UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AVCON, INC.; VASILIOS SAITES AND NICHOLAS SAITES, Respondents.	)	OSHRC Docket Nos. 98-0755 and 98-1168
SECRETARY OF LABOR, Complainant, v. ALTOR, INC., and/or AVCON, INC., and/or VASILIOS SAITES, individually, and d/b/a ALTOR, INC., and/or AVCON, INC. and NICHOLAS SAITES, individually and d/b/a ALTOR, INC. and/or AVCON, INC., Respondents.	)	OSHRC Docket No. 99-0958
SECRETARY OF LABOR, Complainant, v. SHARON and WALTER CONSTRUCTION, INC., Respondent.	)	OSHRC Docket No. 00-1402

JOINT BRIEF OF *AMICI CURIAE* ASSOCIATED BUILDERS & CONTRACTORS, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, THE CHAMBER OF COMMERCE OF THE UNITED STATES, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION

March 24, 2004

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the § 2200.35 of the Occupational Health and Safety Review Commission's Rules of Procedure, the Associated Builders and Contractors, Inc. ("ABC"), the Associated General Contractors of America ("AGC"), the Chamber of Commerce of the United States (the "Chamber"), and the National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation") provide the following corporate disclosure statement:

> ABC, AGC, the Chamber, and NFIB Legal Foundation have no parent corporations, no subsidiary corporations, or affiliate corporations.

Respectfully submitted this 24th day of March.

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The Associated Builders and Contractors, Inc. ("ABC"), the Associated General Contractors of America ("AGC"), the Chamber of Commerce of the United States (the "Chamber"), and the National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation") respectfully submit this joint brief *amici curiae* pursuant to the Notice to Parties and Invitation to Interested *Amici Curiae* to File Supplemental Briefs issued by the Occupational Safety and Health Review Commission on January 8, 2004 (the "Notice").

INTERESTS OF THE *AMICUS CURIAE*

This brief is being filed jointly on behalf of four diverse trade associations, representing large segments of the business community, who are deeply concerned about the development of the nation's occupational safety and health laws and their effect on employers and employees.

ABC is a national trade association representing more than 23,000 construction contractors and related firms in the construction industry. ABC members perform work in all specialties within the construction field. ABC member companies share the philosophy that all construction work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC serves members in 80 chapters providing craft training, professional development, and safety training for employees and management.

AGC is the oldest and largest of the national trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, and it now represents more than 33,000 firms in 100 chapters throughout the United States. Among the association's members are more than 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 14,000 material suppliers and service providers to the construction industry. These firms engage in construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges,

tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities, and other improvements to real property. Most of these firms are small businesses and many of them are family owned. The purposes of AGC are to promote better relations between public bodies and construction contractors, to maintain high professional standards in the conduct of construction work, to combat unfair practices, and to support contractors in efforts to rectify conditions of an unsatisfactory nature. From its very inception, AGC has also taken a great deal of interest in the safety and health of construction workers. Its bylaws expressly provide that "[t]he members of [AGC] shall work to develop good relations with employees … and shall make every effort to provide safe working conditions on construction projects and to promote safe working habits by their employees." Over the last 15 years, AGC has produced over 100 videos and publications on construction safety and health. AGC regularly conducts safety training programs, and each year, it sponsors two nationwide safety award programs. In addition, AGC regularly participates in nationally significant cases pending in federal courts and agencies.

The Chamber is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the

interests of small-business owners throughout all 50 states. The approximately 600,000 members of NFIB own a wide variety of America's independent businesses from restaurants to manufacturing firms to bowling alleys.

All of the *amici curiae* participating in this joint brief represent employers that have a direct interest in the critical issues presented in these cases: Whether, and if so when, an individual should be deemed an "employer," as defined by the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "OSH Act"); whether, and if so when, the Commission may "pierce the veil" of a corporate employer, holding the company's officers or employees personally liable for a violation under the OSH Act; whether, and if so when, the Commission may extend a remedial order against a cited employer to an alter ego or successor; and, whether, and if so when, the Commission may find that a violation is repeat on the basis of either successor or alter ego liability.

While all four *amici curiae* submitting this joint brief strongly support the goals and objectives of the OSH Act, ABC, AGC, the Chamber, and NFIB believe that casting an overly broad net would have a harsh, unfair, and ultimately counterproductive result. The *amici curiae* hope and intend to help the Commission plot a well reasoned course to deal with the issues presented in these cases.

STATEMENT OF THE CASES

Pending before the Review Commission are four separate cases in which the *amici curiae* participate through a single joint brief.

One of the cases is *Altor, Inc., and/or Avcon, Inc., and/or Vasilios Saites, individually and d/b/a Altor, Inc., and/or Avcon, Inc. and Nicholas Saites, individually and d/b/a Altor, Inc., and/or Avcon, Inc.* The employer of record, Altor, Inc., was engaged in poured-in-place,

reinforced concrete construction at a sixteen story residential apartment building in Edgewater, New Jersey. Among the several willful charges in this case is one alleging that workers failed to wear protective helmets in areas where there was a possible danger from impact, falling or flying objects, or electrical shock and burns. The ALJ rejected the Secretary of Labor's argument that he should pierce the corporate veil of Altor, Inc. and Avcon, Inc. and hold the cited individuals personally liable for violations of the OSH Act. The ALJ assessed $196,000 in penalties in this matter.

Two other cases are consolidated in *Avcon, Inc.; Vasilios Saites and Nicholas Saites.*, which arose from a Hackensack, New Jersey site where an eighteen story apartment building was under construction on Prospect Avenue. The cited company was engaged in poured-in-place, reinforced concrete construction. Among the several citations issued to this company was one alleging that the company had exposed workers to the hazard of falling six or more feet. In this case, the ALJ pierced the veil of Avcon, Inc. and held Vasilios and Nicholas Saites personally liable for OSH Act violations. Penalties assessed by the ALJ here totaled $96,300.

The fourth case, *Sharon and Walter Construction Corporation, Inc.*, involves a general contracting business which performed roofing, siding, carpentry, masonry, snow plowing and painting. The workplace at issue here was a building construction site on Clark Street in Pittsfield, New Hampshire. The company received a willful and a repeat citation after an employee fell off the building. Here, the ALJ affirmed the repeat citation on the theory that the cited corporation was both the successor to, and an alter ego of, another employer that had previously violated the OSH Act. The ALJ assessed $10,750 in penalties.

