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VIA ECF DOCUMENT FILING SYSTEM

United States Court of Appeals for the Ninth Circuit
Attn: Molly C. Dwyer, Clerk of the Court
James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103

Re: *Johnmohammadi v. Bloomingdale's, Inc.*
Case No. 12-55578
Notice of Supplemental Authority

Dear Ms. Dwyer:

Appellant Fatemeh Johnmohammadi submits the following Notice of Supplemental Authority pursuant to Fed. R. App. P. 28(j).

On November 19, 2013, in *Kmart Corporation* JD-85-13-1, an NLRB Administrative Law Judge applied *D.R. Horton* analysis in a context where employees were given a 30-day opportunity to opt out of arbitration, not unlike the opportunity at issue in this case. (Appellant's Brief, at 28-31). A copy of the *Kmart* decision is attached hereto as Exhibit "A" and incorporated herein by this reference.

Very truly yours,

/s/ Dennis F. Moss

EXHIBIT A

JD-85-13
Hoffman Estates, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KMART CORPORATION, A SUBSIDIARY
OF SEARS HOLDING CORPORATION,

and

Case No. 06-CA-091823

RONALD DANIELS, an Individual.

SEARS HOLDING CORPORATION,

and

Case No. 06-CA-10002

RONALD DANIELS, an Individual.

Counsel:

Janice A. Sauchin, Esq. (NLRB Region 6)
of Pittsburgh, Pennsylvania, for the Acting General Counsel

Jonathan C. Fritts, Esq. (Morgan Lewis & Bockius),
of Washington, D.C., for the Respondents

Richard T. Ruth, Esq. (Attorney at Law),
of Erie, Pennsylvania, for the Charging Party

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve the application of the principles set forth by the National Labor Relations Board (Board) in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), to a situation anticipated by but not reached in that decision. In *D.R. Horton*, the Board considered, in relevant part, an employer's implementation of a rule requiring employees to arbitrate employment disputes and which, as a feature of the rule, prohibited an employee from bringing or participating in any class or collective actions against the employer in any forum including before the arbitrator. The Board recognized that "these forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7 [of the National Labor Relations Act (Act)]." *D.R. Horton*, *supra* at slip op. 3. The Board opined that such collective redress of grievances in legal or administrative settings are "not peripheral but central to the Act's purposes" (*Id.*), and concluded that an employer violates the Act by maintaining a prohibition on the maintenance of class or collective actions in all forums.

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5 In this case, the question presented is whether an employer may implement an arbitration policy containing the very same type of ban on collective actions prohibited in *D.R. Horton*, where the policy provides each employee a one-time initial window of opportunity to opt out of the arbitration policy, and therefore, out of the restriction on collective actions. After this initial opt-out opportunity, the window shuts and the policy and its ban on collective actions apply irrevocably to the employee. The issue, in other words, is 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. I conclude that it does not and that the maintenance of such a rule, even with a meaningful but one time opt-out provision, is violative of the Act. As explained herein, I believe that this result follows directly, and indeed, quite obviously and inescapably from the reasoning and principles set forth in *D.R. Horton*—principles and reasoning I believe are sound, but more pertinently, to which I am bound to adhere.

10 Accordingly, as set forth herein, I find merit to the government's allegation that the maintenance of the arbitration policy at issue violates Section 8(a)(1) of the Act. However, as discussed herein, I also find that of the two respondents in this case—a parent holding company and one of its subsidiaries—the record fails to provide evidence that the parent respondent is an employer under the Act. No other theory of liability is asserted against the parent by the government. Accordingly, I am compelled to dismiss the complaint as to the parent respondent.

20 STATEMENT OF THE CASE

25 On October 22, 2012, Ronald Daniels filed an unfair labor practice charge alleging violations of the Act by Kmart, docketed by Region 6 of the Board as Case 06-CA-091823. Daniels amended the charge, naming the respondent as Kmart Corporation, a subsidiary of SHC Holdings Corp. (Kmart), on March 11, 2013. Based on an investigation into the charge, on March 15, 2013, the Acting General Counsel (General Counsel), by the Acting Regional Director for Region 6 of the Board, issued a complaint and notice of hearing alleging violations of Section 8(a)(1) of the Act by Kmart. Kmart filed an answer to the complaint denying all alleged violations of the Act.

30 On March 11, 2013, Daniels filed an unfair labor practice charge against Sears Holding Corporation (SHC) alleging violations of the Act, docketed by Region 6 of the Board as Case 06-CA-100022. Based on an investigation into the charge, on April 17, 2013, the General Counsel, by the Regional Director for Region 6 of the Board, issued a complaint and notice of hearing alleging violations of Section 8(a)(1) of the Act by SHC. SHC filed an answer to the complaint denying all alleged violations of the Act, and an amended answer in which it also denied all violations of the Act. On April 17, 2013, the Regional Director issued an order consolidating cases 06-CA-091823 and 06-CA-100022.

