

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

CITIGROUP TECHNOLOGY, INC., ET AL)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	No. 15-60856
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	

**UNOPPOSED MOTION OF THE NATIONAL LABOR RELATIONS
BOARD TO STAY CASE PENDING SUPREME COURT’S REVIEW OF
CERTIORARI PETITIONS IN RELATED CASES**

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, moves this Court to stay this case until the completion of Supreme Court proceedings in three cases with pending petitions for writs of certiorari that present the identical issue as the principal issue in this case.

1. On December 1, 2015, the Board issued a Decision and Order finding that Citigroup Technology, Inc. (“the Company”), violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151, 158(a)(1), by maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain employment-related class

or collective actions in all forums, whether arbitral or judicial. 363 NLRB No. 55. The Board reached that conclusion by applying its 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).

2. The Company petitioned this Court to review the Board's Order, and the Company's opening brief is currently due September 19.¹

3. In the last two weeks, there have been important developments in three cases addressing the principal issue in this case. On Friday, September 9, the Board filed a petition with the Supreme Court seeking a writ of certiorari to review this Court's *Murphy Oil* decision. *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016). Likewise, in the week prior, parties had filed petitions for certiorari in Seventh Circuit and Ninth Circuit cases finding arbitration agreements unlawful pursuant to the Board's *Murphy Oil* rationale. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. pending*, No. 16-285 (filed Sept. 2, 2016); *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080

¹ On July 6, 2016, the Court denied the Board's unopposed motion to stay proceedings until the time for petitioning the Supreme Court for a writ of certiorari had passed in *Murphy Oil*.

(9th Cir. Aug. 22, 2016), *petition for cert. pending*, No. 16-300 (filed Sept. 8, 2016).

4. As the Board’s petition to the Supreme Court explains, a clear circuit split has now emerged with respect to this issue. The Second and Eighth Circuits have joined this Court in rejecting the Board’s rationale. *See Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542 (2d Cir. Sep. 7, 2016) (citing *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-298 n.8 (2d Cir. 2013); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016) (citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013)). The Seventh and Ninth Circuits, by contrast, have agreed with the Board’s position. *See Morris, supra*, and *Lewis, supra*. That existing conflict may continue to grow in the near future as cases that raise this issue are pending in five additional circuits.² Moreover, the issue of whether mandatory individual-arbitration agreements are unlawful and unenforceable is of exceptional legal and practical importance. The Board has found that such agreements threaten the NLRA’s “core objective”: “the protection of workers’ ability to act in concert, in support of one another.” *Murphy Oil USA, Inc.*, 2014 WL 5465454, at *1.

² *See, e.g., The Rose Group v. NLRB*, Nos. 15-4092 and 16-1212 (3d Cir.); *AT&T Mobility Servs., LLC v. NLRB*, Nos. 16-1099 and 16-1159 (4th Cir.); *NLRB v. Alternative Entm’t, Inc.*, No. 16-1385 (6th Cir.); *Everglades Coll., Inc. v. NLRB*, Nos. 16-10341 and 16-10625 (11th Cir.); *Price-Simms, Inc. v. NLRB*, Nos. 15-1457 and 16-1010 (D.C. Cir.).

Resolving the issue of their enforceability will have a direct and immediate effect on countless employees and employers because these agreements have become so widespread.

5. Each of the cases now pending before the Supreme Court on petitions for certiorari would, if that Court grants certiorari and issues a decision on the merits, definitively resolve the key issue of whether an employer violates the NLRA by maintaining an individual-arbitration agreement that requires employees to waive the collective pursuit of work-related disputes. Accordingly, in the interest of judicial economy, the Board requests that the Court stay this case until the Supreme Court proceedings are completed.

6. The Company does not oppose the Board's motion.

WHEREFORE, the Board respectfully requests that the Court stay this case until after the Supreme Court proceedings in *Murphy Oil*, *Ernst & Young*, and/or *Epic Systems* are completed.

Respectfully submitted,

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202)273-2960

Dated at Washington, DC
this 16th day of September, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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 16th day of September, 2016