IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

RIVERTOWN TCI, L.P.,	:	OCTOBER TERM, 2018
	:	
	:	NO. 03616
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control Nos.: 20050691, 20050711,
SPM GLOBAL SERVICES, INC., et al.,	:	20050686, 20050683, 20050681, 20050699,
	:	20050706, 20050705, 20050696, 20050724,
	:	20050676, 20050675, 20050748, 20050722,
Defendants.	:	20050720, 20060027, 20060546, 20050619

ORDER

AND NOW, this 29th day of September, 2020, upon consideration of the eighteen Motions for Summary Judgment filed by the parties, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously herewith, it is **ORDERED** as follows:

1. Plaintiff's Motion No. 20060027 is **GRANTED in part** and **JUDGMENT** is entered in favor of Rivertown TCI, L.P. and against SPM Global Services, Inc. as to liability only on Count I for Breach of Contract;[1]
2. Plaintiff's Motion No. 20060027 is **GRANTED in part** and **JUDGMENT** is entered in favor of Rivertown TCI, L.P. and against Elverta Data Services LLC, Elverta Global Services LLC, Elverta Washington Square LLC, NSD Professional Services LLC, Old Gulph Farm Developers LLC, SPM Corporate Services LLC, SPM Global Services LLC, SPM Holdings Trust f/k/a Elverta Trust, SPM Professional Services, Inc., SPM Software Inc., Turbine Cloud Services LLC, Turbine Global Services LLC, Arezzo Sky Holdings

[1] Plaintiff must prove at trial what damages, if any, should be awarded on this claim.

LLC, Optymyze Corporate Services LLC, Optymyze US, LLC f/k/a Optymyze Operations LLC, and Optymyze LLC f/k/a Synygy LLC as to liability only Count III for Unjust Enrichment;[2]

3. The remainder of plaintiff's Motion No. 20060027 is **DENIED**;
4. Plaintiffs' Motion No. 20060546 is **GRANTED** and **JUDGMENT** is entered in favor of Rivertown TCI, L.P. and against SPM Global Services, Inc. on defendant's Counterclaims;
5. Defendants' Motions No. 20050748 and 20050724 are **GRANTED in part** and **JUDGMENT** is entered against Rivertown TCI, L.P. and in favor of SPM Professional Services LLC, SPM Professional Services, LP, SPM Software LLC, and SPM Software LP on Count III for Unjust Enrichment; and
6. Defendants' Motions No. 20050619, 20050722, 20050686, 20050683, 20050705, 20050676, 20050699, 20050696, 20050691, 20050681, 20050711, 20050720, 20050675, and 20050706, and the remainder of defendants' Motions No. 20050748 and 20050724, are **DENIED**.

BY THE COURT:

GLAZER, J.

[2] Plaintiff must prove at trial what damages, if any, should be awarded on this claim. With respect to several of the defendants, the unjust enrichment damages may be nominal at best.

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	:	20050676, 20050675, 20050748, 20050722,
Defendants.	:	20050720, 20060027, 20060546, 20050619

GLAZER, J. **September 29, 2020**

OPINION

This litigation arises from the breach of a lease agreement (collectively, with amendments, the "Lease")[1] between plaintiff Rivertown, TCI, L.P. as landlord (the "Landlord") and defendant SPM Global Services, Inc. as tenant (the "Named Tenant.") Pending before the court are two motions for summary judgment filed by the Landlord, one by the Named Tenant, and fifteen nearly identical motions filed by multiple corporate defendant entities (collectively, the "Related Entities").[2]

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[1] *See* Ex. 1 to plaintiff's Motion for Summary Judgment No. 20060027 (hereinafter referred to as "Motion 20060027").

[2] The following defendant constitute the Related Entities: SPM Holdings Trust f/k/a Elverta Trust; Elverta Data Services LLC; Elverta Global Services LLC; Elverta Washington Square LLC; NSD Professional Services LLC; Old Gulph Farm Developers LLC; SPM Corporate Services LLC; SPM Global Services LLC; SPM Professional Services, Inc.; SPM Software Inc.; Turbine Cloud Services LLC; Turbine Global Services LLC; Arezzo Sky Holdings LLC; Optymyze Corporate Services LLC; Optymyze US, LLC f/k/a Optymyze Operations LLC; Optymyze LLC f/k/a Synygy LLC; SPM Professional Services LLC; SPM Professional Services, LP; SPM Software LLC; and SPM Software LP.

STANDARD OF REVIEW

A court may grant a motion for summary judgment as a matter of law if there is no genuine issue of material fact between the parties or if the party carrying the burden of proof at trial, "has failed to produce evidence of facts essential to [establish a] cause of action."[3] The Supreme Court of Pennsylvania has explained that the purpose of summary judgment is to "dispense with a trial of a case...where a party lacks the beginnings of evidence to establish or contest a material issue."[4] In considering a motion for summary judgment, the court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.[5]

PROCEDURAL HISTORY

Landlord initiated this action on October 25, 2018, and subsequently was granted leave to file an Amended Complaint to add additional Related Entities and to update the amount of past-due rent. In the Amended Complaint, Landlord asserts claims for breach of contract against the Named Tenant, piercing the corporate veil/alter ego liability against the Named Tenant and Related Entities, and unjust enrichment against the Related Entities. Multiple defendants filed preliminary objections to the Amended Complaint, and after discovery was taken on the issue of personal jurisdiction, the claims asserted against eleven defendants were dismissed.