ISSUES ON WHICH THE REVIEW COMMISSION SOUGHT THE VIEWS OF INTERESTED *AMICI*

In its Notice, the Commission requested supplemental briefing by the parties, as well as interested *amici,* on the following questions:

1. Does the Commission have the authority to pierce the veil of a corporation and hold individuals personally liable for violations of the OSH Act? In answering the question, parties and interested amici may wish to address § 3(5) of the Act, which defines the term "employer," and § 10(c) of the Act, which authorizes the Commission to "direct[] other appropriate relief," (in addition to affirming, modifying, and vacating a citation or proposed penalty)?

2. Does the OSH Act, with specific reference to § 10(c) of the OSH Act, empower the Commission to extend a remedial order entered against a cited employer to a successor or alter ego of the employer?

3. Does 1 U.S.C. § 5 provide a basis by which the definition of "person" in § 3(4) of the OSH Act may be interpreted to include the successor of a cited employer?

4. Can § 17(a) of the OSH Act be interpreted as authorizing successor or alter ego liability for a repeat violation, assuming the other elements necessary for such a violation are established? *See Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979)?

5. Are there policies embodied in the OSH Act that would be served, or frustrated, by piercing the corporate veil or by extending the Commission's remedial orders to successors and alter egos? How would those policies be served or frustrated by (a) piercing the corporate veil of Avcon, Inc. or Altor, Inc.; or (b) finding that Sharon and Walter Construction, Inc. is the successor or alter ego of a previously cited employer?

6. What is the relationship between successor liability and alter ego liability under the OSH Act? Is there any difference in the scope of remedial action required pursuant to findings of successorship and alter ego status?

7. To what extent does the availability of a civil action under § 17(l) of the OSH Act affect the Commission's need to consider piercing the corporate veil, successor liability, and alter ego liability?

8. To the extent the Commission has the authority to pierce the corporate veil and to extend remedial orders to an employer's successor or alter ego, under what circumstances should the Commission exercise that authority? Are those circumstances present in the above-referenced cases?

The parties and interested *amici* were instructed to discuss the relevant Commission precedent as well as any federal and state law that is viewed as controlling. In this regard, the

parties and interested *amici* were advised that they may wish to consider what relevance, if any, *United States v. Bestfoods*, 524 U.S. 51 (1998), has to the instant cases.

The *amici* submitting this joint brief, as four diverse trade associations, representing large segments of the business community, while not taking a position on whether the particular citations against the employers in these cases should be affirmed, are well prepared and qualified to go beyond the immediate concerns of the parties to these cases.

SUMMARY OF THE ARGUMENT

In these cases, the Commission is faced with critical issues for its determination. Clearly, the OSH Act permits citations only against "employers" as defined by the statute. The Secretary advocates for a broad reading of this term. However, to the extent that there is any ambiguity in the OSH Act's definition of the term "employer," her interpretation should not be afforded deference. It is the Commission that is empowered with the authority to interpret the Act. *Arcadian Corp.*, 17 BNA OSHC 1345, 1352, 1995-97 CCH OSHD ¶ 30,856, p. 42,921 (No. 93-3270, 1995), *aff'd on other grounds*, 110 F.3d 1192 (5th Cir. 1997). In determining who is an "employer," it is not appropriate to apply a common law definition based merely on "control." *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974). Moreover, as the U.S. Supreme Court made clear in *United States v. Bestfoods*, 524 U.S. 51 (1998), the definition of the term "employer" may not be read so as to disregard the corporate form unless the statute "speak[s] directly to the question . . .." *Id.* at 63.

Expanding the definition of "employer" as advocated by the Secretary would impose greater civil liability upon a broad range of persons or entities as employers, especially small businesses, and would allow the Secretary to impose criminal liability upon a wide range of individuals. The appropriate means of expanding the remedies available under the OSH Act is

through legislative reform or a change to the regulations. *See U.S. v. MYR Group, Inc.*,? F.3d ? , 2004 WL 503771 (No. 03-3250, 7th Cir. March 16, 2004).

The Commission should determine that it is appropriate to disregard the corporate form and pierce the corporate veil only under "exceptional circumstances." *See generally Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). These excepted circumstances include, at a minimum, that the entity whose veil is sought to be pierced is clearly operating as an alter ego of its owner; they do not include a situation where an entity is merely a successor. The Commission should pierce the corporate veil and find alter ego status only where it is shown, at a minimum, that corporate formalities were not followed; there was intermingling of personal and business property; and the corporation was used for personal purposes. *Eric K. Ho*, 2003 OSAHRC LEXIS 100; 20 BNA OSHC 1361, 2002 CCH OSHD #32692 (Nos. 98-1645, 98-1646, 2003). To pierce a successor's corporate veil, in the absence of any finding of an alter ego relationship, would create a manifestly unjust extension of corporate law that is not warranted by the equitable doctrine of successor liability.

The Secretary's concerns over enforcement of the OSH Act against shell corporations or undercapitalized entities may be properly raised before the courts in an enforcement proceeding brought pursuant to Section 17(l) of the OSH Act, 29 U.S.C. § 666(l).

The Commission should conclude that a violation is repeated under § 17(a) of the Act only if, at the time of the alleged repeated violation, there is a Commission final order against the *same* employer (which does not include a successor employer) for a substantially similar violation. *See Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979) ("[a] violation is repeated under § 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the *same* employer for a substantially similar violation"). The

crux of repeated violations is the recurrence of preventable safety hazards, and the system of penalties set forth in § 17 allows for increased fines when the need arises to provide an employer with added incentive. However, "before a repeated violation may be found it is essential that the employer receive *actual notice* of the prior violation." *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978) (emphasis added) (footnote omitted). In a successorship situation, it is not the successor employer who commits the first violation. Unless the *same* employer has previously been made aware that its safety precautions are inadequate and that it violated safety requirements, there is no basis for concluding that a subsequent violation merits the added incentive of a penalty for a repeat violation.

In sum, recognizing a corporation's separate legal entity is important to encouraging entrepreneurship in this country. Small businesses, in particular, take a significant risk by the very nature of starting a new business that has no guarantee of success. In considering the issues concerning piercing the corporate veil and determining successorship liability, the Commission should not cast an overly broad net so as to create a harsh and ultimately counterproductive result. The Commission should not eliminate the important protections that the corporate structure provides for small employers which are an important sector of the nation's economy and thereby substantially increase the risks associated with starting a business.

