between and among JAB Co., JAB Ohio, and JAB Toledo were "in the nature of a loan" or were "loans," Respondents did not produce a single promissory note or any other document referencing these "loans."[24] Nor did Respondents attempt to explain the absence of such documents. The absence of any such documents is not only "highly suggestive," it confirms that JAB Co. did not deal with JAB Ohio or JAB Toledo at arms-length. *See Int'l Millennium Consultants, Inc.*, 692 F. Supp. 2d at 745. This too supports a finding that JAB Ohio and JAB Toledo were alter egos of JAB Co.

JAB Co.'s "loans" to JAB Ohio and JAB Toledo are not the only alleged transaction between and among Respondents that lacks any supporting documentation. Respondents have argued, and the Presiding Officer again blindly adopted Respondents' argument as true, that they utilize what is known as a "cash management system," meaning that JAB Co. had a single bank account and its subsidiaries, including JAB Ohio and JAB Toledo, had access to the account. (Docket Index No. 65 at 17, 22). Not surprisingly, Respondents have not produced a shred of documentary evidence regarding the mechanics of JAB Co.'s alleged "cash management system." Surely, JAB Co.'s subsidiaries, if they were indeed regarded as separate entities, would need to be formally informed as to their obligations and rights under JAB Co.'s "cash management system." The critical absence of any such documentary evidence is at "highly suspect" and warrants veil-piercing in these cases. *Int'l Millennium Consultants, Inc.*, 692 F.

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[24] The Presiding Officer's October 5, 2009 Order unnecessarily criticized Complainant for "transmogrifying" an unidentified "transaction into a claim that there is no evidence of a 'loan,'" suggesting that Respondents only meant that certain, but not all, transactions between JAB Co. and JAB Ohio or JAB Toledo were merely "in the nature of a loan." There are at least two problems with the Presiding Officer's inaccurate characterization of Complainant's position. First, Respondents themselves, through sworn affidavits, states that certain transactions were indeed "loans." (JAB Ohio, Docket Index No. 55, Exhibit A, ¶4; JAB Toledo, Docket Index No. 55, Exhibit A, ¶5). Consequently, Complainant did not transmogrify Respondents' statements. Second, although Respondents also argued that certain transactions were "in the nature of a loan," this too does little to advance any contention by Respondents that they dealt with one another at arms-length. Regardless of whether the transactions were "loans" or "in the nature of loans" (the characterization is suspect at best), Respondents would have generated some formal document memorializing their transactions, had they dealt with one another at arms-length.

Supp. 2d at 745.

A number of other statements in Richard and Brian Biewer's various sworn affidavits lack documentary support. For example, there is no documentary support for Richard and Brian Biewer's statements that (1) JAB Ohio and JAB Toledo paid JAB Co. an "annual management fee" for the Chief Financial Officer of JAB Co. to prepare their financial statements, (*see* JAB Ohio, Docket Index No. 55, Exhibit C ¶ 2); (2) before they closed, all employees of JAB Ohio and JAB Toledo "were paid by payroll checks issued on behalf of each company," (Docket Index No. 55, Exhibit D ¶ 4); (3) "[a]ll billings for sales of merchandise were issued on invoices in the name of" JAB Ohio and JAB Toledo, (*id.* ¶ 5); (4) JAB Ohio and JAB Toledo had separate profit sharing plans and were closely based on the success and profitability of each subsidiary," (*id.*, ¶ 6). Given that the payment of "annual management fees," payment of "payroll checks," issuance of "invoices," and preparation of "profit sharing plans," if they did in fact occur, would normally be documented by a check or are themselves documents, the Presiding Officer erred in giving Respondents' unsupported statements in affidavits any weight. Such self-serving, conclusory statements in Brian and Richard Biewer's affidavits do not raise a genuine issue of material fact. *See, e.g., FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

Respondents' abject failure to produce, or explain the absence of, critical documents supporting their principal contentions is revealing. Only one inference can be drawn from this lack of evidence: JAB Ohio and JAB Toledo were mere instrumentalities of JAB Co. The Presiding Officer, however, failed to grant Complainant the adverse inferences it was due. The Presiding Officer's failure constitutes reversible error. In addition, Respondents' self-serving,

conclusory affidavits, which lack detailed facts and evidentiary support, cannot create a genuine issue of material fact. *Id.* In sum the absence of any documentary evidence supporting Respondents' claims that certain transactions were "loans" and the mechanics and operation of their "cash management system," along with the conclusory, self-serving statements in Brian and Richard Biewer's affidavits, were insufficient to create a genuine issue of material fact in the face of the probative evidence proffered by Complainant at the time of the parties' cross-motions for accelerated decision.

d) JAB Co.'s "cash management system" is a red herring

Even if Respondents had produced documentary evidence related to the mechanics of JAB Co.'s alleged "cash management system," Respondents' contention that they used a single bank account is a red herring. Respondents relied upon two cases in arguing that the use of a "cash management system" is insufficient, alone, to demonstrate that a subsidiary was a mere alter ego of its parent corporation: *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). The Presiding Officer indiscriminately adopted Respondents' reliance on these cases and agreed that Respondents' alleged use of a "cash management system" did "not show per se undue domination or control." (Docket Index No. 65 at 17). The Presiding Officer overstated the holdings of the cases cited by Respondents on this issue.

Contrary to the Presiding Officer's conclusion, "[t]he courts that have rejected a veil-piercing claim where the evidence was offered or allegations made concerning a shared bank account do not go so far as stating that such evidence is irrelevant. Rather, most decisions merely hold that the existence of such accounts is not dispositive." *Wells Fargo Bank, N.A. v. Konover*, 2009 U.S. Dist. LEXIS 19112, at *26 (D. Conn. Mar. 4, 2009) (citing cases). Although the Presiding Officer seemed to believe otherwise, "if one were 'keeping score' the centralized

cash management would probably warrant a check on the 'pierce' side of the ledger." *Acushnet River*, 675 F. Supp. at 34. Furthermore, as one federal district court noted, the *Fletcher* decision turned on a finding that "the parent did not control the subsidiary's board of directors and in fact had only one director on the subsidiary's board." *Ypsilanti Cmty. Utils. Auth. v. Meadwestvaco Air Sys.*, 678 F. Supp. 2d 553, 574 (E.D. Mich. 2009) (citing *Fletcher*, 68 F.3d at 1460). Here, as in *Ypsilanti Community Utilities Authority*, there is no question that all of JAB Co.'s directors served on and had identical roles on the boards of both JAB Ohio, and JAB Toledo. Furthermore, in these cases, all of JAB Co.'s officers served in identical capacities for both JAB Ohio and JAB Toledo. These distinguishing facts, in addition to the other record evidence described herein, demonstrate that the Presiding Officer placed undue reliance on the holdings of *Fletcher*, *Bliss*, and their progeny.

e) JAB Ohio and JAB Toledo were mere façades of JAB Co. because JAB Co. exercised pervasive control over them after they closed

To decide whether to pierce the corporate veil, federal and state courts also look to "the nature of the corporation's ownership and control" to determine whether the subsidiary corporation was a mere façade of the parent. *Safe & Sure Prods.*, 1998 EPA ALJ LEXIS 53, at *54; *see also Union Corp.*, 259 F. Supp. 2d at 388-89; *LeRoux's Billyle Supper Club*, 602 N.E.2d at 689 (listing similar factors used by Ohio courts). When the significant record evidence of JAB Co.'s pervasive control over JAB Ohio and JAB Toledo is accorded its proper weight, it is apparent that veil-piercing is warranted in these cases.

The Presiding Officer believed that control alone is insufficient to justify piercing the corporate veil. Courts applying federal and Ohio common law have concluded otherwise. *See, e.g., Carter-Jones Lumber Co.*, 237 F.3d at 749 (citing Ohio cases holding that control alone is sufficient to pierce a corporation's veil); *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 905

(1st Cir. 1980) (stating that "the presumption of corporate separateness may be overcome by clear evidence that the parent in fact controls the activities of the subsidiary"). To illustrate this point, the Sixth Circuit in *Carter-Jones* posed the following questions:

> Consider, for example, a case in which a corporation with a single shareholder kept immaculate corporate records, observed all the formalities required by corporate law, and was adequately capitalized. The shareholder never commingled funds, and never held himself out as personally liable for the corporation's debts. The corporation even does some legitimate business. Can it be that the shareholder is immunized from personal liability if he causes the corporation to commit an illegal act, no matter the degree of his control over the corporation with regard to the illegal act, no matter the harm to third parties, and no matter the other equities? Neither we nor the Ohio courts hold that such immunity exists.

Id. at 749. This example sheds light on these cases, because, as explained above, JAB Co. is the sole shareholder of both JAB Ohio and JAB Toledo, all of whom are controlled by identical sets of directors and officers. It illustrates that, even assuming that the record evidence somehow demonstrated that Respondents kept immaculate corporate records, observed all formalities required by corporate law, and were adequately capitalized, the other evidence in the record demonstrating JAB Co.'s control over JAB Ohio and JAB Toledo is sufficient, in and of itself, to support veil-piercing in these cases.

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********** According to Respondents, these amounts were "properly debited" from JAB Ohio's and JAB Toledo's account, yet Respondents admit that neither JAB Ohio nor JAB Toledo had access to JAB Co.'s common bank account after they

ceased operations at their facilities in 1997 and 2001. (*See* Docket Index No. 56, Attachment I at 15). Finally, JAB Co. has admitted that it "paid all expenses" of JAB Ohio and JAB Toledo whenever it found such payments to be "necessary." (Docket Index No. 59(2) at 18). When given its proper weight, this evidence demonstrates that JAB Co. exercised complete control over JAB Ohio's and JAB Toledo's finances after their closures and decided what, if any, expenses were paid.

There can be little doubt that JAB Co. also decided that it would not be financially advantageous for it to decontaminate the drip pads remaining from JAB Ohio and JAB Toledo's operations. JAB Co.'s decision not to decontaminate the drip pads of JAB Ohio and JAB Toledo clearly was against the subsidiaries' interests. If JAB Ohio and JAB Toledo were in fact independent companies, their interests would have been served by decontaminating the drip pads, which would have allowed them to sell their property. Instead, JAB Co. decided to take for itself the remaining assets JAB Ohio and JAB Toledo had at the time of closure and pay itself. Had JAB Co. decided otherwise, the decontamination would have occurred.

The record evidence is also clear that both JAB Ohio and JAB Toledo's boards of directors interlocked with that of their parent, JAB Co. Furthermore, JAB Co., JAB Ohio, and JAB Toledo also had identical officers. JAB Co. incorporated and has been the sole shareholder for both JAB Ohio and JAB Toledo since their inception. (*Id.*; *see also* Docket Index No. 55, Exhibit A, ¶¶ 2-3). While courts have held that interlocking boards of directors and sharing officers and employees between a corporate parent and subsidiary is not in itself sufficient to pierce the corporate veil, several courts note that an identity in directors and officers between a parent and subsidiary corporation is one of many factors relevant to the piercing analysis. *See, e.g., AT&T Global Info. Solutions*, 29 F. Supp. 2d at 866; *see also U.S. Pub. Interest Research*

Group v. Atl. Salmon of Me., LLC, 261 F. Supp. 2d at 25 (holding that a parent corporation's imposition of "its own governing management personnel at the highest corporate level" was one fact supporting piercing). Here, the fact that JAB Co., JAB Ohio, and JAB Toledo shared identical directors and officers, when viewed in conjunction with other record evidence, shows that JAB Co. had the means to, and did, exercise pervasive control over JAB Ohio and JAB Toledo after they ceased operations. And the record clearly shows that such control was exercised to the detriment of those subsidiaries and the environment.

********** Brian Biewer's service as manager/director of JAB Ohio and JAB Toledo after they closed was gratuitous, as he did not get paid for his work in these positions.[25] (*Id.*) As the Third Circuit recognized in *Pharmacia*, the fact that a subsidiary corporation has no employees supports piercing the corporate veil. *Pharmacia*, 309 Fed. Appx. at 672. Here, Brian Biewer's "appointment" as manager/director of JAB Ohio and JAB Toledo was without consideration and should be given little weight.

