

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

E.L.C. ELECTRIC, INC., and its alter ego and/or
Successor MIDWEST ELECTRIC & RETAIL
CONTRACTORS, INC., d/b/a MERC, INC., and
ASSET MANAGEMENT PARTNERS, INC., a
single integrated enterprise and single employer,
and EDWARD L. CALVERT, Individually

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

Cases 25-CA-28283-1 Amended
25-CA-28283-2 Amended
25-28-28283-4 Amended
25-CA-28398-1 Amended
25-CA-28567
25-CA-28582
25-CA-28637 Amended

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
NO. 481, a/w INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Cases 25-CA-28397-1 Amended
25-CA-28406
25-CA-28532 Amended

Rebekah Ramirez and Kimberly R. Sorg-Graves, Esqs.,
for the Acting General Counsel.

Edward L. Calvert, pro se.

Kevin Passman, pro se.

*Neil E. Gath, Esq. (Fillenwarth, Dennerline, Grath
& Towe, LLP), of Indianapolis, Indiana, for the
Charging Party.*

SUPPLEMENTAL DECISION AND ORDER

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of an amendment to compliance specification and notice of hearing issued on April 27, 2011, against E.L.C. Electric, Inc. (ELC), Midwest Electric & Retail Contractors, Inc. d/b/a MERC, Inc. (MERC), Asset Management Partners, Inc. (AM), and Edward Calvert, an individual. Calvert was ELC's sole owner and president, and AM's majority owner and president. Kevin Passman, formerly ELC's vice president of field operations, is MERC's sole owner.

I heard the underlying unfair labor practice (ULP) case on August 20-22 and November 4 and 5, 2003, and found that ELC had committed a number of violations of Sections 8(a)(1) and (3) of the Act, as well as engaged in conduct that warranted setting aside an election held on September 26, 2002. On July 29, 2005, the Board, for all relevant purposes, affirmed my decision.¹ On November 30, 2005, the Region issued a compliance specification and notice of

¹ 344 NLRB 1200.

hearing.² On July 20, 2006, the Acting General Counsel (the General Counsel) filed a motion for partial summary judgment, which the Board granted on September 28, 2006 in regard to 13 discriminatees but denied as to Benjamin Adair, Matthew Aldrich, and Ronald Hamilton.³

5 Pursuant to notice, I held a trial in Indianapolis, Indiana, from August 15–18 and on October 6, 2011, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. For the entire course of the trial, G. Thomas Blankenship of Indianapolis, Indiana, represented AM and Calvert as an individual. He and Calvert stated that Calvert was representing ELC. I later granted Attorney Blankenship's
10 unopposed post-trial motion to withdraw. His stipulations and representations remain binding on Calvert.

Issues

15 At trial, Calvert and the General Counsel stipulated to the amounts owed to Adair, Aldrich, and Hamilton,⁴ and the matter of the amount of backpay owed to all 16 discriminatees therefore is no longer in dispute. Rather, since ELC ceased business operations on about March 25, 2006, the overriding question for determination is who is now responsible for paying
20 ELC's backpay liability?

The answer turns on resolving the following issues:

- (1) Do ELC and AM constitute a single employer?
- 25 (2) Should the corporate veils of ELC and AM be pierced and Calvert found personally liable?
- (3) Are MERC and ELC alter egos?
- 30 (4) Is MERC a *Golden State* successor to ELC?

Witnesses and Credibility

35 The General Counsel called Calvert and Passman as adverse witnesses under Section 611(c) of the Act; CPA Carol Schmidt, who was ELC's and Calvert's personal accountant for many years; and CPA Joseph Holt.

40 At the underlying ULP hearing in 2003, Calvert and Passman were among the witnesses for ELC. Calvert testified primarily on the reasons why he decided to lay off ELC's remaining electrical workers on March 14, 2003 and then utilized them as employees of labor providers. I found him to be a "patently unreliable witness" and that:

45 His testimony . . . smacked of evasion, was replete with internal inconsistencies, and was frequently contradicted by other witnesses of the Respondent. Calvert demonstrated an attitude of defensiveness, sometimes crossing over into argumentative, and at times appeared to show a contemptuous indifference to providing responsive

² GC Exh. 1(b).

50 ³ 348 NLRB 301.

⁴ See GC Exh. 204. Attorney Blankenship allowed Calvert to enter into the stipulation but abstained, as counsel for Calvert and AM, from taking a position.

answers.⁵

ELC excepted to some of my credibility findings, but the Board affirmed them.⁶

5 I approached the present matter with an open mind as far as evaluating Calvert's
credibility and not allowing my past conclusions to influence my judgment. That said, his
testimony at this hearing suffered from the same defects as in 2003, the only exception being
that his attitude was less confrontational. Thus, he regularly professed lack of recall or
10 answered tentatively, even on matters concerning his current and recent situation. Several
examples follow. Calvert still owns the building out of which ELC conducted business. Yet,
when asked if the ELC computer is still there, he replied that he did not know.⁷ When Calvert
was asked if he ever had a landline phone for AM, he replied, "I'm not for sure whether I did or
not. I may have. I'm not certain."⁸ When the General Counsel asked when Calvert transferred
15 ELC assets to himself in partial payment of personal loans he had made to ELC, he could not
recall when, even whether it was before or after ELC ceased operations.⁹ Finally, Calvert
testified that he does not know if he still has or uses a bank credit card that he used for AM.¹⁰

Moreover, Calvert frequently had no answer for many questions, often merely
20 responding that "the records" would show the information (when, in fact, they often did not). A
few examples follow. Calvert could give no specific reason why he waited until April 2008 to
auction off ELC equipment valued at approximately \$127,000, when ELC had stopped doing
business on about March 25, 2006.¹¹ Calvert made personal loans to AM, including loans in the
amounts of \$100,000 and \$70,000 but testified that he did not know why AM needed so much
25 money.¹² General Counsel's Exhibit 41 contains bank and other records that Calvert claimed
showed his personal loans to ELC. He could not explain why one such record indicates three
loans totaling \$180,000 from an account in the names of his daughter Katrina Springer, son
Kevin Calvert, and Tracy Calvert, or why he set up such an account.¹³ When asked when he
decided to close ELC, Calvert gave the very vague answer, "Sometime probably in 2005
30 Could have been the end of 2004."¹⁴ In this regard, although he claimed that he decided to
close ELC because it was losing money, he provided no documentation to substantiate that
avertment.

