

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6<sup>th</sup> day of September, 2012.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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AZTE INC., ABR CONSULTING GROUP  
CORP., and BUDGET AUTOS LLC,

Plaintiffs,

**Decision and Judgment**

Index No. 19999/08

- against -

THE AUTO COLLECTION, INC., STEVEN  
LEVER, JOSHUA LEVER and CHRISTOPHER  
PINKOW,

Defendants.

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**BACKGROUND**

A bench trial in this action seeking damages under alternative theories of breach of contract, fraud and unjust enrichment for the alleged failure to deliver automobiles after full payment had been made was commenced on June 28, 2012, following this court's denial of the defendants' summary judgment motion on June 29, 2011. This action was one of six similar actions in which various plaintiffs alleged that a luxury motor vehicle or several luxury motor vehicles were purchased from defendant The Auto Collection ("Auto Collection") for resale and export to individuals or entities in Russia and eastern European countries, the Auto Collection demanded pre-payment of the full purchase price, and following pre-payment of the full purchase price, the automobiles were never delivered to the respective plaintiffs, nor was the purchase price refunded to them. AZTE, Inc. ("AZTE"), ABR Consulting Group Corp. ("ABR"), and Budget Autos LLC ("Budget"), each claim that funds were paid to Auto Collection in consideration of orders for new luxury vehicles that were never delivered. When a refund was demanded, Auto Collection failed to return their money.<sup>1</sup>

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<sup>1</sup> On July 8, 2009, a joint preliminary conference order was entered in the six actions and extensive discovery has been conducted over the past three years. The Auto Collection also commenced its own action, *The Auto Collection v Pinkow*, Index No. 7847/09 ("Auto Collection Action") against a number of the plaintiffs in this and the other actions, claiming that defendant Christopher Pinkow and the other defendants were involved in a scheme to defraud the Auto Collection. That complaint includes RICO and fraud causes of action. The plaintiffs in this action, AZTE, ABR, and Budget, were all originally named defendants in the Auto Collection Action, however, the Auto Collection discontinued as to AZTE, ABR and Budget in that action. Four of the seven actions have settled; this is the first action to proceed to trial.

The plaintiffs' amended complaint<sup>2</sup> alleges that plaintiffs paid in excess of \$500,000 to the defendants for the purchase of several automobiles and the defendants breached the contract of sale and retained the funds, thereby defrauding them. The complaint alleges that defendants Steven Lever ("Steven"), Joshua Lever<sup>3</sup> ("Joshua", collectively the "Levers"), and Christopher Pinkow ("Pinkow"), "while acting in the capacity of owners and/or fiduciaries to [the Auto Collection], . . . did with intent to defraud plaintiffs, knowingly convert plaintiffs' purchase money for motor vehicles to their own personal use." Plaintiffs alleged causes of action for breach of contract, unjust enrichment, and fraud. The Auto Collection, Steven and Joshua (collectively, "Auto Collection Defendants") alleged cross-claims against Pinkow for contribution and sought to incorporate the RICO claims against Pinkow, as asserted in the Auto Collection Action, into their cross-claims.<sup>4</sup> Before the trial commenced, the plaintiffs withdrew their claims against Pinkow and, during the trial, the Auto Collection Defendants withdrew their cross-claims against Pinkow.<sup>5</sup>

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<sup>2</sup> On January 13, 2011, plaintiffs withdrew their equitable causes of action in this matter. However, on September 14, 2011, this court granted plaintiffs' motion to re-instate their unjust enrichment causes of action, noting that the defendants had not been prejudiced as discovery had been extensive and they were neither surprised, nor disadvantaged. On November 3, 2011, plaintiffs filed their first verified amended complaint including their reinstated unjust enrichment causes of action.

<sup>3</sup> Joshua is Steven's son.

<sup>4</sup> In the Auto Collection Action complaint, the Auto Collection Defendants alleged that Pinkow was "working with [the other defendants in that action, including AZTE, ABR and their principals], to effectuate a scheme to defraud [the Auto Collection Defendants]." The complaint alleged that Pinkow and the other defendants diverted the delivery of the automobiles from the Auto Collection's customers, the "[t]he Auto Collection's in-house documentation, *all of which was prepared and maintained by Pinkow*, generally failed to confirm the delivery of the target vehicle to the purported good-faith purchaser" (emphasis added), and Pinkow simultaneously asserted that he was owed a commission by the Auto Collection despite the diversion of the automobiles from the proper Auto Collection customers. The above emphasized claim is directly contradicted by the Levers' own testimony at this trial.

<sup>5</sup> In a criminal action in Nassau County, *People of the State of New York v Pinkow*, Nassau County Ind. No. 698N/10, Pinkow initially pled guilty to three counts of grand larceny for his role in defrauding the Auto Collection's customers. However, upon the District Attorney's application, and the consent of Pinkow, the pleas of guilty were withdrawn and the indictment was dismissed with leave to re-present to the Grand Jury. Pinkow subsequently consented to prosecution by a superior court information for lesser crimes and pled guilty to one count of a misdemeanor scheme to defraud in the second degree. Pinkow has not yet been sentenced in that action. The Auto Collection was also named as a defendant in the criminal action and pled guilty to a single misdemeanor count of filing a false business record.

