STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2018-CP-23-01643
Jason Tuck,	)	
Plaintiff,	)	**ORDER DENYING PLAINTIFF'S MOTION TO PIERCE THE CORPORATE VEIL**
vs.	)	
On The Mark Automotive Repair and Refinishing, LLC d/b/a On The Mark Automotive, LLC, Carolina's Best Finance Company, Inc., Southeastern Recovery & Towing, LLC, Carolina's Best Auto Sales, LLC, 858A St. Mark Road, LLC, Affordable Auto Finance, Inc., John D. Watts, III (a/k/a John D. Watts)	)	
Defendants.	)	

PROCEDURAL BACKGROUND

This action involves claims by Plaintiff Jason Tuck against his former employer, On-the-Mark Automotive Repair and Refinishing, LLC ("OTM") for breach of an employment contract and for violation of the S.C. Wage Payment Act. At the conclusion of a jury trial on these claims, the jury returned a verdict in favor of Plaintiff, and this Court entered judgment in favor of Plaintiff, and against OTM, in the amount of $301,092.00 inclusive of prejudgment interest and attorneys' fees.

Plaintiff also brought this action against the other named defendants alleging, in the case of the corporate defendants, that OTM's liability should shared by those defendants pursuant to the "single business enterprise doctrine." Plaintiff also brought suit against Defendant John D.

Watts, III ("Watts") seeking the pierce the corporate veil of OTM, or of the other entities should the Plaintiff prevail in its claims pursuant to the single business enterprise doctrine.[1]

Prior to the jury trial portion of the case, the Plaintiff and Defendants consented to have the issues of single business enterprise and veil piercing, which are equitable, severed and tried separately by this Court. Testimony was given by Plaintiff Tuck regarding these issues. The parties agreed that certain financial information of the defendant companies was necessary for a thorough analysis of the equitable issues pending before this Court. The parties agreed that, after the exchange of this financial information, Defendant Watts would testify by *de bene esse* deposition and that the parties would draft proposed findings of fact and conclusions of law accompanied by relevant exhibits and submissions. The parties agreed that any information exchanged in discovery could be submitted with the proposed finding so fact and conclusions of law.

After receipt and review of the *de bene esse* deposition of Defendant Watts and of the other submissions by the parties, this Court finds as follows;

FINDINGS OF FACT AND CONLUSIONS OF LAW

1. Single Business Enterprise / Amalgamation Doctrine

Plaintiff contends that the corporate identities of the various defendants, of whom Defendant Watts is the sole shareholder or member, should be ignored and that the whole of

[1] Those entities are: 1. Carolina's Best Finance Company, Inc. ("Carolina's Best"); 2. Carolina's Best Auto Sales, LLC (a defunct company. See footnote 8, below); 3. 828A St. Mark Rd, LLC (a real estate holding company. See footnote 8, below); 4. Affordable Auto Finance, Inc. ("Affordable Auto"); 5. Southeastern Recovery & Towing, LLC ("Southeastern").

these companies treated as one entity for liability purposes pursuant to the Single Business Enterprise doctrine. The primary contentions of the Plaintiff in this regard are as follows:

a. That Defendant Watts engaged in an integrated business of buying, selling, and financing used cars, re-possessing and selling vehicles and financing and selling repaired vehicles in such a way so as to deprive consumers of their rights under law (See Second Amended Complaint at Paragraphs 4-5, 7).

b. That Defendant Watts commingled funds and assets of the various companies for his personal benefit by putting employees of Defendant Southeastern on the payroll of Defendant OTM. (See Second Amended Complaint at Paragraph 8);

c. That Defendant Watts commingled funds and assets of the various companies for his personal benefit by having company employees perform services for him personally and then taking those expenses as company business expenses. (See Second Amended Complaint at Paragraph 8).

d. That Defendant Watts commingled funds and assets of the various companies for his personal benefit by having company employees perform services for various other companies by whom the employees were not employed, and then taking those expenses as company business expenses. (See Second Amended Complaint at Paragraphs 8-9).

e. Watts has carried out fraudulent enterprises by dominating and dictating decisions himself through common control and centralized management of accounting, commingling of employees, undocumented transfer of funds to himself and

unilaterally determining which entities incur costs and entities to whom he attributes income. (See Second Amended Complaint at Paragraph 9).

These various theories of amalgamation overlap somewhat. Items c, d, and e, above, really amount to one over-arching theory that Defendants Watts blurred corporate distinctions by sharing employees, services, and funds between the companies without proper documentation, and by taking money personally or using company employees for personal work and charging those services as business expenses. These allegations also bleed over into the claims of Plaintiff for piercing the corporate veil of the Defendant companies. For purposes of its analysis, the Court will treat issues c,d, and e as one for purposes of the single business enterprise analysis and will address issues a, b, and then c/d/e *seriatim*. This Court then will take up the issue of the piercing of the corporate veil as to Defendant Watts individually.

I. Law Governing Single Business Enterprise Theory

The South Carolina courts first recognized the "amalgamation" theory allowing separate corporate entities to be treated as one business enterprise in the case of *Kincaid v. Landing Development Corporation*, 289 S.C 89, 344 S.E.2d 869 (Ct. App. 1986). In *Kincaid*, the court found that a development company, a construction company, and a property management company should be consolidated into one entity for liability purposes where the three companies shared common ownership, a common location, and used letterhead branding indicating that it was a "development, construction, and property company."

Subsequently, this amalgamation theory was recognized, but not analyzed, in *Kennedy v. Columbia Lumber & Manufacturing Company*, 299 S.C. 335, 340-41, 384 S.E.2d 730, 734

(1989). The court in *Kennedy* stated only that, "a lender may be liable if it so amalgamated with the developer or builder so as to blur its legal distinction." *Id*.

In *Mid-South Management Co. v. Sherwood Development Corp*., 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007), the Court of Appeals found no blurring of corporate distinction sufficient to amalgamate construction and development companies despite the sharing of common ownership, common directors, a common location, and the sharing of employees.

In two related cases, the Court of Appeals found amalgamation to be appropriate where a blurring of the distinction between development and construction companies led to the risk of confusion on the part of homeowners. See, *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011); *Magnolia North Property Owners Assoc. v. Heritage Communities, Inc*., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).

In 2018, for the first time, our Supreme Court formally adopted the amalgamation doctrine, which it indicated more properly should be called the single business enterprise theory. In *Pertius v. Front Roe Restaurants, Inc*., 423 S.C.640, 817 S.E.2d 273 (2018), the court examined the jurisprudence of the fourteen of our sister states which have applied this theory and set forth with particularity the elements necessary to prove a single business enterprise. The *Pertius* court recognized that the corporate form is utilized by shareholders to limit liability and stated that "there is nothing remotely nefarious in doing so."

As the court further stated:

> Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must be evidence of abuse, or … injustice and inequity. By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or juror; rather these words are used … as shorthand reference for the kinds of abuse, specifically identified, that the corporate structure should not shield – fraud, evasion of existing obligations, circumvention

> of statutes, monopolization, criminal conduct, and the like. … Any other rule would seriously compromise what we have called a "bedrock principle of corporate law" – that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations.

Pertuis, 817 S.E.2d at 280 (citing *SSP Partners v. Gladstron Invs. (USA) Corp.*, 275 S.W. 3d 444, 445 (Tex. 2008)).

The *Pertius* court likened the equitable analysis for application of the single business enterprise doctrine to that of piercing the corporate veil, citing *Drury Development Corp v. Foundation Ins. Co.*, 380 S.C. 97, 668 S.E.22d 798 (2008). In *Drury*, the S.C. Supreme Court recognized the well-established S.C. law regarding piercing the corporate veil, in particular, that it is hard to do. Otherwise, there would be no reason to have corporate liability protection for shareholders. "In general, equitable principles govern the veil-piercing remedy, and 'it is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection.'" *Drury*, 668 S.E.2d at 800 (citing *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316,318 (Ct. App. 1984)).

Since its adoption and explanation in *Pertius*, the single business enterprise doctrine has not been applied to collapse separate companies into one entity by any South Carolina appellate court or by the federal District Court.[2] This development reinforces the language and intent of the *Pertius* decision that this new theory of "veil piercing" may be applied but only where it is manifestly clear that the failure to do so would result in substantial injustice.

