

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket Nos.  
98-0755 and 98-1168

AVCON, INC.; VASILIOS SAITES  
AND NICHOLAS SAITES,

Respondents.

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SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 99-0958

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.

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SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 00-1402

SHARON and WALTER  
CONSTRUCTION, INC.,

Respondent.

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**BRIEF OF THE AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND  
CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS AMICI CURIAE**

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**BRIEF OF THE AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AND THE BUILDING AND CONSTRUCTION  
TRADES DEPARTMENT, AFL-CIO, AS AMICI CURIAE**

The American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) and the Building and Construction Trades Department, AFL-CIO (“BCTD”) submit this brief *amici curiae* in response to the Commission’s January 8, 2004 invitation.

**INTEREST OF AMICI CURIAE**

The AFL-CIO is a federation of 64 national and international unions representing 13 million working men and women and their families. The BCTD is the umbrella organization of 15 national and international unions representing approximately one million workers in the construction industry. The AFL-CIO and the BCTD have a long history of advocating for strong workplace health and safety protections for working people in this country. Since the passage of the Occupational Safety and Health Act (“OSH Act”), the AFL-CIO and the BCTD have worked to promote strong and effective implementation and enforcement of the law. The vast majority of the AFL-CIO’s and the BCTD’s members are covered by the OSH Act, and are therefore affected by the issues presented in these cases.

**INTRODUCTION**

These cases present important questions that concern the Secretary of Labor’s (Secretary’s) ability to hold accountable under the OSH Act individuals and corporations that violate the law and put employees in harm’s way. Specifically, the Commission is

faced with various and related questions involving how the OSH Act may be enforced and its protections made meaningful to workers whose employers alter their identity through nominal change in ownership, creation of related enterprises, bankruptcy, and other means. The answers to these questions will impact the Secretary's ability to hold responsible actors accountable, and to bring about compliance with the law, to the benefit of the health and safety of the working men and women the OSH Act aims to protect.

The cases before the Commission involve closely-held corporations in which members of the same family, and sometimes the very same individual, establish various iterations of what is, at bottom, substantially the same business operation. These cases involve employers in the construction industry, but the business transformations that occurred here are certainly not unique to the construction industry.

The *Altor* and *Avcon* cases involve a father and son -- Vasilios (Bill) and Nicholas (Nick) Saites -- who together have owned and directed a series of reinforced concrete businesses with a long history of OSHA violations. While the company name periodically changes -- from Astro Concrete to Avcon to Altor to most recently Avcrete - the work, the foremen, the equipment, the business office, and the parties in control of the business remain the same. Nick Saites candidly admits that one reason he and his father create new companies and shift the work to them is to avoid paying OSHA penalties. Resp. Br. of Sec'y in *Avcon* at 14-15. The question for the Commission in the *Altor* and *Avcon* cases is whether Bill and Nick Saites may be cited personally and fined for their most recent OSHA violations.

The *Sharon and Walter Construction Co.* case involves an individual – Walter Jensen – who once operated his general contracting business as a sole proprietorship (called “S&W”) but then incorporated six weeks after S&W went bankrupt (and after Jensen was cited for OSHA violations). As with Nick and Bill Saites’ various businesses, both S&W and Sharon & Walter are in the same line of business, have the same office, and use some of the same employees. Significantly, Walter Jensen owned and controlled both businesses. The question before the Commission in the *Sharon and Walter* case is whether Walter Jensen’s OSHA record as a sole proprietor carries over to his current business enterprise, or whether he may erase his prior record through incorporation.

The questions presented in these cases must be viewed through the prism of Congress’s intentions and purposes in enacting the OSH Act. Congress adopted the OSH Act in order to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” 29 U.S.C. § 651(a). The “fundamental objective” of the law is “to prevent occupational deaths and serious injuries.” *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-14 (1980).

From the perspective of the employees the OSH Act was designed to protect, nothing has changed except perhaps the name on their paycheck. Their jobs remain the same, as do the hazards presented by their work. The need for OSHA to be able to force compliance with the law remains acute.

OSHA must have the necessary enforcement tools to deal with the realities of the workplace and hold responsible entities accountable, through citations, financial penalties, and abatement requirements. If employers are able to evade their obligations

under the Act by changing corporate form, playing a corporate shell game, or hiding behind a corporate shield, the purposes of the Act will be frustrated. Employers will have a financial incentive to cut corners on safety and minimize or disregard entirely their responsibility toward the health and safety of workers. The Secretary will be hampered in her ability to enforce the law.

As one court has explained:

OSHA must rely on the threat of money penalties to compel compliance by employers. To let the cessation of a business by an employer render a civil penalty proceeding moot might greatly diminish the effectiveness of money penalties as a deterrence. . . We worry about creating an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name.

More important, employers who were going out of business for ordinary commercial reasons would have little incentive to comply with safety regulations to the end if monetary penalties could be evaded once the business quit altogether. As long as a business operates, it should feel itself to be effectively under the applicable laws and regulations – even on the last day. And, the continuing potential of penalties – more so than injunctive relief – makes these feelings real.

*Reich v. OSHRC (Jacksonville Shipyards, Inc.)*, 102 F.3d 1200, 1203 (11<sup>th</sup> Cir. 1997) (holding that the cessation of an employer's business does not render OSHA penalties moot). *See also, Joel Yandell*, 18 BNA OSHC 1623, 1629 (No. 94-3080, 1999) (given the possibility that the cited employer could resume business in the future, "the Act's purposes would be better served by requiring him to bring his past history with him, rather than allowing him to restart with a 'clean slate.'")

These decisions acknowledge the reality that if the Secretary is hindered in holding the responsible entities accountable, her ability to affect employer behavior

through enforcement actions will be seriously compromised, to the detriment of the safety and health of working people in this country.