35 A trial in these matters was conducted June 18, 2013, in Erie, Pennsylvania. Counsel for the General Counsel and for the Respondents filed posthearing briefs in support of their positions by July 22, 2013. On the entire record, I make the following findings, conclusions of law, and recommendations.

40 JURISDICTION

45 Respondent Kmart is a Michigan corporation with offices and its headquarters in Hoffman Estates, Illinois, and places of business throughout the United States. It is engaged in the retail sale of clothing, household goods, and other consumer products. In conducting its operations during a recent 12-month period Kmart derived gross revenues in excess of \$500,000, and during

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5 this same 12-month period Kmart received and purchased at its Erie, Pennsylvania facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. Kmart is (and admits it is) an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of Case 06-CA-091823 pursuant to Section 10(a) of the Act.

10 Respondent SHC is a Delaware corporation and the parent company of Kmart, as well as of Sears Roebuck and Co. and numerous other subsidiaries, indirect subsidiaries, and affiliates located in and doing business across the United States and its territories. In conducting its operations during a recent 12-month period, SHC derived gross revenues in excess of \$500,000, and during this time period through its subsidiaries and operations, purchased and received at its Kmart and/or Sears facilities located in the Commonwealth of Pennsylvania goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. In its amended answer SHC does not deny, and therefore admits (see, Board Rules & Regulations Section 102.20), that it is engaged in activity affecting commerce, within the meaning of Section 15 2(6) and (7) of the Act.

20 However, while the complaint alleges that SHC is an employer within the meaning of Section 2(2) of the Act, in its amended answer SHC denies it and “avers that,” as a holding company, it is not an employer under the Act because “it does not employ any employees within the meaning of Section 2(3) of the Act.”¹ On brief SHC maintains that, the General Counsel having failed to show that SHC has statutory employees, SHC is not a statutory employer and the scope of this case must be limited to Kmart.

25 Section 8(a)(1) of the Act—the section alleged to have been violated by SHC (and Kmart)—like all violations of Section 8(a) of the Act, requires a finding of “employer” status. In cases alleging violations of Section 8(a) the Board considers this finding of employer status to be jurisdictional. *IUOE Local 487 Health and Welfare Trust Fund*, 308 NLRB 805, 808 (1992) (dismissing complaint for lack of jurisdiction because of the General Counsel’s failure to prove 30 that respondent is a statutory employer).

35 On brief, the General Counsel correctly anticipates that SHC will argue that it is not an employer, and the General Counsel states (GC Br. at 3 fn. 2) that at the hearing “no evidence was introduced to substantiate th[e] claim [of] Respondent SHC.” But of course, it is not SHC’s burden to disprove the allegation, but the General Counsel’s to prove it. Although the General Counsel anticipated SHC’s argument—SHC raised the issue in the amended answer to the complaint, at a prehearing conference call, and in a March 18, 2013 position letter submitted to the Region—the General Counsel has failed to prove the allegation.

40 The General Counsel demonstrated at the hearing that Roberta Kaselitz—an admitted supervisor under the Act—does not know if she works for SHC or Kmart or a subsidiary of one of them. She testified that “they’re are all the same,” and that Kmart and Sears are “one company.” But this does not go to the point. Whatever entity employs her, no one claims she is a statutory employee. And while the General Counsel correctly argues that “there is no requirement set forth 45 in Section 2(2) that an ‘employer’ must employ statutory employees,” the Board has called this definition “not very helpful in resolving the issue of whether an entity must employ statutory employees to be a statutory employer” and ruled that it must. *IUOE Local 487 Health & Welfare*

¹Section 2(3) of the Act contains the statutory definition of “employee.”

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Trust Fund, 308 NLRB 805, 807-808 (1992) (because benefit fund was not proven to have a single statutory employee it was not an employer under the Act).

5 Kaselitz's testimony is suggestive of a theory that SHC and Kmart are a single employer under the Act, but that cannot be proven based on one manager's admission that the various entities are "all the same." Moreover, it is not alleged. Indeed, while there are various theories of derivate or agency liability available to the General Counsel (single employer, joint employer, alter ego, direct participation theory), none is pled and none is argued. The bare evidence suggests that SHC along with its other related companies introduced the arbitration policy at issue in this case together, but little or nothing else is revealed in the record that would shed light on the relationship between SHC and the various entities that comprise what the Respondents' documents refer to as the "Sears Holdings Corporation family."