In applying the *Pertius* analysis, the S.C. Supreme Court in *Stoneledge at Lake Keowee Owners'Assoc., Inc. v. IMK Development Co., Inc, et. al.*, 435 S.C. 109, 866 S.E.2d 542 (2021) stated, "Like other methods of invading the corporate form, invocation of the single business

[2] See Case References, attached hereto, for the citing history for *Pertius*.

enterprise theory should be reserved for drastic situations and is the rare exception, not the rule." 866 S.E.2d at 551.

Against this legal backdrop, the court must examine the Plaintiff's allegations in support of the single business enterprise doctrine, and the facts offered by Plaintiff to carry his burden proving the substantial injustice, fraud, and abuse required for the application of this doctrine.

Plaintiff has offered testimony from the following witnesses regarding the issue of single business enterprise: 1. Plaintiff Jason Tuck; 2. Kelly Albanese; 3. Diana Friedline; 4. Darryl Smith; and 5. John Watts. Plaintiff has not offered any expert testimony to support his claim for single business enterprise liability. The testimony of these witnesses is analyzed below as it relates to the allegations in Plaintiff's Second Amended Complaint regarding the single business enterprise theory.

A. **Defendant Watts did not engage in an integrated business of buying, selling, and financing used cars, re-possessing and selling vehicles and financing and selling repaired vehicles in such a way so as to deprive consumers of their rights under law.**

i. **Plaintiff Tuck**

Plaintiff Tuck testified at trial that Defendant Watts would have Tuck, as shop manager for OTM, to create estimates for the repairs of vehicles repossessed by Carolina's Best Finance and by Affordable Auto. Tuck testified that Watts then would use these estimates to inflate the debt owed to Carolina's Best or Affordable Auto by the consumer by the amount of the estimate without actually performing the repairs. (Tr. p. 15, l. 23 – p. 16, l. 7). Accordingly, when the vehicle then was sold at auction or in a private sale, the consumer would be robbed of equity in the vehicle and Carolina's Best Finance or Affordable Auto would be unjustly enriched. Tuck testified that his knowledge of this alleged practice came from Mr. Watts himself who shared voluntarily with Tuck

that Watts had defrauded the customers in this manner. (*Id*.) For his part, Mr. Tuck denied having knowledge of these actions at the time that they occurred. (Tr. p. 16, ll. 8 – 10).

Mr. Watts denied this activity in his *de bene esse* deposition and testified that these practices never occurred. (Watts *de bene esse* Depos. p. 63, ll. 10 - 24). Accordingly, this court is left with a swearing contest between the Plaintiff and the Defendant. It is Plaintiff Tuck's burden to prove the allegations of his Complaint. As a threshold matter, for Mr. Tuck's testimony regarding these practices associated with repossessed vehicles to be credible, Mr. Watts would have to be foolish, or brazen, enough to share, voluntarily, this incriminating information about his actions with Mr. Tuck. Since there is diametrically opposed testimony about this practice by the two principals in this litigation, the court must look to the testimony of the other witnesses to determine whether Plaintiff has carried his burden of proving this "fraudulent" activity on the part of Defendants.

Plaintiff Tuck also testified that Mr. Watts' companies, Carolina's Best and Affordable Auto, conspired with an auction house, Whitey Auto Auction, to secure ownership of repossessed vehicles outside of the live bidding at auctions in which these vehicles were offered for sale. According to Plaintiff, after a high bid was received by Whitey's at an auction, Mr. Watts, as principal of Carolina's Best and of Affordable Auto, would be contacted and offered a universal "trump card" that allowed Watts to better the highest bid at auction with there being no recourse for anyone else to outbid Watts' companies. If correct, this theory would vest in Watts' companies an absolute right to purchase all repossessed cars at a few dollars more than the auction bid and then to put these vehicles back on Affordable Auto's lot for re-sale and the opportunity to finance the vehicle again and again at, allegedly, a profit to Affordable Auto. Mr. Tuck did not work for either Carolina's Best Finance or Affordable Auto at the time that these alleged practices occurred,

so he had no first-hand knowledge about any alleged arrangement with Whitey' Auto Auction. (Tr. p. 23, l. 21 – p. 24, l. 10). According to Plaintiff Tuck, Mr. Watts, again, voluntarily shared with Tuck that Watts engaged in these practices. (Tr. p. 17, l. 1 – p. 18, l. 19).

Mr. Watts, as is discussed below, denies that he held any universal trump card that insured that he always would get back his vehicle and denies making these statements to Tuck. (See, generally, Watts *de bene esse* Deposition, p. 35, l. 15 – p. 38, l. 17).

Given the divergence between the testimony of Plaintiff and of Mr. Watts, again, the court must look to the testimony of the other witnesses to determine whether Plaintiff has carried his burden of proof.

ii. <u>Kelly Albanese</u>

Plaintiff also relies on the testimony of Kelly Albanese to support these allegations of "bid-rigging" on the part of Defendants. At all times relevant to this action, Ms. Albanese was employed by Affordable Auto Sales in the financing department.[3] (Albanese Depos. P. 12, ll. 1-13). Ms. Albanese ultimately left Affordable Auto's' employment for reasons unrelated to this action.

Albanese testified that, while she was employed with Carolina's Best, she would receive calls from Whitey's Auto Auction who would ask to speak with Mr. Watts. Ms. Albanese would transfer the call to Mr. Watts if he was available. If not, she testified that the Whitey's representative would share with her the sales price of the car at auction for her to share with Mr. Watts. Ms. Albanese testified that she assumed, but did not know, that this call was for purposes

[3] Ms. Albanese actually worked with Affordable Auto for about a year in a similar but slightly different position, left the company for a few months, and then returned. It was during her second period of employment that she performed the services reference herein and had the alleged interactions relevant to this matter. (Albanese Depos. P. 12, ll. 1-13; P. 29, ll. 12-19).

of allowing Mr. Watts to buy back the vehicle. (Albanese Depos. pp. 19, l. 15 – p. 20, l. 1; pp. 20, l. 24 – p. 25, l. 13).

Ms. Albanese's testified candidly that she was not personally aware of what was going on in the process or even if the price that she received over the phone was a price placed on the vehicle before or after the auction. (Albanese Depos. 21, ll. 8-13). This Court finds the testimony of Ms. Albanese speculative and unpersuasive on this issue.

iii. Diana Friedline

In addition to Mr. Tuck and Ms. Albanese, Plaintiff offers testimony from Diana Friedline on this issue of the alleged "revolving door" of sales, repossession, re-purchase, and resale.

Ms. Friedline was continually employed by Carolina's Best from 2008 to 2017 except for a two hear period when she was employed by Southeastern Recovery as manager. (Friedline Depos. p. 21, ll. 17-24; pp. 27, l. 14- p. 28, l. 11). In 2017, Ms. Friedline resigned for health reasons. (Friedline Depos. p. 31, ll. 16-24).

During her time at Southeastern, Ms. Friedline did skip-tracing of debtors, spoke with debtors, submitted reports to companies that requested them, prepared condition reports on vehicles that were repossessed, and handled phone calls. (Friedline Depos. p. 24, ll. 1-7). With the exception of her time as manager of Southeastern, Ms. Friedline was employed by Carolina's Best as a bookkeeper managing accounting matters. (Friedline Depos. pp. 27, l. 14 – p. 28, l. 11).

Ms. Friedline had no personal knowledge regarding any alleged unnecessary repairs or efforts to inflate the debt on repossessed vehicles so as to deprive borrowers of equity in the collateral. (Friedline Depos. p. 86, l. 10 – p. 87, l. 18).

The only additional testimony from Ms. Friedline regarding disposition of repossessed vehicles involved very inexpensive vehicles, which often were not roadworthy, being repossessed

by Carolina's Best and then sold in private sales to individual buyers. Ms. Friedline indicated that there would be "bid sheets" accompanying these sales that were signed by Affordable employees. However, these she described that these "bids" in fact accompanied actual sales of this special category of vehicles. Ms. Friedline speculates that these bid sheets were generated to make it appear that the vehicles were sold at auction. (Friedline Depos. p. 100 l. 18 – p. 102, l. 20).

