UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
John A. Biewer Company of Ohio, Inc.	)	
300 Oak Street	)	
St. Clair, Michigan 48079-0497	)	
(Washington Courthouse Facility)	)	
	)	
U.S. EPA ID #: OHD 081 281 412; and	)	**DOCKET NO. RCRA-05-2008-0007**
	)	
John A. Biewer Company, Inc.	)	
812 South Riverside Street	)	
St. Clair, Michigan 48079; and	)	
	)	
Biewer Lumber LLC	)	
812 Riverside Street	)	
St. Clair, Michigan 48079	)	
	)	
Respondents	)	

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Order on Cross Motions for Accelerated Decision on Derivative Liability

EPA filed a Motion for Accelerated Decision on Derivative Liability, pursuant to 40 C.F.R. §§ 22.1(a)(4), 22.20 and 22.37, seeking a determination of liability on the part of Respondents John A. Biewer Company, Inc. ("JAB Company") and Biewer Lumber LLC for violations alleged to have occurred at the John A. Biewer Company of Ohio, Inc. ("JAB Ohio"). Up until very recently, EPA sought to hold JAB Company and Biewer Lumber LLC liable[1] for the alleged JAB Ohio violations on the theories that JAB Company and Biewer Lumber LLC's

[1]While relegated to a footnote, EPA admits in its Reply to Respondents' Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability that it now agrees that neither "the evidence [nor the] applicable law [] support a finding that Biewer Lumber LLC is either derivatively liable, or directly liable, . . . and [that it] will no longer pursue Biewer Lumber LLC as a respondent in this case." EPA Reply at 3, n.1. EPA's concessions did not stop there; it admits now that JAB Ohio is not a Michigan corporation, but rather was incorporated in Ohio, and that the Environmental Appeals Board ("EAB") did not reach the issue of the appropriateness of piercing the corporate veil in its decision in *Safe & Sure Products, Inc.*, 8 E.A.D. 517, at 528 (1999). *Id.* at 5, n. 2.

"corporate veils" should be pierced and that, applying the guidance provided by the United States Supreme Court in its *United States v. Bestfoods* decision, 524 U.S. 51 (1998), ("*Bestfoods*"), those companies were also directly liable for the alleged violations at JAB Ohio.

Respondents JAB Company and Biewer Lumber LLC also filed their own Motion for Accelerated Decision seeking a holding that neither is directly nor indirectly liable for the alleged RCRA violations. In addition to these submissions,[2] the Court considered a raft of related filings: Complainant's Objection to Respondents JAB Company and Biewer Lumber LLC's Motion for Accelerated Decision, Respondents' Reply thereto, and Complainant's Reply to Respondents' Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability. For the reasons which follow, the Court **DENIES** EPA's Motion for Accelerated Decision on Derivative Liability and **GRANTS** the parallel Motion filed by the Respondents.

Briefly, as background, this action involves EPA's allegation that JAB Ohio violated RCRA by failing to remove contaminated soils around a drip pad after closing its Washington Courthouse facility. As indicated, the focus of this Order is whether, in addition to the Respondent John A. Biewer Company of Ohio, Inc., it is appropriate to hold liable the two new Respondents which were added to the original Complaint: JAB Company and Biewer Lumber LLC. The EPA Consolidated Rules of Practice provide that an accelerated decision is appropriate if there are no genuine issues of material fact. That is the case here, as both sides agree as to the facts. The disagreement is over what those facts mean. Thus, an accelerated

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[2]EPA filed on July 31, 2009, an "objection" to Respondents' Motion, seeking that the Motion be denied for now, while maintaining that the Respondents can file their Motion again, but only later, in response to EPA's Motion for Accelerated Decision on Derivative Liability. EPA's argument first revisited contentions it had already made in its Motion, concerning the factors involved in assessing whether a corporate veil should be pierced. It then recounted that when the Court allowed EPA to add JAB Company and Biewer Lumber LLC as named Respondents, the Court advised that the test for including those Respondents was that there be a sufficient basis to warrant their inclusion in the Complaint but that, after discovery, there would need to be sufficient evidence to establish a *prima facie* showing of parental liability. From this prelude, EPA then asserts that Respondents' Motion cannot be relevant to the fact sensitive inquiry as to whether EPA has established a *prima facie* case. EPA believes that Respondents' Motion cannot have relevance because it was made "without regard to Complainant's analysis of the facts." EPA fails to recognize that this is *the Respondents' Motion*, not EPA's, and that in any event it is based on the same facts provided by the Respondents pursuant to EPA's discovery requests. Respondents' Motion is not premature; rather, it is EPA's Objection that is wanting because it only challenged Respondents' Motion procedurally. Such a narrow response from EPA did not forestall EPA's obligation to have filed a timely Response addressing the Respondents' substantive arguments. However, EPA achieved the same result via its reply in its own motion for accelerated decision. With the parties having literally filed hundreds of pages of argument on this issue, the Court has been more than adequately briefed on the matter.

decision on the issue of JAB Company's liability is fully appropriate.

As the parties are of the view that the Supreme Court's analysis in *Bestfoods* provides significant guidance in this case, the Court begins with a review of that decision. Although *Bestfoods* was an action brought under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq*., the parties believe that it is instructive in this RCRA matter and the Court agrees with this shared view.

In *Bestfoods*, the Court described the issue before it as:

> whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary.

524 U.S. at 55.

The Court held that, unless the corporate veil may be pierced,[3] the answer to the issue is "no." However, apart from that determination, the Court noted that where a "corporate parent [] actively participate[s] in, and exercise[s] control over [] the operations of the facility itself[, such corporate parent] may be held directly liable in its own right as an operator of the [subsidiary's] facility."[4] *Id.*

At the outset of its analysis, the Supreme Court noted that "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *Id.* at 61. Although it was aware that the "respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature," it observed that "nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible." *Id.* at 62. This Court must point out that Congress was similarly silent on this issue regarding RCRA. That is, as with *Bestfoods*' CERCLA analysis, there is "no indication [in RCRA] that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.'" *Id.* at 63 (substituting 'RCRA' for CERCLA). The Supreme Court emphasized that a statute must speak directly to such fundamental issues as corporate ownership liability in order to abrogate this long-established common law principle.

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[3]The Supreme Court did not decide whether state law or federal common law should be applied in deciding whether corporate veil-piercing is justified under CERCLA. *Id.* at 64, n. 9.

[4]CERCLA actions, the Supreme Court noted, may be brought against "any person who *at the time of disposal of any hazardous substance* owned or operated any facility." 42 U.S.C. § 9607(a)(2). "Person," in turn, is defined to include corporations and other business organizations. "Facility," another defined term, has a "broad and detailed definition," but "owner or operator" is less precise as "any person owning or operating" a facility.

The Supreme Court also noted that "the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud . . . ." *Id.* Thus, the principles of corporate separateness are discarded when the purpose is simply to have the subsidiary be a mere agency or instrumentality of the owning company, and the parent corporation can only be charged with *derivative* liability under CERCLA when the corporate veil may be pierced.

The Supreme Court then took note that CERCLA liability can stem from operation as well as ownership. It observed that if a corporation adheres to corporate separateness, such as by following corporate formalities and adequately capitalizing the subsidiary, it could still be liable where it provides active, daily supervision and control over the hazardous waste disposal actions of its subsidiary. However, liability for such actions derives from its direct actions and not from any corporate veil-piercing. This is because any *person* who *operates* a polluting facility is liable for resulting cleanup costs. Accordingly, if a parent corporation is *operating* a facility owned by its subsidiary, the parent can be directly liable for its own actions. Later in its decision, the Court made a point of the distinction, noting that, where direct liability is the issue, the inquiry must be upon the parent's operation of the *facility* itself, not simply the parent's operation of the subsidiary. Hence, a court must look to participation by the parent in the activities of the *facility* of the subsidiary, not simply at the subsidiary. *Id.* at 68. By comparison, the corporate veil approach to examining potential liability looks to control of the *subsidiary* itself and, if it is sufficiently extensive, liability can attach on a veil-piercing theory. Thus, CERCLA's "operator" definition[5] can apply to a parent acting as such on the basis of its direct, personal, liability. Such liability has nothing to do with liability based on piercing the corporate veil.

Accordingly, the act of *operating* the facility of a subsidiary by the parent corporation makes the parent liable and a parent-subsidiary veil-piercing analysis (or as it is sometimes described, an "alter-ego"evaluation) is irrelevant to figuring out if there is direct liability. An

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[5]CERCLA's definition of a facility's "operator" did not aid the Supreme Court, as it only offers that it is any person operating a facility. Given that, the Court applied the ordinary meaning, as one who controls the functioning of something. In the business sense, it means to conduct the affairs of a business. Accordingly, it applies to one "who directs the workings of, manages, or conducts the affairs of a facility." *Id.* at 66. Later, the Court added to its explanation by stating that "operation" includes "the exercise of direction over the *facility's* activities." *Id.* at 71. As applied to CERCLA, the Court emphasized that the term "operator" involves one who "must manage, direct, or conduct operations *specifically related to pollution*, that is, operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67. This Court notes that RCRA's definition section offers less assistance, as "operator" is not among that statute's defined terms. *See* 42 U.S.C. § 6903. Given these considerations, there is no basis to conclude that any different standard applies in RCRA matters.

important point of distinction, the Supreme Court also found that the trial court's finding of *direct liability*, which finding was made on the basis of the directors of the parent corporation's also serving as directors of its subsidiary, was error, as it noted that it is "normal" for a parent and subsidiary to have identical directors and officers and that such persons can and do "change hats" as they represent the parent and subsidiary separately.[6] *Id.* at 69. Because of that, liability requires showing that, contrary to the presumption, such officers and directors of a subsidiary were in fact acting as such *for the parent* and not for the subsidiary. The presumption that one wearing two hats is acting for the subsidiary when wearing the subsidiary hat is "strongest when the act [in issue] is perfectly consistent with the norms of corporate behavior, but wanes . . . [as the act becomes] plainly contrary to the interests of the subsidiary, yet nonetheless advantageous to the parent." *Id.* at 70, n. 13. The norms of corporate behavior "are crucial reference points" in determining when an officer, wearing two hats, is acting inconsistently with the subsidiary's interests while acting as an officer of that subsidiary. *Id.* at 71.

On the basis of the foregoing, a brief summary of the two theories of potential parent corporation liability is appropriate.

1. Derivative Liability

Under the guidance from the Supreme Court's decision in *Bestfoods*, it is clear that a parent corporation can only be charged with *derivative* liability under CERCLA when the corporate veil may be pierced. The same is true where RCRA is concerned. As the Supreme Court stated: ". . . the corporate veil may be pierced and the shareholder[7] held liable for the corporation's conduct when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud . . . ." *Id.* at 62. Thus, the principles of corporate separateness are discarded when the purpose is simply to have the subsidiary be a mere agency or instrumentality of the parent company.

2. Direct Liability

A parent corporation's CERCLA liability can stem from operation as well as ownership. This is because any *person* who *operates* a polluting facility is liable for resulting cleanup costs. Thus, if a parent corporation is *operating* a facility owned by its subsidiary, the parent can be directly liable for its own actions. The Supreme Court made a point of this distinction, noting that, where direct liability is the issue, the inquiry must be upon the parent's operation of the

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[6]Upon remand, the District Court, applying the Court's *Bestfoods* decision, found that CPC was not liable for the costs of remediation under CERCLA. *Bestfoods v. Arrogate-General Corporation, et al,* 173 F. Supp. 2d 729, 733 (W.D. Mich) (November 9, 2001).

[7]While many veil-piercing cases involve circumstances where the issue is whether a corporation's shareholders may be held liable, the same analysis applies where the piercing seeks to hold a parent corporation liable for its subsidiary's transgressions.

facility itself, not simply the parent's operation of the subsidiary. Therefore, one must look to participation by the parent in the activities of the *facility* of the subsidiary, not simply the subsidiary.[8] *Id.* at 68. Accordingly, CERCLA's definition of an "operator" can apply to a parent corporation on the basis of its direct, personal, actions. Such liability has nothing to do with liability based on piercing the corporate veil. As such, the act of *operating* the facility of a subsidiary by the parent corporation makes the parent potentially liable and any parent-subsidiary veil-piercing analysis is irrelevant to figuring out if there is direct liability. This means that, even if a parent corporation adheres to corporate separateness, such as by following corporate formalities and adequately capitalizing the subsidiary, such parent could still be liable where it provides active, daily supervision and control over the hazardous waste disposal actions of its subsidiary's facility. Again, such liability derives from the parent's direct actions and not from any corporate veil-piercing theory.

