

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

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SECRETARY OF LABOR,

Complainant,

v.

AVCON, INC., VASILIOS SAITES, and  
NICHOLAS SAITES,

Respondents.

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OSHRC Docket Nos. 98-0755 and  
98-1168

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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.

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OSHRC Docket No.  
99-0958

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SECRETARY OF LABOR,

Complainant,

v.

SHARON and WALTER  
CONSTRUCTION, INC.,

Respondents.

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OSHRC Docket No.  
00-1402

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MARCH 2004

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## ISSUES ON WHICH THE COMMISSION REQUESTED SUPPLEMENTAL BRIEFING

On January 8, 2004, the Commission invited the parties and interested *amici curiae* to file supplemental briefs on the following issues:

1. Does the Commission have the authority to pierce the veil of a corporation and hold individuals personally liable for violations of the Occupational Safety and Health Act ("OSH Act")? In answering this question, parties and interested *amici* may wish to address § 3(5) of the Act, which defines the term "employer," and § 10(c) of the Act, which authorizes the Commission to "direct[] other appropriate relief," (in addition to affirming, modifying, and vacating a citation or proposed penalty)?
2. Does the OSH Act, with specific reference to § 10(c) of the Act, empower the Commission to extend a remedial order entered against a cited employer to a successor or alter ego of the employer?
3. Does 1 U.S.C. § 5 provide a basis by which the definition of "person" in § 3(4) of the OSH Act may be interpreted to include the successor of a cited employer?
4. Can § 17(a) of the OSH Act be interpreted as authorizing successor or alter ego liability for a repeat violation, assuming the other elements necessary for such a violation are established? *See Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979)?
5. Are there policies embodied in the OSH Act that would be served, or frustrated, by piercing the corporate veil or by extending the Commission's remedial orders to successors and alter egos? How would those policies be served or frustrated by (a) piercing the corporate veil of Avcon, Inc., or Altor, Inc., or (b) finding that Sharon and Walter Construction, Inc., is the successor or alter ego of a previously cited employer?
6. What is the relationship between successor liability and alter ego liability under the OSH Act? Is there any difference in the type or scope of remedial action required pursuant to findings of successorship and alter ego status?
7. To what extent does the availability of a civil action under section 17(l) of the OSH Act affect the Commission's need to consider piercing the corporate veil, successor liability, and alter ego liability?
8. To the extent the Commission has the authority to pierce the corporate veil and to extend remedial orders to an employer's successor or alter ego, under what circumstances should the Commission exercise that authority? Are those circumstances present in the above-referenced cases?

**I. The Commission Has the Authority to Pierce the Corporate Veil and Hold That Individuals Are Employers Under the OSH Act.**

The Commission's veil-piercing authority rests on several grounds, to wit: the statutory definition of the terms "person" and "employer" at 29 U.S.C. §§ 652(4), 652(5); the general common law and precedent establishing that piercing principles will be read into federal statutes; section 10(c) of the Act; and principles of deference.

**A. Section 3(5) of the OSH Act Authorizes Individual Liability.**

Under the OSH Act, if the individual is an "employer," he or she must "furnish employment and a place of employment" that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1). An employer must also "comply with occupational safety and health standards promulgated under the Act." 29 U.S.C. § 654. If an employer does not comply and a citation is issued, the employer is subject to an order to abate the violations found and pay assessed civil money penalties. 29 U.S.C. §§ 658, 659(c), 666.

The Act defines an "employer" as a "person . . . who has employees." 29 U.S.C. §652(5). The term "person," in turn, is defined by the Act to mean "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, **or any organized group of persons.**" 29 U.S.C. § 652(4) (emphasis added). Therefore, an individual or corporation may be an employer. Moreover, an organized group that includes an individual and a corporation may also be an employer under the OSH Act.

**B. General Common Law Principles Authorize Veil Piercing.**

The Supreme Court in *United States v. Bestfoods*, 524 U.S. 51, 62 (1998) ("*Bestfoods*"), characterized as "fundamental" the principle that "the corporate veil may be pierced . . . when, *inter alia*, the corporate form would otherwise be misused . . . ." *Id.* at 62. The Court held that

"to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Id.* at 63 (citation omitted). Veil piercing is thus a basic background principle Congress is presumed to intend when it legislates.

Although the Court in *Bestfoods* addressed the issue of veil piercing principles under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (2001) ("CERCLA"), the Court's reasoning applies equally to the OSH Act. There is no statutory language in the OSH Act that abrogates the common-law veil piercing principle to prevent the misuse of the corporate form by an individual owner or principal. *See* 1 WILLIAM MEAD FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (perm. ed., rev. vol. 1999 & Supp. 2003) ("Fletcher") (discussing piercing to reach an individual). Because Congress did not limit the application of the federal common law under the OSH Act, *Bestfoods* makes clear that piercing is part of the Act.

Courts and administrative bodies, in myriad contexts and under numerous statutes including remedial statutes, have recognized the application of piercing principles to prevent misuse of the corporate form. *See, e.g., Bestfoods*, 524 U.S. at 62 (CERCLA); *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629-630 (1983) ("*Bancex*") (unpaid letter of credit), *quoting Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 713 (1974) ("*Bangor Punta*") (Federal antitrust and securities laws); *Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (Federal Reserve Act, 12 U.S.C. § 64; National Bank Act, 12 U.S.C. § 63). *See also, Reich v. Sea Sprite*, 50 F.3d 413, 418-419 (7th Cir. 1995) ("*Sea Sprite*") (dictum) (court endorses application of piercing).

Moreover, courts have not hesitated to apply piercing principles in the labor law context and under administrative schemes established by federal statute. *NLRB v. Deena Artware, Inc.*,

361 U.S. 398, 403-404 (1960) (National Labor Relations Act ("NLRA")); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 n. 2 (10th Cir. 1993) (Title VII and the Age Discrimination in Employment Act); *United States v. WRW Corp.*, 986 F.2d 138, 143-144 (6th Cir. 1993) ("*WRW*") (Federal Mine Safety and Health Act of 1977) ("*MSH Act*"); *Papa v. Katy Indus. Inc.*, 166 F.3d 937, 940-943 (7th Cir. 1999) (Title VII, Americans with Disabilities Act, Age Discrimination in Employment Act) (noting court would aggregate affiliates where traditional piercing principles applied or where the business was fragmented to duck statutory responsibilities in the context of antidiscrimination law).

In an early, important labor case, the Supreme Court recognized that piercing principles applied in an action under the NLRA. *NLRB v. Deena Artware*, 361 U.S. at 403-404. Quoting Justice Cardozo's famous writings on piercing the corporate veil, the Court wrote:

Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice.

361 U.S. at 403-04, quoting *Berkey v. Third Avenue R. Co.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926) (internal quotations omitted). The Court continued, cataloguing additional circumstances when the court would pierce the corporate veil as follows:

One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations, as the authorities recognize.

*Id.* (footnotes and citations omitted).

