UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

----------X

Omniplex World Services,
Employer,

and

Law Enforcement Officers Security Unions LEOSU-DC,
Petitioner,

Case No. 05-RC-179184

and

Service Employees International Union, Local 32BJ,
Intervenor.

----------X

SEIU LOCAL 32BJ's MEMORANDUM OF LAW IN SUPPORT OF IT'S MOTION TO INTERVENE IN RC PETITION

Service Employees International Union, Local 32BJ, hereby moves to intervene in this matter and submits the following Memorandum of Law in Support of its motion.

INTRODUCTION

The Service Employees International Union, Local 32BJ ("Union" or "Local 32BJ") submits this memorandum of law in support of its motion to intervene in the representation petition in this case.

Local 32BJ represents over 20,000 security guards on the eastern seaboard, including approximately 160 who work for the contractor Omniplex World Services ("Omniplex") at various FDIC locations in Washington D.C. and Virginia. Omniplex and Local 32BJ are parties to a collective bargaining agreement pursuant to which Omniplex has recognized Local 32BJ as the bargaining representative of all of its security guard employees at FDIC.

Local 32BJ seeks to intervene in this proceeding pursuant to Section 102.65 of the National Labor Relations Board Rules and Regulations and to appear on the election ballot should an election be directed. Local 32BJ is the recognized collective bargaining representative of Omniplex' guard employees at the federal facilities that petitioner seeks to represent. Local 32BJ obtained that status through majority support of the employees, as well as Omniplex' voluntary recognition. In light of the Board's recent decision in *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016), which calls into question the continuing validity of *University of Chicago*, 272 NLRB 873 (1984), it is appropriate for the Region to accede to the Union's request. The Board determined in *University of Chicago* that unions that represent guards and non-guards, such as Local 32BJ, cannot intervene in elections under Section 9(b)(3) of the Act. However, in *Loomis,* the Board recognized that the Act only prohibits the *certification* of the mixed unions; it does not impose additional restrictions on mixed units. Thus, the Board should return to its practice before *University of Chicago*, and allow mixed unions to intervene in elections and appear on ballots for the purpose of obtaining accurate arithmetic results of the workers' preferences. *See Bally's Park Place*, 257 NLRB 777 (1981). We urge the Region to permit the Omniplex' officers to assert their rights under the Act to, at a minimum, vote in favor of their incumbent collective bargaining representative if that is their choice.

ARGUMENT

Employees Who Have Selected Local 32BJ as Their Collective Bargaining Representative Should be Permitted to Have Their Interests Represented in this Election Proceeding by Local 32BJ's Intervention

Local 32BJ should be granted intervenor status in this proceeding and should be allowed to appear on the ballot. The employees – guards – are empowered under § 9(b)(3) of the Act to join Local 32BJ, even though Local 32BJ is a mixed guard/non-guard union. In light of their

selection of Local 32BJ as their bargaining representative and the existence of a collective bargaining agreement negotiated by Local 32BJ which has yet to expire, Local 32BJ should be permitted to intervene in this election proceeding.

Section 7 gives all employees, including guards, the right to bargain collectively through representatives of their own choosing. Section 9(b)(3) does not prevent guard employees from joining a labor organization that also represents non-guard employees. *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016) (employers violate 8(a)(5) if they withdraw recognition without actual loss of majority status, workers at issue were members of Teamsters locals); *White Superior Division*, 162 NLRB 1496 (1967), *enf'd* 404 F.2d 1100, 1103 (6th Cir. 1968) (employer violated § 8(a)(1) and (3) by abolishing the positions of security guards who organized with International Association of Machinists); *Bel-Air Mart Inc.*, 203 NLRB 339 (1973), *enf'd* 497 F.2d 322 (4th Cir. 1974) (following *White Superior Division*); *Burns International Security Services*, 216 NLRB 11 (1975) (employer violated § 8(a)(1) and (3) when it unlawfully discharged, surveilled and interrogated officers during an organizing campaign with Laborers' union); *Guardsmark, LLC*, 344 NLRB 809 (2005), *enf'd in part* 475 F.3d 369 (D.C. Cir. 2007) (employer violated § 8(a)(1) by maintaining unlawful handbook provisions; officers were organizing with SEIU local).

