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

In re:	)	
	)	
John A. Biewer Co. of Toledo, Inc.	)	
Docket No. RCRA-05-2008-0006,	)	
	)	
and	)	**RCRA Appeal Nos. 10-01 & 10-02**
	)	
	)	
John A. Biewer Co. of Ohio, Inc.	)	
Docket No. RCRA-05-2008-0007.	)	
	)	
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COMPLAINANT'S BRIEF IN SUPPORT OF ITS NOTICE OF APPEAL

ORAL ARGUMENT REQUESTED

CONFIDENTIAL BUSINESS INFORMATION REDACTED

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I. AUTHORITY FOR THIS CONSOLIDATED APPEAL

Pursuant to 40 C.F.R. § 22.30(a)(2) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, ("Consolidated Rules")*, Complainant, the Director of the Land and Chemicals Division in Region 5 of the United States Environmental Protection Agency ("EPA," "Complainant," or the "Agency"), through its undersigned attorneys, files the instant Complainant's Brief in Support of its Notice of Appeal (hereinafter, "Complainant's Brief").

II. STATEMENT OF THE ISSUES PRESENTED ON APPEAL

A. Did the Presiding Officer err in applying state law, as opposed to federal common law, to determine whether John A. Biewer Company, Inc. ("JAB Co."), as parent corporation, should be held derivatively liable for violations alleged and the proposed penalties sought by Complainant against its subsidiaries, John A. Biewer Company of Toledo, Inc. ("JAB Toledo") and John A. Biewer Company of Ohio, Inc. ("JAB Ohio")?

B. Did the Presiding Officer err in denying Complainant's Motions for Accelerated Decision on Derivative Liability against JAB Co. where Complainant presented significant probative evidence demonstrating the appropriateness of piercing the veil to reach JAB Co. and/or holding JAB Co. directly liable for the alleged violations?

C. In the alternative, did the Presiding Officer err in granting the Motions for Accelerated Decision with regard to derivative and direct liability filed by JAB Co. where, at a minimum, genuine issues of material fact exist with respect to JAB Co.'s liability?

D. Did the Presiding Officer err in denying Complainant's Motions for Accelerated Decision on Liability and Penalty with regard to penalty because Complainant presented significant evidence regarding the appropriateness of the proposed penalties and Respondents presented argument but no evidence in opposition to Complainant's Motions?

E. Did the Presiding Officer abuse his discretion in awarding a zero penalty in these matters when the Presiding Officer had previously granted Complainant's Motions for Accelerated Decision as to Liability and the facts of the violation were already

in the record and, by themselves, warranted imposition of penalties in accordance with the RCRA Civil Penalty Policy or otherwise in accordance with the penalty criteria set forth in RCRA?

F. Did the Presiding Officer err in holding that there is a constitutional right for respondents in an administrative penalty proceeding to cross-examine, during an evidentiary hearing, a live witness with regard to the calculation of the penalties proposed by Complainant?

III. SYNOPSIS OF COMPLAINANT'S ARGUMENT

These cases involve two now closed wood treatment operations located in Ohio that used a toxic chemical solution containing chromium and arsenic to treat wood products. In the course of their wood treatment operations, the toxic chemical solution dripped onto concrete pads at the facilities. The sister companies that conducted the wood treatment are or were known as John A. Biewer Co. of Ohio, Inc. ("JAB Ohio") and John A. Biewer Co. of Toledo, Inc. ("JAB Toledo"). In 1997, after approximately 14 years of operations, JAB Toledo closed, and in 2001, after more than 20 years of operations, JAB Ohio closed. When JAB Ohio and JAB Toledo ceased operations, they were required by federal and State regulations to decontaminate their drip pads to ensure that the chemical solution would not endanger the environment or public health. Neither company decontaminated its drip pad, and at one company, JAB Toledo, the evidence shows that chromium and arsenic remain on the property in amounts many times higher than the applicable standard. JAB Toledo and JAB Ohio were unable to fund the decontamination work required by environmental regulation because their parent corporation, JAB Co., stripped both companies of their assets when they ceased operations. These cases are about companies shirking their clean-up responsibilities without justification.

The Presiding Officer in this matter, Administrative Law Judge William Moran.[1], attempted to re-cast the cases from environmental concerns to an instance of a "rogue" EPA

[1] Throughout Complainant's Brief, Complainant will refer to Administrative Law Judge Moran as the

attorney. To this end, 3 pages of the 20-page Initial Decision were devoted to an irrelevant commentary on a law review article written by Complainant's counsel, an article which was not in the record and had no bearing on the matters at hand. Instead of focusing on the evidence in the case and the law governing the issues before him, the Presiding Officer appears to have engaged in an attempt to personally rebuke an attorney whom he incorrectly accused of "exceed[ing] the scope of his employment authority." The ALJ's personal attack on Complainant's counsel raises issues as to the impartiality of his rulings. The only issues in these matters are the numerous serious errors which, if uncorrected, would undermine both the RCRA regulatory scheme and the orderly administration of EPA's administrative cases in general.

Ignoring both the law and evidence, the Presiding Officer erred in failing to grant Complainant's Motions for Accelerated Decision on the issue of JAB Co.'s liability. Complainant proffered signficant evidence supporting piercing the corporate veil to hold JAB Co. liable, while the only evidence offered by Respondents on this issue was deserving of little, if any, weight and did not create a genuine issue of material fact. At the very least, in the alternative, the Board should conclude that the evidence on derivative liability offered by Complainant was more than sufficient to defeat *Respondents'* Motions for Accelerated Decision on derivative liability; and thus, the Presiding Officer erred in granting Respondents' motions on the issue of JAB Co.'s liability.

The Presiding Officer also should have granted Complainant's Motions for Accelerated Decision on Liability and Penalty as to penalty because Respondents' responses to these Motions failed to provide *any* evidence whatsoever, and thus failed to raise any genuine issue of material fact regarding penalty. The ALJ compounded his error by conducting a hearing and abused his

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"Presiding Officer" or the "ALJ" interchangeably.

discretion by awarding a zero penalty in both cases, despite substantial evidence supporting a significant penalty. Both of these incorrect rulings with regard to penalty appear to be based upon the Presiding Officer's mistaken belief that Respondents had a right to cross-examine a live EPA witness with regard to the mechanics of calculating a proposed civil penalty.

The Board should reverse the Presiding Officer's various orders on these issues, should hold JAB Co. liable or, in the alternative, remand this matter for a hearing on JAB Co.'s liability. In addition, the Board should award a significant penalty in both matters, or, in the alternative, remand the matter for a proper penalty determination. Finally, the Board should require JAB Ohio and JAB Toledo to comply in full with RCRA's requirements, including the full decontamination and closure of the drip pads in question.

IV. STATUTORY AND PROCEDURAL BACKGROUND

A. Applicable Statutes And Federal Regulations

Congress enacted the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§ 6901-6922k, to address the serious environmental and health dangers arising from waste generation, management, and disposal. Congress was particularly concerned with the management and disposal of "hazardous wastes," for which it mandated comprehensive "cradle-to-grave" regulation in RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e (hereinafter "Subtitle C"). *See, e.g., Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994); *Am. Chem. Council v. U.S. EPA*, 337 F.3d 1060, 1062 (D.C. Cir. 2003). Congress broadly defined "hazardous waste" as a "solid waste" which "may . . . pose a substantial present or potential hazard to human health or the environment when improperly . . . managed." 42 U.S.C. § 6903(5).

Congress delegated to the EPA the task of developing criteria for identifying the characteristics of "hazardous waste" and the listing of "hazardous wastes." 42 U.S.C. § 6921(a).

EPA has promulgated regulations identifying specific "hazardous waste" ("listed wastes"). 40 C.F.R. Part 261, Subpart D. These "hazardous wastes" are subject to stringent RCRA Subtitle C standards that govern their generation, transportation, treatment, storage and disposal. *See* 42 U.S.C. §§ 6921-25; 40 C.F.R. Part 261; *Chemical Waste Mgmt., Inc. v. U.S. EPA*, 976 F.2d 2, 8 (D.C. Cir. 1992). Pursuant to Sections 3001 to 3005 of RCRA, 42 U.S.C. §§ 6921-6925, EPA has promulgated regulations governing generators and transporters of hazardous waste, and governing facilities that treat, store and dispose of hazardous waste. At all times relevant to these matters, those regulations were codified at 40 C.F.R. Parts 260 through 279.

