member of its board." *Id* at 1219. The court also stated that the fact that the dual officer had served as the "primary liaison" between the parent and its subsidiary did not "rebut the presumption of wearing separate hats in separate corporate roles." *Id.* at 1218.

In this case, Region 5 does not allege that JAB Company exerted any control over the JAB Ohio or JAB Toledo facilities with regards to the activities that *caused* the pollution; rather Region 5 alleges that JAB Company exerted control over the decontamination process that should have occurred after JAB Ohio and JAB Toledo ceased operations. Appellant's Brief, pp. 45-48. In an attempt to demonstrate this control, Region 5 throws out the following laundry list of factors it claims are relevant: (1) the interlocking officers and directors between JAB Company, JAB Ohio and JAB Toledo; (2) the use of a cash management system; (3) the advances provided to JAB Ohio and JAB Toledo by JAB Company and recorded as corresponding debits; (4) the transfers of inventory to related parties and subsequent 1:1 reduction in accounts payable and accounts receivable; (5) the elimination of JAB Ohio and JAB Toledo individualized checks; (6) the lack of JAB Ohio and JAB Toledo corporate meetings after each ceased operations; (7) the lack of employees and business after operations ceased; (8) the appointment of Brian Biewer as manager without compensation; and (9) the failure of JAB Ohio and JAB Toledo to perform closure activities.

As the *Raytheon* court noted, the suit is against the parent company, not the dual officer. 368 F.3d at 1219. Therefore, the real question is, whether the actions of a dual officer were contrary to the interests of JAB Ohio and JAB Toledo, but advantageous for JAB Company.

The only action taken by Brian Biewer that Region 5 even alleges is contrary to the interests of JAB Ohio and JAB Toledo is Brian Biewer's alleged "decision" not to proceed further with closure activities. Appellant's Brief, p. 58. This argument is easily dismissed. As already thoroughly established above, the only evidence on record demonstrates that JAB Ohio and JAB

Toledo did not have the financial ability to proceed with the closure activities. Region 5 may not simply pronounce its unsupported conclusions to be true to meet its burden of proof here. Region 5 has not provided any evidence that anyone made any "decision" related to the closure activities. The subsidiaries were broke and could not perform closure activities, therefore, there was no decision to be made.

Region 5 simply cannot and does not provide this Board with any evidence that Brian Biewer, or any dual officer, ever took action contrary to the interests of JAB Ohio and JAB Toledo. Therefore the presumption that all actions taken by dual officers were taken on behalf of JAB Ohio and JAB Toledo must stand thereby preventing the imposition of direct liability on JAB Company.

2. Region 5 Offered no Evidence at all Supporting the Second *Bestfoods* Scenerio where "an Agent of the Parent with No Hat to Wear but the Parent's Hat Manages or Directs Activities at the Facility."

Though Region 5 clearly states that it claims direct operator liability against JAB Company on the basis of the "agent with only a parent's hat to wear" scenario, (Appellant's Brief, p. 55), it disproves its own contention by identifying only Brian Biewer as the "agent" of the parent, who also is acknowledged as a director, officer and manager of JAB Ohio and JAB Toledo after they closed. Brian Biewer could and did wear the JAB Toledo and JAB Ohio hats, and this argument by Region 5 is simply baseless. Even though the test is clearly not applicable in the present case, JAB Company demonstrates below that even if it were, Region 5 comes up woefully short of demonstrating the test has been met.

When an agent of a parent corporation "with no hat to wear but the parent's hat" directs or manages activities at a facility that "are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures," that agent's actions "should

not give rise to direct liability." *Bestfoods*, 524 U.S. at 72. The Court further stated that "the critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." *Id.*

Where the evidence merely establishes that there was close parental control of a subsidiary's expenditures, that a parent acted as a "purchasing agent" for a subsidiary, or that a parent made capital contributions to a subsidiary during times of financial difficulty, courts will not grant summary judgment motions. *Consolidated Edison Co.*, 310 F.Supp.2d at 608-09 (holding that evidence of parental control of subsidiary's expenditures and evidence that parent acted as "purchasing agent" and consultant for subsidiary was insufficient for reasonable jury to find that parent was operator); *Friedland*, 173 F. Supp. 2d at 1097 (recognizing that it is entirely consistent with the typical relationship between a parent corporation and a subsidiary for the parent to keep "the subsidiary operating during times of financial difficulties"); *Schiavone,* 77 F. Supp. 2d at 290 (holding that approval of capital expenditures, including those for pollution control equipment was consistent with typical relationship between parent and subsidiary); *see also Datron Inc. v. CRA Holdings Inc*, 42 F. Supp. 2d 736, 747-48 (W.D. Mich. 1999).

In *Datron*, the parent was alleged to be an operator of several subsidiary facilities based on the following evidence: (1) the parent's corporate policy referred to the subsidiaries as divisions; (2) the parent's corporate safety director conducted semi-annual safety inspections of the Facility; (3) the parent's corporate policy required all employees and subsidiaries to comply with RCRA; (4) there were overlapping officers of the parent and subsidiary; (5) the subsidiaries had to obtain the parent's approval for credit arrangements beyond a certain amount; (6) an employee of the parent bought environmental liability coverage for the subsidiary; and (7) the parent's general counsel found outside counsel and was involved in the resolution of the EPA's complaint against the

subsidiary. 42 F. Supp. 2d at 747-748. The *Datron* court granted summary judgment in favor of the parent corporation, holding that its involvement with the subsidiary facilities listed above "falls soundly within the parameters of normal oversight by a parent corporation." *Id.* at 748. "Referring to subsidiaries as divisions, obtaining insurance, establishing corporate policies and conducting sporadic safety inspections are the kind of activities 'which are consistent with the parent's investor status.'" *Id.*

The *Schiavone* court reached a conclusion similar to the above, stating that the "essential question here is whether there is enough evidence for a reasonable jury to find that [the parent] managed, directed, or conducted operations specifically related to the pollution at the [subsidiary] plant, that is, operations having to do with the leakage or disposal of creosote, or decisions about compliance with environmental regulations. 77 F.Supp.2d at 290. In *Schiavone*, the defendant parent company created a subsidiary to purchase assets from a third company. *Id.* at 285. The third company leased property from New Haven and Hartford Railroad Company and that property was eventually contaminated with creosote. *Id.* at 286. The undisputed evidence put forth in *Schiavone* as demonstrating that the parent company was an operator of the subsidiary's facility was as follows: (1) the parent and subsidiary shared the same board of directors; (2) the subsidiary's president, general counsel, assistant comptroller, and assistant treasurer were also employed by the parent; (3) the parent's legal department provided services to the subsidiary; (4) the "interlocking" parent-subsidiary board of directors examined and approved capital expenditures, including pollution-control equipment; (5) the parent supplied capital to the subsidiary to buy the third company that allegedly caused the pollution; (6) the parent agreed to assume and perform all obligations of the third company under the lease with the Railroad; (7) the parent played an extremely active role in managing the subsidiary; (8) some parent officials were copied on

correspondence related to contract negotiations with the Railroad; (9) some parent officials were involved in the subsidiary's accounting and corporate affairs; (10) the subsidiary submitted all contracts to the parent for review; (11) one of the parent's in-house lawyers participated in the contract negotiations with the Railroad and assisted in the sale of the subsidiary's assets; and (12) an employee of the parent guided the contract renewal negotiations between the subsidiary and the Railroad and played a role in keeping the subsidiary's facility open during financial difficulties. *Id.* at 290-291.

The *Schiavone* court considered the above evidence and determined that it was insufficient to create a genuine issue of material fact under *Bestfoods*, as the actions cited above were "consistent with the traditional and typical relationship between a parent and a subsidiary." *Id.* at 291. The fact that a parent company provides a subsidiary with capital in times of need is typical of a parent corporation's investment. *See Id.* at 292. Moreover, overlapping and intertwined management structures are also consistent with an ordinary parent-subsidiary relationship. *Id.* at 291-292. Essentially, the court held that the compilation of cited actions did not establish that the parent's actions "directed to the [subsidiary] plant's pollution control were 'eccentric under accepted norms of parental oversight.'" *Id.* at 293, *quoting Bestfoods*, 524 U.S. at 72.

As listed above, Region 5 has set forth various factors it deems relevant to the direct operator liability analysis and somehow demonstrative of JAB Company's "eccentric" oversight. Appellant's Brief, pp. 57-58. Courts have made clear that interlocking officers and directors are demonstrative of nothing more than a normal parent-subsidiary relationship. *Bestfoods*, 524 U.S. at 61-62, 69. The use of cash management system like the one used by JAB Company and its subsidiaries also supports a normal parent-subsidiary relationship. It is entirely proper and expected that a parent would provide funds to help a struggling or failed subsidiary to protect the parent's investment.

