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VIA E-FILING

Mr. Gary Shinners
Acting Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: AM Property Holding Corp. and Planned Building Services, Case Nos. 2-CA-33146, et al.

Dear Mr. Shinners:

Please accept this submission as the Position Paper of Planned Building Services ("PBS"), responding to the National Labor Relations Board's ("NLRB" or "Board") invitation to brief whether due process considerations support a remand to the Administrative Law Judge (the "ALJ") to develop an adequate record upon which the Board may determine whether PBS was a "successor" to the company that previously provided cleaning services at a New York City office building located at 80 Maiden Lane ("80 Maiden Lane" or "the building"). Consistent with the opinion of the United States Court of Appeals for the Second Circuit (the "Second Circuit") as it remanded this matter back to the Board, the issue as to whether PBS – alone – was a successor to the prior cleaning company has not been either a.) raised by the General Counsel or b.) otherwise explored before the ALJ.

Appreciating that the individual successorship theory was never adjudicated, there is virtually nothing in the record to support a determination that assuming, *arguendo*, PBS is a successor to the prior employer, that PBS also had a bargaining obligation. Understanding that a basic, single-location analysis is wholly inappropriate as applied to PBS and 80 Maiden Lane, PBS never had a bargaining obligation with SEIU Local 32 BJ ("Local 32 BJ" or the "Union") and, as a result, any further remedy, including a make whole remedy, is unwarranted. It is

acknowledged that the analysis regarding whether a single or multi-location unit is appropriate is intensely fact-specific and, as such, this matter can only be adequately adjudicated subsequent to the development of a record before an ALJ.

A. PBS is Not a Successor for Purposes of Establishing a Collective Bargaining Obligation

As the record evidence indicates, PBS began undertaking facility cleaning responsibilities at 80 Maiden Lane upon the building's April 2000 sale to AM Property Holding Corporation ("AM Property"). Prior to the sale of the building to AM Property, 80 Maiden Lane was owned by The Witkoff Group ("Witkoff"), which provided cleaning services through an entity known as Clean-Right, an in-house cleaning division of Witkoff. Clean-Rite employees were covered under a collective bargaining agreement between Local 32BJ and Witkoff, a member of the Realty Advisory Board on Labor Relations. See, e.g., SEIU Local 32BJ v. NLRB, 647 F.3d 435, 439 (2d Cir. 2011)

In its Consolidated Complaint, Counsel for the General Counsel asserted that AM Property and PBS were joint employers at 80 Maiden Lane. Although the ALJ agreed, the Board held that there was insufficient evidence to establish a joint employer relationship and that the Board was precluded from considering whether either AM Property or PBS could individually be deemed a successor to Clean-Right, as the General Counsel had not litigated the issue. See Id., 647 F.3d at 441. The Union appealed this, among other, issues to the Second Circuit, which has now ordered a remand for the limited purpose of determining whether PBS was an individual successor to Clean-Rite.[1] Acknowledging the due process considerations associated with litigating a matter which was not alleged in any complaint or otherwise advanced by Counsel for the General Counsel, the Second Circuit invites the Board to consider remand to an ALJ, which would allow an adequate record to be developed prior to the Board's adjudication of the assertion that PBS is a successor of Clean-Rite. See Id., 647 F.3d at 449.

When determining whether an employer is a successor for purposes of establishing a bargaining obligation, courts look to a "totality of circumstances" when applying a test with well-established factors. Professional Janitorial Service of Houston, Inc., 353 NLRB No. 65 at *13 (2008) citing Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987). In assessing whether

[1] Pursuant to the United States Court of Appeals for the D.C. Circuit's January 25, 2013 decision in Noel Canning v. NLRB, No. 12-1115, Planned Building Services reserves the right to challenge the Board's acceptance of the D.C. Circuit's remand, as well as any other decisions, rulings, orders, or opinions rendered by the NLRB during such time as it is determined that the Board is not properly appointed.

there has been "substantial continuity" between the operations of the predecessor and successor employers, the Board examines the following factors: 1) whether the business of both employers is essentially the same; 2) whether the employees are performing the same jobs for the same supervisors and under the same working conditions; and 3) whether the successor employer is employing the same production processes, and producing the same product for the same customers. See Id. Noting that courts assess these factors "primarily from the perspective of the employees," the Board looks further into whether work continued at the same location using the same equipment to produce the same product, and whether there was a continuity of the work force.

