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PIERCING THE CORPORATE VEIL – SHOULD DOMINATION AND CONTROL OF THE CORPORATION BE THE SOLE FACTOR CONSIDERED?

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I. Introduction

America has become an entrepreneurial society with start-up businesses being incorporated every day. Statistics show that more than 60,000 new corporations are created every year in the United States.[1] Because most startups are risky and require a significant amount of both money and time, there is the possibility that, if the venture proves to be unsuccessful, the individuals will be liable for the debt of starting the venture. As a result, these entrepreneurs have sought out ways to limit this liability. The most efficient way is the use of a corporation, in one form or another, as a vehicle for operating these risky ventures.

II. The use of corporations

Corporations, in one form or another, are a great way to shield liability because "[o]rdinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers and directors."[2] However, what is lost in the process of starting a new business is that the corporation is only as good at providing a liability shield to the shareholders as the managers are at managing the corporation. In the excitement and work, of getting these new ventures up and running, the individuals forget that there are requirements for keeping the business entity in good standing and the liability shield in place. What individuals assume, in some cases, is that as long as they get a name, file it with the Secretary of State, and get an Employer Identification Number from the Internal Revenue Service they have succeeded in protecting themselves from liability.

The individual shareholders, having taken these steps, should be happily protected. They followed the requirements to form the company, so they are protected, right? The lawyerly answer is "maybe you are, and maybe you are not." It all depends on how the corporation was operated both legally and financially. It is not until the startup venture fails or the corporation that has been operating for some years goes wrong that the individuals are reminded of the requirements to keep the liability shield in place. It is not until the individuals want to walk from the corporation that they start to think about liability. When the shareholders want to leave the creditors to fight over the assets, which usually amount to nothing, is when the individuals learn of the concept of personal liability for the corporation's debts. For some, this is the first time they

[1] Hayley Harrison, www.answerbag.com, Questions (June 5, 2014, 9:30 am), http://www.answerbag.com/q_view/2072747
[2] Toho-Towa Co. v. Morgan Creek Productions, Inc., 217 Cal. App. 4th 1096, 1106-07 (2013)

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hear of the idea of "Piercing the Corporate Veil" and the "Alter-Ego" theory.

III. What is "Piercing the Corporate Veil?"

When the new venture or the existing business does not work out, and the corporation leaves creditors with debts owing, the natural instinct of the creditor is to look to the individuals that owned and operated the corporation to pay those debts. "Piercing the corporate veil refers to the judicially imposed exception to [the] principle by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own."[3]

"[T]he corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require."[4] However, where a "corporation is used by an individual . . . or by another corporation, to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation's acts as if they were done by the persons actually controlling the corporation."[5] Piercing the corporate veil and "Alter Ego [are] an extreme remedy, sparingly used."[6] In an empirical study performed in 1991, on 1,563 cases, the courts pierced the corporate veil in only forty percent (40%) of the cases and none of the time if the corporation was a publicly traded company.[7] In addition, the courts do not consider "difficulty in collecting a debt [as] grounds for granting alter ego relief" or piercing the corporate veil.[8]

IV. What does the court require to allow a third party to Pierce the Corporate Veil and reach the assets of the corporation?

In California, the courts look for two conditions to exist before the court allows the third party to pierce the corporate veil or invoke the alter ego doctrine. "First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not . . . exist. Second, there must be an inequitable result if the acts . . . are treated as those of the corporation alone."[9]

A. What does the court consider to be "Unity of Interest and Ownership" such that it will grant a third party's request to Pierce the Corporate Veil?

In Roman Catholic Archbishop v. Superior Court, the unity of interest was clarified as "it must be made to appear that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of

[3] Robert B. Thompson, Article: Piercing the Corporate Veil: An Empirical Study, 76 Cornell L. Rev. 1036 (1991)
[4] Leek v. Cooper, 194 Cal. App. 4th 399, 411 (2011).
[5] Toho-Towa Co., 217 Cal. App. 4th at 1106-07.
[6] Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 539 (2000).
[7] Thompson, supra, at 1048, 1055
[8] Sonora Diamond Corp., 83 Cal. App. 4th at 539.
[9] Sonora Diamond Corp., 83 Cal. App. 4th at 538.

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such person and corporation has ceased."[10]

Piercing the Corporate Veil and the Alter-Ego Doctrine are "founded on equitable principles, application . . . 'is not made to depend upon prior decisions involving factual situations which appear to be similar.'"[11] Rather, "[t]he conditions under which the corporate entity may be disregarded vary according to the . . . case and the matter is particularly within the province of the trial court."[12] In addition, "[t]he law as to whether courts will pierce the corporate veil is easy to state but difficult to apply."[13] To that end, the courts have developed some factors to consider when determining whether there is unity of interest and ownership.

Factors for unity of interest in piercing the corporate veil can be categorized into five general categories: (1) Commingling of Assets; (2) Failure to follow Corporate Formalities; (3) Under Capitalization; (4) Misrepresentation and Fraud; and (5) Domination and Control.[14]

1. The commingling of corporate funds or other assets with other corporations or with the individual shareholders is enough to allow the court to pierce the corporate veil.

