the pre-closing intercorporate liabilities of JAB Ohio and JAB Toledo owed to JAB Company which were reduced dollar for dollar by the subsidiaries' sale of inventory *may* not have been legitimate debts. Here again, Region 5 tries to reverse *its* burden of proof by claiming that JAB Company should have produced evidence of the nature of the liability showing it was legitimate, without Region 5 producing *any* evidence even suggesting the contrary.

receivable, which was then used to pay down a pre-existing liability to their parent company. The transfers did not make JAB Ohio and JAB Toledo insolvent or deepen their existing insolvency. In fact, the transfers had no effect at all on their net worth because the transfer ultimately decreased their assets and liabilities by exactly the same amount.

Region 5's complaint regarding this issue boils down to its unrealistic insistence that JAB Ohio and JAB Toledo should have received cash for the transfers of their inventory, ignored their existing liabilities, and kept the money to pay for a future unquantified liability preferred by Region 5 resulting in other prior creditors remaining unpaid. Appellant's Brief, p. 34. Region 5 fails to allege, much less demonstrate, that any of the related entities had the ability to provide cash and that JAB Ohio and JAB Toledo chose not to receive said funds. Nor does Region 5 cite any authority indicating that a company which pays a pre-existing debt to its parent exposes itself to veil piercing because it did not instead favor EPA over earlier creditors.

Region 5's argument also inherently relies on the erroneous presumption that the transfers were made by JAB Company, instead of JAB Ohio and JAB Toledo. As established in *Bestfoods,* courts *must* presume that directors wear their "subsidiary hats" rather than their "parent hats" when they act in a matter pertaining to the subsidiary. 524 U.S. at 69. Region 5, however, appears to be raising the argument that Brian Biewer was acting for JAB Company alone with regards to the transfers described above; however, Region 5 did not even attempt to meet its burden and provide an explanation with evidence that the transfers were not desired by JAB Ohio or JAB Toledo or were contrary to the interest of JAB Ohio and JAB Toledo. This obvious omission is particularly telling in light of the undisputed fact that each of the subsidiaries received consideration of equal value to the asset transferred. As such, the presumption that Brian Biewer was acting on behalf of JAB Ohio

and JAB Toledo must stand, thereby preventing an assertion or implication that JAB Company caused or forced the transfer of JAB Ohio and JAB Toledo assets.

Yet another flaw in Region 5's argument is its reliance on the supposition that JAB Company "knew or should have known" at the time of the transfers that the inventory or accounts receivable would be needed to meet the subsidiaries' RCRA requirements. Appellant's Brief, p. 32. As demonstrated above, the transfers of inventory were made by JAB Ohio and JAB Toledo, so what JAB Company knew or didn't know is irrelevant. Moreover, this "knowledge" supposedly is the result of a lawsuit JAB Company defended over two decades earlier related to an entirely different subsidiary and involving *a chemical spill* occurring at that subsidiary's facilities. *See Atty. Gen. v. John A. Biewer Co., Inc.*, 363 N.W.2d 712, 714-715 (Mich. Ct. App. 1985).

Not surprisingly, Region 5 does not provide any case law support for its theory that these transfers indicate wrong-doing. While Region 5 obliquely cites a couple of cases, the facts are easily distinguishable, which may explain why the specific "siphoning" discussion did not contain case law support. For example, in *U.S. v. Union Corp.*, 259 F. Supp. 2d 356 (E.D. Pa. 2003), the pertinent transfers occurred four years *after* a lawsuit was initiated and the parent simply deposited funds in the parent's account without providing any consideration to its subsidiary. *Id.* at 387-390. Moreover, the court found the parent had systematically drained the subsidiary of cash by charging severely inflated "corporate charges." *Id.*

In addressing the "siphoning" charge in *Pfohl*, the court found that there was no "siphoning" where the parent transferred the proceeds of a subsidiary's asset sale to the parent in the form of two dividends. The court reasoned that there was no evidence that funds were routinely transferred to the parent. Here, there is even less significance to the transfers at question, as JAB Company did not receive any asset for which it did not give equal consideration, and Region 5 does not even allege,

much less demonstrate with evidence, that there were routine transfers from JAB Ohio and JAB Toledo to JAB Company.

(2) Region 5 Relies on Case Law that is Easily Distinguishable and Inapposite

Region 5 attempts to save its argument by analogizing the present facts with those in two cases where a court found a subsidiary was undercapitalized. *See* Appellant's Brief, p. 31, *citing AT&T Global Information Solutions v. Union Tank Car Company,* 29 F. Supp. 2d 857, 860 (S.D. Ohio 1998), *Pharmacia Corporation v. Motor Carrier Services Corporation*, 309 Fed. Appx. 666 (3d Cir. 2009) (unpublished). Unfortunately, these cases are easily distinguished from the present facts. In *AT & T*, the Ohio EPA introduced *evidence* in the form of depositions and corporate documents that demonstrated the following: (1) the subsidiary had minimally adequate capital; (2) the parent and subsidiary commingled funds; (3) the parent paid employee benefits and other expenses and losses of the subsidiary while the subsidiary was in operation; (4) the parent's employees "effectuated" the liquidation of the subsidiary; and (5) the parent received all of the funds from the subsidiary after liquidation. 29 F. Supp. 2d at 866-867. Region 5 produced no evidence of any of the above. Just because Region 5 makes some of the same allegations that the Ohio EPA *actually proved* does not make the present case analogous with *AT & T*.

First and foremost, as already established, Region 5 has not presented any evidence disputing the presumption that *JAB Ohio* and *JAB Toledo*, rather than JAB Company acted to cease their operations. Moreover, unlike the parent in *AT & T*, JAB Company did not receive a gratuitous transfer of cash. The transfers Region 5 questioned did not affect the net worth or ability of JAB Ohio or JAB Toledo to perform clean-up activities. Each subsidiary was insolvent before the transfers and remained equally insolvent afterward. Therefore, the *AT & T* court's decision has no

bearing on the present case because the court was dealing with an entirely different set of *supported* facts.

