

1 UNITED STATES OF AMERICA
2 BEFORE THE NATIONAL LABOR RELATIONS BOARD
3 Washington, D.C.

4 TARLTON AND SON, INC.
5 and
6 ROBERT MUNOZ, an Individual

Cases 32-CA-119054
32-CA-126896

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11 **RESPONDENT TARLTON AND SON, INC.'S STATEMENT WITH RESPECT**
12 **TO ISSUES RAISED BY THE NINTH CIRCUIT'S REMAND**

13 In response to the Board's November 21, 2018 letter, Respondent Tarlton and Son,
14 Inc. ("Tarlton") files this statement of position with respect to the issues raised by the
15 Ninth Circuit Court of Appeals remanding of this case to the Board.

16 **I. INTRODUCTION, TARLTON'S POSITION AND ARGUMENT**

17 The Ninth Circuit remanded the decision in Tarlton and Son, Inc., 363 NLRB No.
18 175 (2016) to the Board after issuance of the Supreme Court's decision in Epic Systems
19 Corporation v. Lewis, 138 S.Ct. 1612 (2018). The Ninth Circuit did so because Epic
20 Systems impacts the Board's findings that Tarlton violated Section 8(a)(1) in connection
21 with its mandatory arbitration policy.

22 Dismissal of the Section 8(a)(1) violations are compelled by the Supreme Court's
23 Epic Systems decision.

24 First, Epic Systems requires dismissal of the Board's finding that Tarlton violated
25 Section 8(a)(1) by maintaining the MAP.¹ Here, the Board was applying its decisions in
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27 ¹ Counsel for the General Counsel agrees with this position. *See Counsel for the General*
28 *Counsel's Position Statement in Light of the Court's Remand to the Board* filed December 13,
2018, at p. 1.

1 D.R. Horton, 357 NLRB 2277 (2012) and Murphy Oil USA, Inc.,² and adopted the
2 Administrative Law Judge’s (“ALJ”) finding that Tarlton violated Section 8(a)(1) by
3 maintaining a Mutual Arbitration Policy (“MAP”) containing a class action waiver. 363
4 NLRB No. 175, slip op. at pgs. 1-2. This 8(a)(1) finding was based on the Board’s
5 decisions in D. R. Horton, Inc., 357 NLRB 2277 (2012), enf. denied in relevant part, 737
6 F.3d 344 (5th Cir. 2013), and Murphy Oil USA, Inc., 361 NLRB No. 72 (2014), enf.
7 denied in relevant part, 808 F.3d 1013, 344 (5th Cir. 2015). Id. In Epic Systems, the
8 Supreme Court rejected the Board’s Murphy Oil holding that maintenance of a class
9 action waiver in an employer-mandated arbitration agreement violates Section 8(a)(1).

10 Second, Epic Systems also requires dismissal of the Board’s finding that Tarlton
11 independently violated Section 8(a)(1) by implementing the MAP after several
12 employees’ filed a state court wage and hour class action. The General Counsel agrees
13 that this Section 8(a)(1) violation should be dismissed.³ In finding this Section 8(a)(1)
14 violation, the Board adopted the ALJ’s finding that employees were engaged in Section 7
15 protected concerted activity by filing a state court wage and hour class action. 363 NLRB
16 No. 175, slip op. at pgs. 2-3. In Epic Systems, however, the Supreme Court expressly
17 stated that protected concerted activity under Section 7 did not encompass the filing of a
18 class action by employees. Epic Systems, supra, 138 S.Ct. at 1630 (“... today’s decision
19 merely declines to read into the NLRA a novel right to class action procedures that the
20 Board’s own general counsel disclaimed as recently as 2010.”); 138 S.Ct. at 1638 (Justice
21 Ginsburg dissenting) (“In the face of the NLRA’s text, history, purposes, and
22 longstanding construction, the Court nevertheless concluded that collective proceedings
23 do not fall within the scope of § 7.”).

24 Because the Supreme Court held in Epic Systems that the pursuit of a collective or

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26 ² D. R. Horton and Murphy Oil were denied enforcement in relevant part by the Fifth
27 Circuit Court of Appeals in D. R. Horton v. NLRB, 737 F.3d 344 (5th Cir. 2013), Murphy Oil
USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015).

28 ³ See *Counsel for the General Counsel’s Position Statement in Light of the Court’s*
Remand to the Board filed December 13, 2018, at pgs. 1-2.

1 wage and hour class action is not Section 7 protected concerted activity, Tarlton did not
2 violate Section 8(a)(1) by implementing the MAP after the filing of the employees' state
3 court class action. Accordingly, this Section 8(a)(1) violation should be dismissed.

4 **II. CONCLUSION**

5 For the reasons noted above, Respondent Tarlton and Son, Inc. requests that the
6 Board dismiss the Section 8(a)(1) violations and dismiss the complaint in its entirety.
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9 Respectfully submitted,

10 DATED: December 19, 2018

HILL, FARRER & BURRILL LLP
James A. Bowles, Esq.
Richard S. Zuniga, Esq.

11
12 By: 
13 Richard S. Zuniga
14 Attorneys for Respondent
15 TARLTON AND SON, INC.
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CERTIFICATE OF SERVICE

I, Richard S. Zuniga, declare as follows:

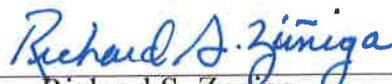
1. I hereby certify that on December 19, 2018, I filed **RESPONDENT TARLTON AND SON, INC.'S STATEMENT WITH RESPECT TO ISSUES RAISED BY THE NINTH CIRCUIT'S REMAND** in Cases 32-CA-119054 and 32-CA-126896, via E-Filing.

2. I hereby certify that on December 19, 2018, I caused to be served true and correct copies of **RESPONDENT TARLTON AND SON, INC.'S STATEMENT WITH RESPECT TO ISSUES RAISED BY THE NINTH CIRCUIT'S REMAND** in Cases 32-CA-119054 and 32-CA-126896, by first-class U.S. Mail and by E-Mail on the following parties:

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I hereby certify that the foregoing is true and correct. Executed this 19th day of December, 2018, at Los Angeles, California.


Richard S. Zuniga

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