When the courts look to the financial operations of the corporation, the court is trying to determine if the funds and assets of the corporation have been treated by the shareholders and managers as those of the corporation or the individual. The court is trying to determine if the corporation's funds were used to pay for personal items of the individuals or whether they were used for corporation expenses alone. The use by shareholders of the corporation's funds for personal expenses is commonly referred to as commingling of funds.

Commingling of funds can be shown through: (1) failure to segregate funds of the separate entities; (2) the unauthorized diversion of corporate funds or assets to other than corporate uses;[15] (3) the treatment by an individual of the assets of the corporation as his own;[16] (4) the diversion of assets from a corporation by or to a stockholder or other person or entity; (5) the manipulation of assets and liabilities between entities so as to concentrate the assets in one entity and the liabilities into another;[17] (6) loans from the corporation to the individual without proper security or documentation;[18] (7) failure to deposit funds of the corporation in corporation accounts;[19] and (8) allowing the funds or assets of the corporation to benefit the shareholders or managers personally and not being used for legitimate business purposes.

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[10] Roman Catholic Archbishop v. Superior Court, 15 Cal. App. 3d 405, 411 (1971).
[11] Toho-Towa Co., 217 Cal. App. 4th at 1108.
[12] Misik v. D'Arco, 197 Cal. App. 4th 1065, 1071-72 (2011).
[13] Talbot v. Fresno-Pac. Corp., 181 Cal. App. 2d 425, 432 (1960).
[14] Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825 (Cal. App. 1st Dist. 1962)
[15] See Riddle v. Leuschner, 51 Cal. 2d 574 (1959); Talbot, 181 Cal. App. 2d at 425; Thomson v. L. C. Roney & Co., 112 Cal. App. 2d 420 (1952); Goldberg v. Engelberg, 34 Cal. App. 2d 10 (1939); Sweet v. Watson's Nursery, 33 Cal. App. 2d 699 (1939); Minton v. Cavaney, 56 Cal. 2d 576 (1961).
[16] See Minton, 56 Cal. 2d at 576; Thomson, 112 Cal. App. 2d at 420; Riddle, 51 Cal. 2d at 574.
[17] See Riddle, 51 Cal. 2d at 574; Thomson, 112 Cal. App. 2d at 420; Sweet, 33 Cal. App. 2d at 699; Talbot, 181 Cal. App. 2d at 425
[18] Riddle, 51 Cal. 2d at 574
[19] Talbot, 181 Cal. App. 2d at 425

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2. The failure to follow corporate formalities is enough to allow the court to pierce the corporate veil.

When the courts look at the operation of the corporation they are looking to determine if the corporation was treated as a corporation and not just a way for the individuals to avoid liability. The courts are trying to determine if the shareholders and managers took the operation of the corporation and the affairs of the corporation seriously. The processes, procedures, and or the operation of the corporation are what is considered by the courts to be the formalities. "A failure to maintain the requisite corporate formalities may increase the probability that the corporate veil will be pierced.[20]

To determine if the formalities of the corporation have been followed, the courts look to: (1) the failure to obtain authority to issue or the failure to issue stock of the corporation; [21] (2) the failure to maintain minutes of meetings;[22] (3) failure to maintain adequate corporate records and/or the confusion of the records of the separate entities;[23] (4) the failure to hold shareholder and or board meetings; (5) the disregard of legal formalities; and (6) the failure to maintain arm's length relationships among related entities.[24]

3. The Undercapitalization of the corporation for the purpose of the business is enough to allow the court to pierce the corporate veil.

When the courts use undercapitalization, they are looking to determine if the shareholders have started the corporation with the funds necessary to carry on the business. The court wants to know that the funds used to start the corporation were sufficient to pay the reasonably expected bills of the enterprise when the enterprise was started.

Specifically the court is looking to: (1) the failure to adequately capitalize a corporation for the business purpose for which it was created; (2) the transfer of assets to other entities or shareholders that leaves the corporation without sufficient assets to pay its debts;[25] (3) loans to shareholders that deplete the corporate accounts;[26] and (4) the total absence of corporate assets.[27]

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[20] Law of Corp. Offs. & Dirs.: Rts., Duties & Liabs. § 20:10 (2013)

[21] See Cal. Nat'l Supply Co. v. Black, 48 Cal. App 122 (1920); Automotriz del Golfo de California S. A. de C. v. Resnick, 47 Cal. 2d 792 (1957); Wheeler v. Superior Mortg. Co., 196 Cal. App. 2d 822 (1961); Marr v. Postal Union Life Ins. Co., 40 Cal. App. 2d 673 (1940); Claremont Press Publ'g Co. v. Barksdale, 187 Cal. App. 2d 813 (1960); Eng'g Serv. Corp. v. Longridge Inv Co., 153 Cal. App. 2d 404 (1957); Shafford v. Otto Sales Co., 149 Cal. App. 2d 428 (1957).

[22] See Riddle, 51 Cal. 2d at 574; Stark v. Coker, 20 Cal. 2d 839 (1942); Temple v. Bodega Bay Fisheries, Inc., 180 Cal. App. 2d 279 (1960); Shafford, 149 Cal. App. 2d at 428.

