

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

**INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE)
WORKERS, AFL-CIO, EAST BAY)
AUTOMOTIVE MACHINISTS)
LODGE No. 1546, DISTRICT LODGE 190)**

Petitioner)

SJK, INC. d/b/a FREMONT FORD)

Intervenor)

v.)

NATIONAL LABOR RELATIONS BOARD)

Respondent)

Case No. 16-74025

**Board Case No.
32-CA-151443**

SJK, INC. d/b/a FREMONT FORD)

Petitioner)

v.)

NATIONAL LABOR RELATIONS BOARD)

Respondent)

Case No. 17-71210

**Board Case No.
32-CA-151443**

**INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE)
WORKERS, AFL-CIO, EAST BAY)
AUTOMOTIVE MACHINISTS)
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_____)**

**NATIONAL LABOR RELATIONS BOARD)
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Petitioner)
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v.)
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SJK, INC. d/b/a FREMONT FORD)
)
Respondent)
_____)**

**Case No. 17-71337
Board Case No.
32-CA-151443**

SUPPLEMENTAL FILING OF THE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF SKJ, INC. d/b/a FREMONT FORD’S MOTION TO HOLD CASES IN ABEYANCE

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

The National Labor Relations Board (the “Board”), by its Deputy Associate General Counsel, submits this filing to inform the Court of a relevant development in support of the June 23, 2017 motion of SJK, Inc. d/b/a Fremont Ford (“SJK”), Docket Entry 21, to hold the above-captioned consolidated cases (the “*Fremont Ford* cases”) in abeyance.

1. The two petitions for review and the cross-application for enforcement pending in the *Fremont Ford* cases all concern the same Board order, reported at 364 NLRB No. 29 (June 16, 2016). One of the petitions, Case No. 16-74025, was filed by the International Association of Machinists and Aerospace Workers, AFL-CIO, East Bay Automotive Machinists Lodge No. 1546, District Lodge 190 (the “Union”) on December 29, 2016. *See* Docket Entry 1.

2. On January 31, 2017, the Board moved to hold the Union’s petition in abeyance until the Supreme Court issues a decision in *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young v. Morris*, No. 16-300; and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307.¹ The Board’s motion argued that the resolution of those cases would definitively resolve the sole unfair labor practice at issue in the Union’s petition. *See* Docket Entry 10. The Union opposed, *see* Docket Entry 12 (February 7, 2017), and the Court thereafter denied the Board’s motion, *see* Docket Entry 13 (February 16, 2017).

3. Subsequently, on March 30, 2017, the Board filed a motion with this Court to hold in abeyance two petitions for review, and a cross-application for enforcement, in *Munoz v. NLRB*, Case No. 16-71915, and related cases No. 17-70532 and No. 17-70632 (the “*Munoz* cases”), on the same ground it relied upon

¹ At the time, SJK had not yet filed its petition for review. It filed that petition in the Court of Appeals for the District of Columbia Circuit on February 1, 2017. *See* Exhibit 6. The D.C. Circuit issued an order to transfer SJK’s petition to this Court on April 11, 2017, pursuant to 28 U.S.C. § 2112. *See* Exhibit 7.

with respect to the Union's petition. *See* Exhibit 1. The *Munoz* cases are unrelated to the *Fremont Ford* cases, but involve the same legal issue. One day later, petitioner Munoz, through the same counsel representing the Union in the *Fremont Ford* cases, opposed the Board's motion. In that opposition, Munoz explained that the Board's motion "presented the very same issue" as the Board's denied motion seeking to stay the Union's petition in this case. Exhibit 2. The Board filed a reply on April 6, 2017, *see* Exhibit 3, and the charging party filed a supplemental opposition on April 25, 2017, *see* Exhibit 4.

4. While the Board's motion to stay the *Munoz* cases remained pending, the Court in this case consolidated the Union's petition with SJK's petition for review, which was transferred to this Court pursuant to Section 2112, and the Board's cross-application for enforcement against SJK. *See* Docket Entry 15 (June 15, 2017). SJK then filed the pending motion to hold all three *Fremont Ford* cases in abeyance based on the pending Supreme Court litigation, *see* Docket Entry 21 (June 23, 2017).

