

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>HUDSON UNITED BANK,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>vs.</b>	:	<b>NO. 03-0158</b>
	:	
<b>RICARDO PENA, et al.,</b>	:	
<b>Defendants</b>	:	

**MEMORANDUM**

**STENGEL, J.**

**March 30, 2005**

This is an action by Hudson United Bank (“Hudson”) to recover over two million dollars on ten separate loans (the “Notes”) extended to nine different corporate borrowers (the “Pena Companies”), each of which was owned and controlled by Ricardo Pena, Jr. (“Pena”). Hudson filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”). Counsel for the Defendants informed Hudson’s counsel that Defendants would not be responding to this motion. For the reasons discussed in this memorandum, I will grant Hudson’s uncontested Motion for Summary Judgment in its entirety.

**PROCEDURAL BACKGROUND**

On January 13, 2003, Hudson filed this Complaint for breach of obligations against the Pena Companies and four individual defendants. By Order dated July 9, 2003, Judge Van Antwerpen dismissed without prejudice the following three corporate defendants: Associated Foods, Inc. (“Associated”), Extra Produce Market, Inc. (“Extra Produce”), and Fun House Bar & Restaurant, Inc. (“Fun House”). *See* Plaintiff’s Ex. 36.

On November 13, 2003, Judge Van Antwerpen approved a Stipulation between Defendant Jesus Pena and Hudson through which Jesus Pena settled Hudson’s claims against him individually. *See* Plaintiff’s Ex. 37. After complying with the terms of the Stipulation, Jesus

Pena was dismissed from this action in September 2004. *See* Plaintiff's Ex. 38.

Defendant Maria DePaz filed a petition for Chapter 7 Bankruptcy after service of the Complaint, and received a discharge on December 15, 2003. Consequently, Hudson has not pursued any claims against Ms. DePaz individually. In this Motion, Hudson seeks summary judgment on all of the claims against the eight remaining defendants.

### **FACTUAL BACKGROUND**

The following facts are based upon the pleadings and documents of record, and are presented in the light most favorable to the Defendants, as the non-moving parties. Between 1998 and 2002, Pena organized several corporations for the purpose of opening businesses in Pennsylvania. Among the grocery stores that Pena owned and operated were Defendants Super Saver Supermarket, Inc. ("Super Saver"), Farm Fresh Produce Market, Inc. ("Farm Fresh"), Junior's Produce Market, Inc. ("Junior's Produce"), and Chester Produce and Meat Market, Inc. ("Chester Produce"). *See* Plaintiff's Ex. 4 at 4-5. Another store incorporated by Pena, Defendant Coatesville Produce and Meat Market, Inc. ("Coatesville Produce"), never became an operating entity. *Id.* at 8; *see also* Plaintiff's Ex. 2 at 192-193; Plaintiff's Ex. 3 at 428. Finally, Pena organized defendant RKDL Prop., LLC ("RKDL"), to purchase a building in Reading. *See* Plaintiff's Ex. 3 at 488-489, 491-494; 512-513. Pena also owned and operated the three corporate Defendants dismissed from this action. *See* Plaintiff's Ex. 4 at 4-5; Plaintiff's Ex. 3 at 491-494, 512-515, and 537.

Pena requested his brother and a family friend to represent themselves as principals of some of these corporations for the purpose of securing the loans from Hudson. Jesus Pena, Pena's brother, represented himself to be the President of RKDL and Fun House, and guaranteed

the RKDL, Fun House, and RKDL/Fun House Notes. Maria DePaz, a long-time friend of the Pena family, guaranteed the Associated, Extra Produce, Junior's Produce, and Fun House Notes, and represented herself as the President of each of these businesses. *See* Plaintiff's Ex. at 18, 105; Plaintiff's Ex. 10 at 50, 63, 76, 111. Marlene Pena, Pena's wife, personally guaranteed the Chester Produce and Coatesville Produce Notes to Hudson. *See* Plaintiff's Ex.'s 24 and 25; Plaintiff's Ex. 10 at 89, 100. However, the record reflects that Pena was the owner, one hundred percent shareholder, officer, director, and controlling manager of each of the Pena Companies. *See* Plaintiff's Ex. 4 at 4-5; Plaintiff's Ex. 12 at 2-4, 7-9, 12-14, 17-19, 22-24, 27-28, 32-34, 42-44.