[23] See Riddle, 51 Cal. 2d at 574; Stark v. Coker, 20 Cal. 2d 839 (1942); Temple v. Bodega Bay Fisheries, Inc., 180 Cal. App. 2d 279 (1960); Shafford, 149 Cal. App. 2d at 428.

[24] See Riddle, 51 Cal. 2d at 574; McCombs v. Rudman, 197 Cal. App. 2d 46 (1961); Wheeler, 196 Cal. App. 2d at 822; Pan Pac. Sash & Door Co. v. Greendale Park, Inc., 166 Cal. App. 2d 652 (1958).

[25] Talbot, 181 Cal. App. 2d at 425

[26] Riddle, 51 Cal. 2d at 574

[27] See Minton, 56 Cal. 2d at 576; Automotriz del Golfo de California S. A. de C., 47 Cal. 2d at 792; Stark, 20 Cal. 2d at 839; Talbot, 181 Cal. App. 2d at 425; Temple, 180 Cal. App. 2d at 279; Wheeler, 196 Cal. App. 2d at 822; Claremont Press Publ'g Co., 187 Cal. App. 2d at 813; Eng'g Serv. Corp., 153 Cal. App. 2d at 404; Shafford, 149 Cal. App. 2d at 428; Pan Pac. Sash & Door Co., 166 Cal. App. 2d at 652.

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4. The Misrepresentation or Commission of Fraud in the Operation of the Corporation by the Shareholders is enough to allow the courts to pierce the corporate veil.

"In this most successful category [] cases involving misrepresentation . . . [lead] to a piercing result . . . 94%" of the time."[28] The courts consider misrepresentation and fraud to be evidenced by (1) the holding out by an individual that he is personally liable for the debts of the corporation;[29] (2) the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation;[30] (3) the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities;[31] (4) the use of the corporate entity to procure labor, services or merchandise for another person or entity;[32] (5) the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; [33] and (6) the formation and use of a corporation to transfer to it the existing liability of another person or entity.[34]

5. The Domination and Control of the Corporation by the Shareholders is enough to allow the courts to pierce the corporate veil.

Domination and control are of concern to the courts, and should be to shareholders, because it is another way that shareholders can disregard the separateness of the identities of the corporation and the shareholder. Keeping the identities separate is necessary to avoid personal liability. However, the factor "domination and control" is not as clear as some of the other factors used to determine unity of interest.

When the courts use domination and control, they are considering: (1) the identical equitable ownership in the two entities;[35] (2) the identification of the same directors and officers of the two entities responsible for supervision and management;[36] (3) sole ownership of all of the stock in a corporation by one individual or the members of a family;[37] (4) the use of the same

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[28] Thompson, 112 Cal. App. 2d at 1064.
[29] See Stark, 20 Cal. 2d at 839; Shafford, 149 Cal. App. 2d at 428
[30] See McCombs, 197 Cal. App. 2d at 46; Eng'g Serv. Corp., 153 Cal. App. 2d at 404; Pan Pac. Sash & Door Co., 166 Cal. App. 2d at 652.
[31] See Riddle, 51 Cal. 2d at 574; Shafford, 149 Cal. App. 2d at 428.
[32] See Temple, 180 Cal. App. 2d at 279; Pan Pac. Sash & Door Co., 166 Cal. App. 2d at 652; Eng'g Serv. Corp., 153 Cal. App. 2d at 404.
[33] See Wheeler, 196 Cal. App. 2d at 822; Claremont Press Publ'g Co., 187 Cal. App. 2d at 813; Shafford, 149 Cal. App. 2d at 428.
[34] Eng'g Serv. Corp., 153 Cal. App. 2d at 404
[35] Shafford, 149 Cal. App. 2d at 428.
[36] Shafford, 149 Cal. App. 2d at 428.
[37] See Riddle, 51 Cal. 2d at 574; Stark, 20 Cal. 2d at 839; McCombs, 197 Cal. App. 2d at 46; Talbot, 181 Cal. App. 2d at 425; Claremont Press Publ'g Co., 187 Cal. App. 2d at 813; Thomson, 112 Cal. App. 2d at 420; Sweet, 33 Cal. App. 2d at 699; Goldberg, 34 Cal. App. 2d at 10; Pan Pac. Sash & Door Co., 166 Cal. App. 2d at 652

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office or business location between two entities;[38] and (5) the employment of the same employees and/or attorney.[39]

V. Should Domination and Control be a factor considered by the Courts?

"Most significantly, piercing occurs only in close corporations or within corporate groups; it does not occur in public corporations." [40] This analysis has a significant effect on domination and control as a factor. "Close corporations . . . are typically formed by individuals who know one another well and who also work together at the corporation." [41] As such, this small number of shareholders makes it more likely that there is going to domination and control by the shareholders. Publicly traded companies, by nature, have a greater number of shareholders who do not participate in the operations of the corporation. The question then becomes, should domination and control alone be enough to allow for the piercing of the corporate veil.

A. Domination and Control of the affairs of the corporation should justify the piercing of the corporate veil.

1. Where the actions of the Parent company are such that they dominate the Subsidiary Corporation, the Parent should be held responsible for the debts of the Subsidiary.