B. State Authorized "Hazardous Waste" Programs

The facilities subject to this administrative proceeding are located in Ohio. RCRA allows a State to apply for EPA authorization of the State's "hazardous waste" program. 42 U.S.C. § 6926(b). Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), EPA granted the State of Ohio final authorization to administer a state hazardous waste program in lieu of the federal government's RCRA program effective June 30, 1989. 54 Fed. Reg. 27170 (June 28, 1989). EPA granted Ohio final authorization to administer certain Hazardous and Solid Waste Amendments of 1984, and additional RCRA requirements, effective June 7, 1991. 56 Fed. Reg. 14203 (April 8, 1991) (corrected effective August 19, 1991, 56 Fed. Reg. 28088 (June 19, 1991); September 25, 1995, 60 Fed. Reg. 38502 (July 27, 1995); and December 23, 1996, 61 Fed. Reg. 54950 (October 23, 1996)). The EPA-authorized Ohio regulations are codified at Ohio Administrative Code ("OAC") Chapters 3745-49 through 69. *See also* 40 C.F.R. § 272.1800 *et seq.* Ohio Rules 3745-69-40 through 3745-69-45 constitute the effective RCRA requirements governing drip pads in Ohio, in lieu of 40 C.F.R. Part 265, Subpart W. In these actions, EPA is enforcing those state regulations which have become requirements of RCRA Subtitle C as a result of authorization.

C. Relevant Procedural History

These cases relate to violations of RCRA's requirements for the decontamination of drip pads at two separate facilities, JAB Toledo's facility located at 13010 Eckel Junction Road, Perrysburg, Ohio ("Perrysburg facility") and JAB Ohio's facility located at 649 Landmark Boulevard, Washington Courthouse, Ohio ("Washington Courthouse facility"). EPA filed Administrative Complaints and Compliance Orders ("Complaints") against both facilities on May 5, 2008, alleging that each facility violated certain requirements in Ohio Rules 3745-69-40 through 3745-69-45 regarding the proper management of drip pads. (Docket Index No. 1[2]). The two cases were assigned separate dockets numbers. The JAB Toledo matter was assigned Docket No. RCRA-05-2008-0006 and the JAB Ohio matter was assigned Docket No. RCRA-05-2008-0007. Complainant requested compliance orders in both cases and sought a penalty of $287,441 against JAB Toledo and $282,649 against JAB Ohio. Respondents filed their Answers on June 9, 2008. (Docket Index No. 2).

On June 26, 2008, Complainant filed Motions for Partial Accelerated Decision in both matters seeking orders that Respondents had waived their claims to raise inability to pay the penalty amount proposed in the Complaints. (Docket Index No. 8). On July 22, 2008, Respondents responded to those Motions for Partial Accelerated Decision and indicated they had no objection. (Docket Index No. 13). On August 8, 2008, the Presiding Officer entered orders in both matters granting the Motions for Partial Accelerated Decision holding that JAB Ohio and JAB Toledo had waived any claim that they were unable to pay the proposed penalties specified

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[2] For ease of reference, Complainant will hereinafter cite to pleadings, filings, and exhibits in these matters by their Docket Number in the Index prepared by the EPA Regional Hearing Clerk for Region 5. Because, in most instances, the pleadings and exhibits have the same docket number in both cases, materials will be referred to as "Docket Index No." and that will refer to the corresponding docket numbers in both dockets. If the docket numbers are different in each case, Complainant will refer to them accordingly, e.g., "JAB Ohio, Docket Index No." or "JAB Toledo, Docket Index No."

in the Complaints. (Docket Index No. 14).

On September 29, 2008, Complainant filed Motions to Amend Complaints and Compliance Orders for the purpose of adding as respondents JAB Co, and Biewer Lumber LLC, alleging that they were parent corporations of JAB Ohio and JAB Toledo, and liable for their RCRA violations. (Docket Index No. 19). On January 7, 2009, the Presiding Officer granted leave to amend both Complaints, and on January 30, 2009, Amended Complaints and Compliance Orders ("Amended Complaints") were filed, with JAB Co and Biewer Lumber LLC added as Respondents. (Docket Index Nos. 36-37). After discovery,[3] the parties each filed Motions for Accelerated Decision on the issue of the parent's liability.[4] (*See* Docket Index Nos. 55 and 56). During the course of briefing on those motions, Complainant acknowledged that Biewer Lumber LLC was not the parent of JAB Toledo, and pursued only JAB Co as parent. On October 5, 2009 in the JAB Ohio matter and December 23, 2009 in the JAB Toledo matter, the Presiding Officer entered orders on the parties' cross motions for accelerated decision on

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[3] Complainant filed a motion for discovery on February 26, 2009, attaching several requests for documents and information entitled "Additional Information Request." (Docket Index No. 40). Respondents did not oppose Complainant's motion for discovery. Instead, Respondents filed their first response to the Additional Information Request on March 27, 2009. (Docket Index No. 42). Respondents filed their Supplemental Responses to EPA's Discovery Requests on April 30, 2009. (Docket Index No. 46). In both their initial and supplemental responses to EPA's discovery requests, Respondents made several blanket and specific objections. (*See generally* Docket Index Nos. 42 & 46).

On May 7, 2009, the Presiding Officer entered an Order regarding EPA's motion for discovery. (Docket Index No. 47). In this Order, the Presiding Officer ruled on the propriety of several of Respondents' objections. In doing so, the Presiding Officer also ruled on whether Respondents satisfied their production requirements with respect to several of the discovery requests by EPA. The Presiding Officer, however, also relied on Respondents' assertions that they would, sometime in the future, provide EPA with certain requested information. At the close of his May 7 Order, the Presiding Officer prematurely concluded (and cut off any attempt by EPA for additional discovery, written or otherwise) that there had been "ample time for discovery," that Respondents had satisfied their discovery obligations, and that he intended to set these matters for a hearing. (*Id.* at 15). Respondents submitted their second and third supplemental responses to EPA on May 18 and June 15, 2009. (Docket Index Nos. 48 & 50).

[4] On November 21, 2008, while Complainant's Motions to Amend the Complaints were under advisement, the Presiding Officer set the matter for hearing, to commence on February 18, 2009, and ordered that no dispositive motions, "such as motions for accelerated decisions," could be filed after December 12, 2008. (Docket Index No. 28 at 1). Thus, Complainant filed its Motions to Strike, In Part, Respondents' Pre-Hearing Exchanges and Motions for Accelerated Decision on Liability and Penalty before JAB Co. was added as a Respondent. (Docket Index No. 32). Respondents did not respond to these Motions until July 31, 2009, over eight months after these Motions were filed.

derivative liability in both cases, finding that JAB Co. was not liable for the violations alleged in the Complaints. (Docket Index No. 68).

On December 12, 2008, Complainant filed Motions for Accelerated Decision on Liability and Penalty. (Docket Index No. 32). Also, on December 12, 2008, Complainant filed Motions to Strike, In Part, Respondents' Pre-Hearing Exchanges. (Docket Index No. 32). Complainant's Motions to Strike, In Part, Respondents' Pre-Hearing Exchanges sought to strike the portions of Respondents' Pre-Hearing Exchanges which reserved the right to cross-examine the author of the "Penalty Rationale" provided by Complainant on grounds that no such right exists as a matter of law. (*Id.*) On December 23, 2009, the Presiding Officer found JAB Toledo and JAB Ohio liable for violations alleged in the Amended Complaints and he denied Complainant's Motions for Accelerated Decision on Liability and Penalty on the issue of appropriate penalty. (Docket Index No. 70). On December 23, 2009 (in JAB Ohio) and on January 12, 2010 (in JAB Toledo), the Presiding Officer denied Complainant's Motions to Strike, In Part, Respondents' Pre-Hearing Exchanges, holding that Respondents had a right to cross-examine an agency witness on the Agency's rationale supporting the penalty amount proposed, prior to the imposition of any penalty. (Docket Index No. 69). A hearing was held on February 23, 2010 regarding both matters. On April 30, 2010, the Presiding Officer issued Initial Decisions Regarding Penalty in both matters. (Docket Index No. 86). The Presiding Officer held that no penalty should be assessed. (*Id.*)

This is a consolidated appeal of certain adverse aspects of the Orders described above pursuant to 40 C.F.R. § 22.30 of the *Consolidated Rules*. Rule 22.30 provides for a party's right to appeal rulings on "those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction." 40 C.F.R. § 22.30(c).

Complainant's Notice of Appeal and Extension of Time to File a Brief in both matters was filed on May 21, 2010. On May 26, 2010, the Environmental Appeals Board (the "Board" or "EAB") issued an Order consolidating both matters into a single appeal, ordering Complainant to provide notice of the issues it is appealing by June 4, 2010 and extending the deadline by which to file its Brief in Support of the Appeal to August 3, 2010.

V. FACTUAL BACKGROUND[5]

A. The Wood Treatment Operations Of JAB Ohio And JAB Toledo And The Resulting RCRA Violations

JAB Ohio and JAB Toledo's business at both of their facilities was to pressure-treat wood with a chemical solution of chromated copper arsenate. (Docket Index No. 56, Attachments G at 4 and KK at 4).[6] JAB Toledo conducted operations at its Perrysburg facility from 1983 until 1997 (Docket Index No. 38, ¶10) and JAB Ohio conducted operations at its Washington Courthouse facility from approximately 1976 to June 2001.[7] (*Id.*) At both facilities, JAB Ohio and JAB Toledo treated the wood with chromated cooper arsenate and then transported the pressure-treated wood by rail to drip pads on facility grounds, where the wood underwent a preservative reaction. (*Id.*, ¶¶13-14). As the wood underwent a preservative reaction on the drip pads, excess chemical solutions on the wood either evaporated or fell off the

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[5] Most of the relevant and material facts in both of these matters are the same. Any factual differences which could bear on the outcome of this appeal will be specifically noted.

