COMMERCE CASE MANAGEMENT PROGRAM DECISIONS:

PIERCING THE CORPORATE VEIL CASES

by

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The following summaries address piercing the corporate veil and alter ego Opinions issued by the Commerce Court. In addition, the Court's Opinions concerning the "participation theory" are set forth below as well.

Shortly after this Chapter's original publication in 2008, the Superior Court issued

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This work is part of a joint project that originated between the Philadelphia Bar Association's Business Law Section and its Business Litigation Committee, and Temple's Beasley School of Law; which effort has now been expanded to include students from the Rutgers-Camden School of Law. Students work with a lawyer mentor/editor to summarize and describe opinions in the Commerce Case Management Program by distinct areas of subject matter. Each lawyer works with one, two or three law students on a particular area of the law in which the Commerce Program Judges have issued opinions, with the students doing the research and writing and the lawyer guiding and editing the work. As completed, each "chapter" will be posted on the Business Litigation Committee's web page, which can be located on the Bar Association's website, http://www.philadelphiabar.org/, with the goal to catch up to the hundreds of opinions already written, and then to keep up with the well over 100 opinions added annually. Ideally, we hope to publish this compilation in a single book. If you are interested in participating in this project, that has so many potential benefits, please contact Lee Applebaum at (215) 893-8702 or lapplebaum@finemanlawfirm.com. Temple Law Professor William J. Woodward, Jr. was and is essential to the creation and development of this effort, and Professor Eve Klothen has brought Rutgers-Camden School of Law students into the effort.

its Opinion in Fletcher-Harlee Corp. v. Szymanski.[2] As the Superior Court itself stated: "'there appears to be no clear test or well settled rule in Pennsylvania . . . as to exactly when the corporate veil can be pierced and when it may not be pierced.'"[3] In this case, the Court plainly intends to clarify the law. The case went to trial (nonjury) on the veil piercing issues, providing the court with this opportunity. The Opinion is now treated by some as the guiding light on the subject.

In providing context and history on piercing the veil, the Superior Court first raises the Pennsylvania Supreme Court's oft-cited language from Lumax Industries, Inc. v. Aultman[4]:

> We note at the outset that there is a strong presumption in Pennsylvania against piercing the corporate veil. Also, the general rule is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person.
>
> Commonwealth Court has set out the factors to be considered in disregarding the corporate form as follows: undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud.

The Court then quotes from its own opinion in The Village at Camelback Property Owners Association, Inc. v. Carr,[5] as part of a "more thorough discussion" on the subject. The emphasis in Village of Camelback was on the broader concepts of injustice and equity, rather than taking a checklist of elements approach. Importantly, the Court states

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[2]936 A.2d 87 (Pa. Super. 2007), appeal denied, 598 Pa. 768 (2008), cert. denied, 129 S. Ct. 1581 (2009). Subsequent application of Fletcher-Harlee in Pennsylvania's state and federal courts is not within the scope of this Chapter.
[3]Id. at 95 (citation omitted).
[4]543 Pa. 38, 669 A.2d 893, 895 (1995).
[5]371 Pa. Super. 452, 538 A.2d 528, 532-533 (Pa. Super. 1988).

that piercing the corporate veil does not require proving actual fraud; rather the focus is on "avoiding injustice."

After a thorough restatement of relevant facts from the record, the Superior Court considers the Lumax Industries factors as a "starting point." It then finds that two factors favor piercing the veil: there was undercapitalization and a failure to adhere to corporate formalities. On the other hand, there was not a substantial intermingling of corporate and personal affairs, and that there was no proof of fraud. On this last point, the Court addresses the issue of whether fraud in this context requires proving common law fraud. The Superior Court responds by observing that "any definition of fraud necessarily includes a knowing misrepresentation of a fact by one party which induced another party to act or to fail to act, which, in the end, caused damage to the party who relied upon the misrepresentation."[6] That standard could not be met in this case. However, this did not end the inquiry, as it did below.

Adhering to its intended course, i.e., to treat piercing the veil broadly and to place the Lumax Industries elements within that broader context, the Superior Court begins the next section of its Opinion with the heading: "Beyond the *Lumax Industry* Factors." It then quotes from Village of Camelback again, particularly emphasizing the following language: "In deciding whether to pierce the corporate veil, courts are basically concerned with determining if equity requires that the shareholders' traditional insulation from personal liability be disregarded and with ascertaining if the corporate form is a sham, constituting a facade for the operations of the dominant shareholder." It is only in this context, and in light of these principles, that courts inquire into "whether corporate

[6]936 A.2d at 100.

formalities have been observed and corporate records kept, whether officers and directors other than the dominant shareholder himself actually function, and whether the dominant shareholder has used the assets of the corporation as if they were his own."[7]

The Court then reiterates the two Lumax Industries elements that it had previously found proven; adduced that even though there was no proof of substantial intermingling, there was proof of some intermingling of personal and corporate affairs; and that the individual owner himself disregarded his corporation's separate legal status as to his family of corporations, further rendering that separation a sham. Additionally, the principal "made little effort to ensure that the interests of [the corporation] diverged from his personal interests and the interests of his other businesses." His supposedly different entities had the same business address, shared the same office and even had the same computer and sole employee. Interestingly, the court considered the principal's lack of credibility, even during the litigation process, in questioning his explanations for later incorporating a new, supposedly distinct, corporation. He was "the sole shareholder, director, and officer" of these entities which were all in the same (concrete) business,[8] i.e., there was no credible reason to have created a new company doing what the old company did other than to avoid a judgment on the old corporation, and to continue the same business debt free.

The Superior Court rejected the fear that the term "injustice" should be treated as an "ephemeral" concept that could be abused in a piercing the veil analysis; rather, it turned the word into a new term of art, describing the sham legal distinctions between

[7] Id. at 101.
[8] Id. at 101-102.

corporations as ephemeral. It reversed the trial court, finding it error not to have pierced the corporate veil on the trial record.[9]

COMMERCE COURT OPINIONS[10]

PIERCING THE CORPORATE VEIL CLAIMS PERMITED

Goldenberg v. Royal Petroleum Corp., September Term 2003, No. 004168, 2004 Phila. Ct. Com. Pl. LEXIS 45 (C.C.P. Phila. Dec. 2004) (Jones, J.) (holding the Defendants' actions sufficient to pierce the corporate veil under the alter-ego theory and for self-dealing)
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/030904168.pdf.

Edwin R. Goldenberg ("Goldenberg") was a minority shareholder of Royal Petroleum Corporation ("Royal") and Acme Oil Corporation ("Acme"). Goldberg alleged that Don Wenger and Ruth Leventhal Nathanson (collectively the "Defendants") together owned a majority interest in Royal and Acme. Goldenberg claimed that he was oppressed and mistreated in various ways through Defendants' improper actions, causing him stock losses; and that the Defendants should have been held liable under the theory of piercing the corporate veil for his damages. Defendants asserted preliminary objections seeking dismissal of this claim.

The Court observed that under Pennsylvania law, even where a corporation's stock is owned entirely by one person, the corporation is to be treated as a separate and independent entity. This creates a strong presumption against piercing the corporate veil. The Pennsylvania courts will disregard the corporate veil under a limited number a circumstances including:

> when [the corporate form is] used to defeat public

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[9] Id.
[10] The Commerce Court case Opinions summarized herein were last updated on October 9, 2010. The appellate case law cited above is not updated.

> convenience, justify wrong, protect fraud or defend crime, and only after considering factors as undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, and use of the corporate form to perpetrate a fraud.[11]

The Court further stated that when an individual or corporate owner sufficiently controls the corporation, the "alter-ego theory" of piercing the corporate can create liability for the controlling owner.[12]

In the case at bar, Plaintiff Goldenberg sufficiently pleaded a claim to pierce Acme and Royal's corporate veil. To support his veil piercing argument, Goldenberg had alleged: (1) that the Defendants dominated and controlled Acme and Royal, such that they caused Acme and Royal to experience losses; and (2) self-dealing by the individual Defendants. The Court held that, as pleaded, these allegations were sufficiently specific to satisfy the strict pleading requirements to pierce the corporate veil.[13]

James J. Gory Mechanical Contracting, Inc. v. Turchi, August Term 2004, No. 3361, 2005 Phila. Ct. Com. Pl. LEXIS 125 (C.C.P. Phila. March 31, 2005) (Jones, J.) (Court found the Plaintiff alleged sufficient facts to establish a cause of action under the theory of piercing the corporate veil).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/040803361.pdf.

In James J. Gory Mechanical Contracting, Inc., the Court overruled the defendant's preliminary objections. Defendant John J. Turchi, Jr. ("Mr. Turchi") had demurred, claiming that the complaint failed to aver facts sufficient to pierce the corporate veil to hold him personally liable.