Mr. Watts explained this situation. Carolina's Best typically sent vehicles to auction. On occasion, however, repossessed vehicle that were not road-worthy or had little to no value would be sold in private sales by Carolina's Best. (Watts de bene esse Depos. p. 18, ll. 13-23). The bid sheets referenced by Ms. Friedline were from actual bids taken for the private sale of these vehicles. Mr. Watts testified that the practice for these sales would be to solicit bid and then to sell to the highest bidder. (Watts de bene esse Depos. p. 173, l. 12 – p. 174, l. 3).

iv. <u>Darryl Smith</u>

Darryl Smith testified by deposition on August 14, 2020. Mr. Smith was employed by Defendant Southeastern Recovery as a repossession officer and as a tow truck driver for a period-of-time in 2015 and then again in 2018 and into 2019. (Smith Depos. p. 7, ll. 9-18). Smith testified that, on one occasion, he was hooking up a vehicle that was repossessed by Affordable Auto and was told by a mechanic to unhook the vehicle. Smith testified that saw the mechanic get under the vehicle and then saw lights come on and testified that, when the vehicle was started, it skipped. Smith did not have personal knowledge of what was done to the vehicle. He testified that he did not watch what the mechanic was doing to it. (Smith Depos. p., 25, ll. 15-22).

Smith indicated that he was told by a manager for Affordable that Mr. Watts wanted this vehicle to go back to the Affordable Auto lot for sale and wanted to make sure that no one else bid on it at auction. (Smith Depos. p. 25, ll. 2-14). This "manager" of Affordable Auto is not identified

nor are his job title or duties. Even if the party who made the statement to Smith was a manager for Affordable, who is a defendant in this action, there is no evidence that this manager was authorized to speak for Mr. Watts regarding the disposition of repossessed vehicles.

Finally, Smith testified that he overheard Defendant Watts tell another Southeastern employee not to pick up a vehicle for repossession because, according to Smith, Mr. Watts wanted the accrued interest on the vehicle to increase. In that case, Affordable or Carolina's Best could avoid paying the borrower for any equity in the car after its repossession. (Smith Depos. p. 26, ll. 12-19).

A common theme in the Plaintiff's case involves Mr. Watts' open confession to his employees of practices that, if carried out as described, would constitute fraud. Perhaps a business owner could be foolish enough, or arrogant enough, to engage in such contrition, but it certainly would not be typical. As indicated below, Mr. Watts denies these confessions. Mr. Watts does testify, however, that purchasers of vehicles from Affordable Auto and borrowers of Carolina's Best would be given the opportunity to cure defaults. He also testified that these companies tried to work with their customers to satisfy the customer's obligations. Watts testified that Affordable Auto and Carolina's Best only profited if its customers paid. In virtually all repossession scenarios, these companies lost money. (Watts *de bene esse* Depos. p. 26, l. 13 – p. 28, l. 4)

Mr. Smith's position is that the consumer would better be served by having their vehicle immediately repossessed by Affordable Auto or Carolina's Best rather than for these companies to allow the consumer the opportunity to work out terms to satisfy their obligations and to keep the vehicle. The statements attributed to Mr. Watts, concerning delaying repossession to run up the consumer's debt, strain credulity to the extent that they represent confessions of wrongdoing to employees where to do so would be unnecessary. Even if believed, the statements attributed to

Mr. Watts lack persuasiveness, as any delay in the repossession of vehicles by Carolina's Best or by Affordable Auto could just as easily be related to attempts at legitimate collection by working with the consumer as in running up debt that never would be collected.

v. John Watts

Mr. Watts testified as to the process for the disposition of vehicles repossessed by Carolina's Best and by Affordable Auto. He also addresses the issues raised by Tuck, Albanese, Friedline, and Smith. Mr. Watts testified that certain "inexpensive" or "non-roadworthy" vehicles repossessed by Carolina's Best occasionally could not be delivered to auction because of their condition. In these rare cases, the vehicles would be sold for their parts or the vehicles may be scrapped. (Watts *de bene esse* Deposition, p. 31, ll. 13-23).

In the typical situation, however, vehicles repossessed by Carolina's Best, who was not in the business of selling vehicles, would be auctioned. (Watts *de bene esse* Deposition, p. 31, ll. 13-17). Vehicles repossessed by Affordable Auto would be placed back on the Affordable lot and sold in private sales, which typically would yield a higher price than sales at auction. (Watts *de bene esse* Depos. p. 30, l. 24 – p. 31, l. 12)(See also S.C. Code Section 36-9-327, Comment 2, which states that "Although subsection (b) allows both public and private dispositions ….This section encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned.").

Mr. Watts testified that, typically, Carolina's Best would use Whitey's Auto Auction for sale of its repossessed vehicles, although, at times, Carolina's Best would use American Auto Auction. (Watts *de bene esse* Depos. p. 32, ll. 8-11).

Watts testified that most used cars sold at auctions in his experience were purchased by dealers as opposed to individuals. (Watt de bene esse Depos. p. 33, l. 25 – 34, l. 6). Mr. Watts' companies would benefit from purchasing vehicles that those companies sent to auction, because he and his companies would be familiar with the vehicles and would know what they were getting. (Watts *de bene esse* Depos. p. 34, ll. 8-16).

When the vehicles were sent to Whitey's, according to Mr. Watts, different forms of auction were employed. On occasion, Affordable Auto would send representatives to the auction to bid on the vehicles. (Watts *de bene esse* Depos p. 33, 16-21). This situation would result in the highest bidder at the auction receiving the vehicle irrespective of the bid price. On other occasions, Carolina's Best, Affordable Auto, and Whitey's would engage in what is known as an "IF" bid. In the IF bid scenario, after the high bid is received at auction, the auction house would contact the seller or its representative, in the case of Carolina's Best, Mr. Watts, to determine if the seller would accept the bid. Mr. Watts then would have the opportunity to offer a bid higher than that obtained at auction. If Mr. Watts, or any other seller, offered a higher bid than that received at auction, Whitey's would later notify the seller if its bid was successful or not. Under the IF bid scenario, in some cases, Mr. Watts' company would get the vehicle. In other cases, it would not. (Watts *de bene esse* Depos. pp. 35, l. 15 – p. 38, l. 17).

The contention of Plaintiff is that Mr. Watts and his companies held a universal "trump card" by which Mr. Watts always could be assured of receiving the auctioned vehicle for a price only a few dollars above the bid price at auction, in effect, circumventing the auction and failing

to satisfy the statutory requirements of the Uniform Commercial Code concerning commercially reasonable sales for repossessed good by secured lenders. [4]

Plaintiff has not offered any expert witness testimony regarding what constitutes a commercially reasonable disposition of repossessed vehicles. The only "expert" testimony offered by any party with personal knowledge of the auction process was that of Mr. Watts, which is summarized above. Plaintiff posits that the process described by Mr. Watts was not commercially reasonable, but this position is premised on the proposition that Mr. Watts never could be outbid for the collateral of Carolina's Best. As set forth above, Mr. Watts testified that his company, Affordable Auto, often was the high bidder, whether at the live auction or through the "IF" bid process described above. Mr. Watts also offered Defendant's Exhibit 4, subject to objections by Plaintiff. Defendant's Exhibit 4 is a Whitey's Auto Auction document provided by Plaintiff in discovery after obtaining the documents from Whitey's by subpoena. Mr. Watts testified that he did not create the document, the document shows a single bidder, Philbeck's Used Cars, submitting two bids on the same vehicle, one being $100 higher than the other. Mr. Watts testified that, typically, if offered the opportunity to present an "IF" bid higher than that received at the live portion of the auction that he would bid $50 above the high bid. Mr. Watts testified that there would be no reason for a high bidder at auction to better their own bid by $100. Mr. Watts concludes that this was a situation in which he, through Affordable Auto, raised the bid by $50

[4] *S.C. Code Section 36-9-610* provides in relevant part, "(a) After default, a secured party may sell … any or all of its collateral in its present condition following **any commercially reasonable preparation or proceeding."** (Emphasis supplied). *S.C Code Section 38-6-9-627* provides that, "(b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made: (1) in the usual manner in a recognized market; (2) at the price current in any recognized market at the time of the disposition; (3) otherwise in conformity with reasonable commercial practices among dealers of the type of property that was the subject of the disposition.

over the live auction bid and then was outbid by the high bidder at the live auction, in accordance with the IF bid process described above. (Watts *de bene esse* Deposition, p. 167, l. 3 – p. 168, l. 23).

