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**Re: Appeal from the Action of the Regional Director
SEIU Local 87 v. Exemplar Enterprises, Case No. 20-RC-149999**

Dear Mr. Griffin:

OF COUNSEL

- ✦ ANNE BUTTERFIELD WEILLS
- ✦ MICHAEL SIEGEL

This letter shall serve as the support for the appeal brought by Service Employees International Union Local 87 (SEIU Local 87) of the Regional Director's decision regarding the bargaining unit determination for the petitioned-for representational election. The Regional Director concluded that the multi-facility bargaining unit requested by SEIU Local 87 was not appropriate despite almost all of the factors used in such a determination supporting SEIU Local 87's requested multi-facility unit. The Director ruled that the requested unit was inappropriate because at the company's sole discretion, and without any need, there was no interchange of employees between the two buildings that Exemplar janitors cleaned. The Regional Director has misapplied the National Labor Relations Board precedents and presumptions and provided precedent that would allow the employer to easily be the sole arbiter of a bargaining unit determination.

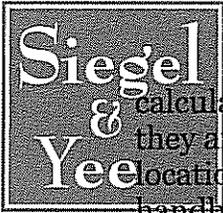
I. Summary of the Facts

SEIU Local 87 is a labor union that represents janitorial employees within the city of San Francisco. SEIU Local 87's union hall is located at 240 Golden Gate Avenue in San Francisco. Exemplar is a company owned and operated by Marth Lutt which provides janitorial services to office buildings in several locations throughout the United States. Exemplar provides janitorial services at three locations in San Francisco: 630 Sansome, 555 Battery, and 50 U.N. Plaza. 630 Sansome and 555 Battery are essentially one location and are treated as such.

630 Sansome has roughly ten employees and 50 U.N. Plaza has six employees. At both locations the employees do janitorial work consisting of cleaning the offices, floors, and bathrooms at the respective buildings. For each building, Exemplar has a separate contract with the United States government to provide janitorial services.

The working conditions, wages, and benefits at both locations are basically the same. Ms. Lutt testified that when wages and benefits are





calculated together for the employees at both 630 Sansome and 50 U.N. Plaza, they are equally paid. Sick days and vacation days paid to the employees at both locations are the same, and both locations are governed by the same employee handbook.

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Both 630 Sansome and 50 U.N. Plaza are governed by the exact same company organizational structure. Both locations are overseen by owner-operator Marth Lutt and both locations are supervised by the regional director Colleen Trundy. Ms. Lutt testified that she makes the “policy decisions for both locations with respect to labor policy, vacation policy, [and] pay policy,” along with everything else. Lutt and Trundy are also responsible for all hiring and firing decisions and disciplinary actions at both locations. The 630 Sansome location requires the employees to go through a higher level of security clearance before they can work in the building. However, this clearance is minimal; it consists of a credit check and criminal background investigation. Employees of Exemplar already have to pass a criminal background check to be hired.

Exemplar has temporary fill-in employees who can cover shifts at 630 Sansome and an additional employee who can cover shifts at 50 U.N. Plaza. Exemplar argues that there is no interchange of employees between 630 Sansome and 50 U.N. Plaza and that they keep the temporary fill-in employees separate between the two buildings. But Exemplar admits there is no real reason for this separation, as Ms. Lutt was unable to articulate a reason under cross examination other than to explain that the need to use workers from the fill-in list of one building in the other has not come up. This assertion is directly contradicted by Ms. Trundy’s testimony that she has had to cover janitorial shifts at 50 U.N. Plaza herself when her one fill-in worker was unavailable.

Exemplar claims that there are extensive differences in the cleaning process used at the two buildings. 50 U.N. Plaza is cleaned exclusively during the day, while at 630 Sansome, only half of the cleaning is done during the day. Exemplar claims that 50 U.N. Plaza is different because it is a LEED certified building and has special requirements, but Exemplar admitted that its employees do not have to get LEED certification, and that any training is minimal. Exemplar also claims that because 50 U.N. Plaza has a historical floor it requires different employees. But under cross examination Ms. Trundy admitted that the training provided for servicing the historical floor is minimal and takes roughly two hours. SEIU Local 87 members constantly service other historical floors throughout the city and have the requisite knowledge and experience in handling them. Exemplar claims that the two locations use different cleaning chemicals and this is a significant difference, but Trundy admitted that the training employees on the different chemicals would take about ten minutes. Trundy admitted that it would only take a half a day at most to train an employee to work at 50 U.N. Plaza despite all the alleged differences in work and equipment.