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[11] First Union Bank v. Quality Carriers, Inc., 48 Pa. D. & C. 4th 1, 50 (C.C.P. Phila. 2000).
[12] Miners, Inc. v. Alpine Equipment Corp., 722 A.2d 691, 695 (Pa. Super. 1998).
[13] The Court cited to Lumax Industries, Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893 (1995) for the proposition that a "claim for piercing the corporate veil will be dismissed if it is not supported by specific factual averments, rather than mere legal conclusions". Goldenberg was favorably cited in Motorola, Inc. v. Airdesk, Inc., No. 04-4940, 2005 U.S. Dist. LEXIS 6601 (E.D. Pa. April 15, 2005) (Kauffman, J.).

In the case at bar, the following Defendants were allegedly controlled by Mr. Turchi, who was the principal officer, employee, and owner of the following: Turchi, Inc.; Walnut Construction Corp.; 400 Walnut Associates, LP; 400 Walnut Corporation; 1700 Association, LP; 1700 Corporation; 1930-34 Associates, LP; and 1930-34 Corporation (collectively the "Defendants").

Between June 2001 and January 2004, the Defendants employed James J. Gory Mechanical Contracting, Inc. ("Plaintiff") to do work for them on various projects; and in each instance paid the Plaintiff less than it invoiced on those jobs. On each of these jobs, the Plaintiff made claims for the unpaid balances against both the Defendants and Mr. Turchi individually, seeking to pierce the corporate veil against Mr. Turchi.

The Court used the Pennsylvania factors test to determine whether to pierce the corporate veil,[14] and after applying this law to the facts pleaded, and making all inferences reasonably deducible therefrom, the Court could not resolve all doubts in favor of granting a demurrer. The Court opined that the Plaintiff met its burden by alleging in its complaint that "Mr. Turchi dominate[d] and control[led] the other Defendants, use[d] them as his *alter ego*, misrepresented their status in dealings with [James J. Gory Mechanical] Contracting, and kept certain of them undercapitalized."

[14]Pennsylvania's courts look to the following factors to determine whether to pierce the corporate veil: (1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs; and (4) use of the corporate form to perpetrate a fraud. Lumax Industries, Inc. v. Aultman, 543 Pa. 38, 42, 669 A.2d 893, 895 (1995); Village at Camelback Prop. Owners Ass'n, Inc., 538 A.2d 528, 533 (Pa. Super. 1988), aff'd, 524 Pa. 330, 572 A.2d 1 (1990).

City of Philadelphia v. Human Services Consultants, II, Inc., March Term 2003, No. 00950, 2004 WL 717240, 2004 Phila. Ct. Com. Pl. LEXIS 26 (C.C.P. Phila. Mar. 23 2004) (Jones, J.) (Court sustained Defendants' preliminary objections relating to piercing the corporate veil to reach one individual, but overruled Defendants' preliminary objections relating to piercing the corporate veil to reach another individual). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/030300950.pdf.

The Court in Human Services Consultants found that Plaintiffs failed to state a claim under the piercing the corporate veil theory against one individual Defendant, but did state a claim under the piercing the corporate veil theory against another individual Defendant.

Plaintiffs, City of Philadelphia, County of Luzerne, and County of Lehigh, brought the instant lawsuit against Defendants Human Services Consultants, II, Inc. ("HSCII"), Human Services Consultants Management, Inc. ("HSCM"), Richard Adams, Linda Adams, and Edgewater, Inc. The suit arose out of three separate contracts for residential services to mentally ill and mentally retarded individuals. Although Richard Adams and Linda Adams were not parties to the contracts, Plaintiffs argue that the allegations in their complaint were sufficient to pierce the corporate veil to reach the Adams, who owned and managed HSCII and HSCM.

The Court started its analysis by noting there is a strong presumption against piercing the corporate veil in Pennsylvania.[15] Piercing the corporate veil is the exception, and courts should always begin with the general rule that the corporate entity should be upheld unless specific and unusual circumstances call for the exception.[16] The following factors are to be considered in determining whether the corporate veil should be pierced

[15]Lumax Indus., Inc. v. Aultman, 543 Pa. 38669 A.2d 893, 895 (1995).
[16]JK Roller Architects, LLC v. Tower Investments, Inc., 2003 Phila. Ct. Com. Pl. LEXIS 40 (C.C.P. Phila. Mar. 17 2003) (Jones, J.) (quoting First Realvest, Inc. v. Avery Builders, Inc., 600 A.2d 601, 604 (Pa. Super. 1991)).

in Pennsylvania: (1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs; and (4) use of the corporate form to perpetuate a fraud.[17]

In order to withstand Defendants' demurrer, Plaintiffs had to set forth facts to support the liability averred in their complaint. The Court found that Plaintiffs' complaint failed to support piercing the corporate veil against Linda Adams. Plaintiffs argued that Linda Adams was the second in command with absolute control over the management and financial affairs of the corporate entities. The Court found this "insufficient to support the extreme remedy of piercing the corporate veil." The Court stated "that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person." Furthermore, the Court found Plaintiffs' allegations that HSCM needed extra money from HSC to fund Linda Adam's lavish lifestyle to be conclusions of law. Plaintiffs failed to allege what Linda Adams purportedly did to bring her actions within the parameters of piercing the corporate veil, and her demurrer was granted.

While similar claims of command and control were inadequate bases for a piercing the veil claim against Richard Adams, the Court determined that five other paragraphs of the Plaintiffs' complaint adequately set forth conduct in which Richard Adams allegedly engaged that would bring his actions within the parameters of a piercing the corporate veil claim.[18]

[17] Id. (quoting Lumax Indus., Inc. v. Aultman).
[18] The details of these allegations were not set out in the Opinion.

Temple University Health System, Inc. v. National Union Fire Insurance Company of Pittsburgh, Pa., February Term 2004, No. 1547, 2005 WL 167583, 2005 Phila. Ct. Com. Pl. LEXIS 21 (C.C.P. Phila. Jan. 7 2005) (Jones, J.), affirmed in part and reversed in part, Temple University Health System, Inc. v. National Union Fire Insurance Company of Pittsburgh, Pa., 898 A.2d 1143 (Pa. Super. 2006) (without opinion)[19] (Court granted Plaintiffs' motion for judgment on the pleadings against non-signatories in light of piercing the veil claims). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/040201547.pdf).

The Court in Temple University Health System determined that the gist of the action doctrine was appropriately applied to parties who were not signatories to the agreement in contest, because the non-signatories' alleged conduct could potentially result in piercing the corporate veil, and permitting the same contract claims against them as against the corporation.

Plaintiffs, Temple University Health Systems, Inc. ("TUHS"), Temple University Hospital, Inc. ("TUH"), Greater Philadelphia Health Services III Corporation ("GPHS"), and several individuals, brought this cause of action against Defendant National Union Fire Insurance Company of Pittsburgh ("NUFIC"). Plaintiffs, insured by NUFIC, sought a declaration that NUFIC had a duty to defend and indemnify the insured corporate entities and indemnify the insured individuals in another lawsuit, Aim High Income Municipal Fund v. Temple University Health Systems, Inc. ("Aim High").

The underlying plaintiffs in Aim High had brought their suit against the instant declaratory judgment Plaintiffs for both breach of contract and negligence. The insurance carrier took the position that the underlying claims were based on a breach of contract claim, and the insurance policy excluded coverage for contract claims. The

[19]The January 7, 2005 opinion was incorporated into Temple University Health System, Inc. v. National Union Fire Insurance Company of Pittsburgh, Pa., February Term 2004, No. 1547, 2005 Phila. Ct. Com. Pl. LEXIS 1 (C.C.P. Phila. Mar. 18 2005) (Jones, J.).

Court found that the gist of the underlying action was in contract, not negligence, and thus coverage was excluded.

The instant Plaintiffs, however, attempted to shield themselves from the consequences of the gist of the action doctrine by asserting that not every corporate Plaintiff herein signed the contract at issue in the Aim High case. Although the Court recognized that TUHS was not a signatory to that agreement, it reasoned that because the Aim High plaintiffs alleged conduct which could potentially pierce the corporate veil of GPHS to reach TUH and TUHS, the application of the gist of the action doctrine was appropriate for them as well.

Fineman & Bach, P.C. v. Wilfran Agricultural Industries, Inc., March Term 2001, No. 2121, 53 Pa. D. & C.4th 62 (C.C.P. Phila. July 30, 2001) (Herron, J.) (alter ego claims permitted in suit by law firm against individuals for corporate client's legal fees). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/fine730.pdf.

A law firm brought claims against a former client and its principals, a husband and wife, alleging liability for unpaid legal fees. The individuals were also alleged to be firm clients in their own right. The principals allegedly promised to pay the corporate legal fees and in fact did so for a time, but subsequently ceased doing so. The law firm claimed that the individuals were liable for both their own outstanding legal fees and those of the corporation. The firm claimed that the corporation was controlled by the principals, and was an alter ego, artifice and façade. The Court found that the Complaint was sufficiently specific, though barely, to withstand dismissal; and permitted a claim for liability on the corporation's legal fees to proceed against the individuals.

