

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION TWENTY-FIVE

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 business 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-CA-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

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

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Comes now counsel for the Acting General Counsel and respectfully submits to the Board this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Supplemental Decision. The Acting General Counsel hereby requests that Respondent's Exceptions be denied and that the Judge's decision in this case issued on December 20, 2011 be affirmed. In support of this position, the Acting General Counsel offers the following:

## I. STATEMENT OF THE CASE

On July 29, 2005, the Board adopted the report and recommendations of Administrative Law Judge (ALJ) Ira Sandron [344 NLRB 1200], finding E.L.C. Electric, Inc. (Respondent ELC) committed numerous unfair labor practices during an organizing campaign conducted by the International Brotherhood of Electrical Workers, Local Union 481 (the Union) in 2002. Among the unfair labor practices, the Board found that in January and February 2003, Respondent ELC laid off three employees, and that in March 2003 it laid off its remaining 13 employees in retaliation for its employees' union activities and in violation of Sections 8(a)(3) and (1) of the Act. The unfair labor practices committed by Respondent ELC were of the nature that warranted the Regional Director of Region 25 to seek injunctive relief, and an injunction was granted by the United States District Court of the Southern District of Indiana on June 29, 2004.<sup>1</sup>

The Region issued a Compliance Specification and Notice of Hearing in this case on November 30, 2005. On September 28, 2006, the Board granted a motion for partial summary judgment with regard to 13 of the 16 discriminatees involved. On April 27, 2011, an Amendment to Compliance Specification and Notice of Hearing issued. On December 20, 2011, following an evidentiary hearing conducted on August 15-18 and October 6, 2011, ALJ Sandron issued his Supplemental Decision and Order (Supp. Decision). Judge Sandron ordered that Respondent ELC, its alter ego and successor, Midwest Electric & Retail Contractors, Inc., d/b/a MERC, Inc. (Respondent Merc), its alter ego, Asset Management Partners, Inc. (Respondent Asset), and Edward L. Calvert (Calvert), jointly and severally pay a backpay liability in the amount of \$437,427 (calculated with interest through August 31, 2011). Respondent Calvert filed Exceptions and an Appeal Brief (Exceptions) on March 19, 2012.

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<sup>1</sup> 2004 WL 2137644 (S.D.Ind.)

## II. MOTION TO STRIKE REFERENCES TO FACTS NOT IN EVIDENCE

Substantial parts of Respondent Calvert's Exceptions constitute facts that are not in the record. The Introduction section of the Exceptions is riddled with facts not in evidence and no cites to the transcript or to the record were provided. Counsel for Acting General Counsel (AGC) respectfully requests that the Board strike any and all references in this section to facts that were not introduced into evidence, and in particular completely strike page three of the Introduction, except for the first sentence, and pages four and five.

The Exception's summary section is also full of facts not in evidence, with bits and pieces throughout that may be supported by the record but no transcript cites. Thus, the summary section is substantially unsupported by facts in evidence and should be disregarded by the Board. Specifically, counsel for AGC respectfully requests that the Board strike all statements on pages 28, 29, 30, and 32 as they generally make reference to facts not in evidence. It is also requested that the Board strike references in the closing statement of the Exceptions to Respondent ELC projects compared to Respondent Merc as these are facts not in evidence.

Throughout the rest of the Exceptions, Calvert continues to make reference to facts not in evidence. Numbered exceptions will be discussed below with additional requests to strike portions of the Exceptions included below.

## III. ARGUMENT

### A. Judge Sandron Correctly Discredited Calvert's Testimony

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d

Cir. 1951). A review of the record in this case will reflect that the preponderance of the evidence supports Judge Sandron's credibility resolutions.

In his Exceptions, Calvert accuses Judge Sandron of not having an "open mind" and of incorrectly using Calvert's lack of recollection as evidence of lack of credibility (Exceptions No. 1 and 2).<sup>2</sup> In his Supp. Decision, Judge Sandron was very thorough as to the basis for finding Calvert an unreliable witness. (Supp. Decision pages 2-5) As found by the Judge, Calvert's testimony was replete with examples of inconsistencies, contradictions, and misleading testimony. His lack of credibility was not solely based on his inability to recall important facts. Judge Sandron also took into account that Calvert frequently answered questions with "the records" would show the truth, when in fact they did not. For instance, Calvert kept insisting that Respondent ELC owed him \$1.2 million and when asked to explain the documents allegedly supporting this number Calvert testified that you "have all the records" and instructed counsel for AGC to "look" for the documents. (Tr. 470) When asked which document to look for, he said that he did not know if there was a document or not. (Tr. 470) In another instance, he was asked to explain two checks, and Calvert said that although he could not explain them, the "documents would reflect" what it meant. (Tr. 584-585)

Judge Sandron also heavily relied on evidence that Calvert incredibly testified that he knew nothing of Passman's business, Respondent Merc, to find him an unreliable witness. Calvert argues in his Exceptions that Judge Sandron incorrectly found that his testimony and Passman's were in conflict (Exception No. 6). He also asserts that Judge Sandron

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<sup>2</sup> It is requested that the Board strike Calvert's statement on page 7, par. 4, referencing reasons why Calvert would go to his building because these are all facts not in evidence. Additionally, it is requested that the Board strike Calvert's statement on page 8, par. 2, referencing reasons why records did not show specific dates when he decided to close Respondent ELC or when he decided to conduct an auction as these are facts not in evidence.

mischaracterized the evidence showing that Calvert had written the name “Merc” on documents (Exception No. 7). Calvert is ignoring the evidence. Calvert insisted that he had loaned money to Passman as a “friend”, that he did not know what Passman was using the money for, and that he did not know that Passman was using the money to finance Respondent Merc’s operations. (Tr. 559-560, 598) When confronted with business records showing notations he made indicating that loans were related to Respondent Merc, Calvert incredibly continued to deny any knowledge and said that the notations were a mistake. (Tr. 558, 560, 562, 575) These notations on checks, bank statements and other business documents were not vague or ambiguous. For instance, the documents stated, “loan to merc”, loan against merc late rent”, “merc rent payments”, “merc’s payments”. (Tr. 558-560, 562, 576, 580) On the other hand, Passman testified that any time he needed money for his business all he had to do was call Calvert. (Tr. 183-186, 194-196)

Additionally, as will be discussed in detail below, evidence demonstrates that Calvert not only knew that the more than \$157,000 he loaned to Passman were used to finance Merc, but that he planned the whole thing. Calvert maintained several “to do lists” as he was planning on closing Respondent ELC and opening Respondent Merc. (G.C. ex. 136, 135, 138, 143, 148, 153) Yet, he kept denying his involvement at hearing and now in his Exceptions, in direct contradiction with all of the evidence.

Calvert also excepts to Judge Sandron relying on the record keeping of documents to find his testimony unreliable (Exception 3). Judge Sandron stated that “further undermining Calvert’s overall credibility was the fact that his business and personal records were, to put it charitably, haphazard”. (Supp. Decision at 3) The Judge made reference to the fact that the documents were filled with “cryptic notations” made by Calvert which he could not explain.

Judge Sandron's reliance on the state of Calvert's business records has nothing to do with the fact that the documents were old or were obtained from companies no longer in business, as Calvert implies in his Exceptions. The record is full of examples of documents with cryptic, handwritten notations, that Calvert was in fact unable to explain. (G.C. ex. 9, p. 16-17, 27, ex. 41, p. 25, 27, 47, 58; ex. 43 and 192; Tr. 562, 575, 580, 584, 586-587).<sup>3</sup>

In his Exceptions, Calvert incorrectly asserts that Judge Sandron found that his accountants did not play a role in Respondent ELC's documents (Exception No. 8). Such conclusion was not made. Calvert objects to the fact that his former employee Darlene Van Treese was not called as a witness and neither was an associate with the CPA firm. Calvert's objection is mistaken. An adverse inference may be drawn when a party fails to call a witness who may have reasonably be assumed to be favorably disposed to the party regarding any factual question on which the witness is likely to have knowledge. Intl. Automated Machines, 285 NLRB 1122 (1987), enf. 861 F.2d 720 (6<sup>th</sup> Cir. 1988). Calvert obviously believes that Van Treese would have helped his case but he failed to call her as a witness and did not explain if she was unavailable. Thus, the Judge correctly drew an adverse inference against Calvert for not calling Van Treese and for not calling members of his family that would have been able to clarify facts in dispute. It is requested that the Board strike statements on page 14, par. 1 and 2 referencing facts not in evidence regarding Van Treese's work.

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<sup>3</sup> It is requested that the Board strike Calvert's statements on pages 8 and 9 referencing how documents were stored as these are facts not in evidence. There was some discussion at trial concerning Respondent ELC not complying with the AGC's subpoena duces tecum and to the fact that Region 25 personnel went to ELC's offices to review documents in 2008. (Tr. 12-48) However, Calvert's assertions as to how the documents were reviewed, copied, or managed are facts not in evidence. Similarly, Calvert's assertion that documents were removed or not returned should be stricken. Further, the AGC objects to Calvert's characterization of these events and disagrees with his claim that documents were removed and not returned.

In his Exception 20, Calvert argues that Judge Sandron used disparaging remarks regarding his character and that these remarks show his animus toward Calvert. Nothing in the record or in the Supp. Decision shows that Calvert has been disparaged. The Judge correctly concluded that Calvert was not a reliable witness based on his credibility findings. There were numerous instances where Calvert's account of events was in direct contradiction with that of other witnesses and there are many examples of Calvert's documents reflecting incomplete and informal record-keeping. All of these instances are discussed in detail in this answering brief. There is absolutely no basis for Calvert's claim that the Judge had animus against him. ALJ Sandron's credibility resolutions should be sustained.

B. Judge Sandron Correctly Held That Documents In Evidence Were Respondent ELC's Business Records

Calvert argues against Judge Sandron stating that Calvert's credibility was undermined because he attempted to claim that some documents that his attorney had stipulated as business records were in fact personal records (Exception No. 4; Supp. Decision at 3). However, in arguing this exception Calvert attempts to take another bite at the apple claiming again that documents that were entered into evidence as business records were in reality personal records. Calvert also mischaracterized the record referencing again the issue of Respondent ELC's compliance with the AGC's subpoena duces tecum to argue that Judge Sandron was confused as to stipulated documents. (Tr. 21-23) Clearly, the issue related to the subpoena had nothing to do with the Judge's finding that certain documents were Respondent ELC's business records.

Calvert also argues in support of this exception that he did not have time to review all of the documents produced pursuant to the subpoena to be sure that they included only business records. He cites transcript pages related only to G.C. ex. 135 and 148, which were stipulated into the record by his attorney, as were numerous other exhibits stipulated by Calvert's attorney

as being Respondent ELC's business records. (Tr. 56, 414-415, 466, 570, 620, 622, 762, 826). Calvert's attorney objected to certain documents on relevancy grounds and on grounds that although business records, parts of them contained personal notes that were not part of Respondent ELC's business records. (Tr. 762, 767, 775, 824-825; G.C. ex. 135, 136, 137, 138, 140, 142, 143, 145, 146, 147). In response to a question from Judge Sandron, counsel for AGC clarified that all of the documents being objected were found in the same box to which Calvert uttered on the record "which meant I had nothing to hide". (Tr. 775) Notwithstanding, during Respondents' case-in-chief, Calvert's attorney asked Calvert if these documents were in fact "business records". (Tr. 852) The Judge specifically asked Calvert's attorney if he was withdrawing his stipulation that these records were Respondent ELC's business records and Calvert's attorney stated that he was not withdrawing the earlier stipulations. (Tr. 856) Yet, Calvert testified just moments later that the documents were personal records. (Tr. 856) The record clearly shows that Judge Sandron correctly referred to this testimony in finding Calvert unreliable. Moreover, Judge Sandron correctly admitted the documents in question in their entirety into evidence. Not only were these documents business records, but Calvert testified that he prepared them and at times discussed them with others. (Tr. 762-768, 776-779, 795, 811, 820)

Finally, Calvert regards the fact that the Judge overruled objections to documents moved into the record by counsel for AGC as some kind of "game". This statement only demonstrates the lack of respect that Calvert has towards the Board's processes which he also demonstrated during the trial. (i.e., Tr. 730, when reading a record said "blah, blah, blah"). Further, the Board should disregard Calvert's assertions on pages 32-34 of his Exceptions stating that somehow the compliance hearing was not conducted according to Board policy and procedures. The fact that the Judge overruled objections made by Calvert's attorney, without more, is not a basis to doubt

the propriety of the proceedings. Neither is the fact that documents were admitted into evidence over Calvert's attorney's objections. Calvert's accusation that the Judge assisted and/or almost prosecuted the case is also baseless. Also baseless are his disrespectful and shameless remarks accusing counsel for AGC of being dishonest and misleading.

C. Judge Sandron Correctly Discredited Calvert's Testimony Regarding Loans and Correctly Characterized Calvert's Accounting of Loans with ELC

Calvert incredibly insisted at trial that Respondent ELC owed him at least \$1.2 million despite documentary evidence to the contrary. (Tr. 870, 881-882; G.C. ex. 43) Judge Sandron correctly pointed out this fact in his Decision. (Supp. Decision at 4) However, in his Exceptions Calvert asserts that according to his calculations Respondent ELC still owes him a little over \$1 million (Exception No. 5). In support of his Exception Calvert makes reference to his brief to the ALJ, which is not part of the record to be considered by the Board. Even if Calvert was allowed to correct this erroneous assumption and submits to the Board excerpts of his brief to the ALJ, Calvert based his accounting on facts not in evidence.

Moreover, a careful review of the record shows that Calvert took more money out of Respondent ELC than what he loaned the company. The only document that shows an alleged \$1.2 million outstanding loan is in a letter Calvert prepared for his attorney Blankenship back in September 2005. (G.C. ex. 41, p. 23) However, documents show that since September 2005 Respondent ELC paid close to \$500,000 to him and/or his home equity line of credit in supposedly "pay-backs" of loans. (See Exhibit C for a summary of these transactions) In addition, the letter he wrote to Blankenship was a self-serving document clearly created to manipulate his records and show loans where none existed. (G.C. ex. 41) The alleged loans in his letter to Blankenship were for the most part completely unsubstantiated. For instance, the first item on his letter states that Respondent ELC owed him and his wife approximately

\$101,000 since 2003, and the only document he had to prove this was a copy of his 2003 financial statements, which he did not include with the letter. (G.C. ex. 41) The 2003 financial statements are not in the record. The next item on Calvert's letter lists a \$126,369 loan and states that he and his wife closed an investment account and loaned the money to Respondent ELC in August 2004. (G.C. ex. 41) As evidence of this "loan" Calvert included a copy of a bank debit form for \$126,369 in his name and his wife's name and a bank credit form for the same amount payable to Respondent ELC with a note that says that the money was transferred to Respondent ELC. However, there is no record that this deposit was ever made in Respondent ELC's bank account. The next item on the letter is an alleged loan for \$275,000. Calvert stated that he got this money from refinancing his building. The document Calvert included to support this claim is completely illegible and therefore has no evidentiary value. (G.C. ex. 41, p. 26-27) The next item on the letter is an alleged \$100,000 loan Calvert made to Respondent ELC from money he got when he closed a Smith Barney account in 2005. (G.C. ex. 41, p. 23) There is no evidence of a Smith Barney account being closed and the only evidence Calvert included with this letter is a July 2003 Fifth Third Bank check for \$100,000 made to Respondent ELC. (G.C. ex. 41, p. 28) The next item on the letter is another alleged loan that came from a closed Smith Barney Account for \$20,000. Calvert included a copy of what appears to be a check that is completely illegible. (G.C. ex. 41, p. 30) The last items on the letter include \$348,000 allegedly loaned from Calvert with personal checks, \$180,000 loaned from one of his personal home equity lines of credit and another \$80,000 from his second home equity line of credit, for a total of \$608,000. (G.C. ex. 41) Calvert included copies of checks totaling only \$473,000 to corroborate these claimed loans. (G.C. ex. 41)

Another source of alleged loans is based on Calvert's use of a bank account he opened in his son's name. (G.C. ex. 41, p. 46) The copy of the register book for this account is full of handwritten notes by Calvert indicating that he loaned money to Respondent ELC and Respondent Asset from this account and that the money had been repaid by Respondent ELC in full. (G.C. ex. 192, p. 2; G.C. ex. 41, p. 47-48) Calvert also documented some of the alleged loans to ELC in spreadsheets he kept in his computer. (G.C. 143) One of such spreadsheets dated November 8, 2005, reflects that ELC paid off the home equity and the balance was zero. (G.C. ex. 188, p. 1) On another column, it also shows that the new home equity line had also been paid in full. (G.C. ex. 188, p. 1) Calvert also claims he made a loan to Respondent ELC on August 26, 2005, for \$10,000, but the only document he submitted as evidence of this loan was a handwritten note by Calvert on an email from Fifth Third Bank. (G.C. ex. p. 55)

Alleged pay backs from ELC to Calvert for the alleged loans were also made without any formal documentation. The only documentation for the repayment of loans was in the form of handwritten notes or typed annotations on copies of Respondent ELC checks stating "payback," "repayment of loan," "payoff," or "repay." The checks were made payable to either Calvert or Fifth Third Bank. (G.C. ex. 43) There is one instance where Respondent ELC "repaid" a loan by paying for a new furnace for Calvert's daughter. (G.C. ex. 43, p. 15-16)

In his Exception 15, Calvert objects to Judge Sandron's finding of fact that Respondent ELC made repayments to Calvert of over \$420,000 after the September 2005 letter. (Supp. Decision at 8) Calvert incorrectly states that Judge Sandron based his finding exclusively on G.C. ex. 41 when in fact Judge Sandron also references G.C. ex. 43. Calvert makes reference to his brief to the ALJ in arguing that other exhibits show evidence of the amount Respondent ELC owes him and argues that the Judge based his conclusions on incomplete information. Calvert's

brief to the ALJ is not in evidence. Moreover, his calculations are based on facts not in evidence. Exhibit C attached to this brief lists the alleged loans Calvert made to ELC and the repayments he received based on facts reflected in G.C. ex. 41, 43, 49, 174, 186, 188 and 203.

