SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 18596

WRIT OF ERROR

ARTHUR J. ROCQUE, JR., COMMISSIONER OF ENVIRONMENTAL PROTECTION, TOWN OF HAMDEN, JOSEPH J. VENDITTO, ZONING ENFORCEMENT OFFICER FOR THE TOWN OF HAMDEN, HAMDEN ECONOMIC DEVELOPMENT CORPORATION, AND TOWN OF NORTH HAVEN

PLAINTIFFS

V.

JOSEPH J. FARRICIELLI, HAMDEN SALVAGE, INC., TIRE SALVAGE, INC., NORTH HAVEN TIRE DISPOSAL, INC., THE QUINNIPIACK REAL ESTATE AND DEVELOPMENT CORP., AND HAMDEN SAND & STONE, INC.

DEFENDANTS

BRIEF OF DEFENDANT IN ERROR COMMISSIONER OF ENVIRONMENTAL PROTECTION WITH ATTACHED APPENDIX

FOR THE DEFENDANT IN ERROR COMMISSIONER OF ENVIRONMENTAL PROTECTION:

GEORGE JEPSEN
ATTORNEY GENERAL

KIMBERLY P. MASSICOTTE
KRISTA E. TROUSDALE
MATTHEW I. LEVINE
ASSISTANT ATTORNEYS GENERAL
OFFICE OF THE ATTORNEY GENERAL
55 ELM STREET, P.O. BOX 120
HARTFORD, CT 06141-0120

TO BE ARGUED BY:

KRISTA E. TROUSDALE
ASSISTANT ATTORNEY GENERAL
TEL. (860) 808-5250
FAX (860) 808-5386

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE ISSUES

TABLE OF AUTHORITIES

Cases:

Statutes and Other Authorities:

COUNTER-STATEMENT OF THE FACTS

Introduction. This writ of error stems from lengthy environmental enforcement efforts by the defendant in error Commissioner of Environmental Protection ("Commissioner") against Joseph J. Farricielli for serious and persistent violations at an unpermitted landfill located along State Street in Hamden and North Haven known as "the Tire Pond." In September 2001, the Commissioner and co-plaintiff Town of Hamden ("Hamden") obtained a judgment ("the 2001 Judgment") against Mr. Farricielli and his companies ordering them, among other things, to hire a consultant to close the Tire Pond and to pay $3.74 million in civil penalties. *Rocque v. Farricielli*, 2001 Conn. Super. LEXIS 2761 (No. HHD CV 99-0591020 S, Hartford Judicial District, Sept. 21, 2001) (Modern App. A31 – A70). This Court affirmed the 2001 Judgment in 2004. *Rocque v. Farricielli*, 269 Conn. 187 (2004). When Mr. Farricielli avoided paying the civil penalties by hiding behind his wife's company, the Commissioner and Hamden brought suit in September 2005 against State Five Industrial Park, Inc. ("State Five") and Jean L. Farricielli, Mr. Farricielli's wife, seeking to hold them liable on the 2001 Judgment on theories of corporate veil piercing. In January 2009, the Commissioner and Hamden obtained a judgment against State Five and Mrs. Farricielli, holding them liable on the 2001 Judgment. *McCarthy v. State Five Indus. Park, Inc.*, 2009 Conn. Super. LEXIS 195 (No. HHD CV 05-4015888 S, Hartford Judicial District, Jan. 5, 2009) (Comm'r App. A11 – A85).[1]

This latest proceeding involves a tenant of State Five and the Farriciellis, plaintiff in error Modern Materials Corp. ("Modern Materials"), which is occupying the southern part of

[1] The defendants' appeal of the *State Five* case is currently pending before this Court, S.C. 18543, but has not yet been scheduled for oral argument.

the Tire Pond under a license and lease given by Mr. Farricielli and State Five in June 2003. Modern Materials is blocking the Commissioner's closure of the Tire Pond, in spite of a 2004 court order prohibiting persons with notice of the 2001 Judgment and the 2004 order from interfering with the Commissioner's closure of the Tire Pond.

2001 Judgment and Lease to Modern Materials. In its March 10, 2010 Memorandum of Decision ("M.O.D."), the trial court made the following unchallenged findings. The Tire Pond, also known as "Parcel B," is an unclosed solid waste disposal area located in North Haven and Hamden, bordered by the Quinnipiac River along the east. *See* Map 1074A, Comm'r Exh. H (Comm'r App. at 1). The Commissioner's original enforcement action against Mr. Farricielli in 1999 ("underlying enforcement action") also concerned Parcel A, which also has an unclosed landfill on it. The northern part of Parcel B is in North Haven, and the southern part of it is in Hamden. *Id.* Parcel A is completely in Hamden. *Id.* Between Parcels B and A lies Parcel C, which is also completely in Hamden. *Id.* Parcel C is owned by State Five. Until January 27, 2003, State Five was known as "Look Investment Agency, Inc." ("Look Investment"). M.O.D. at 1-2 (Modern App. at A85 – A86). Prior to February 2000, when Mr. Farricielli transferred a 6.8 acre strip along the southern part of the Tire Pond from the southern part of Parcel B to the northern part of Parcel C, *see infra*, at 4, the Tire Pond was entirely on Parcel B. Since February 2000, the Tire Pond is on both Parcel B and the northern part of Parcel C. M.O.D. at 9 (Modern App. at A93); Map 1074A (Comm'r App. at 1).

The underlying enforcement action is based on a February 25, 1998 Consent Order ("1998 Consent Order") issued by the Commissioner to Mr. Farricielli and three of the defendants ("the respondents"). The 1998 Consent Order directed the respondents to,

among other things, close the Tire Pond. The Commissioner issued the 1998 Consent Order pursuant to her authority under Conn. Gen. Stat. § 22a-6 (general authority), §§ 22a-208 and 22a-225 (governing solid waste), and §§ 22a-424, 22a-430, 22a-432, and 22a-433 (governing water pollution). As required by statute, *see* Conn. Gen. Stat. § 22a-225(e)[2] and § 22a-434[3], the Commissioner filed the 1998 Consent Order on the land records of the Town of Hamden on March 6, 1998. M.O.D. at 2 (Modern App. at A86).

When Mr. Farricielli and the other respondents to the 1998 Consent Order violated it, the Commissioner commenced the underlying enforcement action in August 1999 to obtain a judgment ordering the defendants to comply with the 1998 Consent Order. The Commissioner moved to add Look Investment, the owner of Parcel C, as a defendant to the case to insure that any injunctive relief requiring access to Parcels B and A be effective. Mr. Farricielli and the other defendants to the enforcement action opposed the motion to add Look Investment. On December 20, 1999, the motion to add Look Investment was

---

[2] Conn. Gen. Stat. § 22a-225(e) reads, "When the commissioner issues an order pursuant to this chapter, he shall cause a certified copy or notice thereof to be filed on the land records in the town wherein the land is located, and such certified copy or notice shall constitute a notice to the owner's heirs, successors and assigns. When the order has been fully complied with or revoked, the commissioner shall issue a certificate showing such compliance or revocation, which certificate the commissioner shall cause to be recorded on the land records in the town wherein the order was previously recorded."

[3] Conn. Gen. Stat. § 22a-434 reads, "When the commissioner issues a final order to any person to correct potential sources of pollution or to abate pollution, he shall cause a certified copy thereof to be filed on the land records in the town wherein the land is located, and such order shall constitute notice to the owner's heirs, successors and assigns. When the order has been fully complied with, the commission shall issue a certificate showing such compliance, which certificate the commissioner shall cause to be recorded on the land records in the town wherein the order was previously recorded. A certified copy of the certificate shall be sent to the owner of the land at his last-known post-office address." In 1998, the statute read the same, except "a final order" in the first sentence read "an order."

denied based on assurances from the defendants that access would be allowed. M.O.D. at 2-3 (Modern App. at A86 – A87).

On February 1, 2000, six weeks after the motion to add Look Investment to the underlying enforcement action was denied, Mr. Farricielli conveyed a 6.8 acre strip of the Tire Pond along the southern portion of Parcel B to Look Investment. Mr. Farricielli was the president of Look Investment at the time. M.O.D. at 3 (Modern App. at A87). This transfer caused the 6.8 acre strip – the southern portion of the Tire Pond – to become part of Parcel C. *See* Map 1074A (Comm'r App. at 1); M.O.D. at 9 (Modern App. at A93).

The underlying enforcement action went to judgment on September 21, 2001. The 2001 Judgment required Mr. Farricielli and the other defendants to retain a consultant to close the Tire Pond under the direction of the Commissioner. The 2001 Judgment placed the closure of the Tire Pond under the supervision of the Commissioner because of "the defendants' proven inability to comply with the provisions of the Consent Order . . . ." 2001 Judgment at ¶ 2, p. 31 (Modern App. at 61). The 2001 Judgment enjoined the defendants from interfering with the closure. If the defendants failed to retain a consultant within sixty (60) days, the 2001 Judgment authorized the Commissioner to retain one, and directed the defendants to reimburse the Commissioner for all her costs in closing the Tire Pond. M.O.D. at 2 (Modern App. at A86); 2001 Judgment at ¶¶ 2, 3, & 6, pp. 31-33 (Modern App. at A61 – A63). Mr. Farricielli appealed and this Court affirmed the 2001 Judgment on June 1, 2004. *Rocque v. Farricielli*, 269 Conn. 187 (2004).

On June 11, 2003, while the appeal of the 2001 Judgment was pending, Mr. Farricielli licensed a three-acre portion of the Tire Pond in its southeast corner to Look Investment, now known as State Five, for one dollar. State Five immediately assigned this

license to Modern Materials. At the same time, State Five leased to Modern Materials the 6.8 acre strip running along the southern portion of the Tire Pond that Mr. Farricielli had transferred to State Five on February 1, 2000. Under the lease the licensed area and the leased area are called "the Leased Premises." The initial term of the lease was for five years and seven months, with an ending date of February 28, 2009. The lease gave Modern Materials one option to renew the lease for an additional five years. M.O.D. at 3, 9 (Modern App. at A87, A93).[4]

Commissioner's Efforts to Close the Tire Pond. The trial court found that the Commissioner is closing the Tire Pond in two phases: the first phase is to cover the tires, and the second phase is to create a stable land form. The first phase was accomplished using Gateway Terminal ("Gateway") as the entity bringing material to the Tire Pond to fill it and cover the tires. M.O.D. at 4 (Modern App. at A88).

Initially, starting in April 2002, Gateway was party to a memorandum of understanding with the Commissioner, Mr. Farricielli, and Northridge Enterprises, under which Gateway obtained material from the "Big Dig" in Boston and delivered it to the Tire Pond for placement by Northridge Enterprises. M.O.D. at 4 (Modern App. at A88). In March of 2003, Gateway's trucks were turned away, the first memorandum of understanding ended, and Gateway took over the delivery and placement of material. Gateway entered a new memorandum of understanding with the Commissioner and started to bring in material in May 2003 to continue with the closure of the Tire Pond. Gateway

[4] In its brief, Modern Materials maintains, without any citation to the record, that the Tire Pond does not include the Leased Premises. *See* Brief of the Plaintiff in Error at 5. The trial court, however, found that Modern Materials is occupying the southern part of the Tire Pond, because the strip was part of the Tire Pond before Mr. Farricielli transferred it to Look Investment in 2000, and it remains part of the Tire Pond still. M.O.D. at 9 (Modern App. at 93).

retained Fuss & O'Neill to provide environmental consulting services for the closure of the Tire Pond. M.O.D. at 4 (Modern App. at A88).

In July 2004, the Commissioner moved to hold Mr. Farricielli in contempt of the 2001 Judgment, alleging that he had failed to do what the 2001 Judgment's injunction required him to do and had done what the injunction prohibited him from doing. Although the court denied the motion, the court concluded that Mr. Farricielli had "engaged in serious harassment" of the Commissioner and Gateway. M.O.D. at 4-5 (Modern App. at A88 – A89); October 7, 2004 Memorandum of Decision at 4 (Comm'r App. at A5).

The court then entered a series of orders designed to strengthen the 2001 Judgment. The court "enjoin[ed] all persons who are given notice thereof, from preventing the Commissioner, his agents, employees and contractors from having full and complete access to the Tire Pond and/or Parcel A, and from interfering with actions taken by the Commissioner pursuant to paragraph 3 of the September 21, 2001 judgment." October 7, 2004 Memorandum of Decision at 6 (Comm'r App. at A7). On October 28, 2004, the Commissioner served both the 2001 Judgment and the October 7, 2004 Memorandum of Decision on Modern Materials. M.O.D. at 4-5 (Modern App. at A88 – A89).

Sometime prior to October 2007, the Big Dig material dried up. In order to get the tires covered, the Commissioner agreed to the entry of an October 3, 2007 First Supplementary Post-Judgment Order on Consent ("First Post-Judgment Order"). M.O.D. at 5 (Modern App. at A89) Under the First Post-Judgment Order, Mr. Farriciell entered into a contract with Gateway. First Post-Judgment Order at ¶ 1(a) (Modern App. at A76). The "Gateway Agreement" provided that Gateway would continue to close the Tire Pond with 400,000 cubic yards of material in accordance with a 2007 Closure Plan prepared by Fuss

& O'Neill. M.O.D. at 5 (Modern App. at A89). The June 2007 Closure Plan is the only approved Closure Plan for the Tire Pond. M.O.D. at 5 (Modern App. at A89). John A. Acampora, Esq., of Cohen & Acampora, Gateway's attorney of over twenty years, represented Gateway in the negotiation of the Gateway Agreement. Mr. Acampora was also Modern Materials' attorney for the June 2003 license and lease. M.O.D. at 5 (Modern App. at A89).

As of September 2009, Gateway had finished placing the 400,000 cubic yards it was entitled to place under the Gateway Agreement. The trial court found that Gateway had successfully covered the tires, and the first phase of the closure had been completed. M.O.D. at 5 (Modern App. at A89).

Once Gateway had covered the tires, the Commissioner proceeded to the second phase of the Tire Pond closure by issuing, on June 18, 2009, an invitation to bid to the contractors on the State's remediation contractor list. The invitation to bid was for the closing and capping of the Tire Pond in accordance with the June 2007 Closure Plan. M.O.D. at 5-6 (Modern App. at A89 – A90).

Modern Materials' Knowing Interference with Closure. The trial court found that the presence of Modern Materials on the southern portion of the Tire Pond is preventing the Tire Pond from being closed in accordance with the June 2007 Closure Plan. M.O.D. at 6 (Modern App. at A90). Modern Materials' presence on the southern part of the Tire Pond is preventing the Tire Pond from being completely closed in accordance with the Commissioner's solid waste regulations. These regulations require closure of the entire footprint of the disposal area, which includes the 6.8 acre strip Modern Materials is occupying. M.O.D. at 6 (Modern App. at A90).

The trial court further found that Modern Materials has known since its incorporation in 2003 that the part of the Tire Pond it occupies must be closed, and that the June 2007 Closure Plan requires the area Modern Materials is occupying to be closed. M.O.D. at 3, 8-9 (Modern App. at A87, A92 – A93). However, instead of vacating its part of the Tire Pond, on February 28, 2009, Modern Materials extended its lease for an additional five-year period. Starting in the spring of 2008 – at about the same time as Modern Materials received a letter from Commissioner's counsel reviewing the need for Modern Materials to move – Modern Materials began to bring onto the Leased Premises more material than it had previously stored there. The trial court found that "the clear inference here is that instead of cooperating with the closure of the Tire Pond, Modern Materials is intentionally positioning itself to make the argument, which it has now done, that it would be a hardship for it to move." M.O.D. at 9 (Modern App. at A93).

The Commissioner commenced the proceeding that is the subject of this writ of error through service on Modern Materials of a June 24, 2009 order to show cause. M.O.D. at 15 (Modern App. at A99). The Commissioner sought an order from the trial court directing Modern Materials to vacate those portions of the Tire Pond it was occupying. M.O.D. at 1 (Modern App. at A85). Modern Materials appeared through counsel, and the trial court conducted a hearing on the matter on September 17 and 29, 2009, giving Modern Materials an opportunity to show why such an order should not enter against it. M.O.D. at 15-16 (Modern App. at A99 – A100). After considering all the evidence, the written submissions, and the arguments of the parties, and after reviewing the 2001 Judgment, the October 7, 2004 Memorandum of Decision, and the October 3, 2007 First Post-Judgment Order, the

trial court granted the Commissioner's motion. M.O.D. at 16-17 (Modern App. at A100 – A101). Modern Materials thereupon filed this Writ of Error.[5]

ARGUMENT

The trial court correctly concluded that Modern Materials is bound by the court's 2001 Judgment and 2004 order prohibiting interference with the Commissioner's closure of the Tire Pond. The trial court properly entered an order requiring Modern Materials to move so that the Commissioner may finish closing the Tire Pond in accordance with the June 2007 Closure Plan. It is well settled that even a non-party is bound by an injunction if it had notice of the injunction and is within the class of persons entitled to be restrained by the injunction. Modern Materials satisfies both these requirements because its 2003 lease was always subject to the recorded 1998 Consent Order and the 2001 Judgment requiring compliance with that order. Modern Materials has, ever since it entered its lease, known that the area it is occupying is part of the Tire Pond and must be closed. The trial court, having authorized the Commissioner in the 2001 Judgment and 2004 Memorandum of Decision to close the Tire Pond without interference, and having found that Modern Materials is obstructing closure, has inherent authority to protect and vindicate its prior judgment and order in this case. Modern Materials has not been deprived of any property interest without due process because Modern Materials' 2003 lease was at all times subject to the recorded 1998 Consent Order directing closure of the Tire Pond, and, in the proceedings below, Modern Materials was given the opportunity to show why the previous orders of the trial court should not apply to it.

[5] Modern Materials simultaneously filed an appeal, A.C. 32131, which was dismissed on October 20, 2010.

I. The Trial Court Properly Concluded that the Previous Orders of the Court Prohibiting Interference with the Commissioner's Closure of the Tire Pond Are Binding on Modern Materials, A Non-Party.

A. Standard of Review.

The question of whether the trial court correctly concluded that Modern Materials, a non-party, is bound by previous orders of the trial court enjoining interference with the closure of the Tire Pond, is a question of law for this Court. *AvalonBay Communities, Inc. v. Plan & Zoning Comm'n*, 260 Conn. 232, 239-40 (2002). Accordingly, this Court's review is plenary. *Id.*

B. Modern Materials' Lease Is Subject to the 1998 Consent Order and the 2001 Judgment.

Modern Materials' rights in this matter derive from its lease and license of the Leased Premises from Mr. Farricielli and Look Investment (now State Five) in June 2003. When Modern Materials entered into the June 11, 2003 lease for the southern portion of the Tire Pond, its rights in that lease were subject to the 1998 Consent Order, which had already been recorded on the Hamden land records. It is "the long-established law of this State . . . that every person who takes a conveyance of an interest in real estate is conclusively presumed to know those facts which are apparent upon the land records concerning the chain of title of the property described in the conveyance . . . ." *Beach v. Osborne*, 74 Conn. 405, 412 (1902) (purchaser put improvements on the land in face of prior-recorded mortgage). Persons who acquire an interest in land subsequent to a prior-recorded interest, take subject to that interest. *The American Brass Co. v. Serra*, 104 Conn. 139, 143 (1926) (owners of servient tract who purchased after creation of a recorded easement, took title subject to the easement); *see Hawley v. McCabe*, 117 Conn. 558, 562-

64 (1933) (where right of way did not appear in the chain of title, the purchaser is not bound).