Applying these precepts to the instant circumstances, it becomes evident that PBS is not a successor to Clean-Rite. First, it is abundantly clear that the respective businesses of Clean-Rite and PBS are entirely different. It is understood that Clean-Rite is a wholly-owned subsidiary of Witkoff and exists exclusively for the purposes of supporting Witkoff's real estate investment operations. Unlike PBS, which is in the business of providing cleaning and janitorial services to the open market (and at market rates), Witkoff's janitorial operation – Clean-Rite – operates solely as a means by which Witkoff can maximize returns on its various real estate investments. The business of Witkoff (and, by extension, Clean-Rite) is wholly dissimilar from that of PBS.

Understanding that PBS and Clean-Rite operate for entirely different purposes, the day-to-day experience for PBS' employees differed substantially from that of Clean-Rite's employees. Although, at first glance, it might appear as though PBS and Clean-Rite perform similar work – cleaning office buildings – the method in which the work was supervised and ultimately performed is readily distinguished. Although the record developed before the ALJ is not conclusive, it appears that Clean-Rite utilized a site-specific supervisory and administrative framework. PBS, on the other hand, exercises centralized control of nearly all supervisory functions, including hiring, firing, and the determination of work rules.[2]

Further, the work performed by PBS at 80 Maiden Lane differed from that completed by Clean-Right. The Second Circuit noted that when former Clean-Rite employee Zoila Gonzalez accepted PBS' offer, she reported to work and was presented with a work cart and a mop. The

[2] PBS' headquarters-based approach (versus the location-specific control exercised by Witkoff and Clean-Right) is consistent with the differences between the respective companies. PBS provides contracted cleaning services at many dozens of locations throughout New York City and in parts of neighboring New Jersey and Connecticut. Clean-Right, by necessity, operates site-by-site, as Witkoff's website boasts that its portfolio of buildings extends beyond New York into New Jersey, Philadelphia, Chicago, Detroit, Hawaii, and Dallas. Appreciating that it would be nearly impossible to exercise any centralized administration over Witkoff's real estate empire, Clean-Rite established its own management structure at each location.

Second Circuit explained, "Gonzalez protested that she had not previously been required to perform this type of heavy work." SEIU Local 32 BJ, 647 F.3d at 440. Upon asserting that she had a medical condition that prevented her from mopping, Ms. Gonzalez was told that, if she refused to mop, no other work was available for her. See Id. Although it is respectfully submitted that a thorough and comprehensive analysis as to the differences in day-to-day tasks between Clean-Rite and PBS would benefit from remand to an ALJ, it is evident that PBS employees working at 80 Maiden Lane did not simply change name tags – work rules, job expectations, and reporting structures were all subject to wholesale revisions. In circumstances where "the successor employer's operational structure and practices differ in significant regard from those of its predecessor, the bargaining unit may no longer be the appropriate representative, and that fact would likely relieve the successor employer of an obligation to bargain with the union." SEIU Local 32 BJ, 647 F.3d at 448 citing NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972). PBS is not a successor of Clean-Rite for purposes of triggering any bargaining obligation.

B. Differences Between Clean-Rite, a Subsidiary Benefitting Witkoff, and PBS Establish That a Single Location Unit is Not Appropriate in This Instance

It is readily acknowledged that a single-facility unit is presumptively appropriate unless "the single facility has been effectively merged into a more comprehensive unit, or is so functionally integrated with another unit that it has lost its separate identity. Marine Spill Response Corporation, 348 NLRB 1282, 1285 (2006) citing R&D Trucking, 327 NLRB 531 (1999). In making this determination, the Board looks to the following factors: similarity of employee skills, functions and training, the distance between the facilities, the functional coordination in operations of the facilities, common supervision, centralized control of operations and labor, contact between employees at different facilities, employee interchange (particularly temporary transfers) between facilities, common wages, benefits, and terms and conditions of employment, and bargaining history, if any. Marine Spill Response Corporation, 348 NLRB 1282, 1285 citing Waste Management Northwest, 331 NLRB 309 (2000); New Britain Transportation Co., 330 NLRB 397 (1999).