"[A] number of cases have . . . listed . . . ways . . . the separate entity of the subsidiary . . . [was] disregarded by the parent, and concluded . . . the subsidiary [was] the 'mere agent, instrumentality, adjunct, tool, or department,' . . . of the parent, and . . . the parent should be held liable for the subsidiary's obligations."[42]

In Papo v. Aglo Restaurants of San Jose, Inc., the plaintiff was an investor in a restaurant entity (Aglo) that was a subsidiary of another larger corporation (Olga) and one of several restaurants operated by the Olga.[43] The plaintiff lent money to Aglo to purchase equipment for the store Aglo operated and took back a lease of the equipment.[44] After several months of operations, the restaurant closed and Olga moved the equipment to other stores they operated, in direct violation of the lease agreement between the plaintiff and Aglo.[45] The investor sued Aglo and Olga for damages of taking the equipment and failing to make payments on the lease. The plaintiff included Olga in the lawsuit as an alter-ego of the Aglo.[46] During discovery, the president of both Olga and Aglo stated that "when I use the word Aglo Restaurants or Olga's

[38] Wheeler, 196 Cal. App. 2d at 827
[39] See McCombs, 197 Cal. App. 2d at 46; Talbot, 181 Cal. App. 2d at 425; Thomson, 112 Cal. App. 2d at 420; Pan Pac. Sash & Door Co., 166 Cal. App. 2d at 652.
[40] Thompson, 112 Cal. App. 2d at 1039.
[41] Harwell Wells, Article: The Rise of the Close Corporation and the Making of Corporation Law, 5 Berkeley Bus. L.J. 263, 275 (2008)
[42] J. A. Bryant, Jr., Annotation: Liability of corporation for contracts of subsidiary, 38 A.L.R.3d 1102, 2b (1971)
[43] Papo v. Aglo Restaurants of San Jose, Inc., 149 Mich App 285, 290 (1986).
[44] Papo, 149 Mich. App. at 290.
[45] Papo, 149 Mich. App. at 291.
[46] Papo, 149 Mich. App. at 291-92.

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Kitchen, I use those words meaning the same thing."[47] In addition, the defendant said that, as president of both corporations, he made the decisions.[48] The issue before the court was whether there was a proper piercing of the corporate veil.[49] This Michigan Court of Appeals held that the "trial court properly pierced [the] corporate veil."[50] The court ruled that where there was no "separate and distinct entity," then the entities were "mere instrumentality" for the parent.[51] Although the court never used the phrase "domination and control" the court gave examples of the operation of the two entities that showed the parent corporation was dominating and controlling the subsidiary. The court justified the piercing of the corporate veil through "mere instrumentality" and gave examples of domination and control by the parent corporation. The court's examples were that (1) the same person was the president of both corporations, (2) president stated in testimony that the two entities were interchangeable, and (3) it was found that the act of parent caused breach of lease underlying suit.

In Graham Graphics, Inc. v. Baer Marketing International, Inc., Cris Anne's (CA) was a subsidiary of Baer Imports (BI) and then of Bear Marketing (BM).[52] While CA was a subsidiary of both corporations, printing orders were placed by members of both companies on behalf of CA.[53] After CA had ceased operations, the plaintiff was unable to collect for the printing jobs and sued BM and CA for recovery.[54] The plaintiff entered into evidence checks and statements that had both CA and BI and BM on them.[55] In addition, checks written by the manager of CA were drawn on the account of BM.[56] When CA needed money to pay its bills, BM and its parent corporation, Alan Baer and Associates (ABA) would provide the financing.[57] The manager of CA stated in testimony that BM employed him as the manager of CA, but that he was not sure what company employed him in reality.[58] The issue before the court was whether BM or BI or ABA was dominating and controlling CA to justify the piercing of the corporate veil.[59] This Nebraska Court of Appeals held "[t]he restructure of the control and management of Cris Anne's from Baer Imports to Baer Marketing presented in the record supports a conclusion that Baer Marketing merely continued and controlled Cris Anne's business as it was under Baer Imports."[60] "The notion of separate corporate existence of parent and subsidiary . . . will not be recognized where one corporation is so organized and controlled and its business conducted in such a manner as to make it merely an . . . alter ego of another corporation."[61] The court

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[47] Papo, 149 Mich. App. at 300.
[48] Papo, 149 Mich. App. at 301.
[49] Papo, 149 Mich. App. at 300.
[50] Papo, 149 Mich. App. at 302.
[51] Papo, 149 Mich. App. at 301-02.
[52] Graham Graphics v. Baer Mktg. Int'l, 10 Neb. App. 382, 389 (2001)
[53] Graham Graphics, 10 Neb. App. at 383.
[54] Graham Graphics, 10 Neb. App. at 383-84.
[55] Graham Graphics, 10 Neb. App. at 383.
[56] Graham Graphics, 10 Neb. App. At 383
[57] Graham Graphics, 10 Neb. App. at 389
[58] Graham Graphics, 10 Neb. App. at 385.
[59] Graham Graphics, 10 Neb. App. at 383.
[60] Graham Graphics, 10 Neb. App. at 389.
[61] Graham Graphics, 10 Neb. App. at 387-88 (quoting Hayes v. Sanitary & Improvement Dist. No. 194, 196 Neb. 653, 664 (1976)).

