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UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH COMMISSION

OSHRC DOCKET NO.: 99-0958

ELAINE L. CHAO, SECRETARY OF  
LABOR, U.S. DEPARTMENT OF LABOR,

Complainant,

-vs-

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

Respondents.

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RESPONDENTS' SURREPLY BRIEF TO THE REVIEW COMMISSION

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## PRELIMINARY STATEMENT

The Secretary of Labor's (hereinafter "Secretary") Reply Brief is rife with factual inaccuracies, misstatements of the record, applies improper legal standards and includes the use of testimony of Respondents, Vasilios N. Saites ("Bill") and Nicholas Saites ("Nick"), from **another distinct and completely separate trial**, currently on appeal, and attempts to impose individual liability against Bill and Nick without even establishing the necessary facts to pierce the corporate veil of the Respondents Avcon or Altor.

Indeed, the Secretary seeks to impose a less onerous standard to imbue personal liability upon Bill and Nick absent the facts to support traditional veil piercing. The Secretary asks the Review Commission to interpret the OSH Act as allowing the imposition of personal liability as a deterrent. Congress has given OSH no such extrajudicial power. The Commission cannot rewrite the OSH Act to satisfy the Secretary's desires.

OSHA's vendetta against Respondents is quite apparent in the Secretary's Reply Brief. Such vendetta must cease and Respondents should be awarded their attorneys' fees incurred as a result of the Secretary's continual wrongful conduct. Any other result would be a serious miscarriage of justice.

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**LEGAL ARGUMENT**

**POINT I**

**THE COMMISSION LACKS AUTHORITY TO PIERCE THE  
CORPORATE VEIL TO IMPOSE INDIVIDUAL LIABILITY  
AGAINST BILL AND NICK.**

In his Decision and Order, Judge Yetman correctly found that he lacked the authority to determine whether the corporate veil should be pierced. Judge Yetman simply and accurately declined to engage in a "premature and extrajurisdictional act." (See Decision at page 6).

1. **Respondents did not manipulate the corporate form in an attempt to avoid the payment of OSHA penalties.**

The Secretary argues in her Reply Brief that the Saites "seek the unfettered right to manipulate the corporate form to continue to ignore their duty to comply with the OSHA standards." (Sec. Rep. Br. p. 3) There is ample testimony in the record that neither Bill nor Nick used the corporate Respondents, Altor or Avcon, for personal motives, personal gain, or any fraudulent or wrongful act. These companies followed all corporate formalities, had bank accounts and filed tax returns.

The Secretary futilely tries to argue that Respondents somehow manipulated the corporate form in an attempt to avoid past history. (Sec. Reply Br p. 4). Contrary to the Secretary's unsubstantiated assertion, neither Altor nor Avcon were incorporated in order to avoid their responsibilities under the OSH Act. (Tr851) The fact that Bill and Nick have been associated with other corporations in the past, that have gone out of business for legitimate reasons, does not taint Altor or Avcon. The Secretary completely disregards Respondents' more than forty years of experience on over 200 poured in place high-rise buildings without any serious injury. It is very common for developers or owners of real estate to separately incorporate each project, so as to limit

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the project's liability to whatever assets or revenue are generated from that particular project. Legally sound business decisions were made to form new companies to handle new projects. Neither Bill nor Nick could know that Altor or Avcon would be cited, sometime in the future by OSHA, when the companies were formed.

**2. Altor and Avcon are legitimate corporations.**

The viability of a corporation must be judged by the corporate law upon which the corporation was established, in this case, *New Jersey Corporate Law*. It is only permissible to pierce the corporate veil to impose individual liability against corporate officers and directors, when the corporate form is not properly followed. After hearing all of the evidence presented in this case, Judge Yetman correctly found that Avcon and Altor were legitimate, viable corporations and, therefore, the Review Commission does not have the authority to pierce the veil of either Avcon or Altor.

As is clearly set forth in great detail in Respondents' Opening Brief, the facts of this case do not satisfy one, let alone all nine, of the factors set forth in *United States v. Pisani*, 646 F.2d 83 (3d Cir. 1984), which are requisite to piercing the corporate veil. The Secretary was not able to elicit sufficient facts which would allow this Court to pierce the corporate veil of Altor or Avcon in order to imbue personal liability upon Bill as a corporate officer, director and shareholder, since none exist. Similarly, the Secretary has elicited no facts on which to support her claim of individual liability as against Nick, a mere employee, since none exist. In order for this Commission to find liability against Nick, the OSH Act, which prohibits citations against employees, would necessarily be ignored, supplanted by a "new" standard of individual liability (the "Nick Saites standard").