In addition, it is important for the Secretary, and the Commission, to have the ability to address matters of individual liability, alter ego liability, and successor liability, at the liability phase of proceedings before the Commission. These determinations should not have to wait until the collections phase. The Commission is well situated to consider these matters at the liability phase, because it must determine the identity of the employer and related threshold issues in the course of its proceedings. While there is certainly support for the Secretary's authority to pursue these doctrines in contempt or penalty collection proceedings, there is no reason to limit their applicability to those contexts. *See Reich v. Seasprite Boat Co.*, 50 F.3d 413 (7<sup>th</sup> Cir. 1995) (permitting the Secretary to establish individual liability in OSH Act contempt proceedings); *U.S. v. WRW Corp.*, 986 F.2d 138 (6<sup>th</sup> Cir. 1993) (piercing the corporate veil to hold individuals liable in a collections proceeding under the Federal Mine Safety and Health Act). *See also* Suppl. Br. for the Sec'y of Labor at 28. In sum, establishing the identity of responsible actors is not simply a matter of money; it is a matter of holding entities responsible and bringing about their compliance with the law in order to abate hazards as quickly as possible.

This brief is organized in three parts. In Part One, we show that the Secretary has authority to hold Nick and Bill Saites, and Walter Jensen, liable as "employers" for their violations of the OSH Act and standards promulgated under the Act. The OSH Act holds

“person[s] engaged in business” directly responsible as employers, and the individuals involved in these cases plainly fall within that definition. 29 U.S.C. § 652(5).

In Part Two, we demonstrate that like other agencies enforcing remedial workplace statutes, the Secretary and the Commission have recognized the importance of disregarding corporate lines or technical changes in business form as necessary -- through doctrines such as single employer, alter ego, and successorship -- to effectuate the purposes of the OSH Act when, as here, the essential nature of the business enterprise has remained the same. By applying those settled principles here, the Commission should hold Nick and Bill Saites and Walter Jensen liable for the cited violations.

Part Three discusses another means of holding Nick and Bill Saites personally liable, i.e., through well-settled principles of piercing the corporate veil. As we show, agencies and courts will disregard the corporate form and hold individuals liable where adherence to the corporate structure will promote injustice or lead to an evasion of legal obligations. *See, e.g., White Oak Coal Co.*, 318 NLRB 732, 732 (1995). While it is not necessary for the Commission to reach this question here in light of Nick and Bill’s direct liability as “employers,” we will demonstrate that the requirements for piercing the corporate veil are met.

#### **I. The OSH Act Holds Statutory Employers Directly Liable for Violations of the Act**

The OSH Act requires “employers” to comply with OSHA standards and to provide their workers with a workplace free from recognized hazards. 29 U.S.C. § 654. “Employers” who violate these requirements are subject to various civil and criminal penalties. 29 U.S.C. § 666.

The Act defines “employer” as a “person engaged in a business affecting commerce who has employees.” 29 U.S.C. § 652(5). “Person,” in turn, is defined as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” 29 U.S.C. § 652(4). Therefore, “one or more individuals” or “group of persons” who are “engaged in a business” meet the OSH Act’s definition of employer and are subject to OSH Act penalties if they violate the law.

The statutory term “employer” is to be interpreted in view of the “broad remedial purpose” of the OSH Act, “which is protection of the worker from industrial injury.” *Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451, 458 (10th Cir. 1976). *See also Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261 (4th Cir. 1974) (the “purpose of the statute and not the technical distinctions of the common law” is the reference point in defining “employer” and “employee”). Thus, the Commission has recognized that “the primary consideration” in determining whether an entity is an “employer” is “whether the [entity] has control over the work environment such that abatement of hazards can be obtained.” *Vergona Crane Co., Inc.*, 15 BNA OSHC 1782, 1786 (No. 88-1745, 1992). *Cf. Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003) (adopting the EEOC’s test that for Title VII purposes, “if the shareholder-directors operate independently and manage the business, they are proprietors and not employees.”)

The term “employer” is used to describe the universe of potentially liable parties under both the civil and criminal penalty provisions of the statute. *Compare* 29 U.S.C. § 666(a) (“Any employer who willfully violates” a standard may be assessed a civil

penalty) *with* 29 U.S.C. § 666(e) (“Any employer who willfully violates any standard . . . and that violation caused death to any employee, shall, upon conviction, be punished by a fine . . . or by imprisonment . . . or by both.”). Congress obviously intended the term “employer” in the criminal penalty provision to include “individuals,” because only individuals, and not corporations, can be imprisoned.

Cases interpreting the term “employer” in the criminal penalty context have confirmed that “an officer’s or director’s role in a corporate entity . . . may be so pervasive and total that the officer or director is in fact the corporation and is therefore an employer under [the OSH Act].” *U.S. v. Cusack*, 806 F. Supp. 47, 51 (D.N.J. 1992);<sup>1</sup> *see also U.S. v. Doig*, 950 F.2d 411, 415 n.5 (7th Cir. 1991) (holding that manager of a construction project could not be held criminally liable under the OSH Act because he did not meet the Act’s definition of an employer, but noting that “[w]ere Doig a corporate officer or director he might well come under the definition of ‘employer’ and, therefore, be subject to liability as a principal.”).

It is well settled that “a term appearing in several places in a statutory text is generally read the same way each time it appears.” *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Moreover, “[t]he interrelationship and close proximity of these provisions of the statute ‘presents a classic case for application of the ‘normal rule of

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<sup>1</sup> The Court in *Cusack* concluded that to hold otherwise “would strip [the criminal provisions of the law] of much of its force when applied to closely held corporations where, as in the present case, the owner and principal officer is also the person actively supervising the work in which OSHA regulations were violated. In such a case it would seem that Congress’ intent is implemented by recognizing the reality of the situation and treating the officer and director as the employer.” 806 F. Supp. at 51.

statutory construction that identical words used in different parts of the same act are intended to have the same meaning.” *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996).

Thus, just as individuals “engaged in a business” may face criminal liability as “employers,” they may also be held civilly liable for violations of the law. Two OSH Act cases have, like the court in *Cusack*, recognized that individual officers or directors can exercise sufficient authority and control over the workplace to themselves meet the statutory definition of employer and be subjected to civil penalties.