Further undermining Calvert's overall credibility was the fact that his business and
35 personal records were, to put it charitably, haphazard. They were lacking in continuity and
completeness and filled with cryptic notations that he made—many of which he was at a loss to
explain at trial.

40 Additionally, on the last day of the hearing, Calvert attempted to claim that some of the
records that his counsel had earlier stipulated were ELC business records were not in fact
ELC's business records but instead personal records. Even after Attorney Blankenship

⁵ 344 NLRB at 1213 (fn. omitted).

⁶ *Id.* at 1200 fn.1.

45 ⁷ Tr. 444.

⁸ Tr. 460.

⁹ Tr. 526.

¹⁰ Tr. 624.

¹¹ Tr. 532.

50 ¹² Tr. 557.

¹³ Tr. 485–486. See GC Exh. 41 at 46.

¹⁴ Tr. 669.

reiterated his stipulation that the documents in question were ELC's business records, Calvert repeated that they were "personal records."¹⁵

5 Calvert also averred on the final day of trial that ELC still owes him at least \$1.2 million,¹⁶ the amount at which he arrived as of September 6, 2005, despite General Counsel's Exhibit 43 showing ELC repayments to him of over \$420,000 after that date. He offered no documentation to support this testimony. As I will describe, his testimony concerning what happened to ELC equipment and vehicles valued at \$127,000 in August 2005 was hopelessly contradictory and confusing.

10 Perhaps most damaging to Calvert's credibility was his professed ignorance of Passman's business operations and the reasons Passman requested loans—testimony that Passman, a myriad of documents of record, and even Calvert's own testimony directly contradicted.

15 General Counsel's Exhibit 9 is a composite exhibit of Calvert's bank statements for his personal equity line of credit. On several documents therein, he wrote the notation "MERC." Additionally, prior to ELC's cessation of operations in March 2006, Calvert noted on various documents that ELC business services be transferred to MERC and/or Passman.¹⁷ General Counsel's Exhibit 135 at 1, dated October 17, 2005, and with the name "Midwest Electric & Retail Contractors" at the top of the first page, was a detailed checklist that Calvert made for Passman "when I found out that he was going in business. I sent set these things up to tell him, this is what you need to do."¹⁸ On about January 10, 2006, Calvert sent letters to ELC's customers, informing them that he was retiring and closing ELC, and recommending that they use MERC for any future work.¹⁹ In March 2006, Calvert admittedly allowed Passman to use Calvert's American Express card for MERC business "because he was just starting out," and Calvert notated that MERC was to be billed for certain expenses that Passman charged to the card in March 2006.²⁰ Finally, Calvert admitted at one point in his testimony that he "probably" advised Passman how to go about forming his new company.²¹

30 Despite all of the above, Calvert testified—incredibly, and in conflict with Passman's testimony—that "I didn't make any loans to MERC. It was—any loans I made was [sic] to Kevin Passman."²² When the General Counsel asked why he would have written in the notations "MERC" and "Midwest" on a September 2006 bank statement for his personal equity line,²³ his answer was totally unbelievable: "No. It's evidently just a mistake, because I never made any money—I never made any loan for MERC at all. I've made personal loans to Kevin Passman"²⁴ He also testified, incredibly, that he did not did not ask why Passman wanted the loans, did not know for what the money was used, and that he was simply "helping him out as a friend, as a personal friend."²⁵

15 Tr. 856.

16 Tr. 870.

17 E.g., GC Exhs. 162, 164.

18 Tr. 763.

19 GC Exh. 139.

20 Tr. 452; GC Exh. 64 at 5, 9.

21 Tr. 672-673.

22 Tr. 558.

23 GC Exh. 9 at 17.

24 Tr. 558-559.

25 Tr. 560, 598.

Calvert was also contradicted by CPA Schmidt. Thus, as subsequently described, her testimony did not gibe with Calvert's claim that she was responsible for separating his personal expenses from ELC's expenses, in terms of his credit card charges and otherwise. In this regard, Calvert testified a number of times that he relied on CPA's and his bookkeepers to properly separate his personal expenses and ELC business expenses in ELC's records, and to otherwise handle his personal and business accounts—testimony that neither Schmidt nor any other ELC CPA or bookkeeper corroborated.

Finally, Calvert did not call his wife Linda, daughter Katrina, or son Kevin to corroborate his testimony, to testify on matters about which they had personal knowledge, or to offer an explanation of why certain documents on their face clearly suggest that ELC, AM, and his other companies were under Calvert's complete control and direction, with almost no practical distinction between themselves and Calvert operating as an individual. I therefore draw an adverse inference that their testimony would not have supported and, indeed, might have harmed Calvert's position. See *International Automated Machines*, 285 NLRB 1122, 1122–1123 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988) ("[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge."). Similarly, I draw an adverse inference against Calvert for not having called Darlene Van Trish, ELC's long-time bookkeeper, to testify since he failed to offer any evidence that he tried unsuccessfully to locate her.

For all of the above reasons, I once again find Calvert's testimony patently unreliable.

Passman—who did not have the benefit of counsel—seemed sincere and to answer questions without hesitation. I credit him where his testimony conflicted with Calvert's, including his testimony that Calvert offered to loan him start-up money to open his own company and that he later requested loans from Calvert specifically to keep MERC operating.

Schmidt, whom the General Counsel subpoenaed, was clearly displeased at having to be a witness. Nonetheless, she seemed candid and to answer questions readily and without an attempt to slant her responses. Accordingly, I also credit her where her testimony contradicted Calvert's.