PIERCING THE CORPORATE VEIL CLAIMS REJECTED

Sandler v. Nunez, December Term 2007, No. 5045, 2009 Phila. Ct. Com. Pl. LEXIS 188 (C.C.P. Phila. Sept. 22, 2009) (Bernstein, J.) (holding that unopposed facts by defendant in support of motion for summary judgment defeated corporate veil allegations).
This Opinion is available at http://www.courts.phila.gov/pdf/cpcvcomprg/071205045.pdf.

Plaintiff's Amended Complaint alleged, among other things, that he should be allowed to pierce the corporate veil of F.I.V.A. Corporation ("FIVA") to seek liability directly against its CEO, Robert Nunez. This included allegations that Nunez allegedly traded under FIVA's name; that FIVA was "believed to be undercapitalized"; that FIVA was "believed to have been undercapitalized to carry on its business"; that Nunez controlled FIVA as its sole shareholder; that Nunez is "believed to" substantially intermingle his and FIVA's assets and affairs; that he is "believed to" disregard corporate formalities; that Nunez is "believed to" used the corporate form to further injustice; and that he was "believed to" use FIVA to violate Pennsylvania's Real Estate Licensing Laws.

Nunez filed a summary judgment motion. Instead of responding, Plaintiff filed Preliminary Objections. These were overruled and the Plaintiff was ordered to respond to the Summary Judgment Motion. The Plaintiff responded generally, but failed to respond to the factual averments in the paragraph by paragraph allegations in the Motion. Plaintiff thus admitted the facts averred, which included: that Nunez was FIVA's CEO; FIVA was a New York corporation registered to do business in Pennsylvania; FIVA filed its own corporate returns and maintained corporate minutes; Nunez filed his own personal tax returns based on the income he received as an officer of FIVA; Plaintiff sought to buy two investment properties in Philadelphia based on his projected income;

Nunez, as a FIVA officer, gave Plaintiff advice on two properties; Plaintiff thoroughly inspected the properties; Plaintiff applied for loans; Plaintiff was given FIVA contracts for renovation work, but claims he did not sign them; Nunez did not sign any of the contracts; throughout all of the transactions and construction, Nunez held himself out to Plaintiff as a public officer of FIVA; all checks paid to FIVA for construction work were made out to FIVA; all renovation contracts offered to Plaintiff contained FIVA's name; all payments to contractors for work at Plaintiff's properties were on FIVA checks; all of Nunez's e-mails identified Nunez as a FIVA officer; and all of Plaintiff's claims against Nunez arise out FIVA's renovation work at the two properties.

Taking these unopposed facts as true, the Court found no genuine issues of material fact and granted Nunez summary judgment.

While the case has an unusual procedural posture, it remains valuable to see the sorts of facts that can defeat an effort to pierce the corporate veil.

Driscoll/Intech II v. Scarborough, August Term 2007, No. 1094, 2008 Phila. Ct. Com. Pl. LEXIS 33, 3 Pa. D. & C.5th 279 (C.C.P. Phila. Feb. 12, 2008) (Sheppard, J.) (no piercing the veil/alter ego pleaded where plaintiff failed to plead as to all required elements).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/070801094.pdf.

This case involves the alleged failures of a surety (Scarborough), a risk manager/claims administrator (IBCS), and bond collateral trustee (FMB) in connection with a construction bond to the owner on a construction subcontract. The plaintiff owner alleged not merely a breach of the subcontract (into which the other agreements merged), and the bond, but allegedly fraudulent conduct in connection with the failure to perform and pay. The surety, Scarborough, was CEO of the claims administrator, IBCS.

The plaintiff/owner sought to pierce the corporate veil between Scarborough and IBCS. Defendants filed Preliminary Objections. The Court cited the following elements that courts have considered in a piercing the veil claim: "1) undercapitalization, 2) failure to adhere to corporate formalities, 3) substantial intermingling of corporate and personal affairs, and/or 4) use of the corporate form to perpetrate a fraud."[20] All the owner's complaint alleged was that Scarborough used IBCS as a sham to create fraudulent delays in meeting Scarborough's obligations by having IBCS ask for information Scarborough already had, and by seeking to investigate the facts surrounding the alleged breach of the construction contract. There were no pleadings addressing the other piercing factors, or going beyond these two limited allegations. Thus, plaintiff "failed to meet the minimum threshold to allow [its] claim of alter ego/piercing the corporate veil liability to go forward." The Preliminary Objections were granted.

BDO Seidman, LLP v. Kader Holdings Company, Ltd., May Term 2004, No. 973, 2005 WL 637450, 2005 Phila. Ct. Com. Pl. LEXIS 140 (C.C.P. Phila. Mar. 11 2005) (Jones, J.) (Court denied Plaintiff's motion to compel the parent corporation to arbitrate because piercing the corporate veil doctrine, agency principles, third-party beneficiary principle, and doctrine of estoppel were invalid as applied). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/040500973-03112005.pdf.

In BDO Seidman, the Court refused to pierce the corporate veil to compel a parent company into arbitration pursuant to an agreement entered into by its subsidiary and the Plaintiff. The Court concluded that Plaintiff could not establish that the parent company controlled the subsidiary to the requisite extent.

Plaintiff BDO Seidman, LLP ("BDO") is an auditing company that provided services to Defendant Bachmann Industries, Inc. ("Bachmann"), a wholly-owned subsidiary of Kader Industrial Company, Ltd. ("Kader"). BDO provided services to

[20] Miller v. Brass Rail Tavern, 702 A.2d 1072, 1075 (Pa. Super. 1997).

Bachman for a series of years pursuant to engagement letters, which contained a dispute resolution clause mandating a negotiation period followed by arbitration.

Bachmann, Kader, and other related entities allegedly engaged in an improper tax planning scheme. The Internal Revenue Service determined that the scheme resulted in the underpayment of withholding taxes for the 1997-1998 tax periods. Bachmann sought damages from BDO for the taxes imposed. In accordance with the engagement letters, Bachmann and BDO went to arbitration. BDO initiated this action to compel Kader to participate in that arbitration, on the theory of piercing the corporate veil.

There is a strong presumption against piercing the corporate veil.[21] There is no precise test that determines when the corporate veil should be pierced.[22] However, there must be a strong showing of domination and control by the parent corporation.[23] In order for BDO to prevail, it must show that Kader dominated and controlled Bachmann to the extent that Bachmann had "no separate mind, will, or existence of its own."[24] BDO had to show that Bachmann did not possess a separate existence, but merely served as a conduit.[25] Furthermore, the corporate veil should only be pierced to prevent "fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from public liability for crime."[26]

In its argument to compel Kader to participate in the arbitration, BDO established

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[21]Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893, 895 (Pa. 1995).
[22]Good v. Holstein, 787 A.2d 426, 430 (Pa. Super. 2001).
[23]See, e.g., Craig v. Lake Asbestos of Quebec, Ltd, 843 F.2d 145 (3d Cir. 1988); Pearson v. Component Tech. Corp., 80 F. Supp.2d 510 (W.D. Pa 1999); Garden State Tanning, Inc. v. Mitchell Mfg. Group, Inc., 55 F. Supp.2d 337 (E.D. Pa. 1999); Nazarewych v. Bell Asbestos Mines, Ltd., 19 Phila. 429 (C.C.P. Phila 1989).
[24]Nazarewych, 19 Phila. at 441.
[25]Craig, 843 F.2d at 149.
[26]Village at Camelback Property Owners Ass'n v. Carr, 538 A.2d 528, 533 (Pa. Super. 1988) , aff'd, 524 Pa. 330, 572 A.2d 1 (1990).

several important factors: Bachmann and Kader had several common directors; Kader guaranteed Bachmann's bank loans; Kader conceived and directed the tax planning scheme; Bachmann did not issue a dividend; the highest ranking officer at Bachmann did not attend its board meetings; and Bachmann almost only sold products supplied by Kader. However, the Court determined that these factors, albeit significant, were not dispositive. Kader demonstrated that Bachmann was a true company, and not a mere conduit for Kader, by establishing these other factors: Bachmann had a minimum of 40 employees; Bachmann had its own headquarters, located far away from Kader; Bachmann had its own officers, maintained its own records, developed its own retirement plans, negotiated its own union, and received no working capital from Kader; and Bachmann's financial statements showed that it had a positive net worth for the period in question. Thus, BDO could not establish that Kader controlled Bachmann to the requisite extent.

Banks v. Hanoverian, Inc., January Term 2005, No. 2807, 2005 Phila. Ct. Com. Pl. LEXIS 287 (C.C.P. Phila. June 23, 2005) (Abramson, J.) (signing a contract on behalf of the breaching party is insufficient to support a corporate veil piercing claim).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/050102807.pdf.