ARGUMENT

I. THE OSH ACT STATES THAT ONLY AN "EMPLOYER" MAY BE CITED AND PERMITS INDIVIDUAL LIABILITY ONLY IF THE STATUTE SPEAKS DIRECTLY TO THE ISSUE.

A. The Secretary's Interpretation of the Term "Employer" Is Neither Supported by the OSH Act Nor Entitled to Deference.

Only an "employer" may be cited for a violation of the OSH Act. The term "employer" is defined in §§ 3(4) and (5) of the Act, 29 U.S.C. § 652(4), (5), which provides, in pertinent part:

§ 652. Definitions

For purposes of this chapter – [(1)-(3) omitted]

(4) The term "person" means one or more individuals, partnerships, associations, business trusts, legal representatives or any organized group of persons.

(5) The term "employer" means a person engaged in business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.

Unless corporate officers, shareholders, or supervisors fall within the OSH Act's definition of "employer,"[1] they cannot be held personally liable for a violation under the statute by virtue of their relationship to the corporate employer alone.[2] *U.S. v. Doig*, 950 F.2d 411 (7th Cir. 1991).

In support of her argument that § 3(5) of the OSH Act authorizes individual liability, the Secretary's Supplemental Brief in this case merely states that "an individual or corporation may be an employer." (Sec'y Supp. Supp. Brief at 2). In addition, the Secretary contends that to the extent that there is any ambiguity in the OSH Act, in light of the OSH Act's language, her

[1] The term "employer" is further defined in the regulations applicable to the coverage of employers under the Act: "Any employer employing one or more employees would be an 'employer engaged in a business affecting commerce who has employees' and, therefore, he is covered by the Act as such." 29 C.F.R. §1975.4(a).

[2] The duties of an employer and an employee are set forth in § 5(a) of the OSH Act, which states:

§ 654. Duties of employers and employees

(a) Each employer –

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational and health standards promulgated under this chapter.

interpretation of the Act is entitled to deference, citing *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991). *CF&I*, however, holds only that deference is owed to the Secretary's reasonable interpretations of the standards and regulations she promulgates. It does not address the question of deference concerning contested interpretations of the statute itself. Moreover, the Commission has held that as the entity charged with "the final administrative adjudication of the [OSH] Act," it does not owe deference to the Secretary's interpretations of the Act." *Arcadian Corp.*, 17 BNA OSHC 1345, 1352, 1995-97 CCH OSHD ¶ 30,856, p. 42,921 (No. 93-3270, 1995), *aff'd on other grounds*, 110 F.3d 1192 (5th Cir. 1997).

Thus, it is the Commission, and not the Secretary, which has statutorily ordained power to determine who is an "employer" for purposes of the OSH Act. In making this determination, the Commission should be mindful of the narrow terms of the statute. As the U.S. Supreme Court made clear in *United States v. Bestfoods*, 524 U.S. 51 (1998), the definition of the term "employer" may not be read so as to disregard the corporate form without an express statutory grant of such authority. *Id.* at 63. In order to impose individual liability under the OSH Act, the Commission must find that the statute "speak[s] directly to the question … ." *Id.*

B. A Simple Test of Control Over Worksite Conditions Will Impose an Unauthorized Risk of Individual Liability, Particularly Upon Small Employers.

As noted above, the U.S. Supreme Court's recent decision in *Bestfoods* supports the principle that the corporation as a separate legal entity may not be overlooked unless the OSH Act speaks directly to imposing individual liability. In addition, longstanding precedent states that it is inappropriate to apply a common law definition of "employer" for purposes of the OSH Act.

In *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974), the court held that properly interpreting the definition of an "employer" does not require the "uncritical wholesale adoption of the common law definition of 'master' or 'employer' determined under the so-called 'control' test … ." *Id.* at 1261. The court reasoned that the common law definition of "employer" evolved "for the purpose of determining a superior's liability to third persons for the torts of his subordinates." *Id.* Hence, "the scope of the common law definition of employer is determined by reference to the purposes of the tort law doctrine of respondeat superior and not for purposes of the [OSH Act.]" *Id.* In addition, the court noted, a common law definition of employer sheds little light on the statutory term because the states differ on the proper scope of the term in various situations, and thus there is no uniform nationwide definition. *Id.* (*citing NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-124 (1944)). The court concluded that, as a congressional enactment of nationwide application, the OSH Act requires a single consistent definition of "employer" throughout the country so that there will be uniform application of this national legislation in all states. *Id.*

The Commission should not use the same factors used to determine who was an "employee" to determine whether the definition of "employer" has been met.[3] "Employee" and "employer" are defined by the plain terms of the OSH Act. Moreover, whether an individual is

[3] While the Commission has adopted a common law "control test," it has done so for purposes of determining who is an "employee" under the OSH Act. For example, in *Froedtert Memorial Lutheran Hosp., Inc.*, 1999 WL 503823 (No. 97-1839, January 16, 2004), the Commission evaluated questions of OSH Act employment status utilizing common-law agency doctrine to determine whether a conventional master-servant relationship exists. The Commission, in applying *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992), which set forth the considerations for "determining whether a hired party is an employee under the general common law of agency," found that the weight of the evidence, in light of extensive court precedent, supported the judge's conclusion that temporary employees working as housekeepers were employees of both a hospital and the temporary help agencies that had assigned the employees to work at the hospital.

an employer is an entirely different question. Application of the common law control test to the determination of whether an individual is an "employer" – instead of the appropriate definition based on corporate structure – would make every small business owner (where the owner is always dominant),[4] subject to individual liability. Indeed, application of a mere control test could establish an entirely different set of liability principles for small businesses because control principles would have much less (or no) application to larger business entities. As a result, application of a control test would create a situation where the outcome of the analysis is largely (if not wholly) dependent upon an employer's size. In such a situation, a control test actually may have the effect of causing those persons who have the highest interests *(e.g.,* ownership of the business entity) and/or the most safety/work experience from regularly visiting the job site to enforce compliance, due to the risk of individual liability for asserting control over the way work is performed. Such a result is not in the least interests of promoting safety. Nothing in the OSH Act justifies such a result.