In finding that a multi-location unit is appropriate, the Board has taken particular note of instances in which there is a frequent and regular interchange of employees between locations and where employees at one unit are required to follow the same processes and procedures as employees at other units. See, e.g., P.S. Elliott Services, Inc., 300 NLRB 1161, 1162 (1990). Although the record lacks development as to the level of integration of PBS' various New York City area operations, what evidence does exist indicates that only a multi-unit location is

appropriate in this instance. For example, the General Counsel's own evidence establishes that over 50 different PBS employees worked intermittently at 80 Maiden Lane – a location that typically needed only 12 employees at any one time.[3] Further, PBS' New York City-area employees are subject to virtually identical work rules, discipline procedures, and supervisory structure.[4] There is nothing unique whatsoever to a PBS employee working at 80 Maiden Lane versus a PBS employee working at any of the Company's other New York City-area buildings – the employees' experiences are virtually identical, with rapid and frequent interchange evidencing the commonality of work rules and centralized control exercised by PBS.[5]

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[3] The level of employee interchange between facilities is a critical factor in determining the appropriateness of a multi-location unit. The Board found a multi-location unit appropriate where 49 technicians employed throughout the state of West Virginia saw 20 temporary transfers within a 9 month period. Orkin Exterminating Company, Inc., 258 NLRB 773, 774 (1981). Where, as with PBS, all employees "have basically the same skills and functions," a multi-location unit is apparent when these employees readily transfer locations. See Id. Further, the Board's decision in Orkin found a multi-location unit appropriate notwithstanding the fact that the distance between locations approached 190 miles – PBS' New York City-area operations are in much closer proximity, lending to a high degree of centralized control.

[4] It is anticipated that Local 32 BJ will argue that various PBS facilities are covered by separate, building-specific collective bargaining agreements. The Union's argument represents the quintessential "red herring," as the collective bargaining agreements are nearly verbatim duplications of each other, applying consistent work rules and policies. Typically, the only provisions that would change are wage rates and the inclusion of a particular, site-specific job classification (e.g. handyman or package handler), which simply accounts for the different contract price that PBS is able to attain at each of its locations as well as the amenities available at a particular site. Where, for instance, PBS' margin is very low, employees tend to earn a lower hourly wage. Where the Company's margin is higher, employees tend to earn more. Recognizing that compensation and job classifications at PBS' New York-area locations was nearly identical, the various agreements are near carbon copies. Understanding that this key evidence was never entered into the record in this matter (as a result of the specific allegations brought by the General Counsel), remand to an ALJ will afford the Board the opportunity to review additional, meaningful evidence.

[5] PBS expects that Local 32 BJ will offer the Board a second "red herring" – suggesting that a heavily qualified and disclaimed statement in a 2002 Answer to Order Further Amending Consolidated Complaint and Notice Rescheduling Hearing is, somehow, determinative of the appropriate bargaining unit. Although the Union may "zero in" on PBS' statement that "Respondent denies that the service employees employed by Respondent at 80-90 Maiden Lane constitute an appropriate unit as contained in ¶ 8(c), and notes that the current appropriate unit is comprised of 75 and 80-90 Maiden Lane." Referencing this representation is entirely misleading, however, without closely reviewing PBS' second Affirmative Defense, stating "The bargaining unit set forth in ¶¶ 8(b) & (c) of the Consolidated Complaint is part of an overall unit contained in the master agreement between Respondent and the UWA, and in accordance with the master agreement and § 8(a)(5) of the Act, Respondent was obligated to recognize the UWA as the representative." The fact that PBS had a master agreement with UWA is controlling and further reinforces the centralized nature of PBS' labor relations and the fact that a multi-location unit is appropriate in this particular instance. Unlike UWA – which was fine with using a master agreement, subject to appropriate,

Significantly, the "common thread" in cases where the single facility presumption has been rebutted – in addition to centralized control of labor relations and personnel functions by the new employer among several facilities – is "no evidence of local autonomy or day-to-day local supervision at the predecessor facilities, evidence of common day-to-day supervision at different plants, evidence of regular interaction among employees, and employee transfers among the facilities including the petitioned for units." Marine Spill Response Corporation, 348 NLRB at 1286. Although the record would benefit from further development before an ALJ, there was precisely zero labor relations autonomy at the facility – everything was centrally controlled by PBS management.[6] Further, as discussed above and as can readily be established into the record on remand, employees working at various PBS locations regularly interacted with each other and often transferred between and among PBS' various New York City-area facilities.