Irrespective of Exhibit 4, Mr. Watts testified that the IF bid process did not insure that he always would be the successful bidder. He testified that sometimes he would offer an IF bid and receive the vehicle, and other times he would offer the bid and not receive it. (Watt *de bene esse* Depos. p. 35, l. 15 – p. 38, l. 17).

Mr. Watts is the only witness to testify regarding the specifics of the auction process. The other witness testimony does not specifically address the auction process, other than Mr. Tuck's testimony that he, on occasion, attended an auction with Mr. Watts but did not bid. (Tuck Testimony, Tr. p. 24, l. 4 – p. 25, l. 6). As reference above, Plaintiff has not offered any expert testimony regarding the commercial reasonableness of any sale by Defendants of repossessed vehicles. The Court finds that Plaintiff has failed to carry the burden of proving any "integrated scheme" for repossessing and disposing of vehicles that would wrongfully deprive consumers of their equity the vehicles.

B. **Defendant Watts did not improperly commingled funds and assets of the various companies for his personal benefit by putting employees of Defendant Southeastern Recovery on the payroll of Defendant On-the-Mark.**

Plaintiff contends that employees of Southeastern Recovery, a towing and repossession company owned by Mr. Watts, were placed on the payroll of OTM in order to reduce Southeastern's insurance expense. In support of this theory, Plaintiff offers testimony from the Plaintiff Tuck, Diana Friedline, and Darryl Smith. Plaintiff also relies to some extent on the testimony of Mr. Watts, which is discussed separately below.

It is not disputed that three to four employees of Southeastern were, for a time, employed by OTM. This fact, standing alone, is not fatal for purposes of single business enterprise analysis. [See *Stoneledge at Lake Keowee Owners' Association, Inc. v. IMK Development Co., LLC*, 435 S.C. 109, 866 S.E.2d 542 (2021)], in which Defendant development company and defendant construction company shared owners and employees]. The critical issue for purposes of single business enterprise analysis is the purpose for which these employees were employed and/or paid by varying companies.

Plaintiff Tuck testified that Defendant John Watts told Tuck that Watts put these employees on the OTM payroll because, "he couldn't get them on the insurance for Southeastern." (Tr. p. 7, ll. 4-10).

Two other witnesses other than Mr. Watts testified regarding the issue of payment to former Southeastern tow truck drivers by OTM. Darryl Smith was a Southeastern tow truck driver. He testified that he received payroll deposits from OTM. (Smith Depos. pp. 8, l. 17 – p. 9, l. 2). Smith testified that one of his main job tasks was to tow vehicles that had been repaired by OTM to the lot of Defendant Affordable Auto for sale on Affordable's lot. (Smith Depos., p. 9, ll. 9-17), providing a benefit to OTM. Smith testified that he did not know why Defendant Watts put him on the OTM payroll. (Smith Depos. p. 9, l. 25-p. 10, l. 2).

Diana Friedline also testified regarding this issue tow truck drivers being on the payroll of OTM. She testified that, perhaps, three to four tow truck drivers were paid by OTM while she was doing the payroll. (Friedline Depos. p. 77, l. 2 – p. 78, l. 16). Friedline testified, however, that she did not know why Mr. Watts chose to pay the tow truck drivers from OTM. (Friedline Depos. p. 79, l. 20 – p. 80, l. 1).

Mr. Watts testified that the reason that the Southeastern employees were placed on the payroll of OTM simply was for efficiency. There were never more than four employees of Southeastern, and Ms. Friedline, who kept the books for all of Mr. Watts' companies (which is addressed more fully below), frequently was overwhelmed by the volume of work that she had to do and suggested combining the payrolls of Southeastern and OTM. In an attempt to simplify the payroll process, Mr. Watts place these employees on the OTM payroll. (Watts Depos. p. 66, ll. 9-21). Mr. Watts denied that the Southeastern employees were transferred for insurance reasons, and testified further he would not have discuss insurance issues of Southeastern with Mr. Tuck, whose job did not involve making insurance decisions. (Watts *de bene esse* Depos. p. 67, l. 1-27). Mr. Watts testified that, while the financial records for Southeastern show an insurance savings between 2018 and 2019, which would have been the time during which these employees were paid by OTM, that savings was due to Southeastern's dropping wrongful repossession insurance, which had become very expensive. (Watts de bene esse Depos. p. 69, l. 1 – p. 70, l. 7; **Defendant's Exhibits 11 & 12, the Profit & Loss Statements for Southeastern Recovery for 2018 and 2019 respectively**).

This sharing of employees did not result in any improper cost shifting from Southeastern to OTM, because Southeastern regularly reimbursed OTM for the payroll expenses associated with these employees. Mr. Watts testified with regard to Defendant's Exhibits 12 and 13, which are excerpts from the Southeastern general ledger for 2018 and 2019, respectively, showing the accrual of these intercompany payroll expenses between Southeastern and OTM. Mr. Watts testified that these amounts were paid regularly to OTM. (Watt de bene esse Depos. p. 70, l. 8 – p. 71, l. 20).

This Court finds that, in accordance with the principles set forth in the *Pertius* case and its progency, such as the *Stoneledge at Lake Keowee Owners' Assoc*. case, the consolidation of

payrolls for purposes of efficiency where there is appropriate reimbursement of payroll expense and no improper cost shifting to avoid tax consequences does not constitute the type of fraud or quasi-criminal fundamental unfairness required to ignore the corporate structure and to collapse companies for liability purposes pursuant to the single business enterprise theory.[5]

This Court refuses to invade the corporate form of OTM and of Southeastern Recovery based solely upon this consolidation of payrolls.[6]

C. Defendants did not carry out a fraudulent enterprise through common control, centralized management of accounting, commingling of employees, undocumented transfer of funds, and unilateral determination by Defendant Watts of which companies incurred costs and received income.

[5] Mr. Watts testified that, after the time period discussed above, he and his wife, Traci Watts, formed two companies, Financial Services Employees, LLC and Auto Services Employees, LLC. These two entities are employee leasing companies who hired former employees of Mr. Watts various businesses including, but not limited to, the defendants in this action. Mr. Watts was transparent that the purposes for the formation of these companies included the ease of leasing employees to his various companies and moving them as the specific needs of each company changed. Mr. Watts also testified that a workers compensation claim against Southeastern, prior to the time periods at issue in this case, led to increased insurance expenses for all of his companies. The formation of these leasing companies provided a fresh start for workers compensation rates these employees. (Watts *de bene* esse Depos. p. 71, l. 21 – p. 73, p. 17; l. 75, ll. 1-23). Plaintiff posits that this action by Mr. Watts somehow was deceptive and an attempt to avoid legitimate workers compensation obligations, which conduct would satisfy the fundamental unfairness required pursuant to the single business enterprise doctrine. In support of that position, Plaintiff argues that these leasing companies are subject to the licensing requirement for Professional Employer Organizations as prescribed by S.C. Code Section 40-68-10, *et. seq.*, and that these companies do not have these licenses. However, Section 40-68-10 (9) defines "Professional Employer Services," to which the licensing regulations apply. This section specifically excludes "temporary employees," and limits its application to employment of a "long-term or continuing nature." Per Mr. Watts testimony, which is the only evidence in the record on this matter, these leased employees are intended to be transferred between his companies based upon need and are not long-term employees of those companies.

[6] It is noteworthy that, even were this Court to apply the single business enterprise doctrine as a result of this consolidation of payrolls, the doctrine would apply only to OTM and to Southeastern Recovery and not to the other corporate Defendants.