The Court allowed the National Labor Relations Board ("*NLRB*" or "*Board*") to show that corporations owned by a single individual were "but divisions or departments of a 'single enterprise.'" 361 U.S. at 402. The "single employer" or "integrated enterprise" test is conceptually different from the test establishing personal liability through veil piercing, but both

tests show the courts and agencies will look beyond the corporate form when necessary to carry out a statute.<sup>1</sup>

The Commission also has recognized its authority to look beyond the corporate form. In *Advance Specialty Co., Inc.*, the Commission disregarded the corporate form to hold that two companies sharing a common worksite, having interrelated and integrated operations, and sharing a common president, management, supervision or ownership, were a single employer under the Act. 3 BNA OSHC 2072, 2075-2076 (No. 2279, 1976).<sup>2</sup> The Commission relied on federal court precedent holding that corporate entities could be disregarded in order to effectuate a clear legislative purpose,<sup>3</sup> on NLRB precedent,<sup>4</sup> and on its own earlier precedent.<sup>5</sup> *Id.*

Recently, the Commission reaffirmed its authority to disregard the corporate structure in *C.T. Taylor Co., Inc., and Esprit Constructors, Inc.*, where it held that the purposes of the OSH Act, including effective enforcement, were best served by treating two affiliated companies as a single employer rather than two employers as the Secretary had done in separately citing them.

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<sup>1</sup> See NLRB Manual: An Outline of Law and Procedure – Chapter 14, Multiemployer, Single Employer, and Joint Employer Units (<http://www.nlr.gov>) ("NLRB Manual"); see *Pearson v. Component Technology Corp.*, 247 F.3d 471, 485-486 (3d Cir.), *cert. denied*, 534 U.S. 950 (2001) (discussing the various tests); see, e.g., *NLRB v. Parklane Hosiery Co., Inc.*, and *Mervyn Roberts d/b/a Parklane Hosiery*, 203 NLRB 597, amended on other grounds, 207 NLRB 146 (1973) (Board distinguished the single employer doctrine from the application of piercing principles under *Deena Artware*).

<sup>2</sup> In *Advance Specialty*, the Commission adopted the Board's "integrated enterprise" or "single employer" test that Administrative Law Judge ("ALJ") Robert Yetman correctly applied below in *Altor, Inc., Avcon, Inc., Vasilios Saites, Nicholas Saites*, Docket No. 99-0958 ("*Altor*"), to hold that Altor and Avcon were a single employer.

<sup>3</sup> The Commission cited *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agriculture*, 438 F.2d 1332 (8th Cir. 1971); *Joseph A. Kaplan & Sons, Inc. v. F.T.C.*, 347 F.2d 785 (D.C. Cir. 1965).

<sup>4</sup> See *Bayside Enterp., Inc.*, 216 NLRB 502 (1975), *order enforced*, 527 F.2d 436 (1st Cir. 1975), *judgment aff'd*, 429 U.S. 298 (1977); *Dee Knitting Mills*, 214 NLRB 1041 (1974), *enforced*, 538 F.2d 312 (2d Cir. 1975); *R.L. Sweet Lumber Co.*, 207 NLRB 529 (1973), *enforced*, 515 F.2d 785 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975).

<sup>5</sup> The Commission also relied on its own previous precedent, *Home Supply Co.*, 1 BNA OSHC 1615 (No. 69, 1974), in which it had held that three entities formed a single venture for purposes of the Act and were "joint employers" when they had adjacent, contemporaneous and integrated construction projects, shared both a common superintendent and common engineer, and routinely transferred employees between the projects.

20 BNA OSHC 1083 (Nos. 94-3241 & 94-3327, 2003). The record in that case showed, wrote a majority of the Commission, that Taylor's general manager controlled and directed the work activities of Esprit's employees at the worksite. *Id.*

Even more recently, in *Eric K. Ho*, the Commission signaled that it had the authority to apply piercing principles. 20 BNA OSHC 1361 (Nos. 98-1645, 98-1646, 2003). The Commission wrote, "[i]nsofar as 'reverse-piercing' is a corollary principle to piercing the corporate veil, we find that it may have application in the context of determining liability under a remedial statute." *Id.*, p. 10. The Commission relied, in part, on *WRW*, 986 F.2d at 143-44, a case holding that individual corporate officers and shareholders could be held liable for civil penalties assessed against a corporation for violations of the MSH Act. In sum, the overwhelming weight of federal and Commission precedent supports the Commission's application of piercing principles under the OSH Act.

**C. Section 10(c) of the OSH Act Authorizes Veil Piercing.**

OSH Act section 10(c) authorizes the Commission to affirm citations issued by the Secretary and to order "other appropriate relief." 29 U.S.C. § 659(c). "Congress . . . never wrote into the [OSH] Act a specific, restrictive jurisdictional grant; rather the Commission was created as a forum in which to resolve disputes arising in connection with enforcement under the Act." *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1264 (No. 91-0438, 1993). By its terms therefore, Section 10(c) is a broad grant of authority and not a list of specifically enumerated powers.

Under this language the Commission applies principles of equity. As an illustration, the Commission has held that it has the authority to enter orders under section 10(c) incorporating settlement agreements resembling federal consent orders that impose abatement measures

beyond what the Commission could order after a hearing. See *Phillips 66 Co.*, 16 BNA OSHC 1332, 1334-36 (No. 90-1549, 1993) (holding the Commission could approve a settlement agreement requiring corrective action at sites for which no citation has been issued). As the Commission recognized in *Oil, Chemical and Atomic Workers International Union*, it is section 10(c) that provides it the "power" "to direct other appropriate relief," and under which it reviews and approves settlements as enforceable final orders. 16 BNA OSHC 1339 (No. 91-3349, 1993). Another illustration is the Commission's adoption of equitable tolling principles under section 10. *Acrom Constr. Services, Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991).

Piercing is an equitable remedy that courts apply to prevent fundamental unfairness or the frustration of a statute, *Bancex*, 462 U.S. at 630; 1 Fletcher, §§ 41.25, 41.75; and, as discussed *supra*, courts have not hesitated to apply it in a variety of contexts. The Commission similarly has the authority to apply piercing as an equitable principle to prevent individuals from manipulating the corporate form to frustrate the legislative policies behind the OSH Act.

**D. The Secretary's Interpretation Should Be Afforded Deference.**

Finally, to the extent that there is any ambiguity in the Act, in light of the Act's language, and the overwhelming weight of authority applying piercing principles under federal statutes, the Secretary's interpretation that piercing principles apply is reasonable and consistent with the Act. As discussed further in the Secretary's Responding Brief in *Avcon* (Docket No. 98-168) and her Opening and Reply Briefs in *Altor* (Docket No. 99-0958), application of piercing principles furthers the Act's remedial purpose of preventing workplace accidents, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-14 (1980) ("*Whirlpool*"), by assuring that individuals who dominate their corporations are not able to avoid their responsibilities through manipulation of the corporate form. The Secretary's interpretation is therefore entitled to deference. *United States v.*

*Mead*, 533 U.S. 218 (2001) ("*Mead*"); *Martin v. OSHRC (C.F.&I.)*, 499 U.S. 144, 154-157 (1991) ("*C.F.&I.*"); *Chao v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219, 227-228 (2d Cir. 2002) ("*LeFrois*"); *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 859-60 (3d Cir. 1996) ("*D.M. Sabia*"); *cf. P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 107 (1st Cir. 1997).

## **II. The OSH Act Including Section 10(c) Empowers the Commission to Extend a Remedial Order Entered Against a Corporation to Its Successor or Alter Ego.**

### **A. The Commission May Order Relief Against an Alter Ego.**

Alter ego, as developed by the NLRB, is a finding that what purport to be two separate employers are in fact and law one employer. *See* NLRB Manual, *supra*, § 14-700 Alter Ego. Two enterprises will be found to be alter egos where they "have substantially identical management, business purpose, operation, equipment, customers and supervision as well as ownership." *Id.*, *citing* *Denzel S. Alkire*, 259 NLRB 1323, 1324 (1982); *Advance Electric*, 268 NLRB 1001, 1002 (1984); *see also* *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 50 (1st Cir. 1994).