Like *AT & T*, *Pharmacia* is also easily distinguished. As established above, undercapitalization is examined at the inception of a corporation, unless the corporation changes the nature of, or significantly expands the magnitude of its business. In *Pharmacia*, the parent purchased the subsidiary and immediately "significantly" changed the nature of the subsidiary's business. 309 Fed. Appx. at 672. Prior to the purchase, the subsidiary was receiving annual revenues of over $1,000,000 from leases of its facilities to third parties, and after the purchase, the subsidiary stopped leasing the facilities so the parent could use the facility rent-free. *Id.* Moreover, four years before the parent bought the subsidiary, the subsidiary had acknowledged that it had some environmental clean-up liabilities. *Id.* at 668. Therefore, the *Pharmacia* court analyzed the capitalization of the subsidiary at the time the nature of the subsidiary's business changed and determined that it was purposefully undercapitalized by the parent's decision to stop leasing the facility given the known environmental liabilities at the time of purchase. *Id.* at 672-673.

Region 5's arguments regarding undercapitalization and "siphoning" are plainly contrary to case law and reason. Region 5 has provided no evidence to support its conclusions and the above examination of the only cases on which Region 5 relies demonstrates that neither case provides support for Region 5's "legal" arguments. Judge Moran appropriately considered the case law and facts associated with the transfers and necessarily concluded, as this Board should, that JAB Company did not "siphon" assets from its subsidiaries and neither JAB Ohio nor JAB Toledo were undercapitalized.

b. JAB Ohio and JAB Toledo Functioned As Normal Corporations Would After Shutting Down Operations

Yet again, Region 5 provides this Board with an argument that is fundamentally flawed. Region 5 does not allege that JAB Company controlled JAB Ohio and JAB Toledo prior to each subsidiary ceasing operations and plainly, such was not the case as shown by the uncontroverted affidavits. Region 5 essentially argues that JAB Company *must have* controlled JAB Ohio and JAB Toledo after each closed operations because there is no evidence that either subsidiary maintained corporate formalities after ceasing operations or that JAB Company maintained an arm's-length relationship with either subsidiary. Appellant's Brief, pp. 38-44. JAB Company has already thoroughly discussed the primary flaws in Region 5's argument, which are Region 5's refusal to acknowledge the significance of the pre-closure relationship between JAB Company and JAB Ohio and JAB Toledo, and Region 5's refusal to acknowledge that the piercing the corporate veil standards are altered when addressing a parent's interaction with a subsidiary that is no longer in business. In addition to those flaws, Region 5's argument is dependent on ignoring relevant uncontested evidence and an undeserved amount of significance placed on the absence of certain documents.

(1) There is Evidence in the Record that JAB Ohio and JAB Toledo Observed Corporate Formalities, Even Post-Closure

Region 5's argument that there is no evidence in the record that JAB Ohio and JAB Toledo observed corporate formalities is utterly false. Region 5 focuses entirely on the fact that JAB Ohio and JAB Toledo did not produce evidence of regular formal director's meetings after JAB Ohio and JAB Toledo ceased operations.[25] Appellant's Brief, p. 39. Region 5 conveniently ignores the fact

[25] Region 5 makes much of the errors contained in the consent resolutions appointing Brian Biewer manager of JAB Ohio and JAB Toledo after each ceased operations. Contrary to the claims of Region 5, JAB Company acknowledged that there were errors in the consent forms in its

there is evidence of other corporate formalities, such as the maintenance of corporate books, the maintenance of tax records, and the maintenance of financial statements during the post-closure period. *See* Section I(D)(2) and (3). Moreover, courts have determined that the lack of formal director's meeting where there is one shareholder and three directors is not dispositive, as informal meetings in such situations are common. *Mancorp, Inc. v. Culpepper,* 781 S.W.2d 618, 622 (Tex.App.Ct. 1989).

Region 5's implicit argument that a business that has shut down its operations must continue functioning as if it were operating in order to retain its legal status is simply not realistic. Since there were no day-to-day operations or decisions to be made, it is not clear that the Board of Directors should have met and what they should have discussed, or what JAB Ohio and JAB Toledo should have looked like in Region 5's version of corporate law. JAB Ohio and JAB Toledo continued to maintain their corporate books in the same manner as they always did, as evidenced by the hundreds of pages of ledgers produced to Region 5. *See* JAB Toledo Region 5 Memorandum, p. 26, Exhibit BB, CC; JAB Ohio Region 5 Memorandum, Exhibit BB, CC. Each corporation continued to generate financial statements, as produced to Region 5. *See* JAB Toledo Region 5 Memorandum, Exhibit N; JAB Ohio Region 5 Memorandum, Exhibit N. Each corporation continued to file tax returns, as produced to Region 5. *See* JAB Toledo Region 5 Memorandum, Exhibit N; JAB Ohio Region 5 Memorandum, Exhibit N. It is disingenuous, at best, for Region 5 to state that "[t]here is a complete absence of documentary evidence demonstrating that JAB Ohio and JAB Toledo observed basic corporate formalities." Appellant's Brief, p. 38.

Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability (Toledo). See p. 3, n. 2. The errors in the documents are unfortunate, but do not take away from the fact that it is undisputed that Brian Biewer was appointed Manager of JAB Ohio and JAB Toledo. As such, no further explanation was or is necessary.