In September, 2019, the court appointed a discovery master to assist in a highly contentious period of discovery marked by numerous motions to compel and motions for sanctions filed by plaintiff Landlord. On December 6, 2019, this court ordered defendants to

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[3] Pa. R. Civ. P. 1035.2.

[4] Ertel v. Patriot-News Co., 544 Pa. 93, 100, 674 A.2d 1038, 1042 (1996).

[5] *See* Jones v. SEPTA, 565 Pa. 211, 216, 772 A.2d 435, 438 (2001).

produce Mark Stiffler for a deposition to be held on or before January 15, 2020.[6] To date, Mr. Stiffler has still not appeared for a deposition in this matter. Discovery closed on February 3, 2020.

FACTUAL HISTORY:

Named Tenant and the Related Entities belong to a network of companies owned and controlled by Mark Stiffler. Mr. Stiffler founded Simulate, Inc. in 1991, with Walt Montague, Esquire, and they changed the company name to Synygy, Inc. in 1997. In 2014, they changed the name of Synygy, Inc. to SPM Global Services, Inc., the Named Tenant for purposes of this litigation.[7]

On March 19, 2001, Mr. Stiffler signed the Lease as President and CEO of Synygy, Inc. making it the "Tenant," and with Rivertown Developers, L.P., the predecessor of plaintiff Rivertown, TCI, L.P., as "Landlord." The Lease was for approximately 158,000 square feet of office space in The Wharf at Rivertown (the "Leased Premises"). The Lease was amended multiple times, to include extensions to the lease term, revisions of the scope of the Leased Premises, and an assignment of interest with respect to the Landlord. To accommodate the Named Tenant's business needs, Landlord made substantial changes to the Leased Premises, including the addition of cooling mechanisms for the installation of approximately 700 computers.[8]

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[6] In December 6, 2019 Order, this court noted that "[f]ailure to strictly comply with this Order will result in additional sanctions, which may include contempt, imposition of fees and costs, adverse inferences and preclusion sanctions."

[7] *See* Motion 20060027, Ex. 8.

[8] *See id.*, Ex. 1, particularly Exhibit B to Lease, Exhibit B to First Amendment to Lease, and Exhibit B-1 to Second Amendment to Lease.

In 2017, the Named Tenant was apparently wound down, liquidated, and its dissolution was sought by its sole shareholder and director Mark Stiffler, although the Landlord as a creditor of the Named Tenant does not appear to have been given written notice of any of such actions.[9] The Related Entities continued the Named Tenant's business thereafter, and they continued to pay rent on the Premises on behalf of the Named Tenant through August, 2018.

On September 1, 2018, the Landlord did not receive a rental payment as required under the Lease. On September 19, 2018, the leasing company for the Landlord sent a notice of default to the Named Tenant demanding payment within fifteen days.[10] A dispute ensued between the parties about whether the Lease had been converted to a tenancy-at-will in 2014, with defendants alleging that SPM Global Services LLC, one of the Related Entities, was the current tenant, and not SPM Global Services Inc., the Named Tenant.[11]

Shortly thereafter, on September 28, 2018, the Related Entity SPM Global Services LLC filed a Certificate of Cancellation.[12] Subsequently, the employees of the Related Entities that were still operating at the Leased Premises were directed to pack up and move office locations to 1700 Market Street in Philadelphia.[13] On October 5, 2018, Landlord provided notice to the Named Tenant of its intention to pursue accelerated rent under the Lease as well as past due rent, which the Landlord claims amounts to a combined sum of approximately $5 million.[14]

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[9] *See* Motion 20060027, Ex. 14, Affidavit of Mark Stiffler, ¶¶ 27-31.

[10] *See id.*, Ex. 27.

[11] *See id.*, Ex. 31.

[12] *Id.*, Ex. 29.

[13] *See id.*, Ex. 30, Deposition of Paige Bishop, pp. 86-90.

[14] *Id.*, Ex. 31.

Because defendants refused to fulfill many of their discovery obligations during the course of this litigation, plaintiff Landlord has had to rely on the following evidence in support of its summary judgment motions: documents obtained from the *Charter* Litigation against certain of the Related Entities in the Delaware Court of Chancery;[15] admissions made by defendants and Mr. Stiffler in the *Charter* Litigation; deposition testimony from Derek Rieger (representative of Elverta Global Services, LLC); deposition testimony from Kenneth Bjorkelo (representative of SPM Global Services, Inc., SPM Global Services, LLC, and SPM Corporate Services, LLC); deposition testimony from former employees Walt Montague, Paige Bishop, and Thomas Urie, and current employee Thomas Chapman; and admissions made in affidavits provided by Mr. Stiffler and Mr. Bjorkelo in this action.

Landlord moved for summary judgment on its claims for breach of contract, alter ego liability, and unjust enrichment, and against the Named Tenant's counterclaims.[16] For the following reasons, Landlord's motions are granted in part and judgment as to liability only on certain claims is entered in favor of Landlord and against the Named Tenant and most of the Related Entities.[17]

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[15] Charter Communications Operating, LLC v. Optymyze, LLC f/k/a Synygy, LLC and Optymyze Pte Ltd., No. 2018-0865-JTL (the "*Charter* Litigation").

[16] In its Counterclaim, the Named Tenant alleges the Landlord breached the Lease first by failing to provide adequate heat and air conditioning and otherwise to maintain the Leased Premises.