D. Judge Sandron Correctly Stated the Facts Based on the Record

1. Respondent ELC

a. Ownership and Employees

Respondent ELC was engaged as an electrical contractor in the construction industry since its inception on August 5, 1983, until about the end of March 2006. (Tr. 384, 399; G.C. ex. 1(a) and 50) Edward Calvert was its sole owner and President. (Tr. 387; G.C. ex. 1(a)) Calvert was also Respondent ELC's Director, with his wife Linda Calvert serving as Secretary of the corporation and Kevin Passman as Vice President of the corporation. (Tr. 387; G.C. ex. 144) Respondent ELC had its principal place of business at 3960 Southeastern Avenue, Indianapolis, Indiana. (Tr. 384) The building is owned by Calvert and his wife.<sup>4</sup> (Tr. 431)

As of the end of March 2006, Respondent ELC had ten employees on its payroll, including Calvert. (G.C. ex. 55) Calvert's wife, Linda, performed miscellaneous administrative functions and was a part-time employee. (Tr. 395) Also part-time was Calvert's daughter, Katrina Stringer, who performed some office and administrative work. (Tr. 395) Passman served as Vice-President of Field Operations and had worked since 1986 serving as estimating project manager, purchasing agent, and electrician. (Tr. 58, G.C. ex. 55) The six remaining employees,

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<sup>4</sup> In his Exceptions, Calvert disputes Judge Sandron's statement that the building was titled in ELC's name and later in Calvert and his wife's name (Exception 10). CPA Joseph Holt testified that when ELC stopped operating, the building was in Asset's books and that when Asset's books closed, the building went to Calvert. (Tr. 510-511) It is requested that the Board strike Calvert's assertions on page 14 regarding dates and title of property as facts not in evidence.

Joshua Graham, James Hendricks, Jason Lucas, Christine Rossitis (aka Christine Patterson), Curtis Vinson and Michael Wallace, worked as electricians and helpers. (Tr. 373, G.C. ex. 55) Darlene Van Treese was an administrative employee that worked for Respondent ELC from December 1994 until her termination sometime before March 2006. (Tr. 396-397; G.C. ex. 55)

Respondent ELC contracted with several temporary labor providers, mostly with National Construction Workforce (herein NCW) and All Trades Staffing (herein ATS) since at least 2003. (Tr. 93, 427-428; G.C. ex. 56, 57) ATS was a party in interest in the underlying unfair labor practice case because it was to ATS that Calvert had all of his employees transferred in order to eliminate the bargaining unit. (G.C. ex. 1(a))

b. Improper Use of Corporate Funds

The informality with which Calvert kept the accounting of loans to ELC and repayments from the company to himself have already been described above. None of the personal loans to Respondent ELC were reduced to writing. (TR 469, 473, 474, 477, 484, 485) None of the loans were documented other than on handwritten notes on checks or bank documents. Records reflect that Respondent ELC paid the finance charges on Calvert's personal home equity lines of credit consistently. (G.C. ex. 188, p. 9-43, G.C. ex. 72, p. 3-6) No records reflect that the balance owed had all been loaned to Respondent ELC exclusively to justify these payments.

Calvert used an American Express credit card and a Citibank credit card, both in his personal name, to charge business and personal expenses. (Tr. 446, 450, 453-454, 628-629) The record reflects that Respondent ELC paid in full the credit card statements regardless of whether they had personal charges. Respondent ELC paid Calvert's American Express every month until March 2006. (G.C. ex. 176) When Calvert closed Respondent ELC, Respondent Asset continued to make the payments. (See Exhibit D for a summary) The balance on the American

Express card was not insignificant. In 2005, Respondent ELC paid \$24,500; in 2006, \$31,000; and in 2007, \$47,500. Calvert charged expenses related to Florida vacations, golf club fees, restaurants, lodging, car rental, golf courses, sporting goods, gift shops, airplane tickets, to name a few of the personal charges paid by Respondent ELC and Asset. (G.C. ex. 207, 64, 65)

Respondent ELC and Respondent Asset also paid in full the balance of Calvert's personal Citibank cards. As with the American Express, Calvert made personal charges on this credit card related to golf outings, restaurants in Mississippi, and country club fees. Payments to the Citibank cards totaled in 2006, \$8,000, in 2007, \$18,000, and in 2008, \$11,000. (See Exhibit D)

Respondent ELC also made numerous payments to pay for Calvert's personal entertainment expenses to the Indianapolis Colts, Sam's Club, and golf related expenses. The records show that these expenses totaled close to \$16,000 from 2003 to 2006. (G.C. ex. 62, p. 20, 178, 179; G.C. ex. 208, p. 1-3)

Respondent ELC paid about \$35,000 in lease payments for Calvert's wife's Lincoln Navigator. (G.C. ex. 71, p. 1-12 and G.C. ex. 181) Respondent ELC also paid for Linda Calvert's cellular phone. (G.C. ex. 177) In April 2004, Linda Calvert paid \$1,600 in car repairs for the Navigator with a personal check and then had Respondent ELC reimburse her. (G.C. ex. 183) Respondent ELC also reimbursed Linda Calvert for her gas expenses and car wash expenses throughout 2003 and 2004. (G.C. ex. 183, p. 5-27) Respondent ELC also paid for Calvert's 2001 Lexus in full. (G.C. ex. 181, p. 53) In February 2004, Respondent ELC performed work at Kevin Calvert's residence, Calvert's son, but the invoice was written-off. (G.C. ex. 195)

There were instances when Calvert voided a check from Respondent ELC after realizing that he had already paid invoices using his personal checks. For instance, on February 25, 2005,

a check payable to the Indianapolis Power & Light Company was voided for this reason, and so was a check on March 4, 2005 to North American Company for Life and Health. (G.C. ex. 184)

Calvert admitted he did not separate his personal expenses from his business expenses in his companies' books. (Tr. 449, 628-629) However, Calvert alleged that his accountants were in charge of separating any personal expenses he made on his credit cards or other invoices the company may have paid that were personal in nature. (Tr. 449, 628-629, 858-859) Two accountants testified at hearing and both stated that they did not separate personal from business expenses in the accounting books of either Respondent ELC or Respondent Asset. (Tr. 508, 696, 706) Carol Schmidt, CPA, provided services as Respondent ELC's part-time controller for almost 12 years. (Tr. 689-690; G.C. ex. 66) She prepared the tax returns for Respondent ELC, Respondent Asset, Calvert and for Retail Marketing, another company owned by Calvert.<sup>5</sup> (Tr. 693-694) In 2005, Calvert hired CPA Joseph Holt to provide accounting services to Respondent ELC, Respondent Asset, Retail Marketing and Calvert. (Tr. 503, 505, 510-511) Both accountants explained that in case Calvert paid personal expenses with corporate funds, he would have had to account for it in an account receivable from the owner to the corporation. (Tr. 512, 708) There was no evidence that Calvert ever set up an account to pay back to the corporations any personal expenses paid with corporate funds. In fact, Calvert could only recall one time he repaid a personal expense to Respondent ELC concerning a ring his wife bought with a credit card and this was before 2003.<sup>6</sup> (Tr. 838)

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<sup>5</sup> In his Exception 12, Calvert asserts that Judge Sandron misrepresented facts about Retail Marketing. It is requested that the Board strike the paragraph named rebuttal #12 on page 16 as stating facts not in evidence. The Judge correctly stated that Calvert testified that Retail Marketing had been set up to sell retail work of various kinds. (Tr. 591-593, 727-732)

<sup>6</sup> In Exception 16, Calvert excepts to the Judge's finding that he improperly used Respondent ELC's funds and alleges that his accounting system and/or his bookkeepers properly separated

c. ELC Suppliers

Respondent ELC's telephone provider was AT&T and Verizon Wireless was the cell phone provider for the Calverts, but ELC paid the account. (G.C. ex. 68, 70) One of Respondent ELC's major electrical supplier was All-Phase Electric. (G.C. ex. 173) ELC also used Marbaugh Reprographics Supply to print blue prints. (G.C. ex. 172) Respondent ELC used the Cert-In software to prepare estimates for bidding on projects. (Tr. 463-464; G.C. ex. 167)

d. ELC Vehicles

Respondent ELC had eighteen vehicles on its books as of April 2002. (G.C. ex. 15) Twelve of these vehicles were pickup trucks or vans, two were trailers, and one was a bobcat. The remaining three were a Lincoln Navigator, a Lexus and a Dodge Intrepid. (G.C. ex. 15) The Navigator was used by Linda Calvert, the Lexus by Calvert and the Intrepid by Passman. (Tr. 298, 429) According to the Indiana Bureau of Motor Vehicles (herein BMV), of the eighteen vehicles on Respondent ELC's books, five vehicles were registered to Respondent ELC and five to Respondent Asset as of March 2006. (G.C. ex. 15)

As of 2003, Respondent ELC and Respondent Asset were co-insurers on a business policy. (G.C. ex. 185) The policy covered Calvert's personal and business vehicles. (G.C. ex. 185) In 2005, Respondent ELC was the insured on the business policy and Respondent Asset was an additional insured appearing as the 'lessor' of several vehicles. (G.C. ex. 185, p. 17) There are no documents reflecting that Respondent ELC paid Respondent Asset any lease payments for any vehicles at any time.

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business and personal expenses. It is requested that Calvert's statements on page 19, par. two, be stricken as to all references regarding how receipts were handled by ELC bookkeepers and how the accounting system worked as these are not facts in evidence. Also, his statements on page 19, par. three, and on page 20, par. one, should be stricken as to references to documents delivered to the AGC and what those documents may or may not have shown as facts not in evidence.

e. ELC Customers

Kmart was a big customer for Respondent ELC. (Tr. 156-157, 662) Records show that as of September 2005, Respondent ELC had jobs with Kmart worth about \$60,000. (G.C. ex. 168, G.C. ex.188, p. 8) ELC also performed work for two companies engaged in the business of offering home warranty services, AHS and Retail Maintenance. As of March 2006, Respondent ELC had only one project at a Wal-Mart job site located in Greenwood, Indiana. (Tr. 82)

f. Decision to Close ELC

After more than 20 years in business, Calvert decided to close Respondent ELC and cease doing business by the end of the first quarter of 2006. As stated above, the Compliance Specification in this case issued on November 30, 2005. Respondent Merc was incorporated by Kevin Passman on December 2, 2005. (G.C. ex. 74) Calvert testified that he started thinking about closing Respondent ELC sometime in 2005. (Tr. 467) Numerous business documents kept by Respondent ELC paint the picture of Calvert's thinking process, decision making, and timeline. These documents also reflect how and when Respondent Merc emerged.

A document prepared by Calvert sometime before Respondent Merc was incorporated lists three ongoing legal actions against Respondent ELC, a list of considerations to "protecting Ed Calvert's assets" and a list of considerations to "protecting ELC Electric's assets". (G.C. ex. 145) Calvert typed as his number one concern "NLRB Actions/ Union Actions". Under the subtitle "protecting Ed Calvert's assets", Calvert wrote, "can the NLRB or anyone filing claims with the NLRB collect any money or file any claims against Ed Calvert's personal assets?" and under the subtitle "protecting ELC Electric's assets" Calvert wrote, "can the NLRB or anyone filing claims with the NLRB lien or put any type of hold on money due ELC Electric from projects....?", "would bank loans take precedence over any claim by the NLRB...?", "if we

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move all tools and equipment to some other place other than being on ELC Electric's books as assets; where should we move them to?" (G.C. ex. 145) On the second page of this document Calvert wrote considerations regarding whether to sale, close or transition ELC. He wrote "what would happen to NLRB actions if business is sold". Calvert also wrote if he should stop bidding for work, layoff people, and whether anyone could present a claim on money due to ELC. He further wrote: "how do I take all assets from ELC and move to another company?"; "how do I have existing contracts with school systems and others moved from ELC to another company?"; "eliminating legal fees...if I set up another electrical company, in whose name should be listed as owner?"; "will a person unrelated to me be someone to use as owner?" (G.C. ex. 145, p. 2)

Calvert prepared several documents that describe a business partnership with "the new company." In one of these documents, Calvert listed items needed to set up a company. He also wrote "Ed Participation" and a list of items that would be provided at no cost to the new company in exchange for 10% of gross receipts. (G.C. ex. 147) In another document, Calvert wrote "give Kevin a chance to become a partner in the business" and "Kevin and I will be attached at the hip", "I need way to make money to pay back loans and make a living". He then wrote "several options" and numbered three items: 1) "Have KC set up company"...2) "use KC company and sub work to...", 3) "set up KP business. Share profits with KP have a "business" partner".<sup>7</sup> He then went on to write: "My Vision", "Set up a corporation with KP as President (probably Sub S or LLC) Constructions Service Inc. (CSI)", "KP to bid out small jobs in Indiana", "KP to set up supplier accounts", "KP to put tele (sic), etc, in his company name", "Need to crunch these numbers to see monthly cost", "KP to him as needed", "KP to have acc

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<sup>7</sup> Calvert's son, Kevin Calvert is the owner of another company that was operating out of the building called USF and another company called CCI. (Tr. 542-543)

(sic) done by someone (Darlene?)” (G.C. ex. 147, p. 3) On the next page, he went on “Move Kmart work ran through CCI or another company if KP cannot handle”, “Get other work to ran through KP”, “Loan KP \$50,000”, “Help KP when needed Rent Space 10 year lease”, “Lease office eq & tools, min 10,000 per month”, “Let KP use my elect licenses... me to inspect”, “KP to pay for bonds, etc.”, “KP to take out X dollars per week plus expenses”, “At end of year review KP salary and give bonus”, “I need 20,000 per month”. (G.C. ex. 147, p. 4)

On another document titled “New Company Considerations” Calvert typed and hand-wrote a long list of action items. (G.C. ex. 146) Some of the action items concerned monthly savings for the new company because there would be no salary or health insurance costs for him, his wife Linda and Katrina. (G.C. ex. 146) Calvert also wrote out several potential names for the new company and considerations regarding its ownership. In his handwriting, Calvert wrote “all assets transferred to me. I put in as a capital asset to Asset Management”, “my deal min of 10,000 min per month for rent of space, office equipment, office operational systems and rental of tools. Any Kmart work I get ½ of gross profits” (G.C. ex. 146)

On a document titled “How Do I Close ELC” Calvert typed a list of items. The first item states that he personally loaned ELC \$800,000 but that number is crossed-out and the second item says that ELC has \$1,000,000 in tax credits. The third item states that ELC has some major items that need to be removed from ELC and names them. The fourth item states that he anticipated about 20 employee lawsuits to deal with in closing and that the company needs to be voided of any asset making it judgment proof. The fifth item is a to-do list which includes canceling water and coffee, changing the dumpster, Nextel phone, copy machine service and the Cert-in software. Another to-do item was to visit general contractors with new company owners to make transition of new work smoothly. Calvert also noted that by February 1, 2006 he needed

to be paid a minimum of \$6,000 (with \$6,000 crossed out and \$7,000 written over it) for the lease of building or 10% of received accounts receivables. Item nine states \$10,000 per month, new company bills \$100,000 per month or \$1.2 million per year and item ten says that this deal does not include work from Kmart. (G.C. ex. 138)

At some point, before closing Respondent ELC, Calvert prepared a flowchart illustration. (G.C. ex. 140) The flowchart shows a box with Kevin Passman's name connected with the name "MERC" and a box with Kevin Calvert's name connected with the names "USF" and "CCI". Arrows from each of the three companies, Merc, USF and CCI are directed to the name "Asset Management." There is a box with Edward Calvert's name that is connected to Asset Management and Retail Marketing. Under Retail Marketing it states "dormant company has pension plan for Ed and Linda Calvert, and under Asset Management "Ed will get his money here". He also wrote "does this company need to change to Sub-S, presently a C-corporation". Under Passman's name, Calvert wrote "sole owner of MERC" and "set up as a Sub-S corporation." Under Merc he wrote "rent space paid to AM, tool rent paid to AM" and an arrow to CCI that states "MERC to pay CCI for marketing". Under Kevin Calvert's name it states "sole owner of USF/CCI." Under USF and CCI it states "space rent paid to AM". By the CCI circle, it states "Ed Calvert will be an employee of CCI." On the backside of the document, Calvert handwrote "ELC paid CCI money 3 to 5 years ago for working with Kmart." (G.C. ex. 140)

Calvert prepared another document that outlines the roles of each company mentioned in the flowchart. On this document, Calvert had a section for "Passman/owner Merc", "Ed Calvert/owner Asset Mgt", "Ed Calvert/owner Retail marketing", Kevin Calvert/owner CCI Calvert Communication, Inc." (G.C. ex. 140, p. 3) At the bottom of this document, Calvert wrote "will it make a difference if NLRB and/or lawsuits actions come against ELC prior to ELC

closing or after ELC announces its closing?” (G.C. ex. 140, p. 3) On the second page of this document, Calvert hand-wrote a similar flowchart as the one already described and then wrote “can I keep purchasing material and pay labor through ELC to complete Wal-Mart Greenwood or must I sub-out the remaining work to Merc?” He also wrote that Passman would contact a list of vendors and that he needed a lease for Merc. (G.C. ex. 140, p. 3) Calvert also wrote that Merc needed two telephone lines, fax and email capabilities and wrote out the greeting Katrina would record for Merc’s voice mail. He also wrote that he would loan \$5,000 to Passman to put in Merc’s bank account and would set up paychecks. Also, that “Kat” and him would help with QuickBooks. (G.C. ex. 140, p. 5)