Between 2000 and 2002, Pena and six of the Pena Companies obtained eight loans from Hudson each memorialized by a Promissory Note or Revolving Credit Agreement. Each of the Notes provides that the entire balance of the loan and all other sums due under the Note, would be accelerated upon the happening of any "Event of Default," including a failure to make any payment within ten days of its due date. Summaries of these Notes follow.

In April 2000, Super Saver executed a promissory note for \$327,000, separately guaranteed by Pena and Farm Fresh. *See* Plaintiff's Ex. 14 at 2. The record reflects that Pena has admitted that the Super Saver Note is a valid obligation, that it has not been repaid, and that he is personally liable on the Note. *See* Plaintiff's Ex. 1 at 34, 101-102, 129, 181-183; Plaintiff's Ex. 3 at 529; Plaintiff's Ex. 4 at 6; and Plaintiff's Ex. 9 at 22-27. In fact, Super Saver has not made payments from July 2002 through the present. *See* Plaintiff's Ex.'s 9 and 10 at 27. On December 2, 2002, Hudson sent Notices of Default to Super Saver and to Pena. *See* Plaintiff's Ex. 26. As of January 14, 2005, Super Saver's total outstanding obligations on the Note were

\$380,030.91.<sup>1</sup>

Also in April 2000, Farm Fresh executed a promissory note for \$331,000, separately guaranteed by Pena and Super Saver. *See* Plaintiff's Ex. 15. The record reflects that Pena has admitted that the Farm Fresh Note is a valid obligation, that it has not been repaid, and that he is personally liable on the Note. *See* Plaintiff's Ex. 2 at 349-353, Plaintiff's Ex. 3 at 529. No payments have been made on this Note since June 2002. *See* Plaintiff's Ex.'s 9 and 10 at 40. On December 2, 2002, Hudson sent Notices of Default to Farm Fresh and to Pena. *See* Plaintiff's Ex. 27. As of January 14, 2005, Farm Fresh's total outstanding obligations on the Note were \$383,455.17.

In July 2001, defendants RKDL and Fun House together executed a promissory note in the amount of \$175,000, guaranteed by Jesus Pena. Pena has admitted that the RKDL/Fun House Note represents a valid obligation to Hudson, and that he is personally responsible for the obligations of both RKDL and Fun House. *See* Plaintiff's Ex. 3 at 530, 533-534. Likewise, Jesus Pena testified that the RKDL/Fun House Note was an enforceable obligation, which was ultimately the responsibility of his brother, Pena. *See* Plaintiff's Ex. 6 at 51-52; 85-86; 143-144. The principal balance of the RKDL/Fun House Note was not repaid on the due date of July 1, 2002, or within ten days thereafter. *See* Plaintiff's Ex. 9 at 141. On December 2, 2002, Hudson sent Notices of Default to RKDL and Fun House, and to Jesus Pena as guarantor. *See* Plaintiff's Ex. 35. Although Hudson's settlement with Jesus Pena resulted in the entire principal balance of

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<sup>1</sup>Hudson submitted the affidavit of John A. Cina, Senior Vice President and Loan Officer responsible for each of the loans at issue in this action. Mr. Cina extracted payoff statements for the notes from Hudson's computerized account management system as of January 14, 2005. These documents establish the balance due on each of the Notes, and their *per diem* interest charges. Defendants do not dispute the total amounts owed on each of the Notes.

the RKDL/Fun House Note being paid off, there remains a total unpaid balance of \$12,295.44 in accrued interest and late fees.

In December 2001, Jesus Pena executed and guaranteed a promissory note on behalf of RKDL in the amount of \$75,000, *See* Plaintiff's Ex. 22. Pena admitted that the RKDL Note represents a valid obligation and that RKDL used the loan proceeds for renovations on its Reading property. *Id.* at 503-504; *see also* Plaintiff's Ex. 4 at 6. Pena also admitted that he is personally responsible for the RKDL Note. *See* Plaintiff's Ex. 3 at 530. Moreover, Jesus Pena testified that his brother, Pena, was personally responsible for the RKDL Note. *See* Plaintiff's Ex. 6 at 145-146. RKDL did not repay the principal balance on the RKDL Note on the due date of July 1, 2002. *See* Plaintiff's Ex. I; Plaintiff's Ex. 9 at 129. On December 2, 2002, Hudson sent Notices of Default to RKDL and Jesus Pena, as guarantor. *See* Plaintiff's Ex. 34. Although Hudson's settlement with Jesus Pena resulted in the entire principal balance of the RKDL Note being paid in full, there remains a total unpaid balance of \$7,506.30 in accrued interest.

