UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 22

COMPUCOM SYSTEMS, INC.	§	
	§	
and	§	**Case No. 22-CA-28969**
	§	
COMMUNICATION WORKERS	§	
OF AMERICA, LOCAL 1032	§	

COMPUCOM SYSTEMS, INC.'S RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE

Respondent CompuCom Systems, Inc. ("CompuCom" or "Respondent"), by undersigned counsel and pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board, submits this, its Response to the Board's Notice to Show Cause and the General Counsel's Motion for Summary Judgment ("Motion") and Supplemental Memorandum in Support of Motion for Summary Judgment, and states as follows:

I. INTRODUCTION

On June 27, 2008, after a representation election was conducted, the Communication Workers of America, Local 1032 (the "Union") challenged five of the ballots that were cast. The result of the election showed 14 votes for and 10 votes against the Union, which means the five challenged ballots could be outcome determinative.

The Recommended Decision on Objections and Challenges issued on December 30, 2008 by Administrative Law Judge Steven Fish ("ALJ Recommendation") (Ex. F to the Motion) and the Board's Decision and Certification of Representative that issued on April 27, 2009 ("Board's April 27, 2009 Decision") (Ex. G to the Motion) in Case No.

22-RC-12925, denied the Union's challenges to three of the ballots, but sustained the Union's challenges to the ballots of John Paynter ("Paynter") and Robert Mikol ("Mikol"). Since the objections to the ballots of Paynter and Mikol were sustained, the other three unsuccessfully challenged ballots were also not counted in the election because they would not, in and of themselves, affect the certification results.

CompuCom refused to recognize the Union as the bargaining representative for the affected employees and refused to bargain with the Union. In response to the General Counsel's Motion filed on August 12, 2009, and the Board's original Notice to Show Cause, CompuCom filed its Response to the Board's Notice to Show Cause, arguing that: (1) the Board's Decision adopting the ALJ Recommendation was erroneous as a matter of law and fact because Paynter and Mikol were not supervisors within the meaning of Section 2(11) of the Act, and as a result their votes, along with the other contested ballots, should have been counted in the representative election; and (2) the Board's Decision was issued by a two member Board, contrary to the quorum provisions of Section 3(b) of the Act.

The Board subsequently issued a Decision and Order granting the Motion, which CompuCom appealed to the United States Court of Appeals for the District of Columbia Circuit. After the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that the Board may not act with fewer than three members, the Board's Decision was set aside, and the Board then issued a subsequent Decision, Certification of Representative, and Notice to Show Cause on August 23, 2010 ("Board's August 23, 2010 Decision"), which once again adopted the ALJ

Recommendation "to the extent and for the reasons stated in the April 27, 2009 Decision and Certification of Representative, which is incorporated herein by reference."

Because all five challenged ballots should have been counted in the representation election, Respondent contests the Board's April 27, 2009 Decision and the Board's August 23, 2010 Decision (the "Board's Decisions"), certifying the Union as the bargaining representative. The record evidence developed in Case No. 22-RC-12925, as well as the applicable legal authorities, demonstrate that Paynter and Mikol are not "supervisors" as defined by Section 2(11) of the Act, and therefore, the five ballots which were challenged during the representation election should be opened and counted.

II.
ARGUMENT & AUTHORITIES

A. Summary Judgment Should Be Denied Because Paynter And Mikol's Ballots Should Be Counted In The June 27, 2009 Representation Election, As They Are Not "Supervisors" Under The Act.

The Board's Decisions adopted the ALJ Recommendation, which sustained the Union's objections to the ballots of Paynter and Mikol and the determination that their ballots should not be counted in the representation election held on June 27, 2009. The Board's Decisions are erroneous as a matter of law and fact because Paynter and Mikol are not supervisors within the meaning of Section 2(11) of the Act, and as a result, their votes should have been counted. The ALJ Recommendation and the Board's Decisions are erroneous based on, among other things, the following exceptions, which were raised and briefed in Respondent's Exceptions to the Administrative Law Judge's Recommended Decision on Objections and Challenges and Respondent's Brief in Support thereof:[1]

[1] All pleadings and briefing submitted by Repsondent within Case No 22-RC-12925 are incorporated

1. To the conclusion that Paynter and Mikol have the authority to effectively make hiring recommendations, using independent judgment, and are therefore supervisors within the meaning of Section 2(11) of the Act.