[6] Docket Index No. 56 consists of Complainant's Memorandum in Support of Motion for Accelerated Decision on Derivative Liability as well as the attachments, some of which include documents that Respondents have asserted contain confidential business information ("CBI"). Docket Index No. 53 is a redacted version of Complainant's Memorandum in Support of Motion for Accelerated Decision on Derivative Liability. Complainant's Brief will cite to Docket Index 56.

[7] Complainant notes that the State of Michigan automatically dissolved JAB Toledo on July 15, 2009, a couple of days after Complainant and Respondent JAB Co. filed their motions for accelerated decision on JAB Co.'s liability, but before JAB Co. responded to Complainant's Motion for Accelerated Decision on Derivative Liability. *See* http://www.dleg.state.mi.us/bcs_corp/dt_corp.asp?id_nbr=238809&name_entity=ECKLE%20JUNCTION,%20INC.

wood onto the drip pads. (*Id.*, ¶15; Docket Index No. 32, Attachment C). The excess chemical solution contained arsenic and chromium, and is a RCRA Listed Hazardous Waste under both federal and Ohio regulations.[8] (*Id.* ¶¶17-20).

Ohio Rules 3745-69-40 through 3745-69-45 constitute the effective RCRA requirements governing drip pads in Ohio, in lieu of 40 C.F.R. Part 265, Subpart W. OAC 3745-69-45 provides that: "[a]t closure, the owner or operator must remove or decontaminate all waste residues, contaminated containment system components (pad, liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leakage, and manage them as hazardous waste." *Id.*

Neither JAB Ohio nor JAB Toledo took steps to assess, and if necessary, remove all waste residues, contaminated containment system components (pad, liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leakage resulting from their wood treating operations at the time that their operations ceased. Ohio EPA inspected JAB Toledo in May 2004 and it inspected JAB Ohio in November 2004. (JAB Toledo, Docket Index No. 32, Attachment A; JAB Ohio, Docket Index No. 32, Attachment E). Ohio EPA issued a Notice of Violation ("NOV") to JAB Toledo in July 2004 (JAB Toledo, Docket Index No. 32, Attachments A and K) and issued a NOV to JAB Ohio in November 2004 (JAB Ohio, Docket Index No. 32, Attachment A). Both NOVs notified Respondents that they were in violation of the Ohio Administrative Rules concerning closure of drip pads. JAB Toledo's consultant, Mannik Smith Group ("MSG"), prepared a Drip Pad Closure Activity Plan in November 2004 (JAB Toledo, Docket Index No. 32, Attachment A); JAB Ohio's consultant, also MSG, prepared

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[8] This waste is listed by EPA as Hazardous Waste F035. See 40 C.F.R. § 261.31 and Ohio Administrative Rule 3745-51-31. Respondents admitted in their Answers that the material was RCRA Hazardous Waste "if disposed of as waste" and "depending on the concentration." (*See* Docket Index No 38, ¶19).

a Drip Pad Closure Activity Plan in May 2005 (JAB Ohio, Docket Index No. 32, Attachment C). Both Drip Pad Closure Activity Plans indicate the amount of contamination is unknown. (JAB Toledo, Docket Index No. 32, Attachment A, § 4.0; JAB Ohio, Docket Index No. 32, Attachment C, § 4.0).

MSG conducted some preliminary decontamination activities at JAB Toledo in June and October 2005; specifically MSG power-washed the drip pad during two cycles of pressure washing and wet vacuuming. (Docket Index No. 32, Attachment C at 1). After each decontamination procedure, composite final rinseate samples were collected and tested for arsenic and chromium. (*Id.*) In November 2005, MSG notified Ohio EPA that all of the test results it had obtained at JAB Toledo exceeded the remediation standards contained in the Drip Pad Closure Activity Plan and the concentrations from the second round of sampling in October 2005 were still four to seventeen times the remediation standards contained in the Drip Pad Closure Activity Plan. (*Id.*) MSG prepared a Supplemental Closure Plan for JAB Toledo for Ohio EPA approval in December 2005. (*Id.*, Attachment D). In January 2006, Ohio EPA notified JAB Toledo that its Supplemental Closure Plan was deficient. (*Id.*, Attachment E). JAB Toledo has never completed the decontamination of its drip pad at the Perrysburg location and the chromium and arsenic contamination its consultant identified to Ohio EPA remains today. JAB Ohio never performed any of the decontamination activities described in the Drip Pad Closure Activity Plan for the Washington Courthouse facility. The arsenic and chromium contamination remains unremediated at the Washington Courthouse facility.

B. The Biewer Corporate Family And JAB Co.'s Control Over JAB Ohio And JAB Toledo

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In addition to JAB Ohio and JAB Toledo, JAB Co. has at least five other subsidiaries located in Illinois, Michigan, and Wisconsin that are either sawmills or engaged in lumber manufacturing, wholesale, and treatment. (*Id.*; *see also id.*, Attachment A). The directors of JAB Co. are Richard Biewer, Timothy Biewer, and Brian Biewer, who also serve as officers for JAB Co. (*Id.*, Attachment C at 8).

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JAB Co., and its various subsidiaries, utilize the trade name "Biewer Lumber™." (*See id.*, Attachment A at 1). The website for Biewer Lumber™ states that it began "over 45 years ago" and "is a third generation, family owned company that is committed to the environment and sound forest practices." (*Id.*) The website further maintains that Biewer Lumber™'s "goal [is] to operate the safest most effective facilities." (*Id.*) Regarding their treatment businesses, the website states that "Biewer Lumber™ was a pioneer in the treating industry, and remains a leader today." (*Id.* at 3) With respect to its current lumber treatment activities, Biewer Lumber™ states that it is committed "to safe, productive treating facilities" and describes "an environmentally conscious choice" it has made in relation to its wood treatment businesses. (*Id.*)

JAB Co. has been the sole shareholder of JAB Ohio and JAB Toledo since their inception. (*Id.*, Attachment C at 5; *see also* Docket Index No. 59(2), Exhibit A, ¶¶ 2-3). JAB Ohio was incorporated as an Ohio corporation in 1980. (JAB Ohio, Docket Index No. 59(2), Exhibit B). JAB Toledo, on the other hand, was incorporated as a Michigan corporation in 1983. (JAB Toledo, Docket Index No. 59(2), Exhibit B). In addition to their directorships for JAB Co.,

Richard, Timothy, and Brian Biewer serve as directors for both JAB Ohio and JAB Toledo. (Docket Index No. 56, Attachment C at 8). They also serve as officers, in capacities identical to those in which they serve JAB Co.: Richard Biewer serves as JAB Ohio's and JAB Toledo's President; Timothy Biewer serves as JAB Ohio's and JAB Toledo's Vice-President; and Brian Biewer serves as JAB Ohio's and JAB Toledo's Secretary/Treasurer. (*Id.*) Furthermore, JAB Co.'s Chief Financial Officer, Gary Olmstead, prepared the financial statements of JAB Ohio and JAB Toledo. (*See* JAB Ohio, Docket Index No. 59(2), Exhibit C, ¶2). JAB Co. required JAB Ohio and JAB Toledo to pay an annual management fee for Gary Olmstead's provision of these services. (*See id.*)

JAB Toledo and JAB Ohio ceased operations in December 1997 and June 2001, respectively. Before they ceased operations, JAB Ohio and JAB Toledo had access to JAB Co.'s common bank account, allegedly through their own separate series of checks. (JAB Ohio, Docket Index No. 55, Exhibit C, ¶1). After they ceased operations, however, JAB Ohio and JAB Toledo no longer had access to JAB Co.'s bank account. (*See* Docket Index No. 56, Attachment I at 15).

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********** Respondents

maintain that JAB Co.'s payment of JAB Ohio and JAB Toledo's expenses after they closed were "in the nature of loans" or were "loans." (JAB Ohio, Docket Index No. 59(2) at 18; *id.*, Exhibit A, ¶4; JAB Toledo, Docket Index No. 59(2) at 18; *id.*, Exhibit A, ¶5). Respondents further state that JAB Co.'s payments were accounted for on JAB Co.'s consolidated financial statements and recorded as intercompany accounts payable. (JAB Ohio, Docket Index No. 59(2), Exhibit A, ¶4; JAB Toledo, Docket Index No. 59(2), Exhibit A, ¶5). There are no documents in the record memorializing the payment terms of any such loans, any interest charged, or the manner in which JAB Co. was to be repaid.

********** Brian Biewer was not paid for his post-closure service as manager/director of JAB Ohio and JAB Toledo. (Docket Index No. 55, Exhibit C, ¶4).

