IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-01843

RESTAURANT OF HTTIESBURG, LLC;
JIM SCHAFER; and COURTNEY BRICK — APPELLANTS

VS.

HOTEL & RESTAURANT SUPPLY, INC. — APPELLEE

BRIEF OF APPELLEE

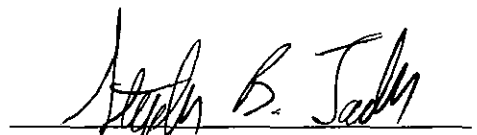
ORAL ARGUMENT NOT REQUESTED

GLOVER, YOUNG, WALTON & SIMMONS, PLLC
1724-A 23rd Avenue
Post Office Drawer 5514
Meridian, MS 39302-5514
Telephone: 601-693-1301
Telecopier: 601-693-1363
Email: stephen@gloveryoung.com

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Restaurant of Hattiesburg, LLC Jim Schafer and Courtney Brick	APPELLANTS
Hotel & Restaurant Supply, Inc.	APPELLEE
L. Clark Hicks, Jr., Esq. R. Lane Dossett, Esq. and the law firm of Hicks & Bennett, PLLC	ATTORNEYS FOR APPELLANTS
Stephen B. Jackson, Esq. and the law firm of Glover, Young, Walton & Simmons, PLLC	ATTORNEY FOR APPELLEE
Honorable Prentiss Greene Harrell	PRESIDING JUDGE IN TRIAL COURT PROCEEDINGS



STEPHEN B. JACKSON
Attorney for Appellee

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I. Did the trial court err in granting summary judgment to pierce the corporate veil of the Restaurant of Jackson, LLC and Southeastern Restaurants, LLC?

II. Were Restaurant of Jackson, LLC and Southeastern Restaurants, LLC necessary parties to this action?

III. Is Plaintiff's claim to pierce the corporate veil barred by res judicata and/or collateral estoppel?

IV. Is Plaintiff's claim barred by the statute of limitations and/or laches?

STATEMENT OF THE CASE

1. Nature of the Case.

The matter before the Court is a "pierce the veil" action. The plaintiff, Hotel & Restaurant Supply, Inc. ("HRS") sought to pierce the veil of Southeastern Restaurants, LLC and Restaurant of Jackson, LLC. HRS had previously obtained a judgment against Southeastern Restaurants, LLC and Restaurant of Jackson, LLC (hereinafter collectively referred to as "Judgment Debtors") and filed this current action in an attempt to receive payment for the previous judgment. The Defendants in the current action are Restaurant of Hattiesburg, LLC, Jim Schafer and Courtney Brick (collectively referred to as "Defendants"). Jim Schafer and Courtney Brick are the sole members of Southeastern Restaurants, LLC, Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC. HRS alleges that the actions of Courtney Brick and Jim Schafer, as owners and managers of the Judgment Debtors warrant the Court's piercing the Judgment Debtors' limited liability company shield of liability, and therefore they should be held personally liable for the damages caused by their actions as owners of the Judgment Debtors. Further, since Restaurants of Hattiesburg, LLC was not operated as a separate entity, but integrated its resources to achieve a common business purpose with the Judgment Debtors, Restaurants of Hattiesburg, LLC may be held liable for the debts in pursuit of that business purpose.

2. Course of Proceedings and Disposition in the Court Below.

HRS and Defendants each filed separate Motions for Summary Judgment. A hearing was conducted on October 25, 2010 wherein the trial court granted HRS's Motion for Summary Judgment and denied Defendants' Motion for Summary Judgment. The Court, after stating that it had read the voluminous documents that had been presented to it for the last three years, ruled

that the three prongs of *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1046 (Miss. 1989) had been met (Transc. at 22-23), thereby allowing HRS to pierce the veil of the Judgment Debtors and holding the Defendants liable for the previous Judgment against the Judgment Debtors.

3. Statement of the Facts.

In order to fully understand the facts of the current pierce the veil matter, it is necessary to explain the facts surrounding the previous judgment against the Judgment Debtors. The previous lawsuit against the Judgment Debtors will be referred to as the "Original Action". This matter was set in motion when the Judgment Debtors failed to make payment on equipment and supplies it received from HRS in order to operate a Copeland's franchise restaurant in Jackson, Mississippi. Between September, 2005 and March, 2006, managers at the said Copeland's ordered and received equipment and supplies from HRS. Some payments were made to HRS for this equipment, with all of said payments coming from Southeastern Restaurants, LLC. R. at 36, paragraph 22-23. However, despite some payments being made, HRS still had an outstanding balance of over $29,000, not including service charges. R. at 32, paragraph 10. This outstanding balance of HRS was the result of unpaid items ordered in 26 separate purchase orders/invoices. R. at 30-31, paragraph 3. HRS was not aware of a particular corporate entity that owned and operated this restaurant and the account was set up in the name "Copeland's Franchise". R. at 251-252, p. 22:20-25:1. For the first 20 of these purchase orders, HRS continued to list "Copeland's Franchise" as the name on the account. At some point in January, 2006, HRS changed the name on the account to "Restaurant of Jackson, LLC". R. at 256-257, p. 44:14-45:9. (Also see the list of invoices, R. at 159. The first 26 invoices listed are the invoices in question.

The last 17 invoices listed each begin with the letters "SC" and are not separate orders but merely service charges for unpaid balances.)

On September 15, 2006, after good faith efforts to receive payment were unsuccessful, HRS was forced to commence the Original Action against the Judgment Debtors in the Lamar County Circuit Court, civil action number 2006-314. On October 30, 2007, the Court entered an Order Granting Plaintiff's Motion for Summary Judgment against the Judgment Debtors in the amount of $36,816.64 with an additional amount of $8,500.00 for attorney's fees, plus 8% post judgment interest. R. at 39. This particular judgment against the Judgment Debtors is final and can no longer be appealed.

On November 9, 2007, the Judgment Debtors filed a Motion to Alter or Amend Judgment and Motion for Reconsideration. On December 10, 2007 the trial court issued its Order denying the said Motion.

Defying the Court's ruling, the Judgment Debtors did not pay HRS any money whatsoever. On January 15, 2008, a Writ of Garnishment was issued against Wachovia Bank in Hattiesburg, Mississippi, the same banking account that was used to pay for some of the equipment, as described above. Wachovia Bank responded soon thereafter indicating that only $36.80 remained in the account.

HRS continued to try and enforce its judgment and collect its debt, but the Judgment Debtors were uncooperative and evasive. For example, on January 31, 2008, HRS propounded and served its Interrogatories to Aid in the Satisfaction of Judgment, which the Judgment Debtors failed to respond. Despite numerous attempts in good faith by HRS to resolve the outstanding discovery matter without seeking remedy from the Court, on April 16, 2008, HRS was forced to file a Motion to Compel Discovery Responses with regard to the said

Interrogatories. Upon a hearing held on this matter, the Circuit Court issued its Order Compelling Answer to Interrogatories on June 24, 2008, which ordered that the Judgment Debtors were to provide certain information requested in the Interrogatories and to pay HRS $750.00 as reasonable expenses in obtaining the Order. R. at 40. The Judgment Debtors once again ignored this Order of the Court and still have not made any payment whatsoever to HRS.

After the Circuit Court issued its Order Compelling Answer to Interrogatories, HRS wished to conduct a judgment debtor exam. Pursuant to its Order Sustaining Motion for Examination of Judgment Debtor, the Court directed the Judgment Debtors to appoint a representative to be present at the judgment debtor exam and the Court further ordered the representative to have with him all documents and other items as specified in the Motion for Judgment Debtor Examination. R. at 57. Specifically, the Motion listed eighteen (18) items including, among other things, "check registers of bank accounts", "all financial statements and reports", "accounting records and/or ledgers", and a listing of "distributions made by the Judgment Debtors to their owners". R. at 42-46. The items were requested so HRS could learn of the presence and whereabouts of any assets in which to satisfy the judgment, as well as to give HRS an idea on the how the Judgment Debtors were managed and operated. Prior to the judgment debtor exam, the Judgment Debtors did produce a 2005 and 2006 tax return for Restaurant of Jackson, LLC, a 2006 tax return for Southeastern Restaurants, LLC, and a copy of bank statements of the checking account of Southeastern Restaurants, LLC for various months in 2006 through 2008.

It should be pointed out that Defendants have claimed throughout this whole matter that Restaurant of Jackson, LLC owned and operated the Copeland's in Jackson and that Southeastern Restaurants, LLC was merely organized "to handle administrative accounting

functions" and that it "efficiently managed the accounting of payroll, receivables and payables for the [Copeland's in Jackson and the Copeland's in Hattiesburg]." See Appellants' Brief, p.4. "Southeastern Restaurants [LLC] is nothing more than a 'transference of money.'" (R. at 64, p. 17:15-20). Restaurant of Hattiesburg, LLC is a company with the same two members (Courtney Brick and Jim Schafer) as the Judgment Debtors, and Defendants claim Restaurant of Hattiesburg, LLC owned and operated a Copeland's restaurant in Hattiesburg. See Appellants' Brief, p. 5. The Defendants claim that all three entities are separate businesses, that followed corporate formalities, filed separate tax returns, and that they had separate assets and employees.