Schiavone, 77 F. Supp. 2d at 291-292. Moreover, Region 5's argument that it would be eccentric for failed subsidiaries *that have ceased operations* to have no employees, sales, or their own individualized checks and to appoint a manager receiving no compensation is ridiculous. Of course, Region 5 does not provide any discussion regarding what its version of a "normal" failed subsidiary would look like, much less provide any case law to support its contention that JAB Ohio and JAB Toledo were not "normal" failed subsidiaries.

The bottom line is that, instead of evidence and case law support, Region 5 has only provided this Board with much rhetoric and many conclusory statements. Even a cursory examination of the the relevant facts produced by Region 5 establish that all actions were consistent with the accepted norms of parental oversight of JAB Ohio's and JAB Toledo's facilities. Therefore, even if Brian Biewer were an agent of only JAB Company, Region 5's claims fail.

3. As a Matter of Law, JAB Company is not Subject to Direct Operator Liability Because the Word "Operate" Means Something Other than the Mere Failure to Act or to Cease Acting.

Another problem facing Region 5 is the fact that Region 5 actually relies on the alleged *inactivity* or *inaction* of Brian Biewer as the basis for holding JAB Company liable for the alleged RCRA violations of JAB Ohio and JAB Toledo. As previously discussed, JAB Ohio and JAB Toledo are being prosecuted, not because of something they did, but because of something they *did not do*.[34] Then, Region 5 takes it one step further and contends that the parent, JAB Company, also did not do what the subsidiaries did not do. Thus, while Region 5 claims that the violations arose because *nothing* was done (i.e., no cleanup activities were performed), it simultaneously claims that

[34] If Region 5 were to attempt to shift gears and claim JAB Toledo and JAB Ohio are being sued because of their *actions* in *causing* contamination, it would merely support Respondents' contention that the veil piercing and direct liability analysis would then need to focus on the pre-closure time period, an analysis for which Region 5 has zero factual support.

JAB Company is the one that "did" it. Apparently, therefore, Region 5 is attempting to establish the novel and untested legal theory that the direct liability of a parent corporation can be established not by showing that it *acted* to take control of the subsidiary's facility, but by showing that the parent did *not* get involved with the environmental operation of its subsidiary's facilities, a theory that would hang every parent company in a legitimate parent-subsidiary relationship.

There is a clear basis in semantics and case law for concluding that the word "operate" means something other than the mere failure to act or to cease acting. In *Bestfoods* the Court stated that "when [Congress] used the verb 'to operate,' . . . the statute obviously meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities." *Bestfoods*, 524 U.S. at 71. In *U.S. v. Township of Brighton,* 153 F.3d 307, 314 (1998), the Sixth Circuit further expounded on the word by stating that "[b]efore one can be considered an "operator" for CERCLA purposes, one must perform affirmative acts." Conversely stated, "[t]he failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator." *Id.*[35]

In this case, the aspect of JAB Company's involvement at the facilities of JAB Ohio and JAB Toledo that is being challenged is JAB Company's *failure* to implement MSG's drip pad closure plan—in other words JAB Company's failure to act. Appellant's Brief, p. 11. Region 5 has presented no evidence suggesting that JAB Company affirmatively acted and controlled environmental decisions in a manner contrary to JAB Ohio and JAB Toledo's interests, such that this Board could consider the actions of the dual officer to be the actions of JAB Company. Region 5 also does not demonstrate that JAB Company had <u>any</u> involvement with the operations of JAB Ohio

[35] While Region 5 attempts to lessen the effect of this case law by arguing the cases are inapplicable because the courts were addressing CERCLA, this argument flies in the face of Region 5's previous argument that this Board should apply *Bestfoods* to the direct liability arguments under RCRA, even though the *Bestfoods* court addressed CERCLA.

and JAB Toledo prior to the closure of its lumber producing operations, when contamination, if any, occurred. As such, there is no basis for asserting direct "operator" liability against JAB Company.

4. Even if JAB Company were an Operator, as a Matter of Law, JAB Company was Not an Operator During The Relevant Time Period.

Operator liability has a temporal aspect, which means that an operator who operates a facility prior to, or after, but not during the relevant time period cannot be subject to operator liability. *See, e.g., Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F.3d 917 (5th Cir. 2000). Some courts have grounded this rule in the definition of operator and in the standards for operator liability that have developed through case law. *Id.* Other courts have grounded this rule in the broader principles of causation. *Township of Brighton*, 153 F.3d at 317-320. Whatever the rationale, it is clear that operator liability does not attach to a defendant when the factual circumstances underlying a plaintiff's claim (in this case, failure to properly close the facility) occurred outside the scope of the defendant's operator status.

As mentioned above, in *Bestfoods*, the Court defined an operator as "someone who directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods*, 524 U.S. at 66. The Court sharpened this definition by stating that "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67. In applying this definition, courts have held that "[f]or one to be considered an operator . . . there must be some nexus between that person's or entity's control and the hazardous waste contained in the facility." *See, e.g., Geraghty*, 234 F.3d at 929.

"This nexus has been described as a 'well-settled rule' that 'operator' liability...only attaches if the defendant had authority to control the *cause* of the contamination *at the time* the hazardous substances were released into the environment." *Id.* (emphasis added); *see also, Bob's Beverage Inc.*

v. Acme Inc., 169 F. Supp. 2d 695, 723 (N.D. Ohio. 1999) ("[a] person who affirmatively acts to cause a release of hazardous waste becomes an operator"); *CPC Int'l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989) ("[t]he most commonly adopted yardstick for determining whether a party is an owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution"). It follows then, that where this nexus is missing, operator liability cannot attach. *See Id.*

In this case, Region 5 has argued that operator liability should attach to JAB Company; however, in doing so, Region 5 has disregarded the temporal aspect of operator liability. Region 5 has made no allegation and has presented zero evidence that JAB Company operated the Facility *at the time of the alleged pollution events* while JAB Toledo and JAB Ohio were operating. Instead, all of Region 5's allegations center around events occurring *after* JAB Ohio and JAB Toledo ceased operations. In fact, Region 5 did not even seek discovery regarding JAB Company's involvement with JAB Ohio and JAB Toledo at the time of the alleged pollution events. *See* Region 5's Motion for Discovery dated February 26, 2009. Therefore, if this Court were to conclude that JAB Company ever became an operator of the Facility, it should further conclude that, as a matter of law, JAB Company was *not* an operator during the relevant time period, namely the period during which hazardous waste was released at the Facility.

II. THE PRESIDING OFFICER PROPERLY DENIED APPELLANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY, AND BECAUSE OF APPELLANT'S REFUSAL TO PRESENT ANY EVIDENCE WHATSOEVER AT TRIAL, HAD NO CHOICE BUT TO AWARD ZERO PENALTY.

Appellant argues that Judge Moran's decision to deny Region 5's Motion for Accelerated Decision on Liability and Penalty, as it relates to the penalty component,[36] was reversible error

[36] As noted earlier, JAB – Ohio and JAB - Toledo did not contest liability, so the only issue for resolution was the penalty.

because there were no factual issues raised by Respondents with respect to assessing the amount of penalty and Judge Moran had no *right* to hold a hearing, even though he clearly wanted more information and evidence in order to properly exercise his discretion in determining an appropriate amount of penalty. Reading only Region 5's Appeal Brief, one would not recognize that disputed factual issues were raised by Respondents, were acknowledged as fact issues in Region 5's prior briefing and were demonstrated by the attachments included with Region 5's own motion. These omissions from Appellant's factual statement do not seem inadvertent, but in any event clearly undercut the basis for its present appeal.

Perhaps even more surprisingly, Appellant is essentially arguing that although Judge Moran was called upon to make what Region 5 acknowledges is a *discretionary* decision in determining a penalty, he lacked the authority or right to call for an evidentiary hearing, the purpose of which would be to provide him evidence regarding how to properly exercise his acknowledged discretion.

A. When a Motion for Summary Judgment is Denied, and the Movant then Loses at Trial, the Movant Cannot Appeal the Denial of the Motion for Summary Judgment.

Before this Board considers the merits of Region 5's contention that Judge Moran was required to grant its Motion for Accelerated Decision on Liability and Penalty, it must first determine if Appellant has even preserved this issue for appeal. As discussed below, Region 5 lost its ability to appeal this issue when it lost at trial following denial of its motion and failed to make a motion for judgment as a matter of law at the end of the hearing.

Where "summary judgment [has been] denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed." *Jarrett v. Epperly*, 896 F.2d at 1016 (6th Cir. 1990); see also *Lind v. United Parcel Service, Inc.*, 254 F.3d 1281, 1286 (11th Cir. 2001) (holding that court will "not review the pretrial denial of a motion for summary judgment after a full trial and judgment on the merits."); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274. 277-78

(7th Cir. 1994); *Black v. J.I. Case Co.*, 22 F.3d 568, 569-70 (5th Cir.), cert. denied, 513 U.S. 1017 (1994); *Johnson International Co. v. Jackson National Life Ins. Co.*, 19 F.3d 431, 435 (8th Cir. 1994); *Lama v. Borras*, 16 F.3d 473, 477, n.5(1st Cir. 1994); *Whalen v. Unit Rig Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992), cert. denied, 507 U.S. 973 (1993); *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1358 (9th Cir. 1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1570 (Fed. Cir. 1986), cert. den., 479 U.S. 1072 (1987).

