UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket Nos. 98-0755, 98-1168, 99-0958, 00-1402

SECRETARY OF LABOR, Complainant,

v.

AVCON, INC., VASILITOS SAITES, and NICHOLAS SAITES, Respondents.

SECRETARY OF LABOR, Complainant,

v.

ALTOR, INC. and/or AVCON, INC., and/or VASILIOS SAITES, individually, and d/b/a ALTOR, INC., and/or AVCON, INC. and NICHOLAS SAITES, individually and d/b/a ALTOR, INC., and/or AVCON, INC., Respondents.

SECRETARY OF LABOR, Complainant,

v.

SHARON AND WALTER CONSTRUCTION, INC., Respondent.

BRIEF OF *AMICUS CURIAE* NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, MISSOURI VALLEY AND SOUTHWESTERN LINE CONSTRUCTORS CHAPTERS

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I. INTRODUCTION AND INTERESTS OF THE AMICUS

The Missouri Valley and Southwestern Line Constructors Chapters of the National Electrical Contractors Association ("Missouri Valley-Southwestern NECA") submits this brief in response to the Occupational Safety and Health Review Commission's ("Review Commission") Notice to Parties and Invitation to Interested *Amici Curiae* to File Supplemental Briefs. Missouri Valley-Southwestern NECA is an association of employers engaged in power line construction and maintenance. Missouri Valley-Southwestern NECA's members are properly-constituted corporations, some of which are owned, partially or fully, by parent corporations.

Missouri Valley-Southwestern NECA's members have an interest in any standards developed by the Review Commission regarding the circumstances in which the corporate form may be ignored. While the issue in this proceeding arises in the context of smaller companies with less formal corporate arrangements, any standards relating to corporate veil piercing are likely to have broader application. Missouri Valley-Southwestern NECA is filing this brief with the Review Commission in order to place the issues raised by the Review Commission in a broader context.

Missouri Valley-Southwestern NECA submits this brief specifically in response to the following questions posed in the Review Commission's Notice:

> <u>Review Commission Question No. 5</u>: Are there policies embodied in the Occupational Safety and Health Act ("OSH Act") that would be served, or frustrated, by piercing the corporate veil or by extending the Review Commission's remedial orders to successors or alter egos?
>
> <u>Review Commission Question No. 8</u>: To the extent the Review Commission has the authority to pierce the corporate veil and to extend remedial orders to an employer's successors or alter ego, under what circumstances should the Review Commission exercise that authority?

II. ARGUMENT

A. The Review Commission Should Only Pierce the Corporate Veil Where There is Clear Evidence of Domination and Fraud

Missouri Valley-Southwestern NECA submits that even assuming the Review Commission possesses the authority to pierce the corporate veil, that authority should be exercised only in extraordinary circumstances.[1] Specifically, the Review Commission should observe established principles of federalism and apply common-law principles of corporate veil-piercing only where one corporation completely dominates another and fraud is present.

It is well-settled under both federal and state law that related corporations are given a presumption of separateness, and that a court should pierce the corporate veil only in extreme circumstances. *See De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 70 (2d Cir. 1996), *cert denied*, 519 U.S. 1007 (1996). While courts examine various factors in a veil-piercing analysis, those factors ultimately must demonstrate two things. First, one corporation must so dominate another that there is a unity of interests and control between the two corporations. *See Craig v. Charter Consolidated, P.L.C.*, 843 F.2d 145, 150 (3d Cir. 1988) (internal citations omitted) (explaining one company must exercise "complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own"). Second, honoring the corporate form would result in injustice or sanction a fraud. *See, e.g., Sea-Land Services, Inc.*, 941 F.2d 519, 520 (7th Cir. 1991) (describing Illinois law). While the details of

[1] While a substantial question exists concerning the Review Commission's authority to pierce the corporate veil, Missouri Valley-Southwestern NECA does not address that issue.

this two-part inquiry vary somewhat from jurisdiction to jurisdiction, the elements of domination and fraud are indispensable requirements for ignoring the corporate form.