5. On June 28, 2017, this Court granted the Board's motion to stay the *Munoz* cases. *See* Exhibit 5. Pursuant to the Court's order, the *Munoz* cases are now being held in abeyance pending the Supreme Court's resolution of *Epic Systems* and its companion cases.

6. The *Fremont Ford* cases are in the same posture as the *Munoz* cases, with the main disputed issue to be decided by the Supreme Court (where responsive briefs are due on August 9, 2017). Abeyance would be proper in the former, just as the Court determined it was in the latter.

WHEREFORE, the Board respectfully requests that the Court grant SJK's motion to hold the *Fremont Ford* cases in abeyance.

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 6th day of July, 2017

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

**INTERNATIONAL ASSOCIATION OF)
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SJK, INC. d/b/a FREMONT FORD)

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Respondent

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**Case No. 17-71337
Board Case No.
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 859 words of proportionally-spaced, 14-point

type, and the word processing system used was Microsoft Word 2010.

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 6th day of July, 2017

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**Case No. 17-71337
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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that this 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 6th day of July, 2017

Exhibit 1

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

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)	Case No. 16-71915
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**MOTION OF THE NATIONAL LABOR RELATIONS BOARD
TO HOLD CASE IN ABEYANCE**

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

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully moves the Court to stay this consolidated case until the Supreme Court decides *Epic Systems Corp. v. Lewis*, No. 16-285, *Ernst & Young v. Morris*, No. 16-300, and *NLRB v. Murphy Oil USA*, No. 16-307, each of which presents the principal issue presented in this case. In support, the Board shows as follows:

1. On April 29, 2016, the Board issued an order against Tarlton & Son, Inc. (“Tarlton”), finding that Tarlton had violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151, 158(a)(1), by maintaining an mutual arbitration policy that requires employees to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial. *Tarlton & Son, Inc.*, reported at 363 NLRB No. 175. The Board also found that Tarlton’s promulgation of the arbitration policy in response to employees’ protected concerted activity independently violated Section 8(a)(1). *Id.* Robert C. Munoz (“Munoz”), the charging party before the Board, petitioned the Court for review of the Board’s Order, which did not grant all of the remedies that Munoz had requested. Tarlton has also petitioned the Court for review, and the Board has cross-applied for enforcement, of the Order. The Court consolidated the three cases on March 28 and set a briefing schedule, with Munoz’s opening brief due on April 19.

2. In finding that Tarlton violated the NLRA by maintaining its arbitration policy, the Board applied 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). In *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), this Court adopted the Board's *Horton/Murphy Oil* rule, refusing to enforce an arbitration agreement that required individual arbitration of work-related claims.

3. A stay is warranted in this consolidated case because, on January 13, 2017, the Supreme Court agreed to review *Morris*, as well as two other cases presenting the same issue, *NLRB v. Murphy Oil*, 808 F.3d 975 (5th Cir. 2015), and *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016). Resolution of those cases will definitively resolve the principal unfair labor practice at issue here, namely, whether Tarlton violated Section 8(a)(1) of the NLRA by maintaining an mutual arbitration policy that requires employees to waive the right to maintain class or collective actions.

The Court, either sua sponte or in response to a motion, has stayed several other cases presenting the same principal issue. *See, e.g., Hoot Winc, LLC v. NLRB*, 9th Cir. Nos. 15-72839 and 15-72931; *Countrywide Fin. Corp. v. NLRB*,

9th Cir. Nos. 15-72700 and 15-73222; *Philmar Care, LLC v. NLRB*, 9th Cir. Nos. 16-70069 and 16-70267; *Bloomingtondale's, Inc. v. NLRB*, 9th Cir. Nos. 16-71338 and 16-71904; *Nijjar Realty, Inc. v. NLRB*, 9th Cir. Nos. 15-73921, 16-70336. *But see Intl. Ass'n of Machinists & Aerospace Workers AFL-CIO v. NLRB*, 9th Cir. No. 16-74025 (denying motion to stay case pending resolution of *Epic Systems, Morris*, and *Murphy Oil*, which the petitioner union opposed, arguing that the Federal Arbitration Act did not apply to the arbitration agreement at issue and that the agreement was unlawful for various other reasons; case now stayed pending resolution of other procedural issues).

