

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  
ANSWER TO RESPONDENT’S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE’S DECISION

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## **I. INTRODUCTION**

On November 29, 2016, Administrative Law Judge (ALJ) Raymond P. Green correctly found, as alleged in the complaint, that Private National Mortgage Acceptance Company, LLC (“Respondent” or “Pennymac”) violated Section 8(a)(1) of the Act by: 1) maintaining a Mutual Arbitration Policy (“MAP”) that was a mandatory condition of employment that required employees to waive their rights to pursue collective or class action in judicial or arbitral forums (Administrative Law Judge Decision (ALJD) page 4, lines 44-47); 2) enforcing the unlawful MAP (ALJD page 4, lines 47-49) against Richard Smigelski (“Charging Party”) in litigation he brought against Respondent and by petitioning the trial court, on multiple occasions, to compel Smigelski to individually arbitrate his class-wide wage and hour claims. (*Smigelski v. PennyMac Financial Services Inc.*, Sacramento Superior Court Case No. 34-2015-00186855); and 3) maintaining a MAP that was overbroad and ambiguous and could be reasonably interpreted to preclude an employee from filing charges with the National Labor Relations Board (NLRB) (ALJD page 4, lines 23-25).

Unable to except to ALJ Green’s factual findings, which were based on a Joint Stipulated Record, or to distinguish *Murphy Oil*, Respondent challenges *Murphy Oil* itself, and fails to present any facts or argument that can support overturning any of the ALJ’s findings.

## **II. STATEMENT OF THE CASE**

Since 2008, Respondent has maintained and enforced a company-wide Mutual Arbitration Policy requiring “mandatory, binding arbitration of disputes, for all employees as a mandatory condition of employment.” (ALJD page 1). The 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 that claim with others or to make claims as a representative or as a

member of a class.” (ALJD page 2, lines 1-3). This essentially means that Respondent’s employees, by virtue of their employment, “can pursue [their] employment-related claims only by way of arbitration and only on an individual basis.” (ALJD page 2, lines 4-5).

A. RESPONDENT’S MUTUAL ARBITRATION POLICY AND EMPLOYEE AGREEMENT TO ARBITRATE (R. EXC. 3, 4, 5, 7, 8, 9, 12)

The terms of Respondent’s arbitration policy are set out in the Mutual Arbitration Policy and are enforced through the “Employee Agreement to Arbitrate” (“EAA”), an agreement Respondent requires every employee to sign acknowledging and agreeing to the terms of the MAP. (ALJD page 2, lines 5-7).

Charging Party Smigelski was employed by Respondent as an Account Executive from November 2014 to April 2015, and signed the EAA on November 17, 2014 acknowledging and agreeing to the MAP. (ALJD page 2, lines 9-11).

Respondent’s MAP states that it was adopted “as a mandatory condition of employment” and that an employee’s “decision to accept employment or to continue employment with PennyMac constitutes [their] agreement to be bound by the MAP.” (ALJD page 2, lines 13-15, lines 41-43). The EAA also states that the MAP is a condition of employment. (ALJD page 2, lines 15-16).

The MAP is broadly drafted extending its coverage to “all employees” and “all existing or future disputes...related in any way to your employment.” (ALJD page 4, line 23; page 2, lines 19-21). The claims covered by the MAP include but are not limited to:

“[C]laims by employees for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation 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 antidiscrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations.” (ALJD page 2, lines 23-31).

The MAP has a comprehensive list of covered claims and only minimally identifies the MAP’s exclusions. (ALJD page 4, lines 23-30). The MAP excludes “any claims that could be made to the National Labor Relations Board.” (ALJD page 3, lines 12-14). As ALJ Green notes, the MAP’s exclusion of NLRB claims is “minimal” and provides no description of what claims can still be filed with the NLRB. (ALJD page 3, lines 13-14). The absence of a reasonable explanation is striking in light of the nine-line list of covered disputes that precedes the exclusion for NLRB claims, especially as the list of covered disputes includes the type of issues employees traditionally bring to the NLRB -- “claims by employees for wrongful termination of employment ... employment discrimination, harassment or retaliation under... legal or equitable claims and causes of action recognized by ... federal law or regulations.” (ALJD page 2, lines 24-31; page 3, lines 12-14; page 4, lines 25-30).