In *Life Science Products Co.*, 6 BNA OSHC 1053 (No. 14910, 1977), *aff’d sub nom. Moore v. OSHRC*, 591 F.2d 991 (4th Cir. 1979), the Commission reviewed the decision of an administrative law judge who had found that that two officers and directors of a corporation could be held personally liable as “employers” under the Act.<sup>2</sup> William Moore and Virgil Hundtofte were cited for two willful and two serious violations of the Act after exposing their employees to a toxic pesticide called Kepone without providing them adequate protection. 6 BNA OSHC at 1054. Moore and Hundtofte were the only officers of Life Science Products, and with their spouses, they constituted the company’s board of directors. *Id.* at 1056. Moore and Hundtofte were responsible for health and safety conditions at the plant. *Id.*

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<sup>2</sup> *Amici* recognize that as an opinion by a divided Commission, this case holds no precedential value. We cite it, and the unreviewed decisions of administrative law judges discussed herein, only for their persuasive reasoning. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976).

The two Commissioners hearing the case disagreed over whether the ALJ's decision was correct, and agreed to affirm the decision to avoid an impasse. Commissioner Cleary, describing the question as one of first impression, would have found that Moore and Hundtofte were properly cited and found liable as "employers" because their "direction and influence over employees and their working conditions were as great as the titular employer." *Id.* at 1061. Concluding that "the primary statutory relief – the protection of the lives and health of the working men and women of the Nation – would be frustrated" if Moore and Hundtofte "could not be held directly accountable for their actions," Commissioner Cleary stated that he would uphold the citations against the individuals and the corporation. *Id.* at 1061, 1059 ("[t]hat Life Science is an 'employer', does not mean that . . . Moore and Hundtofte may not also be considered employers.") Commissioner Barnako, on the other hand, would have reversed the ALJ on grounds that Moore and Hundtofte were not "employers" within the meaning of the Act.

Similarly, in *Sinisgalli d/b/a Metro Wrecking*, 17 BNA OSHC 1849, 1996 OSAHRC LEXIS 49, \*25 (No. 94-2981, 1996), ALJ Hassenfeld-Rutberg determined that Louis Sinisgalli should be held responsible as the "true employer" for violations that occurred on a demolition project, notwithstanding the existence of several wrecking companies owned by Sinisgalli and cited by OSHA for the violations at issue. Finding that Sinisgalli had ultimate control over the working conditions at issue, including the ability to abate hazards, the ALJ stated that Sinisgalli "cannot hide behind his multiple corporate identities in order to avoid liability here." *Id.* at \*18.

The facts presented in the *Altor* and *Avcon* cases reveal that Nick and Bill Saites should be held individually and directly liable as employers for the alleged violations of the Act. Indeed, Judge Rooney so found in her decision in the *Avcon* case. Judge Rooney observed that in determining whether an “employment relationship” exists, the Commission has “placed primary reliance upon who has control over the work environment such that abatement of the hazards can be obtained.” ALJ Dec. at 6. Judge Rooney determined that “the record establishes that both Bill and Nick maintained control over the worksite,” ALJ Dec. at 9, and that “Nick and Bill acknowledged control over the worksite.” *Id.* at 11.<sup>3</sup>

The language of the OSH Act and the record in these cases provide ample support for the Commission to hold Nick and Bill Saites directly liable for the cited violations as “employers.” Nick and Bill Saites controlled the corporations, they controlled the working conditions in question, and they controlled the ability to abate the cited hazards. Just as Nick and Bill Saites could have been held criminally liable if a worker had fallen and died due to the lack of fall protection, *see Cusack*, 806 F. Supp. at 48, 52, they should be held civilly liable for their failure to abide by OSHA’s rules.

## **II. OSH Act Liability for Ongoing Business Operations That Change Corporate Form**

The OSH Act’s primary concern is protecting the safety and health of workers and ensuring that their workplaces are free from recognized hazards. The Secretary achieves

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<sup>3</sup> While Judge Yetman did not reach this question in *Altor*, his decision on the single employer issue and the Secretary’s brief to the Commission contain ample facts upon which to conclude that Nick and Bill Saites meet the definition of “employer” in that case as well.

this goal, in large measure, by holding responsible those actors who have “control over the work environment such that abatement of hazards can be obtained.” *Vergona Crane Co.*, 15 BNA OSHC at 1786. Over the years the Secretary and the Commission have recognized the need, when determining liability, to disregard technical changes in ownership or corporate form when the essence of the business operation has stayed the same. Similarly, on numerous occasions, the Secretary and the Commission have looked past formal corporate structures to find two or more employers to be a single employer under the Act when circumstances warrant.

For example, the Commission has on numerous occasions disregarded the corporate form to hold two allegedly separate businesses liable for OSHA violations under the “single employer” doctrine. Borrowing from a test developed by the National Labor Relations Board, the Commission has held that when “two companies share a common worksite such that the employees of both have access to the same hazardous conditions, have interrelated and integrated operations, and share a common president, management, supervision or ownership, the purposes of the Act are best effectuated by the two being treated as one.” *Advance Specialty*, 3 BNA OSHC 2072, 2076 (No. 2279, 1976).

The Commission most recently applied the “single employer” doctrine in *CT Taylor Co.*, 20 BNA OSHC 1083 (No. 94-3241, 2003), a case presenting facts strikingly similar to the *Altor* and *Avcon* cases. One employer – Taylor – won a bid to perform steel erection work. *Id.* at 1085. A second company – Esprit – provided the labor and the foreman. *Id.* Taylor provided equipment and a general manager to supervise employees,

and handled financial and recordkeeping matters for Esprit. *Id.* Both companies were owned and controlled by the same person – Charles Taylor. *Id.* The Commission determined that Taylor and Esprit should be treated as a single employer and held jointly and severally responsible for the violations of the OSH Act. *Id.* at 1091. Importantly, the Commission cited the purposes of the Act, including “effective enforcement” of the Act, as justification for its decision. *Id.* at 1087.