4. Counsel for Tarlton does not oppose the granting of this motion.

Counsel for Munoz opposes the granting of this motion.

WHEREFORE, the Board respectfully requests that the Court hold this case in abeyance until the Supreme Court's resolution of *Morris*, *Murphy Oil*, 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 30th day of March, 2017

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 788 words of proportionally-spaced, 14-point

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Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2017, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth

Circuit by using the appellate CM/ECF system. I further certify that this 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 30th day of March, 2016

Exhibit 2

CASE NO. 16-71915 [CONSOLIDATED WITH 17-70532 AND 17-70632
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT C. MUNOZ, Charging Party, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. 16-71915 Board Case Nos. 32-CA-119054 32-CA-126896
TARLTON & SON, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. 17-70532 Board Case Nos. 32-CA-119054 32-CA-126896
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. TARLTON & SON, INC. Respondent.	Case No. 17-70632 Board Case Nos. 32-CA-119054 32-CA-126896

**ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD
CASE NO. 32-CA-119054 AND 32-CA-126896, 363 NLRB NO. 175**

OPPOSITION TO MOTION TO HOLD CASE IN ABEYANCE

The Motion of the National Labor Relations Board to hold this case in abeyance should be denied.

As the Board recognizes, it presented the very same issue to this Court in *Int'l Ass'n of Machinists & Aerospace Workers AFL-CIO v. NLRB*, 9th Cir. No. 16-84025 and this Court denied the motion. In that case, the Union (represented by the same counsel) pointed out that the Federal Arbitration Act arguably did not govern the arbitration procedure involved and that the issues were therefore different.

Here, there are even more differences. One of the major differences is that part of the Board's Decision is the finding that the Respondent employer unlawfully implemented its Mutual Arbitration Procedure in response to protected concerted activity. That finding does not hinge on whether the policy is valid or invalid. It hinges on the fact that the policy was implemented in response to the protected concerted activity.

The Petitioner and Intervenor opposes the Motion to Hold this Case in Abeyance. The cases pending in the Supreme Court will not ultimately resolve the issues in this case.

For these reasons, this Court should adopt his Court's ruling in the *Machinists* case referred to above and deny the Motion to Hold the Case in Abeyance.

Dated: March 31, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
DAVID A. ROSENFELD
DAVID A. ROSENFELD, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net

Attorneys for Petitioner, Robert C. Munoz

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on March 31, 2017, I electronically filed the foregoing **OPPOSITION TO MOTION TO HOLD CASE IN ABEYANCE** with the with the United States Court of Appeals, Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct.
Executed at Alameda, California, on March 31, 2017.

/s/ Karen Kempler
Karen Kempler

Exhibit 3

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

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**REPLY TO MUNOZ’S OPPOSITION TO
THE NATIONAL LABOR RELATIONS BOARD’S
MOTION TO HOLD THE CASE IN ABEYANCE**

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

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby replies to the opposition filed by petitioner Robert C. Munoz (“Munoz”) to the Board’s motion to hold the case in abeyance. In further support, the Board shows as follows:

1. As described in the Board’s initial motion, the Board here found that Tarlton & Son, Inc. (“Tarlton”) had violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151, 158(a)(1), by maintaining an mutual arbitration policy that requires employees to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial. *Tarlton & Son, Inc.*, reported at 363 NLRB No. 175. It further found that Tarlton had violated Section 8(a)(1) by promulgating that policy in response to employees’ protected activity. In finding the maintenance violation, the Board applied 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). In *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), this Court adopted the Board’s *Horton/Murphy Oil* rule, refusing to enforce an arbitration agreement that required individual arbitration of work-related claims.