Discussion

As a starting point, the Court observes that there is no suggestion by EPA that JAB Ohio was not a legitimate corporation both in terms of its creation and, at least for a significant period of time, as an ongoing business. As EPA stated, JAB Ohio "is a Michigan[9] corporation that was incorporated in September 1980, which conducted wood treating operations until 2001 at its facility in Washington Courthouse, Ohio." EPA Motion at 6-7.[10] Some other matters are not in dispute. Respondents agree that JAB Ohio is a wholly owned subsidiary of JAB Company (JAB Company is the parent and 100% shareholder of JAB Ohio) and that they share dual officers. Respondents' Opposition at 3. There is also no dispute that JAB Ohio was created as a corporation on September 18, 1980, and that it ceased its wood production operations in June 2001. Respondents' Motion at 3. Also, EPA raises no challenge to Respondents' statement that before JAB Ohio terminated its wood production operations, it was run by its own plant manager which JAB Ohio had hired and which plant manager "had and exercised full authority to hire, fire, train, and discipline [those] employees . . . [and that manager] hired his own inside and outside sales force, and employees were paid by checks issued by JAB Ohio. . . . [and further that] [i]nvoices for materials sold from the JAB Ohio Facility were issued by JAB Ohio, and JAB Ohio maintained separate financial statements and separate profit sharing plans from its parent, JAB Company." Respondents' Opposition at 4, Respondents' Motion at 3-4.

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[8]By comparison, the corporate veil approach to examining potential liability looks to control of the *subsidiary* itself and, if it is sufficiently extensive, liability can attach on a veil-piercing theory.

[9]EPA now realizes that JAB Ohio is an Ohio Corporation. *See* n.1, *supra.*

[10]For convenience, references to the "Motions" in this case actually apply to the parties' memoranda in support of their Motions.

Applicable law:

The Supreme Court did not reach the issue of whether state law or federal common law should be applied in deciding whether corporate veil-piercing is justified under CERCLA. *Bestfoods*, 524 U.S. at 64, n. 9. Respondents state that the Sixth Circuit has held that state common law is to be applied, at least for CERCLA veil piercing claims. As with CERCLA matters, Respondents contend that it is Ohio law which should be applied in RCRA matters.[11] Respondents' Opposition at 8, Respondents' Memorandum at 27-29. Respondents look to *Carter Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745 (6th Cir. 2001)("*Carter Jones*") in support of their view that the Sixth Circuit has applied state law in veil-piercing claims under CERCLA and that the same analysis should apply in this RCRA matter. Respondents' Motion at 27. In this case, upon considering the state with the most significant relationship to the action, Respondents contend that Ohio law should be applied. JAB Ohio is an Ohio Corporation.

EPA challenges the view that state common law must be applied to veil-piercing claims under CERCLA, and it has a different take on *Carter Jones.* While EPA concedes that the court there did indeed favor application of state common law and that the court there saw no reason to depart from that view, it objects to the idea that the view has become Sixth Circuit doctrine requiring the EPA Administrator to apply Ohio common law in determining whether to pierce the corporate veil.[12] EPA Reply at 5.

EPA suggests that administrative actions involve special considerations and that the Administrator cannot have varying standards for determining derivative liability, which depend upon the state where a respondent resides. *Id.* at 8. From there, EPA returns to its preference that the criteria identified in *Safe & Sure Products, Inc.*[13] be applied in determining whether the corporate veil should be pierced in a given case, and it notes that those identified criteria are essentially the same as those listed *In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution* , 675 F. Supp. 22, at 33 (D.C. Mass. 1987), ("*Acushnet River*"), a case cited by Respondents and EPA.[14]

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[11] Both Michigan and Ohio are within the Sixth Circuit.

[12]EPA notes that the Supreme Court in *Bestfoods* did not reach the issue and states that the EAB has not either.

[13]It is appropriate to note that it was this Court that issued the Initial Decision in *Safe & Sure Products, Inc.*

[14]As this case arises in Ohio, it does seem that this Court should, and will, pay more attention to the Sixth Circuit's views. However, at the end of the day, the distinctions are academic because the Court finds that the factors identified in *Acushnet River*, "when viewed together" as that court prescribed, do not establish a basis to pierce the corporate veil in this case.

Ultimately, it becomes clear that EPA's preference for *Acushnet River* derives from that court's view that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* at 8, quoting *Acushnet River* at 33. It is fair to observe that this perspective does not square with the Supreme Court's view in *Bestfoods.* While the court in *Acushnet River* identified a host of factors to be considered,[15] it added that no factor was either necessary or sufficient to justify piercing the corporate veil, and at the end of the day, "the equitable decision to pierce the veil is dependent on the facts peculiar to each case." *Id.* at 9.

The Court concludes that, on balance, Ohio common law, not Michigan or federal common law, should be applied. [16] In any event, as the discussion which follows reveals, the particular law to be applied is academic, as the Court finds that the Respondent, JAB Company, is not liable under either federal or state views.

Piercing the corporate veil

Regarding the appropriateness of piercing the corporate veil, EPA acknowledges that "the general rule is that 'separate entities will be respected,'" and that to pierce the corporate veil it must be shown that "the 'corporate form was so ignored, controlled or manipulated that it was

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[15]The factors cited in *Acushnet River* are inadequate capitalization, extensive or pervasive control by the shareholder(s), intermingling of the corporation's properties or accounts with those of its owner, failure to observe corporate formalities and separateness, siphoning of funds from the corporation, absence of corporate records, and nonfunctioning officers or directors. In the Court's view, as explained more fully within the body of this Order, none of those factors were present in this matter.

[16]In *AT & T Global Information Solutions Company et al. v. Union Tank Car Company, et al.*, 29 F.Supp. 2d 857, (U.S. Dist Ct for S.D. of Ohio) (Nov. 2, 1998), as in this case, the court was confronted with cross motions for summary judgment. The court applied Ohio law, holding that the Sixth Circuit has held that state corporate law is to be applied in CERCLA cases. Without providing an extensive recounting of the court's analysis, it is enough to recount that it considered that Ohio was the state with the most significant relationship to the suit, as the corporation was incorporated there, it employed Ohio's citizens, and the CERCLA violations occurred there. The same is true for JAB Ohio. Applying the three prongs of *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.*, 617 N.E.2d 1075 (1993), the court there made the same fact-specific analysis and found that the corporate veil should be pierced, but obviously, that fact determination has no precedential value here. The value of the case is limited to its perspective of the law to be applied.

merely the instrumentality of another and that allowing its use would constitute a fraud or promote injustice."[17] EPA Motion at 9, quoting *Safe & Sure Products, Inc.*[18]

In its initial attempt to justify piercing the corporate veil of JAB Company and Biewer Lumber LLC, but now only attempting to do so against JAB Company,[19] EPA looks to: "the nature of the corporation's ownership and control" and "other shareholder acts or conduct ignoring, controlling or manipulating the corporate form." *Id.* at 10. It contends that JAB Ohio

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[17]The appropriateness of piercing the corporate veil is fact specific, involving consideration of a host of factors including, whether there is: an absence of corporate assets and undercapitalization; failure to maintain, or the absence of, adequate corporate records or minutes; fraudulent representation by the corporation's shareholders or directors; use of the corporation to promote fraud, injustice, or illegal activities; payment by the corporation of individual obligations; commingling of funds and other assets or affairs and the diversion of corporate funds or assets to noncorporate uses; failure to observe required formalities; the nature of the corporation's ownership and control; disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and other shareholder acts or conduct ignoring, controlling or manipulating corporate form. EPA Motion at 9-10.

[18]As noted, *supra*, Respondents accurately pointed out that the EAB, while adopting the Initial Decision of Administrative Law Judge William B. Moran in *Safe & Sure Products, Inc.*, declined to decide the corporate veil-piercing aspect of that decision. Respondents' Response at 8.

[19]See n. 1, *supra.* While EPA eventually recognized the weakness of its contentions, it should still be noted that Respondents observed that Biewer Lumber LLC was not created until February 9, 2006, and that there is no corporate relationship between that entity and JAB Ohio. The Court agrees with Respondents' point that EPA has attempted to conflate Biewer Lumber and Biewer Lumber LLC, and, for that matter, "the Biewer family," and that this conflation is without any basis in law. EPA is unable to cite any case law in support of its combining of these distinct descriptors. It has not challenged the record evidence regarding the date of creation for Biewer Lumber LLC. Beyond that dispositive determination, the actions taken by Brian Biewer, as cited by EPA, occurred *before* Biewer Lumber LLC was created. Thus, the Court agrees that it is impossible for Biewer Lumber LLC to be found controlling JAB Ohio at a time before it came into existence. EPA only makes this argument by treating the "Biewer family," "Biewer Lumber, " and "Biewer Lumber™" as if they were interchangeable pieces with "Biewer Lumber LLC." It was completely without merit for EPA to have claimed that Respondent Biewer Lumber LLC could have controlled JAB Ohio when the alleged offending actions took place before Biewer Lumber LLC came into existence. Consequently, the Court holds that Biewer Lumber LLC cannot be held liable on any corporate parent theory of liability; that is, on neither a direct liability nor a corporate veil-piercing theory. As such, Biewer Lumber LLC should be dismissed as a named Respondent in this proceeding. It is noted again that now EPA's own reply supports the Court's determination, at least with regard to Biewer Lumber LLC.

did not function as a corporation in fact and that "those acting with regard to the arsenic and chromium contamination at the JAB-[Ohio][20] facility paid no heed to the corporate forms of JAB-Ohio, JAB-Co[mpany], and Biewer Lumber LLC" and that, as the corporate officers for those entities ignored the corporate forms, piercing the corporate veil is essential to avoid "fraud or promote injustice" in this case. *Id.* at 10.

Respondents point out that piercing the corporate veil is a rare exception under Ohio law. It describes *Belvedere Condominium Unit Owners Ass'n v. R.E. Roark Cos.*, 617 N.E. 2d 1075 (1993) ("*Belvedere*") as the leading Ohio case on the subject.[21] Under *Belvedere*, in order for

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[20]The quote from EPA's Motion referred to the companion case, JAB Toledo, and thus, the reason for the bracket is to insert the intended entity. There have been a number of such mistaken references in these proceedings where a party refers to the wrong case, but this is understandable because, while there are some factual differences between the JAB Ohio and JAB Toledo cases, as the parties acknowledge, the critical facts are the same on the issue of parent corporation liability.

[21]In *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.*, 617 N.E.2d 1075 (1993), ("*Belvedere*"), a condominium association brought an action against the developer and the developer's major shareholder. As relevant here, the decision addressed the association's attempt to pierce the corporate veil of the developer corporation. Respondents accurately portray the holding in *Belvedere.* In its decision, the Supreme Court of Ohio first noted the accepted basics on this subject – that piercing the corporate veil is an exception to limited liability which developed to deal with those who use the corporate entity "for criminal or fraudulent purposes." *Id.* at 1085. Although *Belvedere* eased the burden of establishing grounds for piercing the corporate veil from that court's earlier case law by eliminating the requirement that a subsidiary *be created* in order to perpetrate a fraud, the core elements remained unchanged. Those core elements require showing that control over the subsidiary is so complete that the subsidiary has no separate mind, will, or existence of its own and the control by the parent was exercised in such a manner as to commit fraud or an illegal act against the party seeking to have the subsidiary corporate entity ignored and the parent corporation's veil pierced. Citing to the Sixth Circuit's approach to the issue, the Ohio Supreme Court expressed its agreement with the balance that Circuit employed between upholding the basic principle of limited shareholder liability and circumstances when the intent is to use the corporate form as a means to insulate from misdeeds. With that balance in mind, the court in *Belvedere* held that the corporate form may be pierced when "control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, [] control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and [] injury or unjust loss resulted to the plaintiff from such control and wrong." The Ohio court made it clear that mere control over a corporation is not in itself a sufficient basis to pierce the corporate veil as the element of fraud or an illegal act is also essential to establish. *Id.* at 1086.

liability based on veil piercing to be imposed, it must be shown that the corporation had no mind, will or existence of its own; that control over the corporation was such as to commit fraud or an illegal act against the party seeking to pierce the corporation's veil; and that injury or unjust loss resulted from such wrongful activity. Applying *Belvedere*, as the most significant Ohio case, Respondents note that in *Transition Healthcare Associates, Inc. v Tri-State Health Investors, LLC*, 306 Fed Appx. 273, 280 (6th Cir. 2009)("*Transition Healthcare*"), while the court found a number of connections between the parent and the subsidiary, it characterized them only as proof of some overlapping management, showing only a management relationship, and that this was not sufficient to pierce the corporate veil.

