UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROTH STAFFING COMPANIES, L.P. *Plaintiff*, *v*. THOMAS BROWN, OEM PROSTAFFING, INC., OEM OF CT, INC., DAVID FERNANDEZ *Defendants*.	Civil No. 3:13cv216(JBA) January 25, 2016

RULING ON MOTIONS FOR SUMMARY JUDGMENT (Doc. ##166, 167, 170)

Plaintiff Roth Staffing Companies, L.P. ("Roth Staffing") brought this diversity action against its former employee Thomas Brown for breach of restrictive covenants in his Employment Agreement (Count I); against Brown's subsequent employer OEM ProStaffing ("ProStaffing") for tortious interference with this Agreement (Count II); and against both Defendants for misappropriation of Plaintiff's trade secrets in violation of the Connecticut Uniform Trade Secrets Act ("CUTSA"), Conn. Gen. Stat. § 35-51, *et seq.* (Count III) and unfair competition in violation of the Connecticut Unfair Trade Practices Act (CUTPA), Conn. Gen. Stat. § 42-110, *et seq.,* (Count IV).[1] Subsequently, counts were added seeking to pierce the corporate form of OEM of Connecticut d/b/a OEM America ("OEM") based on "a unity of interest and control of OEM ProStaffing by OEM" (Count

[1] Roth Staffing also sought [Doc. # 3] and obtained a preliminary injunction enjoining Defendants from (1) divulging Plaintiff's confidential business information; (2) participating in any venture that competed with Plaintiff within twenty-five miles of any of its locations; (3) soliciting any of Plaintiff's customers with whom Brown had contact while employed by Plaintiff; (4) inducing any person engaged by Roth Staffing to terminate his or her employer, and (5) enjoining them to return within twenty-four hours all Plaintiff's confidential business information. (*See* Stip. Order [Doc. #34]; R. Ruling [Doc. #56].) October 16, 2013 was established as the starting date of the preliminary injunction. (Supp. Rec. Ruling [Doc. # 71].)

V, Am. Compl. [Doc. # 74] ¶¶ 77–89), and to pierce the corporate form of ProStaffing to hold David Fernandez, the president, shareholder, director, and treasurer of both ProStaffing and OEM, individually liable for proved claims against ProStaffing (Count VI, Second Am. Compl. [Doc. # 138]).

In the pending summary judgment motions, Defendants OEM and Fernandez[2] seek summary judgment on Roth Staffing's veil piercing claims and Plaintiff moves for summary judgment on its breach of contract claim against Brown. For the reasons that follow, the Court denies Defendants' summary judgment motions on Counts V and VI, and grants Plaintiff's summary judgment motion on Count I.

I. Factual Background[3]

A. Roth Staffing

Roth Staffing provides staffing, recruiting, and administrative services, including staffing and hiring, direct hiring, and executive search and recruitment to businesses. Brown was employed by Plaintiff from April 2006 to September 2007 in its Hartford office at 280 Trumbull Street in Hartford, Connecticut, and later returned to work there from June 2010 to September 2012.

During his second employment with Roth Staffing, Brown worked as an Account Executive and then a Business Solutions Manager in the Ultimate Staffing Services line

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[2] Fernandez alternatively frames his motion as a request for judgment on the pleadings under Fed. R. Civ. P. 12(c). However, Rule 12(d) clarifies that when "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Given the substantial records relied on by the parties, analysis under Rule 56 is required here.

[3] All page numbers cited correspond with ECF's page numbering.

("Ultimate Staffing"), which provides staffing for clerical, administrative, customer service, manufacturing, and production positions. In this role, he was "responsible for maintaining Roth Staffing's relationships with its clients and job candidates" and was "the primary contact for the Roth Staffing customers and job candidates to whom he was assigned."

Plaintiff's customers' preferences, the methods they liked to use to communicate with their staffing providers, and the types of positions they needed to fill, constituted information that Brown "learned over time" and stored in Roth Staffing's password protected software program called "Staff Suite." This program also included customers' purchasing histories, jobs filled, pay rates, bill rates, past relationships, overall utilization, and how and when each customer hires temporary or permanent employees. (Brown Test. Prelim. Inj. Hr'g ("Brown Tr.") [Doc. # 169-2] at 85–87.) Corey Miller, the Regional Vice President of Roth Staffing, explained that this "protected database[]" is "probably one of the most valuable parts of [Roth Staffing's] business" (Miller Test. Prelim. Inj. Hr'g ("Miller Tr.") at 111–12), although Brown viewed this information as "minimally" valuable to competitors and "pretty common knowledge" (Brown Tr. at 88).