The above-stated rule, which appears to have been adopted by every circuit that has considered its application, has been applied to agency decisions denying summary judgment. *See National Engineering & Contracting Co. v. Occupational Safety & Health Admin., U.S. Dept. of Labor*, 928 F.2d 762, 768 (6th Cir. 1991). In *National Engineering*, the appellants contended that the Occupational Safety and Health Review Commission had erred by denying their pre-hearing motion for summary judgment. *Id.* The Sixth Circuit held that review of the denial was mooted by the subsequent trial of the matter. *Id.* The Court explained that in *Jarrett*, "our circuit held that 'where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed.'" *Id.* (citing *Jarrett,* 896 F.2d at 1016). The Sixth Circuit noted that the case under consideration differed somewhat from *Jarrett* in that "*Jarrett* involved the appellate review of a jury verdict following a pretrial ruling denying a motion for summary judgment," and not "an administrative hearing before an administrative law judge who had expressly reserved his ruling on the motion for summary judgment.'" *Id.* The Court then held that the factual distinction was not significant, however, and that the decision in *Jarrett* rested on logic that applied equally to administrative proceedings, stating that it "would be . . . unjust to deprive a party of a [judgment] after the evidence was fully presented, on the basis of an

appellate court's review of whether the pleadings and affidavits at the time of the summary judgment demonstrated the need for a trial." *Id.* (citing *Jarrett,* 896 F.2d at 1016).

In addition to the reasoning set forth in *Jarrett*, the Sixth Circuit has also stated that a deviation from the above-stated rule would "undo the carefully calibrated structure of the rules of civil and appellate procedure." *Barber v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 295 Fed. Appx. 786, 789 (6th Cir. 2008). Expounding on this point, the Circuit Court explained as follows:

> [A]fter trial, a judgment as a matter of law may be rendered only on a directed verdict motion or by motion at the end of trial. Absent the appropriate motions, judgment as a matter of law may not be granted. Review of a pretrial summary judgment motion would circumvent that rule; review of a denial of a directed verdict or judgment as a matter of law motion obviates the need for review of a denial of a pre-trial summary judgment.

Id. (quoting 19 Moore's Federal Practice § 205.08[2] (3d ed.2007)). The Tenth Circuit has similarly held that summary judgment is a pretrial matter that "ends at trial," and that after a trial, the proper mode of redress is by motion for judgment as a matter of law.[37] *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir. 1994). Consistent with the Sixth Circuit's and Tenth Circuit's reasoning, the Ninth Circuit has held that appellate review of a denial of summary judgment after a trial on the merits would "undermine the district court's discretion to send a case to trial 'if the judge ha[d] doubt as to the wisdom of terminating the case before trial.'" *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1507 (9th Cir. 1995), cert. denied, 516 U.S. 1146 (1996).

In the instant case and as discussed more fully below, Judge Moran properly exercised his discretion to deny the Region 5's Motion for Accelerated Decision on Liability and Penalty as it related to the penalty component, feeling that the better course was to proceed to a full hearing on

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[37] Region 5 made no motion for directed verdict or judgment as a matter of law at the close of the evidentiary hearing in this case.

the merits. Region 5 refused to present any evidence at the hearing on the merits, with the result being that it did not satisfy its burden of presentation or persuasion required under Rule 22.24, and that the Respondents' burden of presentation and persuasion was never triggered. Under these circumstances, the rule adopted by the Sixth Circuit in *Jarrett* should be applied, such that this Board should hold that Region 5 is now foreclosed from appealing Judge Moran's opinion and order denying accelerated decision.

The fact that Region 5 refused to offer any evidence at the hearing does not justify a deviation from the rule adopted in *Jarrett*. Region 5 was afforded every opportunity to present evidence at the hearing and to have a "full trial on the merits," but chose not to do so. It would be a peculiar system of justice indeed if a party's deliberate refusal to participate in a trial or hearing, in direct contravention of judicial orders and applicable law, could serve as a basis for an exception to the rule in *Jarrett* expanding that party's appeal rights. Having failed to participate in any meaningful fashion at the hearing (with two counsel present representing Region 5), Region 5 cannot now be permitted to turn the applicable rules of civil and appellate procedure on their head in order to atone for its earlier error.

B. The Presiding Officer Properly Ruled That There Were Disputed Factual Issues Relevant to Determination of Penalty Amount That Warranted Denial of the Motion for Accelerated Decision and the Holding of an Evidentiary Hearing.

There is no dispute between the parties that under the *Consolidated Rules*, a respondent has a right to a hearing on the merits if there is a genuine issue of material fact. (See, Appellant's Brief, p. 64) Nor is there any dispute that under EPA's adopted RCRA Civil Penalty Policy, the respondent's good faith efforts to comply, as well as the respondent's willfulness (or lack thereof) in committing the violation are two factors relevant for consideration in determining an appropriate penalty. (Appellant's Brief, p. 80; RCRA Civil Penalty Policy, pp. 35, 36) Finally, neither side disputes that

the Presiding Officer's decision on penalty amount is discretionary and that he is not bound to accept Region 5's proposed penalty, or Respondents' proposed penalty, so long as the penalty is based on facts as applied to EPA's Penalty Policy. (See, Appellant's Brief, p. 63)

What the parties do dispute, however, is whether the Presiding Officer was correct in holding that there were genuine issues of material fact pertinent to assessment of a penalty which warranted an evidentiary hearing for further development. (See, Appellant's Brief, at pp. 62-63) Region 5 argues that the Presiding Officer's ruling was in error because Respondents did not specifically cite to evidence in the pre-hearing record or attach any documentary evidence to their Response to Region 5's Motion for Accelerated Decision. *Id.* at p. 69. Region 5's argument is flawed, however, because facts which had already been *acknowledged* by Region 5 suggested error in Region 5's method of calculating penalty, and furthermore, the attachments to Region 5's own Motion for Accelerated Decision on Liability and Penalty mitigated against its own penalty calculation. On these bases, Judge Moran correctly held that there remained disputed factual issues relating to proper assessment of penalty amount under the Penalty Policy that should be resolved through an evidentiary hearing.

In order to understand the factual issues which Judge Moran found were in dispute, it is first important to understand how Region 5, solely through its trial counsel, justified the penalty amount proposed in this proceeding. As part of Region 5's submission in support of its Motion for Accelerated Decision on Liability and Penalty, Region 5 submitted a document entitled Memorandum in Support of Penalty Amount Proposed ("Penalty Memorandum"), authored solely by Richard Wagner, who also served as Region 5's counsel of record throughout the proceedings

below.[38] In Mr. Wagner's legal memorandum, he gave zero adjustment to the penalty calculation for Respondents JAB Ohio's and JAB Toledo's good faith efforts to comply with the law (see, Penalty Memorandum, p. 22) and actually *increased* the calculated penalty amount by 10% because, in the Attorney Wagner's view, the violation was willful (Penalty Memorandum, p. 23). Indeed, counsel's legal memorandum states:

> "An upward adjustment is warranted in Respondents' penalty for its degree of willfulness and/or negligence, *as there is no apparent reason that it could not comply with the law*." (Emphasis added)

Respondents JAB Ohio and JAB Toledo have, from the outset of these proceedings, argued that the proposed penalty was excessive because there were good faith attempts to comply with the law and the violations were not "willful." In support of the latter point, Respondents' pre-hearing exchanges made it clear that JAB Ohio's and JAB Toledo's inability to pay for closure activities was the reason various actions required under RCRA were not *able* to be performed, directly contradicting Mr. Wagner's statement that "there is no apparent reason that it could not comply." (See, Respondents' Supplemental Prehearing Exchange)[39]

Following the filing of Region 5's Motion for Accelerated Decision on Liability and Penalty, Region 5 filed lengthy briefs on July 2, 2009 in support of a separate Motion for Accelerated

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[38] As trial counsel, Mr. Wagner was barred by the Rules of Professional Conduct for both Illinois, where he is licensed, and Ohio, where the hearing was held, from testifying as a witness, and hence his "Memorandum" cannot possibly be construed as "evidence" in the record. *See* Illinois Rules of Professional Conduct, Rule 3.7 "Lawyer as Witness" and Ohio Rules of Professional Conduct, Rule 3.7 "Lawyer as Witness."

[39] Appellant attempts to obfuscate this factual assertion made by Respondents by arguing that neither JAB Toledo nor JAB Ohio asserted an "inability to pay penalty" defense, thus proving that they *could* afford to pay for remediation measures. (Appellant's Brief, pp. 93, 94) This argument misses the point. The fact that neither Respondent asserted what amounted to an affirmative defense regarding ability to pay a *penalty* does not *prove* anything, much less that these Respondents had the financial resources to do the required work. Furthermore, the defense, had it been asserted, only goes to payment of the *penalty* ultimately awarded by the ALJ, not to the financial ability of the Respondent to have performed remedial activities prior to filing of the Complaint.