The validity of that rule is now pending before the Supreme Court in three related cases, which raise challenges to the Board's *Horton/Murphy Oil* rule under the Federal Arbitration Act ("FAA"). See *Ernst & Young v. Morris*, No. 16-300; *Epic Systems Corp. v. Lewis*, No. 16-285; *NLRB v. Murphy Oil USA*, No. 16-307.

2. In claiming that this case should not be placed in abeyance pending the resolution of those Supreme Court cases, Munoz asserts (Opp. 1) that the FAA "arguably did not govern" the arbitration policy in this case, implying that the Board's unfair-labor-practice finding could survive even if the Supreme Court rejects the *Horton/Murphy Oil* rule as contrary to the FAA. However, Munoz, the charging party, prevailed before the Board. Therefore, even though the Board applied a different rationale than he would have liked, he is not aggrieved by the Board's finding that Tarlton's arbitration policy is unlawful under *Horton/Murphy Oil*, and has no standing to challenge that finding before the Court. See 29 U.S.C. § 160(f) ("Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order").

As petitioner, Munoz only has standing to challenge the Board's denial of the extraordinary remedies he requested. See *Tarlton & Son, Inc.*, 363 NLRB No. 175, 2016 WL 1743247, at *1 n.2 (Apr. 29, 2016). In addition, as intervenor on behalf of the Board in defense of the unfair-labor-practice finding, Munoz may only present arguments in support of the rationale relied on by the Board to find

the violation; Munoz may not assert a new rationale. Accordingly, the issue before this Court is identical to the one before the Supreme Court: the validity of the Board's *Horton/Murphy Oil* rule.¹

3. Contrary to Munoz's claim (Opp. 1), the Board's motion also should not be denied because the case includes a second unfair-labor-practice finding based on the Company's promulgation of its arbitration policy in response to employees' protected concerted activity. Although that violation depends on a different legal theory, it relates back to the principal issue in this case, namely, the lawfulness of the arbitration policy. The Board therefore submits that, for the sake of judicial efficiency and the judicious use of the parties' resources, the Court should abey the entire case. In other cases involving *Horton/Murphy Oil* violations, the Court has not hesitated to take that step simply because there is another unfair labor practice based on the same arbitration agreement. *See, e.g., Hoot Winc, LLC v. NLRB*, 9th Cir. Nos. 15-72839 and 15-72931; *Countrywide Fin. Corp. v. NLRB*, 9th Cir. Nos. 15-72700 and 15-73222; *Bloomington's, Inc. v. NLRB*, 9th Cir. Nos. 16-71338 and 16-71904.

¹ Even if Munoz could raise his alternate theory, Munoz advanced that same argument respecting the FAA to the Board, which expressly declined to adopt it. *See Tarlton & Son*, 2016 WL 1743247, at *1 n.2. Consequently, the Court may not reach, or enforce the Board's Order based on, Munoz's alternate theory. *See Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1082 (9th Cir. 2008) (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

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 6th day of April, 2017

**UNITED STATES COURT OF APPEALS
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Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

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)	Case No. 17-70632
v.)	
)	Board Case No.
TARLTON & SON, INC.)	32-CA-119054
)	32-CA-126896
Respondent)	
<hr/>)	

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2017, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth

Circuit by using the appellate CM/ECF system. I further certify that this 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 6th day of April, 2017

Exhibit 4

CASE NO. 16-71915 [CONSOLIDATED WITH 17-70532 AND 17-70632
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT C. MUNOZ, Charging Party, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. 16-71915 Board Case Nos. 32-CA-119054 32-CA-126896
TARLTON & SON, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. 17-70532 Board Case Nos. 32-CA-119054 32-CA-126896
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. TARLTON & SON, INC. Respondent.	Case No. 17-70632 Board Case Nos. 32-CA-119054 32-CA-126896

**ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD
CASE NO. 32-CA-119054 AND 32-CA-126896, 363 NLRB NO. 175**

**SUPPLEMENTAL OPPOSITION REGARDING MOTION TO HOLD
CASE IN ABEYANCE**

Petitioner Robert Munoz has filed his opening brief.