That ambiguity is further aggravated by language in the subsequent paragraph stating, “[T]his mutual obligation to arbitrate claims means that both you and PennyMac are bound to use the MAP as the only means of resolving any employment-related disputes.” (ALJD page 2, lines 43-45, underlining added for emphasis)

Under the MAP and EAA, employees also “forego and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity.” (ALJD page 2, lines 45-51,

page 3, line 1-3). Thus, employees are first limited to pursuing employment-related disputes only through arbitration, and then are limited further to pursue arbitration claims only individually. (ALJD page 2, lines 1-5). The MAP effectively restricts employees from pursuing class or collective action of employment-related disputes in any forum, whether arbitral or judicial. (ALJD page 2, lines 3-5).

**B. THE ALJ CORRECTLY FOUND THAT RESPONDENT ENFORCED ITS MAP AND EAA ON FEBRUARY 16, 2016 AND TWICE ON MARCH 25, 2016 (R. EXC. 3, 4, 5, 7, 8, 9, 12)**

On November 17, 2015, Charging Party filed a cause of action in Sacramento Superior Court against Respondent under California's Private Attorney General Act ("PAGA") alleging Respondent violated the California Labor Code during Charging Party's employment with Respondent. (*Smigelski v. PennyMac Financial Services Inc.*, Sacramento County Superior Court Case No. 34-2015-00186855)(ALJD page 3, lines 24-28). The PAGA Complaint was on behalf of a class of non-exempt employees for alleged violations of wage and overtime laws. (ALJD page 3, lines 27-28)

On or about February 16, 2016, Respondent petitioned the trial court to compel Charging Party to submit the Private Attorney General Act claims to arbitration under Respondent's MAP. (ALJD page 3, lines 30-32). The Sacramento County Superior Court denied Respondent's motion to compel arbitration ("the First Enforcement") on March 11, 2016. (ALJD page 3, lines 37-38).

On March 25, 2016, Respondent petitioned the court to compel Charging Party to submit his new class action claims to arbitration under the Respondent's MAP (ALJD page 3, lines 40-41). Additionally, Respondent petitioned the court to reconsider its earlier decision denying the First Enforcement by filing a Motion for Reconsideration of the initial petition filed in February

(ALJD page 3, lines 43-44).

### III. ARGUMENT

ALJ Green properly found that this case was controlled by the Board's decision in *Murphy Oil*, 361 NLRB No. 72 (2014) denied in relev. part 808 F.3d 1013 (5th Cir. 2015) (ALJD page 4, lines 18-19). Like the arbitration agreement in *Murphy Oil*, Respondent's MAP here was unlawful because it explicitly restricts employees, as a condition of employment, from pursuing class, collective, or representative actions involving employment-related claims in all forums, whether judicial or arbitral. (ALJD page 4, lines 44-47). ALJ Green also correctly found that, as in *Murphy Oil*, Respondent maintained and enforced this unlawful agreement in violation of Section 8(a)(1) of the Act. Additionally, applying the *Lutheran Village Livonia* principles as set forth in *Solar City*, 363 NLRB No. 83 (2015), ALJ Green correctly found the MAP unlawful because an employee would reasonably interpret the MAP to prohibit employees from filing charges with the Board. (ALJD page 4, lines 47-49).

A. ALJ GREEN PROPERLY FOUND THAT RESPONDENT MAINTAINED A MUTUAL ARBITRATION POLICY THAT UNLAWFULLY BARRED EMPLOYEES FROM PURSUING CLASS OR COLLECTIVE CLAIMS IN ANY FORUM, JUDICIAL OR ARBITRAL (R. EXC. 2, 7, 8, 9, 10, 11-30.)

Respondent's Exception 2 attacks the Board's decision in *Murphy Oil*. Every other exception Respondent makes relates to the reasoning and remedy set forth in that decision.

The ALJ's reliance on *Murphy Oil* was proper because it is controlling law despite a split in the circuit courts over its validity. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) , *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); *Herbert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). The Board's *Murphy Oil* decision firmly established that collective action in arbitration,

like the collective pursuit of workplace grievances through litigation, is protected by Section 7 of the Act. *Murphy Oil*, slip op. at 6-7; See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978). Since then, the Board has repeatedly held that agreements requiring employees, as a condition of employment, to refrain from bringing collective action in any forum, judicial or arbitral, unlawfully restrict employees' Section 7 rights. *Murphy Oil* slip op. at 6-7; *Kenai Drilling Limited*, 363 NLRB No. 158 (2016) (maintenance and enforcement of class waiver arbitration agreement unlawful); *RPM Pizza, LLC*, 363 NLRB No. 82 (2015) (same); *Adecco USA, Inc.*, 364 NLRB No. 9 (2016) (class waiver arbitration agreement barring the charging party from filing a private attorney general act cause of action was unlawful).