The 1998 Consent Order requiring closure of the Tire Pond was recorded on the land records on March 6, 1998. The trial court found that the 1998 Consent Order clearly defined Parcel B and included the 6.8 acre strip now occupied by Modern Materials. M.O.D. at 10 (Modern App. at A94). The trial court found that this area is the same property that Mr. Farricielli transferred to Look Investment on February 1, 2000 and that Modern Materials leased from Look Investment, now known as State Five. M.O.D. at 10 (Modern App. at A94).

Moreover, the trial court found that the lease and license from Mr. Farricielli through Look Investment to Modern Materials took place while the 1998 Consent Order was in litigation and the 2001 Judgment enforcing it was on appeal to this Court. M.O.D. at 11 (Modern App. at A95). "[A] person who deals with property while it is in litigation does so at his peril . . . . If the power of the courts to determine the rights of the parties to real property could be defeated by its transfer, [during the pendency of litigation], to a purchaser without notice, additional litigation would be spawned and the public's confidence in the judicial process could be undermined." *Williams v. Bartlett*, 189 Conn. 471, 480 (1983)(internal quotation marks and citations omitted).

The correctness of the trial court's conclusion that Modern Materials' lease is subject to the 1998 Consent Order is eloquently captured in this Court's 1902 *Beach* decision:

> It is the policy of our law to make every man's land title as far as practicable appear of record. The purpose of this policy is to furnish to all full and complete information for their guidance and protection. The place is appointed, the means provided, and the duty prescribed. Inquiry at the appointed sources of information becomes inevitably a part of the rule of duty of every ordinarily prudent person who intends

> to deal in realty. Grantees of realty, like persons in all other situations in life, are bound to exercise reasonable diligence; and that involves, if our registry system is to have any vital efficacy, going to the land records to ascertain what is there published to the world concerning that which they are proposing to purchase. They may not shut their eyes to information which is blazoned for their instruction, and plead innocence if they suffer for their ignorance. Due and reasonable care in a grantee involves something more than passivity and a sublime confidence in all things human. Such an one who fails to examine to see what the records disclose concerning the title to the land he proposes to take, is, in the eye of the law, negligent; and equity does not as a general rule relieve from the consequences of one's own negligence.

Beach, 74 Conn. at 415.

Modern Materials, a commercial venture, took an interest in land in June 2003 that was subject to the requirements of a recorded 1998 Consent Order. Modern Materials was bound to exercise reasonable diligence. If it failed to do so, it may not now be relieved from the consequences of its own negligence. In sum, it is clear that when Modern Materials entered into its license and lease for the Leased Premises, it did so subject to the requirement, embodied in the 1998 Consent Order and the 2001 Judgment, that the Tire Pond be closed.

C. Modern Materials Had Actual Notice That the Area It Leased Is Part of the Tire Pond and Must Be Closed.[6]

The trial court found that when Modern Materials decided to enter the June 11, 2003 lease, Modern Materials knew that the Commissioner was requiring the Leased Premises to be closed as a solid waste disposal area. M.O.D. at 8 (Modern App. at A92). This fact

[6] Issue No. 2 in Modern Materials' Statement of Issues is the question of whether the trial court erred in finding Modern Materials had notice of the trial court's previous orders. Modern Materials, however, has failed to brief this issue. Having failed to brief the notice issue, Modern Materials has abandoned it. *Sequenzia v. Guerrieri Masonry, Inc.*, 298 Conn. 816, 824 (2010). The Commissioner sets forth the unchallenged facts of Modern Materials' notice and knowledge because they relate to the legal arguments in Sections I and III of this brief.

was evident because the 1998 Consent Order was recorded on the Hamden land records on March 6, 1998. The trial court found that anyone searching State Five's chain of title – as Modern Materials should have done before it entered the lease – would have discovered the February 1, 2000 conveyance of part of the Tire Pond and the 1998 Consent Order requiring closure of the Tire Pond. M.O.D. at 11 (Modern App. at A95). The filing of the Consent Order on the Hamden land records caused the environmental condition of the Tire Pond, and the fact that it is a solid waste disposal area required to be closed, to become matters of public knowledge. *See* Conn. Gen. Stat. §§ 22a-225(e) and 22a-434 (requiring the filing on the land records of environmental orders issued by the Commissioner). Much like the filing of a notice of *lis pendens*, the filing of the 1998 Consent Order on the land records put the world on notice that there are environmental issues affecting the property that are the subject of an enforcement action by the Commissioner. *Id.* (filing of orders on the land records "shall constitute a notice to the owner's heirs, successors and assigns").

The trial court further found that since June 2003, on numerous occasions, Modern Materials has been reminded that its presence interferes with the closure of the Tire Pond. Modern Materials was served in October 2004 with a copy of the 2001 Judgment and the October 7, 2004 Memorandum of Decision. In the summer of 2006, Modern Materials, through its president, Skip Tucker, engaged in some settlement discussions concerning the closure of the Tire Pond. Mr. Tucker's attorney, Mr. Acampora, the same attorney who negotiated and represented Modern Materials on the June 11, 2003 lease, also represented Gateway in the 2007 negotiations for the Gateway Agreement, which calls for Gateway to close the Tire Pond in accordance with the June 2007 Closure Plan. In September 2007, when the Commissioner authorized Gateway to close the Tire Pond in

accordance with the June 2007 Closure Plan, Mr. Klemmer, an employee of Fuss & O'Neill, sent to Mr. Tucker, at Mr. Tucker's request, a copy of the final grading plan, which shows that the 6.8 acre strip Modern Materials is occupying must be filled and graded under the June 2007 Closure Plan. At that time Mr. Klemmer also had conversations with Mr. Tucker about the fact that the strip was within the closure area. On March 28, 2008, counsel to the Commissioner sent a letter to Mr. Acampora stating that Modern Materials was occupying a part of the Tire Pond and would need to move. The letter also stated that the 2007 Closure Plan required the area Modern Materials was occupying to be closed, and that proper closure of the Tire Pond cannot occur while Modern is occupying its current location. M.O.D. at 8-9 (Modern App. at A92 – A93).

These unchallenged facts establish that Modern Materials had full knowledge of the trial court's previous orders in this case, as well as the requirement that the area of the Tire Pond Modern Materials is leasing must be closed.

D. The Trial Court Has Inherent Authority to Vindicate Its Prior Judgment and Order.

The 2001 Judgment said that the Commissioner could close the Tire Pond if Mr. Farricielli did not, and it enjoined Mr. Farricielli, his companies, and their tenants from interfering with the Commissioner's closure. 2001 Judgment at ¶¶ 2-3, pp. 31-32 and ¶ 5, p. 35 (Modern App. at A61 – A62 and A65). In 2004, after Mr. Farricielli interfered with Gateway's work at the Tire Pond under the second memorandum of understanding, the trial court strengthened the 2001 Judgment by enjoining

> all persons who are given notice thereof, from preventing the Commissioner, his agents, employees and contractors from having full and complete access to the Tire Pond and/or Parcel A, and from interfering with actions taken by the Commissioner pursuant to paragraph 3 of the September 21, 2001 judgment.

October 7, 2004 Memorandum of Decision, ¶ 6, p. 6 (Comm'r App. at A7). Modern Materials was served with a copy of the October 7, 2004 Memorandum of Decision and the 2001 Judgment on October 28, 2004. M.O.D. at 4-5 (Modern App. at A88 – A89). Now, the trial court has specifically directed Modern Materials to move from the spot it is occupying on the Tire Pond so that the Commissioner may complete the closure of the Tire Pond. M.O.D. at 16-17 (Modern App. at A100 – A101).

The trial court has the power "'to fashion a remedy appropriate to the vindication of a prior . . . judgment.'" *AvalonBay*, 260 Conn. at 239 (quoting *Connecticut Pharm. Ass'n, Inc. v. Milano*, 191 Conn. 555, 563 (1983)). This power is an inherent power of the court. *AvalonBay*, 260 Conn. at 241. From this inherent power flow the trial court's continuing jurisdiction to effectuate prior judgments, *id.*, the trial court's power to coerce compliance with its orders, *Papa v. New Haven Fed'n of Teachers,* 186 Conn. 725, 737 (1982), the power to hold persons in violation of a court order in contempt, *AvalonBay*, 260 Conn. at 241, and the power to enter other post-judgment orders as appropriate, *Connecticut Pharm. Ass'n,* 191 Conn. at 563-64 (trial court had inherent power to order retroactive adjustment of plaintiff's professional fee); *Rocque v. Design Land Developers of Milford, Inc.,* 82 Conn. App. 361 (Conn. App. Ct. 2004) (trial court had jurisdiction to consider Commissioner's motion for contempt even though defendant was in compliance with the prior judgment at the time of the hearing).

The trial court may "fashion whatever orders [are] required to protect the integrity of the original . . . judgment." *Connecticut Pharm. Ass'n,* 191 Conn. at 563-64. Here, the order that is the subject of this writ of error protects two of the trial court's prior orders in this case – the 2001 Judgment, which authorized the Commissioner to close the Tire Pond

if the Farricielli entities did not, and the October 7, 2004 Memorandum of Decision, which prohibited all persons having notice from interfering with the closure of the Tire Pond by the Commissioner. Having found that Modern Materials is blocking the Commissioner's closure of the Tire Pond, that Modern Materials' lease post-dated both the recorded 1998 Consent Order and the 2001 Judgment enforcing its terms, and that Modern Materials had notice of the 1998 Consent Order, the 2001 Judgment, and the October 7, 2004, Memorandum of Decision, the trial court properly entered an order directing Modern Materials to move from the Tire Pond.

E. Even Though A Non-Party, Modern Materials Is Bound By the 2001 Judgment and the October 7, 2004 Memorandum of Decision.

Modern Materials claims that it cannot be bound by the 2001 Judgment or the October 7, 2004 Memorandum of Decision since it is not a formal party to this action. This argument, however, flies in the face of settled Connecticut law, which holds that "[t]he law is clear that a person may be bound by the terms of an injunction, even though not a party to the action, if he has notice or knowledge of the order and is within the class of persons whose conduct is entitled to be restrained or who acts in concert with such persons." *DeMartino v. Monroe Little League, Inc.*, 192 Conn. 271, 277 (1984) (internal citation and quotation marks omitted).[7]

[7] The cases cited by Modern Materials also stand for this proposition. *See DeMartino*, 192 Conn. at 277; *Channell v. Applied Research, Inc.*, 472 So.2d 1260 (Fla. Dist. Ct. App. 1985) (where former employees had been enjoined from competing with their former employer, but starting working for a new employer, the new employer, who had knowledge of the injunction, could be found in contempt, even though it was not a party to the injunction); *Dalton v. Meister*, 84 Wis. 2d 303 (1978) (non-party corporation holding stock that had notice of an injunction prohibiting the transfer of the stock was found in contempt for transferring it).

The October 7, 2004 Memorandum of Decision "enjoin[ed] all persons who are given notice thereof, from preventing the Commissioner, his agents, employees and contractors from having full and complete access to the Tire Pond and/or Parcel A, and from interfering with actions taken by the Commissioner pursuant to paragraph 3 of the September 21, 2001 judgment." October 7, 2004 Memorandum of Decision, ¶ 6, p. 6 (Comm'r App. at A7). Modern Materials was served with this order and thus had notice of it. The injunction was designed to prevent persons from interfering with the Commissioner's closure of the Tire Pond, precisely what the trial court found Modern Materials is doing here. Thus, the trial court properly concluded that Modern Materials is within the class of persons whose conduct is entitled to be restrained and is therefore bound by it.

In addition to binding non-parties with notice who are within the class of persons entitled to be restrained, an injunction decree binds "not only the parties defendant 'but also those identified with them in interest, in "privity" with them, represented by them or subject to their control.'" *DeMartino*, 192 Conn. at 276-77 (internal citation omitted). Modern Materials argues that it cannot be bound because the trial court made no finding that Modern Materials is in privity with the Farricielli entities. This argument lacks merit for two reasons. First, as just discussed, being identified in interest or being in privity with an enjoined defendant are not the only circumstances under which a non-party may be bound – having notice and being within the class of persons entitled to be restrained also binds a non-party to a court order. Second, the facts as found by the trial court are sufficient to sustain the legal conclusion that Modern Materials is both identified in interest and in privity with the Farricielli defendants – at least as far as the right to occupy the Leased Premises goes.

As the cases cited by Modern Materials hold, "privity" is the sharing of the same legal right by the same parties. *See Joe's Pizza, Inc. v. Aetna Life & Cas. Co.*, 236 Conn. 863, 868 (1996); *Aetna Cas. & Surety Co. v. Jones*, 220 Conn. 285, 305-06 (1991). "Privity ordinarily denotes a mutual or successive relationship to the same rights of property." 47 Am. Jur. 2d Judgments § 587 (2010). "[A] privy is one who, after commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase, or assignment." *Id.* at § 588.

Here, as discussed in part I(B), *supra* at 10-12, Modern Materials' right to possess the Leased Premises is co-extensive with the possessory right held by Mr. Farricielli in 2000, when he initiated the series of transactions that led to Modern Materials' 2003 license from Mr. Farricielli and lease from State Five. The initial transfer of the strip in January 2000 from Mr. Farricielli to Look Investment (now State Five), was subject to the recorded 1998 Consent Order, which required closure of the Tire Pond, and the 2003 license and lease to Modern Materials were subject to both the recorded 1998 Consent Order and the 2001 Judgment. In other words, Modern Materials' right to occupy the Leased Premises is the same as Mr. Farricielli's right and State Five's right, that is, the right is completely subject to closure of the Tire Pond by the Commissioner. Although the Commissioner did not present her motion to the trial court on the theory of identification of interest with or privity between Mr. Farricielli and Modern Materials, the trial court's conclusion that Modern Materials is bound by the 2001 Judgment and the October 7, 2004 Memorandum of Decision is legally sustainable on this ground as well.

II. Modern Materials Has Not Shown That the Trial Court's Finding That Modern Materials Is Blocking Closure Is Clearly Erroneous

A. Standard of Review

Modern Materials argues that the Commissioner did not show why it is necessary that Modern Materials must vacate the property, so that it was error for the trial court to have found that Modern Materials must move.[8] This argument goes to the trial court's factual finding that it is necessary for Modern Materials to move because Modern Materials is blocking the closure. Accordingly, this Court cannot sustain this argument unless this Court concludes that the finding is clearly erroneous. It is well-settled that this Court will give great deference to the findings of the trial court and will uphold a factual finding unless this Court is "left with the definite and firm conviction that a mistake has been made." *Farricielli*, 269 Conn. at 212 (internal quotation marks and citation omitted).

B. The Finding That It Is Necessary for Modern Materials to Move Because Modern Materials Is Blocking Closure Is Not Clearly Erroneous.

Here, as discussed *supra* at 7-8, the trial court found that Modern Materials' presence is both preventing closure of the entire Tire Pond, as required by the Commissioner's regulations, and is also preventing closure of the Tire Pond in accordance with the June 2007 Closure Plan, which is the only approved closure plan for the Tire Pond.

Modern Materials does not disagree with these findings, but simply points to additional evidence that there is no emergency and that it would be difficult for Modern

[8] Although Modern Materials has included this issue in its argument section, it is not among its Statement of Issues. Nor has Modern Materials identified the applicable standard of review for this issue. Accordingly, it would be appropriate for this Court to decline to consider this issue, as Modern Materials has inadequately briefed it. *See* Conn. Prac. Bk. § 67-4(a) and (d); *Label Sys. Corp. v. Aghamohammadi*, 270 Conn. 291, 301 n.9 (2004). In the event this Court does consider the issue, the Commissioner briefs it here.

Materials to move. This is not sufficient reason to overturn the trial court's finding that Modern Materials is blocking closure and must move.

Whether or not there is currently an emergency at the Tire Pond – and, owing to the prior efforts of the Commissioner and Gateway, there is no longer any emergency there – the fact is that closure in accordance with environmental regulations and the June 2007 Closure Plan cannot be finished until Modern Materials moves. As to the difficulty of Modern Materials moving, that situation, as the trial court found, is one of Modern Materials' own making: the trial court found that as soon as Modern Materials received a March 28, 2008 letter from the Commissioner requesting it to move, it began bringing on to the Tire Pond more material than it had previously stored there precisely so that it could make the argument that moving would be difficult. M.O.D. at 9 (Modern App. at A93).

In considering this challenge to the trial court's factual finding that Modern Materials must move, this Court reviews the whole record. *Farricielli*, 269 Conn. at 212-13. A factual finding is clearly erroneous only if the appellate court, after reviewing the entire record, is left with the "definite and firm conviction" that a mistake was made. *Id.* at 212. The lack of emergency and Modern Materials' self-imposed difficulties are not sufficient to give rise to the "definite and firm conviction" that the trial court made a mistake in finding that Modern Materials must move because it is preventing closure. As Modern Materials' argument in this regard does not even come close to meeting the clearly erroneous test, the trial court's factual finding must stand.

III. The Trial Court Properly Concluded That Modern Materials Received Due Process

A. Standard of Review

Modern Materials claims that it has been denied due process of law because its property right – its lease – was terminated without a hearing. The question of whether Modern Materials has been denied due process is a question of law, subject to plenary review by this Court. *Town of New Hartford v. Connecticut Res. Recovery Auth.*, 291 Conn. 489, 500 (2009).

B. Modern Materials Was Afforded Due Process

Modern Materials' argument is wholly without merit for two reasons. First, the property interest at stake here – the license and lease for the Leased Premises that Modern Materials received in June 2003 from Mr. Farricielli and State Five – are, as discussed *supra* at 10-12, subject to the closure of the Tire Pond according to the terms of the recorded 1998 Consent Order and the provisions of the 2001 Judgment. In its brief, Modern Materials inexplicably asserts that the lease was executed before any of the court orders were entered. Brief of the Plaintiff in Error, at 13. This is completely contrary to the facts: the license and lease date from June 2003; the 2001 Judgment, incorporating and enforcing the recorded 1998 Consent Order, issued on September 21, 2001. There is simply no question here that, whatever property right Modern Materials has, it is circumscribed by and is subject to, the requirement that the Tire Pond be closed.

Under the due process cases, it is axiomatic that before one engages in the due process analysis, one must first identify the property interest at stake. *See Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Property interests arise from, among other sources, state law, and, to have a property interest in a particular thing, "a person must

have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

Because Modern Materials' property interest in the Leased Premises was always subject to the closure of the Tire Pond, Modern Materials has no entitlement to possess the site without that restriction. Thus, when the trial court ordered Modern Materials to move to accommodate closure of the Tire Pond, there is no due process violation, because there was no interference with a legitimate property interest. Modern Materials asserts that it has the right to stay in the Leased Premises even though it is in the way of closure, but Modern Materials never had an unrestricted right to occupy the Tire Pond. Its occupancy has always been subject to the requirement of closure.

The second reason there is no due process violation here is that Modern Materials had a hearing before the trial court. Even assuming that Modern Materials' June 2003 license and lease for the Leased Premises somehow were not subject to the prior recorded 1998 Consent Order and the 2001 Judgment enforcing it, Modern Materials had the opportunity to appear and did appear before the trial court to show why it should not have to move. Modern Materials was properly served with an order to show cause. It appeared and subjected itself to the jurisdiction of the trial court. Modern Materials had notice and an opportunity to be heard. It presented evidence for its cause, submitted briefs advocating its cause, and argued its case in court to a neutral fact-finder. These procedures unquestionably satisfy due process requirements. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (what process is due).

The trial court properly concluded that Modern Materials was afforded the process it was due in determining whether it should or should not be required to move its operations

in order to effectuate the trial court's prior judgment and order and to enable the Commissioner to close the Tire Pond in accordance with her solid waste regulations and the approved June 2007 Closure Plan.

CONCLUSION

For all the above-cited reasons, the Commissioner respectfully requests this Court to affirm the decision below.