In February 2002, Coatesville Produce executed a Revolving Credit Note in the amount of \$250,000, personally guaranteed by Marlene Pena. *See* Plaintiff's Ex. 17; Plaintiff's Ex. 25; Plaintiff's Ex. 5 at 44-45; and Plaintiff's Ex. 10 at 87-92. Coatesville Produce never became an operating entity. Nevertheless, Pena caused Coatesville Produce to draw the entire \$250,000 limit of the Note. *See* Plaintiff's Ex. 2 at 192-193; Plaintiff's Ex. 3 at 443-444. The record reflects that Pena has admitted that the Coatesville Produce Note represents a valid obligation for which he is personally liable. *See* Plaintiff's Ex. 3 at 529. However, no payments have been made since June 2002. *See* Plaintiff's Ex.'s 9 and 10 at 92; Plaintiff's Ex. 3 at 444; Plaintiff's Ex. 1 at 101. On December 2, 2002, Hudson sent Notices of Default to Coatesville Produce and

to Marlene Pena. *See* Plaintiff's Ex. 29. As of January 14, 2005, Coatesville Produce's total outstanding obligations on the Note total \$292,345.84.

Also in February 2002, Junior's Produce executed a promissory note in the amount of \$130,000, separately guaranteed by Junior's Produce and Maria DePaz. *See* Plaintiff's Ex. 18. Pena has admitted that the Junior's Produce Note is a valid obligation for which he is personally liable. *See* Plaintiff's Ex. 3 at 447-449, 453, 529. No payments have been made on the Junior's Produce Note since June 2002. *See* Plaintiff's Ex. 3 at 453. On December 2, 2002, Hudson sent a Notice of Default to Junior's Produce and to Maria DePaz. *See* Plaintiff's Ex. 30. As of January 14, 2005, the total outstanding obligations on the Junior's Produce Note were \$148,795.68.

In February 2002, Maria DePaz executed a promissory note on behalf of Associated Foods in the amount of \$397,000, at Pena's request. Pena admitted that the Associated Foods' Note is a valid obligation for which he is personally liable. *See* Plaintiff's Ex. 1 at 119; Plaintiff's Ex. 3 at 538-540. No payments have been made on the Associated Note since June 2002. *See* Plaintiff's Ex. 3 at 540; Plaintiff's Ex. 9 at 53. On December 2, 2002, Hudson sent a Notice of Default to Associated Foods and to Maria DePaz. *See* Plaintiff's Ex. 31. As of January 14, 2005, Associated's total outstanding obligations on the Note were \$480,022.73.

Also in February 2002, Extra Produce executed a promissory note in the principal amount of \$170,000, guaranteed by Maria DePaz. *See* Plaintiff's Ex. 20. She executed this note although she was not an officer or owner of Extra Produce, as "as a favor" to Pena at his request. *See* Plaintiff's Ex. 7 at 58-60. Pena has admitted that he is personally liable for the Extra Produce Note. No payments have been made on this Note since June 2002. On December 2,

2002, Hudson sent Notices of Default to Extra Produce and Maria DePaz. *See* Plaintiff's Ex. 32. As of January 14, 2005, the total outstanding obligations on the Extra Produce Note were \$203,403.11.

In May 2002, Chester Produce executed a promissory note for \$325,000, guaranteed by Marlene Pena. *See* Plaintiff's Ex.'s 16, 24, and 10. Pena and Marlene Pena both invoked their Fifth Amendment rights in response to questions regarding Chester Produce at their depositions. However, they had previously admitted in their pleadings that the Note was issued, that Chester Produce was obligated, and that Marlene Pena guaranteed the obligations. *See* Plaintiff's Ex.'s 9 and 10 at 98-103. Pena also admitted that he obtained approximately \$550,000 to \$575,000 from Hudson on the Coatesville Produce and Chester Produce Notes and that he applied the proceeds of the Coatesville Produce Note to Chester Produce. *See* Plaintiff's Ex. 2 at 199. No payments have been made on the Chester Produce Note since June 2002. On December 2, 2002, Hudson sent Notices of Default to Chester Produce and to Marlene Pena. *See* Plaintiff's Ex. 28. As of January 14, 2005, Chester Produce's total outstanding obligations total \$397,632.63.