(2) The Evidence on Record Supports an Arm's-Length Relationship Between JAB Company and JAB Ohio and JAB Toledo

The evidence on record demonstrates that Brian Biewer was the only individual acting on behalf of JAB Ohio and JAB Toledo following their cessation of operations. *See* Section I(D)(2) and (3). This evidence is consistent with the resolutions produced to Region 5 appointing Brian Biewer as manager of JAB Ohio and JAB Toledo after their shut down. JAB Ohio Region 5 Memorandum, Exhibits A, ZZ; JAB Toledo Region 5 Memorandum, Exhibits A, ZZ. While the documents unfortunately contain several clerical errors, the substantive intent of the resolutions is clear. Brian Biewer was the manager of JAB Ohio and JAB Toledo, and also remained the Secretary/Treasurer. Region 5 offered no evidence tending to show that the actions he took were contrary to the interests of the two non-operational companies. Therefore, this Board must conclude that Brian Biewer was acting on behalf of JAB Ohio and JAB Toledo. *Bestfoods*, 524 U.S. at 70, n.13.

(3) Region 5 Places an Unwarranted Amount of Significance Upon the Documents it Claims JAB Company was Obligated to, but did not Produce.

Without providing this Board the context in which the "lack of documents" must be placed, Region 5 erroneously applies negative inferences to several categories of information. First, Region 5 suggests that the lack of documents regarding the advances from JAB Company to JAB Ohio and JAB Toledo requires a conclusion that JAB Company did not maintain an arm's-length relationship with its subsidiaries. Appellant's Brief, pp. 41-42. This conclusion is erroneous for several reasons. JAB Company has clearly characterized the transfers to its subsidiaries as being "in the nature of a loan." *See In re JAB Ohio,* 2009 WL 3496294 at 17-18, n. 40. The transfers to JAB Ohio and JAB Toledo were simply advances provided by JAB Company and were duly recorded as such on the books of both companies. *See* Section I(D)(2). It is consistent with a normal parent-subsidiary relationship for a parent to provide a subsidiary with funds when necessary and that fact certainly

doesn't render the subsidiary incapable of acting on its own behalf. *See Schiavone v. Pearce*, 77 F.Supp.2d 291-92 (D.Conn. 1999); *see also United States v. Friedland*, 173 F.Supp.2d 1077, 1097 (D. Colo. 2001). It is well established that absent evidence of "an improper purpose, financial assistance provided to a subsidiary by a parent does not support piercing the corporate veil." *Friedland*, 173 F.Supp.2d at 1097.

Since all advances were duly recorded, the hundreds of pages of ledgers produced to Region 5 evidence the legitimacy of the transfers. Moreover, the vast majority of advances from related parties that eventually amounted to the intercompany accounts payable on record at the time each subsidiary closed obviously occurred well before the company ceased operations. Notably, Region 5 did not request any documents related to third-party transactions occurring prior to the closure of JAB Ohio or JAB Toledo, so it would be no surprise that it had no documentation of the advances. *See* Memorandum in Support of Complainant's Motion for Discovery, Attachment A. Region 5 may not craft inadequate document requests and then assign significance to the fact that it did not receive that which was never requested. Moreover, Region 5's complaints regarding lack of documentation imply that JAB Company had the burden to demonstrate the legitimacy of the advances, but Region 5 is the only party with the burden of proof relating to that issue. Region 5 does not point to any evidence in the record that would indicate that the advances were not legitimate, and instead attempts to muddle the issue by assigning false significance to what it claims is lack of documentation.[26]

Region 5 also cites as improper the fact that JAB Company did not produce documentation of the cash management system utilized by itself and its subsidiaries. Appellant's Brief, p. 42. Such a

[26] Perhaps more importantly, as already established above, Region 5 did not raise this issue below, so a challenge now to the legitimacy of these loans or advances should not be allowed. If Region 5 had challenged the legitimacy of the loans, JAB Company would have had a chance to provide additional documentation if necessary.

complaint certainly implies that Region 5 requested such information, but alas, no such request was ever made. *See* Memorandum in Support of Complainant's Motion for Discovery, Attachment A JAB Company established the use and general description of the cash management system through Interrogatory answers and uncontested affidavits. *See* Section I(G)(3) and Section I(G)(4). Region 5 acknowledges the facts set forth in the various affidavits and in the records, but posits without case law support that the affidavits must be supported with further documentary evidence. As already thoroughly discussed above, Region 5's arguments are baseless and yet another attempt to improperly shift the burden of presentation and persuasion to JAB Company in order to divert attention from its own lack of evidence.

c. The Cash Management System Used by JAB Company and its Subsidiaries did not Commingle Funds and is Consistent with an Arm's Length Relationship

The uncontested facts demonstrate that the cash management system used by JAB Company and its subsidiaries allowed JAB Ohio and JAB Toledo to have complete control of their own finances through their own separate series of checks with which to pay their obligations and to have the ability to deposit funds into the central account where each deposit was duly recorded and accounted for as a corresponding credit for the subsidiary making the deposit.[27] *See* Section I(D)(2)(a). Even after JAB Ohio and JAB Toledo discontinued active operations, the infrequent payments made by JAB Company on JAB Ohio's and JAB Toledo's behalf were accounted for as an Intercompany Payables. *Id.* JAB Company and its subsidiaries are required by the IRS to file a consolidated tax return and the use of a cash management system facilitates the record-keeping for the consolidated tax return. As such, there is nothing unusual or suspicious about JAB Company using a centralized cash management system, like the system described above, whereby its

[27] Region 5's argument regarding the cash management system seems to be the one pre-closure activity that Region 5 thinks is pertinent to a piercing the corporate veil analysis.

subsidiaries deposit their revenues into a centralized account. *See United States v. Bliss*, 108 F.R.D. 127, 132 (E.D.Mo. 1985) ("cash management system indicative of the usual parent-subsidiary relationship").

