

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

---

<b>SECURITAS SECURITY SERVICES USA, INCORPORATED</b>	)	
	)	
	)	
<b>Petitioner/Cross-Respondent</b>	)	<b>Case No.</b>
	)	<b>16-60304</b>
<b>v.</b>	)	
	)	
<b>NATIONAL LABOR RELATIONS BOARD</b>	)	
	)	
<b>Respondent/Cross-Petitioner</b>	)	

---

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD  
TO PETITIONER/CROSS-RESPONDENT’S MOTION  
FOR SUMMARY REVERSAL**

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 reversal filed by Securitas Security Services USA, Incorporated (“the Company”), and respectfully requests that this Court deny the motion.

**BACKGROUND**

On May 11, 2016, the Board issued a Decision and Order finding that the Company violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(1)) (“the Act”), by maintaining two arbitration agreements in which employees were required, as a condition of employment, to

waive their right to pursue class or collective actions involving employment-related claims in all forums, and by enforcing one of those agreements. *Securitas Sec. Servs. USA, Inc*, 363 NLRB No.182, 2016 WL 2772291, at \*1-3. The Board found that the Company additionally violated Section 8(a)(1) by maintaining, in both agreements, language that employees would reasonably construe as restricting their right to file unfair-labor-practice charges with the Board. *Id.*, at \*3-5.

In finding violations based on the class- or collective-action waivers in the Company's agreements, 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 May 17, 2016, the Company filed a petition with this Court seeking review of the Board's Order. Soon thereafter, 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*. The Court denied the Board's motion and set the case for briefing. Under the current briefing schedule, the Company's opening brief is due on September 7, 2016.

## ARGUMENT

In its motion, the Company argues that summary reversal of the Board’s decision is appropriate because this case “presents the same issues that the Court has already decided” 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), and *Chesapeake Energy Corp. v. NLRB*, 633 F. App’x 613 (5th Cir. 2016) (per curiam). (Motion p. 2.) 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, and that *Murphy Oil* does not resolve the largely factual question of whether employees would reasonably read the agreements at issue as restricting their right to file charges with the Board.

1. 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 of the validity of concerted-action waivers in arbitration agreements 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 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.

As the Company notes (Motion pp. 2 & 3), the Court has granted opposed motions for summary disposition based on *Murphy Oil* in several other cases involving concerted-action waivers in arbitration agreements. *See, e.g., SF Markets, LLC d/b/a Sprouts Farmers Market v. NLRB*, No. 16-60186 (July 26, 2016); *UnitedHealth Grp., Inc.*, No. 16-60122 (July 21, 2016); *MasTech Servs. Co. v. NLRB*, No. 16-60011 (July 11, 2016). Nonetheless, the Board maintains that the

---

<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.

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. Distribs., 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.

2. In this particular case, moreover, summary reversal is inappropriate, as briefing will be necessary to address the unfair-labor-practice findings based on the Company's maintenance of agreements that employees would reasonably read as restricting their right to file charges with the Board. The Company contends that no substantive review of those findings is necessary because "settled law in this Circuit"—specifically, *Murphy Oil*—establishes "that an arbitration agreement does not violate the Act if it expressly states that employees are not precluded from filing charges with the Board." (Motion p. 3.) But the Court in *Murphy Oil* made no such blanket statement. Rather, it applied a fact-specific analysis, as required by Board law, to determine how employees would reasonably interpret the language of the agreements at issue. 808 F.3d at 1019-20.

Pursuant to that analysis, the Court simply held that the particular language preserving the right to file Board charges in Murphy Oil’s Revised Arbitration Agreement made it “unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges,” especially where “[t]he other clauses of the agreement d[id] not negate that language.” *Id.* at 1020. And although the Court stated that an express provision confirming employees’ right to file charges with the Board “would assist” employees in understanding their rights, the Court did not hold that any express provision regarding employee rights will eliminate the possibility of a violation as the Company suggests. *Id.* at 1019.

The language of the arbitration agreements here is markedly different from the language found lawful in *Murphy Oil*. Compare *Securitas*, 2016 WL 2772291, at \*1 (employer agreements permit filing of claims and charges before an administrative agency, including the Board, but “only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate”), with *Murphy Oil*, 808 F.3d at 1019-20 (employer agreement expressly stated that “nothing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]”). And, as the Board specifically found, the language of the Company’s agreements is equivocal and confusing as to the employees’ right to file charges

with the Board. *See Securitas*, 2016 WL 2772291, at \*4. Accordingly, the violations based on interference with employees' right to file Board charges involve a factual question, anchored to the specific language of the agreements in the record, that cannot be resolved simply by reference to *Murphy Oil*. The Court has granted summary disposition in only one case involving such a violation, and did so based on the employer's concession that the agreement unlawfully interfered with the right to file Board charges. *See PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261 (5th Cir. June 16, 2016) (summarily denying enforcement of violations based on concerted-action waiver and enforcing violation based on interference with right to file Board charges).<sup>2</sup>

3. In sum, the Board opposes the Company's request for summary reversal of the Board's Order. Inasmuch as the Board has not yet exhausted its avenues of appeal in *Murphy Oil*, the Board respectfully submits that summary reversal of the Board's findings that the Company unlawfully maintained and enforced concerted-action waivers would be premature. Summary reversal of the Board's findings that the Company unlawfully interfered with employees' right to file unfair-labor-practice charges with the Board is inappropriate because those findings are predicated on a detailed, factual analysis of the documentary evidence in this case.

---

<sup>2</sup> The relevant documents in *PJ Cheese* are attached as Exhibits A and B.

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

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, D.C.  
this 28th day of July 2016

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

<b>PJ CHEESE, INC.,</b>	)	
	)	
<b>Petitioner Cross-Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>No. 15-60610</b>
	)	
<b>NATIONAL LABOR RELATIONS</b>	)	
<b>BOARD,</b>	)	
	)	
<b>Respondent.</b>	)	

---

Petition for Review of an Order of  
The National Labor Relations Board  
And Cross-Petition for Enforcement

---

**PETITIONER CROSS-RESPONDENT PJ CHEESE, INC.’s**  
**MOTION FOR SUMMARY DISPOSITION**

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

Petitioner Cross-Respondent PJ Cheese, Inc. (“PJ Cheese”) respectfully  
moves the Court for summary disposition of 1) its Petition for Review and 2)  
Respondent Cross-Petitioner National Labor Relations Board’s (“NLRB”) Cross-  
Application for Enforcement of an Order of the National Labor Relations Board in

the above-captioned proceeding. In support of its motion, PJ Cheese states as follows:

1. This case is one of many pending before this Court involving:

a) this Court's determination in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5<sup>th</sup> Cir. 2013) that collective action waivers in employment arbitration agreements do not violate Section 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1);

b) the NLRB's continued refusal to acquiesce to that decision in petitions for review filed in this Court; and

c) this Court's recognition in *D.R. Horton* that deference to the NLRB is due with regard to findings that language contained in arbitration agreements that leads employees to reasonably believe that they are prohibited from filing unfair labor practice charges with the NLRB violates the Act.

2. PJ Cheese initiated the above-captioned proceeding by filing a Petition for Review of the NLRB's August 20, 2015 Decision and Order issued in *PJ Cheese, Inc. and James Sullivan*, NLRB Case No. 10-CA-113862, reported at 362 NLRB No. 177. The NLRB seeks cross-enforcement.

3. In the Decision and Order, the NLRB affirmed three findings of Administrative Law Judge William Nelson Cates:

1. “that PJ Cheese violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that requires its employees, as a condition of employment, to submit their employment-related claims for resolution by individual arbitration, thereby compelling them to waive their Section 7 right to pursue such claims through class or collective action in all forums, arbitral and judicial;”
2. “that maintenance of the arbitration policy also violates section 8(a)(1) by leading employees to reasonably believe that they are prohibited from filing unfair labor practice charges with the [NLRB];” and
3. “that [PJ Cheese], though its parent company, PJ United, Inc. (PJU), violated Section 8(a)(1) by enforcing the arbitration policy in response to a lawsuit that Sullivan filed against PJU.”<sup>1</sup>

4. The Decision and Order orders PJ Cheese to do certain things related to the NLRB’s three findings.

5. The issue with regard to the collective action waiver has been decided by this Court. Indeed, on September 23, 2015, the NLRB moved this Court to hold this case in abeyance (“the Abeyance Motion”) pending this Court’s decisions in *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 and *Chesapeake Energy Corp. v. NLRB*, No. 15-60326 because this case presents the identical issue presented for review in *Murphy Oil* and *Chesapeake Energy*--whether the maintenance and enforcement of a collective action waiver contained in an arbitration agreement violates the Act.

6. On October 7, 2015, this Court granted the Abeyance Motion.

---

<sup>1</sup> This finding is simply an extension of the first finding and cannot stand alone (*i.e.*, if the first finding falls, so must the third).

7. On October 26, 2015 this Court decided *Murphy Oil*, ruling that “Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreement at issue”<sup>2</sup> in light of the precedent decision in *D.R. Horton*.

8. On February 12, 2016, this Court decided *Chesapeake Energy*. Noting that “[t]he parties ... agree[d] that enforcement of [the Board’s Order with regard to the collective-action waiver] is precluded by this Court’s decision in *D.R. Horton, Inc. v. NLRB*,” this Court granted Chesapeake Energy’s petition for review of the NLRB’s collective action order in that case.<sup>3</sup>

9. On April 5, 2016, PJ Cheese moved the Court to terminate the order placing this case in abeyance in light of the Court’s *Murphy Oil* and *Chesapeake Energy* decisions.

10. On April 19, 2016, this Court granted PJ Cheese’s motion. A briefing schedule was subsequently entered pursuant to which PJ Cheese’s principal brief in this Petition for Review is due to be filed by June 13, 2016.

11. PJ Cheese’s Petition for Review of the NLRB’s Decision and Order with respect to the collective action waiver simply re-presents an issue decided by

---

<sup>2</sup> *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015).

<sup>3</sup> *Chesapeake Energy Corp. v. NLRB*, 633 Fed. App’x 613 (5<sup>th</sup> Cir. 2016).

this Court in *D.R. Horton*, *Murphy Oil*, and *Chesapeake Energy*. The law of this circuit is clear: collective action waivers contained in employment arbitration agreements do not violate the Act.<sup>4</sup>

12. Similarly, the Decision and Order with respect to the arbitration agreement's language that the NLRB found reasonable leads employees to believe that they are prohibited from filing unfair labor practices does not present new or different facts and faces established law of this Court. PJ Cheese respectfully disagrees with the NLRB's findings, but PJ Cheese recognizes that this Court's rule of orderliness requires enforcement of that aspect of the Decision and Order.

13. Summary disposition of a matter on appeal, without the need for full briefing on the merits or oral argument, is proper in at least two circumstances: (1) "where time is of the essence;" or (2) "those in which 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, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5<sup>th</sup> Cir. 1969) (granting the NLRB's motion for summary disposition of an appeal and noting that "[w]hen a case is frivolous or its outcome so certain as a practical matter the appellate court is not compelled to sacrifice either the rights of other

---

<sup>4</sup> PJ Cheese recognizes that a panel of the Seventh Circuit recently issued a decision that appears to be at odds with this Court's decision in *D.R. Horton* but notes that a panel decision of another circuit has no authoritative effect on decisions of this Court.

waiting suitors, its own irreplaceable judge-time or administrative efficiency in the judicial output by a traditional submission with all the trappings”).

14. This case falls into the second category of cases in which summary disposition is proper. There can be no substantial question as to the outcome of this case in light of:

a) this Court’s published decisions in *D.R. Horton* and *Murphy Oil* and unpublished decision in *Chesapeake Energy*;

b) the NLRB’s admission that the collective action waiver issue in this case is “identical” to the issue decided in *Murphy Oil* and *Chesapeake Energy*; and

c) the “well-settled Fifth Circuit rule of orderliness that one panel of [the] 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.” *Jacobs v. Nat’l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5<sup>th</sup> Cir. 2008) (citations omitted).

15. There has been no intervening change in the law warranting any different conclusion than this Court reached in *D.R. Horton* and *Murphy Oil*. Congress has not amended the NLRA to embrace the NLRB’s theories, and this Court has repeatedly declined to reconsider *en banc* its decisions that collective action waivers contained in employment arbitration agreements do not violate the

Act. Nor has the Supreme Court issued a decision sanctioning the NLRB's position in this matter. The NLRB may eventually seek Supreme Court review of this issue, but the mere potential for Supreme Court review and the attenuated possibility that the Supreme Court might reverse the established law of this Circuit provide no basis for the interruption of expeditious and economic justice.

16. This Court has granted motions for summary disposition in other cases where, as here, the matter on appeal was controlled by Circuit precedent such that there was no substantial question as to the outcome of the case. *See, e.g., Cardenas-Chavarin v. Mukaswy*, 265 Fed. App'x 184, 184-85 (5<sup>th</sup> Cir. 2008) and *Balboa-Longoria v. Gonzales*, 169 Fed. App'x 383, 384-385 (5<sup>th</sup> Cir. 2006). Indeed, this Court's unpublished decision in *Chesapeake Energy* under materially identical facts dictates, without mandating, that PJ Cheese's Petition for Review should be granted as to the collective action waiver and the Decision and Order enforced as to the reasonably-leads-employees-to-believe aspect of the arbitration agreement in the record.

17. PJ Cheese respectfully submits that briefing this case on the merits is unnecessary and would waste judicial resources, rendering summary disposition appropriate. To that end, PJ Cheese moves the Court to stay the briefing schedule with regard to the Petition for Review and Cross-Petition for Enforcement pending a ruling on this motion for summary disposition.

18. The NLRB opposes this motion with regard to granting the Petition for Review and does not oppose a stay of the briefing schedule.

*/s/ William K. Hancock*  
\_\_\_\_\_  
William K. Hancock  
*Attorney for Petitioner*

**OF COUNSEL:**

GALLOWAY, SCOTT, MOSS & HANCOCK, LLC  
2200 Woodcrest Place, Suite 310  
Birmingham, AL 35242  
205.949.5580  
205.949.5581 fax  
[will.hancock@gallowayscott.com](mailto:will.hancock@gallowayscott.com)

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petitioner Cross-Respondent PJ Cheese, Inc.'s Motion for Summary Disposition was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, which should electronically serve counsel of record:

*/s/ William K. Hancock*  
\_\_\_\_\_  
William K. Hancock

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

---

No. 15-60610

---

PJ CHEESE, INCORPORATED,

Petitioner Cross–Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross–Petitioner.

---

Petition for Review of an Order of  
the National Labor Relations Board

---

Before HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of petitioner cross-respondent PJ Cheese, Incorporated, for summary disposition is GRANTED. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 355–364 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015); *Chesapeake Energy Corp. v. NLRB*, 633 F. App’x 613, 614–15 (5th Cir. 2016) (per curiam).

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

<hr/>	)	
<b>SECURITAS SECURITY SERVICES USA, INCORPORATED</b>	)	
	)	
<b>Petitioner/Cross-Respondent</b>	)	<b>Case No.</b>
	)	<b>16-60304</b>
<b>v.</b>	)	
	)	
<b>NATIONAL LABOR RELATIONS BOARD</b>	)	
	)	
<b>Respondent/Cross-Petitioner</b>	)	
<hr/>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 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, D.C.  
this 28th day of July 2016