At trial, plaintiffs called Anatoly Zlatokrasov, owner of AZTE, Steven, Pinkow, Joshua, Teodor Epelbaum, owner of AZTE, and Andrei Lissenkov, owner of Livox and JCP Autos, as witnesses. Defendants called Steven as a witness.

At the conclusion of plaintiffs' case, the Auto Collection Defendants moved to dismiss the complaint and plaintiffs moved to conform the pleadings to the proof, specifically seeking recovery of damages against the Levers personally under the theory of piercing the corporate veil of the Auto Collection. Plaintiffs' causes of action for fraud were dismissed on the record as plaintiffs had not demonstrated prima facie evidence of a fraud independent of the plaintiffs' claim for a breach of contract. This court also dismissed Budget's claims as the only proof of payments to the Auto Collection introduced at trial, with respect to Budget's claim, involved payments from a non-party known as Livox Corp., which apparently had been returned to Livox in January or February 2008. The plaintiffs' motion to conform the pleadings to the proof was granted and the motion to dismiss as to the Levers was denied upon a finding that the plaintiffs had presented enough evidence to pierce the corporate veil and hold the Levers individually liable as to both the breach of contract and the unjust enrichment causes of action. In response to defendants' motion to dismiss, the court held the complaint sufficiently alleged that the Levers managed and controlled the Auto Collection, the Auto Collection received funds from the plaintiffs, and the Levers personally took those funds from the Auto Collection for their personal benefit with the intent of damaging the plaintiffs.<sup>6</sup>

At the conclusion of trial, this court ruled from the bench that the contracts between plaintiffs and the Auto Collection were not, as defendants argued, void pursuant to Vehicle and Traffic Law § 415 based upon this court's decision in *Sirota v Champion Motor Group, Inc.* (18 Misc 3d 862 [Sup Ct, Kings County 2008]).<sup>7</sup> The court awarded judgments for breach of contract against the

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<sup>6</sup> It is noted that plaintiffs indicated at multiple conferences prior to the commencement of the trial that they sought to pierce the corporate veil as to the Levers. The claim for such relief is not a separate cause of action, but is asserted within the causes of action for breach of contract and unjust enrichment pleaded against the corporate entity (*Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

<sup>7</sup> In deciding *Sirota*, this court found unenforceable a contract between a plaintiff used automobile dealer without a license to sell new cars, who, like plaintiffs here, intended to ship overseas the new car it sought to purchase from defendant, and defendant seller, a licensed new automobile dealer, pursuant to Vehicle and Traffic Law 415. *Sirota* is distinguished from the instant case, in which plaintiffs want to merely recoup funds advanced, by the fact that *Sirota* sought to recover damages it sustained as a result of having to fill the order from overseas

Auto Collection to AZTE in the amount of \$232,860.00, plus interest from April 8, 2008, and to ABR in the amount of \$310,000, plus interest from March 31, 2008, based upon the stipulation between the parties entered at the beginning of the trial, whereby the Auto Collection acknowledged receipt of wire transfers from AZTE and ABR, for which no consideration was provided.<sup>8</sup> AZTE's claim for an additional \$71,000 was dismissed as that payment was made by non-party Trinapac Enterprises Limited ("Trinapac") and AZTE failed to establish a connection between AZTE and Trinapac or prove that AZTE had standing to litigate Trinapac's rights to recover the funds paid to the Auto Collection.

This court further found the testimony of the Levers to be incredible, manipulative and dishonest in many respects, that the Levers were completely knowledgeable as to Pinkow's activities, were personally aware of all of the transactions at the Auto Collection, and determined the allocation of all funds received by the Auto Collection. Upon the Levers' own testimony that they personally controlled all financial records, as well as the Police Books containing the record of each vehicle bought and sold by the Auto Collection, this court rejected the Levers' contentions that they were unaware of the transactions at the Auto Collection and that Pinkow was solely responsible for each of the transactions at issue. While the court found substantial aspects of Pinkow's testimony to be incredible, Pinkow's testimony as to the Levers' knowledge of the transactions and control of the business was credible. The court reserved decision as to whether either of the Levers could be held

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(which, like plaintiffs' orders here, had been fully pre-paid) by purchasing an alternative vehicle at a higher price, relying on its contention that defendant licensed new car dealer was obligated to perform the contract even though doing so clearly violated Vehicle and Traffic Law § 415. Plaintiff Sirota had deceived defendant in placing the order, claiming the purchase was for the personal benefit of the used car dealership's principal, rather than for resale. Moreover, once the statutory violation was discovered, defendant had not charged the credit card given by plaintiff as payment so defendant had not been unjustly enriched by wrongful retention of payments made, as in the case at bar. As noted in my decision from the bench, relying upon *Lloyd Capital Corp v Henchar*, 80 NY2d 124, 127 [1992], the instant contracts are not unenforceable because the provisions of Vehicle Traffic Law § 415 are merely *malum prohibitum*. Moreover, defendants are seeking to use such provisions as a sword for their own benefit to avoid a legal obligation and not as a shield for the public's benefit (*id.* at 128).

