

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

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RGIS, LLC)	Case No.
)	16-60129
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
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**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO
RGIS, LLC’S MOTION FOR SUMMARY DECISION**

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

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, opposes the motion for summary decision filed by RGIS, LLC (“the Company”), and respectfully requests that this Court deny the motion. In support of its opposition, the Board shows as follows:

1. On February 23, 2016, the Board issued a Decision and Order finding that the Company committed several violations of Section 8(a)(1), 29 U.S.C. § 158(a)(1), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. *RGIS, LLC*, 363 NLRB No. 132. In reaching its decision, the Board relied on its prior decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant 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), *enforcement denied in relevant part*, 808 F. 3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016). On March 3, the Company filed a petition with this Court seeking review of the Board's Order.

2. On March 8, 2016, the Board moved to have this case placed in abeyance pending the final resolution in *Murphy Oil*. The Company indicated its opposition to the Board without entering a separate filing, and on March 28 the Court denied the Board's motion. The Board filed a cross-application for enforcement of its Order on April 15.

On April 14, the Court issued a briefing schedule setting May 24 as the due date for the Company's opening brief. On May 20, the Company moved without opposition for an extension of time to file its brief until June 21, which the Court granted on May 23. The Company subsequently filed a motion on June 10 requesting that the Court stay briefing and enter a summary decision granting the Company's petition for review and denying the Board's cross-application for enforcement. On June 14, the Court granted the stay of briefing pending disposition of the Company's motion for summary decision.

3. In support of its motion for summary decision, the Company states that, because there has been no intervening Supreme Court decision or change in

statute, this Court is bound by “a well-settled Fifth Circuit rule of orderliness” to rigidly follow *D.R. Horton* and *Murphy Oil*. (Motion p. 9-10 (quoting *Jacobs v. Nat’l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).) But in so arguing, the Company fails to acknowledge that judicial review has not yet been fully exhausted.

The Court’s denial of the Board’s petition for rehearing en banc in *Murphy Oil* issued on May 13, 2016, and the Board has 90 days—until August 11—to file any petition for a writ of certiorari. The issue in *Murphy Oil* is a significant one for the administration of the Act. As an agency of the federal government, the Board requires time to fully consider whether to seek certiorari in *Murphy Oil*, as well as to consult with the Department of Justice. The Board’s consideration will include analyzing the Seventh Circuit’s decision in *Jacob Lewis v. Epic Systems Corp.*, ___ F.3d. ___, 2016 WL 3029464, which issued on May 26, 2016. That decision, in conflict with *Murphy Oil*, upholds the Board’s determination that an arbitration provision requiring employees to waive class and collective claims in any forum violates the Act.¹

¹ The Court of Appeals for the Eighth Circuit subsequently deepened the circuit split as to this issue in its June 2, 2016 decision in *Cellular Sales of Mo., LLC v. NLRB*, ___ F.3d. ___, 2016 WL 3093363, which reaffirmed that court’s rejection of the Board’s rule in an earlier, non-Board case.

The decision whether to seek Supreme Court review will affect not only *Murphy Oil*, but also approximately 70 Board decisions like this one, including nearly 60 decisions pending in various courts of appeals, of which over 30 are before this Court. It will also ultimately affect thousands of employers and employees subject to the Act. For those reasons, summary reversal is not appropriate at this time.

4. The Company also points to *On Assignment Staffing Services, Inc. v. NLRB*, No. 15-60642 (June 6, 2016), in which a panel of the Court entered a summary decision on a *Murphy Oil* issue, as evidence that a summary decision is likewise warranted here. (Motion p. 9-10.) *See also PJ Cheese, Inc. v. NLRB*, No. 15-60610 (June 16, 2016) (granting opposed motion for summary disposition). The Court, however, has taken an individualized approach to the more than 30 cases pending before it that implicate *Murphy Oil*. A day after the ruling in *On Assignment*, for instance, a panel denied a similar opposed motion for summary disposition in *SF Markets, LLC d/b/a Sprouts Farmers Market v. NLRB*, No. 16-60186 (June 7, 2016).² The Court has also stayed numerous cases³ and, after

² The employer subsequently filed a renewed motion for summary disposition, and the Board has filed an opposition.