In considering the motion to hold this case in abeyance, this Court should note that many issues are raised in this brief that do not depend on the outcome of the three current cases in the United States Supreme Court.

As we have also noted, there is a separate issue with respect to the unlawful implementation of the mandatory arbitration procedure which, in our view, does not depend upon the outcome of the cases pending in the Supreme Court.

The motion of the National Labor Relations Board to hold in abeyance should be denied. The briefing should continue.

Dated: April 25, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
DAVID A. ROSENFELD
DAVID A. ROSENFELD, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net

Attorneys for Petitioner, Robert C. Munoz

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on April 25, 2017, I electronically filed the foregoing **SUPPLEMENTAL OPPOSITION REGARDING MOTION TO HOLD CASE IN ABEYANCE** with the United States Court of Appeals, Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct.
Executed at Alameda, California, on April 25, 2017.

/s/ Karen Kempler
Karen Kempler

141619\911331

Exhibit 5

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 28 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT C. MUNOZ,

Petitioner,

TARLTON AND SON, INC.,

Intervenor,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

No. 16-71915

NLRB No. 32-CA-119054
National Labor Relations Board

ORDER

TARLTON AND SON, INC.,

Petitioner,

ROBERT C. MUNOZ,

Intervenor,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

No. 17-70532

NLRB No. 32-CA-119054

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

ROBERT C. MUNOZ,

Intervenor,

v.

TARLTON AND SON, INC.,

Respondent.

No. 17-70632

NLRB No. 32-CA-119054

The Clerk shall file Robert C. Munoz's opening brief and excerpts of record submitted on April 14, 2017.

The motion to strike a portion of the opening brief based on a lack of standing (Docket Entry No. 36), as well as the opposition thereto and the reply in support thereof (Docket Entry Nos. 37, 38), are referred to the panel that will be assigned to decide the merits of these consolidated petitions.

The opposed motion to hold these consolidated petitions in abeyance pending the Supreme Court's resolution of *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 (Docket Entry No. 22) is granted. Further briefing in these consolidated petitions is stayed pending further order of this court.

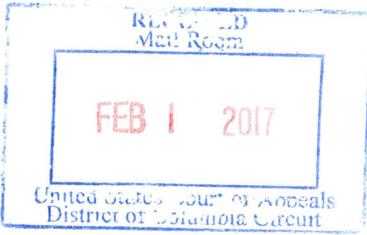
Within 14 days after the Supreme Court's resolution of *Epic Sys. Corp. v. Lewis; Ernst & Young v. Morris*; and *NLRB v. Murphy Oil USA, Inc.*, the National Labor Relations Board shall file an appropriate motion in these consolidated petitions. If any party wishes to terminate the stay of these petitions before the Supreme Court's resolution of *Epic Sys. Corp. v. Lewis; Ernst & Young v. Morris*; and *NLRB v. Murphy Oil USA, Inc.*, that party may file a motion requesting such relief.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Alex Christopher
Deputy Clerk
Ninth Circuit Rule 27-7

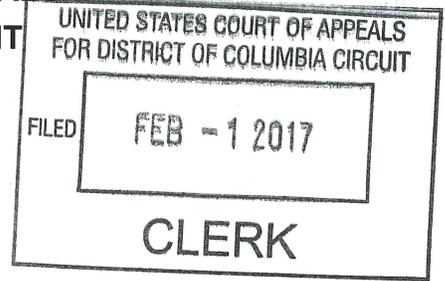
Exhibit 6



UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530



Case Caption: SJK, INC. dba FREMONT FORD
Petitioner

v.

Case Number: 17-1033

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR REVIEW OF AN AGENCY, BOARD, COMMISSION, OR OFFICER

Notice is hereby given this the 31st day of January 20 17 that petitioner(s)
SJK, INC. dba FREMONT FORD hereby petitions the United States Court of Appeals for the District
of Columbia Circuit for review of the order of the respondent(s) National Labor Relations Board entered
the 16 day of June 20 16.