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reasoned that the facts of the case showed the CA was a subsidiary of BI and BM and that BM or ABA paid the debts of CA. That CA and BM were closely tied and managed. Management of CA, the court felt, was really by BM or BI employees.

These two cases are illustrative of the opinions of the courts of both Michigan and Nebraska being willing to pierce the corporate veil where the parent corporation has dominated and controlled the subsidiary corporation. The blurring the lines between the two companies by the parent through the management and control, with no other relevant factors considered, was enough in both cases to allow the courts to pierce the corporate veil. The two courts relied solely on the operations of the companies by the parent corporations and shareholders. This operation, without distinction between the companies, was enough to show the unity of interest and the courts granted the relief requested by piercing the corporate veil.

2. Where the actions of the Shareholders are such that they dominate and control the subsidiary, the Shareholders should be held responsible for the debts of the Corporation.

"Among the [] approaches taken by the courts to the problem of piercing the corporate veil, one involves the consideration of [the] acts of stockholders."[62] The "underlying theory seems to be [] where stockholders, by [their] acts, show that they have themselves ignored the corporate entity, the courts will do likewise."[63]

In Shafford v. Otto Sales Co., Shafford brought suit to recover his commissions on sales of cocoanut from Otto Sales Co., Inc., a corporation (Corporation) and joined Walter E. Otto, Sr. (Otto), individually.[64] During the 15 years prior, Otto operated an import-export business, using the name "Otto Sales Company."[65] Otto incorporated the company in December 1946 and after December 31, 1947, the Corporation was insolvent.[66] In January 1948, Otto and Shafford entered into an agreement for Shafford to sell for the account of Otto/Corporation entire output of desiccated cocoanut.[67] Shafford communicated in writing with Otto/Corporation and received replies on letterhead used by Otto before the incorporation.[68] Shafford used a form contract, with a letterhead of "W. E. Otto" and had a place for the seller's signature at the bottom that read "W. E. Otto, by, Sellers."[69] Shafford introduced Otto to B&O Nut Company who bought the entire production from Otto/Corporation.[70] Neither Otto nor Corporation paid Shafford the commission due.[71] At trial, a former employee testified that Otto was the head of the firm, the sales manager,

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[62] Ferdinand S. Tinio, Annotation: Stockholder's personal conduct of operations or management of assets as factor justifying disregard of corporate entity, 46 A.L.R. 3d 428, 2 (1972)
[63] Ferdinand S. Tinio, Annotation: Stockholder's personal conduct of operations or management of assets as factor justifying disregard of corporate entity, 46 A.L.R. 3d 428, 2 (1972)
[64] Shafford, 149 Cal. App. 2d at 428.
[65] Shafford, 149 Cal. App. 2d at 429.
[66] Shafford, 149 Cal. App. 2d at 429.
[67] Shafford, 149 Cal. App. 2d at 430.
[68] Shafford, 149 Cal. App. 2d at 431.
[69] Shafford, 149 Cal. App. 2d at 431
[70] Shafford, 149 Cal. App. 2d at 431
[71] Shafford, 149 Cal. App. 2d at 431.

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the man in charge.[72] The issue before the court was whether Otto dominated and controlled the Corporation so as to justify piercing the corporate veil to hold Otto personally liable.[73] This California court held that "it would be inequitable to recognize any corporate entity separate and apart from Otto."[74] The court ruled that where "there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist" as to justify piercing the corporate veil.[75] It was the court's determination that Otto formed the corporation to avoid liability and for his personal convenience. In addition, the court reasoned that because Otto was the head of the firm, the sales manager, and the only one in charge of operations, the corporation was controlled and dominated by Otto at all times.

In Flynn v. Thibodeaux Masonry, Inc., Mr. Thibodeaux (Thibodeaux) and his wife operated a masonry business in Louisiana in 1998, called "Thibodeaux Masonry," as a sole proprietorship.[76] Thibodeaux, acting as president of Thibodeaux Masonry, signed a collective bargaining agreement ("CBA") with the union which required Thibodeaux and Thibodeaux Masonry to make payments on behalf of his employees to three different union entities.[77] In 1999, Thibodeaux merged Thibodeaux Masonry into Thibodeaux Masonry, Inc. (TMI).[78] Thibodeaux, as president of TMI, signed a second CBA in 2000 on behalf of TMI imposing the same payment obligations.[79] After an audit by the unions, it was discovered that Thibodeaux and TMI were behind in payments.[80] Plaintiffs then filed suit. The issue before the court was whether or not Thibodeaux, Thibodeaux Masonry, and TMI are the alter-egos of the other.[81] The court held that "because Thibodeaux Masonry and TMI have the same ownership, management, business purpose, and operations, the court concludes that Thibodeaux Masonry and TMI are, for the purposes of this suit, alter egos."[82] The court ruled that "[i]n order to determine whether two businesses are alter egos, the court evaluates the similarities between the two enterprises in their ownership, management, business purpose, operations, equipment, and customers."[83] The court found that Lura Thibodeaux was the secretary of both companies, Thibodeaux was the president of both companies, both companies operated from the same address using the same phone number, and both companies were in the same line of business.[84] The court determined that there was no separateness between the companies and that piercing the corporate veil to get the corporations was justified.