In Banks v. Hanoverian, Inc., the Court granted Donald Metzger's ("Metzger") demurrer because Robert Banks, Sr. ("Banks") failed to set forth facts sufficient to aver a cause of action under a piercing the corporate veil theory.

In the case at bar, Banks entered into a contract with Hanoverian, Inc. ("Hanoverian"), which was signed by Metzger on Hanoverian's behalf. Metzger was Hanoverian's CEO and sole shareholder.[27] Banks claimed that Metzger should be liable

[27]Additional factual details can be found in the Court's later opinion on summary judgment, Banks v. Hanoverian, Inc., January Term 2005, No. 2807, 2006 Phila. Ct.

for breach of contract under the theory of piercing the corporate veil. The Court applied the Pennsylvania factors test to determine whether to allow piercing of the corporate veil,[28] and stated that "while it is not necessary to set forth the evidence by which facts are to be proved, it is essential that the facts the pleader depends upon to show liability be averred."

The Court found that Banks failed to plead the existence of a contract between himself and Metzger through the theory of piercing the corporate veil. Banks grounded Metzger's liability on the single fact that Metzger personally signed the contract on Hanoverian's behalf. The Court held this fact alone was insufficient to pierce the corporate veil, and sustained Metzger's preliminary objections and dismissed the claim against him.

In a footnote, the Court observed that is was mindful of the distinction between piercing the corporate veil and the participation theory, as set forth in Wicks v. Milzoco.[29] While inapplicable to the breach of contract, unjust enrichment and premises liability claims, the Court did recognize that the participation theory could potentially apply to the Plaintiff's fraud claim.[30]

Com. Pl. LEXIS 128 (C.C.P. Phila. March 10, 2006) (Abramson, J.), available at http://fjd.phila.gov/pdf/cpcvcomprg/050102807-031006.pdf.

[28]As stated above, Pennsylvania courts look to the following factors to determine whether to pierce the corporate veil: (1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs; and (4) use of the corporate form to perpetrate a fraud. Lumax Indus., 543 Pa. 38, 42, 669 A.2d 893, 895 (1995); Village at Camelback Prop. Owners Ass'n, Inc. v. Carr, 538 A.2d 528, 533 (Pa. Super. 1988), aff'd, 524 Pa. 330, 572 A.2d 1 (1990).

[29]503 Pa. 614, 470 A.2d 86 (1983).

[30]The fraud claim against Metzger was later dismissed on summary judgment.

CGB Occupational Therapy Inc. v. Bala Nursing and Retirement Center, Ltd., April Term 2003, No. 1758, 2005 WL 280838, 2005 Phila. Ct. Com. Pl. LEXIS 19 (C.C.P. Phila Jan. 27, 2005) (Sheppard, J.) (Defendants' motion for summary judgment granted in part and denied in part, concluding that piercing of corporate veil doctrine invalid as applied).
This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/030401758.pdf.

In CGB Occupational Therapy Inc., the Court refused to pierce the corporate veil. It would not hold Defendant Philip Miller personally liable for claims against his three Co-Defendants, Bala Nursing and Retirement Center ("Bala"), MDC Asset Management Corp. ("MDC") and the Center for Rehabilitative Therapies ("CRT"), based solely upon an affidavit that stated Miller was either the President or CEO of the Defendant business entities.

In December 1997, Plaintiff CGB and Defendant CRT entered into an agreement whereby CGB agreed to manage CRT's rehabilitation services, which Defendant CRT had agreed to provide Defendant Bala. Plaintiff CGB was responsible for hiring therapists who would work as CRT's employees at Bala, but under CGB's management. Defendant CRT was to pay Plaintiff CGB recruitment fees for hiring the therapists.

In July 1998, CRT assigned to Bala all of its rights, interests and obligations in the CGB agreement. In March 1999, Bala's administrator gave notice to Plaintiff CGB that Bala was terminating the management agreement, which CGB claimed violated the agreement and apparently resulted in damages to Plaintiff. Plaintiff claims that a separate harm was discovered in May 1999, when a CGB representative retrieved equipment from Bala. CGB claimed this equipment was unacceptable for reuse, and that there had been a improper substitution of inferior equipment for the equipment that CGB supplied to Bala.

Miller was the CEO or President of all the Defendant entities. Plaintiff CGB argued that the corporate veil must be pierced to hold Miller personally liable for the

alleged acts of CRT, MDC, and Bala, including claims for breach of contract, fraud and conversion, among others. In Pennsylvania, there is a strong presumption against piercing the corporate veil.[31] The following factors are to be considered: (1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs; and (4) use of the corporate form to perpetuate a fraud.[32]

In arguing against Miller's summary judgment motion, Plaintiff relied solely on Miller's affidavit to support its piercing the corporate veil claim. In his affidavit, Miller had stated that he was either the CEO or the President of all the Defendant entities. Plaintiff argued that Miller's status alone could establish that these businesses were merely an instrumentality of Miller; however, Miller's affidavit only established that he held these executive positions with the Defendant entities. The Court found that this alone failed to provide sufficient evidence to support Miller's personal liability. Thus, the Court granted Miller summary judgment on this claim.[33]

[31]Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893, 895 (1995).

[32]JK Roller Architects, LLC v. Tower Investments, Inc., July Term 2002, No. 02778, 2003 Phila. Ct. Com. Pl. LEXIS 40 (C.C.P. Phila. Mar. 17 2003) (Jones, J.), discussed immediately below.

[33]In its Complaint, Plaintiff had pleaded more extensively, upon information and belief, gross under capitalization, failure to observe corporate formalities, no regular payment of dividends, siphoning funds, no functioning officers or directors, inadequate record keeping and that the corporations were "facades" for their principals' operations. Apparently, no facts adduced during discovery supported these averments and Miller's affidavit was the sole evidence offered on the claim.

JK Roller Architects, LLC v. Tower Investments, Inc., July Term 2002, No. 02778, 2003 WL 1848101, 2003 Phila. Ct. Com. Pl. LEXIS 40 (C.C.P. Phila. Mar. 17 2003) (Jones, J.) (Court sustained Defendants' preliminary objections relating to piercing the corporate veil because Plaintiffs failed to plead sufficient facts). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/jkroller303.pdf.

The Court in JK Roller Architects dismissed Plaintiff's claims against an individual because the Plaintiff failed to plead sufficient facts to state a claim against that person under a theory of piercing the corporate veil.

Plaintiff JK Roller Architects, LLC ("JK Roller") brought a breach of contract claim against Tower Investments, Inc. ("Tower"), Delaware 1851 Associates, LP ("1851"), Northern Liberties Development, LP ("NLD"), Reed Development Associates, Inc. ("RDA"), and Bart Blatstein ("Blatstein"). The instant action arose out of seven separate contracts for architectural services between Plaintiff and several of the Defendants.

Plaintiff averred that Blatstein was the dominant owner who controlled Tower, which in turn controlled 1851, NLD and RDA. Plaintiff claimed that Blatstein used these entities as his alter egos. Plaintiff asserted that Blatstein wholly ignored the separate status of these entities, routinely held himself out as Tower, and dominated and controlled these entities so that the separate existence of each entity was merely a sham.

The Court started its piercing the corporate veil analysis by stating that there is a strong presumption in Pennsylvania against disregarding the corporate form.[34] Courts must begin with the general rule that the corporate entity should be upheld unless specific and unusual circumstances call for the exception of piercing the corporate veil.[35] The following factors are to be considered in determining whether to pierce the corporate veil:

[34] Wedner v. Unemployment Comp. Bd. of Review, 296 A.2d 792, 794 (Pa. 1972).
[35] First Realvest, Inc. v. Avery Builders, Inc., 600 A.2d 601, 604 (Pa. Super. 1991).

(1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs; and (4) use of the corporate form to perpetrate a fraud.[36]

Plaintiff failed to meet the burden of averring facts in its complaint to show Blatstein's liability. Blatstein's name was mentioned in only three paragraphs of the complaint, which had twenty-one counts. Plaintiff referred to Blatstein and Tower collectively as "Tower," and lumped the claims against Blatstein with those brought against Tower. The Court stated that Plaintiff must assert specific claims against Blatstein to satisfy Pennsylvania's fact pleading requirements. Furthermore, the averments in the complaint relating to Blatstein's alleged liability under the "alter ego" theory were conclusions of law, and were insufficient to sustain the cause of action. Thus, the Court concluded that the Plaintiff has failed to plead sufficient facts to state a claim against Blatstein under the theory of piercing the corporate veil.

The Court also briefly considered the participation theory. The participation theory "imposes personal liability on corporate officers or shareholders where they have personally taken part in the actions of the corporation."[37] However, the Plaintiff asserted no facts that would support a participation theory claim.

[36]Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893 (Pa. 1995); Village at Camelback Prop. Owners Ass'n, Inc. v. Carr, 538 A.2d 528, 533 (Pa. Super. 1988), aff'd, 524 Pa. 330, 572 A.2d 1 (1990).
[37]Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 621 (1983).