Realizing her lack of proofs, the Secretary brazenly discounts state corporate law as "fictitious" and seeks an extension of the OSH Act to guarantee payment of fines from Bill and

Nick, individually. Is the Secretary saying that American business is fictitious? Should the New Jersey Legislature disassemble since, according to the Secretary, it is powerless to effectively control the corporate entities under its province?

In making such a ludicrous statement, the Secretary erroneously relies on Pearson v. Component Technology Corp., 247 F.3d 471 (3<sup>rd</sup> Cir. 2001) cert. denied 122 S.Ct.345 (2001). Even with the most creative imagination, not one sentence in the Pearson case can be interpreted as remotely supporting the Secretary's proposition that "a corporation is nothing more than a state created fiction".

As is clearly set forth in Respondents' Opening Brief, both Altor and Avcon observed all corporate filings, forms and procedures. All corporate tax returns and bank statements of each corporate Respondent were admitted into evidence as OSHA exhibits. (See, Exhibits C155-162). Unfortunately for the Secretary, the Review Commission does not have authority to pierce the veil of a viable, lawful corporation to assess individual liability against Bill. No support, other than the hypothetical, "Nick Saites standard" exists to assess individual liability against Nick.

3. **OSHA cannot impose personal liability upon Bill or Nick without piercing the corporate veil.**

As Respondents argued in their Opening Brief, the Secretary is asking this Commission to amend the OSH Act to create a direct cause of action against Bill and Nick without following the mandates of the Administrative Procedures Act 5 U.S.C. § 500 *et seq.* and, traditional rule making policy, which requires notice, opportunity to be heard, hearings, and eventual decision. Although Respondents have suggested that the issue lies properly before Congress, the Secretary continues her attempt to change the Act by judicial means. This Commission should see this attempt for what it is and deny it.

In essence, OSHA is seeking the ability to declare that an individual (Nick) who is related to

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an officer (Bill) of his employer (Avcon), can be deemed an "employer" merely through kinship. This is absurd. Certainly there is no Congressional intent to support such a notion. If Congress intended this to be the case, it would have said that "under certain circumstances an employee can be an employer...". It did not.

Simply because Nick is Bill's son does not mean that he is somehow cloaked with a role in Altor or Avcon to justify imposing individual liability against him. There is no evidence that Nick is anything more than an employee. No letters went out on behalf of either corporate Respondent under Nick's signature nor did any witness testify that Nick was in any way an "officer-in-fact" of either company. Nick's testimony was to the contrary.

OSHA sought personal liability in this matter to guaranty the payment of fines in the event of Avcon's potential insolvency or bankruptcy, most likely due to the attorneys' fees and expert costs to defend the OSHA citations, without any regard for the purpose of the OSH Act, employee safety. Such disregard for the law, which the Secretary is required to enforce, should not be tolerated.

Accordingly, Judge Yetman's Decision that the Review Commission lacks the authority to pierce the corporate veil must be affirmed. The Secretary's wrongful quest for extrajurisdictional powers must be put to an end.

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## POINT II

### THE SECRETARY'S REPLY BRIEF IS RIFE WITH FACTUAL INACCURACIES, MISSTATEMENTS OF THE RECORD AND CITES INAPPLICABLE LEGAL STANDARDS EVIDENCING OSHA'S CONTINUING VENDETTA AGAINST RESPONDENTS.

The Secretary's Reply Brief in this matter serves as further evidence of Respondents' contention that OSHA has a vendetta against Respondents. The Secretary's perversion of the facts in this case is obvious right from the second line of her Reply Brief wherein she states that Bill and Nick "and their families have owned and operated seven concrete construction companies..." (Sec. Reply Br. p. 1) This is simply not true. None of the facts or testimony in this matter established that Nick ever owned or operated Avcon or Altor. Nor is there one scintilla of evidence that Nick's wife or sister have or ever had any involvement whatsoever in the ownership or operation of the seven construction companies referred to by the Secretary.

Most audacious is the Secretary's continued misquoting of Judge Covette Rooney in a completely separate trial that the Secretary has referred to as "Avcon-1". Particularly, the Secretary's assertion at page 1 of her Reply Brief that Judge Rooney found that "Avcon was used by Bill and Nick Saites as their "alter ego or business conduit" is flagrantly in error. Nowhere in Judge Rooney's 94 page Decision does she state that Avcon was the "alter ego or business conduit" of Bill or Nick.

