

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

LESLIE’S POOLMART, INC.)	
)	
Petitioner)	
)	
v.)	No. 15-60627
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	

UNOPPOSED MOTION TO HOLD CASE IN ABEYANCE

To the Honorable, the Judges of the United States
Court of Appeals for the Fifth Circuit:

The National Labor Relations Board (“the Board”) moves the Court to hold this case in abeyance pending the Court’s decisions in *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, and *Chesapeake Energy Corp. v. NLRB*, No. 15-60326. The Board’s Decision and Order under review here, *Leslie’s Poolmart, Inc.*, 362 NLRB No. 184, 2015 WL 5027605 (Aug. 25, 2015), presents identical issues to those before the Court in *Murphy Oil* and *Chesapeake Energy*. For the purposes of judicial economy, the Board requests that the Court hold this case in abeyance until those cases have been decided. The Board has also filed simultaneous motions for abeyance in *The Neiman Marcus Group LLC*, 5th Cir. Case No. 15-60572;

PJ Cheese, Inc., 5th Cir. Case No. 15-60610; and *On Assignment Staffing Services, Inc.*, 5th Cir. Case No. 15-60642.

1. On August 25, 2015, the Board issued a Decision and Order finding that Leslie's Poolmart, Inc., violated Section 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, 158(a)(1), by maintaining and enforcing an arbitration agreement, as a condition of employment, that waives employees' right to pursue class or collective actions in employment-related claims in all forums, whether arbitral or judicial.

2. In support of its findings, the Board cited to and applied its decisions in *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *appeal pending*, 5th Cir. Case No. 14-60800 (oral argument held Aug. 31, 2015).

3. In *D.R. Horton, Inc. v. NLRB*, a divided panel of this Court rejected the Board's findings that the maintenance and enforcement of a mandatory arbitration agreement violated Section 8(a)(1) of the Act to the extent the agreement barred concerted pursuit of work-related legal claims in any forum, and denied enforcement of that violation. But it agreed with the Board that employees would reasonably interpret the agreement as prohibiting Board charges, and

enforced the Board's finding that, in that respect, the agreement violated the Act. 737 F.3d at 362-64.

4. In *Murphy Oil*, 2014 WL 5465454, the Board reaffirmed its decision and reasoning in *D.R. Horton*. The Board subsequently asked this Court to hear en banc *Murphy Oil*'s petition for review and the Board's cross-application for enforcement in order to reconsider the panel decision in *D.R. Horton*. The Court denied the Board's request. See Order Denying Motion for Hearing En Banc, ECF No. 7878747-2 (June 24, 2015). Thereafter, *Murphy Oil* was fully briefed and, on August 31, was argued and submitted to a panel of this Court (Circuit Judges Jones, Smith, and Southwick).

5. On May 5, 2015, Chesapeake Energy Corporation petitioned this Court to review a Board Order issued against it, also finding that a mandatory arbitration agreement requiring employees to arbitrate work-related claims individually violated the Act pursuant to *D.R. Horton* and *Murphy Oil*. The Board filed a motion to place *Chesapeake Energy* in abeyance pending the Court's decision in *Murphy Oil*, because the cases raised the same central issue. *Chesapeake Energy*, No. 15-60326, ECF No. 7914507-2 (May 14, 2015). *Chesapeake Energy* opposed the Board's motion, and the Court denied it on June 12 and set the case for briefing. ECF No. 7914507-3. *Chesapeake Energy*'s brief has been filed, and the Board's brief is due on September 30.

6. During the August 31 oral argument in *Murphy Oil*, Judge Jones expressed concern about the number of related cases presenting the same issue that were coming before the Court and asked to know the Board's position, specifically mentioning the pending *Chesapeake Energy* case as well as *Neiman Marcus*, discussed below. Both cases arose in other circuits and were brought to this Court on the employers' petitions for review. Board counsel explained that the National Labor Relations Act affords aggrieved parties a broad liberty of venue, allowing "[a]ny person aggrieved by a final order of the Board . . . [to] obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business" 29 U.S.C. § 160(f). Board counsel also pointed out that the Board had attempted to address the issue of judicial economy in *Chesapeake Energy* but that its motion to hold that case in abeyance pending decision in *Murphy Oil* had been denied.

7. In response to the judicial economy concerns expressed during the oral argument in *Murphy Oil*, the Board renews its prior suggestion that pending related cases, like the present one, be placed in abeyance. The Court presently has before it two cases addressing the merits of the principal issue disputed in this case. One, *Murphy Oil*, has been argued and the other, *Chesapeake Energy*, has been briefed by the employer and the Board's brief is due shortly. The Board submits

that it would best serve the interest of judicial efficiency, and conserve party resources, to place this case and others raising the identical issue in abeyance pending the Court's decisions in *Murphy Oil* and *Chesapeake Energy*.

8. The need for such a practical adjustment has only increased since the issue was raised at oral argument in *Murphy Oil*. In recent weeks, three other companies have filed petitions seeking review of Board decisions finding that their arbitration agreements violate the Act pursuant to *D.R. Horton* and *Murphy Oil*. On August 14, 2015, a petition was filed seeking review of the Board's Decision and Order in *The Neiman Marcus Group LLC*, 362 NLRB No. 157, 2015 WL 4647966 (Aug. 4, 2015), 5th Cir. Case No. 15-60572. *Neiman Marcus* originated from unfair-labor practice charges filed in California. The day of oral argument in *Murphy Oil*, a petition was filed seeking review of *PJ Cheese, Inc.*, 362 NLRB No. 177, 2015 WL 5001023 (Aug. 20, 2015), 5th Cir. Case No. 15-60610, *petition for review filed* Aug. 31, 2015. *PJ Cheese* originated from unfair-labor-practice charges filed in Alabama. And one week later, a petition was filed seeking review of *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), 5th Cir. Case No. 15-60642, *petition for review filed* September 17, 2015. *On Assignment* also originated from unfair-labor practice charges filed in California. Concurrent with the filing of this motion requesting that *Leslie's*

Poolmart be placed in abeyance, the Board is filing similar motions to hold these additional cases in abeyance.

9. Jeffrey A. Schwartz, counsel for Leslie's *Poolmart*, does not oppose this motion.

WHEREFORE, the Board respectfully requests that the Court hold this case in abeyance pending decisions in *Murphy Oil* and *Chesapeake Energy*.

Respectfully submitted,

/s/ Linda Dreeben
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Dated at Washington, DC
this 23rd day of September, 2015

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CERTIFICATE OF SERVICE

I certify that on September 23, 2015, the foregoing motion 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/ Linda Dreeben
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