It is well-established that courts do not find the use of the type of cash management system described above as evidence supporting the piercing of a corporate veil. *Fletcher v. Atex Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995); *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec,* 529 F.3d 371, 380 (7th Cir. 2008) ("use of a cash management system alone is not evidence that funds were being improperly comingled"); *The Mall at IV Group Properties, LLC v. Roberts,* 2005 WL 3338369, at *6 (D. N.J. Dec. 8, 2005) (a cash management system is not indicative that a corporate veil should be pierced "if accurate books were kept for each individual club"); *Joiner v. Ryder Sys. Inc.,* 966 F.Supp. 1478, 1486 (C.D. Ill. 1996) (holding that the fact that parent required subsidiaries to pay a fee for centralized cash management services and allowed subsidiaries to obtain the services from another source *support parent's argument that it was not the alter ego of any of its subsidiaries*); *In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution,* 675 F.Supp. 22, 23 (D.Mass.1987) ("without 'considerably more' 'a centralized cash management system . . . where the accounting records always reflect the indebtedness of one entity to another, is not the equivalent of intermingling funds and is insufficient to justify disregarding the corporate form."); *Japan Petroleum Co. (Nigeria) v. Ashland Oil Inc.*, 456 F. Supp. 831, 846 (D. Del. 1978) ("finding segregation of subsidiaries accounts within parent's cash management system to be a function of administrative convenience and economy, rather than a manifestation of control").

In *Fletcher*, the court rejected the plaintiff's argument that a parent's centralized cash management system demonstrated that the parent had dominated one of its subsidiaries. *Fletcher*, 68 F.3d at 1459. Under the parent's centralized cash management system, the parent's domestic

subsidiaries maintained zero-balance bank accounts. *Id.* All funds transferred from the subsidiaries' accounts were recorded as credits to the subsidiaries. *Id.* When the subsidiaries needed funds a transfer was made. *Id.* At all times a strict accounting was kept of the subsidiaries' funds. *Id.* The *Fletcher* court upheld the district court's ruling that the subsidiary's "participation in the [parent's] cash management system was consistent with sound business practice and [did] not show undue domination or control." *Id.*

In this case, JAB Company used a cash management system that closely resembles that used by the parent in *Fletcher*. Like the system used in *Fletcher*, JAB Company's system requires that all subsidiary deposits go directly into a centralized account. Respondents' Supplemental Responses to EPA's Discovery Requests dated April 28, 2009, ¶ 18. Also, like the system used in *Fletcher*, JAB Company's system allows for subsidiaries to access their deposits when needed. *Id.* Under the system used in *Fletcher* this was accomplished by an account transfer; whereas, in this case, JAB Ohio and JAB Toledo were able to access their funds by using their corporate checkbooks. *Id.* It seems that JAB Company's system, if anything, offers significantly more autonomy to its subsidiaries than did the system in *Fletcher* because JAB Company's subsidiaries did not need to rely on JAB Company to transfer funds from its account; they could simply access their funds with their corporate checkbooks.

Region 5 attempts to muddle this widely recognized norm by citing a case where the defendant challenged a discovery request requesting information regarding the way the defendant's cash management system operated as irrelevant and a case that didn't even address a cash management system. Appellant's Brief, p. 44, *citing Wells Fargo Bank, N.A. v. Konover*, 2009 WL 585430, *9 (D.Conn., March 4, 2009) and *Ypsilanti Community Utilities Authority v. Meadwestvaco Air Systems, LLC*, 678 F. Supp. 2d 553, 574 (E.D.Mich. 2009). The *Konover* court addressed the

Fletcher case and other similar case law and did not disagree with these courts' conclusion that the defendant's use of the particular cash management system was not evidence supporting piercing the corporate veil. The court simply noted that these other courts obviously considered evidence of a common cash management system and found it relevant to the piercing the corporate veil claim. 2009 WL 585430 at *10. Moreover, the *Ypsilanti* court did not even address the *Fletcher* courts findings regarding a cash management system. *See generally* 678 F. Supp. 2d 553. Region 5 inexplicably attempts to distinguish *Fletcher* through *Ypsilanti*, then use *Ypsilanti* as support for Region 5's claims without any discussion at all of the facts in *Ypsilanti*. Ironically, the *Ypsilanti* court noted that "[a]s the court recognized in *Fletcher,* veil piercing claims are highly fact intensive and the question of domination is generally one of fact." 678 F. Supp. 2d at 574.

JAB Company has never made the argument that its use of a cash management system is irrelevant, but instead argues that a cash management system is not the equivalent of commingling funds as Region 5 suggests. Rather, it is a sound business practice that is widely used and consistent with an arm's length parent/subsidiary relationship. Judge Moran's finding that the cash management system used by JAB Company and its subsidiaries preserved the "financial division of transactions between the corporations" and did not weigh in favor of piercing the corporate veil of JAB Ohio or JAB Toledo was appropriate and consistent with all relevant case law. *See In re JAB Ohio,* 2009 WL 3496294 at 14. Region 5's discussion of *Konover* and *Ypsilanti* provide nothing to contradict JAB Company's argument or the case law supporting that argument.[28] Therefore, this

[28] It is interesting that Region 5 opts to summarize the cases cited by the *Konover* court with the phrase "citing cases." Appellant's Brief, p. 44. While Region 5 cherry-picks a quote from the *Acushnet* court, an examination of the cases cited by the *Konover* court (included in the string cite above) reveals that the cases all support the very point made by JAB Company, which is that the type of cash management system used in the present case supports *maintaining* the corporate veil of JAB Ohio and JAB Toledo.

