NO. _____

XXX.	§	**IN THE DISTRICT COURT OF**
	§	
VS.	§	
	§	
YYY, Individually and d/b/a	§	**COUNTY, TEXAS**
YYY; and	§	
YYY	§	
YYY	§	
& YYY	§	**JUDICIAL DISTRICT**

DEFENDANTS' TRIAL BRIEF RE: ALTER EGO AND PIERCING THE CORPORATE VEIL

YYY, Individually and d/b/a YYY, and YYY, Defendants, offer this trial brief regarding alter ego and piercing the corporate veil and would respectfully show the Court as follows:

1. OVERVIEW

1A. XXX is claiming that two entities are alter egos of YYY and is seeking pierce the corporate veil of such two entities:

(1) YYY; and
(2) YYY.

1B. During the relevant time period, YYY was not a corporation but rather was an assumed name of YYY. Accordingly, as to YYY there is no corporate veil to pierce.

1C. YYY (now YYY, Inc.) was formed after the June 24, 1997, foreclosure and received some of the assets that had previously been held by YYY. However, YYY is not a party to this action and is not before the court. Notwithstanding this fact, Defendants will discuss XXX's claims against YYY re: alter ego and piercing the corporate veil, below.

2. REQUIREMENTS FOR ALTER EGO AND PIERCING THE CORPORATE VEIL

2A. The claims against YYY cannot be asserted unless and until YYY is joined as a party in this lawsuit.

2B. In *United Bank Metro v. Plains Overseas Group*, 670 S.W.2d 281 (Tex.App.–Houston [1st Dist.] 1983, no writ), the plaintiff obtained judgments against two individuals and then brought suit pursuant to the turnover statute against two corporations owned by the judgment debtors on the theory that the corporations were merely the alter egos of the judgment debtors. The court of appeals refused to permit this, stating:

> "Appellant has sought to go far beyond collection of an account receivable, commission receivable, contract right receivable, note receivable, or any similar right to future payment. Although neither [of the two corporations] are judgment debtors, the appellant argues that they should be treated as judgment debtors, since they are merely alter egos of judgment debtors Grafton and Musslewhite. This argument would permit the appellant to skip the trial on the merits in this case with respect to the alter ego issue and declare itself the winner.
>
> * * *
>
> "… If [the turnover statute] does not permit such a proceeding even against a judgment debtor, it certainly cannot support a proceeding against [the two corporations], who are not judgment debtors until appellant succeeds in piercing the corporate veil in a separate trial. We construe [the turnover statute] as being intended to facilitate the collection of assets from the judgment debtor only and not from those unnamed in the prior suit … "
>
> *United Bank Metro* at 283-84

2C. Accordingly, until such time as YYY is joined as a party, XXX cannot assert any claim against YYY.

2D. In the landmark case of *Castleberry v. Branscum,* 721 S.W.2d 270 (Tex. 1986, rehearing denied), the Texas Supreme Court, considering the *alter ego* doctrine and whether the corporate fiction should be disregarded, stated:

> "We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property has been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. … Specifically, we disregard the corporate fiction:
>
> (1) When the fiction is used as a means of perpetrating fraud;

(2) Where a corporation is organized and operated as a mere tool or business conduit of another corporation;

(3) Where the corporate fiction is resorted to as a means of evading an existing legal obligation;

(4) Where the corporate fiction is employed to achieve or perpetrate monopoly;

(5) Where the corporate fiction is used to circumvent a statute; and

(6) Where the corporate fiction is relied upon as a protection of crime or to justify wrong."

Castleberry at 272.

2E. <u>*None*</u> of the foregoing criteria have been shown to apply to Straw-K.

2F. In the case of *Robbins v. Robbins,* 727 S.W.2d 743 (Tex.App.—Eastland 1987, ref'd., n.r.e.), the 11th Court of Appeals reviewed the requirements for prevailing under an *alter ego* theory:

> "… Alter ego's rationale is: 'if the shareholders themselves disregard the separation of the corporate enterprise, the law will also disregard it so far as necessary to protect individual and corporate creditors.' …"
>
> * * *
>
> "The alter ego theory will not be utilized to disregard the corporate entity unless: (1) it is made to appear that there is such a unity that the separateness of the corporation has ceased to exist; and (2) the facts are such that an adherence to the fiction of a separate existence of the particular corporation would, under the circumstances, promote injustice. … The courts of this State have been reluctant to pierce the corporate veil and impose personal liability upon an individual (such as its chief executive officer and controlling shareholder) thereby destroying an important fiction under which so much of the business of the country is conducted and have done so only under compelling circumstances. … "
>
> * * *
>
> "The domination of corporate affairs by a sole shareholder will not in itself justify imposition of personal liability. … Neither will the mere unity of financial interest justify a disregard of the corporate entity. …"
>
> *Robbins* at 745-47

2G. In the instant matter, there is no evidence that:

(1) there is such a unity between YYY and YYY that that the separateness of the corporation has ceased to exist (indeed, since YYY has not been joined as a party, XXX has made little or no effort to develop this theory); or that

(2) an adherence to the fiction of a separate existence of YYY would, under the circumstances, promote injustice (the separate existence of YYY has no bearing whatsoever on the remedies available to XXX).

2H. Moreover, the whole purpose of the alter ego doctrine is to hold an ***individual*** liable for the obligations of a ***corporation*** — not vice versa; although he wants the Court to award him the assets of YYY, XXX has not asserted any specific cause of action against YYY.

2I. Texas courts have shown great reluctance in piercing the corporate veil. As noted in *Lachalet International, Inc. v. Nowik*, 787 S.W.2d 101 (Tex.App.–Dallas 1987, 1990, no writ):

> "As a general rule, the veil of the separate identity of the corporation is interposed for the shareholder to avoid personal liability and only under extraordinary circumstances can this veil be pierced, the corporate identity disregarded, and personal liability imposed on shareholders, officers or a parent corporation. [citations omitted] Generally, courts are reluctant to pierce the corporate veil. [citations omitted]"
>
> *Lachalet* at 106

2J. Like the alter ego doctrine, the remedy of "piercing the corporate veil" is an equitable remedy. As noted in *Sims v. Western Waste Industries*, 918 S.W.2d 682 (Tex.App.–Beaumont 1996, denied):

> " 'Piercing' corporate structure is equitable relief and a central concept to such relief is that 'a person seeking equity must come with clean hands.' …"
>
> *Sims* at 685

2K. Streeter ***definitely*** does not come before the court with clean hands.

2L. Among other things, at deposition XXX:

- Asserted his Fifth Amendment privilege against self-incrimination when asked about a particular asset of YYY;
- Admitted that he took property of YYY to his home and failed to return same;
- Admitted that he took more paychecks than authorized;
- Admitted that he took cash from the company for which he could not account;
- Claims that he "doesn't know" if he should be required to reimburse the corporation for any money he may have taken for personal purposes; and

- Asserted that he believes that he should not be held responsible for cash missing from the company during the period he was in charge.

2M. For all of these reasons, there is no basis for disregarding the corporate structure of YYY, a party which is not even before the court.

Request for Relief

WHEREFORE, Defendants request that Plaintiff's claims be in all things denied.

Respectfully submitted,

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