As alluded to earlier, Respondents have highlighted that it is uncontested that, prior to its closure in June 2001, JAB Ohio was operated by a plant manager hired by JAB Ohio; that such manager had and used full authority to hire, fire, train, and discipline employees of JAB Ohio; that such manager hired his own sales force, both inside and outside; that employees of JAB Ohio were paid by checks issued by JAB Ohio; that invoices for materials it sold were issued by JAB Ohio; and that JAB Ohio maintained separate financial statements and separate profit sharing plans from its parent. Further, JAB Ohio had its own, separate, individualized series of

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The Ohio Supreme Court revisited its holding in *Belvedere* fifteen years later with its decision in *Dombroski v. Wellpoint*, 895 N.E.2d 538 (2008) ("*Dombroski*"). There, it modified the second prong of the *Belvedere* test by requiring a showing that the control over the subsidiary corporation be exercised "in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Id.* at 540. The "second prong" allows the corporate veil to be pierced when the control "was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity." The important point made by the Ohio court was its conclusion that the second prong does *not* allow the veil to be pierced where the control exercised involved acts which did not rise to the level of fraud or an illegal act. Stated more directly, to pierce the corporate veil, the acts of control must pertain to fraud or an illegal act. Thus, even though in *Dombroski* it was found that two companies had no separate minds, wills, or existences of their own, the second prong must still be established. *Dombroski*, following the more expansive reading of the second prong offered by several Courts of Appeals, added to fraud or illegality, "other unjust or inequitable act[s]." *Id.* at 544. *Dombroski* concluded that "[l]imiting piercing to cases in which the shareholders used their complete control over the corporate form to commit specific egregious acts is the key to maintaining [the] balance" between the principle that limited liability is the rule and that "piercing the corporate veil is the 'rare exception' that should only be 'applied in the case of fraud or certain other exceptional circumstances.'" *Id.* at 544-545. The Court concluded that the limited expansion to include "similarly unlawful act[s]" means that the corporate veil should be pierced "only in instances of extreme shareholder [or parent corporation] misconduct." *Id.* at 545. The Court did not use the term "extreme shareholder misconduct" lightly, as it determined that the insurer's bad faith, while constituting unjust conduct, was still *not* the type of exceptional wrong justifying veil piercing.

checks which allowed it to separately track and record the subsidiary's debits. JAB Ohio's internal financial statements were prepared separately by the Chief Financial Officer of JAB Company. After JAB Ohio closed its operations, all its expenses were accounted for through the use of an intercompany payable and these expenses were charged to JAB Ohio. In 2005, JAB Ohio itself commissioned the Mannik & Smith Group ("MSG") to draft a drip pad closure plan. Although EPA has alleged that JAB Company is financially propping up JAB Ohio with cash, Respondents reply that any such transactions have all been accounted for and are reflected on the balance sheets of those companies. Further, to the extent that JAB Company has paid JAB Ohio's taxes and other debts, Respondents contend that such transactions are normal and commonplace between subsidiaries and a parent corporation and each such payment was properly recorded in the financial records for those entities. Citing *Dombroski*, Respondents contend that more must be shown than the "mere fact that the company ceased operation without being able to pay all its debts." Respondents' Opposition at 9.

The Nature of corporate ownership and control

-Sole Shareholder and Common Officers

Regarding the factor of the nature of corporate ownership and control, EPA points out "that 'JAB Company is the sole share holder [sic] of JAB Toledo and JAB Ohio'"; "that the President of [JAB Company, JAB Toledo and JAB Ohio] is Richard Biewer, the Vice-President is Timothy J. Biewer, and the Secretary/Treasurer is Brian Biewer"; that "Brian Biewer and Timothy Biewer are the only members of BT Holdings, LLC"; and that "BT Holdings, LLC is the only Member of Biewer Lumber, LLC." EPA Motion at 10-11.[22]

Referring again to *Transition Healthcare*, Respondents assert that proof of some management overlap between the parent and the subsidiary together with showing a management relationship between those entities is not sufficient to warrant piercing the corporate veil. Respondents contend that, under that case, merely sharing management and personnel, having the parent exercise some degree of control over the facility's operation, and having the parent receiving payment of a percentage of the facility's revenue for its services, among cited aspects,

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[22]Although legally and logically unconnected to its argument that JAB Company and, until recently, that Biewer Lumber LLC should be accountable for violations alleged to have occurred at JAB Ohio, EPA adds that "JAB-Co is the sole owner of [] additional subsidiaries: John A. Biewer Company of Wisconsin; John A. Biewer Co. of Illinois; John A. Biewer Wisconsin Sawmill, Inc; and John A. Biewer Lumber Company." It further notes that Richard Biewer, Timothy J. Biewer, and Brian Biewer are "effectively in control of all of JAB-Co and its subsidiaries" and that "Timothy J. Biewer and Brian Biewer are in control of BT Holdings LLC and Biewer Lumber LLC." Motion at 11. These points do not advance EPA's argument in the present matter.

were not sufficient to warrant piercing the corporate veil.[23] Respondents remind that, under *Belvedere,* one must show that: the subsidiary had no separate mind, will or existence of its own; such control was exercised so as to commit fraud or an illegal act against the person seeking to pierce the veil; and there was a consequent injury or unjust loss resulting from such control and wrong. Respondents' Response at 9. Respondents maintain that merely showing that a company ceased its operation without being able to pay all its debts is insufficient to establish an "injustice." *Id.*

Respondents further note that EPA does not address the second prong of the *Belvedere* test that it be demonstrated that control over the corporation be exercised in a manner as to commit fraud, an illegal act, or similar unlawful conduct. Respondents point out that this is distinct from showing "unjust or inequitable conduct," as such an expansive standard would permit piercing the corporate veil in a manner at odds with the principle of limited liability. Respondents' Opposition at 38, citing *Dombroski.* In this regard, Respondents highlight that EPA has not explicitly claimed that Respondents engaged in fraud or other illegal acts, citing *Siva v. 1138 LLC,* 2007 WL 2634007, at *4 (Ohio App. Sep. 11, 2007). The decision in *Siva,* Respondents observe, rejects the idea that insolvency due to unprofitable operations or poor business judgment may be substitutes for defrauding creditors. Respondents' Opposition at 39. Respondents compare *Siva* to the claims here, noting that no fraud has been shown. Rather, after twenty years, JAB Ohio simply failed as a business and the reason it was unable to pay for the remediation in connection with the drip pad was its lack of revenue. JAB Ohio's lawful payment of its debt to JAB Company, its creditor, does not amount to a fraudulent transfer of funds to avoid subsequent liabilities. *Id.* at 39. The Court agrees.

Respondents also note that, per *Bestfoods*, there is nothing inappropriate with directors and officers holding positions with both the parent and a subsidiary. Rather, the inquiry is over whether the individuals were acting in accordance with their proper roles; that is, acting in the subsidiary's interests when performing in the role of an officer of that subsidiary. For those acting as dual officers, such behavior is measured by comparison with corporate norms. Respondents remind that a parent company is also entitled to be the sole shareholder of a subsidiary. Such arrangements are well within the corporate norms referred to by the Supreme Court in *Bestfoods*. Further, the presumption which operates is that when one acts as an officer of a subsidiary, it is presumed that such actions are taken on behalf of the subsidiary. *Id.* at 16. Here too, the Court agrees with Respondents' points.

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[23]Respondents also cite to *Wilson v. Superior Foundations, Inc.*, 2008 WL 757525, as another example under the *Belvedere* decision that, even where the defendant shareholder owned and was the sole shareholder of both companies, and the two companies did the same work, and did not have separate employees, among other factors, such circumstances did not meet the first part of the *Belvedere* decision.

- The "Biewer" website issue

EPA's veil-piercing argument also looks to the website "www.biewerlumber.com," which, as of January 2009, lists its "Corporate Headquarters" as: John A. Biewer Co., Inc., Biewer Lumber LLC, 812 South Riverside, P.O. Box 497, St. Clair, Michigan 48079. EPA notes that this Biewer website states "'our beginning' was 'over 45 years ago,' and that 'Biewer Lumber™ is a third generation, family owned company'; and, ... that 'our goal' is 'to operate the safest and most effective facilities' and '[t]hese facilities include three pressure-treated lumber and distribution facilities[.] . . . that 'Biewer Lumber™ was a pioneer in the treating industry'; ... that it 'remains a leader today' in that industry; and ... that '[o]ur commitment to safe, productive treating facilities has made our company one of the most reliable and respected treaters in this country.'"[24] EPA Motion at 11-12.

Respondents respond that EPA's attempt to build a case based on its claim that the corporate veil should be pierced by virtue of the use of "Biewer Lumber," "Biewer Lumber™" and the website "www.biewerlumber.com" is without merit. It too notes that EPA cites to general statements found at the biewerlumber.com website such as that Biewer Lumber began over 45 years ago and that Biewer Lumber™ is referred to at the website as a pioneer and a leader in the wood treating industry. However, Respondents reply that none of these statements, nor EPA's reference to the "Biewer family," have any pertinence to an analysis of the appropriateness of piercing the corporate veil. It notes that a similar argument was advanced in *American Trading & Production Corp. v. Fischbach & Moore, Inc.*, 311 F. Supp. 412, (D.C. Ill. 1970), and in *Fletcher v. Atex Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995). There, the courts concluded that actions such as advertising, promotional literature, and a parent claiming credit for actions of its subsidiary did not constitute the types of action which evidenced that the companies were actually a single entity. Accordingly, it was determined that neither boastful advertising nor statements describing the entities as "family" are a substitute for showing that the corporate identities were ignored by the parent vis-a-vis the subsidiary.

The Court agrees with the Respondents that EPA's Motion essentially ignores "the *actual* corporate organization of each of the Respondents to the point of not even referring to them separately but instead referring to the 'Biewer family' or 'the Biewer family as JAB Company and Biewer Lumber/Biewer Lumber LLC,'[25] as though that is a single legally recognized entity that is a party to these proceedings." Respondents' Opposition at 1. In the same vein, Respondents note that EPA treats Biewer Lumber LLC and Biewer Lumber™ as if they were the

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[24] For purposes which are clear, but not material; EPA goes on to list *other* Biewer entities which are *not* part of this litigation: Biewer of Lansing LLC; John A. Biewer Co. of Illinois; and John A. Biewer Co. of Wisconsin, and then adding that John A. Biewer Co. of Illinois and John A. Biewer Co. of Wisconsin are wholly-owned subsidiaries of JAB Company. EPA Motion at 12.

[25] Some EPA references to Biewer Lumber LLC are retained even though EPA now realizes it is not a culpable party. Continued references to Biewer Lumber LLC are retained in some instances because they place EPA's contentions in a more complete context.

same. *Id.* at 2. Obviously, they are not; "Biewer Lumber LLC" refers to the limited liability company, presently listed as a Respondent in this matter, while "Biewer Lumber™"is a trademark name. Fittingly, Respondents observe that EPA cites no case law to support its lumping together formal corporate entities with non-corporate descriptives, as if they were indistinguishable.

While the term "Biewer Lumber™" has been used by the various Biewer entities, the Court agrees that this use amounts only to a generic, and general, reference to Biewer businesses and does not serve to create a basis for holding Biewer Lumber LLC liable under any theory. While EPA tosses about Biewer Lumber, Biewer Lumber™ and "Biewer Lumber LLC," and, at times, even "the Biewer family," as if they were one interchangeable entity, they are not. EPA does not assist its argument by melding them as if they were one and the same.

