

I.

The Board asks this Court to hold this case in abeyance due to concerns of judicial economy because there are other cases pending before this Court involving similar issues. Motion at 4. But abatement is not appropriate because the Board's Order directly contradicts the established law of this Court; summary reversal of the Board's decision would therefore better aid judicial economy.

The Order subject to review in this proceeding finds Petitioner "violated Section 8(a)(1) of the Act by maintaining an arbitration agreement ... that waives employees' right to pursue class or collective actions in employment-related claims..." Motion at 2; *see also On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (attached as Ex. A). The Board acknowledges that the Order is based upon its decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).¹ Motion at 2. The Board also acknowledges that this Court rejected the Board's findings from *D.R. Horton* that the maintenance and enforcement of mandatory arbitration agreements containing class and collective action waivers violate Section 8(a)(1) of the Act. Motion at 2; *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014).

¹ The Board acknowledges that its decision in *Murphy Oil* "reaffirmed its decision and reasoning in *D.R. Horton*." Motion at 3.

This Court's *D.R. Horton* decision dictates reversal of the Board's Order finding Petitioner violated 8(a)(1) of the Act because absent a change in statutory law or a decision from the Supreme Court, a panel of this Court will not overturn another panel of this Court and this Court denied the Board's request for *en banc* review in both *D.R. Horton* and *Murphy Oil*.² See e.g. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.") Thus, the outcome of this proceeding is a foregone conclusion and summary reversal is appropriate given concerns for judicial economy.

II.

Moreover, there is no benefit to the Board's proposed abatement of this proceeding because the Board will not commit to applying the decisions of this Court from *Murphy Oil* or *Chesapeake* to this proceeding when those cases are decided consistent with this Court's *D.R. Horton* decision. As a result, an abatement of this proceeding only affords Petitioner a delay in having the Board's

² The Court denied the Board's Motion for Rehearing *en banc* in *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 on June 24, 2015.

Order set aside, and abatement should not be appropriate when it could possibly delay Petitioner's right to seek redress from this Court.

Petitioner has the right to seek quick redress before this Court and therefore asks this Court to deny the Board's Motion to Hold Case in Abeyance. The Court should instead grant Petitioner's motion for summary reversal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 13, 2015, the foregoing Response to Motion to Hold Case in Abeyance and Cross Motion for Summary Reversal was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

/s/ Edward Berbarie _____

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