C. The Commission Should Not Permit Back-Door Statutory Reform Through Adjudication.

The OSH Act permits the assessment of not only civil penalties, but criminal penalties as well.[5] Criminal sanctions under the OSH Act for willfully violating the statute and causing the death of a worker are limited to "employers" under the same definition that applies to civil liability.[6] While criminal penalties are still somewhat rare, they are pursued on an ever-

[4] In a sole proprietorship and a one-shareholder entity there is always a dominant owner.

[5] Under the OSH Act's criminal provisions, an employer may be subject to fines of up to $10,000 and/or imprisonment for up to six months for willful violations causing death to an employee. 29 U.S.C. § 666(e). If the employer is convicted of a violation committed after a first conviction, it shall be subject to a fine of up to $20,000 and/or imprisonment for up to a year. *Id.*

[6] *See, e.g., U.S. v. Cusack*, 806 F. Supp. 47 (D.N.J. 1992). In this case, John Cusack, in his capacity as the President of Quality Steel, was indicted for violations under the OSH Act.

increasing basis. In addition, beginning with the 101st Congress and continuing in succeeding Congresses, legislation has been introduced seeking to strengthen OSHA's remedies, both civil and criminal, by expanding the definition of "employers" covered by the OSH Act and increasing the penalties/fines that may be imposed upon employers. *See, e.g.,* Comprehensive Occupational Safety and Health Reform Act (S. 575) (introduced by Sen. Edward M. Kennedy (D-MA) in the 104th Congress). This bill would have amended § 666 of the OSH Act by adding that employers "or any officer, management official, or supervisor having direction, management, control, or custody of any place of employment" may be liable under this section's criminal provisions. In addition, the bill would have increased the amount of the fines and jail time that can be imposed under this section.

In the instant cases, expanding the definition of "employer" would not only impose greater civil liability upon a broad range of persons or entities as employers, but would also allow the Secretary to impose criminal liability upon a wide range of individuals. The fact is, these changes would provide the Secretary with broad enforcement discretion and significant new tools in the agency's legal arsenal.[7] The appropriate means of expanding the remedies available under the OSH Act, however, is through legislative reform – a process which would

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Quality Steel contracted to erect a structural steel frame for a warehouse. OSHA charged that Quality Steel failed to install a center row of bolted bridging on steel joists 40 feet or more in length before slacking the hoisting line of the crane. As a result, Hugo Castio, a Quality Steel employee, lost his life. Cusack tried to quash the indictment by arguing that the statute applies exclusively to employers and that, in this case, the corporation, rather than Cusack, was the employer. Contrary to the holding of most prior cases that had addressed the issue, the court in *Cusack* held that where an individual's role in a corporate entity (particularly a small one) is "pervasive and total," that individual may be deemed the employer for purposes of the Act and may be subject to criminal sanctions. *Id.* at 51.

[7] These tools could be used by OSHA personnel as leverage or used against employers that OSHA determines to target – not just bad actors.

provide the benefit of allowing for discussion on the impact that such reform would have on small businessmen threatened with the prospect of being a target for jail time. In the instant cases, the Commission should not expand the OSH Act's definition of "employer" in the absence of an amendment to it.

Recently, in *U.S. v. MYR Group, Inc.*,? F.3d ? , 2004 WL 503771 (No. 03-3250, 7th Cir. March 16, 2004), the Court of Appeals for the Seventh Circuit rejected the government's attempt to expand coverage under the OSH Act by holding a parent company and its subsidiary jointly criminally responsible for training violations. In so holding, the Seventh Circuit stated, "Breathtaking vistas of both criminal and civil liability (the latter not dependent on proof that the violation was willful, 29 U.S.C. §§ 666(b), (c); *S.A. Healy Co. v. OSHRC*, 138 F.3d 686, 688 (7th Cir. 1998)), open before our eyes." *MYR Group*. The court stated that "[t]he government's attempt to stretch the statute by filing a criminal indictment is especially questionable. *Surely the proper way to proceed, if the government really thinks the statute can be stretched this far, would be to amend the regulations . . .*." *Id.*, at *2 (emphasis added). In the instant cases, the Secretary should not be permitted to circumvent the procedures required to amend the OSH Act's regulations (or the statute), as recently held by the Seventh Circuit in *MYR.*

For support that there is a remedial purpose justifying an expansive reading of the term "employer," the Secretary cites the language contained in Section 2(b) of the Act, 29 U.S.C. § 651(b), which states that it was the purpose of Congress "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." While the cases cited by the Secretary do state that a statute must be construed in light of its object and underlying policy, the facts of those cases are so different from those here that the cases are not controlling.

Furthermore, the principle for which those cases are cited is only one of many rules for statutory construction. It is also a well-established principle that the remedial purpose of the Act does not give license to disregard the plain meaning of the statute or its standards. *See Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981); *Borton, Inc. v. OSHRC*, 734 F.2d 508 (10th Cir. 1984). While it is true that the OSH Act sets the goal of "safe and healthful working conditions for working men and women," this goal is best accomplished by putting a covered "employer" on notice as to what is precisely required of it under the OSH Act. *General Elec. Co. v. OSHRC*, 583 F.2d 61, 67-68 (2nd Cir. 1978); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649-50 (5th Cir. 1976). The Secretary should not be permitted to rely on the remedial purpose of the OSH Act to exercise what amounts to the power to legislate.

II. THE COMMISSION SHOULD PIERCE THE CORPORATE VEIL ONLY WHERE CORPORATE FORMALITIES HAVE NOT BEEN FOLLOWED AND THERE ARE OTHER EXCEPTIONAL CIRCUMSTANCES.

Generally, a corporation is considered an entity separate and distinct from its owners or shareholders. *Quinn v. Butz*, 510 F.2d 743, 757 (D.C. Cir. 1975). Regarding a corporation as a legal entity with the capacity to contract, sue, and be sued is a legal fiction designed to provide incentives for business investments. *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982). Under federal law, courts defer to the fictional existence of a corporate entity unless the individuals involved have given the corporation but nominal existence, treating it predominantly as a business conduit, and the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation. *Id.* at 96.

The U.S. Supreme Court has not determined specifically whether state or federal common law should apply to "piercing the corporate veil" claims arising under federal statutes that are silent on the issue. However, the D.C. Circuit has stated that federal common law of

veil-piercing should be used when a federal interest is implicated by the decision. The Commission should likewise determine that federal common law of veil piercing should be used for determining whether an alter ego can be held liable under the OSH Act. Otherwise, the result in any particular case before the Commission will vary depending upon the state of incorporation of the employer – a result that should be avoided so that there will be uniform application of this national legislation in all states.