As discussed *supra*, the OSH Act recognizes the concept of alter ego by imposing the duty on "employers," defined as individuals, corporations, and organized groups of individuals and corporations to provide a safe workplace. 29 U.S.C. §§ 652(4), 654(5). If they do not, they are subject to citations and abatement orders. Section 10(c) provides the authority to the Commission to accomplish these ends and provide "other appropriate relief." 29 U.S.C. § 659(c). Therefore, where what purport to be two separate employers are in fact and law one single employer, and that employer violates the Act, the Commission has the authority under the statute to order relief against that single employer or integrated enterprise. *Accord Deena*, 361 U.S. at 403-04 ("the affairs of the group may be so intermingled that no distinct corporate lines are maintained").

The Commission essentially applied this principle in *Advance Specialty* and *Taylor/Esprit*, except that in those cases, the corporations existed simultaneously rather than *seriatim* as did the businesses at issue in *Sharon and Walter Construction, Inc.*, Docket No. 00-1402 ("*Sharon and Walter*"). In *Advance Specialty*, for example, the two companies shared a common worksite, had interrelated and integrated operations, and shared a common president, management, supervision and ownership. In *Taylor/Esprit*, one company was the general contractor, one supplied the erecting crew for the project, and the general contractor's general manager controlled and directed the work activities of the erecting company at the worksite. In *Sharon and Walter*, the same individual continues to direct and control the same employees doing the same work (roofing) after the formation of the corporation.

It is clear therefore that the Commission has already established precedent for ordering relief against an alter ego.

**B. The Commission May Order Relief Against a Successor.**

Under OSH Act section 9(a), the Secretary is authorized upon inspection or investigation to issue citations for violations of the Act. 29 U.S.C. § 658(a). Since the inception of the Act, the citations issued by the Secretary have expressly applied to employers, their successors, and assigns. *See, e.g.*, OSHRC Publications, Employee Guide to Review Commission Procedures, Sample Documents, Appendix 1 – First Page of OSHA Citation. Under OSH Act section 10(c), if the employer files a notice of contest, the Commission has the authority to affirm the citation. 29 U.S.C. § 659(c). Under this provision, the Commission has routinely affirmed citations against employers, their successors, and assigns. *See, e.g., Lakeland Enterp. of Rhinelander, Inc.*, 20 BNA OSHC 1401 (No. 02-1909, 2003) (ALJ); *Staz-On Roofing, Inc.*, 20 BNA OSHC 1408 (No. 02-2229, 2003) (ALJ). It is therefore clear that for thirty years the Secretary has

interpreted the Act as applying to an employer's successors. And, for thirty years, the Commission has affirmed that the Act applies to an employer's successors.

In *Sharon and Walter*, the Secretary interpreted the Act to allow the attribution of the previous citation history of Walter Jenkins d/b/a Sharon and Walter Construction, a fictitious name business, to its successor, Sharon and Walter Construction, Inc., and the imposition of "repeat" penalty liability. This was correct under the statute and under the established principles of federal labor law as announced in *Golden State Bottling, Inc. v. NLRB*, 414 U.S. 168 (1973) ("*Golden State*"), as discussed *infra*.

1. **Successors are liable under the common law and federal labor law.**

It is self-evident that where a corporation's stock is purchased, although the identity of the shareholder changes, the business continues with its liabilities and history intact. Where the acquired corporation is merged with its acquirer, then often by statute, the acquirer will succeed to the acquired corporation's liabilities and obligations. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547-548 & n. 2 (1964); 7 Fletcher § 3110, p. 319 (Rev. 1997). With respect to asset purchases, the --

traditional common law rule states that a corporation acquiring the assets of another corporation only takes on its liabilities if any of the following apply: the successor expressly or impliedly agrees to assume them; the transaction may be viewed as a de facto merger or consolidation; the successor is the "mere continuation" of the predecessor; or the transaction is fraudulent.

*New York v. National Services Indus., Inc.*, 352 F.3d 682,685 (2d Cir. 2003) ("*National Services*"); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996) ("*Betoski*"), overruled on other grounds, *National Services*, 352 F.3d 682; see also 10 Fletcher § 4892.75. The third avenue of imposing liability, the "mere continuation" test, is sometimes referred to in the common law as the identity test. *Betkoski*, 99 F.3d at 519. "It requires the existence of a single

corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations." *Id.*

In *Golden State*, the Supreme Court expanded the "mere continuation" test to uphold successor liability under federal labor law. The Court held that a *bona fide* purchaser, without any identity of stock, stockholder, and directors, acquiring an employer guilty of an unfair labor practice, but who had knowledge of the unfair practice and who carried on the business without interruption or substantial changes in method of operation, employee complement, or supervisory personnel, was liable to reinstate the wronged employee and to pay back wages. 414 U.S. at 168.<sup>6</sup> The *Golden State* doctrine is commonly referred to as the "substantial continuity" test. The principal difference is that the common law test requires an identity of ownership between the successor and predecessor, and the substantial continuity test does not. *See National Services*, 352 F.3d at 685.

In broadening the "mere continuation" test, the Court first approved the Board's interpretation of its authority to issue the order under NLRA section 10(c), 29 U.S.C. § 160(c).<sup>7</sup> This provision authorizes the Board "to take such affirmative action . . . as will effectuate the

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<sup>6</sup> In that case All American Beverages, Inc. ("All American") purchased the soft drink bottling and distribution business of Golden State Bottling Co. ("Golden State") after the Board found that Golden State had violated provisions of the NLRA by discharging a driver-salesman for his union activities and had ordered reinstatement of the employee with back pay. 414 U.S. 170-172. In a subsequent back-pay specification proceeding to which both firms were parties, the Board upon finding that All American continued the business without substantial change in operations, employees or supervisor, was liable as a "successor" for the reinstatement and back pay. The Court of Appeals for the Ninth Circuit enforced the order and the Supreme Court affirmed.

<sup>7</sup> The Court quoted section 10(c) of the NLRA, 29 U.S.C. § 160(c), which provided (and still provides), in pertinent part, as follows:

If upon the preponderance of the testimony taken the Board shall be of the opinion that *any person named in the complaint has engaged in . . . any such unfair labor practice*, then the Board . . . shall issue and cause to be served on such person an order requiring *such person* to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act . . .*

414 U.S. 175 (emphasis in case).

policies" of the NLRA, 29 U.S.C. § 160(c). The Court stated, "we agree that the Board's remedial powers under § 10(c) include broad discretion to fashion and to issue the order before us [providing for reinstatement with back pay] as relief adequate to achieve the ends, and effectuate the policies, of the Act." 414 U.S. at 176. The Court noted that previously, it said that a Board order running to the " 'successors, and assigns' of an offending employer, may be applied, not only to a new employer who is 'merely a disguised continuance of the old employer' [citation omitted], but also 'in appropriate circumstances . . . (to) those to whom the business may have been transferred whether as a means of evading the judgment or for other reasons.' [citations omitted.]" *Id.* at 176.