When Brown returned to work at Roth Staffing in 2010, he signed a new Employment Agreement acknowledging that he would "have access to confidential information maintained at substantial cost by [Roth Staffing] regarding its temporary employees, regular employees, applicants, and prospective and actual customers" and that "[t]his information is proprietary to [Roth Staffing] and, if used by competitors or other third parties, could cause substantial and irreparable damage to [Roth Staffing]." (Brown Employment Agreement ("Employment Agmt."), Ex. 2 to Pl.'s Opp'n [Doc. # 185] § 3.1.)

In the event of his termination, Brown agreed to "deliver promptly" to Roth Staffing all of the "equipment, notebooks, documents, memoranda, reports, files, samples, books, correspondence, lists, or other written or graphic records, and the like" relating to Roth Staffing's business, "which are or have been" in Brown's possession or under his control. (*Id*. § 3.2.) He further agreed that during the term of his employment and for a period of one year after, he would not directly or indirectly compete with Roth Staffing within twenty-five miles of the office in which he had worked (*id*. § 3.3), or solicit customers or prospective customers known to him through his work at Roth Staffing for the purpose of promoting or selling any products or services competitive with Roth Staffing (*id*. § 3.6). Brown's employment with Roth Staffing ended on September 12, 2012.

B. ProStaffing

On November 7, 2012, Fernandez hired Brown to work at ProStaffing, located at 330 Roberts Street in East Hartford, Connecticut, approximately three miles from Roth Staffing's Hartford office. Although ProStaffing was formed in 2007 and previously had two general managers before Brown was hired (Fernandez Dep. [Doc. # 185-5] at 67; Certificate of Incorp., Ex. E [Doc. # 170] at 40), at the time of Brown's hire, the company had been inoperative for years and "had no employees, customers, office space, computers, telephones, equipment, and little or no capital" (Brown Tr. at 96–97; Brady Dep. [Doc. # 185-5] at 57; Fernandez Dep. at 7, 97).

Once revitalized, ProStaffing shared office space and other resources with OEM. While OEM provided Professional Employee Organization ("PEO") services, ProStaffing

provided staffing services.[4] Shortly after hiring Brown, ProStaffing began to work with two companies Brown had staffed while at Roth Staffing: Lincoln Waste Management ("Lincoln Waste") and Connecticut Spring and Stamping ("Connecticut Spring"). (Brown Tr. at 106–07.) Within two months of being hired, Brown had placed more temporary employees at Connecticut Spring than had any other staffing company, and by spring 2013 had permanently filled two high-level positions at Lincoln Waste. (*Id.* at 110–13.)

On January 17, 2013, Roth Staffing's counsel sent Fernandez a letter, stating "I write to make sure that you are aware that Mr. Brown entered into an Employment Agreement . . . [that] contains, among other things, noncompetition, non-solicitation, and confidentiality provisions." (January 17, 2013 Ltr., Ex. 25 to Pl.'s Opp'n [Doc. # 185-1] at 156–58.) Attached to this letter was a letter that Roth Staffing had sent to Brown, reminding him of the provisions and asserting that "investigation into [your] competitive activities is ongoing," [but] we have information that you have solicited business on behalf of OEM from at least one of the customers with whom you had dealings during your employment by [us]." (*Id.*) When Brown spoke to Fernandez about this letter, Fernandez told him, "We'll take care of it, don't worry about it." (Brown Tr. at 132.) Roth Staffing claims that Brown continued to solicit customers in violation of his Agreement and that Fernandez ratified these acts.

After the preliminary injunction was issued, ProStaffing represents that it immediately terminated Brown, effective October 16, 2013. (Defs' Obj. to Mot. Compel

[4] PEOs are distinct from staffing agencies insofar as they assist businesses with services such as human resources, tax invoicing, and employee manuals, while staffing agencies provide actual labor. *See* Conn. Gen Stat. § 31-221a(10)–(11).

