IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-01843

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

VS.

HOTEL & RESTAURANT SUPPLY, INC. — APPELLEE

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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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
Restaurant of Jackson, LLC; and SouthEastern Restaurants, LLC	UNJOINED NECESSARY PARTIES
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

Clark Hicks

L. CLARK HICKS, JR.
Attorney for Appellants

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STATEMENT OF ORAL ARGUMENT

This Court needs to reaffirm the sacred protections of a corporate veil. The trial court mistakenly gave no respect to the generations old law shielding individuals from corporate debt. There are also novel issues of law pertaining to *res judicata*, collateral estoppel and the statute of limitations in the context of corporate veil piercing claims.

STATEMENT OF THE ISSUES

I. Did the trial court err in granting summary judgment and unilaterally piercing the corporate veil despite numerous genuine issues of material fact?

II. Did the trial court err in piercing the corporate veils of companies not joined in this action, which are necessary and indispensable parties?

III. Is Plaintiff's claim to pierce the corporate veil barred by *res judicata* and/or collateral estoppel through the previous judgment on the underlying debt obtained in Lamar County Circuit Court Cause No. 2006-314H, *Hotel and Restaurant Supply, Inc. v. Restaurant of Jackson, LLC; SouthEastern Restaurants, LLC; and John Does 1 through 10*?

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

V. Did the trial court err in sanctioning Defendants in this case for alleged discovery violations in a separate case, Lamar County Circuit Court Cause No. 2006-314H?

STATEMENT OF THE CASE

1. Nature of the Case

The Plaintiff is Hotel & Restaurant Supply, Inc. (HRS), a distributor of restaurant equipment. HRS filed a separate lawsuit for unpaid invoices against SouthEastern Restaurants, LLC and Restaurant of Jackson, LLC. The Lamar County Circuit Court case number is 2006-314H. HRS obtained a judgment against those two corporate Defendants in the separate action. In an attempt to collect the judgment, HRS filed a second suit to pierce the corporate veils of the corporate Defendants. The second suit named a separate company, Restaurant of Hattiesburg, LLC, and two individual Defendants, Jim Schafer and Courtney Brick. The trial judge unilaterally pierced the corporate veils of SouthEastern and Restaurant of Jackson, and entered a monetary judgment against Schafer and Brick as well as the separate company, Restaurant of Hattiesburg, LLC. Aggrieved by this action, Schafer, Brick and Restaurant of Hattiesburg appealed.

2. Course of Proceedings and Disposition in the Court Below

HRS sued SouthEastern Restaurants and Restaurant of Jackson in Lamar County Circuit Court, in cause 2006-314H for claimed unpaid invoices. HRS successfully obtained summary judgment against those defendants on October 30, 2007. After post judgment collection efforts, HRS sought to add Restaurant of Hattiesburg, Schafer, and Brick as additional defendants to that case, but was ultimately unsuccessful because the motion to add additional defendants was brought after final judgment had been entered. Order in Cause 2006-314H, R. at 156. The Order confirming the final judgment and denying the attempt to add parties expressly states "this Court's Order Granting Plaintiff's Motion for Summary Judgment filed October 30, 2007, was a final judgment as to ***all issues*** as to ***all the parties*** brought by the Plaintiff in this case." *Id.*

After the failed attempt to add defendants in the 2006 cause, HRS filed this separate, new suit against Restaurant of Hattiesburg, Schafer, and Brick. This case, although cloaked as a new independent veil-piercing claim, is founded upon the same underlying debt previously litigated in the first action, and is nothing more than a second attempt to circumvent the rules relating to substitution of parties.

HRS filed its motion for summary judgment in this case on January 13, 2010. Restaurant of Hattiesburg, Schafer and Brick filed their cross motion for summary judgment on July 12, 2010. After supplemental briefing, a hearing was held on these motions on October 25, 2010. Separate orders granting Plaintiff's motion for summary judgment and denying Defendants' motion for summary judgment were entered on November 3, 2010. Notice of Appeal was filed on November 9, 2010.

3. Statement of the Facts

Jim Schafer and Cory Brick are shareholders of several restaurant businesses. They invested in two Copeland's restaurants, one in Jackson (Restaurant of Jackson, LLC) and one in Hattiesburg (Restaurant of Hattiesburg, LLC). These restaurants specialized in New Orleans style Cajun cuisine.

Both businesses operated as a Copeland's restaurant, one in Hattiesburg and one in Jackson, making management and operations of the two stores similar. Due to the commonalities of the two restaurants, Schafer and Brick organized a separate company to handle administrative accounting functions, SouthEastern Restaurants, LLC. SouthEastern efficiently managed the accounting of payroll, receivables and payables for the two restaurants. Judgment Debtor Examination, R. at 69, P. 39:9. Despite operational similarities, Restaurant of Jackson and Restaurant of Hattiesburg remained separate entities. R. at 64, P. 19:25-20:7. Each

company was located in a separate city and maintained separate equipment, supplies and employees.

Schafer and Brick intended to open more Copeland's restaurants across the Southern states, with the same administrative tasks to be handled by SouthEastern. Unfortunately, this goal was never realized. The Copeland's in Jackson did not sustain itself and was forced to close in 2006. R. at 76, P. 68. Restaurant of Hattiesburg remained operational a little while longer, but was also forced to close its Hattiesburg restaurant for the same reasons. *Id.* With the closing of the Copeland's restaurants, Schafer and Brick discontinued SouthEastern's administrative assignments.