[17] The Named Tenant and the Related Entities also filed motions for summary judgment. For the most part, those motions are denied, except that judgment is entered in favor of SPM Professional Services LLC, SPM Professional Services, LP, SPM Software LLC, and SPM Software LP on the Landlord's claims for Unjust Enrichment because the Landlord did not proffer any evidence that these entities used or occupied the Leased Premises. The issue of whether those four entities should be found liable under a piercing the corporate veil theory is reserved for a later date.

I. Named Tenant SPM Global Services Inc. Breached the Lease With Landlord.

To establish a breach of contract under Pennsylvania law, a party must show: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) damages resulting from the breach.[18] There is no dispute that a valid contract exists between the Named Tenant, defendant SPM Global Services, Inc., and plaintiff Landlord.

Under the Lease, rent is due on the first day of each month.[19] Failure to pay rent is an event of default under the Lease, and so is vacating or abandoning the Leased Premises.[20] The Lease requires written notice of any assignment or subletting, and the Lease also expressly prohibits assignment of the Lease without a written Assumption of Lease from the assignee and prohibits subletting without a written Sublease.[21] No such documents have been proffered in

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[18] Ocasio v. Prison Health Servs., 979 A.2d 352, 355 (Pa. Super. 2009).

[19] Motion 20060027, Ex. 1, ¶ 5(a).

[20] *Id.* at § 17(a) (a default exists when Named Tenant "shall fail to pay rent or any other sum payable to Landlord hereunder when due and such failure continues for more than fifteen (15) days after written notice thereof from Landlord" or if Named Tenant "vacates or abandons the [Leased] Premises during the term hereof or removes or manifests an intention to remove any of Tenant's goods or property therefrom other than in the ordinary and usual course of Tenant's business.")

[21] *Id.* at § 13, which provides:

> (a)Tenant shall not assign this Lease, whether voluntarily or by operation of law, without first obtaining Landlord's prior written consent thereto, which consent shall not be unreasonably withheld, conditioned or delayed. In addition, Tenant shall not mortgage, pledge or hypothecate this Lease. Any assignment, sublease, mortgage, pledge or hypothecation in violation of this Section shall be void at the option of Landlord and shall constitute a default hereunder without the opportunity for notice or cure by Tenant.
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> (b) Notwithstanding the foregoing, so long as Tenant is not in default under this Lease, upon thirty (30) days prior written notice to Landlord, Tenant shall have the right, without Landlord's consent, to sublet all or a portion of the Demised Premises to any third party (whether or not affiliated to Tenant) or to assign the Lease to any company which is an Affiliate of Tenant. As used herein, "Affiliate" shall mean any entity which controls, is controlled by, or is under common control with Tenant or Mark A. Stiffler, individually, or results from a merger or consolidation with Tenant, or any person or entity which acquires all of the assets of Tenant's business as a going concern.
>
> (c) Notwithstanding the foregoing, no subletting or assignment with or without Landlord's consent shall in any way relieve or release Tenant from liability for the performance of all terms, covenants and conditions of this Lease. Furthermore, no assignment will be valid

this case. In the event of any default, the Lease permits Landlord to demand accelerated rent upon notice provided to Named Tenant.[22] Landlord served such notice on Named Tenant in October, 2018.

In its defense to the Landlord's claims of breach, Named Tenant alleges as follows: it vacated the Leased Premises in 2014; the Lease thereby terminated in 2014, when the Landlord did not provide timely notice of breach; several Related Entities then paid reduced rent to Landlord under a tenancy-at-will until September 2018; and Landlord's acceptance of the reduced rental payments from those Related Entities constituted Landlord's acceptance of the alleged breach by the Named Tenant. However, there is no evidence that Landlord ever knew of, or accepted, the Named Tenant's alleged abandonment of the entire Leased Premises in 2014, nor is there any evidence that the Named Tenant ever properly assigned its obligations under the Lease to any Related Entity in 2014, or at any point thereafter.

Instead, the evidence shows that, on April 2, 2015, four months after Named Tenant allegedly vacated the Leased Premises, general counsel for the Named Tenant, Walt Montague, Esquire, sent a partial termination notice to the Landlord on behalf of the Named Tenant asking to reduce the amount of square footage it was leasing.[23] Mr. Montague makes no mention that the Named Tenant previously vacated the Leased Premises, nor that it was terminating or

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unless the assignee shall execute and deliver to Landlord an assumption of liability agreement in form satisfactory to Landlord, including an assumption by the assignee of all of the obligations of Tenant and the assignee's ratification of an agreement to be bound by all the provisions of this Lease; and no subletting will be valid unless Tenant and the subtenant have executed and delivered to Landlord a sublease agreement pursuant to which such subtenant agrees to be bound by the terms of this Lease.

[22] *Id.* at § 17(a)(i).

[23] *See* Motion 20060027, Ex. 11.

assigning the Lease.[24] Instead, the letter shows that the Lease continued in effect, albeit for smaller Leased Premises and at reduced rent, until September, 2018.

By failing to pay rent when it came due in September, 2018, and thereafter, the Named Tenant breached the Lease. By permitting many Related Entities to operate on the Leased Premises without written notice to the Landlord and without any written acknowledgement by them of their duties under the Lease, the Named Tenant further breached the Lease. Landlord was damaged by these breaches. The exact amount of those damages must be determined at trial.

II. The Related Entities Were Unjustly Enriched By Their Use of the Leased Premises Without Payment of Rent.

Under Pennsylvania law, to bring a claim for unjust enrichment, plaintiff must show: "(1) benefits conferred by it on defendant, (2) appreciation of such benefits by defendant, and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value."[25]

In this case, Landlord conferred a benefit, albeit unknowingly,[26] on the Related Entities by providing the Leased Premises for their use and occupancy in contravention of the Lease

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[24] The Landlord continued to receive rental payments drawn on the account of Named Tenant through at least October 9, 2015. *See id.*, Ex. 9.