Attorney for Petitioner(s)/Pro Se Party,

Fine, Boggs & Perkins, by Michael K. Perkins

Attorneys for SJK, INC. dba FREMONT FORD

Address: 80 Stone Pine Rd, Ste. 210

Half Moon Bay, California 94019

Telephone: (650) 712-8908

EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

SJK, Inc. d/b/a Fremont Ford and International Association of Machinists and Aerospace Workers, AFL-CIO, East Bay Automotive Machinists Lodge No. 1546, District Lodge 190. Case 32-CA-151443

June 16, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

The General Counsel seeks summary judgment in this case on the grounds that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent violated Section 8(a)(1) by maintaining an agreement that prohibits its employees from participating in collective or class litigation in all forums.

Pursuant to a charge filed on May 4, 2015, by the International Association of Machinists and Aerospace Workers, AFL-CIO, East Bay Automotive Machinists Lodge No. 1546, District Lodge 190 (Charging Party), the General Counsel issued a complaint on November 24, 2015, and an amended complaint on December 4, 2015. The amended complaint alleges that at all material times since at least November 4, 2014, the Respondent has maintained an Employee Acknowledgement and Agreement (Arbitration Agreement) that employees are required to sign at the time of their hire. In addition, the amended complaint alleges that the Arbitration Agreement specifically informs employees that they are bound to the agreement as a condition of their employment. The relevant portions of the Arbitration Agreement read as follows:

I . . . acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. . . . I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on . . . Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company . . . arising from, related to, or having any relationship or connection what-

soever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board. . .) shall be submitted to and determined exclusively by binding arbitration. . . . [T]he arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective, representative, or joint action lawsuit or arbitration (collectively "class claims"). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on class, collective, representative, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that [I] must pursue any such claims through this binding arbitration procedure.

The amended complaint alleges that the Arbitration Agreement interferes with employees' Section 7 rights to engage in collective legal action by binding employees to a waiver of their rights to participate in collective and class litigation and that, by this conduct, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

On December 9, 2015, the Respondent filed an answer to the complaint. On December 18, 2015, the Respondent filed an answer to the amended complaint admitting all of the factual allegations in the amended complaint, but denying the legal conclusions in the amended complaint and asserting two affirmative defenses.

On January 11, 2016, the General Counsel filed a Motion for Summary Judgment. On February 1, 2016, the Charging Party filed a Joinder in Motion for Summary Judgment. On February 10, 2016, the Board issued an

order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 23, 2016, the Respondent filed an Opposition to the Motion for Summary Judgment, and on February 24, 2016, the Charging Party refiled its Joinder in Motion for Summary Judgment.¹ On March 8, 2016, the General Counsel filed a response to the Respondent's Opposition, and the Charging Party filed a Partial Joinder in the General Counsel's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and found unlawful the maintenance and enforcement of a mandatory arbitration agreement requiring employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. As stated, the Respondent admits in its amended answer that it has maintained the Arbitration Agreement and required employees to sign it as a condition of employment since at least November 4, 2014. By its terms, the Arbitration Agreement requires that all employment-based claims be resolved through individual, binding arbitration. In its response to the Board's Notice to Show Cause, the Respondent raises no material issues of fact or any other issues warranting a hearing. The Respondent's arguments largely focus on the assertion that *Murphy Oil* and *D. R. Horton* were wrongly decided.² We disagree for

¹ The Charging Party's Joinder in Motion for Summary Judgment raises substantive arguments that are wholly outside the scope of the General Counsel's amended complaint. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. *Kimtruss Corp.*, 305 NLRB 710 (1991). We also decline to award the additional remedies requested by the Charging Party. We find that the standard remedies requested by the General Counsel are sufficient to remedy the unfair labor practice found. See, e.g., *AT&T*, 362 NLRB No. 105, slip op. at 1 fn. 3 (2015).

