

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

**KMART CORPORATION, A
SUBSIDIARY OF SEARS HOLDINGS
CORPORATION,**

Respondent

Case 06-CA-091823

and

RONALD DANIELS, an INDIVIDUAL,

Charging Party.

SEARS HOLDINGS CORPORATION,

Respondent

Case 06-CA-100022

and

RONALD DANIELS, an INDIVIDUAL,

Charging Party.

**RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent Kmart Corporation (“Respondent”)¹ hereby files the following Exceptions to the Administrative Law Judge’s (“ALJ”) decision dated November 19, 2013.

1. The Respondent excepts to the ALJ’s description, at p. 2, lines 1-4, of Respondent’s Arbitration Policy/Agreement (“Agreement”) as “the very same type of ban on collective actions prohibited in *D.R. Horton*.”

¹ Based on Counsel for the General Counsel’s failure to prove that Sears Holding Corporation is an employer within the meaning of the Act, the ALJ dismissed the complaint as it relates to Respondent Sears Holding Corporation. (ALJD 4:14-19).

2. The Respondent excepts to the ALJ's description of the issue in this case on p. 2, lines 6-8, as "whether the inclusion in this policy of a limited initial opportunity for the employee to avoid the rule prohibited in *D.R. Horton* removes the offense to the Act."

3. The Respondent excepts to the ALJ's conclusion, at p. 2, lines 8-12, 14-15; p. 6, fn. 5; and p. 13, lines 1-4, 12-16, that Respondent has violated the Act by maintaining the Agreement.

4. The Respondent excepts to the ALJ's finding on p. 4, lines 22-25, that all of the "Sears Holding" companies maintain an "arbitration policy/agreement" implemented in early April 2012.

5. The Respondent excepts to the ALJ's reliance, at p. 6, lines 12-13; p. 6, fn. 8; p. 7, lines 23-47; p. 9, lines 19-23, 42-44; p. 10, lines 4-14; p. 11, lines 1-11; pp. 11, lines 30- 51; p. 12, lines 1-3; p. 13, fn. 13, on the Board's decision in *D. R. Horton*.

6. The Respondent excepts to the ALJ's conclusion on p. 6, lines 14-15, that "Kmart concedes, as it must," that absent the opt out process in the Agreement, the Agreement "would violate the Act pursuant to *D.R. Horton*."

7. The Respondent excepts to the ALJ's finding on p. 6, fn. 5, that evidence related to the "thoroughness of the communication of the arbitration policy to the employees" was not "relevant to the outcome" of this case.

8. The Respondent excepts to the ALJ's conclusion, at p. 6, fn. 6, that the fact that the Agreement does not prohibit filing of NLRB charges does not distinguish it from the arbitration agreement found to be unlawful in *D. R. Horton*.

9. The Respondent excepts to the ALJ's characterization of Respondent's arguments in its post-hearing brief, on p. 6, fn. 8, as "identical to those rejected by the Board in *D.R. Horton*, without any effort to explain why the facts here warrant a different result."

10. The Respondent excepts to the ALJ's finding on p. 7, lines 1-2, 29-30; and p. 8, lines 3-7, that an arbitration agreement waiving class actions, voluntarily entered into by the employee, would violate the Act under *D.R. Horton*.

11. The Respondent excepts to the ALJ's description of the issue in this case on p. 7, lines 1-12.

12. The Respondent excepts to the ALJ's finding, at p. 7, lines 14-17, that Respondent's Agreement is no more lawful than an agreement with an employee to waive irrevocably his or her future right to go join a union, go on strike, or file charges with the Board.

13. The Respondent excepts to the ALJ's characterization, at p. 8, lines 1-3, of the voluntariness of the Agreement as "debatable."

14. Respondent excepts to the ALJ's finding, at p. 8, lines 31-32, that the Respondent may not reach agreements with individuals that conflict with rights protected by the Act.

15. The Respondent excepts to the ALJ's finding, at p. 9, lines 16-17, 45-47, that the Agreement is not a waiver of rights that the Board can or should countenance under existing principles or policies.

16. The Respondent excepts to the ALJ's conclusion, at p. 9, lines 19-25, that Respondent's argument that the waiver of the right to collective redress of workplace grievances is not a core right under Section 7 "misses the point of the Act."

17. The Respondent excepts to the ALJ's finding, on p. 9, lines 27-28, that the cases cited by Respondent do not advance Respondent's case.

18. The Respondent excepts to the ALJ's conclusion, at p. 10, lines 29-33, 37-39, that this case is not a "difficult" one under *D.R. Horton*.

19. The Respondent excepts to the ALJ's finding, at p. 11, lines 1-11, that *D.R.*

Horton, and the ALJ's decision in this case, do not conflict with the Federal Arbitration Act ("FAA").

20. The Respondent excepts to the ALJ's conclusion, on p. 11, lines 13-44, that the Supreme Court decisions in *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S.Ct. 665 (2012) and *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S.Ct. 2304 (2013), do not inform the analysis, or affect "the reasoning of the Board" in *D.R. Horton*-type cases.

21. The Respondent excepts to the ALJ's conclusion, at p. 12, lines 5-17, that the allegations of the complaint should not be dismissed pursuant to 10(b).

22. The Respondent excepts to the ALJ's conclusion at p. 12, line 14, that the alleged violation in this case is a "classic continuing violation."

23. The Respondent excepts to the ALJ's finding, on p. 13, lines 1-4, that the right to resort to class, collective, or representation actions in any forum by employees is a "'core' Section 7 [right] 'central' to the Act's promise."

24. The Respondent excepts to the ALJ's rejection, on p. 13, fn. 13, of Respondent's argument that, under *Noel Canning*, *D.R. Horton* was decided at a time when the Board did not have a valid quorum, and, therefore is invalid.

25. The Respondent excepts to the ALJ's rejection, on p. 13, fn. 13, of Respondent's argument that the Regional Director, Region 6 did not have the authority to issue the complaint in this matter because the Regional Director was appointed by a Board that lacked the quorum necessary to make valid appointments.

26. The Respondent excepts to the ALJ's rejection on p. 13, fn. 13, of Respondent's argument that, even assuming the validity of Member Becker's appointment, the decision in *D.R.*

Horton was invalid because it was decided without an express delegation to the three member panel.

27. The Respondent excepts to the ALJ's conclusions of law (2) and (3), at p. 13, lines 12-19.

28. The Respondent excepts to all of the remedies, at pp. 14-16, that the ALJ has recommended.

Respectfully submitted,

/s/ Jonathan C. Fritts

Jonathan C. Fritts
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue,
NW Washington, DC 20004
Telephone: 202.739.5867
Facsimile: 202.739.3001

Nicole Buffalano
MORGAN, LEWIS & BOCKIUS LLP
300 S. Grand Avenue
Los Angeles, CA 90071
Telephone: 213.612.7443
Facsimile: 213.612.2501

Christopher D. Havener
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: 215.963.5512
Facsimile: 215.963.5001

Dated: December 20, 2013

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2013, a true and correct copy of Respondent's Exceptions to the Decision of the Administrative Law Judge was filed via the Board's electronic filing system and has been served by electronic mail upon the following:

Janice A. Sauchin, Esq.
National Labor Relations Board
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222-4111
Janice.Sauchin@nlrb.gov
Counsel for the General Counsel

Richard T. Ruth, Esq.
1026 West 26th Street
Erie, PA 16508-1516
rt@rtruth.net
Counsel for the Charging Party

/s/ Jonathan C. Fritts
Jonathan C. Fritts