Decision on Derivative Liability in the JAB Ohio and JAB Toledo cases. In those briefs, Region 5 made it perfectly clear that it did not contest the inability of the two subsidiary corporations to pay for compliance measures, and indeed argued with documentary support that such was the case. For instance, at page 18 in Region 5's brief in support of the motion in the JAB Toledo case, it stated:

> "The data summarized in Table 1 also shows that JAB Toledo in many years had a balance of zero in current assets, and thus had no cash or cash equivalents to carry on its activities and responsibilities, such as remediation of the site." (Region 5 Memorandum, p. 18)

On page 32, Region 5 went further and stated:

> "Simply put, assuming the violation alleged in the Administrative Complaint and Compliance Order is found proven, should only JAB Toledo be found liable, no penalty will be paid, or Compliance Order carried out, as JAB Toledo has no ability to do either." (Id. at 32)

Likewise, in Appellant's Briefs in Support of its Motion for Accelerated Decision on Derivative Liability in the JAB Ohio case, similar statements were made:

> "A conclusion is warranted that JAB Ohio's assets were likely below its liabilities in all years for which data are available, and the company was insolvent between 2001 and 2007. Being without assets, the company could not cover its obligations independently." (Region 5 Memorandum, p. 19)

In both the JAB Ohio and JAB Toledo Briefs, Region 5 proposed factual findings by the Presiding Officer that included, "JAB Toledo, on closing its facility in 1997 was not a viable company, . . ." and "JAB Ohio, on closing its facility in 2001, was not a viable company. . . ." (JAB Toledo Region 5 Memorandum, p. 50; JAB Ohio Region 5 Memorandum, p. 52) Leaving no doubt as to the inability of either JAB Ohio or JAB Toledo to perform necessary remediation activities at their respective sites, Region 5 attached to these accelerated decision motion briefs as Exhibit N the audited financials for JAB Ohio and JAB Toledo supporting these statements of insolvency.

It was thus in the context of this factually supported argument already advanced by Region 5 that JAB Ohio and JAB Toledo responded to Appellant's Motion for Accelerated Decision on

Liability and Penalty on July 30, 2009 asserting that the violations were not willful because Respondents lacked the financial resources (Respondents' Memorandum in Opposition to Motion for Accelerated Decision on Liability and Penalty, pp. 2-4). Neither JAB Ohio nor JAB Toledo attached the financial reports showing their insolvency upon cessation of their operations because Region 5 had already presented these documents to the Presiding Officer in connection with their other Motions for Accelerated Decision and had advocated and argued the very point articulated by Respondents that it was not a lack of willingness to perform remedial activities, but rather a lack of financial ability which resulted in the companies being unable to comply with all of the legal requirements under RCRA.

At a time when it was obvious that *both* parties were in agreement regarding JAB Ohio's and JAB Toledo's inability to fund remediation activities, it was surprising indeed to read in Region 5's August 12, 2009 Reply Brief in Support of its Motion for Accelerated Decision on Liability and Penalty the following at pp. 4-5:

> "In urging a reduction in the penalty amount for an 'inability' to comply with the RCRA requirement violated, on grounds that it was a 'lack of funds' that caused it to be unable to follow through on the drip pad closure plan, have cited no evidence [sic]. *Respondent's statement that it lacked funds to perform the tasks necessary to comply with RCRA is nothing more than an 'unsupported allegation,' a 'conclusion,' and as such cannot defeat a motion for accelerated decision.*" (Emphasis added)

Adding to Region 5's contradictions and inconsistencies which pervaded its briefing on the separate accelerated decision motions, Region 5 filed another reply brief one week later, on August 19, 2009, in support of its Motion for Accelerated Decision on Derivative Liability, answering its own challenge regarding a lack of evidence of JAB Ohio and JAB Toledo's inability to pay:

> "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." (Reply Brief at p. ___)

Leaving no doubt as to its position on this issue, Region 5 further noted at page 5 of its Reply Brief that:

> "Though Respondents assert that 'JAB Toledo did not have the funds to pay' for the additional closure work, they offer no analysis explaining how this circumstance affects the issue of 'derivative' or 'direct' liability. The fact is, JAB Toledo did not have *insufficient funds* to pay for this work. JAB Toledo had *no funds whatsoever*." (Emphasis in original)

Thus, both before Respondents filed their briefs in opposition to the Motions for Accelerated Decision on Liability and Penalty, and after the filing of those briefs, Region 5 argued and documented with audited financials one of the very facts which Respondents used to oppose the Motion for Accelerated Decision on Penalty Amount – their insolvency. This insolvency goes directly to the issue of willfulness and directly contradicts trial counsel's statement in his Penalty Memorandum proposed that "there is no apparent reason that it [JAB Toledo and JAB Ohio] could not comply with the law." In the context of these inconsistent positions asserted by Region 5, the following statement by the Presiding Officer is hardly surprising:

> "While EPA then contends that the 'Respondent cited no evidence in the record to support its assertions' that financial inability was the source of its inability to comply with the cited regulation, this claim is beyond disingenuous because EPA well knows that the Respondent had become insolvent." (Initial Decision Regarding Penalty at p. 3)[40]

Essentially, Region 5 argued below, and argues now to this Board, that Judge Moran and the Board are supposed to turn a blind eye to arguments made and documents provided *by Region 5* in connection with one of its motions, in order to allow Region 5 to argue an opposite factual position in support of another of its motions. The facts are the facts, and Region 5 cannot have the subsidiary Respondents be indisputably insolvent for purposes of one motion, but indisputably able to pay for

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[40] See also, Order on EPA's Motion for Accelerated Decision on Liability and Penalty (JAB Ohio case) at p. 7: "EPA contends, contrary to the facts, 'there is no apparent reason that [Respondent] could not comply with the law.' *Id.* at 23. This is disingenuous, as it ignores that the Respondent went out of business and lacked the funds to carry out the drip pad closure."

closure activities in another of its motions. Both parties agreed that the subsidiaries were financially unable to perform actions that were required, but Region 5 increased its proposed penalty by 10%, while Respondents argued that the penalty should be reduced substantially because of the lack of willfulness. Judge Moran was correct in recognizing this as a material factual dispute.

C. Region 5 Failed to Satisfy Its Initial Burden of Establishing That There Was No Genuine Issue of Material Fact for Trial Because the Attachments to the Region 5's Motion Created Genuine Issues of Material Fact.

As noted above, Region 5 claims that the Presiding Officer erred in not granting its Motion for Accelerated Decision on Liability and Penalty because Respondents did not specifically site to "evidence" in opposing the motion. The truth of the matter, however, as recognized by the Presiding Officer, was that the "evidentiary matter" submitted by Region 5 with its own Motion for Accelerated Decision on Liability and Penalty established some of the very factual disputes upon which the Presiding Officer based his decision to deny the motion.

"Where the evidentiary matter in support of [a] motion [for summary judgment] does not establish the absence of a genuine issue, *summary judgment must be denied even if no opposing evidentiary matter is presented.*" *Stepanischen v. Merchant's Dispatch Transp Corp.*, 722 F.2d 922, 929 (1st Cir. 1993) (emphasis in original). A similar ruling was made in *John v. State of Louisiana*, 757 F.2d 698, 711-714 (5th Cir. 1985). In *John*, the Fifth Circuit reversed the district court's grant of a partial summary judgment in favor of the defendants where "the very evidence cited by defendants in their motion for summary judgment reveal[ed] a question of fact." *Id.* The court explained that "[a]lthough Rule 56(e) does not allow a party to 'rest upon the mere allegations or denials of his pleading,' when his adversary moves for summary judgment, the Rule does not relieve the movant of his duty to establish the absence of a genuine issue as to material facts." *Id.* at 708-709. Based on the foregoing, the court held that the plaintiff was entitled to rely on materials in the

record that raised a genuine issue of material fact even though it was the moving party who drew the district court's attention to these materials in the proceedings below. *Id.* at 712.

In the instant case, Judge Moran properly denied Region 5's Motion for Accelerated Decision on Liability and Penalty because Judge Moran concluded that there were documents attached to Region 5's own motion that created genuine issues of material fact as to the appropriateness of its proposed penalty. Judge Moran specifically noted in his Initial Decision that "some of the documents . . . attached to [the Penalty Memorandum] actually supported Respondent's contention that the penalty amount was excessive." (Initial Decision, p. 7) Judge Moran correctly pointed out that attachments A, B, C, D, L, K and O to the Region 5 Memorandum all tend to show that Respondents made a good faith effort to comply with their remedial obligations under RCRA. *Id.* Attachment O, for example, which is a letter authored by Ohio EPA, states that Respondents had "adequately demonstrated abatement of all violations discovered" during his prior inspection.

