arranging the contracts with Garbino and the merger with PAWS. SoE 5/21/19, p. 9, ln. 22-23. Unlike the putative principles of Mesa, Garbino testified that he was involved in dozens of meetings relating to the merger. SoE 5/15/19, p 13, ln. 16-18. This was confirmed by Mr. Shebanow. SoE 9/29/20, p. 6-7, ln. 23-2. Kurtz testified that there were no written communications with the "principles" regarding the merger with PAWS and the stock transfer agreement with Mr. Garbino. SoE 5/21/19, p. 16, ln. 6-13. Garbino testified that he and Kurtz were involved in forecasting and planning the expansion of Mesa during the merger period. 5/15/19, p. 13-14, ln. 20-2. Andrew Do, still listed as president of Mesa, testified that he had no knowledge of the events surrounding the merger with PAWS and formulation of Praxsyn. SoE 5/15/19, p. 27, ln. 9-15.

Despite still being "president" of Mesa, Andrew Do did not participate in any of the merger negotiations, did not sign the merger contract. SoE 5/16/19, p. 29, ln. 13-15. He was not aware that Mesa had obtained funding from Javlin or any other source. SoE 5/16/19, p. 29, ln. 14-22.

PAWS and Mesa merged to become Praxsyn. SoE 5/21/19, p. 31, ln.16 -17. Praxsyn had a board of directors and Kurtz testified that it was the Praxsyn BOD that decided to fire Andrew Do from Mesa – an allegedly independent company. SoE 5/21/19, p.33, ln. 19-21; 7/9/19, p. 17, ln. 7-9. This action contradicted his own testimony that Mesa was a wholly owned, but independent, subsidiary of Praxsyn. SoE 5/21/19, p. 31, ln.16 -17, p. 32, ln. 16-17. Garbino was on the board of directors of Praxsyn for about eight months, (SoE 5/21/19, p. 33, ln. 11-14; 9/30/20, p. 3, ln. 5-7) and it was his testimony that he thought Mesa, PAWS and Praxsyn were all the same (SoE 5/14/19, p. 27, ln. 24-25) and Mesa business was discussed at the Praxsyn Board Meetings. SoE 5/14/19, p. 28, ln. 22-25, p. 29, ln. 2-17. Garbino testified that he had voting rights in Mesa. SoE 5/14/19, p. 35, ln. 3-4 & 10-12. Kurtz confirmed that Garbino had voting rights in Praxsyn of which Mesa was a wholly owned subsidiary. SoE 5/21/19, p. 33, ln. 14. Mr. Shebanow testified that Mesa/Kurtz had nominated Garbino to the Praxsyn Board. SoE 9/29/20, p. 11, ln 3-7.

The court, as part of its duty to inquire as to the facts, requested that Mesa produce its Board of Director's Meeting Minutes. This would have cleared up issues relating to whether

Mesa was acting as a separate corporation, who the officers/directors/majority shareholders were, the circumstances surrounding the merger and involvement of Garbino. Mesa was either unwilling or unable to do so. The court was therefore entitled to, and did, form an adverse inference that those documents contained material adverse to the position of Mesa.

DISCUSSION

1. VILLANUEVA WAS CORRECTLY DECIDED

a. The Purpose of Labor Code §4615 and §139.21

This trial was convened as part of the Special Adjudication Unit to determine the whether John Garbino exercised control of Mesa Pharmacy sufficient to subject them to the stays under Labor Code §4615 and §139.21.

California Labor Code §139.21(a) **states, in relevant part:**

> **(3)** For purposes of this section and Section 4615, an entity is controlled by an individual if the individual is an officer or a director of the entity, or a shareholder with a 10 percent or greater interest in the entity.
>
> **(4)** For purposes of this section and Section 4615, an individual or entity is considered to have been convicted of a crime if any of the following applies:
>
> > **(A)** A judgment of conviction has been entered by a federal, state, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other
> >
> > record relating to criminal conduct has been expunged.
> >
> > **(B)** There has been a verdict or finding of guilt by a federal, state, or local court.
> >
> > **(C)** A plea of guilty has been accepted by a federal, state, or local court.

This definition was expanded by *Villanueva v. Teva Foods* 84 Cal. Comp. Cases 198. In discussing the standard under LC 4615/139.21 of whether an individual was an officer or director of the entity or a shareholder with a 10 percent or greater interest in the entity the court expanded

the definition to cover those in "de facto" control. While in *Villanueva,* the court found that the determination that the charged provider was in absolute control because of deceit, it did change the governing threshold – officer, director ***or 10% shareholder.*** The court indicated that the trial court could look behind the curtain of how an entity held itself out as structured and make a determination that the charged/convicted provider was in controlling the entity in a de facto manner.

This was to prevent fraud on the workers' compensation system, wherein a provider, subject to suspension, could end-run around the statute by creating a straw corporation; where the provider does not seem to have any interest in the shell company, but still derives all the benefits of it.