In addition to the arguments set out in sections I.A. and I. B.above, Plaintiff claims that the corporate distinctions between the Defendant companies should be set aside for the following reasons:

1. Defendants OTM, Carolina's Best, and Affordable Auto shared accounts for the purchase of auto parts used in Defendant OTM's business;
2. All of the corporate defendants relied upon the back-office of Carolina's Best for accounting, bookkeeping, and payroll services;

i. Purchase of Auto Parts on Accounts of Carolina's Best and Affordable Auto

Defendant OTM was formed in 2014. Prior to that time, Affordable Auto had its own auto repair shop. (Watts *de bene esse* Depos. p. 12, l. 23 – p. 13, l. 4). Accordingly, Affordable Auto had an established credit account with Advance Auto Parts and with LKQ Auto Parts. When OTM was formed, it did not have a credit history to support the purchase of auto parts on account with Advance of with LKQ. OTM did not have a credit card. During this time, auto parts used by OTM were charged to the credit account or to the credit card of Affordable, however, OTM would pay those bills. (Watts *de bene esse* Deposition, p. 13, ll. 2-25). Later, OTM acquired its own credit card. After that time it ceased using the Affordable or Carolina's Best accounts for the purchase of auto parts. (Watt *de bene esse* Depos. p. 19, ll. 4-11).

Mr. Watts testified that Defendants' Exhibit 1 shows invoices for auto parts and OTM cost account information relating to the purchase of auto parts for two vehicles, a Chevy Tahoe and a Honda CRV. Invoices and payment documents related to the Chevy Tahoe are Bates Numbered "On the Mark 12 – 16." Invoices and payment documents related to the Honda are Bates Numbered On the Mark 42-49. The OTM Cost reports for the two vehicles, which are Bates

Numbered OTM 16 and OTM 49, respectively, indicate that those costs were charged to OTM which paid those invoices. (Watts *de bene esse* Depos. p. 14, l. 1 – p. 18, l. 21; **Defendants' Exhibit 1**).

Mr. Watts also testified regarding Defendants' Exhibits 2 and 3. Defendants' Exhibit 2 is an excerpt from the OTM general ledger for 2018 showing the accrual by OTM of payment obligations for the auto parts purchased on Affordable Autos' account. Mr. Watts testified that these obligations were paid by OTM (Watts de bene esse Depos. p. 21, l. 16 – p. 22, l. 22; **Defendants Exhibit 2**). Exhibit 3 is an excerpt from the 2019 general ledger of OTM showing the obligation on the part of OTM to pay $16,000 of auto parts expense which were purchased with the American Express card of Carolina's Best. Mr. Watts testified that these obligations were paid as well (Watts *de bene esse* Depos. p. 22, l. 23 – p. 24, l. 5; **Defendants' Exhibit 3**).

Defendants' Exhibit 20, which is from the OTM general ledger that has been produced in discovery, was submitted after the testimony of the witnesses in in response to cross examination of Mr. Watts in which he was questioned about documentation to support his testimony that OTM actually paid the obligations accrued to its general ledger for the auto parts purchased on the credit accounts of Affordable Auto and of Carolina's Best like those shown on Exhibits 2 and 3. Exhibit 20 shows Account Number 1002, which is the account for checks and payments from OTM's account with UCB Bank. The highlighted portion of Exhibit 20 shows monthly payments at lines 79 and 147 for February and for March of 2018 to American Express for payments to Advance Auto for parts.

Plaintiff contends that OTM's reliance on the credit of these other companies supports an amalgamation of those companies for single business enterprise purposes. However, while this practice, for the time that it took place, does represent an intertwining of the companies,

intertwining alone is insufficient to set aside the corporate form and to collapse corporate distinctions. (See *Pertius*, 817 S.E.2d at 280, 281, "… the single business enterprise theory requires a showing of more than the various entities operations are intertwined. Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities legal distinctions."). Defendants' position with regard to these auto parts purchase is buttressed by the fact that OTM, not Affordable Auto or Carolina's Best, actually paid these obligations.

This Court finds Plaintiff's evidence on this issue unpersuasive.

ii. Sharing of Back Office Employees

Two witnesses testified that employees of Defendant Carolina's Best performed accounting and bookkeeping services for the other corporate defendants and, to some extent, for Mr. Watts personally. Diana Friedline and John Watts were these two witnesses.

Ms. Friedline was employed by two of Mr. Watts' companies, Carolina's Best and Southeastern Recovery, between 2008 and 2017. The Southeastern employment was brief and largely unrelated to this action. Her employment with Carolina's Best that is relevant to this action occurred between 2010 and 2017. (Friedline Depos. p. 41, ll. 10-23; p. 42, l. 21 – p. 43, l. 2). Ms. Friedline testified that, during this period-of-time, she performed accounting services for Carolina's Best, but also for the other named corporate defendants.. This work included general accounting work, including payroll, costing of cars for Affordable Auto, and, in the case of Mr. Watts' rental company, collection of, and accounting for, rent payments. (Friedline Depos. p. 43, l. 18 – p. 44, l. 17). Ms. Friedline testified that she typically worked about 45 hours per week, half of which was dedicated to Carolina's Best's bookkeeping and the other half to the accounting for the other defendants and for Mr. Watts' other companies. (Friedline Depos. 50, ll. 1-10).

While it is more directly related to Plaintiff's action to pierce the corporate veil of the defendant companies, which is dealt with below, Ms. Friedline also testified that she kept the books for the Sertoma Club when Mr. Watts was involved in it and also paid Mr. Watts' personal bills with funds from Mr. Watts' personal accounts. (Friedline Depos. p. 52, ll. 2-8, 18 – 24).

Mr. Watts testified that Ms. Friedline, prior to her departure, performed accounting and general back-office bookkeeping for his businesses while she was employed by Carolina's Best. According to Mr. Watts, Carolina's Best had the most accounting work of his companies, and it made economic sense to consolidate the accounting functions of the other businesses with that of Carolina's Best. (Watts *de bene esse* Depos. p. 79, l. 3 – 19; p. 80, l. 13- p. 81, l. 4). Mr. Watts testified further that Defendant Affordable Auto and Automotive Capital Services, LLC ("ACI"), which serviced the loans from Affordable Auto to consumers, each paid to Carolina's Best a management fee to compensate Carolina's Best for the financial services provided. Defendant's Exhibit 15 contains examples of checks payable from Affordable Auto to Carolina's Best, along with a summary of the same. Defendant's Exhibit 16 consists of profit-and-loss statements for Carolina's Best for 2018 – 2020 each of which shows income from Affordable Auto and from ACI for management fees. (Watts *de bene esse* Depos. p. 81, ll.5-25; **Defendants' Exhibit 15**; Watts *de bene esse* Depos. p. 82, l. 10 – p. 84, l. 5; **Defendants' Exhibit 16**).

Mr. Watts indicated that OTM and Southeastern Recovery did not pay management fees to Carolina's Best because the volume of work performed for those companies was not nearly as substantial as that devoted to Affordable Auto and ACI. (Watt *de bene esse* Depos. p. 84, ll. 6-16).

The sharing of employees and the consolidation of back-office tasks between closely-held companies is a common occurrence. The S.C. courts have recognized that consolidating tasks in

this manner is not tantamount to the blurring of corporate distinctions and the fundamental unfairness necessary to make one corporate entity liable for the obligations of another. In *Hoffeth v. Janssen Pharmaceuticals, Inc*., 2020 W.L. 1536218 (Dist. Ct. S.C. 2020), the U.S. District Court, citing to the *Pertius* case, held that the plaintiff in that action had failed to carry the burden of proof necessary to defeat Defendants' motion for summary judgment on the issue of single-business-enterprise theory. In *Hoffeth*, Plaintiff brought an action against several defendants alleging various causes of action for products liability in association with two drugs manufactured by Defendant Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson. Plaintiff sought to hold two defendants, Johnson & Johnson, and Janssen Research and Development, LLC ("JRD") liable pursuant to the single-business-enterprise doctrine, despite the fact that these entities did not manufacture the allegedly defective drug, on ground that "Johnson & Johnson controls all of its subordinate corporate entities." (*Hoffeth*, 2020 W.L. 1536218, at pp. 7-8). Plaintiff in *Hoffeth* asserted that the annual reports for Johnson & Johnson indicated that employees moved seamlessly between corporate entities …." (Id.). The *Hoffeth* court rejected this argument and granted summary judgment to Johnson & Johnson and to JRD stating, "Hoffeth has provided no evidence of any bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the legal distinction between Johnson & Johnson and JRD. It is commonplace for companies to establish multiple corporate entities, who maintain individual corporate identity despite close collaboration between the different entities." (*Hoffeth*, 2020 W.L. 1536218, at p. 8) (**a copy of this unpublished opinion at attached**).