In the absence of a specific legislative grant by Congress to the contrary, these same standards apply to piercing the corporate veil under federal statutes. *United States v. Bestfoods*, 524 U.S. 51 (1998). In *Bestfoods*, the Supreme Court reviewed whether a parent corporation can be held liable for the acts of its subsidiaries under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.* The Court held that while the Environmental Protection Agency could pierce the corporate veil, its authority to do so was no broader than under general corporate law, *i.e.* only when there is domination for a sufficiently improper purpose. *Bestfoods*, 524 U.S. at 63-64.

The Court in *Bestfoods* stressed that nothing inherent in federal law makes it appropriate to ignore the protection afforded by state corporate law. Rather, the Court held that disregarding the corporate form required an express statutory grant. Specifically, the court stated:

> Nothing in CERCLA purports to rewrite this well-settled rule, either. CERCLA is thus like many another [sic] congressional enactment in giving no indication "that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute" ... and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law."

Id. at 63 (internal citations omitted). Thus, the Court made clear that the general presumption of corporate separateness controls even under federal statutes.

With respect to the standards to apply in a corporate veil piercing analysis, the Court declined to decide whether state law or federal common law controlled. The Court stressed that a parent corporation has the right to exercise some general control over the subsidiary without becoming liable for the subsidiary's actions. *Id.* at 61-62. The Court observed that under the protections afforded by the corporate form, parent corporations are not liable for the acts of their subsidiaries, and that mere stock ownership was insufficient to extend liability. *Id.* at 61-62; *see also Pledger v. U.S.*, 236 F.3d 315, 321 (6th Cir. 2000). The court stressed further that a parent is not liable for the acts of its subsidiary merely because two corporations have some or all of the same directors. *Bestfoods*, 123 S. Ct. at 62.

In reviewing the terms of the statute before it, the Court in *Bestfoods* found that nothing in CERCLA operated to override these basic principles of corporate separateness. The *Bestfoods* Court so found despite observing that CERCLA was a powerful environmental statute that demonstrated a Congressional intent to cast a broad net and include a wide variety of entities within its scope of liability. *Id.* at 55. The Court observed that CERCLA imposes *strict liability* on virtually anyone connected to the disposal of hazardous waste. *See* 42 U.S.C. § 9607(a) (2003). Nonetheless, despite the breadth of CERCLA, the Court concluded that the statute lacked any language indicating an intent to permit the government to ignore the corporate form in pursuit of CERCLA's remedial goals.

The Court's analysis in *Bestfoods* is consistent with the approach historically taken by the courts a wide variety of federal law settings. For example, in *U.S. v. Pisani*, 646 F.2d 83 (3d Cir. 1981), the Third Circuit focused on domination and fraud when fashioning a federal test for corporate veil piercing in the context of Medicare overpayments. *Id.* at 88. Likewise, domination and fraud also weigh heavily in the analysis used in the ERISA context. *See, e.g. Laborers' Pension Fund v. Litgen Concrete Cutting & Coring Co.*, 709 F. Supp. 140, 143 (N.D. Ill. 1989) (stating that the corporate form can be disregarded when there is a unity of interests and control and honoring the corporate form would result in fraud or injustice).[2] The two-part test has also been applied in a variety of state statutory and common law tests. *See, e.g. Sea-Land Serv., Inc.*, 941 F.2d 519, 520 (7th Cir. 1991) (applying Illinois law); *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 211 (4th Cir. 1991) (applying West Virginia law); *Freeman v. Complex Computing Co.*, 119 F.3d 1044 (2d Cir. 1997) (applying New York law). Thus, *Bestfoods* reiterated the well-established principle that the corporate form is to be respected, and that even the sweeping liability provisions or broad remedial purposes of CERCLA could not change the analysis.

Bestfoods is instructive because the OSH Act lacks the sweeping liability provisions that were found to be insufficient under CERCLA to permit the government to ignore the corporate form. The OSH Act contains rather narrow liability provisions, limiting liability to employers. *See* 29 U.S.C. § 658(a). Nowhere does the OSH Act extend liability to individual employees or managers who may be responsible for occupational hazards or expressly seek to impose liability on persons other than "employers." In short, if language of CERCLA with its sweeping liability provisions could not be interpreted as evincing a Congressional intent to take the significant step