The Commission’s use of the single employer doctrine dates back to at least 1976, when the Commission applied the single employer doctrine and described it as “well settled that corporate entities may be disregarded in order to effectuate a clear legislative purpose.” *Advance Specialty Co.*, 3 BNA OSHC at 2075. A year earlier, Commissioner Cleary had described the single employer doctrine as a variant of “piercing the corporate veil,” and observed that courts “consistently permitted the ‘corporate veil’ to be ‘pierced’ when the interests of justice will be served and when such action is required for the protection or enforcement of public or private rights.” *Bob McCaslin Steel Erection Co.*, 1975 OSAHRC LEXIS 438, \*11 (No. 3776, 1975).<sup>4</sup>

At least two ALJs have applied these principles to find that an employer should be found liable for a “repeat” violation of an OSHA standard based on the prior violation by a related entity. In *Carl Thomas Construction Corp.*, 1988 OSAHRC LEXIS 15 (No. 86-

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<sup>4</sup> See also *Hills Dep’t Stores, Inc.*, 1990 OSAHRC LEXIS 141 (No. 89-1807, 1990) (ALJD) (recognizing potential use of alter ego, single employer, and piercing the corporate veil doctrines to hold responsible entities liable, but finding that the test for piercing the corporate veil was not met in this case); *John Ruggiero, Inc.*, 9 BNA OSHC 1582, 1583 (No. 80-4859, 1981) (ALJD) (“by piercing the corporate veil,” ALJ determined that two corporations were so intermingled that they constituted a single entity such that separate service on the second entity was not required.)

989, 1988) (ALJD), two construction companies -- Carl Thomas Construction Corporation and Carl B. Thomas Construction Corporation -- were cited for failing to comply with OSHA standards on blasting and the use of explosives. *Id.* at \*1-2. Ten months earlier, Carl B. Thomas Construction had been cited under the same standard, and that citation had become a final order of the Commission. *Id.* The two companies shared the same building and some of the same office space; they shared the same receptionist and telephone line; and there was overlap between the workforces of the two employers. *Id.* at \*3, 22-23. In addition, the two companies shared common management. *Id.* at 23. In attributing Carl B. Thomas' earlier violation against Carl Thomas Construction for purposes of affirming a "repeat" violation, the ALJ determined that there was such a "commonality of enterprise and management that, for the purposes of the Act, the [two employers] must be treated as one." *Id.* at 24.

And, in *Sinisgalli d/b/a Metro Wrecking*, the ALJ determined that because "[b]ehind all three of the corporations of which Sinisgalli has admitted ownership" -- including the corporation that had been cited for prior violations of OSHA's hazard communication standard "-- is Sinisgalli alone," classification of the violation as "repeat" was appropriate. 1996 OSAHRC LEXIS 49, at \*25.

As with the OSH Act, boards and courts enforcing other labor and employment laws have adopted various doctrines, including the "alter ego" and "successorship" doctrines, to deal with circumstances where the business enterprise for whom employees work is essentially the same, but its ownership has technically changed. The National Labor Relations Board has extensive experience with these doctrines, under which the

Board will impose liabilities and responsibilities on the ongoing business enterprise, regardless of its direct culpability for the violations in question, in order to vindicate workers' rights and effectuate the purposes of the National Labor Relations Act. These doctrines are discussed more fully below.

1. **Alter Ego Doctrine.** "The alter ego doctrine was developed in labor law to prevent employers from evading labor obligations merely by changing or altering their corporate form." 1 William Mead Fletcher *et al.*, Fletcher Cyclopedia of the Law of Private Corporations § 43.90 (perm ed., rev. vol. 1999).<sup>5</sup>

Since shortly after the inception of the NLRA, the NLRB has applied the alter ego doctrine, in cases analogous to those pending before the Commission, to enforce the purposes and policies of the NLRA.<sup>6</sup> *See, e.g., Hopwood Retinning Co., Inc.*, 4 NLRB 922 (1938), *enf'd in part, NLRB v. Hopwood Retinning Co.*, 98 F.2d 97 (2d Cir. 1938), *adjudging respondent and its alter ego in contempt*, 104 F.2d 302 (2d Cir. 1939); *Weinberger Banana Co., Inc.*, 18 NLRB 786, 790-93 & n.13 (1939), and cases cited therein. The alter ego doctrine is related to, but distinct from, the single employer

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<sup>5</sup> The NLRB uses the label "alter ego" to describe a company that has a substantial identity of ownership and control with a predecessor company. The NLRB uses the piercing the corporate veil label when it seeks to hold individuals liable for conduct engaged in behind the façade of a corporation. Some court decisions use the alter ego and piercing the corporate veil labels interchangeably.

<sup>6</sup> Other laws utilize an alter ego test as well. For example, alter ego doctrine has been applied in enforcing the Bankruptcy Act by crediting an income tax refund received by the predecessor closely-held corporation to the subsequently incorporated corporation, which had filed a bankruptcy petition. *Palmer Trading Co. v. Gordon*, No. 77-B-5157, 1980 Bankr. LEXIS 4721 (Bankr. N.D. Ill. July 31, 1980)

doctrine. *Johnstown Corp.*, 322 NLRB 818, 818 (1997). The First Circuit noted in *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 50 (1st Cir. 1994) (citations omitted):

[T]he alter ego doctrine, says that in certain situations one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws. The easiest example is a case where the second entity is created by the owners of the first for the purpose of evading labor law responsibilities; but identity of ownership, management, work force, business and the like are also relevant. [citation omitted] A second rubric – the “single employer” doctrine – has its primary office in the case of two ongoing businesses which the NLRB wishes to treat as a single employer on the ground that they are owned and operated as a single unit. [citation omitted] Most of the alter ego criteria remain relevant but motive is normally considered irrelevant.