In June 2002, Maria DePaz executed a promissory note on behalf of Fun House Bar & Restaurant in the principal amount of \$65,000, at Pena's request. *See* Plaintiff's Ex. 21. Pena has admitted that the Fun House Note represents a valid obligation to Hudson and that he is personally liable for the Fun House Note. *See* Plaintiff's Ex. 3 at 530, 533-534. No payments have been made on the Fun House Note since July 2002. *See* Plaintiff's Ex. 3 at 534; Plaintiff's Ex. 9 at 116. On December 2, 2002, Hudson sent Notices of Default to Fun House and to Jesus Pena and Maria DePaz. *See* Plaintiff's Ex. 33. As of January 14, 2005, Fun House's outstanding obligations on the Note were a total of \$38,740.52. The Fun House Note was partially satisfied

by Jesus Pena as part of his stipulated settlement with Hudson. Only the deficiency is being sought by Hudson against Pena.

## **DISCUSSION**

The court has subject matter jurisdiction over this litigation due to the diverse citizenship of the parties and to the amount in controversy exceeding \$75,000, pursuant to 28 U.S.C. § 1332(a)(1). Summary Judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of

an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255. The court must decide not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. Id. at 252. If the non-moving party has exceeded the mere scintilla of evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

Here, Defendants chose not to respond to this Motion for Summary Judgment. However, this failure to respond does not automatically entitle Hudson to judgment. Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d. Cir. 1990). Rather, the Motion must still be evaluated on the merits, and judgment entered in favor of the movant only if "appropriate." Id. Therefore, the Motion may be granted only if Hudson is entitled to "judgment as a matter of law." Id.

After a careful review of the record in this case, including the pleadings, exhibits, and other related documents, I am satisfied that there is no genuine issue as to any material fact and that Hudson is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). As discussed above, Defendants do not challenge the validity of any of the Notes. *See* Plaintiff's Ex. 4 at 6; Plaintiff's Ex. 9 at 22-25, 35-38, 48-51, 61-64, 74-77, 87-90, 98-101, 111-114, 124-127, 136-139. Further, Defendants admit that the Notes have not been repaid, and that no payments have

been made since July 2002. *See* Plaintiff's Ex.'s 9 and 10 at 27, 40, 53, 66, 79, 92, 103, 116, 129, 139. It is also undisputed that missing a payment by more than ten days constituted an Event of Default under all of the Notes, and triggered the acceleration of the entire principal balance and all obligations due under the Notes. Hudson properly provided a Notice of Default to each of the Defendants and guarantors of the Notes. *See* Plaintiff's Ex.'s 26-35.

Moreover, Defendants have not attempted to rebut Hudson's allegations by setting forth facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e). Under these circumstances, no reasonable jury could return a verdict in favor of the Defendants. Thus, Hudson is entitled to summary judgment against the six remaining corporate Defendants, i.e., Super Saver, Farm Fresh, Chester Produce, Coatesville Produce, Junior's Produce, and RKDL.

Likewise, Marlene Pena's personal liability for the Chester Produce Note and the Coatesville Produce Note is not in dispute. The record is undisputed that Marlene Pena personally guaranteed both of these Notes. *See* Plaintiff's Ex. 10 at 89, 100; Plaintiff's Ex.'s 24 and 25. As of January 14, 2005, according to Mr. Cina's affidavit, these two Notes had an amount due of \$689,978.47, including principal, interest, and late fees. Thus, Hudson is entitled to summary judgment against Marlene Pena, jointly and severally with Chester Produce on the Chester Produce Note, and jointly and severally with Coatesville Produce on the Coatesville Produce Note.

The record is also clear that Pena is personally liable for the Super Saver Note and the Farm Fresh Note. *See* Plaintiff's Ex. 9 at 24 and 37; Plaintiff's Ex.'s 14 and 15. Pena admitted that these two Notes are valid obligations, that they had not been repaid, and that he is personally liable on the Notes. *See* Plaintiff's Ex. 1 at 34, 101-102, 129, 181-183; Plaintiff's Ex. 2 at 349-

353; Plaintiff's Ex. 3 at 529; Plaintiff's Ex. 4 at 6; and Plaintiff's Ex. 9 at 22-27. Thus, Hudson is entitled to summary judgment against Pena, jointly and severally with Super Saver and Farm Fresh on the Super Saver Note, and jointly and severally with Farm Fresh and Super Saver on the Farm Fresh Note.