[Doc. # 127] at 1; Brown Aff., Ex. 26 to Pl.'s Opp'n [185-1] at 161.) However, Roth Staffing claims that Brown continued to work for ProStaffing and solicit Roth Staffing's customers.

II. Discussion[5]

A. Defendants' Summary Judgment Motions on Plaintiff's Veil Piercing Claims (Counts V and VI)[6]

"Generally, a corporation is a distinct legal entity that shields its shareholders from the corporation's liabilities," *Wells Fargo Bank, N.A. v. Konover*, No. 3:05-CV-1924 (CFD), 2011 WL 1225986, at *1 (D. Conn. Mar. 28, 2011), and exceptional circumstances are required to set aside that legal form, s*ee, e.g.*, *Comm'r of Envtl. Prot. v. State Five Indus. Park, Inc.*, 304 Conn. 128, 139 (2012) (piercing the corporate veil is appropriate "where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice" (citing *Angelo Tomasso, Inc.*

[5] Summary judgment is appropriate where, "resolv[ing] all ambiguities and draw[ing] all permissible factual inferences in favor of the party against whom summary judgment is sought," *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008), "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006) (quotation marks omitted). "The substantive law governing the case will identify those facts that are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When considering a motion for summary judgment, the Court may consider depositions, documents, affidavits, interrogatory answers, and other exhibits in the record. Fed. R. Civ. P. 56(c).

[6] The parties agree that Connecticut law governs Plaintiff's veil piercing claims.

v. Armor Const. & Paving, Inc., 187 Conn. 544, 557 (1982))). However, "[c]ourts will . . . disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor." *Tomasso*, 187 Conn. at 552 (internal quotation marks omitted); *Naples v. Keystone Bldg. & Dev. Corp.*, 295 Conn. 214, 234 (2010) ("[C]ourts decline to pierce the veil of . . . corporations in the absence of proof that failure to do so will perpetrate a fraud or other injustice.").

The Connecticut Supreme Court utilizes two theories for analyzing veil piercing claims: the instrumentality rule and the identity or "alter ego" rule, s*ee Konover*, 2011 WL 1225986, at *5, and courts may pierce the veil under either theory, *Atelier Constantin Popescu, LLC v. JC Corp.*, 134 Conn. App. 731, 760 (2012) ("Our courts have concluded that the corporate veil may be pierced if either the instrumentality rule or the identity rule is satisfied."). Although the identity rule and the instrumentality rule have been characterized as "interchangeable," Connecticut's identity rule focuses less on control and more on economic integration and enterprise law. *Konover*, 2011 WL 1225986, at *9.

"The instrumentality rule imposes individual liability for corporate actions upon a shareholder, director, or officer of a corporate entity that is, in economic reality, the instrumentality of the individual." *Campisano v. Nardi*, 212 Conn. 282, 291 (1989). In cases not involving express agency, the rule requires proof of three elements:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive

> legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Davenport v. Quinn, 53 Conn. App. 282, 300 (1999) (citing *Tomasso*, 187 Conn. at 553–54).

The identity rule, on the other hand, primarily applies where two corporate entities are, in reality, controlled as one enterprise because of the existence of common owners, officers, directors, or shareholders and because of the lack of corporate formalities between the two entities. *See Tomasso*, 187 Conn. at 560. Under this rule, a plaintiff must show

> such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, [that] . . . adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.

Naples, 295 Conn. at 232 (internal quotation marks omitted).

Under either rule, courts consider the following factors when determining whether an individual or corporate entity has exercised the requisite level of control or influence:

> (1) the absence of corporate formalities; (2) inadequate capitalization; (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes; (4) overlapping ownership, officers, directors, personnel; (5) common office space, address, phones; (6) the amount of business discretion by the allegedly dominated corporation; (7) whether the corporations dealt with each other at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of debts of the dominated corporation; and (10)

> whether the corporation in question had property that was used by the other corporations as if it were its own.

Litchfield Asset Mgmt. Corp. v. Howell, 70 Conn. App. 133, 152–53 (2002) (internal quotation marks omitted). "The concept of piercing the corporate veil is equitable in nature . . . . No hard and fast rule . . . as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case." *Naples*, 295 Conn. at 233.