The Court held that the Board properly exercised its discretion in issuing the order against the purchaser based on the "objectives of national labor policy." 414 U.S. at 181-182. These objectives included the avoidance of labor strife, the prevention of a deterrent effect on the exercise of rights guaranteed employees under the NLRA, and the protection of the victimized employee. *Id.* at 185. As the Board has noted, the successor is generally in the best position to remedy the past wrong, in that case the unfair labor practice, and becomes the beneficiary of the wrong. *Id.* at 171-172 n. 2. The achievement of the objectives is done with little or no economic dislocation, because the doctrine applies to purchasers with notice. Therefore, the successor "may secure an indemnity clause in the sales contract indemnifying him for liability arising from the seller's unfair labor practices." [citation omitted]" *Id.*

Courts have extended *Golden State* and its "substantial continuity" test to virtually every labor and employment statute, including health and safety statutes against purchasers with notice: *Equal Employment Opportunity Comm'n v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974) (Title VII) ("*MacMillan Bloedel*"); accord *Wheeler v. Snyder Buick*,

*Inc.*, 794 F.2d 1228 (7th Cir. 1986); *Terco, Inc. v. Federal Coal Mine Safety and Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987), *cert. denied*, 488 U.S. 188 (1988) (MSHA discrimination);<sup>8</sup> *Musikiwamba v. ESSI Inc.*, 760 F.2d 740 (7th Cir. 1985) (§ 1981 claim for employment discrimination); *Upholsters' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir. 1990) (Multiemployer Pension Plan Amendments Act); *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991) (the Vietnam Era Veterans' Readjustment Assistance Act of 1974); *Steinbach v. Hubbard*, 51 F.3d 843 (9th Cir. 1995) (the Fair Labor Standards Act); *Criswell v. Delta Air Lines, Inc.*, 869 F.2d 449 (9th Cir. 1989); 860 F.2d 1088 (9th Cir. 1988) (Table) (the Age Discrimination in Employment Act); *accord Baker v. Delta Air Lines, Inc.*, 6 F.3d 632 (9th Cir. 1993); *Dole v. H.M.S. Direct Mail Service, Inc.*, 752 F. Supp. 573 (D. NY. 1990), *rev'd and rem'd on different grounds*, 936 F.2d 108 (2d Cir. 1991) (OSHA discrimination).

Successorship under *Golden State* is an equitable and flexible doctrine. Application of the doctrine in a particular context depends on what is necessary to carry out the purposes of the statute in that context. The real question –

in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other works, may be a successor for some purposes and not for others.

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<sup>8</sup> In *Terco v. FMSHRC*, the Sixth Circuit used the nine-factor test from *MacMillan Bloedel* to uphold a finding by the Federal Coal Mine Safety Board of successor liability in an MSHA discrimination case. In that case, the acquiring company was very closely associated with the predecessor employer and there appeared to be no arm's length acquisition so there may well have not been a change in equity. 839 F.2d 236. Nevertheless, the Sixth Circuit squarely affirmed the Board's use of *MacMillan Bloedel*.

*Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO*, 417 U.S. 249, 262-263 n. 9 (1974) ("*Howard Johnson*") (internal quotations omitted), *quoted in MacMillan Bloedel*, 503 F.2d at 1091. For example, under the NLRA, the duty to bargain may be imposed on a successor, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) ("*Fall River*"), but the successor may reject the collective bargaining agreement. *See, e.g., Howard Johnson*, 417 U.S. at 258-259.

2. **Golden State and its principles of successorship apply in OSHA proceedings.**

The statutory language and purposes of the Act require that *Golden State* and its successorship principles apply in OSHA proceedings, such as *Sharon and Walter*. OSH section 10(c) is similar to NLRA section 10(c), the provision interpreted in *Golden State*, in that both provisions authorize whatever relief is appropriate and necessary to carry out the purposes of the statute. In *Golden State*, the Court noted that under NLRA section 10(c), the Board's authority was broad and capable of ordering remedial relief including reinstatement with back pay. 414 U.S. at 175-176. Similarly, OSH Act section 10(c) gives the Commission the authority to "direct[] appropriate relief" in OSHA proceedings to assure that the purposes of the Act are carried out. This relief must include relief that would remedy the violations of the Act at hand and, as discussed *supra*, may include the application of equitable principles. It is clear, therefore, that the OSH Act gives the Commission the authority to apply *Golden State* successor principles.

Moreover, like the NLRA, the OSH Act is a remedial statute designed to safeguard important federal interests. *Whirlpool Corp.*, 445 U.S. at 11-14. Just as the NLRA is intended to secure labor peace, the OSH Act is designed to bring about employee safety and health. And, indeed, one court has recognized that the furtherance of the OSH Act's remedial scheme requires

the imposition of successor liability. In *Dole v. H.M.S. Direct Mail*, the court held that the later employer was a successor to the earlier employer in an action alleging discrimination under the OSH Act. The court held that it was necessary to apply the successor doctrine "in view of OSHA's broad preventive and remedial scheme, as evident from the [OSH] Act's preamble and which has been duly recognized by the Supreme Court in *Whirlpool*." 752 F. Supp. at 580. The court continued, "Congress did intend federal courts to impose successor corporation liability where . . . 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." *Id. See also Sea Sprite*, 50 F.3d at 418-19 (contempt order extended to successor corporation).

3. **It is appropriate and necessary to apply the successor doctrine in Sharon and Walter.**

In *Sharon and Walter*, it is evident from the facts discussed in the Secretary's Responding Brief that Sharon and Walter Construction, Inc., is the successor of Walter Jenkins d/b/a Sharon and Walter Construction. Docket No. 00-1402, Secretary's Responding Brief, pp. 3-5, 27-29. The two businesses have the same owner and the same principal – Walter Jenkins. Secretary's Responding Brief, pp. 3-5, 27-29. They are in the same business, have the same customers, and have the same suppliers. *Id.* In addition, the corporation is the successor of the previous fictitious name business because it is a substantial continuation of the predecessor. *Id.* at 27-29.<sup>9</sup>

Under *Golden State*, it is appropriate to award relief against Sharon and Walter Construction, Inc., as a successor because to do so will facilitate the purposes of the Act, and

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<sup>9</sup> Unlike the corporate common law "mere continuity" test, the federal labor common law "substantial continuity test" does not require an identity of ownership. *Compare Golden State*, 414 U.S. 168, with *Betkoski*, 99 F.3d at 519 ("mere continuity" "requires the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations."). *See MacMillan Bloedel*, 503 F.2d 1086 (for discussion of factors used by the federal courts in determining whether there is "substantial continuity").

there are no substantial countervailing interests in not awarding the relief. 414 U.S. at 172 n. 2, 181-182, 185. The attribution of the citation history of the fictitious name business to the successor corporation furthers the policies of the OSH Act because the knowledge that increasingly higher penalties will be imposed on an employer if it has previously violated the Act serves as a deterrent to future violations. While first-instance-lower penalties may be viewed as the cost of doing business, if the employer knows that the penalties will increase if it continues to violate the Act, then at some point the employer will be deterred from future violations, setting aside sufficient time and/or money to abate continuing and recurring hazards. It is appropriate and necessary to charge the successor entity with the old entity's citation history because if the new entity has no citation history, the deterrent effect of higher "repeat" penalties is not available. In *Sharon and Walter*, the successor shared the same management and ownership as the predecessor, knew of the previous citation history, chose to use the same employees, chose to continue with the same manner of doing business, and chose not to assure that employees performing roofing work wore adequate fall protection. Secretary's Responding Brief, pp. 3-5, 27-29. Here, the facts of *Sharon and Walter* show an employer who was indifferent to his duty to assure that employees had fall protection training and was indifferent to the previous citation and penalty.

Notwithstanding the application of *Golden State* to these facts, under the narrower corporate common law "mere continuation" test, Sharon and Walter Construction, Inc., qualifies as a successor because there is an identity of ownership between the old and new entities.

*Betkoski*, 99 F.3d at 519.<sup>10</sup> See discussion *infra* pp. 30-31 & nn 20, 21.