Facts

I find the following facts based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, the post-trial briefs that the General Counsel and Calvert filed on December 12, 2011, and Passman's closing statement. I note that I cannot consider averments of fact in Calvert's brief that were not put in evidence, for example, statements on page 32 concerning his present financial status. I grant the General Counsel's unopposed motions to correct the transcript and to replace page 37 of General Counsel's Exhibit 41. On December 16, 2011, the General Counsel filed an errata or supplement to her brief, which added additional subheadings to the table of contents and provided a table of authorities. On December 19, 2011, Calvert filed an objection to the errata. However, I see no prejudice to either Calvert or Passman in allowing the errata, which simply expanded the table of contents but not the body of the General Counsel's brief, and added no new citations but merely listed them in table form. Accordingly, I accept it.

ELC, AM, Calvert, and Other Calvert Companies

Calvert did business as ELC and AM at 3960 Southeastern Avenue (Southeastern

Avenue). Previously, the building was titled in the name of ELC, but Calvert and his wife Linda later purchased it, and it remains in their names today.

5 AM was incorporated on May 18, 2001, and dissolved in June 2009.²⁶ Calvert was 90–
 percent owner and sole officer. He testified that he formed AM to manage his and his wife’s
 personal assets, including their rental properties, and to perform such functions as paying bills
 and depositing rental payments. After ELC ceased business, Calvert used AM to pay ELC’s
 10 outstanding bills, including utilities. General Counsel’s Exhibit 9 contains some of AM checks
 and deposits from March 2, 2005 through January 2, 2007. Calvert testified that the \$100,000
 deposit he made to AM on May 3, 2005 represented a loan but at first could offer no reason why
 AM needed so much money at the time.²⁷ Similarly, he could not answer why he made a
 \$70,000 loan to AM on September 7, 2006.²⁸ In that period, AM made loans, inter alia, to
 Passman, Kevin Calvert, and an acquaintance of Kevin Calvert (in the amount of \$70,000).

15 Calvert contended at trial that a number of recreational and entertainment expenses,
 such as golf outings, golf lessons, and lunches, were properly treated as business expenses
 because they generated business. Not being a CPA or expert in the nuances of the Internal
 Revenue Code, I will give him the benefit of the doubt on that matter.

20 Regardless, General Counsel’s Exhibits 22 and 23 show that on a regular basis in 2006
 and 2007, Calvert used AM checks to pay for his personal American Express credit card, which
 he conceded contained both personal and business charges.²⁹

25 Retail Marketing & Consulting, Inc. (RMC) was another Calvert corporation, which was in
 existence by 2005. He testified that it was set up with the hope that he would be able to sell
 retail work of various kinds around the country; in other words, to act as a contractor. As with
 so many other matters, Calvert could not recall when RMC stopped doing business.³⁰

30 RMC’s employees were Calvert, his wife, his daughter-in-law, and his son-in-law.
 Occasionally, ELC performed electrical work that had been awarded to RMC, which did receive
 profits from ELC’s work at Kmart projects. The only written instrument regarding the
 relationship between ELC and RMC was an unsigned and undated half-page “agreement” that
 Calvert handwrote.³¹ He testified that he had “no idea” when he prepared it or even whether
 35 that was before or after ELC closed.³² All of the jobs he subcontracted to Kmart were for
 electrical work. For out-of-town jobs, he utilized local electrical companies. Calvert used
 ELC’s credit card to purchase certain items for RMC, and then reimbursed ELC.

40 ²⁶ GC Exh. 5.

²⁷ Tr. 557; GC Exh. 9 at 6. The next day, he testified sua sponte that it “could have been”
 for remodeling work done at Southeastern Avenue when USF was moving in as a new tenant.
 Tr. 574. However, this testimony was inconsistent with his testimony that USF’s lease started in
 45 January 2004. Tr. 543.

²⁸ Tr. 557; GC Exh. 9 at 14.

²⁹ Tr. 628–629. He further testified that he assumed the accountants properly separated
 everything but then conceded that he really had “no idea” if they did so. Tr. 629.

³⁰ Tr. 593.

³¹ GC Exh. 154 at 1.

50 ³² Tr. 728. Of course, if ELC had already closed, it could not have been party to an
 agreement. This illustrates Calvert’s seeming lack of effort to answer questions as accurately
 as possible.

Calvert also established Red Lion Construction Services, of which he is the 100% owner, after he closed ELC and needed income. He envisioned picking up electrical and other work. It continues to exist but has had no employees or work.

5 ELC was incorporated on August 5, 1983, ceased doing business on about March 25, 2006, and was dissolved on March 17, 2009.³³ ELC has no current employees, assets, bank accounts, vehicles or business activity. Calvert never filed for bankruptcy for ELC. Calvert was sole owner and president, his wife was secretary, and Passman was vice president of field operations. However, Passman was an officer of ELC in name only, as reflected by his following testimony. Prior to the hearing, he never saw the resolution of January 1, 1993, wherein then sole director Calvert elected him vice president of field operations;³⁴ he was unaware that he had been elected vice president of field operations; he never attended any meetings of ELC's board of directors; and he was never paid any dividends.

15 General Counsel's Exhibit 55 shows ELC's employees during the first quarter of 2006, the last quarter that it conducted business. They included Calvert; his wife, who handled receivables and payables and performed other office functions on a part-time basis, in both Calvert's and ELC's offices; his daughter Katrina; Passman; and Darlene Van Treese, who worked with CPA Schmidt and handled payables and purchases of office supplies in ELC's office on a full-time basis; Joshua Graham and Christine Rossittis (formerly Patterson), electricians; and Justin Glover and Jason Lucas, electrician's helpers. Of the nine other listed employees, eight were electricians or electrician's helpers, and one was a truck driver.