Hudson also argues that it is entitled to summary judgment against Pena individually on each of the Notes. As support, Hudson cites deposition testimony where Pena admitted that he is personally liable on each of the Notes, and where Jesus Pena and Maria DePaz testified that Pena had admitted to them that he was personally liable for the Notes. In the alternative, Hudson requests that Pena be found personally liable through piercing the corporate veil.

At his deposition in this matter, Pena testified that he is personally liable on each of the Notes:

Q. So it's your testimony that you are personally, you, Ricardo Pena, is personally liable, personally obligated on each of the notes we've been talking about at this deposition?

A. Yes.

Q. To Hudson United Bank.

A. Yes.

Q. You are personally obligated on the Super Saver notes.

A. Yes.

Q. And you are personally obligated on the Farm Fresh notes.

A. Yes.

Q. You are personally obligated on the Coatesville note.

A. Yes.

Q. You were personally obligated on the Junior's Produce note.

A. Yes.

Q. You were personally obligated on the RKDL note.

A. Yes.

Q. That you were personally obligated on the Extra Produce note.

A. Yes.

Q. And also that you were personally obligated on the Associated Foods note?

A. Yes.

Q. And that you were personally obligated on the Fun House note?

A. Yes.

Q. And that you're personally obligated on the Chester Produce note.

A. I'm taking the Fifth there.<sup>2</sup>

*See* Plaintiff's Ex. 3 at 529-530; *see also* Plaintiff's Ex. 3 at 520; 536-537; 540. Pena also testified, "I'm just saying I have no money at this time, and that I know I owe Hudson United Bank whatever amount of money it is, whether it is \$1,000,000, \$2,000,000, \$3,000,000, I'm not disputing any of that." *See* Plaintiff's Ex.1 at 150.

Moreover, Jesus Pena testified that it had always been his understanding that although he had signed for the loans, his brother would be responsible for re-payment of the loans; that his

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<sup>2</sup>Pena's invocation of the Fifth Amendment privilege against self-incrimination entitles a fact-finder to draw an inference that the response to the question that Pena refused to provide would be adverse to his position in this litigation. *See Baxter v. Palmigiano*, 425 U.S. 308 (1976). Reliance on the Fifth Amendment in civil cases may give rise to an adverse inference against the party claiming its benefits. *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir.1994)(citing *Baxter*, 425 U.S. at 318). Use of the privilege in a civil case may, therefore, carry some disadvantages for the party who seeks its protection. *Id.*

brother was fully aware that it was his obligation; and that he only signed for the loans to enable his brother to get the money. *See* Plaintiff's Ex. 6 at 142-146. At her deposition, Maria DePaz testified that she was doing Pena a favor by signing for the loans, and that Pena had assured her that he would re-pay the loans. *See* Plaintiff Ex. 7 at 60.

Given Pena's unequivocal admission that he is personally liable for the repayment of each of the Notes, and the corroborating testimony of Jesus Pena and Maria DePaz, I am satisfied that no reasonable jury could find in Pena's favor at trial regarding his personal liability for the Notes.

However, even without such evidence, Pena's personal liability is apparent. A court may disregard the existence of a corporation to make its individual principals liable for the debts of that corporation through the equitable remedy of piercing the corporate veil. In re Blatstein, 192 F.3d 88, 100 (3d Cir. 1999). The alter ego theory comes into play in piercing the corporate veil when one seeks to hold liable an individual owner who controls the corporation. *See* S.T. Hudson Engineers v. Camden Hotel Dev. Assoc., 747 A.2d 931, 936 (Pa. Super. 2000); Miners, Inc. v. Alpine Equip. Corp., 722 A.2d 691, 695 (Pa. Super. 1998) (citing Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1521 (3d Cir. 1994)). Although the corporate form exists to shield shareholders from liability, Pennsylvania courts will not hesitate to treat as identical the corporation and the individuals owning all its stock and assets whenever justice and public policy demand. Good v. Holstein, 787 A.2d 426, 430 (Pa. Super. 2001). Although there is no definitive test under Pennsylvania law,<sup>3</sup> courts apply a totality of the circumstances test when determining