15 At bottom, the General Counsel has failed to prove that SHC is an employer. There is no argument made or proof offered of an agency or derivative theory of liability against SHC. I admit that it feels like a technicality. I am not convinced that SHC has no employees. I am not convinced, indeed I suspect, that SHC could be held liable under a derivative theory.² But the Respondent raised the issue and proof is lacking on this record. I will dismiss the case against SHC, Case 06-CA-100022.

20 UNFAIR LABOR PRACTICES

25 Kmart, and all of the "Sears Holding" companies, maintain an "arbitration policy/ agreement" implemented in early April 2012 at stores nationwide for all of its employees (except those represented by a union).

The full text of the policy is set out in an appendix to this decision. (Appendix 2.) Here, I summarize the key parts of the policy.

30 1. Coverage: Under the policy, all claims between an employee and the employer (with a few specified exceptions) that are not resolved informally shall be resolved by binding arbitration. The policy "provides that virtually any dispute related to [an employee's] employment must be resolved only through binding arbitration." Thus, "[t]his Agreement is intended to apply to and cover all such disputes that Associate has against Company that Associate could otherwise file in court and all such disputes Company has against Associate that Company could otherwise file in court." The agreement states that "[a]rbitration replaces the right of both parties to go to court, including the right to have a jury decide the parties' claims." The Agreement states that it "will continue to apply after Associate is no longer employed by the Company."³

40 2. Not Covered: By its terms, the policy does not apply to claims for workers compensation, state disability, and unemployment insurance benefits. The policy does not bar an employee from filing a claim or charge with a federal, state, or local administrative agency including the

²Indeed, such matters can be explored in a compliance hearing in the case against Kmart. *Southeastern Envelope Co.*, 246 NLRB 423, 423 (1979); *Commissary of Great Race*, 277 NLRB 1175, 1176 fn. 4 (1985).

³I note that while the focus of the arbitration policy is on "employment-related" related disputes, the scope of claims covered sweeps very widely to include trade secrets, unfair competition, and indeed, "all other state or federal statutory and common law claims."

National Labor Relations Board. The policy does not apply to claims for employee benefits under a company-sponsored benefit plan covered by ERISA⁴ or funded by insurance, although the policy does apply to other claims under ERISA, such as a claim for breach of fiduciary duty, or for penalties. Finally, the policy does not apply to any dispute within the jurisdiction of, or amenable to resolution under, any valid collective-bargaining agreement with the company.

3. No class, collective, or private attorney general actions: The agreement prohibits an employee from “filing, opting into, becoming a class member in, or recovering through a class action, collective action, representation action or similar proceeding.” The agreement further provides that the employee and the company “agree to bring any dispute in arbitration on an individual basis only.” The agreement provides for a “class action waiver,” a “collective action waiver,” and a “private attorney general action waiver,” which the agreement defines as there being “no right or authority for any dispute to be brought, heard, or arbitrated as a class action” or as a “collective action,” or as a “private attorney general action.”

4. Opt-Out Provision: The agreement provides that an employee who “does not wish to be bound by the Agreement . . . must opt out by following the steps outlined in this Agreement within 30 days of receipt of this Agreement. Failure to opt out within the 30-day period will demonstrate [the employee’s] intention to be bound by this Agreement and [the employee’s] agreement to arbitrate all disputes arising out of or related to [the employee’s] employment as set forth below.” Further into the agreement (numbered paragraph 11, on page 6) the agreement sets forth the procedure for an employee to opt out and reiterates the requirement that the opt-out procedure be completed within 30 days of receipt of the agreement in order to be effective. Essentially, an opt-out form, to be obtained from a human resources representative or manager, must be filled out and returned to Sears Holding Legal Intake by mail or fax. The agreement provides that an employee “who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement.” The final page of the agreement is the opt-out form, which is comprised of two paragraphs stating that the employee elects to opt out of the arbitration policy, and states the 30-day time limitation to opt out and the need to fax or mail the signed form. In addition to a signature, the employee must provide an employee identification number.

Implementation and opt out

The arbitration policy has been in effect unchanged since its introduction by Kmart and SHM to all of their stores in April 2012. When introduced, corporate officials directed stores to implement numerous procedures and practices to inform employees about the program. While there was some dispute in the testimony at the hearing about whether all of these procedures were followed, at least in the Kmart store in Erie, Pennsylvania, it is undisputed that a significant number of employees, both nationally, and in the Erie store, took advantage of the opportunity to opt out of the policy. Interestingly, at the Erie store this included the store manager, the human resources manager, other management employees who testified, and even the district manager.