As in *Murphy Oil* and its progeny, the ALJ correctly found that Respondent's MAP was unlawful because it was a mandatory term of employment and it explicitly restricts employees from pursuing class, collective, or representative actions in arbitral and judicial forums in violation of Section 8(a)(1) of the Act.

1. **ALJ Green Properly Found that Respondent's MAP Was a Mandatory Condition of Employment**

ALJ Green correctly found that by virtue of employment, "Respondent's employees can pursue employment related claims only by way of arbitration and only on an individual basis." (ALJD page 2, lines 3-4, 13-14). This finding was based on undisputed evidence that the MAP is a mandatory condition of employment that extends to all of Respondent's employees and covers nearly all employment-related disputes (ALJD page 1, page 2, line 1). The EAA likewise requires employees to acknowledge that the MAP is "condition of my employment." (ALJD page 2, lines 15-16). Thus, Respondent has failed to show that its arbitration policy was not a mandatory condition of employment.

2. **ALJ Green Properly Found that Respondent’s Arbitration Policy Explicitly Bars Employees from Pursuing Class, Collective, or Representative Actions in Arbitration**

ALJ Green found the MAP here, as in *Murphy Oil*, covered “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. (ALJD page 2, lines 1-4). ALJ Green correctly concluded that the MAP, as the class waiver arbitration agreement in *Murphy Oil*, violates the Act because it expressly restricts protected activity.<sup>1</sup>

B. ALJ GREEN PROPERLY FOUND THAT RESPONDENT MAINTAINED A MUTUAL ARBITRATION POLICY THAT COULD BE REASONABLY INTERPRETED TO LIMIT OR RESTRICT AN EMPLOYEE FROM FILING CLAIMS WITH THE BOARD (R. EXC. 1, 3, 4, 5, 9, 12, 17, 20, 24, 25, 26.)

Respondent argues that the ALJ erred in finding that an employee had a reasonable basis to conclude that the MAP precluded employees from filing charges with the Board. (ALJD at page 4, lines 23-25). Respondent is correct that the MAP contains language that excludes claims that could be filed with the Board, however, it is well-established that even express language does not cure an agreement where the exclusion is minimal and the agreement as a whole is ambiguous and overbroad. Therefore, Respondent’s argument fails.

1. **Respondent’s Mutual Arbitration Policy Covers “All Employment-Related Disputes,” including Claims Filed with the NLRB.**

Under controlling precedent, ALJ Green properly concluded that the MAP was so overbroad that a reasonable employee would view it as a prohibition on filing charges with the Board in violation of the Act. *Murphy Oil*, slip op. at 26 (class waiver arbitration agreement violates Section 8(a)(1) of the Act if the agreement would be reasonably construed by an

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<sup>1</sup> Furthermore, there is no opt-out provision by which employees can exclude themselves from the class waiver provisions in either the MAP or EAA.

employee to limit or interfere with his rights to file claims with the NLRB); see *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); see also *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972). Even a class waiver arbitration agreements that contains an exclusion of NLRB claims may still be found unlawful if an employee would reasonably construe the agreement to limit or restrict an employee’s right to file a claim with the Board. *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf’d. 255 Fed.Appx. 527 (D.C. Cir. 2007) (holding that “the breadth of the policy language, referencing the policy’s applicability to causes of action recognized by ‘federal law or regulations,’ would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board”).

The ALJ correctly noted that the “MAP provisions are broadly drafted.” (ALJD page 4, line 23). Most striking is the third paragraph of the MAP, which contains a comprehensive list of disputes covered under the MAP, including those “claims by employees for wrongful termination of employment, breach of contract, ... employment discrimination, harassment or retaliation under ...any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations.” (ALJD page 2, lines 19-31). Like the language in the *U-Haul* agreement, the MAP here covers employment disputes (wrongful termination, discrimination, retaliation) normally reserved for the Board. This very broad language in the absence of a description or reasonable explanation of the excluded claims would reasonably lead employees to believe that any claim related to their termination, wages, compensation, work hours, or any other employment dispute covered under the Act, a federal statute, must be submitted to Respondent's arbitration procedures. (ALJD page 4, lines 23-30).

2. **ALJ Green Properly Found that the “Minimal Statement” Excluding NLRB Claims from the MAP and EAA is Insufficient.**

ALJ Green also correctly concluded that, “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...insufficient to assure employees that their rights to file charges with the National Labor Relations Board have not been adversely affected.” (ALJD page 4, lines 25-30).

