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VIA ECF

Ms. Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: **Patterson v. Raymours Furniture Co., No. 15-2820-cv**

Dear Ms. Wolfe:

We write to respond to appellants' Rule 28(j) letter concerning the Ninth Circuit's decision in *Morris v. Ernst & Young,* as follows:

(1) Both the majority and the dissent recognize that *Sutherland* is controlling precedent in this Circuit. *See* slip op. 26 n.16, 43.

(2) By holding that the NLRB may condition enforcement of arbitration agreements on the availability of class procedures, *Morris* conflicts irreconcilably with *Concepcion*. The central premise of the majority's opinion is that: "The arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA." (Slip op. 14.) Respondents in *Concepcion* made this precise argument, to wit: "The approach courts have taken to class-action bans in nonarbitration agreements, both before and after *Discover Bank*, demonstrates that the California Supreme Court and other courts that have reached the same conclusion are concerned with aggregation, not arbitration." (Br. for Resp'ts at 2010 WL 4411292 *21). The Supreme Court flatly rejected the argument, holding that: (1) "nothing in [§ 2's saving clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," and (2)

"[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration. . . ." 563 U.S. at 343-44.

(3) The *Morris* majority's analysis is flawed in other ways too many to be addressed in 350 words. By example, it acknowledges that an arbitration agreement may require employees to resolve disputes individually, and then offers that nothing in *Stolt-Nielsen* would "prevent the district court . . . from severing the 'separate proceedings' clause to bring the arbitration provision into compliance with the NLRA." (Slip op. 17 n.8). If it did so, however, (1) the severed arbitration agreement would necessarily foreclose class litigation, yet (2) the arbitrator could not proceed on a class basis under *Stolt-Nielsen*. Apparently, the majority intended to require class arbitration in the absence of class litigation, but that intent would condition the validity of an arbitration agreement on the availability of class procedures, in conflict with both *Stolt-Neilsen* and *Concepcion*.

Respectfully submitted,

LITTLER MENDELSON, P.C.

David M. Wirtz

Enclosure
cc: Counsel for Plaintiffs-Appellants via ECF
Counsel for *Amici* via ECF