During the operation of the Restaurant of Jackson, the store purchased certain supplies from HRS on a revolving basis. Restaurant of Jackson had a separate individual account from Restaurant of Hattiesburg and HRS invoiced it periodically. HRS 30(b)(6) Deposition, R. at 262, P. 68. There is no dispute that HRS clearly invoiced and sought payment from Restaurant of Jackson, LLC, a corporate entity, and never sought payment or looked to Restaurant of Hattiesburg, or Schafer or Brick individually for payment on items purchased by Restaurant of Jackson. R. at 259, P. 53; Invoices, R. at 158-161.

At some point, a dispute arose between HRS and Restaurant of Jackson concerning the legitimacy of purchase orders and the legitimacy of the shipment of invoiced items to the Jackson store. Multiple meetings were held to discuss these discrepancies, but Restaurant of Jackson ultimately agreed to pay for the majority of the disputed amounts. R. at 249, P. 15:7. At one point, Schafer wrote HRS a letter discussing his concerns and the business's good faith effort to pay for items legitimately owed. Letter to HRS, R. at 172. Despite multiple evidence of good faith and a complete lack of evidence of bad faith, HRS claims that Restaurant of Jackson "defrauded" it by failing to make account payments.

HRS sued Restaurant of Jackson and Southeastern Restaurants in Lamar County Circuit Court in Cause 2006-314H on their account and obtained summary judgment. After judgment was entered, HRS pursued post judgment collection, including conducting a judgment debtor examination. HRS then attempted to add Restaurant of Hattiesburg, Schafer and Brick as addition defendants to that case for the purpose of obtaining additional pockets to satisfy the judgment. When this attempt proved unsuccessful, HRS brought this separate "veil piercing" action.

SUMMARY OF THE ARGUMENT

Summary judgment was wrongly granted because there are triable issues of material fact concerning HRS's veil piercing claim. Most significantly, there was no confusion over who HRS looked to for payment because HRS invoiced Restaurant of Jackson, LLC, and the entities observed proper corporate formalities because they established officers, kept separate accounting records, filed tax returns, and filed certificates of formation with the Mississippi Secretary of state. There is no evidence that any of the companies were used for personal benefit or otherwise used as alter egos.

HRS previously attempted to add Restaurant of Hattiesburg, LLC, Schafer, and Brick as party defendants in Lamar County Circuit Court cause 2006-314H, but was procedurally barred because final judgment had been rendered. Plaintiff could have and should have brought any additional claims in the 2006 case, but is now barred by *res judicata* and collateral estoppel, which bar not only claims which were brought, but could have been brought. HRS is also now time barred by the three year statute of limitations and laches.

ARGUMENT

Strong public policy disfavors piercing a corporate veil. "Mississippi case law generally favors maintaining corporate entities and avoiding attempts to pierce the corporate veil." *Gray v.*

Edgewater Landing, Inc., 541 So. 2d 1044, 1047 (Miss. 1989). "[T]he cardinal rule of corporate law is that a corporation possesses a legal existence separate and apart from that of its officers and shareholders." *Id.* "As do most courts, this Court has reserved piercing the corporate veil for factual circumstances which are clearly extraordinary-where to do otherwise would 'subvert the ends of justice.'" *Johnson & Higgins of Mississippi, Inc. v. Commissioner of Insurance*, 321 So. 2d 281, 284 (Miss. 1975). "Among this Court's reports may be found a long string of decisions reflecting our law's commitment to the legal integrity of the corporate entity-and the concomitant limited liability of shareholders." *Gray*, 541 So. 2d at 1046-47. "Courts do not take piercing of the corporate veil lightly because of the chilling effect it has on corporate risk-taking." *Buchanan v. Ameristar Casino Vicksburg, Inc.* , 957 So.2d 969, 978 (Miss. 2007).

I. Summary Judgment in favor of the Plaintiff was in err because there is sufficient record evidence demonstrating triable issues of fact on Plaintiff's claim to pierce the corporate veil.

The trial court in this case weighed the evidence and made credibility determinations in granting summary judgment instead of using the evidence to evaluate the existence of triable issues. Summary Judgment is reviewed *de novo* and is only appropriate where the evidence before the Court "shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. This Court does not try issues on a Rule 56 motion, but only determines whether there are issues to be tried." *Miss. Gaming Comm'n v. Treasured Arts*, 699 So. 2d 936, 938 (Miss. 1997). "It is not our duty to weigh the competing evidence; it is our duty to determine if there is conflicting evidence for trial." *Estate of Johnson v. Chatelain ex rel. Chatelain*, 943 So. 2d 684, 687 (Miss. 2006). The evidence is considered in a light most favorable to the nonmovant, with the movant bearing the burden of demonstrating that no genuine issues of material fact exist for presentation to the trier of fact. *Harmon v. Regions*

Bank, 961 So. 2d 693, 697 (Miss. 2007). "If any triable issues of material fact exist, the trial court's decision to grant summary judgment will be reversed." *Id.*

In order to pierce a corporate veil, the Plaintiff 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; (c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder.

Gray, 541 So. 2d at 1047.

A. Record evidence demonstrates HRS did not experience frustration of contractual expectation because it knew it was dealing with a corporate entity from the beginning of the contractual arrangement.