The judgment debtor exam took place on September 11, 2008 and the representative chosen for each of the Judgment Debtors was Mr. Courtney Brick. Mr. Brick defied the aforementioned court Order and did not bring any documents or records whatsoever with regard to the Judgment Debtors. R. at 60, p. 4:9-20. As will be explained fully below, during the exam HRS learned, among other things, that the Judgment Debtors were managed and operated as a single enterprise with a flagrant disregard of corporate formalities.

It was discovered in the exam that the Judgment Debtors and Restaurant of Hattiesburg, LLC operated out of the checking account of Southeastern Restaurants, LLC as a single enterprise. R. at 132-133, p. 4-7.

> Q. The checking account where any monies of Restaurant of Jackson went, you said it went to a checking account, I believe you said called Southeastern Restaurants?
>
> A. Yes.
>
> Q. So that checking account was owned and operated by Southeastern Restaurants, LLC?
>
> A. The checking account was, yes.

Q. What other monies went into that checking account, other than Restaurant of Jackson, LLC?

A. We had one other restaurant, and that particular restaurant was deposited into that account accordingly.

Q. What was the other restaurant?

A. It was called Restaurant of Hattiesburg.

R. at 133, p. 7.

As stated earlier, Mr. Brick produced no ledgers, accounting records or any other document to show evidence of segregation or accounting for the moneys coming in and out of the account. Therefore, Mr. Brick could not confirm where the moneys in that account came from, and even testified that there was a possibility of money coming into that account from another corporate entity owned by him and Mr. Schafer, but he couldn't be sure (R. at 133-134, p. 7-9; R. at 147, p. 62-63; R. at 149, p. 72). When Mr. Brick was asked about random payments from the lone checking account, he could give very little explanation as to what the payments were for or for what company it was written. R. at 142-145, p. 44-53.

Upon taking a closer look at the testimony given in the judgment debtor exam revealed further and more damning evidence of the entities combining assets and operating as a single enterprise. Restaurant of Jackson, LLC started its business on or about September 30, 2005. R. at 167. In its 2005 Federal Income Tax Return, Restaurant of Jackson, LLC reported as income its gross receipts or sales in the amount of $423,329. R. at 148, p. 65. However, in its 2006 Federal Income Tax Return, Restaurant of Jackson, LLC reported no income and no gross receipts or sales. R. at 147-148, p. 64-65. Despite Restaurant of Jackson, LLC reporting no income or gross receipts to the IRS in 2006, Mr. Brick testified that it would have had more gross receipts or sales in 2006 than in 2005. R. at 149, p. 69-70.

Mr. Brick testified that the reason for this anomaly was Southeastern Restaurants, LLC began assuming all of the sales of Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC. R. at 148, p. 65-66. These sales by Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC were reported as the gross income of Southeastern Restaurants, LLC. R. at 147, p. 62-64. When Mr. Brick was shown the Federal Income Tax Returns of the Judgment Debtors, the following was stated in the judgment debtor exam:

> Q. Do you have any reason to doubt that in the year 2006 Restaurant of Jackson, LLC did not have any gross receipts?
>
> A. Restaurant of Jackson?
>
> Q. This is Restaurant of Jackson I'm talking about?
>
> A. Restaurant of Jackson, would Restaurant of Jackson's gross receipts be in Southeastern Restaurants' total receipts?
>
> * * *
>
> Q. I'll give you an example. What I'm going to show you, I believe this is Exhibit 1 [Federal Income Tax Return of Restaurant of Jackson, LLC] of this judgment debtor exam, and it's for the year 2005 for Restaurant of Jackson. Okay? And it lists its gross receipts, and the document speaks for itself on Line 1-C, over 423,000.
>
> A. Sure. I already answered that. We don't know what particular point in time Southeastern Restaurants, without knowing the day, actually started to assume the receipt portion of Restaurant of Jackson or Restaurant of Hattiesburg. Without knowing that, I can't answer those questions.
>
> Q. . . . They started assuming the receipt portion; is that what you said?
>
> A. I said, yeah, basically assuming the sales, is what we are talking about.
>
> R. at 148, p. 65-66.
>
> Q. Do you think in 2006, did Restaurant of Jackson, LLC have any gross receipts to your knowledge?

A. Again, we would have to ask my accountant how he ledgered the receipts for those two companies. My belief is that he ledgered the receipts with Southeastern Restaurants.

R. at 148, p. 67-68

Q. . . . do you have any reason to believe that your gross receipts in that whatever period you were open in 2006, do you have reason to believe that [they] would exceed the gross receipts you received in 2005?

A. Yes, probably would.

Q. You think it would exceed it?

A. Yes.

R. at 149, p. 69

Q. I'm going to show you [the Federal Income Tax Return for Southeastern Restaurants, LLC] anyway. And if you'll look at Line 1-A and 1-C, they are the same. In the year 2006, it says that the gross receipts, gross receipts, were $3,887,112. I want to show that to you. That's for 2006. Do you have any reason to doubt that figure? . . .

A. I don't have any reason to doubt that figure.

Q. So you believe that gross receipts, sitting here today, to the best of your knowledge, you believe that Restaurants of Hattiesburg, LLC and Restaurants of Jackson, LLC, they had combine gross receipts of $3,887,112?

A. Into the restaurant of Southeastern Restaurants' account, that the tax return you are looking at, correct?

Q. Let's don't mow [sic] it, thought. I want to know – my earlier question was I want to know where the gross receipts came from that went into Southeastern Restaurants, LLC because they were the only company that had a checking account. And I believe your answer was, well, it came from those two companies, Restaurant of Hattiesburg, Restaurant of Jackson. That was it. So, again, just for clarity, you believe sitting here today, to the best of your knowledge, you believe that Restaurant of Jackson and Restaurant of Hattiesburg had combined receipts of this figure of over $3.8 million?

A. Yeah, other than, like I said, other than if there is another entity in that, you know that may or may not, yes, to the best of my knowledge.

Therefore, Mr. Brick admitted that Southeastern Restaurants, LLC began "assuming the sales" of the Copeland restaurants in Jackson and Hattiesburg (and possibly another entity), and the Income Tax Returns produced indicated that Southeastern Restaurants, LLC did, in fact, report the combined figure as gross income in its 2006 Federal Income Tax Return. Despite the claim that Southeastern Restaurants, LLC, was organized "to handle administrative accounting functions", it recognized $3,887,112 of gross income from sales. There was no distinct separation of any of the entities with regard to the income they reported to the IRS. Therefore, these three entities (Restaurant of Jackson, LLC, Restaurant of Hattiesburg, LLC and Southeastern Restaurants, LLC) treated themselves as a single enterprise to the Internal Revenue Service, and to everyone else.

Except for the money in the checking account of Southeastern Restaurants, LLC, neither Southeastern Restaurants, LLC nor Restaurant of Jackson, LLC had any real assets.

> A. There were no assets owned because we never owned the building. We didn't own furniture, fixtures, or equipment. We didn't own all of that stuff. We didn't own – you know, there is the leasing company or Southeastern Restaurants, I should say. Southeastern Restaurants is nothing more than a transference of money. There is no assets in that particular company that I know of.
>
> Q. What particular company?
>
> A. Southeastern Restaurants.
>
> R. at 136, p. 17.
>
> Q. In 2005, what kind of assets did this company, Restaurant of Jackson, LLC own?
>
> A. Other than items that might be inside that particular restaurant, it would own nothing.
>
> * * *

Q. I want to know what kind of inventories you believe this company had in 2005, let's say?

A. Other than anything that was inside that particular building, i.e. food, liquor, whatever was used to operate that particular building, it had no assets, to my knowledge.

R. at 137, p. 23-24.

Therefore, the only assets Restaurant of Jackson, LLC had were the inventories. Despite not owning the restaurant building, Restaurant of Hattiesburg, LLC committed tax fraud by claiming deductions it was not entitled.

Q. It's a real simple question. Restaurant of Jackson never owned this building, correct?

The Witness: Can I answer that?

Mr. Foxworth: Yes

The Witness: Never owned it.

R. at 138, p. 26-27.

Q. Why did you put on your balance sheet of your income tax return for Restaurant of Jackson that you owned the building?

A. You would have to ask my accountant that.

R. at 136, p. 18.

Q. Like I said, this if for the year 2005. And it looks like on Page 4 [of the Federal Income Tax Return of Restaurant of Jackson, LLC] there is a balance sheet per books. It lists that the buildings that you own that you were depreciating against, it lists this building, and it lists the value as $1,680,000. My question to you is, if I understand your previous answer, is that this is in effect incorrectly filled out, that this company did not own this building.