Respondents properly take note that the Court earlier had made the same observation that EPA blurred the distinction between separate corporate entities and trade names and general references to the Biewer businesses, as a whole. As this is a legal proceeding, it is important to make such distinctions. Up until it filed its Reply, EPA had also failed to distinguish between the two entities against whom EPA wishes to extend liability. One, JAB Company, is the acknowledged parent corporation of JAB Ohio. As such, an analysis of potential parent liability is in order. However, the other entity, Biewer Lumber LLC, as explained in this Order, is completely unrelated to JAB Ohio in the sense of any connection recognized by the law. Biewer Lumber LLC is not owned by JAB Company, nor is it a shareholder of JAB Ohio. None of that is disputed. Accordingly, for Biewer Lumber LLC, no corporate veil piercing is tenable with regard to the violations associated with JAB Ohio, a conclusion EPA has now, belatedly, made.

Accordingly, the Court concludes that, in making its broad lay observations about the website's statement and that the website names various Biewer corporate entities, EPA has discounted the legal realities of the separate corporate existences that it admits exists concerning "the corporate structure of these companies . . . as [they] appear[] on papers filed with the Michigan Department of Commerce," and it effectively ignored its own acknowledgment that "Respondents -- and related 'Biewer' companies -- may have been formed at different times and set up with different corporate identities." Apparently, from EPA's perspective, the important consideration is that "all of these companies are the creation of, and operated by, the same Biewer family members: Richard Biewer, Timothy J. Biewer and Brian Biewer, or some combination of them, and all have been engaged in the same endeavor, the production and sale of treated wood." *Id.* As stated, EPA cites no case law explaining the supposed significance of these lay observations, and certainly the *Bestfoods* decision offers no support for the idea that these observations show a lack of corporate separateness.[26]

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[26]Although finally discarded, EPA initially persisted with what is effectively an argument one would expect from a lay person's perspective, by contending that the fact Biewer Lumber LLC *was not created* until February 2006 presented no obstacle to its position that the entity

While there is some redundancy in the following discussion, the Court now addresses five specific observations put forward by EPA as to the nature and control of JAB Ohio.[25] The Respondents' response and the Court's comments on these "specifics" follows each item.

(1) "Respondents admit that JAB-Ohio 'do[es] not and did not have [a] separate checking account[].'" EPA Motion at 14.

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should be found liable under a direct liability and/or pierced-veil theory of liability for violations alleged to have occurred in 2004 and 2005. EPA's thinking, then, was that in "the Biewer family's actual conduct of its business, 'Biewer Lumber' and 'Biewer Lumber LLC' are one and the same." *Id.* at n.7. However, the "actual conduct of its business" cited by EPA is the Biewer website, www.biewerlumber.com, which identifies "Biewer Lumber™" as a "third generation, family owned company" that has been serving the public for "45 years." *Id.* EPA apparently believed that the website's reference to "Biewer Lumber™" and the same website's remark that "Biewer Lumber™" has been serving the public for 45 years refutes the state's records that Biewer Lumber LLC was not created until February 2006. To make this association, EPA, again in the fashion one would expect from a non-lawyer, simply glided over the fact that "Biewer Lumber LLC" is not the same as "Biewer Lumber™." The blurring of this distinction explains the basis for EPA finding additional support for its claim with the observation that, "after February 2006, the Chief Financial Officer of Biewer Lumber LLC and JAB-Co, in September 2007, continued to use the same "Biewer Lumber™" letterhead -- with the same www.biewerlumber.com e-mail address-- used by Brian Biewer in communicating with Ohio EPA in 2004 regarding the arsenic and chromium contamination at the JAB-Toledo facility." EPA Motion at 13, n. 7.

Respondents also speak to EPA's inferences from the use of letters employing "Biewer Lumber™"as the letterhead, that www.biewerlumber.com website has the same mailing address for JAB Company and Biewer Lumber LLC and that Brian Biewer uses the same office and telephone number for his role with JAB Ohio as well as for JAB Company. Respondents note again that no case law supports the idea that corporate veil piercing is warranted by such practices. Respondents observe that "Biewer Lumber™" is a trade name and nothing more. As to the use of a single office and phone number for more than one entity, Respondents urge that is simply consistent with practicality and efficiency, and it is not indicative of a blurring between JAB Ohio and the other named Respondents. As Respondents point out, such an arrangement makes even more sense once JAB Ohio ceased its operations. Respondents' Opposition at 36. The Court agrees. Nor is EPA's contention advanced by its reference to Brian Biewer's December 30, 2004, letter to Ohio EPA. EPA pointed out that Brian Biewer signed the letter as "Secretary/Treasurer" and argues that shows he was not acting on behalf of JAB Ohio. In contrast, as Respondents note, the letter from Ohio EPA prompting Brian Biewer's December 2004 response was addressed to "Brian Biewer, John A. Biewer Company of Ohio." Respondents' Opposition at 35, citing Exhibit R.

[25]Respondents characterize EPA's veil piercing argument as resting on five key facts or circumstances, but they respond that those "do nothing more than establish a normal parent subsidiary relationship between JAB Company and JAB Ohio." Respondents' Response at 10.

The Court notes that EPA shades this observation by omitting that, prior to closing, JAB Ohio had its own separate series of checks within that master account. As Respondents note with more detail, JAB Ohio, while it was an ongoing concern, had its own series of checks and its funds were separately accounted, not melded, with JAB Company's finances. That separation, from an accounting standpoint, continued after JAB Ohio closed its operations, through an intercompany payable. All of this was simply part of a centralized cash management system. Such centralized cash management systems are not viewed as suspect in the parent-subsidiary relationship and do not show *per se* undue domination or control. Respondents cite to *Fletcher v. Atex Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995), and *United States v. Bliss*, 108 F.R.D. 127, 132 (E.D. Mo. 1985) in support of this argument.[26] The Court agrees with Respondents' contentions.

(2) "Respondents admit that, prior to its closing in 2001, JAB-Ohio drew 'from one bank account in the name of JAB Company[,]' using a separate series of checks, but that, after JAB-Ohio closed, JAB-Co[mpany] itself 'paid all expenses and charged . . . JAB Ohio through an intercompany payable.'" EPA Motion at 14.

Respondents answer that while JAB Ohio used a JAB Company bank account, it had its own separate, individualized checks. With this arrangement, JAB Ohio's debits were separately tracked and recorded. It was only after JAB Ohio ceased its operations that it stopped using its own checks and thereafter JAB Company began paying JAB Ohio expenses, but these expenses were separately charged to JAB Ohio and accounted for by means of intercompany payables owed to JAB Company. Similarly, JAB Ohio had its financial statements separately prepared by the Chief Financial Officer of JAB Company, Gary Olmstead and his staff, for which preparations JAB Ohio paid JAB Company an annual management fee. JAB Opposition at 4-5. When JAB Ohio sold its remaining inventory, JAB Company credited JAB Ohio's account for those sales.[27]

The Court finds that the only conclusion to be drawn from these finances is that, both during the time JAB Ohio was an ongoing enterprise and even after it closed its operation, there was a separate accounting of the finances between JAB Ohio and JAB Company. Thus, this was

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[26]*Fletcher v. Atex* expressly held that "participation in [a] . . . cash management system is consistent with sound business practice and does not show undue domination or control." *Fletcher* at 1459. *Bliss* emphatically says the same thing, and it also dismisses the notion that common officers and directors presents anything other than "a usual parent-subsidiary relationship." *Bliss* at 132.

[27]Respondents observe that the actions cited in *Datron Inc. v. CRA Holdings Inc.*, 42 F.Supp. 2d 736 (W.D. Mich. 1999) and *Schiavone v. Pearce*, 77 F. Supp. 2d 284 (D. Conn. 1999), though numerous, were insufficient to show that they were outside the bounds of the legitimate relationship between parent and subsidiary. While EPA has pointed to certain funding of activities by JAB Company on behalf of JAB Ohio, the *Schiavone* decision makes it clear such funding is not at odds with the normal parent/subsidiary relationship, as they were consistent with the "proper protection of a parent's investment." Respondents' Opposition at 51-52.

not a situation where money simply flowed between JAB Company and JAB Ohio as if they were indistinguishable entities. Accordingly, from an accounting standpoint, which is the critical measure of the entities' finances, separation was maintained. The Court is at a loss to see how this acknowledged arrangement lends support to EPA's argument, as EPA admits JAB Ohio used its own separate checks up until it closed. After JAB Ohio closed, it is hard to fault JAB Company's actions of paying the failed subsidiary's expenses and then charging that subsidiary through an intercompany payable. Surely, JAB Ohio could not issue checks in its name after it had closed.

(3) "Respondents admit that, after JAB-Ohio closed, 'there was no one employed' at the company, and that 'Brian Biewer was duly appointed to be the manager/director of [the] company and was not paid for his work at that position.'" EPA Motion at 14.

Here again, EPA cites no cases to support the inferences it apparently draws from Brian Biewer's actions after JAB Ohio closed. As Respondents note, when JAB Ohio closed, Brian Biewer was appointed as the manager/director of that entity and it is true he was not paid for that work. As mentioned, while true that, once it closed, JAB Ohio no longer issued individualized checks and that thereafter JAB Company paid all of its expenses, those expenses were accounted for through an intercompany payable and chargeable to JAB Ohio.[28] Respondents' JAB Ohio Response at 3. The short answer to EPA's points is that, when viewed in the context that, after twenty years of operating, JAB Ohio closed, they do not afford reasons to pierce the corporate veil.

(4) "Respondents admit that 'internal financial statements for JAB Ohio . . . are not separately prepared, but are part of consolidated financials that are currently prepared by Gary Olmstead, who is the Chief Financial Officer of Biewer Lumber, with the assistance of staff." Attachment I, at 16-17. EPA Motion at 14.

Respondents also admit that Gary Olmstead is the Chief Financial Officer of JAB Company, and they agree that the internal financial statements were prepared separately by Mr. Olmstead, with the assistance of staff. Both JAB Toledo and JAB Ohio paid JAB Company an annual management fee for performing those services. As such, EPA's claim in this regard is, once again, a partial characterization of the financial statement, and, for that reason, it is misleading. Accordingly, the Court agrees that the preparation of JAB Ohio's financial statements do not provide a basis for veil-piercing.

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[28]While Respondents acknowledge that JAB Ohio sold its inventory to customers or at cost to JAB Company, or to John A. Biewer Co. of Illinois and to Biewer of Lansing LLC, JAB Company credited JAB Ohio's account with the amounts owed for the sale of that inventory. Respondents' Memorandum at 4. EPA has not offered any cases or other authority to show that these transactions were contrary to proper accounting practices or that they were otherwise illegitimate.

(5) "Respondents admit that JAB-Ohio, since closing in 2001, has had 'no income of any kind' . . . [and that] 'the parent company has been paying the taxes and insurance since the time it ceased operations.'" EPA Motion at 14.

To this, Respondents assert that while JAB Ohio had to borrow funds once it ceased its operations, it is within the norms of the parent/subsidiary relationship for the parent to provide the subsidiary with funds in such circumstances. Respondents' Response at 18, citing *Schiavone v. Pearce*, 77 F. Supp. 2d 284, at 291-292 (D. Conn. 1999). In short, Respondents contend that financial assistance from a parent to its subsidiary is not a basis to pierce the corporate veil unless there is also a showing of an improper purpose. *United States v. Friedland*, 173 F. Supp.2d 1077, 1097 (D. Colo. 2001). The Court agrees with the Respondents' position.

EPA's own conclusions about these "specifics" leads to some head scratching. For example, EPA notes that *after JAB Ohio closed its facility* in 2001, that entity "has been unable to carry out the basic functions of a business." *Id.* at 14. In the Court's view, this should not be surprising, once JAB Ohio had closed. EPA also notes that, *since its closing*, JAB Ohio has lacked a bank account in which to deposit any income it might realize or from which to withdraw funds to pay its obligations and that it no longer has employees nor *paid* officers to carry out its now defunct business. However, these developments can hardly be considered unusual once JAB Ohio closed its facility.

Respondents respond that EPA's argument in this regard suggests that JAB Ohio was obligated to keep its employees after it shut down but that such a stance is without any case law support. Respondents' Opposition at 20. As Respondents express their position, "there is no case law . . . that requires a corporation that has ceased business operations to have employees, its own bank account, its own source of income, or to provide compensation to individuals providing services in order for that corporation to be legally recognized and to act on its own behalf." Respondents' Opposition at 21.