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<sup>3</sup> When sitting in diversity, a federal court must apply the state substantive law as pronounced by the state's highest court. *See* Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 148-149 (3d Cir. 1988). The Pena Companies were incorporated in Pennsylvania, and were physically located in Pennsylvania. Thus, Pennsylvania law is the appropriate law to apply.

whether to pierce the corporate veil and impose alter ego liability. First Realvest, Inc. v. Avery Builders, Inc., 600 A.2d 601, 604 (Pa. Super. 1991). There are several factors which courts have considered in making this determination: undercapitalization; failure to adhere to corporate formalities; substantial intermingling of corporate and personal affairs; non-payment of dividends; insolvency of the debtor corporation; siphoning of funds from corporation by dominant shareholders; non-function of other officers and directors; absence of corporate records; whether the corporation is a mere facade for the operations of a common shareholder or shareholders; and use of the corporate form to perpetrate a fraud. Lumax Industries, Inc. v. Aultman, 669 A.2d 893, 895 (Pa. 1995). *See also* Eastern Minerals & Chemicals Co. v. Mahan, 225 F.3d 330, 333 n.7 (3d Cir. 2000); Ashley v. Ashley, 393 A.2d 637, 641 (Pa. 1978)(whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate corporate entity may properly be disregarded).

The record in this case contains a multitude of evidence to support piercing the corporate veil to hold Pena personally liable on each of the Notes. For example, Pena used Super Saver funds to make payments to Hudson for obligations owed by RKDL, Extra Produce, and RKDL/Funhouse. *See* Plaintiff's Ex. 2 at 234-235, 243-244, 281-282; Plaintiff's Ex. 39; and Plaintiff's Ex. 40 at 1227. He also used funds of Farm Fresh to make payments to Hudson for obligations owed by Super Saver, Extra Produce, Associated, and RKDL. *See* Plaintiff's Ex. 2 at 282-285; Plaintiff's Ex. 39; Plaintiff's Ex. 3 at 369-371, 535; Plaintiff's Ex. 41; Plaintiff's Ex. 6 at 135-137; Plaintiff's Ex. 42; Plaintiff's Ex. 43. In fact, Pena testified that he made payments from the Farm Fresh account on behalf of Associated "all the time." *See* Plaintiff's Ex. 3 at 371. Pena further testified, "wherever there was money, that's where I would write the check." *Id.* He

used funds from the Super Saver account to pay off obligations on behalf of his other companies, using it as a central account for all of the Pena Companies. *See* Plaintiff's Ex. 2 at 189; Plaintiff's Ex. 4 at 25-26.

Pena's property at Oley Street was used as a warehouse, and housed the Farm Fresh store. Mortgage payments for that property were paid with funds from Super Saver. *See* Plaintiff's Ex. 2 at 254-256, 266-267. Funds from Super Saver also paid utility bills for the property at 900 Chestnut Street where Junior's Produce was located, for waste disposal services on behalf of Fun House, and for fuel oil for the properties on Schuylkill Avenue and Oley Street. *See* Plaintiff's Ex. 2 at 249-250, 257-258, 261-263; Plaintiff's Ex. 40 at 1228; Plaintiff's Ex. 44. At other times, funds from Junior's Produce paid the energy bills for Farm Fresh, and the premiums for an insurance policy on the property owned by RKDL. *See* Plaintiff's Ex. 2 at 251; Plaintiff's Ex. 3 at 474-475, 479-481; Plaintiff's Ex. 40 at 1439; Plaintiff's Ex. 45 at 13, 130, 141.

Another of Pena's routine business practices was to purchase produce and meat which he then distributed to all of his stores in operation. He did so "all the time." *See* Plaintiff's Ex. 2 at 212. Pena would pay for this inventory with the funds from the checking account of one of his companies, but would distribute the inventory to any of the Pena Companies which needed it, without keeping adequate records, or ever requiring the recipient stores to reimburse the cost of the inventory. *See* Plaintiff's Ex. 2 at 207-208; Plaintiff's Ex. 4 at 13-14, 19-21. Pena put all of the income from the Pena Companies "in one pot," and wrote checks from "wherever the money was" to cover obligations on behalf of the Pena Companies. *Id.* at 19-20; 21; Plaintiff's Ex. 2 at 207-208.