Furthermore, nothing in § 9(b)(3) prohibits an employer from recognizing and bargaining with a mixed guard/non-guard union for a unit of guards. *See Stay Security*, 311 NLRB 252 (1993). Indeed, in *Loomis Armored US, Inc.*, the NLRB overturned *Wells Fargo, Corp.*, 270 NLRB 787 (1984), and its holding that it was permissible for an employer to withdraw recognition from a guard/non-guard union, even without actual loss of majority support. 364 NLRB at pg. 2. The Board found that "this interpretation unnecessarily sacrifices one of the

Act's primary objectives—the promotion of stability of established collective bargaining relationships." *Id.* Moreover, the Board reiterated that "guards still retain their rights as employees under the [Act], notwithstanding the terms of Section 9(b)(3)." *Id.,* citing 93 Cong.Rec. 6601 (1947). Accordingly, the Board found that an employer's withdrawal of recognition, absent an actual loss of majority status, was unlawful. *Id.* at 7.

Loomis Armored US, Inc., was merely the latest in a series of affirmations of security guards' rights under the Act. In *The Wackenhut Corp.*, 348 NLRB 1290 (2006), the Board reaffirmed guards' § 7 right to organize with a mixed union and that guards possess the same rights as non-guard employees, affirming the ALJ's conclusion that

> "[a]lthough Section 9(b)(3) prohibits Board certification of a mixed-guard union, it does not operate to prevent guard employees from joining a labor organization, and this principle extends to labor organizations which also represent non-guard employees ... . Guards are employees within the meaning of Section 2(3) and possess the same rights as nonguard employees under Section 7."

Id. at n. 2 and 1297 (internal quotation marks omitted). *See also University of Chicago*, 272 NLRB at 876, n. 26 (guards are free under the Act to choose a guard/non-guard union); *Brink's*, 272 NLRB 868, 870 (1984) (the Act's prohibition on certification of a mixed union does *not* prohibit an employer from voluntarily recognizing a mixed union as the representative of a guard unit); *Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933 (1st Cir. 1992) (mixed guard/non-guard unions have the right under § 7 to organize guards and an employer of such guards may voluntarily recognize a mixed union as their collective bargaining representative); *NLRB v. White Superior Division*, 404 F.2d. at 1103 ("[i]f guard employees do join a union which also represents non-guards, their membership is not unlawful, and in fact an employer may, if it wishes, recognize such a union for purposes of collective bargaining").

When Congress intended to do more than deny a union certification under the Act, it has explicitly provided so. In the Section 9(f), (g) and (h) Taft-Hartley amendments to the Act, added concurrently with § 9(b)(3), Congress barred non-complying unions from participating in the Board's processes to a far greater degree than in § 9(b)(3). Subsection (f) explicitly prohibited the Board from investigating any questions concerning representation and from issuing complaints on unfair labor practice charges filed by any unions that did not file their constitution, bylaws, and certain reports with the Secretary of Labor. Similarly, subsection (h) explicitly prohibited the Board from investigating representation questions or pursuing unfair labor practices charges for any union that had not filed an anti-communist affidavit. Had Congress intended to dramatically restrict the access of guard/non-guard unions to its processes, it clearly knew how to draft § 9(b)(3) to prohibit more than certification. It did not do so. Moreover, when examining the restrictions of §§ 9(f), (g) and (h) in *NLRB v. District 50, United Mine Workers of America*, 355 U.S. 453 (1958) the Supreme Court noted that, even with the far more extensive prohibitions in these subsections, the Board could "conduct an election among the employees and certify the union if it wins the election provided it is in compliance but otherwise certify only the arithmetical results." *Id.* at 462.

Despite these principles, in *University of Chicago,* the Board held that unions representing both § 9(b)(3) guards and non-guards may not participate in Board-conducted elections for guard units— even for arithmetic purposes. As a result, these employees have no ability to freely choose their advocate in election proceedings concerning their workplace. *See General Shoe Corporation,* 77 NLRB 124, 127 (1948) ("it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the *uninhibited* desires of the employees.") (emphasis added).