Kevin D. Flynn Development Corp. v. Corporate Express Office Products, Inc., July Term 2005, No. 3523, 2006 Phila. Ct. Com. Pl. LEXIS 50 (C.C.P. Phila. Jan. 19, 2006) (Sheppard, J.)(the Court granted the defendant's demurrer for failure to offer facts to establish a cause of action under the theory of piercing the corporate veil).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/050703523.pdf.

In Kevin D. Flynn Development Corp., the Court granted CE Philadelphia Real Estate, Inc.'s ("CEPRE") demurrer against Kevin D. Flynn Development Corporation ("Flynn") for failing to set forth facts sufficient to plead a cause of action. Flynn claimed that CEPRE should be liable for breach of contract under the theory of piercing the corporate veil.

On or about March 18, 2003, Flynn entered into an agreement of sale with Corporate Express Office Products ("Corporate"). The agreement gave Flynn the exclusive right to sell the property, and a six percent commission for producing a buyer. Flynn pleaded that it produced a ready, willing and able buyer, but that Corporate did not pay the six percent commission as contracted. Flynn claimed that CEPRE was liable for breach of contract because CEPRE was the registered owner/seller of the property within the agreement of sale, and that Corporate was the putative owner. The Court granted CEPRE's demurrer for Flynn's inability to set forth facts establishing liability under the theory of piercing the corporate veil.

In order to withstand a demurrer, a plaintiff must set forth sufficient facts to establish a defendant's liability under the theory of piercing the corporate veil. The Court applied the Pennsylvania factors test to determine whether to pierce the corporate veil.[38] The Court further stated that "[w]hile it is not necessary to set forth the evidence by which facts are to be proved, it is essential that the facts the pleader depends upon to

[38]See Lumax Industries, Inc. v. Aultman and Village at Camelback Prop. Owners Ass'n, Inc., supra at footnote 18.

show liability be averred."[39] The Court dismissed the claim to pierce the veil because the Complaint was devoid of facts that could even potentially make out such a claim.

Tunnell-Spangler & Associates, Inc. v. Katz, May Term 2003, No. 3030, 2003 Phila. Ct. Com. Pl. LEXIS 79 (C.C.P. Phila. Dec. 31, 2003)(Cohen, J.) (the Court applied the Pennsylvania factors to sustain the Defendant's demurrer).
Opinion available at http://fjd.phila.gov/pdf/cpcvcomprg/tunnell-spangler-op.pdf.

In Tunnell-Spangler & Associates, Inc., the Court held that the corporate veil could not be pierced because Tunnell-Spangler & Associates ("Plaintiff") merely alleged conclusions of law, and not the special circumstances necessary to pierce the corporate veil. The Court applied the Pennsylvania factors test to determine whether to allow the piercing of the corporate veil.

The Plaintiff and Entersport Capital Advisors, Inc. ("Entersport") entered into a contract in which Samuel P. Katz ("Katz") was not a named party. (Entersport and Katz are hereinafter collectively referred to as the "Defendants") Plaintiff brought a breach of contract suit naming both Entersport and Katz as Defendants. Katz file preliminary objections on the basis that he was improperly named as a Defendant in the action.

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief.[40] Although "all well-pleaded material, factual averments and all inferences fairly deducible there from" are presumed to be true, pleader's conclusions or averments of law are not considered to be admitted as true.[41] In order to withstand a demurrer, a plaintiff must set forth conduct which the defendant

[39] Frey v. Dougherty, 286 Pa. 45, 48, 132 A. 717, 718 (1926)).
[40] JK Roller Architects. L.L.C. v. Tower Investments, Inc., September Term 2002, No. 2778, 2003 WL 1848101, slip op. at page 1 (C.C.P. Phila. March 17, 2003)(Jones, J.) *available at* http://fjd.phila.gov/pdf/cpcvcomprg/jkroller303.pdf (citing Bailey v. Storiazzi, 729 A.2d 1206, 1211 (Pa. Super. 1999)).
[41] Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. 2000).

allegedly engaged in that would bring his actions within the parameters of a cause of action based on a theory of piercing the corporate veil. Although it is not necessary to set forth the evidences to be proved, the pleader must present facts which show the liability averred.[42]

The complaint alleged that: (1) the Defendants assured the Plaintiff that Entersport and Katz were one and the same, and that Entersport was the corporate name Katz used to initiate the project; (2) Katz was the principal owner of Entersport, and had a significant personal financial interest in the success of the project; and (3) Katz was Entersport's alter ego.

The Court determined that the Plaintiff did not aver the special circumstances necessary to pierce the corporate veil such as fraud, illegality or injustice – that the averments were merely conclusions of law – and therefore dismissed the claims asserted against Katz. However, the dismissal was without prejudice, and Plaintiff was given leave to amend its claims against Katz. As discussed immediately below, the amended claims were ultimately dismissed as well.

Tunnell-Spangler & Associates, Inc. v. Katz, May Term 2003, No. 3030, 2004 Phila. Ct. Com. Pl. LEXIS 33 (C.C.P. Phila. July 15, 2004) (Cohen, J.) (the Court held the Plaintiff's amended complaint to be insufficient to pierce the corporate veil).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/030503030.pdf.

Tunnell-Spangler & Associates ("Plaintiff") brought a Complaint against Entersport Capital Advisor's Inc. ("Entersport") and Samuel P. Katz. The claims against Entersport were ordered to mediation and arbitration. As set forth immediately above, claims against Katz were dismissed with leave to amend those claims. After the Court granted Plaintiff leave to amend its claims against Katz, Plaintiff filed its third amended

[42]Lumax Industries, Inc., supra, 669 A.2d at 895.

complaint against Katz only. The Court sustained Katz's preliminary objections because the Plaintiff's allegations were legally insufficient to impose alter ego liability upon Katz for Entersport's debt.

The amended complaint alleged that Katz breached his contract with the Plaintiff, and that he should be liable for the debt because he was Entersport's alter ego. In support of the corporate veil piercing theory, the amended complaint alleged the following:

1. Katz caused Entersport to be uncapitalized or undercapitalized for its corporate purpose and activities, and that any capitalization was provided by Katz from his personal assets;
2. Katz intermingled substantial assets of Entersport with his personal assets and used the assets of Entersport as his own;
3. Katz was the sole shareholder, director and officer of Entersport;
4. Katz failed to maintain the corporate books and records of Entersport;
5. Katz failed to adhere to corporate formalities;
6. Katz engaged in business activities on behalf of Entersport by personally acknowledging its claims and paying claims made against Entersport by creditors who were similarly situated;
7. Katz employed the corporate entity of Entersport to defraud Plaintiff by promising in the contract to pay the balance of the consideration due to Plaintiff when Katz knew that Entersport was undercapitalized and knew that it was likely that Entersport would not be awarded the contract;
8. Katz assured Plaintiff that Entersport and Katz were one and the same, and that Entersport was the corporate name Katz was using to initiate the project;
9. Katz was the principal owner of Entersport;
10. Katz had a significant personal financial interest in the success of the project;
11. Katz assured Plaintiff that he would be involved in the project every step and would stand 100 percent behind the project; and
12. That as a result of Katz's assurances the Plaintiff signed a contract with Entersport to provide architectural services.

In Pennsylvania, shareholders, officers and directors are not held liable for the corporation's breach of contract, unless liability is premised on the theory of piercing the

corporate veil.[43] The Court applied the Pennsylvania factors test with respect to the theory of piercing the corporate veil.[44]

The Plaintiff's allegations were legally insufficient to impose liability on Katz for Entersport's debt. The Court determined that although the allegations of undercapitalization, intermingling of funds, and failure to adhere to corporate formalities alleged control and alter ego status, the complaint failed to allege how that control and alter ego status were used by the Defendant to further his personal interest. The Court further stated that the complaint contained no allegations averring that Katz agreed to pay, gave a personal guarantee, or agreed to be personally liable in the event Entersport did not pay the consideration. Furthermore, there were no allegations that Katz made any payments on Entersport's behalf. Therefore, the Court held that the Plaintiff's allegations were insufficient to successfully plead a corporate veil piercing claim.

Validation Commerce, LLC v. NGRAVIS, March Term 2004, NO. 07272, 2004 Phila. Ct. Com. Pl. LEXIS 76 (C.C.P. Phila. August 28, 2004) (Cohen, J.) (holding that the Plaintiff failed to plead sufficient facts to sustain liability under the theory of piercing the corporate veil).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/040307272.pdf.