Thus, Judge Moran correctly found that there was evidence supplied by Region 5 tending to show that Respondents acted in "good faith." Region 5 obviously disputed this fact, (i.e. there was a genuine issue as to this fact) because even though the RCRA Civil Penalty Policy states that "good faith" is a mitigating factor, and that the penalty maybe reduced by as much as 40% for good faith, Region 5 did not reduce the proposed penalty against Respondents at all on account of Respondents' good faith. Furthermore, this fact (a potential penalty reduction of up to 40%) was obviously material, and not, as Region 5 now suggests, merely something to "quibble" over. (Appellant's Brief, p. 80) It was, therefore, eminently reasonable for Judge Moran to find that, on the face of Region 5's motion and supporting papers, there were questions of fact as to the appropriateness of the proposed penalty, and to proceed to a hearing on the merits. This conclusion is bolstered by case law holding that issues of intent like good faith are ill-suited for summary judgment, and should be

left to the finder of fact. See, e.g., *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 318 (3d Cir. 1999) ("where there is a genuine dispute about whether the employer acted in good faith, summary judgment will typically be precluded"); *Lang v. Retirement Living Publ'g Co.*, 949 F.2d 576, 583 (2d Cir. 1991) ("[i]ssues of good faith are generally ill-suited for disposition on summary judgment").

D. Even if the Presiding Officer Could Have Decided the Issue of Penalty Amount on the Accelerated Decision Motion Briefs, He Had the Discretion to Deny the Motion and Hold an Evidentiary Hearing.

If the Board concludes, as Respondents have, that Judge Moran properly found that there were disputed fact issues regarding application of EPA's Penalty Policy in determining an appropriate penalty, then his decision to deny the motion for accelerated decision was correct and Region 5 was obligated to present its case at an evidentiary hearing as was ordered and scheduled. Even if, however, Judge Moran would have been *entitled* to decide the penalty amount on the parties' motion briefs and attached documents, the law is quite clear that he nonetheless had the discretion to hold a hearing if he felt such a hearing would be necessary or even useful in deciding this issue. Ironically, even though Region 5 acknowledges that determination of the appropriate penalty is a discretionary decision to be made by the Presiding Officer and that the Presiding Officer is under no obligation to accept EPA's proposed penalty amount, they implicitly argue that the Presiding Officer has no discretion to say "I have some of the information I need in the briefs, but I need more evidence to properly exercise my discretion." In other words, even if the Presiding Officer wants to hear more evidence in exercising his discretion, Region 5 contends he simply cannot do so by holding a hearing.

The analysis supporting the Presiding Officer's discretion to hold an evidentiary hearing begins with 40 C.F.R. § 22.4. Subsection (c), which defines the duties and powers of the presiding officer states that "the presiding officer shall conduct a fair and impartial proceeding, *assure that the*

facts are fully elicited, adjudicate all issues and avoid delay." (Emphasis added) The rule goes on to specify various powers of the presiding officer, including:

> "(1) Conduct administrative hearings under these Consolidated Rules of Practice;
>
> * * *
>
> (5) Order a party, or an officer or agent thereof to produce testimony, documents or other non-privileged evidence . . .
>
> (6) Admit or exclude evidence;
>
> (7) Hear and decide questions of facts, law or discretion;"

In the proceedings below, Judge Moran could not have made it more clear that he felt an evidentiary hearing was necessary and appropriate "to assure that the facts are fully elicited" and in doing so, ordered Region 5 to produce its penalty calculation witness at the hearing so that he could hear an explanation of how various factual factors included in EPA's Penalty Policy should be applied in exercising his discretion to award an appropriate penalty amount.[41] Equally clear was the

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[41] The EPA asserts that Judge Moran erred in ordering Region 5 to produce its penalty calculation witness to be cross examined at the hearing . The EPA sets forth various arguments to support this assertion, all of which are completely without merit, and even if accepted, should not affect the outcome of this appeal for the other reasons set forth herein.

Notably ignored in Region 5's argument is the fact that 40 C.F.R. § 22.4(c) expressly authorizes an ALJ to "order a party, or an officer or agent thereof to produce testimony, documents or other non-privileged evidence. . . ." Even more remarkable is Region 5's failure to acknowledge the fact that the RCRA Civil Penalty Policy itself expressly contemplates the testimony of EPA's penalty calculation witness at the hearing: "*Enforcement personnel must be prepared to present at the pre-hearing conference or evidentiary hearing more detailed information reflecting the specific factors weighed in calculating the penalty proposed in the complaint.*" Penalty Policy, p. 8. (Emphasis added) How then, can Region 5 seriously question the Presiding Officer's authority to do precisely what is contemplated by the Rules and the Penalty Policy itself?

Region 5 argues that Judge Moran "misse[d] the critical distinction between factual testimony and legal argument." (Appeal Brief, p. 70) Region 5 follows up this statement by stating that whether it had "in fact faithfully adhered to the penalty policies' instructions" was not a question of fact, such that it could not possibly require further factual development. *Id.* Based on the foregoing statements, Region 5 appears to be suggesting that if Respondent's counsel directed a question to the Region 5's penalty witness such as, "did the EPA properly consider this piece of

evidence [showing Respondent's good faith] in deciding not to adjust the penalty downward, and if not why not?", this question could not elicit any factual response whatsoever with respect to the appropriateness of the proposed penalty. Region 5's suggestion is ludicrous. What if the response to that question were, "no the EPA ignored that evidence when determining whether respondents acted in good faith"? Would that response not provide Judge Moran with valuable factual information regarding the "appropriateness" of the Region 5's proposed penalty?

As any person who has reviewed the Penalty Policy and its Assessment Matrix knows, the Policy and Matrix is a complicated document consisting of roughly 100 pages. The Matrix sets forth numerous factors that can influence where on the Matrix a proposed penalty should fit. Judge Moran was entitled to order cross examination of the EPA penalty calculation witness so that the Respondents, and if necessary, Judge Moran himself, could elicit factual information from the witness with respect to exactly how Region 5's proposed penalty ended up where it did.

Region 5's second argument as to why Judge Moran erred in ordering cross examination of the EPA's penalty witness is that "the *principal reason* to take testimony and allow for cross examination of witnesses regarding factual issues is to allow the trier of fact to determine witness credibility and demeanor," and witness credibility and demeanor are irrelevant to the appropriateness of the EPA's proposed penalty. *Id.* at p. 70. Having set forth this argument, Region 5 then proceeds to act as if determining witness credibility and demeanor is the *only* reason for cross examination. *Id.* at pp. 71-72. In doing so, Region 5 ignores Judge Moran's stated reason for ordering cross examination, which was to give the Respondents, and presumably Judge Moran himself, the opportunity to elicit facts that were peculiarly within the knowledge and possession of the EPA. (Order on Motion for Accelerated Decision, p. 13) Judge Moran's stated purpose for ordering cross examination comports with case law holding that "[f]or purposes of evidentiary hearing, the parties are free to use all customary avenues, including the right to subpoena witnesses and conduct direct and cross examination, *in order to explore and elicit the relevant facts for consideration by the court.*" *Lewis v. Secretary of Health and Human Services*, 707 F.2d 246, 250 (6th Cir. 1983) (emphasis added).

Finally, Region 5 argues that although ALJs have routinely "express[ed] a preference for a live witness to present a proposed penalty calculation" in the past, the only reason that they have been allowed to hear such testimony in the past is that the EPA wished to avoid "conflict with the presiding officer by providing such a witness." *Id.* at pp. 72-73. Region 5's argument continues that "the decision of the Agency's enforcement staff not to mount a fight against such a requirement in other cases does not make that requirement any more reasonable or legally acceptable." *Id.* Perhaps the more plausible reason why this issue has never been raised by the EPA's enforcement staff in the past, however, is that, unlike Mr. Wagner, most of the EPA's enforcement staff respect the authority of ALJs to order a hearing on the merits where, as here, there is a distinct need for further factual development with respect to the "appropriateness" of a proposed penalty. It defies belief that Region 5 would try and characterize Judge Moran's order for cross examination of a penalty witness as not being "reasonable" where Judge Moran alone was charged with assessing the "appropriateness" of the EPA's proposed penalty, and where Judge Moran believed that witness testimony would help him in making that assessment. In summary then, Region 5's arguments as to why Judge Moran erred in ordering cross examination of the EPA's penalty witness hold no water and are nothing but a

fact that he felt that the bits of information in documents provided by Region 5 in the form of attachments to its brief were not enough to "fully elicit" the facts needed in exercising his discretion. Moreover, Judge Moran properly recognized that the document entitled "Memorandum in Support of Penalty Amount Proposed" was not "evidence," but simply a legal brief authored by trial counsel and unsupported by a witness competent to testify. As will be discussed in greater detail below, Region 5 refused to produce a witness competent to testify or any evidence whatsoever at the hearing properly scheduled by the presiding officer, despite being ordered to do so.