Board should find, as did Judge Moran, that the cash management system used by JAB Company and its subsidiaries is not commingling of funds and is consistent with an arm's-length relationship.

d. JAB Company did not Exhibit *Pervasive* Pre-Closure or Post-Closure Control Over JAB Ohio or JAB Toledo

The facts cited by Region 5 as demonstrative of JAB Company's pervasive control over JAB Ohio and JAB Toledo fall far short of meeting the standards set forth in Ohio and federal law. In order to fulfill the first prong under Ohio or federal law, Region 5 must demonstrate that the control exerted was so pervasive and complete that JAB Ohio and JAB Toledo had no independent will. *In re JAB Ohio,* 2009 WL 3496294 at 5. It is not enough for Region 5 to demonstrate that JAB Company exhibited "some" control over JAB Ohio and JAB Toledo, as is fully expected by a normal parent over its wholly owned subsidiary. *Bestfoods* at 61-62. The control must be pervasive and must be over the day-to-day operations of JAB Ohio and JAB Toledo. *Corrigan*, 478 F.3d at 726. Ohio and federal law permit a parent corporation to own all of the stock of its subsidiaries, as well as employ common officers and directors and other personnel, without risking the destruction of the corporate veil. *See, e.g., Univ. Circle Research Ctr. Corp. v. Galbreath Co.* (1995), 106 Ohio App. 3d 835.

Region 5 does not even allege or attempt to prove that JAB Company pervasively controlled JAB Ohio's and JAB Toledo's pre-closure activities, only the post-closure activities. To the extent that the post-closure time frame is considered, the support for Region 5's claim appears to be limited to the fact that JAB Company advanced JAB Ohio and JAB Toledo the funds to pay their environmental consultant for the preparation of the Drip Pad Closure Activity Plans and correspondingly debited each subsidiary for such amounts, and the fact that JAB Company similarly advanced payments for other expenses, such as property taxes. Appellant's Brief, pp. 46-47.

Region 5's allegations are not sufficient to establish the pervasive control necessary to pierce the corporate veil. Piercing the corporate veil is not supported where a parent corporation advances funds for certain expenses to a subsidiary *and* the parent documents and accounts for any expenses paid on behalf of the subsidiary, as the fact that a parent company provides a subsidiary with capital in times of need is consistent with the parent corporation's protection of its investment. *See Id.* at 292; *Friedland,* 173 F.Supp.2d at 1091-1092; *Schiavone*, 77 F. Supp. 2d at 291-292. Moreover, where the subsidiary is no longer operational, the *Pfohl* court made clear that it is not enough for a plaintiff to demonstrate control over the sale of the subsidiary's assets and the subsequent winding up of the subsidiary's business affairs. *Id.*

Region 5 concludes, without case law support, that the fact JAB Company provided funds to JAB Ohio and JAB Toledo and debited those amounts accordingly demonstrates that JAB Company "exercised complete control over JAB Ohio's and JAB Toledo's finances after their closures." The first problem with Region 5's conclusion is that Region 5 doesn't even claim to have demonstrated pervasive control over the day-to-day activities of JAB Ohio and JAB Toledo. To the contrary, Region 5 seems to have acknowledged that all other activities occurring were controlled by JAB Ohio and JAB Toledo.[29]

The second flaw in Region 5's conclusion is the fact that JAB Company's payment for some subsidiary expenses which were debited from JAB Ohio's and JAB Toledo's account is demonstrative only of a normal managerial relationship between a parent and a subsidiary. *See*

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[29] While JAB Ohio and JAB Toledo had ceased operations, there were still some activities occurring. Region 5 certainly does not allege or provide evidence that other activities were not occurring, nor does Region 5 address who controlled any of these other activities, such as renting the facilities, maintenance and upkeep of the facilities, or communications with the Ohio EPA and MSG regarding required closure activities. JAB Company has already established above that Region 5 has not produced evidence to overcome the presumption that all actions taken by Brian Biewer were taken on behalf of JAB Ohio and JAB Toledo.

Transition Healthcare Associates, Inc., v *Tri-State Health Investors, LLC*, 306 Fed. Appx. 273, 280 (6th Cir. 2009); *see also Wilson* v *Superior Foundations, Inc.*, No. CA2007-03-043, 2008 WL 757525, at *3 (Ohio App. Mar. 24, 2008). Region 5's argument that JAB Company's "decision" not to pay for and perform closure activities for JAB Ohio and JAB Toledo was contrary to the subsidiaries' interest is nothing more than a repeat of its overall theme that anything short of the parent's financial bailout of the failed subsidiary is evidence compelling veil piercing. JAB Toledo and JAB Ohio were insolvent and out of business at the time Region 5 claims JAB Company should have fully paid for the subsidiaries' environmental obligations, and they would have remained insolvent and out of business even had JAB Company done as Region 5 assets was required. Either way, they remain insolvent, merely trading one liability (Ohio EPA) for another equal liability (debt to parent company). JAB Company's decision not to pump even more money into the failed businesses neither hurt nor benefitted JAB Toledo's or JAB Ohio's balance sheets. If such decision were a basis for piercing the corporate veil, the parent of every insolvent subsidiary unable to pay for its environmental liabilities would automatically be on the hook and the concept of limited corporate liability would evaporate.

e. Under Ohio and Federal Law, Control Alone is Insufficient to Pierce the Corporate Veil

Region 5's claim that demonstration of a parent corporation's control over its subsidiary is sufficient to pierce that subsidiary's corporate veil is utterly false. Under every version of state or federal law of which JAB Company is aware, there are at least two prongs: the first addressing the control of a parent over a subsidiary and the second addressing the use of that control to accomplish a fraud, illegal act, etc. A plaintiff is required to demonstrate each prong before a court will pierce a corporate veil. Indeed, the *Belvedere* court addressed this issue head on and found that "mere control over a corporation is not in itself a sufficient basis for shareholder liability. 671 N.E.2d at

1086-1087; *see also LeRoux's Billyle Supper Club v. MA*, 77 Ohio App.3d 417, 425; 602 N.E.2d 685, 690 (Ohio App. Ct. 1991); *Transition Healthcare*, 306 Fed.Appx. at 282.