A. I don't know how to answer that question.

Q. Did you own the building?

A. No, we did not own the building.

Q. This year alone you depreciated $24,883 against this building that you did not own; is that correct?

A. What line are you looking at?

Q. I'm looking at 9-B.

A. 9-B states $24,883.

R. at 137, p. 21-22.

Depreciation was also taken on the building by Restaurant of Jackson, LLC in 2006. R. at 148, p. 67. The fact that Restaurant of Jackson, LLC did not own the building clearly constitutes tax fraud, but this fraudulent behavior is even more egregious since it was not recognizing any of the income in 2006 (as stated above, Southeastern Restaurants, LLC assumed the income in 2006).

It was also learned in the judgment debtor exam that in December, 2007 Courtney Brick and Jim Schafer decided to divert funds away from the checking account of Southeastern Restaurants, LLC. In September, 2006 the monthly bank receipts for the aforementioned bank account of Southeastern Restaurants, LLC were over $234,000. R. at 151, p. 79. Every month thereafter until November, 2007 receipts were as high as $257,000 but never lower than $166,000. R. at 151, p. 79-80. Then, in December, 2007 the monthly receipts for the aforementioned checking account were approximately $10,000. R. at 151, p. 80. Not coincidentally in December, 2007 the Court in the Original Action denied the Judgment Debtors Motion for Reconsideration of the Summary Judgment.

Q. Can you explain the dramatic difference between several months [of receipts being] over $200,000 to $10,000?

A. Well, I would probably explain that is, Southeastern Restaurants is probably not retaining their receipts.

* * *

Q. Could it be, if you know, could it be that in December of '07 that Southeastern Restaurants, LLC no longer handled the receipts of Restaurant of Hattiesburg?

A. It could be.

Q. Who made that decision; Southeastern Restaurants?

A. Probably Southeastern Restaurants, the accountant and/or Drew, my attorney.

Q. Assuming they are not an officer or something, there is a –

A. They would advise, correct.

Q. They are advisers. Who makes the decisions at Southeastern Restaurants?

A. The two members.

Q. Which are?

A. Courtney Brick and Jim Schafer.

Q. And Restaurant of Hattiesburg, LLC, they are maintaining their own receipts now?

* * *

A. Yes, Southeastern Restaurants no longer handles the receipts.

R. at 151-152, p. 80-81.

After Mr. Brick testified about the closing of the checking account of Southeastern Restaurants, he was asked the following:

Q. But, then, Restaurant of Hattiesburg, at that point, when Southeastern Restaurants made that decision [to close their checking account].

A. Restaurant of Hattiesburg should have gotten incorporated into Southeastern Restaurants.

Q. I'm not saying should have. I'm just saying what actually happened. At that point, Restaurant of Hattiesburg, LLC had to go out and open a new checking account?

A. To the best of my knowledge, yes.

R. at 154, p. 91.

Therefore, Southeastern Restaurants, LLC who not only had been recognizing all sales of Restaurant of Hattiesburg, LLC as its own gross income, but also had been depositing all of the said funds from the business in its checking account, made the decision to no longer do business as usual. Courtney Brick and Jim Schafer decided to close the only business checking account (that happened to be receiving sales receipts in excess of $200,000) and divert those monthly sales receipts to another checking account they first created in December, 2007 (the same month the Court in the Original Action denied the Judgment Debtors Motion for Reconsideration of the Summary Judgment). When this diversion of funds took place, it was well over a year after Restaurant of Jackson, LLC has ceased doing business (as Restaurant of Jackson, LLC had shut down in the second quarter of 2006 (R. at 148-149, p. 68-69)), and therefore all of the money being deposited into this account came from Restaurant of Hattiesburg, LLC.

After learning the above facts in the judgment debtor exam, HRS attempted to name the Defendants as additional defendants in the Original Action. Upon being denied naming the Defendants as additional defendants in the Original Action, HRS commenced the current action against Defendants to pierce the veil of the Judgment Debtors. This "piercing the veil" complaint was filed on November 5, 2009 in the Lamar County Circuit Court, civil action number 2009-200.

On January 13, 2010 HRS filed a Motion for Summary Judgment stating much of the facts learned at the judgment debtor exam. On April 8, 2010 (after receiving extensions of time

to respond), Defendants filed their Response to the Motion for Summary Judgment. On April 22, 2010, HRS filed its Rebuttal to Defendants' Response to the Motion for Summary Judgment. Subsequently, on July 12, 2010 the Defendants filed the Defendants' Supplemental Response to Plaintiff's Motion for Summary Judgment. R. at 240-413. In this supplemental response, which was filed 670 days (over 22 months) after the date of the judgment debtor exam, Defendants produced, for the very first time, documents they claim to be accounting records for Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC. It is not known if these alleged records came from the accountant of Defendants.

A hearing was conducted on October 25, 2010 wherein the trial court granted HRS's Motion for Summary Judgment and denied the Defendants' Motion for Summary Judgment.

SUMMARY OF THE ARGUMENT

Summary Judgment was proper in the current action because there are no issues of material fact and all the three prongs of *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1046 (Miss. 1989) were met. HRS is therefore entitled to pierce the veil of the Judgment Debtors. Specifically, there was clear evidence that HRS experienced frustration of contractual expectation, that the Defendants had a flagrant disregard of corporate formalities by commingling assets, income and expenses to act as a single enterprise, and the actions of Defendants constituted fraud. Furthermore, all matters of procedure in the current action were proper and the trial court's Judgment should be affirmed.

ARGUMENT

HRS is aware that Mississippi case law generally favors maintaining corporate entities. HRS does not wish that this Court take this issue lightly and to give this matter its due attention. However, an action to pierce the veil is a legal right of a plaintiff if the right circumstances are present. In the current matter, piercing the veil of the Judgment Debtors is truly warranted due to the actions of the Defendants. In its Brief, Defendants seem to imply as though piercing the veil of a corporate entity is never to occur and that the Court should reaffirm the sacred protection of the corporate veil under any circumstances. As this Court is well aware, Mississippi case law is replete with numerous cases wherein a corporate entity was allowed to be pierced when certain requirements were met and to avoid an injustice. "While holding to the principle that piercing the veil of a corporation is not to be undertaken lightly, we will not rigidly maintain the distinct corporate identity where, as would be the case here, to do so would subvert the ends of justice." *Highway Development Co., Inc. v. Mississippi State Highway Commission*, 343 So.2d 477, 480 (Miss. 1977); *Johnson & Higgins of Mississippi, Inc. v. Commissioner of Insurance*, 321 So.2d 281 (Miss.1975).

I. Summary Judgment in favor of the Plaintiff was correct as there is no evidence demonstrating material issues of fact on Plaintiff's claim to pierce the corporate veil.

Under Mississippi law, to pierce the corporate veil, one must demonstrate: a.) some frustration of contractual expectations regarding the party to whom he looked for performance; b.) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and c.) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder. *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1046 (Miss. 1989).

A. The evidence clearly demonstrates that HRS experienced frustration of contractual expectation.

HRS agrees that frustration of contractual expectation occurs when a party enters into an agreement that contains ambiguity as to who is to fulfill the contract. See *Rosson v. McFarland*, 962 So. 2d 1279, 1286-1288. (Miss. 2007); *Richardson v. Jenkins Builders, Inc.* 737 So. 2d 1030 (Miss. App. 1999). The Mississippi Supreme Court has allowed an aggrieved contracting party to pierce the corporate veil when there is confusion about the real parties at interest in an agreement. See *Thames v. Eicher*, 373 So. 2d 1033 (Miss. 1979).

The cases cited in the Brief of Appellants are distinguishable from the matter *sub judice* because the parties in this action were operating under the parameters of the Uniform Commercial Code and did not have the benefit of a contract or other writing that listed the responsible corporate entity prior to execution of the agreement. HRS made numerous deliveries to the Copeland's restaurant in Jackson, and therefore there were numerous contracts entered into under the U.C.C. The dispute in the Original Action involved 26 separate purchase orders (these do not include the purchase orders wherein HRS received full payment) and therefore there were 26 contracts entered into under the U.C.C.

Under the U.C.C., "tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract." Miss. Code Ann. §75-2-507(1). Therefore, there is a binding contract once there has been "tender of delivery". "Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonable necessary to enable him to take delivery." Miss. Code Ann. §75-2-503. The employees' signature/initials on each Purchase Order is ample evidence

that HRS put the goods at the "buyer's" disposition and that the "buyer" had notice to enable them to take delivery.

