

STATE OF WISCONSIN CIRCUIT COURT DUNN COUNTY

MARY X, et al,

Plaintiffs,

DECISION AND ORDER

vs.

Case No. 06-CV-195

VINCENT PITTS, et al,

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 Defendants.

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Decision And Order

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Plaintiffs,

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vs.
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Case No. 06-CV-195 **SEP 24 2007**
DUNN COUNTY
CLERK OF COURT

Defendants.

I. Memorandum Opinion

Defendants Pitts, Palmetto, Ms. Cecil, Mr. Cecil and Mr. Pitts argue that the suit against them should be dismissed because Wisconsin courts do not have personal jurisdiction over them. The defendants assert that they had no involvement in Green's assault of X and thus the Wisconsin courts lack specific jurisdiction over them for the matter at hand. They also argue that that have had very little, to no contact, with the state since at least 1999 and therefore Wisconsin courts cannot exercise general jurisdiction over them, as they are all Florida citizens who were served with process outside the State of Wisconsin. The plaintiff argues that Wisconsin courts do have jurisdiction over all defendants because the corporations involved are alter-egos of their shareholders, they all operate as one entity, and this entity is ultimately controlled by Mr. Pitts. To supplement this, the plaintiff argues that, once the corporate veil is pierced, each defendant, individually, had sufficient contact with the state to support jurisdiction.

To determine whether the Wisconsin courts have personal jurisdiction over each of the defendants, the Court first must determine whether there is sufficient evidence to support piercing the corporate veils and holding the shareholders liable for the activities of their respective corporations. Second, the Court must determine whether Gemini and **Decision And**

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Pitts had sufficient control over the actions of Green, and whether Palmetto had sufficient control over the actions of Gemini and Pitts, so that the doctrine of *respondeat superior* can be used to impute the actions of these parties to their superiors. Third, the Court must determine whether the exercise of personal jurisdiction over the defendants is allowed under Wisconsin's long-arm statute. Finally, the

Court must determine whether the exercise of personal jurisdiction over the defendants will comport with the due process requirements of the Fourteenth Amendment to the United States Constitution.

In order to determine whether the Court may properly exercise personal jurisdiction over the defendants, certain facts need to be ascertained. For the purpose of determining personal jurisdiction, the Court is authorized to make these findings of fact based on the evidence before it. [Wis. Stat. § 801.08 (1) (2005-2006)]. "Factual doubts are to be resolved in favor of the plaintiff." [Kopke v. A. Hartrodt S.R.L., 245 Wis.2d 396,409 (Wis. 2001) (citation omitted)]. During a trial on the merits, the jury will not be bound by any findings of fact made by the Court in the determination of personal jurisdiction, but rather will arrive at its own conclusions based on the evidence properly before it at trial. [Wis. Stat. § 801.08(2) (2005-2006)].

II. Questions Presented And Issues

- A. For the purpose of determining personal jurisdiction, should the court pierce the corporate veils and hold Tina Cecil liable for the actions of Gemini Subscriptions, Inc., and hold Vincent Pitts liable for the actions of Palmetto Marketing Inc.?
- B. For the purpose of determining personal jurisdiction, should the court, using the doctrine of *respondeat superior*, hold Gemini Subscriptions, Inc., Pitts Sales, Inc., and Palmetto Marketing, Inc., liable for the actions of Brandon Green?
- C. Do the Wisconsin courts have personal jurisdiction over the defendants Pitts Sales, Inc., Palmetto Marketing, Inc., Tina Cecil, Robert Cecil and Vincent Pitts?

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III. Factual Background

On July 01, 2005, Brandon Green (hereinafter *Green*) was working for Gemini Subscriptions, Inc. (hereinafter *Gemini*) as a member of a traveling magazine subscription sales crew and was soliciting subscriptions in Menomonie, Wisconsin. [Pl. Ex. 1, Letter of Brandon Green (PJ-000003)]. On the evening of July 01, 2005, Green attempted to solicit a subscription from Mary X (hereinafter *X*) at her home. [Pl. Ex. 1, Letter of Brandon Green (PJ-000003)]. X informed Green that she did not have time to read magazines and asked him to leave; however, she felt sorry for him and gave him a couple dollars to buy a soda. [Pl. Ex. 6(A), Criminal Compl. (PJ-000056)].

After leaving X's home, Green hid and smoked some "white widow", which is the street name for marijuana laced with cocaine. [Pl. Ex. 1, Letter of Brandon Green (PJ-000003); Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000213)]. Green then returned to X's home, forced his way inside, trapped her in her bedroom, and violently sexually assaulted her. [Pl. Ex. 6(A), Criminal Compl. (PJ-000056-000057); Pl. Ex. 6(A), Incident Report (PJ-000062)]. Once Green left, X called the police to report the incident, was seen at the hospital, and stayed at her former mother-in-law's home for safety. [Pl. Ex. 6(A), Incident Report (PJ-000062)]. Green was arrested the next day. [Pl. Ex. 6(A), Incident Report (PJ-000064)]. Green has since described his conduct in a letter to Judge Shabaz. [Pl. Ex. 1, Letter of Brandon Green (PJ-000002-000004)].

Gemini is owned and operated by Tina Cecil, the company's sole shareholder. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000293)]. Ms. Cecil's husband, Robert Cecil, is the general manager of Pitts Sales, Inc. (hereinafter *Pitts*), another traveling magazine subscription sales company. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000293); Pl. Ex. 13,

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Dep. Digest-Vincent Pitts(PJ-000223)]. Pitts is owned by Vincent Pitts. [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ-000222)]. Mr. Pitts also owns Palmetto Marketing, Inc., n/k/a Sunshine Subscription Agency, Inc. (hereinafter *Palmetto*), a company that processes subscription orders that have been solicited by traveling magazine subscription sales crews. [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ-000221-000222)]. At the time Green assaulted X, both Gemini and Pitts were processing their subscription orders through Palmetto, although Gemini has since terminated its contract with Palmetto. [Def. Ex. 8, Def. Ans. to Pl. Interrog. 4 (4); Supp. Aff. Vincent Pitts, Dec. 18, 2006 123 & ¶ 25)].

Gemini was incorporated in 2002, [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ000258)], after Ms. Cecil and Mr. Cecil were married in 2001 [Supp. Aff. Tina Cecil, Dec. 15, 2006 1 4)]. Since Gemini's incorporation, the Gemini crew has generally traveled with the Pitts crew. [Supp. Aff. Tina Cecil (Dec. 15, 2006 1 5)]. The crews stay in the same hotels, although members from different crews will not share rooms and each company has a different room to use as an office. [Supp. Aff. Tina Cecil (Dec. 15, 2006

16-17)]. Additionally, members from both crews will sometimes travel in the same vans, under the supervision of a driver from one crew or the other, when a particular group chemistry may lead to higher overall sales. [Pl. Ex. 24, Aff. Brandon Green ¶ 6 (PJ-000502)].

Mr. Cecil conducted the morning meeting for both crews. [Supp. Aff. Tina Cecil (Dec. 15, 2006 19)]. Mr. Cecil also handled discipline for both crews. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000211, 000218); Pl. Ex. 24, Aff. Brandon Green ¶ 8 (PJ000502)]. Ms. Cecil made the room reservations for both crews, placed employment ads

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for both crews, ran background checks (under the name of PMI, for Palmetto Marketing, Inc.) on prospective employees for both crews, performed other secretarial tasks for both crews, and handled other issues regarding Pitts when Mr. Cecil was unavailable. [Pl. Ex. 61, Dep. Digest-Tina Cecil (PJ-000258-000259)].