Applying federal common law, the U.S. Court of Appeals for the D.C. Circuit set the framework for determining whether liability should reach beyond the corporate veil in *Labadie Coal Co*. *Labadie* establishes a two-prong test to examine the individual's relationship to the corporation:

> (1) is there such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist?; and
>
> (2) if the acts are treated as those of the corporation alone, will an inequitable result follow?

Id. at 96. *See also Bufco Corp. v. NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998) (noting that this test is derived from the federal common law). The test, as applied by the D.C. Circuit, is consistent with veil piercing in other Circuits. *See, e.g., Alman v. Danin*, 801 F.2d 1, 4 (1st Cir. 1986) (examining use of corporate formalities, fraudulent intent of incorporators, and degree of injustice); *Laborers Clean-Up Contract Admin. Trust Fund, Inc. v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir. 1984) (examining formalities, fraud, and equitable concerns).

Relevant to the first question, the *Labadie* court indicated that adherence to "the relatively simple formalities of creating and maintaining a corporate entity" is an "excellent litmus" of the degree to which the controlling individuals viewed the corporation as a separate

entity. *Labadie*, 672 F.2d at 97. In assessing the degree to which separate corporate formalities have been followed, the Commission should consider the following factors:

(1) the nature of the corporate ownership and control;

(2) failure to maintain corporate minutes;

(3) substantial disregard of the formalities of the corporate form;

(4) commingling of funds and other assets of the corporation;

(5) diversion of the corporation's funds and other assets to noncorporate uses such as the personal use of the corporation's shareholders; and

(6) use of the same office or business location by the corporation and its individual shareholders.

Id. at 97.

Domination and control of the corporation by the sole or principal shareholder, who is entitled to all of the corporation's profits, does not alone make the shareholder personally liable. For example, in *International Brotherhood of Painters and Allied Trades Union v. Kracher, Inc.*, 856 F.2d 1546 (D.C. Cir. 1988), the court decisively rejected a district court attempt to impose personal liability for pension fund contributions directly on owner-operators of closely-held corporations "merely because they actively participated in running the business." *Id.* at 1550. "Limited liability is the hallmark of corporate law," the *Kracher* court explained, and went on to add, "Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in legislative history." *Id.*

Under the second prong, the court considers general issues of fairness. *Labadie*, 672 F.2d at 97. Under *Labadie*, veil-piercing is appropriate "when the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation … ." *Id.* at 96. The equities of reliance on corporate form are generally analyzed in

terms of the adequacy of a corporation's capitalization. *See Alman*, 801 F.2d at 4; *Labadie*, 672 F.2d at 99-100.

Disregard for the corporate form is appropriate only when a corporation is merely the alter ego of its owners, such that the corporation no longer has a "separate personality" apart from its owners. *Quinn*, 510 F.2d at 758. Courts apply the alter ego rule with great caution and reluctance. *See, e.g., CM Corp. v. Oberer Dev.*, 631 F.2d 536 (7th Cir. 1980) (one of the primary purposes of the corporate form is to insulate shareholders from unlimited liability; thus, the power to pierce the corporate veil should be exercised reluctantly and cautiously). In fact, many courts require exceptional circumstances before disregarding the corporate form. *See generally Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); 21 Fletcher Corp Law Adviser 6:1 (2003). Here, the Commission should likewise conclude that the corporate veil may be pierced only in such exceptional circumstances where, at a minimum, the entity whose veil is sought to be pierced is clearly operating as an alter ego of its owner.

The Commission should conclude that the required exceptional circumstances do not include a situation where an entity whose veil is sought to be pierced is merely a successor. To pierce a successor's corporate veil, in the absence of any finding of an alter ego relationship, would create a manifestly unjust extension of corporate law that is not warranted by the equitable doctrine of successor liability. Such an interpretation of the successor doctrine would penalize innocent third parties and simply stretch the equitable foundations of successor liability too far.

The Commission should pierce the corporate veil and find alter ego status only where it is shown, at a minimum, that corporate formalities were not followed; there was intermingling of personal and business property; and the corporation was used for personal purposes. In

determining whether to engage in veil piercing, the Commission should not cast an overly broad net that would have a harsh and ultimately counterproductive result.

III. THE COMMISSION SHOULD EXTEND A REMEDIAL ORDER OR A SUCCESSOR ONLY WHERE ABSOLUTELY NECESSARY TO CARRY OUT THE PURPOSES OF THE OSH ACT.

A. Neither Commission Nor NLRB Precedent Support Extending Alter Ego Liability As The Secretary Contends.

1. The Commission should not in a wholesale fashion import the NLRB standard of alter ego liability for purposes of the OSH Act.

The Secretary advocates the position that the Commission may order relief against an alter ego of an employer. (Sec'y Supp. Brief, p. 8). In support of this theory, the Secretary initially references an NLRB manual, developed for the National Labor Relations Board ("NLRB"), *NLRB Manual: An Outline of Law and Procedure – Chapter 14, Multiemployer, Single Employer, and Joint Employer Units.* (Sec'y Supp. Brief, p. 8). However, the Secretary has advanced no authority for the proposition that a definition, contained in a manual developed for an agency of the federal government charged with the enforcement of an entirely different statutory scheme, has any applicability whatsoever to the question posed by the OSH Act. Indeed, the purposes and policy considerations underlying the OSH Act and National Labor Relations Act ("NLRA") are significantly different.[8]

The Secretary further attempts to support the proposition that the Commission may order relief against an alter ego by reviewing case law under the NLRA. The cases cited by the

[8] The Secretary notes that it is axiomatic that the goal of the OSH Act is to achieve safe and healthful workplaces for all employees. (Sec'y Supp. Brief, p. 23). In contrast, the general policy considerations underlying the NLRA are to eliminate the causes of substantial obstructions to the free flow of commerce by encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. 29 U.S.C. §151.

Secretary support the general notion that an alter ego relationship exists, for NLRA purposes, where there is "substantially identical management, business purpose, operation, equipment, customers, and supervision, as well as ownership." *See, e.g., Advance Elec., Inc.,* 268 NLRB 1001, 1002 (1984), *enf'd in relevant part*, 748 F.2d 1001 (5th Cir. 1984), cert. denied, 470 U.S. 1085 (1985). Nonetheless, the Secretary offers virtually no relevant analysis of the facts of the instant cases under alter ego principles recognized under the NLRA. Further, as discussed herein, there is substantial reason to question the applicability of NLRA precedent cited by the Secretary.