University of Chicago was a far too expansive restriction on the rights of security guards under the Act and its holding violates the principle that "exceptions to the Act's protections should be construed narrowly." *Loomis Armored US, Inc.*, 364 NLRB at pg. 2. As the Board recently found, "the *only* limitation" under § 9(b)(3) for a guard-only bargaining unit "is that the labor organization representing such employees cannot be 'certified,' if, in other aspects of its operation it admits non-guard employees..." *Id.* at n.27 (emphasis supplied). Accordingly, there is no statutory bar to returning to the customary Board practice, engaged in prior to *University of Chicago,* of placing guard/non-guard unions on the ballot, in order to obtain an accurate arithmetic determination of voters' preferences. *See Bally's Park Place*, 257 NLRB 777 (1981); *Fisher-New Center Co.*, 170 NLRB 909, n.10 (1968); *Columbia-Southern Chemical Corp.*, 110 NLRB 1189, n.6 (1954). As the Board cautioned, "administrators and reviewing courts must take care to assume that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Id.* at pg. 5, citing, *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

The absurdity of the *University of Chicago* decision is placed into particularly sharp relief in situations such as this, where a guard/non-guard union is the incumbent union. Unless Local 32BJ is permitted to appear on the ballot, it will be impossible to determine the meaning of a "no" vote, creating confusion and placing employees, Omniplex and the Region in a difficult bind. Indeed, barring Local 32BJ from the ballot presents the officers with a false and misleading choice, between only "Law Enforcement Officers Security Unions LEOSU-DC" and "no union." Employees are prevented from reaffirming their support for their *current, lawful representative*, if they wish to do so. It will be impossible to determine whether a vote for "no union" indicates that the employees seek to continue to be represented by Local 32BJ, or that

they desire to be without union representation altogether. Thus, barring the lawful incumbent from the ballot dilutes employee free choice and substantively undermines the Omniplex employees' right to select a representative of their own choosing. *Cf. Williams v. Rhodes,* 393 U.S. 23, 31 (1968) ("the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot"). On

the other hand, permitting Local 32BJ to appear on the ballot and providing an arithmetical calculation of all of the votes would aid the "fundamental purpose of the 9(b)(3) prohibition..." as such a demonstration of employee choice would aid Omniplex when "decid[ing] for themselves whether to recognize and bargain with" Local 32BJ. *Loomis Armored US, Inc.*, 364 NLRB at pg. 5

Moreover, should the "no's" prevail, Omniplex is in a difficult position, as it would be faced with the unenviable choice of either continuing to recognize Local 32BJ, potentially in violation of the officers' wishes, or withdrawing recognition, also potentially in contravention of the officers' desire. Either result could subject Omniplex to further legal action. *See Loomis Armored US, Inc.*, 364 NLRB at 7. Similarly, should the "no" votes prevail, the Region would certify the results of the election as "no union," when, in actuality, the officers may wish to retain Local 32BJ. Thus, the Region would be complicit in affirmatively undermining the officers' wishes. Accordingly, the interests of the employees who wish to support their current collective bargaining representative should be given weight and Local 32BJ should be permitted to appear on the ballot.

CONCLUSION

For the foregoing reasons, Local 32BJ respectfully requests it be granted intervenor status in these proceedings.

Dated: July 1, 2016

Respectfully submitted,

Katy Dunn
Associate General Counsel
Service Employees International Union, Local 32BJ
25 West 18th Street
New York, New York 10011
(212) 388-3970 (office)
(212) 388-2062 (facsimile)
kdunn@seiu32bj.org

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, entitled **SEIU LOCAL 32BJ's MEMORANDUM OF LAW IN SUPPORT OF IT'S MOTION TO INTERVENE IN RC PETITION** was served on this 1ST day of July, 2016, by email and regular U.S. mail on the following parties:

Charles L. Posner, Regional Director
Barbara Duvall, Board Agent
National Labor Relations Board Region 05
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, MD 21201
charles.posner@nlrb.gov
barbara.duvall@nlrb.gov

Law Enforcement Officers Security Unions LEOSU-DC
1155 F Street NW
Unit 1050
Washington, DC 20004
leosunions@gmail.com

Grant Lally
Lally & Misir, LLP
220 Old Country Road
Mineola, NY 11501
glally@lallymisir.com

Katy Dunn
Attorney for Intervenor