Region 5 cites a Sixth Circuit case applying Ohio law as support for its claim that control alone is sufficient to justify piercing the corporate veil. Appellant's Brief, pp. 45-46, citing *Carter Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 749 (6th Cir. 2001). Region 5's reliance is wholly misplaced. In *Carter Jones*, the Sixth Circuit clearly stated that it was considering whether, "mere control of a corporation may be sufficient to satisfy ***the first prong*** of *Belvedere*." *Id.* at 750 (emphasis added). Moreover, the case that Region 5 claims is applying "federal" law is actually determining whether the court can exercise jurisdiction over the parent corporation of a local subsidiary, not whether the court should pierce the subsidiary's corporate veil. *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (Puerto Rico Cir. 1980)(cited at p. 45 of Appellant's Brief). Therefore, the court's analysis was limited to a control analysis, not because the court found that that is the only thing necessary to pierce a corporate veil, but because, unlike a veil piercing analysis, the jurisdiction analysis only required proof of control.[30] *Id.*

It is incredible to JAB Company that Region 5 relies on the above two cases as support for its supposition that Judge Moran erroneously "believed that control alone is insufficient to justify piercing the corporate veil." Judge Moran was absolutely correct in his belief. Nevertheless, as demonstrated above, the evidence produced by Region 5 falls far short of meeting its burden of proof regarding prong one of the piercing the corporate veil analysis, under Ohio or federal common law.

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[30] Region 5 also did not accurately quote the *Escude Cruz* case, which in fact stated that "[t]here is a presumption of corporate separateness that *must* be overcome by clear evidence that the parent in fact controls the activities of the subsidiary." 619 F.2d at 905 *(emphasis added).*

2. Even If This Court Were to Conclude that the First *Belvedere* Prong Could Be Met, Complainant Has Not Demonstrated That JAB Company Used Its Control to Commit Fraud, an Illegal Act, or Similarly Unlawful Acts .

a. Ohio Common Law

Region 5 has not demonstrated that JAB Company exercised control over JAB Ohio and JAB Toledo to commit fraud, an illegal act, or a similarly unlawful act. *See Dombroski v. WellPoint, Inc.* 119 Ohio St.3d 506, 895 N.E.2d 538, 544-545 (Ohio 2008). Region 5 claims it is necessary to find an Ohio case that has applied *Dombroski*, however, Region 5 need look no further than *Dombroski* itself for appropriate guidance. *See* Appellant's Brief, pp.50-51. While *Dombroski* clarified that the second prong of *Belvedere* encompassed more than fraud and illegal acts, the court cautioned that the corporate veil should be pierced "only in instances of extreme...misconduct" where complete control was used to commit "specific egregious acts." 895 N.E. 2d at 544. Moreover, as discussed in detail in Section I(D) above, the *Dombroski* court made it clear that the second prong of *Belvedere* did *not* include "unjust or inequitable conduct." *Id.*

In *ITT*, the court addressed claims very similar to those made by Region 5, albeit applying Michigan law, which requires control to be used "to commit a wrong or fraud." 2009 WL 2242904 at *6. The plaintiff in *ITT* alleged that the parent corporation used its control to commit a wrong or fraud where the undisputed facts demonstrate that the parent maintained a subsidiary in its post-operational status and did not provide the subsidiary with funds to meet its environmental liabilities. *Id.* at *7. The plaintiff argued, as Region 5 does here, that the parent used the subsidiary as a "shell" company to shield the parent from environmental liabilities. *Id.* at *7. The *ITT* Court disagreed and found that no wrong was committed, as there is no legal duty that requires a parent to discontinue the corporate existence of a non-operational subsidiary with outstanding potential liabilities, environmental or otherwise, nor to infuse cash into a failed subsidiary. *Id.*

Like the plaintiff in *ITT*, the gravamen of Region 5's argument is that JAB Company's failure to pay for JAB Ohio and JAB Toledo's closure costs under RCRA should be considered "extreme misconduct" and an "egregious," "unlawful act." Appellant's Brief, pp. 49-52. It is an undisputed fact that the reason JAB Ohio and JAB Toledo could not follow through with closure plans under RCRA is because both were failed businesses that simply lacked the cash assets to perform the closure obligations. JAB Company did not cause the inability of JAB Ohio and JAB Toledo to pay. All that Region 5 alleges is that JAB Company did not bail out its failed subsidiary.

As demonstrated in *ITT*, a parent's choice not to bail out a failed subsidiary is not even wrongful conduct, much less the type of "egregious," "extreme misconduct" required under *Dombroski*. *See* 2009 WL 2242904 at *7. *See also LeRoux's,* 602 N.E.2d 685, 689 (1991) (a pre-*Dombroski* case holding that "liability cannot be imposed upon a shareholder simply because he invests in an unsuccessful venture...[E]ven though [the creditor's] inability to collect . . . may appear "unjust" or "inequitable", it is not the kind of inequity or injustice which merits the imposition of liability for a corporate debt on a shareholder.").[31]

Region 5 also implies that there is something inherently wrong with JAB Company paying the taxes and insurance or other legally incurred expenses of JAB Ohio and JAB Toledo but not providing funds for clean-up activities. The fact that RCRA imposes duties on JAB Ohio and JAB Toledo that neither subsidiary is able to meet, however, does not transform Region 5 into a "supercreditor" that has a right to be paid before all other creditors with legally incurred debts. Region 5 has not produced a shred of legal support for such a theory. Moreover, to argue that the parent's duty to pay *all* of a subsidiary's debts somehow arises because the parent opted to pay for

[31] *Dombroski* further cements the conclusions of the *LeRoux's* court, as *Dombroski* makes clear that actions rising only to the level of "unjust" or "inequitable" are not enough to satisfy the second prong of *Belvedere*.

some of the subsidiary's obligations would deter parents from paying *any* of a failed subsidiary's debts for fear that the parent will later be forced to pay all of the debts. Public policy considerations weigh against imposing such a standard.