Stipulations entered into by the parties provide some evidence of the extent of employees choosing to opt out of the policy. As of May 28, 2013, out of more than 84,500 Kmart employees nationwide approximately 8500, or just over 10 percent had affirmatively opted out. Approximately 54,000 (nearly 64 percent) had acknowledged the arbitration policy but not opted out (although some of these who are recent hires may have been within the 30 day opt out period). Approximately 21,000 (26 percent) others had yet to acknowledge the policy and were in

⁴The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1000, et seq.

various stages of being notified about the policy. If no answer is received, this would lead to them being considered bound by the policy. At the Erie, Pennsylvania store, at which the charging party in these cases was employed, the opt-out rates have been considerably higher than the national average. At the Erie store, 47 out of 76 employees, nearly 62 percent, opted out.⁵

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Analysis

In *D.R. Horton*, supra, the Board held that an employer violates Section 8(a)(1) of the Act “by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.”⁶ Here, Kmart’s arbitration policy requires a similar waiver.⁷ It is the one time opt-out opportunity, Kmart contends, that removes its policy from the ambit of *D.R. Horton*’s proscription. In other words, absent the opt-out provision, Kmart concedes, as it must, that its policy would violate the Act pursuant to *D.R. Horton*.⁸

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⁵Notwithstanding the policy’s statement that employees had only 30 days to opt out, in practice, if an employee failed to acknowledge the policy within 30 days, headquarters would send a copy of the policy to the employee’s home and provide additional time for the employee to respond by mail or computer. Testimony suggested that if the employee still did not take steps to acknowledge or opt out of the policy, he or she would then be considered not to have opted out and to be bound by the policy. I do not reach any conclusion about the General Counsel’s evidence—very much disputed by the Employer and its witnesses—questioning the thoroughness of the communication of the arbitration policy to employees. I do not find these disputes relevant to the outcome. Even assuming a thoroughly communicated policy, as discussed below, I do not believe the arbitration policy, even with an opt-out provision, is consonant with the Act.

⁶The Board in *D.R. Horton* also found that the arbitration policy at issue in that case violated the Act by requiring employees to submit all employment-related disputes to arbitration. The Board found that this violated Section 8(a)(1) of the Act because it would lead employees to reasonably believe that they were prohibited from filing unfair labor practices with the Board. Here, the Respondent’s arbitration policy expressly excludes from its coverage the filing of charges with the Board and other agencies. Thus, that issue is not presented in this case.

⁷Kmart’s policy waives the employee’s right to be involved in a “class,” “collective,” “representation,” “private attorney general,” or “similar” actions. For simplicity, throughout this decision I will use the terms collective action or claim, or collective redress of grievances to refer generally to all of the types of claims that are prohibited by Kmart’s policy.

⁸Kmart also contends that *D.R. Horton* should be overruled, however, it represents current Board precedent that I must follow. *Waco Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“We emphasize that it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied”) (citation omitted). This is true even in the face of criticism of the rule of *D.R. Horton* by some federal courts. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). In addition to arguing that *D.R. Horton* should be overruled, the Respondent mounts numerous arguments identical to those rejected by the Board in *D.R. Horton*, without any effort to explain why the facts here warrant a different result. I have ignored such arguments, as they carry no force in light of my obligation to follow *D.R. Horton*. Throughout this decision, I focus on the question of whether the policy at issue here—i.e., an arbitration policy containing an opt-out provision—warrants a different result from the result in *D.R. Horton*. I conclude that it does not.

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5 Does the opportunity for employees to make an initial decision to opt out of the policy render it lawful? In my view it does not, and the problem is more fundamental than whether the employees are fully apprised of their choice before making their decision, whether the decision to opt in or out may be considered "voluntary," may be undertaken without fear of retaliation, or whether the burden posed by having to affirmatively act to preserve rights under the Act is undue.

10 The problem is not the feasibility of the opportunity to opt out. The issue is whether an employer and an individual employee may enter into an agreement to waive *irrevocably* future rights protected by the Act. In this case, the right at issue is the substantive right to engage in collective redress of grievances, a right the Board has recognized as being "at the core of . . . Section 7" rights and "central to the Act's purposes." *D.R. Horton*, supra.

15 An employer can no more make such a binding agreement (or purport to make such a binding agreement) with an individual employee than it can purport to obtain an employee's agreement to waive irrevocably his or her future right to join a union, go on strike, or file charges with the Board. They are all illegitimate impingements and restrictions on section 7 activity. As the Board explained in *D.R. Horton*,

20 That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights –including, notably, agreements that employees will pursue
25 claims against their employer only individually.