1. OEM's Motion (Count V)

OEM's motion for summary judgment on Count V challenges the sufficiency of the evidence supporting horizontal veil piercing[7] under either the instrumentality or identity rules. *See Zaist v. Olson*, 154 Conn. 563, 574–75 (1967) (analyzing a veil piercing claim against affiliate corporations pursuant to the identity and instrumentality rules); *Avant Capital Partners, LLC v. Strathmore Dev. Co. Michigan, LLC*, No. 3:12-CV-1194 (VLB), 2013 WL 5435083, at *1 (D. Conn. Sept. 30, 2013) (same); *Konover*, 2011 WL 1225986, at *5 (same); *Societa Bario E. Derivati v. Kaystone Chem., Inc.,* No. 5:90-CV-599 (EBB), 1998 WL 182563, at *9 (D. Conn. Apr. 15, 1998).

While OEM acknowledges that it shared with ProStaffing office space and certain resources, including a telephone trunk number, receptionist, and server, it contends "that

[7] Affiliate corporations exist "[w]hen two or more corporations are controlled by the same, or substantially the same, owners" but neither has an ownership interest in the other. *Minno v. Pro-Fab, Inc.*, 905 N.E.2d 613, 616–17 (Ohio 2009) (citing BLACK'S LAW DICTIONARY (8th ed. 2004). In a "horizontal" veil piercing claim, the court is asked to ignore the autonomous corporate structures of affiliate corporations and make their assets available to satisfy claims.

this is hardly a unique situation among small and closely held corporations" (OEM Mem. Supp. Mot. for Summ. J. [Doc. # 170] at 27), and that the affiliates' "necessarily close relationship" merely reflects OEM's role as ProStaffing's PEO, an arrangement memorialized in a Customer Service Agreement and later a Vendor Service Agreement (Customer Service Agreement, Ex. O to OEM's Loc. R. 56(a)1 Stmt. [Doc. # 170]; Brown Dep. I at 159). Thus, OEM claims, although it sent out invoices for ProStaffing and provided other services, these were typical services it provided to all its PEO customers and not evidence of domination or unity. (Brady Dep., Ex. F to OEM's Loc. R. 56(a)1 Stmt. [Doc. # 170] at 58–59.)

OEM also offers evidence that the affiliates functioned as separate and distinct corporate entities, including dates of incorporation separated by over a decade, the filing of separate tax returns in 2012, separate billing for accounting and bookkeeping services, and maintenance of separate bank accounts. (*See* Tax Returns, Ex. J to OEM's Loc. R. 56(a)1 Stmt. [Doc. # 170-1] at 38–45; Invoices, Ex. K to OEM's Loc. R. 56(a)1 Stmt. [Doc. # 170-1] at 47; Bank Accounts, Ex. H to OEM's Loc. R. 56(a)1 Stmt. [Doc. 170-1].) Despite the undisputed existence of overlapping ownership and resources, OEM claims that this evidence is insufficient to support a veil piercing claim with respect to these affiliate corporations.

2. David Fernandez's Motion (Count VI)

Fernandez seeks summary judgment on Count VI on two grounds: (1) the record fails to demonstrate that he exercised the requisite control over ProStaffing or that he used this control to contravene Roth Staffing's legal rights under the instrumentality rule; and (2) the record fails to show that there was such a unity of interest between Fernandez

and ProStaffing that adherence to the fiction of separate entities would defeat justice and equity.

Fernandez avers that he never commingled his personal funds or property with that of ProStaffing (Fernandez Aff., Ex. 1 to Mem. Supp. [Doc. #166-1] ¶ 13), and that the company maintained a separate bank account (*id.* ¶ 8), used its funds only for corporate purposes (*id.* ¶ 9), never loaned money to Fernandez (*id.* ¶ 11), never paid a guarantee of debt on Fernandez's behalf or vice versa (*id.* ¶ 12), and maintained a separate address and telephone number (*id.* ¶¶ 14, 15). *Contrast Naples*, 295 Conn. at 236 (piercing corporate veil due to close interrelationship between the owner's personal finances and the corporate entity); *Litchfield*, 70 Conn. App. at 153 (piercing corporate veil where corporation's owner used his company funds to purchase gifts, make interest free loans to family members, and pay the balance of a loan on a vehicle).