2. The Commission precedent cited by the Secretary supports extending alter ego liability, if at all, only to contemporaneously existing entities.

The Secretary cites *Advance Specialty Co., Inc.,* 3 BNA OSHC 2072 1981 CCH OSHD ¶ 20,490 (No. 2279, 1976) and *C.T. Taylor Co., Inc. and Esprit Constructors, Inc.*, 20 BNA OSHC 1083, 2002 CCH OSH ¶ 32,659 (Nos. 94-3241 & 94-3327, 2003), in which the Commission recognized its authority to look beyond the corporate form. In *Advance Specialty,* the Commission found that two companies which shared a common worksite, had interrelated and integrated operations, and shared certain common officers were a single employer under the OSH Act. *Advance Specialty,* 3 BNA OSHC at 2075-2076.[9] Similarly, in *C.T. Taylor*, two affiliated companies were treated as a single employer, rather than two separate employers. In *C.T. Taylor,* a majority of the Commission also found that Taylor's general manager controlled and directed the work of Esprit's employee's at the worksite.

[9] In *Advance Specialty,* the Commission cited an earlier decision (*Home Supply Co.,* 1 BNA OSHC 1615, 1973-74 CCH OSHD ¶17,521 (No. 69, 1974)). In that case, the Commission found that three entities formed a single venture for purposes of the Act, under facts involving companies with adjacent, contemporaneous and integrated construction projects, a common superintendent and engineer and the routine transfer of employees between the projects.

The *amici* have no quarrel with the cases, noting that they involve *contemporaneously existing* companies or entities which shared a number of common elements, employees, officers, etc. Thus, the Secretary admits the cases cited in the Secretary's brief are distinguishable from the facts in *Sharon and Walter*: "The Commission *essentially* applied … [the alter ego principle] in *Advance Specialty* and *Taylor/Esprit*, *except in those cases, the corporations existed simultaneously rather than seriatim as did the businesses at issue in* Sharon and Walter Constr., Inc., Docket No. 00-1402 ... ." (Sec'y Supp. Brief, p. 9) (emphasis added).

The important distinction between the facts in *Sharon and Walter* and those in *Advance Specialty* and *Taylor/Esprit* cannot be so easily overlooked. In Sharon and Walter, there is *no* contemporaneous "other" entity sharing common elements with Sharon and Walter Construction, Inc., a fact again recognized by the Secretary: "In *Sharon and Walter*, the prior final order was issued against a prior incarnation of what is essentially the same business entity, the fictitious name business Sharon and Walter Construction." (Sec'y Supp. Brief, p. 22-23). There is no dispute that the predecessor entity, S & W, filed for bankruptcy and was dissolved in 1995. (ALJ Decision, footnote 10). Accordingly, there is and was no contemporaneous "alter ego" of Sharon and Walter Construction, Inc.

The Secretary's alter ego theory, if permitted to prevail, would indicate that alter ego status could be conferred *anytime* a business entity had a historically different form, even though the prior business entity no longer existed, had declared bankruptcy, and liquidated its assets in a sale approved by the bankruptcy court. The Commission precedent cited by the Secretary falls far short of establishing this as the rule. Indeed, the Secretary's resolution of this issue would make bankruptcy a useless effort and deny debtors the "fresh start" allowed by the Bankruptcy Act.

3. Commission should not find alter ego status unless the elements set forth in *Ho* are established.

The Secretary cites the recently decided case of *Eric K. Ho*, 2003 OSAHRC LEXIS 100; 20 BNA OSHC 1361, 2002 CCH OSHD #32692 (Nos. 98-1645, 98-1646, 2003). In *Ho*, the Commission properly recognized the principles that it should use to determine whether the alter ego doctrine applies:

> the total dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.

Id. at *17 (*citing Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635 (5th Cir. 1991) and *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986)).

It is interesting that the Secretary chooses to cite *Ho* because, in applying these principles, the Commission flatly rejected the Secretary's effort to establish that the respondent corporations were the alter ego of Ho, the individual principal shareholder and president of both corporations. *Id*. at * 22 - *26. In reaching this conclusion, the Commission noted that the mere transfer of funds from the corporate entities to a project initiated by Ho, in his individual capacity, was insufficient to find that the respondent corporations were the alter ego of Ho. *Id*. at *25. The Commission made this finding, despite the fact that it found that ". . . the casual manner in which funds were routinely transferred amongst Ho and the respondent corporations indicate[d] a *somewhat lax* attitude toward the corporate structure." *Id.* at *23 (emphasis added).

Importantly, the Commission noted Fifth Circuit precedent that "the corporate form . . . is not lightly disregarded, since limited liability is one of the principal purposes for which the law has created the corporation." *Id*. at *22 (*citing Krivo Indus. Sup. Co. v. National Distillers & Chem. Corp*., 483 F.2d 1098, 1102 (5th Cir. 1973)). The Commission found that the Secretary

failed to provide evidence regarding Ho's role in directing the day-to-day conduct of corporate operations of the respondent corporations and that, based upon the record, the Commission could not find that the corporations in question were "mere business conduits" for purposes of the controlling entity. *Id.* at *23 (citations omitted).

In the instant cases, the first question is whether corporate formalities were followed.[10] That an entity maintains elements of the same management, purpose, ownership, operation and supervision as a former corporation or other entity is of no consequence. If this were the test for alter ego status (and it is not), almost any formerly unincorporated sole proprietorship could be found to be the alter ego of a newly formed corporate entity.

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[10] In the ALJ's Decision and Order in *Sharon and Walter*, there is no discussion of several critical elements of the alter ego test enunciated in *Ho*: 1) whether corporate formalities were followed by Sharon and Walter Construction, Inc.; 2) whether there was intermingling of personal and business property; and 3) whether the corporation was used for personal purposes by any individual officers or shareholders of Sharon and Walter Construction, Inc. The only two facts which might arguably fall within the principles cited by the Commission in *Ho* is the payment of an OSHA fine out of an S & W account and the identification of S & W for a trade name (showing the initial formation date of the business entity). As noted in *Ho*, however, mere transfers of funds are insufficient to find alter ego status. Here, a single payment of an OSHA fine from an S & W account pales in comparison to the account transfers between the entities at issue in *Ho*. Further, the issue of the trade name application is not dispositive. Indeed, this single fact cannot control the determination of the alter ego issue as the Commission has correctly determined that it is the total dealings between the entities at issue which must be considered in making alter ego determinations. *Ho* at *17.