[2] Successorship law is also consistent with the *Bestfoods* analysis. In *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168 (1973), the Supreme Court considered whether a bona fide purchaser could be held liable for unfair labor practices committed by a predecessor corporation. The Court found that there was nothing offensive about requiring the buyer to comply with the remedial backpay order so long as the buyer had prior notice of the relevant violations. The Court reasoned that the corporation had some control over such violations because it could have taken those liabilities into account when calculating an offer price and deciding to purchase the company. *See id.* at 185. However, the Court stated that the purchaser can be held responsible for remedying the unfair labor practices without becoming an actual "party to the unfair labor practices." *See id.* at 172 (citing *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967), *enfd. sub nom. United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968)). As such, the Court impliedly held that it could not go beyond this financial responsibility to find that the defendant was a party to the actual underlying action. *See id.* Thus, while the employer could be held liable for the financial remedy over which it had control, it could not be treated as a party to the underlying violation because it had no control over such acts. The Court's decision also reflects its concern with fraud that may occur in the form of a corporation being sold as a method of escaping unfair labor practice liability. *See id.* at 176-77. In sum, although the Court never explicitly stated that it was applying the two-part test for piercing the corporate veil, the Court considered the same factors and applied the same test.

of ignoring the corporate form, the much narrower liability provisions of the OSH Act certainly do not demonstrate such an intent.

The absence of clear Congressional intent to avoid the corporate form is telling, because where Congress has sought to provide broader liability, it has done so through express language in the statute. *Compare* Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(d) (defining employer as "any person acting directly or indirectly in the interests of an employer in relation to an employee). *See also* Randy Rabinowitz & Mark Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT'L L.J. 373, 406 (2000) (discussing Canadian laws that explicitly penalize employees for violations of occupational health and safety laws).

An application of the *Bestfoods* principles shows that the Review Commission would not have authority to pierce the corporate veil of a properly-constituted corporation. In such a corporation, even one owned partially or fully by a parent corporation, veil piercing would never be appropriate under state law, or even federal common law fashioned from the same principles. In a properly constituted corporation, there is no failure to comply with corporate formalities, no commingling of assets, no undercapitalization, no lack of discretion shown by both companies, no lack of arms-length transactions between the companies, no treatment of the entities as a single profit center, and no one corporation treating the assets of another corporation as its own. *Sea-Land Servs.*, 941 F.2d at 521 (internal citations omitted); *Freeman v. Complex Computing Co.*, 119 F.3d 1044 (2d Cir. 1997). Instead, each corporation operates as an independent entity, with a proper degree of oversight by the parent over the subsidiary. Properly constituted corporations simply do not exercise the amount of control and domination over each other necessary to satisfy the first prong of the *Bestfoods* test.

Similarly, a properly constituted corporation would not engage in the type of fraud required under traditional veil piercing doctrine. Such fraud does not exist merely because individuals or parent corporations properly formed a corporation for the purpose of insulating themselves from liability. Indeed, that is the recognized and legitimate purpose of the corporate form. *See* 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (perm. ed, rev. vol. 1999); *see also Browning-Ferris Indus. of Illinois, Inc.*, 195 F.3d 953, 959 (7th Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). Piercing of the corporate veil in cases of fraud is necessary to prevent situations in which "the privilege of transacting business in corporate form has been illegally abused to the injury of a third person." *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003).[3] Properly constituted corporations are not created solely for the purpose of defrauding creditors or escaping existing monetary obligations, and thus would not meet this prong of the *Bestfoods* standard. In sum, because the OSH Act contains no language clearly indicating a Congressional intent to permit the government to ignore the corporate veil, traditional veil piercing doctrine must be applied. In such case, absent domination and fraud by another party, the corporate form must be respected.

B. The Review Commission Should Never Pierce the Corporate Veil to Reach Officers, Safety Professionals, or Operational Managers and Supervisors

Recognition of properly constituted corporations also requires extending protections to the individuals through whom a corporation acts. In a properly constituted and operated corporation, there is a hierarchy of control from directors to safety professionals to supervisors. Each of these individuals contributes to the greater whole that is the corporation. It is the

[3] This test is intended to cover such situations as unjust enrichment, the creation of a new corporation solely for the purpose of escaping existing monetary obligations, or an intentional scheme to separate assets and liabilities in order to protect assets from other liabilities and from creditors. *See Sea-Land Servs.*, 941 F.2d at 524; *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 943 (7th Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999).

corporation that controls the jobsites, the corporation that institutes and enforces the safety policies, and the corporation that bears responsibility under the OSH Act for any violations of OSH Act standards. The corporation is the actor, and the corporate form shields individuals working to further the goals of the corporation.

