

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

PRIVATE NATIONAL MORTGAGE ACCEPTANCE
COMPANY LLC (“PENNYMAC”)

and

Case 20-CA-170020

RICHARD SMIGELSKI, an Individual

COUNSEL FOR GENERAL COUNSEL’S BRIEF IN SUPPORT OF CROSS EXCEPTIONS
TO THE DECISION THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Raymond P. Green (ALJ) correctly found that the Respondent violation Section 8(a)(1) of the Act by implementing, maintaining, and enforcing an arbitration agreement requiring employees to arbitrate their work-related complaints in individual arbitration. (ALJD at 4:44-49). The ALJ also correctly found that Respondent’s Mutual Arbitration Policy (“MAP”) was broadly drafted that “employees would have a reasonable basis for concluding that they would be precluded from filing charges with the National Labor Relations Board.” (ALJD at 4, 23-25). In finding that the MAP exclusions were “minimal” and “insufficient to assure employees that their rights to file charges with the National Labor Relations Board have not been adversely affected,” ALJ Green cited to *SolarCity Corp.*, 363 NLRB No. 83 (2015), where the Board found an arbitration agreement violated Section 8(a)(1) of the Act despite exceptions that refer to the “NLRA” or “the National Labor Relations Act.” (ALJD page 4, lines 28-30). Despite ALJ Green’s *SolarCity* analysis and finding, ALJ Green’s Conclusions of Law, Remedy, Order, and Notice to Employees inadvertently fail to conform to his finding.

I. THE ALJ'S INADVERTENT ERROR IN HIS CONCLUSIONS OF LAW (CROSS EXCEPTION NO. 1)

Based on ALJ Green's finding that "employees would have reasonable basis for concluding that they would be precluded from filing charges with the National Labor Relations Board" (ALJD page 4, lines 23-30), the Conclusions of Law should be amended to include the following:

"By maintaining a mandatory and binding arbitration agreement that employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board or from accessing the Board's processes, the Respondent has violated Section 8(a)(1) of the Act." *See e.g. SolarCity Corp*, supra, slip op pg. 21.

II. THE ALJ'S INADVERTENT ERROR IN HIS REMEDIES (CROSS EXCEPTION NO. 2)

Based on ALJ Green's finding that "employees would have reasonable basis for concluding that they would be precluded from filing charges with the National Labor Relations Board" (ALJD page 4, lines 23-30), the Remedies should be amended to include the following:

"I have found that the Respondent maintained a mandatory arbitration policy, the MAP and the EAA, which may be reasonably interpreted as prohibiting or restricting employees from filing unfair labor practice charges with the National Labor Relations Board. I therefore recommend that the Respondent be ordered to rescind the MAP and EAA and to provide the employees with specific notification that the MAP and EAA have been rescinded." *See e.g. SolarCity Corp*, supra, slip op pg. 21.

III. THE ALJ'S INADVERTENT ERROR IN THE CEASE AND DESIST SECTION OF HIS ORDER (CROSS EXCEPTION NO. 3)

Based on ALJ Green's finding that employees had reasonable basis to conclude that the Respondent's arbitration agreement precluded employees from filing charges with the Board, the

cease and desist section of his Order should be amended to the following and subsequent paragraphs appropriately renumbered:

“(b) Maintaining and/or enforcing a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.” *See e.g. SolarCity Corp*, supra, slip op pg. 6.

IV. THE ALJ’S INADVERTENT ERROR IN THE AFFIRMATIVE ACTION SECTION OF HIS ORDER (CROSS EXCEPTION NO. 4)

Based on ALJ Green’s finding that employees had reasonable basis to conclude that the Respondent’s arbitration agreement precluded employees from filing charges with the Board, the affirmative action section of his Order should be amended to the following and subsequent paragraphs appropriately renumbered:

“(b) Rescind or revise the Mandatory Arbitration Policy in all of its forms to make clear to employees that the MAP does not bar or restrict employees' right to file charges with the National Labor Relations Board.” *See e.g. SolarCity Corp., supra*, slip op. at 6.

V. THE ALJ’S INADVERTENT ERROR IN THE NOTICE TO EMPLOYEES (CROSS EXCEPTION NO. 5)

Based on ALJ Green’s finding that employees had reasonable basis to conclude that the Respondent’s arbitration agreement precluded employees from filing charges with the Board, the Notice to Employees should be amended to include the following:

“Section 7 of the Act gives employees these rights.

To file charge with the National Labor Relations Board.”

And

“WE WILL NOT maintain or enforce the Mutual Arbitration Policy or any agreements made with employees pursuant to that policy that an employee can reasonably interpret to

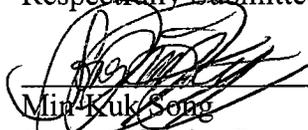
preclude an employee from filing a charge with the Board.” *See e.g. SolarCity Corp., supra*, slip op. at 12.

VI. CONCLUSION

Counsel for the General Counsel respectfully requests that the Board’s final order amends the ALJ’s Conclusions of Law, Remedies, Order and Notice to Employees to properly conform to the ALJ’s findings.

DATED at San Francisco, California this 7th day of March, 2017

Respectfully Submitted



Min Kuk Song
Counsel for the General Counsel
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

**PRIVATE NATIONAL MORTGAGE
ACCEPTANCE COMPANY LLC ("PENNYMAC")**

and

Case 20-CA-170020

RICHARD SMIGELSKI, an Individual

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S CROSS
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND
COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on March 7, 2017, I served the above-entitled document(s) by **electronic mail** upon the following persons, addressed to them at the following addresses:

RICHARD SMIGELSKI
c/o CHRIS BAKER , ESQ.
BAKER & SCHWARTZ PC
44 Montgomery Street, Suite 3520
San Francisco, CA 94104
CBaker@bakerlp.com

PRIVATE NATIONAL MORTGAGE
ACCEPTANCE COMPANY LLC
c/o RICHARD S. ZUNIGA , ESQ.
HILL, FARRER & BURRILL LLP
300 S Grand Ave
One California Plaza 37th Fl
Los Angeles, CA 90071-3109
RZuniga@hfbllp.com

March 7, 2017

Date

Min-Kuk Song

Name

/s/ Min-Kuk Song

Signature