Even where agreements contain explicit exclusions of NLRA claims, as here, the Board has routinely held arbitration agreements unlawful after applying the *Lutheran Heritage* test. *SolarCity Corp.*, 363 NLRB No. 83 slip op. at 6 (2015) (holding that despite an explicit exception of “claims brought before...the National Labor Relations Board,” class waiver arbitration was unlawful); *Bloomington’s, Inc.*, 363 NLRB No. 172 slip op. at 4-5 (2016) (holding arbitration agreement expressing that “claims...under the National Labor Relations Act are...not subject to arbitration” still unlawful); *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 2-3 (2016) (same); *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2 (2016) (same).

In *SolarCity*, the Board reasoned that “[a]bsent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights.” 363 NLRB slip op. at 5. As in *SolarCity*, Respondent notes that the MAP contains an explicit exclusion for claims filed with the NLRB from the MAP. (R. Exc. Br. page 24, lines 21-23, page 25, lines 24-25). But, ALJ Green properly concluded that here, as in the agreements in *SolarCity* and its progeny, Respondent’s exclusion fails in the context of the MAP’s all-encompassing scope. (ALJD page 4, line 23).

ALJ Green correctly noted that while the “MAP expressly exclude claims that might be made under the National Labor Relations Board...it is also clear that in the MAP provision there

is no description of what those types of claims might entail.” (ALJD page 3, lines 12-14). While it is undisputed that the MAP contains an exclusion of any claims to the Board, the exclusion here, as in *Ralph’s*, is entirely illusory. *Ralph’s*, slip op. at 3. As in *Ralph’s*, the exclusion in the MAP here, with neither an explanation nor an example, cannot overcome the overwhelming force of the MAP’s unrelenting insistence that it covers all employment-related disputes. The exclusion here is short, contains no examples, and is buried deep in a paragraph replete with examples of covered claims including claims brought before the NLRB. An employee reading the MAP, without the legal expertise of an attorney, could not reasonably accommodate the apparent contradiction within the MAP or reasonably interpret the MAP to prohibit them from filing unfair labor practice charges with the Board.

At best, the MAP’s ambiguity and the EAA’s silence breeds confusion as to which process an employee is allowed to use. In light of the MAP’s scope, a reasonable employee, rather than explore the legal specifics of the exclusion, would avoid the risk of violating the MAP and not file a charge. Such ambiguity must be construed against Respondent as the drafter of the agreement. *Murphy Oil*, 361 NLRB slip op. at 26.

3. **ALJ Green Properly Denied Respondent’s Due Process Argument that the Complaint Did not Adequately Identify the Unlawful Provision of the MAP**

Respondent argues that the General Counsel’s Complaint failed to provide Respondent with sufficient notice of which provision in the MAP and EAA could be reasonably read to restrict employees’ rights to file charges with the Board. As a preliminary matter, at no point before, during, or after the hearing, did Respondent ever move for a Bill of Particulars. Respondent’s argument regarding due process and the bill of particulars was also orally presented to the ALJ twice and rejected both times.

A Bill of Particulars is normally handled at the pretrial stage or raised at the beginning of

a trial. (NLRB Bench Book § 3-230). If Respondent wished to move for a bill of particulars, Respondent should have filed the motion with the regional director issuing the complaint, the chief administrative law judge in Washington, DC, or the associate chief judge in San Francisco or New York before the hearing. (NLRB Rules and Regulations § 102.24). In the alternative, Respondent could have filed the motion for a bill of particulars with the administrative law judge at the hearing. *Id.* Respondent did none of these and failed to seek further clarification to the *Solar City* allegation at the appropriate time.

Even assuming (*arguendo*) that Respondent would have been entitled to a bill of particulars here (which it was not), rather than take the proper steps, Respondent sat on its rights and subsequently responded to the purportedly ambiguous allegation citing the specific provision in the MAP.

Moreover, the Complaint's Section 8(a)(1) allegation is sufficiently clear. Paragraph 3(c) of the General Counsel's Complaint specifies that "[t]he Mutual Arbitration Policy and Employee Agreement to Arbitrate...contain language which may reasonably be read to prohibit or restrict employees' right to file unfair labor practice charges with the Board."

As explained in the preceding section, the MAP and EAA as a whole contained broad language that employees would reasonably believe precluded them from filing charges with the Board. The MAP and EAA, the documents on which all of the 8(a)(1) allegations in the Complaint are based and which were drafted by Respondent, have a combined length of four pages. Respondent's argument that the Complaint did not adequately identify the unlawful portions of the MAP and EAA is without merit.