Mr. and Ms. Cecil determined where the sales crews traveled and who was assigned to which vans. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000190)]. The driver of each van assigned the salespeople in his van to their specific territories, telling the salespeople where and when they would be picked up, and ultimately determining when enough sales had been solicited to quit for the day. [Def. Ex. 3, Dep. Brandon Green (38-39)]. Each salesperson was given a commission on each sale; however, the commission was not immediately received by the salesperson. Instead, Mr. and Ms. Cecil maintained a log for each employee which records the commissions and subtracts an amount for lodging. Mr. and Ms. Cecil gave each employee a specific amount of money per day and any remaining balance was to be disbursed to the employees each Sunday. [Deposition Brandon Green (08/28/2006) (P.115, Ln. 19)].

When crewmembers were soliciting sales, they utilized materials produced by Palmetto. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000281)]. The list of available magazines, including the prices for them, was created by Palmetto [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000281)] and specifically stated that sales agents do not have the authority to change any prices [Pl. Ex. 23(E) (PJ-000446-000448)]. The

receipts listed Palmetto as the company (on behalf of whom the sale was being solicited) and all checks were made out to Palmetto Marketing, Inc. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ000282)]. If a customer wished to cancel an order, Palmetto specified the cancellation

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policy on the back of the receipt, which required that the customer contact Palmetto directly. The sales rewards programs were organized by Palmetto. The materials for that program, including the point-values of each subscription, were also produced by Palmetto. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000294)]. In fact, the name of the subscription sales company, in this case either Gemini or Pitts, did not appear anywhere and any potential customer was not aware that the salesperson actually worked for a company other than Palmetto. Because Palmetto is the only name that appears on the documentation, criminal citations for soliciting without a proper permit were issued against Palmetto and Palmetto paid the fines. [Pl. Ex. 5, Aff. Charles Wysocky ¶ 8 (PJ000029)]. Palmetto, Pitts and Gemini are all Florida corporations and all share the same business and mailing address in Coral Springs, Florida.

X is suing Green, Gemini, Pitts, Palmetto, Ms. Cecil, Mr. Cecil and Mr. Pitts for damages arising out of Green's sexual assault of X. Pitts, Palmetto, Ms. Cecil, Mr. Cecil and Mr. Pitts filed motions to dismiss for lack of personal jurisdiction. X opposes these motions and argues that the Wisconsin courts do have jurisdiction over all defendants in this matter.

IV. Discussion

A. Piercing The Corporate Veil

1. Legal Standard For Disregarding The Corporate Form.

A corporation exists as a distinct entity and this legal fiction is not to be lightly disregarded. See Milwaukee Toy Co. v. Indus. Comm'n, 203 Wis. 493, 496 (Wis. 1931). See also, Consumer's Co-Op of Walworth County v. Olsen, 142 Wis.2d 465, 474 (Wis. 1988) (hereinafter *Consumer's Co-Op*). The Court will pierce the corporate veil

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and disregard this distinction; however, when the corporation is the alter ego or mere instrumentality of

its shareholders. (See Consumer's Co-Op, 142 Wis.2d at 484). In order to pierce the corporate veil, two elements must be satisfied. First, there must be a complete domination of corporate finances, policy and business practices by shareholders such that the corporation does not have an independent existence. [See Consumer's CoQ, 142 Wis.2d at 484; Wiebke v. Richardson & Sons, Inc., 83 Wis.2d 359, 363 (Wis. 1978); Milwaukee Toy Co., 203 Wis. at 495]. Second, this complete domination must result in the violation of statutory or legal duties, the commission of fraud, or injustice. [See Consumer's Co-Op, 142 Wis.2d at 484; Wiebke, 83 Wis.2d at 363; Milwaukee Toy Co., 203 Wis. at 496).

The rule for determining when to pierce the corporate veil is flexible and the Court will look at the totality of the circumstances when deciding whether a corporation has its own existence or is merely the shareholder's alter ego. [See Consumer's Co-Op, 142 Wis.2d at 485-486 (stating that piercing the corporate veil is an equitable remedy which must remain flexible and, therefore, there is no one determinative factor but rather is a range of possible factors which may combine to demonstrate that the corporation did not have an independent existence)]. Factors that may demonstrate that the corporation is the alter ego of its shareholder are failure to observe corporate formalities, non-payment of dividends, siphoning of corporate funds or draining of corporate coffers, nonfunctioning of directors, lack of corporate records, use of corporate funds to pay personal expenses and lack of repayment of amounts borrowed from the corporation. See Wiebke, 83 Wis.2d at 364 (piercing the corporate veil when the sole shareholder used the corporate checking account as his personal account, did not repay the corporation for

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money spent on personal expenses, rarely took wages, and credited what he claimed was a personal loan to his business account); Olen v. Phelps, 200 Wis.2d 155, 162 (Wis. Ct. App. 1996) (piercing the corporate veil when the company's sole shareholder and director handled all decisions informally and did not keep minutes, treated corporate funds as personal funds, used corporate funds to pay personal debts and mortgages on personal property and treated corporate assets as personal assets by conveying the office building owned by the corporation to his daughter as a "nest egg")].

In a closely held corporation, the mere lack of formality is generally insufficient to pierce the corporate veil and a more determinative factor will be the use of corporate funds for personal expenses. [Compare Consumer's Co-Op, 142 Wis.2d at 488 (finding insufficient evidence to pierce corporate veil when the company had elected officers, meetings were held even if minutes weren't taken, all business was undertaken under the corporate name, and, although defendant did use some personal funds to infuse capital, this mixing of personal and corporate funds was not improper because it was approved by the board and was used to increase, rather than decrease, corporate capital), with Wiebke, 83 Wis.2d at 364 (primarily discussing the intermingling of corporate and personal funds, assets and debts as the reason to pierce the corporate veil), and Olen, 200 Wis.2d at 162 (discussing lack of formality but primarily focusing on the use of corporate funds for personal debts and the fact that defendant assigned ownership of a corporate building to his daughter for the purpose of creating a "nest egg")].

In cases where sufficient factors exist to demonstrate the lack of a separate corporate identity, the corporate fiction will be disregarded when treating the corporation and the dominant shareholder as separate entities would result in injustice or fraud. See

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Wiebke 83 Wis.2d at 364; Olen, 200 Wis.2d at 162. See also Consumer's Co-On, 142 Wis.2d at 494]. Inadequate capitalization or inability of the shareholder to satisfy a judgment can be sufficient, when combined with the complete domination of corporate affairs, to show that an injustice would result if the corporate fiction is not disregarded. [Compare, Wiebke, 83 Wis.2d at 364 (piercing the corporate veil and holding the corporation liable for a personal debt when not doing so would result in an injustice because the shareholder had been declared bankrupt and a judgment on a personal loan against him had been dismissed, but the creditor, the shareholder's housekeeper, had thought the loan was being taken by the business and had been told the loan would be used for business expenses), **and** Olen, 200 Wis.2d at 162 (piercing the corporate veil and finding that the shareholder fraudulently tried to hide assets to avoid satisfying the judgment when he transferred ownership of the corporate building and a

personal property to his daughter as a "nest egg" but the daughter was not aware of the conveyance and the corporation continued to pay the mortgage on both properties), with Consumer's Co-Op, 142 Wis.2d at 494 (finding that, under these circumstances, no injustice would result in upholding the corporate fiction because the corporation was adequately capitalized at its inception and because the creditor was aware that the business was failing and continued to extend credit, against its own stated policies, and never asked for a personal guarantee on the credit)].