4. Complainant satisfied the second-prong of both the federal and Ohio common law veil-piercing tests

a) Complainant satisfied the second-prong of the federal common law veil-piercing test

In addition to applying the alter ego factors analyzed above, courts determining whether to pierce the corporate veil under federal common law look to whether the parent corporation's control was exercised in such a manner as 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

[25] Brian Biewer, who was already serving as a dual officer and director for JAB Co. and the subsidiaries, was appointed, without pay, to manage JAB Co.'s holding companies. This is yet another example of JAB Co.'s intention to reduce JAB Ohio and JAB Toledo to mere holding companies for the contaminated property.

plaintiff's legal rights. *Union Corp.*, 259 F. Supp. 2d at 388-89; *Safe & Sure Prods.*, 1998 EPA ALJ LEXIS 53, at*53. There can be no dispute that Respondents have violated a legal duty. In the underlying proceedings, JAB Ohio and JAB Toledo conceded that they violated RCRA and the implementing Ohio regulations related to the closure of drip pads. (Docket No. 65 at 2). Based on this concession, the Presiding Officer found JAB Ohio and JAB Toledo liable. (*Id.*) Proof of the admitted violations satisfies the second prong of the piercing test. Therefore, if the Board determines that federal common law governs the derivative liability analysis, then the second prong of the federal common law test is easily satisfied.[26]

b) Complainant satisfied the second-prong of the Ohio common law veil-piercing test

Even if Ohio common law applies, Complainant has satisfied the second prong of Ohio's veil-piercing test. In *Dombroski*, the Ohio Supreme Court expanded the second prong of the Ohio's veil-piercing test to require that the control of the offending corporation was exercised in a manner to commit fraud, an illegal act, or a similarly unlawful act. *Dombroski*, 895 N.E.2d at 544-45. The court in *Dombroski* noted that piercing the corporate veil must be limited "to cases in which the shareholders [or parent corporations] used their complete control over the corporate form to commit specific egregious acts." *Id.* at 544. Further opining on the meaning of its addition of "similarly unlawful acts" to the second prong of Ohio's piercing test, the *Dombroski* court stated that the corporate veil should be pierced "only in instances of extreme shareholder [or parent corporation] misconduct." *Id.* at 545. Applying this standard to the facts before it, the court concluded that the plaintiff's allegation that the defendant denied her insurance claim in bad faith did not rise to the level of a "similarly unlawful act." *Id.*

[26] In addition, Complainant notes that the satisfaction of the second prong of the federal common law veil-piercing test is warranted for the same reasons that Complainant has proffered regarding the second prong of Ohio's veil-piercing test.

The Presiding Officer's October 5, 2009 Order misinterpreted *Dombroski*'s limited expansion of the second prong of Ohio's veil-piercing test, concluding that it was not satisfied because "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."[27] (Docket Index No. 65, at 13). The Presiding Officer further noted that "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.*) However, Respondents proffered no evidence to support their claim of a debt owed to JAB Co. Further, the Presiding Officer completely ignored reasoning reveals that the "illegal act" or "similarly unlawful act" portions of the second prong of Ohio's piercing test. Contrary to the Presiding Officer's conclusion, the record evidence demonstrates that JAB Co.'s control over JAB Ohio and JAB Toledo was exercised in a manner to commit fraud, an illegal act, or a similarly unlawful act. *Dombroski*, 895 N.E. 2d at 544-45.

Respondents did not cite a single case interpreting *Dombroski*'s limited expansion of Ohio's second prong in their various briefs below.[28] In addition, Complainant's research of post-*Dombroski* cases has failed to reveal a single case dealing with facts analogous to these cases. Without an Ohio case on point interpreting *Dombroski*'s limited expansion of the second prong, the Board's task, assuming Sixth Circuit law provides guidance on the issue, is to "anticipate

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[27] To the extent that the Presiding Officer's conclusion as to the second prong of Ohio's piercing analysis rested on the notion that JAB Ohio and JAB Toledo were businesses that simply failed, it was based on nothing more than pure speculation. There has been no reliable evidence produced by Respondents regarding the true reason(s) for the closure of JAB Ohio and JAB Toledo's facilities. Nor is there evidence showing that the closures of JAB Ohio's and JAB Toledo's facilities were the product of formal corporate deliberations. In addition, the Presiding Officer apparently believed that the systemic transfers of money from JAB Ohio and JAB Toledo to JAB Co. after they closed were a "lawful payment[s] of [their] debt[s]." *Id.* Respondents, however, failed to present any evidence documenting the terms of the alleged debts, repayment terms, or the amount of interest, if any, owed. The Presiding Officer simply adopted Respondents' contentions wholesale.

[28] Respondents did cite, and the Presiding Officer appeared to rely upon, *Siva v. 1138 LLC*, 2007 Ohio 4667, 2007 Ohio App. LEXIS 4202 (Ohio Ct. App. Sep. 11, 2007), a pre-*Dombroski* case which involved the decision of a trial court after a bench trial. *Siva* involved a claim for breach of contract, which Ohio courts agree does not satisfy the second-prong of the *Belvedere* test. Thus, *Siva* is of little value in these cases.

how the state's supreme court would rule on an issue of state law when the law of the state is unsettled."[29] *Taylor Steel, Inc.*, 417 F.3d at 608 (6th Cir. 2005) (citing *C & H Entm't, Inc. v. Jefferson Co. Fiscal Court*, 169 F.3d 1023, 1025 (6th Cir. 1999)). "To perform the task, [the Board] should look to the state's intermediate courts unless [it is] convinced that the state supreme court would decide the issue differently." *Id.* (citing *United of Omaha Life Ins. Co. v. Rex Roto Corp.*, 126 F.3d 785, 789 (6th Cir. 1997)).

Based on Complainant's research of post-*Dombroski* Ohio court decisions, one can conclude only that breach of contract and the straightforward tort of insurer's bad faith do not rise to the level of an "illegal act" or a "similarly unlawful act." *Dombroski*, 895 N.E.2d at 545. Courts applying *Dombroski*'s narrow expansion of Ohio's piercing test have merely held that a breach of contract, standing alone, does not satisfy the second prong of Ohio's piercing test. *Advantage Bank v. Waldo Pub, LLC*, 2009 Ohio 2816 (Ohio Ct. App. June 15, 2009); *Jewell v. Victorian Vill. Internal Med., Inc.*, 2009 Ohio 2233 (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). Furthermore, the court in *Dombroski* held that a "straightforward tort" of an insurer's bad faith denial of a claim does not rise to the level of an "illegal act" or "similarly unlawful act" to satisfy the second prong of Ohio's piercing test. In other words, the *Dombroski* court's limited expansion of the second prong of Ohio's piercing test allows a corporation's veil to be pierced for something less than outright fraud and something more than a breach of contract or a straightforward tort.

The instant cases involve much more than claims related to a mere breach of contract or a straightforward tort. The statute giving rise to these cases "is a comprehensive environmental

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[29] The fact that the Board would have to determine how the Ohio Supreme Court may rule with respect to the derivative liability issues in these cases is yet another reason that the Board should conclude that federal common law governs the veil-piercing determinations.

statute that empowers EPA to regulate hazardous waste from cradle to grave." *Envtl. Def. Fund*, 511 U.S. at 331. Its "primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig*, 516 U.S. at 483 (quoting 42 U.S.C. § 6902(b)). The specific regulations involved in these cases required Respondents, at the time the JAB Ohio and JAB Toledo facilities were closed, to "decontaminated 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." OAC 3745-69-45. Respondents admitted and the Presiding Officer concluded that they violated this regulation and, as a result, violated RCRA. (Docket Index No. 70 at 2). Based on this admission, the Presiding Officer concluded that Respondents were liable for violating RCRA.[30] *Id.*

For all of the foregoing reasons, Complainant respectfully submits that, should the Board apply Ohio common law, the violations in these cases rise to the level of "illegal acts" or "similarly unlawful acts" satisfying the second prong of Ohio's test for piercing the corporate veil. *Cf. State of Ohio v. Tri-State Group, Inc.*, 2004 Ohio 4441, 2004 Ohio App. LEXIS 4036 (Ohio Ct. App. Aug. 20, 2004) (pre-*Dombroski* case holding that control resulting in violations of permits issued under Ohio's environmental laws is sufficient to satisfy the second prong of Ohio's veil-piercing test).

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[30] Furthermore, Respondents do not dispute that "[w]astes from the preservation of wood with inorganic formulations or arsenic and/or chromium typically contain high concentrations of toxic metals, as well as lead," all of which are known carcinogens. 53 Fed. Reg. 53282, 53284 (Dec. 30, 1988). More than two decades ago, EPA observed that wood treatment and the resulting generation of hazardous wastes "has led to off-site contamination of ground water, surface water, and soils." *Id.*

5. Complainant satisfied the third-prong of both the federal and Ohio common law veil-piercing tests

The final prong of the federal common law piercing test requires a showing that the "control and breach of duty must proximately cause the injury or unjust loss complained of," *U. S. Pub. Interest Research Group*, 261 F. Supp. 2d at 25, or stated similarly under Ohio common law, that the "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. The Sixth Circuit has recognized that the final prong of the veil-piercing analysis is "self-evident." *Taylor Steel, Inc.*, 417 F.3d at 608. These cases are no exception. As the record evidence in these cases demonstrates, JAB Co.'s pervasive control over JAB Ohio and JAB Toledo, its ability to siphon their remaining assets when JAB Ohio and JAB Toledo ceased operations, and its decision not to complete the decontamination of the drip pads are the proximate cause of the RCRA violations in these cases and the potential threats to the environment and public health. Therefore, the Board should conclude that the third prong of the veil piercing analysis, under either federal or Ohio common law, is satisfied in these cases.

6. Piercing the corporate veils of JAB Ohio and JAB Toledo is warranted in these cases

To summarize, Complainant proffered probative evidence establishing each of the three prongs for piercing the corporate veil under both federal and Ohio common law. The record evidence shows that JAB Co. siphoned the remaining assets from JAB Ohio and JAB Toledo after their closures, taking for itself any remaining assets that could have been used to pay for decontamination and environmental liabilities associated with JAB Ohio's and JAB Toledo's wood treatment operations. JAB Ohio and JAB Toledo were mere instrumentalities of JAB Co. JAB Ohio and JAB Toledo failed to maintain basic corporate records, giving rise to an inference that they conducted few, if any, corporate meetings. Furthermore, JAB Co. did not deal with

JAB Ohio and JAB Toledo as a typical corporation would in an arms-length transaction. Respondents presented no documentary evidence substantiating the alleged loans JAB Co. made to JAB Ohio and JAB Toledo after they ceased operations. Simply put, when the evidence is viewed as a whole, Complainant satisfied its burden to prove that veil-piercing is warranted in these cases and the Respondents' evidence, which included Brian and Richard Biewer's self-serving, conclusory affidavits, was not sufficiently probative to raise a material issue for hearing regarding the three prongs of the veil piercing test.

The result sanctioned by the Presiding Officer would provide a blueprint for parent corporations, such as JAB Co., to avoid known potential environmental obligations arising from their subsidiaries' operations. Even worse, it would allow any arsenic and chromium contamination that may remain on the subject properties to migrate to surface and ground waters and to soils. For all of the foregoing reasons, the Board should reverse the Presiding Officer's Order on Cross Motions for Accelerated Decision on Derivative Liability and hold JAB Co. derivatively liable for JAB Ohio and JAB Toledo's continuing RCRA violations.

7. The ALJ erred in granting accelerated decision to JAB Co. under Complainant's claims for direct liability

In addition to recognizing that a parent corporation could be held derivatively liable for the environmental violations of its subsidiary, the Supreme Court in *Bestfoods* also recognized that under CERCLA a parent corporation can be held directly liable as an operator of the subsidiary's facility. 523 U.S. at 65. As the Court in *Bestfoods* stated:

> Under the plain language of [CERCLA], any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. This is so regardless of whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice. If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship

> under state corporate law is simply irrelevant to the issue of direct liability.

Id. "To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

The first issue the Board must decide is whether the direct liability standard recognized by the Supreme Court in *Bestfoods* under CERCLA applies equally to RCRA, the statute giving rise to these cases. Fortunately for the Board, the parties agree that direct liability can also attach to a parent corporation under RCRA. RCRA, like CERCLA, was enacted in response to the concerns of Congress regarding the health and environmental risks caused by industrial pollution. *See* 42 U.S.C. § 6902(b). Liability under RCRA extends to "any person" in violation of its provisions and implementing regulations. 42 U.S.C. § 6928(a)(1). Therefore, as the Presiding Officer correctly held, a parent corporation, such as JAB Co., can be held directly liable under RCRA. (Docket Index No. 65 at 4 n.5 and 5-6).

The Court in *Bestfoods* recognized the following three scenarios in which a parent corporation can be held directly liable as an operator: (1) where the "parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of joint venture"; (2) where dual officers or directors "depart so far from the normal parental influence exercised through dual-office holding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility," or (3) where "an agent of the parent with no hat to wear but the parent's hat might manage or direct activities at the facility." *Id.* at 71. Complainant's claims for direct liability against JAB Co. fall under the second or third scenario.