357 NLRB No. 184, slip op. at 4 (footnotes with supporting citations omitted).

30 The problem is in no way cured by the contention that the restriction on Section 7 rights is voluntarily agreed to by the employee. Again, the Board's reasoning in *D.R. Horton*, supra, is instructive, and fully applicable to the situation at bar here:

35 the Board [has] held unlawful a clause in individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration. *J. H. Stone & Sons*, 33 NLRB 1014 (1941), *enfd.* in relevant part, 125 F.2d 752 (7th Cir. 1942). "The effect of this restriction," the Board explained, "is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a
40 representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer." *Id.* at 1023 (footnote omitted). The Seventh Circuit affirmed the Board's holding, describing the contract clause as a *per se* violation of the Act, even if "entered into without coercion," because it "obligated [the employee] to bargain individually" and was a "restraint upon
45 collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). These precedents compel the conclusion that the [agreement] violates the NLRA.

357 NLRB No. 184, slip op. at 5. (footnotes omitted).

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5 In truth, the voluntariness of the Respondent's policy is debatable: an employee can be bound by the policy if he fails to respond to (or learn of) the arbitration policy and its opt-out provisions. However, assuming without deciding that the failure of an employee to opt out constitutes a voluntary agreement to the policy, this does not save the policy under the Act. The inducement to individuals to irrevocably waive future Section 7 rights is not one the employer has the right to provide. It is not a choice employers may purport to enforce. It is not an agreement that an employee may irrevocably make with his employer. In *D.R. Horton*, the vice was the imposition of a rule barring future collective actions. In this variant, the vice is the *agreement* between the individual employee and the employer to bar them.

10 In this regard, the Respondent misses the issue at hand when it asserts (R. Br. at 23) that "[t]he Act does not prohibit employees from voluntarily entering into individual agreements with the employer" and in support of this proposition cites and quotes *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336-337 (1944): "Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act."

15 No one questions the general proposition that employees may enter into individual agreements with employers. But not at the expense of substantive rights under the Act. The point of *J.I. Case*, and the point of the instant indictment of the Respondent's policy, is that while individual's agreements with employers are not prohibited:

20 individual contracts no matter what the circumstances that justify their execution or what the terms, may not be availed to defeat or delay procedures prescribed by the National Labor Relations Act. . . . Wherever private contracts conflict with [the Boards] functions, they must obviously yield or the Act would be reduced to a futility.

25 *J.I. Case*, 321 U.S. at 337.

30 The Respondent is free to reach all sorts of agreements with individual employees. However, the Respondent may not reach agreements with individuals that conflict with rights protected by the Act.

35 None of this is based on new Board precedent. While the Board in *D.R. Horton* did not have to consider the issue of voluntary individual agreements, the Board has had occasion to consider such waivers and, consistent with the principles set forth in *D.R. Horton*, found that an individual's broad waiver of "core" Section 7 rights "central" to the purposes of the Act is unlawful. Thus, in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004), the Board found unlawful a separation agreement between an employee Brown and the employer that restricted for a one year period the employee from attempting "to hire, influence, or otherwise direct any employee of the Company to leave employment of the Company or to engage in any dispute or work disruption with the Company, or to engage in any conduct which is contrary to the Company's interests in remaining union-free." According to the Board:

40 In our view, this separation agreement is overly broad in that it forces Brown to prospectively waive her lawful Section 7 rights. "[F]uture rights of employees as well as the rights of the public may not be traded away in this manner." *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973) (release used by employer was overly broad and unlawfully prohibited filing of unfair labor practice charges concerning future incidents). See generally *Metro Networks, Inc.*, 336 NLRB 63 (2001).

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337 NLRB at 175-176; see also, *Goya Foods*, 358 NLRB No. 43, slip op. at 1-2 (2012) (rejecting settlements that "purport to indefinitely prohibit [the employees] from engaging in any union activity relating to the Respondent or its employees. As in *Ishikawa Gasket*, we will not approve a settlement agreement that prospectively waives employees' Section 7 rights in such a manner. That reason alone suffices for us to find the settlements void and reject them in their entirety") (footnotes omitted).

In much the same way, those Kmart employees who failed to opt out of the arbitration policy have been deemed to have agreed to waive prospective Section 7 rights with regard to this employer, and in the case of the Kmart employees, the waiver is forever and not just for one year as was the case in *Ishikawa Gasket*.

In *Ishikawa Gasket* the employee had to agree to waiver of these rights in exchange for compensation. In this case, Kmart employees had to agree to the waiver of their rights if they wanted to accept the benefits of the arbitration policy offered by the Respondent. This is not a waiver of rights that the Board can or should countenance under existing principles and policies.