Fernandez further supports his motion with testimony that Brown had "complete discretion as to the means and methods by which he identified and contacted potential customers" and that Fernandez did not "oversee the finances and accounts foreseeable." (Fernandez Dep. at 51; Fernandez Aff. ¶ 19.) Thus, he insists, the record reflects a normal level of control exerted by a corporation's owner over business matters, providing no grounds for veil piercing. *KLM Indus., Inc. v. Tylutki*, 75 Conn. App. 27, 34 (2003) (declining to pierce the corporate veil where defendant "exercised no more control over Home Investment than that of any president of a closely held corporation").

3. Roth Staffing's Opposition

Roth Staffing addresses OEM's and Fernandez's motions collectively, proffering evidence that is applicable to both Defendants. It claims that Defendants minimize the

extent to which the affiliates shared common resources and had overlapping personnel, and points to evidence that ProStaffing paid no rent, possessed no sub-lease agreement with OEM or with a separate landlord (Fernandez Dep., to Pl's Opp'n [Doc. # 185-5] at 83–84, 92, 97), that the companies shared employees, including Cathie Brady who worked as a risk manager at OEM while handling accounts payable and insurance work at ProStaffing (Brown 30(b)(6) Dep. [Doc. # 185-5]at 13), and that Tyler Fernandez, the son of Ms. Brady and Defendant Fernandez, worked with Brown on ProStaffing matters in OEM's office, using his OEM email address (*id.* at 6; Brown Dep. I at 204; Tyler Fernandez Emails, Ex. 15 to Pl.'s Opp'n [Doc. # 185-1] at 120–22).

Roth Staffing also offers evidence that the affiliates did not hold themselves out to the public as separate entities: ProStaffing referred to OEM's "website domain as its own in its advertising and correspondence with customers" (Job Posting, Ex. 21 to Pl.'s Mem. Supp. [Doc. # 185-1] at 136; Jan 3, 2013 Email, Ex. 22 to Pl.'s Mem. Supp. [Doc. # 185-1] at 138), and customers' invoices from ProStaffing or emails from Brown included OEM's logo, address, and telephone number (Email, Ex. 22 to Pl.'s Mem. Supp. [Doc. # 185-1] at 138). Moreover, ProStaffing's formal offer of employment to Brown described him as an "employee of OEM" on multiple occasions. (*See* Nov 7, 2012 Job Offer, Ex. 4 to Pl.'s Opp'n [Doc. # 185-1] at 23–24.)

Roth Staffing claims that the affiliates commingled funds, pointing to four "unexplained" bank transfers in January 2014 from ProStaffing's account to OEM's totaling $28,256.66 (Bank Transfers, Ex. 43 to Pl.'s Opp'n [Doc. # 185-2]).[8] It further

[8] Roth Staffing also disputes OEM's assertion that the affiliates always maintained separate bank accounts, as the only evidence OEM provided to support its claim were two

claims that ProStaffing was undercapitalized, citing the company's 2012 income tax return, which listed $11,755.00 in total assets, consisting of approximately $3,000 in cash and $8,000 as an allowance for bad debts. (ProStaffing Income Tax Return, Ex. 10 to Pl.'s Opp'n [Doc. #185-1] at 61–66.) While OEM does not address Roth Staffing's undercapitalization claim in its Reply, it rebuts Roth Staffing's fund commingling evidence, asserting that the transfers were a component of PEO services provided by OEM to ProStaffing. (Brady Dep. at 56–58; Benton Aff., OEM's Reply [Doc. # 194] ¶¶ 5–11.) Meanwhile, Fernandez testified that the company was "still paying back a debt" and that the "starting capital" had to get healthy again. (Fernandez Dep. at 142.)

Fourth, Roth Staffing disputes Fernandez's claim of Brown's autonomy and discretion in managing ProStaffing, pointing to Fernandez's "veto power" over ProStaffing's operations; his role as the "ultimate decision maker" regarding which companies ProStaffing should pursue as customers; and his establishment of parameters for customer billing rates. (Fernandez Dep. at 12; Brown Dep. I at 81, 132.)