With respect to the second scenario, the Supreme Court in *Bestfoods* "acknowledged the possibility that directors and officers might hold positions with both a parent and a subsidiary, and recited the corporate law principle that it is entirely appropriate for them to do so." *United States v. Newmont USA Ltd.*, No. CV-05-020-JLQ, 2008 U.S. Dist. LEXIS 82922, at *138 (E.D. Wash. Oct. 17, 2008) (citing *Bestfoods*, 524 U.S. 69). "Such dual officers can and do 'change hats' to represent the two corporations separately." *Id.* As the Supreme Court in *Bestfoods* recognized, there is a general presumption that "directors are wearing their subsidiary hats and not their parent hats when acting for the subsidiary." *Bestfoods*, 524 U.S. at 69-70. The proponent of direct liability must "show that, despite the general presumption to the contrary, the officers and directors were acting in their capacities as [parent] officers and directors, and not as [subsidiary] officers and directors, when they committed those acts." *Id.* As recognized by the Court in *Bestfoods*, "the presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from these accepted norms approaches the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent." *Id.* at 70 n.13.

As to the third scenario, the Supreme Court states that activities that "involve the facility but which are consistent with the parent's investor status . . . should not give rise to direct liability." *Id.* at 72. "Activities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability." *Id.* (citation and internal quotations omitted).

"Thus, 'the critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.'" *United States v. Kayser-Roth Corp.*, 272 F.3d 89, 100 (1st Cir. 2001) (quoting *Bestfoods*, 524 U.S. at 72). "'[N]orms of corporate behavior (undisturbed by any CERCLA provision) are crucial reference points.'" *Bestfoods*, 524 U.S. at 71. Finally, "[t]he fact that an inquiry into corporate norms may involve factors relevant to veil-piercing would not render such an analysis impermissible under *Bestfoods*." *Kayser-Roth*, 272 F.3d at 100 n.11 (citing *Carter-Jones Lumber Co.*, 237 F.3d at 750).

There is significant probative evidence in these cases demonstrating that JAB Co. is directly liable for the RCRA violations at JAB Ohio's and JAB Toledo's facilities. While not dispositive on the issue of direct liability, the fact that JAB Co., JAB Ohio, and JAB Toledo have interlocking officers and directors and JAB Co.'s financial oversight and control of JAB Ohio and JAB Toledo through its "cash management system" and systemic "loans" of money all are relevant to and show that JAB Co.'s "inextricably interwoven involvement in the management of [JAB Ohio and JAB Toledo] departed from the accepted norms of corporate oversight." *Newmont USA Ltd.*, 2008 U.S. Dist. LEXIS 82922, at *141. It is undisputed that after they closed, JAB Co. controlled JAB Ohio and JAB Toledo's finances by terminating their access to JAB Co.'s common bank account and paid their expenses when it deemed such payments were "necessary." (Docket Index No. 59(2) at 18). As already explained, JAB Co. utilized its control after JAB Ohio's and JAB Toledo's closure to siphon any remaining assets to reduce undocumented intercompany accounts payable. *See supra* section VII.B.3.a). Finally, JAB Ohio and JAB Toledo conducted no corporate meetings or otherwise issued any corporate resolutions after they closed. *See supra* VII.B.3.b).

Furthermore, there is additional record evidence that shows that the degree and detail of JAB Co.'s oversight were eccentric under accepted norms of parental oversight at its subsidiaries' facilities. At the time they closed, JAB Ohio and JAB Toledo were reduced to corporate shells. They had no paid employees, no access to a checking account, and no sales. They no longer engaged in wood treatment or lumber sales. Instead, after they closed, Brian Biewer was appointed as JAB Ohio's and JAB Toledo's "manager/director."[31] (JAB Ohio, Docket Index No. 55, Exhibit, ¶4). Brian Biewer performed such services gratuitously and from St. Clair, Michigan, which happens to be the location of JAB Co.'s corporate headquarters.[32] (*Id.*; Docket Index No. 56, Attachments D, T, and U). Without a doubt, any decisions that were made on behalf of JAB Ohio and JAB Toledo were made by one of the same three individuals that control JAB Co.: Richard Biewer, Timothy Biewer, and Brian Biewer.

The record evidence in these cases also shows that Brian Biewer, to the extent that it is presumed that he was acting in his capacity as "manager/director" of the already closed JAB Ohio and JAB Toledo, was acting "plainly contrary to the interests of [JAB Ohio and JAB Toledo] yet nonetheless advantageous to [JAB Co.]." *Bestfoods*, 524 U.S. 70 n.13. Brian Biewer, as "manager/director" and the only "employee" of JAB Ohio and JAB Toledo, decided only to pay for MSG's preparation of the Drip Pad Closure Activity Plans and later abandoned the decontamination of JAB Ohio's and JAB Toledo's drip pads. Brian Biewer abandoned all

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31 The corporate documents that purported to appoint Brian Biewer as "manager/director" of JAB Ohio and JAB Toledo after they ceased operations are extremely questionable. *See supra* section VII.B.3.b).

32 Brian Biewer's correspondence with Ohio EPA was on "Biewer Lumber™'s" letterhead, a "Biewer Lumber™'s" email address, and lists the telephone number for "Biewer Lumber's" corporate headquarters, which is in St. Clair, Michigan. (Docket No. 56, Attachments D, T, U). Brian Biewer signed these letters in his capacity as "Secretary/Treasurer," without identifying the entity for whom he was acting. (*Id.*) He also refers to the drip pad closure plan activities at both JAB Ohio and JAB Toledo in these letters. (*Id.*) Given that JAB Co. was paying for MSG to conduct the limited drip pad closure activity that occurred at JAB Ohio and JAB Toledo, it is reasonable to infer that Brian Biewer was acting in his capacity as secretary/treasurer for JAB Co. when he sent this correspondence. Had he truly been acting on behalf of JAB Ohio and JAB Toledo, Brian Biewer likely would have signed this correspondence as "manager/director" the role he was appointed to after JAB Ohio and JAB Toledo ceased operations.

further decontamination efforts at JAB Toledo's facility, despite the fact that he knew that MSG's sampling of the drip pad rinseate revealed arsenic and chromium levels four to seventeen times greater than the applicable standard.[33] (Docket Index No. 32, Attachment C at 1). By deciding to abandon all decontamination of JAB Ohio's and JAB Toledo's drip pads, Brian Biewer clearly was acting in a manner that was plainly contrary to the interests of JAB Ohio and JAB Toledo (that is, if they were indeed separate entities). Upon closure, independent corporations that once profited from operations that produced hazardous waste certainly would find it in their best interest to comply with their environmental obligations, lest they find themselves, as JAB Ohio and JAB Toledo did in these cases, the subject of an environmental enforcement action or lawsuit. Because JAB Ohio and JAB Toledo still own their property, it also would have been in their interest to decontaminate the drip pads. Only one inference can be drawn from the "fact" that Brian Biewer was appointed, without pay, as "manager/director" of JAB Ohio and JAB Toledo after they closed: he was appointed to do the bare minimum, to maintain the appearances that JAB Ohio and JAB Toledo were actual corporations, and to shield JAB Co. from potential environmental liabilities.

The record evidence demonstrates that JAB Co. is directly liable for the RCRA violations at issue in these cases. Complainant respectfully requests that the Board reverse the Presiding Officer and grant accelerated decision in Complainant's favor finding JAB Co. directly liable.

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[33] In concluding that Complainant had failed to demonstrate JAB Co.'s direct liability, the Presiding Officer overstated the holding of the Sixth Circuit in *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998). The Sixth Circuit in *Brighton* held that "[b]efore one can be considered an 'operator' for CERCLA purposes, one must perform affirmative acts. The failure to act, even when coupled with the ability or authority to do so, cannot make an entity into an operator." *Id.* at 314. *Brighton* is distinguishable from these cases, not only because it is limited to direct CERCLA liability, but because, in these cases, there is evidence that JAB Co., through Brian Biewer, did perform affirmative acts, namely the hiring and payment of MSG for preparation of the drip pad closure plans and the decision to abandon any decontamination efforts at the JAB Ohio and JAB Toledo facilities.

C. In The Alternative, The Presiding Officer Erred In Granting The Motions For Accelerated Decision With Regard To Derivative And Direct Liability Filed By JAB Co.

In the alternative, Complainant appeals the ALJ's October 5 and December 23, 2009 Orders to the extent that they granted Respondents' motions for accelerated decision on the issue of whether JAB Co. could be held derivatively liable. Even if the facts relied upon by Respondents and the inferences Respondents drew from the same were credible (they were not), the Board should reverse the ALJ's October 5 and December 23 Orders denying Complainant's and granting Respondents' cross-motions for accelerated decision on derivative and direct liability. Where, as here, "contradictory inferences may be drawn from the evidence" accelerated decision is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. 2002) (citation omitted). If the Board does not believe that Complainant has satisfied its burden of proving by a preponderance of the evidence that JAB Co. is liable at the accelerated decision stage, it should conclude that these cases were not susceptible to accelerated decision and should remand these cases for a full hearing on Complainant's claims that JAB Co. should be held liable.

There are numerous competing reasonable inferences that could have been drawn from the record. The Presiding Officer, however, chose to adopt Respondents' version of the facts. For example, nearly every finding made by the Presiding Officer stemmed from his conclusion that Respondents had accounted for various transactions that allegedly occurred between JAB Co. and JAB Ohio or JAB Toledo. Neither Respondents nor the ALJ, however, cited any case or other authority stating that accounting for an alleged transaction somehow makes it legitimate, proves that it was conducted at arms-length, or shows that it was the product of documented, formal corporate action. Further proof that the Presiding Officer was predisposed to rule for Respondents is his comment that "[a] credible basis for challenging the transactions between

JAB Ohio [or JAB Toledo] 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." (Docket No. 65, at 22). In making this statement, the ALJ ignored Respondents' utter failure to produce a single document demonstrating that the transactions did indeed originate from some sort of legitimate, properly documented debt that JAB Ohio or JAB Toledo owed JAB Co. The complete lack of any evidence of Respondents' various "loans" and other transactions suggests that they were not conducted at arms-length. *See U.S. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 52052, at *29.

In addition, much of the ALJ's October 5, 2009 Order was founded upon the contention that JAB Ohio and JAB Toledo were simply failed corporations and focused on what occurred at JAB Ohio and JAB Toledo prior to their closures. This conclusion not only lacks any support in the record evidence, it is irrelevant. Respondents produced no reliable evidence regarding the true reason(s) for the closure of JAB Ohio and JAB Toledo's facilities. Furthermore, for purposes of his veil-piercing determination, the Presiding Officer's focus should have been on the transfers of assets by JAB Co. from JAB Ohio and JAB Toledo after they closed, not on when and why they closed.

Furthermore, the ALJ completely accepted as credible a series of totally unsupported statements made in Respondents' affidavits. Courts agree that a trial judge, regardless of whether he or she is faced with cross-motions for summary judgment in a bench trial case, cannot make credibility determinations at the summary judgment or accelerated decision stage. *See, e.g., Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (holding that a court reviewing a summary judgment motion must not weigh the evidence or evaluate the credibility of a witness); *see also Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978) (noting

that disputes over credibility or issues that warrant further factual development cannot be determined at the summary judgment stage). The Presiding Officer, however, seemingly adopted, in their entirety, Richard and Brian Biewer's various affidavits. These affidavits contain numerous references to "loans" and other "facts" that Respondents have failed to support with even a scintilla of documentary evidence.

In conclusion, the parties drew often times directly contradictory inferences from the same body of facts and documents. While the basic facts as set forth in the documents in the record at the time of the parties' cross-motions for accelerated decision may have been undisputed, the parties disagreed as to the ultimate facts and, most importantly, the proper inferences that should be drawn from the facts. The Presiding Officer, however, abdicated his duties in evaluating motions for accelerated decision and chose to accept Respondents' (often times unsupported) version of the facts. In doing so, the Presiding Officer erred. Further fact-finding, either before or at an evidentiary hearing, should have been permitted on the issue of JAB Co.'s derivative liability. Therefore, in the alternative, Complainant requests that the Board remand this matter for further fact-finding and an evidentiary hearing on the issue of JAB Co.'s derivative liability.