On June 22, 2005, there was a meeting of the ELC Board of Directors attended by Calvert and his wife, and their attorney. The minutes of this meeting reflect that it was decided that the Calverts would purchase the equipment of the corporation for a sum to be determined by a qualified commercial appraiser and that the current outstanding debt owed to the Calverts by the company would be reduced by the amount of the appraisal. (G.C. ex. 41, p. 20) The minutes also indicate that at that time Calvert estimated that the corporation owed him \$1,231,020.34 and that copies of the notes of indebtedness were attached to the minutes. However, no such copies of notes were attached. The only alleged evidence of the debt is in the form of a letter dated September 6, 2005, which was previously discussed in detail above. A report of the appraisal dated August 22, 2005, indicates that in July a professional appraiser appraised the fair market value of Respondent ELC’s vehicles and equipment at \$127,000. (G.C. ex. 41, p. 8) Respondent ELC conducted another Board of Directors meeting on September 2, 2005 where it was decided that the equipment appraised would be purchased by the Calverts for \$127,000 with a Bill of

Sale to be executed effective July 1, 2005. It was also decided that the debt owed by the company to the Calverts would be reduced by the same amount. (G.C. ex. 41, p. 21)<sup>8</sup>

A different to-do list titled "Close Out 8-15-05" that Calvert typed states that he needs to copy all loan documents that Calvert made to ELC, copy the pay off check to First Indiana for \$275,000 and copy documents of money loaned from his home equity accounts. He also wrote that he would call his attorney Einterz about Blankenship closing ELC and keeping a watch on litigation. He also included to-do action items of getting a lawyer to set up new company for Passman, setting up a lease agreement between Passman's company and Asset Management, getting a tool list and fair market value from the appraiser, and contacting general contractors to get the Wal-Mart contract transferred to Passman's company. (G.C. ex. 138)

Another "to-do" list that Calvert prepared titled "Things To Do" states that for the Wal-Mart Portland job he would have contract cancelled with ELC and "write new contract to new Passman company". (G.C. ex. 136) It also states that a Wal-Mart Greenwood project had not started yet and that he should consider having the general contractor cancel the P.O. and write a new one to Passman's new company. Another item states that he needs to continue taking Kmart

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<sup>8</sup> In his Exception 14, Calvert objects to Judge Sandron's characterization of the facts regarding the appraisal of Respondent ELC's assets, the alleged transfer of these assets to the Calverts, and the amount that Respondent ELC allegedly owed the Calverts. Calvert mischaracterizes the evidence in the record and makes a personal attack on counsel for AGC in his Exception. There was nothing deceitful about how his direct examination was conducted. The Judge correctly pointed out that Calvert's testimony was conflicting when he was asked about the whereabouts of Respondent ELC's vehicles and equipment once the company ceased operating. (See i.e. Tr. 430-433) As is discussed in this brief, the evidence reflects that these vehicles and equipment continued to be used by Respondent Merc after ELC closed. Also, as discussed fully in this brief, the evidence reflects ELC's debt to Calvert was a sham. Calvert also argues that, since he did not receive the \$24,930 in proceeds from the auction of ELC's equipment, the amount ELC owes him should increase by \$127,000. This argument only goes to show what little respect and/or understanding Calvert has to corporate form.

work. He also wrote that he needed paperwork to transfer or sell the tool inventory to him, that he has completed all requests from the NLRB except getting the financial information, and that the Asset Management lease had to be a minimum of "\$10,000 per month plus 10% gross sales if sales are greater than 100k". (G.C. ex. 136)

On a document dated October 17, 2005, titled "New Company", Calvert typed a list of things needed to start Respondent Merc. (G.C. ex. 135) The first item was "name" and in a blank line by it he wrote "Midwest Electric & Retail Contractors". Next was a line for "PO Box" and Calvert wrote "none" and a line for "address" and he wrote "3960 Southeastern". By a line for "email address" he wrote "[kpassman@midwest-erc.com](mailto:kpassman@midwest-erc.com)" and he also had an X by "business type Sub-S". The list goes on to state "buy and set up QuickBooks for new company", "decide on girl needed for inside- \$9 or \$10", "recruit Christine, Jason, Josh", "have Kevin Passman contact customers via telephone, email and letters", "contact service work", "put estimating system in Asset Management's name and set up accounts with suppliers." (G.C. ex. 135, p. 1)

On the second page there are a series of descriptions about the new business as follows:

- Passman will receive \$6,000 per month to run and operate the company...any amount paid to "Ed" is deductible through new company.
  - "Ed gets 10,000 per month. Ed pays his own taxes...Ed provides for the new company, office space, car including license plates and insurance for Kevin, company vehicles including vans, pick up and stake bed trucks (and license plates & insurance), tools, office equipment, use of electrical license, \$100,000 line of credit when needed (at 10% interest) consulting when needed, etc."
  - "All project *gross profits* .....will be split 50/50 between Passman and Ed."
  - "New Company will pay for any additional needed office cost... New company will repair and or replace any tool, vehicles, office equipment, etc, owned by Asset"
- (G.C. ex. 135, p. 2)

Calvert made another list of things to do between Christmas and New Year's Eve stating: "Contact Christine, Josh, put on new co payroll" and "Contact Home Shield and Retail Maintenance and other service customers- have work transfer to Merc". (G.C. ex. 148)

In an undated handwritten memo made sometime before March 2006, Calvert made another list of things he needed to do. (G.C. ex. 153, p. 1-2) The list included: “Sprint- Cell Phones- Cancel after 3/27/06. Passman to call and get same phone #”, order caller ID on Respondent Asset’s line, cancel water and coffee, move the DSL line, drop the email for ELC except for Passman and Calvert, have telephone lines and directory changed, and “begin at USF Jan. 1, 2006”. (G.C. ex. 153, p. 2) On another document titled “Contractors to Contact”, Calvert attached a list of contractors to contact, marked with an \* for those he had worked with in the past and with an arrow for those he wanted to try to work with, and crossed out for the ones he did not want to bid “under any circumstances”. He also included general instructions on what to tell contractors about their past prices and their reputation. (G.C. ex. 142)

Undeniably, things transpired according to plan, as will be shown below. On Respondent ELC’s January 2006 invoice for an electrical materials catalog, Calvert wrote that he “gave to Passman...to get changed over to Merc”. (Tr. 750-751; G.C. ex. 162, p. 3) On a letter dated January 10, 2006, Calvert informed Retail Maintenance that he had decided to close ELC and that he would appreciate the company contract Respondent Merc for any future work. He also stated that Merc was operated and owned by Passman, ELC’s Vice President and that they would continue receiving the same quality service under Merc and from the same service technicians as had previously successfully completed their projects. An identical letter was sent to American Home Shield (AHS). (G.C. ex. 139)<sup>9</sup> In a January 10, 2006 letter to Cert-In Software Systems,

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<sup>9</sup> In his decision, Judge Sandron states that these letters effectively precluded ELC from obtaining new jobs. (Supp. Decision at 7) In his Exception 13, Calvert claims that he decided to close Respondent ELC because of his inability to obtain new work. In his Exception 21, Calvert also argues that Judge Sandron was incorrect in finding that he did not establish a bona fide reason for closing ELC. (Supp. Decision at 13) The evidence strongly supports the ALJ’s conclusions. As has been described in detail, Calvert closed Respondent ELC as a way to avoid

Inc., Calvert instructed the company to rescind Respondent ELC's license agreement and transfer it to Respondent Merc waiving the transfer charges. (G.C. ex. 167)

In February, 2006, Calvert contacted a company called K&J Communications (K&J) to set up the telephone lines in the building. (Tr. 741) K&J's invoice dated February 28, 2006 stated that the service call was in response to "Kevin" at ELC. (G.C. ex. 62, p. 3) The invoice also described that there were four companies sharing the same telephone system and that ELC will have a total of two lines that will ring directly to voice mail and that "Merc" will have two new lines to appear on the system and a new fax line. (G.C. ex. 62, p. 7) In March 2006, Respondent ELC paid K&J. (G.C. ex. 62, p. 19) On February 20, 2006, Respondent ELC purchased a new hard drive from Indy Web and also paid them for the maintenance of Respondent ELC's web domain for the months of January through March 2006. (G.C. ex. 62, p. 14-18) On February 27, 2006, Respondent ELC repaired a hard drive for one of its computers, installed a network and configured a domain user, and changed the hard drive on Kevin Passman's laptop. (G.C. ex. 62, p. 23)

As of February 9, 2006, Respondent ELC had an employer-provided medical health insurance covering eight employees. (G.C. ex. 69) Among these employees were Calvert, his wife and his daughter, Joshua Graham, Kevin Passman and Christine Rossitis. (G.C. ex. 69, p. 4) On the November 2005 statement Calvert wrote "per conversation with Kevin...pay April premium for all 5, cancel policy in May 1". (G.C. ex. 141) In March 2006, Calvert wrote a letter to the insurance company requesting that Rossitis' health coverage be terminated effective April 1, 2006. (G.C. ex. 141)

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litigation costs. The evidence clearly shows that Calvert transferred or tried to transfer work from ELC to Merc (i.e. Wal-Mart, Kmart, AHS, Retail Maintenance, and others).

Respondent ELC paid its AT&T bill in March and April 2006. (G.C. ex. 70) Respondent ELC also paid the Sprint invoice in March 2006. (G.C. ex. 59) Sprint was the cell phone provider for the phones used by Passman and Rossitis. (G.C. ex. 59, p. 3) Also in March 2006, Respondent ELC paid for the repair of a drill used by Josh Graham. (G.C. ex. 60) In May 2006, Respondent ELC paid the Shell Oil gas card used by Respondent ELC employees. (G.C. ex. 61) The records reflect that Kevin Passman, Josh Graham, and Christine Rossitis were still using the card in February and March 2006. (G.C. ex. 61)

On March 22, 2006, Calvert sent a letter to the Wal-Mart job's general contractor stating that it was a "Notification of Business Closing" and "Proposal for Wal-Mart/Greenwood project Completion". (G.C. ex. 52) In his letter, Calvert states that as of March 25, 2006, Respondent ELC would terminate all employees and discontinue its business and proposes a way to complete the project which he estimates will take another three to four weeks. (G.C. ex. 52) Calvert instructed SM Wilson to "get with Kevin Passman" "immediately" and issue a subcontract to his company Respondent Merc. (G.C. ex. 52)

## 2. Respondent Asset Management

### a. Ownership and Employees

Calvert incorporated Respondent Asset on May 18, 2001. (Tr. 460; G.C. ex. 5) Calvert was the majority owner and President. (G.C. ex. 6) Respondent Asset operated out of Calvert's office in his building located on 3960 Southeastern Avenue. (G.C. ex. 6) Respondent Asset never had any employees, or other officers, and did not pay Calvert a salary. (Tr. 549) Calvert initially formed Respondent Asset to manage assets owned by him and his wife. (Tr. 549-550) Respondent Asset did not provide any services and was not supposed to own any property. (Tr. 550) It is unclear when exactly Respondent Asset ceased operating but its bank account shows a

closing entry in July 2008.<sup>10</sup> (Tr. 604; G.C. ex. 39) Respondent Asset was administratively dissolved on June 18, 2009 and final tax returns were filed in March 2008. (Tr. 505, 609; G.C. ex. 5, p. 3; G.C. ex. 13)

b. Prior to ELC Closing

Respondent Asset's records reflect very little activity in 2004. In 2005, the activity related exclusively to transactions with USF, Kevin Calvert's company. (G.C. ex. 24-39) In 2005, Calvert had numerous expenses related to the building being remodeled to accommodate USF. (Tr. 574, 630, 656) The cost of the "USF build out," as Calvert described it, was paid for by Respondent Asset but funded substantially by personal loans from Calvert. From March to May 2005, Calvert loaned \$145,000 to Respondent Asset. (See Exhibit B for a summary) During the same time period, Respondent Asset paid about \$274,000 in USF build-out related expenses. (G.C. ex. 25, p. 8-9, 29-36; ex. 26, p. 10; ex. 189, p. 3) In June 2005, when the USF build out was almost complete, the bank statements reflect that Respondent Asset started making a mortgage payment on the building of \$6,641.62 per month. (G.C. ex. 26, p. 7) From July 2005 until March 2006, the only transactions reflected on Respondent Asset's bank statements are the payment of the mortgage and deposits of USF's \$7,000 monthly rent. (G.C. ex. 26 p. 13-29)

c. After ELC Closed

Starting in December 2005, Calvert started transferring bills in Respondent ELC's name to Respondent Asset. In December 2005, Calvert transferred Braden Business Systems' account from Respondent ELC to Respondent Asset. This company provided maintenance service to Respondent ELC's copier machine. (G.C. ex. 156, p. 2) On the Braden Business invoice Calvert

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<sup>10</sup> It is requested that the Board strike Calvert's assertions on page 15, par. two, referencing Retail Marketing and how Asset's documents were stored as facts not in evidence.

wrote "Put in Asset Mgt Name, Bill Merc Cost ea. Month". (G.C. ex. 156, p. 3) On the January 2006 Indianapolis Power and Light invoice to Respondent ELC, Calvert wrote that "next bill will be to Asset Mgt". (G.C. ex. 163, p. 2) On the January 2006 invoice from the Indianapolis Water company, Calvert wrote that the bill "will come with new name next week". (G.C. ex. 162, p. 2) The March 2006 invoice from Best Way Disposal (dumpsters) had a note stating, "change from ELC to Asset Mgt". (G.C. ex. 162, p. 5) Calvert also completed a Change Name and Responsibility form from SBC/ AT&T to transfer the telephone service contract from Respondent ELC to Respondent Asset. (G.C. ex. 164(b), p. 1-2) On the fax transmittal sheet to SBC, Calvert wrote that he would "still have my office at the property...Nothing has changed except I will be closing ELC Electric and disconnecting all ELC lines probably within 2 to 3 months...the 375-5022 has been my private number and I want it to remain my private number." (G.C. ex. 164(b), p. 3) On another AT&T invoice statement, Calvert circled the charge for the SBC internet service and wrote "Transfer to USF (Asset Mgt)." (G.C. ex. 164, p. 1) Thus, from about February 2006 until the bank account closed in July 2008, Respondent Asset paid for all the utilities of the building, and paid for repairs to the copier.

In May 2006, for the first time, Respondent Asset made a payment to an insurance company. (G.C. ex. 28, p. 24) Records show that Respondent Asset's insurance policies in 2007, 2008 and until April 2009, included a list of Respondent ELC's former equipment. (G.C. ex. 19(a), p.4-5; ex. 19(b), p. 5) The insurance policy effective April 2009 was changed to reflect Respondent Asset and Calvert as coinsured. (G.C. ex. 19(b))

Also in May 2006, Respondent Asset paid the bond for Calvert's master electrical license. (G.C. ex. 28, p. 25) On June 14, 2006, Respondent Asset made a check payable to Respondent ELC for \$750 as a business loan. (G.C. ex. 8, p. 4) No documentation exists for this

loan except for the notation on the check. In January 2007, Respondent Asset paid \$100 for an Anderson electrical license bond, and in February 2007, paid \$199 for an electrical permit that according to the memo line was used in a Fed-Ex/Kinko's job. (G.C. ex. 31, p. 5, 48) This was a Merc job. In November 2007, Respondent Asset paid Old National Insurance \$175, according to the memo line, for an electrical contractor license bond. (G.C. ex. 36, p. 13)

Up until July 2006, USF continued to pay its monthly rent deposited into Respondent Asset's account. The deposits always reflected two separate checks from USF, one for \$3,000 and one for \$4,000. (G.C. ex. 25, p. 5) On July 31, 2006, instead of depositing two checks from USF for a total of \$7,000, the deposit slip stated \$4,000 from "Ed/Kevin" and \$3,000 from Retail Marketing. (G.C. ex. 29, p. 6) In October 2006, USF paid \$14,000 in rent. (G.C. ex. 30 p. 13) This is the last rent payment recorded in Respondent Asset's bank account from USF. A Respondent Asset check dated November 13, 2006 states that "USF moved out on "10/14/06." (G.C. ex. 30, p 26).