2. **Palmetto and Vincent Pitts**

This Court finds that Palmetto should be treated as Mr. Pitts's alter ego. Mr. Pitts and his wife are the sole shareholders. [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ000221)]. Mr. Pitts is the President, there is no board of directors, and there are no

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Palmetto employees in managerial positions, just seven employees in clerical positions. [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ-000221)]. Mr. Pitts stated in his deposition testimony that he makes all of the decisions and does not meet with anyone in the process. [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ-000221)]. As such, Mr. Pitts exercises complete control over Palmetto.

Mr. Pitts uses corporate funds to pay personal expenses, including the mortgage payment on a yacht owned by Mr. & Ms. Pitts personally and registered to their home address [Pl. Ex. 22(C) (PJ-000394-000403)], the payments on the Mercedes-Benz that Mr. Pitts uses for both business and personal transportation [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ-000227)], and a bill to "Phil's Expert Tree Service" in the amount of \$1,500 [Pl. Ex. 23(D) (PJ-000434)], even though Palmetto leases its office space.

In addition, Mr. Pitts intermingles corporate debts and assets, as the balance remaining on the mortgage for the yacht (\$430,092.58) registered to Mr. & Ms. Pitts individually is listed as a liability on the Palmetto statements of assets and liabilities. [Pl. Ex. 23(B) (PJ-000427)]. Further, Palmetto lists as a current asset an amount "DUE FROM SHAREHOLDER" as \$155,925.28. [Pl. Ex. 23(B) (PJ-000426)]. Palmetto's total current assets are \$202,431.41. [Pl. Ex. 23(B) (PJ-000426)]. Thus, as Mr. &

Ms. Pitts are Palmetto's sole shareholders, 77% of Palmetto's current assets is a loan due from Mr. Pitts. There is no evidence in the corporate accounting that Mr. Pitts has repaid any of this amount. The loan is essentially a tax-free, interest-free loan from Palmetto to Mr. Pitts, representing a vast majority of Palmetto's assets. [Pl. Ex. 25, Aff. William Spitz (PJ-000507)]. This suggests to the Court that Mr. Pitts is in complete control of Palmetto's finances. [Pl. Ex. 25, Aff. William Spitz (PJ-000507)].

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As a sub-S corporation, Palmetto does not retain any earnings, but rather any profits are disbursed to Mr. Pitts personally. [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ000226)]. Palmetto has described assets and liabilities in the exact same amount. [Pl. Ex. 23(B) (PJ-000426-000427)]. Further, Mr. Pitts stated that Palmetto has approximately \$60,000 in its operating account and that Palmetto's assets are "very miniscule." [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ-000230)]. According to the plaintiffs accountant, who reviewed these records, Palmetto was undercapitalized. [Pl. Ex. 25, Aff. William Spitz (PJ-000507)]. Additionally, Palmetto does not carry liability insurance. [Pl. Ex.13, Dep. Digest-Vincent Pitts (PJ-000228)]. Thus, Palmetto is without assets to satisfy any judgment entered against it.

Palmetto is under the absolute control of Mr. Pitts. Mr. Pitts has used corporate funds as his own, as well as intermingling corporate and personal assets and liabilities. As such, Palmetto is without funds to satisfy any judgment that would be entered against it. Thus, failing to pierce the corporate veil would result in injustice. For the purposes of exercising personal jurisdiction, the Court finds it proper and justified to pierce the corporate veil and treat Palmetto as the alter ego of Mr. Pitts.

3. Gemini and Tina Cecil

This Court finds that Gemini should be treated as Ms. Cecil's alter ego. Ms. Cecil has complete domination over corporate policy and business practices, as she is the owner and only manager [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000293)]. In addition, Ms. Cecil is the only officer and makes all decisions regarding Gemini [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000289)]. Based on the evidence, Ms. Cecil also uses corporate funds for personal expenses, as the corporation leases a vehicle which Ms.

Cecil uses for

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personal as well as business purposes. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000288000289, 000298)].

As a sub-S corporation, Gemini does not retain any earnings. Instead, any profits are paid to Ms. Cecil personally. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000000287)]. Ms. Cecil approximates this amount as \$120,000 in 2004. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000287)]. Gemini has very limited corporate assets, a 1999 Ford Club Wagon and a 2004 Ford Club Wagon. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000261)]. Additionally, Gemini does not carry liability insurance. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000261)]. Thus, Gemini arguably does not have sufficient assets to satisfy any judgment entered against it.

In summary, Gemini is under the complete control of Ms. Cecil, as Ms. Cecil is the sole shareholder, officer and manager. Ms. Cecil uses corporate funds for personal benefit. The corporation retains very limited assets and does not carry liability insurance. Therefore, the corporation would likely be unable to satisfy a judgment entered against it, which would likely result in an injustice. For the purposes of exercising personal jurisdiction, the Court has sufficient evidence to pierce the corporate veil and treat Gemini as Ms. Cecil's alter ego.

4. Gemini, Pitts and Palmetto

It is the opinion of the Court that Gemini and Pitts should be treated as alter egos of Palmetto. Palmetto exercised sufficient control over Gemini and Pitts, and the corporations are sufficiently intertwined, so that the Court can disregard the corporate forms of Gemini and Pitts and treat all three as one entity. Palmetto dictates many business practices of Gemini and Pitts. Palmetto also controls the flow of money for

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Gemini and Pitts. Gemini and Pitts are supposedly competitors in the same industry, yet they behave in a remarkably cooperative manner. Ultimately, they appear to function as one unit. Furthermore, there

are additional links between the corporations which tend to show that they, for all relative purposes, do not act as distinct corporate entities.

Palmetto dictates the business practices and controls the money for all three corporations. Palmetto establishes the list of available subscriptions and the prices for those subscriptions. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000281)]. Neither Gemini nor Pitts may raise these prices for a greater profit or lower these prices to guarantee a sale. [Pl. Ex. 23(E) (PJ-000446-000448)]. Palmetto provides the marketing materials for Gemini and Pitts, including brochures and subscription price lists. Palmetto provides sales receipts to Gemini and Pitts. The sales receipts provided by Palmetto instruct purchasers to make checks payable directly to Palmetto Marketing, Inc., and Palmetto dictates the cancellation policy. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000281000282)]. Palmetto receives the money from sales. Palmetto keeps a ledger for each company and then credits Gemini and Pitts with their share of sales. Palmetto keeps a log of how much Gemini and Pitts owe for sales materials and deducts that from the amount listed in the ledger. Palmetto also deducts amounts for any cancellations received on orders sold by each company. Upon request, Palmetto will disburse to either company any positive balance shown in the ledger. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ000284-000287)].

Mr. Pitts is the owner of Pitts and Palmetto, and arguably Palmetto's alter ego, and it appears he rarely requests such disbursement on behalf of Pitts, as Palmetto lists in its statement of assets, as a negative asset, an amount due to Pitts of \$56,910.88. [Pl. Ex.

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23(B) (PJ-000426)]. Thus, Palmetto retains control over much of Pitts's money. Palmetto also coordinates the sales-rewards programs in which sales agents for both Pitts and Gemini participate. This includes setting the amount of points awarded for each subscription and determining which subscriptions qualified for double or triple points. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000294)]. This also includes providing materials for this program to the sales agents, who then share this information with the potential customers to try and induce sales. [Pl. Ex. 18 (PJ-000322)].

