TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX: KINGSHILL

IN RE: ST. CROIX SEAMEN'S ASBESTOS CASES	CASES NOS. 606/92; 608/92; 609/92; 611/92; 615/92; 629/92; 632/92; 633/92; 634/92; 636/92; 638/92; 642/92; 644/92; 645/92; 646/92; 648/92; 649/92; 650/92; 653/92; 654/92; 656/92; 657/92; 658/92; 661/92; 662/92; 665/92; 666/92; 672/92; 680/92; 681/92; 685/92; 687/92; 688/92; 694/92; 697/92; 699/92; 700/92; 701/92; 703/92

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PETERSEN, Senior Sitting Judge

MEMORANDUM OPINION AND ORDER
(JUNE 16 , 1993)

Complaints have been filed on behalf of seamen allegedly exposed to asbestos during their career as sailors on American ships against numerous Shipowner Defendants, Machinery Manufacturers Defendant and Asbestos Products Defendant. These Defendants have individually filed Motions to Dismiss on jurisdictional grounds. Before this Court is Defendant Amerada Hess Corporation's Motion to Dismiss for Lack of Personal Jurisdiction. For the reason herein stated, the Motions to Dismiss by Defendant Amerada Hess will be Granted.

FACTS

Amerada Hess Corporation (hereinafter "AHC") is a Delaware corporation with its principal place of business in New York, New York. AHC is the surviving corporation of the 1969 merger of Amerada Petroleum Corporation (hereinafter "APC") and Hess Oil and Chemical Corporation (hereinafter "HOCC"), successor to Hess, Inc. APC's principal place of business was New York, New York; HOCC's principal place of business was Perth Amboy, New Jersey. Neither AHC nor its predecessor companies solicits or conducts any business in the Virgin Islands. None of these three companies have performed any services in the Virgin Islands. Neither AHC nor its predecessor companies owned or operated vessels. None of these companies own any real property or personal property in the Virgin Islands.

Hess Oil Virgin Islands Corporation (hereinafter "HOVIC") is a wholly owned subsidiary of AHC. Since 1967, HOVIC has operated an oil refinery and terminal in St. Croix. AHC purchases refined petroleum products from HOVIC. AHC has loaned money to HOVIC. AHC's 10K filing with the Securities and Exchange Commission included consolidated financial statements for itself and all subsidiaries. AHC and HOVIC have an interlocking board of directorates.

Defendant has filed a Motion to Dismiss for Lack of Personal Jurisdiction. Defendant notes that it has not conducted any business or performed any services in the Virgin Islands. Further, Defendant argues that it has not exercised the extensive control of its HOVIC subsidiary required for this Court to "pierce the corporate veil". Plaintiffs argue that AHC has a presence in the Virgin Islands through its corporate-parent relationship with HOVIC.

DISCUSSION

The issue herein is whether jurisdictional contacts can be imputed to a non-resident parent corporation through its wholly owned local subsidiary under the Virgin Islands Long-Arm Statute, 5 V.I.C. §4903.

The Virgin Islands Long-Arm Statute, 5 V.I.C. §4903 provides in relevant part:

> (a) A Court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim for relief arising from the person's
>
> (1) transacting any business in this territory
> (2) contracting to supply service or things in this territory
> (3) causing tortious injury by an act or mission in this territory's
> (4) causing tortious injury in this territory by an act or omission outside this territory if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in this territory...

5 V.I.C. §4903(a)(1)-(4).

5 V.I.C. §4903 permits the Court to exercise personal jurisdiction over a person who acts directly or by an agent as to a claim for relief. "Person" includes a corporation. 5 V.I.C. §4901. It is well established that a corporation is a legal entity endowed with a separate and distinct existence from that of its owners. American Protein Corp. v. Ab. Volvo, 844 F.2d 56 (2nd Cir. 1988). As one of the principal purposes for organizing a corporation is to permit its owners to limit their liability, there is a strong presumption of separateness between a corporation and its owners. See e.g., Crown Cent. Petroleum v. Cosmopolitan Shpg. Co., 602 F.2d 474 (2d Cir. 1979). Courts "pierce the corporate veil" where fraud, wrong, or injustice would result if the corporate structure shielded shareholders

from liability. <u>Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.</u>, 842 F.2d 1466 (3rd Cir. 1988). If the shareholder is another corporation, piercing the corporate veil results in disregard for the separate existence of parent and subsidiary. <u>Id</u> at 1476.