A hearing to determine the applicable bargaining unit was held before an Administrative Law Judge; following that hearing the Regional Director made a determination. SEIU Local 87 requested a bargaining unit that consisted of all Exemplar employees engaged in janitorial work within San Francisco. Exemplar argued that each building should be a separate bargaining unit and needs to hold

separate elections and negotiate separate contracts.

The Regional Director concluded that the two locations sought to be included in the bargaining unit were geographically close, under the same direct management and supervision, the employees at the two locations had the same exact job duties as janitors, and that the employees at both locations received equivalent pay and benefits. However, the Regional Director denied SEIU Local 87's requested multi-facility bargaining unit because Exemplar has made sure there is no interchange between the employees of the two facilities and because the union has not shown that the six employees of 50 U.N. Plaza have asked to join the union. On that logic the Regional Director certified the 630 Sansome building as the bargaining unit.

I. Legal Argument

a. The Factors Used to Determine if a Requested Multi-Facility Unit Is Appropriate Favor Granting SEIU Local 87's Requested Multi-Facility Unit

In determining if a requested multi-facility bargaining unit is appropriate the NLRB looks at the community of interests among the employees. The Board, in evaluating the community of interests among employees working at more than one location, considers several factors, including (1) similarity in employee skills, duties, and working conditions, (2) functional integration of the business, including employee interchange, (3) centralized control of management and supervision, (4) geographical separation of facilities, (5) collective bargaining history and extent of union organization, and (6) employee choice. *See Spring City Knitting Co.*, 647 F.2d at 1014; *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038 (9th Cir.1978); *NLRB v. Sunset House*, 415 F.2d 545, 548 (9th Cir.1969).

"Because unit determinations are dependent on slight variations of facts, the Board decides each case on an *ad hoc* basis, and it is not strictly bound by its prior decisions." *NLRB v. J.C. Penney Co., Inc.*, 620 F.2d 718, 719 (9th Cir.1980); *see also Pacific Southwest Airlines*, 587 F.2d at 1038. Each decision ultimately rests on the particular circumstances of that unique case when looking at the "community of interest" factors.

The only factors that do not weigh in SEIU Local 87's favor are the lack of employee interchange and employee choice.

b. The Legal Presumptions Established By the NLRB Favor the Establishment of the Requested Multi-Facility Bargaining Unit.

Originally the NLRB had a presumption favoring the creation of bargaining units that included the employer's entire operation. However, as this presumption was used by employers to make organizing employees more difficult, the NLRB adopted a presumption that a single facility was an appropriate unit that must be rebutted by the employer. This can also be used to

make organizing employees unnecessarily difficult as an employer can force the union to organize location by location. Thus the NLRB adopted another presumption.

The NLRB has a rebuttable presumption in favor of single facility bargaining units. However, that presumption does not apply where the union is the party seeking the multi-facility bargaining unit and the employer is requesting a single facility unit. *NLRB v. Carson Cable TV*, 795 F.2d 879, 886 (9th Cir. 1986).

c. Employee Interchange Should not be the Determining Factor in Light of the Legal Presumptions.

In light of the above presumptions which favor the creation of a multi-facility unit when requested by the union, the degree of interchange of employees between the facilities should not be the determining factor as that is something entirely within the control of the company and can be easily manipulated by the employer to create smaller bargaining units that must be organized and negotiated for separately.

The facts in the present case illustrate how a company can manipulate this factor in order to make organization of employees and bargaining more difficult for a labor union. Despite having employees on an on-call list who are without a set position and are waiting to replace temporarily absent employees, Exemplar refuses to use those employees to clean 50 U.N. Plaza. Exemplar has gone so far as to have their managers fill in for shifts and do janitorial work at 50 U.N. Plaza rather than call in one of these temporary employees. Exemplar could offer no reason for doing this. It is clear that the only reason for such actions is to make sure that there is no employee interchange whatsoever, to force SEIU Local 87 to organize and negotiate building by building.

The Regional Director determined that the lack of employee interchange was the determining factor in the decision to deny the multi-facility bargaining unit. The Director noted that even though there were no reasons why employees could not be interchanged between the locations, and the facts indicate the actually need to interchange employees, there can be no community of interest unless employees are actually interchanged. For this proposition the Director cited *Exsex Wire Corp.* 130 NLRB 450. However, the citation to this case is misplaced. That case involved the extension of a current collective bargaining agreement to a new location and not just a bargaining unit determination. Additionally, the facts of the case indicate that, unlike the present case, the two facilities were under separate supervision. *Exsex Wire* does not stand for the proposition that lack of employee interchange alone can be the determining factor.