C. Remand Is Appropriate to Develop the Facts Necessary to Determine Whether a Bargaining Obligation Existed and Whether PBS is a Legal Successor

PBS can only be found to be a legal successor – complete with an obligation to bargain with Local 32 BJ – upon a determination that a single location unit is appropriate. To do so, the Board must examine evidence relating to: 1) employee skills; 2) functions and training; 3) the distance between the facilities; 4) the functional coordination in operations of the facilities; 5) common supervision; 6) centralized control of operations and labor; 7) contact between employees at different facilities; 8) employee interchange between facilities; 9) wage rates; 10) benefits packages; 11) terms and conditions of employment; and 12) bargaining history. Respectfully, performing such an analysis based upon the paucity of information available in the record would be impossible. Understanding that the "Board has the primary responsibility to

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minor changes to reflect economic realities of various engagements – SEIU demands absolute adherence to its master contract, which has led to any number of disputes between PBS and SEIU in the past.

[6] The instant circumstances are readily distinguished from a situation where, in theory, centralized control exists, but where each individual facility has its own supervisory staff with the authority to make assignments, supervise work, schedule maintenance inspections, impose discipline, handle employee complaints, and set vacation schedules. See, e.g., Cargill Incorporated, 336 NLRB 1114 (2001). The worksite structure at PBS' various New York City-area locations is reflective of that examined by the Board in P.S. Elliott Services, another case involving an office building contractor. PBS, like P.S. Elliott Services, performs cleaning services with employees who are commonly supervised and who see frequent and regular interchange between sites. All employees abide by the same rules and regulations, follow the same procedures, and are subject to similar discipline procedures. P.S. Elliott Services, 300 NLRB at 1161-62. Accordingly, PBS' employees at 80 Maiden Lane did not have a community of interest sufficiently distinct and separate from PBS' other employees to warrant the establishment of a separate appropriate unit.

develop the factual record in each case," the development of a record adequately addressing PBS' bargaining responsibility (or lack thereof) must first be established. See, e.g., D&D Enterprises, Inc., 336 NLRB 850, 854 (2001). Appreciating that the Board has the primary responsibility for developing the factual record in each case, it is apparent that justice is best served by remanding this matter to an ALJ such that an adequate record can be developed to fairly adjudicate a cause of action which was not prosecuted by the General Counsel.

D. A Bargaining Demand is a Prerequisite to a Bargaining Obligation

Even assuming, *arguendo*, that a single location unit was, in fact, appropriate, at 80 Maiden Lane, Local 32 BJ never requested to bargain with PBS and, as such, the Company cannot now be held liable for failing to bargain with the Union. It is hornbook law that a bargaining request is a prerequisite to an employer's duty to bargain. See, e.g., Pontiac Osteopathic Hospital, 336 NLRB 1021, 1029 (2001); see also Armour & Co., 280 NLRB 824, 828 (1986). Even if a request to bargain "would have been rejected out of hand, it nevertheless is a prerequisite to a finding of a refusal to bargain." See Henry I. Siegel, Inc., 165 NLRB 493, 498 (1967). It is of little moment whether Local 32 BJ believed that requesting to bargain with PBS would be a fruitless exercise. Absent a request to bargain by Local 32 BJ, there can be no finding that PBS unlawfully refused to bargain with the Union

Planned Building Services respectfully submits that this matter is best remanded to an ALJ for further factual development. In so doing, PBS is confident that the record will conclusively demonstrate that PBS is not a successor for purposes of establishing a bargaining obligation and that a single location unit is not, in this instance, appropriate. Further, a remand will present the parties with the opportunity to provide evidence speaking to whether Local 32 BJ ever requested to bargain with PBS.

Respectfully submitted,

Marvin L. Weinberg
MLW:dg/s
cc: Andrew Strom, Esquire (via e-mail)
Olga Torres, Esquire (via e-mail)