In the Court's view, the analysis of the nature of corporate ownership and control, and for that matter, any analysis of the propriety of corporate veil piercing, is significantly impacted once a subsidiary entity has closed. In short, the analysis, when applied for the purpose of holding a parent corporation liable, is very different when the subsidiary is not an ongoing operation but rather has closed its operations. For example, given JAB Ohio's closing, the Court is unable to infer the impropriety of that entity's books thereafter being maintained by a related party, specifically, the Chief Financial Officer of JAB Company. Similarly, given that JAB Ohio had closed, a negative inference cannot be drawn from the fact that no management fee has been collected for that service, nor from JAB Company's paying some of the defunct entity's bills.

EPA contends that the evidence in the record shows that "the nature of the corporate ownership and control of JAB-Ohio by JAB-Co and Biewer Lumber/Biewer Lumber LLC has been clearly inconsistent with JAB-Ohio operating as a separate corporation [and that] JAB-Co[mpany] and Biewer Lumber/Biewer Lumber LLC ignored, controlled and manipulated the

corporate form." *Id.* at 15. Once again, the Court must emphasize that EPA's entire analysis ignores that the point in time concerning the observations about JAB Company's actions was *after* JAB Ohio had ceased its operations.

Alleged divestiture of assets and intentional undercapitalization.

EPA also maintains that "*the Biewer family*, as JAB-Co[mpany] and Biewer Lumber/Biewer Lumber LLC, divested JAB-Ohio of any valuable assets and intentionally undercapitalized JAB-Ohio . . . and depleted [it] of its assets *after its closing in 2001*." EPA Motion at 15 (emphasis added). As a consequence, EPA maintains that JAB Ohio lacked the funds to clean up the alleged arsenic and chromium contamination at the drip pad of its closed facility.

In this regard, EPA notes that JAB Ohio had nearly one and a half million dollars worth of inventory in 2000, the year *before* it closed, but that this inventory was eliminated by the time it closed in November 2001. Respondents admit that inventory remaining at the time of closure was sold to JAB Company, John A. Biewer Co. of Illinois and Biewer Lansing LLC. EPA's objection to this is that the sold inventory was only a "paper" sale because the proceeds were applied to debts JAB Ohio owed to other JAB entities.[29]

However, EPA does not claim that these debts were illegitimate nor that the transactions evidence steps that justify piercing the corporate veil. Rather, its real objection is to JAB Ohio's reducing those debts in the face of its obligation to remove the alleged contamination from its drip pad. Accordingly, EPA protestation that JAB Ohio's transactions reduced its current assets does not equate with the type of activities that justify piercing the corporate veil under the *Bestfoods* decision, as when the corporate form is misused to accomplish certain wrongful purposes, such as fraud, or where it is shown that the subsidiary is a mere agency or instrumentality of the owning company. There is no evidence that during the time JAB Ohio was an ongoing enterprise, nor after it closed, that such wrongful purposes were occurring, nor that JAB Company used that company as a mere agency or instrumentality.

Although EPA looks to JAB Ohio's state of capitalization, asserting that it was undercapitalized, Respondents note that such a description pertains to a time *after* JAB Ohio closed its operations. Respondents add that there is no evidence that JAB Ohio was purposefully undercapitalized. They point out that EPA has not asserted that JAB Ohio was undercapitalized when it was formed, and they note instead that JAB Ohio operated for twenty years. Instead, Respondents characterize JAB Ohio as simply a corporation that failed and, consistent with that, its liabilities exceeded its assets. They add that there is no evidence that JAB Company engaged

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[29]EPA challenges Respondents' claim that JAB Ohio had no income at all. Financial information provided by the Respondents shows that between 2002 and 2006 there was some small rental income, totaling $ 20,195 over that five year period.

in illicit siphoning of JAB Ohio's funds, nor that its assets were acquired by JAB Company for less than their value. *Id.* at 24.

Further, while EPA suggests that JAB Ohio's sale of its inventory to related parties is a basis to pierce the corporate veil, Respondents point out that such transfers were properly accounted for and there is no suggestion that the transfers were for less than fair value. *Id.* Respondents point out that the "corporate shield" would be hollow protection if a subsidiary which fails and cannot pay its debts affords sufficient grounds to pierce the corporate veil. Respondents' Opposition at 21. In short, a subsidiary's financial failure is not by itself a basis to pierce the corporate veil. *Leroux's Billyle Supper Club v. MA*, 77 Ohio App.3d 417, 425; 602 N.E. 2d 685, 689 (1991). The Court agrees.

While EPA has described the transfers of inventory as simply paper transactions because there was no corresponding credit to JAB Ohio's cash account, Respondents counter that there is no support for the idea that a transfer resulting in an equivalent reduction in debt is illegitimate. It notes that those transfers are consistent with legitimate accounting practices and that JAB Ohio's net worth was unchanged and did not make it any more or less solvent. Respondents' Opposition at 25.

Equally troubling, from Respondents's perspective, is the idea suggested by EPA that environmental obligations effectively create "some sort of pre-judgment lien or some sort of super creditor status" over JAB Ohio's obligations for pre-existing, valid, intercompany debts. *Id.* at 25. Respondents repeat that there is no legal basis to support EPA's claimed exalted status. Although EPA has suggested otherwise, Respondents maintain that it has not presented evidence to show that, when acting as the JAB Ohio officer, Brian Biewer was in fact working only in JAB Company's interests. *Id.* at 26.

Respondents also dismiss EPA's claim that the Schoolcraft facility contamination relates to JAB Company's knowledge of wood treating risks and the inference that JAB Ohio was created to avoid further environmental liability. Respondents assert that the comparison between different entities is inapt and, even if it were assumed that JAB Company created JAB Ohio with the idea of limiting its environmental liability, that theory was rejected by the Court in *Acushnet River*, 675 F. Supp. at 34. *Id.* at 27. Respondents also contend that, in truth, EPA is arguing for a rule that whenever a subsidiary fails, if it cannot pay its environmental debts, it should be deemed to be purposefully undercapitalized. *Id.* at 27. In contrast, Respondents maintain that JAB Ohio was legitimately paying down an intercompany payable owed to JAB Company. Such legitimate actions are not reversible simply by characterizing those transactions as "diverted [] funds" and by then assuming that those transactions cannot be made when one has RCRA obligations. *Id.* at 27.

While the Court agrees that JAB Ohio's liabilities exceeded its assets and that it was insolvent for the years after it closed, that is, between 2001 and 2007, those facts do not advance

EPA's argument that the corporate veil should be pierced.[30] While JAB Ohio was undercapitalized and insolvent *after* it closed down, EPA's attempt to ascribe a nefarious design to the legitimate financial transactions between that entity and other Biewer entities is pure speculation. Thus, EPA's claim that the "Biewer family," having paid a civil penalty for contamination created by another Biewer entity, intentionally undercapitalized JAB Ohio, so that it could avoid a similar penalty, is completely without support. A credible basis for challenging the transactions between JAB Ohio and other Biewer entities would need to be founded upon a showing that the transactions themselves were mere financial chicanery, not originating from genuine debt. Accordingly, EPA's claim that JAB Company's awareness of environmental expenses was the driving force for the intercompany payments is without substance, does not provide any recognized financial grounds to undercut the legitimacy of those transactions, and does not provide support for a corporate veil piercing theory for holding the parent corporation liable.

EPA's claim that the Respondents failed to observe legal formalities and commingled funds in support of its claim that the corporate veil should be pierced.

While this topic has been mentioned earlier, EPA cites to factors to be considered in this regard: a failure to maintain (or the absence of) adequate corporate records; nonobservance of required formalities; a failure to maintain an arms-length relation between the parties; and fund commingling. In support of its claim that these shortcomings occurred, EPA again points to JAB Ohio's lack of its own checking account and that its financial statements were not separately prepared but instead were part of "consolidated financials" prepared by the Chief Financial Officer of JAB Company. EPA Motion at 23-24. EPA asserts that the fact that financial records for JAB Ohio were provided by the JAB Company Chief Financial Officer and on a "Biewer Lumber™" letterhead, which itself referenced www.biewerlumber.com, "is clear evidence of commingling of funds." *Id.* at 4. The Court does not agree.

Respondents maintain that the cash management system employed by JAB Company and JAB Ohio was entirely legitimate, a widely used and accepted practice, and hence did not constitute commingling of funds. *Id.* at 28. Respondents have noted that the use of a cash management system, such as that employed here, does not amount to grounds for disregarding corporate separateness. *Id.* at 28, citing *Fletcher v. Atex Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995), *Acushnet River*, 675 F. Supp. at 34, *Japan Petrol.*, 456 F. Supp. 831 D.Del. (1978), and *Bliss*, 108 F.R.D. at 132. Respondents also take note that even after JAB Ohio ceased its operation, payments between that entity and JAB Company were still separately accounted for between them.

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[30] Although addressed *infra*, obviously those financial transactions add nothing to the claim that the one true parent corporation, JAB Company, is directly liable for any environmental violation at the subsidiary's operation.

How EPA concludes that a general website address and use of the Biewer Lumber trademark translates into commingling of funds is not explained. True commingling involves the situation where corporations throw all their income into one, indistinguishable, pile. That is not what happened here. One can trace all assets and liabilities of JAB Ohio and see, from an accounting standpoint, where those funds moved between parent and subsidiary. Thus, the financial division of transactions between the corporations remained intact.

EPA also asserts that the fact there is only one meeting of the Board of Directors for JAB Ohio for the period from January 1, 1997, to the present "is clear evidence that there was little effort by the Biewer family to conduct business as JAB-Ohio *after* its operations were shut down in 2001." *Id.* at 25.

There are several problems with the conclusions EPA makes with this assertion. First, again in the fashion of an argument one would expect from a lay person's perspective, EPA refers to conduct of the "*Biewer family*," as if such an entity exists, and without regard to the fact that the "Biewer family" is not a named Respondent. Second, for commingling of funds to occur, it seems indisputable that, by definition, there must be funds that are commingled. Yet, JAB Ohio apparently was without funds during this time and in any event EPA has not identified any funds that were commingled.[31]

The Court views EPA's related arguments, regarding its contention that JAB Company, as the parent corporation, should be liable, in a similar fashion because each of them involve actions taken after JAB Ohio closed its business operations. For that reason, EPA observations that *after* "JAB-Ohio was shut down in 2001, no one was employed at the company, and that Brian Biewer was duly appointed to be the manager/director of JAB-Ohio and that he 'was not paid for his work at that position.'" can not be faulted because, as EPA notes, JAB Ohio had closed at that point in time.

The fact that "Brian Biewer was also Secretary/Treasurer of JAB-Co[mpany], and, from its formation, in 2006, was one of only two members of BT Holdings, LLC, which, in turn, has

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[31] EPA's other "evidence" of failure to observe legal formalities and "fund commingling," namely that, "in submitting consolidated financial reports for 1998 through 2003 for 'John A. Biewer Co., Inc., and Subsidiaries,' one of which is JAB-Ohio, Plante & Moran LLP submitted those reports under 'Biewer Lumber™' *letterhead.*" This claim similarly ignores the distinction between use of the general identifier "Biewer Lumber™" from "Biewer Lumber LLC." *Id.* at 24 (emphasis added). EPA also believes that the absence of minutes, notes or resolutions by JAB Ohio's Board of Directors "is clear evidence that there was little effort by the *Biewer family* to conduct business as JAB-Ohio *after its operations were shut down in 2001.*" *Id.* at 25 (emphasis added). However, Respondents' admission "that 'there are no other Board of Directors' Meeting Minutes, Resolution, or any other records of the Board [from January 1, 1997 to the present] that pertain in any way to JAB Toledo, JAB Ohio, or Biewer Lumber that have not already been produced to the EPA," simply reflects that JAB Ohio stopped doing business in 2001. *Id.*

been the only member of Biewer Lumber LLC," *id.* at 26, similarly leads nowhere on the issue of the parent corporation's liability because being an officer of a parent corporation and of a subsidiary does not, *ipso facto*, establish a basis to pierce the corporate veil nor create direct liability. And while it is true, as EPA summarizes, that "[w]ith no directors conducting meetings on JAB-Ohio's management, with no checking account to enable JAB-Ohio to meet its financial obligations or to receive any payment for services it might render, with no ability on the part of JAB-Ohio to maintain its own financial records, and with no employees and no ability on the part of JAB-Ohio to pay anyone to manage its affairs, it is impossible to conclude that JAB-Ohio 'function[ed] as a corporation in fact,'" *id.*, those observations ignore that this was the situation *after* JAB Ohio had ceased its operations and that financial distinctions were maintained, albeit not in the manner EPA would have preferred. However, the bookkeeping conventions EPA would have preferred are not a basis to support piercing the corporate veil.