Without more, the evidence that Carolina's Best performed back-office accounting functions for Mr. Watts' other businesses is insufficient to support invading the corporate status

of these defendant companies, particularly where, in the case of the companies benefiting most from these services, a management fee was paid to Carolina's Best for the work performed.

The Plaintiff has failed to carry the substantial burden of proof required in order to establish liability across the separate corporate defendants. While the companies owned by Mr. Watts may be closely related, and while they may be intertwined in terms of shared employees and intercompany transfers for the purchase of auto parts and for other purposes, the record does not contain evidence of the kind of fraud or abuse necessary to ignore corporate identities and to employ the single business enterprise doctrine. Specifically, Plaintiff has not demonstrated that OTM, who is the judgment debtor, and the other corporate defendants have engaged in any fraudulent or abusive collaboration. The record actually indicates just the opposite, where Southeastern Recovery compensated OTM when its employees were on the OTM payroll, and where OTM reimbursed Affordable Auto and Carolina's Best where the credit accounts of those companies were used to purchase auto parts for OTM. The only testimony to the contrary comes from ex-employees of Mr. Watts' companies who claim that, for reasons that are unexplained, Mr. Watts simply would confess to them that he intended to, or did, engage in deceptive or illegal practices including the insurance fraud, violation of consumer laws, and the defrauding of customers of his companies with regard to vehicle repossessions and auction. This testimony is insufficient to carry Plaintiff's burden of proof.

The corporate defendants are not liable to Plaintiff pursuant to the single business enterprise doctrine.

II. Piercing of the Corporate Veil

a. <u>Defendant On the Mark</u>

Plaintiff seeks to hold Mr. Watts liable personally for the judgment against OTM on grounds that the Plaintiff is entitled to pierce the veil of OTM, or of the other corporate entities.[7]

In *Drury Development Corp v. Foundation Ins. Co.*, 380 S.C. 97, 668 S.E.22d 798 (2008) the S.C. Supreme Court recognized the well-established S.C. law regarding piercing the corporate veil, in particular, that it is hard to do. Otherwise, there would be no reason to have corporate liability protection for shareholders. "In general, equitable principles govern the veil-piercing remedy, and 'it is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection.'" *Drury*, 668 S.E.2d at 800 (citing *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316,318 (Ct. App. 1984)).

The courts have established a two-pronged analysis for the application of the veil-piercing doctrine. The first prong involves an analysis of factors which, essentially, address the issue of whether the corporation has served a the mere alter ego for the dominant shareholder. Those factors include: 1. whether the corporation is undercapitalized; 2. whether the corporation failed to observe corporate formalities; 3. whether the corporation paid dividends; 4. whether the corporation was insolvent; 5. whether the corporation lacked corporate records; 6. whether the corporation had its funds siphoned off by the dominant shareholder; and 7. whether the corporation was used as the mere façade for operations of its dominant shareholder. *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316,318 (Ct. App. 1984).

The second prong involves examination of whether fundamental unfairness or substantial injustice would result from observance of the corporate form. (*Id*.).

[7] Plaintiff has not obtained a judgment against any entity other than OTM. Accordingly, for any veil-piercing analysis regarding other companies to become relevant, Plaintiff first must prevail pursuant to its single business enterprise arguments. As set forth above, Plaintiff has failed to do so; however, as additional sustaining grounds for this Court's ruling, the veil piercing arguments of Plaintiff regarding the other corporate defendants are discussed herein.

The *Sturkie* case is instructive as to the emphasis put on the second prong of the analysis by the courts. In *Sturkie*, the Defendant company was chronically undercapitalized and borrowed from the Plaintiff bank to fund the company's operation. Despite it undercapitalized status, the company, nonetheless, regularly paid is dominant shareholder. At a time when the company carried $265,000 in losses on its books, the dominant shareholder transferred company assets to another company owned by the same shareholder. Nevertheless, the court refused to pierce the corporate veil, stating, "In summary, on the facts before us, we are unable to say that failure to pierce the corporate veil will work a fundamental unfairness to Ruple (plaintiff) …." *Sturkie*, 313 S.E.2d at 319.

The facts of this case must be measured against this legal backdrop to determine whether this Court will invade the corporate form and subject the personal assets of Mr. Watts to Plaintiff's judgment. In doing so, we first must examine the first prong of the *Sturkie/Drury* analysis as it applies to Defendant OTM, i.e. the alter ego analysis.

i. Capitalization

While the company did have slightly negative equity for four of the five years for which records were offered, that fact was driven largely by depreciation expense. There is no evidence that OTM lacked the cash-flow necessary to fund its operations. No witness has testified otherwise. In all, there is no evidence of any chronic undercapitalization of OTM.

ii. Corporate Formalities

As a limited liability company, OTM was not required to observe corporate formalities such as regular shareholder meetings attested by meeting minutes, etc. Accordingly, this prong of the *Sturkie* analysis is irrelevant to this action.

iii. Siphoning Off of Funds by Dominant Shareholder

There is no evidence that Mr. Watts improperly siphoned off any fund of the company. There is no evidence that OTM ever paid personal expenses of Mr. Watts or of his family. Mr. Watts was the only witness who testified regarding this issue, and he denied any such activity. (See Watts *de bene esse* Depos. p. 84, l. 17 – p. 85, l. 4). Mr. Watts did not even take owner distributions from OTM. The OTM balance sheet for 2018 is silent as to owner distributions, but the balance sheets for 2019 – 2022 show positive amounts for owner distributions, indicating investment of money by Mr. Watts which increase the equity of the company to the tune of almost $109,000 over those four years (See OTM Balance Sheets for 2018 – 2022, attached as **Defendants' Exhibit 21**, Account 3080 – Owner Draws).

Mr. Watts also made loans to the company to support is operations. (See, i.e. OTM's balance sheets for 2018 – 2022 which show "Account 2600 Intercompany Payables - A/R JDW, III" for amounts owed to Mr. Watts, which range from $4,000 in 2022 to $43,500 in 2018; **Defendants' Exhibit 21**).

iv. Operating the Company as a "Mere Façade" for Operations of it Dominant Shareholder

There is no evidence in the record that OTM conducted any business other than to repair and refinish automobiles. (See Watts de bene esse Depos. pp. 11, ll. 2-17). Accordingly, this prong of the *Sturkie* analysis is satisfied in favor of Defendant Watts.

Since there is insufficient evidence of alter ego to support piercing of the corporate veil of OTM, the finding of fundamental unfairness to Plaintiff in order to support veil-piercing would have to be substantial.

v. Fundamental Unfairness Analysis - OTM

There is no evidence in the record to indicate that OTM has engaged in practices which would involve fraud or abuse that in any way would result in fundamental unfairness to the Plaintiff. From the formation of OTM in 2014 until the time of his departure from OTM in 2019, Plaintiff was employed by OTM and, after 2018, was the shop manager for OTM. Plaintiff would have had knowledge of the company operations for this entire period, yet Plaintiff has not offered evidence of any transfers of funds by OTM that are outside the ordinary course of business or any activity that would make it fundamentally unfair to recognize its corporate status.

