

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**PRIVATE NATIONAL MORTGAGE  
ACCEPTANCE COMPANY LLC,  
“PENNYMAC”**

**And**

**Case 20–CA–170020**

**RICHARD SMIGELSKI, an individual**

*Min-Kuk Song, Esq.*, Counsel for the  
General Counsel.  
*Richard S. Zuniga, Esq.*, Counsel for  
the Respondent.  
*Chris Baker, Esq.*, Counsel for the  
Charging Party.

**DECISION**

RAYMOND P. GREEN, Administrative Law Judge. This case was presented to me by way of a stipulated record. The charge was filed on February 18, 2016 and served upon the Respondent on February 19, 2016. The Complaint was issued on May 10, 2016 and was thereafter amended on July 14 and August 15, 2016. In substance, the Complaint as amended alleges (a) that the Respondent violated Section 8(a)(1) by implementing and maintaining a company-wide arbitration policy applicable to most employment-related disputes and which requires employees as a condition of employment to waive any right to join or consolidate claims in arbitration with others or to make claims as a representative or member of a class or in a private attorney general capacity, unless such procedures are agreed to by to both the company and the employee; and (b) that the Respondent violated Section 8(a)(1) by seeking to compel the Charging Party to submit his claims alleged in *Smigelski v. PennyMac Financial Services Inc.* to arbitration.

**FINDINGS AND CONCLUSIONS**

**I. JURISDICTION**

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICE**

The stipulated facts are as follows:

1. The Respondent originates and services residential mortgage loans in 49 states, including California and the District of Columbia. Since 2008, the Respondent has maintained and enforced a company-wide Mutual Arbitration Policy, (referred to as MAP), that requires mandatory, binding arbitration of disputes for all employees as a mandatory condition of

5 employment. MAP covers all disputes relating to or arising out of an employee's employment and requires employees to forego and waive any right to join or consolidate a claim with others or to make claims as a representative or as a member of a class. This essentially means that the Respondent's employees can pursue employment related claims only by way of arbitration and only on an individual basis. The Respondent requires every employee to sign a document called the Employee Agreement to Arbitrate, referred to herein as the EAA, pursuant to which they acknowledge and agree to the terms of the MAP.

10 2. The Charging Party, Smigelski was employed by the Respondent as an Account Executive from November 2014 to April 2015. He signed the EEA on November 17, 2014 and therefore acknowledged and agreed to the MAP.

15 3. The MAP states that it was adopted as a mandatory condition of employment and further states that an employee's decision to accept employment or to continue employment with PennyMac constitutes agreement to be bound by the MAP. The signed EEA also states that the MAP is a condition of employment. In pertinent part the provisions of the MAP are as follows:

20 The MAP applies to PennyMac employees, regardless of length of service or status and covers all disputes relating to or arising out of an employee's employment with PennyMac or the termination of that employment. Examples of the types of disputes or claims covered by the MAP include, but are not limited to claims against employees for fraud, conversion, Misappropriation of trade secrets, or claims by employees for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation  
25 under the American With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code or any other legal or equitable claims and cause or action recognized by local,  
30 state or federal law or regulations. The MAP does not cover workers' compensation claims, unemployment insurance claims or any claims that could be made to the National Labor Relations Board. The MAP also does not prohibit either PennyMac or any PennyMac employee from filing a claim in small claims court, as long as the claim properly is within the jurisdiction of the small claims court. Because the MAP changes the forum in which you may pursue claims against PennyMac and affects your legal rights, you may wish to review the MAP with an attorney or other advisor of your choice. PennyMac encourages you to do so.

40 Your decision to accept employment or to continue employment with PennyMac constitutes your agreement to be bound by the MAP Likewise, PennyMac agrees to be bound by the MAP. This mutual obligation to arbitrate claims means that both you and PennyMac are bound to use the MAP as the  
45 only means of resolving any employment-related disputes. This mutual agreement to arbitrate claims also means that both you and PennyMac forego any right either may have to a jury trial on claims in any way to your employment and both you and PennyMac forego and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as  
50 a representative or as a member of a class or in a private attorney general capacity, unless such as procedures are agreed to by both you and

PennyMac. No remedies that otherwise would be available to you individual or to PennyMac in a court of law, however, will be forfeited by virtue of this agreement to use and be bound by the MAP.

5           4. The MAP describes in some detail the arbitration process and states that the  
employee and the Respondent will share the cost of the American Arbitration Association's filing  
fee and the arbitrator's fees and cost, except that the employee's share shall not exceed the  
amount equal to the local court's civil filing fee. It also provides that except as otherwise  
10           provided by law, the employee will be responsible for the fees and costs of legal counsel plus  
other costs associated with witnesses and the obtaining of hearing transcripts.