So too, EPA's characterization that "Brian Biewer's 2004-2005 communications with Ohio EPA and The Mannik & Smith Group ('MSG') regarding the arsenic and chromium contamination at the facility drip pads of JAB-Ohio and JAB-Toledo," show indifference "to any corporate boundaries that may have existed between JAB-Ohio and JAB-Toledo and their related companies," EPA Motion at 26, is similarly flawed because its analysis examines only the post-closure relationship between the entities and because the "indifference" EPA refers to, that Brian Biewer communicated using his "Biewer lumber" email address, that the phone number Brian Biewer provided is the same number used by other Biewer entities and that he used "Biewer Lumber™" letterhead, simply reflect matters of convenience which do not reflect on corporate separateness for the closed JAB Ohio entity.[32]

EPA's reference to statements made by the Mannik & Smith Group similarly do not advance its contentions. While EPA tries to present a picture that letters between MSG and Brian Biewer show that Brian Biewer was acting on behalf of "Biewer Lumber," Respondents contend that once again EPA has shown nothing to support a corporate veil piercing argument. As a starting point, Respondents note that communications between JAB *Toledo* and MSG are not informative with regard to JAB *Ohio*. Beyond that fundamental observation, Respondents note that it was MSG that made the incorrect reference and that, regarding Biewer Lumber LLC, Brian Biewer could not have approved MSG's proposal on behalf of that entity, as it had not yet been created. That *MSG* described its client by using the generic descriptor "Biewer Lumber"[33]

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[32]At times EPA's Motion wanders off into particulars about the companion case, JAB Toledo, apparently in the belief that the matters are not distinct. *See*, for example, EPA's Motion at 27-28. Even if the conclusions EPA draws from JAB Toledo were correct, they do not shed light on the JAB Ohio case.

[33]As Respondents also note, MSG at times referred to "JAB Toledo" in its communications. This observation is not to suggest that, had *MSG* uniformly referred to "Biewer Lumber," the Court's conclusion would be any different. MSG's generic references to "Biewer Lumber" mean nothing in the veil piercing analysis, and its reference to "JAB Toledo" simply underscores the point that there was no corporate blurring between the Biewer entities on the part

does not amount to the type of *activity by the subject parent and subsidiary* upon which any analysis of veil piercing can depend. The Court agrees that Brian Biewer's communications with MSG do not support EPA's argument that the corporate veil of Biewer Lumber LLC or JAB Company should be pierced.

EPA's remaining contentions also lack merit. For example, EPA contends that Brian Biewer was not holding himself out as JAB Ohio's representative but rather as "representing Biewer Lumber." EPA Motion at 29. Although the Court has explained the flaw in this argument before, it bears repeating. First, "Biewer Lumber" is not an entity and it is certainly not named in this proceeding. Only "Biewer Lumber LLC" was among the named respondents. Second, Biewer Lumber LLC cannot be liable for activities which occurred prior to its corporate birth, and now EPA itself has admitted that Biewer Lumber LLC has no place in this litigation. Third, references to "Biewer Lumber" are only indicative of the generic description of the various Biewer corporate entities, but such general references do not advance any true legal analysis of whether Biewer Lumber LLC or JAB Company can be liable under a direct liability or a corporate veil-piercing theory. Similarly, EPA's assertion that "Brian Biewer could not have been acting for JAB-Ohio, as JAB Ohio had no account on which he could draw upon and [Respondents' admission] that 'JAB-Co' paid all expenses of JAB-Ohio and charged JAB-Ohio 'through an intercompany payable,'" EPA Motion at 29, does not speak to any corporate veil piercing theory because those matters simply reflect that JAB Ohio had closed and, more importantly, there is no citation to case law or accounting rules offered by EPA to show that payment through an intercompany payable violates corporate separateness under any circumstance, let alone in the context of a business that had ceased its operations.

It is disconcerting that so much of EPA's argument raises contentions that are irrelevant to the issue under consideration. The Agency's obvious concern is that, if found liable, JAB Ohio will not have funds to pay a civil penalty nor to fund any compliance order. Having provided nothing to support either of the two theories to hold a parent corporation liable, EPA moves to a "public policy" claim that corporate distinctions should be disregarded because RCRA's intent is to deal with hazardous wastes from "cradle to grave." It notes that the Administrator has taken note of the environmental hazards created by arsenic and chromium wastes from the wood preserving industry. EPA Motion at 31-34.

Apparently, realizing that it is short on facts, EPA ultimately seems to rely upon the argument that "public policy" should direct the outcome it seeks. It asserts "that '[i]t has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement,' [and that corporate forms] can be set aside where an otherwise separate corporate existence has been used to 'subvert justice or cause a result that is contrary to some other clearly overriding public policy.'" EPA Motion at

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of JAB Toledo and JAB Company. Thus, it is fair to conclude that MSG used the term "Biewer Lumber" as a general term and in the context of its communications was referring to JAB Toledo.

35, citing *Anderson, Receiver, v. Abbott, Administratrix, et al.*, 321 U.S. 349, 361-362 (1944) and *Seasword v. Hilti, Inc.*, 449 Mich. 542, at 548 (1995). The direct answer to this last claim is that the Supreme Court spoke very specifically to the point in its *Bestfoods* decision and, applying the Court's direction on that point, there is no substance to EPA's "legislative policy" argument.[34]

Respondents address EPA's claim that Congress intended that RCRA override the well-established principle of limited corporate liability. Respondents note that, like CERCLA, RCRA is similarly silent on the issue of corporate limited liability. Respondents' Opposition at 40. As that is the case, the normal rule applies requiring one to show that the corporate form has been "impermissibly exploited" and thereby warranting piercing of the corporate veil. In Respondents' view, *Anderson v. Abbott*, 321 U.S. 349 (1944), does not alter the landscape. That case allows for abrogation of the principle of limited corporate liability only when it is "essential to the end that some public policy may be defended or upheld." Respondents' Opposition at 41. Respondents point to *Acushnet River*, 675 F. Supp. at 33, and that decision's reference to *Anderson v. Abbott*, to make its point that it remains the case that only in fraud cases dealing with inadequacy of capital and when an *express* legislative policy intent has been stated, is the principle of limited corporate liability to be overridden. The Court agrees.

Apart from its argument that the legislative silence on RCRA dictates the conclusion that the normal rules for piercing the corporate veil apply, Respondents also contend that it is simply the case that limited liability is a key aspect of the corporate form and that utilizing that form of ownership affords such limited liability, absent showing fraud or a violation of public policy. The Court agrees with Respondents' observation that "avoiding liability through the corporate form, without more, is not a wrong that equity's hand must right." Respondents' Opposition at 42. Respondents note that while EPA alleges that Respondents took "deliberate steps" to avoid parental liability, that plan would have to have occurred some twenty years earlier when JAB Ohio was formed. *Id.* at 43. Further, as Respondents correctly note, the Supreme Court declined to allow a public policy that favors altering the traditional principles of corporate liability where environmental issues are present, absent a clear expression from Congress. Respondents' Opposition at 2.

In its Reply,[35] EPA essentially repeats its view of the application of those identified factors, beginning with its contention that there was a substantial disregard for any separate

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[34]Essentially, the remainder of EPA's Motion addresses its analysis of the Supreme Court's opinion in *United States v. Bestfoods, et al.*, 524 U.S. 51 (1998). EPA maintains that the evidence presented in its motion supports liability under both a corporate veil piercing and the direct liability theory, with the latter theory established upon showing that the parent operated the facility, as evidenced by the parent's participation in the facility's activities. The Court's application of the guidance provided by the Supreme Court in that decision has already been discussed.

[35]In its Reply to its Motion, EPA disregarded the Supreme Court's clearly stated requirement for a parent corporation's liability regarding its subsidiary.

corporate identity between JAB Ohio and JAB Company. The "substantial disregard" it points to is the same litany: that the www.biewerlumber.com website identifies "John A. Biewer Company, Inc." and "Biewer Lumber LLC" as "corporate headquarters" at the same address and telephone number," and the site's use of Biewer Lumber™ and the like, all as previously set forth *supra.* EPA believes that the website's statements amount to "a corporate entity's public statements regarding its organization and production and marketing activities" can be considered in determining the 'nature of corporate ownership and control' of its various corporate components." EPA Reply at 10.

There are several problems with EPA's assertion, beginning with the claim that the statements are "a corporate entity's public statements." They are not statements made by "a corporate entity," nor by JAB Company in particular. Rather obviously, they are simply statements from the www.biewerlumber.com website, which is *not* the same as the various Biewer enterprises themselves. Beyond that, the general statements at the website say nothing about JAB Company and JAB Ohio, nor does it say anything from the perspective of a legal analysis about the relationship between those entities, facts which need to be noted given that the statements at the website are offered by EPA as a substitute for the traditional factors used to gauge whether a corporate veil should be pierced. EPA, likely aware that such website statements are not part of the usual factors evaluated when the issue of corporate veil piercing is in issue, admits that such statements do not justify piercing the veil.[36] Instead, it argues that the statements, empty by themselves, are "one item of evidence . . . regarding the structure and operation of the Biewer family companies [and as such] are relevant and probative to an inquiry into the 'nature of corporate ownership and control' of JAB Ohio and JAB Co[mpany]. . . . ." *Id.* at 11. The problems with this novel approach include the fact that "the Biewer family companies" are not an entity nor are they named in this action. Further, the website says nothing in fact about the nature of corporate ownership and control of JAB Ohio or JAB Company. In a real sense, EPA, cognizant that the website adds up to a "zero" for either the direct liability or the corporate veil-piercing theory, believes that, given enough zeroes, a total number will appear. Unfortunately, a string of zeroes, added together, still produces a total of nothing.[37]

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[36]EPA is cognizant of the dilemma posed by *Fletcher et al v. Atex, Inc.*, 68 F.3d 1459 (2nd Cir. 1995) and *American Trading and Production Corporation v. Fishcbach and Moore, Inc.*, 311 F. Supp. 412 (N.D.Ill. 1970), cases cited by Respondents. *Fletcher* noted that descriptions of the relationship between the subsidiary and the parent and use of the parent's logo in the subsidiary's promotional literature was rejected as a basis to pierce the corporate veil, while *American Trading* rejected the attempt to turn the parent's boastful advertising into a basis to show that corporate identities were melded.

[37]EPA's theory that items, individually considered, add up to nothing but that a number of such items, taken together, somehow do add up, is reminiscent of the fellow whose girlfriend admitted that when she first knew him she did not care for him at all, but that after seeing him for many months, her feelings for him were now "a million times that." Like that fellow, EPA doesn't appreciate that a million times zero is still zero.

EPA's other indicia of the "nature and control" of JAB Ohio fare no better. Thus, it states, yet again, that JAB Ohio "had no separate checking account," that, *after it shut down* in 2001, it had no income and its expenses were paid by JAB Company which then charged JAB Ohio through an intercompany payable for those expenses. EPA also notes that, again *after it shut down*, JAB Ohio had no employees nor paid officers, and that its financial records were kept by the Chief Financial Officer of JAB Company. However, EPA's recounting is selective and thereby creates an inaccurate picture. Thus, EPA neglects to mention that, while it was still a going operation, JAB Ohio had its own separate checks. Further, once it shut down, although JAB Company then paid some of its expenses, those expenses were properly noted through the intercompany payable. Importantly, EPA does not cite to a single case for the proposition that such accounting method, charging JAB Ohio for those expenses, was improper. The same is true with EPA's observation that the financial records for JAB Ohio were kept by the Chief Financial Officer of JAB Company. Certainly, if that practice was as sinister as EPA makes it sound, it could have easily presented case law to support that view. As for its remark that *after it shut down* JAB Ohio had no employees nor paid officers, one could hardly expect otherwise in such circumstances. While EPA does not frontally attack the intercompany payable records by suggesting that the transactions were not properly accounted for, it does question the payments made by JAB Company which were *in the nature of a loan*[38] and charged against JAB Ohio. EPA seems to believe that, to be genuine, there would need to be a formal loan documents created. Thus, EPA asserts that the intercompany transfer of funds needed to be identified as a loan and include details such as terms of repayment. EPA provides no authority to support this view.