This is a type of piercing the corporate veil – essentially the doctrine of Alter Ego used in a slightly different manner; instead of moving aside the corporate veil to reach the assets of the officers and shareholders, the court is using it to dismantle the corporate shield and hold the company responsible for the bad actions of its stakeholders. Under that doctrine the court disregards the "fiction" of corporate entity and how it is structured "on paper," to look behind the curtain to see who is actually pulling the strings. While this definition of Alter Ego has been criticized because the corporate entity is not a fiction, but juridical entity with the characteristic of legal "personhood," it is applicable as it limits the exercise of the corporate privilege to prevent abuse. See 13 Cal. L. Rev. 235;51 Harv. L. Rev. 1401;48 So. Cal. L. Rev. 56. The abuse of the entire Workers' Compensation System is what the LC 4615 and LC139.21 proceedings are here to prevent.

At its essence, the alter ego doctrine was created to insure that justice is done. *Mesler v. Bragg Management Co. (1985)* 39 C.3d 290, 301. A court may disregard the corporate entity and treat the fraudulent acts as if they were done by an individual. Where a corporation, such as Mesa, is used by an individual or individuals to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose the corporate entity may be disregarded. See *Shapoff v. Scull (1990)* 222 C.A.3d 1457, 1466, 1469, 1471. Alter ego does not relieve individual guilty actor of liability, rather, it prevents parties with same interest from inequitably using corporate

form to thwart a third party's rights. *Communist Party v. 522 Valencia (1995)* 35 C.A.4th 980, 995; S*haoxing County Huayue Import & Export v. Bhaumik (2011)* 191 C.A.4th 1189, 1199. The issue is not whether Mesa's corporate entity should be disregarded for all purposes, nor whether Mesa's corporate purpose was to defraud. Rather, the issue is whether in this particular case and for purposes of this case "justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form." *Kohn v. Kohn (1950)* 95 C.A.2d 708, 718.

In Associated Vendors Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838–840. The court listed various factors that, taken alone or cumulatively depending on the situation, would allow a piercing of the veil. Relevant to this action are the failure to maintain minutes or adequate corporate records and the use of a corporation as a mere shell, instrumentality, or conduit for a single venture or the business of an individual or another corporation. Here, while Garbino was not in total control, he was, at times, listed on documents filed with regulatory agencies as an officer or director and was on the Board of Directors for the parent company Praxsyn after the merger. The testimony indicates that Mesa Pharmacy was not following the rules of corporate governance. The witnesses were not credible on who the actual officers and/or directors were as they weren't sure who held what position (such as Andrew Do not knowing he was listed as president of Mesa on certain documents) the recollections were contradictory as to when/who attended/whether there were any BOD meetings. Mesa was unable, or unwilling, to produce Minutes of the BOD to shed any light by contemporaneous, written record of Mesa's actions.

Because of the amount of revenue Garbino drove to Mesa and its subsequent incarnations, and the providers he and his company brought to Mesa resulting Mesa's need to expand and find financing and that expansion led to the merger with the pet transportation company, PAWS, Garbino held the purse strings. He had enough influence on the companies to wind up on the board of directors of the resulting, post-merger company, Praxsyn. Praxsyn's only asset and only source of income was that of Mesa Pharmacy. He testified that he had substantial influence on Mesa Pharmacy. He believed he had a right to sue them when they didn't do what he wanted them to do. All this indicates that he had at least as much, if not more, influence than a 10% shareholder would on Mesa Pharmacy.

Whether to pierce the veil is a question of fact, within the province of the trial court. *Stark v. Coker (1942)* 20 C.2d 839, 846. It is determined under a Preponderance of evidence standard. *Wollersheim v. Church of Scientology Int. (1999)* 69 C.A.4th 1012, 1014. The Preponderance of Evidence standard (California Evidence Code §115) is defined as the need prove only that something is more likely to be true than not. Judicial Council of California Civil Jury Instructions (2023 edition) CACI #200. Here, it is more likely true than not that John Garbino had at least as much influence and control over Mesa as a 10% shareholder and thus had sufficient "de facto" control to attribute his suspension to Mesa Pharmacy.

2. **ADVERSE INFERENCES WERE CORRECTLY TAKEN**

a. Failure to Produce the Minutes of the Mesa Pharmacy Board of Directors and failure of Kimberly Brooks to testify.

A WCJ has not only the ability, but the duty, to develop the record. Under Labor Code, §5708, "[a]ll hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they **shall not be bound by the common law or statutory rules of evidence and procedure**, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. (emphasis added).

i. <u>The WCJ Ordered the production of the Board of Directors' Minutes</u>

The Petition for Recon incorrectly asserts that the court inferred adversely to Mesa for its failure to produce the Board Minutes during discovery. In fact, as part of the duty to develop the record, the WCJ Ordered the Minutes produced and warned that, if they were not, an adverse inference would be taken.

> *"LET THE MINUTES FURTHER REFLECT that the court required that Mesa Pharmacy produce the Minutes of Hearing for the Board of Directors from Mesa Pharmacy, whether quarterly, yearly, or bi-yearly for the period from 2007 to*