To determine parental liability, some courts apply an agency theory and others focus on an alter ego theory. <u>Phoenix</u> 842 F.2d at 1476. Where an agency or alter ego relationship is premised upon the parent's domination and control, such domination and control can be of a general nature and "need not have any particular relationship to the cause of action being asserted", <u>Mobil Oil Corporation v. Linear Films, Inc.</u>, 718 F. Supp. 260 (D.Del. 1989). However, under a pure agency theory, there must be a relationship between the corporation and the cause of action. <u>Id</u>. Thus, total domination or general alter ego criteria need not be proven under a pure agency theory. <u>Id</u>. As the plaintiffs have not alleged that HOVIC and AHC had an agency arrangement for any specific transactions(s) in the Virgin Islands, the Court will consider the facts herein under the alter ego theory.

The Third Circuit has held that a subsidiary is the "mere instrumentality" or "alter ego" of the parent corporation where "the controlling corporation wholly ignored the separate status of the controlled corporation and so dominated and controlled its affairs that its separate existence was a mere sham."

Culbreth v. Amosa Pty. Ltd., 898 F.2d 13 (3d Cir. 1990). Where one corporation controls and dominates another corporation to the extent that the second corporation becomes the mere instrumentality of the first, the dominant corporation becomes liable for those debts or torts of the subservient corporation attributable to an abuse of that control. Duff v. Southern Ry. Co., 496 So.2d 760 (Ala. 1986). In considering the indicia of control, courts have quoted extensively from **Powell on Parents and Subsidiary Corporations** §§ 5 and 6. See Duff v. Southern Ry. Co., supra at 763. The circumstances which render the subsidiary an instrumentality include the following factors:

> (a) The parent corporation owns all or most of the capital stock of the subsidiary.
> (b) The parent and subsidiary corporations have common directors or officers.
> (c) The parent corporation finances the subsidiary.
> (d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
> (e) The subsidiary has grossly inadequate capital.
> (f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
> (g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
> (h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.
> (i) The parent corporation uses the

> property of the subsidiary as its own.
> (j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.
> (k) The formal legal requirements of the subsidiary are not observed.

Duff v. Southern Ry. Co., quoting **Powell**, supra at 763. Significant factors to consider when determining whether two corporations are truly separate include adequacy of capitalization, overlapping directorates and officers, separate record keeping, payment of taxes and filing of consolidated returns, level of parental financing and control over the subsidiary and subsidiary authority over day to day operations. Phoenix 842 F.2d at 1476.

The District Court of the Virgin Islands has instructed that the separateness of corporate entities will be disregarded where: (1) the two entities are closely related in the similarity of corporate purposes, conduct, officers and shareholders; (2) the two entities are owned and/or controlled by a common owner or manager who exerts pervasive control in a uniform manner and (3) failure to disregard the separate identity of the two entities would result in an injustice to a third party. Anderson v. Lorck-Schierning, 20 V.I. 200 (D.C. 1983). In Anderson, the plaintiff sought to enforce a Massachusetts judgment for wrongful termination of an employment contract. The plaintiff was an employee of defendant West Indies Distillers, a wholly-owned subsidiary of defendant H.H. Pott Nfgl. Gmbtt and Co. Rum Landerlshrus (the Pott partnership). Plaintiff was also employed by Distim, Inc. While West Indies Distillers manufactured the rum products in St. Thomas, Distim purchased and distributed the products in the continental United States. Both Distim, Inc. and West Indies Distillers were affiliated with the Pott partnership. Defendant Norbert Lorck-Schierning, the managing partner of the Pott partnership, was the president of both West Indies Distilleries and Distim, Inc. Lorck-Schierning was the sole shareholder of Distim, Inc.