To the extent the issue of liability under the OSH Act has arisen in the past, the courts consistently have limited the scope of liability to that imposed *directly* by the statute. The general rule is that an individual who is not himself or herself an "employer" cannot be held liable for OSH Act violations. *See, e.g. Skidmore v. Travelers Insurance Co.*, 356 F. Supp. 670 (E.D. La. 1973), *aff'd*, 483 F.2d 67 (5th Cir. 1973) (concluding that the OSH Act "applies only to 'employers,' and that individual employees were not personally liable for OSH Act violations).

The one exception to this principle is when an individual's or officer's or director's conduct "was so pervasive and total that [he] is in fact the corporation and therefore an employer" under the Act. *United States v. Cusack*, 806 F. Supp. 47, 51 (D. N.J. 1992); *See Secretary of Labor v. Sinisgalli*, 17 OSHC (BNA) 1849 (1996) (explaining that an individual can only be considered liable for an OSH Act violation if he has "control over the work environment such that abatement of hazards can be obtained').

The *Skidmore*, *Cusack*, and *Sinisgalli* decisions in essence apply the established veil piercing doctrine in the situation where the corporation is so dominated by an individual or organization that they are essentially one and the same – or "alter egos." The alter ego test is a shorthand form of the corporate veil piercing test in situations of such complete domination. *See, e.g. Walensky v. Jonathan Royce Int'l*, 624 A.2d 613, 617 (N.J. Superior Ct. 1993) (piercing the corporate veil to hold a corporate principal liable when he was using the company as his own alter ego). Under the test, a court will disregard the corporate entity and hold individuals responsible for acts knowingly and intentionally done in the name of the corporation. 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (perm. ed, rev. vol. 1999) (internal citations omitted). The alter ego test can be applied to hold either individuals or corporations personally liable for the acts of another corporation in the context of such domination and control. *Babitt v. Vebeliunas (In re Vebeliunas)*, 332 F.3d 85, 91 (2d Cir. 2003).

Regardless of whether the label of corporate veil-piercing or alter ego is used, however, the same requirements apply. *See, e.g. Mid Am. Title Co. v. Transnation Title Ins. Co.*, 332 F.3d 494, 495 (7th Cir. 2003) (explaining there Arizona courts will only find that one corporation is an alter ego of another entity if there is both "unity of control" between the corporation and the directing entity and observance of the corporate form would either sanction a fraud or promote injustice). First, there must be domination and control by one entity, where the corporate entity has been "disregarded to such an extent that the affairs of the corporation are indistinguishable from the affairs of the officer or director." *Tubos de Acero de Mex., SA v. Am. Int'l Inv. Corp.*, 292 F.3d 471, 478 (5th Cir. 2002) (applying Louisiana law on alter egos). Second, the alter ego doctrine will only be applied if honoring the corporate form would result in fraud or similar inequity. *See Mass. Carpenters Cent. Collection Agency v. A.A. Bldg. Erectors, Inc.*, 343 F.3d 18, 21 (1st Cir. 2003) (explaining the alter ego doctrine "is a tool to be employed when the corporate shield, if respected, would inequitably prevent a party from receiving what is otherwise due and owing from the person or persons who have created the shield"). As a result, alter ego analysis is consistent with, and indeed simply shorthand for a variant of, the corporate veil-piercing doctrine reiterated in *Bestfoods*.

As *Bestfoods* instructs, absent such veil piercing, any attempt to ignore the corporate form to impose liability upon individuals must rely on a clear demonstration of Congressional intent in the statutory language. However, nothing in the language of the OSH Act evinces such an intent. Indeed, the differences between the OSH Act and the FLSA illustrate Congressional intent in the OSH Act to only impose liability on the corporation, or employer, itself. The OSH Act defines an employer as a "person" engaged in a business affecting commerce who has employees, and it defines a "person" as one or more individuals, associations, corporations, etc. 29 U.S.C. § 652(4)(5). As mentioned above, the courts have interpreted this provision and held that Congress did not intend to impose liability on individual employees. *See e.g. Skidmore*, 356 F. Supp. 670. In contrast, FLSA defines employer more broadly to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The courts have held that this broader definition of employer allows a plaintiff to bring suit against an individual corporate officer, shareholder, or employee that exercises control over the operation and has some responsibility for the alleged violation. *See, e.g. Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983). If Congress had intended to impose personal liability in the OSH Act context, it easily could have so provided, as it did under FLSA. Therefore, unless the principles of corporate veil piercing or alter ego make individual liability appropriate, no basis exists for extending that principle.

