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March 16, 2016

Lyle W. Cayce, Clerk
United States Court of Appeals
Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: *Macy's, Inc. v. NLRB*, No. 15-60022 (Oral argument held October 6, 2015)

Dear Mr. Cayce:

FedEx Freight, Inc. v. NLRB, No. 15-1848, 2016 WL 859971 (8th Cir. Mar. 7, 2016), does not control this case.

First, regardless of whether *Specialty Healthcare* provides a permissible standard for unit determinations in general, the NLRB failed to provide a reasoned basis for its decision here. Macy's Br. 18-30; Reply Br. 3-15. Rather than discussing the significance of purported distinctions between employees in the cosmetics-and-fragrances department and employees in other departments, the Board merely "tall[ied] the factors" in support of the proposed unit. *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980). It did not "adequately explain" "the weight [it] assigned to each individual factor" or its "conclusion that the totality of the factors" favored a cosmetics-and-fragrances unit. *Id.* at 1160-61. The Board's failure to explain *why* it exercised its discretion as it did violates fundamental precepts of administrative law. This deficiency—which was not argued in *FedEx*—provides an independent basis for granting Macy's petition.

Second, the Eighth Circuit erred in approving *Specialty Healthcare*, for reasons Macy's has explained. Macy's Br. 35-60; Reply Br. 17-30. Moreover, *FedEx* did not consider arguments Macy's made here. For example, while insisting that *Specialty Healthcare* "is not a material departure from past [NLRB] precedent," 2016 WL 859971, at *7, the court did not address the Board's adoption of the "substantially more stringent" standard from *accretion* cases to make *initial* unit determinations. *NLRB v. Superior Prot.*, 401 F.3d 282, 287-88 (5th Cir. 2005); Macy's Br. 49-52; Reply Br. 24-36. *FedEx* also sanctioned the Board's use of a deferential *appellate* standard to make *initial* unit determinations. 2016 WL 859971, at *6; Macy's Br. 42-43. The court denied the resulting test means "the union's choice of bargaining unit is 'sure to prevail.'" 2016 WL 859971, at *8. But unless the union makes the mistake of proposing a unit that does not track some employer-drawn line, that choice will be "controlling."

Reply Br. 17-22 n.4. This approach—which cannot be squared with retail-industry precedent—would justify the unionization of every department in every department store. Macy's Br. 30-34, 52-55; Reply Br. 9-10, 16-17.

Word count: 350

Respectfully submitted,

/s/ Shay Dvoretzky

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CERTIFICATE OF SERVICE

I hereby certify that, on March 16, 2016, I filed the foregoing Rule 28(j) letter with the Clerk of this Court through the Court's electronic case filing system. The electronic case filing system will send a "Notice of Electronic Filing" to all counsel of record.

/s/ Shay Dvoretzky
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