Therefore, the question before this Court in order to determine if the first prong of *Gray* is met is who is the "buyer" to the numerous U.C.C. contracts and then determine if there was any ambiguity as to who was to fulfill the obligations of said contracts. Defendants state that, "the evidence before the trial court showed that HRS contracted with Restaurant of Jackson, LLC and looked only to it for payment," which is simply not true.[1] See Appellants Brief, p. 9. First of all, Tom Stewart, the 30(b)6 representative of HRS who happens to be the salesman of HRS who established the account with the Copeland's restaurant in Jackson, stated repeatedly in his deposition that he was unaware of who owned the restaurant.

> Q. Who did you understand to own the [Jackson] Copeland's at that point?
>
> A. I'm not sure if I knew who the owner was. I knew that they were affiliated with Copeland's of Hattiesburg.
>
> * * *
>
> Q. So you prepared an order from without knowing who you were preparing it for?
>
> A. I was preparing it for Copeland's of Jackson.
>
> Q. Copeland's of Jackson?
>
> A. Yes.
>
> Q. Was it Restaurant of Jackson, LLC?
>
> A. It was just Copeland's. I don't know.
>
> R. at 255, p. 38-39.

[1] Any affidavit given by Courtney Brick or Jim Schafer that testifies as to HRS's understanding of who they were dealing with is speculative and should not be considered.

Therefore, when the account was established between HRS and the Copeland's restaurant in Jackson, HRS was not aware of the owner. Consequently, the account was opened under the generic name, "Copeland's Franchise". R. at 251-252, p. 22-25.

Secondly, HRS had received payment for some goods it delivered to the Copeland's restaurant in Jackson (said goods were not part of the Original Action). All payments received by HRS for goods it delivered to the said restaurant was from Southeastern Restaurants, LLC. R. at 36, paragraph 22-23. In addition, after the issue of non-payment arose, HRS received a letter written on Southeastern Restaurants letterhead (not Restaurant of Jackson, LLC) from Jim Schafer which stated "***We*** have closed the Jackson location . . . I feel your salesman oversold items to ***our*** restaurant without approvals from ***us*** . . . what accommodations can you make in helping ***us*** resolve this balance." (Emphasis added). R. at 172. This letter indicates that Southeastern Restaurants, LLC was, at least in some part, responsible for some of the performance of the contractual obligations and further confuses the issue of who was responsible for paying for the goods documented in the invoices. Furthermore, the trial court in the Original Action held in its Summary Judgment that HRS was justified in looking to both Restaurant of Jackson, LLC and Southeastern Restaurants, LLC for the performance under the numerous U.C.C. contracts and ruled both Judgment Debtors liable for the obligations therein. Defendants are trying to reshape certain facts that have already been ruled on and cannot be appealed.

Thirdly, evidence was shown that even the Judgment Debtors were confused about the real parties at interest in the U.C.C. contracts. It is therefore disingenuous of Defendants to claim that HRS knew which entity formed the contracts since even defendant Jim Schafer, both in his individual capacity and as a corporate representative of Restaurants of Jackson, LLC, did

not even know who the real party at interest was in the contracts formed within the parameters of the U.C.C.

Jim Schafer, in his Response to HRS's Request for Admissions stated that each of the purchase orders (which were the subject of the Original Action) were signed and/or initialed by an employee of Restaurant of Jackson, LLC. See R. at 420-460, Answer to Requests Nos. 6, 13, 20, 27, 34, 41, 48, 55, 62, 69, 76, 83, 90, 97, 104, 111, 118, 125, 132, 139, 146, 153, 160, 167, 173 and 179.

In a sworn Affidavit by Jim Shafer, he then stated that "the supplies that were allegedly delivered to Restaurant of Jackson, LLC were never authorized by me or Courtney Brick, the only persons authorized to do so for Restaurant of Jackson, LLC." R. at 472, paragraph 6. Thus, according to the sworn affidavit of Jim Schafer, someone other than Restaurant of Jackson, LLC entered into the contracts with HRS that were the subject of the Original Action.

In his Response to HRS's First Set of Interrogatories, Jim Schafer then stated he was unable to identify the initials or signatures of the persons that signed or initialed the purchase order. R. at 466-467, Answer to Interrogatory No. 10.

In one instance, Mr. Shafer says that employees of Restaurant of Jackson, LLC signed or initialed the purchase orders, thereby causing Restaurant of Jackson, LLC to enter into the contracts with HRS. In another instance, he states that someone other than Restaurant of Jackson, LLC entered into the contracts with HRS. In yet another instance, he states he cannot identify who entered into the contracts with HRS. By Jim Shafer's own testimony, it is impossible to imagine how there could be any more ambiguity as to who was to fulfill the contract. Mr. Shafer was attempting to play a shell game and trying to manipulate the corporate

entities to avoid liability. If the representative of the corporate entity did not know who was to fulfill the contract, it is impossible to expect HRS to know as well.

HRS did change the name on the account from "Copeland's Franchise" to "Restaurant of Jackson, LLC" in January, 2006. However, out of the 26 disputed deliveries that were the subject of the Original Action, this name change on the account occurred after 20 of the deliveries. R. at 256-257, p. 44:14-45:9. (Also see invoice listing, R. at 159. The first 26 invoices listed are the invoices in question, with the 21st invoice being the first one prepared in January, 2006. The last 17 invoices listed each begin with the letters "SC" and are not separate orders but merely service charges for unpaid balances). Furthermore, a contract is not made under the U.C.C. when a seller changes the name on an invoice. This has nothing to do with "tender of delivery" and evidence of this name change alone cannot remove the frustration of contractual expectation as described in *Gray*. The evidence shows that there was ambiguity as to who was to fulfill the contract. HRS wasn't even made aware of the existence of Restaurant of Jackson, LLC until after several months of orders had been placed. Even after HRS was made aware of both Judgment Debtors, HRS would have no way of knowing if either of the Judgment Debtors owned the restaurant, or if they were merely management companies, or if they were in any way the other party in the U.C.C. contract.

Like the aggrieved party in *Thames*, HRS did not know who the real parties at interest were until after they had formed a contract. As in *Thames*, HRS should be allowed to pierce the corporate veil because the corporate structure of the Judgment Debtors made it impossible to determine the true party at interest to the agreement.

Defendants' reliance on *Rosson v. McFarland*, 962 So. 2d 1279 (Miss. 2007) and *Richardson v. Jenkins Builders, Inc.*, 737 So. 2d 1030 (Miss. App. 1999) is unpersuasive. Both

cases involved a contract for the construction of residential property and did not involve matters governed by the U.C.C. Both cases involve uncontroverted evidence that the plaintiffs were aware that they were contracting with the defendant corporation and no other individual or entity. In *Rosson*, the plaintiff testified to this fact and in *Richardson*, the contract listed the defendant corporation and a partial payment was made payable to the defendant Corporation. The plaintiff in *Richardson* made no forceful argument to show ambiguity of the burden of performance (as well as no argument as to fraud or other malfeasance), which "weigh[ed] heavily against [him]." *Richardson*, 1032.

The fact that there were no personal guarantees or no written contract signed by the Defendants is irrelevant in a piercing the veil action. It is not necessary, under *Gray*, to show that HRS contracted directly with any of the Defendants or that they received a personal guarantee from any of the Defendants in order for HRS to pierce the veil of the Judgment Debtors. If contracting directly with the owners of a corporation or receiving a personal guarantee from the owners were necessary before proceeding with a piercing the veil action, there would never be any such thing as a piercing the veil action. The plaintiff would simply file a breach of contract claim for violation of the contract and/or personal guarantee. Again, Mississippi law is replete with cases where the plaintiffs have been allowed to pierce the veil of corporations without contracting directly to the owners or having personal guarantees of the owners.

B. <u>There is clear evidence of flagrant disregard of corporate formalities</u>.

HRS does not contend that the corporate veil of the Judgment Debtors should be pierced by the sole fact that it believes they were being operated from the same address, or with the same phone number, or solely because they were both owned by Courtney Brick and Jim Schafer.

HRS believes the corporate veil should be pierced because of the flagrant disregard of the corporate formalities, as well as the flagrant disregard of the legal separation and distinct properties of the Judgment Debtors and Restaurant of Hattiesburg, LLC. The Judgment Debtors and Defendants conducted their business on an interchangeable basis as if they were one.

There is no question that Mr. Brick's testimony during the judgment debtor exam did reveal a willful disregard of corporate formalities that created rampant commingling of funds between the corporate entities. Testimony revealed that Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC did not have a checking account and their money was deposited into an account owned by Southeastern Restaurants, LLC. R. at 133, p. 5-7. Mr. Brick ignored the trial court's order and did not produce any ledgers, accounting records or any other document to show evidence of segregation or accounting for the moneys coming in and out of the account. The significance of Mr. Brick defying the said order was that he was unable to give any information as to where the moneys in that account came from, and even testified that there was a possibility of money coming into that account from another corporate entity owned by him and Mr. Schafer, but he couldn't be sure. R. at 133-134, p. 7-9; R. at 147, p. 62-63; R. at 149, p. 72). When Mr. Brick was asked about random payments coming out of the lone checking account, he again could give very little explanation as to what the payments were for or for what company it was written. R. at 142-145, p. 44-53.