<sup>8</sup> The parties stipulated that AZTE wired the Auto Collection \$232,860 on April 8, 2008 and ABR paid \$750,790 to the Auto Collection between October 2007 and March 2008. It was further stipulated that AZTE did not receive any vehicles or a refund and ABR did not receive four of the eleven vehicles it purchased and did not receive a refund of \$310,000, agreed to represent the value of the undelivered vehicles.

individually liable for the judgments against the Auto Collection under a theory of piercing the corporate veil.

### DISCUSSION

“The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation” (*Morris v State Dep’t of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993]). “Generally, a plaintiff seeking to pierce the corporate veil must show that ‘complete domination’ was exercised over a corporation with respect to ‘the transaction attacked,’ and ‘that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury’” (*Williams v Lovell Safety Mgt. Co., LLC*, 71 AD3d 671 [2d Dept 2010], internal citations omitted). “Additionally, ‘the corporate veil will be pierced to achieve equity, even absent fraud, [w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator’s business instead of its own and can be called the other’s alter ego’” (*Id.* at 671-672, internal citations omitted). “[A] party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff’s injury” (*Superior Transcribing Serv., LLC v Paul*, 72 AD3d 675, 676 [2d Dept 2010], internal citations omitted). “Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use” (*Id.*, internal citations omitted).

Plaintiffs argue that the evidence at trial established that the Levers completely dominated all aspects of the operation of the Auto Collection and that, through their domination of the company and their use of the funds from the transactions at issue, the Levers committed a wrong against the plaintiffs by failing to provide the automobiles and retaining the funds without consideration. It was established at trial that the funds received by the Auto Collection from AZTE and ABR, that are the subject of the judgment against the Auto Collection, were used to purchase automobiles that were ultimately sent to entities unrelated to AZTE and ABR. Plaintiffs introduced credible evidence at trial that the Levers were the only people with access to the books and records of the Auto Collection and were the only people with access to the Auto Collection’s bank account or the ability to issue checks or money wires on behalf of the Auto Collection. The Levers admitted that the only

handwriting in the three New York State Motor Vehicle Books of Registry (“Police Books”), which lists where the automobiles coming into the Auto Collection were purchased and where they were sold, belonged to them (Plaintiffs’ Exhibits 6, 6A, 6B). According to Steven’s testimony at trial, the Auto Collection did not have a bookkeeper or accountant that regularly maintained the records of the Auto Collection. At trial, it was uncontested that Pinkow did not have access to the Auto Collection’s bank account or make entries in the Police Books, ledgers, or Quicken accounting files. The ownership of the Auto Collection was established as follows: Steven owned 90%, Joshua owned 5%, and Steven’s wife, who is Joshua’s mother and is not a party to this action, owned 5%.

Although Steven testified repeatedly at trial that he merely followed whatever directions Pinkow gave him, exercising no discretion whatever, the court finds this testimony to be implausible in light of the evidence and incredible based upon Steven’s demeanor on the witness stand. It was confirmed by the Levers that Pinkow was unable to perform elementary mathematical computations, even using a calculator, and had no involvement whatever in financial transactions, but would simply supply the framework for a particular sale on a worksheet that would be supplied to Steven or Joshua. These worksheets do not supply the detail necessary to enter the information that was entered in the Police Books, the ledgers, bank register or the deal jackets by Steven and Joshua, nor does the information contained in the worksheets actually correspond to the Levers’ entries. It is further noted that Steven testified he had managed a complex real estate business for 25 years before entering the auto business, employing bookkeepers and accountants, but had been the sole bookkeeper and accountant for the Auto Collection, maintaining strict exclusive control of all records and banking. Joshua testified that upon losing his job as a salesman at another dealership, he was instructed by his father as to how to make entries in the books of the Auto Collection in order to take over his father’s work. The court’s observation of Steven Lever’s demeanor on the witness stand convinces that Steven Lever would not have permitted anyone else to control his business and would certainly not mindlessly take direction from Christopher Pinkow.

Similarly, Steven’s claim that automobiles purchased by AZTE were sent to entities, such as Empire Leasing (“Empire”), because Pinkow told him that Empire was an “umbrella company” for Azte, is unsupported by any other evidence and is believed to be a total fabrication. Steven and Joshua were intimately involved in the recording of every single transaction in the Police Books and

ledger; they personally signed the checks for each of the Auto Collection's payments, and they maintained exclusive control over the management of the Auto Collection's bank account. There was testimony that Pinkow would initially fill in a "worksheet" for an order and the Levers reviewed and wrote information on the "deal jackets." Pinkow testified that Joshua's desk was only a few feet away from Pinkow's desk at the Auto Collection's office, Steven's office was approximately 16 feet away from Pinkow's desk, and Steven worked full time at the office. Pinkow further testified that he regularly gave Auto Collection customers the impression that he was a partner of the Levers, in the presence of the Levers, and they did not object to this characterization. While blaming Pinkow for causing plaintiffs' losses, when repeatedly asked at trial whether Pinkow perpetrated a fraud while working at the Auto Collection, Steven declined to affirmatively state that Pinkow committed any fraud, notwithstanding the allegations of such fraud in the Auto Collection Action. Steven never actually explained why the Auto Collection did not provide AZTE or ABR with the automobiles or a refund, other than to state that he just followed what Pinkow told him to do. The court finds his evasive and unresponsive testimony incredible.