Further support for the conclusion that Judge Moran had the discretion to conduct an evidentiary hearing is found in 40 C.F.R. § 22.15(c), where the rules provide that *even if the respondent does not request a hearing*, "the presiding officer may hold a hearing if issues appropriate for adjudication are raised in the answer." The excessiveness of Region 5's proposed penalty was expressly raised in Respondent's answer.

Finally, even the rule cited by Appellant for the proposition that Judge Moran was obligated to decide the penalty amount solely on the basis of the motion papers, fails to support the contention asserted. Rule 22.20(a) states:

> "The Presiding Officer ***may*** at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." (Emphasis added)

The rule does not state that the Presiding Officer "must" render accelerated decision if there are no genuine issues of material fact and furthermore states that such order "may" be granted if a party is entitled to judgment "as a matter of law" without mention whatsoever of a decision not made as a

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thinly-veiled attempt to hide the fact that what Mr. Wagner really wanted in the proceedings below was for Judge Moran to simply rubber stamp his proposed penalty.

matter of law, but rather, as Region 5 concedes here, as a matter of discretion.[42] Based on the foregoing, it is clear that the *Consolidated Rules* support Judge Moran's exercise of discretion in denying Region 5's motion and proceeding to a hearing.

This conclusion is also compelled under this Board's precedent in *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997). In *In re Green Thumb*, this Board held that at the accelerated decision stage, "Green Thumb did not put into issue, before the Presiding Officer, a single genuine issue of material fact." This Board concluded, therefore, that Green Thumb had no *right* to a hearing under FIFRA or under the due process clause of the Constitution. Notwithstanding the foregoing, this Board held that "the Presiding Officer [still] retained *discretion* to hold a hearing in his *informed discretion,*" and that it was, therefore, "appropriate for [the Board] to review his exercise of discretion." *Id.* at 792 (emphasis added). The court ultimately concluded that "the Presiding Officer's *election* not to hold an evidentiary hearing was neither erroneous nor unreasonable." *Id.* at 794 (emphasis added). Thus, in *In re Green Thumb*, this Board clearly held that even in the absence of a genuine issue of material fact, a Presiding Officer still has discretion to deny a motion for accelerated decision and to proceed to a hearing.[43]

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[42] The distinction between a decision made "as a matter of law" and a decision made by exercise of discretion is important here, where Appellant acknowledges that the latter is the type of decision Judge Moran had to make with regard to penalty amount. A result compelled as a matter of law can be, as the label suggests, only *one* outcome (i.e. the law dictates that X must be the result, not Y or Z). Yet here, Region 5 admits that the Presiding Officer was *not* obligated to accept Region 5's proposed penalty amount but was "free to exercise his discretion in determining appropriate penalties." (Appeal Brief, p. 63) Given the Presiding Officer's latitude in determining the appropriate amount of penalty, how can it be seriously argued that he is powerless to ask for additional factual development beyond that supplied with motion papers?

[43] Region 5 cites extensively to this Board's opinion in *In re Green Thumb* in its brief on appeal; however, quite astonishingly, it ignores the only portions of this Board's opinion that address the issue of the ALJ's discretion. Region 5 repeatedly cites *In re Green Thumb* to support the proposition that a party loses its *right* to a hearing if that party fails to present a genuine issue of material fact for trial. (See, e.g., Appellant's Brief, p. 64) Region 5 then states that in *In re Green Thumb*, this Board held that "a party waives its *right* to an adjudicatory hearing where it fails to

The foregoing conclusion is also bolstered by case law and commentary interpreting the summary judgment provisions of the Federal Rules of Civil Procedure, which, as Region 5 notes in its appeal brief, is persuasive precedent with respect to issues arising under the *Consolidated Rules*. (See Appellant's Brief, p. 64, citing *In re Green Thumb, supra*). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), for example, the U.S. Supreme Court held that even where a party is technically entitled to summary judgment, a trial judge has discretion to deny summary judgment and to proceed to trial. The Court stated, in pertinent part, as follows: "[n]either do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Id.* (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

In *Veillon v. Exploration Services*, 876 F.2d 1197, 1200 (5th Cir. 1989), the Fifth Circuit held that a district court judge did not err in refusing to grant the plaintiff's unopposed motion for summary disposition and in ruling that the case should proceed to trial. *Id.* The Fifth Circuit reasoned that "[a] district judge has the discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof *if the judge has doubt as to the wisdom of terminating the case before a full trial.*" *Id.*[44] (emphasis added).

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dispute the material facts upon which an agency's decision rests" and that "the *constitutional right* to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute." *Id.* (emphasis added). Certainly, the Respondents do not dispute that a party may waive its *right* to a hearing by failing to present a genuine issue of material fact in response to a properly supported motion for summary judgment; however, this rule in no way supports the conclusion that Region 5 leaps to, which is that where a party fails to present a genuine issue of material fact, "the Presiding Officer simply does not have the discretion to . . . hold[] a hearing. . . ." (Appellant Brief, p. 67)

[44] The Appellant also relies heavily on *Newell Recycling Company, Inc. v. U.S. E.P.A.*, 8 E.A.D. 598 (EAB 1999), a case which is completely inapposite with respect to the issue of a Presiding Officer's discretion. The issue in *Newell Recycling* was simply whether "it was per se impermissible for the Presiding Officer to assess a penalty . . . without first conducting an evidentiary hearing." *Newell Recycling*, 8 E.A.D. at 625. The Board held that in *In re Green*

In addition to the foregoing cases, the following authorities have either relied on or recognized the rule that a judge has discretion to deny an unopposed motion for summary judgment for a variety of prudential reasons: *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir. 1984) ("[e]ven where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it"); *Johns v. International Business Machines Corporation*, 361 F. Supp. 2d 184, 190-91 (2005) ("[d]enial of summary judgment is addressed to the discretion of the Court, in a case that would benefit from a full trial"); Moore's Federal Practice, § 56.41 [3][d] (Mathew Bender 3d ed.) ("[t]he trial court has the right to exercise its discretion to deny a motion for summary judgment, even if it determines that a party is entitled to it, if, in the court's opinion, the case would benefit from a full hearing."); C. Wright, A. Miller and M. Kane, 10A Fed. Prac. & Proc. Civ. § 2725 (3d ed.).

Thumb, it had previously ruled that "an oral hearing . . . is *required* only if the party requesting the hearing raises a genuine issue of material fact." *Id.* (emphasis added). The Board's decision in *Newell Recycling* was appealed to the Fifth Circuit. *Newell Recycling v. U.S. E.P.A.*, 231 F.2d 204, (5th Cir. 2000). The Fifth's Circuit's opinion is also completely inapposite with respect to the issue of judicial discretion. The Fifth Circuit simply held that because Newell Recycling had failed to raise a genuine issue of material fact, Newell Recycling had not been deprived of a *due process right* to a hearing.

The flaw in Region 5's analysis of *Newell Recycling* was clearly recognized by Judge Moran who discussed the case at page 4 of his Initial Decision. Judge Moran emphasized that *Newell Recycling* supported the proposition that a presiding officer has the discretion to hold an evidentiary hearing on the amount of a penalty, even where, as in *Newell Recycling*, there was no dispute of material facts. In Judge Moran's words:

> "While the Court may not be under an *obligation* to hold a hearing, it still has the discretion to do so. It is the Court's view that such discretion should almost always be exercised to grant a respondent the opportunity to cross-examine EPA's penalty proposal. The reasons for this are plain. In the Court's experience of nearly 13 years of presiding in EPA administrative litigation, far more often than not, cross-examination has disclosed flaws in EPA's penalty calculation, which flaws were not apparent on the face of the document supporting it." Initial Decision, p. 4. (emphasis in original).

The instant case was clearly a case where the Presiding Officer had doubts as to the wisdom of terminating the case before a full trial, and where he believed that the best course would be to proceed to a hearing on the merits. Indeed, in the very first paragraph of the discussion section of his Order on Region 5's Motion for Accelerated Decision on Liability and Penalty at page 9, Judge Moran stated, "[t]he Court finds that there are material facts in dispute as to the appropriate penalty *and in addition to that finding, the Court, in the exercise of its discretion, finds that a hearing on the penalty issues is otherwise warranted.*" (emphasis added) Judge Moran cited the fact that in his experience "a respondent will not know, until the process of cross examination has been afforded, if the [Region 5] has in fact faithfully adhered to the penalty policies' instructions." *Id.* Judge Moran explained that "while a respondent is apt to be on equal footing as to knowledge of the facts surrounding an alleged violation, the same is not true where the issue is the Agency's application of its penalty policy to such alleged violations." *Id.* Based on the foregoing, Judge Moran clearly had doubts as to the wisdom of granting an accelerated decision where the facts relating to the appropriateness of the proposed penalty were peculiarly within the Region 5's knowledge and possession and where documents attached to Region 5's own motions called into question Region 5's application of the facts to the EPA Penalty Policy. Judge Moran obviously felt that the better course was to give Region 5 a chance to present whatever evidence it chose to support its proposed penalty and to give the Respondents the opportunity to present its evidence and cross examine the EPA agent responsible for calculating the proposed penalty so that the Respondents could have a full and fair opportunity to elicit these facts.