[25] Milby v. Pote, 189 A.3d 1065, 1087 (Pa. Super. 2018), *app. denied,* 650 Pa. 122, 199 A.3d 340 (2018).

[26] The case law does not require that the plaintiff *knowingly* confer benefits on the defendant who was unjustly enriched. Notably, the elements set forth for unjust enrichment do not have a requirement of purpose or intent to confer benefits. The Commonwealth Court has addressed the issue of intention and knowledge in an unjust enrichment claim, but only in the context of the defendant accepting and appreciating the benefit. In Com. v. Ortho-McNeil-Janssen Pharm., Inc., the court stated, "a defendant need not have accepted and appreciated the benefit intentionally; instead, the focus remains on the question of whether the defendant has been unjustly enriched." 52 A.3d 498, 512 (Pa. Cmwlth. 2012). Similarly, the plaintiff here need not have knowingly and intentionally conferred the benefit on defendants.

terms and without payment of rent to Landlord. The Related Entities were unjustly enriched by using the Leased Premises without permission and without payment of rent for at least September and October of 2018.

Defendants claim, based entirely on the self-serving affidavits of Mr. Stiffler and Mr. Bjorkelo, that certain of the Related Entities did not have employees and never worked out of the Leased Premises. However, most of the Related Entities received mail at the Leased Premises and used the address for their Pennsylvania bank accounts.[27] Many also had employees who worked at offices at the Leased Premises.[28] Two of the Related Entities apparently even took their names from a portion of the Leased Premises known as "Turbine Hall."[29]

Under these circumstances, it would be inequitable for those Related Entities to retain the benefits of occupying and using the Leased Premises without compensation to the Landlord.[30] The amount of such compensation, however minimal it may be, must be determined at trial. However, since Landlord has proffered no evidence that four of the Related Entities used or

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[27] *See* Motion 20060027, Ex. 33 (Mail) and Exs. 110-127 (Bank Accounts). *See also id*, Ex. 47 (request for signage at Leased Premises).

[28] *See id.*, Ex. 48 (List showing Elverta Data Services LLC, SPM Corporate Services LLC, SPM Global Services LLC, SPM Holdings LLC, SPM Professional Services, Inc., SPM Software Inc., Turbine Cloud Services LLC, and Turbine Global Services LLC had offices at the Leased Premises.)

[29] Those Related Entities are Turbine Cloud Services LLC and Turbine Global Services LLC.

[30] The sixteen entities that were unjustly enriched are Elverta Data Services LLC, Elverta Global Services LLC, Elverta Washington Square LLC, NSD Professional Services LLC, Old Gulph Farm Developers LLC, SPM Corporate Services LLC, SPM Global Services LLC, SPM Holdings Trust f/k/a Elverta Trust, SPM Professional Services, Inc., SPM Software Inc., Turbine Cloud Services LLC, Turbine Global Services LLC, Arezzo Sky Holdings LLC, Optymyze Corporate Services LLC, Optymyze US, LLC f/k/a Optymyze Operations LLC, and Optymyze LLC f/k/a Synygy LLC.

occupied the Leased Premises, they cannot be found to have been unjustly enriched in the same manner as the others.[31]

III. Pennsylvania Law Supports Piercing The Corporate Veil Against Defendants Under Either An Alter Ego Theory Or A Single Entity Theory.

In Pennsylvania, there is a strong presumption against piercing the corporate veil.[32] However, courts are permitted to pierce the corporate veil and disregard the corporate form whenever "justice or public policy demand."[33] For courts to justify piercing the corporate veil, it must be determined that "the corporate fiction is being used by the corporation itself to defeat public convenience, justify wrong either to third parties dealing with the corporation, or intentionally between shareholders (derivative suits), perpetuate fraud or other similar reprehensible conduct."[34]

Pennsylvania law acknowledges two theories for piercing the corporate veil: alter ego and single entity. The alter ego theory is applicable where "the individual or corporate owner controls the corporation to be pierced and the controlling owner is to be held liable."[35] The

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[31] The four entities for which there is no evidence of unjust enrichment are SPM Professional Services LLC, SPM Professional Services, LP, SPM Software LLC, and SPM Software LP.

[32] *See* Wedner v. Unemployment Bd., 449 Pa. 460, 464, 296 A.2d 792, 794 (1972).

[33] Ashley v. Ashley, 482 Pa. 228, 237, 393 A.2d 637, 641 (1978).

[34] Sams v. Redevelopment Auth. Of the City of New Kensington, 431 Pa. 240, 244-5, 244 A.2d 779, 781 (1968). *See also* Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC, 648 Pa. 604, 644, 194 A.3d 1010, 1034–35 (2018) ("Piercing the corporate veil is . . . a matter of equity, allowing a court to disregard the corporate form and assess one corporation's liability against another. The corporate veil will be pierced and the corporate form disregarded whenever justice or public policy demand, such as when the corporate form has been used to defeat public convenience, justify wrong, protect fraud, or defend crime.")