Region 5 acknowledges that there is no Ohio or comparable case law support for its claim that JAB Company's *failure to act* is somehow "egregious" and "extreme misconduct" that amounts to an "illegal" or "similarly unlawful act." Appellant's Brief, p. 50. Instead, Region 5 makes rather vague attempts at invoking the "policies" of RCRA to establish that JAB Company had some sort of duty to act. Appellant's Brief, pp. 51-52. Contrary to Region 5's claims, however, the subsidiaries, as owners and operators, are the only entities that had positive duties under RCRA—not JAB Company.[32] JAB Company did not prevent either JAB Ohio or JAB Toledo from fulfilling their duties -- JAB Ohio and JAB Toledo simply did not have the funds to do so. Region 5's attempt to establish a duty for JAB Company by classifying JAB Company as an "owner" of JAB Ohio's and JAB Toledo's facilities puts the cart before the horse and invokes circular reasoning. Whether JAB Company should be considered an "owner" of JAB Ohio and JAB Toledo facilities is exactly the issue that this Board must decide. Region 5 may not prove JAB Company is an "owner" of JAB Ohio and JAB Toledo's facilities by invoking an argument that is only applicable if in fact this Board finds that JAB Company is the "owner" of JAB Ohio and JAB Toledo. Moreover, nothing in RCRA indicates a public policy to alter established state law on issues such as the "operator's" parent's liability.

b. Federal Common Law

For the same reasons Region 5 fails to meet the second prong of Ohio common law, Region 5 also fails to meet the second prong of federal common law. No matter which version of federal

[32] The subsidiaries are also the only entities that admitted liability under RCRA—not JAB Company.

common law is applied, it is axiomatic that "'[t]here is nothing fraudulent or against public policy in limiting one's liability by the appropriate use of corporate insulation.'" *Acushnet*, 675 F. Supp. at 34, *quoting Miller v Honda Motor Co.*, 779 F.2d 769, 773 (1st Cir. 1985). In *Acushnet*, the government argued that a subsidiary's veil should be pierced where the parent corporation's intent in forming a subsidiary was with an eye towards limiting its environmental liability. *Id.* The court noted that this "remarkable" argument would convert the "very purpose for which the law enables investors to incorporate into an impermissible evil." *Id.* Therefore, "avoiding liability through the corporate form is not a wrong that equity's hand must right." *Id.*

Region 5's argument is essentially that JAB Company formed a subsidiary and because the subsidiary owns the facilities, not JAB Company, JAB Company is able to avoid the environmental liabilities attached to those facilities. As demonstrated above, such an allegation, even if proved true, is not sufficient to pierce a corporate veil.

While Region 5 summarily concludes that the second prong of federal common law is obviously met by the failure of JAB Ohio and JAB Toledo to meet the duties established in RCRA, as demonstrated above, RCRA imposes no duties on JAB Company. Region 5 must hang its hat on the simple fact that two failed subsidiaries do not have the financial means to pay their debts and the parent has not bailed out those subsidiaries. JAB Company's inaction is not unjust, inequitable, wrongful, or even unexpected.

Ultimately, it is very instructive that Region 5 cites a case authored by Judge Moran as being demonstrative of federal common law on piercing the corporate veil, yet the author himself unequivocally held that Region 5 did not meet the federal common law standards to pierce the corporate veil of JAB Ohio and JAB Toledo. *In re JAB Ohio,* 2009 WL 3496294 at 5. Judge Moran's thorough and well-reasoned opinion determined that Region 5 did not meet its burden of

proof regarding its piercing the corporate veil claims under Ohio or federal common law. *Id.* at 19. Region 5 has not demonstrated to this Board that Judge Moran committed any reversible error, therefore, this Board must maintain Judge Moran's decision to grant JAB Company's Motion for Accelerated Decision and deny Region 5's Motion for Accelerated Decision.

G. JAB Company is not Subject to Direct Operator Liability as a Matter of Law

Region 5 also seeks to assign liability to JAB Company on the theory that it can be held directly liable as an actual "operator" of the JAB Ohio and JAB Toledo facilities. As established above, *Bestfoods* recognizes the possibility for parental liability under CERCLA for a parent's direct operation of a subsidiary's facility, however, such liability can be predicated only upon evidence showing that the parent directed the operations of the subsidiary's facility with specific respect to pollution control and environmental compliance.[33] The Court noted that it might be "easy" to claim a parent is an "operator" of a subsidiary's facility, however, "the difficulty comes in defining actions sufficient to constitute direct parental 'operation.'" *Id.* at 66. The Court then provided three alternatives for demonstrating the direct liability of a parent as an operator: (1) when "a dual officer or director depart[s] so far from the norms of parental influence exercised through dual office holding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility;" (2) when "an agent of the parent with no hat to wear but the parent's hat manage[s] or direct[s] activities at the facility;" and (3) "when the parent operates the *facility* instead of its

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[33] RCRA authorizes suit against "any person [who] has violated or is in violation of any requirement of [RCRA]." 42 U.S.C. § 6928(a)(1). The only type of "person" relevant to this case that is subject to RCRA, however, and who can therefore be alleged to have "violated" its requirements, are those persons who are "owners [or] *operators* of facilities for the treatment, storage, or disposal of hazardous wastes." (42 U.S.C. §6924(a); *see* also 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.

subsidiary or alongside the subsidiary in some sort of joint venture." *Id.* at 71 (emphasis added). Region 5's claim is that JAB Company can be held directly liable under the first and second scenario. Appellant's Brief, p. 55. As demonstrated below, Region 5's arguments fail.