**********JAB Ohio's inventory was allegedly sold to its customers or, at cost, to JAB Co. and/or its other subsidiaries. (JAB Ohio, Docket Index. No. 55, Exhibit C, ¶6). Initially, the alleged inventory sale was recorded as an intercompany accounts receivable on JAB Co.'s consolidated financial statements. (JAB Ohio, Docket Index No. 55, Exhibit C, ¶6). JAB Ohio, however, did not receive any cash for this alleged inventory sale. Rather, JAB Co. applied the ********** that JAB Ohio was allegedly owed as an intercompany accounts receivable, as of November 30, 2001, to reduce JAB Ohio's intercompany accounts

payable, which was allegedly owed to JAB Co.[9] (*Id.*)

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JAB Toledo's facility is leased and generates rental income. (*See* JAB Toledo, Docket Index No. 55, Exhibit A, ¶ 4).

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VI. STANDARD OF REVIEW

In an enforcement proceeding, the Board reviews *de novo* the administrative law judge's factual findings and legal conclusions. *See* 40 C.F.R. § 22.30(f). "On appeal from or review of the initial decision, the [Board] has all the powers which it would have in making the initial decision . . . ." 5 U.S.C. § 557(b). In exercising its review, the Board has the power to "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed." 40 C.F.R. § 22.30(f). The "Board may remand the case to the Presiding Officer for further proceedings." *Id.* § 22.30(c).

VII. ARGUMENT

A. Federal, Not State, Common Law Should Govern The Veil-Piercing Determinations In These Cases

The Presiding Officer erred in holding that state common law, as opposed to federal common law, governs the determination of whether JAB Co. should be held derivatively liable for the costs associated with JAB Ohio's and JAB Toledo's compliance and any penalty associated as a result of their non-compliance with RCRA and its implementing regulations. In an Order dated October 5, 2009 in JAB Ohio, the Presiding Officer held that Ohio, not federal, common law applied to its analysis of whether the corporate veils of JAB Ohio and JAB Toledo

could be pierced to hold JAB Co. liable.[10] (JAB Ohio, Docket Index No. 65 at 8[11]). For reasons that follow, the Presiding Officer's application of Ohio, rather than federal, common law constituted reversible error. Complainant respectfully requests that the Board rule that federal common law applies in determining whether JAB Co. can be held derivatively liable in these cases.

The corporate form generally protects parent corporations from liability for the environmental violations of their subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 69 (1998). Courts recognize that "mere ownership of a subsidiary does not justify the imposition of liability on the parent." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001) (citing *Bestfoods*, 524 U.S. at 69). "However, courts may disregard the corporate entity and hold a parent derivatively liable for the acts of a subsidiary to prevent abuse of the corporate form." *United States v. Union Corp.*, 259 F. Supp. 2d 356, 388 (E.D. Pa. 2003) (citing *Pearson*, 247 F.3d at 484). The equitable doctrine of piercing the corporate veil is used to determine whether a parent corporation can be held derivatively liable for the environmental violations of its subsidiary. *Bestfoods*, 524 U.S. at 61-64.

In *United States v. Bestfoods*, the United States Supreme Court recognized that a parent corporation can be held derivatively liable for the acts of its subsidiary in the context of actions brought under the Comprehensive Environmental Response, Compensation and Liability Act, 42

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[10] In JAB Toledo, the Presiding Officer entered an Order dated December 23, 2009 adopting his ruling in the October 5, 2009 Order in JAB Ohio. (Docket Index No. 68).

[11] Complainant notes that the Presiding Officer also stated that the "particular law to be applied is academic, as the Court finds that JAB Company is not liable under either federal or state views." (*Id.*) In the analysis that followed, the Presiding Officer noted and implicitly adopted the more restrictive piercing analysis employed under Ohio common law, but applied a potpourri of cases applying both federal and state law. (*Id.* at 10-11 n. 21). While Complainant's position is that the Presiding Officer's piercing analysis was flawed regardless of whether federal or state common law was applied, *see infra*, it appears that the Presiding Officer's Order on the parties' motions related to derivative liability was, at least in part, predicated on the more restrictive Ohio common law veil-piercing test.

U.S.C. §§ 9601 *et seq.* ("CERCLA"). *Id.* at 63-64. There is no authority or other case law holding that the result should be otherwise in the context of actions brought under RCRA, the environmental statute giving rise to these cases. In fact, the parties to these cases appear to agree that the Supreme Court's recognition of corporate veil-piercing in the context of CERCLA should apply equally to RCRA. (Docket Index No. 65 at 4-5 and n. 5).

Although it recognized that there is significant disagreement on the issue among courts and commentators, the Supreme Court in *Bestfoods* avoided deciding the question of whether federal or state common law applies to corporate veil-piercing analysis under CERCLA, *Bestfoods*, 524 U.S. at 64 n. 9, and Complainant is aware of no case or ruling from the Board that has decided the issue in the context of RCRA or any other environmental statute. Notwithstanding the lack of controlling authority, the Supreme Court "has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). As the Supreme Court stated in *Kimbell*, "whether to adopt state law or to adopt a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." *Id.* at 728 (citation omitted).

In determining whether to apply federal or state law under an ambiguous or incomplete federal statute, the Supreme Court in *Kimbell* employed a three-factor analysis. Courts determining whether to apply federal or state law consider: "(1) whether the federal program, by its very nature, require[s] uniformity; (2) whether application of state law would frustrate specific objectives of the federal program; and (3) whether application of uniform federal law would disrupt existing commercial relationships predicated on state law." *United States v. Gen.*

Battery Corp., 423 F.3d 294, 299 (3d Cir. 2005) (citing *Kimbell*, 440 U.S. at 728-29). Federal courts, including the Supreme Court, utilize the *Kimbell* test in determining whether federal common law fills the gaps in a variety of federal statutes, including federal environmental statutes, and whether it applies in other contexts that impact federal rights. *See id.*; *see, e.g., Atherton v. FDIC*, 519 U.S. 213 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994); *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001) (CERCLA); *Atl. Richfield Co. v. Blosenski*, 847 F. Supp. 1261 (E.D. Pa. 1994 (CERCLA); *In re Acushnet River & New Bedford Harbor*, 675 F. Supp. 22, 30-31 (D. Mass. 1987) (CERCLA). Applying the *Kimbell* factors, the Board should hold that federal common law governs the corporate veil-piercing analysis under RCRA in these cases.

The first *Kimbell* factor – "whether the federal program, by its very nature, require[s] uniformity" – weighs in favor of the application of federal common law to the derivative liability issue in these cases. In enacting RCRA, Congress explicitly stated "that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal . . . have become a matter national in scope and in concern and necessitate Federal action . . . ." 42 U.S.C. § 6901(a)(4).[12] Thus, Congress, in addressing "a matter national in scope," *id.*, authorizes EPA to promulgate regulations establishing standards applicable to hazardous waste generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. §§ 9622-9624. Like many federal environmental statutes, "RCRA permits states to seek EPA approval to administer and enforce their own hazardous waste programs ('authorized states') in lieu of the federal program." *Titan Wheel Corp. v. U.S. EPA*, 291 F. Supp. 2d 899, 904 (S.D. Iowa 2003)

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[12] "It is undisputed that hazardous waste management is an area of national importance." *Old Bridge Chems., Inc. v. N.J. Dep't of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992); 42 U.S.C. § 6901(a)(4).

(citing 42 U.S.C. § 6926(b)). RCRA, however, mandates that EPA's federal regulations serve as the floor, or minimum requirements, and that any authorized state regulation must be no less stringent than the corresponding federal regulation. 42 U.S.C. § 6929. As is more often the case than not, the particular Ohio regulation that Respondents have admitted violating, OAC 3745-69-45, is identical to its federal counterpart, 40 C.F.R. § 265.445(a).

RCRA's "comprehensive" nature and successful implementation of its waste management program depend on national uniformity. Simply put, liability for a violation of RCRA should not depend on the particular state in which the violation occurs. *See Acushnet River & New Bedford Harbor*, 675 F. Supp. at 31 ("The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under [CERCLA] must not depend on the particular state in which a defendant happens to reside."). The Board should conclude that the first prong of the *Kimbell* test is satisfied in these cases.

The second prong of *Kimbell* likewise is satisfied in these cases. As to *Kimbell*'s second prong, the Supreme Court has "indicated 'that federal courts should incorporate [state law] as the federal rule of decision,' unless 'application of [the particular] state law [in question] would frustrate specific objectives of the federal programs." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991) (quoting *Kimbell*, 440 U.S. at 728) (alterations in original). It is normally presumed that "state law should be incorporated into federal common law" and this presumption "is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Id.* (citations omitted). In *Kamen*, the Supreme Court noted that state corporate law normally is one of these areas. *Id.* State corporate law, however, should not govern where "the state law permit[s] actions prohibited by [federal statutes], or unless '[its] application would be

inconsistent with the federal policy underlying the cause of action.'" *Id.* (quoting *Burks v. Lasker*, 441 U.S. 471, 479 (1979)) (first and third alternations in original). Thus, to prevail on the second prong of *Kimbell*, the Supreme Court requires "a significant conflict between some federal policy or interest and the use of state law . . .," and notes that "such a 'conflict' is normally a 'precondition'" for the application of federal common law. *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petro. Co.*, 384 U.S. 63, 68 (1966) and *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994)).