The ALJ decisions in the cases involving Avcon, Inc., Altor, Inc., Vasilios and Nicholas Saites also involve an attempt by the Secretary to establish an alter ego relationship. Here, the Secretary argues that two individuals, Vasilios and Nicholas Saites, are alter egos of viable, existing corporate entities. The Secretary's effort to establish alter ego status between the Saites and the corporate entities at issue must be founded upon factors, as recognized in *Ho*, demonstrating that there are not separate corporate personalities. Again, there is virtually no record information regarding the elements of the alter ego test set forth in *Ho* or *Labadie*. Neither the ALJ in *Avcon* nor the Secretary point to any factors suggesting that the corporations were shells, with no legitimate business purposes. There is virtually no record information regarding maintenance of corporate minutes, the filing of corporate tax returns, the maintenance of corporate records, accounts, and other legal documents. Further, there is very little discussion as to whether there is evidence of intermingling of personal and business assets or the personal use of corporate assets/facilities.

The Secretary raises concerns about collection of OSHA fines against a defunct or shell corporate entity. The Secretary's argument is based upon the claim that an inadequately capitalized corporate structure or "shell" corporation could be abandoned by incorporators, officers or shareholders with no recourse by the Secretary in terms of collecting penalties. According to the Secretary, financial penalties would have little deterrent effect if individuals could not be held accountable for payment of such penalties, following the demise of the corporate employer.

Nonetheless, the Secretary's concerns are insufficient to bypass the usual tests applied to determine whether the corporate form should be disregarded. As noted above, the Secretary has not shown in the instant cases that, under such tests, it is appropriate to pursue individual officers or employees for corporate debts. The analysis set forth in *Ho* and *Labadie* remains the proper inquiry as to whether two entities may be considered alter egos. The interpretation urged by the Secretary attacks the very reasons businesses adopt the corporate form. As recognized by the Commission, it is only after the totality of the circumstances are reviewed (including attention to whether: corporate formalities were observed and ownership of property was properly maintained, etc.) that determinations as to alter ego status may properly be made.

B. The Applicable Precedent Does Not Support Extending Successor Liability as the Secretary Contends.

The Secretary compares sections 10(c) of the OSH Act and the NLRA and concludes that the sections are "similar" in that both authorize appropriate and necessary relief to carry out the purposes of the statutes. The Secretary then concludes that it is therefore clear that the OSH Act gives the Commission the authority to apply *Golden State* successorship principles. (Sec'y Supp. Brief, p. 14). Under the principles enunciated in *Golden State,* the following factors are to be reviewed in making successorship determinations for purposes of the NLRA: (1) whether the

successor company had notice of the charge; (2) ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the successor used the same plant; (5) whether the successor uses the same or substantially the same work force; (6) whether the successor uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the successor uses the same machinery, equipment and methods of production; and (9) whether the successor produces the same product. *See, e.g., Golden State Bottling, Inc. v. NLRB*, 414 U.S. 168 (1973).

However, an important issue, not addressed in the Secretary's brief, is the significant difference between the NLRA and the OSH Act with respect to the definitions of the term "employer." Upon review of the underlying definitions of the term "employer" under both the NLRA and the OSH Act, it is clear that successorship principles under the NLRA may not be imported in a wholesale fashion for application under the OSH Act.

Under the NLRA, the term "employer" potentially includes any "person" acting as an agent of an employer. 29 U.S.C. § 152(2) (emphasis added). Indeed, under the NLRA definition, the term "employer" may include any individual, labor organization, partnership, association, corporation, legal representative, trustee, bankruptcy trustee, or receiver. 29 U.S.C. §152(1). Thus, the definition of the term "employer" under the NLRA is significantly broader than the definition of the term under the OSH Act. Recognizing the broad statutory definition of the term "employer," the NLRA's requirements have even been applied to a labor consultant retained by an employer under that definition. *See, e.g., Blankenship and Assoc., Inc. v. NLRB*, 999 F.2d 248 (7th Cir. 1993).

In contrast, section 3 of the OSH Act provides a far more limited definition of the term "employer." "The term 'employer' means a person engaged in a business affecting commerce *who has employees* … ." 29 U.S.C. §652(5) (emphasis added). The OSH Act defines the term "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. §652(4).

There is nothing in the OSH Act or the implementing regulations which purports to apply the kind of expansive definition of the term "employer" found under the express provisions of the NLRA. To the contrary, each and every definition of the term, for purposes of the OSH Act, requires the "employer" to "have" or "employ" employees.

Indeed, the Supreme Court's decision in *Bestfoods* confirms that government regulators may not ignore the corporate form, even under statutes providing for wide ranging liability (as in the case of the issues in *Bestfoods* arising under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 *et seq.*). The Secretary attempts to distinguish CERCLA as having wholly "financial" considerations in comparison to the alleged policy considerations at issue under the OSH Act (Sec'y Supp. Brief, p. 19).

However, in comparison to potential liability under CERCLA, the liability provisions of the OSH Act are considerably more limited in scope. It is interesting that the Secretary interprets the Court's holding in *Bestfoods* as being solely concerned with the interpretation of the term "person" (Sec'y Supp. Brief, p. 19). In fact, the limited definition of the term "person" under the OSH Act, compared to CERCLA's imposition of strict liability upon a wide ranging class of persons connected with the disposal of hazardous waste, demonstrates that the Court's analysis in *Bestfoods* upholding the protections of the corporate form should easily apply to issues under the

OSH Act. Finally, the Court in *Bestfoods* held that disregarding the corporate form requires an express statutory grant. *Bestfoods*, 524 U.S. at 63-64.

In holding that *Bestfoods* overruled the Second Circuit's decision in *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2nd Cir. 1996), the Second Circuit noted that section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "authorizes federal courts to fashion a body of federal law for the enforcement of [] collective bargaining agreements." *State of New York v. National Services Industries, Inc.*, 352 F.3d 682, 686 (2nd Cir. 2003) (*citing Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957)). As observed by the Second Circuit in *National Services*, "the rules that federal courts and the Supreme Court have adopted in the labor law context do not necessarily reflect general common law *but rather represent law fashioned for the purpose of enforcing section 301*." *Id.* at 685. (*citing Golden State*, 414 U.S. at 182 n.5) (emphasis added).