Upon taking a closer look at the testimony given in the judgment debtor exam revealed further and more damning evidence of the entities combining assets and operating as a single enterprise. According to the Federal Income Tax Returns produced by the Judgment Debtors, the gross sales of both Restaurant of Hattiesburg, LLC and Restaurant of Jackson, LLC were combined and recognized as gross income by Southeastern Restaurants, LLC. R. at 147-149, p.

62-72. Therefore, these three entities (Restaurant of Jackson, LLC, Restaurant of Hattiesburg, LLC and Southeastern Restaurants, LLC) treated themselves as a single enterprise to the Internal Revenue Service, and to everyone else. Any argument that these entities should be treated as one entity to the IRS and separate entities to creditors is without merit.

"The corporate entity may be disregarded where the separate personalities of the corporation and the shareholder no longer exist and adherence to the fiction of separate corporate existence would under the circumstances sanction a fraud or promote injustice." *A & L, Inc. vs. Grantham*, 747 So. 2d 832, 843 (Miss. 1999). "If a principal shareholder or owner conducts his private and corporate business on an interchangeable or joint basis as if they were one, he is without standing to complain when an injured party does the same." *Id.* at 844.

Had Southeastern Restaurants, LLC merely been assigned administrative duties regarding management of accounts receivables and payables, as Defendants contend, it would not have combined the gross sales receipts received from Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC and recognized it to the IRS as its own income. Rather, a true management company that was separate and distinct would have only recognized its fee for providing such services as its income. Despite the fact that "Southeastern Restaurants [was] nothing more than a transference of money", it recognized $3,887,112 of gross income in its tax return in 2006 which came from sales from Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC, as well as possibly from another company. R. at 147-149, p. 62-72. Consequently, Restaurant of Jackson, LLC showed no gross receipts or sales in 2006 (due to the fact that it was being recognized by Southeastern Restaurants, LLC) despite the fact that Mr. Brick testified that Restaurant of Jackson, LLC had more receipts in 2006 than in 2005, when Restaurant of Jackson, LLC recognized in excess of $423,000. R. at 148-149, p. 65, 69. Thus, Defendants' claim that

Southeastern Restaurants was only maintaining a trust account is without merit. "If the shareholders themselves, or the corporations themselves, disregard the legal separation, distinct properties, or proper formalities of the different corporate enterprises, then the law likewise will disregard them." *Gammill v. Lincoln Life and Annuity Distributors, Inc.*, 200 F.Supp. 2d 632, 634 (S.D. Miss. 2001).

Therefore, as of the judgment debtor exam, HRS had clear evidence of commingling funds with no evidence of segregation or accounting. HRS also had solid evidence that the Judgment Debtors and Restaurant of Hattiesburg, LLC held themselves out to be a single enterprise to the IRS and others by combining their sales and recognizing them as income to a single company. HRS also had evidence that in addition to committing tax fraud, they were able to divert funds out of their standard business account of Southeastern Restaurants, LLC and create a new account for Restaurant of Hattiesburg, LLC, as if Restaurant of Hattiesburg, LLC had always been acting as an independent company. R. at 151-152, p. 78-81; R. at 154, p. 91. All of this was evident as of the judgment debtor exam. However, over 22 months after the judgment debtor exam, Defendants belatedly tried to enter additional evidence.

After HRS had filed its Motion for Summary Judgment (in the current action), after the Defendants filed their Response to said Motion, and after HRS filed its Rebuttal to said Response, Defendants then filed the Defendants' Supplemental Response to Plaintiff's Motion for Summary Judgment. In this supplemental response, which was filed 670 days after the date of the judgment debtor exam, the Defendants produced, for the very first time, documents they claim to be accounting records for Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC. It is not known if these alleged records came from the accountant of Defendants. Defendants claim that "there were no . . . accounting records or any other evidence in support of .

. . HRS's motion for summary judgment." See Brief of Appellant, p. 16. This is because no accounting records were ever given to HRS prior to its motion for summary judgment, or even its rebuttal.

At the hearing on HRS's Motion for Summary Judgment, the trial court judge stated, "And if [the Judgment Debtor representative] is directed in a lawsuit, of which we must maintain, and he's told to bring eighteen records and he brought none, that inexcusable, even though his accountant may have had them. But he can't hide behind the accountant. He is a sophisticated businessperson, and . . . he has personal responsibility." (Transc. at 25).

Rule 37 of the Mississippi Rules of Civil Procedure addresses the imposition of sanctions for failure to make or cooperate in discovery. If a party fails to obey an order to provide discovery the court may refuse to allow the disobedient party to support or oppose designated claims or defenses or prohibit that party from introducing designated matter in evidence. See Miss. R. Civ. P. 37(b)(2). "The control of discovery is a matter committed to the sound discretion of the trial judge. The trial court has great flexibility in dealing with abuses of the discovery rules, and trial courts have considerable discretion in the imposition of sanctions under Miss. R. Civ. P. 37. Where a party fails to comply with a court order permitting discovery, the court may refuse to allow the disobedient party to support its claims with the undisclosed evidence." *Broadhead v. Bonita Lakes Mall, Ltd. Pshp.*, 702 So.2d 92 (Miss. 1997). "If a party fails to obey a court order permitting discovery, the trial court may, in its discretion, refuse to allow the disobedient party to support her claims with the undisclosed evidence. Sanctions may be imposed for the failure to supplement even without a prior court order." *Ladner v. Ladner*, 436 So. 2d 1366, (Miss. 1983). "An appellate court is limited in reversing a trial court's actions regarding its decisions relating to discovery. An appellate court may only reverse the trial

judge's ruling regarding discovery if it finds that there has been an abuse of discretion. *Warren v. Sandoz Pharms. Corp.*, 783 So. 2d 735 (Miss. Ct. App. 2000). "The decision to impose sanctions or discovery abuse is vested in the trial court's discretion." *White v. White*, 1987 Miss. LEXIS 2983 (Miss. 1987). The trial court was perfectly within its right to discount or disregard any weight of evidence Defendants claim these documents infer.

Although the trial court has complete discretion to discount or even disregard the self serving documents that were brought in by Defendants 22 months after they were ordered to be produced, the documents themselves carry little weight as they contradict what was on the actual Federal Income Tax Returns of the Judgment Debtors. Defendants claim that the alleged accounting records indicate that Restaurant of Jackson, LLC had $873,504.95 in gross sales in 2006. R. at 410. However, according to the actual income tax return of Restaurant of Jackson, LLC shows that they recognized no gross income in 2006, as Mr. Brick testified that any sales receipts were being recognized as income by Southeastern Restaurants, LLC. R. at 147-149, p. 62-72. Any claim of segregation or accounting of the sole checking account of Southeastern Restaurants, LLC is moot since the tax returns indicate that these entities did, in fact, combine income and treat themselves as a single enterprise.

Computer accounting software is commonly maintained by businesses and then reports from this software are then given to their accountant. The fact that these alleged accounting records so starkly contradict the actual Federal Income Tax Returns prepared by the accountant gives serious doubts that these alleged records came from the Defendants' accountant, or that they were timely given to him in order to prepare the tax returns. Had the entities truly maintained the necessary accounting records needed to account and segregate assets, the tax returns would clearly indicate the legal distinction and separation of each company. Since the

returns show that the incomes are combined and there is no distinction between the companies, the alleged accounting records become useless.