#### 4. **Respondent's Other Arguments Also Fail**

Respondent suggests that ALJ Green read the MAP as interfering with employees' rights "simply because it could be read that way." (R. Exc. Br. page 24, lines 16-17). To support this

proposition, Respondent cites to *Lutheran Heritage Village-Livonia*, which warns that the “[Board] must not presume improper interference with employee rights.” *Id.* at 646. Respondent neglects to include the entirety of the warning, which reads: “In determining whether a challenged rule is unlawful, the Board must...give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.” *Id.* Here, ALJ Green did not read the provisions in isolation. He gave a reasonable reading of the provisions in the MAP and EAA, weighed the exclusions included therein, noted the absence of explanations as to the MAP exclusions, and reached his conclusion. (ALJD page 2, lines 13-51, page 3, lines 1-3, lines 12-14; page 4, lines 23-30). Ironically, it is Respondent who focuses on a particular provision of the MAP in isolation (the MAP’s exclusions), ignores the remainder of the MAP and EAA, and thereby fails to give the MAP and EAA a reasonable reading.<sup>2</sup>

C. ALJ GREEN PROPERLY FOUND THAT RESPONDENT UNLAWFULLY ENFORCED ITS MUTUAL ARBITRATION POLICY ON FEBRUARY 12, 2016 AND TWICE ON MARCH 25, 2016. (R. EXC. 2, 6, 7, 8, 9, 10, 11, 15, 16, 22, 23, 28, 31, 32)

1. **ALJ Green Properly Concluded that Respondent’s First Amendment Defenses had no Merit**

ALJ Green correctly concluded that Respondent’s First Amendment defenses were unavailing. (ALJD p. 4, lines 32-34) While lawsuits and attendant motions are generally protected under the First Amendment, an employer does not enjoy the First Amendment’s protection where litigation has an illegal objective. *Teamsters Local 776 (Rite Aid Corp)*, 305 NLRB 832, 834 (1991), *enfd.* 973 F.2d 230 (3d Cir. 1992), *cert. denied* 507 U.S. 959 (1993); *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983). Because an employer violates

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<sup>2</sup> Notably, *Lutheran Village* stands for the proposition that “[i]f the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Village*, 343 NLRB at 647.

Section 8(a)(1) of the Act by enforcing a rule that restricts an employee's Section 7 rights, an employer has no First Amendment protection in enforcing an unlawful rule in litigation. *Murphy Oil*, slip op. at 20; See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962); *Republic Aviation Corp.*, 324 U.S. 793 (1945).

Respondent filed various petitions seeking to enforce the unlawful provisions of the MAP and EAA. (ALJD p. 3, lines 30-32 and 40-41, 43-44). First, Respondent enforced the unlawful MAP on February 12, 2016, when Respondent sought relief from Charging Party's Private Attorney General Act complaint by petitioning the court to compel the Charging Party to submit the PAGA wage and hour claims to arbitration. (ALJD page 3, lines 30-32). Shortly after Respondent's first petition was denied by the trial court on March 11, 2016, Respondent again sought to enforce its unlawful MAP on March 25, 2016, when it petitioned the trial court to reconsider its decision denying its earlier petition. (ALJD page 3 lines 40-41). On that same day, Respondent filed an additional petition to compel arbitration of the class action wage and hour claims filed by the Charging Party on March 10, 2016. (ALJD page 3, lines 43-44).

Each of Respondent's motions sought to enforce the MAP against Charging Party, an employee who filed a class, collective, or representative lawsuit in state superior court alleging employment-related claims. Because the purpose of Respondent's motions on February 12, 2016 and March 25, 2016, was to enforce unlawful provisions of the MAP, ALJ Green correctly found each individual motion unlawful under the Act, and Respondent's efforts to preclude class, collective, or representative legal actions enjoyed no First Amendment protection. (ALJD page 4, lines 32-40).

Respondent further argues that Respondent had no retaliatory motive and had a "reasonable basis" for its petitions to compel individual arbitration. (R. Exc. Page 31, lines 22-

23). However, even assuming *arguendo* that Respondent had a reasonable basis for filing a petition to compel individual arbitration on or about February 12, 2016, Respondent had no reasonable basis for petitioning on March 25, without introducing any new substantive arguments, the trial court to revisit and reconsider the February 12, 2016 petition the court had already denied.

Additionally, Respondent argues that its February 12, 2016 petition to compel arbitration was not alleged in the Complaint. This clearly overlooks or misinterprets paragraph 4 of the Complaint, which states that “[s]ince about February 12, 2016, Respondent maintained and enforced the Mutual Arbitration Policy and the Employee Agreement to Arbitrate ... by petitioning the trial to compel Smigelski to individually arbitrate his class-wide wage and hour claims against Respondent.” It is clear from this paragraph that it references Respondent’s attempt on February 12, 2016 to compel Smigelski individually arbitrate the claims under California’s Private Attorney General Act (PAGA), which were the only claims filed by Smigelski on that day.