Validation Commerce, LLC ("Validation") filed suit against nGravis, Bryan Yingst ("Yingst"), Justin Staufer ("Staufer"), and Donald Reynolds ("Reynolds") for breach of contract and breach of warranty. Yingst, Staufer and Reynolds (collectively the "Defendants") raised preliminary objections asserting that the Defendants could not be held liable because: (1) Defendants were not parties to the agreement at issue; and (2) Validation's pleadings were insufficient to pierce the corporate veil. The Court

[43] First Realvest, Inc. v. Avery Builders, Inc., 600 A.2d 601, 603 (Pa. Super. 1991) (citing Loeffler v. McShane, 539 A.2d 876 (Pa. Super. 1988)).
[44] See Lumax Industries, Inc. v. Aultman and Village at Camelback Prop. Owners Ass'n, Inc., supra at footnote 18.

concluded that the pleadings were insufficient and dismissed the claims against the Defendants.

Validation entered into a Master Consulting Services Agreement ("Agreement") with the nGravis. Bryan Yingst, who signed the Agreement on behalf of nGravis as an "Internet Consultant" was the only one of the Defendants to be mentioned within the Agreement. The main issue was whether Validation set out material, relevant, well-pleaded facts which, if true, stated a claim against the Defendants under the theory of piercing the corporate veil. To determine whether to pierce the corporate veil, the Court used the Pennsylvania factors test.[45]

In the case at bar, Validation failed to meet its burden. The complaint had averred that each Defendant was an adult individual with "the actual or apparent authority to act on behalf of all the Defendants," including nGravis. The Court held that such pleadings were insufficient to maintain a cause of action based on the theory of piercing the corporate veil, and sustained the Defendants' preliminary objections.

Eisen v. Independence Blue Cross, Aug. Term 2000, No. 2705, 2002 Phila. Ct. Com. Pl. LEXIS 63 (C.C.P. Phila. May 6, 2002) (Herron, J.) (claiming the Defendants operate as a single entity is insufficient to pierce the corporate veil through the alter ego theory).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/eisen502.pdf.

In Eisen v. Independence Blue Cross, the Plaintiffs asserted liability over the named Defendants for breach of contract, relying on the alter ego theory to pierce the corporate veil against certain parties where there was no contractual privity. The Court held that the Plaintiffs did not present sufficient evidence to ground a claim on the alter

[45]See Lumax Industries, Inc. v. Aultman, and Village at Camelback Prop. Owners Ass'n, Inc., supra at footnote 18.

ego theory, and therefore granted summary judgment in favor of four of the six Defendants.

The relationship between the parties consists of a series of contracts between health insurance companies and their subsidiaries, health insurance subscribers and healthcare providers and doctors. The two named subscriber plaintiffs, Deborah A. Carl and Sally Ann Spall, each held Personal Choice health care plans through a subsidiary of Independence Blue Cross ("IBC"). The named provider plaintiffs, Steven C. Eisen, Alice E. Wright, Douglas G. Pfeiffer and John Cecchini, all testified that they treated patients using IBC, AmeriHealth Administrators and Keystone Health Plan East.

The moving Defendants[46] argued that the Plaintiffs could not establish breach of contract claims against them because contractual privity was lacking. The Plaintiffs recognized that apparent fact, instead relying on the alter ego theory to establish privity. The Court stated that, typically, a parent corporation is not liable for the contractual obligations of its subsidiaries, and "[s]uch liability occurs only by application of the 'alter ego' theory to pierce the corporate veil."[47] Although there is a strong presumption against piercing the corporate veil, the corporate veil can be pierced "when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime."[48] The Court stated that the use of the alter ego theory "is applied only in special and unusual circumstances to

[46]AmeriHealth, Inc., AmeriHealth Integrated Benefits, Inc. f/k/a American Health Alternatives, AmeriHealth Administrators, Inc., Healthcare Delaware, Inc., Vista Health Plan, Inc., and Keystone Health Plan East, Inc.

[47]Norbers v. Crucible, Inc., 602 F. Supp. 703, 706 (W.D. Pa. 1985). See also Commonwealth v. Vienna Health Prods., Inc., 726 A.2d 432, 434 (Pa. Commw. 1999); Shared Communications, Servs. Of 1800-80 JFK Blvd., Inc. v. Bell Atlantic Prods., Inc., 692 A.2d 570, 573 (Pa. Super. 1997).

[48]Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893, 895 (1995).

reach the parent corporation which wholly controls the subsidiary and ignores corporate formalities or it is applied to the principal owner/shareholder."

The Plaintiffs asserted that the corporate veil should be pierced solely because IBC and all of the named Defendants operated as a single entity. However, the Plaintiffs were only able to present evidence of their relationship and dealings with IBC, AmeriHealth Administrators and Keystone Health Plan East,[49] and no evidence was presented of any contractual relationship between any of the named Plaintiffs and AmeriHealth, Inc., AmeriHealth Integrated Benefits, Inc. f/k/a American Alternatives, Healthcare Delaware, Inc. or Vista Health Plan Inc. ("non-contractual Defendants"). Therefore, the Court determined that this was not the unusual case in which to ignore the corporate form, and held that the Plaintiffs' evidence was insufficient to establish the Plaintiffs' standing to sue the non-contractual Defendants.

Koch v. First Union Corporation, May Term 2001, No. 0549, 2002 WL 372939, 2002 Phila. Ct. Com. Pl. LEXIS 82 (C.C.P. Phila. Jan. 10 2002) (Herron, J.) (Court sustained Defendants' preliminary objections relating to dismissal of the bank's parent company due to Plaintiffs' lack of alleged facts to pierce the corporate veil). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/kochpo1.pdf.

The Court in Koch determined that Plaintiffs could not pierce the veil to reach the parent corporation because they did not allege facts legally sufficient to establish the parent corporation's liability.

Plaintiffs were homeowners. Defendant Pennsylvania Resource Corporation ("PRC") was a contractor that provided home repairs and home improvement financing through its broker, Defendant First Liberty Financial Services, Inc. ("First Liberty"). Plaintiffs, through PRC and First Liberty, obtained home equity loans from Defendant

[49]Eisen, Wright, Pfeiffer, and Cecchini, each testified that they had treated patients using IBC, AmeriHealth Administrators and Keystone Health Plan East.

First Union National Bank of Delaware ("FUNBD"). FUNBD was a subsidiary of Defendant First Union Corporation ("First Union"). Plaintiffs alleged that all of the Defendants worked together to secure home equity loans on the basis of misleading "good faith cost estimates." Plaintiffs also alleged, among other matters, that FUNBD and its parent, First Union, were liable for the high closing costs associated with the loans.

Plaintiffs argued that First Union could be held liable because First Union "appear[ed] to dominate FUNBD in such a manner that their separate corporate entities may be disregarded." First Union, a bank holding company, argued that since it was not a state chartered bank nor a national bank association, it lacked the capacity to be sued with respect to these loans. It further argued that it was misjoined as a Defendant because the Plaintiffs failed to allege facts sufficient to pierce the corporate veil. The Court agreed with First Union that Plaintiffs did not allege sufficient facts to pierce the corporate veil and proceed against First Union.

A parent corporation must be treated as a separate entity from a subsidiary, unless circumstances justify piercing the corporate veil.[50] Pennsylvania law allows the corporate form to be disregarded in situations where there is gross undercapitalization, failure to adhere to corporate formalities, substantial intermingling of personal and corporate affairs, and the use of the corporate form to perpetrate a fraud.[51] In applying these standards, courts must start from the general rule that the corporate entity should be recognized and upheld, unless specific and unusual circumstances call for the

[50]Matter of Chrome Plate, 614 F.2d 990, 996 (5th Cir.), cert. denied, 449 U.S. 842 (1980).
[51]Saint Joseph Hospital v. Berks County Bd. of Assessments, 709 A.2d 928 (Pa. Commw. 1998).

exception.[52] Furthermore, there is a strong presumption against piercing the corporate veil in Pennsylvania.[53]

The Court, in the instant case, refused to pierce the corporate veil because Plaintiffs did not allege that First Union engaged in gross undercapitalization, failed to adhere to corporate formalities, substantially intermingled personal and corporate affairs, or used the corporate form to perpetrate a fraud. Absent these allegations, the Court determined that Plaintiffs could not proceed against First Union. In their complaint, Plaintiffs merely alleged that First Union "appear[ed] to dominate FUNBD in such a manner that their separate corporate entities may be disregarded." The Court stated that this was insufficient to pierce the veil. Thus, the Court sustained First Union's preliminary objections and dismissed all counts as to First Union because the Plaintiffs would be "unable to prove facts legally sufficient to establish First Union's liability."

First Union Nat'l Bank v. Quality Carriers, Inc., April Term 2000, No. 2634, 48 Pa. D. & C.4th 1 (C.C.P. Phila. October 10, 2000) (Sheppard, J.) (no basis to pierce the corporate veil against parent company).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/1st-op.pdf.