2. To the finding that Paynter and Mikol possess the authority to effectively recommend hire even though they have not been involved in any regular employee interview for over two years.

3. To the conclusion that Aardvark Post, 331 NLRB 320 (2000), and its progeny are factually distinguishable and not dispositive cases.

4. To the finding that the technical assessment interviews conducted by Paynter and Mikol were not factually analogous to the administration of tests.

5. To the finding that the hiring recommendations made by Paynter and Mikol were based on more than their assessments of applicant's technical abilities.

6. To the finding that Respondent did not conduct independent investigations before following hiring recommendations made by Paynter and Mikol.

7. To the finding that the continued viability of Aardvark Post and its progeny is in "considerable doubt" after Oakwood Healthcare, Inc., 348 NLRB 686 (2006).

8. To the finding that Paynter and Mikol have substantially higher salaries than their team members, are considered to be supervisors by their team members, attend management meetings, and regularly perform different work from their subordinates, and that these secondary factors may be relied upon in support of the conclusion that Paynter and Mikol are supervisors under Section 2(11) of the Act.

In contending that the Board erred in overruling its exceptions and adopting the ALJ Recommendation, Respondent relies on the complete record that was developed during the proceedings in Case No. 22-RC-12925 (as defined by Sections 102.68 and 102.69(g)(1)(i) of the Rules and Regulations of the National Labor Relations Board), including without limitation all transcripts of any hearings in Case No. 22-RC-12925,

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herein by this reference, including its Post-Hearing Brief submitted on October 17, 2008 ("Respondent's Post-Hearing Brief") and its Exceptions to the Administrative Law Judge's Recommended Decision On Objections and Challenges and Brief in Support thereof, which were both submitted on January 23, 2009 ("Respondent's Exceptions and Brief in Support thereof").

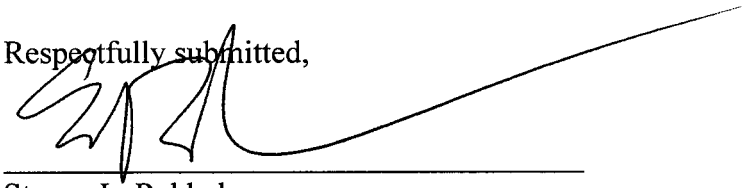
Respondent's Post-Hearing Brief; Respondent's Exceptions and Brief in Support thereof; the ALJ Recommendation; and the Board's Decisions.[2]

As a result, the General Counsel's Motion should be denied because Paynter and Mikol's ballots should have been counted in the representation election, as they are not "supervisors" as defined by Section 2(11) of the Act. If counted, their ballots, together with the other unsuccessfully challenged ballots, would have a determinative effect on the certification results and could result in no bargaining unit being certified.

III.
CONCLUSION

Based on the foregoing, Respondent respectfully submits that the General Counsel's Motion should be denied and the Board's Decision should be vacated.

Respectfully submitted,



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[2] In evaluating motions for summary judgment involving Section 8(a)(5) allegations, the Board is required to take "[o]fficial notice . . . of the 'record' in the [underlying] representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g)." See e.g., Hartzheim Dodge Hayward, 354 NLRB No. 22 (2009).

STATEMENT OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served on the following parties via email on this 7th day of October, 2010:

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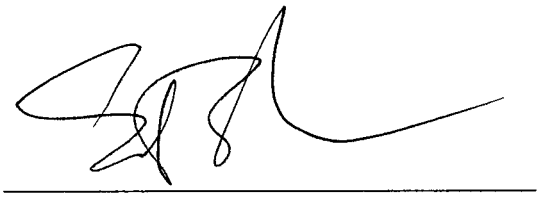

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