

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: December 16, 2013

TO: Ronald K. Hooks, Regional Director  
Region 19

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: A List MMJ  
Case 19-CA-093389

280-2830-0000  
601-5050-1500

This case was submitted for advice as to (1) whether the Board should decline jurisdiction over an enterprise in the medical marijuana industry; and (2) whether a successor can be held liable for an unfair labor practice under *Golden State*<sup>1</sup> where the predecessor's revenues do not meet the Board's monetary jurisdictional standards. Though we will not decline to assert jurisdiction over the employer solely on the basis that it operates within the medical marijuana industry, we conclude that the employer cannot be held liable as a *Golden State* successor where the predecessor employer did not meet the Board's jurisdictional standards. Accordingly, the charge should be dismissed, absent withdrawal.

### FACTS

Magione di Mare Group d/b/a A List MMJ ("A List MMJ") operated a medical marijuana dispensary in Seattle in May 2012.<sup>2</sup> During the few weeks that A List MMJ operated, it earned approximately \$50-\$90 of revenue per day. A List MMJ was owned and managed by one individual (the Owner), while two others (the Investors) contributed capital and construction services respectively. The Investors believed they were co-owners, but did not participate in the management of the company.

The Owner hired a number of employees in April to prepare for the opening of A List MMJ. However, the Owner did not pay these employees for work performed, and a number of them participated in efforts to obtain the wages they were owed. The Region has determined that the Owner terminated the charging party and other employees in May because of their protected concerted activity.

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<sup>1</sup> *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973).

<sup>2</sup> All dates hereinafter are in 2012, unless otherwise noted.

At the end of May, the Investors sued the Owner for fraud, embezzlement, theft, and misrepresentation, and sought an injunction to protect any remaining assets of A List MMJ. After they obtained the injunction, the Investors discovered that they were not actually owners of A List MMJ. Ultimately, the Investors removed the Owner from the dispensary operation through legal action.

On June 20, the Investors created Altercare LLC (Altercare). Altercare immediately began operating a medical marijuana dispensary in the same location that A List MMJ had operated<sup>3</sup> with some of the same personnel.<sup>4</sup> Altercare asserts that there was no transfer of any goods, equipment, property, supplies, services or any other things of value between A List MMJ and Altercare, though there is some evidence that some equipment, supplies and/or funds were in fact transferred. Altercare had average revenue of \$42,000 per month between September and November.

### ACTION

Though we will not decline jurisdiction over Altercare solely on the basis that it operates within the medical marijuana industry,<sup>5</sup> we conclude that Altercare cannot be held liable as a *Golden State* successor where the predecessor employer, A List MMJ, did not meet the Board's jurisdictional standards. Accordingly, the charge should be dismissed, absent withdrawal.

#### **A. There is no jurisdiction over A List MMJ**

The Board asserts jurisdiction over retail enterprises that fall within its statutory jurisdiction and which do a gross volume of business of at least \$500,000 annually.<sup>6</sup> Though the Board allows for the projection of revenue where a business entity has been in business for less than 12 months, it is improper to project sales

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<sup>3</sup> One of the Investors negotiated a new lease with the landlord on behalf of Altercare.

<sup>4</sup> All of those who work at Altercare are called "volunteers" and either donate their time or are compensated through the use of product.

<sup>5</sup> See *Wellness Connection of Maine*, Cases 01-CA-104979 et. al., Advice Memorandum dated October 25, 2013.

<sup>6</sup> *Carolina Supplies & Cement Co.*, 122 NLRB 88, 89 (1958).

figures of a store when it has gone out of business,<sup>7</sup> or to combine revenues of a predecessor and successor in order to assert jurisdiction.<sup>8</sup>

Here, A List MMJ had revenue of approximately \$50-\$90 per day for a few weeks. Therefore, A List MMJ's revenue was far below the \$500,000 annual revenue needed to assert jurisdiction. Because there can be no projection of A List MMJ's revenue or combination with Altercare's revenue, we cannot assert jurisdiction over A List MMJ.<sup>9</sup>

### **B. The Board cannot hold Altercare liable under *Golden State***

In *Golden State*, the Supreme Court approved the Board's *Perma Vinyl*<sup>10</sup> holding that a successor employer that acquires and operates a business in an unchanged form, with knowledge of facts surrounding a predecessor's unfair labor practice, can be liable for remedying the predecessor's unfair labor practices.<sup>11</sup> However, *Golden State* successorship is a remedial principle and, as such, it is only applicable after an unfair labor practice is found and needs to be remedied.<sup>12</sup> Thus, there must be a

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<sup>7</sup> *District 76, Retail, Wholesale, & Dept. Store Union (Morgan Shoe Co.)*, 129 NLRB 1339, 1340 (1961) ("The same logic which permits projection of the sales figures of the new stores, requires also elimination from consideration of sales which will not be repeated during the period under projection, as obviously is the case with the store that went out of business.").

<sup>8</sup> *Galaxy Theatre*, 210 NLRB 695, 696 (1974) (rejecting ALJ's computational method of combining revenue of the employer's predecessors in order to assert jurisdiction).

<sup>9</sup> We also conclude that there is not an alter ego relationship between A List MMJ and Altercare because of material changes in ownership, management, and supervision. *See Summit Express, Inc.*, 350 NLRB 592, 594 (2007) (the Board will find alter-ego status where two entities have "substantially identical" management, business purpose, operations, equipment, customers, supervision, and ownership).

<sup>10</sup> *Perma Vinyl Corp.*, 164 NLRB 968, 969 (1967), *enforced sub nom. United States Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

<sup>11</sup> *Golden State*, 441 U.S. at 171-72.

<sup>12</sup> *Id.* at 175-77 (Board's ability to hold a predecessor liable is grounded in its remedial powers under Section 10(c) of the Act); *Perma Vinyl Corp.*, 164 NLRB at 969 ("one who acquires and operates a business of an employer *found guilty of unfair labor practices*" can potentially be held liable for remedying the unlawful conduct of the predecessor) (emphasis added).

viable charge against A List MMJ before Altercare can be held responsible for remedying A List MMJ's unfair labor practices.<sup>13</sup> Here, there is no viable charge against A List MMJ because there is no jurisdiction over that entity. Therefore, Altercare cannot be held liable under *Golden State*.<sup>14</sup>

For the foregoing reasons, the charge should be dismissed, absent withdrawal.

/s/  
B.J.K.

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<sup>13</sup> See *USC University Hospital*, Case 21-CA-38999, Advice Memorandum dated April 30, 2010, at pp. 3-4 (an employer cannot be held liable as a *Golden State* successor where the predecessor was not charged within the 10(b) period because *Golden State* can only be invoked after an unfair labor practice is found and needs to be remedied).

<sup>14</sup> We further note that, even if there was jurisdiction over A List MMJ, Altercare arguably cannot be held liable as a *Golden State* successor because it appears that it had no ability to protect itself against liability in its dealings with A List MMJ. See *Lebanite Corp.*, 346 NLRB 748, 750-52 (2006) (holding that where a successor could not have structured the transaction with the predecessor to offset its potential liability for the predecessor's ULPs, there cannot be *Golden State* successor liability).