Pena also testified that he routinely shifted employees from one store to another

according to the needs of the stores on a particular day. *See* Plaintiff's Ex. 4 at 12-13; Plaintiff's Ex. 2 at 212; Plaintiff's Ex. 3 at 386-387, 389-390. The shifted employee's home store paid the salary and no attempt was made to reimburse the salary with the funds of the store who borrowed that employee. *See* Plaintiff's Ex. 4 at 12-13.

Pena also used corporate funds for his personal affairs. He testified that he had no personal checking account, and that it was not unusual for him to use Super Saver checks to pay personal debts. *See* Plaintiff's Ex. 4 at 24. Marlene Pena also testified that she and her husband had no checking account or credit cards. *See* Plaintiff's Ex. 5 at 21-22. When asked whether her husband's businesses pay their personal bills, Marlene Pena invoked her Fifth Amendment rights against self-incrimination. *Id.*

Pena made a down payment with Super Saver funds on the Chestnut Street property, which was purchased by Pena for his personal use, and not for Super Saver's use. *See* Plaintiff's Ex. 4 at 239-240; Plaintiff's Ex. 40 at 1227. He also routinely used Super Saver's checking account to make payments on his personal vehicle and the vehicle driven by Maria DePaz. *See* Plaintiff's Ex. 2 at 245-248; Plaintiff's Ex. 40 at 1228, 1439, 1440. Pena used Farm Fresh funds to pay the mortgage on his family's home. *See* Plaintiff's Ex. 6 at 14-20; Plaintiff's Ex. 42. He wrote a Super Saver check to make a security deposit on Maria DePaz's personal residence. *See* Plaintiff's Ex. 2 at 252-253; Plaintiff's Ex. 40 at 1439. Although Pena testified that Ms. DePaz reimbursed Super Saver for the deposit, he admitted that there is no record of any such payment. *See* Plaintiff's Ex. 2 at 253.

Pena also used Super Saver's funds to purchase supermarket equipment which he then warehoused either to use for his other stores, or in order "to start a resale company just to

wholesale supermarket equipment.” *See* Plaintiff’s Ex. 2 at 267-269.

Pena admitted that the Pena Companies had no other officers or directors other than him. *See* Plaintiff’s Ex. 2 at 224. The companies failed to observe such basic corporate formalities as holding board meetings or paying dividends. *Id.* When asked whether any of the Pena Companies ever maintained a corporate minute book or other type of corporate record, Pena invoked the Fifth Amendment. *See* Plaintiff’s Ex. 4 at 11-12.

These uncontradicted facts establish that Pena disregarded the corporate formalities of each of the Pena Companies by commingling their funds, siphoning corporate funds for his personal use, using the funds of one company to satisfy the debts of the other companies, and transferring inventory and employees among the companies without reimbursement. The evidence also demonstrates that Pena passed off his wife, his brother, and a long-time family friend as the principal shareholders and officers of most of the Pena Companies. These misrepresentations were part of an effort to shield Pena’s personal involvement with the Pena Companies at a time when he personally could not have obtained credit. This undisputed evidence provides ample support for a determination that Pena was the alter ego of each of the Pena Companies, and therefore warrants piercing the corporate veil to find Pena personally liable for each of the Notes. Accordingly, Hudson is entitled to summary judgment against Pena personally on each of the Notes.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>HUDSON UNITED BANK,</b>	<b>:</b>	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	<b>:</b>	
	<b>:</b>	
<b>v.</b>	<b>:</b>	<b>NO. 03-0158</b>
	<b>:</b>	
<b>RICARDO PENA, et al.,</b>	<b>:</b>	
<b>Defendants</b>	<b>:</b>	

**ORDER**

**STENGEL, J.**

**AND NOW**, this 30th day of March, 2005, upon consideration of Plaintiff's uncontested motion for summary judgment (Document #49), it is hereby **ORDERED** that the motion is **GRANTED** in its entirety. The Clerk of Court shall mark this case closed for all purposes.