Respectfully submitted,

DEFENDANT IN ERROR
COMMISSIONER OF ENVIRONMENTAL PROTECTION

GEORGE JEPSEN
ATTORNEY GENERAL

BY: Krista E. Trousdale

Krista E. Trousdale
Assistant Attorney General
Juris No. 409208
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5250
Fax: (860) 808-5386
krista.trousdale@ct.gov

CERTIFICATION

The undersigned attorney hereby certifies that this brief complies with all provisions of Connecticut Rules of Appellate Procedure 67-2 and that a copy of the foregoing was mailed, first class postage prepaid, this 2nd day of March, 2011 to:

Kenneth A. Votre, Esq.
Votre & Associates, P.C.
201 Orange Street
New Haven, CT 06510
Tel.: (203) 498-0065
Fax: (203) 821-3595

Kerry M. Wisser, Esq.
Weinstein & Wisser, P.C.
29 South Main Street, Suite 207
West Hartford, CT 06107
Tel.: (860) 561-2628
Fax: (860) 521-6150

Susan Gruen, Esq.
Office of the Town Attorney
Town of Hamden
2750 Dixwell Avenue
Hamden, CT 06518
Tel.: (203) 287-7050
Fax: (203) 287-7051

Jeffrey M. Donofrio, Esq.
Ciulla & Donofrio, LLP
127 Washington Avenue
P.O. Box 219
North Haven, CT 06473
Tel.: (203) 239-9828
Fax: (203) 234-0379

Ann M. Catino, Esq.
Halloran & Sage LLP
One Goodwin Square
225 Asylum Street
Hartford, CT 06103
Tel.: (860) 522-6103
Fax: (860) 548-0006

Hon Robert J. Hale
Hartford Superior Court
95 Washington Street
Hartford, CT 06106

Krista E. Trousdale
Assistant Attorney General

SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 18596

WRIT OF ERROR

ARTHUR J. ROCQUE, JR., COMMISSIONER OF ENVIRONMENTAL PROTECTION, TOWN OF HAMDEN, JOSEPH J. VENDITTO, ZONING ENFORCEMENT OFFICER FOR THE TOWN OF HAMDEN, HAMDEN ECONOMIC DEVELOPMENT CORPORATION, AND TOWN OF NORTH HAVEN

PLAINTIFFS

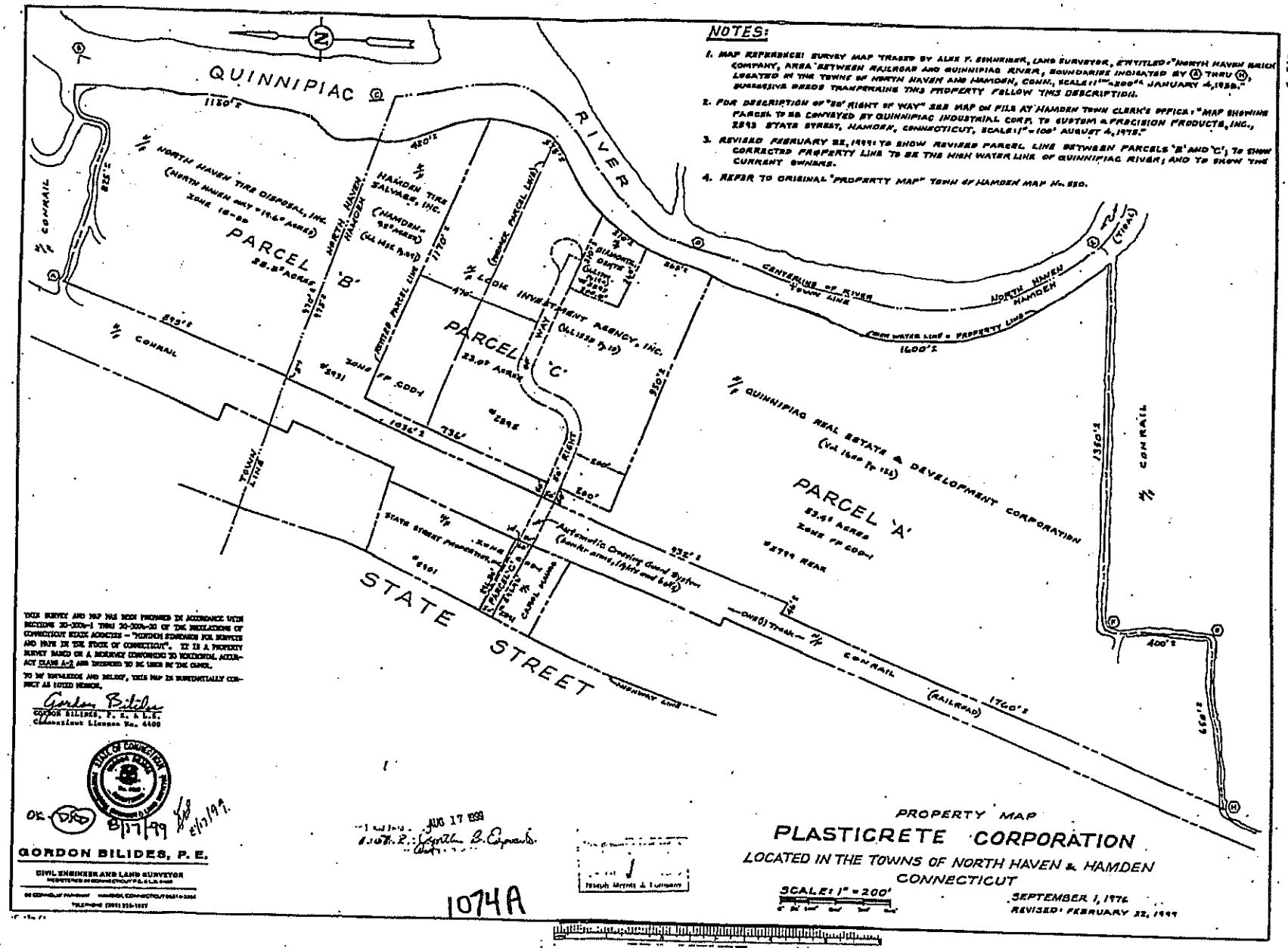
V.

JOSEPH J. FARRICIELLI, HAMDEN SALVAGE, INC., TIRE SALVAGE, INC., NORTH HAVEN TIRE DISPOSAL, INC., THE QUINNIPIACK REAL ESTATE AND DEVELOPMENT CORP., AND HAMDEN SAND & STONE, INC.

DEFENDANTS

APPENDIX

APPENDIX TABLE OF CONTENTS



STATE OF CONNECTICUT
COUNTY OF NEW HAVEN } ss HAMDEN

I hereby certify that this is a true copy of record in this Office, Vol. 1239 Page 10744.
In testimony whereof, I have hereunto set my hand and affixed the Seal of said Town, at Hamden this 23rd day of June A.D. 2000.

HAMDEN TOWN CLERK

A 1

Tt's Ex. H

DOCKET NO. CV 99-0591020 S	:	STATE OF CONNECTICUT
ARTHUR J. ROCQUE, JR., COMMISSIONER OF ENVIRONMENTAL PROTECTION, TOWN OF HAMDEN, AND JOSEPH J. VENDITTO, ZONING ENFORCEMENT OFFICER FOR THE TOWN OF HAMDEN	:	JUDICIAL DISTRICT OF HARTFORD AT HARTFORD
V.	:	
JOSEPH J. FARRICIELLI, HAMDEN SALVAGE, INC., TIRE SALVAGE, INC., NORTH HAVEN TIRE DISPOSAL, INC., THE QUINNIPIACK REAL ESTATE AND DEVELOPMENT CORPORATION, AND HAMDEN SAND & STONE, INC.,	:	OCTOBER 7, 2004

MEMORANDUM OF DECISION

The plaintiff in this case, the Department of Environmental Protection, has brought this Motion for Contempt alleging violation of the court's injunction dated September 21, 2001, claiming that the principal defendant in that action, Joseph J. Farricielli, has failed to do what he was required to do under that injunction and has done what he was prohibited from doing. In that injunction the court ordered the defendant to either clean up the "tire pond" site on his property in accordance with an earlier consent order and stipulated agreement or, failing that, not to interfere with efforts by the Commissioner of Environmental Protection to effect remediation.

According to the Commissioner, the defendant did not manage to complete the remediation and has now directly interfered with the Commissioner's efforts to get the job done.

The DEP also seeks a finding of contempt and incarceration against Joseph Farricielli on the basis that he failed to file an "Environmental Land Use Restriction" as ordered by the court.

The defendant was unable to complete the remediation at the pond and the Commissioner in accordance with the court's decision hired Gateway Terminal Company, a New Haven corporation, which agreed, without charge to the Commissioner, to bring in, by barge, soil from the so-called "Big Dig" in Boston; to truck it to the tire pond and to deposit it in the pond. To accomplish this, Gateway built a gravel road around the perimeter of the pond with a so-called chip seal surface and built a road on a portion of Parcel B which extends into Parcel C and goes to the right-of-way over the railroad track on the west of the defendant's property. This portion that runs from the right-of-way to the main boundary of Parcel B is referred to as the access road. At the present time this access road is in very poor condition with many potholes.

The DEP maintains that the defendant interfered with the remediation project in several ways. First, the Department claims that the defendant was responsible for the damage to the access road by granting an easement to a tenant, State Five Investments, formerly LOOK Investments, claiming that this eventually led to tenants using the access road and damaging it. The Department also claims that the defendant brought an excavator into Parcel B in order to remove a large pile of loam which belonged to him, and that this excavator chewed up the surface of the chip sealed road.

The giving of an easement itself had no effect on the road and the remediation. It is questionable as to the amount of the damage that was caused by the tenants to a road which was designed to accommodate 20-25 ton trucks on a steady basis. The defendant maintains that the excavator had what he calls "street tracks" on it which would not disturb this truck route. This was not successfully refuted by the Commissioner. It also seems that this excavator machine would probably have traversed the road on only two different occasions to obtain ingress and egress although this is not definitely established one way or the other by either party. There was evidence about the chip seal surface of the road but there was no evidence about the base. Considering the size and volume of the Gateway trucks and intervening winter weather, it is doubtful as to who or what caused the alleged $45,000 worth of damage to the road.

The next allegation is that the defendant interfered with the Department's contractors' source of supply, i.e. the Bectel Corporation at the Big Dig in Boston, by raising questions with the contractor in Boston and with Gateway about the quality of the soil coming from the Big Dig. Mr. Angelo testified that, in his view, these questions caused alarm and eventually caused the supply of soil to be dried up. It was evident, however, that the initial stoppage of the supply of the soil was caused by lack of material in Boston. When it became available later, it could have been requested by Angelo who, however, was reluctant to do so because of his "view" of the situation and uncertainty caused by the letters from the defendant.

Plaintiff next claims that the defendant interfered with the project by harassing Gateway, in that the defendant sent monthly statements to that corporation totaling

almost half a million dollars claiming use and occupancy of its land. This was done without any intention of seeking payment. Because of the continuing nature and amount of these invoices, the court considers this to be harassment and taken with the action toward Bectel and Mr. Angelo's reluctance because of that to order new material, this amounts, in the opinion of the court, to serious harassment.

In addition to the above claims the Department brought out that the defendant had sent about 45 Freedom of Information requests to the DEP. He claims he was simply seeking information which he would have a right to do. However, although the defendant would normally have a right to seek information about his land from the DEP, the manner in which he did it, knowing full well that each letter required a four-day response, leads to the conclusion that he was harassing the DEP with his many requests. The court disbelieves the reason he gave for this activity. With this harassment he has definitely wasted the time of the DEP and the taxpayers' money that it takes to service his request.

In the opinion of the court the plaintiff has produced evidence that the defendant engaged in serious harassment of the plaintiff and of Gateway and Bectel such that it could cause interference with the DEP's work. However, there is, in the opinion of the court, not enough evidence to say that the plaintiff has proven by a "fair preponderance of the evidence" that the defendant actually interfered with progress of the project. The court will not find him in contempt for interference at this time. However, the court cautions the defendant that his actions violate the spirit of the injunction and come close enough to a finding of contempt that if these activities continue they may well be deemed actual interference.

The subject matter of this hearing is concerned with possible violations of the injunction issued by this court. Because of the proven harassing actions of the defendant, the court is of the opinion that some further clarification, guidance and strengthening of its injunction is required and so the court issues the following supplemental orders as an amendment to its decision of September 21, 2001.

1. The defendant is enjoined from demanding that the Commissioner or any of its contractors now owe, or must pay for, any rent or any fees or other remuneration for use and occupation of Parcel B and the North Haven parcel (the Tire Pond) during the period in which remediation of these properties is ongoing.

2. The DEP, as part of its being fully authorized to take any action necessary and appropriate to address the environmental conditions at the Tire Pond, may include, inter-alia, monitoring conditions, retaining of consultants to perform the work set out in the February 1998 Consent Order and secure the site including the control of all entry and egress from the site.

3. Because of the defendant's proven harassment of the Commissioner and his contractors and suppliers, the defendant is enjoined from having any contact or communication, direct or indirect with the contractors or material suppliers employed or used by the Commissioner for purposes of conducting site remediation work pursuant to the court's September 21, 2001 judgment except communications between counsel for the defendant and counsel for the Commissioner.

4. The defendant is enjoined from having any contact or communication whether direct or indirect with the Commissioner, his agents or employees concerning the subject matter of the court's September 21, 2001 judgment until such time as the

Commissioner notifies the defendant in writing that he has concluded his remediation work at the site, except for communication between counsel for the defendant and counsel for the Commissioner. Numbers 3 and 4 are aimed at curtailing further harassment of the Commissioner and his contractors and employees.

5. During the course of this hearing it was brought out that the defendant transferred his interest in the LOOK Investment business to a friend at a time when the remediation was in progress and that he granted an easement over Parcel B to the owner of this business during that period. It is clear that such a transfer can lead to complications in continuing the remediation. Therefore, the court enjoins the defendant from transferring any legal or equitable interest in the Tire Pond property or Parcel A or Parcel C without the written approval of the Commissioner or the court until such time as the Commissioner notifies the defendant in writing that he has concluded his remediation work. Parcel C is included because it controls access to Parcels B and A through its control of the right of way.

6. The court herewith enjoins all persons who are given notice thereof, from preventing the Commissioner, his agents, employees and contractors from having full and complete access to the Tire Pond and/or Parcel A, and from interfering with actions taken by the Commissioner pursuant to paragraph 3 of the September 21, 2001 judgment.

As to the failure to file an Environmental Land Use Restriction for over three years, the court has a problem. Without a recollection of any discussion about the ELUR and time limits at the time of the hearing on the original injunction and noting that time limits were used in other parts of the original decision, the court is unclear

as to the purpose at that time of requiring its filing, therefore it must rely on the situation as it is today. The injunction of 2001 has no time limits mentioned as to the ELUR. The court has considerable doubt as to the applicability of the ELUR to the present situation considering the incomplete state of the remediation of the Tire Pond and the cost of potential repeated filings and repeated recordings. Frankly, the court can see no reason to enforce the filing of the ELUR at this time. Therefore, if the Commissioner is of the opinion that the filing of an ELUR at this time is necessary and important, the court requests that the Attorney General, acting for the Commissioner, file with the court a motion and a detailed brief as to why this action should be taken by the defendant. The same is to be treated as any other pleading with copies sent to the defendant and the defendant shall have time to reply and file a brief if necessary and the court will then rule on the question. The court is aware that the defendant has filed an ELUR at this time which is incomplete and orders that the completion of that be held in abeyance until this question has been decided.

One final word. The defendant had been given a good deal by the Commissioner and Gateway. Why he would endanger it by harassing the DEP and Gateway and wasting taxpayers' and his own time and money shocks and puzzles the court. He is in danger of "cutting his own throat". If the defendant is wise he will leave the Commissioner and contractors and employees to do the job and stay out of it completely.

Remember that the Commissioner has requested incarceration for failure to file the ELUR. The court has ruled against that but the court does have the power to incarcerate in order to ensure that its orders are carried out and if at some time in the

future, the defendant is found to be in violation of the injunction by harassing, interfering or slowing down the project, he could be incarcerated until the project is completed.

Hale

Hale, JTR

This Page Intentionally Left Blank

cc: AAG Krista Trowsdale (P.) Holloran + Sage LLP(P).

DOCKET NO. HHD CV-05-4015888S SUPERIOR COURT

GINA MCCARTHY, COMMISSIONER OF ENVIRONMENTAL PROTECTION, TOWN OF HAMDEN, AND BRUCE E. DRISKA, ZONING ENFORCEMENT OFFICER FOR THE TOWN OF HAMDEN,
Plaintiffs,

JUDICIAL DISTRICT OF HARTFORD

AT HARTFORD

V.

JANUARY 5, 2009

STATE FIVE INDUSTRIAL PARK, INC. AND JEAN L. FARRICIELLI,
Defendants

MEMORANDUM OF DECISION

I

STATEMENT OF CASE

This case is based on theories of piercing the corporate veil brought by the plaintiffs, the commissioner of environmental protection (commissioner), the town of Hamden and its zoning enforcement officer, against the defendants, State Five Industrial Park, Inc. (State Five) and Jean L. Farricielli, who is currently State Five's president.

In September 2001, the plaintiffs obtained a judgment against Joseph J. Farricielli, Jean Farricielli's husband, and various companies owned or controlled by him for violations of state environmental laws and local zoning regulations (the 2001 judgment). The named defendants in that case were Joseph J. Farricielli, Hamden Salvage, Inc. (Hamden Salvage), Tire Salvage, Inc. (Tire Salvage),

North Haven Tire Disposal, Inc. (Tire Disposal), Quinnipiack Real Estate and Development Corp. (QRED), and Hamden Sand & Stone, Inc. (Hamden Sand). The 2001 judgment required the defendants to close two landfills located in Hamden and North Haven, and to pay the plaintiffs $3.8 million in civil penalties. The 2001 judgment also required the defendants to post a $1 million bond to cover work at one of the two landfills — the "Tire Pond" — as well as post a $45,000 bond to cover some dike stabilization work at the Tire Pond. The 2001 judgment also made the defendants personally liable for any amounts the commissioner expended in addressing the environmental conditions at the two landfills.

In the amended complaint in this case, dated September 15, 2005, the plaintiffs allege several claims based on piercing and reverse-piercing of the corporate veil. The first and second counts of the amended complaint seek reverse veil piercing[1] under the instrumentality and identity rules against State Five. The plaintiffs claim that the defendant State Five is the alter ego of Joseph J. Farricielli, such that State Five should be held liable for the obligations imposed by the 2001 judgment. Counts three and four seek veil piercing under the instrumentality and identity rules against Jean Farricielli. The plaintiffs also allege that State Five is the alter ego of Jean Farricielli, and, therefore, she should be held liable for the obligations imposed by the 2001 judgment, assuming the corporate veil of State Five is first pierced, imposing upon State Five the obligations of the 2001 judgment. Based upon theories of veil piercing,

the plaintiffs seek to impose upon the defendants the monetary aspects of the 2001 judgment as well as prohibitory injunctions.

The defendants deny that State Five and Joseph Farricielli are alter egos of one another. The defendants further deny that State Five and Jean Farricielli are alter egos of one another. The defendants also maintain that, as a matter of physics and law, Joseph Farricielli and Jean Farricielli are not alter egos of one another. The defendants argue that, as a matter of law, Jean Farricielli cannot be liable on the 2001 judgment because the plaintiffs cannot pierce the corporate veil from Joseph Farricielli, an individual, through the corporation to Jean Farricielli, another individual, to make Jean Farricielli responsible for Joseph Farricielli's personal judgment debts. In their amended answer, dated February 12, 2008, the defendants raise four special defenses: abandonment, failure to mitigate damages, estoppel and lack of clean hands.

This matter was tried to the court on February 13-15, 2008, February 20-21, 2008 and March 5-6, 2008. The last posttrial brief was filed on October 14, 2008.