The combining of income fits with the true intent of these companies to operate as one. The purpose of Southeastern Restaurants, LLC was to "incorporate most of the payroll and the cash flow for [Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC]" R. at 135, p. 16. This is precisely what occurred. All of the payroll and cash flow was incorporated into one company, Southeastern Restaurants, LLC. Restaurant of Hattiesburg, LLC was not intended to act as a separate company, as Mr. Brick testified that "Restaurant of Hattiesburg should have gotten incorporated into Southeastern Restaurants." R. at 154, p. 91. "[W]hen corporations are not operated as separate entities, but integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for the debts incurred in pursuit of that business purpose." *Western Oil & Gas JV, Inc. v. Castlerock Oil Co., Inc.*, 91 Fed. Appx. 901, 904 (5th Cir. 2003) (citing *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 594 (5th Cir. 1999)). The separate corporate existence of affiliated corporations 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 agency, instrumentality, adjunct, or alter ego of another corporation. *Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490 (1918).[2]

While there doesn't appear to be any Mississippi case on point in regard to piercing the veil of a limited liability company, other states have ruled on this issue and provide guidance. "A court may disregard the separate LLC entity and the protective veil it provides to an individual member of the LLC when that member, in order to defeat justice or perpetrate fraud,

[2] See also: *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634 (8th Cir. 1975); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984); *Main Bank of Chicago v. Baker*, 427 N.E.2d 94 (Ill. 1981); *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 596 P.2d 227 (Nev. 1979); *Southern Elec. Supply Co. v. Raleigh County Nat. Bank.*, 320 S.E.2d 515 (W. Va. 1984).

conducts his personal and LLC business as if they were on by commingling the two on an interchangeable or joint basis or confusing otherwise separate properties, records, or control." *Bonner v. Brunson* 585 S.E. 2d 917 (Ga. 2003) (citing *Stewart Bros., Inc. v. Allen*, 377 S.E. 2d 724 (Ga. 1989); *Bone Constr . Co. v. Lewis*, 250 S.E. 2d 851 (Ga. 1978); *Clark v. Cauthen*, 520 S.E. 2d 477 (Ga. 1999)).[3]

C. <u>There is clear evidence of fraud and malfeasance</u>.

"Piercing the corporate veil is appropriate where the corporation exists to perpetuate a fraud." *Stanley v. Mississippi State Pilots of Gulfport, Inc.*, 951 So. 2d 535 (Miss. 2006); *North Am. Plastics, Inc. v. Inland Shoe Mfg. Co.*, 592 F.Supp. 875, 877-878 (N.D. Miss. 1984); *Johnson & Higgins of Miss., Inc. v. Comm'r of Ins. of Miss.*, 321 So. 2d 281, 285 (Miss. 1975).

HRS does not allege fraud merely because the Judgment Debtors did not pay their debt. HRS alleges fraud due to the fact that the Judgment Debtors perpetuated fraud by operating all of the entities as a single enterprise in order to fraudulently evade paying its debt and furthermore to manipulate their corporate entities for their own benefit.

Fraud was discovered when Mr. Brick testified in the judgment debtor exam that in December, 2007, all deposits coming into the checking account of Southeastern Restaurants, LLC were diverted to another checking account in another name. R. at 151, p. 79-80; R. at 154, p. 91. This action was clearly done in order to avoid paying the debt of Southeastern Restaurants, LLC.

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[3] See also *Filo American, Inc. v. Olhoss Trading Co., LLC*, 2004 WL 1385767 (M.D. Ala S. Div. 2004); *KLM Industries, Inc. v. Tylutki*, 815 A.2d 688 (Conn. App. 2003); *Lee v. Clinical Research Center of Florida, L.C.*, 889 So.2d 317, 2004-0428 (La. App. 4 Cir. 11/17/04); *Kaycee Land and Livestock v. Flahive*, 46 P.3d 323 (Wyo. 2002); *Litchfield Asset Management Corp. v. Howell*, 799 A.2d 298 (Conn. App. 2002).

As stated in the Statement of Facts, above, Southeastern Restaurants, LLC who not only had been recognizing all sales of Restaurant of Hattiesburg, LLC as its own gross income, but also had been depositing all of the said funds from the business in its checking account, made the decision to no longer do business as usual. Courtney Brick and Jim Schafer decided to close the only business checking account, that happened to be receiving sales receipts in excess of $200,000, and divert those monthly sales receipts to another checking account they first created in December, 2007 (the same month the Court in the Original Action denied the Judgment Debtors Motion for Reconsideration of the Summary Judgment). When this diversion of funds took place, it was well over a year after Restaurant of Jackson, LLC has ceased doing business (as Restaurant of Jackson, LLC had shut down in the second quarter of 2006 (R. at 148-149, p. 68-69)), and therefore all of the money being deposited into this account came from Restaurant of Hattiesburg, LLC. Thus, the diversion had nothing to do with Restaurant of Jackson, LLC ceasing to do business but rather to divert funds away from the checking account of Southeastern Restaurants, LLC in order to avoid paying the judgment rendered against it by the trial court in the Original Action. Had Mr. Brick and Mr. Schafer kept doing business as usual and allow Southeastern Restaurants, LLC to retain the sales receipts it was recognizing as its own gross income, the monies in the bank account would have been garnished by HRS and the judgment would have been satisfied.

"Corporate officers who participate in illegal diversions of corporate assets are liable therefore." *Stanley v. Mississippi State Pilots of Gulfport, Inc.*, 951 So.2d 535, 542 (Miss. 2006); *Gibson v. Manuel*, 534 So. 2d 199, 202 (Miss. 1988); *Knox Glass Bottle Co. v. Underwood*, 89 So. 2d 799, 828 (Miss. 1956). The fiction of separate corporate identity of two or more

corporations will not be extended to permit one of the corporations to evade its just obligations or to promote injustice. *Forest Hill Corp. v. Latter & Blum*, 29 So.2d 298 (Ala. 1947).

The tax returns of the Judgment Debtors, in addition to evidencing their true intent of being treated as a single enterprise, also demonstrates fraud. The combining of gross sales income between the entities and an entity's recognition of expenses it wasn't entitled show a pattern of fraudulent behavior by shuffling assets, income, and expenses between the entities to gain an economic benefit they are not entitled.

In addition, Mr. Brick was unable to explain several withdrawals and transfers after the Judgment in the Original Action. Specifically, Mr. Brick could not explain why he received a $8,900 check from the sole checking account after the Summary Judgment was granted in the Original Action. R. at 143-144, p. 48-49. Also, Mr. Brick could give no answer as to why there was a distribution from the sole checking account to Schafer Real Estate, a company owned by Jim Schafer over $800. R. at 144, p. 52. These payments were made to the owners during the month of the Summary Judgment of the Original Action.

All of the above actions illustrate a volitional plan to make the Judgment Debtors judgment proof. This fraudulent behavior was undertaken to subvert a debt and was in direct conflict with the summary judgment in the Original Action. The corporate veil may be lifted to protect persons whose rights have been jeopardized by the corporate device where the corporate affairs are confused with those of an affiliate corporation. *Abbot v. Bob's U-Drive*, 352 P.2d 598 (Or. 1960).

II. <u>The Judgment Debtors are not Necessary Parties.</u>

Defendants cite no case law that deals with compulsory joinder in the context of piercing the corporate veil and their argument contradicts their position regarding collateral estoppel and

res judicata. The American Jurisprudence directly contradicts Defendants' claims regarding the proper parties to be named by stating, "[an action to pierce the corporate veil] may also be brought against individual shareholders, officers, directors or others in control ***without naming the corporation as a defendant***." 45 Am. Jur. § 19 (2008) (emphasis added).

It is not necessary to name the corporation as a defendant because, "an attempt to pierce the corporate veil is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* §41.28 (1999).[4] "Piercing a corporate veil is not itself a cause of action any more than the doctrine of respondeat superior is." *Turner Murphy Co. v. Specialty Constructors, Inc.*, 659 So. 2d 1242, 1245 (Fla. Dist. Ct. App. 1995). In piercing the veil actions, the court is merely trying to identify the true debtor on the judgment, based on the defendants own actions. See *Sandlin v. Corporate Interiors, Inc.*, 972 F. 2d 1212, 1217 (10th Cir. 1992). The Judgment Debtors were already liable for the judgment in the Original Action. In the current action, the trial court decided that Defendants were liable for their own individual and corporate acts. It was Defendants' actions that were deemed to allow the piercing of the veil of the Judgment Debtors. Therefore, the Defendants are the only necessary parties.

Furthermore, Defendants argue, on one hand, that *res judicata* should apply (addressed below). Logically, that would infer that if HRS named the Judgment Debtors in the 2009 action then they would be violating the principles of *res judicata* and collateral estoppel by subjecting

[4] The exact section of this very treatise has been previously cited with favor by the Supreme Court of Mississippi in *Hardy v. Brock*, 826 So. 2d 71, 75 (Miss. 2002); see also *International Financial Services Corporation v. Chromas Technologies Canada, Inc.*, 356 F.3d 731, 736 (7th Cir. 2004); *Thomas v. Peacock*, 39 F. 3d 493, 499-500 (4th Cir. 1994); *Hennessey's Tavern, Inc. v. American Air Filter Co.*, 204 Cal.App.3d 1351, 1359 (Cal. Ct. App. 1988).

those Defendants to "duplicitous litigation". Yet the Defendants argue on the other hand that because the Judgment Debtors were not named as Defendants to the current action they are not able to answer these charges. These arguments, taken together, are unreasonable and would provide an aggrieved HRS with no legal recourse against a corporate Defendant in a separate collection action when piercing the corporate veil is appropriate. In this case, the Judgment Debtors are the corporate alter egos of the current Defendants and they are not required to be named as parties.

III. This Matter Should Not Have Been Dismissed Pursuant to Res Judicata and Collateral Estoppell

Defendants erroneously allege that Plaintiff's claims are barred by *res judicata* and collateral estoppel, claiming that Plaintiff is merely re-litigating an original claim previously adjudicated by this Court. Defendants readily admit that there is no Mississippi case directly on point, and cite cases that can easily be distinguished from the case at bar. Defendants are attempting to confuse the court to think that there are jurisdictions that bar any and all subsequent piercing the veil actions due to *res judicata* and/or collateral estoppel. This is pure legal fiction and, in fact, ***none*** of the cases cited by Defendants hold such a theory.