**BY THE COURT:**

/s/ Lawrence F. Stengel  
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LAWRENCE F. STENGEL, J.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>HUDSON UNITED BANK,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>NO. 03-0158</b>
	:	
<b>RICARDO PENA, et al.,</b>	:	
<b>Defendants</b>	:	

**ORDER OF JUDGMENT**

**AND NOW**, this 30th day of March, 2005, in accordance with my Order granting Plaintiff's motion for summary judgment, and in accordance with Federal Rule of Civil Procedure 58, judgment is hereby entered in favor of Plaintiff and against Defendants as follows:

1. On the Super Saver Note, against Defendants Ricardo Pena, Jr., and Super Saver Supermarket, Inc., jointly and severally, in the amount of \$385,404.66;
2. On the Farm Fresh Note, against Defendants Ricardo Pena, Jr., and Farm Fresh Supermarket, Inc., jointly and severally, in the amount of \$388,858.92;

3. On the Chester Produce Note, against Defendants Ricardo Pena, Jr., Marlene Pena, and Chester Produce & Meat Market, Inc., jointly and severally, in the amount of \$402,707.88;
4. On the Coatesville Produce Note, against Defendants Ricardo Pena, Jr., Marlene Pena, and Coatesville Produce & Meat Market, Inc., jointly and severally, in the amount of \$296,122.09;
5. On the Junior's Produce Note, against Defendants Ricardo Pena, Jr., and Junior's Produce Market, Inc., jointly and severally, in the amount of \$150,700.68;
6. On the RKDL Note, against Defendants Ricardo Pena, Jr., and RKDL Prop, LLC, jointly and severally, in the amount of \$7,506.30;
7. On the Fun House Note, against Defendants Ricardo Pena, Jr., and Fun House Bar & Restaurant, Inc., jointly and severally, in the amount of \$39,162.02;
8. On the RKDL/Fun House Note, against Defendants Ricardo Pena, Jr., Fun House Bar & Restaurant, Inc., and RKDL Prop, LLC, jointly and severally, in the amount of \$12,295.44;
9. On the Associated Note, against Defendant Ricardo Pena, Jr., in the amount of

\$486,203.78;

10. On the Extra Produce Note, against Defendant Ricardo Pena, Jr., in the amount of \$206,027.36.

BY THE COURT:

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LAWRENCE F. STENGEL, J.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>HUDSON UNITED BANK,</b>	<b>:</b>	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	<b>:</b>	
	<b>:</b>	
<b>v.</b>	<b>:</b>	<b>NO. 03-0158</b>
	<b>:</b>	
<b>RICARDO PENA, et al.,</b>	<b>:</b>	
<b>Defendants</b>	<b>:</b>	

**ORDER OF JUDGMENT**

**AND NOW**, this 30th day of March, 2005, in accordance with my Order granting Plaintiff's motion for summary judgment, and in accordance with Federal Rule of Civil Procedure 58, judgment is hereby entered in favor of Plaintiff and against Defendants as follows:

1. On the Super Saver Note, against Defendants Ricardo Pena, Jr., and Super Saver Supermarket, Inc., jointly and severally, in the amount of \$385,404.66;
2. On the Farm Fresh Note, against Defendants Ricardo Pena, Jr., and Farm Fresh Supermarket, Inc., jointly and severally, in the amount of \$388,858.92;

3. On the Chester Produce Note, against Defendants Ricardo Pena, Jr., Marlene Pena, and Chester Produce & Meat Market, Inc., jointly and severally, in the amount of \$402,707.88;
  
4. On the Coatesville Produce Note, against Defendants Ricardo Pena, Jr., Marlene Pena, and Coatesville Produce & Meat Market, Inc., jointly and severally, in the amount of \$296,122.09;
  
5. On the Junior's Produce Note, against Defendants Ricardo Pena, Jr., and Junior's Produce Market, Inc., jointly and severally, in the amount of \$150,700.68;
  
6. On the RKDL Note, against Defendants Ricardo Pena, Jr., and RKDL Prop, LLC, jointly and severally, in the amount of \$7,506.30;

7. On the Fun House Note, against Defendants Ricardo Pena, Jr., and Fun House Bar & Restaurant, Inc., jointly and severally, in the amount of \$39,162.02;
8. On the RKDL/Fun House Note, against Defendants Ricardo Pena, Jr., Fun House Bar & Restaurant, Inc., and RKDL Prop, LLC, jointly and severally, in the amount of \$12,295.44;
9. On the Associated Note, against Defendant Ricardo Pena, Jr., in the amount of \$486,203.78;
10. On the Extra Produce Note, against Defendant Ricardo Pena, Jr., in the amount of \$206,027.36.

BY THE COURT:

/s/ Lawrence F. Stengel

LAWRENCE F. STENGEL, J.