II

FINDINGS OF FACT

The following facts were proved at trial by a fair preponderance of the evidence.[2]

A

Parties and Nonparties

The plaintiff Gina McCarthy is the commissioner of environmental protection of the state of Connecticut (commissioner). The commissioner is charged with the supervision and enforcement of environmental laws and is generally empowered by General Statutes § 22a-6 (a) (3) to institute all legal proceedings necessary to enforce statutes, regulations, permits or orders administered, adopted or issued by her. The plaintiff town of Hamden is a Connecticut municipality. The plaintiff Bruce E. Driska is the zoning enforcement officer of the town.

The defendant State Five is a Connecticut corporation that both owns and has listed 2895 State Street, Hamden, Connecticut (Parcel C) as its business address with the secretary of state. Parcel C abuts Parcel B on the north and Parcel A on the south. State Five is a closely held corporation, which is typically a corporation organized under state law with a few shareholders intimately involved in running the business. It is a small business engaged primarily in leasing out its property to tenants. As a landlord, it has ordinary expenses for property tax, utilities, snowplowing and landscaping. Prior to January 27, 2003, State Five's name was Look Investment Agency, Inc. (Look). Joseph Farricielli was president of Look prior to February 2001. He ran all aspects of the company, the stock of which was owned by Recycling Enterprises, Inc. (Recycling Enterprises). Recycling Enterprises is a Connecticut company owned 80 percent by defendant Jean Farricielli and 20 percent by the Farriciellis' two sons. The evidence demonstrates that the Farriciellis' two sons had no real involvement with Look/State Five or Recycling Enterprises. They did not make

any decisions necessary to run the business and did not make any suggestions that things be done any differently. Before February 2001, State Five was in the business of being a landlord, receiving income from the commercial tenants on Parcel C.

The defendant Jean Farricielli is currently president and sole officer and director of State Five. She is the majority stockholder of Recycling Enterprises, which owns 100 percent of the stock of State Five. Jean has been married to Joseph Farricielli for approximately forty years. They reside together at 108 Cherry Hill Road in Branford, Connecticut. Jean Farricielli has owned the home since 1969. While the residence was owned debt free in the 1990s, it now carries a $650,000 mortgage. Joseph Farricielli is an obligor on the mortgage.

Joseph Farricielli has operated a number of businesses over the last thirty years or so. He was president of Look from 1967 through 2001. Look underwent several name changes during this period. On October 3, 1967, the Hemingway Realty Company was changed to Joseph Farricielli Real Estate & Insurance Company, Inc. On January 26, 1973, it became Look Insurance Agency, Inc. The name changed to Look Investment Agency, Inc. on November 15, 1985. In the late 1980s, Joseph Farricielli transferred all of the stock of Look to Recycling Enterprises, which was owned by his wife and two sons. Over the years, Joseph Farricielli transferred several parcels of property to Look by quit claim deed. On February 29, 1996, Joseph Farricielli transferred Parcel C to Look.

William LaVelle is a long-time friend of Jean and Joseph Farricielli. Before his involvement with State Five, LaVelle owned and ran several businesses.

LaVelle had prior business dealings with Joseph Farricielli. During 2001, LaVelle became president and then owner of Look.

Alan Mandell is a certified public accountant (CPA). He testified at trial and was qualified as an expert in certified public accounting and forensic accounting.

Phil DeCaprio is also a CPA. He is Joseph Farricielli's first cousin. DeCaprio provided accounting services to Jean and Joseph Farricielli and their business for many years.

B

The *Rocque* Action and the 2001 Judgment

By complaint dated July 9, 1999, the plaintiff commissioner commenced *Rocque* v. *Farricielli*, Superior Court, judicial district of Hartford, Docket No. CV 99 0591020 (the *Rocque* action), which resulted in the 2001 judgment. The original named defendants in that case were Joseph Farricielli, Hamden Salvage, Tire Salvage, and North Haven Tire Disposal. On October 14, 1999, the commissioner moved to add Look as a defendant to the *Rocque* action. The defendants objected to the motion. After oral argument on the motion, the court (*Booth, J.*) denied the motion on December 20, 1999. On January 13, 2000, the commissioner moved to add Hamden Sand as a defendant to the *Rocque* action. By stipulation dated March 8, 2000, in the *Rocque* action, the commissioner and the defendants in the *Rocque* action agreed to add Hamden Sand as a defendant. Hamden Sand was formerly Hamden Storage and Trucking, Inc. (Hamden Storage). On March 22, 2000, the commissioner, the town and the

town's zoning enforcement officer filed a fourth amended complaint in the *Rocque* action. The defendants were Joseph Farricielli, Hamden Salvage, Tire Salvage, Tire Disposal, QRED and Hamden Sand.

After the *Rocque* action was commenced, Joseph Farricielli caused Hamden Sand to go out of business. Jean Farricielli was personally liable for six notes payable as of June 1, 2000. Jean and Joseph Farricielli caused State Five to assume, without consideration, debt of Hamden Sand, debt that had been personally guaranteed by Jean and Joseph Farricielli. The Hamden Sand debt assumed by Look was later refinanced. State Five remains liable on this debt. Assets were also transferred from Hamden Sand to Look, including a large quantity of topsoil. The topsoil was eventually sold for $20,000 in July, 2007.

Trial of the *Rocque* action was held in September and October, 2000. Additional testimony was heard in March, 2001. Posttrial briefing occurred in April and May, 2001.

On September 21, 2001, the court (*Hale, J.*) entered the 2001 judgment in the *Rocque* action. The plaintiffs obtained a judgment against Joseph Farricielli and five companies owned and/or controlled by him: Hamden Salvage; Tire Salvage; Tire Disposal; QRED; and Hamden Sand. The 2001 judgment concerned the property known as the Tire Pond and Parcel A. The 2001 judgment required the defendants to comply with a February 1998 consent order issued by the commissioner against all the defendants except QRED and Hamden Sand, and to fund the closure of two illegal solid waste areas on land located in Hamden: the Tire Pond, on Parcel B, owned by Joseph Farricielli; and

the Q-Park landfill on Parcel A, owned by QRED. It required the defendants to comply with a March, 1997 stipulated judgment between the town and all the defendants except QRED and Hamden Sand. The 2001 judgment also required the defendants to pay a civil penalty to the commissioner of $2,336,800 and a civil penalty to the town of $1,416,910. Certain work was required to be performed on the Tire Pond and Parcel A. The 2001 judgment also required that the defendants in that action post a $1 million bond to cover the work to be performed at the Tire Pond and a $45,000 bond to cover dike stabilization work to be performed at the Tire Pond. The defendants were also made liable for any sums expended by the commissioner to address environmental conditions at the site. Joseph Farricielli appealed the judgment of the trial court. On June 1, 2004, the Supreme Court affirmed the judgment of the trial court. *Rocque* v. *Farricielli*, 269 Conn. 187, 190, 848 A.2d 1206 (2004).

The following has been done in furtherance of the work required to be performed at the Tire Pond pursuant to the 2001 judgment.

Pursuant to a memorandum of understanding dated May 13, 2002 (May 13, 2002 MOU), between the defendants to the *Rocque* action, the commissioner, Northridge Enterprises, Inc., and Gateway Terminal (Gateway), the Tire Pond was partially filled with acceptable material and a portion of the exposed tires was covered.

Pursuant to a memorandum of understanding dated April 24, 2003 (April 24, 2003 MOU), between the commissioner and Gateway, the Tire Pond

continued to be partially filled with acceptable material and an additional portion of the exposed tires were covered.

Pursuant to a first supplementary post-judgment order on consent in the *Rocque* action, dated and entered by the court (*Sheldon, J.*) on October 3, 2007, and a first stipulated order on consent in this action, also dated and entered by the court (*Sheldon, J.*) on October 3, 2007, Joseph Farricielli, Tire Disposal, 2803 State Street, Inc., and State Five entered into an agreement with Gateway (the Gateway Agreement) concerning additional work at the Tire Pond. Pursuant to the Gateway Agreement, a closure plan for the Tire Pond was prepared by Gateway and approved by the commissioner.

Pursuant to the closure plan, Gateway has continued to fill the Tire Pond with acceptable material and to cover the exposed tires. Four hundred thousand dollars of the $1 million bond required by the 2001 judgment has been deposited into an account with the commissioner. The amount of $450,000 has been paid by Gateway into an account with the court (trust account). These monies may be disbursed only upon order of the court. Of the funds deposited to the trust account, $167,589.83 has been paid by the court to attorneys representing the Hamden Economic Development Corporation. Pursuant to the October 3, 2007 orders in this action and in the *Rocque* action, this amount "shall serve as a dollar-for-dollar credit against the civil penalty obtained by Hamden in the 2001 judgment." Pursuant to the Gateway Agreement, Gateway may, without the necessity of additional court orders, deposit to the trust account an additional amount up to $750,000. On September 16, 2005, the commissioner executed on

a Bank of America account of Joseph Farricielli in the amount of $4,367.15 in partial satisfaction of the 2001 judgment.

Gateway provided 1.2 million cubic yards of acceptable fill for the Tire Pond pursuant to the May 13, 2002 MOU and the April 24, 2003 MOU. Gateway did not pay any fees under the two MOUs. The plaintiffs did not try to garnish $250,000 that Gateway paid Joseph Farricielli to dump 100,000 cubic yards of fill on Parcel A. On Parcel B, Gateway was putting fill and had generated $1 million in tipping fees. The defendants argue that if Gateway were allowed to proceed, Gateway would have generated millions of dollars in tipping fees. Gateway was not allowed to go beyond the first 400,000 cubic yards because there were no further agreements or court orders. The department of environmental protection put out a request for proposals for the rest of the fill. Bids were due by April 21, 2008.

C

LaVelle and State Five

LaVelle began his involvement with State Five before the 2001 judgment was entered. He had known the Farriciellis for years. The Farriciellis had allowed LaVelle to share office space, rent free, at State Five's office. During this time, LaVelle came up with the idea of developing Parcel C as an industrial park. He had successfully developed other commercial property and planned to use his experience in business and government to help develop the State Five property. LaVelle discussed his plans with the Farriciellis. On February 15, 2001, LaVelle was elected president of Look. His election was reflected on an

annual report filed with the secretary of the state dated May 14, 2001. The report indicated that LaVelle was president of Look and Jean Farricielli was vice president/secretary/director. Joseph Farricielli was no longer reported as a director, officer or stockholder of Look.

After LaVelle became president of State Five, he ran into difficulties trying to develop Parcel C into an industrial park. LaVelle became convinced that the state of Connecticut and the town would not allow development of Parcel C because of Joseph Farricielli's ties to the property. LaVelle had discussions with the Farriciellis about the difficulties developing the property and the possibility of becoming owner of Look.

Three months after the 2001 judgment was entered, Joseph Farricielli negotiated the transfer by Recycling Enterprises of all the stock of Look to LaVelle. At that time, Joseph Farricielli was not a stockholder, director, or officer of Look or Recycling Enterprises. The agreement was entered into on December 1, 2001, by Jean Farricielli, as president of Recycling Enterprises, and LaVelle. Pursuant to the agreement, LaVelle purchased all the assets of Look, in return for assuming obligations of Look and Hamden Sand. LaVelle gave no legal consideration to Recycling Enterprises for the stock. The agreement stated that LaVelle was interested in developing the property for commercial use. LaVelle became president, secretary, director and sole stockholder of Look. As part of the agreement, Jean Farricielli and LaVelle entered into an installment sale and promissory note for a sale price of $2.5 million. The parties agreed that LaVelle would split with the Farriciellis any profits from the development of Parcel C.

After the transfer of the stock, LaVelle came up with the idea of changing the name of Look to State Five to further distance the company and Parcel C from Joseph Farricielli.

LaVelle's control of State Five, however, was significantly restricted. Pursuant to the sales agreement, he was not able to mortgage or sell any of State Five's assets. The agreement basically says that LaVelle was going to receive stock, for which he did not pay anything, and take on debt. Even though LaVelle was the "owner," he did not have authority to draw on State Five's credit line with Citizen's Bank; only Jean Farricielli had authority to draw. From January 2001 through August 2004, LaVelle had limited dealings, only a few conversations, with State Five's bookkeeper and accountant. It was Jean Farricielli who dealt with State Five's bookkeeper and accountant on a regular basis. Although LaVelle was the president and sole stockholder of State Five from December 2001 to August 2004, he never put any of his own money into State Five. He never received any wages from State Five. Contrary to LaVelle's testimony that Joseph Farricielli was not allowed to have anything to do with State Five's checking account while LaVelle was in charge, Joseph Farricielli continued to write checks on State Five's checking account. LaVelle, however, did sign the corporate tax returns for State Five from 2001 through August 2004.

During LaVelle's tenure at State Five, several new tenants signed leases for Parcel C, including Cardinal Trucking, Newbridge Enterprises, Inc., and Modern Materials, Corp./Inc. (Modern Materials). When State Five was transferred to LaVelle, Joseph Farricielli had agreed to assist LaVelle with the

"old" tenants. LaVelle asked Joseph Farricielli to negotiate the lease between Look and Modern Materials. As a result of the lease agreement negotiated by Joseph Farricielli, State Five received monthly rent from Modern Materials of between $5000 and $8000. Look also continued to receive rental income from the "old" tenants on Parcel C.

After the transfer of ownership, LaVelle continued to run into roadblocks in developing the property. No significant progress was made. LaVelle grew frustrated with the lack of progress in developing the property. In August, 2004, after the 2001 judgment had been affirmed and while contempt proceedings were pending against Joseph Farricielli for his noncompliance with the 2001 judgment, LaVelle transferred the stock of State Five back to Recycling Enterprises. No payments were ever made on the installment sale and promissory note signed in December 2001.

D

State Five's Financial Condition

Before LaVelle became involved with State Five, the financial records show that the business was operating profitably as a landlord. There were no notes payable to lending institutions for 1998 through 2000, and no loans related to Hamden Sand were on the books during this period.

The financial picture of Look/State Five changed dramatically after LaVelle became president and then owner. Starting in 2001, the company took on substantial debt while the core business remained the same. On June 4, 2001, while LaVelle was president, Look and Hamden Sand entered into an agreement

by which Look assumed a $150,000 debt of Hamden Stone and received 20,000 cubic yards of topsoil located adjacent to the Tire Pond (Parcel B). Jean Farricielli signed the agreement for Look, while Joseph Farricielli signed for Hamden Sand. As a result, State Five assumed debt of Hamden Sand that Jean Farricielli had personally guaranteed. Joseph Farricielli had also guaranteed the debt. Although debt was supposedly assumed with accompanying assets, it was unclear whether all the assets actually came over to the business. The topsoil asset was actually located on Joseph Farricielli's property, not on property of State Five. The records show that equipment associated with debt never came into the business, nor were the proceeds of any sale of assets reflected in the books. Later, State Five assumed additional debt relating to Newbury and Anthony Garcia. Garcia had agreed to take over the crushing operations and assumed the business debts and assets of Newbury. When Garcia went out of business on or about May 5, 2003, State Five assumed the debts and assets of Newbury, which Jean and Joseph Farricielli had personally guaranteed. Jean and Joseph Farricielli both benefited financially from State Five's assumption of debt.

State Five was always in need of funds. It was unable to borrow funds on its own because it did not have sufficient income and unencumbered assets. When State Five did not have enough money from rents to pay bills, Jean Farricielli would finance State Five by borrowing money on her personal assets and Joseph Farricielli's assets. She also borrowed money from her mother-in-law, Josephine Farricielli.

When Joseph Farricielli was still president of Look, he negotiated a lease with Nextel to build a cell phone tower on Parcel C. The cell tower was to be placed partly on property of one of the defendants in the 2001 judgment (the strip) in order to create a fall zone for the cell tower. On January 25, 2000, Joseph Farricielli, as president of Look, transferred the strip to Look, without consideration, to create a fall zone for the Nextel cell tower. Look entered into a lease with Nextel for the cell tower and subsequently received rental payments. In March, 2006, after this lawsuit was commenced, Jean Farricielli sold the rights to rent from the cell tower lease to a third party for a present payment, which she used to fund State Five.

During this period, State Five's financial condition worsened. It was unable to meet its financial needs during this period. Most of State Five's debt had nothing to do with its core business. The business was thinly capitalized. State Five was involved in several transactions that lacked legitimacy or a real business purpose.

E

State Five and the Farriciellis' Personal Expenses

Despite State Five's financial condition, it has paid thousands of dollars of the Farriciellis' personal expenses. These payments provided, directly or indirectly, a benefit to both Joseph and Jean Farricielli. The personal expenses paid included the following: Joseph Farricielli's legal bills relating to the 2001 judgment and a state environmental criminal action against Joseph Farricielli arising out of the same facts that gave rise to the 2001 judgment; the mortgages

on the Farriciellis' residences in Connecticut and Florida; taxes on the Branford residence; fees and taxes on the Florida condominium; lawn care for the Farriciellis' residence in Branford; a club membership used by Jean and Joseph Farricielli; payments for a car for Joseph Farricielli; payments on State Five credit cards used by Jean and Joseph Farricielli; health insurance for the Farriciellis; and taxes on the Hamden portion of the Tire Pond owned by Joseph Farricielli and subject to the 2001 judgment.

State Five's financial records show that personal expenses were not handled consistently from year to year. In some years, mortgage payments were classified as officer loans, thus, maintaining corporate formalities. In other years, the mortgage payments were not so recorded and were deducted as management fees, treated as interest payments, or only the tax escrow was treated as an officer loan. Legal fees were charged to an officer loan account in some years and as corporate expenses in other years.

The inconsistent treatment was evident in the payments of the Branford and Florida (Sun Trust) mortgages. State Five's records for 1999 indicate that payments were made to Sun Trust, but the Florida mortgage was not listed as a liability on the books. The records for 2000 reflect that State Five made payments on the Branford mortgage, the Florida condominium mortgage and condominium fees. Payments on the Branford mortgage were treated as personal expenses of the officer. The Florida condominium mortgage and fee payments were not listed under officer loans. The two Branford and Florida mortgages were not listed as notes payable/loans from lending institutions on

State Five's books. Starting in 2001, mortgage payments were recorded as corporate expenses, not as officer loans. In 2001, five payments were made toward the Branford mortgage.

In 2002, the first mortgage on the Branford residence, $236,906, was shown on State Five's books for the first time. The evidence is unclear as to what happened to the proceeds.

An opening balance in the 2002 general ledger reflecting Jean Farricielli's loan account shows that the company owed Jean Farricielli $48,833.82. The closing balance reflected that Jean Farricielli owed the company $105,069.53. Even though Jean Farricielli owed State Five over $100,000 at the end of 2002, there was no promissory note. The Fleet note was supposedly secured by equipment, but the records do not show where the equipment was or whether it was sold. The 2002 general ledger reflects that State Five paid Joseph Farricielli's legal expenses, but these payments were not reflected in either Jean or Joseph Farricielli's loan account. They were treated as corporate expenses. The evidence was unclear as to whether the legal fees were actually repaid.

The 2003 financial records reflect that while Jean Farricielli owed the company substantial funds, she was receiving large sums from the company characterized as loan repayment. Money was withdrawn from State Five's checking account and paid to Jean Farricielli. These payments were characterized as loan repayment when they actually increased the loan from the company to Jean Farricielli. The 2003 general ledger reflects that State Five paid Joseph Farricielli's legal bills to the Santos & Seeley Law Firm, but these

payments were not reflected in Joseph or Jean Farricielli's loan accounts. These payments were treated as corporate expenses. There was no specific evidence that these legal fees were repaid.