Ultimately, it is difficult to differentiate the businesses from one another based on the actions of

Palmetto. Palmetto dictates the prices to be charged by Pitts and Gemini and the manner for payment and refund, controls the flow of all money to Gemini and Pitts, and supplies some of the sales techniques, including the materials needed to implement them. This is a substantially high level of control exercised by Palmetto over Gemini and Pitts.

Gemini and Pitts, who are competitors in the same industry, coordinate and cooperate in a manner that suggests they are, for all practical purposes, actually functioning as one unit. Mr. Cecil, who is the general manager of Pitts, conducts morning meetings for both sales crews and motivates them to make high volumes of sales. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000190); Supp. Aff. Tina Cecil, Dec. 19, 2006 1 9)]. Mr. Cecil disciplines members of both sales crews, including Green. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000211, 000218); Pl. Ex. 24, Aff. Brandon Green ¶ 8 (PJ-000502)]. Mr. Cecil also conversed with new employees of both sales crews to introduce them to the industry and make them aware of company policies and practices. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000210)]. Mr. Cecil does not

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receive any compensation from Gemini for these services.

Ms. Cecil performs secretarial tasks for both Gemini and Pitts. Ms. Cecil arranges hotel accommodations for both crews, ensuring that there are enough rooms for both crews and members from separate crews are housed on separate ends of the hotel. Ms. Cecil also places newspaper ads to recruit employees for both companies. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000258-000259)]. When she does this, Mr. Pitts tells her in which publications to place recruitment ads for Pitts and then she selects alternate publications in which to place recruitment ads for Gemini. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000277-000279)]. Finally, Ms. Cecil runs background checks on new employees for both companies. The account with the company who runs the background checks is held in the name of PMI, for Palmetto Marketing, Inc.¹ [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000258-000259)]. Ms. Cecil draws a small salary from Pitts for her services. [Pl. Ex. 16, Dep. Digest-Tina Cecil PJ-000290)].

Avoiding placing recruitment ads in the same publications may or may not be seen as cooperation, as this is a relatively unilateral act of Ms. Cecil. However, to this Court it appears highly

suggestive of cooperation. The crews also have additional means of cooperation. Mr. and Ms. Cecil discuss their sales areas and send their crews to different geographic regions to avoid overlapping territory. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000259)]. They also place members from one crew with members of the other

This is puzzling because, if the corporate fictions are upheld, Ms. Cecil has nothing but a contractual relationship for subscription processing with Palmetto. She would be running background checks on behalf of Gemini or Pitts for prospective employees of those two companies and none of this bears even remotely on Palmetto. Why Ms. Cecil would instinctively create the account in the name of PMI is baffling if her relationship with Palmetto is truly the attenuated contractual relationship that they claim exists. Further, if Gemini and Pitts are truly distinct entities, it is puzzling that they would not have separate accounts for running background checks, as they would need to be billed separately and would need to pay these bills from separate accounts. Most mystifying is that the results of these background checks are sent to PMI at the corporate address in Florida. This would truly be of little assistance, as Gemini and Pitts hire crew members in the field and typically not in Florida.

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when they feel that the specific group will have a positive chemistry which will lead to higher sales. [Pl. Ex. 24, Aff. Brandon Green ¶ 6 (PJ-000502)]. While defendants claim that the two crews are distinct entities, in reality they function as one unit. Ms. Cecil performs the clerical tasks. Mr. Cecil, who is more of a "people person", handles the crews, which are working together in a mutually inclusive form to generate the highest sales.

There are several indicia that further tie the three companies together, demonstrating they all function as one unit headed by Palmetto. Although the defendants rely on their contractual agreements to demonstrate distinct legal entities, this does very little to substantiate their case. Their professed abiding by restrictive terms in the contract, ignores terms which would suggest autonomy. For example, in the contract between Palmetto and Gemini, one term that would suggest distance between the companies is term 9. Term 9 states that Palmetto is not required to provide Gemini with sales materials [Pl. Ex. 7 (PJ-000096)]. This would suggest that Gemini creates its own sales materials. Although Palmetto is not required to provide sales materials, it does so anyway [Pl. Ex. 16 (PJ-00028 1)]. Term 9, therefore, does little to show that they are separate entities.

In addition, there are services which Palmetto provides to Pitts and Gemini which are not

included in the contract and which tend to show a close relationship between the companies. All three companies share the same mailing address. They claim that Palmetto receives mail for all the companies for whom it processes orders. However, this service is not specified anywhere in the contract between Gemini and Palmetto.

Palmetto leases and insures a vehicle for Ms. Cecil, which Gemini then leases

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from Palmetto and which Ms. Cecil uses for business and personal transportation [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000288)]. However, contractually, Palmetto is not responsible for providing a vehicle for Ms. Cecil. Ms. Cecil processes background checks in the name of PMI. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000258)]. Palmetto pays fines on citations issued to Gemini employees for solicitation without a permit [Pl. Ex. 5, Aff. Charles Wysocky ¶ 8 (PJ-000029)]. However, this is in direct conflict with a contractual term which explicitly states that Palmetto is not responsible for securing sales permits.

Palmetto, Pitts and Gemini are closely linked and any distinctions between them are blurred, if nonexistent. Gemini and Pitts behave cooperatively, rather than competitively, even though they are companies that fill the exact same functions in the same industry and should be competing for the same customers. Ms. Cecil provides services for Pitts and Mr. Cecil provides services for Gemini. Palmetto exercises a great degree of control over both corporations, including setting prices, dictating sales and return policies, receiving money and issuing all refunds on orders, and tracking and controlling the flow of funds. The companies ignore many of the terms of their contractual agreements and Palmetto provides many services which are not indicated in the contract. These corporations have failed to keep their affairs separate and distinct and therefore the Court should not attempt to do so. (See Wiebke, 83 Wis.2d at 364). The Court pierces the corporate veils of Gemini and Pitts, treating them as Palmetto's alter egos.

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B. Agency

1. The Doctrine of *Respondeat Superior*

The doctrine of *respondeat superior*, also known as the master/servant doctrine, is a strict liability doctrine whereby a master is liable for the torts of his servant regardless of the master's own conduct.² [See Kerl v. Dennis Rasmussen, Inc., 2004 WI 86, ¶ 21, 273 Wis.2d 106, 118 (Wis. 2004)]. Wisconsin has adopted the version of this doctrine set forth in the Restatement (Second) of Agency § 219 (1958)³:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

See Kerl, 2004 WI 86,123, 273 Wis.2d at 120).

Under this doctrine, an employer will be liable for the torts of his employee, but not the torts of an independent contractor. [See Kerl, 2004 WI 86, 127, 273 Wis.2d at 122 (stating that vicarious liability will only result from a master/servant relationship); Arsand v. City of Franklin, 83 Wis.2d 40, 56 (Wis. 1978) (discussing the difference between "agent," "servant," and "independent contractor" and stating that liability

z The courts and the Restatement (Third) of Agency (2006) have begun using the terms "employer" and "employee" rather than "master" and "servant." In this memo, "employer" and "employee" will be used and are synonymous with the older terms "master" and "servant."

³ The Restatement (Second) of Agency has been superseded by the Restatement (Third) of Agency (2006). The Restatement (Third) of Agency now uses the terms "employer" and "employee" rather than "master" and "servant." The doctrine of *respondeat superior* remains substantially unchanged in regard to servants/employees acting within the scope of their employment. Wisconsin has not yet adopted the doctrine as re-codified in the Restatement (Third) of Agency and, thus, the doctrine as codified in the Restatement (Second) of Agency still controls.