2. **ALJ Green Correctly Found that Respondent Violated Section 8(a)(1) of the Act by Forcing Charging Party Smigelski to Individually Arbitrate his Claims Under the California Private Attorney General Act (PAGA)**

Respondent further argues that PAGA claims do not fall under the purview of collective or class action. Under PAGA, a violation of the California Labor Code may be remedied “through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.” Cal. Labor Code Section 2699 (a). While an individual employee may initiate a PAGA action, such claims may also be brought by multiple employee-plaintiffs acting in concert. *See, e.g. Bridgeford v. Pacific Health Corp.*, 202 Cal. App. 4<sup>th</sup> 1034, 135 Cal.Rptr.3d 905 (2012); *Gutierrez v. California Commerce Club, Inc.*, 187 Cal.App.4<sup>th</sup> 969, 114 Cal.Rptr.3d 611 (2010). To the extent that the MAP prohibits all PAGA claims, it precludes

protected concerted activity under Section 7 of the Act.

Moreover, it is clear that the Charging Party here filed his PAGA claims “in his representative capacity,” and “on behalf of all current and former aggrieved employees.” (Jt. Exh. J page 1, line 21; page 4 lines 13-16; page 6 lines 2-3). Respondent argues as much in its petition to compel arbitration on February 12, 2016, noting that other employees represented under Charging Party’s PAGA claims were also bound by the MAP. (Jt. Exh. K, page 6, lines 3-5). Indeed, the state court, when it denied Respondent’s enforcement of the MAP, stated that Charging Party asserts a “representative cause of action under the Private Attorney General Act (‘PAGA’) on behalf of the State and other aggrieved employees for alleged Labor Code violations. Plaintiff does not assert any individual claims.” (Jt. Exh. R page 2).

Lastly, the Board has held contractual provisions precluding employees from filing PAGA claims to be unlawful. *Adecco USA, Inc.*, 364 NLRB No. 9, 2 (2016). Therefore, ALJ Green properly held that Respondent’s enforcement of the unlawful provisions of the MAP and EAA included those petitions against Charging Party’s PAGA claims.

**D. *MURPHY OIL* IS A NATURAL EXTENSION OF U.S. LABOR POLICY, REFLECTING CAREFUL ACCOMMODATION OF THE NLRA AND THE FAA. (R. EXC. 2, 7, 8, 9, 10, 11-30)**

The majority of Respondent’s argument insists that *Murphy Oil* was wrongly decided. Respondent’s argument consists of four points: 1) that *Murphy Oil* conflicts with the FAA; 2) that collective or class action litigation is not protected under Section 7 of the Act and even if it were it would be a procedural rather than a substantive right; 3) that the MAP does not interfere with employees’ section 7 rights because it does not involve any allegations of discrimination or retaliation; and 4) that individuals possess the right to present their own grievance at any time under Section 9(a) of the Act.

There is nothing new to Respondent’s arguments. Although accepted by the Second, Fifth, and Eighth Circuits, the Board nevertheless rejected all of the circuit courts’ arguments in *Murphy Oil*. See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2016); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016). In *Murphy Oil*, *supra* slip op. at 12, the Board found the Fifth Circuit’s reasoning to be a “fundamental misunderstanding of the NLRA and the collective, substantive rights it creates for the Board to enforce.” Respondent’s arguments repeat that same fundamental misunderstanding of the NLRA by insisting that the right to collective action is a procedural, not a substantive right. The *Murphy Oil* Board re-emphasized that *D.R. Horton* was correctly decided and that the Fifth Circuit’s view “failed to come to terms with the unique provisions and policies of the NLRA.” *Id.* slip op at 13.<sup>3</sup>

1. **Murphy Oil Reflects a Careful Accommodation Between the NLRA and the FAA**

Respondent cites to *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), *CompuCredit v. Greenwood*, 132 S.Ct. 665 (2012) , and *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (“FAA jurisprudence”) for the proposition that the MAP is enforceable under the FAA. As a preliminary matter, Respondent’s reliance on FAA jurisprudence assumes the false premise that the MAP is a voluntary agreement. However, unlike the agreements in *Italian Colors*, *CompuCredit*, and *Concepcion*, the MAP here is not voluntary but rather a mandatory condition of employment. Additionally, the Supreme Court’s FAA jurisprudence fails to address the issue at hand: that under Section 7 an employee has a substantive right to pursue concerted legal action in at least one legal forum, whether judicial or arbitral. *Italian Colors*, *supra*, 133 S.Ct. 2304 (holding that waiver was lawful after finding that there was no intention to preclude waiver of class action within federal antitrust statute), *CompuCredit*, *supra*,

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<sup>3</sup> The Seventh Circuit likewise found that “none [of the Second, Fifth, and Eighth Circuits] has engaged substantively with the relevant arguments.” *Lewis v. Epic Systems Corp.*, 823 F.3d at 1158.