Frustration of contractual expectation occurs when a party enters into a contract that ambiguously identifies the obligor or the contract allows for a guarantee. *Rosson v. McFarland*, 962 So. 2d 1279, 1286-88. (Miss. 2007). The frustration of contractual expectation occurs in the confusion over the party responsible for fulfilling the contract. *Id.* It is also a long standing tenet of corporate law that an agent acting for a disclosed principal incurs no individual liability, as there is no confusion over the obligated party. *Gardner v. Jones,* 464 So. 2d 1144, 1151 (Miss. 1985). *See Gray* 541 So. 2d at 1046(stating "Since contract liability arises from an essentially consensual relationship, courts generally decline to disregard the corporate entity...").

In *Rosson*, the evidence showed that the plaintiff "did not contract with [defendant] individually for performance or require [defendant] to guarantee the performance." 962 So. 2d at 1286. Based upon this consideration, the Mississippi Supreme Court concluded that the plaintiff failed to satisfy the first prong of frustration of contractual expectation. *Id.*

Similarly, in *Richardson*, "there [was] no arguable basis to conclude that [plaintiff] either actually believed or was justified in believing that [defendant] was personally guaranteeing the contract's performance." *Richardson v. Jenkins Builders, Inc.*, 737 So. 2d 1030, 1032 (Miss.

App. 1999). Without such evidence, the Court refused to grant the "extraordinary" remedy of piercing the corporate veil.

In evaluating the first factor in *Gray,* the Court stated that "[defendant] had no doubt that he was contracting with a corporate party." 541 So. 2d at 1047. The Mississippi Supreme Court found that in such a case, there was insufficient proof to pierce a corporate veil. *Id.*

In this case, the evidence before the trial court showed that HRS contracted with Restaurant of Jackson, LLC, and looked only to it for payment, which, at a minimum, established a disputed, triable issue concerning HRS's contractual expectations. The best evidence of who HRS looked to for payment and who it believed was a party to the contract is its very own invoices. Defendants submitted as an exhibit to their response to Plaintiff's motion for summary judgment multiple HRS invoices clearly seeking payment from Restaurant of Jackson, LLC. R. at 158 to 161. HRS conceded in response to this evidence that, "[a]s the Defendants point out, the initial invoice listed Restaurants of Jackson, LLC and one could construe that, under the U.C.C., a contract was formed between the Plaintiffs and Restaurant of Jackson, LLC." R. at 181.

There is no evidence that Schafer or Brick personally guaranteed payment or were a party to the contract for the purchase and payment of restaurant supplies. To the contrary, the store managers at Restaurant of Jackson, LLC purchased the supplies. HRS 30(b)(6) Deposition, R. at 250, P. 17:15. HRS did not meet with or talk with Schafer until a dispute arose over the legitimacy of invoiced items, which was long after the items had been purchased, shipped, and invoiced. R. at 253, P. 30:20, 31:10. HRS was asked in their 30(b)(6) deposition,

Q: Well, you didn't expect Jim Schafer to pay for it, did you?

A: I didn't know Jim Schafer at that point in time.

Q: So you didn't expect him to pay for it?

A: I suppose not.

Q: Or Courtney Brick?

A: I still don't know him.

R. at 258, P. 51:1. Since HRS did not know of Schafer or Brick prior to the offer, acceptance, purchase order, shipment, receipt, and invoicing, there can be no claim that HRS was somehow confused over their involvement as a party to the contract. Schafer and Brick were also never subsequently invoiced for items purchased by Restaurant of Jackson, LLC. R. at 253, P. 29:21 to 30:11. HRS knew that the items it sold were business supplies and it had no opinion or belief that they would be used personally by Schafer or Brick. R. 258, P. 49:9.

HRS is a sophisticated business that routinely obtains collateral and personal guarantees for items sold on credit. R. at 256, P. 44:13. This includes obtaining corporate information and filing UCC-1 financing statements under the correct name. *Id.* Despite this routine practice and industry knowledge and experience, HRS never attempted to secure a personal guarantee from Schafer or Brick. R. at 253, P. 44:13. HRS never even inquired into the identity of the owners/shareholders at any point during their business relationship. R. at 258, P. 51:25. Therefore, there is no claim that a collateral agreement, personal guarantee, let alone any communication with Schafer and Brick, created confusing ambiguity over the parties to the agreement. HRS failure to investigate and obtain personal guarantees not only weighs against their argument of frustration of contractual expectation, but it also evidences their assumption of the normal risks of business. *See Richardson*, 737 So. 2d at 1032 (stating "it was within [plaintiff's] power to investigate the financial strength and prior business dealings of [the defendant] and take appropriate means to safeguard against the ever-present possibility of non-performance by that corporation. That he did not is no reason to extend the corporation's liability to individuals acting on behalf of the corporation").

Two separate affidavits before the Court, one by Courtney Brick and the other by Jim Schafer, set forth evidence that HRS knew that it was dealing with only Restaurant of Jackson, LLC, a corporate entity. Brick states,

> 6. Hotel & Restaurant Supply, Inc. supplied some of the materials and equipment purchased by Restaurant of Jackson, LLC. Restaurant of Jackson, LLC made a good faith effort to pay invoices if they were due and owing, some of which were disputed in the original action. Nevertheless, Hotel & Restaurant Supply, Inc. knew at all times that it was dealing [with] corporate entities, Restaurant of Jackson, LLC and SouthEastern Restaurants, LLC. At no time was Restaurant of Hattiesburg, LLC involved with any of the transactions between Hotel & Restaurant Supply, Inc. and Restaurant of Jackson, LLC. Hotel & Restaurant Supply, Inc. invoiced Restaurant of Jackson, LLC and clearly understood that they were dealing with a corporate entity.
>
> 7. I did not personally guarantee the purchases and credit extended by Hotel & Restaurant Supply, Inc. to Restaurant of Jackson, LLC, nor did my partner, Jim Schafer. All transactions were based on the credit of Restaurant of Jackson, LLC. Hotel & Restaurant Supply, Inc. had the option of obtaining a personal guarantee, which it did not.

