

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

GENERAL COUNSEL’S REPLY TO RESPONDENT’S ANSWER TO GENERAL  
COUNSEL’S CROSS-EXCEPTIONS

Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board, Counsel for General Counsel files this Reply to Respondent’s Answer to General Counsel’s Cross Exceptions.

Respondent’s Answer repeats the same arguments found in Respondent’s Exceptions to the Administrative Law Judge’s Decision.<sup>1</sup> Because those arguments were fully addressed in the General Counsel’s Answer to Respondent’s Exceptions,<sup>2</sup> this brief addresses Respondent’s remaining argument that the Board should not correct the ALJ Decision because there was no inadvertent error. (Respondent’s Answer to General Counsel’s Cross-Exceptions, p. 2.) For the following reasons, Respondent’s argument has no merit.

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<sup>1</sup> Respondent argues that the ALJ erred in finding that an employee could reasonably interpret Respondent’s Mutual Arbitration Agreement (MAP) to prohibit the filing of charges with the NLRB and that the allegation itself is a violation of Respondent’s due process rights. (Respondent’s Brief pp. 2-3.)

<sup>2</sup> General Counsel’s Answer to Respondent’s Exceptions, at pp. 7-12.

**I. THE ALJ INADVERTENTLY NEGLECTED TO CONFORM HIS CONCLUSIONS OF LAW, REMEDIES, ORDER AND NOTICE TO HIS FINDINGS.**

Administrative Law Judge Raymond Green (the ALJ) expressly concluded that an employee had reasonable basis to conclude that Respondent's Mutual Arbitration Agreement precluded the filing of charges under the Act. ALJ Green simply omitted that clear and express finding in his conclusions of law, order, remedies and notice.

Specifically, ALJ Green summarized that while the MAP excludes claims that might be made under the National Labor Relations Act, "it is also clear that in the MAP provisions there is no description of what those types of claims might entail." (ALJ Decision p. 3, lines 12-14). He identified the central provision of the MAP, and, after considering the entire MAP, found 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, in my opinion, insufficient to assure employees that their rights to file charges with the National Labor Relations Board have not been adversely affected." (ALJD p. 4, lines 25-29.)

The ALJ concluded that "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." (ALJD p. 4, lines 23-25., emphasis added.)

The ALJ's finding against Respondent is clear. The ALJ's omission of this finding is an obvious but inadvertent error that the Board can easily rectify.

In its Answer, Respondent argues that the ALJ is an experienced judge and could not make an inadvertent omission. An inadvertent error, however, is just that: accidental. Even the

most experienced jurist can have an “oops” moment. *El Paso Disposal*, 2009 WL 1174171, 24 (2009).

Respondent also argues that ALJ Green’s decision lacks analysis, and fails to identify language in the MAP that supports his conclusion. (Respondent’s Answer, p. 3, Ins. 17-23.) As shown above, the opposite is true. The ALJ found Respondent violated Section 8(a)(1) after identifying the salient MAP provisions (ALJD p. 2, line 13 to p. 3 line 4), considering and analyzing the entirety of the MAP (ALJD p. 3, Ins. 5-14, p. 4, Ins. 23-30.), and then concluding against Respondent. (ALJD p. 4, Ins. 23-30.) The ALJ’s only (inadvertent) error was not conforming the concluding portions of his decision<sup>3</sup> to his clear and explicit analysis and finding. The Board can correct the ALJ’s omission by granting General Counsel’s Cross Exceptions.<sup>4</sup>

## **II. THE BOARD REGULARLY CORRECTS INADVERTENT ERRORS IN ALJ DECISIONS**

The Board has regularly corrected inadvertent omissions in the underlying ALJ decision where portions of the judge’s decision fail to conform to the judge’s findings. *General Trailer, Inc.*, 330 NLRB 1088, fn. 3 (2000); *MTR Sheet Metal, Inc.*, 337 NLRB 713, fn. 1 (2002); *Urban Constructors, Inc.*, 320 NLRB 1166, fn. 2 (1996). This is no different. The ALJ’s finding against Respondent is clear, the ALJ’s omission of his findings is an inadvertent error that the Board should rectify.

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<sup>3</sup> Namely, the conclusions of law, remedy, order and notice to employees.

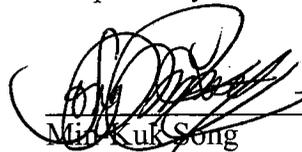
<sup>4</sup> Notably, Respondent argues two contradictory positions, on the one hand, stating that the ALJ made significant errors in his factual finding, analysis, and application of the law and on the other hand, arguing that the ALJ is infallible because of his experience. Both arguments have no merit.

**III. CONCLUSION**

Counsel for the General Counsel respectfully requests that the Board's final order amend 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 21<sup>st</sup> day of April, 2017

Respectfully Submitted



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

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**RICHARD SMIGELSKI, an Individual**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR GENERAL COUNSEL'S REPLY TO  
RESPONDENT'S ANSWER TO CROSS EXCEPTIONS**

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

CHRIS BAKER , ESQ.  
BAKER & SCHWARTZ PC  
For Charging Party Richard Smigelski  
44 Montgomery St., Ste 3520  
San Francisco, CA 94104  
[cbaker@bakerlp.com](mailto:cbaker@bakerlp.com)

RICHARD S. ZUNIGA , ESQ.  
HILL, FARRER & BURRILL LLP  
For Respondent Private National Mortgage  
Acceptance Company, LLC  
300 S Grand Ave  
One California Plaza 37th Fl  
Los Angeles, CA 90071-3109  
[RZuniga@hfbllp.com](mailto:RZuniga@hfbllp.com)

April 21, 2017

Min-Kuk Song, Designated Agent of  
NLRB

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Date

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Name

/s/ Min-Kuk Song

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Signature