In addition, as to the liability of Thibodeaux personally, the D.C. Circuit court held that Thibodeaux controlled TMI "as in reality to dominate its separate personality."[85] The court ruled

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[72] Shafford, 149 Cal. App. 2d at 431.
[73] Shafford, 149 Cal. App. 2d at 428.
[74] Shafford, 149 Cal. App. 2d at 430.
[75] Shafford, 149 Cal. App. 2d at 432.
[76] Flynn v. Thibodeaux Masonry, Inc., 311 F. Supp. 2d 30, 35 (D.D.C. 2004)
[77] Flynn, 311 F. Supp. 2d at 35.
[78] Flynn, 311 F. Supp. 2d at 35.
[79] Flynn, 311 F. Supp. 2d at 35.
[80] Flynn, 311 F. Supp. 2d at 35.
[81] Flynn, 311 F. Supp. 2d at 39-40.
[82] Flynn, 311 F. Supp. 2d at 40.
[83] Flynn, 311 F. Supp. 2d at 40.
[84] Flynn, 311 F. Supp. 2d at 40.
[85] Flynn, 311 F. Supp. 2d at 42.

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that "a corporate form may be ignored whenever an individual so dominates his organizations as in reality to dominate its separate personality."[86] Here, the court reasoned that it was enough that Thibodeaux was president, one of the two shareholders, and authorized, in his sole and absolute discretion to, act on behalf of the corporation. As such, Shareholder's control and domination of corporation weighed in favor of piercing corporate veil and holding shareholder personally liable for corporation's liability.

In both Shafford and Flynn, the courts found that the individual shareholders so dominated and controlled the operations of the corporations that it would be inequitable not to pierce the corporate veil and hold the shareholders liable. In these two cases, the domination and control by the shareholders was the sole and determining factor for the courts of California and the District of Columbia to justify piercing the corporate veil.

B. Domination and Control of the affairs of the corporation alone should not justify piercing the corporate veil; more should be required.

1. More is needed than ownership and control by the Parent company over the Subsidiary, to pierce the corporate veil to hold the Parent responsible for the debts of the Subsidiary.

"It is clear that taken alone, the fact that one corporation owns all or a majority of the stock of the other, or that the two corporations have common officers and directors, or both, does not render a parent liable on its subsidiary's contract."[87]

In Lobegeiger v. Celebrity Cruises, Inc., the plaintiff was hurt while aboard the Celebrity Mercury and sued Celebrity Cruises (Celebrity) and Royal Caribbean Cruises Ltd. (RCCL).[88] The plaintiff alleged that Celebrity was the wholly owned subsidiary of RCCL and that RCCL exercised complete domination and control over Celebrity.[89] The plaintiff was trying to hold RCCL liable for the injury by piercing the corporate veil of Celebrity to get to RCCL.[90] The plaintiff initially alleged that RCCL purchased Celebrity in 1997 and that Celebrity was the wholly-owned subsidiary of RCCL and that this amounted to total domination and control.[91] The plaintiff further alleged that RCCL bought the chairs that caused the plaintiff's harm, hired the doctor for Celebrity, whose conduct was at issue, and that the two companies shared safety and policy manuals.[92] The issue before the court was whether there was complete domination and control and whether or not this would be enough to allow for piercing the corporate veil. The court found that "[m]erely alleging that RCCL is the sole owner of Celebrity is not enough to pierce the corporate veil."[93] The court further held that "black letter law in Florida [requires] that . . . (1) the shareholder dominated and controlled the corporation . . .; (2) the corporate form must

[86] Flynn, 311 F. Supp. 2d at 41 (quoting Labadie Coal Co., v. Black, 672 F.2d 92, 96 (D.C. Cir. 1982)).
[87] J. A. Bryant, Jr., Annotation: Liability of corporation for contracts of subsidiary, 38 A.L.R.3d 1102, 2 (1971).
[88] Lobegeiger v. Celebrity Cruises, Inc., 869 F. Supp. 2d 1350, 1351 (S.D. Fla. 2012)
[89] Celebrity Cruises, 869 F. Supp. 2d at 1353.
[90] Celebrity Cruises, 869 F. Supp. 2d at 1353.
[91] Celebrity Cruises, 869 F. Supp. 2d at 1353.
[92] Celebrity Cruises, 869 F. Supp. 2d at 1353.
[93] Celebrity Cruises, 869 F. Supp. 2d at 1353.

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have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use . . . caused injury."[94] The court ruled that "the parent corporation's control must amount to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation."[95] In this situation, the court reasoned that the allegations related to only one specific incident. As such, one specific incident did not fulfill the requirements of showing total domination and control. It was the opinion of the court that s handful of events related to the purchase of chairs and the hiring of a few staff members, both of which were minor aspects of the operations of running a cruise ship, and did not show domination and control.