After the plaintiff was discharged from his position with Distim, he brought suit against Distim, in Massachusetts. Distim changed its name before the law suit occurred. Distim, Inc. ceased business operations. The court found that West Indies Distillers and Distim were interdependent. The court also noted the existence of an intercompany account, the issuance of invoices by the distributor on behalf of the manufacturer and the forbearance in collecting a debt owed to the distributor as evidence of the parties close relationship. The court also found that the Pott partnership exerted uniform and pervasive control over both companies. As evidence of this control and domination, the court noted several directives on price policies and on liquidation and the submission of consolidated financial statements and thus held over each of the named defendants jointly and severally and liable for the judgment.

In Dickson v. Hertz Corp., 559 F.Supp. 1169 (D.V.I. 1983) a Virgin Islands corporation and a Virgin Islands resident brought an action against a Delaware corporation to recover for personal injuries which occurred on defendant's automobile leasing facility at a Miami, Florida airport. Two Hertz affiliates conducted business in the territory. The license agreement between Hertz and its local affiliates imposed several obligations upon the licensee including the duty to use the corporation's trademark, to conduct its business in accordance with the rules and regulations of the Hertz system, and to maintain rate structures promulgated by the licensor. The plaintiffs argued that the defendant's corporate-parent relationship with these two local rental agencies gave the defendant a jurisdictional presence in the Virgin Islands.

The court stated that "jurisdiction over the foreign corporation may be exercised consistent with due process restrictions when the parent corporation exercises such control and domination over the subsidiary that they do not in reality constitute separate and distinct entities". Id. Noting the integrated sales and promotion system, the shared use of a trademark, the supervision over records, and the mandatory adherence to uniform operational procedures, the court stated that a unified corporate enterprise existed between the defendant Hertz and its local affiliates. The court also found that the defendant's control over its Virgin Islands affiliates "put it on notice of its amenability to suit here" and that defendant's imposition of its standardized operational methods on its local licensees "amounted to doing business in and therefore availing itself of the protections of the [territory]". It concluded that the license agreement allowed the non-resident defendant to control and dominate the resident affiliates so "as to in effect disregard the latter's independent corporate existence".

In <u>Watley v. V.I. Industrial Gases</u>, 19 V.I. 550 (D.V.I. 1983) the court found that DuPont's promotional and distribution methods in the territory, along with the physical presence of its sales representatives, amounted to voluntary business seeking activity under 5 V.I.C. §4903 and held that "where a non-resident manufacturer has obtained significant revenues from the territory through a local distributor, jurisdictional contacts can be imputed to the manufacturer through its distributor".

The burden of establishing an alter-ego relationship rests with the party making the claim. <u>Reynolds Metals Co. v. Columbia</u>

Gas System ,Inc., 669 F.Supp. 744 (E.D. Va. 1987). In the instant case, the Plaintiffs have selected certain facts which purportedly establish an alter-ego relationship between AHC and HOVIC. Initially, the Plaintiffs point to AHC's 10K filing with the Securities and Exchange Commission("SEC"). Pursuant to federal securities regulations, AHC submitted consolidated financial data for itself and its subsidiaries including HOVIC, to the SEC. AHC does not file consolidated tax returns with HOVIC. This Court does not find that AHC's lawful reporting of consolidated financial data demonstrated the requisite degree of control over HOVIC.

