

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

| | | |
|---------------------------------------|---|---------------------|
| COVENANT CARE CALIFORNIA, LLC; |) | |
| COVENANT CARE LA JOLLA, LLC |) | |
| |) | |
| Petitioners |) | |
| |) | |
| v. |) | No. 16-71502 |
| |) | |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | |
| Respondent |) | |

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD
TO SUMMARILY GRANT THE COMPANY’S PETITION FOR REVIEW
IN PART, AND SEVER AND REMAND TO THE BOARD THE
REMAINDER OF THE CASE**

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 this Court to summarily grant review of that portion of the Board’s Order governed by the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018), and sever and remand to the Board the remainder of the case.

1. In the Decision and Order under review, the Board found that the Covenant Care California, LLC and Covenant Care La Jolla, LLC (“the Company”) violated the National Labor Relations Act by maintaining and enforcing an agreement barring employees from concertedly pursuing work-related

claims in any forum, arbitral or judicial. In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307 (Jan. 13, 2017). *Covenant Care Cal., LLC & Covenant Care La Jolla*, 363 NLRB No. 80, 2015 WL 9315533, at *1 (Dec. 22, 2015). The Board separately found that the Company violated the Act by maintaining a confidentiality provision in its arbitration agreement requiring employees to keep information about arbitral proceedings confidential. *Id.* at *1, *5 & n.3.

2. The Company subsequently filed a petition for review of the Board's Order.

3. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*, holding that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related legal claims.¹ The Board acknowledges that under that decision, the Board's finding that the Company unlawfully maintained and/or enforced the agreement is not enforceable, and the Board is willing to submit to a partial summary grant of review of the relevant portion of its Order.

¹ The Court issued *Epic Systems* together with *Murphy Oil*, No. 16-307, and *Ernst & Young LLP v. Morris*, No. 16-300.

4. On December 14, 2017, the Board issued *The Boeing Company*, which overruled the *Lutheran Heritage* standard for evaluating facially neutral work rules. 365 NLRB No. 154, 2017 WL 6403495 at *2 (Dec. 14, 2017). The issue of whether the confidentiality provision in the Company's agreement violates the Act under the *Boeing* framework is a question for the Board to answer in the first instance. Accordingly, the Board respectfully moves this Court to sever and remand that issue to the Board.

WHEREFORE, the Board respectfully requests that the Court summarily grant review of that portion of the Board's Order governed by the Supreme Court's decision in *Epic Systems*, and sever and remand to the Board the remainder of the case.

Respectfully submitted,

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
This June 5th of June 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 492 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

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CERTIFICATE OF SERVICE

I certify that on June 5, 2018, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, D.C.
This June 5th of June 2018