

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

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

and

RICHARD SMIGELSKI, an Individual

CASE 20-CA-170020

**PRIVATE NATIONAL MORTGAGE ACCEPTANCE COMPANY, LLC'S RESPONSE
TO THE BOARD'S NOTICE TO SHOW CAUSE**

In response to the Board's November 16, 2018 Notice to Show Cause, Respondent Private National Mortgage Acceptance Company, LLC, responds that it does not oppose remand of the issue whether Respondent's Mutual Arbitration Agreement unlawfully restricts employees' access to the Board to an Administrative Law Judge ("ALJ"). In light of the decision in The Boeing Company, 365 NLRB No. 154 (2017), Respondent supports remanding this issue to the ALJ for further proceedings including, if necessary, the filing of statements/briefs, reopening the record, and issuance of a supplemental decision.

I. The Board Should Remand This Case.

Respondent supports remanding this case to the ALJ. The Board's decision in Boeing decision overruled the "reasonably construe" analysis set forth in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), and established a new standard for evaluating employer policies. As the Board pointed out in Boeing, new case law must be developed under the Boeing standard. It is appropriate for administrative law judges to begin the process of developing that case law in the first instance subject, of course, to review by the Board and the Courts of Appeals.

II. Any Opposition To Remanding This Case Should Be Rejected,

Respondent is informed that Counsel for the General Counsel will oppose remanding this case to the ALJ based on the Board's decision in U-Haul Company, 347 NLRB 375 (2006).

U-Haul is not a basis to oppose remand in this case for the following reasons:

First, the stipulated record and the parties' briefing in this case for obvious reasons did not address issues pertinent to the analysis under the new Boeing standard. Due process requires that Respondent be able to supplement and augment the record, if necessary, to address issues raised by Boeing. Moreover, the General Counsel filed exceptions to the ALJ to remedy the alleged Section 8(a)(1) violation on the basis that it interferes with employees' ability to access the Board. This is the same issue that is the subject of the Board's Notice to Show Cause. Remanding this case will allow the parties to more fully develop the record and allow the ALJ to address the General Counsel's exceptions. The Board will then have a full record and briefing by the parties on which to base a decision.

Second, U-Haul (and Solar City Corporation, 363 NLRB No. 83 (2015) relied upon by the ALJ in finding a Section 8(a)(1) violation)), rely on the analysis of Lutheran Heritage rejected in Boeing.

Third, Respondent's arbitration agreement is different from the agreement in U-Haul. Respondent's arbitration agreement contains a savings clause expressly preserving employees' rights to file Board charges. See Private National Mortgage Acceptance Company, LLC, ALJ Decision [JD(NY)-45-16], dated November 29, 2016, at p. 2. ("The MAP does not cover ... any claims that could be made to the National Labor Relations Board.") No such savings clause was involved in U-Haul.

Fourth, the Fifth Circuit Court of Appeals which rejected the Board's decision in Murphy Oil, USA, Inc., 361 NLRB 774 (2014), has also rejected U-Haul. See Logisticare Solutions, Inc. v. NLRB, 866 F.3d 715 (5th Cir. 2017). Respondent has offices, employees and does business in Texas, within the jurisdiction of the Fifth Circuit.

Fifth, the Supreme Court in Epic Systems Corporation v. Lewis, ___ U.S. ___, 138 S.Ct. 1612 (2018), reaffirmed that arbitration agreements, like Respondent's, must be enforced

according to their terms. 138 S.Ct. at 1632. As noted above, Respondent's arbitration agreement contains a savings clause preserving employees' rights to file Board charges which states that "The MAP does not cover ... any claims that could be made to the National Labor Relations Board." Construing Respondent's arbitration agreement as interfering with employees' rights to file Board charges, when the agreement contains a savings clause stating the opposite, violates the Supreme Court's mandate that arbitration agreements be enforced according to their terms.

Sixth, to the extent the General Counsel opposes remand based on Prime Healthcare Paradise Valley, LLC, Case 21-CA-133871, which is currently pending before the Board, the General Counsel's position is misplaced. Respondent's arbitration agreement is different than the arbitration agreement in Prime Healthcare, which like the arbitration agreement in U-Haul, does not include a savings clause. Thus, a Board decision in Prime Healthcare will not dispose of this case. In fact, footnote 1 of Counsel for the General Counsel's Brief on Remand to the Board undercuts the General Counsel's position in this case. Footnote 1 of that brief states: "The General Counsel did not allege that the arbitration agreement Prime Healthcare has maintained since May 13, 2014, which expressly exempts NLRA claims, is unlawful." (Emphasis added.) Rather than supporting the General Counsel's opposition to a remand in this case, the position taken by the General Counsel in Prime Healthcare compels a dismissal of the remaining Section 8(a)(1) allegation in this case.

Based on the foregoing, Respondent submits that U-Haul would not dispose of this case and, in fact, is contrary to applicable legal precedent. Accordingly, any opposition by the General Counsel to remanding this case to the ALJ should be rejected.

III. Conclusion

For the foregoing reasons, Respondent requests that the Board remand this case to the ALJ. If the Board decides not to remand this case, Respondent requests that Board permit Respondent to submit new or additional briefing analyzing this case under the Boeing standard.

Respectfully submitted,

DATED: November 30, 2018

HILL, FARRER & BURRILL LLP

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By: _____

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CERTIFICATE OF SERVICE

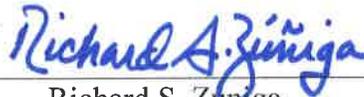
I hereby certify that on November 30, 2018, I caused the foregoing document described as PRIVATE NATIONAL MORTGAGE ACCEPTANCE COMPANY, LLC'S RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE in Case 20-CA-170020 to be filed via E-Filing.

I hereby also certify that on November 30, 2018, I caused the foregoing document to be served by electronically mailing a true copy thereof and by regular U.S. Mail by placing a true copy thereof in a sealed envelope with postage thereon fully pre-paid and addressed as follows:

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Executed on November 30, 2018, at Los Angeles, California.


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