15           5. The provisions of the MAP expressly exclude claims that might be made under the  
National Labor Relations Board. However, it is also clear that in the MAP provisions there is no  
description of what those types of claims might entail.

20           6. The parties stipulated that if called to testify, witnesses for the Respondent would  
testify that the Respondent's purpose in implementing the MAP was to create an expedient,  
efficient, more cost-effective and fair means to resolve employment-related disputes that cannot  
be resolved informally.

25           7. On November 17, 2014, Richard Smigelski signed the EEA wherein he acknowledged  
receipt of the MAP.

30           8. On November 17, 2015, Smigelski filed a Complaint against the Respondent in the  
Sacramento Superior Court, in case number 34-2015-00186855. This was entitled  
"Representative Action Complaint for Violation of the Private Attorneys General Act of 2004"  
(Labor Code Section 2698, et. seq.). In essence, this was an action on behalf of a class of non-  
exempt employees for alleged violations of wage and overtime laws.

35           9. On February 16, 2016, the Respondent filed a Petition to Compel Arbitration and Stay  
Action in the aforesaid law suit and sought to compel Smigelski to submit his claims to  
arbitration in accordance with the MAP.

40           10. On March 10, 2016, Smigelski filed a First Amended Complaint in Smigelski v.  
PennyMac.

45           11. On March 11, 2016, the Court issued an Order denying the Respondent's Petition to  
Compel Arbitration.

50           12. On March 25, 2016, the Respondent filed a Petition to Compel Arbitration and Stay  
Action in relation to the amended Complaint filed in Smigelski v PennyMac.

          13. On March 25, 2016, the Respondent filed a Motion for Reconsideration regarding the  
Court's denial of its previous Petition to Compel Arbitration.

          14. On April 22, 2016, the Sacramento Superior Court issued an Order denying the  
Respondent's Petition to Compel Arbitration.

          15. On April 22, 2016, the Sacramento Superior Court issued an order denying the  
Respondent's Motion for Reconsideration.

### III. DISCUSSION

5 This is another in a long line of cases involving whether (a) an employer can require its employees to agree, as a condition of continued employment, to utilize arbitration as an alternative to the judicial process for resolving employment disputes; and (b) whether an employer can require employees, as a condition of continued employment, to waive their ability to file class action claims. (Whether in a court or before an arbitrator).

10 It is the Board's current position, despite reversals by several Circuit Courts, that an employer will violate Section 8(a)(1) of the Act when it requires its employees to utilize arbitration to resolve employment disputes and when it precludes employees from acting in concert to bring class actions, whether in court or before an arbitrator.

15 In my capacity as an Administrative Law Judge of the NLRB, I am bound to follow Board precedent irrespective of contrary opinions by Circuit Courts, unless and until the Supreme Court makes a definitive ruling on the subject matter in dispute.

20 Therefore, this case is controlled by the Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied 808 F.3d 1013 (5th Cir. 2015). In *Murphy Oil* and subsequent cases, the Board has consistently held that requiring employees to sign class action waivers, with or without an "opt out" clause, is a violation of Section 8(a)(1) of the Act.

25 Further, in light of the manner in which the MAP provisions are broadly drafted, I conclude that employees would have a reasonable basis for concluding that they would be precluded from filing charges with the National Labor Relations Board. In the absence of some reasonable explanation to employees of their rights under the National Labor Relations Act, the minimal statement to the effect that the MAP excludes charges filed with the Board is, in my opinion, insufficient to assure employees that their rights to file charges with the National Labor Relations Board have not been adversely affected. *SolarCity Corp.*, 363 NLRB No. 83, slip op. at page 6 (2015).

30 Finally, in light of current Board precedent, I must reject the Respondent's contention that its Motions to compel individual arbitration were protected by the First Amendment's Petition Clause. The Supreme Court in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 731-743 (1983), noted that there were two situations where such legal actions do not enjoy the Amendment's protection. The first is where the action is outside the State Court's jurisdiction because of Federal preemption. And the second is where the action seeks to enforce a matter which is illegal under Federal law. The Board has therefore restrained litigation efforts that have an illegal objective of curtailing employees' Section 7 rights. *Murphy Oil*, supra, slip op. at 20-21, *Convergys Corp.*, 363 NLRB No. 51, slip op. at fn. 5 (2015).

### CONCLUSIONS OF LAW

45 By maintaining a provision that requires employees to (a) waive the right to bring class actions or to act concertedly in regard to their terms and conditions of employment; (b) waive the right to initiate lawsuits regarding terms and conditions of their employment; and (c) by filing Motions in Court to compel an employee to arbitrate on an individual basis a class action lawsuit relating to terms and conditions of employment, the Respondent has violated Section 8(a)(1) of the Act.