R. at 163. Schafer discussed in his affidavit the process in which the supplies were purchased and paid for by Restaurant of Jackson, LLC and the involvement of employees and managers. R. at 471 to 472. At no point were Schafer and Brick acting in their individual capacities. *Id.* These affidavits, which are based upon the facts of the purchasing procedure and the facts contained in the invoices, establish a genuine issue of material fact. HRS did not raise any objection to these affidavits in a motion to strike, so any objections were waived. *Board of Educ. of Calhoun County v. Warner*, 853 So. 2d 1159, 1163 (Miss. 2003). As such, the Court should have considered them, even if they were somehow defective. *Id.*

B. <u>All entities observed corporate formalities.</u>

In order to pierce a corporate veil, there must be a "***flagrant*** disregard of corporate formalities." Gray, 541 So. 2d at 1047(emphasis added). Limited liability companies were

statutorily created in 1994. This relatively new type of entity was created to facilitate business development and investment by reducing legal formalities for creating and maintaining companies. For this reason, archaic common law decisions concerning corporate formalities, in the context of veil-piercing, do not apply. See generally Encyclopedia of Mississippi Law Chap. 49 § 9("that the typically applied common law rule regarding strict construction of statutory obligations does not apply to the limited liability company act"); Miss. Code Ann. § 79-29-1201. For example, there is no requirement to keep minutes and the failure to keep records does not work to invoke individual liability. Miss. Code Ann. § 79-29-115; *compare with* Miss. Code Ann. § 79-4-16.01. Although statutory formalities have evolved, common law guidance is still helpful.

In *Rosson*, the Court noted that, although three businesses operated from the same street address and used the same phone number, corporate formalities were followed because the plaintiff knew the officers of the corporation, separate accounting records were kept, separate tax returns were filed, and all were licensed by the Secretary of State to do business. 962 So. 2d at 1286-87.

Additionally,

> The mere fact that one owns all the stock of the other, or substantially all, is not enough to warrant disregard, in the absence of some fraudulent purpose; nor is the fact that there was an opportunity to exercise control. Furthermore the fact that the shareholders of the two corporations are the same is not of itself sufficient to treat the two corporations as one.

Buchanan, 957 at 978.

Like *Rosson*, the entities in this case observed corporate formalities by establishing officers, keeping separate accounting records, filing tax returns, and filing certificates of formation with the Mississippi Secretary of state. Brick states in his affidavit that :

> Restaurant of Jackson, LLC, Restaurant of Hattiesburg, LLC, and SouthEastern Restaurants, LLC each filed separate Certificates of

> Formation with the Mississippi Secretary of State, filed separate tax returns, and kept separate accounting records. Each entity had separate assets, equipment, liabilities, employees, and operated in separate cities. All these corporate entities were separate businesses.

R. at 164. Defendants attached as Exhibits to their response to Motion for Summary Judgment each companies' certificate of formation. R. at 165 to 171.

As stated in more detail in the Statement of Facts *supra*, Restaurant of Jackson, and Restaurant of Hattiesburg, assigned administrative management of accounts receivables and payables to SouthEastern Restaurant, LLC. HRS's only argument that the Defendant companies failed to observe corporate formalities is its erroneous claim that the companies commingled their cash in one checking account without regard for record keeping. Plaintiff claimed in its brief in support of summary judgment that "there can be no more of a blatant disregard of corporate formalities when there is commingling of cash between companies and no attempt whatsoever to account or distinguish whose money goes in or out of said shared account." R. at 183. Although the companies did share an account, the record evidence shows that the claim of lack of accounting is completely false. By way of the example year of 2006, beginning on Record Page 269, continuing nearly through the entire Volume 3 of the Record to Page 411, Defendants presented accounting records demonstrating that every deposit and expenditure was recorded for and classed as either "Jackson" for Restaurant of Jackson, LLC or "Hattiesburg" for Restaurant of Hattiesburg, LLC. This system allowed for easy profitability evaluation and efficiency in management. See translation of date to profitably reports, R. at 410 and 412. Any attorney who maintains a trust account knows that, with computer accounting software (or ledgers), a single account can be used for multiple ventures. Regardless of the invalidity of HRS's claim of undocumented comingling, the use of separate or consolidated bank accounts should given little consideration in evaluating the existence of corporate formalities. *See American Fuel Corp. v. Utah Energy Development Co., Inc.*, 122 F. 3d 130, 134 -135 (2nd Cir.

1997)(dismissing veil piercing claim as a matter of law where subject corporation had no separate bank account); *Moyle v. Elliott Aviation, Inc.*, 2006 WL 468764, 3 (Iowa App. 2006)(finding insufficient evidence of disregard of corporate formalities where there were no separate bank accounts).

The standard for piercing a corporate veil is a flagrant disregard of corporate formalities. The facts of this case do not support such a strong showing but, at a minimum, create triable issues of material fact.

C. <u>There is no evidence of fraud or malfeasance.</u>

A breach of contract for failure to pay a debt is itself insufficient to pierce a corporate veil. *Gray*, 541 So. 2d, 1044. In order to pierce a corporate veil, the type of fraud or malfeasance required typically is present only where a business is formed for inappropriate purposes or the corporate entity is created to thwart creditors "from the beginning." *Castillo v. M.E.K. Const., Inc.*, 741 So. 2d 332, 342 (Miss. App. 1999); *Richardson*, 737 So. 2d at 1032.

In *Castillo,* the Court declined to pierce the corporate veil where there was "nothing in the record to suggest that the formation of these separate entities was for an inappropriate purpose." *Castillo,* 741 So. 2d at 342. The Court in *Rosson* declined to pierce the corporate veil where "there is no proof that [defendant] acted in any capacity other than as that of officer, agent, or employee of the corporation, nor that [defendant] was using a shell corporation as a shield from personal liability pursuant." 962 So. 2d at 1289. Similarly, in *Richardson,* the court stated that "Richardson presented no evidence that Jenkins, from the beginning, was intent on obtaining Richardson's money for his own personal use with no intention of performing on the contract and that he used a shell corporation to shield himself from personal liability on the day of reckoning that was inevitably to come." 737 So. 2d at 1032.

In this case, there are no facts, argument or evidence that any of the entities were formed for any other purpose than opening and running businesses in the form of restaurants in the cities of Jackson and Hattiesburg. There is no evidence that any of the entities intended to defraud HRS from the beginning. Instead, the evidence shows that Restaurant of Jackson and SouthEastern Restaurants, LLC paid their obligations to HRS, Inc. on a revolving basis, including the final days of their business. See Letter to HRS, R. at 172(stating "We have closed the Jackson location . . . I have gone through all the large equipment items and have paid most of them.").

HRS's claims that two "unexplained" transfers of money, one for $800 and the other for $8,900, constitute fraud. Brick was asked about these two transactions long after they were made in the judgment debtor examination in the original action. Restaurant of Jackson, LLC and Restaurant of Hattiesburg, LLC had hundreds of thousands of transactions per year, with Jackson having $800,000 worth of expense in 2006 (R. at 411) and Hattiesburg having $2.2 million in expenses in 2006 (R. at 413). Despite such numerous transactions, among Schafer and Brick's other businesses, Brick, to his credit, remembered and explained the transactions to the best of his ability. One expense was for a return on a deposit and the other was reimbursement for Kinko's menus. R. at 144, P 49:16, 52:21. He stated, as he should have, that, under oath, he could not absolutely swear that was what the transactions were for, as he would have to go back to the other accounts to verify the source of those expenses. These questions were asked in the context of a judgment debtor examination of Restaurant of Jackson, LLC, so Brick did not have, at that time, his personal check stubs to verify the source of the expenses. However, using the information provided in the memo section of the Restaurant of Jackson check stubs, he explained the transfer. Simply put, these transactions were, in accounting-ledger parlance, loans from shareholders. To prove fraud, HRS would be required to show that no such expenditure was ever

made for the benefit of the business, which is contrary to Schafer's testimony during the deposition. Moreover, there were no bank records, checks, accounting records, or any other evidence in support of this or any other claim of fraud used in support of HRS's motion for summary judgment.

This claim and HRS's own argument demonstrates their effort to grasp at straws to show fraud. HRS claims in its motion for summary judgment that the judgment debtor deposition evidences a diversion of funds to avoid creditors claims, and that "such funds were diverted to a newly created account owned by Restaurant of Hattiesburg, LLC (Exhibit "D", P. 82; 91)." R. at 26. However, a review of the deposition pages cited (R. at 80, 82) makes no mention of a transfer of money or assets. This is argument with no evidence.

Brick states in his affidavit in response to the claim of fraud,

> 5. Although Restaurant of Jackson, LLC, could not sustain itself as a going concern, I can state on behalf on myself, Jim Schafer, and as an officer and manager of Restaurant of Jackson, LLC and Southeastern Restaurants, LLC, that I made a good faith effort to pay all the outstanding bills and invoices with the resources and income that Restaurant of Jackson, LLC, earned. Fortunately, we were unable to meet all of the expectations of our creditors, but such is the nature of the risk of doing business. However, it was never my intent to defraud anyone.

R. at 163.

Fraud requires a showing of particularity, which is not present in this case. There is no evidence that these companies were opened or operated for any use other than as restaurants.

II. Summary Judgment could not be granted prior to joining Restaurant of Jackson, LLC and Southeastern Restaurants, LLC as party defendants because they are necessary and indispensable parties.

The Complaint in this case is titled "Complaint to Pierce the Veil of SouthEastern Restaurants, LLC and Restaurant of Jackson, LLC." R. at 6. Plaintiff's motion for summary judgment states that "Plaintiff is attempting to pierce the veil of Restaurant of Jackson, LLC and

Southeastern Restaurants, LLC." R. at 22. In order to succeed in this claim, HRS must prove that the *Gray* elements are present as to these companies, i.e., that Restaurant of Jackson, LLC and Southeastern Restaurants, LLC confused contractual expectations, disregarded corporate formalities, and committed fraud. However, these entities are not before this Court to answer these charges. Defendants timely raised an objection to non-joinder pursuant to M.R.C.P. 19 and 21 in response to the motion for summary judgment. (R. at 113).

"[T]he court will not proceed to a final decree as to any defendant until the cause is triable as to all the defendants." *Dorsey v. Sullivan,* 24 So. 2d 852, 854 (Miss. 1946). Comment to M.R.C.P. 21 cites *Williams v. General Insurers, Inc.,* 7 So. 2d 876, 878 (Miss. 1942) for its holding that an "equity court will not proceed where necessary party has been omitted" and *Union Naval Stores Co.,* 45 So. 979, 980 (Miss 1908) for its holding that the "supreme court raised issue of nonjoinder and declined to proceed until the necessary parties were joined." "[W]here the decree is void as to one of the necessary parties, it will be vacated as to all," regardless of whether it is a final decree or merely interlocutory. *Francis v. Francis,* 413 So. 2d 382, 383-84 (Miss. 1982). Comment to M.R.C.P. 19 states that this rule is for "protecting the absent persons from the possible prejudicial effect of deciding the case without them."

HRS makes multiple accusations and arguments against Restaurant of Jackson, LLC and SouthEastern Restaurants, LLC. This action centers on allegations concerning whether these entities followed corporate formalities and committed fraud, yet no representative of these entities is jurisdictionally before this Court to speak in defense. According, an adverse ruling piercing their veil could be and has been rendered against them without their ever having had an opportunity to answer.

III. **Plaintiff's claim is barred and should have been dismissed under *res judicata* and collateral estoppel.**

"When a court of competent jurisdiction has entered a final judgment on the merits of an action, the doctrine of *res judicata* precludes a party from relitigating claims that were actually litigated and determined ***or could have been litigated and decided in a prior action***." *Forrest v. McCoy*, 996 So. 2d 158, 160 (Miss. App. 2008)(emphasis added).

Res judicata applies when there is (1) the same identity of the thing sued for, (2) similar underlying facts and circumstances forming the basis of the claim, (3) same identities of the parties, and (4) identity of the quality or character of the person the claim is made. *Hill v. Carroll County*, 17 So. 3d 1081, 1086 (Miss. 2009). In older cases, this Court has referred to "subject matter identity as identity in the thing sued for." *Id.* Concerning the second factor, the claims are "the same if they arise from the same 'transaction'; whether they are products of the same 'transaction' is to be determined by 'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation." *Id.* As to the third, strict identity of the parties is not required and a non-party to the original action can assert *res judicata* if privity exits. The quality or character factor addresses the similarity of the positions/nature of the parties. *EMC Mortg. Corp. v. Carmichael*, 17 So.3d 1087, 1091 (Miss. 2009)(two mortgagors are the same character). It is also a widely held rule that an action by or against a corporation is *res judicata* in a subsequent suit by or against a stockholder. *Western Inn Corp. v. Heyl*, 452 S.W.2d 752, 760 (Tex.Civ.App. 1970)(citing 129 ALR 1041). Similarly, collateral estoppel bars relitigation of essential issues determined in a prior suit, even though a different cause of action is the subject of the subsequent action. *Richardson v. Audubon Ins. Co.*, 948 So. 2d 445, 449 - 450 (Miss. App. 2006).

Although no Mississippi case could be found addressing the preclusionary effect of prior litigation on a subsection separate suit brought in an attempt to pierce a corporate veil, other

jurisdictions have addressed this issue and have found such claims to be barred by *res judicata* and/or collateral estoppel.

Balcom Marine Centres, Inc. v. Hoeksema, 2010 WL 334563 (Mich. App. 2010.) is very similar to this case. In *Balcom,* the court dismissed plaintiff's second suit, which was brought under a veil-piercing claim, because it was barred by *res judicata.* Plaintiff tried to argue that the veil-piercing claim was not adjudicated in the prior suit because the Court denied plaintiff's attempt to amend his Complaint to add the veil-piercing claim. The court stated that

> Although there was not an adjudication on the merits of the corporate veil piercing claim in the 1994 case, such an adjudication is not needed in order for res judicata to apply. Courts will apply res judicata broadly, precluding not only those claims that were brought and adjudicated but also those claims that could have been brought. The trial court in 1994 found that plaintiff's motion for amendment to add the corporate veil-piercing claim was brought too late and would prejudice Rudholm and Marina. Therefore, had plaintiff timely brought the claim, it could have and should have been adjudicated before the court in the 1994 case.

Id. at *4(internal citations omitted).

In *Magic Valley Radiology, P.A. v. Kolouch*, 849 P. 2d 107, 112 (Idaho 1993), the Idaho Supreme Court denied the plaintiff's attempt to hold individuals liable in a subsequent suit premised on a veil-piercing claim by finding that the claims were barred by *res judicata.* The Court found that the underlying transaction was the same as in the original suit, thereby constituting claim preclusion. The Court in *Magic Valley* conducted an inquiry into the diligence of the parties and found that "Magic Vally did not exercise due diligence to discover its claim to pierce the corporate veil."

Here, there is no dispute that the transaction/claim at issue in this case is identical to Plaintiff's first action. Plaintiff's Complaint states in paragraph 6 that this action is premised on the same alleged debt asserted in Cause No. 2006-314. R. at 7. Identity of the same subject matter and facts of the underlying transaction satisfy the first two elements of *res judicata.* The

third and fourth elements of *res judicata* are nearly indistinguishable, with the fourth element often not being considered. *Cockrell v. City of Southhaven*, 730 So. 2d 1119 (Miss. 1998); *McIntosh v. Johnson*, 649 So. 2d 190, 193 (Miss. 1995). There is also no question in this case that Restaurant of Hattiesburg, LLC, Schafer, and Brick (as shareholders, corporate officers, agents and administrators) are in privity with the defendants in the original suit. See *C.F. Trust, Inc. v. First Flight Ltd. Partnership*, 140 F.Supp. 2d 628, 642 (E.D.Va. 2001).

Like the plaintiff in *Balcom,* HRS attempted to amend its Compliant in its first suit to add a veil-piercing claim. The trial court, like the court in *Balcom*, determined that Plaintiff's attempt to amend was untimely, as it was made after final judgment was entered. R. at 156. The court in *Balcom* stated that plaintiff could have asserted a veil-piercing claim in the original suit, had plaintiff timely brought that claim. HRS could have timely asserted a veil-piercing claim in its first suit, and, indeed, it attempted to do so. *Res judicata* bars not only claims which were brought, but "subsequent litigation of any claim that should have been litigated in a previous action." *Saint v. Quit,* 24 So.3d 395, 402 (Miss.App. 2009).

HRS claims that it did not discover facts supporting a veil-piercing claim until after the conclusion of the original suit. R. at 179. However, HRS sat on its rights and conducted insufficient discovery in the initial suit prior to proceeding to a final judgment. In *Magic Valley*, the Court considered whether the plaintiff exercised due diligence to discovery a veil-piercing claim. In this case, all of the facts and information available to the HRS which form the erroneous basis of their veil-piercing claim were just as available prior to the conclusion of the first litigation as they were after it. There is no allegation or evidence that the Defendants attempted to conceal information; Plaintiff simply did not conduct timely discovery.

Collateral estoppel bars this action because the 2006 case determined the existence of a contract/account, the parties thereto, and the validity of HRS's claim. Had HRS desired to seek

recovery from additional defendants, the proper procedure would have been to name those defendants in the first case. The first action determined the parties liable for the account and additional liable parties, if any, should have also been determine at that time. HRS did attempt to add the Defendants in this case to the 2006 action, but was procedurally barred because the joinder was untimely. Therefore, this claim could have been and should have been adjudicated in the first case. HRS should not be afforded multiple bites at the apple. HRS did not conduct discovery in the 2006 action and did not timely add defendants, although it could have.

IV. HRS's claim is barred by the statue of limitation and laches.

Plaintiff's Complaint was filed November 5, 2009, in an attempt to hold Defendants liable for an alleged open account relating to transactions that occurred between August 16, 2005 and February 28, 2006. Complaint, R. at 7. This action is barred by the general three year statute of limitation for breach of contract. Miss. Code Ann. § 15-1-29.

No Mississippi case could be found addressing the applicable statute of limitation for veil-piercing actions. However, in similar derivative type actions, Mississippi applies that statute of limitation of the attendant action. *Price v. Clark*, 21 So. 3d 509, 518 (Miss. 2009)(stating that "The statute of limitations for a wrongful-death claim is subject to, and limited by, the statute of limitations associated with the underlying tort that resulted in the wrongful death").

In addition to this action being barred by the statute of limitation, this Court should dismiss Plaintiff's Complaint under laches. Laches is an "omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Cannada v. Marlar*, 185 So.2d 649 (Miss. 1966). Hotel and Restaurant Supply, Inc. had the option and right to timely discovery and assert a veil-piercing claim in the original action, which it did not pursue. M.R.C.P. 9, relating to the substitution of fictitious parties, required Plaintiff to use reasonable diligence in the first suit, which it failed to do. The shareholders of

these companies have had to expend funds to defend against two separate suits due to Plaintiffs failure to timely follow M.R.C.P. 9 in the first action, causing material injury and expense, although Defendants assert that they were not proper parties to the first action and deny the merits of Plaintiff's Complaint.

Summary judgment should be reversed and rendered in favor of Defendants because the veil piercing claim is nothing more than an untimely attempt to subvert the substitution procedures of M.R.C.P. 9. This action is premised on a breach of contract action, which is barred by the three year statute of limitation. HRS omitted a veil-piercing claim in the original case, further barring this action under laches.

V. Defendants in this case were incorrectly sanctioned for alleged discovery issues arising out of the 2006 case.

In an effort to confuse the issues and prejudice the Defendants, HRS argued multiple times in its motion for summary judgment, brief and oral argument that the Court should pierce the corporate veil of the Defendants because they failed to produce documents at the prior judgment debtor examination instituted in Cause No. 2006-314.

HRS argued at length in its motion for summary that HRS should be held accountable for discovery issues. R. at 23. HRS stated in its motion,

> 3. Defying the Court's ruling, the Judgment Debtors did not pay Plaintiff any money whatsoever. In fact, the Judgment Debtors have been uncooperative and evasive with regards to Plaintiff's attempt to enforce its judgment and collect on its debt. For example, after the aforementioned summary judgment, Plaintiff propounded [...discovery]. Despite Plaintiff's numerous attempts in good faith to resolve the outstanding discovery matter without seeking remedy from the Court, Plaintiff was forced to file a Motion to Compel Discovery Responses. upon a hearing held on this matter, this Honorable Court issued its Order Compelling Answer to Interrogatories, a copy of which is attached hereto as Exhibit "B", which ordered that the Judgment Debtors were to provide certain information requested in the Interrogatories and to pay Plaintiff $750 as reasonable expenses in obtaining the Order. To this date Plaintiff has not received any payment whatsoever from the Judgment Debtors with