1. Brian Biewer is a Dual Officer of JAB Company and JAB Ohio and Region 5 did not Demonstrate that His Actions Were Contrary to JAB Ohio or JAB Toledo.

As previously discussed, Region 5 must demonstrate that JAB Company operated the JAB Ohio and JAB Toledo facilities with regards to decisions about pollution control or environmental compliance. *See Bestfoods*, 524 U.S. at 66-67. Moreover, since Region 5 only questions actions taken by Brian Biewer, an officer of JAB Company, JAB Ohio, and JAB Toledo, Region 5 *must* address the standards set forth by the Supreme Court for the first scenario. Specifically, Region 5 must demonstrate that Brian Biewer's actions were contrary to the interests of JAB Ohio and JAB Toledo, yet advantageous to JAB Company. *See Bestfoods*, 524 U.S. at 70. Region 5 does not meet its burden, as most of the facts Region 5 cites as supporting its allegation that JAB Company was an operator of the JAB Ohio and JAB Toledo facility have nothing to do with pollution control or environmental compliance and those that do are not contrary to the interests of JAB Ohio. *See* Appellant's Brief, pp. 57-59.

This Board must presume that all actions taken by Brian Biewer, because he is a dual officer, were taken on behalf of JAB Ohio and JAB Toledo unless Region 5 demonstrates that Brian Biewer was acting in his capacity as an officer of JAB Company at the time of the acts. *See Bestfoods*, 524 U.S. at 70. When determining whether a dual officer is acting in his or her capacity as a parent officer or director, rather than his or her capacity as a subsidiary officer or director, the Court in *Bestfoods* provided the following guidance:

> [T]he 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. In other words, the presumption that Brian Biewer is acting for JAB Ohio and JAB Toledo cannot be overcome by mere evidence that he engaged in decision making regarding JAB Ohio's and JAB Toledo's facility. *Raytheon Constructors, Inc. v. Asarco Inc.*, 368 F.3d 1214, 1218-19 (10th Cir. 2003); *Consol. Edison Co. v. UGI Utilities*, 310 F.Supp.2d 592, 605 (S.D.N.Y. 2004), affirmed in relevant part, 153 Fed.Appx. 749 (2d Cir. 2005); *Friedland*, 173 F.Supp.2d at 1095-96; *Schiavone*, 77 F.Supp.2d at 291-92 (holding that overlapping and intertwined management structure of parent and subsidiary was consistent with that of an ordinary parent-subsidiary relationship); *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, No. 3:03-cv-614-J-20MMH, 2005 WL 5660478, at *8 (M.D.Fla. Mar. 22, 2005).

In *Atlanta Gas Light Co.*, the court granted summary judgment in favor of a parent corporation notwithstanding undisputed evidence that dual officers and directors of the parent and its subsidiary had made decisions for the subsidiary or completed physical work at the subsidiary's facility. 2005 WL 56604786 at *8. The plaintiff alleged that the overlapping officers and directors of the parent and subsidiary supported the finding of operator liability. *Id.* The court noted that the simple fact that a parent and subsidiary have overlapping officers and directors and intertwined management "does not create operator liability for a parent or investor corporation." *Id., citing Bestfoods*, 524 U.S. at 69-70.

Although it was undisputed that dual officers and directors made decisions for the subsidiary and completed physical work, the court ruled that the actions of the dual officers and directors had been consistent with "corporate norms regarding a parent/subsidiary relationship and [were] the exact behavior embodied by the *Bestfoods* presumption." *Id.* The fact that dual officers and employees appointed the parent as a purchasing agent, took part in negotiating contracts, and

"practically rebuilt" the subsidiary's facility did not rebut the presumption that all of those actions were taken on behalf of the subsidiary as all of the actions benefitted the subsidiary. *Id.* The court further stated that "[t]here ha[d] simply been no showing that dual position-holders acted in any capacity other than Board members or employees of [the subsidiary]." *Id.* On this basis, the court held that no reasonable jury could conclude that the parent was subject to operator liability for its involvement with the subsidiary's facility. *Id.* at *12.

The *Raytheon* court held that the *Bestfoods* presumption was not overcome by a showing that a dual officer had engaged in *environmental* decision-making at the subsidiary's facility. 368 F.3d at 1218-1219. In *Raytheon*, the president of the parent company and president and chairman of the board of the subsidiary company participated in the purchase of land used to store the environmental waste at issue. In addition, that dual officer also took the following actions: (1) wrote a letter to the stockholders of the subsidiary regarding its financial and operating conditions; (2) negotiated a contract for the subsidiary; (3) submitted licenses and agreements to the board and had the board's approval to sign contracts; (4) ordered and took on a mortgage for new equipment for the subsidiary; and (5) helped supervise and replace the on-site facility manager of the subsidiary. *Id.* at 1219. After listing these activities, the *Raytheon* court held that the evidence listed above was insufficient to support the conclusion that the parent company was an operator of the subsidiary facility, noting:

> [T]he critical point, however, is that nothing indicates [the dual officer] undertook any of these actions while wearing any hat other than his [subsidiary] president hat. The crucial consideration here is not what [the dual officer] did, but what [the parent company] did. As long as [the dual officer] acted as an executive and board member of [the subsidiary], *Bestfoods* tell [sic] us that his actions cannot be attributed to the [parent]. While the district court believed that [the dual officer] himself was an operator of [the subsidiary's] facilities, that does not suffice to make [the parent]...an operator. The suit here is against the company, not [the dual officer] personally.

Id. Essentially, "there was no evidence to rebut the presumption that [the dual officer's] involvement . . . was undertaken in any capacity other than as president of [the subsidiary] and a