[35] Miners, Inc. v. Alpine Equip. Corp., 722 A.2d 691, 695 (Pa. Super.1998).

single entity theory is applicable where "two or more corporations share common ownership and are, in reality, operating as a corporate combine."[36]

From the evidence that the plaintiff Landlord has been able to gather, it appears that both theories may be used to pierce the corporate veils of the defendants here. In this case, the Named Tenant and the Related Entities are distinct in name only, and all are controlled by, and act at the whim of Mr. Stiffler.[37] The Named Tenant and the Related Entities in this case together offered "sales performance management" by packaging and selling Optymyze software and SPM "professional services" as a single product, billed simultaneously to customers.[38]

Kenneth Bjorkelo was responsible for the SPM Group of businesses, and he testified that certain of the Related Entities would act as the "employer of record" for other Related Entities.[39] Employees from SPM Global Services, Inc. were hired by another SPM entity, SPM Corporate Services, LLC as the former entity began winding down.[40] SPM Corporate Services LLC then served as "employer of record" for any SPM entity that required employees or persons to provide

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[36] *Id.*

[37] Mr. Stiffler's control of Related Entities was even recognized in the Lease in the section permitting assignment or sublease to an "Affiliate of Tenant." "As used herein, 'Affiliate' shall mean any entity which controls, is controlled by, or is under common control with Tenant or Mark A. Stiffler, individually, or results from a merger or consolidation with Tenant, or any person or entity which acquires all of the assets of Tenant's business as a going concern." Motion 20060027, Ex. 1 at § 13.

[38] *See* Motion 20060027, Ex. 3, Deposition of Thomas Urie, 144:21-147:9.

[39] In his affidavit, Kenneth Bjorkelo stated he was authorized to testify on behalf of the following Related Entities: Elverta Trust n/k/a SPM Holdings Trust; Elverta Data Services LLC; Elverta Washington Square LLC; Elverta Holdings LLC; SPM Professional Services LP; SPM Professional Services, Inc.; SPM Professional Services LLC; SPM Software LP; SPM Software, Inc.; SPM Software LLC; SPM Global Services LLC; SPM Corporate Services LLC; Turbine Cloud Services LLC; NSD Professional Services LLC; and Turbine Global Services, LLC. *See* Motion 20060027, Ex. 15, Affidavit of Kenneth Bjorkelo, ¶ 1.

[40] *Id.*, Ex. 43, Deposition of Kenneth Bjorkelo, pp. 69-72.

services. Employees were shared between the SPM entities without formal agreements because they were "part of the same group."[41] Furthermore, services were provided by SPM Corporate Services LLC employees to the "Optymyze brand" from the Leased Premises.[42]

Similarly, Elverta Global Services LLC operated as the employer of record for the Optymyze entities, so that employees of Elverta worked for the Optymyze "business" or "brand."[43] An internal alignment chart showed "SPM Corporate Services" as Kenneth Bjorkelo's and Paige Bishop's pay entity and "Turbine Global Services LLC" as their employer.[44] The same chart shows that Thomas Urie's pay entity was "Elverta Global Services," even though his employer was listed as "Optymyze US LLC."[45]

Even corporate officers could not readily distinguish between the various Related Entities and how they worked together.[46] For example, Derek Rieger, the former Vice President of Legal for Elverta Global Services LLC, was not aware of any formal contracts between that entity and the Optymyze companies it regularly served.[47] Mr. Rieger stated that, with regard to the Optymyze and Elverta entities, he was uncertain of the division between specific entities, but

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[41] *Id.* at p. 138:6-23.

[42] *Id.* at pp. 174:20-184:18.

[43] Motion 20060027, Ex. 44, Deposition of Derek Rieger, pp. 19-22, 29-30, 138-40.

[44] *Id.*, Ex. 80.

[45] *Id.*

[46] *Id.*, Ex. 44, Deposition of Derek Rieger, pp. 19 -20; Ex. 30, Deposition of Paige Bishop, pp. 57-67; Ex. 71, Organizational Chart.

[47] *Id.*, Ex. 44, Deposition of Derek Rieger, pp. 205-210.

"view[ed] it as more of a business brand," and he "didn't know from a contractual perspective...the roundabout way that I get billed out to."[48]

After the Named Tenant was purportedly dissolved by Mr. Stiffler, Related Entities paid the monthly rent and signed documents on behalf of the Named Tenant.[49] Rent payments to the Landlord were made by various entities, some with names very similar to, or overlapping with, that of the Named Tenant, including SPM Global Services, SPM Global, SPM Corporate, Turbine Cloud Services, and SPM Global Services LLC.[50]

Daily operations at the Leased Premises also show that the Related Entities' assets were commingled. Quarterly meetings and team building events were held at the Leased Premises and attended by all employees involved in defendants' business operations, regardless of which of the Related Entities officially employed them.[51]

Under the direction of Mr. Stiffler, the Related Entities underwent various structural changes between 2018 and 2019 to make the entities appear unrelated. Mr. Stiffler stated in a written message to Kenneth Bjorkelo in December of 2018: "The most important issue, and the only thing on my list is being unrelated."[52] In one of the responses, Mr. Bjorkelo states: "On the matter of employees and who belongs to what entity, yes, I am reviewing the alignments and I know there are a few open items."[53] To that end, Mr. Stiffler suggested the following: "So filter

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[48] *Id.* at pp. 19:9-20:3.

[49] *See* Motion 20060027, Ex. 9 (Copies of Rental Payments.)

[50] *See id.* Defendants allege that Landlord's "acceptance" of rent payments from several Related Entities constitutes knowledge and acceptance that the Related Entities were occupying the Leased Premises as tenants-at-will. This argument is unavailing, as set forth *supra,* Section I.