This Court finds that Plaintiff has failed to carry his burden of proof with regard to piercing the corporate veil as to Defendant OTM.

b. <u>Defendants Carolina's Best Finance Company, Inc. and Affordable Auto Sales, Inc.</u>

Having determined that Plaintiff has failed to carry his burden of proof sufficiently to establish liability on the party of corporate defendants other than OTM, this Court really need not consider veil-piercing arguments as to other entities. However, as additional support for this Court's findings, we will here analyze the veil-piercing doctrine as it applies to Defendants Carolina's Best and Affordable Auto. Plaintiff's theories of recovery with regard to these entities is virtually identical.

i. Capitalization

The financial records including profit & loss statements, balance sheets, and general ledger entries for Carolina's Best for years 2018 – 2022 have been produced. Those records show the following:

(1.) 2018
- Revenue $2,191,000
- Net Income $ 116,925
- Total Equity $ 594,561.46

(2.) 2019
- Revenue $2,100,327.00
- Net Income $ 152,022.00
- Total Equity $ 579,336.37

(3.) 2020
- Revenue $1,506,913.05
- Net Income $ 115,592.87
- Total Equity $ 579,925.32

(4.) 2021
- Revenue $ 828,466.64
- Net Income $ 100,263.04
- Total Equity $ 284,412.1
-

(5.) 2022 (through August)
- Revenue $ 259,530.65
- Net Income $ -33,346.10
- Total Equity $ 248,629.00

[**See financial records of Carolina's Best – Defendants' Collective Exhibit 23 (under seal**)].

Mr. Watts testified that the market for title loans has shrunk in recent years, which account for the declining revenue and net income for Carolina's Best; however, as Exhibit 23 demonstrates, while revenue for Carolina's Best did drop, from, for example, from $1.5 million in 2020 to $828,000 in 2021, expenses also fell from $1.3 million in 2020 to$728,208 in 2021, resulting in an overall net income reduction of only $5,000. (See Exhibit 23).

Additionally, the 2021 balance sheet shows a shareholder loan from Mr. Watts in the amount of $192,924. (Exhibit 23, 2021 Balance Sheet). Watts also testified that the company never has had negative equity and never has been unable to respond to its creditors. (Watt *de bene esse* Depos. p. 87, ll. 3-12).

The financial records for Affordable Auto reflect the following:

(1.)2018

- Revenue $2,390,633.57
- Net Income $ 64,807.14
- Total Equity $ 253,851.45

(2.) 2019

- Revenue $1,844,493.84
- Net Income $ 74,919.05
- Total Equity $ 298,242.45

(3.) 2020

- Revenue $1,680,130.00
- Net Income $ 32,670.30
- Total Equity $ 306,561.17

(4.) 2021

- Revenue $1,288,184.57
- Net Income $ 64,912.46
- Total Equity $ 368,826.63

(5.) 2022 (through August)

- Revenue $1,240,268.17
- Net Income $ 64,912.46
- Total Equity $1,181,021.52

[Defendants Collective Exhibit 24].

As was the case with Carolina's Best, Affordable Auto has remained financially viable, has not been undercapitalized, and has not failed to respond to its creditors. (Watts de bene esse Depos. p. 87, ll. 3-6).

ii. Corporate Formalities

Carolina's Best and Affordable Auto are South Carolina Subchapter S corporations. As such, they are not required to follow corporate formalities such as holding regular shareholder meetings, keeping minutes, etc. (See S.C. Code Sections 33-18-200 through 33-18-230 eliminating corporate formalities for Subchapter S corporations).

iii. Insolvency of Company

As demonstrated by the financial record of Carolina's Best, summarized above, the company has not been insolvent.

iv. Siphoning of Funds by Dominant Shareholder

The Plaintiff points to one area in which he claims that Defendant Watts, as the sole shareholder of Carolina's Best, siphoned company funds. Plaintiff's Exhibit 21 shows the General Ledger Account Number 3500, the Distribution Account for Mr. Watts from Carolina's Best for 2021. Those ledger entries show $187,705.30 in personal expense for Mr. Watts or for his wife charged to the Carolina's Best American Express Card. Defendants' Exhibit 14 shows similar personal charges to the Carolina's Best American Express Card through April of 2022.

Mr. Watts was candid in admitting that he did not have a personal credit card at this time and used the company card regularly for personal expenses. Mr. Watts testified that those expenses were charged to his distributional account, were not take by the company as business expenses, reduced his equity account balance, and that he bore the personal income tax liability for those expense. (Watt de bene esse Depos. p. 76, l. 17 – p. 78, l. 12). He testified on cross

examination that he ceased charging personal expenses to Carolina's Best in 2022 and began to put money into the company for operating purposes due to the decline in the title loan market. (Watt de bene esse Depos. p. 184, ll. 9-15). Defendants' **Exhibit 14** shows that the personal expense stopped in April 2022.

Plaintiff also asserts that Mr. Watts siphoned money from Carolina's Best and from Affordable Auto through the disposition of scrapped vehicles. Mr. Watts testified that, on occasion, repossessed vehicles may be inoperable and that it would not be feasible economically to repair those vehicles. In those cases, the vehicles would be towed to a facility know as CRS Scrap Yard where they would be destroyed and Mr. Watts would be paid for the metal generated by the vehicles. (Watts de bene esse Depos. p. 43, l. 21-p. 45, l. 1).

Darryl James, a former tow truck driver for Southeastern, testified that he often took vehicles to the scrap yard. On those occasions, he would be given a S.C. Department of Motor Vehicles form to present with the vehicles to be scrapped. These forms would be signed in blank by Mr. Watts attesting that the vehicles were in his possession, were inoperable, and were appropriate for scrapping. Mr. Smith then would fill in the VIN numbers for the cars to be scrapped, retrieve the payment from the scrap yard and deliver the checks for payment to Mr. Watts. According to Mr. Smith, the checks were made payable to Mr. Watts in his individual capacity. [Smith Depos. p. 17, l. 18 – p. 19, l. 12; Defendants' Exhibit 7 (Exhibit 6 to Smith Deposition) – SCDMV Scrap Forms signed by Watts].

Mr. Watts testified that the reason that the SCDMV forms were signed in blank was because multiple vehicles would be taken to the scrap yard at one time, and it simply was more efficient for those to be completed by the party delivering the individual vehicles. (Watts *de bene esse* Depos. p. 47, ll. 11-12; p. 49, l. 23- p. 50, l. 4). As regards the checks for payment being

made to Mr. Watts personally, he testified that, since the vehicle being scrapped were taken from both Carolina's Best and from Affordable, he would collect the funds, deposit them into his personal account, and then pay them over to the appropriate company where they would be entered on the books as "Bad Debt Recovery." Defendants' **Exhibit 8**, which contains excerpts from the general ledger of Carolina's Best for 2016 and 2017 show these payments coming into the bad debt recovery account. **Defendants' Exhibits 9 and 10** show those payments being booked as bad debt recovery in the general ledger for Affordable Auto, who had the most repossessed vehicles, for 2020 – 2022, and for Carolina's Best, respectively. These Defendants' Exhibits show payments from an account number 2442 into the accounts of Affordable Auto and Carolina's Best. It also shows funds deposited from an account ending in the numbers 279. Mr. Watts testified that the accounts from which these funds were transferred and deposited into Carolina's Best and Affordable were his personal checking accounts. (Watts de bene esse Depos., p. 52, ll. 14-22; p. 57, l. 22 – p. 59, l. 20; p. 60, l. 24 – p. 63, l. 9).[8]

Diana Friedline also testified regarding one additional way in which she claims that Mr. Watts received personal benefits from Carolina's Best. She testified that Mr. Watts received some payments of personal expenses from the company in addition to the American Express charges.

[8] The companies' records show little to no income from scrap sales for 2018 – 2019, which Plaintiff would argue demonstrates that Mr. Watts took this money himself during this period. The record is devoid of proof of any personal payment to Mr. Watts during this time. Mr. Watts testified that the reason for this dearth of income from scrap sales resulted from a reduction in the prices that his companies could receive for scrap during this period. When prices went back up in 2020, scrap sales rebounded. (Watts de bene esse Depos. p. 169, l. 19 – p. 171, l. 1).

With regard to payment of personal expenses from company accounts, Ms. Friedline candidly admitted that she did not know if that occurred more than 10 times while she was the controller at Carolina's Best between 2010 and 2017. (Friedline Depos. p. 54, ll. 22-25).