D. The Presiding Officer Erred In Denying Complainant's Motions For Accelerated Decision With Regard To Penalty Because Complainant Presented Significant Evidence Regarding The Appropriateness Of The Proposed Penalties And Respondents Presented Argument But Raised No Genuine Issue Of Material Fact In Opposition To Complainant's Motions

The ALJ either found the Respondents[34] had raised a genuine issue of material fact regarding penalty or he believed he had the independent discretion to require a live testimony

[34] Throughout the remainder of this Argument section, Complainant refers to "Respondents" as the initial respondents JAB Ohio and JAB Toledo only, because JAB Ohio and JAB Toledo were in effect the only parties to these cases at the time the Presiding Officer rendered his various orders regarding penalty and his Initial Decision.

hearing.[35] In either event, the ALJ was wrong. In each of the two cases, Complainant filed a Motion for Accelerated Decision on Liability and Penalty. Respondents did not contest these Motions insofar as they asked for accelerated decision on liability and only superficially contested a minor point of the Motions as to penalty. The ALJ denied the Motions with regard to penalty, notwithstanding the fact that Respondents offered *no evidence of any kind,* and did not contest any of Complainant's evidence, in response to the Motions.

Contrary to the ALJ's assertions,[36] Complainant has never taken, the position that the Presiding Officer had no choice but to award the exact penalty proposed by Complainant. *See In re Pacific Refining Company*, 5 E.A.D. 520, 524 (EAB 1994); 40 C.F.R. § 22.27 (b). The penalties of $282,649 (JAB Ohio) and $287,441 (JAB Toledo) proposed by Complainant in its Motions for Accelerated Decision were just that, proposals which presented to the Presiding Officer what Complainant believed would be proper penalties, taking into consideration the uncontested facts. Respondents were free to argue from the same uncontested facts that lower penalties were warranted but they chose not to do so. The Presiding Officer, after considering both sides' penalty arguments, was free to exercise his discretion in determining appropriate penalties based upon the uncontested facts and he erred when he failed to do so. Of course, on appeal to the EAB, the Board itself is free to exercise its own discretion to determine appropriate penalties based on the uncontested facts.

Despite the considerable discretion granted to the Presiding Officer under the *Consolidated Rules*, in RCRA itself and under the RCRA Penalty Civil Policy, what the Presiding Officer was *not* free to do was to require a hearing in a matter where the Respondent

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[35] Complainant is aware of footnote 14 in *Green Thumb Nursery* wherein the Board distinguishes between live testimony hearings and hearings only on papers. In Complainant's Brief, references to the term "hearing" mean a live witness hearing.

[36] (*See* Docket Index No. 69 at 6).

offered no evidence whatsoever in support of its penalty arguments. Requiring a hearing on penalty where there are no disputed issues of fact violates the express provisions of the *Consolidated Rules* and is inefficient and unfair. .

1. A motion for accelerated decision should be granted where there is no genuine issue of material fact

The *Consolidated Rules* provide that a Presiding Officer shall hold a hearing "*if* the proceeding presents genuine issues of material fact." 40 C.F.R. § 22.21(b) (emphasis added). The Presiding Officer may render accelerated decisions in favor of a party, as to any or all parts of the proceeding, without a hearing if 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). The Board has held that "a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests," and that "the constitutional right to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute." *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792 (EAB 1997). In *Green Thumb Nursery*, the Board noted that the "principle that one must raise actual, relevant, and material disputes of fact in order to obtain an evidentiary hearing is at the heart of all procedures for summary disposition," and held that accelerated decision under the *Consolidated Rules*, 40 C.F.R. § 22.20, is "similar to judicial summary judgment under Rule 56, Fed. R. Civ. P." *Id.* at 793; *see also Jones v. Chieffo*, 833 F. Supp. 498, 503 (E.D. Pa. 1993); *ALM Corp. v. U.S. EPA*, 974 F.2d 380, 382 n.2 (3d Cir. 1992); *In re Rogers Corp.*, 9 E.A.D. 534 (EAB 2000); *In re BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *In re Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (ALJ, Sept. 11, 2002), *In re Martex Farms, Inc.*, Docket No. FIFRA-02-2005-5301, 2005 EPA ALJ LEXIA 56, at *10 (ALJ, Oct. 4, 2005); *In re Municipality of Rio Grande,* No. CWA-02-2009-3458, 2010 EPAALJ LEXIS 1

(ALJ, Jan. 13, 2010).

In *Green Thumb Nursery*, the Board explained that "the party must demonstrate that [the] dispute is 'genuine' by referencing probative evidence in the record, or by producing such evidence." 6 E.A.D. at 793. The Board explained that "summary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up...." *Id.* n. 24. The Board clarified that "the mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party." *Id.*

In a more recent case, the Board has ruled on a respondent's challenge to an initial decision in which an ALJ found, in an accelerated decision, that a civil penalty of $1.345 million was appropriate for the respondent's violations. Before the Board, the respondent argued that it was "*per se* impermissible for the Presiding Officer to assess a penalty against it without first conducting an evidentiary hearing." *In re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 625 (EAB 1999). The Board held that "Newell's penalty arguments fail to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing." *Id.* The Board stated: "We have held, however, that an oral hearing (as opposed to an opportunity to obtain a ruling from the Presiding Officer on the documentary record) is required only if the party requesting the hearing raises a genuine issue of material fact[.]" *Id.* (citing *Green Thumb*, 6 E.A.D. at 792-93).[37]

On judicial review, the Fifth Circuit Court of Appeals upheld the Administrator's final

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[37] In the Initial Decision Regarding Penalty, the ALJ completely misunderstands the application of *Newell Recycling* to the instant case. (*See* Docket Index No. 86 at 3). First, the ALJ distinguishes *Newell Recycling* from these cases by stating that unlike the situation in *Newell Recycling*, Complainant here had no documentary record. That assertion is not true; Complainant relied on a strong documentary record in its Motions for Accelerated Decision as to penalty. Second, the ALJ mistakenly believes that *Newell Recycling* stands for the proposition that the Presiding Officer has the discretion to hold a hearing even if no genuine issue of material fact exists. The Board makes no such holding in *Newell Recycling*.

decision in *Newell Recycling*. *Newell Recycling Co., Inc. v. U.S. EPA*, 231 F. 3d 204 (5th Cir. 2000). There the court upheld the Agency's full penalty assessment, rejecting Newell's claim that before a penalty could be assessed "an evidentiary hearing was 'required' in [the] matter, and that the absence of one violated Newell's right to due process of law." *Id.* at 210-11. The Court cited two U.S. Supreme Court decisions for the following propositions: (1) "[i]f the hearing . . . is to serve any useful purpose, there must be some factual dispute...." (*Codd v. Velger*, 429 U.S. 624, 627 (1977)) and (2) it is permissible for an agency to "condition an adjudicatory hearing on 'identification of a disputed issue of fact by an interested party[.]'" *Costle v. Pac. Legal Found.*, 445 U.S. 198, 213 (1980). The Court found that there was "no contested issue of fact on penalty in the record" and "decline[d] to set aside the penalty[.]" *Newell Recycling*, 231 F.3d at 211.

The Agency's provision for accelerated decisions conforms with 100 years of American law holding that, in a civil case, no one has an absolute right to an evidentiary hearing. The Supreme Court has made it clear that

> a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial....the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, (1986); *see also Ex parte Peterson*, 253 U.S. 300, 310 (1920); *Hepner v. United States*, 213 U.S. 103, 115 (1909); *Puerto Rico Aqueduct & Sewer Auth. v. U.S. EPA*, 35 F.3d 600, 606 (1st Cir. 1994) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544 (1978)).

Moreover, the non-moving party must raise an issue of fact with actual, probative evidence. *Gen. Office Prods. v. A.M. Capen's Sons, Inc.*, 780 F.2d 1077, 1078 (1st Cir. 1986); *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985). Unsupported allegations

are simply not enough. *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985). A "mere promise to produce admissible evidence does not suffice to thwart the summary judgment ax." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990); *see also United States v. One Parcel of Real Property*, 960 F.2d 200 (1st Cir. 1992).

The Board noted in *Green Thumb Nursery* that it is not appropriate to hold a hearing based solely on an allegation that "future proceedings may turn something up." *Green Thumb*, 6 E.A.D. at 793 n. 24.[38] The import of this language is clear: where the non-moving party fails to produce "actual, probative evidence" demonstrating a disputed issue of fact, the Presiding Officer simply does not have the discretion to give the non-moving party the chance to turn something up by holding a hearing based solely on unsupported allegations.[39]

2. The Presiding Officer erred by not applying the correct standard when he denied Complainant's Motions for Accelerated Decision as to penalty

a) The Presiding Officer erred in holding that Respondents were entitled to cross-examine a live penalty witness despite Respondents' failure to present evidence to establish a genuine dispute of material fact

On December 12, 2008, Complainant submitted Motions for Accelerated Decision on Liability and Penalty, Memoranda in Support of Complainant's Motions for Accelerated Decision on Liability and Penalty, and Memoranda in Support of the Penalty Amount Proposed.

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[38] Contrary to the Board's holding in *Green Thumb Nursery*, the Presiding Officer clearly believed Respondents had an absolute right to cross examination of a live witness merely to see if something would "turn up" when he stated "[i]n over a decade of experience ...the Court has observed instances when EPA's facially-sound penalty rationale has unraveled during ...the process of cross-examination. Such weaknesses would have gone undetected, absent cross-examination because the flaws could not have been gleaned based on the mere exchange of papers supporting the rationale." (Docket Index No. 69 at 18). The Presiding Officer does not have the discretion to hold a hearing just to see if a witness will unravel if the respondent has not raised any genuine issues of material fact.

[39] In his analysis of *Green Thumb Nursery*, the ALJ failed to understand the Board's holding in that case. The ALJ relies on *Green Thumb Nursery* for his claim that the Presiding Officer has unbridled discretion to hold a hearing. (Docket Index No. 86 at 4). Instead, this Board held in *Green Thumb Nursery* that in order to earn the right to a hearing, respondent must still put into issue a genuine issue of material fact. *Green Thumb Nursery*, 6 E.A.D. at 792-94.

Accompanying each of these submittals were more than a dozen attachments including, but not limited to, correspondence between the Respondents and Ohio EPA, correspondence from Respondents' consultant (MSG), and toxicological information from the Agency for Toxic Substances & Disease Registry ("ATSDR").[40] In addition to these attachments, the Motions relied upon the facts supporting the violations themselves, which were the subject of the liability portion of the Motions. In each matter, Complainant's Memoranda in Support of its Motions for Accelerated Decision on Liability and Penalty set forth a detailed and methodical explanation of the applicable standard of review for motions for accelerated decision and a thorough analysis of the facts and evidence relating to each of the instant cases. Each Memorandum proposed Findings of Fact for that case and Complainant cited to either Respondents' Answers or to one of Complainant's attachments as evidence of each particular finding.[41] Complainant attached a separate 27-page Memorandum in Support of the Penalty Amounts Proposed for each matter; each Memorandum contained a detailed explanation as to how the proposed penalty was calculated in accordance with the statutory factors contained in RCRA and the RCRA Civil Penalty Policy (Penalty Policy).[42] The Memoranda in Support of the Penalty Amount carefully articulated how RCRA penalties are calculated in general and how, in fact, the penalty in each case was calculated with references to the facts in each particular case. Each fact relied upon in

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[40] There were actually 14 attachments in JAB Ohio and 16 Attachments in JAB Toledo. Some of the attachments in both matters are identical and some are unique to just one matter. For the most part, the attachments are similar and do not present material differences. Where the attachments do present factual differences between the two matters which bear on the outcome of these cases, those differences will be pointed out.

[41] There are 12 proposed Findings of Fact in JAB Ohio and 14 proposed Findings of Fact in JAB Toledo. As is the case with the attachments, the proposed Findings of Fact in both cases are substantially similar; where material differences exist, they will be pointed out.

[42] Just as with the attachments and the Memoranda in Support of the Motions for Accelerated Decision on Liability and Penalty, the Memoranda in Support of the Penalty Amount Proposed in each case is substantially similar and each largely relies on the same or similar attachments; where there are material differences, they will be pointed out.

calculating the penalty was supported by either an admission by Respondents in their Answers or by an attachment to the Memorandum.

In each of their four-page Memoranda in Opposition to Complainant's Motions for Accelerated Decision on Liability and Penalty, Respondents admitted their liability for the RCRA violations alleged. Respondents did not offer any evidence whatsoever with regard to liability, nor did they contest any of Complainant's proposed Findings of Fact in either case. (*See* Docket Index No. 59(3)). The Presiding Officer correctly granted Complainant's Motions for Accelerated Decision for Liability and Penalty as to liability.