Plaintiffs argue that the Levers failed to adhere to corporate formalities in the operation of the Auto Collection. While the evidence generally supports the maintenance of appropriate, separate corporate records, plaintiffs established that the address listed on the Auto Collection's bank account was the personal address of Steven, and not the address of the Auto Collection's place of business (Plaintiffs' Exhibits 4-4E). Plaintiffs also introduced evidence that Steven deposited over \$900,000 of his personal funds into the Auto Collection that he identified as "loans" to the Auto Collection, but it is undisputed that the Auto Collection did not issue any loan documents indicating the terms of the purported loans. At trial, Steven explained the failure to acknowledge such debts by the fact that he did not think it was necessary for the Auto Collection to issue any loan documents since it was a closely held company in which he owned ninety percent. Clearly, in Steven's mind, the Auto Collection was his personal property, the assets of which could be used as he deemed appropriate.

Plaintiffs further contend that the Auto Collection was inadequately capitalized. Steven testified that he had initially capitalized the Auto Collection with "a few thousand dollars," but he wasn't sure of the amount because he contributed funds "as needed." Plaintiffs cite to the 2007 and 2008 tax returns for the Auto Collection which indicate that, despite almost \$60,000,000 in gross

sales receipts, the value of the capital stock of the Auto Collection was \$1,000 (Defendants' Exhibit BB). While the defendants introduced a document, as prepared by the Auto Collection Defendants' forensic accountant, titled "The Auto Collection, Inc. Capital Contributions 2006-2007" that indicated a balance of \$922,700 on December 6, 2007, Steven testified that this amount was actually the sum of his purported "loans" to the Auto Collection (Defendants' Exhibit M). As of May 31, 2008, the balance in the Auto Collection's bank account was \$1,301.73 (Plaintiffs' Exhibit 4). It is noted that, in his testimony, the Auto Collection's Quicken accounting records, and the June 2, 2011 affidavit by Steven submitted in this action and discussed *infra*, Steven interchangeably referred to the money he personally deposited into the Auto Collection as both a "loan" and as "capitalization" (Plaintiffs' Exhibit 14, Page 122).

Plaintiffs argue that the Levers commingled the assets of the Auto Collection with Steven's own funds in his personal bank account. Evidence was presented at trial that Steven deposited and withdrew money from the Auto Collection's bank account at his sole discretion. Notably, on November 6, 2007, Steven wrote five checks to himself from the Auto Collection's bank account, for a total sum of \$65,000.00 (Plaintiffs' Exhibit 4E, page 11).<sup>9</sup> At trial, Steven claimed that these payments represented repayment of a portion of his loan to the Auto Collection. After some of the Auto Collection's customers began to complain that they had not received the automobiles they ordered and demanded a refund in 2008, Steven issued a check to himself in the amount of \$275,000, dated April 25, 2008, from the Auto Collection's account, leaving a balance of \$52,948.51 in the Auto Collection's bank account (Plaintiffs' Exhibit 4A). In response to this evidence, the Auto Collection Defendants introduced Steven's personal bank account statements, in an apparent attempt to demonstrate that Steven used the \$275,000 exclusively for Auto Collection's expenses. However, Steven admitted that he did not recall why he issued a number of the checks. Prior to the deposit of the \$275,000 check into Steven's personal bank account on April 28, 2008, the balance in that account was \$395.55 (Defendants' Exhibit MM). Between April 28, 2008 and January 30, 2009, the next date any money was deposited into Steven's account, out of the total \$275,395.55 in his

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<sup>9</sup> The five checks at issue were in the amounts of \$25,000, \$15,000, \$10,000, \$10,000, and \$5000. No explanation was provided at trial as to why five separate checks were issued to the same person on the same date.

account, Steven wrote a \$10,000 check to himself, a \$5000 check to “Cash”, for which Steven was unable to remember the purpose, a \$1000 check to an employee of Platinum Volkswagen, a separate car dealership purchased by Steven upon the closing of the Auto Collection in approximately April 2008, and over \$50,000 in checks to various entities, after the commencement of this action, for the construction of a spray booth (Defendants’ Exhibit MM). Obviously these checks were drawn against the Auto Collection’s \$275,000. Steven, who personally owns two vintage “collectible” automobiles, stated that the spray booth was intended to be used in the expansion of the Auto Collection for work on their collectible cars, but the business did not make it that far.