² The Respondent also asserts that the Arbitration Agreement is lawful because it does not prevent employees from filing charges with the Board or with other administrative agencies and assures employees that they will not be disciplined, discharged, or otherwise retaliated against for exercising their Sec. 7 rights. We reject these arguments for the reasons stated in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

The Respondent further asserts that the filing of a class action on behalf of potential class members, without action by each employee to affirmatively associate with the filing of the lawsuit, is not concerted activity under Sec. 7. Contrary to the Respondent's assertion, as the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for group action

the reasons given in those decisions. See also *Lewis v. Epic Systems Corp.*, ___ F.3d ___, No. 15-2997 (7th Cir., May 26, 2016) (holding mandatory individual arbitration agreement that did not permit collective action in any forum violates the Act and is also unenforceable under the Federal Arbitration Act, 9 U.S.C. §§1, et seq.). Accordingly, we apply those cases here and find that the Respondent violated Section 8(a)(1) by maintaining an agreement requiring employees to waive their right to pursue class or collective claims in any forum.³

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation with an office and place of business in Newark, California, has been engaged in the sale and servicing of automobiles.

During the 12-month period ending October 31, 2015, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$500,000 and purchased and received goods or services valued in ex-

and is therefore conduct protected by Sec. 7." *Id.*, slip op. at 2. See also *D. R. Horton*, 357 NLRB at 2279.

In addition, the Respondent asserts that employees would not reasonably construe the Arbitration Agreement to restrict employees from filing charges with the Board or from accessing the Board's processes. The amended complaint does not allege the agreement to be unlawful on this basis. In addition, in his Motion for Summary Judgment, the General Counsel focuses exclusively on whether the agreement infringes on employees' rights to engage in collective action and does not argue that the agreement is also unlawful because employees would construe it to restrict their right to file charges with the Board or otherwise interfere with their access to the Board's processes. In these circumstances, we find that the issue raised by the Respondent is not before us for our consideration.

³ Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22-35 (2014), would find that the Respondent's Arbitration Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Arbitration Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Arbitration Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 2. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17-18; *Bristol Farms*, above, slip op. at 2.

SJK, INC. D/B/A FREMONT FORD

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cess of \$5000 which originated outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least November 4, 2014, the Respondent has maintained the Arbitration Agreement that employees are required to sign as a condition of employment. As described above, the Arbitration Agreement requires employees to bring all employment-related disputes to individual binding arbitration, thereby interfering with employees' Section 7 right to engage in collective legal activity.

CONCLUSIONS OF LAW

1. The Respondent, SJK, Inc. d/b/a Fremont Ford, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement under which employees are required, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to rescind or revise the Arbitration Agreement; notify all current and former employees who were required to sign or otherwise become bound to the Arbitration Agreement about the rescission or revision and, if revised, provide them a copy of the revised agreement; and post a notice at its Newark, California location where the agreement was in effect. See *D. R. Horton*, above at 2289.

ORDER

The National Labor Relations Board orders that the Respondent, SJK, Inc. d/b/a Fremont Ford, Newark, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that require 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.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory Arbitration Agreement in any form that it has been rescinded or revised, and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Newark, California facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since November 4, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 16, 2016

Mark Gaston Pearce,

Chairman

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues grant the General Counsel's motion for summary judgment and find that the Respondent's Employee Acknowledgment and Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this ruling and finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*¹ Although I agree that there are no genuine issues of material fact warranting a hearing, I believe the General Counsel is not entitled to judgment as a matter of law on this complaint allegation. To the contrary, the *Respondent* is entitled to judgment as a matter of law. Accordingly, I would enter summary judgment for the Respondent and against the General Counsel and dismiss the complaint.²

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.³ However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive

¹ 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

² It is well settled that summary judgment may be entered in favor of the party against whom the motion is filed even though that party has not filed a cross-motion for summary judgment. See 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2720, at 347 (3d ed. 1998) ("The weight of authority . . . is that summary judgment may be rendered in favor of the opposing party even though the opponent has made no formal cross-motion under [Federal] Rule [of Civil Procedure] 56.") (citing cases).

³ I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."⁴ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;⁵ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;⁶ and (iii)

⁴ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

⁵ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.")