> regard to the aforementioned summary judgment or the subsequent order to pay $750.
>
> 4. After this Court issued its Order Compelling Answers to Interrogatories, Plaintiff wished to conduct a judgment debtor exam. Pursuant to its Order Sustaining Motion for Examination of Judgment Debtor, this Court directed the Judgment Debtors to appoint a representative to be present at the judgment debtor exam and this Court further ordered the representative to have with him all documents and things as specified in the Motion for Judgment Debtor Examination, which included certain books, papers, and other documents, including, but not limited to a specific request of eighteen (18) listed items. A copy of the motion for Examination of Judgment Debtor (which list the 18 requested items) and the Order Sustaining Motion for Examination of Judgment Debtors, and Citation issued by the Circuit Clerk is collectively attached hereto as Exhibit "C".[1]

R. at 23 to 24. Despite no relevance to the veil piercing claim whatsoever, HRS went on to attached as exhibits the specified judgment debtor pleadings. R. at 30-59. In addressing the corporate formalities element of the veil piercing claim, HRS's primary argument was simply that insufficient materials were produced at the judgment debtor examination. R. at 24.

HRS continued to confuse the issues during oral argument at the hearing. HRS argued,

> As to the second arm, which is a flagrant disregard of corporate formalities, Judge, I asked him in the judgment debtor exam - - and all this is on the record where I served him and his attorney. Bring a list of every account, every ledger, every accounting entry, document, anything you have. I actually listed 18 items for them to bring. He brought nothing, not one thing. And in the testimony, if you read it, I'm going, Hey, I asked for all this. He goes, Well, I might - - I can get that to you . . . He didn't bring anything. That is a tacit admittance that there is none. There is none. They should have tax returns or something . . .

Transc. at 8 to 9.

Irrespective of the merits of this agreement, Defendants explained that these documents were not produced at the judgment debtor examination because they were in the possession of Defendants' accountant, Robert Donnell. R. at 126; R. at 142, P. 43:21.

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[1] Current defense counsel were not retained or involved with these proceedings.

The documents were also subsequently made available to HRS in this action pursuant to a subpoena. R. at 104, 227.

Defendants explained in their Brief to the trial court and at the hearing (Transc. at 18) that this was the same misguide argument advanced in *Rossen.* In *Rossen*, the plaintiff attempted to argue that because the defendant did not produce accounting and financial records that this meant that defendant did not observe corporate formalities. 962 So. 2d at 1287. The defendant stated, however, that her accountant had her records. *Id.* The Court found that "no evidence was presented that [defendant's books] or tax returns did not existed" and that this argument "was at best, extremely weak." *Id.*

The timeliness of responses to written discovery in Cause No. 2006-314H should be and was addressed in that action. Similarly, the sufficiency or insufficiency of the production of documents at the judgment debtor examination instituted in Cause No. 2006-314H should be addressed in that case.

Unfortunately, the record demonstrates that the basis for piercing the veil of the corporations and holding the defendants individually liable is their alleged failure to produce documents, which were not in their possession, at the judgment debtor examination. The Court, in rendering its decision from the bench, stated,

> And I will agree with you that an accountant should know, but a sophisticated businessman has responsibilities, and a sophisticated businessperson that owns multiple business, as you said, has multi-million dollars going through their accounts is under responsibility to maintain good corporate records. And if he is directed in a lawsuit, of which we must maintain, and he's told to bring eighteen records and he brought none, that's inexcusable, even though his accountant may have had them. But he can't hide behind the accountant. He is a sophisticated businessperson, and if he's not, which obviously he may not be, well, then he has personal liability.

Transc. at 25. A full page and a half of the Order granting summary judgment in this case addresses the discovery issues in the 2006 action, further confirming reliance on this

discovery issue as a basis of the Court's decision to pierce the corporate veils. R. at 507 to 508.

The proper procedure for discovery disputes is for those issues to be addressed by the court in that cause, not to render judgment on the merits in a separate veil piercing claim. In addition to being procedurally incorrect, as the Court stated in *Rossen*, the absence of produced documents does not demonstrate their lack of existence when their absence is explained.

CONCLUSION

Summary judgment in favor of the HRS should be reversed because there are genuine issues of material fact as to each element of the veil piercing claim and necessary and indispensable parties, Restaurant of Jackson, LLC and SouthEastern Restaurants, LLC, were not joined. Judgment should further be reversed because Plaintiff inappropriately argued and confused the issue of alleged discovery issues in Lamar County Circuit Court, cause 2006-314H with the merits of this case.

Judgment should be rendered in favor of Defendants because Plaintiff's claim is barred by *res judicata* and collateral estoppel because all issues in this case could have been and should have been litigated in Lamar County Circuit Court, in cause 2006-314H. The veil piercing claim is further untimely and should be dismissed under the three year statute of limitations and laches.

Respectfully submitted, this the 29th day of April, 2010.

RESTAURANT OF HATTIESBURG, LLC;
JIM SCHAFER; and COURTNEY BRICK
Appellants

Clark Hicks
L. CLARK HICKS, JR.

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 APPELLANTS* pursuant to M.R.A.P. 25 upon the individuals identified below and that 4 copies of the same were mailed for filing with the Clerk of the Supreme Court on the date below:

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Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Post Office Box 117
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This the 29th day of April, 2011.

Clark Hicks

L. CLARK HICKS, JR.