As of October 2006, Respondent ELC owed attorney Michael Einterz \$10,590. (G.C. ex. 7, p. 1) Respondent Asset paid off this debt by making monthly payments of \$500. (G.C. ex. 7, p. 3-15, ex. 39) On May 6, 2008, Respondent Asset paid Einterz for services related to Respondent ELC's Wal-Mart job. (G.C. ex. 39, p. 12) In February and April 2008, Respondent Asset paid additional legal fees related to Respondent ELC. (G.C. ex. 39, p. 46-47, ex. 37, p. 26-27, ex. 38, p. 15, 46) On February 27, 2007, Respondent Asset deposited a check from the U.S. Treasurer for \$584.21 payable to Respondent ELC. (G.C. ex. 31, p.56)

d. Improper Use of Corporate Funds

After Respondent ELC closed, Calvert started having Respondent Asset pay for his personal American Express and Citibank credit cards and for the Calverts' cell phone bill. (G.C.

ex. 27, p. 7, 9, 10, 12, 15) During this time, Respondent Asset paid a total of \$61,895 to Calvert's American Express and \$27,836 to his Citibank credit card. (See Exhibit D) Substantial amounts of these charges were personal, including vacation expenses, park entrance fees, car rentals, golf courses, golf equipment, airfare for the whole family, and college tuition expenses. (G.C. ex. 22, p. 3-4, 11, 12, 16-18, 21, 23, 27-29, 36-37; G.C. ex. 20, p. 2, 21; G.C. ex. 21, p. 4, 6, 8, 20) Additionally, some credit card charges were to pay the BMV expenses related to nine to eleven vehicles. Calvert was unable to explain the BMV charges. (Tr. 447-448) In addition, during the same time period, Respondent Asset paid over \$7,000 in golf country clubs memberships and related golf expenses such as golf lessons, golf outings, and Florida golf trips. (G.C. ex. 28, p. 9, 47, 51; ex. 29, p. 34; ex. 30, p. 16; ex. 31, p. 45, 55; ex. 34, p. 4, 6, ex. 35, p. 6, ex. 35, p. 41, 46, ex. 36, p. 19; ex. 37, p. 39; ex. 39, p. 10-11) Respondent Asset also started to pay monthly lease payments on Calvert's Lexus in May 2006 and eventually paid off the vehicle with a payment of over \$11,000. (G.C. ex. 28, p. 28; ex. 32, p. 61) Respondent Asset also paid the car insurance premiums for the Calverts' Lincoln Navigator, Lexus and a BMW. (G.C. ex. 19(c), p. 8)

Starting around March 2005, Calvert was loaning money on a consistent basis to Respondent Asset. None of the loans were in writing. The only documentation indicating that these transactions were loans was Calvert's annotations on copies of checks, bank statements or on a spreadsheet Calvert maintained. (G.C. ex. 9, p. 27) Exhibit B has a summary of all the loans made to Respondent Asset by Calvert in this manner. In March 2005, Respondent Asset made a payment of \$12,000 to First Indiana Bank to pay for Respondent ELC's payroll and payroll taxes. (G.C. ex. 8) On March 23, 2005, \$6,000 were deposited to Respondent Asset's bank account as a payment from Respondent ELC. (G.C. ex. 7, p. 2) On March 31, 2005, another \$6,000 was deposited to Respondent Asset from Respondent ELC. (G.C. ex. 8, p. 3) This deposit

appears to be a repayment of the \$12,000 but no document exists to explain these transactions. A cashier's check payable to Respondent Asset for \$10,000 dated November 29, 2006 stated on the memo line that it was a "loan against Merc late rent payment." (G.C. ex. 9, p. 20)

Since August 2006, Respondent Asset started paying the finance charges on Calvert's line of credit. (G.C. ex. 29) Just as with ELC, Respondent Asset paid the finance charges regardless of whether money was being loaned to Calvert, ELC, Merc, Asset, Passman or others. For instance, on September 7, 2006, Calvert made a personal loan to Rich Schwartz, an acquaintance of his son Kevin Calvert, for \$70,000 out of Respondent Asset's bank account. (Tr. 577-578; G.C. ex. 29, p. 42) In October 2006, Respondent Asset paid the finance charges of the line of credit and the check stated in the memo line that it was for "personal loan Rich". (G.C. ex. 30, p. 3) Respondent Asset's 2006 tax return reflects that Calvert reported the personal loan that he made to Schwartz as a business loan. (G.C. ex. 14, p. 7, 13) Respondent Asset's bank records show that Schwartz only paid back about \$17,500. (G.C. ex. 32, p. 7, ex. 33, p. 46, ex. 35, p. 28, ex. 36, p. 45, ex. 38 p. 24) The bank statements have no other records of repayments received from Schwartz although Calvert testified that the loan was repaid in full. (Tr. 577-578) Another example of commingled funds/ loans was when on September 22, 2006, Calvert wrote on a copy of a bank transfer document showing a \$7,500 transfer of money from his savings account to his checking account "transferred this money from savings to checking so I can loan money to Asset Mgt and pay Randy for roofing." (G.C. ex. 9, p. 16) He also wrote on a printed-out statement showing his Fifth Third Bank account balances that he was going to "borrow \$17,500 from home equity 9689" for a "merc loan, 2 checks, 1 Kevin Passman 10,000 and Ed Calvert 7,500". (G.C. ex. 9, p. 17)

One December 2006 check from Respondent Asset to Fifth Third Bank for \$316.44 stated on the memo line that it was for "fin charge merc loans" and another check for \$610.28 to Fifth Third stated in the memo line "fin charge Schwartz and KC loans." (G.C. ex. 30, p. 12-13) The July 2007 home equity line of credit statements reflected an outstanding balance of \$102,393.91 for the account ending x1889 and \$78,000 for the account ending x9689. (G.C. ex. 42, p. 5) Calvert's handwritten notes on these statements reflect that loans were made for \$70,000 to "Rich," \$20,000 to "KC," and \$12,393.91 to "Ed" for the account ending x1889; and that in account x9689 the loans consisted of \$25,000 to "Pass" and \$53,000 to "Ed". (G.C. ex. 42, p. 5) Regardless of who the loans were for, Respondent Asset continued to pay the interest on Calvert's lines of credit until he closed Respondent Asset's bank account in July 2008. (G.C. ex. 32, p. 9, 10, 11, 24, 49, 51; G.C. ex. 33, p. 5, 25, 26; G.C. ex. 34, p. 11, 31, 33, 43; G.C. ex. 35, p. 2, 11, 31, 35; G.C. ex. 36, p. 3, 7, 31, 32; G.C. ex. 37, p. 16, 17, 25, 44; G.C. ex. 39, p. 16)

e. Lease Agreement with Respondent Merc

Just as Calvert had planned, Respondent Asset entered into a lease agreement with Respondent Merc, to lease it the office area, including office equipment, that had been used (and was still being used at the time) by Respondent ELC. (G.C. ex. 11) The lease agreement stated that Respondent Merc would pay \$120,000 a year paid at a rate of \$10,000 a month starting on January 1, 2006. (G.C. ex. 11) Respondent Asset issued an invoice to Respondent Merc every month in the amount of \$10,000 from February 2006 until May 2007. (G.C. ex. 16, 17) However, Respondent Merc did not make a lease payment until May 22, 2006 when it paid the January 2006 lease. (G.C. 28) Respondent Merc did not make any other lease payment in 2006 until December 29, 2006. (G.C. ex. 16, p. 63) At that time, it paid eleven months of leases in arrears. (G.C. ex. 16, p. 63) (See Exhibit F for a summary of all payments Respondent Merc

made to Respondent Asset) In addition, Respondent Merc only paid \$9,689 a month because it deducted \$311 to reflect the monthly amount Respondent Merc was paying on car insurance. (Tr. 234-235, 266) The car insurance was covering vehicles owned by Respondent Asset, as will be discussed more fully below. (Tr. 266)

Although the lease agreement stated that a delinquency fee would be charged on late payments, Respondent Asset never charged Respondent Merc late fees. (G.C. ex. 11; Tr. 225, 252-254, 259, 602) In January and February 2007, Respondent Merc paid the \$9,689 lease on time, but only paid \$5,000 in lease in April 2007. No additional lease payments were made until August 2007 when Respondent Merc paid March through May 2007. (Exhibit F) In December 2007, Respondent Asset invoiced Respondent Merc for part of the cost of the building's utilities. (GC ex. 17, p 59) From January 2008 until April 2008, Respondent Merc paid part of the building's utilities in lieu of the lease payment. This was based on a verbal agreement between Passman and Calvert. (Tr. 768)

f. Other Transactions with Respondent Merc

There is no evidence in Respondent Asset's company records that, prior to the creation of Respondent Merc, Respondent Asset invoiced any company for any services or for the sale of any goods. However, right after Respondent ELC closed, Respondent Asset started issuing invoices on a consistent basis to Respondent Merc. Starting in February 2006, Respondent Merc "purchased" Respondent ELC's electrical materials stored in the building's warehouse. (Tr. 236-238, G.C. ex. 16) Passman prepared material requisition forms, pricing the materials himself, and in turn Respondent Asset invoiced Respondent Merc for the alleged cost of the materials. (Tr. 236-238) Respondent Asset invoiced a total of \$9,473.84 to Respondent Merc for materials between April 2006 and December 2007 (G.C. ex. 17, p. 2, 12-14, 32-35) In April and May

2006, Respondent Asset paid Respondent Merc's employee, Jason Lucas, \$360 and \$130, respectively, for building maintenance services. (G.C. ex. 28, p. 4, 27, G.C. ex. 77)

The record indicates that Passman charged at least \$20,000 of Respondent Merc's expenses on Calvert's personal American Express card from April 2006 until April 2008. (See Exhibit F and G.C. ex. 23, p. 3 and 7) Respondent Asset invoiced Respondent Merc for these charges and correspondingly, Respondent Merc paid Respondent Asset. (G.C. ex. 16, p. 52-56; G.C. ex. 17, p. 9-10) Passman had also charged this card in the past. (G.C. ex. 65)

Starting on October 1, 2006, Respondent Asset invoiced Respondent Merc for the finance charges charged on the Calverts' home equity line of credit for their account ending in xxx9689. (G.C. ex. 16, p. 44-45, 49-50, 64) The October 2006 invoice states that it is for finance charges on an overdue balance of personal loans through September 30, 2006; the November 2006 invoice states that it is for interest charged on personal loans through October 30, 2006; the December 2006 invoice states that it is for finance charges on overdue balances of \$50,000 for personal loans and \$10,000 of borrowed money due to late rent. As discussed already, the advances and/or loans taken from this account were loaned to Passman, Calvert and others, but Respondent Merc paid the full amount of interest charges from October 2006 until March 2008. (Exhibit F) Respondent Asset also invoiced Respondent Merc for miscellaneous items such as at one time \$150 for an electrical license and permit fee in Calvert's name. (G.C. ex. 16, p. 60-61) Also, Respondent Asset invoiced Respondent Merc for the permit it paid for Respondent Merc's FedEx/Kinko's project in Anderson, Indiana. (G.C. ex. 17, p. 24-25)

g. Commingling of Corporate and Personal Funds after Respondent ELC and Respondent Asset Closed

On August 16, 2007, Calvert sold Respondent ELC's bobcat and trailer for \$20,000. (G.C. ex. 171) The buyer made the check payable to Calvert and the check was deposited in

Calvert's savings account. (G.C. ex. 171) On February 28, 2008, Calvert sold Respondent ELC's former 1997 Chevy van and 2001 Chevy van for a total of \$2,300. (G.C. ex. 15) There is no evidence that this money was deposited in any corporate account. On January 13, 2009, Calvert sold the Dodge Intrepid that was used by Passman while working for Respondent ELC and Respondent Merc for \$2,700. (G.C. ex. 15) At this time both Respondent ELC's and Respondent Asset's bank accounts were closed.

Months after ceasing its operations, Respondent ELC paid accounting firm Yount and Co. for services with money Calvert loaned ELC. (G.C. ex. 174) On November 18, 2006, Calvert paid ELC's supplier All-Phase Supply with a personal check for \$2,500. (G.C. ex. 41, p. 60) After Respondent Asset's bank account was closed, Calvert paid any remaining Respondent ELC related expenses. For instance, on July 27, 2008, Calvert wrote a personal check to his attorney Thomas Blankenship for legal fees related to the auctioning of Respondent ELC's materials and on March 23, 2009, for legal fees related to Respondent ELC's tools sale. (G.C. ex. 213, p. 1, 4) He also continued to pay his attorney Michael Einterz for Respondent ELC's legal fees. (G.C. ex. 213, p. 2, p. 75) In 2008 and 2010, he also paid for the preparation of ELC's and Asset's federal and state tax returns. (G.C. ex. 213, p. 17, 75, 112) On June 16, 2009, Calvert paid the required government fees to file Articles of Dissolution with the Secretary of State for both Retail Marketing and Respondent Asset. (G.C. ex. 213, p. 87)

Calvert also continued to pay the interest charges on his home equity lines of credit. (G.C. ex. 213, p. 3, 15, 62, 152) Instead of using corporate funds as he previously did, Calvert started to pay for his membership in golf clubs. (G.C. ex. 213, p. 10, 56, 57, 65).

Calvert also has continued his practice of making personal loans. In June 2009, Calvert made a personal loan of \$10,000 to Katrina Stringer; and loaned her \$5,000 on May 14, 2009 and

again on May 24, 2010. (G.C. ex. 213, p. 3, 121). In addition, Calvert made over forty personal loans amounting to around \$480,000 to his son, Kevin Calvert, between April 2008 and December 2010. (G.C. ex. 213, p. 7-9, 11, 13, 15, 17-20, 22-25, 63, 65, 67, 69, 73, 76, 78, 80, 86, 88, 91, 94, 96-97, 99, 103, 105, 107, 109, 111, 114, 116, 118-119, 121, 126-135, 137-138) Calvert incorporated a new company called Red Lion and paid his son Kevin Calvert to get Red Lion letterhead, business cards, and computers. (TR 641-642, G.C. ex. 213, p. 12) He also had the Cert-In license rights transferred from Respondent Merc to Red Lion. (G.C. ex. 118) On June 6, 2010, Calvert made a check to Red Lion for \$500 as a “personal loan”. (G.C. ex. 213, p. 122)

### 3. Respondent Merc

#### a. Ownership and Employees

Respondent Merc was incorporated in December 2005 as an S-corporation. (Tr. 699-700; G.C. ex. 74 and 211) The company operated out of Calvert’s building at 3960 Southeastern Avenue from its inception until about July 2010. (Tr. 124-125) Respondent Merc conducted business in the same office space as Respondent ELC. (Tr. 108) Calvert continued to use the same office he had in the building as the one he used when Respondent ELC was in operation. (Tr. 108, 111-112, 140) The only other tenant in the building was Calvert’s son, Kevin Calvert.<sup>11</sup>

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<sup>11</sup> In his Exception 19, Calvert objects to Judge Sandron’s finding that Calvert maintained an office on the left side of the building as did Katrina Stringer and Kevin Calvert. The Judge’s finding is correctly based on Passman’s testimony that to the right of the building were Respondent ELC’s and Respondent Merc’s offices, and to the left Calvert’s office. (Tr. 108, 111-112, 140, 196) Additionally, Passman testified that Kevin Calvert had an office on the second floor of the building and that Katrina Stringer worked at the ELC offices. (Tr. 163-174, 289-290, 294-295) Joseph Holt also testified that he met with Stringer at the ELC offices to review the company’s accounting books. (Tr. 506-507) It is requested that the Board strike Calvert’s statements on page 21, par. two, stating how much time he spent at his office, whether or not Stringer had an office at the building, and statements related to his son’s office or dates when USF supposedly vacated the building, as these are all facts not in evidence.

(Tr. 110, 163-174) At the end of July 2010, Respondent Merc started operating out of Passman's home in Indiana.<sup>12</sup> (Tr. 124-125)

Passman is Respondent Merc's sole owner and President. (Tr. 60) Listed on Respondent Merc's first payroll in February 2006 were Josh Graham, Jason Lucas, Clint Beck, and Christine Rossitis. (Tr. 63-64; G.C. ex. 77) A short time later, Respondent Merc also hired Justin Glover and Curtis Vinson. (G.C. ex. 84) All of these employees were former Respondent ELC employees and had the same titles as they had had with Respondent ELC. (Tr. 63-64; G.C. ex. 77) Passman, Graham, Lucas, Vinson, and Rossitis were still on Respondent ELC's payroll as of the last week of March 2006 and were working at Respondent ELC's Wal-Mart job site. (G.C. ex. 55 and G.C. ex. 53, p. 17-24) Rossitis and Graham were Respondent ELC's most senior employees aside from Passman. (G.C. ex. 55) Glover had been employed by Respondent ELC until the end of February 2006 and also worked at the Wal-Mart job. (Tr. 63-64; G.C. ex. 55, ex. 53, p. 26) Passman, Rossitis and Graham continued to be covered by Respondent ELC's medical health insurance until April 1, 2006. (G.C. ex. 69 and G.C. ex. 141)

b. Respondent Merc Operates as Respondent ELC's Alter-Ego and Successor

Passman continued to use the same office space, office equipment, furniture, vehicles, work equipment, phone number, and job bidding estimating software, Cert-In, as he had been using under Respondent ELC. (Tr. 108, 117, 150) Passman used business forms that were left by Respondent ELC. (Tr. 150-151) The material requisition forms that Passman used repeatedly had Respondent ELC's name on it and records show that he crossed-out the name and handwrote

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<sup>12</sup> In his Exception 17, Calvert objects to the Judge's characterization of the facts surrounding the incorporation of Respondent Merc and his involvement. The Board is requested to strike statements on page 20 of Calvert's Exception referring to Calvert's personal knowledge of the Merc incorporation and who Passman would employ as facts not in evidence.

Respondent Merc's name. (G.C. ex. 16, p. 24-34) As early as February 1, 2006, Respondent Merc was purchasing left over materials from Respondent ELC and preparing material requisition forms for the materials used on its jobs. (G.C. ex. 16, p. 7-9) These forms were prepared by Passman, were priced by Passman, and the materials were taken from Respondent ELC's leftover inventory by Passman himself. (Tr. 236-238)

On February 7, 2006, Region Twenty-Five of the National Labor Relations Board sent a letter to Passman at Respondent Merc's office advising him that there was a pending compliance matter with Respondent ELC and that the Region had been advised Respondent Merc was operating as a successor to Respondent ELC. (G.C. ex. 82) Passman replied in a letter dated February 14, 2006, that he was not operating his company as a successor of ELC. (G.C. ex. 82)

However, the Wal-Mart project continued to be managed and supervised by Passman and Rossitis as if nothing had changed although they were both already on Respondent Merc's payroll. Passman continued to make purchase orders for the project through the end of March 2006 and continued to rent equipment for the project. (G.C. ex. 54) On February 8, 2006, Passman also purchased blue prints for the project as a representative of Respondent ELC. (G.C. ex. 64, p. 10) Christine Rossitis continued to be the job site supervisor. (G.C. ex. 53) On an invoice dated April 5, 2006, Respondent Merc charged Respondent Asset for work performed by Curtis Vinson, Jason Lucas and Christine Rossitis at Respondent ELC's Wal-Mart project. (G.C. ex. 16, p. 6) At the end of March, Passman talked to the project manager at the job site to request that the completion of the job be awarded to Respondent Merc. (Tr. 95-97) As described above, Calvert also sent the general contractor a letter requesting that the project be transferred to Respondent Merc. (G.C. ex. 52) For unknown reasons the project was not completed by Merc.