C. The Two-Part Analysis Set Forth in *Bestfoods* Effectuates the Goals of the OSH Act

Although the OSH Act's broad remedial goals do not support extending liability outside of traditional veil piercing doctrine, they do suggest that the Review Commission should apply the doctrine in a manner that will foster the Act's remedial purpose. The OSH Act aims not only to create safe working conditions for employees, but also to encourage all involved parties to take appropriate safety measures. As explained in the statute itself, Congress intended to create safe working conditions "by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions." 29 U.S.C. § 651(b)(1). Congress thus recognized that employees are best protected by having multiple parties scrutinize workplace safety policies.

Adopting a rule that allows parents to monitor the safety practices of their subsidiaries without incurring automatic liability would advance the goals of the OSH Act. Parent corporations have an obvious economic interest in their subsidiaries, as shareholders of the entity. Parent corporations frequently audit their subsidiaries on a variety of matters. Safety violations and accidents can result in harm to a company's employees, damage to good will, loss of contracts, diminished workers' compensation safety ratings, negative public relations, and other economic harms. As a result, parent corporations can have a powerful incentive to influence their subsidiary companies on effective safety management. If automatic personal liability under the OSH Act is not a threat, parent corporations will be more likely to monitor their subsidiary's safety practices.

Some of a parent corporation's practices that may enhance safety include: the employment of a full-time safety director and staff by the parent corporation, worksite inspections, technical assistance, access to training, and other efforts. These efforts on the part of the parent corporation, meant both to ensure and supplement the vigorous and effective safety practices on the part of the subsidiary corporation, contribute to the safety of the subsidiary's employees by providing a "second set of eyes" on the subsidiary's compliance programs.

A similar rule was adopted by the Idaho Supreme Court in *Bowling v. Jack B. Parson Co.*, 793 P.2d 703 (Idaho 1990). In that case, the parent corporation's safety officer would periodically inspect the subsidiary's facilities, check its equipment, and inform the subsidiary about any OSH Act violations. *Id.* at 705. The court refused to hold the parent liable for subsequent violations because it found that the parent had never assumed responsibility for the subsidiary's safety program. *Id.* at 1032. This decision thus allowed the parent corporation's safety officer to continue to provide additional protection to employees without fearing the imposition of undesirable liability.

Adopting a standard that holds a parent corporation liable for the safety violations of a subsidiary as soon as the parent exerted any oversight over the subsidiary's safety policies would chill parent corporations' beneficial safety oversight of its subsidiaries. Should such activity allow the piercing of the subsidiary's corporate veil, parent corporations would be wary of exercising even cursory oversight over their subsidiary's safety practices. Such a rule might encourage parent corporations to ignore even known hazards on the basis that lack of involvement is the only way in which to preserve corporate separateness. Even on close calls, corporations might err on the side of caution out of fear that the Review Commission will second guess a legitimate judgment made in the interest of safety and disregard the subsidiary's corporate form to reach the parent corporation.

The type of analysis set forth in *Bestfoods* best promotes the purposes of the OSH Act. Workplace safety is promoted because the test allows properly-constituted parent corporations to monitor the safety practices of their subsidiaries. Parent corporations are not discouraged from engaging in such beneficial activities by the fear of rendering themselves personally liable for subsequent OSH Act violations. This "second set of eyes" promotes workplace safety and ensures the safety and protection of America's employees.

III. CONCLUSION

For the reasons set out above, Missouri Valley-Southwestern NECA strongly urges the Review Commission to consider the interests of properly constituted corporations in determining whether, and how, to pierce the veil of a corporation, and urges the Review Commission to reject veil-piercing in the case of a properly constituted corporation in order to reach a parent corporation or individual directors, officers, safety professionals, or operational managers and supervisors.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of *Amicus Curiae* has been served by United States mail, postage prepaid, this 23rd day of February, 2004 to:

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