

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

**WAFFLE HOUSE, INC.**

**Petitioner,**

**v.**

**Case No. 16-60077**

**NATIONAL LABOR RELATIONS  
BOARD,**

**Respondent.**

**PETITIONER’S MOTION FOR SUMMARY REVERSAL**

TO: THE HONORABLE JUSTICES OF THE FIFTH CIRCUIT COURT OF APPEALS:

Petitioner Waffle House, Inc. (“Petitioner”) respectfully files this motion to summarily reverse the National Labor Relations Board’s (“NLRB”) February 1, 2016 Order (the “Order”) that the Petitioner violated Section 8(a)(1) of the National Labor Relations Act (the “NLRA”) by maintaining an arbitration agreement with a class and collective action waiver. The NLRB’s Order contradicts binding Fifth Circuit precedent that holds class and collective action waivers do not violate the NLRA and must be enforced under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*<sup>1</sup>

---

<sup>1</sup> See *D.R. Horton v. NLRB*, 737 F.3d 344, 355-64 (5th Cir. 2013), *petition for reh’g en banc denied*, Case No. 12-60031 (5th Cir. Apr. 16, 2014); see also *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015), *petition for*

## I.

On February 26, 2016, the Court placed this case in abeyance “pending outcome of *Murphy Oil USA, Inc. v. NLRB* [5th Cir. No. 14-60800],” after the NLRB on February 18, 2016 filed an unopposed motion to stay further proceedings in this case. On May 13, 2016, this Court denied the NLRB’s Petition for Rehearing En Banc in *Murphy Oil*. On July 6, 2016, this Court *sua sponte* removed this case from abeyance because the mandate in *Murphy Oil* was issued on May 23, 2016.

The law of this Circuit is now settled regarding arbitral class and collective action waivers. *See D.R. Horton v. NLRB*, 737 F.3d 344, 355-64 (5th Cir. 2013), *petition for reh’g en banc denied*, Case No. 12-60031 (5th Cir. Apr. 16, 2014) (“*DR Horton*”); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015), *petition for reh’g en banc denied*, Case No. 14-60800 (5th Cir. May 13, 2016) (“*Murphy Oil*”); *Chesapeake Energy Corp. v. NLRB*, 633 F. App’x 613, 614-15 (5th Cir. 2016) (“*Chesapeake*”).

Though the NLRB has until August 11, 2016<sup>2</sup> to file a petition for a writ of certiorari with the U.S. Supreme Court in *Murphy Oil*, whether or not the NLRB

---

*reh’g en banc denied*, Case No. 14-60800 (5th Cir. May 13, 2016); *Chesapeake Energy Corp. v. NLRB*, 633 F. App’x 613, 614-15 (5th Cir. 2016).

<sup>2</sup> Per Rule 13 of the Rules of the Supreme Court of the United States, the NLRB has 90 days to file a petition for a writ of certiorari after entry of judgment, which occurred in *Murphy Oil* on May 13, 2016.

does so is of no consequence to the status of this case. Therefore, Petitioner requests that this Court summarily reverse the NLRB's Order to conform to the law in this Circuit and this Court's rule of orderliness. *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.")

## II.

Where, as here, "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," the interests of judicial economy dictate summary disposition. *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). This Court should summarily reverse the NLRB's Order because it presents the same issues this Court has already decided in *D.R. Horton*, *Murphy Oil*, and *Chesapeake*. In fact, the NLRB has already conceded that "[t]he Board Decision and Order under review here **presents identical issues** to those in *Murphy Oil*." *See* the NLRB's Feb. 18, 2016 Unopposed Motion to Hold Case in Abeyance, p. 2 (emphasis added).

Reversal of the NLRB's Order is inevitable, and summary reversal is appropriate at this point. Under the law of this Circuit, *D.R. Horton*, *Murphy Oil*, and *Chesapeake* require reversal of the NLRB's Order. *See e.g. Jacobs*, 548 F.3d

at 378. In fact, this Court has recently granted summary reversal in similar cases involving the NLRB, and should do so here as well. *See 24 Hour Fitness USA, Inc. v. NLRB*, Case No. 16-60005 (5th Cir. June 27, 2016); *PJ Cheese Inc. v. NLRB*, Case No. 15-60610 (5th Cir. June 16, 2016); *On Assignment Staffing Servs., Inc. v. NLRB*, Case No. 15-60642 (5th Cir. June 6, 2016). *But see SF Markets, L.L.C. v. NLRB*, Case No. 16-60186 (5th Cir. June 7, 2016) (denying petitioner's opposed motion for summary disposition without prejudice).<sup>3</sup>

### III.

In accordance with this Circuit's rules, reversal of the NLRB's Order is a forgone conclusion. Accordingly, summary reversal is appropriate. The NLRB intends to oppose the relief sought in this motion.

Respectfully submitted, this 11th day of July, 2016.

*s/ Daniel E. Turner*

---

Daniel E. Turner  
Georgia Bar No. 719330  
dturner@littler.com  
Tracey T. Barbaree  
Texas Bar No. 00783594  
tbarbaree@littler.com  
LITTLER MENDELSON, P.C.  
3344 Peachtree Road N.E., Suite 1500  
Atlanta, GA 30326.4803

---

<sup>3</sup> In *SF Markets, L.L.C.*, on June 8, 2016, the petitioner renewed its motion for summary disposition, which motion is still pending before this Court.

Phone: 404.233.0330  
Facsimile: 404.233.2361

**Attorneys for Petitioner Waffle House,  
Inc.**

**CERTIFICATE OF SERVICE**

I certify that on July 11, 2016, the foregoing **Petitioner's 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, which will serve notice of the same on the following counsel of record:

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570

*s/ Daniel E. Turner*  
Daniel E. Turner  
Attorneys for Petitioner