Since the Presiding Officer here had the discretion to hold an evidentiary hearing, his decision to do so must be reviewed on an abuse of discretion standard. "A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial

court," but rather, "will look for reasons to sustain a trial court's discretionary decision." 5 Am. Jur. 2d Appellate Review § 623 (2010) (citing numerous cases). "A discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion." *Id.*

"A determination that a trial court has abused its discretion involves far more than a difference in judicial opinion." *Id.* It requires a finding that the trial court's decision in the proceedings below was "arbitrary, unreasonable, or unconscionable," or "exercised on untenable grounds or for untenable reasons, or one with which no reasonable person could . . . agree." *Id.* "It has been held that to demonstrate an abuse of discretion, the complaining party must show the trial court's decision was so arbitrary and unreasonable as to shock one's sense of justice." *Id.*

Region 5 makes no credible argument that Judge Moran's decision to hold a hearing was arbitrary, unreasonable or one with which no reasonable person would agree. Thus, Region 5's Motion for Accelerated Decision on Liability and Penalty was properly denied and Region 5 was properly ordered to present its penalty case at the evidentiary hearing.

E. Region 5's Refusal to Participate in the February 23, 2010 Evidentiary Hearing Means that there is No Evidentiary Record to Support Anything Other than a Zero Penalty Award.

Normally, when a party loses a summary judgment motion, it obeys the Court's scheduling orders, appears at trial with counsel, offers either testimony or documents or both into evidence, cross examines the other side's witnesses and awaits a decision by the judge. There is no reason Region 5 could not have done that in this case where it was represented at the hearing by not one, but two attorneys, and in over 30 years of practice, Respondents' counsel has never seen a party pout about an adverse summary judgment decision to the point of refusing to present a case at trial. Judge Moran likewise found Region 5's conduct rather bizarre, particularly since it was ostensibly done for

the purpose of "preserving" its appeal rights.[45] [46] Nonetheless, that is what happened, and in light of Region 5's failure to present any evidence at the hearing, the Presiding Officer had absolutely no choice but to award zero for the penalty award.

In an obvious attempt to undue a fatally flawed strategy decision, Region 5 now argues, without support, that the documents that were attached to its earlier Motion for Accelerated Decision on Liability and Penalty should be considered "evidence" in the record for purposes of an appeal of the Initial Decision[47] (Appellant's Brief, p. 85), contrary to the ruling of the Presiding Officer (Initial Decision pp. 3, 4, 8). Indeed, Region 5 even goes further and argues, again without support, that documents attached to its Pre-Hearing Exchange with Respondents early in the case should likewise be considered "evidence" in the record. Appellant's Brief, p. 89. There can be no dispute that neither the documents exchanged in Appellant's Pre-Hearing Exchange nor documents attached to

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[45] *See* Supplemental Pre-hearing Exchange of the Administrator's Delegated Complainant, Docket #68, p. 2.

[46] It was only because of Mr. Wagner's defiant strategy to refuse introduction of any evidence at trial that Judge Moran explored the possible reasons for such strange behavior by Mr. Wagner (*see* Initial Decision, p. 9). While Region 5 now tries to portray Judge Moran's dicta comments regarding Mr. Wagner as some sort of witch hunt, the fact is that the Judge's bewilderment was understandable and his commentary on Mr. Wagner's unique views of the limited role of ALJ's is irrelevant to the outcome of the case, both below and with this Board.

[47] Region 5 also argues, beginning on page 74 of its brief, that Respondents presented no evidence to support the Respondents' argument that the proposed penalty was excessive. As stated above, given Region 5's refusal to participate in the February 23, 2010 hearing, and its concomitant failure to carry its burden of presentation and persuasion on its *prima facie* case, the burden of presentation and persuasion *never shifted to the Respondents*. In other words, the Respondents were not required to present *any* evidence at the hearing because no *prima facie* case was presented requiring rebuttal. Notwithstanding this fact, the Respondents elected to present some evidence showing that even if Region 5 had carried its burden of showing the existence and amount of environmental contamination at the Respondents' sites, as well as how the statutory and policy penalty factors had been or should be applied, the proposed penalty would still have been excessive because the Respondents made a good faith effort to remediate the contamination and any failure to remediate was not willful.

its accelerated decision briefs were ever "offered" or "admitted" into evidence as required to establish an evidentiary record for appeal.

Although conveniently ignored by Appellant, the *Consolidated Rules* repeatedly observe that "evidence" must be *presented* and *admitted* in order for it to become "evidence" in the record upon which the Presiding Officer's decision *must* be based. In 40 C.F.R. § 22.22 of the Rules entitled "Evidence," the words "admit," "admitted," "admission," or "introduced into evidence" are used no less than eight times in reference to the procedure for including "evidence" in the record. Moreover, 40 C.F.R. § 22.23(b) addresses a situation where the Presiding Officer refuses to admit into evidence testimony or documents offered by one party or the other, making it clear that not all evidence offered will necessarily be admitted. The concept of offering evidence and admitting the evidence is unambiguously embraced by the *Consolidated Rules*, just as it is in the Federal Rules of Evidence. And, as noted earlier, the Presiding Officer's decision must be based upon "a preponderance of the evidence." 40 C.F.R. § 22.24(b).

The above-referenced Sections of the *Consolidated Rules*, when read in their proper context as rules relating to "Hearing Procedures," compel the conclusion that the "evidence" upon which a post-hearing decision must be made is limited to oral and written evidence that was offered at the hearing and admitted by the presiding judge. Indeed, such was the conclusion by the EPA's Chief ALJ, Susan L. Biro, in a case where the respondent challenged the appropriateness of the EPA's proposed penalty for 166 violations of FIFRA. *In the Matter of: 99 Cents Only Stores,* 2010 WL 2787749 (June 24, 2010). In rendering her initial decision, Judge Biro refused to consider "[t]wo demonstrative exhibits" that were "marked for identification and used during the course of the hearing" because "neither was offered or admitted into the record as evidence." *Id.* Based on the foregoing, it would be incongruous for this Board to conclude that it can go beyond the hearing

record when deciding this appeal by relying on documents that were attached to the parties' prehearing motions but not even "used during the course of the hearing." If the drafters of the *Consolidated Rules* had intended for documents and affidavits from outside the hearing record to form the basis of a post-hearing decision, then the drafters would have given Presiding Officers the authority to consider such evidence and would have dispensed with the requirement for *admission* of evidence by the Presiding Officer.[48]

In addition to the foregoing, courts in a variety of jurisdictions, including federal courts, have consistently held that if summary judgment affidavits and documents are not *admitted at trial*, an appellate court cannot consider such documents as "evidence" in an appeal from a trial on the merits. See, e.g. *Irving v. U.S.*, 49 F.3d 830, 836, (1st Cir. 1995) ("documents attached to summary judgment motions are not evidence unless admitted at trial"); *Ernst v. Child and Youth Services of Chester County*, 108 F.3d 486, 488-89 (3d Cir. 1997), cert denied, 522 U.S. 850 (1997) (finding no reversible error where trial court refused "to consider the substance of . . . statements [in affidavit supporting summary judgment motion] when the contents of the affidavit were never offered into evidence during the trial"); *Johnson Intern.*, 19 F.3d at 434 ("[a] ruling by a district court denying summary judgment is interlocutory in nature and not appealable after a full trial on the merits. The final judgment from which an appeal lies is the judgment on the verdict. *The judgment on the verdict, in turn, is based not on the pretrial filings under Federal Rule of Civil Procedure 56(c), but on the evidence adduced at trial.*")(emphasis added); *Noble Exploration, Inc. v. Nixon Drilling Co,*

[48] With respect to the EPA's argument that documents in Complainant's Prehearing Exchange should be considered part of the hearing record, the EPA has ignored contrary precedent in case law that the EPA cited in its own brief on appeal. In *Titan Wheel Corp. of Iowa v. U.S.E.P.A.*, 291 F.Supp.2d 899 (S.D. Iowa 2003), (cited in Appellant's Brief p. 19) the district court cited the following statement from the ALJ's opinion in *In re Dr. Robert Schattner*, No. FIFRA-92-H-02, 1993 EPA ALJ LEXIS 460, at *2 (February 11, 1993): "[b]eing in the nature of discovery, pre-hearing exchange exhibits are, of course, not in evidence unless offered and admitted at the hearing."