Thus, the only differences between the single employer doctrine, which the Commission has expressly adopted, and the alter ego doctrine are, first, that the alter ego doctrine applies where successive companies are at issue, whereas the single employer doctrine applies to concurrently operated businesses. Second, in applying the alter ego doctrine, in addition to the factors relevant to a single employer finding, motive to evade statutory obligations is relevant, although not required.<sup>7</sup>

The *Weinberger* case exemplifies the NLRB’s early alter ego cases. There, Weinberger Banana Company, Inc. (“Banana Company”) was engaged in the import and sale of bananas. 18 NLRB at 790. After its employees began joining a union, the company’s President Charles Weinberger incorporated Weinberger Sales Company

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<sup>7</sup> The NLRB does not require a showing of intent to evade statutory obligations to show alter ego status. *AAA Fire Sprinkler, Inc.*, 322 NLRB 69, 71 n.8 (1996). The courts of appeals, however, are split on the question of the need to show unlawful intent. *Id.* The Commission need not resolve that issue in addressing the three pending cases, in which new entities were incorporated on the heels of OSHA citations at least in part to evade OSH Act liability.

(“Sales Company”) “because he knew that the Banana Company ‘was liable to be sued [and] put out of business by its creditors.’” *Id.* at 790-91. Banana Company then ceased operations, and Sales Company began operating substantially the same business, out of the same offices, using the same dock and supplies, under the same management, and employing substantially the same employees as had Banana Company. *Id.* Charles Weinberger, president of both companies and responsible for their policies, owned 90 percent of the stock of Banana Company and all of the stock of Sales Company. *Id.* at 790-93.

The NLRB concluded:

Weinberger remained the actual employer, and the same work was done, by the same employees, under the same supervisors and conditions, with the same machinery, facilities, and products. The change in corporate name and structure resulted in no material change in the employer-employee relationship. This relationship is our chief consideration here, since it is all important in effectuating the purposes and policies of the Act. Under these circumstances, therefore, we find that the [two companies] are one and the same legal entity in so far as the Act is concerned, and in any event are so interrelated as to be jointly and severally liable for the unfair labor practices of both.

*Id.* at 792-93. *See also Hopwood*, 4 NLRB at 934 (where one company partially ceased business after its employees joined a union, and the company’s attorney incorporated a new company, with different but related shareholders, to resume the business, “the conclusion [was] inevitable that [the new company was] but the alter ego of Hopwood Company, operated for its benefit, and controlled by it” and accordingly both were held liable for the NLRA violations).

The United States Supreme Court has repeatedly expressed its approval of the NLRB's use of the alter ego doctrine to enforce the statute, starting with *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942). In *Southport*, the NLRB had ordered a corporation to reinstate three unlawfully discharged employees with backpay. *Id.* at 101-102. The court of appeals rejected the corporation's request that the court order the NLRB to permit it to present evidence showing that it had distributed all its assets and that the two stockholders who received the facility where the employees were to be reinstated had conveyed it to an unrelated Delaware corporation with unrelated stockholders. *Id.* at 102-104. Concluding that the court had committed no error, the Supreme Court noted: "Such operation might have continued under the old business form or under a disguise intended to evade [the NLRB's order]. If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for compelling obedience."<sup>8</sup> *Id.* at 106. See also *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) ("We have indicated that Labor Board orders are binding upon successors and assigns who operate as "merely a disguised continuance of the old employer.").

The Supreme Court described the classic alter ego case in *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 259 n.5 (1974):

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<sup>8</sup> The Supreme Court also stated in *Southport*: "a bona fide discontinuance and a true change of ownership [] would terminate the duty of reinstatement created by the Board's order." 315 U.S. at 106. But, the Supreme Court later held in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180 (1973), "that a bona fide purchaser, acquiring, with knowledge that [unfair labor practices] remain[] unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65(d)," and accordingly, liable for remedying the unfair labor practices. See discussion *infra* at pp. 21-24.

[T]he successor corporation is the “alter ego” of the predecessor, where it is “merely a disguised continuance of the old employer.” [citation] Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.

Some of the NLRB’s more recent alter ego cases, which are analogous to the cases pending before the Commission, show that the common ownership factor of the alter ego doctrine is satisfied where different members of the same family own and control the businesses. For example, *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), involved a closed corporation, as do the cases currently before the Commission. In that case, the NLRB set forth the factors considered to determine whether an entity should be held liable for statutory violations as an alter ego of another entity. *Id.* at 1144. The NLRB stated that generally alter ego status will be found where “two enterprises have ‘substantially identical’ management, business purpose, operation, equipment, customers, and supervision, as well as ownership.” *Id.*

In *Crawford Door*, Cleon Cordes and his wife Ann had begun a partnership with Ann’s father and mother, engaging in garage door sales and installation. *Id.* at 1146. The business was later incorporated, and Cleon and Ann bought out Ann’s father and mother. *Id.* Ann and Cleon’s two sons, Michael and Charles, also became involved in the business. Michael became the vice president of Crawford Door. *Id.* Eventually, Cleon owned 30 shares of Crawford Door, Ann owned 20 shares, Michael owned 15 shares, and Charles owned 10 shares. When the parents experienced failing health, Michael assumed

sole charge of labor relations and other policy matters on a day-to-day basis for Crawford Door. *Id.* at 1146-47.

Michael then incorporated Cordes Door Company. *Id.* at 1148. Crawford Door was liquidated, and its assets divided among the four shareholders. *Id.* Michael's parents received the business premises, and Michael received furniture, equipment, some trucks, inventory, and sufficient cash to remain in business. Michael and his wife then leased the business premises from Michael's parents, and Michael began operating Cordes Door at the same location. *Id.* Michael was Cordes Door's president and majority shareholder, and his wife held the remaining shares. *Id.* at 1144. Michael's brother, Charles became Cordes Door's vice president. *Id.* at 1144, 1148.

Finding that common ownership between the entities was sufficient to support an alter ego finding, the NLRB noted, "both Respondents at all times material were wholly owned by members of the Cordes family and never lost their character as a closed corporation. In these circumstances, we find that ownership and control in both enterprises is substantially identical." *Id.* at 1144. *See also Campo Slacks, Inc.*, 265 NLRB 492, 492 & n.1, 501 n.18 (1983) (various companies and the family member who "ran" them liable as alter egos of one another); *Precision Builders, R.S., Inc.*, 296 NLRB 105, 109 (1989) (companies are alter egos where "[t]he ownership of all stock in both corporations by family members and the fact that all corporate officers and directors are members of the family warrants a finding of common ownership and control ... the simple fact [is that] both companies were and are family corporations entered into by and for the benefit of family members, and owned and managed by family members.")