The requisite conflict between federal and Ohio common law on piercing the corporate veil is readily apparent in these cases. Although federal and Ohio common law on piercing the corporate veil are similar in many respects, *see infra* section VII.B.2., there is at least one significant difference. On the one hand, courts applying federal common law do not hesitate to pierce a corporation's veil and hold a parent corporation liable for an environmental violation when there has been a showing of "injustice or fundamental unfairness." *Union Corp.*, 259 F. Supp. 2d at 389; *see also Acushnet River & New Bedford Harbor*, 675 F. Supp. at 33 (holding that "a corporate entity may be disregarded in the interest of public convenience, fairness and equity").

On the other hand, courts applying Ohio common law arguably must employ a more exacting standard. The Ohio Supreme Court in *Belvedere Condominium Unit Owners' Association v. R.E. Roark Companies Inc.*, set forth Ohio's veil-piercing test, requiring, among other things, a showing that the "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." 617 N.E.2d 1075, 1086 (emphasis added). More recently, the Ohio Supreme Court narrowly expanded the *Belvedere* test to test to apply where "the defendant

shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, *or a similarly unlawful act.*" *Dombroski v. WellPoint, Inc.*, 895 N.E.2d 538, 544-45 (Ohio 2008) (emphasis added). The Ohio Supreme Court in *Dombroski* cautioned that the corporate veil should be pierced "only in instances of extreme shareholder [or parent corporation] misconduct." *Id.* *Dombroski* itself and post-*Dombroski* cases make clear that "straightforward torts," such as an insurer's bad faith denial of a claim, or mere breach of contract do not constitute "similarly unlawful act[s]." *Id.*; *Advantage Bank v. Waldo Pub, LLC*, 2009 Ohio 2816, 2009 Ohio App. LEXIS 2387 (Ohio Ct. App. June 15, 2009); *Jewell v. Victorian Vill. Internal Med., Inc.*, 2009 Ohio 2233, 2009 Ohio App. LEXIS 1876 (Ohio Ct. App. May 12, 2009); *see also Transition Healthcare Assocs. v. Tri-State Health Investors*, 306 Fed. Appx. 273, 282 (6th Cir. Jan. 9, 2009) (unpublished) (applying Ohio law).

While the admitted violations in these cases certainly rise to the level of "illegal" or "similarly unlawful act[s]" for purposes of the Ohio common law veil-piercing test, the apparent differences between the federal and Ohio common law tests warrant the imposition of federal common law. Piercing the corporate veil is approached differently by each State, some of which may require a holding that that is more "protective of parent corporations" creating "safe havens for polluters."[13] *Atl. Richfield Co.*, 847 F. Supp. at 1279. Given what appear to be significant differences between federal and Ohio common law on veil-piercing, and the fact that applying a patchwork of different State's veil-piercing tests to determine whether to hold a parent corporation derivatively liable for the RCRA violations of its subsidiary would undermine Congress's objectives in enacting RCRA, the Board should conclude that the second prong of the *Kimbell* test is satisfied in these cases.

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[13] *Dombroski*'s limited expansion and use of confusing language, such as "other similarly unlawful act[s]," do little to aid in a court's interpretation and here anticipation, of Ohio common law. *See infra* section VII.B.4.b).

Finally, with respect to the third prong of the *Kimbell* test, applying federal common law to determine whether to pierce a corporation's veil would not disrupt existing commercial relationships predicated on state law. As one district court noted under CERCLA, "the principal economic effects of a rule imposing alter ego liability under CERCLA would be to discourage corporations from establishing undercapitalized subsidiaries to engage in hazardous waste disposal and to encourage parent corporations to oversee the hazardous waste disposal activities of their subsidiaries." *Atl. Richfield Co.*, 847 F. Supp. at 1279 (citation omitted). The Presiding Officer's orders in these cases, if left undisturbed, would do the opposite – namely encourage parent corporations to undercapitalize subsidiaries, reducing them to holding companies for contaminated property, and it would allow them to walk away from any legal or financial responsibility for serious contamination and known potential threats to the environment.

Here, Respondents cannot possibly claim that applying federal common law to determine whether to hold JAB Co. derivatively liable would disrupt some existing commercial relationships they maintained that were predicated on state law. Respondents in these cases are three separate corporations organized under the laws of Michigan (JAB Co. and JAB Toledo) and Ohio (JAB Ohio). Respondents' arguments, perhaps not surprisingly given its arguably more restrictive nature, relied only upon Ohio common law on the issue of JAB Co.'s derivative liability, even as to their contentions related to JAB Toledo, a Michigan corporation. (Docket Index No. 55 at 27-34). Thus, even Respondents ignore any differences between Michigan and Ohio common law as it applies to their commercial relationships. Furthermore, even assuming that Ohio common law governs the alleged commercial relationships between two Michigan corporations (JAB Co. and JAB Toledo) and one Michigan corporation and one Ohio corporation (JAB Co. and JAB Ohio), Ohio law, during the time period relevant to these cases, and when

Respondents presumably were evaluating the effect of Ohio law on their commercial relationship, was even less clear than it is today. *See Dombroski*, 895 N.E.2d at 540 (resolving an Ohio appellate court split as to whether the second prong of *Belvedere* allows for piercing "in cases where control was exercised to commit unjust or inequitable acts that do not rise to the level of fraud or an illegal act").

In sum, the Board should hold that federal common law applies to determine whether JAB Co. can be held derivatively liable for the admitted RCRA violations at issue in these cases. JAB Co., a Michigan corporation, should not be permitted to facilitate serious contamination of its subsidiaries' properties and hide behind Ohio common law to avoid legal and financial responsibility.

B. The Presiding Officer Erred In Denying Complainant's Motions For Accelerated Decision With Regard To Derivative And Direct Liability Of JAB Co.

In addition to erroneously holding that Ohio common law controls the veil-piercing analysis, the Presiding Officer's October 5 and December 23, 2009 Orders denied Complainant's motions for accelerated decision with respect to its claims for JAB Co.'s derivative and direct liability and granted Respondents' motions for accelerated decision on these same issues. (JAB Ohio, Docket Index No. 65; JAB Toledo, Docket Index No. 68). The Board reviews the Presiding Officer's orders on derivative liability de novo. 40 C.F.R. § 22.30; see also 5 U.S.C. § 557(b). For the reasons that follow, Complainant respectfully requests that the Board reverse the Presiding Officer's October 5 and December 23, 2009 Orders and hold that Complainant is entitled to accelerated decision on JAB Co.'s derivative and direct liability.

1. Accelerated decision is appropriate where there is no genuine issue of material fact

Accelerated decision is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). The Board has held that motions for accelerated decision are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., In re BWX Techs., Inc.*, 9 E.A.D. 61, 74-77 (EAB 2000). The movant has the initial burden of showing "no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). Once the movant meets its burden, the non-movant must come forward with specific facts showing that there is a genuine issue for hearing. *See BWX Techs., Inc.*, 9 E.A.D. at 75. All of the non-movant's evidence must be accepted as true and all permissible inferences must be drawn its favor.[14] *See, e.g., Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, in order to raise a genuine issue of material fact, the evidence presented by the non-movant must be sufficiently probative that the judge could reasonably find for the non-movant applying the burden of proof. *BWX Techs., Inc.*, 9 E.A.D. at 75.

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[14] This standard changes slightly when the parties file cross-motions for accelerated decision. As the Board recognized in *In re BWX Technologies, Inc.*, "the fact-finding function is performed by the administrative law judge in a manner akin to that of a district court judge who performs the fact-finding function in a bench trial. This latter point is noteworthy because it may be possible for the judge, in appropriate circumstances, to resolve disputed issues of fact on cross-motions for summary judgment if it is clear that there is no further evidence to be developed." *In re BWX Techs., Inc.*, 9 E.A.D. at 75 n. 19 (citing *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978)). The Presiding Officer viewed the parties' motions for accelerated decision regarding JAB Co.'s liability as cross-motions.

Complainant, however, never conceded that no further evidence could be developed in the proceeding below. Thus, it is unclear what, if any, leeway the Presiding Officer had in ruling on the parties' cross-motions for accelerated decision on derivative liability. While Complainant believes that the record evidence at the accelerated decision stage demonstrated that it, not Respondents, was entitled to accelerated decision on JAB Co.'s derivative liability, Complainant argues, in the alternative, that the Presiding Officer should have denied the parties' cross-motions for accelerated decision on derivative liability. This position is the subject of Complainant's latter argument. *See infra* section VII.C.