Testimony at trial from Pinkow, Steven, and Joshua established that the vast majority of the cars bought and sold by the Auto Collection were recently-manufactured cars, if not brand new cars, manufactured between approximately 2003 and 2008. A review of the Police Books introduced into evidence demonstrates that approximately 1100 cars were bought and sold by the Auto Collection between November 2006 and June 2008, however, based on the testimony of Steven, and a review of the Police Books, the Auto Collection only purchased seven “collectible” automobiles in that time period and never actually sold any of them while doing business as the Auto Collection<sup>10</sup> (Plaintiffs’ Exhibits 6, 6A, 6B). Although Steven denied the assertion, Pinkow testified that at least two of the “collectible automobiles” were purchased for Steven’s personal collection. The evidence does not support defendants’ claim that purchase of the spray booth components was a reasonable expense of the Auto Collection, but rather, supports the inference that the spray booth was actually intended for the personal use of Steven or of his new dealership, Platinum Volkswagen.

Plaintiffs contend that the Levers used the corporate funds of the Auto Collection for their personal use, including the creation of the spray booth (now in storage) for Steven’s personal car collection, a substantial loan to the Levers’ new car dealership, Platinum Volkswagen, and Joshua’s

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<sup>10</sup> Steven testified that the Auto Collection purchased seven “collectible” vehicles. Six of the automobiles had manufacturer dates between 1969 and 1970 and the seventh was identified as a replica of a 1965 Cobra. Steven testified that none of these cars were sold by the Auto Collection until April of 2011 when they were sold at auction and the proceeds of the sales were used for settlement payments in the various other lawsuits involving the Auto Collection. It is noted that the six automobiles with manufacturer dates between 1969 and 1970 are listed in the Police Books as unsold. As a specific description of the replica 1965 Cobra was not elicited at trial, the court is unable to identify that automobile in the Police Books.

excessive salary, particularly in 2008. The court takes judicial notice of an affidavit signed by Steven on June 2, 2011, in this action, in which he acknowledged, “I caused [the Auto Collection] to pay approximately \$126,482 in expenses related to [Platinum Volkswagen]. However, this was done as a mere convenience and because it also served as a re-payment tool for the more than \$1,000,000 that I personally posted to capitalize [the Auto Collection].” The Auto Collection Defendants introduced a list, created by Steven and referenced in the June 2, 2011 affidavit, of the disbursements by the Auto Collection to Platinum Volkswagen (Defendants’ Exhibit M, Identified as “SR-6”). The Auto Collection’s Quicken accounting records identifies a number of these payments as “Loan to VW”, “Legal VW” and “VW Environmental” (Plaintiffs’ Exhibit 14, Pages 116, 117, 127). Steven also indicated in his June 2, 2011 affidavit that Steven’s withdrawal of \$275,000 from the Auto Collection bank account in April of 2008 “was spent on criminal and civil defense costs related to this fraud by my former employee. Further, notwithstanding that [the Auto Collection] ceased operations when the fraud was uncovered, it was still liable for ongoing expenses which were obligations which existed prior to the fraud - like office rent.” However, as discussed *supra*, a substantial portion of those funds were not used for the expenses of the Auto Collection. While legal expenses may have been a legitimate business expense of the Auto Collection, there was no proof of these expenses and no attempt to delineate charges for the Auto Collection from expenses incurred by the Levers personally. Further, Steven did not provide a reasonable, credible explanation as to why any legitimate expenses of the Auto Collection could not have been paid from the Auto Collection’s bank account, without transferring the funds to his personal account.<sup>11</sup>

Plaintiffs argue that Joshua’s compensation from the Auto Collection was excessive and that, by paying him an exorbitant salary, the Levers had effectively removed the Auto Collection’s corporate assets for Joshua’s personal use. According to the payroll records and his 2008 Auto

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<sup>11</sup> Steven testified on cross-examination that in April of 2008, he became concerned with “identity theft” of the Auto Collection based upon a review of an E-Z Pass account and the \$275,000 was placed in a “dormant account” in his name to protect the funds. However, no evidence of this purported “identify theft”, other than Steven’s bald assertion, was produced at trial. This improbable, self-serving explanation is completely incredible and is disregarded, other than to the extent that it further supports this court’s finding that Steven was not a credible or candid witness.

Collection W-2 Statement, Joshua was paid a total of \$474,850 between June 2007 and April 2008 while employed by the Auto Collection ( which was in operation for less than two years),<sup>12</sup> including \$103,192.00 in 2008 alone (Plaintiffs' Exhibits 10, 13). Plaintiffs argue that Joshua's pay in 2008 was especially excessive as Joshua, a shareholder of the Auto Collection, was paid over \$100,000 for less than 4 months of work at a time when there were numerous complaints of undelivered automobiles and outstanding claims for refunds, and the Auto Collection's bank account was being depleted. Although plaintiffs' attorney argued in summation that, based upon Steven's representation that the Auto Collection was making a profit of \$300-400 per automobile sale, the Auto Collection's profit for the first three months of 2008 was approximately \$90,000 to \$120,000, a review of the Auto Collection's ledger establishes that the Auto Collection was far more profitable during this time period, showing a profit<sup>13</sup> in excess of \$125,000 for the month of January 2008 alone (Plaintiffs' Exhibit 15). Further, automobile sales and the Auto Collections' profits, as listed in the ledger, were similar in February and March of 2008. Thus, Joshua's salary, though substantial, may actually have been reasonable. Of course, the diversion of these substantial "profits" from the Auto Collection to other purposes, so as to leave the Auto Collection without the funds needed to pay its debts, is not justified.