25 ELC's last job was electrical work on a new Walmart store in Greenwood, Indiana (Walmart Greenwood), on which ELC employees worked through on about March 25, 2006. Prior to ELC's cessation of business, Calvert and Passman talked about Passman assuming the remaining work there, which was taking long than originally anticipated. On about January 10, 2006, Calvert sent letters to ELC's customers, informing them that he was retiring and closing ELC, and recommending that they use MERC for any future work.³⁵ I note that this effectively precluded ELC from obtaining any new jobs.

30 General Counsel's Exhibit 15 is a list of 18 vehicles that ELC had as of April 8, 2002. One was assigned to Calvert for his own use, one to his wife, and one to Passman. What ultimately happened to all of them is unclear from the record. At a June 22, 2005 meeting of the ELC Board of Directors, attended by Calvert, his wife, and Attorney Blankenship, Calvert and his wife voted that certain ELC equipment and vehicles (trailers and bed trucks) be transferred to them as partial repayment of their loans to ELC.³⁶ Those item were later valued at \$127,000 on about August 22, 2005, and at a directors' meeting on September 2, 2005, again attended by Calvert, his wife, and Attorney Blankenship, Calvert and his wife voted that such assets be transferred to them retroactively to July 1, 2005, and the amount that ELC owed to them be reduced by \$127,000.³⁷

45 Calvert testified that some of those vehicles were later titled to AM and then sold. He was uncertain whether AM or he as an individual held title to them before their sale and where the proceeds went, illustrating the difficulty in separating Calvert's business operations from him as an individual. His conflicting testimony makes it impossible to know when such transfer

³³ See GC Exh. 50.

³⁴ GC Exh. 144 at 2. Linda Calvert was later made a director.

³⁵ GC Exh. 139.

³⁶ GC Exh. 41 at 20.

³⁷ Id. at 1.

occurred. Thus, he testified that the same equipment and vehicles were still ELC's at or shortly before its closure (on about March 25, 2006), and he was uncertain when those items were transferred to him—even whether it was before or after ELC closed.³⁸ However, at another point, he testified that he believed that those items were among those sold at an auction of ELC assets held on about April 28, 2008, at which virtually everything was sold.³⁹ Calvert could give no specific reason for why the auction was held more than 2 years after ELC ceased operations.⁴⁰ In any event, he later purchased two of the trucks, which he currently maintains at the Southeastern Avenue warehouse. He occasionally drives one of them.

On about September 6, 2005, Calvert prepared a list of the loans that he and his wife had made to ELC, totaling slightly over \$1,231,000.⁴¹ General Counsel's Exhibit 43 shows ELC repayments to Calvert of over \$420,000 after September 6, 2005. He testified that his loans to ELC and ELC's repayments went back and forth, depending on the status of ELC funds. He equivocated on whether he has records showing all of his loans to ELC.⁴² In any event, no formal business records were prepared or maintained to document the loans or their repayments.

All of the documentation of the loans that he produced for trial is contained in General Counsel's Exhibit 41. They reflect personal loans from his and his wife's index account, credit line account, home equity loan, and refinancing of Southeastern Avenue. I note that General Counsel's Exhibit 41 at 46, 47 blurs the distinction between Calvert and his family members regarding ELC. Thus, the account from which \$200,000 was presumably loaned to ELC in April 2005 was not an account in Calvert's or his wife's names, but rather was in the names of his son Kevin, daughter Katrina, and Tracy Calvert. Calvert wrote that he deposited all of the \$230,000 from his home equity line into his account "set up at 5th 3rd Bank in my son's name. From this account I wrote (3) check [sic] to ELC (loaned money)." (Emphasis in original). Calvert was unable to give a reason for why he did this.⁴³

Calvert admitted that he used ELC checks to pay for his and his wife's credit cards, on which they charged both personal and business expenses.⁴⁴ Thus, Calvert used ELC checks to pay his American Express credit card, which contained both personal and business expenses, in 2003, 2004, 2005, and 2006, with one payment as high as \$10,344.07 in October 2005, and the last payment (\$3,301.73) in March 2006.⁴⁵ He also used ELC checks to pay for his Citibank credit card charges, which included personal as well as business expenses.⁴⁶ Calvert furnished no records showing that he ever reimbursed ELC for what it paid for his and his wife's personal charges. In March 2006, Calvert wrote two ELC checks to pay Katrina Stringer for "some money that I owed her."⁴⁷ He did not offer an explanation of how that repayment related to ELC.

Calvert claimed that Schmidt reviewed the charges on a monthly basis and differentiated

³⁸ Tr. 523, 526.

³⁹ Tr. 531. See GC Exh. 40.

⁴⁰ Tr. 532.

⁴¹ GC Exh. 41 at 23–24.

⁴² Tr. 469–470, 480–490.

⁴³ Tr. 485.

⁴⁴ Tr. 447, 450, 667, 836–837.

⁴⁵ See GC Exh. 176.

⁴⁶ See GC Exhs. 63–65 (2003–2006 statements).

⁴⁷ Tr. 842; see GC Exh. 208 at 18.

personal and business expenses, but she contradicted this assertion, testifying that she never separated any of Calvert's personal expenses from ELC's business expenses in ELC's books. Instead, her involvement was limited to answering any questions from ELC's bookkeepers, the last of whom for many years was Van Treese. Schmidt could not recall any specific questions. She emphasized that she did not prepare audits per se or financial statements in the legal sense for ELC; rather, she prepared journal entries or non-disclosure compilations based on information that ELC provided to her.

On one occasion, in December 2005, ELC paid a \$5,262.48 bill to a heating and air-conditioning company for work it had performed for Katrina Springer. Calvert testified that he advanced the money and had ELC pay him "as partial repayment" of the loans he had made to ELC.⁴⁸

ELC and Calvert as an individual, were parties to a lease effective January 1, 2000 through December 31, 2010, with a yearly rental of \$72,187.68, payable monthly.⁴⁹ ELC was to pay all of the utilities for the building, which has common meters. On one occasion, in December 2004, Calvert paid his Southeastern Avenue monthly mortgage payment of \$2,015.64 with an ELC check that he made out to himself.⁵⁰ Calvert testified that ELC stopped making rent payments in 2004 or 2005.