The records for 2004 reflect mortgage payments on the Branford and Florida properties, but the transactions were not reflected on the loan accounts of Jean or Joseph Farricielli. For 2004, the payment of legal fees was not reflected in any loan account. In May, 2004, State Five purchased a GMC pickup truck with a down payment on the Farriciellis' Discover card. The 2004 records reflect that the company owed Josephine Farricielli $27,000. The 2005 records reflect that State Five made property tax payments for the Tire Pond property.

Overall, the financial records reflect that State Five ran a great deal of transactions in and out of loan accounts with little documentation to explain the transactions. Prior to 2001, there was no loan account for Jean Farricielli on the books. The books reflect a significant number of loans to and from Jean and Joseph Farricielli during the period in question. The records indicate that many of these transactions lacked a legitimate business purpose.

Since the transfer back of the State Five stock from LaVelle to Recycling Enterprises in August, 2004, many of these transactions have continued, including: Joseph Farricielli and Jean Farricielli have continued to write checks on State Five's bank account; State Five has continued to pay the personal expenses of Joseph Farricielli and Jean Farricielli, including the Florida condominium fees and lease payments for Joseph Farricielli's vehicle; State Five has continued to pay the taxes on Parcel B and the debt of Hamden Sand; Jean

Farricielli has continued to transfer funds to the company to pay for the aforesaid items; and Joseph Farricielli has continued to hold himself out as an agent of State Five. In addition, Joseph Farricielli and Jean Farricielli have caused State Five to make payments to one or more of the following: Joseph Farricielli himself; Jean Farricielli's brother; Joseph Farricielli's mother; QRED; and a lawyer doing work in connection with developing Parcel B, a parcel owned by Joseph Farricielli. While State Five has paid thousands of dollars towards Joseph Farricielli's personal expenses during this period, State Five has not paid any of the 2001 judgment for which he is personally responsible.

F

Jean Farricielli and State Five

As discussed above, the evidence shows that Jean Farricielli continued to play a major role in State Five after ownership was transferred to LaVelle. Under the sales agreement, State Five was required to pay thousands of dollars of debt that Jean Farricielli had personally guaranteed. She borrowed on personal assets that she and her husband owned to fund the company. Jean Farricielli was frequently in the office and often dealt with State Five tenants. She wrote numerous checks on State Five's checking account during LaVelle's involvement with the company. She did not talk to LaVelle about every check she signed for State Five and did not get specific authority for each check. During this period, State Five opened a credit line with Citizens Bank on which only Jean Farricielli had authority to draw. The line of credit established with Citizens Bank was secured by Jean Farricielli's certificates of deposit, part of her inheritance from

her parents, Jean Farricielli allowed Joseph Farricielli to write checks on State Five's checking account, even though he no longer had the authority to do so.

G

Joseph Farricielli and State Five

The evidence also demonstrates that Joseph Farricielli continued to play a major role in State Five. Joseph Farricielli negotiated the transfer agreement with LaVelle, even though he was not an officer of Look or Recycling Enterprises. He maintained office space at State Five and on occasion received wages from State Five during this period. He continued to deal with State Five's tenants. State Five paid many of his personal expenses, including thousands of dollars in legal fees.

Joseph Farricielli remained directly involved in the company's financial matters. He gave instructions to State Five's accountant and bookkeeper about how transactions should be characterized. For example, Joseph Farricielli wrote a memorandum to DeCaprio dated April 19, 2002, notifying DeCaprio that LaVelle had become owner of Look and that the tax returns should reflect LaVelle as president, secretary, director and sole stockholder. He instructed the bookkeeper to record the checks he wrote on State Five's account as a loan from Jean Farricielli. On or about June 12, 2002, Joseph Farricielli sent a memorandum to DeCaprio asking Look to pay a debt for which he was personally responsible. There was also a memorandum between Joseph Farricielli and DeCaprio indicating how State Five's line of credit was distributed.

Joseph Farricielli also sent letters to Hudson United Bank regarding debt for which State Five was liable and/or paying.

During LaVelle's tenure, Joseph Farricielli wrote checks on State Five's account without LaVelle's authorization. Joseph Farricielli also wrote personal checks to State Five. Joseph Farricielli continued to be listed as an obligor on the Branford mortgage. Hudson United Bank issued invoices on the Branford Mortgage listing both Joseph and Jean Farricielli as obligors. In May of 2004, Joseph Farricielli wrote a check on the couple's Discover Card for a down payment on a GMC pickup truck for State Five.

On June 11, 2003, Joseph Farricielli entered into a license agreement with State Five to allow Modern Materials to become a tenant. State Five then entered into an assignment of license agreement with Modern Materials. The rent Modern Materials is paying to State Five covers the part of Parcel B subject to the license.

Joseph Farricielli testified that he had over one million dollars in debt relating to Hamden Stone, which was not assumed by Look and not guaranteed by Jean Farricielli. Most of the debt was held by CIT, GE Credit and Mack Truck and was for heavy equipment used for the business. There was no evidence that Joseph Farricielli was ever sued on the CIT, GE Credit and Mack Truck debt. Moreover, in July, 2004, Joseph Farricielli completed a Hudson United Bank personal financial statement and did not list any liabilities to CIT, GE or Mack Truck. The accountant's work papers indicated that on about June 12, 2002,

Joseph Farricielli asked Look to make payments on debt for which he was personally responsible.

After State Five was transferred back to Recycling Enterprises, Joseph Farricielli continued to write checks on State Five's checking account. Joseph Farricielli's mother, Josephine Farricielli, loaned money to Jean Farricielli for State Five. On March 3, 2005, Joseph Farricielli wrote a check for $30,000 to pay back his mother. The check was made out to "J. Farricielli." According to Joseph Farricielli, his mother told him to keep the money, and he subsequently endorsed and cashed the check.

The court will provide additional facts, as needed, which are proved by a fair preponderance of the evidence.

III

DISCUSSION

A

Veil Piercing Law

"Pursuant to Connecticut case law . . . a court may properly disregard a corporate entity if the elements of either the instrumentality rule or identity rule are satisfied." (Citations omitted.) *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 148 n.11, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002). The fair preponderance of the evidence standard applies to veil piercing cases. Id., 148 n.12.

Our Supreme Court discussed the concept of piercing the corporate veil in the seminal case of *Zaist* v. *Olson*, 154 Conn. 563, 573, 227 A.2d 552 (1967).

In *Zaist*, the question before the court was the plaintiffs' right to look beyond the corporate entity with which they dealt, The East Haven Homes, Inc. (E Co.) to the controlling officer and stockholder, Martin Olson (O) and a related corporation, Martin Olson, Inc. (O Co.) for a recovery of the amount due them. Id. The court concluded that O and O Co. were liable under an "alter ego" theory, concluding that the corporate structure of the defendant in that case could properly have been disregarded under the instrumentality or identity rule. Id., 578. In reaching this conclusion, the Supreme Court expounded on the law of corporate veil piercing. "Courts will disregard the fiction of separate legal entity when a corporation is a mere instrumentality or agent of another corporation or individual owning all or most of its stock. . . . Under such circumstances the general rule, which recognizes the individuality of corporate entities and the independent character of each in respect to their corporate transactions, and the obligations incurred by each in the course of such transactions, will be disregarded, where, as here, the interests of justice and righteous dealing so demand. . . . The circumstance that control is exercised merely through dominating stock ownership, of course, is not enough. . . . There must be such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal . . . ." (Citations omitted; internal quotation marks omitted.) Id., 573-74.

In *Zaist* v. *Olson*, supra, 154 Conn. 563, O Co. owned none of the stock of E Co., but O held a dominating stock interest in both E Co. and O Co. and was president, treasurer and a director of both corporations. The court held that "it is

not the fact that [the defendant] held these positions which is controlling but rather the manner in which he utilized them. The essential purposes of the corporate structure, including stockholder immunity, must and will be protected when the corporation functions as an entity in the normal manner contemplated and permitted by law. When it functions in this manner, there is nothing insidious in stockholder control, interlocking directorates or identity of officers. When, however, the corporation is so manipulated by an individual or another corporate entity as to become a mere puppet or tool for the manipulator, justice may require the courts to disregard the corporate fiction and impose liability on the real actor . . . ." (Citations omitted; internal quotation marks omitted.) Id., 574-75.

The Supreme Court then set forth the instrumentality and identity rules for evaluating corporate veil piercing cases. "The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of the plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of . . . ." *Zaist* v. *Olson*, supra, 154 Conn. 575-76.

"Complementing the instrumentality rule is the identity rule. . . . The proposition has been otherwise expressed as follows: If plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise . . . ." *Zaist* v. *Olson*, supra, 154 Conn. 575-76. In *KLM Industries, Inc.* v. *Tylutki*, 75 Conn. App. 27, 815 A.2d 688, cert. denied, 263 Conn. 916, 821 A.2d 770 (2003), citing *Zaist*, the Appellate Court noted: "Although the identity rule primarily applies to prevent injustice where two corporations are controlled as one enterprise . . . it has been applied to hold an individual liable for a corporate obligation." (Citations omitted.) *KLM Industries, Inc.* v. *Tylutki*, supra, 75 Conn. App. 33 n.3.

In finding for the plaintiffs and piercing the corporate veil, the court in *Zaist* considered the following factors: (1) O caused the creation of both companies; (2) after incorporation, O had completely dominated and controlled not only them but his other corporate creations; (3) all shared the same office; (4) all the work performed by the plaintiffs went into property which, after being juggled about, came to rest in O or O Co.; (5) there was a lack of formal corporate action by the directors or stockholders of the corporations; (6) E. Co. had no sufficient funds of its own and acquired no funds for the work on its own initiative; (7) E Co. had no proprietary interest in the property on which the work was done and apparently gained nothing from whatever part it played in the transaction; and (8) E Co. was

used by O for the benefit of O and O Co. *Zaist* v. *Olson*, supra, 154 Conn. 576-77.

The Supreme Court cautioned: "We do not wish to be understood to countenance, by anything we have said here, the imposition of the legitimate indebtedness of a corporation upon a majority stockholder in derogation of his legal immunity merely because of the corporate control inherent in his stock ownership." *Zaist* v. *Olson*, supra, 154 Conn. 577-78.

(1)

Veil Piercing Applicable

A review of the pertinent caselaw reveals a number of different factual scenarios where veil piercing was found applicable. In *Saphir* v. *Neustadt*, 177 Conn. 191, 209-12, 413 A.2d 843 (1979), the Supreme Court found no error in the referee's conclusion that the defendant Candlewood Lake Estates Service Corporation (C Co.) was a corporation in name only and that it operated as the instrumentality of the defendant Egon Neustadt (N) subject to his sole control, and in the imposition of liability on both C Co. and N. In that case, the plaintiff home owners sought damages and equitable relief from the defendant individual (N) and company (C Co.) relating to the failure to properly construct and maintain roads in a development. Id., 194-96. The court concluded that N could properly have been held liable, and the corporate structure of C Co. disregarded, under either the instrumentality or identity rule. Id., 210. "The record before us reasonably supports a conclusion that [C Co.] was a corporation in name only and that it was operated as the instrumentality or alter ego of [N], subject to the

sole control of [N]; as such, [C Co.]'s activity was not indicative of corporate activity, but was symptomatic of the business operations of an individual." Id., 210-11.

In finding support for piercing the corporate veil, the court considered the following factors: (1) N was the sole shareholder of C Co.; (2) N was the president of C Co.; (3) N held the only proprietary interest in C Co.; (4) no minutes were kept of the meetings of C Co.'s directors; (5) no records existed of annual elections of C. Co.; (6) other officers of C. Co. existed solely to accommodate N; (7) N solely directed C. Co.'s affairs; (8) only N could deal with corporate funds; and (9) C Co. had never filed a business tax return. Id., 211.

The Supreme Court held: "In view of those facts the court could reasonably conclude that [N] completely dominated the corporation to the point where [C Co.] had no separate existence, and that such control was used for the purpose of diverting [N]'s 'positive legal duty' . . . [and] there existed a unity of interest and ownership between [C Co.] and [N] such that the purposes of justice would be served by disregarding the shield of [C Co.]'s corporate structure." Id.

The Supreme Court again cautioned: "We do not wish to be understood to countenance, by anything we have said here, the imposition of the legitimate indebtedness of a corporation upon a majority stockholder in derogation of his legal immunity merely because of the corporate control inherent in his stock ownership. To do so would be to act in opposition to the public policy of this state as expressed in legislation concerning the formulation and regulation of corporations." Id., 212.

In *Toshiba America Medical Systems, Inc.* v. *Mobile Medical Systems, Inc.*, 53 Conn. App. 484, 730 A.2d 1219, cert. denied, 249 Conn. 930, 733 A.2d 851 (1999), the Appellate Court affirmed the trial court's piercing of the corporate veil. There, the plaintiff brought a breach of contract action against a corporation and its sole stockholder. Id., 486-87. The trial court had concluded from the intermingling of funds and monetary exchanges between the corporation and the sole stockholder that the company was the alter ego of the stockholder. Id., 488. The court found sufficient evidence to pierce the corporate veil under both the instrumentality rule and the identity rule. Id., 489.

The court considered the following facts in applying the instrumentality rule: (1) the stockholder had received lease payments from third parties for products manufactured by the company from equipment purchased from the plaintiff; (2) the stockholder transferred over a millions dollars in lease payments from the defendant company to another company owned by the stockholder; (3) after its incorporation, the defendant corporation failed to hold any corporate meetings to approve the transfers, file any tax returns, or file any corporation documentation with the secretary of state; and (4) the defendant corporation had no employees. Id., 490.

In rejecting the defendants' argument that "the trial court improperly pierced the corporate veil because it did not find that the defendants' breaches of contracts rose to the level of deceptive, unethical or immoral acts," the Appellate Court held that "[t]he instrumentality rule merely requires the trial court to find that the defendants committed an unjust act in contravention of the plaintiff's legal

rights. . . . When the statutory privilege of doing business in the corporate form is employed as a cloak for the evasion of obligations, as a mask behind which to do injustice, or invoked to subvert equity, the separate personality of the corporation will be disregarded." (Citations omitted; internal quotation marks omitted.) Id., 491-92.

In applying the identity rule, the court considered the following facts: (1) defendant company operated from the same premises of the other company owned by the shareholder; (2) the defendant company had no employees and no equipment or property other that an automobile for the stockholder's use; (3) the stockholder used the defendant corporation's funds to pay his federal personal income tax and permitted his son to write checks on the corporate account; and (4) the defendant corporation existed as a shell that permitted the stockholder to make unsupported withdrawals and payments to the other corporation owned by the stockholder. Id., 490-91.

In rejecting the defendants' claim that "that the trial court improperly imposed liability on him as the sole shareholder on the basis of the payments made by [the defendant corporation] to [the other corporation], a corporation that is not a party to this lawsuit," the Appellate Court held that "[t]he identity rule . . . applies to the situation . . . where the facts demonstrate that [the stockholder] was the common owner and officer of both [corporations] and there was a failure to observe corporate formalities between the two entities." Id., 492. The court further disagreed that the other corporation "had to be a party to the present

litigation in order to pierce [the defendant corporation's] corporate veil to impose liability on the [stockholder.]" Id., 493.

In *Davenport* v. *Quinn*, 53 Conn. App. 282, 730 A.2d 1184 (1999), the Appellate Court found that the trial court had properly allowed the plaintiff to pierce the corporate veil. There, the plaintiff sought to satisfy a default judgment, claiming that the defendant sole shareholder/officer/director was the alter ego of the defendant corporation. The defendant individual was also the sole shareholder/officer/director of another company as well as the owner of a sole proprietorship. Id., 295. The trial court employed both the instrumentality and identity rules to determine that the plaintiff could successfully pierce the corporate veil. Id., 301.

The Appellate Court determined that all three prongs of the instrumentality rule were satisfied. Id., 302-303. As to the first prong, control, the following facts were considered: (1) the defendant individual maintained exclusive control over both companies; (2) he allowed and authorized one corporation to pay for the debts of another; (3) he controlled all financial transactions; (4) in essence, there was no separate account for each corporation; (5) if one corporation needed funds, he authorized a transfer of funds from either the other corporation or his sole proprietorship; and (6) he was fully involved in each of the business transactions of each of his entities. Id., 302.

The second prong, breach, was met by the following facts: (1) the defendant individual transferred assets out of the defendant corporation, after the plaintiff had filed his original complaint; (2) the defendant corporation had notice

of the lawsuit; (3) he continued his practice of commingling funds and removing assets out of the corporate defendant's account to pay the other corporation's expenses and his salary, even after the bar had ceased operations; and (4) the defendant corporation's account balance was less than 1 percent of the judgment against it. Id., 302.

Finally, as to the third prong, proximate cause, the following facts were dispositive: (1) the plaintiff attempted a property execution on the defendant corporation, but was unsuccessful; and (2) if the defendant corporation had sufficient funds to satisfy the judgment, the plaintiff would not have had to bring the action. Id., 302-303.

The Appellate Court determined that the identity rule was also satisfied based on the following facts: (1) the evidence showed a complete lack of corporate formality, which was approved by the defendant individual; (2) the defendant corporation paid the defendant individual's personal bills and the other corporation's bill; and (3) when the defendant corporation ceased doing business, it never dissolved, and it paid the individual defendant thousands of dollars in income. Id., 303.

In *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 149-52, the Appellate Court considered the doctrine of reverse piercing of the corporate veil. There, in 1993, the plaintiff had entered into an agreement with Mary Ann Howell (H) operating through the now defunct corporation, Mary Ann Howell Interiors, Inc. (I Co.). Id., 135. The plaintiff filed suit in Texas against H and I Co. and was awarded a default judgment in July, 1996 (Texas Judgment).

Id. In December, 1996, the plaintiff brought an action in Connecticut to enforce the Texas Judgment. Id. The plaintiff obtained a judgment in Connecticut in its favor in February, 1997, which was affirmed on appeal. Id. While these actions were pending, H and her family members formed two new limited liability companies, Mary Ann Howell Interiors and Architectural Design, LLC (D Co.), and Antiquities Associates, LLC (A Co.). Id., 135-36. In May, 1996, H contributed nearly $150,000, which she borrowed against her life insurance policies, for a 97 percent ownership interest in D Co. Id., 136. Her husband and two daughters each contributed $10 in exchange for a 1 percent ownership interest. Id. In November, 1997, D Co. contributed just over $100,000 for a 99 percent interest in A Co., and H contributed $10 for the remaining 1 percent. Id. On May 11, 1998, the plaintiff commenced a veil piercing and civil conspiracy action against H, her husband, D Co. and A Co. Id. H was general manager of both D Co. and A Co. Id., 137. D Co. and A Co. did not have any employees and operated out of a garage at the H's personal residence. Id. No rent was paid to H's husband who was owner of the residence. Id. H controlled D Co. and A Co. Id. H's family members did not participate in any significant way in the companies' operations. Id.

The Appellate Court concluded that the assets of the corporate entity were available to pay personal debts of the owner. *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 158. In reaching this conclusion, the court considered that "[a] corporation is a separate legal entity, separate and apart from its stockholders. . . . It is an elementary principle of corporate law that a

corporation and its stockholders are separate entities and that . . . corporate property is vested in the corporation and not in the owner of the corporate stock. . . . That principle also is applicable to limited liability companies and their members. . . . The assets of a corporation or limited liability company, therefore, typically are not available to creditors seeking to recover amounts owed by a stockholder or member of that corporation or limited liability company. Nonetheless, [c]ourts will . . . disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed . . . ." (Citations omitted; internal quotation marks omitted.) Id., 147.