Plaintiffs also contend that, after February of 2008, the Levers improperly diverted both automobiles and Auto Collection funds to RJK Auto Brokers ("RJK"), owned by Richard J. Kaufman ("Kaufman"), a family friend of the Levers. Defendants acknowledged that Kaufman was a friend of Joshua, but Steven claimed to have had very few interactions with Kaufman, although Pinkow testified that Kaufman was a frequent visitor at the Auto Collection. Plaintiffs introduced evidence establishing that between February 1 and April 8, 2008, the Auto Collection sold 16

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<sup>12</sup> Steven testified that the Auto Collection was formed and incorporated in March, 2006. However, according to the Police Books, the first purchase of an automobile occurred on October 23, 2006 (Plaintiffs' Exhibit 6). Based upon the testimony of multiple witnesses, and a review of the Auto Collection's ledger and Police Books, it appears to be uncontested that the Auto Collection essentially ceased operations in April of 2008 (Plaintiffs' Exhibits 6B, 15).

<sup>13</sup> According to testimony adduced at trial, the ledger calculates the profit on each automobile sale by subtracting the sum of the purchase price and the transfer fee from the sale price, without consideration to other expenses, such as overhead.

automobiles to RJK (Plaintiffs' Exhibits 6A, 6B). Plaintiffs claim that the Auto Collection bank account statements from this time period do not indicate the receipt of a single payment from RJK and, as is supported by a review of the Auto Collection's bank account statements, the Auto Collection made payments to RJK in the amount of over \$750,000 during this time period (Plaintiffs' Exhibits 4-4E). When asked at trial whether the Auto Collection purchased automobiles from RJK, Steven incredibly indicated that he did not remember. A review of the Police Books establishes that the Auto Collection identified 64 automobiles that it purchased from RJK between February 5 and April 14, 2008 (Plaintiffs' Exhibits 6A, 6B). Although the Police Books indicate that the automobiles purchased from RJK were sold to various entities, the Auto Collection's ledgers do not contain corresponding purchaser information, sale price or profit per car for the automobiles purchased from RJK (Plaintiffs' Exhibits 6A, 6B, 15). In fact, the accounting records actually contradict some of the information listed in the Police Books (Plaintiffs' Exhibit 14). For example, plaintiffs elicited testimony from Steven that one particular automobile purchased from RJK, identified as inventory number "7230" on two Auto Collection checks issued to RJK, is listed as being sold to "Transatlantic Auto Group" in the Police Book, is not listed as being sold in the ledger, and is listed as being paid for by "Grand PRIX" and "1&L AUTO DI"<sup>14</sup> in the Quicken accounting records (Plaintiffs' Exhibits 4C page 12, 6A page 81, 15 page 8, 14 page 94). Further, the Quicken accounting records show a loss of \$40,600.00 for this particular vehicle (Plaintiffs' Exhibit 14 page 94). Steven did not provide any explanation for these discrepancies. When asked at trial whether a loss of \$40,600.00 was typical for the sale of an automobile, Steven stated that it was not and that it could be an "error." The inconsistencies and irregularities evident in the records maintained by defendants support the inference that the assets of the Auto Collection were intentionally diverted to the personal purposes of Steven and that the individual defendants sought to obscure such diversion by obfuscation.

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<sup>14</sup> The Quicken printout introduced into evidence limits the number of characters visible in the column identifying the buyer (Plaintiffs' Exhibit 14, page 94), but the referenced entity clearly refers to L&L Auto Distributors and Suppliers Inc. which is a defendant in the Auto Collection Action and a plaintiff in a separate action against the Auto Collection. Both actions are currently pending before this court as described *supra*.

Based upon the testimony and exhibits introduced at trial, it is clear that Steven exercised complete domination and control of the Auto Collection, including the transactions at issue in this action, commingled the Auto Collection's funds with his personal funds and that of another unrelated corporation, Platinum Volkswagen, owned by Steven, and that Steven's domination resulted in significant damages to the plaintiffs in that insufficient funds remain in the Auto Collection to satisfy plaintiffs' judgments.<sup>15</sup> There was substantial evidence that only Steven and Joshua personally entered and reviewed the sales information for every Auto Collection transaction recorded in the Police Books (which were kept locked in Steven's office) and ledger, and exclusively controlled the Quicken accounting records and bank accounts for the Auto Collection. Often the various records could not be reconciled and there are inconsistent entries for many transactions, including those in the Police Books, which were not properly bound and consecutively paginated, as required by law.