The Respondent argues—in a contention that underlies its whole defense—that the waiver of the right to collective redress of workplace grievances "cannot be equated with the core rights protected by Section 7" and "has nothing to do with organizing or bargaining collectively under the NLRA." (R. Br. 26-28). However, in accordance with longstanding judicial precedent, the Board squarely holds otherwise. See, *D.R. Horton*, supra, slip op. at 2-4, citing cases.

Indeed, in a very real sense, the Respondent's contention misses the point of the Act. Illustrative of this, is the Respondent's repeated citation to cases involving agreements negotiated between a union and an employer that waive Section 7 rights. These precedents do not advance the Respondent's case. In fact, the distinction between union-employer negotiated waivers of Section 7 rights and employee-employer attempts to do so goes to the heart of the Act's schema. It has been

long recognized that a union may waive a member's statutorily protected rights, including his right to strike during the contract term, and his right to refuse to cross a lawful picket line. Such waivers are valid because they rest on the premise of fair representation and presuppose that the selection of the bargaining representative remains free.

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705 (1983) (internal quotations and citations omitted).

These sanctioned waivers of section 7 rights are "freely and collectively bargained between a union and an employer"—and "the negotiations of such a waiver stems from an exercise of Section 7 rights: the collective bargaining process." *D.R. Horton*, supra, slip op. at 10) (Board's emphasis). Collectively-bargained waivers in the form of collective-bargaining contracts are the very essence of the Act in action. On the other hand, employer imposed or procured individual employee waivers of Section 7 rights are a completely different matter and not permitted under a regime that exists to protect the right to engage in collective action. The difference between these two situations goes to the very heart of the Act, which has as its

purpose the protection of collective bargaining as the means of negotiating terms and conditions of employment.⁹

5 Although the principles set forth in *D.R. Horton* (and *Ishikawa Gasket*) control the outcome of this case, the Board in *D.R. Horton* did not face and did not reach the question presented here. The Respondent sees great significance in the Board's footnote in *D.R. Horton* calling "more difficult" the question of

10 whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

15 357 NLRB No. 184 at slip op. 13 fn. 28.

In my view, the Board's comment constitutes an appropriate recognition that there are a range of ways in which an individual employee might decide to forego collective action, and some pose "more difficult" questions than others.

20 For instance it is one thing for an individual to choose not to engage in Section 7 activity, and, in that regard, to choose not to join or participate in a class action grievance or case as a means of resolving an employment dispute with his employer. That is a decision reserved for the employee, and it would be a difficult question if the Board were asked to find unlawful an individual's one-time specific agreement with an employer not to join in a class action in
25 exchange for an employer's agreement to arbitrate a concrete pending employment dispute. In such a case, the waiver is narrow, discrete, and embodies a litigation choice made in light of known circumstances. It might well warrant a different outcome than that reached in *D.R. Horton*.

30 At the other end of the spectrum, however, and not a difficult case, is the situation we encounter here: where an employer enters into an agreement with an employee—through employee inaction, no less—requiring the employee to waive prospectively and for all time the right to engage in an important form of Section 7 activity against the employer, in exchange for having access to an employer-offered arbitration program. The latter is what we have here and that is not an employee exercising the rights afforded under Section 7 to forego collective action
35 but a permanent waiver of the right to engage in a "central" Section 7 right.

40 Thus, if there are hard and easy cases—this one is easy: an irrevocable prospective lifetime waiver of certain Section 7 rights relating to all employment disputes that may arise in the future. It could be "worse" only if the employer's policy purported to waive an even greater array of Section 7 rights. The Act's treatment of such a broad indefinite and irrevocable individual employee waivers is not in doubt.

⁹See Section 1 of the Act ("It is declared to be the policy of the United States . . . [to] encourage[e] the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection").

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I would add that there is no conflict between the result here and the Federal Arbitration Act (FAA), and no undermining of the policy favoring arbitration agreements underlying the FAA. The Respondent advances numerous arguments on this score but this was also the “principal argument” of the employer and supporting amici in *D.R. Horton* and the Board extensively considered and rejected the proposition. *Supra*, slip op. at 8–12. It is unnecessary to repeat the Board’s extended reasoning here. Suffice it to say that each point of the Board’s reasoning and conclusion on this score is fully and equally applicable to the restriction on the waivers at issue here. For the very same reasons set forth by the Board in *D.R. Horton*, there is no conflict here with the FAA or the federal policy favoring arbitration. In short, the FAA and its policy preference for arbitration do not privilege enforcement of such agreements when the terms contravene substantive protections under the Act.