Respondents did, however, superficially contest the penalty portions of Complainant's Motions for Accelerated Decision on Liability and Penalty and Complainant's Memoranda in Support of the Penalty Amounts Proposed, but offered no evidence whatsoever relevant to the penalty. Respondents made some speculative claims about evidence they might present at a hearing, but they did not present any actual evidence, nor did they contest any of Complainant's evidence. They did not present a single declaration or affidavit, nor did they offer any documents. Respondents did not point to any admission made by Complainant or document relied on by Complainant to support their position. Respondents' announcement of an intention to provide evidence at a later date did not meet the standards articulated by this Board for defeating a motion for accelerated decision with regard to penalty. *Green Thumb Nursery*, 6 E.A.D. at 793; *Newell Recycling*, 8 E.A.D. at 625. Because Respondents failed to offer any evidence whatsoever at this stage, there were no "genuine issues of material fact," and under the terms of Section 22.1(b) of the *Consolidated Rules*, there were no grounds upon which to hold a hearing. The Presiding Officer did not have the discretion to hold a hearing merely to see if a hearing "may turn something up." Instead, he should have evaluated the uncontested evidence

offered by Complainant, considered the statutory penalty factors, the RCRA Penalty Policy, and the penalty arguments offered by the parties, and determined a penalty without a hearing.

Complainant believes that its proposed penalties of $282,649 (JAB Ohio) and $287,441 (JAB Toledo) were appropriate, and as discussed further below, Complainant urges the Board to exercise its discretion to adopt these penalties as a remedy for the Presiding Officer's error. The Presiding Officer's error, however, was not his failure to award the full penalties proposed by Complainant. His error, at this stage in the proceedings, was his failure to determine the amount of the penalties from the uncontested evidence, which raised no disputed issues of material fact.[43]

Apparently, a key factor relied upon by the ALJ in his decisions to deny accelerated decision with regard to penalty in these matters was his mistaken belief that Respondents had a "fundamental" right to cross-examine a live witness with regard to Complainant's calculation of the penalty. (JAB Ohio, Docket Index No. 70 at 13; JAB Toledo, Docket Index No. 70 at 17). The ALJ, however, completely misses the critical distinction between factual testimony and legal argument. In his Orders in both cases, he states that "[i]t has been this Court's experience that a respondent will not know, until the process of cross-examination has been afforded, if the Agency has in fact faithfully adhered to the penalty policies' instructions." (JAB Ohio, Docket Index No. 70 at 13; JAB Toledo, Docket Index No. 70 at 17). This statement demonstrates a complete misunderstanding of the nature of a penalty presentation in an EPA administrative proceeding and is wholly at odds with EAB case law.

As this Board has previously explained, the appropriateness of a proposed penalty involves both factual issues and legal or policy issues. *In re Chautauqua Hardware*, 3 E.A.D.

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[43] The ALJ later compounded his error by holding a hearing, over Complainant's objections, and issuing a zero penalty. As argued below, Complainant believes that issuing a zero penalty was itself an abuse of discretion, and it would have been an abuse of discretion had the Presiding Officer granted accelerated decision on penalty but awarded a zero penalty. The ALJ's eventual award of a zero penalty, however, is a separate issue, and is dealt with separately in this brief.

616, 623 (E.A.B. 1991). It is very important to distinguish between the two. For example, the "quantity" of a particular chemical may be a "factual issue" bearing on the appropriateness of a penalty, but whether an appropriate penalty dollar amount was selected for each box of the policy matrix is a "legal or policy issue." *Id.* Similarly, Federal Courts have recognized that "[t]he assessment [of a penalty] is not a factual finding but the exercise of a discretionary grant of power," *Panhandle Co-op Ass'n v. U.S. EPA*, 771 F.2d 1149, 1152 (8th Cir. 1985), and that, "once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion." *Robinson v. United States*, 718 F.2d 336, 339 (10th Cir. 1983).

The principal reason to take testimony and allow for cross-examination of witnesses regarding factual issues is to allow the trier of fact to determine witness credibility and demeanor. These considerations may apply if a witness is presenting contested *facts* which a party wishes the presiding officer to consider in determining the penalty, but they do not apply at all to the *arguments* both sides may offer as to the appropriate application of those facts to the applicable statutory penalty factors and applicable penalty policy. See *River Forest Pharmacy, Inc. v. Drug Enforcement Admin.*, 501 F.2d 1202, 1206 (7th Cir. 1974) (holding that witness credibility and demeanor "are irrelevant to an assessment of the seriousness of petitioner's violations and of the sanctions most appropriate for the promotion of agency policy regarding them").

In these matters, the facts, as discussed above, were undisputed. Respondents may disagree with Complainant's proposed application of those uncontested facts to the RCRA penalty factors and RCRA Penalty Policy, but that does not mean they are entitled to cross-examine an Agency employee simply to test that employee's personal ability to articulate the

rationale behind the Complainant's recommendations. Complainant's penalty rationale is argument, not fact, and as such can be properly presented in briefing, not exclusively in the testimony of a sworn witness subject to cross-examination. Respondents, in their responses to Complainant's Motions, were free to present their own counter-arguments as to the proper application of undisputed facts to the statutory penalty factors and the RCRA Penalty Policy. The Presiding Officer was wrong when he concluded the Agency was required to put on a live witness to explain the penalty calculation.[44]

Respondents had the opportunity to challenge the penalty amount proposed by Complainant in a variety of ways: if they believed Complainant did the math wrong, they could have presented the correct math in their brief; if they believed the wrong box in the matrix was chosen, they could have suggested the correct box along with their reasons for the suggestion; if they believed insufficient credit was given for some mitigating factor, they could have pointed to evidence of the mitigation and argued for a greater reduction. None of these options, though, require the cross-examination of an EPA witness.

Complainant is mindful of the fact that the ALJ is not the only EPA ALJ ever to express a preference for a live witness to present a proposed penalty calculation. In most such instances, it is likely that the complainant has avoided conflict with the presiding officer by providing such a witness. However, what may have been the decision of the Agency's enforcement staff not to

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[44] It is interesting to note that this Presiding Officer has, in another case, explicitly recognized that the calculation of a proposed penalty is *not* the personal act of a specific individual. In *In re Alliant Techsystems, Inc. and Riteway Services*, CAA-III-075, 1997 EPA ALJ LEXIS 142 (Dec. 4, 1997), the ALJ deemed it acceptable that the Agency chose to substitute a different penalty witness when the original case developer retired from public service. *Id.* at *12. In that case, the ALJ found that "[t]here is nothing unique to the subject matter about which Ms. Ferraiolo [the original penalty witness] was to testify. Even if Ms. Ferraiolo had personally done the penalty calculation, other qualified witnesses can read the records generated by that effort and agree or disagree with the conclusions made." *Id.* at *12-13. This finding is very telling. If there is nothing unique about the testimony concerning the calculation of the penalty – if anyone can read the records and agree or disagree – then there is no rationale for a requirement that a live witness to testify and be subjected to cross-examination with regard to such a calculation.

mount a fight against such a requirement in other cases does not make the requirement any more reasonable or legally acceptable. In these cases, instead of acquiescing in an incorrect decision, Complainant continues to insist that the desire of the Presiding Officer to have a live penalty calculation witness was not a valid reason to deny accelerated decision.

Very few initial decisions or final orders directly mention whether a penalty calculation witness was used, and thus, it is difficult to determine how frequently such a witness is required. However, there clearly are multiple cases in which the Board has upheld a penalty which was not presented by a penalty calculation witness. As noted above, a $1.345 million penalty was assessed against Newell Recycling Company on accelerated decision. *Newell Recycling*, 8 E.A.D. at 643. In *In re Euclid of Virginia, Inc.*, Complainant's proposed penalty calculation was not presented by a witness but was instead presented in Complainant's Post-Hearing Brief, but this did not prevent the ALJ from assessing a penalty of $3.085 million or the Board from increasing this penalty to $3.165 million. 13 E.A.D.___ , slip op. at 132 (EAB March 11, 2008). Other cases in which it is clear that a penalty was assessed without a penalty calculation witness include, without limitation: *In re Green Thumb Nursery*, 6 E.A.D. 782 (1997); *In re Spitzer Great Lakes Ltd. Inc.*, 9 E.A.D. 302 (EAB 2000); *In re Roger Antkiewicz,* 8 E.A.D. 218 (EAB 1998); *In re Federal Cartridge Co.*, RCRA-05-2002-003, 2004 EPA ALJ LEXIS 135 (ALJ, Sept 3, 2004).[45]

It is clear from these cases that the Board has never *required* a penalty calculation witness. The continuing confusion in this area makes it important for the Board to clarify that such a witness is not required in every case. *Green Thumb Nursery*, 6 E.A.D. at 792. To the

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[45] *In Re Federal Cartridge* was an Initial Decision issued by an Administrative Law Judge which became a final decision of the Administrator by operation of rule, 40 C.F.R. § 22.27(c), as neither party appealed the initial decision.

extent that either complainants or respondents wish to argue the proper application of the facts in evidence to the statutory penalty factors and the relevant penalty policy, such argument is not evidence, and need not be presented by a live witness subject to cross-examination. Nor should accelerated decision on penalty be denied due to a presiding officer's personal preference to hear such a witness prior to determining the penalty in a matter.[46]

b) The instant matters are an excellent illustration as to why it is necessary to present probative evidence to defeat a motion for accelerated decision in Agency administrative hearings

These cases illustrate the wisdom of the rule requiring a party seeking to defeat summary disposition to show that there is a disputed issue of material fact by providing actual, probative evidence, as opposed to merely a promise to come up with such evidence at a later date. After the Presiding Officer denied accelerated decision on the basis of mere promises to provide evidence, he held a hearing in which Respondents failed, with one minor exception, to present any of the evidence they had promised in response to Complainant's Motions.

Respondents opposed accelerated decision by promising to present evidence to demonstrate (1) that it was Respondents' financial inability, not unwillingness, to perform the drip pad closure; (2) that the lack of funds stemmed from circumstances beyond their control; (3) that Respondents had no expectation their business would fail; and (4) that Respondents had borrowed money to repay their consultant. However, at the hearing, Respondents presented no evidence whatsoever that the lack of funds stemmed from circumstances beyond their control, that they had no expectation their business would fail or that they had borrowed money to repay their consultant. Respondent did present very limited testimony with regard to their claim of a financial inability to perform the cleanup. This testimony was conclusory and it did not include

[46] It is clear that the Presiding Officer believed that every contested penalty case be the subject of a live testimony hearing. (Docket Index No. 86 at 3-4). Among other things, this ignores the reality of limited enforcement resources that must be judiciously used only when necessary.

a foundation as to the witness's basis for knowledge, or any details as to the rationale for the conclusions drawn by the witness. Further, the very identity of the witness was withheld from Complainant until the very eve of the hearing.[47] The entire discussion of an inability to afford to decontaminate the drip pads consisted of the following exchange during the testimony of Gary E. Olmstead, the Chief Financial Officer for JAB Co:

> Q: Very good. Now, during the time period 2003, four, five, six, that general time period, was John A. Biewer Company of Toledo expending funds to perform environmental investigation or remediation?
>
> A: Yes, they were, to the extent they had funds available.
>
> Q: And was it possible for John A. Biewer Company of Toledo to have performed greater environmental investigation or remediated then it did based upon its financial condition?
>
> A: No.
>
> Q: So, again, was its failure to perform more investigation or more remediation a product of unwillingness or a product of inability?
>
> A: It was a product of inability, financial inability.

(Docket Index No. 80 at 54). That is it. No details were provided as to the funds expended to perform work at JAB Toledo, nor were any details presented as to the work performed. There was no information at all regarding funds expended for environmental work at JAB Ohio.[48]

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[47] Not surprisingly, the Presiding Officer also ignored fundamental tenets of fair proceedings throughout these cases. For example, from the time Respondents filed their first Prehearing Exchanges (August 27, 2008) until two business days prior to the hearing, they had named only a single witness: Brian Biewer. Two business days before the hearing, Respondents notified Complainant that they were substituting Mr. Olmstead for Mr. Biewer. We will never know whether Mr. Biewer would have had more to say regarding Respondents' issues. He said nothing by way of affidavit or declaration at the motion for accelerated decision stage he did not testify at the hearing. Respondents essentially played a shell game with Complainant, hiding what limited evidence they had, (even the identity of their witness), until the 11th hour. It appears that the evidence promised in response to Complainant's Motions for Accelerated Decision was not provided in response to such Motions for a very good reason: the evidence simply did not exist. Further, as the Board noted in *In re Titan Wheel Corp. of Iowa*, 10 E.A.D. 526 (EAB 2002), "the [*Consolidated Rules*] are clear that the parties must submit any document, exhibit, witness name or summary of expected testimony during the pre-hearing information exchange, unless good cause exists for failing to do so." *Id.* at 541; 40 C.F.R. § 22.22(a).

[48] Probably because no funds were expended there as JAB Ohio made no attempt whatsoever to decontaminate its drip pad.

There was no foundation as to how Mr. Olmstead had knowledge of the environmental work conducted by MSG or had knowledge of JAB Toledo's or JAB Ohio's "willingness" to comply with environmental regulations.