## 2. Successorship Doctrine

The successorship doctrine is distinct from the “alter ego” doctrine, but it serves a similar remedial purpose. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 259 n.5 (1974) (successorship liability is different from cases where “the successor corporation is the ‘alter ego’ of the predecessor, where it is ‘merely a disguised continuance of the old employer.’”). The successorship doctrine concerns the duty of “a bona fide purchaser” to remedy its predecessor’s violations of the law. As a leading treatise has explained:

In successorship cases, the continuity of the employee complement provides the threshold linkage between the old and the new employer. In alter ego cases, the substantial identity of employer ownership and control provides that threshold linkage. Thus, the fact that a new employer is not a successor does not preclude a finding that it is an alter ego. Nor, of course, will a finding that the new employer is not an alter ego preclude a finding that it is a successor.

Patrick Hardin & John E. Higgins, *et al.*, *The Developing Labor Law*, at 1094 (4<sup>th</sup> ed. 2001).

The test for successorship liability was established by the Supreme Court in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180 (1973), where the Court said that successor liability could attach when the subsequent employer was a bona fide successor and the subsequent employer had notice of the potential liability.<sup>9</sup> As developed by the

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<sup>9</sup> *Golden State* makes clear that the Board’s authority to require successors to take remedial action derives from Section 10(c) of the NLRA, which gives the Board “broad discretion to fashion and . . . order . . . relief adequate to achieve the ends, and effectuate the policies, of the Act.” 414 U.S. at 176. If anything, Section 10(c) of the NLRA is written more narrowly than Section 10(c) of the OSH Act. *Compare* 29 U.S.C. § 160(c) (“If . . . the Board shall be of the opinion that any person named in the complaint has engaged in [unfair labor practices] . . . the

National Labor Relations Board and the courts, determining whether an employer was a “bona fide” successor depends on the degree of continuity between the old and the new businesses, and looks at factors such as whether the new employer employs the same workforce and performs the same work with the same equipment as the previous employer. Determination of successor liability does not depend on whether the new employer was established to evade the predecessor’s legal liabilities, but rather holds the successor responsible in order to effectuate the policies of the Act. *Id.* at 177.

The *Golden State* formulation of successorship liability has been “extend[ed] to almost every employment law statute,” including the Mine Safety and Health Act<sup>10</sup>, the Age Discrimination in Employment Act, ERISA, Title VII, and the Fair Labor Standards Act. *Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir. 1995) (holding that successorship doctrine articulated in *Golden State* applies under the Fair Labor Standards Act, and noting that “beginning with cases under the National Labor Relations Act, federal courts have developed a federal common law successorship doctrine that now extends to almost

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Board shall issue . . . an order requiring *such person* to cease and desist. . .”) with 29 U.S.C. § 659(c) (“The Commission shall . . . issue an order . . . directing other appropriate relief.”) Thus, Section 10(c) of the OSH Act plainly provides authority for the Commission to order relief against successors and other related entities.

<sup>10</sup> The Federal Mine Safety and Health Review Commission has adopted, with judicial approval, a nine-factor test for successorship that is very similar to the test utilized by the NLRB. *See Secretary of Labor v. Mullins*, 888 F.2d 1448, 1453-54 (D.C. Cir. 1989). The factors considered by FMSHRC are: (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production, and (9) whether he produces the same products. *Id.*

every employment law statute.”). The successorship doctrine has been adopted and applied by one district court as part of remedying discrimination violations under Section 11(c) of the OSH Act. *See Dole v. HMS Direct Mail Service, Inc.*, 752 F. Supp. 573, 581 (WDNY 1990), *rev'd on other grounds*, 936 F.2d 108 (1991) (“where, as here, the violator has sold or transferred its entire operation to another entity which, in essence, merely continues the business using the same premises, machinery, employees and supervisory personnel,” it is appropriate to hold the successor employer responsible for remedying violations of the Act.)

In *Steinbach*, the court explained that “in deciding to extend successorship liability [from *Golden State*] to other contexts, courts have recognized that extending liability to successors will sometimes be necessary in order to vindicate important statutory policies favoring employee protection.” *Id.* Thus, “where employee protections are concerned, ‘judicial importation of the concept of successor liability is essential to avoid undercutting Congressional purpose by parsimony in provision of effective remedies.’” *Id.*

### **3. Application of These Principles Here**

The facts in *Altor* and *Avcon* demonstrate the appropriateness of disregarding the corporate form to hold Nick and Bill Saites individually liable for the cited violations under the various doctrines we have just described.

The Saites have owned and operated a series of construction companies for more than 20 years. *Altor* Dec. at 3; *Avcon* Dec. at 2, 15. Each of these companies has been in the same line of business – reinforced concrete construction – and each has been cited

and fined by OSHA for a variety of OSHA violations, typically including OSHA's fall protection rules. *Id.* Each of these companies has been owned by Nick and/or Bill Saites, and either Nick or Bill has been an officer and/or director of each company. *Id.* Nick and Bill have managed and controlled the companies' work, including day to day supervision, and they acknowledge their control over the worksite. *Avcon* Dec. at 9. Bill has hired the same individuals to be foremen on the various jobs. The companies have all operated out of the basement of Nick's house, and all office workers but one are members of Nick and Bill's family, including Bill's wife. *Altor* Dec. at 3.

The substantial continuity and overlap between the Saites' various companies, and the complete domination and control exercised by Nick and Bill, show that the corporations are alter egos of each other, and are merely alter egos of Nick and Bill. It is clear that each manifestation of their business is "merely a disguised continuance of the old employer," that involves "a mere technical change in the structure or identity of the employing entity . . . without any substantial change in its ownership or management." *Howard Johnson Co.*, 417 U.S. at 259 n.5. The "business" that Nick and Bill are engaged in remains the same, as do the hazards their workers face. And, regardless of the identity of the company *de jour*, from the perspective of the workers, it is all too clear that their employers -- Nick and Bill -- are failing to protect them from harm. Thus, alter ego liability provides another basis upon which to hold Nick and Bill Saites individually liable for their violations of the OSH Act.