50

## REMEDY

As it concluded that the Respondent has unlawfully maintained an Arbitration Policy that precludes class or collective actions by employees, I shall recommend that it be ordered to rescind or revise that policy to make it clear to employees that the Policy and agreements made pursuant to the Policy do not constitute a waiver in all forums of their rights to maintain class or collective actions relating to their wages, hours or other terms and conditions of employment. I shall also recommend that the Respondent be required to notify its employees of the rescinded or revised Policy.

Because the Arbitration Policy has been and continues to be maintained throughout the United States, it is recommended that the Respondent be ordered to post the attached Notice at all locations where the Policy has been or is still in effect.

To the extent that the Charging Party has incurred litigation expenses relating to the Respondent's Petition to compel arbitration in conformance with its Arbitration Policy, it is recommended that the Respondent reimburse the Charging Party for such expenses with interest as determined in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds, sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (DC Cir. 2011).

Additionally, although the Sacramento Superior Court has denied the Respondent's Petitions and Motions to compel arbitration, it is not clear to me that the matter has been finally put to rest and that no appeal has been or will be filed. It therefore is recommended that the Respondent be required to file Motions with the Court in *Smigelski v. PennyMac*, requesting the withdrawal of its motions to compel individual arbitration.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

## ORDER

The Respondent, Private National Mortgage Acceptance Company LLC, ("PennyMac"), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a policy that compels employees, as a condition of employment waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Requiring employees to sign binding arbitration agreements that prohibit collective and class litigation.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

5 (a) Rescind or revise the mandatory arbitration policy in all of its forms, or revise it in all of its forms, to make clear to employees that the arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums or that requires employees to waive their right to maintain employment-related class and collective claims in all forums, whether arbitral or judicial.

10 (b) Notify all current and former employees who were required to sign or otherwise become bound by the mandatory arbitration policy in any form that it has been rescinded or revised and, if revised, provide them with a copy of the revised policy.

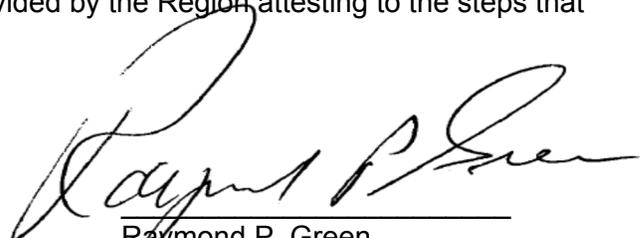
15 (c) Withdraw any pending motions for individual arbitration in which the Respondent seeks enforcement of the arbitration policy's unlawful restriction on class or collective claims; or if such motions have already been granted, move the appropriate court to vacate any orders for individual arbitration and reimburse employees for any litigation expenses including attorney's fees, directly related to opposing Respondent's motions to compel individual arbitration.

20 (d) In the manner set forth in this decision, reimburse Richard Smigelski for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondent's Motion to compel individual arbitration.

25 (e) Within 14 days after service by the Region, post at its locations nationwide where the Arbitration Policy has been promulgated, maintained or enforced copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and /or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, a copy of this notice will be made available to employees on the same basis and to the same group or class of employees as the Arbitration Policy was made available to them. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 10, 2012.

40 (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

45 Dated, Washington, D.C. November 29, 2016

  
Raymond P. Green  
Administrative Law Judge

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**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

**WE WILL NOT** maintain or enforce the MAP policy or any agreements made with employees pursuant to that policy that waives the right to maintain class or collective action in any forum.

**WE WILL NOT** pursuant to the terms of such agreements enforce them by filing Motions in Court to stay collective action lawsuits and to compel individual arbitrations.

**WE WILL NOT** require employees to sign binding arbitration agreements that prohibit collective and class litigation.

**WE WILL NOT** in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

**WE WILL** withdraw any pending motions in which we have sought to enforce the arbitration policy's unlawful restriction on class or collective claims; or if such motions have already been granted, move the appropriate court to vacate any orders for individual arbitration.

**WE WILL** reimburse Richard Smigelski for any reasonable litigation expenses, including attorney's fees, directly related to opposing our motions to compel individual arbitration.

Private National Mortgage Acceptance Company  
LLC, ("PennyMac"),  
\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

901 Market Street, Suite 400, San Francisco, CA 94103–1735. Phone: (415) 356–5130.  
Hours: 9 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/20-CA-170020](http://www.nlr.gov/case/20-CA-170020) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF  
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER  
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS  
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE  
OFFICER, (415) 356–5130).