Furthermore, the Secretary states that Judge Rooney "affirmed willful citations for violations of 29 C.F.R. §1926.100(a) (hard hats)". Judge Rooney, quite contrarily, found that "the Secretary has not established by a preponderance of the evidence that the violations were willful." (2000 WL 1466090 at p. 67). Such misrepresentation is yet another example of the Secretary's reprisal against Bill and Nick Saites and any companies with which they are associated.

At page 6 of her Reply Brief, the Secretary attempts to present as fact, OSHA Inspector Brian Donnelly's recollection of a conversation that he had with Nick wherein Nick allegedly told OSHA inspectors that he would not "babysit his employees" and that he "did not care" that they

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were working near the edge without fall protection, even though Nick vehemently denied ever saying this. (Tr. 417) Yet, the Secretary's reference seems to infer the quoted testimony is Nick's rather than Brian Donnelly's recitation of what he thought Nick had said.

The Secretary continuously refers to Altor and Avcon as the "Saites companies" throughout her Reply Brief. It was well established at trial that Nick is merely an employee of Avcon. He has never been an employee of Altor nor an officer, director, or shareholder of Avcon or Altor. By making reference to the "Saites companies" the Secretary is improperly attempting to imbue ownership or control to Nick.

Such mischaracterizations evidence the disingenuousness of the Secretary's arguments and her vendetta against the Saites and any companies with which they have any affiliation.

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**POINT III**

**THE SECRETARY'S REFERENCES TO "AVCON 1" MUST BE  
DISREGARDED AS NO FINAL DECISION HAS YET BEEN ISSUED IN  
THAT MATTER.**

What the Secretary has referred to as "Avcon-1", is a completely separate matter that is presently pending before the Review Commission. No final decision has yet been made in "Avcon-1" and, therefore, it is not binding precedent. Nevertheless, the Secretary continues to make reference to "Avcon-1" in an apparent attempt to establish what OSHA could not elicit through evidence during the trial of the instant matter.

Most notable is that in "Avcon-1", Bill and Nick were not cited by OSHA individually within the six month limitation period afforded to issue citations required under 29 U.S.C. 658(c). Accordingly, it is very likely that Judge Rooney's findings of individual liability as against Bill and Nick will be reversed on jurisdictional grounds once that matter is heard by the Review Commission.

Since a final decision has not yet been rendered in "Avcon-1", it is not binding precedent and any reference to same should be disregarded by this Commission.

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**POINT IV**

**JUDGE YETMAN ERRED IN AFFIRMING CITATION 2, ITEMS 2  
THROUGH 7 (FALL PROTECTION) AS WILLEFUL.**

As Respondents properly argued in their Opening Brief, much of the work at the Mariner high-rise project was “leading edge” work and, therefore, OSHA's citations for violation of fall protection standard, under § 1926.501(b)(1), were inapplicable.

There is no binding precedent in which OSHA has determined the applicability of the leading edge exception to the trade of poured in place concrete construction. No case law exists that says that once a deck is poured, stripping the formwork is not leading edge work. It is solely left to the subjective interpretation of the inspector. Respectfully, until the Commission sets forth a binding written standard, no violations can be classified as willful, which requires a heightened standard of proof of a deliberate flaunting of the Act.

Nevertheless, no such proof exists here which would suggest that Respondents willfully disregarded the Act. Rather, all of the evidence indicates that Respondents took every precaution to ensure the safety of their employees. Avcon had guardrail systems in place at the site. Where vertical guardrails were infeasible, Avcon constructed a catch platform to serve the dual purpose of providing fall protection and retaining stripped material. (Tr. 879:13-15, 1100:5-8). The fact that OSHA Inspector Donnelly did not even realize what catch platforms were, is further evidence of the entirely subjective nature of the fall protection standard and the leading edge exception. Avcon instructed its employees to place the outriggers two feet apart so as to replicate a vertical guardrail on a horizontal plane. Certainly, such precautions do not suggest that Respondents willfully “flaunted the Act.”

Accordingly, Judge Yetman committed reversible error in ruling that Avcon’s alleged violation was willful and his Decision should be vacated in this regard.

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**CONCLUSION**

For all the foregoing reasons, Respondents respectfully request that the Review Commission affirm in part and reverse in part, Judge Yetman's Decision and Order in accordance with the foregoing and Respondents' Opening Brief.

Respectfully submitted,

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