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<sup>10</sup> It appears, however, that the more expanded federal labor law test would apply even under state law. In construing and applying New Hampshire law, the First Circuit employed a successor test incorporating the expanded federal labor law test. *Cyr v. B. Offen. & Co.*, 501 F.2d 1145, 1152-1153 (1st Cir. 1974).

Finally, under the OSH Act, the Secretary has the authority to interpret the provisions of the Act. *Mead*, 533 U.S. 218, *C.F.&I*, 499 U.S. at 154-157; *LeFrois*, 291 F.3d at 226-227; *D.M. Sabia*, 90 F.3d at 859-860. The Commission should defer to the Secretary's reasonable interpretation that the OSH Act incorporates *Golden State* successorship, which is consistent with the Act, just as the Supreme Court deferred to the Board and its interpretation that the NLRA incorporates successorship. *See Fall River*, 482 U.S. at 42 ("If the Board adopts a rule that is rational and consistent with Act . . . then the rule is entitled to deference from the courts").

Because the Secretary's interpretation is reasonable, because it is appropriate to hold that Sharon and Walter Construction, Inc., is the successor to Walter Jenkins d/b/a Sharon and Walter Construction, and therefore has committed a repeated violation, and because it would encourage employers succeeding to another employer's business to bring the business into compliance with safety and health standards and the Act, the Commission should hold that Sharon and Walter Construction, Inc., has committed a repeat violation of the fall protection training standard.

4. **Bestfoods does not alter the Golden State principle of successor liability in labor cases.**

The Commission has asked that the parties address the impact of *Bestfoods* on these cases. In *Bestfoods*, the Court held that in considering whether a corporation is liable to pay clean up costs under CERCLA for the actions of its subsidiary, general common law principles apply rather than a special CERCLA rule. 524 U.S. at 63-64. Two courts of appeals have applied *Bestfoods* in CERCLA cases where successor liability was sought to be imposed. *United States v. Davis*, 261 F.3d 1, 53-54 (1st Cir. 2001); *National Services*, 352 F.3d 682.

In *Davis*, the First Circuit found that *Bestfoods* left "little room for the creation of a federal rule of liability" under CERCLA. *Davis*, 261 F.3d at 54. It found that the application of Connecticut's "mere continuation" test did not frustrate CERCLA objections and applied and

analyzed successorship under the state common law test. *Id.* at 53-54. In *National Services*, the Second Circuit held that the labor law "substantial continuity" doctrine was not a part of the general federal corporate common law, and should not be applied to determine whether a corporation takes on CERCLA liability as the result of an asset purchase. 352 F.3d at 687. The courts distinguished general corporate common law from the principles established in federal labor common law cases. *Bestfoods* and its progeny, however, do not limit the application of federal labor common law in labor cases. Indeed, *National Services* acknowledges that the result would be different in a labor case. 352 F.3d at 692-693 & n. 3.

More fundamentally, nothing in *Bestfoods* suggests that the Court intended to overrule decades of federal common law. As discussed *supra*, the *Golden State* principles of labor common law apply to the OSH Act. Like the NLRA, the OSH Act is a labor/employment statute enacted to accomplish important government objectives. With the NLRA, it is industrial peace. *Fall River*, 482 U.S. at 43-44. With the OSH Act, "the fundamental objective" is "to prevent occupational deaths and serious injuries." *Whirlpool*, 445 U.S. at 11-14.

Without the application of *Golden State*, it would be impossible to redress certain violations of the Act. For example, without the imposition of successorship principles, a *bona fide* purchaser would have no obligation to reinstate an employee who had reported unsafe conditions and been fired for his protected activity by the predecessor even though the work position continued to exist at the succeeding employer's workplace. Without the imposition of successorship principles, the succeeding employer will have no duty to abate a cited item. The deterring effect of failure-to-abate penalties will be lost. The imposition of federal labor common law is therefore necessary to further the Act's purposes.

Furthermore, in *Bestfoods*, the Court did not address the interpretation of a statutory grant of authority to an administrative agency. The Court was solely concerned with the interpretation of the term "person." As discussed *supra*, OSH Act section 10(c) is a grant of authority to the Commission to provide remedial relief comparable to NLRA section 10(c). *Bestfoods* does not address the equitable principles of successorship in the context of administrative relief to redress statutory wrongs.

The policy considerations under the OSH Act are not comparable to the considerations under CERCLA that are wholly financial. The issues under CERCLA are which corporation or corporations shall bear the cleanup costs or contribute towards the costs of clean up. These are questions best answered by the corporate common law that is itself wholly concerned with the question of financial liability. They are not controlling in OSHA cases where the question may involve non-financial remedial relief like reinstatement, abatement, or where the financial impact is indirect, the issue being whether the penalty structure, which serves as a deterrent, will be emasculated by recognition of a new business entity.

Finally, as also discussed *supra*, the Secretary's determination that an employer should be treated as a successor is reasonable and entitled to deference in the same way that the Court deferred to the NLRB's determination in *Golden State. Mead*, 533 U.S. 218, *C.F.&I*, 499 U.S. at 154-157; *LeFrois*, 291 F.3d at 226-227; *D.M. Sabia*, 90 F.3d at 859-860.

In sum, the Commission has the authority to order relief against an alter ego and successor. *Bestfoods* does not undermine this authority.

### **III. 1 U.S.C. § 5 Provides Additional Support That "Person" in OSH Act Section (4) Includes Successors.**

Successor liability is a concept that has long been recognized in equity. *See generally* 1 Fletcher § 48 (discussion of successor doctrine). When appropriate, it directly incorporates into

the term "corporation" any successors of that corporation. *See Golden State*, 414 U.S. at 174-175, 181-185 (discussing history of successor doctrine in labor law context and articulating rule for application to successors of corporations found to have committed unfair labor practices); *Betkoski*, 99 F.3d at 518-519 (discussing appropriateness of application of successor liability doctrine in the context of federal remedial statutes), *overruled on other grounds*, *National Services*, 352 F.3d 682.

Title I, Rules of Construction, section 5 codifies this federal common law principle and provides:

The word "company" or "association", [sic] when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association", [sic] in like manner as if these last-named words, or words of similar import, were expressed.

1 U.S.C. § 5 (1949).

This provision is universally applicable throughout the U.S. Code. As such, the conclusion is inescapable that when used in the U.S. Code, references to "corporation" include successors.

OSH Act section 3 (4) defines "person," among other things, as a corporation or association. When read together with 1 U.S.C. § 5, the term "corporation" in section 3 (4) logically encompasses that corporation's successors. 1 U.S.C. § 5 is a general interpretative statute. The OSH Act, which was enacted subsequent to 1 U.S.C. § 5, is presumed to have been enacted with knowledge of the section. Norman J. Singer, 1A SUTHERLAND STATUTORY CONSTRUCTION § 27.3 at 631 (Rev. 2002). Indeed, when interpreting the term "person" under CERCLA, the Seventh Circuit held in *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 649 (7th Cir. 1998), that this construction "lends credence" to the notion that when Congress defines the term "person" by "listing a variety of terms that apply to business entities, it intend[s] to include all known forms of business and commercial enterprises," *quoting Anspec Co. v.*

*Johnson Controls, Inc.*, 622 F.2d 1240 (6th Cir. 1991) (internal quotations omitted). Not surprisingly, "successor liability is so well-established in corporate doctrine that the Eighth Circuit has suggested Congress would have to explicitly *exclude* successor corporations if it intended to place them beyond reach." *Id.*, citing *United States v. Mexico Feed & Seed Co., Inc.*, 980 F.2d 478, 486 (8th Cir. 1992).<sup>11</sup>

**IV. OSH Act Section 17(a) Authorizes Successor or Alter Ego Liability for a Repeat Violation, Assuming the Other Elements for Such a Violation are Established.**

Section 17(a) of the OSH Act relevantly provides:

Any employer who . . . repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than \$70,000 . . . .