EPA also continues with its theme that a sufficient number of zeroes eventually add up to a positive integer by noting next that the same family names, Richard, Brian and Timothy Biewer, reappear in the organizational structures for the various Biewer entities and that these businesses are all in the wood treating business. While admitting again that such observations do not "in and of themselves warrant a finding that 'piercing the corporate veil' . . .[,]" it contends these observations add up, along with the other non-determinative factors, to warrant piercing the veil of the parent, JAB Company. As with its other observations, EPA does not point out any case law to support its non-traditional veil-piercing analysis. Similarly, it places great emphasis on a matter unrelated to this case; that JAB Company was fined by the state of Michigan for wood treating pollution occurring at its Schoolcraft facility. EPA's reasoning is that after the Schoolcraft fine, JAB Company *knew* that its wood treating operations were "dirty" and it thereafter created separate, independent, subsidiaries to reduce JAB Company's exposure to liability.

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[38]EPA, earlier unable to distinguish between "Biewer Lumber LLC" and "Biewer Lumber™", conflates a transaction described as *in the nature of a loan* with a formal loan. When first addressing the issue, it correctly quotes Respondents' characterization of the intercompany payable as "*in the nature of* a loan" but, a paragraph later, it transmogrifies the transaction into a claim that there is no evidence of a "loan." EPA Reply at 14.

Perhaps JAB Company did act to create subsidiaries in order to limit the parent company's liability. Perhaps they were not so motivated. Either conclusion is no more than speculation. The critical problem with EPA's objection to the creation of those subsidiaries is that there is nothing illegal about their creation. More troubling is EPA's assertion that JAB Company "limit[ed] funding of the subsidiaries so as to leave them without the funds to pay for any clean-up required." EPA Reply at 18. There are other serious deficiencies with EPA's claim, beginning with the fact that JAB Ohio operated for a substantial number of years and there is no evidence that entity functioned with insufficient funding during those many years. A second troubling aspect of EPA's claim is the implicit assertion that a subsidiary must retain "sufficient funding" to pay for any environmental clean up which *may* develop. Again, case law is not presented to support EPA's position. EPA's financial analysis of JAB Ohio is selective, focusing on the years *after* the subsidiary closed. It should not be surprising that JAB Ohio's financial condition was not strong after the business closed.

EPA also objects, in a fashion, to the disposition of the proceeds from JAB Ohio's sale of its inventory. Pointing to what amounts to another "zero," it states that it does not have an issue over *who* that inventory was sold to, but rather, it takes issue with "what happened with the proceeds from [that] sale." According to EPA, selling the inventory is not, by itself, a basis to pierce the corporate veil, but somehow the fact that it was sold is another "circumstance" which should be considered as part of the overall picture. Its real objection is that JAB Ohio used the proceeds to credit its intercompany payables instead of keeping the proceeds as cash, as EPA would have preferred.[39] Had it used the proceeds in the manner EPA thought best, JAB Ohio would have had money available to "comply with its legal obligation to rid its facility of any arsenic and chromium contamination left behind by its operations." As with its other arguments, EPA presents no case law to support its view about disposition of inventory proceeds.[40]

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[39]It is only in the sense of the absence of loan documents, including the interest rate and terms of repayment, that EPA asserts there is "no evidence . . . that JAB-Ohio was indebted to JAB-Co." EPA Reply at 20. This is a misleading characterization on EPA's part, because, in fact, there is documentation, through intercompany payables, that JAB Ohio's indebtedness to JAB Company was credited.

[40]EPA's analysis routinely goes off into distracting arguments which have absolutely nothing to do with the issues of the appropriateness of piercing the corporate veil or whether there is evidence that JAB Company directly participated in the alleged environmental violation involving the drip pad at JAB Ohio's facility. Thus, EPA objecting that JAB Company elected, *after* JAB Ohio had closed its operations, to pay taxes and insurance bills for the subsidiary, leads EPA to contend that, if those expenses were deemed "necessary" by JAB Company, then the funding to decontaminate the drip pad was also "necessary." From this non-material point, EPA then takes the distraction further, stating that the Administrator "cannot take the position that compliance with those law (sic) is optional." EPA Reply at 21. The problem is that EPA's disagreement with JAB Company's decisions about which post-closure expenses it paid, and those it decided not to pay, do not contribute to the analysis of any potential parent corporation liability issue.

The Court does not take issue with the Administrator's determination that these wastes can lead to ground water and soil contamination, and it shares genuine concerns about the potential gravity of such hazards to the environment. However, the Court's analysis must be dispassionate and based on the law. Accordingly, the analysis cannot be directed by these valid concerns about contamination of the environment because they do not speak to the question of corporate veil-piercing nor to whether a parent corporation directed activities at a subsidiary which resulted in environmental violations. Further, as the Supreme Court made clear in its *Bestfoods* decision, there must be a clearly expressed legislative intent that corporate separateness is to be ignored in environmental matters. Just as that Court observed that there was no such clearly expressed legislative intent for CERCLA violations, this Court has noted that no such intent or legislative policy regarding parental corporate liability was expressed by Congress for RCRA matters.[41]

EPA then expresses its consternation that "both JAB Co[mpany] and Biewer Lumber LLC will escape liability for their actions by hiding behind a corporate veil, made possible by deliberate steps taken by the Biewer family in setting up its corporate entities under Michigan (*sic*) law. [As a consequence] there will be no effective remedy available to the Administrator to penalize those responsible for the arsenic and chromium contamination at the JAB-Ohio facility . . . . Having profited between 1983 and 2001 from the wood-treating operations at the JAB-Ohio facility, now closed, the *Biewer family* walks away from that facility refusing to pay the costs of removing the arsenic and chrome contamination left behind by that operation." EPA Motion at 34 (emphasis added). The problem with EPA's claim is that a parent corporation "hiding" behind a corporate veil is not a basis to hold a parent corporation liable absent justification for piercing that veil. Again, the Court cannot decide the issues before it based on emotional considerations. This is the essence of the distinction between an emotionally-based analysis that one would understand from the perspective of a lay person, and the dispassionate review that is required for a legal analysis. EPA's arguments suffer from its laic analysis. *See*, for example, EPA's Motion at 31- 37.

In point of fact, EPA's own analysis of the *Bestfoods* decision reflects the weakness of its case here. Thus, while EPA acknowledges the general principle cited by the Supreme Court that a parent is not liable for the acts of its subsidiaries, the point that the corporate veil may be pierced when "the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud on the shareholder's behalf," has not been demonstrated here, as EPA has not identified any "wrongful purpose" nor "fraud," on the part of JAB Ohio, JAB Company, or Biewer Lumber LLC.

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[41]EPA has not pointed out any such language from the statute or the legislative history that supports the idea that corporate distinctness should be ignored in RCRA matters. The Court's own review of the legislative history reached the same conclusion – Congress did not speak expressly to the issue.

Apparently, realizing that it is short on facts, EPA ultimately seems to rely upon the argument that "public policy" should direct the outcome it seeks. It asserts "that '[i]t has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement,' [and that corporate forms] can be set aside 'where an otherwise separate corporate existence has been used to 'subvert justice or cause a result that is contrary to some other clearly overriding public policy.'" EPA Motion at 35, citing Anderson, Receiver, v. Abbott, Administratrix, et al., 321 U.S. 349, 361-362 (1944) and Seasword v. Hilti, Inc., 449 Mich. 542, at 548 (1995). The short answer to this last claim is that the Supreme Court spoke very specifically to the point in its *Bestfoods* decision and that, applying the Court's direction on that point, there is no substance to EPA's "legislative policy" argument.[42]

Accordingly, the general principles of corporate separateness and limited liability remain intact in RCRA matters and the discussion now turns to the other category where a parent corporation can be liable, despite the presence of a subsidiary, through direct liability, when the parent corporation is actually operating the subsidiary's facility.

The "Direct Liability" Contention.

EPA's "direct liability" analysis begins with the correct premise that the parent can be liable where it is found to "have committed, or participated in, violating conduct." EPA Motion at 38. It is also correct that the issue is not whether the parent operated the *subsidiary*, but whether it operated the subsidiary's *facility*, as evidenced by participation in *the environmental activities of that facility.* It is EPA's contention that the violation arose out of events occurring after the JAB Ohio facility had shut down. Thus, although any contamination occurred during the time JAB Ohio was a going concern, EPA maintains the violation, i.e. the failure to clean up contamination from the drip pad area, is to be placed on "whoever *was responsible* for the facility after it had ceased [its] wood treating operations." EPA Motion at 39 (italics added). Thus, EPA imposes a test that is different from that recognized by the Supreme Court because it substitutes "*responsibility*" for actions that needed to be taken, for the true test, which looks to actions taken by the parent corporation at the facility. Even this altered test, suggested by EPA, has not been established here because to prove that JAB Company was "responsible" for the failure to deal with the alleged drip pad contamination, EPA simply relies upon "[t]he same evidence [it] cited to support the 'piercing of the corporate veil' [to establish its] direct liability theory." *Id.* at 38. Yet, having altered the test, EPA then lists back to the appropriate inquiry, asking whether the parent corporation's action constituted "the exercise of direction over the facility's activities."[43]

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[42]Essentially, the remainder of EPA's Motion addresses its analysis of the Supreme Court's opinion in *United States v. Bestfoods, et al.*, 524 U.S. 51 (1998). That decision has already been discussed.

[43]EPA poses other questions which do not deal with the issue of direct liability. For example, EPA asserts that one test is whether "JAB Ohio [had] the capacity to conduct activities

EPA's support for its contention that parent corporation JAB Company is directly liable for the alleged violations begins "[a]pproximately four years after JAB-Ohio shut down" with Brian Biewer's communication to Ohio EPA regarding conversion options and EPA forms submitted on behalf of JAB Ohio. EPA Motion at 40. EPA finds significance in this communication from the same facts it pointed to in its corporate veil-piercing argument; that is, that Brian Biewer communicated with Ohio EPA through the Biewer corporate headquarters' telephone number, used a "biewerlumber.com" email address, and employed a letterhead which displayed "Biewer Lumber™." Brian Biewer, EPA points out, yet again, signed the letter as "Secretary/Treasurer." However, Brian Biewer is the "Secretary/Treasurer" for JAB Ohio as well as for JAB Company.[44] As it noted in its veil-piercing argument, EPA observes again that MSG's communication regarding the JAB Ohio drip pad was addressed to "Biewer Lumber." *Id.* at 41. The Court observes again that, in addition to the fact that MSG's communication employed the generic descriptive term "Biewer Lumber," there is the problem that the descriptor is not the equivalent of, nor synonymous with, "Biewer Lumber LLC," that the latter's business has nothing to do with treating lumber, as JAB Ohio once did, and that the general descriptor adds nothing to EPA's claim that "JAB Company" was making the *environmental* decisions for JAB Ohio. EPA repeats its oft-raised contention that Brian Biewer could not have been acting on behalf of JAB-Ohio during 2004 and 2005 because that entity had no bank account, and no employees, and therefore had no ability to act for itself. EPA Motion at 43. It is the Court's view that JAB Ohio's financial straits and employee-less status did not preclude Brian Biewer from taking what actions he could as its appointed, albeit unpaid, manager/director.

EPA applies the *Bestfoods* decision only to a direct liability analysis. EPA Reply at 29. Although is recognizes that there must be exercise of direction over the subsidiary facility's activities, and that this means more than the mere mechanical activation of pumps and valves, EPA's analysis of that decision is far off the mark because it treats the situation where a facility has closed in the same manner as one which continues to operate. Thus, its assertion that "JAB Ohio was left with nothing by its parent, JAB Company, with which to operate its facility" ignores that the facility was no longer operating. EPA Reply at 30. Avoiding discussion of JAB Company's culpability for the alleged drip pad contamination and unable to show that JAB Company took over the drip pad contamination matter, EPA falls back on financial transactions between the parent and the subsidiary, including the parent's payment of taxes and insurance owed by JAB Ohio. Those transactions have not been shown to be anything other than legitimate debts owed by the subsidiary to the parent. Significantly, such financial debits and credit transactions do not speak to direct liability on the part of JAB Company for the alleged environmental violations and *that* is the only issue where direct liability is the subject. Accordingly, EPA's "direct liability" analysis ends up with its pique that JAB Company did not pay for the implementation of the drip pad closure plan at JAB Ohio facility. EPA believes that, because the parent corporation did not elect to fund that closure plan and it determined which

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on its own?" EPA Motion at 40.