2. The three-pronged test for piercing the corporate veil is highly fact specific

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *Bestfoods*, 524 U.S. at 61 (citations omitted). "But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id.* (citations omitted). Piercing the corporate veil is an equitable doctrine intended to prevent inequitable results. *See, e.g., Carter-Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 749 (6th Cir. 2001) (applying Ohio common law). As already explained above, there appear to be significant differences between the federal and Ohio common law veil-piercing tests. *See supra* section VII.A. Nevertheless, Complainant asserts that it is entitled to accelerated decision regardless of whether the Board decides to apply federal or Ohio common law.

Determining whether to pierce the corporate veil is a "highly fact sensitive inquiry" that differs with the specific circumstances of each case. *In re Safe & Sure*, 1998 EPA LEXIS 53, at *54; *Ohio v. Tri-State, Inc.*, 2004 Ohio 4441, 2004 Ohio App. LEXIS 4036, at *31 (Ohio Ct. App. 2004) ("When determining whether to pierce the corporate veil a trial court must approach each case *sui generis*, on its own facts.") (citations omitted). Federal courts applying federal common law to the veil-piercing determination are guided the following three-pronged test:

> (1) Control, not mere majority or complete stock ownership, but complete domination, not only of finances, but of policy and business practices in respect to the transaction attacked so that the

> corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
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> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

U.S. Pub. Interest Research Group v. Atl. Salmon of Me., LLC, 261 F. Supp. 2d 17, 25 (D. Me. 2005) (citing *MCI Telecomms. Corp. v. O'Brien Mktg., Inc.*, 913 F. Supp. 1536, 1541 (S.D. Fla. 1995)). The test for piercing the corporate veil under Ohio common law is nearly identical. *Compare Belvedere Condo. Unit Owners' Ass'n*, 617 N.E.2d at 1086 *see also Dombroski*, 895 N.E.2dat 544-45.[15] "The burden of proof to demonstrate grounds for piercing the corporate veil is on the party seeking to impose liability on the parent corporation." *Corrigan v. U.S. Steel Corp.*, 478 F.3d 718, 723 (6th Cir. 2007). Complainant will discuss each of these prongs as they apply to these cases. The facts in the records at the accelerated decision stage show that JAB Co. should be held derivatively liable. Consequently, the ALJ erred in failing to grant Complainant's motion for accelerated decision as to JAB Co.'s derivative liability.

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[15] The test set forth by the Ohio Supreme Court in *Belvedere* is as follows:

> The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) 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, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere Condo. Unit Owners' Ass'n, 617 N.E.2d at 1086; *see also Dombroski*, 895 N.E.2d at 544-45 (modifying second prong of Belvedere test to apply, not only to outright fraud or an illegal act, but where "the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act")

3. Complainant satisfied the first-prong of the federal and Ohio common law veil-piercing tests

The first prong of the federal and Ohio common law veil piercing tests is known as the alter-ego doctrine. *Union Corp.*, 259 F. Supp. 2d at 388-89; *LeRoux's Billyle Supper Club v. Ma*, 602 N.E.2d 685, 689 (Ohio Ct. App. 1991). In deciding whether a subsidiary corporation is the alter ego of its parent, courts focus on the whether the specific facts of the case demonstrate that the corporate parent and subsidiary are "fundamentally indistinguishable." *Belvedere Condo. Owners' Unit Ass'n*, 617 N.E.2d at 1086. The alter ego doctrine is satisfied where the parent corporation's control over its subsidiary "'amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation' with no separate mind, will or existence of its own." *United States v. Wallace*, 961 F. Supp. 969, 978 (N.D. Tex. 1996) (quoting *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985)).[16] Courts apply a variety of factors to determine whether the subsidiary is the alter ego of its parent corporation, including the following:

1) gross undercapitalization;

2) failure to observe corporate formalities;

3) nonpayment of dividends;

4) insolvency of subsidiary corporation;

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[16] The relevant time period for determining whether the requisite control has been demonstrated for purposes of the alter ego doctrine "focuses on the relationship between the parent and the subsidiary at the time the acts complained of took place." *Wallace*, 961 F. Supp. at 979 (citing cases). In these cases, the relevant time period began after the decision was made to stop the wood treatment operations at the JAB Ohio and JAB Toledo facilities and continued to run through the deliberate decision to avoid decontaminating the drip pads and remediating the attendant arsenic and chromium contamination. This time period was the focus of Complainant's motions for accelerated decision on JAB Co.'s derivative liability below. Much of the ALJ's focus, however, was on undocumented events that allegedly occurred before the decision was made to close JAB Ohio and JAB Toledo's facilities. (*See* Docket Index No. 65 at 11-12 (reciting evidence, proffered by Respondents through affidavits unsupported by any documentary evidence, related to JAB Ohio and JAB Toledo's alleged pre-closure activities)).

5) siphoning of funds from the subsidiary;

6) non-functioning of officers and directors of subsidiary;

7) absence of corporate records; and

8) whether the subsidiary corporation is merely a façade for the operations of the parent.

Union Corp., 259 F. Supp. 2d at 388-89 (quoting *Pearson*, 247 F.3d at 484-85; *see also In re Safe & Sure Prods.*, 1998 EPA ALJ LEXIS 53, at*54[17]; *Am. Bell Inc. v. Fed. of Tel. Workers of Pa.*, 736 F.2d 879, 886 (3d Cir. 1984); *Corrigan*, 478 F.2d at 724 (6th Cir. 2007) (applying Ohio law)[18]; *LeRoux's Billyle Supper Club*, 602 N.E.2d 685, 689 (Ohio Ct. App. 1991) (same).

Courts agree that "a finding of liability does not require that all of the elements be satisfied." *Union Corp.*, 259 F. Supp. 2d at 389. Due to "the equitable nature of the veil piercing doctrine, no list of factors can be exclusive or exhaustive." *Carter-Jones Lumber Co.*, 237 F.3d at 749. Furthermore, "there is no litmus test for determining whether a subsidiary is the alter ego of its parent. Instead, [the Board] must look to the totality of the circumstances." *Jon-T Chems., Inc.*, 768 F.2d at 694. As will be discussed below, Complainant presented evidence in its Motions for Accelerated Decision for Derivative Liability from the companies' own financial

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[17] The Presiding Officer in *Safe & Sure* was the same ALJ who presided over the proceedings below. He relied on the Seventh Circuit's formulation of the piercing analysis in *Nat'l Soffit v. Superior Sys.*, 98 F.3d 262, 265 (7th Cir. 1996), listed the eleven factors relevant to a determination of whether an individual shareholder should be held derivatively liable for the acts of a corporation. *Id.* at 54. These factors are nearly identical to those used to by the court in *Union Corp.*, *supra*, to determine whether a subsidiary was an alter ego of its parent corporation. *Compare id. with Union Corp.*, 259 F. Supp. 2d 356, 388-89. Also, the factors utilized by the Presiding Officer in *Safe & Sure*, also include factors that are similar to the first- and second-prongs of the federal and Ohio common law piercing tests. In addition, the Presiding Officer in *Safe & Sure* noted that a party seeking to pierce the corporate veil must demonstrate 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." *Safe & Sure*, 1998 EPA ALJ LEXIS 53, at *54 (citing *Nat'l Soffit*, 98 F.3d at 265).

[18] The factors Ohio courts use to determine whether a subsidiary corporation is a mere alter ego of its parent include: "(a) grossly inadequate capitalization; (b) failure to observe corporate formalities; (c) insolvency of the debtor corporation at the time the debt was incurred; (d) parent holding itself out as personally liable for certain subsidiary obligations; (e) diversion of funds or other property of the subsidiary for the parent's use; (f) absence of corporate records; and (g) the fact that the subsidiary was a mere façade for the operations of the parent." *Corrigan*, 478 F.3d at 724 (quoting *LeRoux's Billyle Supper Club*, 602 N.E.2d at 689).

records demonstrating JAB Co.'s pervasive control over its subsidiaries, including draining them of capital and leaving them without funds to decontaminate their drip pads after the subsidiaries' operations shut down. This evidence was met by Respondents' undocumented and self-serving assertions in their responses to Complainant's Motions and their own Motions for Accelerated Decision that these asset transfers were repayment of "loans" or were in "the nature of loans." Respondents' undocumented assertions were insufficient to raise a genuine issue of material fact as to JAB Co.'s responsibility for its subsidiaries' failure to comply with RCRA. Complainant submits that the unrebutted evidence of JAB Co.'s acquisition of virtually all of its subsidiaries' remaining assets, leaving them as mere empty corporate shells, warranted granting of Complainant's Motions for Accelerated Decision as to JAB Co.'s derivative liability.

a) The record evidence shows that JAB Co. stripped JAB Ohio and JAB Toledo of their assets preventing them from satisfying their environmental liabilities

Federal and Ohio law veil-piercing tests require courts to determine whether the parent corporation siphoned funds from the subsidiary and whether the subsidiary was grossly under capitalized. *Corrigan*, 478 F.3d at 724; *Union Corp.*, 259 F. Supp. 2d at 388-89. Undercapitalization or inadequate capitalization is often a key reason for piercing the corporate veil. *See, e.g., Anderson v. Abbott*, 321 U.S. 349, 362 (1944). As stated by one federal district court, "inadequate capitalization is defined as capitalization that is very small in relation to the nature of the business of the corporation and the risk the business necessarily entails." *AT&T Global Info. Solutions v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 867 (S.D. Ohio 1998). Where undercapitalization is a "deliberate attempt to evade anticipated liability for contamination," courts do not hesitate to pierce the corporate veil to hold the parent corporation liable. *See Union Corp.*, 259 F. Supp. 2d at 390.