29 U.S.C. § 666(a).

The assessment of civil penalties for violations of the compliance obligations imposed on employers by sections 5(a)(1) and 5(a)(2) of the Act is a central feature of the enforcement mechanism established by the Act. As has often been noted, section 17 of the Act establishes a hierarchy of penalties that increases as the culpability of an employer increases. Under this hierarchy, the penalties that can be assessed for willful and repeated violations are among the highest allowable under the Act. The intended deterrent effect of such penalties cannot be mistaken. Interpreting the OSH Act as authorizing successor or alter ego liability for a repeat violation is fully consistent with the deterrence purposes of section 17.

Moreover, there is nothing in the language used in section 17 that suggests that the

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<sup>11</sup> We note also that while *Bestfoods* raised (and then reserved) the question of whether federal or state common law might be applied to questions of reaching the proper entity for liability under a remedial statute, 524 U.S. at 63 n. 9, no such question could arise with respect with Sharon and Walter, for in applying New Hampshire law, the First Circuit has employed the successor liability test, and indeed even principles of successor liability adopted in labor law. *Cyr*, 501 F.2d at 1152-1153. Accordingly, the Sharon and Walter corporation would be equally held to be a "mere continuation" by application of that state's law.

widely applicable doctrine of successor liability would not apply to this provision of the OSH Act. Indeed, the terminology used, "any employer," is expansive, not narrow. As the Supreme Court has noted, 'any' is "expansive, unqualified language" that "undercut[s] the attempt to impose [a] narrowing construction . . . ." *Salinas v. United States*, 522 U.S. 52, 57 (1997). *Accord United States v. Sabri*, 326 F.3d 937, 942 (8th Cir. 2003) (holding the word 'any' "is unambiguous" and noting that "time and time again the [Supreme] Court has held that the modifier 'any' prohibits a narrow construction of a statute").

The statutory term "any employer" thus provides additional support for interpreting the Act as allowing both the successor and alter ego liability under section 17(a). The broad statutory language authorizing heightened sanctions against "any employer who . . . repeatedly violates" easily accommodates application of the equitable doctrines of successor and alter ego liability. The Secretary's interpretation is both reasonable, in that it is wholly congruent with plain meaning and authoritative judicial constructions of this term, and consistent with the Act's purpose, in that it advances the statutory goal of reaching employers who have demonstrated a need for heightened deterrence, and it therefore merits the Commission's deference.

In particular, the term "any employer" permits application of alter ego and successor tests to find liability for repeated violation where employers have changed forms, in recognition, as in this case (*Sharon and Walter*), that the employer remains essentially the same. As noted, successorship is an equitable doctrine whose application in a specific context depends on what is needed to carry out the purposes of the Act. *See supra* p. 13. The Commission need not delve into all possible nuances of the successorship doctrine to resolve the case before it, *Sharon and Walter*, because the application of the policies of the Act to the circumstances of this case is crystal clear. In *Sharon and Walter*, the prior final order was issued against a prior incarnation

of what is essentially the same business entity, the fictitious name business Sharon and Walter Construction. The successor business, Sharon and Walter Construction, Inc., is indeed the "same" employer. Indeed, this result holds whether the analysis applied is the Board's "substantial continuation" doctrine or the corporate common law "mere continuation" doctrine; by either test, the corporation is in all ways relevant to the OSH Act the same employer that was cited for a violation of the fall protection training standard, 29 C.F.R. § 1926.503(a)(2), less than three years after the fictitious name company's violation of the same standard became a final Commission order.

#### **V. The Policies of the OSH Act Are Served by Piercing the Corporate Veil and Extending the Commission's Remedial Orders to Successors and Alter Egos.**

It is axiomatic that the goal of the OSH Act is to achieve safe and healthful workplaces for all employees. Where compliance with the Act is not voluntary, an enforcement structure is provided, including the authority to issue mandatory abatement orders and penalty assessments to coerce future compliance and deter future violation.<sup>12</sup>

This policy is illustrated in the Act's penalty scheme, which is organized in a descending hierarchy of severity, calibrated to compel compliance at levels directly responsive to the perceived reluctance of the employer to comply.<sup>13</sup> The increase in severity directly reflects the

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<sup>12</sup> An abatement order aims to correct the violative condition. But it also provides the predicate for a citation for a repeated violation or for a failure to correct the violation, with the concomitant increased penalties. See 29 U.S.C. § 666(a), (d).

<sup>13</sup> Congress expressly intended that the fines connected with OSHA violations should not dwindle into simply another cost of doing business. "The philosophy underlying [the proposed bill] is not based on the assumption that American industry can be made safe and healthful by simply enacting a Federal law which emphasizes penalties, because even large ones can become mere license fees." H. Rep. No. 91-1291, at 23 (1970), *reprinted in Legislative History of the Occupational Safety and Health Act, 1970*, at 853. Eighteen years after the initial adoption of the OSH Act, Congress underlined its legislative intent on this point by enacting a sevenfold increase in the maximum penalty that may be assessed for a repeat violation, and establishing a \$5,000 minimum penalty for willful violations, the first time in the history of this statute that any minimum penalty had been required. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-552, § 3101, 104 Stat. 1388 (1990). See *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978) ("heightened penalties" are imposed because of the apparent need for greater coercion to abate where a violation has been repeated); *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927,

increasing urgency of compelling abatement.<sup>14</sup> Both the courts and the Commission have recognized that the threat of penalties plays a very important role in deterring employers from violating the Act:

Because of the large number of workplaces, which OSHA must regulate, relying solely on workplace inspections is an impractical means of enforcement. We accept that OSHA must rely on the threat of money penalties to compel compliance by employers. . . .

To let the cessation of 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.**

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 (11th Cir. 1997) ("*Jacksonville*"), quoted in Joel Yandell, 19 BNA OSHC 1623, 1625 (No. 94-3080, 1999) (emphasis added); accord *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994) ("The purpose of a penalty is to achieve a safe workplace"); accord *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1687 (No. 00-0315, 2001). To adopt the doctrines of veil-piercing and successor and alter ego liability will aid substantially in vindicating the Congressional intention that the hierarchy of the penalty structure works as an ever-increasing coercive pressure upon an employer who demonstrates reluctance, or entrenched refusal, to comply with the Act's

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1929 (No. 91-414, 1994) (noting that penalties must be assessed in an amount sufficient to preclude their being assumed by the employer as "simply another cost of doing business").

<sup>14</sup> Thus, at the top of the hierarchy, the willful or repeated violator has demonstrated some indifference to the Act's requirements and must be given additional incentive to comply by the imposition of fairly severe penalties. The serious violator has permitted a potentially life-threatening or other gravely dangerous condition to exist in its workplace. The nonserious violator has in its workplace a noncomplying condition that poses a lesser peril to life or limb. The *de minimis* violator has in his workplace nothing more than a purely technical variation from requirements. 29 U.S.C. § 666(c).

requirements.