The doctrines discussed here -- single employer, alter ego, and successorship -- and the statutory interests they promote, also provide strong justification for attributing Walter Jensen's earlier OSHA violations to his current business.

As found by the decision of the ALJ, Walter Jensen was the sole owner of S&W, a general contracting business. ALJ Dec. at 12-15. In 1998, OSHA cited S&W and Jensen individually for a violation of OSHA's fall protection standards, and the citation became a final order of the Commission. S&W subsequently ceased operations. Jensen purchased some of S&W's assets in a bankruptcy sale. Six weeks after S&W's demise, Jensen resumed operations, this time as Sharon and Walter Construction Co. Jensen is the president and sole shareholder of Sharon and Walter. Sharon and Walter is in the same general contracting business as S&W, and uses some of the same assets. The companies have the same office address and phone number, and operate in the same geographic area. Sharon and Walter hired at least part of S&W's workforce. ALJ Dec. at 14-15. In 2001, OSHA cited Sharon and Walter for a violation of its fall protection rules, and classified the citation as "repeat" based on the earlier citation to S&W.

There is ample justification to affirm the ALJ's decision finding Sharon and Walter an alter ego of S&W and/or Walter Jensen and attributing S&W's past history to Sharon and Walter on this basis. There is complete overlap between the ownership and management of the two companies, they perform the same work in the same geographic area, and they utilize some of the same equipment and employees. Without question there is sufficient commonality in ownership and control to establish alter ego liability for S&W's earlier OSHA violations. The fact that Jensen incorporated and restarted

operations as Sharon and Walter so soon after S&W's demise (and S&W's OSHA violations) lends further support to alter ego liability in this case.

The ALJ was also correct in finding that Sharon and Walter was a successor to S&W, and classifying the citation as a "repeat" violation pursuant to successorship principles developed under federal labor law. In form, Sharon and Walter is a successor to S&W, in that there is substantial continuity in operations, including the equipment, the type of business, the workforce, and the ownership and management of the company. Sharon and Walter clearly had notice of S&W's past OSHA violations, given that the same individual was in charge of both businesses.

Moreover, strong policy reasons support classifying the violation as "repeat" based on the conduct of the predecessor employer. From the perspective of the employees, many of whom worked for both companies, the same unabated hazards are present at their workplace. Holding Sharon and Walter responsible for a "repeat" violation of OSHA's fall protection standards imposes a higher financial cost, and thereby creates a stronger incentive, to comply with OSHA's rules. *See Steinbach*, 51 F.3d at 845 (citing appropriateness of successor liability "in order to vindicate important statutory policies favoring employee protection.")

### **III. Individual Liability Through Piercing the Corporate Veil**

Because, as we have shown, Nick and Bill Saites should be held directly liable for the citations and penalties in question as "employers" under the Act, it is unnecessary for the Commission to reach the question of whether they may be also found individually liable pursuant to traditional common law methods of disregarding the corporate form to

reach individual actors. However, because the Secretary has advanced these doctrines as additional bases upon which Nick and Bill Saites may be held personally liable, and because the Commission has requested briefing on these issues, we address them here.

“Normally, the corporation is an insulator from liability on claims....” *Anderson v. Abbott*, 321 U.S. 349, 361 (1944). However, “it is indisputable that there are some circumstances under which the corporate entity will be disregarded and liability imposed upon its members.” 1 Fletcher, § 41. “Piercing of the corporate veil is justified when there is a unity of interest and ownership such that the separate personalities of the corporation and the individual no longer exist and to credit that separateness would work an injustice.” *Id.* at § 41 (Supp. 2003). Applying these fundamental corporate law principles, “[i]t has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement.” *Anderson*, 321 U.S. at 362-63.<sup>11</sup>

The NLRB applies a corporate veil piercing doctrine, derived from federal common law,<sup>12</sup> to hold corporate shareholders liable for statutory violations. In *White Oak Coal Co.*, 318 NLRB 732 (1995), the NLRB reexamined the doctrine of piercing the corporate veil and set forth a two-part test to determine if the corporate veil should be pierced in a given case. Under the NLRB’s standard, the veil may be pierced to hold

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<sup>11</sup> *U.S. v. Bestfoods*, 524 U.S. 51 (1998), confirms that statutes do not abrogate the common law on piercing the corporate veil unless the statute speaks directly to the question. *Bestfoods* also lends support to our argument that Nick and Bill Saites should be held directly liable as statutory employers, because *Bestfoods* confirms that a parent corporation may be held directly liable under CERCLA if its conduct brings it within the statutory definition of “operator.” *Amici* do not view *Bestfoods* as otherwise relevant to these cases.

<sup>12</sup> *White Oak Coal Co.*, 318 NLRB 732, 732 (1995).

individual shareholders liable where: (1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. In assessing whether the shareholder and corporation have failed to maintain separate identities under the first prong of the standard, several factors are considered: (a) the degree to which corporate formalities have been maintained and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. These factors are further broken down: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of same, or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes; and (9) transfer or disposal of corporate assets without fair consideration. *Id.* at 735.