The Appellate Court explained: "In the usual veil piercing case, a court is asked to disregard a corporate entity so as to make available the personal assets of its owners to satisfy a liability of the entity. In this case, an instance of what is known as 'reverse piercing,' the plaintiff argues the opposite, that the assets of the corporate entities should be made available to pay the personal debts of an owner. . . . Many of the reverse pierce cases . . . involve similar circumstances, that is, a creditor of an individual debtor is seeking to reach the assets of an entity controlled by that debtor. . . . We discern from these cases a growing recognition of the doctrine of reverse piercing of the corporate veil. . . . A guiding concept behind both standard and reverse veil piercing cases is the need for the court to avoid an over-rigid preoccupation with questions of structure . . . and apply the preexisting and overarching principle that liability is imposed to reach

an equitable result. . . . We consider this directive to be sensible and therefore recognize that under the appropriate circumstances, i.e., when the elements of the identity or instrumentality rule have been established, a reverse pierce is a viable remedy that a court may employ when necessary to achieve an equitable result and when unfair prejudice will not result. Id., 149-51.

The Appellate Court next reviewed the trial court's application of the instrumentality rule's three elements. Id., 152-56. In evaluating the first element, control, the following factors were considered: "(1) the absence of corporate formalities; (2) inadequate capitalization; (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes; (4) overlapping ownership, officers, directors, personnel; (5) common office space, address, phones; (6) the amount of business discretion by the allegedly dominated corporation; (7) whether the corporations dealt with each other at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of debts of the dominated corporation; and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own." Id., 152-53.

The Appellate Court found that there was evidence of dominance and control based on the following facts: third factor – use of company funds to pay personal expenses, purchase of gifts for family members, interest free loans to family members, and payoff of a loan of a family member; fourth factor – overlapping ownership, officers, directors and personnel; fifth factor – operation out of the same office space; seventh factor – lack of arm's length dealings

between companies; eighth factor – failure to treat the company as an independent profit center; and ninth factor – use of property by other of the corporations as if it were their own. Id., 153.

The court next found evidence of use of control and dominance to perpetrate a wrong, based on the following facts: (1) use of personal funds; (2) listing of relatives as officers, directors or members who had no involvement in the company, other than to sign the paperwork for its formation, and who did not make any decisions necessary to run the business and did not make any suggestions that things be done any differently; (3) the individual in question was the only party with signatory powers on the company's bank account; (4) causing an existing company to fund the start-up of a new company after an out of state was obtained and just before that judgment was recognized by the Connecticut court; (5) continued use of transferred funds as if they were her own; and (6) payment of personal expenses directly from company funds, instead of payment of a salary or providing regular cash distributions, thereby depriving the plaintiff of any means of collecting its judgment. Id., 154-55.

Finally, in finding that the last element of the instrumentality rule, proximate cause, was satisfied, the following facts were considered: (1) the individual defendant knew that the plaintiff was pursuing a claim against her, and she chose not to defend against that claim; and (2) she transferred personal assets to the company that prevented the plaintiff from securing collection of the judgment it eventually obtained. Id., 156.

The Appellate Court next reviewed the trial court's application of the identity rule. After stating the identity rule, the court noted that "[t]he identity rule primarily applies to prevent injustice in the situation where two corporate entities are, in reality, controlled as one enterprise because of the existence of common owners, officers, directors or shareholders and because of the lack of observance of corporate formalities between the two entities. . . . There must be such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal." (Citations omitted; internal quotation marks omitted.) Id., 156

In applying the identity rule, the court found that there was unity of interest based on the following factors: (1) the individual's large ownership interests in both companies; (2) "how she used her complete control of each company to manage their assets as if they were her own"; (3) the use of "company funds extensively to pay personal expenses, to make casual loans to family members and to buy gifts for family members"; (4) and that the individual "conducted the operations of the companies without any input from the other members"; (5) the lack of adherence to any corporate formalities other than some segregation of expenses for tax purposes; (6) the use of "the same checking account and credit cards for both personal and business purposes"; (7) the lack of reimbursements; (8) the fact that "regular distributions were not made to members"; (9) the lack of meetings held; (10) the fact that "neither company leased office space, but operated out of the same area of the [individual's] home" (11) the treatment of

one company as an adjunct of the other company, not as an independent entity with its own distinct interests; and (12) the fact that the individual "conducted the business of the two companies no differently from the way she conducted her personal affairs." Id., 157-58.

The Appellate Court recognized "that the separate existence of a corporate entity for liability purposes represents a public policy choice, as expressed in Connecticut's legislation governing the formulation and regulation of corporations and limited liability companies, and that the corporate or limited liability form should not be disregarded lightly." (Citations omitted; internal quotation marks omitted.) Id., 158. The court further noted "that of the many factors underlying a finding that the instrumentality or identity rule has been satisfied, no one factor or group of factors is necessarily dispositive of the inquiry. However, [w]hen the statutory privilege of doing business in the corporate [or limited liability company] form is employed as a cloak for the evasion of obligations, as a mask behind which to do injustice, or invoked to subvert equity, the separate personality of the corporation [or limited liability company] will be disregarded." (Citations omitted; internal quotation marks omitted.) Id., 158.

In *Cadle Co.* v. *Zubretsky*, Superior Court, judicial district of Hartford, Docket No. CV 04 0832477 (January 30, 2008, *Hale, J.T.R.*) (44 Conn. L. Rptr. 843), the plaintiff sought to reverse pierce the corporate veil and brought claims of fraudulent transfer and unjust enrichment. Pursuant to an assignment from Fleet Bank, the plaintiff was a creditor of John Zubretsky (John Z) based on a 1993 judgment. Id., 844. The plaintiff maintained that defendants John Z and his

wife Ann Zubretsky (Ann) engaged in a series of transactions and business decisions after the judgment entered involving the defendant Access America (Access) designed and implemented to keep John Z's creditors including the plaintiff, from collecting their judgments. Id.

The court, citing *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 149-52, reviewed the doctrine of reverse piercing of the corporate veil. "In the usual case of piercing the corporate veil a plaintiff seeks the assets of stock holders to satisfy a judgment against the corporation. In a case of reverse piercing of the corporate veil the plaintiff seeks the assets of a corporation to satisfy the liability of the owner or insider. . . . Although reverse veil piercing has not been addressed with any frequency by Connecticut Appellate Courts, the Appellate Court in *Litchfield* made it clear that reverse veil piercing is common in numerous other jurisdictions where as in the matter before the court, a creditor of an individual debtor [is] seeking to reach the assets of an entity controlled by that debtor." (Citation omitted; internal quotation marks omitted.) *Cadle Co.* v. *Zubretsky*, supra, 44 Conn. L. Rptr. 844. The court noted that "[i]n both standard and reverse veil piercing a court should avoid an over rigid preoccupation with questions of structure . . . and apply the preexisting and overreaching principle that liability is imposed to reach an equitable result." (Internal quotation marks omitted.) Id.

The court reviewed the instrumentality and identity rules. "In examining the application of each of these rules, instrumentality and identity, the court is mindful that both involve fact based determinations; that the ultimate issue of

whether corporate veil should be pierced presents a question of fact." Id., 845. The court in *Litchfield* stated that of the many factors underlining a finding that the instrumentality or identity rule has been satisfied, no one factor or group of factors is dispositive of the inquiry. Id., 846.

In *Cadle Co.*, the defendants, citing *KLM Industries, Inc.* v. *Tylutki*, supra, 75 Conn. App. 27, argued against reverse piercing based on the following facts: "that John was not an owner or shareholder of the corporation in question, although he was president; that Ann claimed to be the sole owner of the corporation and had nothing to do with the debt to Fleet which Cadle now owns and which debt was unrelated to the corporation; that the books of the corporation are kept separately from their personal books; that there was no massive cash flow from one corporation to another by John; that the corporation in *Tylutki* and in this case were created prior to the debt in each case; and that the *Tylutki* court found it significant that the Voloshins, the husband and wife who operated the corporation in that case, maintained the separate corporate existence by filing corporate tax returns, and by filing their required reports with the Secretary of the State's office." *Cadle Co.* v. *Zubretsky*, supra, 44 Conn. L. Rptr. 846.

The court found that "[t]he *Tylutki* case is clearly distinguishable by the fact that the doctrine of piercing the corporate veil and also reverse piercing of the corporate veil is an equitable doctrine. The argument that the debt was incurred subsequent to the formation of the corporation and that the corporation had existed for a substantial period of time but before and since the debt is of no

consequence whatsoever. The fact remains that a legitimate debt authorized by the Superior Court of the State of Connecticut remains unpaid by a person who has been proven capable of earning substantially more than the amount of the debt by divesting himself of any earnings of assets, not by the payment of other debts, but by refusing to accept salary or commissions and allowing them to be taken by the corporation yet managing to live well supposedly by the largesse of his wife and/or the corporation." Id.

The court in *Cadle Co.*, found that "[t]he essence of this case is that the plaintiff and his wife acted jointly and in concert to bring about the result of protecting him from the payment of his debts. For all practical purposes he was as much an owner of the corporation as his wife. He was an owner in essence. He is an equitable owner of the corporation. To any member of the public dealing with the corporation he was the owner. For all practical purposes he and his wife were the joint owners of the corporation. . . .

"This court finds that there is more than sufficient evidence of complete domination of the corporation's finances, policy and business practice so that the corporate entity as to this case had no separate mind, will or existence of its own and that this situation existed because of the joint actions and understanding of the Zubretskys acting in concert. Note, the Zubretskys' two homes, one in Wethersfield and one at the Connecticut shore, were owned in Ann's name. In the opinion of this court the only reasonable explanation for the [corporation's] failure to pay John Z., that John Z. had no bank account, that he had no real estate, no income is that it was part of an overall scheme to put essentially every

dollar of John Z.'s current and future assets and income out of the reach of his creditors. Note, John Z. was the 'face' of the corporation. Rather than pay John Z. duly earned commissions and/or a salary for his contributions to the overall running of the real estate operation the Zubretskys jointly decided to have the corporation retain these commissions, thus keeping yet more of John Z.'s earnings out of the reach of creditors. Having retained John Z.'s commissions within the corporation, the Zubretskys applied these funds towards Ann Z's salary, John Z.'s perks and benefits, John Z.'s loans, John Z.'s allowance and the assumption of the Zubretskys personal travel, meals, entertainment and household items charged to the credit card accounts yet paid entirely by the corporation. In this way the Zubretskys were able to hold John Z.'s creditors at bay yet maintain a comfortable lifestyle of two homes including a home at the Connecticut shore, luxury cars, a boat, frequent restaurant meals and regular expensive family vacations. There is no documentation of the loans and no interest paid on same. With respect of the second element of' the instrumentality rule it is the opinion of this court that the control and domination of the corporation has been used by the defendants to commit wrong. Their actions were unjust and in contravention of the plaintiff's legal right to collect its debt. It is the opinion of the court that the aforesaid control and breach of duty has ultimately caused the unjust loss complained of. Thus it is the opinion of this court that the plaintiff has proven each of the three elements of the instrumentality rule and that it also qualifies under the identity rule and has qualified for a reverse piercing of the corporate veil.

"All the evidence at trial leads to the conclusion that the Zubretskys jointly manipulated the corporation to keep John Z.'s income and assets out of the hands of his creditors including plaintiff and into their own pockets via the corporation." Id.

In *Miller* v. *Guimaraes*, 78 Conn. App. 760, 772, 829 A.2d 422 (2003), the trial court had pierced the corporate veil. There, the defendant Peter Guimaraes had treated his two companies, Guimaraes Development, Inc., and Guimaraes Construction, Inc., as if they were the same entity. Guimaraes Construction, Inc., did not have a bank account and, as a result, Guimaraes, as its president, deposited the plaintiffs' check into the account of Guimaraes Development, Inc. Guimaraes Development, Inc., had no assets in its name. Guimaraes had exercised complete domination over the policy and business of Guimaraes Construction, Inc. Id. Based on the appellate record, the Appellate Court held that the trial court's basis for its conclusion was not clearly erroneous and affirmed the trial court's determination to pierce the corporate veil. Id.

In *Connecticut. Light & Power Co.* v. *Westview Carlton Group, LLC*, 108 Conn. App. 633, 637, 950 A.2d 522 (2008), the trial court invoked the instrumentality rule to pierce the corporate veil. There, the court found that the defendant Howard S. Sousa was the sole owner, member and manager of Westview Carlton Group, LLC (Westview), which he formed for the sole purpose of owning the two buildings in question; Sousa's residence was Westview's principal place of business; Sousa was in total control of all of Westview's operations and made all the decisions involving finances, policy and business

practices; No state or federal tax returns were filed by Westview for the three tax years that Westview owned the buildings, and Sousa intentionally failed to preserve Westview's financial records so that there was inadequate documentary support for his claim that Westview was a losing venture; Sousa's control and domination of all of Westview's affairs was such that as to the obligation to the plaintiff, Westview had no separate mind, will or existence of its own. Id., 633.

The Appellate Court, citing *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 148, held: [t]here was more than ample evidence to support the court's determination that under the instrumentality test, the corporate veil should be pierced in this case. In addition to, and in support of, the numerous specific factual findings made by the trial court, there was evidence that Westview lacked an agent for service as required by General Statutes §§ 34-121 and 34-104, filed no annual reports with the secretary of the state as required by General Statutes § 34-106 and lacked any of the documentation required for a limited liability corporation, as required by General Statutes § 34-144. In addition, there was evidence that Westview failed to maintain any business records for the property, failed to file tax returns for any of the years involved and was undercapitalized. There was also evidence that Sousa commingled Westview funds for his own benefit, by transferring funds from Westview to a different entity controlled by him, namely, the Clyde Group, for purported payment of undocumented and unsubstantiated loans. Finally, there was evidence that when Westview sold the property, Sousa, not the plaintiff, Westview's creditor, was the beneficiary of the $74,000 net proceeds of the sale.

"Thus, we reject the defendants' suggestion that this was simply a case of a single shareholder being charged with a corporate debt solely because of his ownership status. There was ample evidence that Westview had no separate existence, that Sousa treated it as such and that Sousa used it to perpetrate an unjust act in contravention of the plaintiff's legal rights. The evidence in this case amply supports the court's determination that the corporate veil should be pierced." Id., 641.

(2)

Veil Piercing Inapplicable

The caselaw also reveals a number of factual scenarios where veil piercing was found not applicable. In *Vogel* v. *New Milford*, 161 Conn. 490, 290 A.2d 231 (1971), the Supreme Court concluded that the record did not support the application of the instrumentality or identity rules to permit the corporate form to be disregarded. Id., 494. In that case, the plaintiff contested the application of defendant William E. Thomas (Thomas) to the board of selectman for a change of name for his business, Bill's Garage, a sole proprietorship, to Bill's Auto Wrecking, Inc. a corporation. Id., 491. In finding error in the trial court's dismissal of the appeal, the Supreme Court emphasized the following factors: (1) the record did not support that defendant Thomas was the dominant shareholder of Bill's Auto Wrecking, Inc.; and (2) "nor is there anything to indicate that if he was, his control was being used in this case to commit a fraud or to perpetuate a dishonest or unjust act." Id., 494.

In *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 447 A.2d 406 (1982), the Supreme Court considered a situation where an "insider" attempted to pierce the corporate veil to reach an "outsider" who, personally and not through another corporate entity, exercised a great deal of control over corporate affairs. Id., 555. The court distinguished the case from "the ordinary situation in which a corporate veil is pierced by a creditor suing an individual who has used a corporation as an instrument of fraud. See *Saphir* v. *Neustadt*, supra [177 Conn. 191]; *Zaist* v. *Olson*, supra [154 Conn. 563]. Nor is this a 'reverse pierce' situation where an 'insider' is attempting to pierce the corporate veil from within the corporation." *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 555.

The court in *Angelo Tomasso, Inc.*, explained: "The concept of piercing the corporate veil is equitable in nature. . . . No hard and fast rule, however, as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case. . . . The circumstance that control is exercised merely through dominating stock ownership, of course, is not enough. . . . There must be such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal."[3] (Citations omitted; internal quotation marks omitted.) Id., 555-56.

In concluding against veil piercing, the court noted the following factors: (1) "stock ownership, while important, is not a prerequisite to piercing the corporate veil but is merely one factor to be considered in evaluating the entire

situation"; (2) "we have never required that an individual be an officer or director of the pierced corporation in order to hold him liable for the debts of the corporation"; and (3) "[i]t is clear that the key factor in any decision to disregard the separate corporate entity is the element of control or influence exercised by the individual sought to be held liable over corporate affairs." Id., 556-57.

The court held that there was insufficient evidence to pierce the corporate veil. Id., 557-58. In so holding, it explained: "Ordinarily the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice. . . . Even though the evidence, when viewed in the light most favorable to the third party plaintiffs, demonstrates that [the individual] did indeed exercise a considerable amount of control (although he was not a director, officer or shareholder) over the business affairs of [the corporation], with respect to the specific transaction attacked . . . there is insufficient evidence of [the individual's] dominance or influence such as is required to disregard the separate legal entity of the corporation.

"The specific transaction out of which the third party plaintiffs' liability arises is the signing of the plaintiffs' guarantee. There was simply no evidence presented which could show that, with respect to the signing of the guarantee, [the individual's] control was used . . . to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the third party plaintiffs'] legal rights; and . . . that the aforesaid control and breach of duty . . . proximately cause[d] the injury or unjust loss

complained of." (Citations omitted; internal quotation marks omitted.) Id., 557-58.

Under the identity rule, the court in *Angelo Tomasso, Inc.*, held that "[t]he evidence presented does not show that there was such a unity of interest and ownership that the independence of the corporation had in effect ceased or had never begun, [such that] an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise. . . . The identity rule primarily applies to prevent injustice in the situation where two corporate entities are, in reality, controlled as one enterprise because of the existence of common owners, officers, directors or shareholders and because of the lack of observance of corporate formalities between the two entities. . . . The third party plaintiffs have neither claimed nor presented evidence that [the corporation] and [another corporation], the company of which [the individual] was president, were actually one enterprise. Therefore, the identity rule cannot avail the third party plaintiffs of the relief they seek." (Citations omitted; internal quotation marks omitted.) Id., 559-60.

In *Hersey* v. *Lonrho Inc.*, 73 Conn. App. 78, 807 A.2d 1009 (2002), the trial court had concluded that the facts failed to support piercing the corporate veil. There, the plaintiff sought to recover for personal injuries suffered while a guest at a resort in the Bahamas owned and promoted by out-of-state corporations. Id., 79-80. The Appellate Court noted: "When determining whether piercing the corporate veil is proper, our Supreme Court has endorsed two tests:

the instrumentality test and the identity test." (Internal quotation marks omitted.) Id., 87. In affirming the decision of the trial court, the Appellate Court noted, among other factors, that "[e]ven 100% stock ownership and commonality of [officers and directors] are not alone sufficient to establish an alter ego relationship between two corporations," and that "there had been adherence to the corporate formalities between the defendant and its subsidiaries." (Citations omitted; internal quotation marks omitted.) Id., 88.

The Appellate Court in *KLM Industries, Inc.* v. *Tylutki*, supra, 75 Conn. App. 27, reversed a court's decision ascribing liability to an individual by piercing the corporate veil. In that case, the plaintiff brought an action against a company and its president to recover for materials furnished by the plaintiff in connection with home construction. Id., 29. In reversing the trial court's decision to pierce the corporate veil, the Appellate Court considered the following factors: (1) the president was not the sole shareholder and, in fact, held no corporate shares, the president's spouse was sole shareholder and director of the company; (2) the president exercised no more control over the company than that of any president of a closely held corporation; (3) the president and his spouse treated the company as a distinct entity as evidenced by them having informal discussions concerning company activities from time to time, the spouse consenting to corporate activities from time to time, and the company maintaining its returned checks and statements, filing and maintaining corporate tax returns, and filing its biannual report. Id., 34-35.