Finally, Roth Staffing supports it claims that OEM and Fernandez used their control over ProStaffing to contravene its rights with evidence that OEM, through the direction of Fernandez and Brady, ratified Brown's solicitation of Roth Staffing customers even after receiving Roth Staffing's warning letter regarding violations of Brown's Employment Agreement. (Brown Dep. I at 57–59.) It also contends that OEM allowed "Brown to continue using its premises, email server, equipment, and staff" after the preliminary injunction was in place and after Fernandez claimed that Brown's

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heavily redacted bank statements from January 2014 and September 2013. (Bank Transfers at 15–22; ProStaffing Bank Statement, Ex. 44 to Pl.'s Opp'n [Doc. # 185-2].)

employment had been terminated.[9] (*See* Madamba Email Oct 21, 2013, Ex. 28 to Pl.'s Opp'n [Doc. # 185-1]; June 30, 2013 Aqua Blasting Email, Ex 29 to Pl.'s Opp'n [Doc. # 185-1]; July 17, 2014 Aqua Blasting Email, Ex. 30 to Pl.'s Opp'n [Doc. #185-1].)

OEM explains that ProStaffing had an obligation to its already established clients to service their "run off," which is the revenue and payroll generated by temporary employees already in place. (OEM Reply at 9.)

In sum, Roth Staffing maintains that the summary judgment record demonstrates triable factual disputes as to whether OEM and ProStaffing were appropriately autonomous corporations or whether Fernandez inappropriately used corporate assets.

4. Analysis

Construing all ambiguities and reasonable inferences supported by the summary judgment record in favor of the nonmoving party, the Court concludes that summary judgment for Defendants on Counts V and VI is not warranted under the identity rule, applicable both to corporations and individuals, and focusing on whether "two corporate entities are, in reality, controlled as one enterprise because of the existence of common owners, officers, directors or shareholders and because of the lack of observance of corporate formalities between the two entities." *Avant Capital Partners, LLC v.*

[9] Roth Staffing claims that after Fernandez terminated Brown, ProStaffing became inoperative and Fernandez created another staffing company, B.O.S.S. ProStaffing, based in Massachusetts and incorporated by Fernandez's son (a minor league hockey player in West Virginia) and daughter (a school teacher in New Hampshire) and that this new company hired Brown who continued to solicit Roth Staffing's customers in violation of the preliminary injunction. (Brown Dep. II at 69, 79–80; B.O.S.S. ProStaffing Article of Incorporation, Ex. 31 to Pl.'s Opp'n [Doc. # 185-1] at 177–180; Email to Dri-Air Industries, Ex. 34 to Pl.'s Opp'n [Doc. 185-1] at 187.)

Strathmore Dev. Co. Michigan, LLC, No. 3:12-CV-1194 VLB, 2013 WL 5435083, at *13 (D. Conn. Sept. 30, 2013) (citing *Litchfield*, 70 Conn. App. at 156); *DeMartino v. Monroe Little League, Inc.*, 192 Conn. 271, 276 (1984) ("Where there is a near identity between corporations, their separate existences can be disregarded in order to prevent injustice to a third party."). Factors to be weighed in determining whether the circumstances for veil piercing exist include:

> (a) the business transactions, property, employees, bank and other accounts and records are intermingled; (b) the formalities of separate corporate procedures for each corporation are not observed . . . (c) the corporation is inadequately financed as a separate unit from the point of view of meeting its normal obligations . . . (d) the respective enterprises are not held out to the public as separate enterprises; [or] (e) the policies of the corporation are not directed to its own interests primarily but rather to those of the other corporation

Konover, 2011 WL 1225986, at *9 (citing *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 232 (1991)). When proof is adduced on some or all of these factors are satisfied, courts may pierce the corporate veil to hold both the individual owner or shareholder and the dominant or more adequately capitalized corporation responsible for the dominated corporation's liabilities, making their assets available to satisfy judgments.