These cases demonstrate the inefficiency and lack of fairness which could result if Presiding Officers were to be allowed the discretion to deny motions for accelerated decision even when the non-moving party has utterly failed to present any probative evidence disputing a genuine issue of material fact. As the Court held in *Puerto Rico Aqueduct,* bare assertions (such as those of Respondents in their Memoranda in Opposition to Complainant's Motions for Accelerated Decision on Liability and Penalty) should not be able to defeat a motion for accelerated decision because that result would "hopelessly crowd hearing dockets and clearly is not in accord with the purposes of ...the Agency's regulations. *Puerto Rico Aqueduct and Sewer Auth.*, 35 F.3d at 608 n. 8. Here, the parties were forced to prepare for a hearing, the Presiding Officer was required to travel to the hearing, a court reporter was hired and post hearing briefs were required, all on the basis of Respondents' promises to present unspecified evidence that they in fact did not have.

This is not just a procedural matter, a technical, but harmless, flaw in Respondents' pleadings and other filings. Motions for accelerated decision are supposed to flesh out the real issues between the parties so that issues which can be decided on papers need not proceed to a resource-intensive live hearing. Moreover, under both the *Consolidated Rules* and the Federal Rules of Civil Procedure, the availability of summary disposition is designed in part to force parties to disclose their evidence to prevent the "blindsiding" that occurred in these cases. The lack of evidence Respondent showed up with when they did have "their day in court" only serves

to highlight that there were no disputes of any genuine issues of material fact in the first place, a conclusion the Presiding Officer should have arrived at much earlier in these proceedings.

c) As a remedy for the Presiding Officer's error, the Board should assess a penalty based upon the evidence presented in Complainant's Motions

As noted above, Complainant does not contend that the Presiding Officer had to assess the exact penalty amounts requested by Complainant. Rather, Complainant's argument is that the Presiding Officer erred, at the motion for accelerated decision stage, by allowing the proceedings to continue instead of evaluating the uncontested evidence he had before him at the time and assessing an appropriate penalty consistent with the RCRA penalty criteria and the Penalty Policy.[49] *See, e.g., Newell Recycling*, 231 F.3d at 211. If this Board concludes that Complainant's Motions for Accelerated Decision should be granted, it could choose to remand these matters to the Presiding Officer to determine an appropriate penalty in accordance with the RCRA penalty criteria and the Penalty Policy. Alternatively, the Board has on numerous occasions promoted judicial economy by deciding the appropriate penalty itself without a remand. *In re Morton L. Friedman*, 11 E.AD. 302 (EAB 2004) (reversing the ALJ's finding of no liability and assessing a penalty); *In re City of Wilkes-Barre*, CAA Appeal 06-03, 2007 WL 2193367 (EAB July 11, 2007) (reversing the ALJ's penalty assessment, evaluating the penalty assessment *de novo*, and assessing a penalty); *In re FRM Chem, Inc.*, 12 E.A.D. 739 (EAB 2006) (same); *In re Chem Lab Prods.*, 10 E.A.D. 711 (EAB 2002) (same). This option is particularly appropriate in cases such as these where the evidence supporting Complainant's proposed

[49] Section 3008(a)(3) of RCRA requires that the Administrator in assessing a penalty take into account "the seriousness of the violation and any good faith efforts to comply with applicable requirements," a standard which appears to allow for substantial discretion in determining a proper penalty. Moreover, the applicable penalty policy for violations of Subtitle C of RCRA itself builds in substantial latitude in determining the exact penalty for any given violation.

penalty is submitted solely on paper, and thus, there is no need for the Presiding Officer's credibility determinations.

Should the Board decide to determine the appropriate penalty without a remand, Complainant believes that the Board should assess penalties of $282,649 (JAB Ohio) and $287,441 (JAB Toledo) proposed by Complainant in the proceedings below. Complainant's penalty explanations were set forth in detail in its Memoranda in Support of the Penalty Amounts Proposed, (Docket Index No. 32), and these explanations are hereby incorporated by reference. As discussed below, Respondents provided little or no relevant argument with regard to the size of the penalties. Complainant, on the other hand, believes that it has provided adequate rationale to support the penalties proposed.

Respondents' responses to Complainant's Motions for Accelerated Decision regarding penalty did not challenge Complainant's description of the relevant law or explanation of the Agency's Penalty Policy, nor did they contest the findings of fact set forth in Complainant's Motions. These undisputed facts are set forth in more detail in Complainant's Memoranda in Support of the Penalty Amounts Proposed (Docket Index No. 32), and include the following highlights:

Respondents did not contest that after ceasing operations at the two facilities at issue in these matters they did not complete closure of the drips pads at either facility as required under RCRA. There was no dispute as to the fact that samples of drip pad rinseate taken from the Perrysburg facility (JAB Toledo) in 2005 revealed elevated levels of chromium and arsenic, and the waste management unit (the drip pad) had been compromised by what appears to be ancillary piping or tank components associated with the drains on the pad.

Neither JAB Ohio nor JAB Toledo contested the evidence that they had actual knowledge of RCRA's requirements for wood treating operations prior to the violations at issue in these matters. Respondents offered no argument in opposition to Complainant's assessment that the probability of exposure in both cases was (and still is) "substantial." Respondents did not contest Complainant's description of the toxicity of chromated copper arsenate, the solution used by Respondents in their wood treating processes, and raised no objection to Complainant's assessment that escape of these toxic substances could have occurred into the soil under the drip pad at JAB Toledo, that there are creeks nearby both facilities or that the potential seriousness of the contamination in both cases is minor. Respondents took no exception to Complainant's view that they have not accounted for all hazardous wastes resulting from the operation of the drip pads, whether on the pads themselves, in the soil around and under the pads or in any pattern of migration away from the pads. They did not contest the Region's claim that the fundamental purpose of RCRA's "cradle to grave" hazardous waste tracking systems has not been met and that the harm to the RCRA regulatory program is substantial in both cases.

Respondents did not dispute that their facilities closed in 1997 (JAB Toledo) and 2001 (JAB Ohio) or that they thus should have decontaminated the drip pads and surrounding areas long ago and thus did not contest EPA's assessment that there were greater than 180 days of violation at each facility starting only after Ohio EPA served Respondents with Notices of Violation for failing to properly decontaminate their drip pads in July 2004 (JAB Toledo) and November 2004 (JAB Ohio). (JAB Toledo, Docket Index No. 32, Attachments A and K; JAB Ohio, Docket Index No. 32, Attachment A). Respondents did not contest Complainant's assessment of the violation in the Penalty Assessment Matrix, nor did they suggest a different point within the matrix cell than that proposed by Complainant. Nor did Respondents challenge

the amount of economic benefit that Complainant asserts was enjoyed by Respondents at each facility.

The only issue raised by Respondents with regard to Complainant's calculation of the penalty relates to EPA's assessment of "good faith efforts to comply" and "degree of willfulness." Respondents suggested that the penalty should have been adjusted downward due to Respondents' supposed "good faith" in attempting to comply. In fact, there is no evidence of good faith efforts to comply, and in fact, Complainant gave Respondents the benefit of the doubt by not proposing an *increase* to the penalties due to their lack of good faith in allowing the extended and continuing periods of knowing noncompliance with RCRA. Complainant did propose an upward adjustment of 10% at each facility for "degree of willfulness," because Respondents knew of their legal obligations and had complete control of the events out of which the violations arose. Respondents' entire argument, therefore, amounts to a quibble with Complainant's proposal of this 10% increase under the RCRA Penalty Policy, as opposed to making a downward reduction for "good faith" (limited, under the RCRA Penalty Policy, to a maximum reduction of 40%).

As noted above, Respondents' responses to Complainant's Motions offered no evidence of any kind to support Respondents' claims of good faith and lack of willfulness. Respondents instead offered only a vague promise to "present evidence at hearing" showing, among other things, that the failure to decontaminate the drip pads was due to financial inability, not unwillingness to comply with the law.[50] Respondents also promised, without supporting evidence, to later provide evidence that their lack of funds stemmed from circumstances beyond their control, i.e., the failure of their business and contended (again without evidence) that the

[50] This assertion is all the more egregious given that the Respondents had expressly waived their claims of inability to pay a penalty and the Presiding Officer had already ruled in these cases that waiver had occurred. (*See* Docket Index No. 14).

"fact" that they allegedly borrowed money to do the limited work they did do demonstrates good faith. (Docket Index No. 59 (2)).

Apart from the lack of evidence provided, Respondents' arguments are not convincing as applied to the uncontested evidence in the record, and both Respondents' arguments and the ALJ's orders demonstrate a lack of understanding regarding how the Penalty Policy treats the adjustment factors of "good faith efforts to comply" and "degree of willfulness." To the extent the ALJ believed he Respondents had or could demonstrate "good faith," he was mistaken. The Penalty Policy's discussion of "good faith efforts to comply" allows a downward adjustment to the penalty only if the respondent takes steps to come into compliance before being notified of a violation. For example, the Policy states it would usually be inappropriate to give a downward adjustment if the respondent comes into compliance only after a notice of violation[51] but that it *might* be appropriate to mitigate the penalty if the respondent comes into compliance *before* the Agency's detection of violation or if the respondent uses significant new resources to achieve compliance. The Penalty Policy certainly does not contemplate any downward adjustment for "good faith efforts to comply" *where there has been no compliance at all.* Even though JAB Toledo made *some* efforts towards compliance after Ohio EPA issued an NOV, JAB Toledo fell far short of compliance with the regulations. At the JAB Ohio facility, no efforts at all were made to decontaminate the drip pads.

The Penalty Policy also allows for a downward adjustment in the penalty if (1) the violations were not reasonably foreseeable and (2) the respondent had no control over the violation. Respondents focus on their supposed lack of control over the violation, but provided

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[51] So, for example, contrary to Respondents' assertions in their Post Hearing Briefs, it would be completely inappropriate under the Penalty Policy to give the Respondents *any* credit for coming into compliance for the 1992 violations noticed by Ohio EPA at JAB Ohio *after the date of the inspection.* (See JAB Ohio Docket Index No.32, Attachments K, L, M).

no evidence in opposition to Complainant's Motions to support their claims that they had absolutely no resources with which to come into compliance with RCRA. Further, Respondents and the ALJ completely ignore the additional requirement for this reduction: that the violations be shown to be not reasonably foreseeable. It is not surprising that Respondents do not want to focus on this requirement, because it strains credulity to suggest that companies in the business of treating wood with chromated arsenate, who knew they were managing RCRA hazardous waste on their properties, and who have been previously cited by the State of Michigan for their environmental violations, could not reasonably foresee the requirement that they would have to decontaminate the drip pads when they ceased operations.[52]

E. The Presiding Officer Abused His Discretion In Awarding A Zero Penalty In These Matters In His Initial Decisions Regarding Penalty

After holding a hearing with regard to penalty, the Presiding Officer issued Initial Decisions awarding a zero penalty in each of these matters. This conflicts with the *Consolidated Rules,* there was evidence to support a penalty and that evidence justified the award of a significant penalty. As discussed above, if the Board agrees that the Presiding Officer erred in denying Complainant's Motions for Accelerated Decision with regard to penalty, the correct remedy would be for the Board to either remand the matter for a determination of the penalties on the records established in Complainant's Motions, or for the Board itself to determine the penalty on such record. Under either option, the Presiding Officer's Initial Decisions on penalty would be vacated. If, however, the Board does not agree with Complainant's argument that a

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[52] The 1992 correspondence between Ohio EPA and JAB Ohio make it apparent that JAB Ohio was well aware that it was regulated by RCRA regulations concerning wood preservers in general and to drip pads in particular. *See* Attachments K, L, and M. Docket Index No. 32) JAB Ohio. Further, in 1985, JAB Co, was found liable in state court for causing groundwater and soil contamination resulting from chrome and arsenic releasing into the environment from the drip pads JAB Co. used in its wood treating operations. *Atty. Gen. v. John A. Biewer Co., Inc.*, 363 N.W. 2d 712. There can be no doubt that Respondents knew their actions were illegal and dangerous.

penalty should have been awarded on accelerated decision, the Board should nonetheless vacate the Presiding Officer's determinations of zero penalties as abuses of his discretion.

1. The *Consolidated Rules* required the Presiding Officer to determine the amount of the civil penalty based on the evidence in the record and in accordance with RCRA and the RCRA Civil Penalty Policy

The *Consolidated Rules* provide that: "If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set." 40 C.F.R. 22.27. There is no dispute that the Presiding Officer did determine that violations had occurred (*see* Docket Index No. 70), and there is no dispute that Complainant did seek a civil penalty. (*See* Docket Index Nos. 1 and 37). The Presiding Officer was, therefore, obligated to determine the amount of civil penalty based on evidence in the record and in accord with the RCRA statutory penalty factors and the RCRA Penalty Policy. Given the seriousness of the admitted violations in these matters, the Presiding Officer's determination that zero penalties were appropriate was clearly an abuse of discretion.

