

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

CELLULAR SALES OF MISSOURI, LLC)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 15-1620,
)	15-1860
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

**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 the Eighth Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, moves this Court to stay this case pending the completion of Supreme Court proceedings in three cases with pending petitions for writs of certiorari that present the identical threshold issue as this case.

1. On March 15, 2015, the Board issued an order against Cellular Sales of Missouri, LLC (“the Company”). 362 NLRB No. 27, 2015 WL 1205241. The threshold issue in this case is whether the Company violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151, 158(a)(1), as the Board found, by maintaining an arbitration agreement that requires employees, as a

condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial. 2015 WL 1205241, at *1.¹ 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, and the Board cross-applied for enforcement of, the Board's Order. On June 2, the Court issued its opinion. *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016). Having denied the Board's petition for initial en banc consideration, the Court adhered to its decision in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), which had rejected the Board's position that individual-arbitration agreements violate the NLRA. *Id.* at 776. Accordingly, it granted review with respect to the Board's finding that the Company violated the NLRA by

¹ The Board found that the Company also violated Section 8(a)(1) by seeking to enforce the unlawful agreement in court, and by maintaining an agreement that employees reasonably would believe bars or restricts their rights to file charges with the Board or to access the Board's processes. *Cellular Sales*, 2015 WL 1205241, at *1 n.4.

maintaining and enforcing its agreement.² *Id.* at 776-77. The Court issued its judgment on August 10; a petition for panel rehearing or rehearing en banc is thus due on September 26, 2016.

3. In recent weeks, there have been important developments in three cases addressing the threshold issue in this case. On 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. Prior to that, parties had filed petitions for certiorari in Seventh Circuit and Ninth Circuit cases invalidating arbitration agreements 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 Sep. 2, 2016); *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (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 solid circuit split has now emerged with respect to this issue. The Second Circuit has joined this Court and the Fifth Circuit in rejecting the Board's rationale. *See Patterson v. Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542 (2d Cir. Sept. 14, 2016) (citing *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-98 n.8 (2d Cir. 2013)).

² The Court agreed with the Board, however, that employees would reasonably believe that the agreement restricts their rights to access the Board's processes and thus enforced the portion of the Board's Order remedying that violation. *Id.* at 777-78.

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.³ 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. 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 takes certiorari and issues a decision on the merits, definitively resolve the threshold issue underlying each of the violations that this Court reversed. Accordingly, to allow for the possibility that the Supreme Court may resolve the issue in a manner requiring further proceedings in this case, and to preserve the opportunity for the Board to ask the en banc Court to revisit the

³ *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 College, 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.).

issue in light of the deepening split among the circuits should the Supreme Court deny certiorari, the Board asks this Court to stay the date by which a petition for rehearing is due until the Supreme Court proceedings are completed.

6. Counsel for the Company opposes the Board's motion.

WHEREFORE, the Board respectfully requests that the Court stay the date by which a rehearing petition is due until after the Supreme Court proceedings in *Murphy Oil*, *Ernst & Young*, and *Epic Systems*.

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 19th day of September, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth 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 19th day of September, 2016