In *Konover*, for example, a case brought against an individual defendant as well as several affiliate corporations of which he was sole shareholder, director, and officer, the district court denied defendants' summary judgment under the identity rule where evidence showed "substantial overlap between the officers, directors, and employees [of the affiliate companies]"; that the companies shared or had shared "the same office space, website," and "bank account"; the existence of "commingling of funds among members"; and the "overlap in management." 2011 WL 1225986, at *10–11. The court rejected the

defendants' position that sufficient corporate separateness was proved because each affiliate filed its own tax returns and maintained its own corporate records, concluding that this evidence was more indicative of a "sophisticated business person" than separateness. *Id.* at 11. Likewise, in *Zaist*, the Connecticut Supreme Court upheld a referee's recommendation to pierce the corporate veil to hold an affiliate corporation and its owner liable based on evidence of mutual domination and control by the president and owner, shared office space, failure to maintain corporate formalities, and undercapitalization. *Zaist*, 154 Conn. at 570–71.

Here, the Court concludes that sufficient record evidence exists for which reasonable factfinders could conclude "there was such a unity of interest and ownership" between OEM and ProStaffing that adherence to the fiction of a separate identity would enable OEM and Fernandez to unjustifiably remain insulated from the consequences of ProStaffing's actions and corresponding liabilities. Although Defendants are correct that common ownership *or* the presence of shared resources *or* the failure to observe corporate formalities alone do not support a veil piercing claim, the record presented implicates *all* these factors. In addition to the overlap in employees, office space, telephone numbers, webpages, and servers, the lack of corporate formalities, and public use of OEM's logo on ProStaffing's advertisements and emails to customers, there is disputed evidence regarding whether ProStaffing was adequately capitalized and whether the affiliates commingled assets. *See, e.g.*, *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 233 (1991) (declining to pierce the corporate veil due to the absence of evidence showing corporate assets had been intermingled, formalities of separate corporate procedures had been ignored, and that the corporation was inadequately financed);

Connecticut Light & Power Co. v. Westview Carlton Grp., LLC, 108 Conn. App. 633, 641 (2008) (finding ample evidence to pierce the corporate veil where corporate entity filed no annual reports, tax returns, failed to maintain business records, was undercapitalized, and used the corporation to make undocumented, personal loans); *Davenport*, 53 Conn. App. at 302–03 (upholding veil piercing claim where defendant "maintained exclusive control" over both corporations, "allowed one corporation to pay for the debts of another . . . [and] in fact, authorized such a practice" and there was "no separate account for each corporation. If one corporation needed funds, Quinn authorized a transfer of funds from either his sole proprietorship or the other corporation.").

The fact that ProStaffing is no longer operative and was unable to pay a discovery sanction in this action suggests that if Plaintiff succeeded on its claims against ProStaffing, it would be unable to collect any judgment. (*See* Email from Vincent Provenzano dated Dec. 4, 2014, Ex. 51 to Pl.'s Opp'n [Doc. # 185-2] (stating that the company is "no longer doing business . . . so I don't [sic] if there is any money to satisfy the $5,694.00)). Because the Court finds triable disputes regarding the nature of the unity of interest between OEM and ProStaffing and the role Fernandez played in choreographing this relationship, summary judgment is denied both to OEM (Count V) and Fernandez (Count VI). Should Roth Staffing prevail at trial on its claims against ProStaffing, a determination will then be made about whether the corporate veil should be pierced to attribute such liability to either Fernandez or OEM.

B. Breach of Employment Agreement

Roth Staffing seeks summary judgment of liability on its breach of contract claim against Brown (Count I), contending that the restrictive covenants in the Employment

Agreement regarding confidentiality, noncompete, and nonsolicitation were both reasonable and enforceable and that there are no genuine issues of material fact disputing that Brown breached these covenants.

1. Enforceability of Restrictive Covenants

As a preliminary matter, Brown contends that the Court is not bound by its preliminary injunction finding that the restrictive covenants in the Agreement between Roth Staffing and Brown are reasonable and enforceable. While Brown is correct that preliminary injunction findings do not constitute "the law of the case,"[10] now that discovery has concluded in this case, Brown has offered no additional evidence beyond the preliminary injunction hearing record to support a different conclusion. Therefore, the Court finds that the restrictive covenants in the Agreement imposed reasonable temporal and geographic restrictions on Brown's opportunity to pursue his occupation and did not harm the public's interest and are thus enforceable.