Another important enforcement tool, summary enforcement proceedings and a contempt action under section 11(b), 29 U.S.C. § 660(b), may be unavailable if the true parties who own and control a business are not included in the Commission order that the Secretary brings to the court of appeals to enforce. In addition, "failure to abate" and "repeat" penalties under section 17, 29 U.S.C. §§ 666(a), 666(c), are also undermined by the failure to reach the actual employers in the Commission final order because it makes it easier for them to argue in future cases that the new entities are unrelated to the old and should not therefore be responsible for the former business' violative history.

The application of these policies to the present cases is both clear and direct. In the Avcon and Altor cases, failure to name the individual principals as employers in the Commission's final order would render possible further manipulation of the corporate form by the members of this family to the detriment of the Act's enforcement and penalty scheme and in direct opposition to the result Congress intended in designing that scheme.<sup>15</sup> Likewise, allowing Sharon and Walter to escape liability for a repeated violation by taking the step of incorporating, would frustrate the Congressional intent to deter repeated violations by imposing higher penalties. The policies underlying the OSH Act stand in direct opposition to allowing these results. Rather, the Congressional policies embodied in this statute militate strongly in favor of employing the doctrines of piercing the corporate veil, and successor and alter ego liability, under the OSH Act.

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<sup>15</sup> Almost the exact situation described in *Jacksonville* existed with the Saites and their corporations. Avcon did not go out of business, but it was only sufficiently funded to pay current labor and expenses and left with virtually no assets to pay the penalties incurred from its operating in a manner that exposed employees to unsafe and unhealthful working conditions. Docket No. 99-0958 Opening Brief, pp. 2-3, 7-8, 20-21, 23-25; Reply Brief, pp. 4-5. The record in the cases shows a thirty-year history of citations resulting in progressively higher penalties paralleled by increasing manipulation of the corporate form and fragmentation of the business into multiple corporations. Docket Nos. 98-0755 and 98-1168, Responding Brief, pp. 1-4 & n. 3; Docket No. 99-0958 Opening Brief, pp. 1, 4-5, 24-25, 26-27; Reply Brief, pp. 3-4.

**VI. Alter Ego and Successorship Are Distinct Concepts. Remedies Available Against an Employer Are Also Available Against Its Alter Ego. Remedies That Are Appropriate and Necessary to Carry Out the Purposes of the Act Are Available Against a Successor.**

As discussed *supra* in Part II, the alter ego doctrine recognizes that what purport to be two separate businesses are, in fact, one single business or one single employer. NLRB Manual at § 14-700; *NLRB v. Hospital San Rafael*, 42 F.3d at 50; *United States v. Vitek Supply Corp.*, 151 F.3d 580 (7th Cir. 1998); *Sea Sprite*, 50 F.3d at 418-19.<sup>16</sup> Accordingly, all the remedies and relief available against an employer are available against its alter ego.

Successorship encompasses employers who are alter egos. It also, however, encompasses *bona fide*, good faith purchasers so long as there is a substantial continuation of the business and notice of the violation of the applicable employment or labor law. *Golden State Bottling*, 414 U.S. 168. Successorship is an equitable doctrine, and the relief the Commission may award is whatever is necessary and appropriate to carry out the purposes of the Act. We have argued *supra* that successorship liability is necessary so that, for example, the successors may be held responsible for abating cited violations and for reinstating with back pay a wrongfully discharged whistleblower. *See supra* pp. 11, 14, 18 -19. A *bona fide* purchaser successor does not necessarily stand in the same shoes as its predecessor for all purposes under the Act, however. Under the NLRA, the Supreme Court has held that such a successor succeeds to the duty to bargain with the incumbent union, but is not bound by the pre-existing collective bargaining agreement. *Compare Fall River*, 482 U.S. 27, with *Howard Johnson*, 417 U.S. at 258-259. The

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<sup>16</sup> In *Vitek Supply*, the court stated,

To call corporations alter egos is to say that they are one—that a single business uses a variety of corporate names and charters but is still just one entity. Many cases hold that corporations cannot escape their obligations under judgments entered by federal courts by playing a shell game with assets.

151 F3d at 585, citing *Sea Sprite*, 50 F.3d at 418-419).

Court determined that it would be contrary to statutory policies to bind the purchaser to terms it had not agreed to and that to do so might discourage purchases of economically distressed businesses. *Howard Johnson*, 417 U.S. 249.

The Commission need not decide the full range of relief it may award against a successor employer in various contexts to decide these cases. The only question directly presented is whether Sharon and Walter Construction, Inc., is a successor to Walter Jenkins d/b/a Sharon and Walter Construction for purposes of attributing responsibility for a repeat violation. As we have argued *supra*, the answer to that question is unequivocally "yes."

**VII. A Civil Action Under OSH Act Section 17(l) Is Not Material to the Authority of the Commission, nor Does It Affect the Need for the Commission to Apply the Doctrines in Determining Whether the Person Before it is an Employer Under the Act.**

OSH Act section 17(l) provides that the Secretary may recover civil penalties in a civil action in the federal district courts.<sup>17</sup>

As the Secretary has argued in *Altor*, whether the person to whom the Secretary issues a citation is an "employer" within the meaning of the Act is a question for the Commission to decide. *Joel Yandell*, 18 BNA OSHC at 1626 (employer who had gone out of business when citation was issued was nevertheless "employer" under the Act); *MLB Ind., Inc.*, 12 BNA OSHC 1525 (No. 83-231, 1985) (company that loaned employees to another and did not control their working conditions was not an "employer" for purposes of the Act); *University of Pittsburgh*, 7 BNA OSHC 2211 (No. 77-1290, 1980) (state-related university met Act's definition of "employer" because it was not a political subdivision of Pennsylvania).

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<sup>17</sup> Section 17(l) provides as follows:

Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

29 U.S.C. § 666(l).

As the Secretary also argued, the determination of employer status fits squarely within the administrative review scheme established and contemplated by Congress. *C.F.&I.*, 499 U.S. 144; *see Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 874 (D.C. Cir. 2002) ("interpretation of the parties' rights and duties under the Act and its regulations . . . falls squarely within the Commission's expertise") (internal quotations omitted). And, as shown *supra*, and argued in *Avcon I* and *Altor*, it is necessary for the Commission to reach the issue to promote the congressional purpose of deterrence. It would thwart the purposes of the OSH Act to allow business operators to avoid protecting employees by acting through corporations that are deliberately kept without sufficient funds to pay meaningful penalties and, thus, brought to comply.

The fact that the Secretary may bring a collection action sometime in the future to collect the penalties assessed against an employer is immaterial to whether the Commission should determine whether the individual is an employer, imposing a statutory duty on that individual to comply with the Act and abate the cited hazards. A collection action is simply another tool in the Act's scheme. It is immaterial to the authority of the Commission as the adjudicator in an OSH administrative proceeding. Moreover, there is no sound reason to postpone indefinitely the alter ego determination. The evidence concerning how the business is conducted and the relationship of the entities to each other is freshest during the hearing before the administrative law judge. Many of the main witnesses will be required to testify on both how the business is conducted and the facts of the violations. It preserves judicial resources to have the witness testify in one proceeding. Additionally, facts concerning control of the circumstances leading to a citation, informs the determination of whether the individual respondent is an employer under the Act.

In sum, OSH Act section 17(1) providing that the Secretary may bring a collection action to recover assessed penalties in the federal district courts is not material to the authority of the Commission to determine whether an individual is an employer. Nor does the provision affect the need for Commission to make the determination.