Calvert's son Kevin was a partner in USF Worldwide (USF), whose lease at Southeastern Avenue started on January 2004 or approximately May 2005, depending on which portion of Calvert's testimony is credited. USF was delinquent in rent payments at the time it vacated the premises, and Calvert has never sought to collect any arrearages or penalties. However, Kevin Calvert is still a tenant, being half-owner of the company (not USF) that now leases Southeastern Avenue, including ELC's old space, and pays \$7,000 a month rent. In fact, Calvert asked MERC to move out because his son's company needed more space. Kevin Calvert has also had a company named Calvert Communications, but the record does not reflect if this company is Calvert's tenant.

MERC

Passman testified at the underlying ULP proceeding in 2003 as ELC's vice president of field operations. By letter of February 7, 2006, sent to MERC in care of Passman, the Region stated that it had information that MERC was contemplating operating as a successor to ELC and that ELC was a party-respondent to litigation with the NLRB. The letter went on to inform him of the outstanding compliance specification and notice of hearing regarding ELC, enclosed a copy thereof, and advised him that "the potential backpay liability at issue is substantial."⁵¹

In late 2005, Calvert told Passman that ELC was going to close and that Passman could either work for someone else or start his own company; if Passman chose the latter, Calvert would help him out by loaning him some money "to get started."⁵² In approximately October 2005, shortly after their conversation, Passman decided to start his own business. He discussed business names with Calvert but decided on MERC on his own. As reflected by General Counsel's Exhibit 135, Calvert advised Passman on how to set up the new business.

⁴⁸ Tr. 538; GC Exh. 43 at 15.

⁴⁹ GC Exh. 45.

⁵⁰ GC Exh. 47 at 5-7.

⁵¹ GC Exh. 82 at 1. Passman responded by letter of February 14, 2006. Id. at 2.

⁵² Tr. 227.

Passman incorporated Midwest Electric & Retail Contractors, Inc. on December 2, 2005, when he was still employed by ELC, and he conducts business under the name of MERC, Inc.⁵³ He is the sole owner and officer. He is on salary, as is his wife Rose, who performs administrative duties on a full-time basis. In addition to drawing a salary, Passman has received dividends from MERC, most in the amounts of \$1,000, \$2,000, or \$3,000.⁵⁴ Those dividends declined to two in 2009 and three in 2010, as a result of dwindling revenues. He has also made personal loans to MERC and then reimbursed himself.

MERC Prior to ELC's Closure on About March 25, 2006

Passman did not do any paid advertising for MERC when he began operations. Rather, he contacted industry acquaintances that he had made through ELC, and by letter or phone communicated to vendors or customers that he had formed MERC. As earlier noted, Calvert sent out letters to customers in January 2006, informing them that ELC was going out of business and recommending MERC.

While he was still an ELC employee, Passman on February 16, 2006 entered into a subcontract agreement between MERC and Steiner Construction Services, LLC.⁵⁵ He had prepared the underlying bid using ELC office equipment. In February 2006, MERC did a job for USF.⁵⁶ Passman made a proposal that MERC continue and finish ELC's Walmart Greenwood work but was not awarded the job.

Calvert and Passman entered into a 10-year lease agreement on January 1, 2006, Calvert on behalf of AM and Passman on behalf of MERC.⁵⁷ The monthly rent of \$10,000 included utilities, with late payments to be charged a five-percent late fee. At the time, MERC had no revenues, and ELC was still in operation. Passman leased two of ELC's office spaces and 10,000 square feet, including "furnished offices, fax machine, copy machine, computers, printers, warehouse, truck dock, private rest rooms, break room, and 2 acres of fenced area for construction equipment." No furniture or equipment list was made part of the lease. During the first quarter of 2006, both ELC and MERC operated out of the same address. Passman purchased his own supplies but used ELC's equipment and furniture.

The ELC warehouse contained electrical and other materials, as well as various vehicles. The lease agreement did not say anything about MERC's use of ELC's vehicles or stored materials. According to Passman, those items were subject to "just kind of a gentlemen's agreement . . ." ⁵⁸ that Calvert would let Passman use them on a temporary basis without charge. Passman used the ladders in the warehouse, but not the lifts. Initially, Katrina Stringer served as MERC's notary, but Passman then utilized his branch bank for such service.

As General Counsel's Exhibit 77 reflects, Passman first used electrical employees in mid-February 2006. They did electrical service calls. In February and March 2006, he employed five individuals who had worked for ELC: Beck, Glover, Graham, Lucas, and Rossittis. In February and March 2006, Graham and, possibly Rossittis, worked for both ELC

⁵³ See GC Exh. 75.

⁵⁴ See GC Exh. 124.

⁵⁵ See GC Exh. 89.

⁵⁶ See GC Exh. 88, which reflects that MERC continued to do work for USF after ELC closed.

⁵⁷ GC Exh.11.

⁵⁸ Tr. 151.

and MERC simultaneously.

Passman purchased the rights to use certain software specific to the industry that ELC had used, first paying for it in January 2006, when he was still an ELC employee and ELC was
5 still in operation and had employees.

MERC After ELC's Closure

10 MERC occupied two of the six or seven ELC office spaces, which were on the right side of the building. All of ELC's office equipment was in place when ELC closed, and Passman used the same computer and software, printer, photocopier, desk, and chairs. Later, Calvert auctioned off the contents of the other spaces, and Passman paid him for MERC's office equipment.

15 Passman obtained a new phone number and fax number for MERC but continued using the ELC equipment. He also continued to have possession of the cell phone that ELC had provided to him as an ELC employee. The cell phone number remained the same, but Passman paid for it after ELC closed. Calvert and Passman orally agreed that Passman could continue to use his ELC American Express card, paying for the charges he incurred, until he
20 was able to establish his own account. No fixed time limit was set. Passman was still using the card for MERC business at least into mid-2007.⁵⁹ At all times since he started MERC, Passman has used National City Bank (later PNC) for all of his banking needs, including a business line of credit, whereas Calvert had his accounts at Fifth Third Bank.