In Jean Anderson Hierarchy of Agents v. Allstate Life Ins. Co., the plaintiff brought suit against Surety Life Insurance Company (Surety), a wholly-owned subsidiary of Allstate Life Ins. Co. (Allstate) for wrongful termination, among other things, and joined Allstate Life Insurance Company, Allstate Group of Life Insurance Companies, Lincoln Benefit Life Company and Sears, Roebuck and Company.[96] Plaintiffs claimed that the additional companies shared a business relationship and were thus liable.[97] "Specifically, Surety and Lincoln Benefit are alleged to be sister corporations (sharing the same officers and Board of Directors) and wholly owned subsidiaries of Allstate, while Allstate is alleged to have been a subsidiary of Sears until 1992."[98] The issue before the court was whether there were sufficient facts to show that the corporations, other than Surety, so dominated and controlled Surety as to make them liable for the obligations of Surety.[99] The court held that "since there [were] no [facts] . . . upon which Surety was so dominated by the activities of the other defendant[s] . . . there [was] no basis upon which Allstate, Lincoln Benefit or Sears can be held liable for Surety's acts."[100] The court ruled that "a parent corporation, like any stockholder, is not normally liable for the . . . obligations of a subsidiary even if or simply because the parent wholly owns the subsidiary."[101] The only allegation the plaintiff put forth was the subsidiary and sister relationships of the corporations. This California State Court determined that ownership or business relationship was not enough. The court was looking for some other actions by the other defendants to control Surety and to perform some actions of control over Surety.

In both of these cases, the courts were specific that total domination and control was not enough, alone, to provide the necessary basis for piercing the corporate veil and holding the parent corporation liable for the debts of the subsidiary. The courts required that the total domination and control must be accompanied by some form of fraud or bad faith. More than just ownership needed to be present.

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[94] Celebrity Cruises, 869 F. Supp. 2d at 1353-54.
[95] Celebrity Cruises, 869 F. Supp. 2d at 1354 (internal citations omitted).
[96] Jean Anderson Hierarch of Agents v. Allstate Life Ins. Co., 2 F. Supp. 2d 688, 691 (E.D. Pa. 1998).
[97] Jean Anderson Hierarch of Agents, 2 F. Supp. 2d at 691.
[98] Jean Anderson Hierarch of Agents, 2 F. Supp. 2d at 692.
[99] Jean Anderson Hierarch of Agents, 2 F. Supp. 2d at 691.
[100] Jean Anderson Hierarch of Agents, 2 F. Supp. 2d at 692.
[101] Jean Anderson Hierarch of Agents, 2 F. Supp. 2d at 691.

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2. More than being a sole or majority shareholder is required to hold the Shareholder responsible for the debts of the Corporation.

In Michaels v. Banks, Mr. Banks (Banks) filed Articles of Organization for Aloha LLC with the New York Secretary of State on March 31, 2010.[102] Banks and his partner each owned fifty percent of the company until April 2010, when Banks unilaterally and without informing his partner, took all of the membership from him and redistributed it to himself and Jennifer Kingston (Kingston).[103] Banks used the checking account of Aloha LLC as his own, paying health insurance and depositing child support.[104] Kingston and Banks both used personal equipment to operate Aloha LLC.[105] Aloha LLC and Bret Michaels (Michaels) entered into a contract for Michaels to perform at a concert.[106] When Michaels arrived on the date of the concert he found no stage, sound equipment, nor lighting equipment.[107] Banks admitted that Aloha LLC breached the contract.[108] The issue the court faced was whether to hold Banks and Kingston personally liable for the breach of contract.[109] The court held that neither "Banks [nor] Kingston exerted control over Aloha LLC in order to further their personal business"[110] and neither "Banks' [nor] Kingston's individual actions on behalf of Aloha LLC were wrongful or unjust toward plaintiffs."[111] The court ruled that a "corporate veil may be pierced where . . . (1) the owner exercised complete domination over the corporation with respect to the transaction at issue, and (2) such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil."[112] The court reasoned that a showing of complete control over the corporation was not enough. This New York court wanted the shareholder's actions to be wrongful along with domination and control.

In Talbot v. Fresno-Pacific Corp., Dorothy R. Lee (Lee), as an individual, operated a lumber business under the name Sequoia Lumber Sales.[113] In September 1957, Lee formed Fresno-Pacific Corporation and Sequoia Enterprises, Inc. and owned all the stock of both corporations.[114] On September 19, 1957, Lee abandoned the name "Sequoia Lumber Sales" from use personally and then filed the fictitious name for Fresno-Pacific Corporation to use.[115] After forming the corporations, Lee transferred the inventory, accounts receivable, and accounts payable including liabilities, to Fresno-Pacific.[116] In addition, Lee transferred all fixed assets of

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[102] Michaels v. Banks, 901 F. Supp. 2d 354, 355 (N.D.N.Y 2012).
[103] Michaels, 901 F. Supp. 2d at 355.
[104] Michaels, 901 F. Supp. 2d at 355-56.
[105] Michaels, 901 F. Supp. 2d at 356.
[106] Michaels, 901 F. Supp. 2d at 356.
[107] Michaels, 901 F. Supp. 2d at 356.
[108] Michaels, 901 F. Supp. 2d at 356.
[109] Michaels, 901 F. Supp. 2d at 357.
[110] Michaels, 901 F. Supp. 2d at 358-59.
[111] Michaels, 901 F. Supp. 2d at 358-59.
[112] Michaels, 901 F. Supp. 2d at 357 (quoting Freeman v. Complex Computing Co., 119 F.3d 1044, 1052 (2d Cir.1997)).
[113] Talbot, 181 Cal. App. 2d at 426.
[114] Talbot, 181 Cal. App. 2d at 426.
[115] Talbot, 181 Cal. App. 2d at 426.
[116] Talbot, 181 Cal. App. 2d at 426.