Among other claims, this case involved shareholder claims against a successor corporation in a merger. The successor corporation, Quality Carriers, Inc. ("Quality Carriers"), was created as the result of a merger with a holding company, Chemical Leaman Corporation ("CLC"), which held all of the stock of Chemical Leaman Tank Lines, Inc. ("CLTL"). The shareholders alleged that under an earlier agreement, they became shareholders of preferred stock in CLC and entered consulting agreements with CLTL. The issue of piercing the corporate veil arose in the context of an alleged breach

[52] Wedner v. Unemployment Comp. Bd. of Review, 296 A.2d 792, 794-95 (Pa. 1972).
[53] Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893 (1995).

of these consulting agreements, the Court having rejected the averment that Quality Carriers absorbed and controlled CLTL as adequate to set out a claim that it was CLTL's successor (especially where CLTL was named as a separate Defendant).

First, the Court observed that the Plaintiffs had no contract with Quality Carriers/ CLC, but only with CLTL; and a parent corporation and its wholly owned subsidiary are legally distinct, even where they may share common goals. The presumption is against piercing the corporate veil, which only applies in narrow circumstances where the corporate form is being used "'to defeat public convenience, justify wrong, protect fraud or defend crime,' … "and only after considering such factors as 'undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud.'"

Plaintiffs failed to meet their burden and preliminary objections were sustained on this claim. Here, neither Quality Carriers nor CLC was a party to the Consulting Agreements. There was only one possible basis for piercing the corporate veil, based on fraud allegations made in an earlier count. However, that fraud claim did "not involve the use of the corporate form, as is required to pierce the corporate veil."

Academy Electrical Contractors, Inc. v. Nason and Cullen Group, Inc., July Term 2001, No. 3252, 2004 WL 95181, 2004 Phila. Ct. Com. Pl. LEXIS 77 (C.C.P. Phila. Jan. 14 2004) (Sheppard, J.) (piercing the corporate veil claim failed in light of Plaintiff's acquiescence that there was a merger). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/academy_sj_denied_granted_order_memorandum.pdf.

In Academy Electrical Contractors, Inc., the Court dismissed Plaintiff's piercing the corporate veil claim where Plaintiff presented no evidence to support such a claim.

In 1998 and 1999, Defendant Nason and Cullen, Inc. ("NCI") entered into separate construction contracts with each of the following entities, which were also

named Defendants: Drexel University ("Drexel"), Crozer-Chester Medical Center ("Crozer-Chester") and Lippincott Williams & Wilson, Inc. ("Lippincott"). For each project, NCI entered into a separate subcontract with Plaintiff Academy Electrical Contractors, Inc. ("Academy") for Academy's services. Academy claimed that it was not paid for certain work which it performed both under and outside of the subcontracts. Academy asserted that Nason and Cullen Group, Inc. ("NCG") should be held liable for NCI's debts under the piercing of the corporate veil theory, among others claims.

Defendants asserted that NCG merged with NCI on or about March 31, 2002, which resulted in the transfer of all of NCG's assets and liabilities to NCI, well after the contract at issue. The Court found that Plaintiff did not proffer or discover any evidence to support its claim to pierce NCG's corporate veil. In fact, Academy apparently acquiesced in Defendants argument that a merger occurred by: (1) failing to argue to the contrary in its brief, or by presenting any evidence to support a claim for piercing the corporate veil; and (2) accepting, without refutation, NCI's document submission establishing the merger. With the merger unrefuted, the premise for piercing the corporate veiled was absent, and the Court found in favor of Defendants on this claim.

Advanced Surgical Services, Inc. v. Innovasive Devices, Inc., August Term 2000, No. 1637, 2001 Phila. Ct. Com. Pl. LEXIS 127 (C.C.P. Phila. Nov. 8, 2001) (Herron, J.)[54]
(the Court found successor liability inapplicable where a parent company was not the successor, and that to permit such a claim would eviscerate the requirements of piercing the corporate veil).

In Advanced Surgical Services, the Court refused to impose successor liability on a parent company because it would essentially require piercing the corporate veil without a finding of fraud, injustice or any other conduct required to justify doing so.

[54]The Opinion found on the Commerce Court website with this date addresses a motion for reconsideration of this Opinion.

Defendant Innovasive Devices, Inc. ("Innovasive") and Plaintiff Advanced Surgical Services, Inc. ("ASSI") entered into a three-year agreement. Under the agreement, ASSI would serve as an Innovasive sales representative, receiving commissions on invoice sales. Additionally, Innovasive would provide ASSI a monthly allowance of $2,000 for ASSI to hire a sales sub-agent. The agreement included a buy-out provision in the event of a change in control over Innovasive. In those circumstances, the acquiring entity would have the option either to continue the agreement with ASSI, or to make a buy-out payment to ASSI and terminate the agreement.

Defendant Mitek Products ("Mitek") acquired Innovasive by incorporating Raptor Acquisition Corp. ("Raptor") as a wholly owned subsidiary, and merging it into Innovasive. Mitek chose to terminate the agreement with ASSI, but allegedly failed to make the full buy-out payments to ASSI as required under the buy-out provision in the ASSI-Innovasive agreement. ASSI further alleged that Mitek's agents attempted to induce ASSI customers not to place orders until a time after which Defendants would not have to pay ASSI an otherwise required commission. ASSI brought claims against Defendants for breach of contract, interference with contractual relations, defamation, and civil conspiracy.[55]

Plaintiffs sought to impose successor liability on Mitek, as the parent of the wholly owned subsidiary which merged with Innovasive. The Court stated that if Plaintiffs were seeking to impose liability on Raptor, then successor liability would be appropriate; however, Plaintiffs were attempting to recover from Mitek, the parent of that successor corporation, as if the parent were automatically liable for the subsidiary's acts.

[55]ASSI agent Robert Morris also was a Plaintiff in all but the breach of contract and conspiracy claims.

Essentially, Plaintiffs were seeking to obtain the results of piercing the corporate veil, but without any evidence of fraud, injustice or other conduct that could meet the strictures of piercing the corporate veil. Therefore, the Court concluded that successor liability was inapplicable; though it found that Mitek could be liable to ASSI for the buy-out payment if there was an implied-in-fact contract.

In a footnote, the Court discussed the requirements to pierce the corporate veil. In Pennsylvania, "a corporation is to be treated as a separate and independent entity even if its stock is owned entirely by one person."[56] Thus, there is a strong presumption against piercing the corporate veil.[57] A Pennsylvania court will pierce the corporate veil "only in limited circumstances when used to defeat public convenience, justify wrong, protect fraud or defend crime,"[58] and only after considering such factors as "undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud."[59]

Webpro, Inc. v. International Lithographing, Inc., June Term 2001, No. 070015, 2001 WL 1808027, 2001 Phila. Ct. Com. Pl. LEXIS 77 (C.C.P. Phila. July 20, 2001) (McInerney, J.) (the Court set aside a writ of execution that would allow Plaintiff to recover from Defendant's parent company by a foreign judgment against Defendant because this method of piercing the corporate veil violated due process). This Opinion is available at http://courts.phila.gov/pdf/opinions/civiltrial/webpro-03362.pdf.

In Webpro, the Court set aside a writ of execution that Plaintiff served upon the parent company of a corporation against whom Plaintiff obtained a judgment in an Illinois court. The Court refused to allow Plaintiff to pierce the corporate veil without due process.

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[56] Commonwealth v. Vienna Health Products, Inc., 726 A.2d 432, 434 (Pa. Commw. 1999).
[57] Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893, 895 (Pa. 1995).
[58] Kiehl v. Action Mfg. Co., 535 A.2d 571, 574 (Pa. 1987).
[59] Lumax Indus., Inc., 669 A.2d at 895.

Plaintiff, Webpro, Inc. ("Webpro"), obtained an Illinois judgment against Defendant International Lithographing, Inc. ("International Lithographing"). Webpro transferred the Illinois judgment to Pennsylvania pursuant to Pennsylvania's Uniform Enforcement of Foreign Judgment Act. Webpro filed a praecipe to issue a writ of execution. Although the writ was issued against International Lithographing, Webpro believed that International Lithographing's parent company, Taconic Direct Acquisition Corporation ("Taconic"), had operated in such a way as to allow Webpro to pierce the corporate veil and recover directly against Taconic. Thus, Webpro served the writ on Taconic's garnishee to reach Taconic's bank accounts.

The Court rejected the garnishment procedure because it would only allow for post-deprivation review, which violated Taconic's federal due process rights. Citing National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Evans,[60] the Court observed that the following procedural protection would satisfy due process:

> An affidavit should be required clearly setting forth the factual basis for the conclusion that the garnishment defendants are alter egos of the judgment debtors. This affidavit should be presented to an official with competence to evaluate the claim and discretion to deny the writ. The writ should issue only if on its face probable cause exists for accepting its conclusion. Plaintiff should post bond to indemnify the defendant for a mistaken taking. Finally, an immediate post attachment hearing should take place where plaintiff would be required to prove the existence of an alter ego relationship.