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depends on whether the actor was a servant or an independent contractor); Snider v. N. States Power Co., 81 Wis.2d 224, 232 (Wis. 1977) (stating that the general principle is that "one who contracts with an independent contractor is not liable to others for the torts of the independent contractor"). Thus, in order to attribute the tortious conduct to the employer, the court will need to determine whether the actor was an employee or an independent contractor.⁴

The test for whether an actor is an employee or an independent contractor is a factual one and the term "independent contractor" in a contract is not dispositive. See Kerl, 2004 WI 86, 124, 273 Wis.2d at 121 ("The use of the label "independent contractor" in the contract between the parties is not by itself dispositive; the test looks beyond labels to factual indicia."). See also Harris v. Richland Motors, Inc., 7 Wis.2d 472, 480 (Wis. 1959) (affirming the denial of defendant's motion for summary judgment when the facts in the record show that there is an question of fact as to whether the actor was an independent contractor or an employee of the defendant); Thum v. La Crosse, Liquor Co., 258 Wis. 448, 455 (Wis. 1951) (reinstating a jury verdict after explaining that the inferences to be made were questions of fact and that there was enough evidence to support the jury's finding that the actor was an employee of the defendant, rather than an independent contractor)].

⁴ Wisconsin has adopted the definitions of master, servant, and independent contractor as they appear in the Restatement (Second) of Agency, sec. 2:

(1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to this physical conduct in the performance of the undertaking. He may or may not be an agent.

(1958). See Arsand v. City of Franklin, 83 Wis.2d 40 (Wis. 1978) (discussing § 2 throughout the opinion).

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The primary distinction between an employee and an independent contractor is the degree of control that the worker has over his actions. [See Snider, 81 Wis.2d at 232 ("The most important single

criterion in determining whether a person is an independent contractor is the degree to which the owner, rather than the independent contractor, retains the right to control the details of the work."). See also Harris, 7 Wis.2d at 478 (discussing owner's control over details of employee's work)]. The Restatement (Second) of Agency § 220 has codified this definition of servant which relies on the right of the employer to control the activities of the employee and has listed several factors which support a finding that the actor is an employee rather than an independent contractor. Wisconsin has adopted § 220 of the Restatement (Second) of Agency. [See Heims v. Hanke, 5 Wis.2d 465, 468 (Wis. 1958). See also Kerl, 2004 WI 86,119,273 Wis.2d at 117; Arsand, 83 Wis.2d at 45; Harris, 7 Wis.2d at 478].

To determine the level of control that the employer retains over the actions of the worker, the Court will look to see the amount of supervision that the employer exercises over the actor and the level of detail with which the employer controls the undertaking.

⁵ Restatement (Second) of Agency, § 220 (1958), states gives the definition of a servant as:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct on the performance of the services is subject to the other's control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant; and
 - (j) whether the principle is or is not in business.

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Compare Harris, 7 Wis.2d at 478-479 (listing the following factors as evidence which would tend to support an employer/employee relationship: the owner "hired" and could "discharge" the worker and the worker could "quit," the owner authorized any price reduction and established the value of each car

traded in, the owner authorized credit and determined which financing company to use in each sale, the owner instructed the worker to collect on payments or repossess cars when the worker's customers fell behind in payments, the owner reviewed the worker's list of prospective customers and where the worker was going to make these sales, the owner had the right to send the worker out to visit prospective customers, the owner had the worker watch the garage when the owner was unavailable, the owner sent the worker out to buy used cars for the company or drive new cars to the company's lot, and the owner deducted social security, tax withholdings and insurance premiums from the worker's commission checks), **and** Thurn 258 Wis. at 452-453 (listing the factors which supported the jury's decision that the relationship was an employer/employee one as: the employee needed a "job" so the employer "hired" him, orders from the employee's area that were phoned into the company were credited to the employee, the company would instruct the employee to only accept COD from customers with bad credit, the employee collected accounts and issued receipts in the company's name, the employee had some discretion when granting discounts but the company placed limits on the discounts, the company would alert the employee when his sales were down, the company had established routes and delivery days that the employee had to comply with, and on the day in question the employee phoned the company to say he had a headache and would not be working that afternoon), with Snider, 81 Wis.2d at 232 (finding that the worker was an independent contractor when the company made no effort

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to supervise the worker or the details of the work and that the company only inspected the work once completed to ensure that the work complied with the contract's specifications)].

There is overwhelming evidence in the record demonstrating that Green was an employee of Gemini, rather than an independent contractor. Further, Gemini is not challenging the jurisdiction of the Wisconsin courts. At the time of the attack on X, Green was clearly not acting within the scope of his employment. The question of whether one of the exceptions listed in § 219(2) of the Restatement (Second) of Agency (1958) applies to this situation is one for the jury. There is no question that Green was acting within the scope of his employment during his first encounter with X and, therefore, that he was in Menomonie, Wisconsin, in his capacity as a Gemini employee.

Thus, the Court will need to examine the level of control that Palmetto exercised over Gemini and Pitts to determine whether those corporations were acting as independent contractors or as employees of Palmetto. If they were acting as employees of Palmetto, Palmetto can be held liable for their actions and their contacts with the state of Wisconsin will be imputed to Palmetto.

2. Gemini, Pitts and Palmetto

For the purpose of exercising personal jurisdiction, Gemini and Pitts should be considered employees of Palmetto, rather than independent contractors. Palmetto exercised sufficient control over both corporations and dictated their actions to a sufficiently detailed level to support a finding that they were Palmetto employees. Palmetto determined which magazine subscriptions would be available for sale and at what prices these subscriptions would be sold. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ **Decision And Order** 22 X v. Pitts 06-CV-195 000281)]. Gemini, Pitts, and the sales agents had no authority to change these prices.⁶ [Pl. Ex. 23(E) (PJ-000446-000448)]. Palmetto provided all of the sales materials to Gemini and Pitts, including available subscriptions with price lists, brochures, and sales receipts. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000281)]. These sales receipts instructed purchasers to make checks payable to Palmetto Marketing, Inc., rather than to the sales companies. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000282)]. These sales receipts also stated Palmetto's cancellation policy, which required the purchaser to submit a cancellation to Palmetto in writing, within three business days of the date of purchase. Gemini, Pitts and the sales agents were not able to provide alternatives to this policy.' Further, Palmetto collected all funds and then kept a log of the subscription sales of each company, the amount of money to credit to each company for the sales, and the amount spent by each company on sales materials. Palmetto would then disburse these amounts of money to the sales companies at their request. [Pl. Ex. 16, Dep. Digest-Tina Cecil (PJ-000284-000287)].

Defendants Gemini and Palmetto rely on the terms of their contract to demonstrate that Gemini is an independent contractor. The Court, however, is required to look beyond contractual labels to factual indicia. (See Kerl, 2004 WI 86, ¶ 24, 273 Wis.2d at 121). The evidence demonstrates that the companies do not abide by many of the contractual terms which would, if followed, indicate that Gemini is an

independent contractor. The contractual terms which are followed are those restrictive terms through

⁶ For example, Gemini did not have the authority to charge a higher price for a greater profit and sales agents were not authorized to grant discounts to secure sales.