On February 13, 2006, Respondent Merc was awarded the Regency Beauty Institute (RBI) job. (G.C. ex. 89) Passman prepared the RBI job bid using Cert-In and using the same computer, copier, desk and same office he would normally use while working for Respondent ELC. (G.C. ex. 89, 112-113, p. 15, G.C. ex. 112-113) In fact, at this time he was on both companies' payrolls. The cost estimate documents had Respondent ELC's name on it. (Tr. 105; G.C. ex. 89, p. 15) Respondent Merc purchased ELC electrical materials from Respondent Asset for this job. (G.C. ex. 16, p. 12; Tr. 108) The job paid close to \$60,000. (G.C. ex. 106, p. 5-6)

Also in February 2006, Respondent Merc performed a job for USF. (G.C. ex. 88) Graham performed work as a Respondent Merc employee at USF jobs on February 28, 2006, and March 1 and 2, 2006, while still an employee of Respondent ELC. (G.C. ex. 55, 88, ex. 106)

As early as March 2006 Respondent Merc was awarded a Kmart project. (G.C. ex. 16, p. 10) Passman purchased materials for this project charging Calvert's American Express and also used materials left-over by Respondent ELC. (G.C. ex. 16, p. 10-11, 13, 21) Kmart paid Respondent Merc \$34,156 on March 31, 2006. (G.C. ex. 106, p. 3) In April 2006, flooring that had been previously installed in a Kmart store by Respondent ELC had to be removed and reinstalled. (G.C. ex. 16, p. 36) This work was covered by Respondent ELC's warranty. (G.C. ex. 16, p. 35) A subcontractor completed the job and billed Respondent Merc for its services at the Kmart store. (G.C. ex. 16, p. 36-37) In turn, Respondent Merc invoiced Respondent Asset for the warranty floor repair. (G.C. ex. 16, p. 35) Passman was unable to explain why Respondent Merc invoiced Respondent Asset for this work. (Tr. 246-247)

In April 2006, Respondent Merc job performed work on the Ryder Transportation job, which had been previously awarded to Respondent ELC in August 2005. (G.C. ex. 90) When the general contractor contacted Respondent ELC to perform the job, Passman informed him that

Respondent ELC was out of business, and the job was transferred to Respondent Merc on April 17, 2006. (G.C. ex. 90)

Aside from performing work on job sites, Respondent Merc performed about a dozen residential service calls in February and March 2006. (Tr. 142-145; G.C. ex. 86) Respondent Merc did not advertise and Passman was unable to explain how these residential customers reached Respondent Merc at the time. (Tr. 146) However, it is only logical to conclude that calls either came through Respondent ELC's telephone, which was still in service as of March and April 2006, or through Passman's cellular phone number, which he did not change. (Tr. 146; G.C. ex. 52, p. 8 and G.C. ex. 169) One smaller job performed in February and March 2006 by Respondent Merc was for the Technical Service Group, a low voltage contractor involved in the installation of telephone systems. (Tr. 147; G.C. ex. 86, p. 6; G.C. ex. 106, p. 4) Technical Service Group had been a Respondent ELC customer. (Tr. 149; G.C. ex. 170) By March 9, 2006, Respondent Merc had also performed work for AHS, a home warranty service provider who Respondent ELC had serviced for years. (Tr. 152-154; G.C. ex. 86, p. 8; G.C. ex. 168, p. 3) In April 2006, Respondent Merc also performed AHS warranty work for jobs that would have been performed by Respondent ELC in the past. (G.C. ex. 16, p. 38) AHS provided a steady source of monthly income for Respondent Merc in 2006. (G.C. ex. 116)

In February and March 2006, all of the above described jobs would have been performed by either Passman, Rossitis or Graham, all of whom were still employed by Respondent ELC. (Tr. 145, 147-148, 154-155)

Even a year after Respondent Merc started its operations, jobs awarded to it were related to Passman's former connections with Respondent ELC. For instance, in November 2006, Respondent Merc was a subcontractor for CJM Contractors, Inc. (G.C. ex. 92) CJM Contractors,

project manager was Mike Swalley. (G.C. ex. 91) Swalley was a project manager at Respondent ELC at the time of the unfair labor practices in 2003 and 2004. (Tr. 174; G.C. ex. 1(a)) Katrina Stringer served as notary for Respondent Merc's September 2006 Application and Certificate of Payment for this project. (G.C. ex. 92) Stringer had also served as notary public for Respondent ELC. (G.C. ex. 53, p. 10)

c. Loans from Calvert to Respondent Merc

Just a few days before Respondent Merc was incorporated, Passman and Calvert signed a Promissory Note dated November 30, 2005, loaning Passman \$5,000. (G.C. ex. 10, p. 1) Calvert issued a check dated November 29, 2005, from his company Retail Marketing for \$5,000 to Passman. (G.C. ex. 10, p. 2) Passman deposited this check into Respondent Merc's bank account on January 5, 2006. (Tr. 185, G.C. ex. 105, p. 1-2) Passman testified that this loan was to help him get his business started. (Tr. 183) However, Calvert testified that he never loaned any money to Respondent Merc, only to Passman, and that he did not know whether Passman was using the money for Merc because he was not "privity to Kevin's business or records".<sup>13</sup> (Tr. 558-559)

Calvert continued to loan money to Passman to fund Respondent Merc's operations for another year and a half. In total, they prepared eleven Promissory Notes that totaled \$157,500 in loans. (G.C. ex. 10; See Exhibit A for a summary of the eleven Promissory Notes) Most of the

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<sup>13</sup> In his Exception 18, Calvert characterizes Judge Sandron's decision as having "baffling" contradicting statements when the Judge correctly pointed out that Passman's testimony concerning the reason for the loans directly contradicted Calvert's testimony. (Supp. Decision at 12) It seems that Calvert misinterpreted the Supp. Decision on page 9 when the Judge makes reference to Calvert telling Passman that he would help him out by loaning him money he was crediting this testimony to Passman, not Calvert. (Tr. 227) As the facts in evidence clearly show, Calvert was contradicted by Passman and Calvert did in fact deny that he loaned the money to help Passman with his business. (Tr. 183, 227, 558-559)

Promissory Notes were not signed by Calvert. (Tr. 185-192; G.C. ex. 10) The first \$10,000 loaned came from checks from Calvert's company Retail Marketing.<sup>14</sup> (G.C. ex. 10 and 203) He then loaned an additional \$20,000 from his personal savings account. (See Exhibit A) On June 12, 2006, Calvert loaned another \$7,500 to Passman from his personal savings account. (See Exhibit A) On September 22, 2006, Calvert advanced himself \$7,500 from his home equity line of credit to repay himself \$7,500 that he had withdrawn from his savings. (G.C. ex. 10, p. 22) The memo on the check for \$7,500 payable to Calvert states "repay loan from Merc".<sup>15</sup> (G.C. ex. 10, p. 25) From then on, Calvert loaned money to Passman from his home equity line of credit. (Exhibit A)

Although the Promissory Notes stated that they were interest bearing loans, no such interest was ever charged to Passman. (Tr. 185-188) Also, the loans stated that they were due twelve months after being issued, but Passman repaid them following no particular repayment schedule other than at times when Respondent Merc had revenue. (Tr. 194-196) Every time Passman repaid a loan to Calvert, he would make a personal check payable to Calvert. (G.C. ex. 10, 105, 106; Exhibit A) However, prior to any such repayment, Respondent Merc issued Passman checks for the same amount as the checks he would make to Calvert. (G.C. ex. 104; Exhibit A) On one occasion the memo line of the Merc check payable to Passman stated "loan repayment." (G.C. ex. 104, p. 6) On one instance Respondent Merc issued a check to Passman

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<sup>14</sup> This evidence directly contradicts Calvert's assertion in his Exception 11 that no loans were made to Passman from Retail Marketing.

<sup>15</sup> Calvert testified at hearing and continues to argue in his Exception 18 that he did not loan money to Merc because the checks were all written out to Passman. However, the way the money flowed from Calvert, to Passman, to Merc, and then the repayments from Merc, to Passman, to Calvert, clearly shows that this was simply a sham. The end result of this arrangement was that the money from the loans was going from Calvert to Merc, and back.

for \$20,000 although he only owed Calvert \$10,000 at the time. (G.C. ex. 104, p. 1; Exhibit A) Passman wrote a personal check to Calvert for \$10,000 to repay the loan from him. (G.C. ex. 104) Then on April 12, 2006, Passman made a personal check for \$10,000 to Respondent Merc stating that it was a "loan" on the check's memo line. (G.C. ex. 105, p. 8-9)

d. Finance Charges on Calvert's Line of Credit Paid by Respondent Merc

When Calvert started loaning money to Passman out of his home equity line of credit accounts, Respondent Asset started charging Respondent Merc for the finance charges or interest on the accounts. The home equity line of credit statement for September 2006 reflects that a total of \$17,500 was borrowed from the account and that the entire finance charge for the month was billed by Respondent Asset to Respondent Merc. (G.C. ex. 16, p. 44-45) The entire finance charge was billed to and paid by Respondent Merc in October 2006 again, although \$7,500 had been advanced to Calvert. (G.C. ex. 16, p. 50) In June 2007, Respondent Asset again invoiced the entire finance charge on the home equity line of credit. (G.C. ex. 17, p. 47) The May 2007 home equity line of credit account reflects that a \$30,000 advance was made on May 14, 2007, and a \$10,000 advance was made on May 31, 2007. (G.C. ex. 17, p. 48) This would correspond with the \$30,000 loan given to Passman on May 15, 2007 (Promissory Note #11) and a \$10,000 loan Calvert made to Respondent Asset on May 31, 2007 (see Exhibit F).

e. Vehicles

Respondent Merc also continued to use Respondent ELC's vehicles in its operations without paying any rent or lease for their use. (Tr. 301) Passman made an oral agreement with Calvert that Respondent Merc would be able to use Respondent ELC vehicles free of charge. (Tr. 301-302) This agreement was not reduced to writing. (Tr. 301) Passman continued to use the Dodge Intrepid just as he had as Vice-President of Respondent ELC. (Tr. 305) It is unclear

how long Respondent Merc continued to use Respondent ELC's former vehicles, but the records show that these vehicles were in use and being repaired long after Respondent Merc started doing business. For instance, in December 2006, Respondent Merc paid for an oil change, an engine check, new tires and alignment for the Intrepid. And in April 2007, Respondent Merc paid for repairs to the 2000 Chevy (license plate 143502). (G.C. ex. 112, p. 8, 15) In April 2007, Merc paid for the 2001 Chevy van (VIN ending 8080) to have its fuel pump and filter replaced. (G.C. ex. 112, p. 13) In May 2007, Graham was reimbursed by Respondent Merc for a towing expense related to the 2000 Chevy Van (VIN ending 8080). (G.C. ex. 112) In August 2007, Passman took the 2001 Chevy Van (license plate 35254V, #12 on list in G.C. ex. 15) for a \$1,000 repair and on August 28, 2007, Graham took the same 2001 Chevy for an oil change. (G.C. ex. 112, p. 5, 17) All of these expenses were paid by Respondent Merc. Incredibly, Respondent Asset also paid for repairs to vehicles used by Respondent Merc. In June 2006, Respondent Asset paid \$794 for a stake bed truck repair. (G.C. ex. 28, p. 40) In September 2007, Respondent Asset paid \$181 to repair a pickup steering wheel and in November 2007 paid \$732 to repair the steering column for a 1996 stake bed truck. (G.C. ex. 35, p. 18; G.C. ex. 36, p. 11)

Respondent Merc acquired an automobile insurance policy effective April 1, 2006, to cover nine vehicles titled to Respondent ELC or Respondent Asset. (G.C. ex. 95, ex. 96, ex. 15) The auto policy monthly premium amount was \$311.99 in 2006; \$201.28 in 2007 and \$302.87 in 2009. (G.C. ex. 95, p. 5; G.C. ex. 99, p. 5, 7)

On August 21, 2007, Respondent Merc entered into a Promissory Note with National Bank to borrow \$16,000. (G.C. ex. 94, 103) Passman used the proceeds of this loan to buy two of the vehicles he had been using cost-free owned by Respondent ELC. (Tr. 307) He signed a Purchase Agreement with Calvert on August 13, 2007, purchasing two Chevy vans and two van

attachments for \$16,000. (G.C. ex. 46) Passman still uses one of the Chevy vans that he purchased from Calvert. (Tr. 316-317) Passman stated that he does not know when he stopped using the Dodge Intrepid but Calvert testified that he sold it in 2009. (Tr. 436)

Respondent Merc used the same temporary labor providers to supplement its labor force that Respondent ELC used: NCW and ATS. Records reflect that Respondent Merc has used NCW since at least September 2006 to date. (G.C. ex. 113, checks 2006-2007; G.C. ex. 114, 2008 checks; G.C. ex. 115, 2009 checks) Records reflect that Respondent Merc used ATS's services in 2007 and 2008. (G.C. ex. 110-111) Respondent Merc also sporadically hired an individual named Walt Freese as casual labor. (G.C. ex. 83) Freese was a former Respondent ELC employee and electrician. (Tr. 77-78)

Respondent Merc also continued to use Respondent ELC's former suppliers: All-Phase Electrical (G.C. ex. 100); Marbaugh Reprographics (G.C. ex.117); and United Rentals (G.C. ex. 117 and 122) Respondent Merc's cellular phone provider continued to be Sprint and office phone provider continued to be AT&T. (G.C. ex. 117, 120, 119) Passman hired Respondent ELC's former CPA, Carol Schmidt, to assist him with Respondent Merc's QuickBooks, tax planning and preparation of his personal and corporate tax returns. (G.C. ex. 107) ELC's former attorney Mike Einterz also provides services for Merc. (Tr. 328-329)

#### E. Judge Correctly Found Merc is a Disguised Continuation of ELC

##### 1. Applicable Case Law

It is "well settled that an employer cannot evade its obligations under the Act by forming what appears to be a new company but is in fact a 'disguised continuance' or alter ego of the old company". Mar-Kay Cartage, 277 NLRB 1335, 1340 (1985), enfd. 822 F.2d 1089 (6<sup>th</sup> Cir. 1987). The Board will consider whether the two entities have substantially identical ownership,

management, supervision, business purposes, operations, equipment, premises, and customers. Liberty Source W, LLC, 344 NLRB 1127 (2005). The Board also looks to “whether the purpose behind the creation of the alleged alter ego was legitimate or whether instead, its purpose was to evade responsibilities under the Act.” Fugazy Continental Corp., 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). No single factor is determinative and the presence of each factor is not necessary. Reigel Electric/Central Electrical Services, 342 NLRB 847, 847 (2004). Finding an alter ego status ultimately depends on “all circumstances of the case” and is characterized as an absence of an “arms’ length relationship among unintegrated companies”. Diverse Steel, Inc., 349 NLRB 946 (2007) citing Operating Engineers Local 627 v. NLRB, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), affd. on this issue sub nom.

2. Identical Management, Supervision, Business Purpose and Employees

The evidence overwhelmingly establishes that Respondent ELC and Respondent Merc have had identical management, supervision, business purposes, and employees. Both entities have been engaged as electrical contractors in the construction industry. (TR 64; G.C. ex. 1(a)) Both entities had identical management and supervision in Passman and Christine Rossitis. (G.C. ex. 55 and 77) All employees on Respondent Merc’s payroll during its first month of operation were former Respondent ELC employees and a majority of them were still employed by Respondent ELC at the same time. (G.C. ex. 77, ex. 53, p. 26)

3. Identical Premises, Equipment, Vehicles and Operations

Both Respondent Merc and ELC operated out of the same premises, using the same office space, office furniture, vehicles, equipment and materials. In fact, Passman testified that nothing changed when Respondent ELC stopped operating because everything was left there,

and he just continued to use the same office furniture, equipment, forms, supplies, computer and software. (Tr. 108, 112-113, 150) Calvert kept his same office in the building. (Tr. 140)

Respondent Merc used the same vehicles that Respondent ELC used without any consideration in return. (TR 301-302) This agreement was not reduced to writing. The only cost related to the vehicles was the automobile insurance. The insurance documents reflect that Respondent Merc insured nine vehicles all of which were owned by either Respondent ELC or Asset. (G.C. ex. 15) Passman continued to use the Dodge Intrepid just as he had done while working for Respondent ELC. (Tr. 298, 305) Passman admitted that he had been using the vehicles that he later bought from Calvert in 2007. (Tr. 307) Respondent Merc paid for any repairs these vehicles needed. (G.C. ex. 112) As of the time of the hearing, Passman still insured and used two vehicles that were formerly used by Respondent ELC. (Tr. 312)

Respondent Merc continued using all of the electrical supplies left by Respondent ELC in its warehouse. (Tr. 327) The evidence indicates that Passman had complete access to the supplies in the warehouse and prepared the material requisitions and pricing himself. (Tr. 236-238) Passman claims that he determined pricing by calling other electrical suppliers but there is absolutely no evidence that the prices were based on their fair market value. (Tr. 245) He did not keep any evidence of reviewing or comparing prices with the market. He claims that he calculated sales tax on the supplies but there is absolutely no evidence to substantiate this claim. It should make no difference in the alter-ego analysis that Respondent Merc was transacting with Respondent Asset in "buying" these supplies since Calvert and Asset were one and the same.

#### 4. Identical Customers and Suppliers

The record made it clear that Respondent Merc's customers were substantially identical to Respondent ELC's. In fact, the evidence clearly established that Respondent ELC transferred

its customers AHS and Retail Maintenance to Respondent Merc in writing. (G.C. ex. 139) Respondent Merc employees performed work at ELC's Wal-Mart project in Greenwood. Respondent Merc also performed work for Kmart and Technical Services Group, both of which had been Respondent ELC customers. (G.C. ex. 16, p. 10, ex. 168) Further, Passman said that Respondent Merc was an approved bidder for Kmart jobs although Calvert said that to be a Kmart approved bidder a company had to be in business for two years. (Tr. 883, 891) Since Passman admitted not preparing any profit projections for Respondent Merc, it would be fair to conclude that Respondent Merc was awarded an approved bidder status by taking into account its relationship with Respondent ELC. (Tr. 895) Respondent Merc bid for the Regency Beauty Institute job while Passman still worked for ELC. (Tr. 105, 118) And, Respondent Merc also completed the Ryder job which had been originally awarded to Respondent ELC. (G.C. ex. 90)

Respondent Merc also used ELC's same suppliers. Respondent Merc continued to use NCW and ATS as temporary labor providers, just as Respondent ELC had customarily done. (G.C. ex. 56, 57, 110, 111, 113, 114) Respondent Merc continued to use Sprint for company cell phones and kept the same cell phone numbers that were used by Respondent ELC. (G.C. ex. 59, 162) It also continued to use AT&T, who had been a provider for Respondent ELC. (G.C. ex. 165) Respondent Merc also continued to purchase materials from All-Phase Electrical, continued to use the services of Marbaugh Reprographics, continued to rent equipment from United Rentals, and continued to use the Cert-In software. (Tr. 328; G.C. ex. 100, 117, 119, 120, G.C. ex. 67) All of these suppliers were previously used by Respondent ELC. (Tr. 329; G.C. ex. 172, 173) Calvert and Passman tried to argue at hearing that these suppliers were simply the same suppliers that any other electrical services company would use, however when asked to

name the major electric supply houses in Indianapolis, Calvert mentioned five others that neither Respondent ELC or Respondent Merc used. (Tr. 863) As already mentioned, Passman also hired Respondent ELC's former attorney and former accountant. (Tr. 328-329)

5. Calvert Fully Financed and Maintained Control of Respondent Merc

Although Respondent ELC and Merc have different owners, the relationship between Calvert and Passman are determinative in finding an alter ego status. "The Board does not view legal ownership in a vacuum, but instead looks to the totality of the circumstances to determine where the real control exists". East Tennessee Packing Co., 270 NLRB 520, 524 (1984). See also Liberty Source at 1136. The Board has found alter ego status when entities have different owners if the owners are in a close familial relationship. Midwest Precision Heating & Cooling, 341 NLRB 435, 439 (2004), affd. 408 F.3d 450 (8<sup>th</sup> Cir. 2005). The Board has also found alter ego status where there is no substantial identity of ownership in light of other evidence of control. See, e.g., ADF, Inc., 355 NLRB No. 14 (2010).