The Court concluded that Taconic's federal constitutional due process rights had been violated, and thus the writ of execution was set aside and dissolved. However, the Court

[60]71 F.Supp.2d 427, 430 (M.D. Pa. 1999).

added in a footnote: "An existing, constitutionally acceptable method of piercing the corporate veil to reach Taconic's funds would be to sue on the foreign judgment."[61]

Commonwealth of Pennsylvania v. BASF Corporation, March Term 2001, No. 3127, 2001 WL 1807788, 2001 Phila. Ct. Com. Pl. LEXIS 95 (C.C.P. Phila March 15, 2001) (Herron, J.) (the Court sustained Defendants' preliminary objections in part, concluding that piercing the veil doctrine was inapplicable).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/basfop.pdf.

In BASF Corporation, the Court refused to apply the piercing the corporate veil doctrine to Plaintiff's breach of contract claim where the parent corporation was not a party to the disputed contract. However, the Court did permit a civil conspiracy claim to proceed because of the alleged lack of an alter ego relationship between parent and subsidiary.

Defendant BASF Corporation ("BASF") was the parent company of Defendant Knoll Pharmaceutical Company ("Knoll"). Knoll was the successor to Boots Pharmaceuticals, Inc. ("Boots") through merger, which itself was the successor to Flint Laboratories ("Flint").

Flint had developed and manufactured the drug Synthroid. The Commonwealth alleged that certain misrepresentations were made by Boots and Knoll (and various individuals connected to them) concerning Synthroid's unique and exclusive nature; and that improper actions were taken to hide the fact that there were equivalent drugs to treat the same problems that Synthroid addressed. This was allegedly done to prevent Synthroid's market share from dropping, if physicians and consumers realized that there were equivalent drugs that could be purchased less expensively than Synthroid. The Commonwealth allegedly paid for Synthroid prescriptions through various programs,

[61] 42 Pa.C.S. § 4306(e).

which programs would have required greater co-pays by individuals if equivalent drugs other than Synthroid were prescribed. Thus, the Commonwealth claimed that it paid more than it otherwise would have paid if Defendants had not convinced Pennsylvania physicians to specify Synthroid in their prescriptions, and persuaded patients to request it.

Among other claims, the Commonwealth asserted breach of contract claims against Defendants based upon a rebate agreement with Knoll. BASF (Knoll's parent) and various individuals named as Defendants were not parties to that contract.[62] The Court stated that a parent corporation is not normally liable for the contractual obligations of its subsidiary, even if the subsidiary is wholly-owned.[63] The parent company's liability can only exist when the alter ego theory is applied to pierce the corporate veil[64]; however, there is a strong presumption against piercing the corporate veil,[65] and a court will only do so when it "must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime."[66]

In this case, the Court found that the Commonwealth did not set forth any allegations that would compel the Court to pierce the corporate veil, and the demurrer was granted. Moreover, the Court observed that the Commonwealth's civil conspiracy

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[62]The Court would not find these individuals liable because a corporation can only act through its agents, and if they are acting within the scope of their employ, and the nature of their agency is disclosed, they cannot be held liable for the corporation's contractual obligations. Daniel Adams Associates, Inc. v. Rimbach Publishing, Inc., 360 Pa. Super. 72, 79, 519 A.2d 997, 1000-01 (1987). In this case, there was no allegation that these individuals acted outside the scope of their employment; however, they were subject to claims for civil conspiracy based upon allegations of their roles in the alleged fraudulent and deceptive conduct, along with that of the corporate Defendants.

[63]Norbers v. Crucible, Inc., 602 F. Supp. 703, 706 (W.D. Pa. 1985).

[64]Commonwealth v. Vienna Health Prods., Inc., 726 A.2d 432, 434 (Pa. Commw. 1999).

[65]Lumax Indus., Inc., 669 A.2d at 895.

[66]Id.

claim depended upon BASF and Knoll being distinct entities that could legally conspire with each other, even though parent and subsidiary[67]; a claim as to which the Court permitted the Commonwealth to proceed. Thus, the same allegations that supported the civil conspiracy count undermined the piercing the corporate veil claim.

PARTICIPATION THEORY

Hemispherx Biopharma, Inc. v. Asensio, July Term 2000, No. 3970, 2002 WL 31387765, 2002 Phila. Ct. Com. Pl. LEXIS 72 (C.C.P. Phila Oct. 22, 2002) (Sheppard, J.), aff'd, 855 A.2d 141 (Pa. Super. 2004) (without opinion), appeal denied, 583 Pa. 673, 876 A.2d 396 (2005) (While dismissing a veil piercing argument against one party prior to trial, the Court granted Plaintiffs' motion for a new trial on its claims for defamation and commercial disparagement against an individual Defendant based on the participation theory).
This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/he-apl-o.pdf.

In Hemispherx Biopharma, the Court determined that the issue of an individual Defendant's personal liability properly went to the jury because there was evidence that he personally took part in the commission of the alleged tort.

Plaintiff Hemispherx Biopharma, Inc. ("HBI") was engaged in the business of researching, developing, and testing experimental pharmaceutical compounds and drug technologies. HBI was a publicly traded company. Defendant Asensio & Company, Inc. ("ACI") was a registered broker and investment banking firm that published and distributed analytical research reports regarding publicly traded companies. ACI was also engaged in proprietary trading and short-selling.[68] Defendant Asensio.Com, Inc. ("Asensio.Com") allegedly owned 100% of ACI's shares, maintained ACI's accounts,

[67]The Court cited Shared Communications, Servs. of 1800-80 JFK Blvd., Inc. v. Bell Atlantic Props., Inc., 692 A.2d 570, 573 (Pa. Super. 1997) for the proposition that there is "no per se rule that a parent and a wholly owned subsidiary cannot be found liable for civil conspiracy."
[68]Short-selling occurs when a speculator sells stock he does not own, in anticipation of a fall in price before his covering purchase of those shares.

and provided capital to ACI. Defendant Manuel P. Asensio ("Asensio") was ACI's founder and chairman. He engaged in short-selling on ACI's behalf, and produced research reports on publicly traded companies, including reports on HBI.

Plaintiff brought causes of action against Defendants, alleging that Defendants engaged in a scheme to short-sell and manipulate the price of HBI's common stock through Defendants' publication of allegedly defamatory statements in a series of research reports and press releases. The matter went to trial before a jury; however, the Court dismissed Plaintiff's claims against Asensio.Com on a directed verdict, based on the finding that the evidence was insufficient to pierce the corporate veil or to show that Asensio.Com participated in the alleged misconduct. The sole fact that Asensio.Com was ACI's parent company was insufficient by itself to establish either of these claims.

The jury found for Defendants on all of the remaining claims. HBI filed a motion for JNOV, or in the alternative, for a new trial. Defendants filed a cautionary cross-motion for issue preservation, contending that the Court erred in not granting a non-suit as to Defendant Asensio's personal liability. The Court ruled that Plaintiffs would be granted a new trial on claims of defamation and disparagement due to Defendant Asensio's blatant misconduct before the jury. This made his cross-motion pertinent.

In Pennsylvania, under the participation theory, "corporate officers are personally liable for the alleged tortious conduct of the corporation if they personally took part in the commission of the tort, or if they specifically directed other officers, agents or employees of the corporation to commit the act."[69] The Court ruled that it would be contrary to the evidence to find that Defendant Asensio did not personally take part in the alleged

[69]Babich v. Karsnak, 528 A.2d 649, 654 (Pa. Super. 1987) (quoting Donner v. Tams-Witmark Music Library, 480 F.Supp. 1229, 1233 (E.D. Pa. 1979)).

tortious conduct. There was ample evidence in the record showing that Asensio wrote the allegedly defamatory statements and that he stood behind these statements. Thus, the Court had properly allowed the issue of Asensio's personal liability on these issues to be decided by the jury; issues on which the Court granted Plaintiff a new trial.

In addition to the foregoing Opinion, the participation theory received some address in the following Opinions, summarized above: Banks v. Hanoverian, Inc., January Term 2005, No. 2807, 2005 Phila. Com. Pl. LEXIS 287 (C.C.P. Phila. June 23, 2005) (Abramson, J.); JK Roller Architects, LLC v. Tower Investments, Inc., July Term 2002, No. 02778, 2003 WL 1848101, 2003 Phila. Ct. Com. Pl. LEXIS 40 (C.C.P. Phila. Mar. 17 2003) (Jones, J.). Further, in Commonwealth of Pennsylvania v. BASF Corporation, March Term 2001, No. 3127, 2001 WL 1807788, 2001 Phila. Ct. Com. Pl. LEXIS 95 (C.C.P. Phila March 15, 2001) (Herron, J.), summarized above, individual officers, directors and employees against whom a cause of action could not be stated for breach of a contract executed with a corporation, could be subjects of a civil conspiracy claim where they were alleged to have committed various fraudulent or deceptive acts along with their corporations. For a recent discussion of the participation theory and its relationship to piercing the corporate veil, see Nordi v. Keystone Health Plan West, Inc., 989 A.2d 376 (Pa. Super. 2010).