⁷ For example, there is a complaint on record with the Wisconsin Department of Agriculture, Trade, and Consumer Protection detailing an account where a sales agent told a customer that she could call a specific phone number, *which* the agent wrote on the receipt, to cancel her order. The customer called this number to find it was out of service and then placed a stop-payment on her check. Palmetto refused to cancel this order because the request did not fall within its stated procedures. Thus, the sales agent had no authority to specify an alternate mode or cancellation. (Pl. Ex. 18 (PJ-000321-000336)).

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which Palmetto dictates the practices that Gemini must follow. Those terms which are not followed are superseded by behaviors which tend to indicate that Palmetto has control over Gemini's decisions. For example, Term 2.2 of the contract states that "[t]he Servicer will furnish the Subscription Sales Company up-to-date information concerning the availability of magazines and other publications Such information shall include, but not be limited to, ...the suggested retail price for such publications." [Pl. Ex. 7 (PJ000094)]. However, although the contract states that they will provide a suggested retail price, the price lists actually provided by Palmetto state that "SALESPERSON HAS NO AUTHORITY TO CHANGE ANY PRICES." [Pl. Ex. 23(E) (PJ-000446-000448)]. Term 2.4 discusses refunds for cancellations and states that the "Servicer shall make refunds directly to consumers on behalf of the Subscription Sales Company." [Pl. Ex. 7 (PJ-000094)].

Term 5 of the contract prohibits the use or adoption by the sales company of the name Palmetto, [Pl. Ex. 7 (PJ-000095)]; however, most of the materials supplied to the sales companies (including the price lists and receipts) have the name Palmetto printed on them and do not contain the names of the individual sales companies, [Pl. Ex. 23(E) (PJ000446-000451)]. Term 9 of the contract states that the Servicer is not obligated to provide any sales materials to the sales company, [Pl. Ex. 7 (PJ-000096)]. Although Palmetto is not required to provide any materials, it does provide many materials, including price lists, brochures and receipts. Finally, terms 10 and 11 state that the sales company is responsible for all licensing fees and is responsible to ensure that its employees follow all applicable laws. [Pl. Ex. 7

(PJ-000096)]. There is at least one documented instance where Palmetto paid a fine in Wisconsin pursuant to a citation for

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violating a local ordinance requiring door-to-door sales agents to obtain licenses. [Pl. Ex. 5-Aff. Charles Wysocky (PJ-000029)].

Thus, terms which would tend to show a distance between the companies, such as a suggested price list, the prohibition of using the servicer's name, and the placing of responsibility for abiding the law and obtaining licenses on the sales company, have been disregarded. Other terms which would suggest autonomy consistent with an independent contractor, such as the term which states that the servicer is not required to provide sales materials, are of little weight (whether required to by contract or not), since Palmetto did provide Gemini with all sales materials.

Palmetto did not dictate certain decisions made by Gemini and Pitts. Gemini and Pitts were free to hire and fire whomever they chose. They were free to travel within the continental United States to sell subscriptions as they wished.⁸ They assigned employees to drivers as they saw fit and disciplined employees in a manner they thought was appropriate. This level of discretion, however, does not rise to the level required to consider an actor as an independent contractor, rather than an employee. In instances where the courts have upheld the classification of independent contractor, the principle was not intertwined in the day-to-day affairs, but merely the results. In cases where the principle dictated the prices and policies and involved itself in day-to-day operations, the courts have upheld employer/employee relationships. The facts in this case support a finding that Gemini and Pitts were employees of Palmetto, rather than independent

a The extent to which Gemini and Pitts could truly choose their own sales territories is questionable. Therefore, any actions of Palmetto are the actions of Mr. Pitts. Mr. Pitts is also the owner of Pitts Sales and thereby dictates where the Pitts Sales crew travels. Thus, while Palmetto may not be dictating where the Pitts Sales crew was to travel, *per se*, Mr. Pitts told the Pitts Sales crew where to travel and, as Mr. Pitts is Palmetto, Palmetto told the Pitts Sales crew where to travel via its alter ego, Mr. Pitts. As Ms. Cecil would typically choose to have the Gemini crew travel with the Pitts Sales crew, a practice that was known to Mr. Pitts, Palmetto, through its alter-ego Mr. Pitts, was effectively dictating where both crews would travel.

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contractors. For the purpose of exercising personal jurisdiction over Palmetto, the Court finds that such a relationship existed.

3. Robert Cecil

Mr. Cecil exercised sufficient control of Green's actions so that he should be considered an employer of Green and be held to answer for Green's actions through the doctrine of *respondeat superior*. As discussed above, Mr. Cecil and Ms. Cecil operated in such a fashion that the affairs of Gemini and Pitts are intertwined and each played a role in the operation and management of the other.

Mr. Cecil conducted morning meetings where, among other things, the van/driver assignments for the day were announced for both Gemini and Pitts, including those meetings that Green attended. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000190)]. Mr. Cecil explained the policies to both Gemini and Pitts employees, including giving Green a brief orientation [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000210)], and instructing Green not to use any drugs while working and to keep to himself any drug use on his own time [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000198, 000217)]. Mr. Cecil rewarded both Gemini and Pitts employees for high sales volumes, including handing out cash bonuses to high sellers while Green was working for Gemini. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000192)]. Mr. Cecil punished both Gemini and Pitts employees for misconduct, including instructing Green to stay in his room after Mr. Cecil encountered him drunk and high one night. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ000211)].

Ultimately, this Court finds that Mr. Cecil exercised control over the actions of Gemini employees as if he were their manager or employer and thus should be required

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to be held liable for the actions of his employees. **C. Wisconsin's**

Long-Arm Statute

Palmetto, Pitts, Ms. Cecil, Mr. Cecil and Mr. Pitts are all Florida residents who were not served with process in the State of Wisconsin. Therefore, in order for Wisconsin courts to exercise personal jurisdiction over defendants, such an exercise of personal jurisdiction must be authorized by the Wisconsin long-arm statute. [Wis. Stat. § 801.05 (2005-06)]. The exercise of specific personal jurisdiction over all defendants complies with the requirements of the Wisconsin long-arm statute.

1. Requirements for Specific Jurisdiction

The Wisconsin long-arm statute provides that Wisconsin courts will have personal jurisdiction:

In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

- (a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or
- (b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

§ 801.05(4) (2005-06). Section 4(a) requires that the party doing the soliciting is an agent of the defendant and that the defendant receives either direct or indirect financial benefit from the solicitation. [See Pavlic v. Woodrum, 169 Wis.2d 585, 592 (Wis. Ct. App. 1992) (finding lack of jurisdiction over defendant whose only contacts with the state were the mailing of stock certificates after an investment had been made and the mailing of a corporate dissolution letter, neither of which was made in anticipation of financial benefit)].

Section 4(b) requires that, in addition to the defendant's contact with the state **Decision And**

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which gives rise to the lawsuit, the defendant have at least one other contact with the state and this additional contact can be satisfied by the presence of additional products in the state or by the solicitation activities described in sec. 4(a). See Fields v. Playboy Club of Lake Geneva, 75 Wis.2d 644, 651 (Wis. 1977) (stating that either the purchase of 41 vehicles by Wisconsin residents in the 18 months

preceding the accident in question or the placing of ads containing 800-numbers in national publications which are circulated in Wisconsin would have been independently sufficient to furnish the additional contact needed to confer jurisdiction; reversing on other grounds). See also Stevens v. White Motor Corp., 77 Wis.2d 64, 71 (Wis. 1977) (discussing the requirement that more than one product be used in the state at the time of the injury); Hasley v. Black, Sivalls & Bryson, Inc., 70 Wis.2d 562, 580 (Wis. 1975) (discussing the multiple product requirement and stating that it can be satisfied by two of the product)].