In cases brought pursuant to Section 3008(a)(3) of RCRA, assessments of penalties for violations of Subtitle C of RCRA "shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). While EPA bears the ultimate burden of proof regarding the appropriateness of its proposed penalty, the Board held in *In re New Waterbury, LTD.*, 5 E.A.D. 529 (1994) that Complainant, in establishing its *prima facie* case, need only touch on each factor and explain how its analysis supports the proposed penalty. At that point the burden of going forward then shifts to Respondent. *Id.* at 538. If respondent introduces evidence tending to show that the complainant failed to consider all of the statutory factors or that the recommended penalty is not appropriate, the complainant

must then either introduce additional evidence to rebut respondent's evidence or must discredit respondent's evidence through cross-examination. *Id.* at 539.

2. The Presiding Officer erred in ruling that there was no evidence in the records to justify the award of civil penalties

The Presiding Officer in these matters based his zero penalty decisions upon his clearly erroneous conclusion that "there is no documentary *evidence in the record* from EPA." (Docket Index Nos. 86 at 3). Although Complainant did not introduce any *additional* evidence at the hearing, the evidence already in the records was more than sufficient to warrant the imposition of significant penalties in accordance with RCRA and the RCRA Penalty Policy. The Presiding Officer had already found that Respondents were liable for the violations alleged in the Complaints and Amended Complaints. (Docket Index No. 70). The Presiding Officer did not formally set forth his own findings of fact or conclusions of law regarding liability. His rulings, however, granting accelerated decision regarding JAB Ohio and JAB Toledo's liability necessarily established as fact the allegations of liability in the Complaints as the facts of these cases, and implicitly incorporated the Findings of Fact and Conclusions of Law proposed by Complainant in its Motions, at least those findings and conclusions which establish liability.

The ALJ cited the well-established principle that pleadings are not by themselves evidence, but he completely ignores the fact that in these cases Respondents' concession of liability and the Presiding Officer's grant of summary disposition with regard to liability converted the original "unverified pleadings" into the uncontested facts of the case. Further, the documents relied on by Complainant in its Motions are also part of the uncontested facts of the case. While Complainant did not introduce *additional* evidence at the penalty hearing, the Presiding Officer abused his discretion by explicitly ignoring the facts of the case, as established on accelerated decision.

The record supporting accelerated decision includes those attachments included with Complainant's Motions which Complainant relied upon to establish liability. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d. 224 (9th Cir. 1988). The attachments are evidence in the case because they formed the record supporting Complainant's Motions for Accelerated Decision as to Liability. In *In re First Capital Holdings Corp.*, the Bankruptcy Court for the Central District of California held that abandoning the summary judgment record as to matters requiring a bench trial would result in an inordinate waste of judicial resources. 179 B.R. 902, 905 (Bankr. D. Cal. 1995). Furthermore, requiring a full trial would result in waste of time and effort that the parties spent presenting and arguing their summary judgment motions. *Id.* While Complainant did not enter more penalty evidence into the record at the hearing, Complainant had no need to put on evidence of the violations themselves, which had already been established on accelerated decision. In *Holdings Corp.*, the Court held that "documents admitted in connection with the summary judgment motion are fully before the Court, except where objections have been reserved, but a reservation of objections is effective only for those documents actually used at trial." *Id.*

In their Post Hearing Briefs, Respondents do state, in cursory fashion, that had Complainant sought to admit any of the attachments it relied on in its Motion for Accelerated Decision, they "would have objected on a host of evidentiary grounds." However, Respondents did not object to the authenticity, reliability or admissibility of a single one of those Attachments in their Responses to Complainant's Motions for Accelerated Decision. Moreover, in several instances in their Post Hearing Briefs, Respondents rely on the very same documents which they claim they would have objected to (albeit drawing different conclusions from those documents). Further, Respondents' Post Hearing Briefs rely in part on attachments to the parties' Motions for

Accelerated Decision on Derivative Liability relating to the financial health of the Respondents, arguing that such attachments are evidence in the case. Respondents cannot have it both ways, claiming the attachments they like to be evidence in the case and objecting to the attachments they do not like. So long as an attachment formed part of the basis for a grant of accelerated decision, such attachment must be considered part of the case record. Several other cases bolster the position that documents filed in support of a motion for summary judgment are evidence during the trial stage. In *Alinsky v. United States*, a wrongful death action under the Federal Torts Claim Act, the Court held a bench trial, hearing live witness testimony as well as deposition transcripts. "*Having received the evidence, including the extensive documentary record on file in this case from the several prior motions for summary judgment*," the Court made findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a) Judgment on Partial Findings (Rule 52(a)). *Alinsky*, No. 98 C 6189, 2004 U.S. Dist. LEXIS 1217, at *4 (N.D. Ill. Jul. 16, 2004) (emphasis added). Similarly, in *American Constitutional Law Foundation, Inc. v. Meyer* the Court prefaced its opinion and order by stating that "the legal questions have been presented within the context of an *evidentiary record submitted in support of cross motions for summary judgment* and at a trial to the court." 870 F. Supp. 995, 997 (D. Colo. 1994) (emphasis added), *aff'd in part, rev'd in part*, 120 F.3d 1092 (10th Cir. 1997), *aff'd*, 525 U.S. 182 (1999). The U.S. Supreme Court granted certiorari in that lawsuit, and in a review of the procedural history of the case, the Court noted that in the district court, "*the record included evidence submitted in support of cross-motions for summary judgment* and at a bench trial." *Buckley v. Am. Constitutional Law, Inc.*, 525 U.S. 182, 190 n.9 (1999) (emphasis added).

A number of the attachments Complainant relied on to establish liability are also relevant to the penalty determination. For example, Complainant relied on the Closure Activity

reports[53] to establish liability and the same documents also demonstrate the proximity of nearby creeks, and the estimated cost of closure which Complainant relied on in determining the economic benefit of Respondents' noncompliance. (JAB Ohio, Docket Index No. 32, Attachment C and JAB Toledo, Docket Index No. 32, Attachment A). These same Attachments reveal that Respondents did not know how much hazardous waste was released onto their drips during their operations. The Closure Activity reports were prepared by Respondents' own consultant and Respondents have never raised even a scintilla of suggestion that their reports are not authentic, reliable or admissible. In fact, Respondents rely on the same reports to demonstrate their purported "good faith" efforts to comply with RCRA's requirements and it would be disingenuous for them to argue now that those reports cannot be relied on by Complainant as well. Similar arguments can be made for the other attachments which Complainant relied on in establishing both liability and penalty.[54] These attachments prove that although JAB Toledo made some efforts to decontaminate its drip pad at the Perrysburg location, in 2005, JAB Toledo's own consultant reported elevated levels of chromium and arsenic even after rinsing the drip pads and that Ohio EPA issued a notice of deficiency to JAB Toledo in January 2006. The Attachments reveal that Ohio EPA advised JAB Ohio in January 2006 that its Closure plan was inadequate, that the drip pad was not lined, that there were cracks in the drip pad Respondent JAB Ohio admitted in its Answer that Ohio EPA had asked for an amended plan and admits that it did not provide one. (Docket Index No. 2, ¶27).Moreover, even without the attachments to Complainant's Motions, the uncontested findings of fact supporting liability by themselves

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53 (JAB Toledo, Docket Index No. 32, Attachment A; JAB Ohio, Docket Index No. 32, Attachment C).

54 (JAB Toledo, Docket Index No. 32, Attachments A, and C-E; JAB Ohio, Docket Index No. 32, Attachments A-D).

demonstrate serious violations of RCRA. These facts include the following: Respondents had operated businesses at the Perrysburg, Ohio location from 1983 to 1997, and the Washington Courthouse, Ohio location from 1976-2001 (Docket Index No. 38, ¶ 38). In conducting those businesses Respondents had pressure-treated wood with a chemical solution of chromated copper arsenate. (Docket Index No. 56, Attachments G at 4 and KK at 4). In their production processes, Respondents had transported the treated wood to drip pads, where excess chemical solution on the wood either evaporated or fell off of the wood onto the drip pad. (Docket Index 38, ¶15; Docket Index No. 32, Attachment C). The waste that fell off of the wood onto the drip pad was hazardous waste under RCRA. At no time since closing their drip pads did Respondents meet their obligations to remove or decontaminate waste residues as required by the EPA-approved Ohio hazardous waste regulations.[55] At the JAB Ohio facility, Respondents made no effort to decontaminate the drip pad. At the JAB Toledo facility, Respondents performed an initial rinsing, but the RCRA hazardous waste remaining on the drip pad and still resulted in concentrations of waste significantly above the required cleanup standard. In addition, Complainant's Accelerated Decision Motions included several attachments printed off the internet from the website of the Agency for Toxic Substances & Disease Registry (ATSDR).[56] These documents were attached for the convenience of the Presiding Officer, but the Presiding Officer could and should have taken judicial, or official, notice of this public information from the ATSDR as it is a governmental agency charged with providing information regarding toxic substances and the information contained in the ATSDR documents is not subject to reasonable dispute. *See* 40 C.F.R. § 22.22(f); *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th

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55 Although JAB Toledo did remove some contamination from its drip pad in 2005, after Ohio EPA had issued a Notice of Violation, JAB Toledo never fully decontaminated the drip pad.

56 (JAB Toledo, Docket Index No. 32, Attachments F-J; JAB Ohio, Docket Index No. 32, Attachments F-J).

Cir. 1986); *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp 2d 1053, 1060 (D. Cal. 2003); *Daghlian v. Devry Univ., Inc.*, No. CV 06-994-MMM, 2007 U.S. Dist. LEXIS 98490 (C.D. Cal. Oct. 10, 2007). Respondents never objected to any portion of Complainant's Memoranda in Support of Penalty Amount Proposed which referred to the information from the ATSDR. Respondents have never taken issue with Complainant's position that chromium and arsenic are toxic and present health dangers.

The Presiding Officer should have considered as evidence 1992 correspondence between Ohio EPA and JAB Ohio. Respondents certainly knew Complainant would rely on these documents, as the documents had been included in Complainant's Prehearing Exchanges. As was the case with the other attachments, Complainant had given considerable notice to Respondents that it intended to rely on these documents. Furthermore, these documents were either sent or received by Respondents themselves, so Respondents could hardly complain about the documents' authenticity or reliability. Indeed, not only did Respondents not object to any of these documents, Respondents actually relied on them in their Post-Hearing briefs for the proposition that correcting other RCRA violations after they were notified about them in 1992 somehow establishes their "good faith" regarding the violations they have admitted to but not corrected in these cases.

Following the hearing the Presiding Officer should have considered *all* of the facts of the case in determining a penalty, not merely the additional evidence offered by Respondent at the hearing.

3. The evidence in these matters justified a significant civil penalty

The evidence in this matter clearly warrants a significant penalty, and thus the Presiding Officer erred in awarding a zero penalty. The Presiding Officer made very clear that a finding of

a zero penalty was necessary due to his mistaken belief that Complainant had presented no evidence regarding penalty. As discussed above in connection with the argument on the denial of accelerated decision on penalty, the ALJ is clearly wrong on this point: an explanation of the calculation of the penalty is legal argument, not evidence subject to cross-examination.

At the hearing, Respondents presented a single witness who introduced unaudited financial statements from Respondents from the years 2002 through 2006, and testified in conclusory terms that the failure to decontaminate the drip pads was the result of financial inability. At best, this testimony and the documents bear on the financial condition of the Respondents after the fact, that is, after time the facilities closed in 1997 and 2001. Although the Complaints do not allege violations in 1997 and 2001, there is no dispute that Respondents closed their operations at the facilities in those years. Similarly, there is no dispute that is when they were required to decontaminate the drip pads and they admit they did not do so. Any inability to pay arguments should have focused on that time period and the ten years since.

Neither the witness's testimony nor the exhibits offer any evidence as to why the facilities did not decontaminate their drip pads when they closed. The testimony and Exhibit 2 also make clear that JAB Toledo is in fact currently transferring the rental income it currently receives to its parent company, JAB on account of an "account payable intercompany" rather than spending money to decontaminate its drip pad. (Docket Index No. 80 at 55-56). When the witness was asked if there were other expenses during the same time period (2002-2006) for environmental work, his only answer was "I believe so, yes." (*Id.* at 56). Respondents' Exhibit 3 consists of two letters from JAB Toledo to EPA in 2006 and 2008, each promising to submit a revised closure plan to Ohio EPA. Since the Respondents never submitted that revised plan, it would seem those letters hardly evidence any good faith efforts to comply. Respondents

presented no evidence their businesses failed due to events beyond their control or that the need for money to preserve the capital of the subsidiaries to pay for the cleanup of the drip pads could not have been anticipated. There was no evidence at the hearing that Respondents borrowed money to do any environmental work at either facility. There was not even any evidence presented as what it would cost to comply. Respondents' claims of a good faith desire to properly close the drip pads is simply not credible given that the companies never even obtained a reliable estimate of the cost of that compliance.