There was testimony that Steven first became aware of the complaints from various customers, including AZTE and ABR, in March and April of 2008, and the Auto Collection Defendants argue that Steven cannot be held personally liable because there is no evidence that Steven was contemporaneously personally involved with the transactions at issue. However, the evidence does not support this contention. Although the parties stipulated that the principals of AZTE and ABR did not actually meet Steven until April of 2008, after the money was transferred to the Auto Collection, and Steven did not personally induce them to enter into the transactions with the Auto Collection,<sup>16</sup> the Principal of AZTE, Zlatokrasov, testified that, when speaking to Pinkow after AZTE sent its wire to the Auto Collection, Zlatokrasov heard Steven confirm to Pinkow that

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<sup>15</sup> An indication of the extent of Steven Lever's knowledge and control of all aspects of the Auto Collection is the undisputed evidence that Steven arranged for Long Island resident Brian Flynn, an Auto Collection employee who purchased new cars for the Auto Collection nation-wide, and the prospective brother-in-law of Joshua, who was to marry Brian's sister, to establish a residence in New Hampshire in order to avoid New York State's higher tax rate. The Auto Collection paid all expenses associated with such alternative residence. A second Auto Collection employee similarly established a Vermont residence.

<sup>16</sup> The parties stipulated that the principal of AZTE, Anatoly Zlatokrasov ("Zlatokrasov"), never met the Levers prior to April of 2008 and the Levers did not make any direct representations to Zlatokrasov which induced him to enter the transactions at issue in this matter. Similarly, the parties stipulated that, except for a brief introductory meeting with Joshua in December of 2007, the principal of ABR, Alex Brioukhov ("Brioukhov"), never met the Levers prior to April of 2008 and the Levers did not make any direct representations to Brioukhov which induced him to enter the transactions at issue in this matter.

the Auto Collection had received the payment. Thus, although he had no direct contact with plaintiffs' principals, Steven was contemporaneously aware of plaintiffs' transfers of funds. It was established that only Steven and Joshua received direct confirmation from their bank of the receipt of wire transfers. Further, Steven exercised complete control over the Auto Collection's bank account, accounting files, ledger, and the Police Books which record every automobile sale. There is, therefore, substantial evidence that Steven was involved in all of the Auto Collection's transactions. The Auto Collection Defendants' argument, as to Steven's lack of personal involvement in the transactions at issue, also relies on the premise that "the transactions attacked" by the plaintiffs terminated upon the plaintiffs' transferring the money to the Auto Collection. However, as the Auto Collection was still required to perform in exchange for the funds it received from AZTE and ABR, the transactions were still ongoing after the Auto Collection received the funds. There was testimony that it was common practice for customers of the Auto Collection to accept alternative automobiles of various makes and luxury features, in place of a specifically identified automobile that had been ordered, but Defendants did not introduce any evidence that, upon learning that automobiles had not been delivered to the plaintiffs, any attempt was made to offer alternative vehicles or refund their payments.

Steven commingled the Auto Collection's funds with his personal funds and used corporate assets for his personal benefit. Plaintiffs introduced substantial evidence that Steven wrote checks from the Auto Collection to himself, on multiple occasions, totaling \$340,000. Although Steven described these payments as either a repayment of a loan, or used to pay the Auto Collection's expenses, the evidence established that substantial portions of these funds were actually used to pay for Steven's new business entity, Platinum Volkswagen, or for other personal purposes. Steven admitted that he paid over \$126,000 directly from the Auto Collection's bank account to Platinum Volkswagen or for Platinum Volkswagen's benefit, explaining that he thought it was his money. It is noted that Platinum Volkswagen, Steven's own new business, was not affiliated with the Auto Collection in any way. Steven's bald assertion that the "spray booth" was to be used in the expansion of the Auto Collection is completely incredible based on the evidence that the Auto Collection never sold "collectible" cars, did not maintain a lot for the storage of automobiles, and the vast majority of its business was the sale of either new or almost new luxury cars. The fact that the spray booth expenses were paid at a time when the Auto Collection was approaching insolvency and, by Steven's own admission, at a time when he was focused on opening his new Platinum Volkswagen business, is further evidence that the Auto Collection's assets were commingled with

the personal resources of Steven and were diverted to his personal use, unrelated to the Auto Collection.

Piercing the corporate veil, while generally disfavored as incompatible with the protection afforded business owners from personal liability for the failings or transgressions of the corporate entity, is an equitable remedy designed to protect creditors or other victims from a fraudulent design by such owners to thwart recovery from the corporation for legitimate debts or injury. Even where outright fraud is not established, where a corporation is so dominated by its principal that its separate identity has been ignored, such that the principal's interests take precedent over and control the business purpose of the corporation, and the corporation thus becomes the alter ego of the individual, the corporate veil may be pierced to avoid injustice (*Williams*, 71 AD3d at 671; *Morris*, 82 NY2d at 141). As the Appellate Court noted in *Weinstein v Willow Lake Corp.* (262 AD2d 634, 635 [2d Dept 1999]), “[t]he decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances.”

In this case, the Auto Collection was initially formed by Steven Lever in pursuit of his own personal hobby of collecting antique automobiles. Its business model as a used car dealership was developed in order to serve a foreign market for new luxury vehicles, which was directly served by unlicensed, and usually inexperienced, individuals or businesses, with contacts in Russia, Ukraine and Eastern Europe. Although he employed Christopher Pinkow, who had himself developed connections to these foreign dealers, as a salesman, Steven Lever exercised absolute and exclusive control of all funds received and the records of all transactions, including maintenance of the Police Books, required by law to track the purchase and sale of each automobile by Vehicle Identification Number (“VIN”). By virtue of his sole and exclusive control of all record keeping, Steven was aware of, and controlled, every transaction. When son Joshua lost his job, in or about June 2007, he became an employee of the Auto Collection and was trained by Steven to maintain the records exactly in the same manner as his father Steven did. A comparison of these records with the Police Books indicates that these records were inconsistent and far from accurate, possibly deliberately so.

