

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

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<b>RPM PIZZA, LLC</b>	)	
	)	
<b>Petitioner</b>	)	<b>Case No.</b>
	)	<b>15-60909</b>
<b>v.</b>	)	
	)	
<b>NATIONAL LABOR RELATIONS BOARD</b>	)	
	)	
<b>Respondent</b>	)	
<hr/>	)	

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD  
TO RPM PIZZA’S MOTION FOR SUMMARY DISPOSITION**

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 disposition filed by RPM Pizza, LLC (“the Company”), and respectfully requests that this Court deny the motion.

In support of its opposition, the Board shows as follows:

1. On December 22, 2015, the Board issued a Decision and Order finding that the Company violated 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. *RPM Pizza, LLC*, 363 NLRB No. 82. 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 December 29, 2015, the Company filed a petition with this Court seeking review of the Board's Order.

2. On February 9, 2016, the Board moved without opposition to have this case placed in abeyance pending final resolution of *Murphy Oil*, because the case presents identical issues to those in *Murphy Oil*. On February 12, the Court granted the Board's motion and instructed that a "Stay Follow-up" be filed. The Board subsequently filed "Stay Follow-ups" on March 23, April 22, May 24, and June 27. On July 11, the Court granted the Company's opposed motion to terminate the Court's prior abeyance order.

3. In support of its motion, the Company argues that its petition is "ripe for summary disposition" because the outcome of this case is controlled by the Court's decisions in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *Murphy Oil USA, Inc. v. NLRB*, 808 F. 3d 1013 (5th Cir. 2015), *Chesapeake Energy Corp. v. NLRB*, 633 F. App'x 613 (5th Cir. 2016) (per curiam), and *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261 (5th Cir. June 16, 2016) (granting opposed motion to terminate abeyance order and for summary disposition). (Motion p. 3 (citing *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d

375, 378 (5th Cir. 2008) (one panel of Court may not overturn decision of another).) But in so arguing, the Company fails to acknowledge that judicial review of the Board's *Murphy Oil* decision has not yet been fully exhausted. (Motion p. 3-4.)

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 a petition for a writ of certiorari. The issue in this case 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.<sup>1</sup>

The decision whether to seek Supreme Court review will affect not only *Murphy Oil*, but also approximately 70 Board decisions like this one, including

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<sup>1</sup> 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. Cases raising the same issue are presently pending in several other courts of appeals.

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. Until the time for certiorari has passed, or certiorari is denied, the Board maintains that, in the interests of judicial economy and conserving party resources, the best course of action remains holding the case in abeyance.

4. In support of its motion, the Company cites (Motion pp. 2 & 3) the Court's granting of an opposed motion to terminate an abeyance order and for summary disposition on the *Murphy Oil* issue in *PJ Cheese*. See also *MasTech Servs. Co. v. NLRB*, No. 16-60011 (July 11, 2016) (granting opposed motion for summary reversal); *RGIS, LLC v. NLRB*, No. 16-60129 (July 7, 2016) (granting opposed motion for summary disposition); *24 Hour Fitness USA, Inc. v. NLRB*, No. 15-60005 (June 27, 2016) (same); *On Assignment Staffing Services, Inc. v. NLRB*, No. 15-60642 (June 6, 2016) (same). The Company does not acknowledge, however, that the Court denied an opposed motion for summary disposition in *SF Markets, LLC d/b/a Sprouts Farmers Market v. NLRB*, No. 16-60186 (June 7, 2016).<sup>2</sup>

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

More generally, the Court has taken an individualized approach to the approximately 30 cases pending before it that implicate *Murphy Oil*. The Court has stayed numerous cases<sup>3</sup> and, after 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.<sup>4</sup> In several other cases, the Court

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<sup>3</sup> See, e.g., *Acuity Specialty Prods., Inc. v. NLRB*, No. 16-60367 (July 1, 2016) (held in abeyance “pending the time for petitioning for certiorari” in *Murphy Oil*); *Lincoln E. Mgmt Corp. v. NLRB*, No. 16-60401 (July 1, 2016) (held in “abeyance until time for petitioning for certiorari in [*Murphy Oil*] has passed and, in the event that such a petition is filed, until the Supreme Court resolves the case”); *SolarCity Corp. v. NLRB*, No. 16-60001 (Jan. 26, 2016) (“stay[ing] this case, pending resolution of . . . *Murphy Oil*”); *Brinker Int’l Payroll Co., L.P. v. NLRB*, No. 15-60859 (Dec. 24, 2015) (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*).

<sup>4</sup> On May 23, 2016, after issuing mandate in *Murphy Oil*, the Court issued Letters of Advisement in approximately 10 stayed 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. Thereafter, the Court denied a motion to lift the abeyance in one such case. *Domino’s Pizza*, No. 15-60914 (July 13, 2016). The Court also subsequently withdrew some orders granting stays and denied the Board’s motion instead. See, e.g., *Citigroup*, No. 15-60856 (July 7, 2016) (withdrawing December 21, 2015 order granting motion to stay and denying motion). In another case, however, the Court granted *nunc pro tunc* the Board’s motion to stay. *Brinker Int’l Payroll Co., L.P. v. NLRB*, No. 15-60859 (July 6, 2016) (granting stay “until the time has elapsed for petitioning for a writ of certiorari in” *Murphy Oil*).

denied the Board's motions for stays.<sup>5</sup> In others, the Court has set briefing schedules. Employers have filed their opening briefs in two such cases and the Board has filed its responsive briefs.<sup>6</sup> In sum, the Court has taken different approaches to the many pending *Horton/Murphy Oil* cases, and the panel's decision in *PJ Cheese* (and *MasTech*, *RGIS*, *On Assignment*, and *24 Hour Fitness*) need not control.

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

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<sup>5</sup> *See, e.g., Securitas Sec. Serv. USA, Inc. v. NLRB*, No. 16-60304 (May 26, 2016); *RGIS, LLC v. NLRB*, No. 16-60129 (Mar. 28, 2016).

<sup>6</sup> *See, e.g., Citi Trends, Inc. v. NLRB*, No. 15-60913 (employer brief filed April 25, Board brief filed June 28); *Emp'rs Res. v. NLRB*, No. 16-60034 (employer brief filed April 25, Board brief filed June 30). *See also Prof'l Janitorial Serv. of Houston, Inc. v. NLRB*, No. 15-60858 (setting briefing schedule); *Securitas Sec. Serv. USA v. NLRB*, No. 16-60304 (same); *UnitedHealth Group, Inc. v. NLRB*, No. 16-60122 (same).

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 disposition.

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 20th day of July, 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

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600 S. MAESTRI PLACE  
NEW ORLEANS, LA 70130

May 24, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

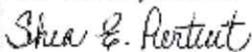
No. 15-60856 Citigroup Technology, Inc., et al v. NLRB  
Agency No. 12-CA-130742

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 July 20, 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 20th day of July, 2016