As described above, Calvert clearly master minded the creation of Respondent Merc. He thought of every single detail that needed to be done to create the new company. Calvert kept dozens of documents describing his plans but none describe it better than the flowchart he created. (G.C. ex. 140) The flowchart says it all- the money flows down to Calvert no matter who owns which company. He determined that Respondent Merc would be solely owned by Passman, that it would be a Sub-S corporation, and that he would make money by having Merc pay rent to Respondent Asset. (G.C. ex. 140, 147) On one document he specifically addressed the fact that having "the new company" be owned by someone unrelated to him was an advantage in avoiding liability. (G.C. ex. 145) On his many to-do lists, Calvert wrote that he needed to set up a lease agreement between Passman's company and Respondent Asset, and that

he needed to get the Wal-Mart contract transferred to the new company. (G.C. ex. 138) He also calculated, more than once, that he needed a minimum of \$10,000 per month from Respondent Merc. (G.C. ex. 136, 138, 146, 147) He calculated that the new company would be able to afford the rent with savings realized by not having to pay him and his family a salary and benefits. (G.C. ex. 146) He planned that he would loan money to Passman, help him when needed, and let him use his electrical licenses. (G.C. ex. 147)

By October 17, 2005, only three months after the underlying ALJD in this case issued, Calvert had determined the name of the new company, that it would be a Sub-S corporation operating out of his building, Passman's email address, and which Respondent ELC employees to hire. (G.C. ex. 135) Calvert determined that Passman would be paid \$6,000 a month to run and operate the company and that he would get \$10,000 per month. (G.C. ex. 135) In exchange for the \$10,000 a month he would provide the office space, car and insurance for Passman, company vehicles, tools, office equipment, use of his electrical license, a \$100,000 line of credit and consulting as needed. (G.C. ex. 135) Calvert's plans were so detailed that he wrote out specific instructions for Passman to say to contractors when he contacted them. (Tr. 810, G.C. ex. 142)

Although Calvert kept repeating at hearing that "none of this happened" the evidence clearly shows the exact opposite. (Tr. 765-766, 770, 774, 782-783, 785, 795, 799) As planned, Respondent Merc was created as a Sub-S corporation solely owned by Passman operating out of the building with a \$10,000 a month lease agreement. (Tr. 699-700; G.C. ex. 11) Respondent Merc used Calvert's electrical license and Calvert continued to pay for the licenses. (G.C. ex. 28, p. 25, ex. 31, p. 5, 48, ex. 36, p. 13) As planned, Calvert changed all of the services in Respondent ELC's name to Respondent Asset's name. (G.C. ex. 138, 156, p. 2) Calvert transferred Respondent ELC's assets to himself, as planned. (TR 816, G.C. ex. 138) He loaned

\$5,000 to Passman to start the company's payroll. (G.C. ex 140; ex. 10) He also contacted the Wal-Mart general contractor and requested that the work be transferred to Passman's company. (G.C. ex. 52) The Cert-In software license was transferred to Respondent Merc. (G.C. ex. 135 and 167) As planned, Respondent Merc paid Passman \$3,000 biweekly. (G.C. ex. 78) This amount is identical to Passman's salary with Respondent ELC. (G.C. ex. 55) Respondent ELC's phones were changed, the PO Box was canceled, Rossitis and Graham were hired by Merc, and the AHS and Retail Maintenance work went to Merc. (G.C. ex. 139, 143, 162, 149, 165, 159)

There are some items on Calvert's to-do lists that are impossible to verify and some that seem to not have worked out. For instance, Calvert planned to have his son's companies CCI and USF pay rent to Respondent Asset and have CCI provide marketing services to Respondent Merc.<sup>16</sup> (G.C. ex. 140) Although there are no records reflecting that CCI has had any transactions with either Respondent Merc or Respondent Asset, there are strong indications in the record that Calvert is in business with his son Kevin Calvert, as planned. Calvert testified that CCI stands for Calvert Communications named after his son Kevin Calvert. (Tr. 683-684) Calvert incredibly testified that CCI was a company that never got started and that he had no involvement with it. (Tr. 684) According to his to-do lists and plans, he seemed to know quite a lot about CCI. Evidently CCI had a connection with Kmart work. (G.C. ex. 136, .137, 140) Calvert testified that he has medical insurance coverage through one of his son's companies but did not say which company, USF or CCI. (Tr. 844) However, the flowchart indicates that Calvert planned to become a CCI employee. (G.C. ex. 140)

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<sup>16</sup> Calvert had his company Retail Marketing provide "marketing services" to Respondent ELC through which he was able to pay himself and three other members of his family salaries and pensions. A lot of this work was Kmart work. It is a fair assumption that Calvert planned to use CCI in a similar fashion to funnel Respondent Merc's profits back to himself. (Tr. 591-593, 727, 732, 829; G.C. ex. 35, p. 5, 190, 198)

The evidence also shows that Calvert has a new company called Red Lion, that the Cert-In license has been transferred to it, that his son is involved with Red Lion, and that Calvert has loaned his son close to half a million dollars just from April 2008 to December 2010. (G.C. ex. 213) Thus, even though there is no concrete evidence that the plan with CCI worked, there is enough evidence to conclude that Calvert is in fact transacting with one of his son's companies and is in the process of creating another business, possibly because the sham he attempted to do with Respondent Merc and Asset did not work in protecting him against the NLRB action.

Another plan that may not have worked out was to split any profits from Kmart jobs or from other Respondent Merc jobs. Calvert and Passman denied that they had shared any profits or revenues since Respondent Merc started. (Tr. 859, 896) It is indisputable that they planned to share profits when Respondent Merc started. (G.C. ex. 135, 136, 138, 146) Calvert did not deny that he planned it; he just stated that it did not happen. The part of the plan having to do with Kmart projects most likely did not come to fruition only because the Kmart projects did not continue after Kmart merged with Sears. (Tr. 156-157) The extent to which Calvert schemed and hid money transactions through the use of different bank accounts, businesses, and lines of credit makes it very difficult to follow the money. However, there is evidence that Passman continuously paid himself "dividends" from Respondent Merc despite the fact that he was "unable" to pay rent. (G.C. ex 124) In 2006, Merc paid Passman \$14,800 in dividends while he borrowed \$122,500 from Calvert, and did not pay any lease payments until December. (G.C. ex. 16 and Exhibit F) This does not make any business sense. In 2007, Passman was paid \$70,300 in dividends, borrowed \$30,000 from Calvert in May, and only paid \$48,000 in lease payments. Again, this does not make sense. These numbers provide a strong indication that there is a

scheme behind these transactions to hide the fact that the money flows to Calvert, as planned. Another indication that the money is flowing to Calvert is the fact that he allowed Respondent Merc to stay in his building without paying any lease for so long and that neither he nor Passman believe Respondent Merc owes him any money. (Tr. 269, 872)

Thus, although some of the plans may not have been successfully achieved, at the end, most of Calvert's plan was executed as he had outlined it. At the end, Calvert was not the owner of Respondent Merc because that is exactly how he planned it. Passman could not go anywhere else to start "his" business because nowhere else would he have been afforded office space, furniture, materials, trusted and experienced employees, vehicles, contacts, credit, and access to liberal financing. As Calvert so plainly noted in his plans, he and Passman would be "attached at the hip." (G.C. ex. 147, p. 3)

#### 6. Lack of Arm's-Length Financial Transactions

The evidence demonstrated that Respondent Merc's operations began smoothly because it did not have any immediate overhead costs or expenses and did not have to engage in any start-up costs. It is clear that Passman was under no pressure to pay the "lease" on time. There is ample evidence that the lease was not an arm's-length transaction. The lease agreement was signed in January 2006, at a time when Respondent Merc did not have any revenues and no way to really know if \$10,000 a month was viable. (Tr. 221-223; G.C. ex. 11) Passman admitted that he did not look for other rental options. (Tr. 221-223) Calvert admitted he did not check other comparables to come with the \$10,000 amount and in the past he had charged \$7,000 for office space to USF. All of the equipment included in the lease agreement was being used by Respondent ELC at the time the agreement was signed. (Tr. 221-223) Passman wrote over the lease amount due on the invoices to reflect the car insurance that Respondent Merc was paying.

(Tr. 266) The lease payment was seldom paid on time and Respondent Merc never paid delinquent fees. (Tr. 259 and Exhibit F) The agreement to reduce the \$10,000 amount to \$9,689 was never reduced to writing and neither was the agreement to allow Respondent Merc stay on the premises by paying partial utilities expenses. (Tr. 234-235, 266, 270, 768) Passman testified that Respondent Merc does not owe any money to Calvert or Respondent Asset because Calvert forgave it any amounts due. (Tr. 269-270) The evidence indicates that Respondent Merc's lease payments should have amounted to \$550,000 from January 1, 2006 to July 31, 2010, but that it paid only \$170,000 in leases. (Exhibit F) In other words, Calvert "forgave" it \$380,000 in overdue leases. This makes no business sense. The fact that the lease agreement was made with Respondent Asset and not with Calvert does not make it less questionable. Calvert was in total control of Respondent Asset. No one but Calvert had the authority to forgive the delinquent fees on past due lease payments or to decide not to pursue past due lease payments.

The record also made it clear that Passman financed Respondent Merc's entire operations with Calvert's/Respondent ELC's/ Respondent Asset's commingled money and lax/inexistent financial terms and conditions. Any time Passman needed money for the business all he had to do was call Calvert and Calvert would loan him money immediately. (Tr. 185-188) Passman would repay the money as soon as Merc had revenue. (Tr. 194-195) Passman and Calvert prepared eleven Promissory Notes to document these loans. (Exhibit A) Most of the Promissory Notes were never signed by Calvert giving the impression that Passman prepared and signed them on his own while Calvert only had to provide the money. (G.C. ex. 10) Passman did not pay interest on the loans either although the Promissory Notes stated they were interest-bearing loans. (Tr. 185-188; G.C. ex. 10) Passman did not invest any of his own money into Respondent Merc. Passman admitted that the \$15,000 loan that was reported on Respondent

Merc's tax return was money he had borrowed from Calvert. (Tr. 355) In addition, even though Passman made a personal check to Respondent Merc for \$10,000 on April 12, 2006 depicting it as a "loan" he had paid himself \$10,000 on April 5, 2006 from Merc's account. (G.C. ex. 104 and 105) Thus, he made no loan to Respondent Merc from his own personal funds.

It is also evident that the money for these loans came from Respondent ELC's proceeds and was going into Respondent Merc's funds. For instance, on February 13, 2006, Respondent ELC paid Calvert \$75,000 allegedly "paying-back" loans. And, on March 2, 2006, Calvert loaned \$10,000 to Passman. Again, on March 20, 2006, Respondent ELC paid Calvert \$15,000 in alleged "paybacks" and on March 29, 2006 Calvert loaned \$10,000 to Passman. Compare summaries of transactions in Exhibits A and C. In total from November 2005 until December 2006, Calvert loaned Passman \$127,500 and during the same time period diverted \$416,000 of Respondent ELC's money to himself. Not all of the \$416,000 was payable to Calvert, some of it was payable to his home equity line of credit accounts. But it is also evident that Calvert also used his home equity line of credit to loan money to Passman. In addition, it is irrelevant that Passman and Calvert entered into the Promissory Notes as individuals because not only does the evidence show that the money came from Respondent ELC, but it also shows that it went into Respondent Merc. All of the checks made out to Passman were deposited into Respondent Merc's bank account. (G.C. ex. 105) And, all of the checks Passman made to repay Calvert were made after he had Respondent Merc issue him checks for the exact same amount. (G.C. ex. 104)

It is also apparent that not all of the money loaned to Respondent Merc was documented in the Promissory Notes. Starting in October 2006, Respondent Merc started paying the full amount of finance charges on Calvert's home equity line of credit. (G.C. 16, p. 44-45, 49-50, 64) Calvert charged these fees to Respondent Merc by having Respondent Asset invoice

Respondent Merc. So it would appear that Respondent Asset was invoicing interest to Respondent Merc although, in reality, the interest was charged to Calvert personally. (See Exhibit F- showing interest was paid by Respondent Merc from November 2006 until August 2007). In addition, the interest charged to Calvert was for money advances that he made from his home equity line of credit that he used to loan to Passman and to himself. Thus, in September 2006, the home equity line of credit statement reflects advances of \$17,500 and in September 2006 Calvert loaned \$10,000 to Passman (Promissory Note number 7). (G.C. ex. 16 p. 45) The \$7,500 difference was loaned to Calvert "in repayment of the \$7,500 he loaned to Passman in June 2006". (G.C. ex. 16, p. 50) In November 2006, the home equity line of credit reflects advances of \$50,000 and the promissory notes for that month were for \$40,000. (G.C. ex. 16, p. 65) The \$10,000 difference was advanced to Calvert. The invoice from Respondent Asset to Respondent Merc for the month of December 2006 states that finance charges due are for personal loans of \$50,000 and \$10,000 borrowed due to late rent. (G.C. ex. 16, p. 64) In December 2006, the home equity line of credit reflects advances of \$45,000 and the promissory notes for that month were for \$30,000. (G.C. ex. 17, p. 21) The \$15,000 difference was advanced to Calvert. In January 2007 and April 2007, the home equity line of credit reflects advances of \$10,000 and \$12,000, respectively, and there were no promissory notes on those months. (G.C. ex. 17, p. 39, 42) The \$22,000 was advanced to Calvert. In May 2007, the home equity line of credit reflects advances of \$40,000 and the promissory notes for that month were for \$30,000. (G.C. ex. 17, p. 48) The \$10,000 difference was advanced to Calvert. In June and July 2007, the home equity line of credit reflects advances of \$10,000 per month and there were no promissory notes on those months. (G.C. ex. 17) The \$20,000 was advanced to Calvert. Based on the above numbers, \$77,000 were advanced to Calvert unrelated to the Promissory Notes he

signed with Passman, but Respondent Merc was paying the interest on this money. One explanation could be that it was additional money loaned to Respondent Merc or to Passman and another reason could be that Calvert borrowed the money to pay for the building's mortgage and utilities. Regardless, Calvert and Passman failed to provide an explanation and these transactions undeniably lack any sense of being arm's-length.

Passman continued to use Calvert's American Express card to purchase supplies for Respondent Merc as he had done with Respondent ELC. Although the American Express was in Calvert's name, Respondent Asset invoiced Respondent Merc for the charges made by Passman on the card. Passman clearly had unfettered authority to make charges on Calvert's American Express as reflected by the fact that he charged it from April 2006 to April 2008 a total of \$20,000. (see Exhibit F)

7. Respondent Merc Was Created To Evade Responsibilities Under The Act

Finally, the evidence also demonstrated that the purpose behind the creation of Respondent Merc was "to evade responsibilities under the Act." Fugazy, Id. Calvert was clearly concerned with protecting himself and his company from the liability related to this case. He considered the "NLRB Actions/ Union Actions" as being a major threat to his business, as depicted in his early memorandum. (G.C. ex. 145) He made notes about how to protect his assets from the NLRB action and part of the thought process was to transition all assets from Respondent ELC and move them to another company. (G.C. ex. 145) The Board will find an alter-ego relationship where an employer attempts to evade liability by closing one business and opening the same business under a new name. D.L. Baker, Inc., 351 NLRB No. 35 (2007) citing Barnard Engineering Co., 295 NLRB 226, 246 (1989).

It is obvious that Calvert merely closed Respondent ELC to evade liability under the Act and opened Respondent Merc to continue the same business. Calvert's only explanation for closing ELC is that he could not get any more work.<sup>17</sup> (Tr. 670, 862) However, at the time that he started planning to close Respondent ELC, the Wal-Mart job had been awarded to the company and was a \$481,000 job. (G.C. ex 53) There is also evidence that as of the end of 2005, Respondent ELC was involved in working at Kmart projects that paid at least \$60,000. (G.C. ex. 168 and 188, p. 8) Respondent ELC had also been awarded the \$28,000 Ryder Transportation job in August 2005. (G.C. ex. 90, p. 26) Respondent Merc's first tax return for the year ending 2006 reflects gross sales of \$801,159 and a gross profit of \$264,413. (G.C. ex. 210, p. 1) These would have been Respondent ELC's sales and profit numbers.