³ Only two days prior to this filing, a panel of the Court granted the Board's unopposed motion to stay proceedings until the time for petitioning the Supreme Court for certiorari in *Murphy Oil* has passed and, "in the event that such a petition is filed, until the Supreme Court resolves the case." *See Neiman Marcus Grp.*,

mandate issued in *Murphy Oil*, expressly clarified in some stayed cases that the stays would remain in effect until the period for seeking certiorari in *Murphy Oil* expires.⁴ In this and several other cases, the Court denied the Board's motions for stays.⁵ In two of those, the Court has set briefing schedules, employers have filed their opening briefs, and the Board will be filing its responsive briefs at the end of the month.⁶ In sum, the Court has taken different approaches to the many pending *Horton/Murphy Oil* cases, and the panel's decision in *On Assignment* (and in *PJ Cheese*) need not control.

LLC, v. NLRB, No. 15-60572 (June 20, 2016). See also, e.g., *Brinker Int'l Payroll Co., L.P., v. NLRB*, No. 15-60859 (held in abeyance "until petition for rehearing en banc is resolved and time for petitioning the Supreme Court for a writ of certiorari has passed" in *Murphy Oil*); *RPM Pizza, L.L.C. v. NLRB*, No. 15-60909 (staying "further proceedings in this court pending resolution of *Murphy Oil*"); *SolarCity Corp. v. NLRB*, No. 16-60001 ("stay[ing] this case, pending resolution of . . . *Murphy Oil*").

⁴ On May 23, 2016, after issuing mandate in *Murphy Oil*, the Court issued Letters of Advisement in approximately 10 cases, informing the parties that it had reactivated the cases. See, e.g., *Citigroup Tech., Inc. v. NLRB*, No. 15-60856 (May 23, 2016); *Kmart Corp. v. NLRB*, No. 15-60897 (May 23, 2016) (same); *Domino's Pizza, LLC v. NLRB*, No. 15-60914 (same). The next day, the Court issued a Memorandum in many of those cases placing the case back into abeyance until the time for petitioning the Supreme Court has passed. Although the parties received those memoranda by ECF notification, they do not appear on PACER. A sample Memoranda from the Court is attached as Exhibit A.

⁵ See, e.g., *Securitas Sec. Serv. USA, Inc. v. NLRB*, No. 16-60304 (May 26, 2016).

⁶ See, e.g., *CitiTrends Inc. v. NLRB*, No. 15-60913 (employer brief filed April 25, Board brief due June 30); *Emp'rs Res. v. NLRB*, No. 16-60034 (employer brief filed April 25, Board brief due June 30).

5. The Board maintains that the best approach would be to stay all related cases until the period for seeking certiorari expires, or the Supreme Court decides or denies certiorari in *Murphy Oil*. In similar circumstances, the Court of Appeals for the District of Columbia Circuit held dozens of Board cases in abeyance while the Board determined whether to seek certiorari of that court's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). *See, e.g.*, *Ozark Auto. Distributors, Inc. v. NLRB*, 779 F.3d 576, 577 (D.C. Cir. 2015); *Europa Auto Imports, Inc. v. NLRB*, 576 F. App'x 1 (D.C. Cir. 2014). To preserve its Orders, however, the Board remains ready to brief this and any other similar case that is not stayed until *Murphy Oil* is final. Should the Company seek an extension of the due date for its brief until after the period for seeking certiorari has expired in *Murphy Oil*, the Board would not oppose that motion.

WHEREFORE, the Board respectfully requests that the Court deny the Company's motion for summary decision.

Respectfully submitted,

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 22nd day of June, 2016

EXHIBIT A

Case: 15-60856 Document: 00513518321 Page: 1 Date Filed: 05/24/2016

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

May 24, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

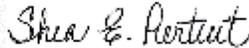
No. 15-60856 Citigroup Technology, Inc., et al v. NLRB
Agency No. 12-CA-130742

Please disregard the letter issued May 23, 2016. Case remains in abeyance pending the time for petitioning the Supreme Court for a writ of certiorari has passed.

Once the case has been removed from abeyance, you will receive notification from this court with any additional instructions.

Sincerely,

LYLE W. CAYCE, Clerk



By: Shea E. Pertuit, Deputy Clerk
504-310-7666

Mr. Jeffrey William Burritt
Mr. Edward M. Cherof
Ms. Linda Dreeben
Mr. Jeffrey A. Schwartz
Mr. Jonathan J. Spitz
Ms. Kira Dellinger Vol

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 22nd day of June, 2016