132 S.Ct. 665 (holding that a civil liability and class non-waiver provision in the Credit Repair Organization Act was insufficient to override the FAA's mandate to enforce arbitration agreements), and *Concepcion, supra*, 563 U.S. 333 (holding that a California state law deeming unconscionable any waiver of class arbitration was preempted by the FAA).

Respondent further argues that the FAA and the NLRA are in conflict. (Br. R. Exc. page 8, lines 6-8). However, the Federal Arbitration Act (FAA) does not preclude a finding that the collective and class waiver here is unlawful under the Act. For one, *Murphy Oil* does not stand for the proposition that all arbitration agreements are unlawful, nor, as Respondent appears to suggest, does *Murphy Oil* obligate all arbitrations that could possibly be brought as collective or class action be litigated that way. In the world of *Murphy Oil*, Section 7 of the Act and the FAA can exist harmoniously. Indeed, there is rich Board law that encourages arbitration of NLRA charges. See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies, Corp.*, 268 NLRB 557 (1984).

The Board explained that where possible conflict exists between two statutes, it is required, when possible, to undertake a "careful accommodation" of the two statutes, citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) and that such an accommodation does not mean that the Act must automatically yield to the FAA or vice versa. When two federal statutes are capable of coexisting, both should be given effect absent a clearly expressed congressional intent to the contrary.

The Board in *Murphy Oil* noted that holding an arbitration agreement unlawful under the Act does not run afoul of the Federal Arbitration Act. *Murphy Oil*, slip op. at 21. Section 2 of the FAA provides that an arbitration agreement may be invalidated for any grounds that exist at law or in equity for the revocation of any contract. The agreement there, as here, was contrary to

the public policy of the NLRA, which guarantees the pursuit of class or collective action of workplace grievances, including in litigation and arbitration. *Murphy Oil*, slip op. at 21.

Respondent adopts the Fifth Circuit’s reasoning that because the FAA “embod[ies] a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements,” Section 7 of the Act, which only incidentally burdens arbitration, necessarily conflicts with the FAA. *D.R. Horton*, 737 F.3d at 360 quoting *Concepcion*, 563 U.S. at 346.

As the Seventh Circuit explained in *Epic*, “[i]f the NLRA does not render an arbitration provision sufficiently illegal to trigger the savings clause, the savings clause does not mean what it says.” *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016). Indeed, if we take Respondent’s proposition that the FAA requires the MAP’s terms be enforced despite Section 7 of the Act and that the savings clause does not apply, then the FAA effectively immunizes arbitration agreements from all federal law that does not directly address the FAA.

**2. The Right to Engage in Collective Legal Action is a Core Substantive Right Under Section 7**

Respondent repeats the argument rejected by ALJ Green that “class action” is a procedural right not a substantive one.

The Board’s holding in *Murphy Oil* and ALJ Green’s ruling did not determine that Board law “guarantees class treatment” but rather that a mandatory arbitration agreement was unlawful if it waived employees’ rights to seek any collective, representative, or class legal action. *Murphy Oil*, slip op. at 22. The MAP and EAA are unlawful because they seek to preclude *all* concerted legal actions, whether the pursuit of class action lawsuits or the joinder of two individual arbitration claims.

To the extent Respondent argues that concerted pursuit of legal claims is not a substantive right under Section 7 of the Act, the Supreme Court disagrees. In *Eastex, Inc.*, the

Court held that “it has been held that the ‘mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” *Id.* at 565-567. Based in part on *Eastex, Inc.*, the Board held that the “right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA.” *Murphy Oil* slip op at 9 citing *D.R. Horton*, 357 NLRB No. 184, slip op at 11.

Any argument that class, collective, or representative actions in any forum is not protected concerted activity ignores the foundational principle that the Act “create[s] a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.” *Murphy Oil*, 361 NLRB slip op. at 2. Respondent’s maintenance and enforcement of the Mutual Arbitration Agreement here is an effort to restore the very same unbalanced dynamic that the Act was intended to remedy.