The Respondent cites two Supreme Court cases decided since *D.R. Horton*, but neither case changes anything nor informs the issue. In *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S.Ct. 665 (2012), the Supreme Court upheld an arbitration agreement waiving the ability to sue in court for alleged violations of the Credit Repair Organization Act (CROA), 15 U.S.C. § 1679 et seq., a federal statute regulating the practices of credit repair organizations. The Court rejected the proposition that CROA contained a substantive right to sue—individually or as a class. 132 S.Ct. at 670. The Court reaffirmed its reasoning, found in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and other cases, that an “utterly commonplace” provision in a federal statute creating a private right of action does not prohibit an enforceable agreement to arbitrate such claims. 132 S.Ct. at 670.

Similarly, in *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S.Ct. 2304 (2013), the Court, again reaffirming longstanding reasoning, this time articulated in *Mitsubishi Motors, Inc. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), and held that federal antitrust statutes do not evince an intent to preclude waiver of class action procedures, and found this so even if individual vindication of “low-value” antitrust cases would be impractical.

Neither case affects the reasoning of the Board in *D.R. Horton*, precisely because, among other reasons, the Board in *D.R. Horton* relied upon the Supreme Court’s recognition in *Gilmer* and *Mitsubishi* that the FAA does not require arbitration of statutory claims where it means that a party will “forgo the substantive rights afforded by the statute” *D.R. Horton*, *supra*, slip op. at 9, quoting *Gilmer*, *supra* at 26, quoting *Mitsubishi*, *supra* at 628. This principle is unaffected by the Court’s decision in *CompuCredit* and *American Express*, cases where the Court rejected the contention that there was a substantive right to collective action contained in the statutes at issue in those cases. However, the Act is different. In *D.R. Horton* the Board affirmed the settled principle that a “categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates substantive rights vested in employees by Section 7 of the NLRA.” On this basis the Board invalidated the arbitration agreement at issue in *D.R. Horton*, and the reasoning is equally valid here and consistent with the Supreme Court’s decisions in *American Express* and *CompuCredit*. The key point is that the Board’s “issue” is with protecting the substantive right under the Act for employees to act collectively—at least in some forum—to vindicate their legal and contractual rights.

In this regard, it cannot be stressed enough that the Board’s concern in this case, and in *D.R. Horton*, is not with the FAA or with arbitration. The Board’s rules neither evince nor are motivated by any hostility to arbitral resolution of disputes. An employer’s arbitration policy reached with individual employees, even one that bars collective actions in arbitration, does not run afoul of *D.R. Horton* as long as the employee’s right to pursue collective actions in other forums is not infringed. The Board is not hostile to arbitration, but rather, unwilling to

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countenance any unilateral employer policy, arbitral or otherwise, imposed upon or agreed to with individual employees, that purports to restrict employees' substantive Section 7 rights, in this case the prohibition on all forms of collective actions in all forums.¹⁰

5 Finally, the Respondent contends (R. Br. at 15) that the Act's six-month statute of
 limitations set forth in Section 10(b) of the Act precludes finding a violation "with respect to
 employees who acknowledge and entered into the Agreement more than six months prior to the
 filing of charges in this case." This is completely wrong. Indeed, there is something ludicrous
 10 because the contention that employees waive the right to engage in Section 7 activity *in perpetuity*
 rule. The violation here is the maintenance of an unlawful restriction on Section 7 activity that is
 an unfair labor practice each day that it is maintained. Whether viewed as an employer rule or as
 an agreement, the unlawful restriction on Section 7 activity may be prosecuted as long as the
 unlawful restriction is in effect. It is a classic continuing violation.¹¹

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The General Counsel alleges a violation only for a period of time within the statute of
 limitations period (i.e., since April 23, 2012). There is no 10(b) issue.¹²

¹⁰The Respondent also argues (R. Br. at 19-20) that a ruling preventing the individual waiver
 of Section 7 rights is bad policy as employers will be unwilling to offer arbitration agreements, if
 they are "required to permit employees to present class claims in arbitration." This is wrong in
 two ways. First, neither *D.R. Horton*, nor the reasoning of this decision requires employers to
 offer arbitration agreements that permit class claims in arbitration. They may offer arbitration
 agreements that preclude class claims in arbitration, as long as employees remain free to pursue
 rights they may otherwise have to pursue class claims through the judicial system. Second, this
 policy argument is better directed to Congress than to me or the Board. It is unlikely that the
 Board would eliminate substantive statutory protections of the Act it administers in order to
 incentivize employers to offer arbitration agreements.