In his Exception 26, Calvert argues that his personal and close relationship with Passman is the reason he loaned him money, allowed him to operate rent-free and use ELC's equipment, vehicles and materials. In essence, Calvert is admitting that this relationship was not based on normal business practices. Judge Sandron concluded that, based on the overwhelming evidence establishing that Calvert and Passman lacked an arms-length business relationship, the only logical explanation for Calvert's apparent "generosity" was that Merc was created to avoid ELC's financial liability for the unfair labor practices it committed. There should be no doubt that Judge Sandron correctly found Merc to be ELC's alter-ego.<sup>18</sup>

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<sup>17</sup> In his Exceptions, Calvert argues for the first time that another reason to close ELC was that he had loaned it money that he would not be able to recover (Exception 24, page 24, par. three). It is requested that the Board strike par. three on page 24 regarding references to what subpoenaed records may have shown and regarding him liquidating assets as facts not in evidence. Further, Calvert should not be allowed to submit in his Exceptions reasons for closing ELC that he did not argue at hearing.

<sup>18</sup> In Exception 25, Calvert argues against Respondent Merc being found to be ELC's alter-ego. His arguments demonstrate a lack of understanding of the alter-ego analysis and applicable case

F. Judge Correctly Found Respondent Merc is a *Golden State* Successor

1. Applicable Case Law

In Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), the Supreme Court upheld the Board's finding that an employer that acquires substantial assets of a predecessor and continues without substantial change the predecessor's business operations may also be required to remedy the unfair labor practices of the predecessor if it was on notice of the unlawful conduct.

2. Successorship Analysis

The facts in this case established that Respondent Merc was not only on notice of the pending unfair labor practice litigation against Respondent ELC but that the company was created with the main purpose of evading responsibility under the Act. (G.C. ex. 82) Passman also knew of the unfair labor practices because he was found to have violated Section 8(a)(1) of the Act in the underlying ULP hearing.

As discussed in the previous section, Respondent Merc continued Respondent ELC's business in basically unchanged form, with substantially identical management, employees, premises, business purpose, suppliers, equipment, vehicles, and customers. Therefore, the Board should sustain the ALJ's conclusion finding Respondent Merc to be a *Golden State* successor of Respondent ELC.<sup>19</sup>

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law. As will be demonstrated in this section, Judge Sandron correctly found Respondent Merc is an alter-ego of Respondent ELC.

<sup>19</sup> Calvert's Exception 27 objecting to the successorship finding misconstrues the significance of Region 25's notice to Respondent Merc. What Passman or Calvert believe the letter meant is not only immaterial but should be stricken as facts not in evidence.

## G. Judge Correctly Found Respondent ELC and Respondent Merc Are Single Employers

### 1. Applicable Case Law

A “single employer” relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a “single employer.” NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1122 (3d Cir. 1982). The single employer status is characterized by the absence of an arm’s-length relationship found among unintegrated companies. RBE Electronics of S.D., 320 NLRB 80 (1995). The Board considers four factors: interrelations of operations, common management, centralized control of labor relations, and common ownership. Stardyne, Inc., 313 NLRB 170 (1993).

### 2. Single Employer Analysis

There is no dispute that Respondent ELC and Respondent Merc were operating concurrently out of the same premises, using the same employees, office space, equipment, supplies, vehicles, and under the same management and supervision for months after Respondent Merc was incorporated. As discussed above, Calvert controlled both entities and master-minded the formation of Respondent Merc as a company that would continue his business, with his same customers, suppliers, and employees, in order to escape liability from this NLRB action. There is no doubt that there was identical control of labor relations in the months that employees worked on the Wal-Mart project and were on both companies’ payroll. Respondent ELC’s actions at the end of 2005 and beginning of 2006 do not reflect a company that was in the process of closing down but a company that was simply continuing business as usual under a different name.

The record is full of examples of the absence of arm’s-length transactions between Respondent Merc and Respondent ELC but nowhere is it more obvious than in the supposed lease agreement and promissory notes. Respondent Merc only paid lease when it could and only

for a few months out of the year without having to pay any delinquent charges. Respondent Merc did not pay interest on the loans from Calvert either. Respondent Merc paid the finance charges on Calvert's home equity line of credit even though the records show that money from this line of credit also went to Calvert and Respondent Asset. The transactions got so convoluted that it made it impossible to distinguish to which company loans or advances taken from Calvert's home equity line of credit were going to. Respondent Merc used vehicles owned by Respondent ELC or Respondent Asset without any consideration. Also lacking an arm's-length relationship was the fact that Respondent Merc could supposedly "purchase" materials from Respondent ELC at a price determined solely by Passman unrelated to any fair market value. Respondent Merc also performed warranty work for Respondent ELC jobs as though they were the same company. Thus, besides finding Respondent Merc and Respondent ELC as alter-egos, the evidence shows that they are also a single employer under the Act.

#### H. Judge Correctly Found Respondent ELC and Respondent Asset Are Single Employers

Respondent ELC and Respondent Asset were both solely owned by Calvert, who was also the President of each corporation. (Tr. 387; G.C. ex. 6 and 50) Respondent Asset never had any employees so no labor relations ever existed. (Tr. 549) As President of both companies, Calvert was authorized to open and close bank accounts, issue checks, borrow money, and enter into contracts. He managed both companies out of the same office in his building located at 3960 Southeastern Avenue. (Tr. 384; G.C. ex. 6)

Calvert testified that he created Respondent Asset to manage his assets. (Tr. 549-550) However, there is no evidence that Respondent Asset managed any assets until USF started paying rent. (G.C. ex. 24) Respondent ELC did not pay rent to Respondent Asset despite operating in the building. In June 2005, Respondent Asset started paying the building mortgage.

(G.C. ex, 26, p. 7) It is obvious that the monthly mortgage payment was covered by USF's \$7,000 monthly rent. One of the invoices related to the USF build-out was originally billed to Respondent ELC but was paid by Respondent Asset. (G.C. ex. 189, p. 2) There is also evidence that Respondent ELC employees worked for Respondent Asset in the build-out, but there are no records indicating that Respondent Asset paid Respondent ELC for this work. (G.C. ex. 189)

Respondent ELC and Respondent Asset were co-insured under one policy from April 1, 2003 until April 1, 2004. (G.C. ex. 185) In 2005, the policy showed Respondent Asset as a lessor of Respondent ELC. (G.C. ex. 185, p. 17) The policy reflected that Respondent Asset was leasing four vehicles to Respondent ELC and BMV records show the vehicles registered to Asset. (G.C. ex. 15) However, no records exist reflecting Respondent ELC paid lease to Respondent Asset for the use of these vehicles. In August 2005, two insurance companies paid Respondent ELC about \$4,000 on an insurance claim. (G.C. ex. 73) Three months later, in November 2005, Respondent ELC paid Respondent Asset \$4,000. Calvert was unable to explain this transaction.

Starting around November and December 2005, Calvert transferred most of Respondent ELC's accounts payable to Respondent Asset, including the copier maintenance cost, electric and water bills, dumpster bill, and telephone bills. (G.C. ex. 156, ex. 163, ex. 162, ex. 164(b), ex. 27, ex. 27) All of these accounts were paid by Respondent ELC until about March 2006 and then continued to be paid by Respondent Asset. Respondent Asset also started to pay for Calvert's master electrical license and electrical license bonds, and making insurance payments. (G.C. ex. 28, p. 24-25, 28 ex. 31, p. 5, 48, ex. 36, p. 13) Respondent Asset also started paying the interest charges on Calvert's line of credit which had previously been paid by Respondent ELC.

Not only did Respondent Asset start paying invoices that had regularly been paid by Respondent ELC but it also paid Respondent ELC expenses. For instance, starting about March 2006 until about June 2008, Respondent Asset paid \$500 a month to Respondent ELC's attorney Einterz to payoff outstanding legal expenses. (G.C. ex. 7, p. 3-15, ex. 39) In 2008, Respondent Asset also paid about \$7,200 in legal fees related to Respondent ELC litigation. (G.C. ex. 39, p. 46-47, ex. 37, p. 26-27, ex. 38, p. 15, 46) Calvert also deposited a check payable to Respondent ELC into Respondent Asset's bank account. (G.C. ex. 31, p.56)

In January 2006, Respondent Asset entered into the lease agreement with Respondent Merc. (G.C. ex. 11) There is no evidence and no records to establish that Respondent ELC or Calvert sold or transferred assets to Respondent Asset in order to be able to lease them. The minutes of the board of director's meeting that determined that Respondent ELC's assets would be valued and transferred to Calvert state that a bill of sale would be prepared to document the transaction. (G.C. ex. 41) Evidently, no such bill of sale or any record representing a transfer of assets was created. Additionally, a review of all of Respondent Asset's bank records establishes that Respondent Asset has never paid Respondent ELC or Calvert to purchase these assets.

In April 2006, Respondent Asset started invoicing Respondent Merc for electrical materials that had been in Respondent ELC's books. (G.C. ex. 17, p. 2, 12-14) From April 2006 to December 2007, Respondent Merc paid Respondent Asset \$9,475 for these electrical materials. (See Exhibit F) There is no record reflecting that Respondent Asset paid Respondent ELC to acquire these materials in order to be able to sale them.

The BMV records indicate that in January 2007, two vehicles that were previously registered in ELC's name were transferred to Respondent Asset's name even though there is no evidence that Respondent Asset made any payment to Respondent ELC in consideration for

these vehicles. (G.C. ex. 15) Similarly, the BMV records indicate that the Lexus was registered in Respondent ELC's name although it was paid off by Respondent Asset. (G.C. ex. 32, p. 61)

Based on the foregoing, it is evident that Respondent ELC and Respondent Asset are single employers. There has been an absolute lack of arm's-length transactions between these two companies and it is obvious that Calvert views them as a single enterprise for purposes of insurance, vehicle registrations, paying of invoices, and the lease and sale of assets of one by the other without any consideration.<sup>20</sup>

#### I. Judge Correctly Pierced Corporate Veils of Asset and ELC

##### 1. Applicable Case Law

In White Oak Coal Co., 318 NLRB 732 (1995), enfd. 81 F.3d 150 (4th Cir. 1996), the Board held that it will pierce the corporate veil when "there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct." Id. 735. In making its determination the Board will consider "(a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled." Id. Factors that are considered include: the failure to maintain adequate corporate records; evidence of under capitalization; disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; diversion of the corporate funds to noncorporate purposes; and transfer or disposal of corporate assets without fair consideration. Id. The corporate veil may also be pierced when "adherence to

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<sup>20</sup> In his Exception 23, Calvert argues that because ELC and Asset filed separate tax returns and engaged outside legal counsel and accountants they cannot be found to be single employers. The finding of the single employer status goes beyond simply hiring an accountant or attorney. It is requested that the Board strike Calvert's statement regarding the companies having a separate accounting system as this is a fact not in evidence.

the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.” Id. 735.

2. Calvert had Complete Disregard to the Separate Identity of Respondent Asset and Respondent ELC

The evidence established clearly that Calvert abused the corporate form as the owner and shareholder of both Respondent ELC and Respondent Asset.<sup>21</sup> He did not keep adequate records of transactions such as loans and repayments of loans to each of these entities. He also commingled personal and corporate funds. He diverted corporate funds to pay for personal expenses. Moreover, Calvert stripped Respondent ELC and Respondent Asset of any assets in order to evade his legal obligations. Calvert transferred all cash and other assets to himself before closing Respondent ELC and Respondent Asset without any consideration.

a.) Commingling of Funds and Assets

The record is replete with examples of the commingling of personal and business funds. For example, Calvert continuously used corporate funds to make personal loans to different individuals. For instance, in September 2006, Calvert loaned \$70,000 to an acquaintance of his son from Respondent Asset’s funds. (G.C. ex. 29, p. 42) Respondent Asset’s bank records only reflect a few deposits in repayment of this loan. Therefore, either the loan was not repaid or

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<sup>21</sup> In his Exception 24, Calvert argues against piercing the corporate veil of ELC and Asset. The Board is requested to strike statements on page 23, last par., regarding whether ELC was in good standing with the state and other third parties, and whether records were relied on by any outside entity. Calvert again implies that his accountants kept everything “legal”, ignoring their testimony that indicated the limitations of their professional engagement. In support of Exception 22, Calvert again makes reference to his accountants’ testimony and claims that he had no control over their work. Calvert again is mischaracterizing the accountants’ testimony. Any reference on page 22 about how the accounting was done and other employees who worked with the company’s finances should be stricken as facts not in evidence.

Calvert sometimes deposited the payments in Respondent Asset's account and other times deposited it some other account. (G.C. ex. 32, p. 7, ex. 33, p. 46, ex. 35, p. 28, ex. 36, p. 45, ex. 38, p. 24) Calvert also loaned money to Passman/ Respondent Merc from his company Retail Marketing. He later loaned Passman money from his personal funds and from his personal home equity line of credit. However, at the time that Calvert made the loans to Passman, he had transferred all of the money from Respondent ELC to himself in "repayment of loans" allegedly owed to him by Respondent ELC. As discussed in detail above, the loans to Respondent ELC and the repayments from Respondent ELC to Calvert did not follow any corporate formality. Also, as it has already been described Calvert, through Respondent Asset, charged Respondent Merc, the interest on his home equity line of credit. These transactions completely contradict Calvert's claim that the loans he made to Passman were strictly personal in nature.

The record clearly shows that Calvert used Respondent ELC and Respondent Asset funds to pay the interest on his home equity lines of credit and to pay-off the money he borrowed from his lines of credit. (G.C. ex. 29, p. 42, ex. 30 p. 3, 12-13) The home equity lines of credit are in Calvert and his wife's name. The record shows that he has advanced himself money from the lines of credit for many reasons which include to "loan" money to Respondent ELC and Respondent Asset, to loan money to Passman, to his son Kevin Calvert, and at one time to an acquaintance of his son, and to Calvert himself. Regardless of who ultimately received the borrowed money, Calvert paid the interest on his lines of credit with Respondent ELC and Respondent Asset funds consistently. Clearly, this interest expense was not business related when the record clearly shows that the money was not all borrowed for the companies and the line of credit was personal in nature.

Calvert also transferred all of Respondent ELC's assets to himself without any consideration. Calvert claimed that the assets were transferred to him in repayment of the loans he made to Respondent ELC. As has been discussed above, the loans Calvert made to Respondent ELC did not follow any corporate formality and were not arm's-length transactions. In reality, the only explanation for Calvert to transfer Respondent ELC's assets to himself was to leave the company asset-less in anticipation of litigation. After transferring Respondent ELC's assets to himself, Calvert leased some of these assets to Passman and Respondent Merc. However, Calvert commingled these assets with Respondent Asset because he had Respondent Asset act as the entity entering into the lease agreement with Passman. He also had Respondent Asset invoice Respondent Merc for former Respondent ELC electrical materials. In addition, Calvert allowed Merc to use vehicles in Respondent ELC's name and in Respondent Asset's without consideration. Later two of these vehicles were sold to Passman, and the proceeds of the sale must have gone to Calvert personally since Respondent Asset's bank records have no record of a deposit for the \$16,000. (G.C. ex. 46) Additionally, Calvert sold a bobcat and trailer formerly in Respondent ELC's books for \$20,000. (G.C. ex. 171) At the time of this sale Respondent ELC and Respondent Asset did not have any active bank accounts so Calvert must have pocketed the proceeds. The same must have happened when Calvert sold former Respondent ELC vehicles, the Intrepid for \$2,700 and two Chevy vans for \$2,300. (G.C. ex. 15)

b.) No Records or Documentation of Loans and No Arm's-Length Relationship

It is clear that Calvert "loaned" money to Respondent ELC and had Respondent ELC "repay" him, without any documentation and without keeping any corporate formalities. Calvert incredibly testified that he was not sure if these alleged loans were reduced to writing. (TR 469,473,474, 477, 484, 485) Clearly, they were not. There is no document or Promissory Note

that records any of the alleged loans. It is also clear that Calvert abused Respondent ELC's funds in such a way that he called any transaction a "loan" without a single shred of documentation that a loan was transacted. Calvert obviously did not keep track of any loans or paybacks between him and Respondent ELC until he decided he would close Respondent ELC and hide its assets from the NLRB and any other litigation. It was then that he planned to make up a list of alleged loans he had made to Respondent ELC and make it appear as though they were still outstanding. As described above, he wrote in his notes on bank balances, "can I claim any losses on money loaned to ELC?" (G.C. ex. 143) Evidently the plan was to make it appear as though Respondent ELC owed him so much money that he could justify transferring all of Respondent ELC's assets to himself at the closing of the company in partial "repayment" of the so-called loans. (TR 816, 818; G.C. ex. 146)

The record also established that Calvert loaned money to Respondent Asset continuously. Just as he did with Respondent ELC, none of the loans to Respondent Asset were reduced to writing. None of the loans were documented in any fashion except for when Calvert would make a handwritten note on checks or bank statements. In 2005, Calvert "loaned" Respondent Asset \$145,000, all of which was used to pay for the building build-out costs. As noted above, the build-out costs were much more than the amount Calvert loaned Respondent Asset. During that time the records show that Calvert refinanced the building because the mortgage amount changed drastically. The refinanced money never made it into Respondent Asset's account. It makes no business sense for Calvert to have incurred in the build-out expenses without having some kind of secured agreement with USF. However, it would appear that some of the money he loaned to Respondent Asset in 2005 and 2006 were considered by him loans to his son Kevin Calvert. (G.C. ex. 30, p. 12-13) In 2006, Calvert loaned Respondent Asset \$132,724. This

money was obviously used to pay for the many monthly expenses that were transferred from Respondent ELC to Respondent Asset when Respondent ELC closed. Also, this money was used to pay for the many personal expenses Calvert was paying with Respondent Asset funds after closing ELC. In 2007, Calvert loaned \$169,500 to Respondent Asset. Clearly, part of this money was used to pay for the \$6,600 monthly mortgage payment and building utilities. However, the reality is that a lot of this money was used to pay for Calvert's expenses as will be discussed below. In repayment of these many loans, Calvert made checks payable to himself and to his home equity line of credit in early 2007 for a total of \$129,000. The repayments were not documented.

