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June 14, 2018

VIA ECF

David J. Smith
Clerk of Court
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *Samsung Electronics America, Inc. v. NLRB* – Case No. 16-10788-FF

Dear Mr. Smith:

In accordance with the Court’s May 23, 2018 Order directing that counsel file letter briefs regarding the effect of the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, No. 16-285, 2018 WL 2292444 (May 21, 2018), Petitioner-Cross Respondent Samsung Electronics America, Inc. (“Samsung”) respectfully submits this reply to the National Labor Relations Board’s (“NLRB” or “Board”) June 6, 2018 letter brief.

The Board concedes that, under *Epic Systems*, Samsung’s arbitration agreements with collective and class action waivers are lawful. The Board also agrees that Samsung did not unlawfully instruct Jorgie Franks not to discuss with other employees her lawsuit against Samsung.

Regarding the effect of *Epic Systems* on the Board’s finding that Samsung unlawfully interrogated Franks, Samsung does not object to the Board’s request that the Court sever and remand this issue to the Board.

If the Court decides to consider the interrogation issue, it should grant Samsung’s petition and rule that Samsung did not unlawfully interrogate Franks. The Board is incorrect in arguing that *Epic Systems* does not implicate “whether the NLRA continues to protect an employee who, like Franks, speaks ‘to other employees about whether they were being adequately compensated for the number of hours they were working and . . . whether they

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would be interested in joining in a lawsuit against [their employer].” NLRB’s Ltr. Br. at 2. The allegations against Samsung are that Samsung human resources officer Sandra Sanchez’s September and October 2014 conversations with Franks were interrogations about Franks’s attempts to get other employees to participate in her lawsuit. If Franks does not have a Section 7 right to institute a collective action, questioning her about bringing such a lawsuit would not violate the NLRA.

Notwithstanding the Board’s reference to the question whether the NLRA protects “speak[ing] ‘to other employees about whether they were being adequately compensated for the number of hours they were working . . . ,’” *id.*, this question cannot be considered here if the Court decides to consider rather than remand the interrogation issue because this question was not decided below. The Board found an unlawful interrogation based solely on an alleged attempt to acquire information about Franks bringing a collective action:

Although not framed as questions, we have no difficulty finding that Sanchez’ statements [on September 3], “sharing” with Franks that some coworkers were “uncomfortable” with a conversation about “some issues of a potential lawsuit,” were calculated to elicit a response from Franks *about her protected activity of bringing a collective lawsuit against the Respondent* and to gain information about Franks’ conversations with employees *about the lawsuit*. . . .

Contrary to the judge, we find that the Respondent again unlawfully interrogated Franks about her protected concerted activities through Sanchez’ October 7 email. Although phrased as a general inquiry about whether anything had “changed,” we find that Sanchez’ question was in reality a second, thinly disguised question aimed at discovering the extent of Franks’ protected concerted activity.

Samsung Elecs. Am., Inc., 363 NLRB No. 105, 2016 WL 453584, at *4 (Feb. 3, 2016) (emphases added).

The NLRB also disputes Samsung’s alternative ground for granting Samsung’s petition—that an employer that is looking into a grievance is attempting to resolve it, rather than to gather intelligence about the lawsuit—by arguing that “Samsung never claimed that it was conducting an investigation into Franks’ complaint.” NLRB’s Ltr. Br. at 2-3 n. That is incorrect. In its initial brief, Samsung cited the following facts establishing that it was attempting to resolve a grievance:

The September/October conversations—where Sanchez informed Franks that she made coworkers uncomfortable, and offered to listen to any problems that Franks might have—were plainly offers to resolve workplace grievances, not inquiries into Franks’ planned lawsuit. Franks

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acknowledged on cross-examination that Sanchez did not prohibit her from discussing her lawsuit or her work schedule with other employees—which one might expect if Franks and Sanchez mutually understood their conversation to be about Franks’ planned lawsuit, not her problems at work. Tr. at 42. For that matter, Franks described the conversations as “very nice” and “really . . . friendly,” Tr. at 27, 36, suggesting that Sanchez and Franks understood that the conversations sought to solicit any complaints Franks might have—not that they sought to investigate a potential violation of the mutual arbitration agreement. And both contacts by Sanchez were immediately preceded by worker complaints that Sanchez was obligated to address. ALJD 3-4; Tr. 53, 64-65. This attempt to resolve internal problems—typical for human resources professionals—explains why Sanchez contacted Franks both times (rather than because of rumors of a lawsuit).

Br. of Pet’r Samsung Elecs. Am., Inc. at 51-52 (June 9, 2016).

In conclusion, Samsung and the Board agree that the Court should hold that Samsung’s arbitration agreements are lawful and that Samsung did not unlawfully instruct Franks not to discuss with other employees her lawsuit against Samsung, and Samsung does not object to the Board’s request that the Court remand to the Board the issue whether Samsung unlawfully interrogated Franks. But if the Court addresses the unlawful interrogation issue, it should rule in Samsung’s favor based on *Epic Systems* or, alternatively, because Samsung was attempting to resolve a grievance rather than gather intelligence about Franks’s lawsuit.

Respectfully submitted,

/s/ Mark E. Zelek
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MEZ/bc

cc: All counsel of record (via ECF)