B

Post-Judgment Collection Efforts

(1)

Adequate Remedy at Law

The defendants, in addition to denying the plaintiffs' claims, contend that the plaintiff are not entitled to equitable relief through veil piercing because the plaintiffs have adequate remedies at law in seeking to collect on the 2001 judgment. They argue that the plaintiffs have not fully pursued normal statutory judgment collection procedures, including garnishments, attachments and executions. Although the plaintiffs have a lien on Parcel A pursuant to General Statutes § 52-380a,[4] they have not attempted to foreclose that lien. A judgment lien has not been filed on Parcel B. The plaintiffs have not realized on assets disclosed pursuant to post-judgment discovery. Nor have the plaintiffs filed a fraudulent transfer action under General Statutes § 52-552a et seq. The defendants also contend that the plaintiffs have lost an opportunity to collect tipping fees for filing activities from Gateway.

In opposition, the plaintiffs argue that no Connecticut court has ever denied a plaintiff's equitable request for veil piercing based on the failure to pursue post-judgment collection remedies. Moreover, the Farriciellis have used State Five to hide the fact that Joseph Farricielli had assets. Noting that this action was filed on August 24, 2005, the plaintiffs contend that it was reasonable to start extensive collection efforts after the Supreme Court decided Joseph Farricielli's appeal of the 2001 judgment on June 1, 2004. See *Rocque* v. *Farricielli*, 269 Conn. 187, 848 A.2d 1206 (2004). Contempt proceedings were

also pending to prevent Joseph Farricielli from interfering with remediation efforts. The plaintiffs also accuse the Farriciellis of not truthfully responding to post-judgment interrogatories served by the commissioner in the fall of 2004. They argue that the Farriciellis have greatly overestimated the value of Parcel A and B. The plaintiffs also contest the defendants' argument regarding the generation and use of tipping fees.

In seeking guidance on this issue, the parties have cited several Connecticut cases. The Supreme Court in *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 555, noted the general principal that "[o]rdinarily the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." Id., 557. In *Stocker* v. *Waterbury*, 154 Conn. 446, 226 A.2d 514 (1967), the court explained that "'[a]dequate remedy at law' means a remedy vested in the complainant, to which he may, at all times, resort, at his own option, fully and freely, without let or hindrance. . . . If the plaintiffs have an adequate remedy at law then they are not entitled to the injunction." Id., 449.

In *Connecticut. Light & Power Co.* v. *Westview Carlton Group, LLC*, supra, 108 Conn. App. 641-642, the Appellate Court held that the evidence demonstrated that the corporate veil should have been pierced. The defendants claimed on appeal that the trial court improperly concluded that the plaintiff was not obligated to mitigate its damages by pursuing the statutory remedy of a receiver of rents pursuant to General Statutes § 16-262f. Id. The Appellate

Court disagreed. Id. The court held that, under the facts of the case, the plaintiff had to make reasonable efforts. Id. There, the "plaintiff was not obligated to mitigate its damages by resorting to a rent receivership, which would have itself been expensive, time-consuming, and might well have resulted in tenants declining to pay rent at all. Furthermore, there was evidence that [the sole shareholder] misrepresented to the plaintiff that he was working on a long-term solution that would have afforded payment to the plaintiff. Instead, he sold the property without notifying the plaintiff and pocketed the net proceeds of the sale for himself." Id. 642-43.

The Appellate Court in *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 133, found that the plaintiff was not required to try an attachment before pursuing a reverse veil piercing. The court noted: "Another concern in reverse piercing cases is that they result in the bypass of normal judgment collection procedures, for example the charging of a member's interest in the limited liability company pursuant to General Statutes § 34-171. . . . In this case, however, Mary Ann Howell did not receive regular distributions but rather, paid her personal bills directly using limited liability company funds. Any attempt by the plaintiff to attach distributions, therefore, would have been fruitless." (Citation omitted.) Id., 151 n.14.

Although the defendants raise a valid concern, it is not implicated by the particular facts of this case. After the 2001 judgment was entered, the parties were occupied with the appeal and the remediation efforts. Before the Appellate Court's decision in *All Seasons Services, Inc.* v. *Guildner*, 89 Conn. App. 781,

782-83, 878 A.2d 370 (2005) (denying motion to enforce automatic stay of judgment), the law was unclear as to whether the plaintiffs were able to start collection procedures during the pendency of the appeal.

Contrary to the defendants' assertions, the plaintiffs did not make an "end run" around normal collection efforts. Under the extraordinary circumstances of this case, the plaintiffs made reasonable efforts to collect on the 2001 judgment. The evidence demonstrates that the Farriciellis attempted to use State Five to hide assets. The Farriciellis made misrepresentations in the post-judgment interrogatories. See *Connecticut. Light & Power Co.* v. *Westview Carlton Group*, LLC, supra, 108 Conn. App. 633. The defendants used corporate funds to pay thousands of dollars in personal expenses, complicating any normal collection efforts. See *Litchfield Asset Management Corp.* v. *Howell*, supra, 70 Conn. App. 133.

C

Plaintiffs' Claims

(1)

State Five

The First and Second Counts allege claims of reverse veil piercing against State Five based on the instrumentality and identity rules. The plaintiffs claim that the defendant State Five is the alter ego of Joseph Farricielli, such that State Five should be held liable for the obligations imposed by the 2001 judgment.

As previously-stated, the instrumentality rule requires: "(1) Control, not mere majority or complete stock control, but complete domination, not only of

finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." *Zaist* v. *Olson*, supra, 154 Conn. 575. The identity rule requires "that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." *Zaist* v. *Olson*, supra, 154 Conn. 576. "The instant case requires an analysis of the facts adduced at trial to determine whether or not the plaintiff[s have] fulfilled the requirements of either the instrumentality rule or the identity rule." *Cadle Co.* v. *Zubretsky*, supra, 44 Conn. L. Rptr. 846.

Contrary to the defendants' denial that State Five and Joseph Farricielli are alter egos of one another, the evidence demonstrates that the defendant State Five is the alter ego of Joseph Farricielli, such that State Five should be held liable for the obligations imposed by the 2001 judgment.

The first prong of the instrumentality rule, control, is met based on the following. During this period, Joseph and Jean Farricielli continued to make or be involved in making decisions necessary to run State Five. Joseph Farricielli

created the defendant company. Even after stock ownership was transferred to Recycling Enterprises, which was owned by Jean Farricielli and their two sons, Joseph Farricielli controlled the defendant company. Over the years, he transferred property to the defendant company for no consideration. Joseph Farricielli transferred Parcel C to the defendant company by quit claim deed. He negotiated a lease agreement for the Nextel cell tower on State Five property which, to create a fall zone, required the transfer of a parcel of property from one of the defendant corporations subject to the 2001 judgment. The defendant company then received the lease payments for the cell tower without paying anything for the property.

Joseph Farricielli negotiated the terms of LaVelle's involvement with the defendant company. After LaVelle became president of the defendant company, Joseph Farricielli continued to use office space there. Later in 2001, Joseph Farricielli negotiated the transfer of ownership of the defendant company to LaVelle. LaVelle did not pay anything for his stock ownership. The sale was not properly reflected in the defendant company's books. The transfer of ownership included a "side deal" by which LaVelle and the Farriciellis would equally split profits from the development of Parcel C as an industrial park. The sale did not rise to the level of a real sale from an economic standpoint.

During and after LaVelle's tenure, Joseph Farricelli continued to exercise power and influence over the defendant company's affairs, even though he was no longer an officer or director. Joseph Farricielli remained involved in State Five's business transactions. He continued to deal with the old tenants and

negotiated at least one lease with a new tenant. Joseph Farricielli wrote and signed checks on State Five's account on a regular basis. He continued to direct the defendant company's accountant and bookkeeper. Joseph Farricielli maintained direct or indirect power to control the management and policies of State Five with his wife.

LaVelle was not in full control of the defendant company while he was president or owner. Under the sales agreement, he was not able to sell or mortgage any of the corporate property. He was not able to draw on State Five's line of credit. LaVelle did not pay anything for his stockholdings in the defendant company. He did not receive any income.

The sale of State Five to LaVelle did not rise to the level of a bona fide sale from an economic point of view. The seller bound the buyer from engaging in necessary or desirable transactions. Although the main asset of the company was its approximately seventeen acres of property, LaVelle was prohibited from mortgaging or selling any property to finance the development of Parcel C as an industrial park. If the seller was looking for protection, the seller could have secured a note rather than place restrictions on buyer's ability to sell and mortgage the property. The documentation for the $2.5 million sale consisted only of a few pages. The agreement called for the sale price to be paid in installments, but it was not recorded in the books. The sale was not booked as a liability. There was a lack of evidence that the transaction rose to the level of a real sale from an economic point of view.

While State Five's core business was being a landlord for commercial tenants on its property, Parcel C, it assumed substantial debts transferred from 2001 judgment corporate defendants. These debts had nothing to do with State Five's core business. State Five's financial situation worsened dramatically after the 2001 judgment was entered. State Five assumed more and more debt personally guaranteed by the Farriciellis. The debts were assumed with insufficient assets. The defendant company was not adequately capitalized; it had insufficient funds to pay the assumed debt. State Five paid the debts of Joseph Farricielli's other companies that were liable for the 2001 judgment.

State Five was used to pay personal expenses of Joseph and Jean Farricielli and used to make interest-free loans to family members. Funds were put in and taken out of State Five for personal rather than corporate purposes. There was an absence of corporate formalities. The defendant company was not treated as an independent profit center. State Five's account was treated as a personal account. State Five had no full time employees. State Five paid the debts of other corporations. The corporate defendants that were subject to the 2001 judgment and State Five did not deal with each other at arm's length as evidenced by the transfer of property for the cell tower lease. For all of these reasons, the first prong of the instrumentality rule, control, is met.

The second prong of the instrumentality rule, that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights, is satisfied based on the following. A few

months after the 2001 judgment was entered, Joseph Farricielli negotiated the transfer of State Five to LaVelle. Joseph Farricielli and his companies did not have sufficient funds or assets to satisfy the 2001 judgment, yet financial resources were transferred to the defendant company. The defendant company's funds were increasingly commingled with the Farriciellis' personal funds, and State Five assets were diverted for personal use. Joseph Farricielli used his direct or indirect control or influence over State Five to pay personal expenses, while he avoided satisfying the obligations of the 2001 judgment. In addition, State Five paid the property taxes of one of the corporate defendants that were subject to the 2001 judgment. State Five paid Joseph Farricielli's personal expenses, including attorneys' fees, when he was no longer an officer or director. Joseph Farricielli's direct and indirect control or influence over the defendant company was used to avoid funding the obligations under the 2001 judgment. Joseph Farricielli committed an unjust act by using the defendant company to evade satisfying the 2001 judgment. Accordingly, the second prong of the instrumentality rule is satisfied.

The third prong of the instrumentality rule, proximate cause, is met based on the following. Joseph Farricielli and the corporate defendants have not complied with the 2001 judgment; specifically, they have not funded the closure of the Tire Pond or the Q-Park landfill, nor have they paid the assessed penalties. Joseph Farricielli's direct or indirect control or influence over State Five was used to avoid funding the obligations under the 2001 judgment, including the obligation to pay the civil penalties assessed. Joseph Farricielli was

responsible for transferring assets and funds out of the 2001 judgment corporate defendants, thereby depriving the plaintiffs of means to collect the 2001 judgment. Joseph Farricielli commingled his personal funds with the defendant company to evade the 2001 judgment.

The plaintiffs attempted property executions, but they have not been able to satisfy the 2001 judgment. They have been deprived of the means of collecting the 2001 judgment. The actions of Joseph Farricielli were a substantial factor in the failure to satisfy the 2001 judgment and were the proximate cause of the plaintiffs' loss. As a result, Joseph Farricielli and the other defendants to the 2001 judgment have not funded the obligations under the Judgment and have not paid the civil penalties.

Under the instrumentality rule, there is sufficient evidence of Joseph Farricielli's control or influence over State Five such as is required to disregard the separate legal identity of the corporation. During the period in question, State Five had no separate mind, will or existence of its own; it was merely a business conduit for the Farriciellis.

The evidence also demonstrates that the identity rule's requirement, unity of interest and ownership, is met based on the following facts. There was a unity of interest and ownership between Joseph Farricielli and State Five. Joseph Farricielli created the defendant corporation. He transferred ownership to Recycling Enterprises, which was owned by his wife and his two sons. Over the years, he transferred property and assets to the defendant company, including

Parcel C, without consideration. He was the president of the defendant company for over thirty years.

During and after LaVelle's tenure, Joseph Farricielli was intimately involved in the business of State Five. Joseph Farricielli continued to write checks on State Five's account, even though he was no longer an officer or director or on the signature card. He dealt with old tenants and negotiated a lease with at least one new tenant. He continued to direct the defendant company's accountant and bookkeeper. He used State Five's office space.

Joseph Farricielli did not treat State Five as a distinct entity. Personal and business funds were commingled. Corporate funds were used to pay personal expenses. The defendant company assumed thousands of dollars of debt that Joseph and Jean Farricielli had personally guaranteed. The debt was assumed with insufficient assets and had nothing to do with the core business of State Five. The Farriciellis' personal assets were used to fund the defendant company. Company funds were used extensively to pay personal expenses. State Five paid thousands of dollars of Joseph and Jean Farricielli's personal expenses, including his legal bills relating to the 2001 judgment. Joseph Farricielli made purchases on the corporate credit card. The defendant company was not fully reimbursed for the payment of personal expenses. Interest-free loans were made to family members. There was a lack of corporate formalities, including Joseph Farricielli being able to write checks on the corporate account when he was no longer president and when LaVelle was owner. The defendant company

was not adequately capitalized. The defendant company had a lack of economic resources.

In addition, corporate formalities were not observed, and the separate corporate existence was ignored in the following ways: shareholders' or directors' meetings were not held regularly; no sharp distinction was drawn between corporate property and personal property; improper accounting was employed; transactions between the defendant company and the 2001 judgment corporate defendants were not conducted on an arm's length basis; State Five failed to receive consideration for stock transfer to LaVelle; and undocumented loans were made.

At all times relevant to this litigation, there was such a unity of interest and control among Joseph Farricielli and the defendant company that the independence of State Five had in effect ceased or never began. Joseph Farricielli, directly or indirectly, so controlled the finances, policies, and practices of State Five that "an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting" Joseph Farricielli and the defendant company to escape liability for the obligations of the 2001 judgment. See *Zaist* v. *Olson*, supra, 154 Conn. 575-76.

Under both the instrumentality and identity rules, the evidence supports the conclusion that the defendant State Five is the alter ego of Joseph Farricielli, such that State Five should be held liable for the obligations imposed by the 2001 judgment.

(2)

Jean Farricielli

The Third and Fourth Count allege claims of veil piercing against Jean Farricielli based on the instrumentality and identity rules. The plaintiffs allege that State Five is the alter ego of Jean Farricielli, and, therefore, she should be held liable for the obligations imposed by the 2001 judgment, assuming the corporate veil of State Five is first pierced, imposing upon State Five the obligations of the 2001 judgment.

Contrary to the defendants' denial that State Five and Jean Farricielli are alter egos of one another, the evidence demonstrates that State Five is the alter ego of Jean Farricielli, and, therefore, she should be held liable for the obligations imposed upon State Five by reverse-piercing the corporate veil. It is axiomatic that many of the factors relevant to the prior claims are relevant to these claims as well.

The first prong of the instrumentality rule, control, is met based upon the following facts. During this period, Jean and Joseph Farricielli continued to make or be involved in making decisions necessary to run State Five. Jean Farricielli maintained direct or indirect control and influence over the management, finances, policies and business practices of the defendant company before, during and after LaVelle's tenure. She continually utilized her authority over State Five regardless of her status as shareholder, director or officer. She was involved in almost all of the defendant company's business transactions. This control and influence was clearly evident in the fact that only Jean Farricielli was able to draw on the defendant company's line of credit, not LaVelle.

Jean Farricielli commingled personal and business funds. Jean Farricielli borrowed money on personal assets, put the money into State Five, then State Five paid off debt she had personally guaranteed. Jean Farricielli authorized State Five to pay the Farriciellis' personal expenses. Jean Farricielli failed to maintain corporate formalities when she used State Five to pay her personal obligations.

Jean Farricielli returned as president and majority stockholder after LaVelle left in August, 2004. Jean Farricielli had, by far, the largest ownership interest in State Five. Jean Farricielli continued to use her control and influence over State Five to pay her and Joseph Farricielli's personal expenses. She used her authority of State Five to do her bidding.

State Five was used to pay personal expenses of Jean and Joseph Farricielli and used to make interest-free loans to family members. Funds were put in and taken out of State Five for personal, rather than corporate, purposes. There was an absence of corporate formalities.

The second prong of the instrumentality rule, breach, is satisfied by the following. A few months after the 2001 judgment was entered, Jean Farricielli transferred her majority ownership of the defendant company to LaVelle for no consideration. The defendant company was required to assume thousands of dollars of debt that Jean and Joseph Farricielli had personally guaranteed. The debt was assumed with insufficient assets. State Five funds were increasingly commingled with the Farriciellis' personal funds, and State Five funds and assets were diverted for personal use. Jean Farricielli used her direct or indirect control

or influence over the defendant company to pay the Farriciellis' personal expenses, including the mortgages and taxes on the residence in Branford and Florida. State Five was used to pay these personal expenses, while Joseph Farricielli avoided satisfying the obligations of the 2001 judgment.

Jean Farricielli used her direct and indirect control or influence over State Five to help her husband and his companies evade funding the obligations under the 2001 judgment. Jean Farricielli committed an unjust act by using the defendant company to evade satisfying the 2001 judgment.

The third prong of the instrumentality rule, proximate cause, is satisfied by the following. Joseph Farricielli and the corporate defendants have not complied with the 2001 judgment; specifically, they have not funded the closure of the Tire Pond or the Q-Park landfill, nor have they paid the assessed penalties. Jean Farricielli's direct or indirect control or influence over State Five was used to assist her husband to evade satisfying the obligations under the 2001 judgment, including the obligation to pay the civil penalties assessed. Jean Farricielli participated in transferring assets and funds out of the 2001 judgment corporate defendants, thereby depriving the plaintiffs of means to collect the 2001 judgment. Jean Farricielli was responsible for commingled personal funds with the defendant company to evade the 2001 judgment.

The plaintiffs attempted property executions, but they have not been able to satisfy the 2001 judgment. They have been deprived of the means of collecting the 2001 judgment. The actions of Jean Farricielli were a substantial factor in the failure to satisfy the 2001 judgment and were the proximate cause of

the plaintiffs' loss. As a result, Joseph Farricielli and the other defendants to the 2001 judgment have not funded the obligations under the judgment and have not paid the civil penalties.

Under the instrumentality rule, there is sufficient evidence of Jean Farricielli's control or influence over State Five such as is required to disregard the separate legal identity of the corporation. During the period in question, State Five had no separate mind, will or existence of its own; it was merely a business conduit for the Farriciellis:

The evidence also demonstrates that the identity rule's requirement, unity of interest and ownership, is met based on the following facts: There was a unity of interest and ownership between Jean Farricielli and State Five. Jean Farricielli is the majority shareholder of Recycling Enterprises, which has owned the defendant company except for the period of LaVelle's involvement.

During and after LaVelle's tenure, Jean Farricielli was intimately involved in the business of the defendant company. She wrote numerous checks on State Five's account. She used office space. Jean Farricielli did not treat State Five as a distinct entity. Personal and business funds were commingled. Corporate funds were used to pay personal expenses. The defendant company assumed thousands of dollars of debt that Jean and Joseph Farricielli had personally guaranteed. The debt was assumed with insufficient assets and had nothing to do with the core business of State Five. The Farriciellis' personal assets were used to fund the defendant company. Company funds were used extensively to pay personal expenses. State Five paid thousands of dollars of Jean and

Joseph Farricielli's personal expenses, including the mortgages on the family residences and Joseph Farricielli's legal bills relating to the 2001 judgment. The defendant company was not fully reimbursed for the payment of personal expenses. Interest-free loans were made to family members. Jean Farricielli used State Five to pay her personal expenses. Jean Farricielli made unsupported withdrawals from and payments to State Five's account. The defendant company was not adequately capitalized to pay these debts and personal expenses. State Five lacked economic resources.