25 After ELC had closed, Passman took ELC materials from the warehouse for MERC's use. He sent payment to AM, based on his determination of the prices of various items from talking with suppliers. General Counsel's Exhibit 19(b) at 5 is a list of equipment that ELC used in early 2006, some of which MERC used and Passman later purchased. Other items were sold
30 by auction in 2008.

35 ELC had 18 vehicles in early 2006.⁶⁰ Two were specifically assigned to Calvert, and one to Passman. After ELC closed, MERC used two of the trucks and, occasionally, two of the other vehicles. MERC did not pay for their use. Calvert and Passman orally agreed that Passman could use the ELC vehicles without payment until he was able to obtain his own. In a phone conversation prior to February 2, 2006, Calvert and Passman agreed that MERC would start paying insurance on the vehicles, but the agreement was never reduced to writing. Passman started paying such insurance on April 1, 2006.⁶¹ On August 13, 2007, Passman purchased the two trucks and their accessories from Calvert for \$16,000.⁶² MERC currently
40 uses three vehicles, two of which were among those ELC owned in early 2006.

45 MERC payroll records for the period ending December 3, 2007, list Graham and Rossittis, as well as Zachary Culp and Brian Ferguson, electrical helpers, who had not worked for MERC.⁶³ In 2007, MERC employed two other employees to perform electrical work, neither of whom had worked for ELC (Michael McKinney and Jason Moss).

Graham and Rossittis continue to work for MERC as electricians. They are MERC's

⁵⁹ See GC Exh. 17 at 54.

⁶⁰ See GC Exh. 15 at 1.

50 ⁶¹ See GC Exh. 95 at 3.

⁶² GC Exh. 46.

⁶³ See GC Exh. 77 at 4.

only current employees, excluding Passman and his wife. Until recently, MERC also employed Passman's son, Devin, on a part-time basis.

5 For contracted temporary labor, MERC used All Trades for a long period of time on a regular basis,⁶⁴ as well as National Construction; at present, it uses Commercial Trades Service. ELC "frequently" used All Trades Staffing, Inc. (All Trades) and National Construction Work Force for such temporary labor.⁶⁵

10 MERC's main suppliers for electrical materials have been All-Phase Electric, Central Supply, and Allied Wholesale; and for rental equipment, United Rentals. ELC also used All-Phase Electric and United Rentals.

15 In April 2006, MERC performed a job for Ryder Truck.⁶⁶ ELC had made a proposal for the work in July 2005, but the scope of the job later changed. Another early MERC job was for CJM Contractors,⁶⁷ for which ELC had not performed work. MERC again performed work for CJM in February 2008.

20 ELC had performed a considerable amount of work for K-Mart, which MERC continued to do until K-Mart purchased Sears, which then did most of K-Mart's electrical work in-house. For K-Mart jobs, MERC bid on and performed different kinds of work, including painting, floor repair, and electrical. After ELC closed, MERC did ELC's repair warranty work and then billed AM. After about a year in business, MERC started doing garage door work, although nothing in the record shows its volume.

25 Passman was often past due on monthly rent payments, but Calvert never charged him a late fee. Thus, Passman made no rent payments for at least the first few months, and MERC was never able to pay in full the lease payments as per the lease agreement. At some point prior to September 2008, in light of Passman's nonpayment of rent, Calvert and Passman orally agreed that Passman would reimburse Calvert for finance charges on his personal credit line. 30 At another point, Passman told Calvert that he could no longer make lease payments, Calvert replied that he could stay, and Passman offered to contribute \$500 a month toward utilities. Calvert has never sought to collect the unpaid rent or delinquency fees.

35 General Counsel's Exhibit 10 reflects a number of loans from Calvert to Passman, totaling \$157,500. After the first loan, the normal practice was for Passman to let Calvert know when he needed additional money for MERC, Calvert would let him know when he had the money, and Calvert would then meet him at the office to sign. All of the promissory notes were due a year from their execution and provided for eight-percent interest until maturity.

40 The first, for \$5,000, was dated November 30, 2005. Passman testified that his loan was made "to help get my business started"⁶⁸—directly contradicting Calvert's unbelievable testimony that all of the loans were personal to Passman and that Calvert did not know they were for MERC.

45 Passman signed subsequent promissory notes, totaling \$152,500, as follows:

⁶⁴ See GC. Exh. 111.

⁶⁵ Tr. 428. See GC Exh. 57 (All Trades records).

50 ⁶⁶ See GC Exh. 90 at 16.

⁶⁷ See GC Exh. 92.

⁶⁸ Tr. 183.

January 5, 2006 -- \$5,000
 March 2 -- \$10,000
 March 29 -- \$10,000
 June 12 -- \$7,500
 5 July 11 -- \$10,000
 September 22 - \$10,000
 November 7 -- \$40,000
 December 14 -- \$15,000
 December 20 -- \$15,000
 10 May 14, 2007 -- \$30,000

When MERC made revenues, Passman repaid Calvert. He ultimately paid all of the promissory notes back on or before their due dates. However, Passman never paid any interest on them, even though they provided for such.

15 As of when Passman moved out of the building, in about July 2010, Calvert maintained an office on the left side of the building, as did Katrina Stringer, and Kevin Calvert had an office on the second floor and operated as USF. Passman now operates MERC out of his residence.

20 Conclusions

Calvert, ELC, and AM

25 From the above, certain conclusions are abundantly clear, taking into account Calvert's lack of reliability as a witness and his incomplete and informal record-keeping. Calvert did not establish that he had a bona fide business reason for deciding to close ELC at the time that he did so. He testified vaguely that it was because ELC was losing money. However, he provided no documentation that ELC was doing worse in late 2005 or early 2006 than in prior years and, indeed, he was uncertain when he made the decision to close ELC, testifying that it might have
 30 been in 2004, in which case one has to wonder why he waited over a year to initiate the process of going out of business. Moreover, Calvert took affirmative actions in early 2006 to foreclose ELC from obtaining further work, as reflected in his letters to existing customers in January 2006, telling them that he was going out of business and recommending MERC for their future jobs.