[51] *See* Motion 20060027, Ex. 30, Deposition of Paige Bishop, pp. 51-53, 114-116.

[52] *Id.*, Ex. 72.

[53] *Id.*, Ex. 73

all the employees by three paymasters and see if they look like they are run independently. One thing is always the giveaway is who signs the taxes. Who signs the client contracts. Who signed the vendor contracts. In all cases it should not be me, but who is it and does it align with who employs them?"[54]

This façade building continued even as the *Charter* Litigation commenced.[55] In another email, Mr. Stiffler stated, "I am representing to a court that the company [Optymyze] has ceased operations...it needs to look like they ceased operations."[56] Frequent changes to the corporate structure left the employees confused and struggling to keep up with corporate alignment.[57]

Mr. Stiffler was frequently concerned and would write to employees about his concerns regarding criminal charges brought against him for these evasive and manipulative tactics.[58] Employees and corporate officers would discuss amongst themselves their concerns regarding the lack of independence of the Related Entities, particularly in light of pending litigation: "Just like *charter* [sic], nobody is going to be on the deposition and lie;" "So unless we operate the right way, people cannot be expected to lie that we did;" "Bottom line if I am under oath I want to be able to say confidently that yea [sic] we operate as independent companies," "...and not have documentation and other proof that can demonstrate that I'm lying;" "The *charter* [sic]

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[54] Motion 20060027, Ex. 79.

[55] In the *Charter* Litigation, the plaintiff was a customer of Optymyze LLC and/or Optymyze Pte, Ltd, which had contracted with them to provide "Cloud Services and Professional Services in connection with [Optymyze's] sales compensation platform." *Id.*, Ex. 50, Complaint, ¶1. The plaintiff alleged that Optymzye had wrongfully terminated that contract.

[56] Motion 20060027, Ex. 82.

[57] *See id.*, Exs. 3, 30, 43, 44 (employee and officer depositions)

[58] *Id.*, Ex. 3, Deposition of Thomas Urie, pp. 188:22-189:16.

litigation has taught us a very good lesson, don't assume what you think you can demonstrate to the court;" [59] and "So let's pray we never get forced by a court to submit to an [sic] forensic audit."[60]

In the *Charter* litigation, Mr. Stiffler admitted and the Delaware Chancery Court found that Mr. Stiffler controlled Optymyze US LLC and Optymyze Corporate Services, LLC, as well as Optymyze USA, LLC, Optymyze Holdings LLC, Optymyze Ltd., Synygy Ltd., Elverta, Inc., Elverta Operations, LLC, and Elverta Holdings, LLC.[61]

To the extent that the corporate ownership structure of some of the Related Entities remains unclear, that is in large part due to defendants' refusal to meaningfully participate in discovery in this case. At best, defendants were derelict in their duties with regard to their discovery responses, and at worst, they actively flouted court orders in an attempt to conceal adverse evidence.[62]

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[59] Motion 20060027, Ex. 91 (correspondence).

[60] *Id.*, Ex. 92 (correspondence).

[61] *See* Motion 20060027, Ex. 22, Affidavit of Mark Stiffler, ¶ 15 ("I have control over the 'Affiliate' entities."); *id.* Ex. 63, Order of March 22, 2019 ("[P]laintiff served subpoenas on nine non-parties affiliated with Optymyze and controlled by Mark Stiffler who also controls Optymyze"). The nine entities involved in the Charter litigation were : (1) Optymyze Corporate Services LLC; (2) Elverta, Inc.; (3) Optymyze USA LLC; (4) Optymyze US LLC; (5) Optymyze Holdings, LLC; (6) Elverta Operations LLC; (7) Elverta Holdings LLC; (8) Optymyze Ltd.; and (9) Synygy Ltd. *See id.*, Ex 64.

[62] In the affidavit of Mark Stiffler in the *Charter* litigation, Mr. Stiffler had to address, and take ownership of, similar discovery failures including the refusal to submit answers to requests for production of documents. Motion 20060027, Ex. 22, Affidavit of Mark Stiffler, ¶ 17 ("Similarly, I do not dispute that the defendant entities, Optymyze, LLC and Optymyze Pte. Ltd., did not respond in writing to the Requests for Production (the "RFPs") and Interrogatories served on them by March 1, 2019, as required by the Court. I also acknowledge that as the most senior executive of Defendants, I bear responsibility for their failure to do so").

The Rules of Civil Procedure provide that a court may dismiss a party's pleading or enter a default judgment against a party as a sanction for improper conduct during litigation.[63] Courts are permitted to look to the following factors to assess whether such sanctions are appropriate:

(1) the nature and severity of the discovery violation;
(2) the defaulting party's willfulness or bad faith;
(3) prejudice to the opposing party;
(4) the ability to cure the prejudice; and
(5) the importance of the precluded evidence in light of the failure to comply.[64]

At this juncture, it would be inappropriate for the court to adopt adverse inferences or impose preclusive sanctions, as the evidence is to be viewed in the light most favorable to the non-moving party, *i.e.*, defendants.[65] Adverse inferences and other sanctions may be appropriately imposed at later stages in this litigation.[66] Though the court is not permitted to draw any adverse inferences at this time, it remains clear that defendants' own conduct during discovery has resulted in a lack of additional evidence to support the Landlord's claims to pierce the corporate veils of Named Tenant and the Related Entities. Now that discovery in this matter

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[63] *See* Pa. R. Civ. P. 4019(c)(3).

[64] Rohm & Haas Co. v. Lin, 992 A.2d 132, 142 (Pa. Super. 2010).