In addition, corporate formalities were not observed, and the separate corporate existence was ignored in the following ways: Shareholders' or directors' meetings were not held regularly; no sharp distinction was drawn between corporate property and personal property; improper accounting was employed; transactions between the defendant company and the 2001 judgment corporate defendants were not conducted on an arm's length basis; State Five failed to receive consideration for stock transfer to LaVelle; and undocumented loans were made.

At all times relevant to this litigation, there was such a unity of interest and control between Jean Farricielli and the defendant company that the independence of State Five had in effect ceased or never began. Jean Farricielli, directly or indirectly, so controlled the finances, policies, and practices of State Five that "an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting" Jean Farricielli and the defendant company, having pierced the corporate veil through her husband, to escape

liability for the obligations of the 2001 judgment. See *Zaist* v. *Olson*, supra, 154 Conn. 575-76.

Under both the instrumentality and identity rules, the evidence supports the conclusion that State Five is the alter ego of Jean Farricielli, and, therefore, she should be held liable for the obligations of the 2001 judgment, which are, as stated previously, to be imposed upon State Five by reverse-piercing the corporate veil.

D

Special Defenses

In their amended answer, dated February 12, 2008, the defendants raise four special defenses: abandonment[5]; failure to mitigate damages[6]; estoppel[7]; and "lack of clean hands."[8]

Ordinarily, a special defense is analyzed in the following way. "[A] special defense is not an independent action; rather, it is an attempt to "plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." *Valentine* v. *LaBow*, 95 Conn. App. 436, 447 n. 10, 897 A.2d 624, cert. denied, 280 Conn. 933, 909 A.2d 963 (2006). "Generally speaking, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. Practice Book § 10-50." *Almada* v. *Wausau Business Ins. Co.*, 274 Conn. 449, 456, 876 A.2d 535 (2005). Practice Book § 10-50, entitled "Denials; Special Defenses," provides: "No facts may be proved under either a general or special denial except such as show that

the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged." "Under our practice, when a defendant pleads a special defense, the burden of proof on the allegations contained therein is on the defendant." *DuBose* v. *Carabetta*, 161 Conn. 254, 262, 287 A.2d 357 (1971). "Whoever asks the court to grant judgment regarding any legal right or liability has the burden of proving the existence of the facts essential to his or her claim or defense." C. Tait & E. Prescott, Tait's Handbook of Connecticut Evidence (4th Ed. 2008) § 3.3.1, p. 114.

"Piercing the corporate veil is not a cause of action; it is an equitable remedy. Strictly speaking, then, it may be wrong to speak of 'defenses' to an action to pierce the corporate veil. The best 'defense' is simply that the doctrine is inapplicable on the facts of the case and this is primarily a matter of ascertaining the plaintiff's theory and negating the plaintiff's allegations." 45 Am. Jur. 3d, Proof of Facts § 16 (1998).

Under common law, "[a]bandonment is a question of fact. . . . It implies a voluntary and intentional renunciation, but the intent may be inferred as a fact from the surrounding circumstances." (Citation omitted.) *Pizzuto* v. *Newington*, 174 Conn. 282, 285, 386 A.2d 238 (1978). See also, *State* v. *Zindros*, 189 Conn. 228, 240 (1983), cert denied, 465 U.S. 1012, 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984), and *Stankiewicz* v. *Hawkes*, 33 Conn. Sup. 732, 369 A.2d 253 (App. Sess., Super. Ct., 1976).

Ordinarily, a party receiving a damage award has a duty to make reasonable efforts to mitigate damages. See *Cweklinsky* v. *Mobile Chemical Co.*, 267 Conn. 210, 223, 837 A.2d 759 (2004). "Although . . . failure to mitigate damages is not one of the enumerated defenses listed in [Practice Book] § 10-50, Superior Court cases have approved the use of a special defense to plead this claim. . . .

Moreover, by allowing the failure to mitigate damages to be pled as a special defense, it is clear that the defendant bears the burden of proof on this issue." (Citations omitted.) *Profitec, Inc.* v. *FKI Industries, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV 99 0427490 (November 24, 2000, *Devlin, J.*) (28 Conn. L. Rptr. 619, 620).

"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse. . . . Its two essential elements are that one party must do or say something which is intended or calculated to induce another to believe in the existence of certain facts to act on that belief, and that the other party, influenced thereby, must change his position or do some act to his injury which he otherwise would not have done." (Citations omitted; internal quotation marks omitted.) *Bozzi* v. *Bozzi*, 177 Conn. 232, 241-42, 413 A.2d 834 (1979). "Estoppel rests on the misleading conduct of one party to the

prejudice of the other." *W.* v. *W.*, 248 Conn. 487, 496, 728 A.2d 1076 (1999); *Remkiewicz* v. *Remkiewicz*, 180 Conn. 114, 119, 429 A.2d 833 (1980).

The clean hands doctrine is "[t]he principle that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith. Such a party is described as having 'unclean hands.'" Black's Law Dictionary (8th Ed. 2004). In evaluating the issue of clean hands, the court must consider "the equitable maxim that one who seeks to show that he is entitled to the benefit of equity must demonstrate that he comes to court with 'clean hands.'" *Cohen* v. *Cohen*, 182 Conn. 193, 201, 438 A.2d 55 (1980). The clean hands doctrine "is a legal euphemism which expresses the principle that where a party comes into equity for relief he must show his conduct has been fair, equitable and honest as to the particular controversy in issue." *Collens* v. *New Canaan Water Co.*, 155 Conn. 477, 492, 234 A.2d 825 (1967). "The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." *Polverari* v. *Peatt*, 29 Conn. App. 191, 202, 614 A.2d 484, cert. denied, 224 Conn. 913, 617 A.2d 166 (1992). "Application of the doctrine of unclean hands rests within the sound discretion of the trial court. . . . The doctrine generally should not be employed to insulate the party who asserts it from the consequences of his own wrongdoing." (Citations omitted; internal quotation marks omitted.) *A & B Auto Salvage, Inc.* v. *Zoning Board of Appeals*, 189 Conn. 573, 578, 456 A.2d 1187 (1983). The party who seeks to invoke the clean hands doctrine to bar equitable relief must show that

his opponent engaged in willful misconduct with regard to the matter in litigation. *DeCecco* v. *Beach*, 174 Conn. 29, 35, 381 A.2d 543 (1977).

The court has analyzed the defendants' special defenses to the veil piercing claims. As to abandonment, the evidence shows that the plaintiffs never renunciated any right or interest in pursuing this matter. The defendants' arguments for abandonment and failure to mitigate damages are similar to the post-judgment collection efforts arguments which were rejected by this court. The facts fail to show that the plaintiffs did anything to invoke the equitable estoppel doctrine. Contrary to the defendants' contentions, the plaintiffs' conduct was not misleading. Finally, there is no evidence that the plaintiffs acted in bad faith. The unclean hands doctrine should not be employed to insulate the defendants from the consequences of their own wrongdoing.

As previously stated, "[t]he concept of piercing the corporate veil is equitable in nature. . . . No hard and fast rule, however, as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case." *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 555-56. Based on the evidence presented, the defendants have failed to demonstrate that veil piercing is inapplicable to the facts of this case. Accordingly, the special defenses must fail.

IV

CONCLUSION AND ORDER

Based on the foregoing, defendant State Five is liable on the 2001 judgment, and defendant Jean L. Farricielli is liable on the 2001 judgment.

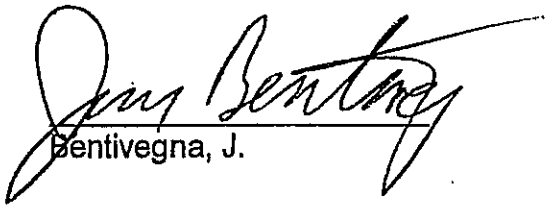
For the above-stated reasons, Judgment shall enter in favor of the plaintiffs and against the defendants as follows:

1. The prohibitory injunctions issued in the September 21, 2001 Memorandum of Decision and the October 7, 2004 Memorandum of Decision in *Rocque* v. *Farricielli*, No. HHD CV 99 0591020 S, shall be binding on State Five Industrial Park, Inc., and on Jean L. Farricielli.

2. Judgment shall enter against State Five Industrial Park, Inc., and Jean L. Farricielli, jointly and severally, in the amount of $4,164,317.22 plus interest at ten percent (10%) per annum calculated from September 21, 2001.

3. The obligations to reimburse the plaintiff commissioner of environmental protection for costs incurred, as set forth in paragraphs 6 and 7 on pages 32 and 33 of the September 21, 2001 Memorandum of Decision in *Rocque* v. *Farricielli*, No. HHD CV 99 0591020 S, shall be binding, jointly and severally, on State Five Industrial Park, Inc. and on Jean L. Farricielli.

BY THE COURT,



Bentivegna, J.

[1] "In the usual veil piercing case, a court is asked to disregard a corporate entity so as to make available the personal assets of its owners to satisfy a liability of the entity. In this case, an instance of what is known as "reverse piercing," the plaintiff argues the opposite, that the assets of the corporate entities should be made available to pay the personal debts of an owner." *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 149, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002). "The fact pattern before us has been more specifically described as 'outsider reverse piercing,' in that an outside third party pursuing a claim against a corporate insider is attempting to have the corporate entity disregarded. Conversely, in an 'insider reverse piercing' claim, a

corporate insider attempts to have the corporate entity disregarded." Id., 149 n.13, citing G. Crespi, "The Reverse Pierce Doctrine: Applying Appropriate Standards," 16 J. Corp. L. 33, 37 (1990).

[2] "The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties . . . ." (Internal quotation marks omitted.) *Cavolck* v. *DeSimone*, 88 Conn. App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005).

"It is well established that in cases tried before courts, trial judges are the sole arbiters of the credibility of witnesses and it is they who determine the weight to be given specific testimony. . . . It is the quintessential function of the fact finder to reject or accept certain evidence . . . ." (Internal quotation marks omitted.) *In re Antonio M.*, 56 Conn. App. 534, 540, 744 A.2d 915 (2000). "The sifting and weighing of evidence is peculiarly the function of the trier [of fact]. . . . [N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony. . . . The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Citation omitted; internal quotation marks omitted.) *Smith* v. *Smith*, 183 Conn. 121, 123, 438 A.2d 842 (1981). "That determination of credibility is a function of the trial court." *Heritage Square, LLC* v. *Eoanou*, 61 Conn. App. 329, 333, 764 A.2d 199 (2001).

"[T]he trier is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the trier's exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The trier of fact may accept or reject the testimony of any witness. . . . The trier can, as well, decide what — all, none, or some — of a witness' testimony to accept or reject." (Citations omitted; internal quotation marks omitted.) *State* v. *Osborn*, 41 Conn. App. 287, 291, 676 A.2d 399 (1996).

The trial court's function as the fact finder "is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *In re Christine F.*, 6 Conn. App. 360, 366, 505 A.2d 734, cert. denied, 199 Conn. 808, 508 A.2d 770 (1986).

"[T]riers of fact must often rely on circumstantial evidence and draw inferences from it. . . . Proof of a material fact by inference need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact." (Citations omitted; internal quotation marks omitted.) *Coville* v. *Liberty Mutual Ins. Co.*, 57 Conn. App. 275, 285, 748 A.2d 875 (2000).

"While a plaintiff is entitled to every favorable inference that may be legitimately drawn from the evidence, and has the same right to submit a weak case as a

strong one, the plaintiff must still sustain the burden of proof on the contested issues in the complaint and the defendant need not present any evidence to contradict it. . . . The general burden of proof in civil actions is on the plaintiff, who must prove all the essential allegations of the complaint." (Citation omitted; internal quotation marks omitted.) *Gulycz* v. *Stop & Shop Cos.*, 29 Conn. App. 519, 523, 615 A.2d 1087, cert. denied, 224 Conn. 923, 618 A.2d 527 (1992), citing *Lukas* v. *New Haven*, 184 Conn. 205, 211, 439 A.2d 949 (1981).

The standard of proof, a fair preponderance of the evidence, is "properly defined as the better evidence, the evidence having the greater weight, the more convincing force in your mind." (Internal quotation marks omitted.) *Cross* v. *Huttenlocher*, 185 Conn. 390, 394, 440 A.2d 952 (1981).

[3] "The circumstances which have been considered significant in an action to disregard the corporate entity have rarely been articulated with any clarity. Perhaps this is true because the circumstances necessarily vary according to the facts of the particular case. Therefore, each case in which the issue is raised should be regarded as sui generis, to be decided in accordance with its own underlying facts. Since the issue is thus one of fact, its resolution is particularly within the province of the trial court and such resolution will be regarded as presumptively correct and will be left undisturbed on appeal unless it is clearly erroneous. (Footnotes omitted.) 1 Fletcher, Cyc. Corp. (Perm. Ed. 1981 Sup.) 41.3, p. 38." *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 556 n.7.

[4] General Statutes § 52-380a provides in relevant part: "(a) A judgment lien, securing the unpaid amount of any money judgment, including interest and costs, may be placed on any real property by recording, in the town clerk's office in the town where the real property lies, a judgment lien certificate . . . .

"(b) From the time of the recording of the judgment lien certificate, the money judgment shall be a lien on the judgment debtor's interest in the real property described. . . .

"(c) A judgment lien on real property may be foreclosed or redeemed in the same manner as mortgages on the same property. . . ."

5 As to abandonment, the defendants allege the following. "1.The plaintiffs are seeking to enforce a 2001 Judgment against the defendants based solely on corporate veil-piercing theories. 2. The plaintiffs have been aware of the facts and circumstances that they rely on to support their veil-piercing claims in this action for many years. 3. The plaintiffs' delay in bringing this action against the defendants was unreasonable. 4. The plaintiffs' unreasonable delay in asserting their rights in this action amounts to a voluntary and intentional relinquishment of those rights. 5. The plaintiffs have lost their right to assert claims against the defendants, and are therefore barred from asserting the same, based on the doctrine of abandonment." Amended Answer, dated February 12, 2008.

[6] As to failure to mitigate damages, the defendants claim the following. "1. The plaintiffs in this action were the plaintiffs in an action entitled *Arthur J. Rocque, Jr., Commissioner of Environmental Protection, et al* v. *Joseph J. Farricielli, et al*, HHD CV 99-0591020 S. 2. On September 21, 2001, the Court (Hale, J.) entered judgment (the "2001 Judgment") in favor of the *Rocque* plaintiffs against Mr. Farricielli and the other defendants (the "*Rocque* defendants"). 3. The 2001 Judgment required the *Rocque* defendants to perform environmental remediation to close certain parcels of land referred to as the "Tire Pond," including stabilization of an embankment along the Quinnipiac River. The 2001 Judgment also required the *Rocque* defendants to post a $1,000,000 bond to cover the remediation work. The 2001 Judgment further imposed a civil penalty in favor of the plaintiff Commissioner in the amount of $2,336,880 and a civil penalty in favor of the plaintiff Town of Hamden in the amount of $1,416,910 against the *Rocque* defendants. 4. Prior to September 20, 2007, the *Rocque* defendants had not performed, in whole or in part, the terms of the 2001 Judgment requiring said defendants to post the bond, stabilize the embankment, remediate the Tire Pond, or pay the civil penalties. 5. On September 20, 2007, the Commissioner of Environmental Protection issued an Authorization to Waterfront Enterprises, Inc., d/b/a Gateway Terminal ("Gateway") to close the Tire Pond in accordance with the Tire Pond Closure Plan, which plan would fulfill the obligations of the *Rocque* defendants in closing the Tire Pond and stabilizing the embankment. 6. On or about September 20, 2007, the *Rocque* defendants negotiated an agreement with Gateway pursuant to which Gateway would perform the obligation of the *Rocque* defendants for the closure of the Tire Pond and the stabilization of the embankment. Pursuant to said agreement, Gateway agreed to pay $4 for every ton of materials that Gateway delivered to the Tire Pond and fill the same and to spread on the surrounding land. 7. The plaintiff Commissioner of the Department of Environmental Protection and the plaintiff Town of Hamden in the instant action agreed to allow the *Rocque* defendants to utilize Gateway as aforesaid and the plaintiffs established with the Superior Court of the State of Connecticut at the Hartford Judicial District an account to allow the Court to accept funds paid by Gateway to be used to fund the obligation of the *Rocque* defendants under the 2001 Judgment. The plaintiffs herein further agreed that the *Rocque* defendants would have no liability for the materials managed or placed at the Tire Pond pursuant to the Commissioner's authorization to allow Gateway to fulfill the obligations of the *Rocque* defendants under the 2001 Judgment. 8. On or about October 3, 2007, the plaintiffs herein, the *Rocque* defendants and the defendant State Five Industrial Park, Inc. among others, entered into an agreement, which was issued as an Order in the 2001 Judgment entitled First Supplementary Post-Judgment Order on Consent, which was adopted by the Court (Sheldon, J.) as a modification of the 2001 Judgment. A copy of said Order is attached hereto as Exhibit A and incorporated herein. Said Order authorized Gateway to perform the activities referenced therein and stated above. 9. Gateway has been performing its obligations and delivering materials to the Tire Pond for many months. Gateway has further tendered $600,000 to the Commissioner of Environmental Protection pursuant to the filling effort, which

sums have been deposited into the Court. Additionally, Gateway has paid $400,000 to the Department of Environmental Protection against the $1,000,000 bond that is the obligation of the *Rocque* defendants. 10. On or about February 8, 2008, the plaintiff Commissioner advised Gateway that Gateway will no longer be authorized to supply any further fill materials to the Tire Pond after Gateway completes the initial 400,000 ton delivery that is currently in process. The Commissioner advised Gateway of this fact despite the fact that the Commissioner has already tested and approved as much as 800,000 tons of material, and possibly 1,000,000 tons of material proposed by Gateway to deliver to the Tire Pond as authorized and approved by the Commissioner under the Closure Plan. 11. As a result of the actions of the Commissioner terminating Gateway's authority to deliver up to 1,000,000 tons of material to the Tire Pond in accordance with the approved Closure Plan, the Commissioner has prevented the *Rocque* defendants from receiving the full benefit of $4,000,000, which sums were to be used to fully fulfill the $1,000,000 bond obligations and the vast majority of the civil penalty imposed upon the *Rocque* defendants, which the plaintiffs herein seek to impose upon the instant defendants under theories of vicarious liability. 12. As a result of the aforesaid, the plaintiffs have failed to mitigate damages." Amended Answer, dated February 12, 2008.

[7] As to estoppel, the defendants allege the following.. "1-11 Paragraphs 1 through 11 of the Second Special Defense are hereby incorporated as Paragraphs 1 through 11 of this, the Third Special Defense, as if fully set forth herein. 12. As a result of the aforesaid, the plaintiffs should be estopped from imposing the full liability against the defendants, as the plaintiffs have prevented the *Rocque* defendants from substantially satisfying the 2001 Judgment, yet the plaintiffs now seek to impose the entirety of said Judgment that is remaining against the defendants herein." Amended Answer, dated February 12, 2008.

[8] As to unclean hands, the defendants claim the following: "1-11 Paragraphs 1 through 11 of the Second Special Defense are hereby incorporated as Paragraphs 1 through 11 of this, the Fourth Special Defense, as if fully set forth herein. 12. As a result of the aforesaid, the plaintiffs are barred from recovery for lack of clean hands." Amended Answer, dated February 12, 2008.