**VIII. The Commission Has the Authority to Pierce the Corporate Veil and to Extend Remedial Orders to an Employer's Successor or Alter Ego. Circumstances Justifying Application of These Doctrines Are Present in These Cases.**

In applying labor law policy under the NLRB, the Supreme Court noted early on that equitable principles and Congressional policy alike forbade the avoidance of responsibility under the Board's orders by a purported new employer who was "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942), *quoted in Golden State*, 414 U.S. at 176. As discussed at length *supra*, the Commission has the authority to pierce the corporate veil and to extend remedial orders to an employer's successor or alter ego. The facts of these cases richly document that circumstances justifying the application of these doctrines are present here. Thus, the Secretary has shown in her previous briefs that the corporate veil the Saites seek to interpose between themselves and OSH Act liability in *Avcon I* and *Altor* should be pierced under the teaching of *United States v. Pisani*, 646 F.2d 83 (3d Cir. 1981). *Avcon* was highly undercapitalized and its finances were manipulated by Vasilios Saites to make the company appear wholly impecunious.<sup>18</sup> Nor was there an arm's length relationship

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<sup>18</sup> While *Avcon* paid hundreds of thousands of dollars in labor and material costs before receiving payments under the construction contract, it had only \$9.88 in its bank account, and no other significant assets, at the time of the hearing in January 2001 (Docket No. 99-0958 Tr. 1126, Ex. C-160). At that time, over two years after the end of the project, Vasilios Saites had still not transferred a portion of *Avcon's* profit, approximately \$139,000, from *Altor* into *Avcon* (Docket No. 99-0958 Tr. 1123-29). Indeed, Vasilios Saites at first misrepresented that the money had not been paid by the general contractor to *Altor* (Docket No. Tr. 1123). In addition, rather than fund *Avcon* with the new construction contract for the project's garage, Vasilios and Nicholas Saites formed a new corporation and awarded it the new contract, thus further avoiding possession of assets in *Avcon* which might be susceptible to OSHA penalties (Docket No. 99-0958 Ex. C-255, pp. 178-179).

between the Saites and Altor and Avcon.<sup>19</sup> As the Supreme Court has recognized, the presumption of regularity of the corporation wanes as the distance increases from the accepted norms of corporate behavior. *Bestfoods*, 524 U.S. at 70 n. 13. The facts here show that such distance had grown wide indeed. The Commission therefore should pierce the corporate veil and hold that Vasilios and Nicholas Saites are employers under 29 U.S.C. § 652(5), Section 3(5) of the Act.

Similarly, as we showed in our responding brief in *Sharon and Walter*, the new corporate employer seeks to rely on a change in business form to insulate itself from its repeated failure to provide fall protection training for its employees, when the only aspect of the business that actually changed was its name.<sup>20</sup> Company employee Robert Bell suffered serious injuries from a fall that might have been prevented if Sharon and Walter had attempted in earnest to meet its

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<sup>19</sup> In *Avcon and Altor*, corporate formalities were not observed, dividends were never paid, and salaries paid to Vasilios and Nicholas Saites were kept to levels well below arm's length market rates. See Docket Nos. 98-0755 & 98-1168 Responding Brief, pp. 1-3, 12-19; Docket No. 99-0958, Opening Brief, pp. 2-4, 7, 20-24. The profits (\$400,000) that Avcon was supposed to receive from the construction project were never accounted for. Docket No. 99-0958 Opening Brief, p. 23. The other officers and directors of Altor and Avcon, primarily the wife of Vasilios Saites, were non-functioning. Docket No. 99-0958 Opening Brief, pp. 23-24. Vasilios Saites dominated both Avcon as well as Altor, despite the fact that others allegedly owned Altor. *Id.* at 2-4, 20-25. In sum, the facts show that there was not an arm's length relationship between the Saites, particularly Vasilios Saites, and Altor and Avcon, but rather that Vasilios Saites dominated the corporations.

<sup>20</sup> In *Sharon and Walter*, the corporation does the same work, possesses many of the physical assets, and conducts its business from the same address and telephone number as the previous company. Docket No. 00-1402 Responding Brief, pp. 3-5, 28-29. Corporate Sharon and Walter even paid at least one of its debts with a check drawn on the bank account of Walter Jensen d/b/a Sharon and Walter Construction (Docket No. 00-1402 J.D. 16, Tr. 414-415). The corporation continued to perform on a contract made by Walter Jensen d/b/a Sharon and Walter Construction, indicating a common customer base between the two entities (Docket No. Tr. 323, 324-329). The commonality of the customer base can also be inferred from the fact that the corporation continues its operations in the identical geographic area as the fictitious name business. In short, Sharon and Walter Construction, Inc., essentially picked up exactly where Walter Jensen d/b/a Sharon and Walter Construction left off. Its principal, Walter Jensen, clearly did not receive adequate coercion from the prior OSHA citation to bring him into compliance with the Act's fall protection training requirements.

OSH Act responsibilities.<sup>21</sup> Sharon and Walter Construction has repeatedly violated the Act. Under 29 U.S.C. § 666(a), it should face the appropriate penalty.

### CONCLUSION

For all of the above reasons, the doctrines of piercing the corporate veil and successorship are available to the Secretary to further the purposes of the OSH Act. As discussed at length in the Secretary's briefs in the three cases, the Commission should apply the doctrines in the respective cases. The Commission should pierce the corporate veil to hold that Vasilios Saites and Nicholas Saites are employers under the Act, and should hold that Sharon and Walter Construction, Inc., is the successor of Walter Jenkins d/b/a Sharon and Walter Construction.

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<sup>21</sup> The predecessor fictitious name business had been cited for failing to train its employees in fall protection, yet the company provided no fall protection training for its employees. Docket No. 00-1402 J.D. 11-13. The company forced its employees to execute meaningless independent contractor agreements in an effort to insulate itself from liability; employees would not be paid until they executed the agreements. Docket No. 00-1402, Responding Brief, pp. 6-8, 21-23. It told its employees it would provide all the safety equipment that would be needed on the job, but in fact provided none, even though it did own at least some of the needed fall protection equipment. *Id.* at 2 & n. 3. In fact, after one of two employees working with no training and no fall protection gear fell off a wet, slippery roof and was seriously injured, the company transported the other employee to another roof and made him finish out the work day, also without fall protection. *Id.* at 3, 16.

March 1, 2004  
Washington, D.C.

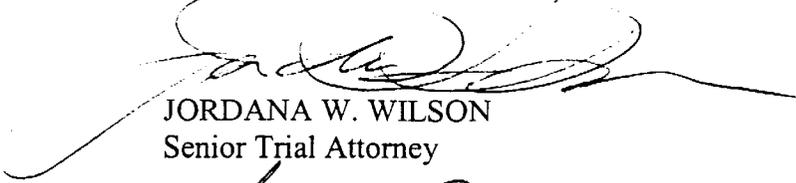
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I certify that on March 1, 2004, I served a copy of the foregoing Supplemental Brief for the Secretary of Labor upon counsel by facsimile transmission followed by overnight courier Federal Express addressed as follows:

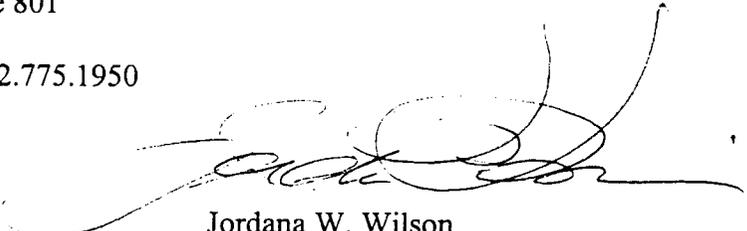
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