The Plaintiffs also introduced evidence of overlapping of AHC's and HOVIC's officers and directors. AHC has 17 directors; HOVIC has 4 directors. Three of HOVIC's four directors are also directors of AHC. Leon Hess, the Chairman of the Board and Chief Executive Officer of AHC, is also the Chairman of the of the Board and President of HOVIC. Robert F. Wright and J.Y. Schreyer, the other two directors of AHC, are HOVIC vice presidents. AHC has 50 officers. HOVIC has 13 officers. Seven of the 50 AHC officers are also officers of HOVIC. Clearly, there is significant overlapping of directors and officers between AHC and HOVIC. However, the mere existence of interlocking directorates does not prove control and domination by the corporate parent. Dickson, 559 F.Supp. at 1174. The overlapping of directors is a "common place circumstance of modern business". American Protein 844 F.2d at 60 which "[must] be expected where a holding company owns a majority interest in a subsidiary". Savin Corp. v. Heritage Copy Products, Inc. 661 F.Supp. 463 (M.D. Pa. 1987). Plaintiffs have not provided any **prima facie** evidence that the overlapping was so extensive that there was no real distinction between the boards of AHC and HOVIC. See Savin, 661 F.Supp.at 470. In a similar vein, the Plaintiffs have not presented any **prima facie** evidence that Leon Hess or AHC's officers exerted pervasive control in a uniform manner over both corporations. As indicated by the interlocking board of directorates, AHC's degree of control over HOVIC is no more than would be expected from a majority shareholder. Consequently, the fact that AHC and HOVIC possess some common directors is insufficient to establish an alter-ego relationship.

Plaintiffs also argue that AHC's loan of money to HOVIC evidences control and domination. In 1991, AHC loaned HOVIC money for construction purposes. AHC has stated that the loan will be repaid in full with interest. AHC has served as a guarantor of loans made to its subsidiaries. Plaintiffs have not provided any evidence indicating that AHC was merely paying HOVIC's bill or that AHC will not require the payment of interest on its loans. There is no evidence here that HOVIC was under-capitalized, that AHC covered HOVIC overdrafts, or of any other parent-financing factors that are indicative of an alter-ego relationship. See United States v. Jon-T Chemicals, Inc., 768 F.2d 686 (5th Cir. 1983). Loans from a parent to a subsidiary merely indicate a relationship between the companies, totally consistent with parent subsidiary status and do not indicate any degree of control whatsoever. Garshman v. Universal Resources Holding, 641 F.Supp. 1359 (D.N.J. 1986).

The totality of the facts here do not indicate that AHC controlled and dominated HOVIC such that the Court can establish in personam jurisdiction over AHC. AHC's joint 10K filing, the loan with interest to HOVIC, and the interlocking directorates amount to normal business practices between a parent corporation and its wholly owned subsidiary. Plaintiffs have not demonstrated that AHC wholly ignored the separate status of HOVIC. Unlike the licensing agreement in Dickson, there is no evidence of a binding agreement between AHC and HOVIC that would create a unified corporate enterprise. There is no **prima facie** evidence of any integrated sales and promotion system between AHC and HOVIC. The Plaintiffs have not demonstrated that HOVIC adheres to uniform operational procedures imposed by AHC. Accordingly, the Court finds that AHC has not exerted the substantial control over the day to day affairs of HOVIC so as to put AHC on notice of its amenability to suit here.

In contrast with the foreign manufacturer in Watley, AHC has not solicited business through sales representatives or distributed promotional materials in the territory. AHC does not transact any business or perform any services in the Virgin Islands. While AHC does purchase products from HOVIC, Plaintiffs' claims do not stem from these transactions. Mere purchases, even if occurring at regular intervals are not enough to warrant a State's assertion of in personam jurisdiction over a non-resident corporation in a cause of action not related to those purchases." Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1983). The Supreme Court in Hanson v. Denckla, 357 U.S. 235 (1958) stated that it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking "the benefits and protections of its laws". The Supreme Court has further stated that due process requires that defendants have a reasonable expectation that the nature of this conduct might result in it being "haled before a court" in the forum state. Shaffer v. Heifner, 433 U.S. 186 (1977); Kulko v. Superior Court, 436 U.S. 84 (1978). Mere foreseeability on the part of the defendant that its conduct might affect the forum state is too attenuated to constitute such a reasonable expectation See World Wide Volkswagen v. Woodson, 444 U.S. 286 (1980). Under the facts presented herein, the Court's exercise of in personam jurisdiction over AHC would clearly offend constitutional standards of fair play and justice.

Accordingly, this Court concludes that no jurisdictional contacts can be imputed to AHC through HOVIC and that AHC has not availed itself of the benefits and protections of this territory.

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