In a case presenting facts analogous to those here, *AAA Fire Sprinkler, Inc.*, 322 NLRB 69 (1996), the NLRB pierced the corporate veil to hold an individual shareholder liable where he used "a complex scheme of shifting corporate entities" to avoid paying his statutory liabilities. *Id.* at 69. There, the shareholder, Robert Gordon, incorporated IWG, Inc. and began operating a fire sprinkler contracting company under the trade name AAA Fire Sprinkler, Inc. Gordon, as the majority shareholder and chief executive officer

of the company, recognized the union as the majority representative of its employees. During the term of a collective bargaining agreement with the union, in order to avoid his statutory requirements under that agreement, Gordon discontinued IWG's business and laid off all his employees. At the time that IWG ceased business, however, Con-Bru, Inc. began business under the AAA Fire Sprinkler, Inc. trade name it had purchased from IWG. Martin Christensen, a former IWG sprinkler designer, was the sole owner of Con-Bru on paper and was its president. Gordon's wife was secretary treasurer of Con-Bru. A few months later, Con-Bru went out of business, and Arlene, Inc. began doing the same business under the name AAA Fire Suppression, Inc. To conceal Gordon's involvement in Arlene, Inc., Gordon's long-time friend was its sole owner, and the friend and his wife were the corporate officers. Gordon created these "successive" corporations to continue operating the fire sprinkler business while avoiding his obligations under the NLRA. Calling this "a classic case involving the misuse of the corporate form in order to create a shield against legal liability," the NLRB pierced the veil to hold Gordon individually liable. *Id.* at 74. The NLRB's holding was based in part on the fact that Gordon had "used both Con-Bru and Arlene as a 'shell, instrumentality or conduit' of I.W.G. so that he could continue in the fire sprinkler business without the burden of the union contract" that the NLRA required him to honor. *Id.*

Similarly, in *Genesee Family Restaurant*, 322 NLRB 219 (1996), *enf'd*, 129 F.3d 1264 (6<sup>th</sup> Cir. 1997), the corporate veil was pierced where, to avoid dealing with the union, members of the Branoff family closed Genesee Family Restaurant, which had been run by one closely held corporation, ostensibly owned by the husband and wife.

Their son then established International Bakery & Pastries, and the same family members proceeded to operate substantially the same business under the name of the new corporation.

With NLRB approval, the ALJ found “the three [Branoffs] share in overseeing, running, and profiting from International’s revenues.” *Id.* at 229. Some dealings between family members and the corporation were not arms-length. The corporation also failed to comply with normal corporate indicia – such as board meetings, minutes, director resolutions, or other documentation. Again, with NLRB approval, the ALJ stated, “[T]he only reason for the creation of International [was] to serve as an escape route for the Branoffs from their . . . obligation[s] under the Act” and that “Genesee and International [we]re . . . merely facades for the personal business activities of Alex, Anastasia, and George Branoff, and it is necessary to pierce the corporate veil to avoid the circumvention of the remedial purposes of the Act.” *Id.* at 230. *See also West Dixie Enterprises*, 325 NLRB 194, 195 (1997), *enf’d*, 190 F.3d 1191 (11<sup>th</sup> Cir. 1999) (corporate veil was pierced and owner-wife and her husband, who ran the business, were held liable for violations of the NLRA where family members failed to maintain corporate formalities as well as other indicia showing abuse of corporate form).

The veil piercing doctrine has been applied under other labor and employment laws. For example, the Fifth Circuit pierced the corporate veil (and found alter ego liability) to enforce the WARN Act against several related corporations and the individuals who controlled them. *Hollowell v. Orleans Regional Hosp. LLC*, 217 F.3d 379, 385-88 (5th Cir. 2000). And the Sixth Circuit has upheld piercing the corporate veil

to hold individuals liable under the Federal Mine Safety and Health Act. *U.S. v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993). *See also Reich v. Seasprite Boat Co.*, 50 F.3d 413 (7th Cir. 1995) (contempt proceeding under OSH Act, with Court noting the interrelatedness between two companies and their owner and stating that the Secretary “m[ight] be able to establish [the president and sole stockholder]’s personal liability by showing that [he] operated Sea Sprite without observing the corporate forms and that respecting those forms would perpetrate an injustice.” *Id.* at 418. These decisions reflect a recognition of the need to apply settled veil-piercing doctrines in enforcing labor and employment laws when circumstances warrant.

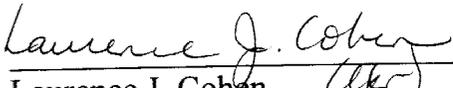
The record contains compelling evidence for holding Nick and Bill Saites personally liable through piercing the corporate veil. As we have shown, under well-settled principles of federal common law, it is appropriate to disregard the corporate form and hold the owners directly responsible where the owners and corporation have failed to maintain separate identities, and where adherence to the corporate structure would promote injustice or lead to an evasion of legal obligations. *White Oak Coal Co.*, 318 NLRB 732 (1995). Here, the evidence shows that the corporations have no identity separate from Nick and Bill. In many important respects, corporate formalities have been ignored. Resp. Br. of Sec’y in *Avcon* at 14-15; *Avcon* Dec. at 3, 15. Nick has frankly admitted that Avcon was created in part to avoid OSHA liability. *Id.* at 14-15; *Avcon* Dec. at 14. Avcon was undercapitalized throughout its existence, and rather than recapitalizing it with \$253,535 in profits from another of Bill and Nick’s projects, Bill and Nick created a new business – Avcrete. *Id.* Indeed, Nick testified that part of the

reason for Avcrete's formation was that Avcon had no money and might have a substantial liability in OSHA penalties. *Id.* Finally, without reference to his duty to shareholders or obligation to pay OSHA penalties, Bill testified that "whatever [money] is left" from the current project, "I'm going to get." *Avcon* Dec. at 4. Under these circumstances, to allow the corporate form to shield Nick and Bill from individual liability for their continued failure to protect their workers from serious hazards would perpetrate a gross injustice. The Commission should uphold the citations against Nick and Bill Saites.

### CONCLUSION

Individuals like Nick and Bill Saites, and Walter Jensen, who regularly and repeatedly put their employees in harm's way, should not be able to escape liability for their actions by hiding behind the corporate form. In order to achieve the OSH Act's "fundamental objective" of "prevent[ing] occupational deaths and serious injuries, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-14 (198), such employers must be held accountable when they violate the OSH Act. The citations should be affirmed.

Respectfully submitted this 24<sup>th</sup> day of March, 2004,

  
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## CERTIFICATE OF SERVICE

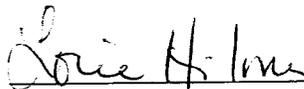
I hereby certify that on this date I served copies of the attached Brief of the American Federation of Labor and Congress of Industrial Organizations and the Building and Construction Trades Department, AFL-CIO, as Amici Curiae via First Class mail on the following counsel:

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