Further, the long-arm statute is to be given a liberal construction in favor of exercising personal jurisdiction. [See Stevens, 22 Wis.2d at 74 ("statutes regulating longarm jurisdiction are to be given a liberal construction in favor of the exercise of jurisdiction")].

2. Specific Jurisdiction Through Piercing the Corporate Veil

As discussed above, the Court believes it proper to pierce the corporate veils of Gemini and Pitts and treat them as alter egos of Palmetto. Due to the findings of this Court that Gemini is not challenging personal jurisdiction and that Gemini, Pitts and Palmetto are treated as the same entity, then personal jurisdiction can be exercised over Pitts and Palmetto, as well. Further, in addition to the contact at issue, Pitts and Palmetto have other contacts with the State of Wisconsin.

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Pitts' sales agents solicited subscription sales from approximately seventy Wisconsin residents in the two weeks prior to the attack on X, and likely attempted to solicit at many additional Wisconsin homes during that time. [Pl. Ex, 26(B) (PJ-000518000519)]. This solicitation activity provides the necessary additional contact to exercise jurisdiction over Pitts.

Palmetto regularly processed subscriptions from Wisconsin residents in the eighteen months prior to the attack on X, totaling approximately 1,343 subscriptions from Wisconsin residents processed during that time. [Pl. Ex. 23(G) (PJ-000455000492)]. Additionally, during that time Palmetto used a collection agency to threaten legal action against Wisconsin residents whose checks did not clear. [Pl. Ex. 18 (PJ000323-000327)]. These activities provide sufficient additional contact

with Wisconsin to confer jurisdiction over Palmetto.

The Court finds it proper to pierce the corporate veils of Gemini and Palmetto and treat them as the alter egos of their shareholders, Ms. Cecil and Mr. Pitts, respectively. This determination allows the Court to exercise personal jurisdiction over Ms. Cecil⁹ and Mr. Pitts because the actions of their corporations can be treated as their actions, which have been shown to be sufficient to exercise personal jurisdiction.

The Court finds that Gemini and Pitts are alter egos of Palmetto and that Gemini and Pitts as alter egos of each other. Mr. Cecil exercised substantial control over the employees of both companies. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000192118000219) (discussing Mr. Cecil throughout, including that Mr. Cecil ran morning

⁹ Ms. Cecil challenges personal jurisdiction while Gemini does not. To the extent that it is necessary to demonstrate that Gemini had additional contacts with the state of Wisconsin that can be imputed to its alter ego, Ms. Cecil, Mr. Green testified that he, himself, had solicited sales in approximately seven different Wisconsin communities on at least seven different days. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ000193)].

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meetings, gave cash rewards to the highest sellers each day, disciplined Gemini employees for drug use and disorderly behavior, and expressed his view that he only disapproved of drug use while employees were working, among other things)]. Since these companies behaved as one, and as alter egos, the actions of one are sufficient to confer jurisdiction over the other.

3. Specific Jurisdiction From Solicitation on Behalf of Defendants

As also discussed above, the Court believes Green was an employee of Gemini and Pitts. Gemini and Pitts acted as one entity and both Mr. and Ms. Cecil exercised control over Green's work and even free time. As such, Green's solicitation activities should be viewed as being done on behalf of Gemini, Pitts, Ms. Cecil and Mr. Cecil under the doctrine of *respondeat superior*. Because Green was an agent of Gemini, Pitts, Ms. Cecil and Mr. Cecil, and all received a direct financial benefit from his solicitation activities, his solicitations in Wisconsin are sufficient to confer jurisdiction over them.

Since Gemini and Pitts can be viewed as employees of Palmetto, then Green was therefore, in essence, an agent of Palmetto. The Palmetto name was on the forms that were used to sell subscriptions and Palmetto received a direct benefit, a processing fee, from each subscription sold. [Pl. Ex. 13, Dep. Digest-Vincent Pitts (PJ-000244) (stating that Palmetto makes its money by processing orders form sales companies and that if it does not process orders, it does not make money)]. Because Palmetto, and its alter ego Mr. Pitts, received a direct benefit from Green's solicitation activities in Wisconsin, these activities are sufficient to confer jurisdiction over Palmetto and Mr. Pitts.

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D. Constitutional Due Process

1. Due Process Requirements

An exercise of personal jurisdiction that complies with the Wisconsin long-arm statute must then be examined for compliance with the due process requirements of the Fourteenth Amendment to the U.S. Constitution. [See Hasley, 70 Wis.2d at 577 (applying two-stage analysis for personal jurisdiction); State v. Advance Mktg. Consultants, Inc., 66 Wis.2d 706, 718 (Wis. 1975) (treating the question of due process as the second step in the analysis of personal jurisdiction); Brown v. LaChance, 165 Wis.2d 52, 66 (Wis. Ct. App. 1991) (discussing Wisconsin's two-part test for the exercise of personal jurisdiction)].

Satisfaction of the Wisconsin long-arm statute creates a rebuttable presumption that the exercise of personal jurisdiction satisfies due process requirements. [See Hasley, 70 Wis.2d at 577 (stating that satisfaction of the long-arm statute presumes satisfaction of due process requirements, but that the defendant may rebut this presumption); Fields, 75 Wis.2d at 654 (finding that the legislature intended for the long-arm statute to satisfy due process requirements and then stating that because of the defendant's contacts with Wisconsin, the exercise of jurisdiction does not violate due process)].

When a defendant challenges the presumption of constitutionality, the court will apply a five-part analysis to evaluate whether the exercise of personal jurisdiction would violate due process. [See Hasley, 70 Wis.2d at 585-588 (applying five-factor test for due process); Advance Mktg. Consultants, Inc., 66 Wis.2d at 718-719 (applying five-factor test for due process)]. The five factors are: (1) the quantity of contacts, (2) the nature and quality of contacts, (3) the source of the cause of action, (4) the

interest of Wisconsin in

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the action, and (5) convenience. Id.

2. Quantity of Contacts

All defendants in this matter have sufficient contacts with the State of Wisconsin that exercising personal jurisdiction over them will not violate due process requirements.¹⁰ Gemini's sales agents were soliciting sales in Wisconsin at the time of the assault on X. They had also solicited sales in Wisconsin in at least seven communities in the seven days prior to the attack of X. [Pl. Ex. 12, Dep. Digest-Brandon Green (PJ-000193)]. Pitts's sales agents had solicited sales from approximately seventy Wisconsin residents in the two weeks prior to the assault of X and had presumably visited many additional Wisconsin homes during that time. [Pl. Ex. 26(B) (PJ-000518-000519)]. Palmetto processed hundreds of orders (approximately 1343) solicited from Wisconsin residents in the eighteen months prior to the assault of X. [Pl. Ex. 23(G) (PJ-000455-000492)]. Palmetto has also, through its collection agent, sent collection letters to Wisconsin residents whose checks had not cleared. [Pl. Ex. 18 (PJ-000323-000327)].

This Court finds that at the time when X was assaulted, each of the defendants had, in the recent past, made substantial contacts with the State of Wisconsin. These contacts are sufficient for the exercise of personal jurisdiction.