Also, obviously the source of some of the money Calvert "loaned" to Respondent Asset in 2005 and early 2006 most probably came from the close to \$500,000 Calvert stripped from Respondent ELC during this same time period. (Compare Exhibits B and C) In addition, some of the money came from Calvert's home equity line of credit. As was previously discussed, Calvert advanced himself \$77,000 from the home equity line of credit and deposited it into Respondent Asset's bank account in 2006 and 2007. Another source of the "loans" to Respondent Asset came from Passman's repayments of the so-called personal loans Calvert made to him. Based on the foregoing, there should be no doubt that Calvert commingled his personal funds and corporate funds keeping absolutely no corporate formalities.

c.) Diversion of Corporate Funds to Pay for Personal Expenses

Calvert spent thousands of dollars of Respondent ELC and Respondent Asset funds to pay for personal expenses. For instance, although Linda Calvert was in Respondent ELC's payroll there was no evidence that she spent any substantial time working at the office. Calvert testified that she performed some administrative function but could not say what specifically or

how many hours she worked. (Tr. 394-395) Kevin Passman and Carol Schmidt rarely saw Linda Calvert in the office. (Tr. 292, 684-695) Linda Calvert did not make any sales calls or business related trips. (Tr. 394-395) Despite the fact that she did very little for the company Linda Calvert had a company-provided vehicle. (Tr. 429) Respondent ELC paid for Linda Calvert's car and also paid for the vehicle's insurance, and for Linda Calvert's gasoline, car washes and cell phone. (G.C. ex. 71, 181-183, 185; ex. 27, p 7, 177) There is absolutely no evidence that these were legitimate business expenses.

Similarly, Respondent ELC and Respondent Asset paid for Calvert's Lexus. (G.C. ex. 175, 181, ex. 28, p. 28, ex. 32, p. 61) No records show that Calvert kept track of his personal use of the Lexus as compared to business use. Respondent Asset paid-off the Lexus at a time when Calvert alleged to be "retired" and there is no evidence of what type of business transactions he was doing while using the Lexus to justify payments as a business expense.

The record also demonstrated that Calvert charged both business and personal expenses on his personal American Express and Citibank cards and had Respondent ELC and/or Respondent Asset pay the credit card statements in full. The balances on these credit cards, as described above, were not insignificant. (See Exhibit D for summary) Calvert charged substantial amounts related to vacations to Florida and golf expenses. (G.C. ex. 207, 64, 65)

Respondent ELC and Respondent Asset also paid for numerous golf related expenses and other personal expenses incurred by Calvert. As described above, Respondent Asset paid close to \$6,300 in golf related expenses made by Calvert. No records were kept indicating that these expenses were business related and none of the records indicate that Calvert was conducting business with anyone. (G.C. ex. 28, p. 9, 47; ex. 29, p. 34; ex. 31, p. 45, 55, ex. 30, p. 16; ex. 34, p. 4, 6, ex. 35, p. 6, 41, 46; ex. 36, p. 19; ex. 37, p. 39; ex. 39, p. 10-11) Respondent ELC also

made numerous payments to pay for Calvert's personal entertainment expenses. As described above, some of these expenses totaled close to \$16,000 from 2003 to 2006. (G.C. ex. 62, p. 20, 178-179; ex. 208, p. 1-3) In December 2005, ELC paid \$5,262 for a new furnace for Stringer's home, although Calvert called it a loan "pay-back". (G.C. ex. 43, p. 15-16) As described above, no credible evidence exists to indicate that Calvert paid back to the corporations any personal expenses paid with corporate funds.

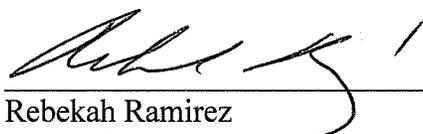
It should also be note that in diverting corporate funds to pay for personal expenses, by loaning money unrelated to the business, and by repaying himself loans without any formality, Calvert maintained Respondents ELC and Asset under-capitalized. Calvert argues that ELC was not undercapitalized because the concept does not apply to corporations whose financial situation has changed. (Exception 28) However, Calvert only makes reference to the fact that ELC was in business 23 years to assert it was not undercapitalized. This argument fails to carry any weight.

#### IV. CONCLUSION

For the foregoing reasons, counsel for the Acting General Counsel respectfully requests that Respondent's Exceptions be denied in their entirety.

Dated at Indianapolis, Indiana this 20<sup>th</sup> day of April, 2012.

Respectfully submitted by:



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**Exhibit A Promissory Notes Between Passman and Calvert**

Based on G.C. ex. 104 and 105

	Date	Amount	from	Deposited in Merc Acct	Date Repaid	Merc checks to Passman	Amount
1	11/30/05	\$5,000	Retail Marketing	1/5/06	4/6/06	4/5/2006 *	\$ 10,000
2	1/5/06	\$5,000	Retail Marketing		4/6/06		
3	3/2/06	\$10,000	Calvert check	3/2/06	4/20/06	4/20/06	\$ 10,000
4	3/29/06	\$10,000	Calvert check	3/29/06	5/19/06	5/18/06	\$ 10,000
5	6/12/06	\$7,500	Calvert check	6/13/06	10/3/06	9/30/06	\$ 7,500
6	7/11/06	\$10,000	Cashier's check	7/11/06	8/29/06	8/28/06	\$ 10,000
7	9/22/06	\$10,000	Cashier's check	9/25/06	12/30/06	12/29/06	\$ 65,000
8	11/7/06	\$40,000	Cashier's check	11/8/06	12/30/06		
9	12/14/06	\$15,000	Cashier's check	12/14/06	12/30/06		
10	12/20/06	\$15,000	Cashier's check	12/20/06	2/22/07	2/21/07	\$ 15,000
11	5/15/07	\$30,000	Cashier's check	5/14/07	8/17/07	8/15/07	\$ 30,000
<b>Totals</b>		\$157,500					\$ 157,500

\* Merc Check to Passman was for \$20k and from Passman to Calvert for \$10k

**Exhibit F Respondent Merc Checks to Respondent Asset**

Based on G.C. ex. 16, 17, 32 p. 64-65, 33 p. 21, 33 p. 47, 34 p. 44, 36 p. 23, 38 p. 25-26, 31 p. 19-20

Date	Total Amount	Calvert's AMEX	MAT REQ	Interest on line of Credi	Lease Payments	Comments
4/6/06	977.33	315.46	719.00			
5/4/06	1,010.54	383.70	978.94			
5/22/06	10,000.00				10,000.00	Jan. 06 Lease
7/26/06	1,224.44	75.00	1,135.80			
8/28/06	2,554.55		2,554.55			
9/30/06	1,414.70	731.34	85.92			
11/2/06	37.76			37.76		
11/21/06	2,296.29	2,296.29				
11/21/06	92.29			92.29		
12/21/06	1,648.35	1,331.91		316.44		
12/29/06	107,814.29	123.68	187.08		107,503.53	Feb. Dec. 06 Leases
1/8/07	3,649.10	3,590.80	58.30			
1/10/07	586.13			586.13		
2/5/07	9,689.00				9,689.00	Jan. 07 lease
2/14/07	1,964.62	1,765.52				
2/20/07	9,689.00				9,689.00	Feb. 07 lease
3/29/07	7,848.18	7,336.43	280.70	231.05		
4/3/07	5,000.00				5,000.00	partial lease pymt
4/4/07	223.05			223.05		
5/20/07	137.43			137.43		
6/14/07	339.93			339.93		
8/15/07	27,400.78	890.80	1,352.31	1,090.27	24,067.00	Mar., April, May 07 lease
11/9/07	2,028.15		2,028.15			
12/17/07	93.09		93.09			
12/12/07	232.11	232.11				
1/8/08	1,781.21				1,781.21	
2/19/08	507.48	507.48				
3/25/2008	75.84	75.84				
3/13/08	1,876.13				1,876.13	
4/23/08	422.70	422.70				
<b>TOTALS</b>	<b>\$ 202,614.47</b>	<b>\$ 20,079.06</b>	<b>\$ 9,473.84</b>	<b>\$ 3,054.35</b>	<b>\$ 169,605.87</b>	

**Exhibit B**

**Calvert Loans to Respondent Asset**

<u>Date</u>	<u>Amount</u>	<u>Documentation</u>		<b>Repayment of Loans from Calvert</b>		
3/2/05	\$ 15,000	deposit slip		from G.C. ex. 48 and 187, p. 31, 35, 38, 58		
3/31/05	\$ 10,000	deposit slip		<u>Date</u>	<u>Amount</u>	<u>Documentation</u>
4/12/05	\$ 10,000	deposit slip		3/31/05	\$ 6,000	ELC check
5/1/05	\$ 10,000	deposit slip		1/2/07	\$ 15,000	check to 5th 3rd xxx9689
5/3/05	\$ 100,000	deposit slip	2005 total	1/2/07	\$ 90,000	check to Calvert
5/9/06	\$ 2,000	check	\$ 145,000	2/27/07	\$ 10,000	check to 5th 3rd
6/30/06	\$ 4,000	cashier's check		4/4/07	\$ 14,000	check to 5th 3rd xxx9689
8/7/06	\$ 1,500	check		<b>Total</b>	<b>\$ 135,000</b>	
8/10/06	\$ 500	check		<b>Net</b>	<b>\$ 378,224</b>	
undated	\$ 1,500	check 1481				
8/28/06	\$ 10,000	check				
9/7/06	\$ 70,000	deposit slip				
9/7/06	\$ 1,224	deposit slip				
9/14/06	\$ 2,500	check				
9/26/06	\$ 7,000	check				
9/27/06	\$ 7,500	deposit slip				
11/29/06	\$ 10,000	cashier's check				
12/14/06	\$ 5,000	deposit slip				
12/29/06	\$ 10,000	deposit slip	2006 total			
1/17/07	\$ 2,000	check	\$ 132,724			
1/29/07	\$ 10,000	deposit slip				
2/27/07	\$ 10,000	check				
3/2/07	\$ 10,000	deposit slip				
3/26/08	\$ 20,000	deposit slip				
3/28/07	\$ 20,000	cashier's check				
4/27/07	\$ 12,000	deposit slip				
5/23/07	\$ 5,000	deposit slip				
5/31/07	\$ 10,000	deposit slip				
6/18/07	\$ 500	deposit slip				
6/29/07	\$ 10,000	deposit slip				
7/25/07	\$ 10,000	deposit slip				
8/1/07	\$ 7,500	deposit slip				
10/1/07	\$ 5,500	deposit slip				
10/25/07	\$ 17,000	cashier's check				
11/26/07	\$ 8,000	cashier's check				
12/12/07	\$ 3,000	deposit slip				
12/24/07	\$ 4,000	deposit slip				
12/28/07	\$ 5,000	deposit slip	2007 total			
1/29/08	\$ 12,000	cashier's check	\$ 169,500			
2/4/08	\$ 1,000	check				
2/19/08	\$ 10,000	deposit slip				
2/22/08	\$ 10,000	deposit slip				
3/13/08	\$ 5,000	deposit slip				
3/25/08	\$ 8,000	deposit slip				
4/26/08	\$ 16,000	deposit slip				
5/23/08	\$ 4,000	deposit slip	2008 total			
<b>Total</b>	<b>\$ 513,224</b>		<b>\$ 66,000</b>			

As reflected in G.C. ex. 9 and 42

Exhibit C

**Calvert Loans to Respondent ELC and Paybacks**  
**As reflected in G.C. ex. 41, 43, 49, 174, 186, 188, 203**

<u>Date</u>	<u>Amount</u>	<u>Documentation</u>
7/7/03	\$ 100,000	official check from 5th 3rd to ELC
11/14/03	\$ (100,340)	to 5th 3rd Home Equity
2/26/2004	\$ (60,000)	to 5th 3rd Home Equity
3/10/04	\$ 15,000	Calvert check to ELC
3/26/04	\$ (80,000)	to 5th 3rd Home Equity
4/12/04	\$ 100,000	Calvert check to ELC
4/16/04	\$ 30,000	Calvert check to ELC
6/2/04	\$ (40,000)	ELC check to Calvert
6/17/04	\$ 50,000	Calvert check to ELC
6/21/04	\$ 50,000	Calvert check to ELC
6/28/2004	\$ 50,000	Calvert check to ELC
7/20/2004	\$ 25,000	Calvert check to ELC
7/29/2004	\$ 50,000	Calvert check to ELC
8/24/2004	\$ 126,369	credit advice form
9/20/2004	\$ 50,000	Calvert check to ELC
10/18/2004	\$ (35,000)	to 5th 3rd Home Equity
11/23/2004	\$ (30,000)	to 5th 3rd Home Equity
2/7/2005	\$ 30,000	Calvert check to ELC
3/23/2005	\$ 28,000	Calvert check to ELC
3/29/2005	\$ 20,000	Calvert check to ELC
4/14/2005	\$ 40,000	Son's acct to ELC
4/18/2005	\$ 60,000	Son's acct to ELC
6/3/05	\$ (70,000)	ELC check to Calvert
7/11/05	\$ (10,000)	ELC check to Calvert
8/9/05	\$ (5,000)	ELC check to Calvert
8/9/05	\$ (2,500)	ELC check to Calvert
9/12/05	\$ (80,399)	Debit Advice from ELC to Home Equity
9/12/05	\$ (1,650)	Debit Advice from ELC to Home Equity
11/2/05	\$ (5,000)	ELC check to Calvert
11/2/05	\$ (60,000)	to 5th 3rd Home Equity
11/2/05	\$ (50,000)	to 5th 3rd Home Equity
11/8/05	\$ (10,070)	to 5th 3rd Home Equity
11/8/05	\$ (170,337)	to 5th 3rd Home Equity
12/13/05	\$ (5,262)	to Hamilton Heating and Air
2/13/06	\$ (75,000)	ELC check to Calvert
3/20/06	\$ (15,000)	ELC check to Calvert
3/20/2006	\$ (25,060)	to 5th 3rd Home Equity
8/16/2006	\$ 1,500	Calvert check to ELC to pay Yount and Co.
1/17/2007	\$ 584	Calvert check to IRS for ELC payroll
	\$ (104,164.85)	

**Exhibit D**

**Summary American Express Statements and Citibank Credit Card Statements  
Paid by Respondent ELC and Respondent Asset**

**According to G.C. ex. GC 63, 63b, 180, 64, 65 and 176, 207 and G.C. ex. 28-37**

**American Express**

	Total Charges	Charges Passman	Paid by
<b>2005</b>			
Sept	\$ 9,424		ELC
Oct	\$ 10,344		ELC
Dec	\$ 4,751		ELC
total	<u>\$ 24,519</u>		
<b>2006</b>			
Jan.	\$ 9,380		ELC
Feb	\$ 4,158	\$ 2,161	ELC
Mar	\$ 3,302	\$ 315	ELC
Apr	\$ 1,988	\$ 322	AM [GC 28 #3]
May	\$ 1,477	\$ 506	AM [GC 28 #22]
Jun	\$ 1,034	\$ 311	AM [GC 28 #39]
Jul	\$ 2,486	\$ -	AM [GC 29 #26]
Aug	\$ 754		AM [GC 29 #12]
Sep	\$ 1,524	\$ 862	AM [GC 29 #39]
Oct	\$ 493		AM [GC 30 #6]
Nov	\$ 2,321	\$ 2,297	AM [GC 30 #19]
Dec	\$ 2,271	\$ 1,494	
total	<u>\$ 31,188</u>		
<b>2007</b>			
Jan.	\$ 4,509	\$ 3,590	AM [GC 31 #33]
Feb	\$ 4,692	\$ 1,766	AM [GC 31 #44]
Mar	\$ 9,131	\$ 7,336	AM [GC 32 #12]
Apr	\$ 2,932	\$ -	
May	\$ 2,199	\$ -	AM [GC 33 #9]
Jun	\$ 4,104	\$ 891	AM [GC 34 #14]
Jul	\$ 5,490		
Aug	\$ 7,109		
Sep	\$ 1,350		AM [GM 35 #17]
Oct	\$ 3,354		AM [GM 35 #40]
Nov	\$ 1,835		AM [GC 36 #10]
Dec	\$ 842		AM [GC 36 #37]
total	<u>\$ 47,547</u>	\$ 21,851	

**Citi Bank Cards**

	Total Charges	Paid By
<b>2004</b>	4,032	ELC
<b>2005</b>		
Jan.	\$ 541	ELC
July	\$ 1,123	ELC
Aug	\$ 1,189	ELC
Sept	\$ 3,055	ELC
oct	\$ 1,176	ELC
nov	\$ 409	ELC
Dec	\$ 570	ELC
<b>2006</b>		
Jan.	\$ 1,042	ELC
Feb	\$ 1,698	AM [GC 27 #12]
Mar	\$ 2,520	ELC
Apr	\$ 2,121	AM [GC 28 #6]
May	\$ 485	AM [GC 28 #20]
Jun	\$ 1,259	AM [GC 29 #4}
Jul	\$ 702	
Aug	\$ 486	AM [GC 29 #11]
Sep	\$ 1,044	AM [GC 29 #36]
Oct	\$ 2,008	AM [GC 30 #7]
Nov	\$ 3,256	AM [GC 30 #20]
Dec	\$ 1,070	AM [GC 31 #7]
<b>2007</b>		
Jan.	\$ 882	AM [GC 31 #23]
Feb	\$ 2,033	AM [GC 31 #42]
Mar	\$ 982	
Apr	\$ 1,078	AM [GC 33 #18]
May	\$ 289	AM [GC 33 #6]
Jun	\$ 637	AM [GC 33 #27]
Jul	\$ 284	AM [GC 34 #12]
Aug	\$ 1,779	AM [GC 34 #34]
Sep	\$ 246	AM [GC 35 #13]
Oct	\$ 1,969	AM [GC 35 #36]
Nov	\$ 600	AM [GC 36 #8]
Dec	\$ 429	AM [GC 36 #34]
<b>2008</b>		
Jan.	\$ 1,042	AM [GC 37 #42]
Feb	\$ 1,457	AM [GC 37 #33]

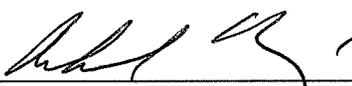
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Supplemental Decision has been filed electronically through the Division of Judges' E-Filing Program this 20<sup>th</sup> day of April 2012. On the same date a copy of said filing was served by electronic mail upon the following persons:

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