At least two recent federal court decisions where a parent corporation's veil was pierced are analogous to the facts in these cases. The first of these decisions was rendered by the Third Circuit Court of Appeals in *Pharmacia Corporation v. Motor Carrier Services Corporation*, 309 Fed. Appx. 666 (3d Cir. 2009) (unpublished). The Third Circuit in *Pharmacia* upheld the district court's grant of summary judgment piercing the corporate veil of a wholly-owned subsidiary to hold the parent corporation liable for costs associated with the cleanup of environmental contamination. *Id.* at 669, 672-73. In *Pharmacia*, the subsidiary engaged in no independent business of its own and merely existed as a holding company for the contaminated site, "thereby shielding the [parent corporation] from any potential liability arising out [of] the environmental harms caused by the [subsidiary's] former operations."[19] *Id.* at 673.

Another recent federal decision from a federal district court in Ohio applying the Ohio veil-piercing test is also instructive. In *AT&T Global Information Solutions v. Union Tank Car Company*, the plaintiff sought to hold a parent company liable for response costs incurred by the plaintiff in remediating a contaminated site under CERCLA. 29 F. Supp. 2d 857, 860 (S.D. Ohio 1998). The district court, applying the test set forth by the Ohio Supreme Court in *Belvedere*, held that the parent's control over the subsidiary was pervasive and warranted piercing. *Id.* at 867. In so concluding, the court focused on the fact that the subsidiary corporation had "minimally adequate capital" and "had environmental risks which became obvious to [the parent] prior to [the subsidiary's] dissolution." *Id.* Despite the parent's knowledge of these environmental risks, it failed to leave an adequate fund in place to satisfy the subsidiary's

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[19] In addition to these facts, the Third Circuit noted that "[s]ince the [subsidiary's] closing, in January 1998, neither the shareholders, officers nor directors of [the parent corporation] have held a meeting as set forth in the company's by-laws. Moreover, [the subsidiary] has not . . . maintained a balance sheet, nor issued a financial report to [the parent]." *Id.* at 672 (quoting the district court). The court also noted that the subsidiary had "no employees." *Id.* JAB Ohio and JAB Toledo's lack of shareholder, officer, or director meetings and employees is explained below, as is JAB Co.'s control over their finances.

potential environmental liabilities. *Id.* In no uncertain terms, the *AT&T Global Information Systems* court held that "[l]eaving no fund in place to provide for potential liability is equivalent to undercapitalization." *Id.* (citing 18 Am. Jur. 2d Corporations, § 50 (1988); *In re Ozark Restaurant Equip. Co.*, 41 B.R. 476 (Bankr. W.D. Ark. 1983), *cert. denied*, 484 U.S. 848 (1987)).[20]

The current record is replete with evidence showing that JAB Co. deliberately siphoned off virtually all of the assets of JAB Ohio and JAB Toledo after they closed when it knew or should have known that such assets and funds would be required to comply with RCRA's decontamination requirements. Furthermore, JAB Co. was aware of the potential for groundwater and soil contamination that could result from wood treatment operations at JAB Ohio's and JAB Toledo's facilities. It is undisputed that JAB Co. was notified in 1979 by the State of Michigan and later found liable for groundwater and soil contamination resulting from its own wood treatment activities at its facility in Schoolcraft, Michigan. *Atty. Gen. v. John A. Biewer Co., Inc.*, 363 N.W.2d 712, 714-15 (Mich. Ct. App. 1985). Notably, the toxic substances which caused the groundwater and soil contamination resulting in JAB Co. being held liable were arsenic and chromium, the same hazardous substances at issue in these cases. *Id.* at 714-15. Therefore, JAB Co. deliberately siphoned the remaining assets of JAB Ohio and JAB Toledo at the time they closed with full knowledge that the hazardous substances utilized in JAB Ohio's

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[20] Unlike *Pharmacia* and *AT&T Global Information Solutions*, which are analogous to the record facts in the cases at bar, the cases relied on by Respondents below and adopted by the Presiding Officer are factually distinguishable from these cases. In support of their argument that JAB Ohio and JAB Toledo were adequately capitalized, Respondents cited *LeRoux's Billyle Supper Club v. Ma*, 602 N.E.2d 685 (1991), *Tandem Staffing v. ABC Automation Packaging Inc.*, No. 19774, 2000 Ohio App. LEXIS 2366 (Ohio App. June 7, 2000). *LeRoux* and *Tandem Staffing*, both of which apply Ohio common law, do not address the issue of whether a parent corporation can be held liable when it deliberately siphons the remaining assets of allegedly failing subsidiaries without leaving sufficient funds to pay for potential environmental liabilities. Furthermore, unlike *LeRoux* and *Tandem Staffing*, there is ample record evidence in these cases that JAB Co. was on notice that wood treatment operations, like those conducted at the JAB Ohio and JAB Toledo facilities, had a probability for arsenic and chromium contamination of the groundwater and soils. Consequently, Respondents' reliance on *LeRoux* and *Tandem Staffing* was misplaced.

and JAB Toledo's wood treatment operations posed threats to the environment and could result in soil and groundwater contamination.

The Presiding Officer blindly adopted JAB Co.'s contention that JAB Ohio and JAB Toledo were adequately capitalized at all times relevant to these matters. Without any citation or reference to record evidence, he also adopted JAB Co.'s argument that JAB Ohio and JAB Toledo are "simply failed corporation[s] with liabilities that are greater than [their] assets."[21] (*Id.* at 24; Docket Index No. 65 at 13, 18, 20, 32 n. 44, 36). This conclusion misses the mark. The inquiry is not why or whether JAB Ohio or JAB Toledo closed. Instead, the Presiding Officer should have focused on what happened to JAB Ohio's and JAB Toledo's assets after they closed. *Wallace*, 961 F. Supp. at 979. Had he done so, he would have realized that the record evidence demonstrates that JAB Co. deliberately siphoned off any existing funds it attributed or accounted to JAB Ohio and JAB Toledo for its own benefit and without regard for the environmental consequences of such decisions.

(1) There is record evidence showing that JAB Co. siphoned assets from JAB Ohio after 2001

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**********According to Respondents, JAB Ohio's inventory was sold to its customers or, at cost, to JAB Co. and/or JAB Co.'s other subsidiaries sometime before it ceased operations in November 2001. (JAB Ohio, Docket Index No. 55, Exhibit C, ¶ 6). JAB Co. recorded the sale of JAB Ohio's inventory as an intercompany accounts receivable on JAB Ohio's books. (*See id.*)

[21] Complainant notes that there is no evidence in the record providing insight into the reason(s), business or otherwise, that JAB Ohio and JAB Toledo ceased operations.

********** JAB Co. continued, at least until July 2, 2009, to pay all of its expenses, including taxes and/or insurance. (JAB Ohio, Docket Index No. 55, Exhibit C, ¶ 5; *see also id.* Exhibit A, ¶4).

This evidence proves that JAB Co. siphoned JAB Ohio's substantial inventory for its own benefit, to reduce an undocumented intercompany accounts payable. Like the subsidiary in *AT&T Global Information Solutions*, JAB Ohio had "minimally adequate capital" at the time of its closing. 29 F. Supp. 2d at 867. Despite the fact that JAB Co. was on notice of the potential environmental liabilities that could result from wood treatment, and notice of RCRA's requirements to remove and decontaminate wood treatment drip pads upon closure, JAB Co. failed to ensure that an adequate fund was left in place to pay for potential environmental liabilities after wood treatment operations ceased at JAB Ohio's facility. *Id.*

JAB Ohio exists solely as a holding company for property that could be seriously contaminated with arsenic and chromium. *See Pharmacia*, 309 Fed. Appx. at 673. JAB Co.'s deliberate attempt to shield itself from the environmental liabilities resulting from JAB Ohio's former operations should not be tolerated. These undisputed facts support veil-piercing.

(2) There is record evidence showing that JAB Co. siphoned assets from JAB Toledo after 1997

Not surprisingly, the evidence shows that JAB Co. engaged in the same deliberate siphoning of assets at JAB Toledo. Unlike JAB Ohio, which has had a zero cash balance and received no revenue since it ceased operations, JAB Toledo has received rental income since it ceased operations in June 1997. (*See* JAB Toledo, Docket Index No. 55, Exhibit A, ¶ 4).