For instance, one case cited by Defendants, *Balcom Marine Centres, Inc. v. Hoeksema*, 2010 WL 334563 (Mich. App. 2010), involved a dispute over a lease and purchase agreement of a marina, not purchase orders governed by the U.C.C., as in the case at bar. Thus, unlike the case at bar, among other things, the parties in *Balcom Marine Centres, Inc.* had the benefit of a contract that listed the responsible corporate entity prior to execution of the agreement. The court in *Balcom Marine Centres, Inc.* makes a point to state that it reviews piercing the veil matters on a case by case basis, and in this particular instance, it chose to bar the subsequent

matter based on *res judicata* because, among other things, "there is an identity of parties or privies because Rudholm (the individual shareholder) was a defendant in both cases." *Id.* Defendants in the case at bar were never defendants in the previous litigation (due to the impossibility of knowing their involvement of commingling assets and income until after the summary judgment was final and a judgment creditor exam was conducted), thereby eliminating one of the essential elements of *res judicata.*

Similarly, in another case cited by Defendants, *Magic Valley Radiology, P.A. v. Lolouch*, 849 P.2d 107, 112 (Idaho 1993), the court, after noting that the "corporate veil should be pierced to avoid unjust consequences inconsistent with the corporation concept," it noted that "[h]ere, there is no evidence to support piercing the corporate veil; thus, we adhere to the general rule stated above." *Id.* Therefore the court in *Magic Valley Radiology* holds that if there been evidence of unjust consequences inconsistent with the corporation concept (as in the case at bar), piercing the veil would have been the correct remedy.

Despite Defendants' attempts to suggest that HRS is legally barred from ever being able to bring a pierce the veil action against them, there are numerous legal precedents that hold when a plaintiff has already obtained a judgment against a corporate entity, the plaintiff does, in fact, have the right to file a separate subsequent action against those behind the corporation to satisfy the judgment. Specifically, "If [a] plaintiff initially sues only the corporation, but later learns facts which might justify piercing the corporate veil, the plaintiff may file an amended complaint to add individual defendants. ***If the plaintiff has already obtained a judgment against the corporation, the plaintiff may file a separate action against those behind the corporation to satisfy the judgment.***" 45 Am. Jur. § 19 (2008) (emphasis added). See also *Dudley v. Smith*, 504 F.2d 979 (5th Cir. 1974); *Matthews Const. Co., Inc. v. Rosen*, 796 S.W.2d 692 (Tex. 1990);

Ponderosa Development Corp. v. Bjordahl, 787 F.2d 533, 5 Fed. R. Serv. 3d (LCP) 696 (10th Cir. 1986); *Carpenter Paper Co. of Nebraska v. Lakin Meat Processors, Inc.*, 231 Neb. 93, 435 N.W.2d 179 (Neb. 1989); *Belleville v. Hanby*, 152 Mich. App. 548, 394 N.W.2d 412 (1986); *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 608 F. Supp. 1261 (S.D.N.Y. 1985); *Matthews Const. Co., Inc. v. Rosen*, 796 S.W.2d 692 (Tex. 1990). In each of these cases cited in this paragraph, each plaintiff obtained a judgment against a corporate entity and was unable to collect on the judgment. Each plaintiff was then allowed to file a subsequent separate lawsuit against those behind the corporation to satisfy the judgment. Therefore, Defendants' claim that HRS is barred per se due to *res judicata* and collateral estoppel is not correct. Plaintiff is well within the law to pursue the current action to satisfy its previous judgment.

Defendants' assertion that the Plaintiff's failure to conduct alter ego discovery in the initial proceeding somehow disqualifies the Plaintiff from bringing a separate action is disingenuous and holds no merit. In fact, the Court of Appeals for the Tenth Circuit addressed this very issue in *Ponderosa Development Corp. v. Bjordahl*, 787 F.2d 533, 5 Fed. R. Serv. 3d (LCP) 696 (10th Cir. 1986). In this case, the Court noted that it was unreasonable to allow the principles of *res judicata* and collateral estoppel to force a plaintiff to conduct alter ego research in the initial action. See *Ponderosa Development Corp.*, 787 F.2d at 537. Even if Defendants were correct in their assertion that alter ego discovery is required in the initial action, none of the material sought would have been discoverable because it was not relevant to the initial action. Defendants agree with this analysis as, in the current action they objected to the production of the financial records of other entities owned by Courtney Brick and Jim Schafer. They claimed in their Motion for *In Camera* Review, "[d]iscovery of unrelated entities is irrelevant and is not reasonable calculated to lead to the discovery of admissible evidence." R. at 484. Furthermore,

Defendants stated that "financial information [of the defendants] is not necessary for the prosecution of plaintiff's claim" and felt that the trial court should have entered an order "prohibiting the disclosure of this information until a determination is made on the underlying claim." *Id.* Therefore, Defendants are trying to blame plaintiff for not getting information in the Original Action that they deem to be irrelevant and undiscoverable.

HRS first learned about the Defendants' corporate malfeasance in a judgment debtor examination on September 11, 2008, which was subsequent to the judgment entered against the Judgment Debtors. Prior to the judgment debtor exam, HRS had no way of knowing that Restaurant of Jackson, LLC, Restaurant of Hattiesburg, LLC and Southeastern Restaurants, LLC were operating as the same corporate entity by commingling funds without accounting or segregation, as well as combing gross sales receipts from all of them to determine income of Southeastern Restaurants, LLC.

Prior to getting a judgment against the Judgment Debtors and giving HRS the platform of a judgment debtor exam, any attempt by HRS to get discovery about Restaurant of Hattiesburg, LLC, Courtney Brick or Jim Schafer would have been denied. To hold any plaintiff to such a standard that it should have conducted alter ego discovery against a defendant corporation without any basis whatsoever (since this information could have only been discovered after a judgment) is unreasonable.

IV. This Matter Should Not Be Dismissed Pursuant to Statute of Limitations and/or Laches

As stipulated by Defendants in their Brief, there is no Mississippi case on point for the issue of statute of limitations or laches with regard to subsequent piercing the veil actions. However, the law in other jurisdictions makes it is clear that if a plaintiff chooses to file a new

piercing the veil action after obtaining a judgment against the corporation and finding it uncollectible, the proper limitations period is that applicable to the enforcement of judgments. *Dudley v. Smith*, 504 F.2d 979 (5th Cir. 1974); *U.S. v. Clawson Medical Rehabilitation and Pain Care Center, P.C.*, 722 F. Supp. 1468, 27 Soc. Sec. Rep. Serv. 465 (E.D. Mich. 1989); *Belleville v. Hanby*, 152 Mich. App. 548 (1986). "It is established that an action may be brought against an alter ego defendant after the statute of limitations applicable to the cause of action alleged in the original complaint has expired." *Hennessey's Tavern, Inc. v. American Air Filter Co.*, 204 Cal. App. 3d 1351, 1359 (Cal. App. 1988) (citing *Most Worshipful Sons v. Sons Etc. Lodge*, 160 Cal.App.2d 560, 564-567, 569 and *Taylor v. Newton*, 117 Cal.App.2d 752, 757. See also *Belleville v. Hanby*, 152 Mich. App. 548, 394 N.W.2d 412 (1986); *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 608 F. Supp. 1261 (S.D.N.Y. 1985).

The *Belleville* and *Wm. Passalacqua Builders* cases are directly on point to the current issue before this Court. In both of these cases, the plaintiffs were successful in obtaining a judgment against a corporate entity. Upon being unable to collect on the judgment, subsequent separate lawsuits were filed against other parties on a piercing the veil theory. It should also be noted that in *Belleville*, the facts specifically state the subsequent lawsuit was filed after learning new information in a creditor examination, thus rejecting the claim of Defendants that Plaintiff's claim should be dismissed under laches. In both the *Belleville* and *Passalacqua Builders* cases, it was determined that the appropriate limitations period was that applicable to the enforcement of judgments. See also *U.S. v. Clawson Medical Rehabilitation and Pain Care Center*, P.C., 722 F. Supp. 1468 (E.D. Mich. 1989). The judgment limitations period is appropriate because "an attempt to pierce the corporate veil is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract." 1

William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* §41.28 (1999). According to Mississippi law, "[a]ll actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven years next after the rendition of such judgment or decree, and not after . . . ." Miss Code Ann. §15-1-43. Therefore, Plaintiff was well within the statute of limitations to proceed with the current action.