⁶ The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); *Cellular Sales of Missouri, LLC v. NLRB*, ___ F.3d ___ (8th Cir. 2016); see also *Patterson v. Raymours Furniture Co.*, 96 F.Supp.3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F.Supp.3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services*, No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); *Bell v. Ryan Transportation Service*, No. 15-9857-JWL, 2016 WL 1298083 (D. Kan. Mar. 31, 2016); but see *Lewis v. Epic Systems Corp.*, ___ F.3d ___, No. 15-2997 (7th Cir. May 26, 2016); *Tot-*

SJK, INC. D/B/A FREMONT FORD

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enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).⁷ Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.⁸

Accordingly, I respectfully dissent.

Dated, Washington, D.C. June 16, 2016

Philip A. Miscimarra Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that requires our 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.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Employee Acknowledgment and Agreement Arbitration Agreement (the Arbitration Agreement) in all of its forms, or revise it in all of its forms to make clear that the agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory Arbitration Agreement in all of its forms that the agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

SJK, INC. D/B/A FREMONT FORD

The Board's decision can be found at www.nlr.gov/case/32-CA-51443 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



ten v. Kellogg Brown & Root, LLC, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

⁷ For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49-58 (Member Johnson, dissenting).

⁸ Because I disagree with the Board's decisions in *Murphy Oil*, above, and *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), *enf. denied* in part, 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, *supra* at 2288, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 29, 2016, I served the following documents in the manner described below:

PETITION FOR REVIEW

- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

David Reese, Esq.
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Ms. Linda J. Dreeben
National Labor Relations Board
Appellate and Supreme Court Litigation
Office of Appeals
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Washington, D.C. 20570-0001
linda.dreeben@nlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 29, 2016, at Alameda, California.

/s/ Karen Kempler
Karen Kempler

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of San Mateo, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On January 31, 2017, I served the following documents in the manner described below:

PETITION FOR REVIEW OF AN AGENCY, BOARD, COMMISSION, OR OFFICER

(BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Fine, Boggs & Perkins LLP's electronic mail system from jdare@employerlawyers.com to the email addresses set forth below.

On the following part(ies) in this action:

Ms. Valerie Hardy-Mahoney
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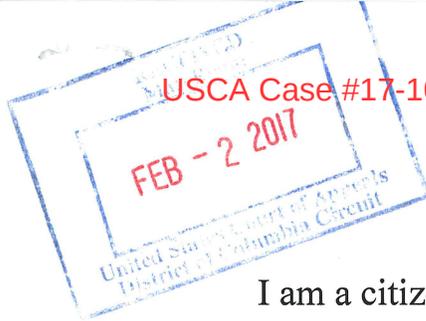
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200
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Drosenfeld@unioncounsel.net

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 31, 2017, at Half Moon Bay, California.



Julie Dare



AMENDED PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of San Mateo, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 1, 2017, I served the following documents in the manner described below:

PETITION FOR REVIEW OF AN AGENCY, BOARD, COMMISSION, OR OFFICER

(BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Fine, Boggs & Perkins LLP's electronic mail system from jdare@employerlawyers.com to the email addresses set forth below.

On the following part(ies) in this action:

Ms. Valerie Hardy-Mahoney
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 1, 2017, at Half Moon Bay, California.



Julie Dare

Exhibit 7

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1033**September Term, 2016****NLRB-32CA151443****Filed On:** April 11, 2017

SJK, Inc., doing business as Fremont Ford,

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Henderson, Rogers, and Griffith, Circuit Judges

ORDER

Upon consideration of the motion to intervene, and the motion to transfer and the opposition thereto, it is

ORDERED that the motion to transfer be granted and this case, including the motion to intervene, be transferred to the United States Court of Appeals for the Ninth Circuit once the record has been filed there. 28 U.S.C. § 2112(a); see also Liquor Salesmen's Union Local 2 v. NLRB, 664 F.2d 1200, 1205 (D.C. Cir. 1981) (“[Section] 2112(a) is a mechanical device to determine which court will determine venue, not which court will ultimately hear the case.”). Respondent is directed to inform this court when the record has been filed. Once the respondent has filed the record in the Ninth Circuit, the Clerk is directed to transmit the original files and a copy of this order to the Ninth Circuit.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam