



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570-0001

VIA CM/ECF

September 16, 2016

Molly Dwyer, Clerk of the Court
Office of the Clerk
United States Court of Appeals
For the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Nijjar Realty, Inc., a California corporation, dba PAMA
Management v. NLRB*, 9th Cir. Nos. 15-73921 & 16-70336
Board Case No. 21-CA-092054

Dear Ms. Dwyer:

We submit this letter pursuant to Rule 28(j).

The Board's unfair-labor-practice finding in this case is premised on its determination in *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), that an employer violates Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), by maintaining an agreement requiring employees to individually arbitrate work-related disputes. *See Nijjar Realty, Inc.*, 363 NLRB No. 38, slip op. at 1-2 (Nov. 20, 2015). This Court has now adopted the *Murphy Oil* rule. *See Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016).

The *Morris* Court referenced *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014), which the Board discussed (Bd. Br. 25-26) regarding the opt-out provision in Nijjar's unlawful agreement. 2016 WL 4433080, at *4 n.4. The Court had no occasion to reexamine *Johnmohammadi*, however, as there was no opt-out provision in *Morris*. Similarly, in *Mohamed v. Uber Techs., Inc.*, No. 15-16178, 2016 WL 4651409, at *6 n.6 (9th Cir. Sept. 7, 2016), the Court mentioned *Johnmohammadi*'s holding without reevaluating it, this time because the plaintiffs' NLRA argument was waived.

Also recently, the Second Circuit rejected the *Murphy Oil* rule in *Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542 (2d Cir. Sept. 7, 2016). The court held it was bound by its decision in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), but observed that, "writing on a clean slate, [it] might well be persuaded, for the reasons forcefully stated in ... *Lewis*[*v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016)], and *Morris*[, *supra*], to ... hold that [a] waiver of collective action is unenforceable." *Id.* at *3.

Finally, petitions for writs of certiorari were recently filed in the Supreme Court in three of the above-cited cases: *Epic Sys. Corp. v. Lewis*, No. 16-285 (Sept. 2, 2016); *Ernst & Young LLP v. Morris*, No. 16-300 (Sept. 8, 2016); and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (Sept. 9, 2016).

Very truly yours,

/s/Linda Dreeben

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cc: all counsel (via CM/ECF)