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********** From 1998 to 2007, JAB Toledo, unlike its sister corporation JAB Ohio, continued to generate revenue from leasing its property. (*See* JAB Toledo, Docket Index No. 55, Exhibit A, ¶4).

As it should for JAB Ohio, the Board should hold that JAB Co.'s deliberate siphoning of JAB Toledo's assets supports piercing. Any revenue that JAB Toledo generated after it closed in December 1997 was applied to

********** Without a doubt, and because JAB Co. deliberately chose to keep any rental income generated from the lease of JAB Toledo's property, JAB Toledo had "minimally adequate capital" after the time it closed in 1997. Furthermore, JAB Co. cannot deny that JAB Toledo's continued existence is solely as a holding company for the contaminated property.[22]

[22] As explained above, the environmental consultant, MSG, began implementing the Drip Pad Closure Activity Plan at JAB Toledo's facility and determined that the level of arsenic and chromium contamination is four

See Pharmacia, 309 Fed. Appx. at 673. JAB Co.'s intention to reduce JAB Toledo to a mere holding company for the contaminated property is further demonstrated by the fact that after it ceased operations, JAB Toledo's name was changed to "Eckle Junction, Inc." or "Eckel Junction, Inc.," Eckel Junction being the name of the street on which the JAB Toledo facility is located. (JAB Toledo, Docket Index No. 55, Exhibit C; *see also* Docket Index No. 56, Attachments E and F (letters on "Eckel Junction, Inc." letterhead)). As they do in the case of JAB Ohio, these undisputed facts support veil-piercing.

(3) JAB Co. siphoned the remaining assets of JAB Ohio and JAB Toledo after they closed and rendered them undercapitalized

When taken as a whole, the record evidence in these cases demonstrates that they involve more than mere failed subsidiary corporations with outstanding liabilities for environmental contamination. Contrary to the Presiding Officer's October 5 and December 23, 2009 Orders, the actions of JAB Co. after the closure of JAB Ohio's and JAB Toledo's operations certainly are relevant to the issue of whether the assets of JAB Ohio and JAB Toledo purposefully were siphoned off and transferred to JAB Co. to satisfy intercompany accounts payable intercompany, leaving corporate shells as holding companies for the contaminated properties. Courts have held that parent corporations cannot avoid liability for the known environmental contamination by their subsidiaries by rendering their subsidiaries judgment proof. *See, e.g., Union Corp.*, 259 F. Supp. 2d at 390. Failing to leave the subsidiary with assets to pay for potential environmental liabilities is tantamount to undercapitalization. *AT&T Global Info. Solutions*, 29 F. Supp. 2d at 867. The Presiding Officer appears to have deliberately ignored the impact of *AT&T Global Information Solutions* on these cases. (*See* Docket Index No.65 at 8 n.16).[23] The Presiding

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to seventeen times higher than the applicable standard. (Docket Index No. 32, Attachment C at 1).

[23] In footnote 16 of his October 5, 2009 Order, the Presiding Officer cited and described *AT&T Global*

Officer erred in failing to hold that JAB Co. siphoned the remaining assets of JAB Ohio and JAB Toledo after their closures, intentionally causing JAB Ohio and JAB Toledo's undercapitalization during the relevant time period.

b) There is a complete absence of documentary evidence demonstrating that JAB Ohio and JAB Toledo observed basic corporate formalities

Courts applying both the federal and Ohio common law veil-piercing tests also hold that the following weigh in favor of piercing the corporate veil: a "failure to observe corporate formalities" or a "failure to maintain, or the absence of, adequate corporate records or minutes." *Corrigan*, 478 F.3d at 724; *Union Corp.*, 259 F. Supp. 2d at 388-89; and *Safe & Sure*, 1998 EPA ALJ LEXIS 53, at *54-55. Courts recognize that "where corporate records were not in evidence because the defendant failed to produce them, the 'failure to produce those corporate records after being requested to do so demonstrates an absence of corporate records.'" *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 607 (6th Cir. 2005) (quoting *State of Ohio v. Tri-State, Inc.*, 2004 Ohio 4441, 2004 Ohio App. LEXIS 4036, at 36 (Ohio App. 2004)). As the ALJ himself previously held, "once the proponent provides sufficient evidence to justify piercing the corporate veil, one cannot continue to merely assert that the burden of proof lies with the EPA when the financial records remain in Respondent's possession, available to exculpate or inculpate." *Safe & Sure*, 1998 EPA ALJ LEXIS 53, at *59. Similarly, one federal court has held that the "conspicuous absence of corporate records" in the record after being requested from a party having control over such documents gives rise to an adverse inference that corporate formalities were not observed. *Dimmitt & Owens Fin., Inc. v. Superior Sports Prods.*, 196 F. Supp. 2d 731, 738-40 (N.D. Ill. 2002).

Information Solutions for the proposition that Ohio law applied to the veil-piercing analysis in these cases. The Presiding Officer appears to have gone out of his way to say that "[t]he value of the case is limited to its perspective of the law to be applied." (Docket Index No. 65 at 8 n. 16).

Contrary to the ALJ's orders, the lack of any record evidence showing that either JAB Ohio or JAB Toledo observed basic corporate formalities weighs heavily in support of veil-piercing. In response to Complainant's discovery request for "[c]opies of the Board of Directors' Meeting Minutes, Resolutions, or any other records of the Board for [JAB Co., JAB Ohio, and JAB Toledo] from January 1, 1997 to present," Respondents stated that any such documents have been produced to Complainant. (Docket Index No. 56, Attachment C at 8). Having reviewed all of the various documents produced by Respondents, Complainant identified only two potentially responsive documents produced by Respondents related to Boards' of Directors meeting minutes, resolutions, or similar records, a designation Respondents never challenged. No other documents purporting to represent JAB Ohio or Toledo's observance of basic corporate formalities were produced in response to Complainant's unambiguous discovery request. Respondents' failure to produce any credible evidence showing that they observed basic corporate formalities gives rise to an inference that JAB Ohio and JAB Toledo did not hold annual meetings, or any meetings for that matter, and did not issue any other corporate resolutions. *Taylor Steel*, 417 F.3d at 607. Notably, Respondents failed to produce a single shred of evidence of any corporate meeting that related to JAB Ohio and JAB Toledo's closures, the unsatisfied environmental obligations resulting from such closures, and this litigation, all of which were worthy of formal corporate approval and action by JAB Ohio and JAB Toledo. The absence of such documents reveals that Respondents never bothered to hold any corporate meetings related to these critical events. *See Dimmitt*, 196 F. Supp. 2d at 738-40.

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In sum, JAB Ohio and JAB Toledo's glaring failure to observe any basic corporate formalities weighs heavily in favor of piercing their corporate veils. The highly suspect documents Respondents did produce that purport to represent their observance of corporate formalities do not create a genuine issue of material fact.

c) <u>There is an absence of documentary evidence showing that Respondents maintained formal arms-length relationships</u>

In addition to the lack of any documents demonstrating that JAB Ohio and JAB Toledo

observed elementary corporate formalities, there is a complete absence of other documents demonstrating that JAB Co. dealt with its subsidiaries through typical arms-length transactions, demonstrating that JAB Co. engaged in "acts or conduct ignoring, controlling or manipulating the corporate form.". *Union Corp.*, 259 F. Supp. 2d at 388-89; *Safe & Sure*, 1998 EPA ALJ LEXIS 53, at *54-55; *LeRoux's Billyle Supper Club*, 602 N.E.2d at 689. As one federal district court recently held, "[e]vidence that one company 'provides interest free loans without observing corporate formalities documenting those loans with promissory notes' supports an alter ego finding." *U.S. Fire Ins. Co. v. Polestar Constr., LLC*, No. 09-12362, 2010 U.S. Dist. LEXIS 52052, at *29-30 (E.D. Mich. May 27, 2010) (piercing the corporate veil on summary judgment) (quoting *Precision, Inc. v. Kenco/Williams, Inc.*, 66 Fed. Appx. 1, 5 (6th Cir. 2003) (unpublished)). The absence of such critical documentation in the face of a properly supported motion for summary judgment is "highly suggestive." *Int'l Millennium Consultants, Inc. v. Taycom Bus. Solutions, Inc.*, 692 F. Supp. 2d 733, 745 (E.D. Mich. 2010). The Board should conclude that the absence of any documents supporting alleged loans between JAB Co. and JAB Ohio or Toledo gives rise to an adverse inference that such transactions are not loans at all, but mere transfers of money without any consideration. *See Taylor Steel, Inc.*, 417 F.3d at 607-08.

During the course of the underlying proceedings, Complainant sought, and the Presiding Officer ordered, discovery from Respondents related to Complainant's derivative liability claim. Included among the information and documents sought by Complainant was information and documents describing and relating to "related party transactions" between and among JAB Co., JAB Ohio, and JAB Toledo for certain time periods, including documents reflecting any loans or transactions involving more than $5,000. (Docket Index No. 47 at 7-8). In response to these requests, despite claiming in their various memoranda and affidavits that certain transactions