This argument is further undercut by the Director's citation to *Jerry's Chevrolet, Cadillac Inc.*, 344 NLRB 689. The Regional Director cites this case for the position that "lack of significant employee interchange between groups of employees is a strong indicator that employees enjoy a separate community of interest." However, he cites the dissenting opinion for this proposition. The

majority opinion holds that the employer rebutted the single facility presumption despite the lack of employee interchange between multiple car dealerships that was necessitated by the maintenance employees' separate skills working on different types of cars.

The Director attempts to get around this decision by claiming that in the present case the facilities lack the geographic closeness and functional integration that was important to the majorities' decision. However, the Director neglects the fact that in the present case the same individuals have direct supervisory control and responsibility for labor relations at both facilities.

The Ninth Circuit in *NLRB v. Carson cable TV* stated that in contrast to what the Director has established here, "the most reliable indicium of common interests among employees is similarity in their skills, duties and working conditions. 795 F.2d 879, 885 (9th Cir. 1986) (citing *Pacific Southwest Airlines*, 587 F.2d 1042).

"The primary concern or "touchstone" of a bargaining unit determination is the question of whether all the members have a mutual interest in wages, hours, and other terms and conditions of employment. [citation] This key factor assumes special prominence in any bargaining unit determination....In particular, centralized control of day-to-day labor relations in areas of importance to employees may indicate an integrated operation where a broader unit may be appropriate." *N.L.R.B. v. Catherine McAuley Health Center* (6th Cir. 1989) 885 F.2d 341, 345. The employer's organizational structure is given considerable weight in determining an appropriate bargaining unit. *Central Greyhound Lines*, 88 NLRB 13.

d. The Factor of Employee Choice Is Not the Determining Factor

The Director indicates that because the hearing record does not indicate whether the employees at 50 U.N. Plaza wish to join the union, the multi-facility bargaining unit should be denied. The Director states in a footnote that "on this basis alone, it would appear that the board policy forecloses me from directing an election among the UN Plaza employees." For this proposition the Director cites *Speery Gyroscope Co.* 147 NLRB 988; *Brooklyn Union Gas Company* 123 NLRB 441; *the Hartford Electric Light Co.* 122 NLRB 1421 and *Great Lakes Pipe Line Co.* 92 NLRB 583. However, these cases do not stand for the proposition for which they are cited. Additionally that notion is rejected by the cases cited in the body of the decision which make clear that the extent employees have been organized is a factor but not a controlling one. *Audiovox Communications Corp.* 323 NLRB 647; *Pacific Southwest Airlines*, 587 F.2d 1032.

Additionally, the Director has flipped the rebuttable presumption on its head with this logic. A union requested multi-facility unit is presumed valid unless rebutted by the employer. By elevating the importance of this factor the Director has forced SEIU Local 87 to make the showing that the requested unit is appropriate. The employer provided no evidence that the employees were opposed to the union and no employees testified. If this factor is determinative then there is no presumption at all.

e. The Director has Misapplied the Precedent and Made a Ruling That Will Have Far-Reaching Negative Consequences

The Director's logic that the employer-created lack of employee interchange and the lack of a record on employee choice should outweigh the other clearly established factors is disturbing and should not be allowed by the NLRB to stand.

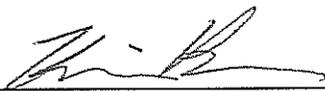
The Director has taken the two factors of employee choice and interchange and made those the determining factors in a bargaining unit determination while ignoring the factors that favor the union's requested bargaining unit. Such a decision is not appropriate.

Employee interchange should not be considered the determining factor in the union's request for a multi-facility bargaining unit as it is a factor directly in the control of the employer and can be used to manipulate the bargaining unit determination. As in this case where the employer's function—cleaning office buildings—necessitates that it work with small numbers of employees at different buildings, the chance for abuse is too great. All an employer has to do under the logic of the Director's decision is refuse to interchange employees despite a need to do so, and the union would be forced to negotiate contracts with the same employer on a building-by-building basis. Contracts that may cover as few as the four employees who work at 50 U.N. Plaza.

Additionally, forcing the union to prove that the employees in each separate building want to join the union defies the NLRB precedent and the established presumption that such a unit is appropriate and forces the union to make the required showing.

For the above stated reasons, SEIU Local 87 asks the NLRB to overturn the decision of the Regional Director and certify a multi-facility bargaining unit that includes all employees of Exemplar engaged in janitorial work within the City and County of San Francisco.

SIEGEL & YEE

By: 
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