



United States Government

**NATIONAL LABOR RELATIONS BOARD**

**OFFICE OF THE GENERAL COUNSEL**

Washington, DC 20570-0001

VIA CM/ECF

January 18, 2017

Lyle W. Cayce  
Clerk of the Court  
United States Court of Appeals  
for the Fifth Circuit  
Office of the Clerk  
F. Edward Hebert Building  
600 S. Maestri Place  
New Orleans, LA 70130-3408

Re: *Acuity Specialty Products, Incorporated, doing business as Zep, Incorporated v. NLRB*, 5th Cir. No. 16-60367  
Board Case Nos. 32-CA-075221 & 32-CA-102838

Dear Mr. Cayce:

The National Labor Relations Board submits this letter pursuant to Federal Rule of Appellate Procedure 28(j) to advise the Court of developments in three cases addressing the precise issue before the Court in this case.

The Board's ruling in this case is based on its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), which respectively held and reaffirmed that an employer violates Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 151, 158(a)(1), by maintaining an agreement requiring employees to individually arbitrate work-related disputes. In its brief, the Board recognized that this Court rejected that rule in *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil, USA v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *petition for certiorari filed*, No. 16-307 (U.S. Sept. 9, 2016). The Board acknowledged further that

unless the Court were to reconsider its *Horton/Murphy Oil* holding *en banc*, or the Supreme Court were to rule for the Board in *Murphy Oil* (or another petition presenting the same issue), the Court would be precluded from enforcing the aspects of the Board's Order that depend on the its *Horton/Murphy Oil* rule. The Board also referenced *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *petition for certiorari filed*, No. 16-285 (U.S. Sept. 2, 2016), and *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *petition for certiorari filed*, No. 16-300 (U.S. Sept. 8, 2016), in which the Seventh and Ninth Circuits adopted the *Horton/Murphy Oil* rule.

Last Friday, January 13, 2017, the Supreme Court granted petitions seeking writs of certiorari in *Epic Sys. Corp. v. Lewis*, No. 16-285, *Ernst & Young v. Morris*, No. 16-300, and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307.

Very truly yours,

/s/ Linda Dreeben

Linda Dreeben

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NATIONAL LABOR RELATIONS BOARD

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cc: all counsel (via CM/ECF)