2. Breach of Employment Agreement

The elements of a breach of contract claim under Connecticut law are: (1) formation of the agreement, (2) performance by one party, (3) breach by the other party, and (4) damages. *United Rentals, Inc. v. Price*, 473 F. Supp. 2d 342, 346 (D. Conn. 2007).

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[10] *See Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007) (recognizing that a district court's determinations at the preliminary injunction stage were "unavailing because such findings were made before discovery was completed and before the evidence was fully developed at trial and were thus not binding on the court at the summary judgment stage"); Law of Case—Nature of the Ruling or Issues, 18B Fed. Prac. & Proc. Juris. § 4478.5 (2d ed.) ("Rulings—predictions—as to the likely outcome on the merits made for preliminary injunction purposes do not ordinarily establish the law of the case, whether the ruling is made by a trial court or by an appellate court.").

Brown only disputes the third element—Plaintiff's claim that he breached their Employment Agreement with respect to the confidentiality, nonsolication, and noncompete provisions.

i. Confidentiality

Section 3.1 of the Employment Agreement, entitled "Confidentiality," provides that a Roth Staffing employee shall not "use or divulge . . . any confidential information of any kind, nature, or description concerning any matters affecting or relating to the business of [Roth Staffing]." (Employment Agmt. § 3.1.) The Agreement defines "confidential information" as encompassing "customer lists, qualified prospective customer lists, employee lists, qualified employee lists, [and] sales and marketing information" as well as "customer account records, training and operation materials, personnel records, code books, pricing information, financial information, or any other confidential information . . . concerning the business." (*Id.*)

Brown admits that he had access to customer and job candidate information stored in Staff Suite and that he retained in his memory additional information relating to his working relationships with clients such as Connecticut Spring and Lincoln Waste constituting specialized knowledge, *i.e.*, not known throughout the staffing services industry. (Brown Tr. at 85.) He argues that some of this information was "easily and readily available" or "public information," such as "bill rates," which he characterized as "fairly basic across the industry" (*id.* at 86), but provides no record evidence that the information he used to solicit clients was public information.[11]

[11] Brown's minimization of the importance of this information to competitors is irrelevant to the question of its confidentiality.

Therefore, the undisputed record of Brown's solicitation of Plaintiff's customers demonstrates that Brown used Plaintiff's confidential information to ProStaffing's benefit and thus breached this obligation in his Employment Agreement.

ii. Nonsolicitation

Section 3.6 of the Employment Agreement, entitled "Solicitation of Customers or Prospective Customers," states that Brown "shall not directly or indirectly solicit, induce, or influence (or seek to influence) Roth Staffing's customers for the purpose of promoting or selling any products or services in competition with Roth Staffing." (Employment Agmt. § 3.6.).

It is undisputed that Brown solicited both Connecticut Spring and Lincoln Waste, two Roth Staffing customers with whom he had previously worked, and Brown offers no evidence to support a contrary conclusion. Thus, the record is undisputed that Brown violated the nonsolicitation clause of his Employment Agreement.

iii. Noncompete

Section 3.3 of the Agreement provides that for "the one year after an employee's employment with Roth Staffing is terminated, the employee shall not work for or otherwise participate in a company that competes with Roth Staffing with a radius of twenty-five miles of Roth Staffing's Hartford office."

It is undisputed that (1) Brown's employment with Roth Staffing ended on September 12, 2012; (2) Brown began working for a competitor, ProStaffing, the first week of November, 2012 (Brown Tr. at 21); (3) ProStaffing's office is located within twenty-five miles from Roth Staffing's office (*id*. 21–22); and (4) Brown provided staffing services to at least two companies to which he had previously provided such services as an

employee of Roth Staffing. The only reasonable conclusion that a reasonable factfinder could draw from these undisputed facts is that Brown violated the noncompete clause of his Employment Agreement.

On the undisputed record that Brown violated all three contractual obligations under his Employment Agreement, Plaintiff's summary judgment motion on its breach of contract claim is granted as to Brown's liability for these breaches.

C. Conclusion

For the foregoing reasons, Defendants Fernandez's and OEM's motions [Doc. ## 167, 170] for summary judgment on Plaintiff's veil piercing claim are DENIED, and Plaintiff's motion for summary judgment [Doc. # 167] on its breach of contract claim against Brown (Count I) is GRANTED as to liability.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 25th day of January 2015.