3. **Respondent’s Argument that Section 7 Protects Employees Only from Employer’s Retaliation Based on Concerted Legal Action is Without Merit**

Oddly, Respondent argues that the MAP does not interfere with employees’ Section 7 rights because “this case does not involve any alleged retaliation by PennyMac.” Presumably, Respondent is relying on Member Miscimarra’s dissent in *Murphy Oil*, which attempted to characterize that *Eastex* stood for the proposition that collective legal action is a protected concerted activity only where employers retaliated against employees for their concerted legal action. *Murphy Oil* slip op. at 22. Respondent’s argument leads to a ludicrous conclusion. Under Respondent’s argument, it would be *unlawful* for an employer to retaliate against an employee for engaging in concerted legal action because it is a right *protected* under Section 7 but the employer could *lawfully* preclude an employee from exercising that exact same Section 7 right.

Moreover, contrary to Respondent's characterization, *Eastex, Inc.* involved only an 8(a)(1) allegation and did not involve retaliation against employees. Instead, like Respondent here, the employer there violated Section 8(a)(1) of the Act by interfering with employees' exercise of their right under Section 7 of the Act when it implemented an unlawful rule. *Id.* at 558.

4. **Respondent's Argument that the MAP is Lawful under Section 9(a) of the Act is Without Merit**

Respondent further argues that the MAP is permitted by Section 9(a) of the Act, which Respondent argues, "permits an agreement by the employee to forego the adjustment of his grievance or employment-related dispute on a classwide or collective basis." As the Board recognized in *Murphy Oil*, the premise that an individual employee agreed to pursue their claims individually is false. The MAP and EAA here were mandatory conditions of employment. Employees had no choice but to waive their pursuit of concerted or class action. Moreover, Section 9(a) of the Act clearly refers to employees represented by a union and does not apply here.

E. RESPONDENT'S ARGUMENT THAT ALJ GREEN ERRED IN GRANTING REMEDIES, ORDER, AND NOTICE TO EMPLOYEES HAS NO MERIT (R. EXC. 11-26).

Aside from inadvertent omissions detailed in Counsel for General Counsel's limited Cross-Exceptions, ALJ Green properly issued his Remedies, Order and Notice of Employees<sup>4</sup> despite Respondent's argument to the contrary.

First, as addressed above, contrary to Respondent's argument, Respondent does not enjoy

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<sup>4</sup> Counsel for General Counsel concurrently files limited Cross Exceptions to the ALJ's Decision. ALJ Green properly concluded "that employees would have a reasonable basis for concluding that they would be precluded from filing charges with the National Labor Relations Board" and that the exclusions in the MAP were "minimal" and "insufficient to assure employees that their rights to file charges with the [NLRB] have not been adversely affected." (ALJD page 4, lines 24-25, 28-30). ALJ Green, however, inadvertently omitted his *SolarCity* findings in his Conclusions of Law, Remedies, Order, and Notice to Employees.

First Amendment rights to enforce its unlawful MAP under *Bill Johnson*, supra, 461 U.S. at 737.

Second, Respondent wishes to limit the notification remedies to Smigelski and current employees. It is undisputed that Respondent implemented its unlawful MAP and EAA nationwide since 2008 and required all of its employees to sign and acknowledge them. The violation, as found by ALJ Green, pertains to the maintenance and implementation of the MAP and EAA during the 10(b) period. The remedy, therefore, should include all individuals subjected to the violation during the 10(b) period, whether or not those employees are currently employed by Respondent. Because the MAP and EAA is so broad in scope and directly affects employees' rights to pursue legal action, it is especially important that even former employees be informed of the MAP and EAA's unlawful nature.

Third, ALJ Green properly ordered Respondent to pay for attorney's fees incurred by Charging Party as a result of Respondent's petitions to enforce its unlawful MAP. The Board has routinely imposed reasonable attorney's fees and litigation expenses in *Murphy Oil* cases. See e.g. *Murphy Oil*, supra, slip op at. 30., *SolarCity Corp.*, 363 NLRB slip op. at 9, *Adecco USA, Inc.*, 364 NLRB slip op. at 7.

#### **IV. CONCLUSION**

For the foregoing reasons, the General Counsel respectfully requests that the Board reject Respondent's exceptions. The clear preponderance of all the relevant evidence demonstrates that

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the ALJ's findings of fact, conclusions of law, remedy and order were fully supported by the record evidence and established Board law.

DATED AT San Francisco, California this 7<sup>th</sup> day of March, 2017.

Respectfully Submitted,

**/s/ Min-Kuk Song**

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**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 TO THE GENERAL COUNSEL'S ANSWER TO  
RESPONDENT'S EXCEPTIONS TO THE ALJ DECISION**

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:

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March 7, 2017

\_\_\_\_\_  
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\_\_\_\_\_  
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