[65] *See* Jones v. SEPTA, 565 Pa. 211, 216, 772 A.2d 435, 438 (2001).

[66] *See* Stewart v. Rossi, 452 Pa. Super. 120, 122–23, 681 A.2d 214, 216 (1996) (Appellant conducted no discovery between the date the action was instituted and . . . just prior to trial, when appellant filed a petition for extraordinary relief seeking an extension of the discovery period. In response, appellees filed two motions in limine seeking to prevent appellant from introducing evidence at trial of damages based upon appellant's failure to provide an expert report and of liability based upon appellant's failure to provide during discovery any information to appellees concerning how he intended to establish liability. The motions were granted, and summary judgment subsequently was entered. We have reviewed the trial court's reasons for granting the motions in limine, which include specific findings of willful discovery violations by appellant and prejudice to appellees. . . . We conclude that these findings support dismissal under the case law regarding discovery sanctions which appellant has asked us to apply. We therefore affirm.)

has closed, plaintiff Landlord is free to file a Motion in Limine requesting appropriate sanctions against defendants.

A. The Named Tenant and the Related Entities Appear To Be Alter Egos of Mark Stiffler and One Another.[67]

Courts look to the following factors when considering the alter ego theory under Pennsylvania law: "undercapitalization; failure to adhere to corporate formalities; substantial intermingling of corporate and personal affairs; use of the corporate form to perpetuate a fraud."[68]

Mr. Stiffler is apparently the ultimate beneficiary of the Trust,[69] which owns all of the other extant Related Entities, so Mr. Stiffler's personal affairs appear to be substantially intermingled with every Related Entity under the current ownership structure.[70] Even with respect to entities where Mr. Stiffler is not the lead corporate officer or owner, he appears to be responsible for making business decisions related to those entities.

B. All Defendants Appear To Be Operating as a Single Entity.

Although the single entity theory has not been expressly adopted in Pennsylvania, this litigation presents the exact situation for which the doctrine was developed. To determine whether multiple companies are a single entity, courts consider the following factors: "identity of

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[67] In its Motion, Landlord largely relies on the single entity theory in making its request that this court pierce the corporate veil because Landlord maintains that all defendants, in failing to respond to Landlord's requests for admissions and other discovery requests, have admitted they are all alter egos of each other. *See* Pa. R. Civ. P. 4014(b).

[68] *See* Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 42, 669 A.2d 893, 895 (1995).

[69] Motion 20060027, Ex. 16, Elverta Trust Agreement, ¶1.3.

[70] Mr. Bjorkelo pointed out this problem to Mr. Stiffler in an instant message: "Because if the Trust ultimately owns the businesses, and you are beneficiary (regardless of percentage) there remains risk [of them being found to be related] and if audited up to interpretation of some IRS schmuck," or a court. *Id.*, Ex. 71.

ownership, unified administrative control, similar or supplementary business functions, involuntary creditors, and insolvency of the corporation against which the claim lies."[71]

In the two cases in which the Superior Court noted that the single entity theory has not been adopted in Pennsylvania, the Court did not outright reject the theory. On the contrary, the Superior Court found that the evidence did not support a finding of liability.[72]

(a) Identity of Ownership.

Mr. Stiffler is the sole owner of Named Tenant, SPM Global Services, Inc., and the ultimate beneficiary of Elverta Trust n/k/a SPM Holdings Trust.[73] That Trust appears to own and control the following Related Entities: Elverta Washington Square, LLC; Elverta Data Services, LLC; SPM Holdings, LLC; NSD Professional Services, LLC; Sales Performance Services, LLC; and Turbine Global Services, LLC. As Mr. Bjorkelo testified, these entities are "related companies under a common ownership structure."[74]

(b) Unified Administrative Control.

Mr. Bjorkelo also admitted that SPM Corporate Services LLC employs people on behalf of "affiliated companies under common ownership, management, and control."[75] Similarly,

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[71] Miners, Inc. v. Alpine Equip. Corp., 722 A.2d 691, 695 (Pa. Super.1998)

[72] *See* Advanced Tel. Sys. v. Com-Net Prof'l Mobile Radio, LLC, 846 A.2d 1264, 1279 (Pa. Super. 2005); Miners, Inc., 722 A.2d at 695 ("The corporations, therefore, do not satisfy the 'identity of ownership' necessary to pierce their corporate veils and treat them as a single entity under the single entity theory").

[73] *See* Motion 20060027, Ex. 16, Elverta Trust Agreement, ¶1.3.

[74] *Id.*, Ex. 43, Deposition of Kenneth Bjorkelo, p. 132:12-13. The ownership structure of each individual entity is not fully fleshed out, in large part due to defendants' refusal to respond to requests for admissions and other discovery requests made by plaintiff Landlord.

[75] *See id.*, Ex. 15, Affidavit of Kenneth Bjorkelo, ¶ 17. These "affiliated companies" were SPM Professional Services Inc, SPM Software Inc., SPM Global Services LLC, Turbine Cloud Services, NSD Professional Services LLC, and Turbine Global Services LLC. *Id.*, ¶¶ 120-21, 130.

Thomas Urie stated in his deposition that he held no decision-making authority regarding the Optymyze brands, even though he was the President.[76] It was Mr. Stiffler who had exclusive decision-making power over the Optymyze entities, according to both Mr. Urie and Ms. Bishop.[77] Regardless of which of the Related Entities one looks at, Mark Stiffler had the ultimate decision-making authority.

(c) Similar Business Functions.