In view of the Court's decision in *Bestfoods* and the significant differences in the underlying definitions of the term "employer" between the NLRA and the OSH Act, strict application of the NLRA's *Golden State* successorship principles to disputes under section 17(a) of the OSH Act is not warranted, particularly in the absence of an express statutory grant in the OSH Act.

C. The Secretary's Enforcement Concerns Are to Be Addressed by the Courts.

The Secretary's concerns over enforcement of the OSH Act against shell corporations or undercapitalized entities may be properly raised before the courts in an enforcement proceeding brought pursuant to Section 17(l) of the OSH Act. 29 U.S.C. § 666(l). Moreover, as concluded by the ALJ in *Avcon* (Docket No. 99-0958), the Secretary's fear that a particular corporate employer may become defunct does *not* grant to the Commission the broad power to disregard

the corporate form. As noted by the ALJ in that case, the Secretary's attempt to disregard the corporate form is not only premature, it involves an extrajudicial act by the Commission. Any concerns of the Secretary that an employer will disintegrate, leaving the Secretary with no ability to enforce the OSH Act, are best left to the courts, which are the proper (and only) statutory vehicle for enforcing penalty payments owed under the OSH Act. The courts have the ability to make determinations about alter ego and successorship issues. Claims about alter ego status, disintegration of the corporate form, improper following of corporate formalities, intermingling of assets, and successorship are best left to the courts under the enforcement mechanism provided by the OSH Act.

IV. THE COMMISSION MAY FIND THAT A VIOLATION IS REPEAT ONLY WHERE THERE IS A FINAL ORDER AGAINST THE *SAME* EMPLOYER, NOT A SUCCESSOR.

Section 17(a) of the OSH Act provides that:

> Any employer who wilfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

29 U.S.C. § 666(a).

The issue of what constitutes a repeat violation has come before the Commission and the courts on a number of occasions. However, the issue of whether § 17(a) of the OSH Act can be interpreted as authorizing successor or alter ego liability for a repeat violation, assuming the other elements necessary for such a violation are established, appears to be a novel issue for the Commission. The Commission's precedent in *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979), indirectly answers the question. In *Potlatch*, the Commission announced the principle that "[a] violation is repeated under § 17(a) of the Act if, at the time of the alleged repeated

violation, there was a Commission final order against the *same* employer for a substantially similar violation." *Id.* at 1063 (emphasis added). *See also D & S Grading Co. v. Sec. of Labor*, 899 F.2d 1145, 1147 (11th Cir. 1990); *J.L. Foti Constr. Co. v. OSHRC*, 687 F.2d 853, 856-57 (6th Cir. 1982); *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 13337 (10th Cir. 1982); *Kent Nowlin Constr. Co. v. OSHRC*, 648 F.2d 1278, 1282 (10th Cir. 1981); *Bunge Corp. v. Sec. of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *Todd Shipyards Corp. v. Sec. of Labor*, 566 F.2d 1327, 1330-31 (9th Cir. 1977) (applying the same definition of when a violation is repeated as set forth in *Potlatch*).

While the Commission in *Potlatch* focused on whether the violations in the case were "substantially similar," the equally important language, "the same employer", should not be overlooked here since the crux of repeat violations is the recurrence of preventable safety hazards. In a successorship situation, it is not the successor employer who committed the first violation. The system of penalties contained in § 17 allows for increased fines when the need arises to provide an employer with added incentive. To effectuate this policy, as the Fourth Circuit pointed out in its decision in *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834 (4th Cir. 1978), "[B]efore a repeated violation may be found it is essential that the employer receive *actual notice* of the prior violation." *Id.* at 841 (emphasis added) (footnote omitted). Unless the *same* employer has previously been aware that its safety precautions are inadequate, there is no basis for concluding that a subsequent violation indicates the employer requires a greater than normal incentive to comply with the OSH Act.[11] *Id.* The Commission should conclude that a

[11] *See, e.g., Trinity Indus., Inc.*, 1990 OSAHRC LEXIS 251 (No. 88-2691, 1990), *aff'd on other grounds* 15 BNA OSHC 1481, *aff'd on other grounds*, 15 BNA OSHC 1481, 1992 CCH OSHD ¶ 29,582 (No. 88-2691, 1992) (*citing Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)), where, in applying the *Golden State* factors argued by the Secretary to the facts before him (involving an old and new corporate entity), the ALJ expressly declined to find a repeat violation

violation is repeated under § 17(a) of the Act only if, at the time of the alleged repeated violation, there is a Commission final order against the *same* employer (which does not include a successor employer) for a substantially similar violation.[12]

CONCLUSION

For the reasons set forth above, ABC, AGC, the Chamber, and NFIB Legal Foundation strongly urge the Commission to consider the interests of properly constituted corporations in determining the issues set forth for supplemental briefing in these cases. While all four *amici curiae* submitting this joint brief strongly support the goals and objectives of the OSH Act, the *amici* believe that casting an overly broad net on these issues concerning piercing the corporate veil and determining successorship liability would have a harsh and ultimately counterproductive result.

Recognizing a corporation's separate legal entity is important to encouraging entrepreneurship in this country. Small businesses, in particular, take risk by the very nature of starting a new business that has no guarantee of success. The Commission should not eliminate the important protections that the corporate structure provides for this important sector of the nation's economy and thereby substantially increase the risks associated with starting a business. The *amici curiae* respectfully request that the Commission plot a well reasoned course to deal with the issues presented in these cases.

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of the standard at issue even though he found that many employees (including some managers and supervisors) worked for both the old and new corporate entities where he concluded that there was not a sufficient showing of nexus between the old and new corporate entities to impose repeat penalties upon the successor based upon the earlier violation of the predecessor entity.

[12] Under this standard, under exceptional circumstances, the Commission may find a citation to be a repeated one where the cited employer is deemed to be the alter ego (thus, the same employer) pursuant to the framework set forth above in Sections II and III of the *amici's* joint brief.

Respectfully submitted this 24th day of March.

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CERTIFICATE OF SERVICE

This is to certify that on March 24, 2004, a copy of the Joint Brief of *Amici Curiae* Associated Builders & Contractors, the Associated General Contractors of America, the Chamber of Commerce of the United States, and the National Federation of Independent Business Legal Foundation was served on the following counsel of record by First Class, United States Mail as follows:

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