[44]When JAB Ohio failed, Brian Biewer was then also appointed to be its manager/director.

remaining expenditures it would fund for the closed operation, that amounts to "complete dominance of the JAB Ohio facility." In short, EPA's analysis has nothing to do with the guidance provided by the Supreme Court in its *Bestfoods* opinion explaining the basis for a direct liability analysis.

Respondents, by contrast, note that "direct liability" rests upon the idea that JAB Company and Biewer Lumber LLC can be found liable as "operators" at the JAB Ohio facility.[45] Regarding JAB Company, Respondents submit that EPA has failed to show that it acted at odds with the accepted norms of parental oversight of a subsidiary's facility. Respondent's Opposition at 45. Respondents also point out that the parties agree that the *Bestfoods* decision is the source for guidance on this issue. Further, the statutory definitions of "owner" and "operator" are the same for CERCLA and RCRA and the standards for owner and operator liability under those statutes are the identical as well. *Id.*, citing, among other decisions, *LeClercq v. Lockformer Co.*, 2002 WL 908037 (N.D. Ill. May 6, 2002).

Respondents agree that direct liability of a parent corporation is possible if that parent is an operator of facilities for the treatment, storage, or disposal of hazardous wastes. They point out that, under *Bestfoods,* such operator must "manage, direct, or conduct operations specifically related to pollution . . ." Respondents' Motion at 10, citing *Bestfoods at* 66-67. An important presumption operates in these situations, namely that when one is wearing the subsidiary hat it is presumed they are acting for the subsidiary. Thus, it is certainly insufficient to merely show that a person is a dual director or officer. Direct liability can be demonstrated when a dual officer departs so far from the corporate norms of the parent/subsidiary relationship that it is clear such officer, while ostensibly acting for the subsidiary, was in truth serving the parent corporation. In addition to *Bestfoods*, Respondents cite, in support of this principle, *United States v. Friedland*, 173 F. Supp. 2d 1077 (D. Colo. 2001), *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, 2005 WL 5660478 (M.D. Fla. Mar. 22, 2005), and *Raytheon Constructors, Inc. v. Asarco Inc.,* 368 F.3d 1214 (10th Cir. 2003). Respondents' point is that Brian Biewer was such a dual officer and not merely an officer of the parent corporation, JAB Company.

Respondents contend that, because of JAB Ohio's lack of resources to pay taxes and insurance on its property or to retain a drip pad closure plan, those actions could only have been done by the parent corporation. However, Respondents assert that such actions by the parent are entirely consistent with the parent/ subsidiary relationship and there is nothing wrong with such actions to provide the subsidiary with capital and to keep it operating when the subsidiary is in financial difficulty. *Id.* at 13, citing *Friedland.* Accordingly, Respondents certainly agree that Brian Biewer and any other common officers were acting as dual agents. That being the case, Respondents observe that EPA has not even alleged that such decisions were contrary to the interests of JAB Ohio and advantageous to JAB Company. Respondents therefore maintain that

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[45]With EPA's acknowledgment that Biewer Lumber LLC cannot be a culpable respondent in this proceeding, most of the Court's analysis regarding Respondent's responses to those aspects of that claim have been dropped.

Brian Biewer *was* acting as a dual director/officer.

Even if the Court does not adopt that contention, that is, if the Court were to find that Brian Biewer was acting *only* on behalf of JAB Company, Respondents alternatively argue that the actions taken were nevertheless entirely consistent with parental oversight of a subsidiary's facility as they were "expected as necessary for the proper protection of a parent's investment." They note that the Supreme Court articulated in *Bestfoods* that when an agent of a parent corporation directs or manages activities at a facility, the question is whether those activities are "consistent with the parent's investor status." A measure of that, in fact the "critical question" is to determine whether the parents' actions "are eccentric under accepted norms of parental oversight of a subsidiary's facility." Respondents' Motion at 15, citing *Bestfoods*, 524 U.S. at 72. Respondents assert that things like "close parental control of a subsidiary's expenditures," acting as a purchasing agent, making "capital contributions to a subsidiary during times of financial difficulty," and parental exercise of control "that may be expected as necessary for the proper protection of an investment," do not transform the parent into the operator of the subsidiary's facility. Respondent's Motion at 15-16, citing *Consolidated Edison Co.*, 310 F. Supp.2d at 608-609, *Friedland*, 173 F. Supp.2d at 1097, *Schiavone*, 77 F. Supp.2d at 290, and *Datron Inc. v. CRA Holdings Inc.*, 42 F. Supp.2d 736, 747-48 (W.D. Mich. 1999).[46]

Respondents also raise a defense to which EPA has not responded. They contend that JAB Company can not be subject to direct liability because the word "operate" has to mean something more than a "mere failure to act or to cease acting." Respondents' Motion at 22. This defense deserves some discussion.

Respondents note that EPA's Complaint charges JAB Ohio with a failure to remove contaminated soils associated with the drip pad after the facility closed and with its subsequent failure to follow the cleanup steps recommended in the MSG drip pad plan. Respondents contend that it is one thing to charge a corporation with a failure to take certain steps but quite another to hold the parent company liable for not taking those same closure steps when its subsidiary did not. Respondents contend that this would be a starkly new approach to parent corporation liability because, rather than showing that the parent *acted* in some environmentally hazardous manner, EPA is attempting to hold the parent liable for its *failure to act.* Respondents submit that if *non-action* by a parent can be a basis for direct liability than all parent corporations

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[46]Although EPA has not expressly claimed that JAB Company could be liable under a common law "joint venture" theory, Respondents note that such a theory does not apply in any event because an *undocumented* joint venture has been rejected by courts. Respondents' Motion at 19-21. The reasoning behind the rejection of such a theory is that, if allowed, it would create a means for an end run around the long established principle of limited corporate liability. The Court agrees. Certainly, the tenor of the Supreme Court's opinion in *Bestfoods* was not an invitation to undercut that principle as the Court was fully aware of law review articles which had expressed displeasure with the corporate limited liability firewall, yet the Supreme Court made it clear it did not favor such revisions.

would face direct liability upon failures of their subsidiaries to meet their environmental obligations. Such a result would be nothing less than another road to eliminating the traditional, limited, bases for holding a parent corporation liable. The Court agrees.

As Respondents note, the Supreme Court, in *Bestfoods*, addressed the use of the verb "operate" in the CERCLA context. There, it noted operate "must be read to contemplate 'operation' as including the exercise of direction over the facility's activities." Respondents' Motion at 23, citing *Bestfoods* at 524 U.S. 71. In fact, the Sixth Circuit, picking up on this direction from the Supreme Court, explained that "[b]efore one can be considered an 'operator' for CERCLA purposes, one must perform affirmative acts . . . [and that] [t]he failure to act, *even when coupled with the ability or authority to do so*, cannot make an entity into an operator." *U.S. v. Township of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998) ("*Brighton*")(emphasis added). As Respondents properly observe, EPA "has asserted no evidence suggesting that JAB Company controlled environmental decisions for JAB Ohio, or that JAB Company had any involvement with the operations of JAB Ohio prior to the closure of its lumber producing operations in 2001 or thereafter." Respondents' Motion at 23-24. The Court agrees with Respondents' analysis and conclusions in this regard as well.

Respondents also contend that, for one to be deemed liable as an "operator," a temporal aspect must be established. That is, one must be found to be an "operator" during the time of the violative events. Respondents relate that some of these analyses have relied upon the statutory definition of "operator" while others have relied upon "causation." Respondent's Motion at 24-25, citing *Bestfoods, Brighton*, and *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000). Some courts have expressed the need for a "nexus" between the entity's control and the complained of activity. Applying this nexus requirement, Respondents state that one looks to see if the alleged operator "had authority to control the cause of contamination at the time the hazardous substances were released." Respondent's Motion at 24-25. Respondents urge that, under any approach of deeming one to be an "operator," EPA cannot avoid the fact that JAB Company did not operate the facility "*at the time of the alleged pollution events* or prior to 2001." Thus, Respondents assert that it is significant that EPA's allegations regarding JAB Company all involve events after JAB Ohio had closed its operations in 2001 and that, despite the opportunity for discovery, EPA produced no evidence that JAB Company was an operator at the time of the alleged pollution, nor prior to 2001. Because there is no evidence that JAB Company controlled JAB Ohio at the time of the alleged contamination release from the drip pad, JAB Company cannot be deemed an operator.

Regarding JAB Company, the Court agrees with Respondent's statement that EPA must show "that JAB Company operated the Facility with regards to decisions about pollution control or environmental compliance . . . [and that as EPA] only questions actions taken by Brian Biewer . . . [it] must demonstrate that [his] actions were not in the best interests of JAB Ohio, yet were advantageous to JAB Company." Opposition at 48. As to the former, Respondents point out that most of the matters raised by EPA have "nothing to do with pollution control or environmental compliance." *Id.* With respect to the latter, Respondents contend that EPA did

not assert that the actions it relies upon were contrary to JAB Ohio's interests. Simply stated, Respondents contend that JAB Ohio's lack of its own bank account, that JAB Company paid some of JAB Ohio's expenses, that JAB Ohio had no employees and that Brian Biewer was not paid for his services to that subsidiary, do not suffice to establish direct liability for JAB Company. Further, Respondents assert that, even if Brian Biewer's actions can be construed as made on behalf of JAB Company, those acts were within the "accepted norms of parental oversight of a subsidiary's facility." *Id.* at 49. The Court agrees.

Conclusion[47]

As the foregoing has amply demonstrated, EPA has not advanced any substantial facts to support either its claim, regarding Respondent JAB Company, that its corporate veil should be pierced or that it is directly liable for the alleged violations at JAB Ohio's facility. Conversely, Respondent JAB Company has put forward substantial evidence to support its contention that, as a matter of law, it cannot be held liable under either of those theories. Although clearly expressed already, it should be emphasized that there is no material evidence that establishes that the "corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that allowing its use would constitute a fraud or promote injustice." Certainly the evidence EPA points to does not show that the parent and subsidiary here were separate in name only, nor that they operated as a single entity, ignoring corporate boundaries. Rather the evidence EPA has highlighted reflects nothing more than commonplace arrangements between parent and subsidiary corporations. Once JAB Ohio failed, of necessity, JAB Company had to make some adjustments in its oversight. Still, all the while, on this record, corporate separateness has been maintained. Nor, it is clear, can JAB Company be held liable on any direct liability theory.

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[47]While it is completely up to the parties, given the outcome of this Order, and as the Court has reflected on this litigation, it does seem that there is a potential basis for a settlement that the parties may wish to explore between themselves. For example, EPA could concede that JAB Company is completely without fault in this matter and that, at most, that JAB Ohio is the only culpable party. JAB Company could then voluntarily agree to step forward, purely as an act of good corporate environmental citizenship, and pay for the clean up of the drip pad. Part of any such voluntary step by JAB Company should include a public compliment by EPA for JAB Company's willingness to absorb those costs, despite having no legal liability to do so. As part of this arrangement, EPA should also agree to dismiss the charge it brought against JAB Ohio. The foregoing represents only a suggestion and in no manner should be viewed as an attempt to push the parties toward settlement, let alone the particular terms of one. Further, for obvious reasons, the Court *does not* want to be advised of the parties reactions to the suggestion other than through the announcement of a settlement, should one occur. Barring such a development the case will proceed to hearing with the remaining respondent, JAB Ohio.

As this is deemed the "lead" case on the issue of derivative liability, the Court directs the parties to advise it of any material differences, if they genuinely believe there are any, regarding the companion case of JAB Toledo, which material differences the parties contend could produce a different outcome, and to provide such information within two weeks from the date of issuance of this Order. Although the Court is of the opinion that there are no such material differences between JAB Ohio and JAB Toledo, at least on the issue of parent corporation liability, it is affording the parties the opportunity to present their views on this.

So Ordered.

William B. Moran

William B. Moran
United States Administrative Law Judge

October 5, 2009
Washington, D.C.

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In the Matter of John Biewer
Docket No. RCRA-05-2008-0007

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Cross Motions for Accelerated Decision on Derivative Liability**, dated October 6 2009, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Ladawn Whitehead
Regional Hearing Clerk
U.S. EPA - Region 5
77 W. Jackson Blvd., E-13J
Chicago, IL 60604-3590

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Copy by Regular Mail and facsimile to:

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Dated: October 6, 2009