As Steven openly admitted, he owned the Auto Collection and treated its assets and resources as his own. When Steven became involved in the purchase of Platinum Volkswagen, he saw no conflict in transferring the Auto Collection's assets to his new venture. As he stated, he thought it was his money and he “used money [he] had in one thing to move into another thing.” Because of this perception, he also freely transferred Auto Collection funds into his own personal bank account. This practice is the essence of commingling, self dealing and disregard of the corporate form.

When plaintiffs alerted him to their claims and demands, in order to preserve the Auto Collection's funds for his own use, and shield them from plaintiffs' attempts to recover the funds they had provided to the Auto Collection without receiving the intended consideration, Steven transferred the funds in the Auto Collections' account into his personal account. There is no corroboration of Steven's glib explanation that he did so on advice of counsel and the court rejects such claim as a fabrication, comparable to Steven's fabricated defense that he acted solely (and apparently mindlessly) at Pinkow's instruction.

Piercing the corporate veil and holding Steven individually liable for the judgments against the Auto Collection is an appropriate equitable remedy in this case as there was substantial evidence that Steven did not treat the Auto Collection as a separate entity and that he used it as his alter ego. Steven ignored a number of corporate formalities, including the use of his personal address on the Auto Collection's bank statements and the failure to create loan documents with respect to the money he deposited into the Auto Collection, treating the Auto Collection's accounts as though they were his personal funds that he could remove at will. Upon learning that it was likely that the Auto Collection was going to be named as defendant in a number of lawsuits from customers that did not receive their automobiles or refunds, Steven transferred most of the Auto Collection's remaining funds to his personal account and left the Auto Collection undercapitalized and virtually judgment proof. This court finds that Steven used his complete domination over the Auto Collection to prevent AZTE and ABR from receiving either automobiles in exchange for their payments or a refund and, as a proximate result, AZTE and ABR were damaged, justifying the piercing of the corporate veil to hold him liable for the corporation's debt (*see Williams*, 71 AD3d at 671-672; *Superior Transcribing*, 72 AD3d at 676; *see also Gateway I Group v Park Ave. Physicians, P.C.*, 62 AD3d 141, 146-147 [2d Dept 2009] (allegations of one entity paying another entity's debts and the conveyance of assets between entities in an attempt to make one entity judgment proof held sufficient to pursue liability under a theory of piercing the corporate veil); *Fantazia Int'l Corp v CPL Furs New York, Inc.*, 67 AD3d 511 [1st Dept 2009] (leaving corporation a judgment proof empty shell would constitute wrong against a creditor so as to justify piercing the corporate veil)). Accordingly, Steven "abused the privilege of doing business in the corporate form to perpetrate a wrong" and thus it is appropriate for this court to intervene in equity and pierce the corporate veil (*Morris*, 82 NY2d at 142).

Upon review of the testimony and exhibits introduced at trial, the court finds there is insufficient evidence, however, to pierce the corporate veil as to Joshua. There was extensive testimony that Joshua, a former manager of an automobile dealership, was involved in the day to day

operations of the Auto Collection and had the same access to the bank accounts and books and records of the Auto Collection as Steven. However, there was insufficient evidence to establish that Joshua, a mere 5% owner of the Auto Collection, otherwise owned and controlled by his father Steven, who had created the Auto Collection at least a year before Joshua began his employment there, treated the corporation as his alter ego. There was no evidence that Joshua, like Steven, ignored corporate formalities; Joshua did not receive the bank account statements at his personal address or issue loans to the corporation without any form of documentation. Although the Auto Collection was undercapitalized, as a 5% shareholder of the Auto Collection, Joshua did not withdraw the Auto Collection's funds in an attempt to make the Auto Collection judgment proof. There was no evidence that Joshua commingled the assets of the Auto Collection with his own or used the Auto Collection's assets for his personal purposes. Although Joshua was paid over \$100,000 for only a few months work in 2008, the Auto Collection's ledger indicates that the Auto Collection was still highly profitable during this period and such salary may well be justified. This payment alone, for services rendered, is insufficient to hold Joshua personally liable for the judgment against the Auto Collection. Accordingly, the plaintiffs' claim to pierce the corporate veil and hold Joshua liable is denied and the complaint is dismissed as to Joshua Lever.

Plaintiffs' causes of action for unjust enrichment are dismissed as duplicative of the breach of contract claim.

### CONCLUSION

Plaintiff AZTE is granted a judgment against the Auto Collection and Steven Lever in the amount of \$232,860.00, plus interest from April 8, 2008. Plaintiff ABR is granted a judgment against the Auto Collection and Steven Lever in the amount of \$310,000, plus interest from March 31, 2008. Plaintiffs' causes of action for unjust enrichment are dismissed.

The complaint is dismissed against Joshua Lever.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.