The Plaintiff has not presented any evidence to support the notion that Defendant Watts improperly siphoned off funds from Carolina's Best (or from Affordable Auto).

v. Company's Being Used a Façade for Operations of the Dominant Shareholder

With the exception of the expenses referenced in section iv., above, there is no evidence in the record that Carolina's Best operated in any way for the personal benefit of Mr. Watts as opposed to the business interest of the company.

vi. Fundamental Unfairness

Notwithstanding the personal distributions for the benefit of Mr. Watts and his wife, the evidence from the financial records of Carolina's Best is that the company always was solvent, had not been negatively capitalized and has been able to respond to its creditors. There is no evidence that Carolina's Best made any transfers of assets designed to avoid any creditor, including Plaintiff.[9] In analyzing the fundamental fairness prong of the veil-piercing analysis, the S.C. Courts have focused primarily on whether any alter ego activities of the company have left it unable to respond to creditors. If not, the courts typically have found that the fundamental unfairness necessary to pierce the corporate veil to be lacking. *Federal Deposit Ins. Corp. v. Sea*

[9] Mr. Watts testified that Carolina's Best did make an intercompany loan to partially fund the start-up of a new company, Automotive Sales Funding, LLC, which finances dealer auto sales, Automotive Sales Funding has repaid that obligation by assuming debt owed by Carolina's Best. (Watts *de bene esse* Depos. p. 11, l. 18 – p. 12, l. 22).

Pines, 629 F.2d 973 (4th Cir. 1982) is a case demonstrative of the type of fundamental unfairness necessary to pierce the corporate veil. In that action, the plaintiff issued a loan commitment for $250,000 to a subsidiary of the defendant. The subsidiary shared a common board with the parent and was grossly undercapitalized. At a time when the Board knew the company to be insolvent, they mortgaged the only unencumbered real estate owned by the parent (worth $350,000) to pay the debts of the parent company, crediting the subsidiary company's account only $8,000 in exchange. The Court found that recognizing the corporate form of the subsidiary and protecting the parent would be fundamentally unfair to plaintiff lender.

This case is devoid of the fundamental unfairness recognized by the S.C. Courts to support veil-piercing. Accordingly, this Court finds that Plaintiff has failed to carry the significant burden required to pierce the corporate veil of Carolina's Best or of Affordable Auto.

c. Southeastern Recovery and Towing, LLC

At all times relevant to this action, Southeaster Recovery and Towing, LLC has been engaged solely in the business of repossessing and towing vehicles. (Watts *de bene esse* Depos. p. 10, ll. 14-19). At its height it had as many as four employees. (Tuck testimony, Tr. p. 38, ll. 15 – 20).

Admittedly, the company receives modest revenues and is thinly, buy adequately, capitalized, because it has limited debt and liabilities.

Southeastern is a S.C. limited liability company and, accordingly, not subject to the corporate formalities of C-Corporation. Additionally, there is no evidence that Mr. Tuck ever siphoned any funds from Southeastern improperly or that the company acted as his alter ego. This Court finds that it would work no fundamental unfairness on Plaintiff if this Court were to

recognize the corporate form of Southeastern. Accordingly, this Court finds that Plaintiff has failed to carry his burden of proving the elements necessary to pierce the corporate veil of Southeastern.[10]

SUMMATION

Whether analyzing the single business enterprise doctrine or the doctrine of piercing the corporate veil, South Carolina's courts have applied the strictest of scrutiny to attempts by claimants to set aside the protection of the corporate entity. This practice is in keeping with the statutory laws governing corporations and limited liability companies and with the long-established common law protecting the integrity of the corporate form and its shielding of individual owners and affiliated companies from common liability, which is primarily why corporations are created.

In the language of the *Pertius* case, there are two unique words which apply to the heart of this action. In that case the S.C. Supreme Court stated:

> We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, or injustice or inequity. By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or

[10] Mr. Watts testified that Defendant Carolina's Best Auto Sales, LLC is merely a corporate shell that never has held any assets and has conducted no business. Accordingly, the Court finds it unnecessary to conduct the veil-piercing analysis with regard to Carolina's Best Auto Sales, LLC. Defendant 828A St. Mark's Road, LLC is a single-member LLC with Mr. Watts as its sole member. It is a holding company that owns real estate where Defendant On the Mark operates. (Watts de bene depos. p. 10, l. 20 – p. 11, ll. 9). There is no evidence of any intertwining of operations between 828A St. Mark's Road and the other defendants nor of any activity on the part of this company to support any piercing of its corporate veil. Mr. Watts collected rent owed to 828A into a personal account under the name of Watts Rentals. As the sole member of 828A, income to that company would be reported on Schedule C to his personal 1040. The rental income paid to Watts rentals was reported on Mr. Watts personal return in accordance with this practice. (See John D. Watts, III and Traci Watts tax return for 2019, Schedule E, Defendants' Exhibit 25). This Court finds this practice to be appropriate and holds that it does not support any piercing of the corporate veil).

> juror; rather, these words are used … as shorthand references for the kinds of abuse, ***specifically identified***, that the corporate structure should not shield – fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like.
>
> *Pertius*, 817 S.E.2d at 280.

Abuse sufficient to penetrate the corporate shield must be "*specifically identified*," and cannot be conflated with evidence of mere alter ego activity. The Plaintiff in this action has *alleged* specific conduct that he contends supports his claim for amalgamation and veil-piercing; however, none of the evidence offered in support of those allegations, when analyzed carefully, meets the rigid standard required for a court to ignore the corporate form and to impose liability across companies and upon the private assets of individual owners.

In the place of such specifically identified abuse, Plaintiff would have this Court to substitute a plethora of evidence relating to claims of alter ego. The sharing of employees, the use of common back-office support, the sharing of credit accounts (which are accounted for and reimbursed), the personal payments to an owner for obligations owed to the company (which funds then are turned over to the companies), and, perhaps most importantly, the payment of personal expenses with corporate funds (which is attributed to owner distributions, which is not deducted as a business expense, and which does no lead to undercapitalization), all speak loudly of alter ego. However, the cases in this area all have looked beyond surface appearances and focused on the question of what the companies were trying to accomplish by their actions. If they attempting to avoid the law or to circumvent existing legal obligations by forming sham companies and hiding assets, then the corporate form should not constitute a shield.

In this case, however, the activity complained of by the Plaintiff arises from the birthing of new companies, such as the sharing of credit accounts upon the formation of OTM, or from

attempts to consolidate inter-company overhead and to operate efficiently and profitably, as in the case of centralized bookkeeping and consolidation of payrolls.

The fundamental question here is whether the actions of Defendants constitute abuse that is damaging to competitors, customers, or employees at large, or whether this simply is a case of an individual Plaintiff, Tuck, trying to collect a judgment from someone wealthier than the judgment creditor.

It may be tempting for the Court not to look beyond this evidence of alter ego, simply determining that small businesses have to follow the record-keeping and procedural formality of large companies, and that anything less, even that which is remotely suspect, requires the abandonment of well-established principles of corporate protection that encourage entrepreneurship and job creation. However, this Court is bound by these well-established principles. The volume of evidence produced by the Plaintiff cannot be substituted for the specific evidence of fraud, deception, abuse, and fundamental abusive conduct mandated by the caselaw relating to amalgamation and veil-piercing.

This Court finds that the Plaintiff in this action has failed to specifically identify conduct or business practices on the part of the Defendants sufficient to make separate companies liable for each other's obligations and to impose personal liability on a company owner. In the case of Mr. Watts, this finding is particularly applicable since the evidence related to the actual judgment debtor, On the Mark, doesn't even meet the standard for alter ego required for veil-piercing.

This Court finds as a fact, and concludes as a matter of law, that Plaintiff's claims for relief pursuant to the single business enterprise theory and the doctrine of piercing the corporate veil should be, and are, denied, and judgment entered for the Defendants.

AND IT IS SO ORDERED.

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Letitia H. Verdin

Judge

Thirteenth Judicial Circuit

Greenville, SC

Date:

Greenville Common Pleas

Case Caption: Jason Tuck vs. On The Mark Automotive Repair And Refinishing LLC , defendant, et al

Case Number: 2018CP2301643

Type: Order/Other

So Ordered

s/Letitia H. Verdin, SC Judge 2162