35 Calvert had sole and total control of ELC and AM, which he operated at his unfettered discretion in a freewheeling manner. He transferred funds from company to company and between his companies and himself and his family members (wife, daughter, and son), to the point where distinctions between his corporate and personal accounts were for all practical
 40 purposes meaningless. ELC (and AM, as well, based on this record) were corporations in name only, with no functional existence separate and apart from Calvert. This is best reflected by the fact that Passman was never even informed that he was elected vice-president of ELC in 1993.

45 Because Calvert was not a credible witness and his "business" records were so informal and incomplete, knowing what happened to all of the assets ELC had before Calvert began implementing a phase-out of its operations is impossible. Clearly, however, a certain portion of them has gone to Calvert and his family members: from the auction in 2008, repayment of Calvert's loans, transfer of Southeastern Avenue from ELC to Calvert and his wife, and checks to Kevin Calvert and Katrina Stringer. I note again that none of Calvert's family members
 50 testified and therefore failed to rebut what appears to have been disbursements of ELC funds to them unrelated to ELC's business operations. In sum, an indeterminate but apparently substantially amount of ELC's assets remain with Calvert and his family.

ELC and AM as a Single Employer

5 In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) interrelationship of operations, and (4) common control of labor relations. No single factor is controlling, and all not need to be present. Rather, single-employer status depends on all of the circumstances and is based ultimately on the absence of an arms-length relationship between seemingly independent companies. *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283-1284 (2001); *Dow Chemical Co.*, 326 NLRB 288, 288 (1998).

10 Based on my above factual findings, I conclude that all four criteria have been met and that ELC and AM were inseparable from the person of Calvert. Therefore, I conclude that ELC and AM constituted a single employer.

15 Calvert's Personal Liability

20 The Board will pierce the corporate veil and impose personal liability for backpay on a now-defunct corporation's owners/officers when 1) there is such unity of interest and lack of respect given to the separate identify of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct; and 2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. *A. J. Mechanical*, 352 NLRB 874 (2008), enfd. mem. sub nom. *Greene v. NLRB*, 321 Fed.App. 816 (11th Cir. 2009) (unpublished); *White Oak Coal Co.*, 318 NLRB 732, 732 (1995), enfd. 81 F.3d 150 (4th Cir. 1996).

25 When assessing the first prong, the Board considers 1) the degree to which the corporate legal formalities have been maintained, and 2) the degree to which individual and corporate funds, other assets, and affairs have been comingled. *White Oak Coal*, *ibid* at 735. Commingling, treatment of corporate assets as one's own, and undercapitalization often constitute the most serious forms of abuse of the corporate entity. *D.L. Baker, Inc.*, 351 NLRB 515, 522 (2007).

30 In finding piercing of the corporate veil appropriate, the Board in *White Oak Coal* concluded: (318 NLRB at 735)

35 In short, the Deels failed to maintain an arm's-length relationship between themselves and the related corporate entities under their control. In these circumstances, we find such unity of interest, and lack of respect given by the Deels to the separate corporate entities, that the personalities and assets of these corporations and the Deels effectively have been blurred.

40 The Board further concluded that that "[t]he natural, foreseeable, and inevitable consequence" of the Deels' conduct was "the diminished ability of the corporate alter egos to satisfy [the Respondent's] statutory remedial obligations." *Ibid*.

45 Such conclusions are warranted here. Both ELC and AM had no practical existence outside of the person of Calvert, who controlled their operations at will and used them for both business and personal purposes, as he himself admitted. Thus, the first prong of the test is satisfied. As for the second prong, I am convinced from this record that Calvert has sought to evade his legal obligations to pay the backpay owed to the 16 discriminatees. He effectively sabotaged ELC's business, funneled an apparently significant portion of its assets into other enterprises and/or his or his family members' personal funds, and effectively established MERC

and kept it operating. Allowing him to shirk his backpay obligation by such conduct would work a manifest injustice and be untenable.

Accordingly, I conclude that the corporate veils of ELC and AM should be pierced and Calvert be held personally liable for the backpay.

MERC

As ELC's Alter Ego

The Board generally will find an alter-ego relationship when two entities have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. *McCarthy Construction*, 355 NLRB No. 10, slip op. at 2 (2010). Not all of these indicia need to be present, and on one of them is a prerequisite to finding an alter-ego relationship. *Ibid*. Unlawful motivation is not a necessary element of an alter-ego finding, but the Board does consider whether the purpose behind the creation of the suspected alter ego was to evade responsibilities under the Act. *Ibid*; *Diverse Steel, Inc.*, 349 NLRB 946, 946 (2007); *Fallon-Williams, Inc.*, 336 NLRB 602 (2001). I note that the Board has not hesitated to find alter-ego status when the owners were different but in a close familial relationship. *ADF, Inc.*, 355 NLRB No. 14, slip op. at 4 (2010); *Fallon-Williams, Inc.*, *ibid* at 602.

A variety of factors support an alter-ego finding, the following in particular. First, MERC's primary type of work has been electrical, as was ELC's. In this respect, MERC's workforce, aside from Passman's wife and, possibly, his son, has at all times consisted of employees classified either as electricians or electrical helpers. Second, a majority of those employees have continuously been former ELC employees. Thus, all of MERC's first five employees in February and March 2006, including Graham and Rossittis, still worked or had worked for ELC, and Graham and Rossittis are MERC's only current employees, aside from Passman's wife. Third, at least at the beginning of MERC's operations, much of its work represented a continuation of ELC's work: MERC performed work for K-Mart, one of ELC's major customers, until K-Mart's purchase by Sears, and also did ELC's repair warranty work after ELC closed. Finally, MERC operated out of the same address as ELC until about July 2010 and used some of the same office and warehouse equipment and some of the same vehicles, either on a paid or unpaid basis.