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her sole proprietorship to Sequoia Enterprises, which included equipment and a building located on leased land which Lee then leased to Fresno-Pacific Corporation.[117] Lee, as president of both corporations, signed the lease for both corporations.[118] After the incorporation of Fresno-Pacific, Sequoia Lumber Sales continued to use the same letterheads, billheads, invoices and purchase orders which had formerly been used by Lee doing business as Sequoia Lumber Company, a sole proprietorship.[119] When Fresno-Pacific became insolvent, Lee sold all of the merchantable lumber left in its yard and, in order to collect money, granted to its customers an additional discount of ten percent for cash payments, which Lee did not deposit in the account of Fresno-Pacific.[120] Further, there was about $4,786 in Lee's possession in a dresser drawer of her home at the time Fresno-Pacific became insolvent.[121] The issue before the court was whether the evidence supported piercing the corporate veil.[122] The court held that it was conceded that Lee dominated and controlled the corporation,[123] however, it was the transfers and conveyances to the two corporations that were made without adequate or sufficient consideration and were made with deliberate intent to hinder, delay and defraud existing and subsequent creditors of Fresno-Pacific Corporation that justified piercing the corporate veil.[124] The court ruled that "[e]quity will lift the corporate mask and identify the person behind it when a business corporation reorganizes under a new name, with practically the same stockholders and directors, to carry on the former business with the design of avoiding the liabilities of the original company."[125] The actions of Lee and the corporations to receive the transfers, and their knowledge the that transfers were made with a fraudulent intent and to prohibit the creditors from reaching the assets of the corporation by placing them the assets in another corporation, Sequoia Enterprises, Inc., was justification to pierce the corporate veil.

In both of these cases, the California and New York courts were looking at the domination and control as one factor. In one case all the court found was domination and control, but no wrongful acts by the shareholders, thus the court did not pierce the corporate veil. In the other case, the court found the actions of the shareholder, coupled with the domination and control by the shareholder, was enough to pierce the corporation veil.

VI. Domination and control alone should not be the only factor considered by the courts for piercing the corporate veil.

As has been shown, the courts in Michigan and Nebraska have allowed the piercing of a subsidiary to get to the parent corporation. The courts of California and District of Columbia, have allowed the piercing for shareholders. In both of these situations, the courts determined that it was the actions of the parent or shareholders to dominate and control the subsidiary or

[117] Talbot, 181 Cal. App. 2d at 427.
[118] Talbot, 181 Cal. App. 2d at 427.
[119] Talbot, 181 Cal. App. 2d at 429.
[120] Talbot, 181 Cal. App. 2d at 427.
[121] Talbot, 181 Cal. App. 2d at 428.
[122] Talbot, 181 Cal. App. 2d at 426.
[123] Talbot, 181 Cal. App. 2d at 427.
[124] Talbot, 181 Cal. App. 2d at 427.
[125] Talbot, 181 Cal. App. 2d at 432.

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corporation was egregious enough to justify the court in allowing the third party to pierce the corporate veil. What is important to note is that, although the courts used domination and control, these courts were also looking to the actions of the parent or shareholders. This is another showing that, even though the courts justified the piercing under domination and control, they were in reality, using more than simple domination and control.

The courts of California and New York have, except for Texas, looked at the most veil piercing cases through 1991, with California hearing 89 cases and New York hearing 212 cases.[126] This experience and the expression from both of these courts that more than domination and control is required to allow the courts to pierce the corporate veil should be the prevailing attitudes for all courts in the United States.

VII. Conclusion

It is therefore the contention that when considering "domination and control" of the affairs of the corporation as a factor for piercing the corporate veil, the best practice is to require the addition of another factor, and not to allow the courts to look solely to "domination and control" alone, to justify piercing the corporate veil.

About the author: L. Joseph Hudack has spent the last 28 years working in the Real Estate Industry doing transactional real estate for companies such as Walmart, Dial and Fluor Corporation. He has experience drafting, negotiating, executing and closing purchase and sale, lease and sublease, and lease terminations. In conjunction with general counsels, he has been responsible for the lease compliance and interpretation, property management, and budgeting for a portfolio of properties exceeding $400 million in book value. In addition to his work for others, Mr. Hudack has owned and operated a real estate development and construction company; and consulted for nationally recognized companies such as Home Depot and Rubbermaid on their real estate needs. Mr. Hudack obtained the CCIM and MCR designations and is a licensed real estate broker in California. In 2015, Mr. Hudack completed his J. D. with Magna Cum Laude honors and is admitted to practice in California. Mr. Hudack has been a small business owner and has experience with the issues of piercing the corporate veil by creditors trying to hold the owners and shareholders responsible for the debt of the companies. Mr. Hudack can be reached at Joseph@HudackLaw.com or through his website www.hudacklaw.com.

[126] Thompson, 112 Cal. App. 2d at 1052.