There is no evidence to suggest that the allegedly separate Related Entities functioned independently. Employees for nearly all entities operated out of an intermingled workspace, namely the Leased Premises. They all provided vague, unspecified "professional services" or "sales consulting services" or "marketing and administrative support services" for their affiliates and shared clients.[78]

(d) Involuntary Creditors.

The Named Tenant argues that the Landlord cannot be an "involuntary creditor," nor pierce the corporate veil, of the Named Tenant because the Landlord voluntarily entered into the Lease agreement with the Named Tenant. However, the Lease expressly prohibits any entity other than the Named Tenant from occupying or conducting businesses on the Leased Premises without written notice to the Landlord, and a written Assignment or Sub-Lease, which do not exist here. As a result, the Landlord became an involuntary creditor of each Related Entity operating out of the Leased Premises.

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[76] Motion 20060027, Ex. 3, Deposition of Thomas Urie., 25:3-14,

[77] *See id.*; and Ex. 30, Deposition of Paige Bishop, 78:20-79:3.

[78] *See* Motion 20060027, Ex. 14, Affidavit of Mark Stiffler; Ex 15, Affidavit of Kenneth Bjorkelo.

(e) Insolvency.

Insolvent means: "having liabilities that exceed the value of assets; [or] having stopped paying debts in the ordinary course of business or being unable to pay them as they fall due."[79] From 2015-2017, Mr. Stiffler wound down, liquidated the assets of, and attempted to dissolve the Named Tenant, so it necessarily was insolvent in 2018, and it continues to be so. He and his agents also appear to have engaged in similar activities with respect to several of the Related Entities, so they may also prove to be insolvent at this juncture.

IV. Named Tenant Failed To Produce Sufficient Evidence To Support Its Counterclaims Against Landlord.

In its Answer to the Complaint, Named Tenant asserted Counterclaims for breach of contract and breach of warranty against the Landlord. Named Tenant alleges that Landlord's failure to conduct certain repairs to the air conditioning system and to correct various leaks at the Leased Premises constituted a breach. Pursuant to Section 12 of the Lease, Landlord was not required to make repairs until notice was provided by Named Tenant.[80] Named Tenant has not produced any evidence that proper notice was given to Landlord, as required by the Lease.

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[79] Black's Law Dictionary (11th ed. 2019).

[80] Motion 20060067, Ex. 1 at § 12 ("Landlord shall make, or cause to be made, all necessary repairs to the structure and exterior of the Building, as well as to the mechanical, HVAC, electrical and plumbing systems servicing the Building, provided that Landlord shall have no obligation to make any repairs until Landlord shall have received notice of the need for such repair.")

"Notices given by Tenant to Landlord must be given by registered or certified mail, return receipt requested, overnight express delivery service or by courier service delivery against written receipt or signed proof of delivery, to Landlord at Landlord's Notice Address . . . with a copy to the Property Manager . . . Notices shall be deemed to have been received upon receipt with proof of delivery or on the date delivery is refused.") *Id.* at § 32.

Even if proper notice had been given, the Lease provides an alternate remedy in the event the Landlord fails to act; Named Tenant is permitted to cure the default at Landlord's expense.[81] Named Tenant has not proffered any evidence that it attempted to cure the alleged issues itself.

Since Named Tenant has not provided any valid evidence that it complied with the notice or self-help provisions of the Lease, judgment must be entered in favor of Landlord and against Named Tenant on the Counterclaims.

CONCLUSION:

Ultimately, it would defy logic and fundamental fairness for Landlord to be precluded from recovery because the Named Tenant has been intentionally liquidated at the hands of Mr. Stiffler, thereby rendering it "judgment proof" by merely transferring its assets to the other Related Entities he owns and controls. This corporate shell game is neither particularly novel nor unusually clever. It is, however, painfully obvious.

For the foregoing reasons, summary judgment is granted, in part, as to liability only, in favor of Landlord on its claims against Named Tenant for breach of contract and against most of the Related Entities for unjust enrichment. Summary judgement is also granted in favor of Landlord on the Counterclaims. The issue of the damages to be awarded to Landlord remains outstanding and will be heard at a later date.

The court refrains at this time from making a definitive finding of liability against the Named Tenant and the Related Entities on the claim for piercing the corporate veil. Those issues

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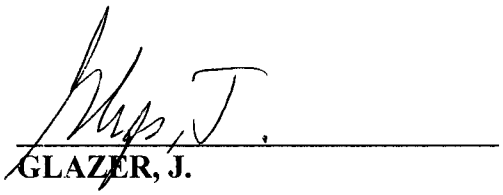
[81] *Id.* at §18(b) ("If Landlord fails to perform any covenant, condition or agreement contained in this Lease within (30) days after receipt of written notice from Tenant specifying such default, or if such default cannot reasonably be cured within thirty (30) days, if Landlord fails to commence to cure within that (30) day period and thereafter proceed to cure with reasonable speed and diligence, then Tenant shall have the right to cure that default at Landlord's expense, and Landlord shall reimburse Tenant for Tenant's reasonable out-of-pocket cost to cure within thirty (30) days of receipt from Tenant of invoices, bills, etc., evidencing such cost.")

are best addressed by way of further motions practice, such as a Motion in Limine requesting an adverse inference or other evidentiary sanction due to defendants' failure to produce Mr. Stiffler for deposition and any other discovery abuses.[82]

BY THE COURT:



GLAZER, J.

[82] One Motion in Limine should be sufficient, and there should not be 15 separate responses.