As far as ownership, management, and supervision, Calvert has had no direct involvement in MERC. However, further analysis is required to determine how pivotal a role he played in MERC's establishment and operations.

Various facts establish that Calvert and Passman did not have an arms-length business relationship when it came to MERC and that Calvert rendered him a degree of assistance that went far beyond the pale of normal business practice. Calvert allowed Passman to use ELC's vehicles without charge until Passman could afford to pay. Many of their agreements, for example, Passman's use of certain ELC's equipment, and materials, were merely verbal and never reduced to writing. Passman never paid Calvert the interest specified in the promissory notes for the loans totaling \$157,500 that Calvert gave him. Calvert allowed Passman to remain a tenant at Southeastern Avenue even when he was far behind in his \$10,000 monthly rent payments, and Calvert never sought to collect back rent. In sum, Calvert rendered considerable financial and other assistance to Passman without which MERC would never have been established or been able to survive as a viable business. The only reason that Calvert advanced on the record for his extraordinary largesse, in particular, his loans to Passman, was that Passman was a "friend." Especially when coming from a businessperson such as Calvert,

who has had numerous companies over a period of many years, such an explanation wholly lacks credibility. The only logical explanation for Calvert's generosity toward Passman and MERC must be that it was part and parcel of his strategy to avoid financial liability for the ULP's that he committed as ELC's owner. I need not speculate on whether Passman was privy to this motive because the answer makes no difference as far as Calvert's motivation for sponsoring MERC.

I conclude that regardless of Passman's direct ownership and management of MERC, MERC's establishment and survival depended on Calvert, who used MERC as a means of evading ELC's obligations under the Act. I consider this another factor supporting a finding of alter ego.

Accordingly, I conclude that MERC is an alter ego of ELC.

Golden State Successor

To be a successor employer, the similarities between the two operations must manifest continuity between the enterprises, and a majority of its employees in an appropriate bargaining unit must be former bargaining unit employees of the predecessor. *NLRB v. Burns Security Services*, 406 U.S. 272, 280-281, 281 fn. 4 (1972). A number of factors must be examined: whether the business of both employers is essentially the same; whether the employees of the news company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987); *Aircraft Magnesium*, 265 NLRB 1344, 1345 (1982), enf'd. 730 F.2d 767 (9th Cir. 1984). See also *Shares, Inc. v. NLRB*, 433 F.3d 939, 943 (7th Cir. 2006); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 289 (7th Cir. 2001). To "a substantial extent," the applicability of *Burns* turns on whether the new employer made a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor. *Fall River Dyeing* at 40-41; *Francisco Foods* at 288.

As the Seventh Circuit Court of Appeals has held, a finding of continuity of operation does not require that the old and new operations be identical; rather, the test is whether employees "perform[] largely the same tasks, under comparable conditions, and under a number of the same supervisors." *Shares, Inc.* at 944, citing *Bloedorn* at 289. Moreover, the old and new jobs must be compared from the employees' perspective. *Ibid.*

Based on the facts that I set out under my alter-ego analysis above, and Passman's continuity as a supervisor as per *Shares, Inc.*, I conclude that MERC was a successor employer to ELC.

In *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court held that a successor employer under *Burns* can be charged with notice of an outstanding Board order against his predecessor and held liable for the unremedied ULP's. See also *S. Bent & Bros.*, 336 NLRB 788, 790 (2001). The burden is on the successor to establish that he did not have notice thereof. *Bent* at 790, *Robert G. Andrew, Inc.*, 300 NLRB 444, 444 (1990); *NLRB v. Jarm Enterprises*, 785 F.2d 195, 199 (7th Cir. 1986).

Here, there is no question that Passman had actual notice of the Board's Order against ELC, from the Regional Office's February 7, 2006 letter and its attachments, which expressly warned of potentially substantial backpay liability. This was prior to ELC's closure and while Passman was simultaneously an ELC employee and beginning operations as MERC.

Accordingly, I further conclude that MERC is a *Golden State* successor to ELC.

Therefore, my ultimate conclusion is that all of the named respondents are subject to liability for ELC's ULP's. In light of this determination, I need not decide the General Counsel's further contention that ELC and MERC constitute a single employer.

ORDER

I HEREBY ORDER that E.L.C. Electric, Inc.; its alter ego and successor, Midwest Electric & Retail Contractors, Inc., d/b/a Merc, Inc.; its alter ego, Asset Management Partners, Inc.; and Edward L. Calvert, an individual, their officers, agents, successors, and assigns shall jointly and severally pay the individuals named below the amounts following their names (computed through August 31, 2011), plus interest accrued to the date of payment in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws.⁶⁹

	Benjamin Adair	\$ 23,517.00
	Matthew Aldrich	9,715.00
20	Todd Bailey	2,383.00
	Ryan Chambers	19,231.00
25	Gregory Frazier	6,610.00
	Timothy Grow	46,439.00
	Mikalys Grunde	11,285.00
30	Ronald Hamilton	90,508.00
	Mark Herche	3,049.00
35	Benjamin Mullins	3,049.00
	Rory Navratil	1,399.00
	Bruce Sanderson	73,823.00
40	Jonathan Trinosky	57,694.00
	Jonathan White	18,055.00
45	Troy Whitaker	67,621.00

⁶⁹ Although the General Counsel requests compound interest (GC Br. at 100), the Board has determined that such remedy is not applicable to cases that were in the compliance stage prior to the issuance of *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F. 3d 1137 (D.C. Cir. 2011). *Rome Electrical Systems, Inc.*, 356 NLRB No. 38, slip op. at 1 fn. 2 (2010).

David Wilson	3,049.00
Total	\$437,427.00

5 Dated, Washington, D.C. December 20, 2011

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Ira Sandron
Administrative Law Judge

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