3. Nature and Quality of Contacts

Gemini's and Pitts' sales agents went into residents' homes in an attempt to solicit

¹⁰ For the duration of the due process analysis, it is assumed that Ms. Cecil is the alter ego of Gemini and that Gemini's actions and interests are identical to those of Ms. Cecil. Gemini does not challenge jurisdiction and is discussed only to the extent that it is necessary for the purpose of establishing personal jurisdiction over Ms. Cecil. It is also assumed that Mr. Pitts is the alter ego of Palmetto and that Palmetto's actions and interests are identical to those of Mr. Pitts. It is assumed that Mr. Cecil, in his role as general manager of Pitts, is responsible for the actions of its employees and its actions and interests can be applied to him through the doctrine of *respondeat superior*.

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magazine subscription sales. These are very personal contacts with residents of the State of Wisconsin and are made only for financial gain. The sales agents physically entered the State of Wisconsin for the purpose of making sales, which constitutes a purposeful availment of the privileges and protections of doing business in the state. This purposeful availment by physically entering the state to solicit sales is sufficient to show that the exercise of personal jurisdiction will not violate due process requirements.

The purposeful availment of the privileges and protections of doing business in the State of Wisconsin is further demonstrated by the nature of Palmetto's contacts with the state. When processing orders from Wisconsin residents, Palmetto, through its collection agent, would threaten legal action according to Wisconsin law against individuals whose checks were returned to Palmetto. [P1. Ex. 18 (PJ-000323-000327)]. This threat to use Wisconsin laws and the Wisconsin judicial system is sufficient to show that the exercise of personal jurisdiction will not violate due process requirements.

4. Source of Cause of Action

This cause of action arose out of Green's initial contact with X while attempting to solicit a magazine subscription sale. Gemini, Pitts and Palmetto all rely on this particular type of contact for all of their revenue. None of these companies will make any money if sales agents do not solicit subscription sales door-to-door. Thus, the very source of income for all three companies, door-to-door sales contacts, led to Green's encounter with X. The source of the cause of action is sufficiently connected to all defendants such that the exercise of personal jurisdiction would not offend due process.

5. Interest of Wisconsin in the Action

Wisconsin has a significant interest in litigating this matter. X, as the victim

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of a violent sexual assault, was a Wisconsin resident at the time. Wisconsin has an interest in protecting its citizens from similar assaults in the future by requiring people and corporations to answer for their actions and the actions of their employees" in the State of Wisconsin.

Further, public policy considerations strongly support the exercise of personal jurisdiction over the defendants in this matter. Gemini and Pitts are Florida corporations who are in the business of

traveling across the country selling magazine subscriptions. Their employees are citizens of various states. The nature of their business is such that they only operate within one state for one to two weeks at a time, and then move on to another state. They may only spend one to two weeks per year in any given state. While in these states, they do not register with local authorities as is generally required and thus local law enforcement are not aware of who their employees are. These employees sometimes misrepresent their work and some appear to have stolen from those people they solicit. If these contacts with a state are insufficient to confer personal jurisdiction for acts committed while in that state, these companies will (arguably) be able to travel across the country, with some of their employees committing tortuous, criminal or unethical acts, and then only answer for their actions when they injure parties who have enough money to litigate this matter in the company's home state. The injured parties do not seek these companies out, rather the companies enter their homes and communities, and therefore the companies should be required to answer for their actions in the communities where they choose to do business.

Palmetto conducts all of its business within the state of Florida and does not enter the homes and communities of Wisconsin. However, Palmetto has made no effort to

¹ Some of whom are habitual drug users or have been convicted of violent crimes or larceny

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limit its liabilities in Wisconsin. There are no terms in its contracts with sales companies that prevent these companies from entering Wisconsin to solicit sales, and then when these companies do enter Wisconsin to solicit sales, Palmetto processes those sales and profits from the endeavor. Wisconsin has an interest in protecting its citizens from foreign corporations who profit directly from transactions that take place within this state.

6. Convenience

Gemini and Pitts are magazine sales subscription corporations that travel the country soliciting subscription sales. They were operating within the State of Wisconsin at the time of the assault of X.

They are Florida corporations who are seldom physically present in Florida, but rather are conducting sales activities nationwide. As such, litigating in Wisconsin should be no less convenient than litigating in Florida. Palmetto, through its collection agent, has threatened Wisconsin residents with legal action in this state. Because Palmetto would be able to travel to Wisconsin to initiate a lawsuit, it should be no less difficult to travel to Wisconsin to defend itself in a lawsuit.

V. Conclusions Of Law And Order

Based on the arguments of counsel, depositions, affidavits, and all of the files, records and proceedings herein, this Court makes the following conclusions:

- A. In response to the first question presented and for the purpose of determining personal jurisdiction, this Court finds that the corporate veils of Gemini Subscriptions, Inc. and Palmetto Marketing, Inc., are pierced. Further, Tina Cecil and Vincent Pitts are liable for their respective corporations for using the funds of their corporations for their own personal uses; showing disregard for corporate formalities such that the corporations can be considered their alter-egos.
- B. In response to the second question presented and for the purposes of determining personal jurisdiction, this Court finds that Gemini Subscriptions, Inc., and Pitts Sales, Inc., exercised sufficient control over Brandon Green's actions to hold them liable for his conduct using the doctrine of *respondeat superior*. Further, this Court finds that Palmetto Marketing, Inc., exercised sufficient control over the actions of both Gemini

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Subscriptions, Inc., and Pitts Sales, Inc., to hold it liable for their actions using the doctrine of *respondeat superior*.

- C. In response to the third question presented and for the purposes of determining personal jurisdiction, this Court finds that Wisconsin courts have personal jurisdiction over the defendants Pitts Sales, Inc., Palmetto Marketing, Inc., Tina Cecil, Robert Cecil and Vincent Pitts specifically due to their relation to the action which is the subject of this lawsuit and generally due to the nature and number of their contacts with the State of Wisconsin.
- D. For the reason stated above, this Court finds: (1) Gemini Subscriptions, Inc., to be the alter ego of Ms. Cecil; and (2) Palmetto Marketing, Inc., to be the alter ego of Mr. Pitts.
- E. For the reasons stated above, this Court finds that: (1) Gemini Subscriptions, Inc., and Pitts Sales, Inc., are the alter egos of Palmetto Marketing, Inc.; (2) Gemini Subscriptions, Inc., and Pitts Sales, Inc., function as one corporate entity and that Mr. Cecil and Mrs. Cecil were employers of Green; and (3) for all practical purposes Gemini Subscriptions, Inc., and Pitts Sales, Inc., are employees of Palmetto Marketing, Inc. Because of these relationships, exercising personal jurisdiction over Pitts Sales, Inc., Palmetto Marketing, Inc., Ms. Cecil, Mr. Cecil and Mr. Pitts is justified. Each of the parties is responsible for the actions of Green and each has sufficient additional contacts with Wisconsin to support exercise of personal jurisdiction.
- F. To wit, such exercise of personal jurisdiction over the defendants will not violate the due process requirements of the Fourteenth Amendment to the United States Constitution.

- G. The arguments raised by defendants (subsequent to the Court's briefing order and oral arguments) regarding the applicability of Florida law to jurisdictional issues, is deemed untimely raised, and therefore, will not be considered by this Court.
- H. The defendants' motion to dismiss this action on the basis of lack of personal jurisdiction is denied for the reasons stated herein.

ORDERED this 24th day of September, 2007.

BY THE COURT

Hon. Wm. C. Stewart, Jr. Circuit Court Judge, Br. I

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