In the alternative to the proper limitations period being that applicable to the enforcement of judgments, the filing of a lawsuit against a corporation should toll the statute of limitations as to the alter ego of the corporation. *Matthews Const. Co., Inc. v. Rosen*, 796 S.W.2d 692 (Tex. 1990); also see *Gentry v. Credit Plan Corp.*, 528 S.W. 2d 571 (Tex. 1975). In *Matthews Const.*, there were identical circumstances to the case at bar in that, the plaintiff ("Matthews") sued a corporate entity ("Houston Pipe") for breach of contract and secured a judgment, which Matthews was unable to collect. Matthews filed a separate subsequent suit against an individual defendant ("Rosen") under a pierce the veil theory to collect on the previous judgment against Houston Pipe. The Texas Supreme Court tolled the limitations in its suit against Rosen based on equity, which was "the same equitable considerations that allow for piercing the corporate veil generally. . . . When the corporate form is used as an essentially unfair device – when it is used as a sham – courts may act in equity and disregard the usual rules of law in order to avoid an inequitable result." *Matthew Const. Co.*, 796 S.W.2d at 692. The court went on to provide an analysis that is directly on point to the case at bar as to the role of statute of limitations with regard to piercing the veil claims.

> A statute of limitations serves primarily to compel the assertion of a cause of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available. It prevents the bringing of stale claims. Matthews' claim against Houston Pipe is not stale because Matthews has already pursued that claim to judgment. Neither is Matthews' claim against Rosen stale

> because Rosen is simply Houston Pipe's "other self" -- he is not a legally separate entity from Houston Pipe. To apply limitations under these circumstances would fail to serve the underlying purpose of limitations and instead would be a purely formal exercise. (citations omitted).
>
> At the same time, if we were to apply limitations under these circumstances, it would effectively permit the corporate form to be used as a "cloak for fraud." We will not permit the law to be used for unlawful ends. The same considerations that justified tolling limitations in *Gentry* also justify tolling limitations under the circumstances presented here. We therefore hold that once Matthews filed suit against Houston Pipe in June 1979, limitations was tolled as to Houston Pipe's alter ego until final judgment. Because the running of limitations was tolled during the pendency of Matthews' suit against Houston Pipe, Matthews' suit against Rosen is not barred. (citations omitted).
>
> *Matthews Const. Co., Inc. v. Rosen*, 796 S.W.2d 692, 693 (Tex. 1990).

V. The trial court's decision to pierce the corporate was based on material undisputed facts irrespective that Defendants failed to comply with discovery.

The trial court's decision to grant the HRS's Motion for Summary Judgment and pierce the corporate veil was not based solely on the fact that the Judgment Debtors defied the court order to bring various documents to the judgment debtor exam. Rather, the court stated that it "has read, over the last multiple years . . . everything that has presented to me" (Transcript, p. 22) and that "in my opinion, based on - - the three prongs of *Gray* have been met: frustration of contractual expectation, flagrant disregard of corporate formalities, and at the very least, malfeasance and, in all likelihood, fraud." Transcript, p. 23. Any insinuation that the trial Court's decision to grant summary judgment was not based on Mississippi law or was meant to sanction the Defendants for not cooperating during a prior judgment debtor examination is without merit.

It is true that HRS mentioned the Defendants' conduct during the prior judgment debtor examination to illustrate the fact that Defendants did not give evidence of accounting or

segregating the assets of the entities, but it was not HRS's "primary argument" to satisfy the corporate formalities element of piercing the corporate veil. From its inception, HRS's argument relevant to the corporate formalities element has been based on the commingling of assets between the Defendants' three corporate entities (Restaurants of Jackson, LLC, Restaurants of Hattiesburg, LLC and Southeastern Restaurants, LLC) without accounting or segregation and the treatment of the entities as a single enterprise. In its Motion of Summary Judgment, HRS pointed to the fact that the Defendants' three corporate entities were operated out of a single checking account without accounting or segregating funds by stating,

> ...Courtney Brick was able to testify in great detail about the history of commingling assets between various business entities owned by Jim Schafer and Courtney Brick, which is yet another blatant disregard for corporate or limited liability company formalities. This included testimony that Restaurants of Jackson, LLC, Southeastern Restaurants, LLC and Restaurants of Hattiesburg, LLC operated out of the same checking account as a single enterprise ([Motion for Summary Judgment] Exhibit "D", p. 4-7). There can be no greater example of commingling assets that three (3) separate companies operating out of a single checking account for a common business purpose with no accounting, segregation, or company formalities when depositing or distributing money from said account...

Again, during oral argument, counsel for HRS argued that commingling of asset between the three corporate entities without accounting or segregation of funds was evidence of a flagrant disregard of corporate formalities when he stated, "There is no way that they observed any sort of corporate formality, because its one checking account. They can not segregate it. They don't know what's coming in, they don't know what's going out." Transc., p. 9.

Likewise, the trial court did not base its decision to grant HRS's Motion for Summary on the mere fact that the Defendants' were not cooperating during the judgment debtor examination. Instead, the trial court addressed the issues before the Court and the facts that supported its

decision. The trial court agreed with HRS's argument that there was a sufficient showing that the Defendants showed a disregard for corporate formalities by commingling assets between three corporate entities. Specifically, the trial court stated,

> . . . you can not intermingle the responsibilities without finding consequences. They must maintain each corporate entity with the integrity of that corporation being maintained as a viable company. And when you start intermingling, then there are consequences. I certainly don't believe they adhered to corporate policy or corporate laws and responsibilities.

Transcript P. 24. Granted, the trial court later mentioned that the Defendants' uncooperative behavior during the discovery process was "inexcusable", but it in no way ruled that the Defendants' shortcomings during discovery were the basis of its decision to grant HRS's Motion for Summary Judgment.

The Defendants' argument on this issue stems from a perceived factual similarity between the facts this case and the facts in *Rosson.* However, the factual scenario in *Rosson* differs from the facts of this case in that HRS is able to satisfy the corporate formalities element without evidence that Defendants did not produce tax returns at the judgment debtor exam. In *Rosson*, the Mississippi Supreme Court overturned Hancock County Circuit Court's decision to grant summary judgment that, in effect, pierced the corporate veil of a home builder. *Rosson*, 962 So. 2d at 1283 In attempting to prove that Defendant in *Rosson* showed a "flagrant disregard for corporate formalities", the Plaintiff was only able to offer evidence that the Defendant was unable to produce certain tax returns during her deposition. On appeal, the Mississippi Supreme Court decided that evidence that the Defendant could not produce certain tax returns during her deposition was not evidence that the tax returns or books did not exist and that the Plaintiff's attempt to prove that the Defendant did not adhere to corporate was "weak".

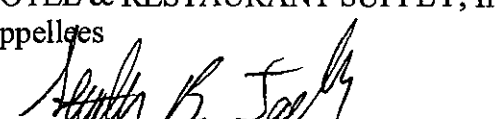
Id at 1287. In fact, the Defendant in *Rosson* maintained separate checking accounts for her various corporate entities. Unlike the Plaintiff in *Rosson*, HRS is able to show that the Defendants did not adhere to corporate formalities by not maintaining separate checking accounts, irrespective of the fact that the Defendants were not able to offer certain documentation during the judgment debtor deposition. In making their argument on this issue, the Defendants seem to ignore Courtney Brick's testimony at the judgment debtor exam when he made it very clear that the three corporate entities were being operated out of the same checking account (Exam. P. 5-7) without any explanation for monies coming in or out. R. at 133-134, p. 7-9; R. at 142-145, p. 44-53; R. at 147-149, p. 62-72. This evidence was provided to the trial court and was a basis for its decision to grant the HRS's Motion for Summary Judgment and pierce the corporate veil. Therefore, the trial court's decision to grant HRS's Motion for Summary Judgment was based on substantial evidence and was, by no means, a way to sanction the Defendants for their behavior during discovery.

CONCLUSION

Summary judgment in favor of HRS should be affirmed because there are no genuine issues of material fact as to any element of the veil piercing claim and all three prongs of *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1046 (Miss. 1989) were met. Furthermore, all proper parties were joined, Plaintiff's claim is not barred by res judicata or collateral estoppel, and the veil piercing claim is timely and not barred by the statute of limitations.

Respectfully submitted, this the 1st day of June, 2011.

HOTEL & RESTAURANT SUPPLY, INC.
Appellees



Stephen B. Jackson

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date served a true and correct copy of the above *BRIEF OF APPELLEES* pursuant to M.R.A.P 25 upon the individuals identified below and that three (3) copies and the original were mailed for filing with the Clerk of the Supreme Court on the date below:

L. Clark Hicks, Jr, Esq.
Hicks & Bennett, PLLC
Post Office Box 18350
Hattiesburg, MS 39404-8350

Honorable Prentiss G. Harrell
Lamar County Circuit Court Judge
Post Office Box 488
Purvis, MS 39475

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Post Office Box 117
Jackson, MS 39205

This the 1st day of June, 2011.

STEPHEN B. JACKSON