Inc., 794 S.W.2d 942, 944 (Tex App. 1990) ("[a]lthough the contract was attached to Nixon's reply to Anthony's motion for partial summary judgment, *it was not introduced into evidence at trial on the merits, and we may not consider it on appeal*")(emphasis added); *State Farm Life Insurance Co. v. Smith*, 29 Ill. App. 3d 942, 949; 331 N.E.2d 275 (1975), reversed in part on other grounds, 66 Ill.2d 591, 363 N.E.2d 785 (1977) ("no evidence of a no bill was offered at trial. The defendant had previously filed a motion for summary judgment [and] . . . one of the exhibits which was attached was 'a determination by a Grand Jury that no true bill lies.' We know of no authority for the proposition that all matters heard on a motion for a summary judgment must be considered later by the trial factfinder."); see also *White v. Vathally*, 732 F.2d 1037 (1st Cir. 1984), cert. denied, 469 U.S. 933 (1984) (holding (1) that "we look to the evidence actually introduced at trial to determine whether the district court's finding is adequately supported," and (2) that "it would have been improper for the district court to rely on . . . extra-evidentiary documents in weighing the merits of the case.").[49]

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[49] Support for the contrary argument advanced by Region 5 appears to be confined to a bankruptcy court decision issued by a bankruptcy court in California. (Appellant's Brief, p. 85) See *Official Committee of Creditors v. Shearson Lehman Brothers Holdings (In re First Capitol Holdings Corp),* 179 B.R. 902 (Bankr. C.D. Cal. 1995). Indeed, while Region 5 cites several other cases, none of these cases go into any kind of analysis whatsoever of the pertinent issue. With respect to the bankruptcy court's decision in *First Capitol*, even if the court's reasoning were sound, which is doubtful at best, Region 5's reliance on this decision would still be misplaced because this decision deals with a situation where a trial court judge actually exercised his discretion to *admit* summary judgment evidence into the trial record under an alternate procedure arguably authorized under Federal Rules of Civil Procedure 42, 43, and 56. *Id.* at 906. The bankruptcy court stated that "[g]iven the complexity of th[e] case, the Court ha[d] decided to proceed as [putatively] authorized in Rules 42(b), 43(e) and 56(d) . . . ." *Id.* at 906. The court concluded that "*[u]nder this procedure*, the evidence and argument presented in the summary judgment record is fully before the court in connection with the trial." *Id.* (emphasis added).

With respect to the instant case, the *First Capitol* decision is completely inapposite. First, Federal Rule of Civil Procedure 43 has no counterpart or equivalent in the *Consolidated Rules* that govern this administrative proceeding. To the contrary, Subpart D of the *Consolidated Rules* compels the conclusion that a post-hearing decision must be made upon a preponderance of the "evidence" actually offered at the hearing and *admitted* by the presiding judge.

In the instant case, it would have been simple for Region 5 to offer evidence for admission at trial, and had it done so, it is very possible Judge Moran may have awarded a penalty acceptable to Region 5. Instead, it chose not to do so in a manner that can only be described as defiant. As a result, there was zero evidence in the hearing record relating to the proposed penalty for Judge Moran or this Board to review and consider in deciding an appropriate penalty. Even if Region 5 had a leg to stand on with its argument that Judge Moran had the authority to consider as "evidence" documents that were attached to accelerated decision motion briefs, Region 5 did not make this argument or request in the proceedings below, and cannot raise it for the first time on appeal. Based on the foregoing, this Board can reach but one conclusion: there is no evidence in the record to support anything other than a zero penalty award.[50]

Furthermore, even assuming that Judge Moran had any authority to adopt an alternative procedure for admission of evidence, it is abundantly clear that Region 5 did not move or request the Presiding Officer to follow such an alternate procedure, evidenced by its Supplemental Pre-Hearing Exchange (Docket #69) in which it stated "Complainant will present no evidence at the hearing. . ." (Supp. Exchg., p. 2). It is equally clear that Judge Moran did not exercise whatever discretion he may have had to receive into evidence the entire accelerated decision motion attachments, and therefore did not procedurally incorporate the summary judgment record into the hearing record. Rather, Judge Moran held that "EPA has not introduced any evidence to support its penalty rationale . . . ." and that "*[t]here [are] no exhibits from EPA nor did it provide any testimony.*" (Initial Decision, p. 37, emphasis in original). In short, Judge Moran followed the traditional procedure, and the only one available to him under the *Consolidated Rules*, which is to make a decision based upon the preponderance of the evidence actually offered and admitted at that trial.

[50] The EPA also argues, albeit briefly, in its brief on appeal that when Judge Moran granted accelerated decision on liability based on Respondents' concession on liability, the factual allegations in the unverified pleadings became the facts of the case. *Id.* at pp. 84. Even assuming *arguendo* that Judge Moran could have considered factual allegations relating to liability, Judge Moran still could not have considered allegations, or portions of allegations, that would have established the EPA's *prima facie* case with respect to the "appropriateness" of the EPA's proposed penalty without evidence offered and admitted at the hearing. Respondents conceded liability, not specific facts that would be used to prove the penalty amount.

III. THE BOARD SHOULD AWARD COSTS AND ATTORNEY'S FEES TO RESPONDENTS.

The Presiding Officer did not rule on Respondents' request for costs and attorney's fees, believing that this Board must first decide whether costs and attorney's fees can be awarded. Initial Decision, pp. 17, 18. He did, however, acknowledge what he perceived to be abuses by Region 5's pursuit of frivolous claims. *Id.* at 18, 19.

The *Consolidated Rules* provide the Presiding Officer and this Board with the discretion to resolve issues not addressed in the rules as it deems appropriate. 40 C.F.R. § 22.1(c) and § 22.4(c)(10). Respondents submit that these rules include awarding costs and attorney's fees when Region 5 pursues frivolous claims to unreasonable lengths and flaunts orders of the Presiding Officer.

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

In *Mattingly*, the court noted that it had previously decided that federal sanctions such as attorney's fees are appropriate to deter "future government misconduct" for violations of discovery orders and further noted imposing such sanctions against the government is "in keeping with the

principle that the government must conduct its litigation with the same degree of integrity as that expected of other litigants."[51] Therefore, it is appropriate for this Board to consider the standards set forth in the federal rules and applicable case law, and apply such standards to the facts before it.

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

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

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

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

28 U.S.C. § 1927.[52]

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

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

The Board should award some of Respondents' attorney's fees and costs for two reasons. First, Region 5 pursued its claim against Biewer Lumber, LLC well beyond the time it was patently obvious that there was no legitimate claim, a fact conceded by Region 5 much later. Even before discovery began, Respondents supplied to Region 5 the incorporation documents for Biewer Lumber, LLC clearly showing that Biewer Lumber, LLC *did not even exist* until well after the violations alleged by Region 5 occurred. How can a company that does not exist be the parent of another, or pervasively control another or "operate" a facility? The claim was absurd, yet Region 5 forced Biewer Lumber, LLC to brief its own Motion for Accelerated Decision and respond to Region 5's cross-motion before throwing in the towel on a claim that defines the term frivolous.

Second, if Respondents had known that following the briefing on the various Motions for Accelerated Decision, Region 5 would simply boycott the hearing if it lost the motions, Respondents would have stopped incurring fees and simply waited for the decisions. Instead, it was forced to prepare for trial, file a Motion for Entry of Decision, appear for trial in Toledo, Ohio with its witness, and file another post-hearing brief. Moreover, the "boycott" was in direct violation of Judge Moran's order on Region 5's motion to present Region 5's enforcement witness who could testify regarding Region 5's application of the RCRA Civil Penalty Policy to the facts of this case.[53] This type of conduct, in utter disregard for its costs to Respondents and its effect on the integrity of the entire process simply should not be tolerated.

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[53] Despite the fact that this Court had stated on January 9, 2009 that Respondents had the right to cross-examine the author of the proposed penalty amount at a hearing, and providing the same in its Order on Region 5's Motion for Accelerated Decision on Liability and Penalty and Order on Motion to Strike, in part, Respondents' Prehearing Exchange (*See* p. 20 of each Order), Region 5's attorney declared that Region 5 would not offer any evidence or make any witness available for cross-examination regarding the proposed penalty amount. Supplemental Pre-Hearing Exchange of the Adminstrator's Delegated Complainant, p. 2. It seems that Region 5 decided that it no longer had to meaningfully participate in the adjudicatory process *that it started* after this Court dismissed the derivative liability claims against JAB Company and Biewer Lumber, LLC.

For these reasons, Respondents request the Board to award their costs and attorney's fees in defending the frivolous claim against Biewer Lumber, LLC and the costs and fees incurred in going through the evidentiary hearing which was made a farce by Region 5's stubborn refusal to even present a case. A detailed itemization of Respondents' attorney's fees were submitted to the Presiding Officer in the Affidavit of Douglas A. Donnell, filed with Respondents' Post-Hearing Brief, dated March 30, 2010.

IV. RELIEF REQUESTED

Respondents request that the decision of Judge Moran be affirmed, and that costs and attorney's fees be awarded.

Respectfully submitted,

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Dated: Oct. 18, 2010

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