In both cases, Complainant concluded that the "potential for harm" was moderate because the probability of exposure was substantial, the potential seriousness of contamination was minor and harm to the regulatory program was substantial. These recommendations should be adopted by the Board. Complainant based its assessment regarding the potential for harm on a number of facts, as detailed in its Memoranda, including that the facilities had pressure-treated wood with a chemical solution of chromated copper arsenate, that the facilities had transported the treated wood to drip pads, that the excess chromated copper arsenate on the wood evaporated or dripped onto the drip pad as a waste and that Respondents failed to decontaminate or remove all waste residues and containment system residues when they ceased operations in 1997 and 2001. Complainant relied on EPA's position articulated in 53 Fed. Reg. 53282, 53284 (December 30, 1988) wherein EPA stated "[w]astes from the preservation of wood with inorganic formulation or arsenic and/or chromium typically contain high concentrations of these toxic metals, as well as lead." Complainant relied on Public Health Statements from the ATSDR which document the potential for harm to the environment and public health caused by release of these substances. Complainant relied on Respondent JAB Toledo's own data which showed that after rinsing the drip pads 8 years after closure there were still elevated levels of

chromium and arsenic. Complainant relied on the fact that neither facility ever decontaminated the drip pads and those drip pads remain contaminated to this day. Complainant relied on the fact that there are creeks nearby both facilities. Complainant explained that it is fundamental to the RCRA program's "cradle to grave" hazardous waste tracking system that drips pads such as the ones used by Respondents be decontaminated when operations cease. Respondents have never taken issue with any of those facts or assertions. They admit the violations. Similarly, the Presiding Officer took no issue with any of those facts or assertions when he found Respondents liable for violating RCRA.

RCRA violations are always serious to some degree. That is because the violations involve hazardous wastes and once a waste is deemed hazardous under the regulations, some degree of potential danger has already been established. *In re of A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402 (1987); *In re of Federal Cartridge Co.*, Docket No. RCRA-5-2002-0003, 2004 EPA ALJ LEXIS 135 (ALJ, Sept 3, 2004). Even if harm from the violation consists of a general harm to program, that will weigh in favor of assessing a penalty, and can justify even a substantial penalty. *In re Safe & Sure Prods., Inc.*, 8 E.A.D. 517 (E.A.B. 1999). In these cases, Respondents have failed to decontaminate their drip pads for years after ceasing operations, there is documented contamination well above the applicable standards at JAB Toledo, and Respondents have not even determined the level of contamination at JAB Ohio. There can be no question but that the violations are serious.

Moreover, the seriousness of the violation is determined totally apart from any economic considerations. *In re Carroll Oil Co.*, 10 E.A.D. 635 (E.A.B. 2002). In *Carroll Oil*, the Board held

> [w]e see no compelling reason why economic considerations should inform an evaluation of the gravity or 'seriousness' of a violation as these factors relate to the duration of a

> violation. In the instant case, the company's protracted failure to conduct a site assessment prolonged the time during which potential releases from the company's USTs went undetected and unremediated, aggravating the potential for harm associated with its violation. Even if the company's financial situation prevented it from coming into compliance, this strikes us as irrelevant to the relationship between a violation's duration and its "seriousness."

Id. at 659. Therefore, there can be no doubt that once the Presiding Officer determined that there were RCRA violations, it was incumbent upon him to find that the violations were "serious."

Complainant also argued that the number of days of violation exceeded 180 days and that there was some economic benefit to Respondents for not complying with the regulations. Again, neither Respondents nor the Presiding Officer ever take issue with either of those arguments. The only argument offered by Respondents to Complainant's proposed penalty had to do with Respondents' claims of "good faith efforts to comply" and their contentions that the violations were not "willful." As explained in Section VII.D.2.c) above, the Respondents and the Presiding Officer completely misunderstood both of those terms as they relate to the calculation of a penalty under the RCRA Penalty Policy. In essence, both the Respondents and the Presiding Officer took a look at unaudited financial statements long after the companies ceased operations and concluded that the companies' lack of resources at that time then translated into a good faith effort to comply and lack of willfulness of the violation. Aside from the fact that financial resources have no bearing on either factor, the Presiding Officer had no reasonable explanation as to why these factors, even if proved, supported a 100 percent reduction of the penalties. What makes this result even more stunning is that Respondents had affirmatively waived their right to raise inability to pay a penalty and the Presiding Officer entered an Order Granting Complainant's Motions for Partial Accelerated Decision as to the issue of ability to pay in 2008. In his Order on Complainant's Motions for Accelerated Decisions on Liability and Penalty, the Presiding Officer concedes that Respondents waived the issue of ability to pay, but he then

concludes that Respondents' waiver of that issue was because "implicitly the Respondent elected to forego that fight as its business had closed and, having no funds, fight over the ability to pay would serve no purpose." (Docket Index No.70 at 8.) It should be noted that Respondents never once made that argument, nor is there any evidence in the record to explain why they waived their right to raise ability to pay. Further, the waiver of that issue meant that no evidence was to be admitted on that point, and thus the Presiding Officer had no grounds upon which to conclude that Respondents had "no funds." But despite this waiver, and the granting of orders preventing the introduction of evidence on the issue of ability to pay, the Presiding Officer nonetheless explicitly found that Respondents had no assets with which to pay for a cleanup.

Respondents, with the support of the Presiding Officer, improperly reopened through the back door an argument which it had agreed to waive. Further, the essential lack of action cannot be considered a "good faith effort to comply," even if such lack of action was due to a deficit of funds. There are simply no grounds for finding a good faith effort to comply when there has been no actual compliance and no evidence of any serious attempt to comply. This Board held in *Carroll Oil* that "[e]ven if a company's financial condition is theoretically relevant to an evolution of this penalty factor..., we see little in Carroll Oil's behavior that evinces good faith or cooperation." *Carroll Oil*, 10 E.A.D. at 660. Moreover, the Board in *Carroll Oil* noted that it was "mindful that companies are generally required to comply with their environmental requirements regardless of economic circumstance." *Id.* at 48. Like the respondent in *Carroll Oil,* despite years of correspondence between Respondents, and the federal and Ohio EPA, no compliance resulted from these years of correspondence. There is simply nothing that can be gleaned Respondents' behavior that demonstrates good faith or willingness to comply.

Further, under the Penalty Policy any consideration of the "willfulness of the violation" requires an evaluation of the forseeability of the violations. Respondents put on no evidence even suggesting the violations were not foreseeable. Surely, given that the Respondents had been in the wood treating business at these locations for approximately 14 years at JAB Toledo and over 20 years at JAB Ohio, and that Respondents knew they were regulated by RCRA, they could foresee that upon ceasing operations they would have to decontaminate their drip pads. They could not in good faith have believed that it was acceptable to leave chromium and arsenic contamination on the ground.

The Presiding Officer also failed to consider the assets of the parent corporation when evaluating whether the Respondents had demonstrated an inability to comply. While the Presiding Officer had already determined that the parent corporation, JAB Co., was not liable for the violations themselves (a finding that Complainant contests above), that does not mean that the Agency is precluded from looking at the assets of the parent to determine of the subsidiaries can afford to comply with the law. Administrative and judicial decisions have held that the assets of a non-liable parent can be evaluated in determining a penalty. See *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 549 (EAB 1994); *Carroll Oil*, 10 E.A.D. at 665; *United States v. Mun. Auth. of Union Twshp.*, 150 F.3d 259 (3rd Cir. 1998). The Presiding Officer did not consider what other assets JAB Co. might have had to effect the compliance of its wholly-owned subsidiaries even though Respondents admitted that JAB Co. has been paying their taxes and providing them "with funds when necessary." (Docket Index No. 59(2) at 18). JAB Co. is a source of funding to meet Respondents obligations under RCRA. Moreover, the very limited economic data the Presiding Officer did have showed that that at least JAB Toledo continued to transfer assets to its parent while ignoring its obligations under RCRA, to the detriment of the

environment. This has continued until long after receiving the notices of violations from Ohio EPA regarding the drip pads. Not only was JAB Toledo not decontaminating the drip pad with the limited rental income it did have, it was giving that money instead to its parent, all the while telling EPA and the Presiding officer that it was making "good faith efforts to comply."[57] The claim of "good faith" is even more outrageous in light of the fact that Respondent JAB Ohio transferred significant assets to its parent JAB Co. at or around the same time that money should have been spent to decontaminate the drip pads instead.[58]

Finally, even if there had been grounds to find a good faith effort to comply, the Penalty Policy only allows for a maximum of a 40% reduction in the penalty. The Presiding Officer was free to award a larger discount than allowed for in the Penalty Policy, so long as he gave reasons for doing so. Certainly, the ALJ certainly did not provide a sufficient basis for a 100 percent reduction in the penalty. At the very least the Board should remand the case for a determination of the penalty based upon the full record. Alternatively, the Board should itself determine the penalty based upon the record before it. Complainant again refers the Board to its previously-filed explanations of the penalty, and believes that these explanations provide sufficient basis for the penalties proposed.

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[57] As discussed, Complainant contends there was sufficient evidence in the record for the Presiding Officer to determine an appropriate penalty amount against both Respondents, and further contends that the amount of civil penalty it was seeking in both cases remains the appropriate penalty amount and it urges the Board to award those penalty amounts against Respondents. However, if the Board decides to remand the determination of derivative liability, the Board could also consider ordering that the determination of the proper penalty be remanded for the Presiding Officer to determine after holding a hearing on the derivative liability of JAB Co.

[58] If JAB Ohio were independently owned and operated, as opposed to being controlled and managed by a related party, JAB Co., it would have had inadequate working capital, including no cash, as a result of JAB Co.'s siphoning of its remaining assets at the time JAB Ohio's operations ceased in 2001. The likely outcome in such a case would have been bankruptcy or a controlled liquidation by JAB Ohio. Had JAB Ohio entered bankruptcy, Complainant's enforcement action would not have been subject to the automatic stay under the Bankruptcy Code. *Commonwealth Oil Refining Co, Inc. v. U.S. EPA*, 805 F.2d 1175 (5th Cir. 1986) (holding that the primary purpose of enforcement of environmental laws is to promote public safety and welfare and thus such enforcement actions are not subject to the automatic stay).

VIII. CONCLUSION AND PRAYER FOR RELIEF

Complainant has demonstrated that the Presiding Officer erred in denying Complainant's Motions for Accelerated Decision on Derivative Liability and in granting Respondents' Motions for Accelerated Decision on Derivative Liability. Respondents provided no documentation to rebut Complainant's evidence that JAB Co improperly de-capitalized JAB Ohio and JAB Toledo by transferring their assets to itself instead of using such assets to fulfill the subsidiaries' environmental obligations. At the very least, Complainant's evidence of improper transfers was more than sufficient to preclude an accelerated decision on derivative liability in favor of JAB Co.

The Board should also overturn the Presiding Officer's denial of Complainant's Motions for Accelerated Decision with regard to penalty, because the Respondents did not provide any evidence creating a genuine issue of material fact in their oppositions to such Motions. The Board should either award the civil penalty proposed by Complainant in each case, award a different amount in accordance with the penalty criteria in RCRA and the Penalty Policy, or remand the matters for a consideration of the penalties based on the records at the time of Complainant's Motions.

Alternatively, if the Board does not find error in the denial of accelerated decision on the penalties, the Board should find that the Presiding Officer abused his discretion in awarding a zero penalty in each matter. If the Board so finds, the Board should either award the civil penalty proposed by Complainant in each case, award a different amount in accordance with the penalty criteria in RCRA and the Penalty Policy, or remand the matter for a consideration of the penalty based on all of the evidence in the record at the time of the Initial Decisions.

The Board should also clarify that Complainant was not required to call a witness at a hearing to testify regarding the calculation of the proposed penalty.

Finally, the Board should enter a Compliance Order stating that Respondents are not relieved of their environmental obligations and ordering Respondents to comply with the drip pad closure requirements of RCRA and the EPA-approved Ohio hazardous waste regulations.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing **Complainant's Brief in Support of Its Notice of Appeal**, with confidential business information redacted, was filed with the Environmental Appeals Board electronically, via the CDX portal. I certify that on this date the foregoing was also served as follows:

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