¹¹An employer commits a continuing violation of the Act throughout the period that an unlawful
 rule is maintained. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Relco Locomotives*, 359
 NLRB No. 133, slip op. at 16 (2013) (To the extent Respondent may claim this allegation is time-
 barred, unlawful work rules which may be longstanding which are maintained within the statutory
 limitations period established in Section 10(b) of the Act constitute continuing violations of the
 Act."); *Alamo Cement Co.*, 277 NLRB 1031, 1037 (1985) (maintenance of unlawful rules within six
 months of filing charges renders the action timely). Moreover, it is well-settled that an agreement
 entered into outside the 10(b) period may be found unlawful within the 10(b) period where its
 provisions are unlawful on their face. *Teamsters Local 293 (R.L. Lipton Distributing)*, 311 NLRB
 538, 539 (1993) (provision requiring extra payment of 45 cents per hour to shop stewards); *Great
 Lakes Carbon Corp.*, 152 NLRB 988, 989-900 (1965) (provision providing for superseniority for
 strikers), review denied, 360 F.2d 19 (4th Cir. 1966); *Whiting Milk Corp.*, 145 NLRB 1035, 1037-
 1038 (1964) (unlawful seniority provision in contract executed outside 10(b) period but enforced
 inside the 10(b) period), enforcement denied on other grounds, 342 F.2d 8 (1st Cir. 1965).

¹²*Local Lodge No. 1424, IAM (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960) is inapposite. In
 that case the Supreme Court treated with a contract lawful on its face and in its enforcement, but
 unlawful, essentially because of one party's lack of capacity when entered into during a time-
 barred period.

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For all of these reasons, I find that the Respondent's maintenance of its arbitration policy which prohibits for all time the resort to class, collective, or representation actions in any forum by employees covered by it, unlawfully restricts "core" Section 7 rights "central" to the Act's promise and is, therefore, violative of Section 8(a)(1) of the Act.¹³

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CONCLUSIONS OF LAW

1. The Respondent Kmart Corporation, a subsidiary of Sears Holding Corporation, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Since on or about April 1, 2012, the Respondent has violated Section 8(a)(1) of the Act by maintaining an arbitration policy that waives the right to maintain collective actions in all forums, whether arbitral or judicial, and is applicable to all employees who fail to opt out of coverage under the arbitration policy during a one-time initial opt out period permitted each employee.
3. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

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¹³The Respondent makes three procedural arguments relating to the Board's authority, each of which I reject. First, relying on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the Respondent argues (R. Br. at 35-36) that Member Becker's March 27, 2010 recess appointment was invalid and therefore, the Board, which had only three members at the time *D.R. Horton* issued, had only two valid members and thus, lacked the required quorum to operate (in accordance with *New Process Steel v. NLRB*, 560 U.S. 674 (2010)).

Second, in a related claim based on the same premise, the Respondent argues (R. Br. at 39-40) that the Regional Director of Region 6 did not have authority to issue the complaints in the instant cases because at the time of his appointment in March 2009, the Board had only two members and lacked the quorum necessary to make appointments. I reject both of these arguments for the reasons set forth in *Bloomingtondale's Inc.*, 359 NLRB No. 113 (2013).

Third, the Respondent argues (R. Br. at 36-39) 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 (Member Hayes was a member of the panel but recused himself). This is a meritless argument. As the Respondent notes (quoting Office of Legal Counsel Memorandum Opinion for the Solicitor National Labor Relations Board, 2003 WL 24166831 (March 4, 2003)): "when the Board's membership has fallen to three members, the Board has developed a practice of designating those members as a 'group' in cases where one member will be disqualified." This practice, which was "left undisturbed" by the Supreme Court in *New Process Steel (Correctional Medical Services, Inc.)*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010), is precisely what the Board did in *D.R. Horton*, which is why *D.R. Horton* was issued "by" all three members, including Member Hayes, although he was recused and did not participate in deciding the merits of the case. Designate is not delegate and there is no requirement that a Board with only three members delegate its authority to the three before it is empowered to issue decisions. As the only members of the Board, the three had the right to "exercise all powers of the Board." See, Section 3(b) of the Act ("A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"). This power includes "allow[ing] any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S.Ct. at 2644.

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REMEDY

5 Having found that the Respondent have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

10 Having found that the Respondent's arbitration policy is unlawful, the Respondent shall be ordered to rescind or revise it to make clear to employees in all of its facilities in which the arbitration policy has been implemented that the policy does not require a waiver in all forums of their right to maintain collective actions, and shall notify employees of the rescinded or revised policy including by providing them a copy of the revised policy or specific notification that the policy has been rescinded.

15 The Respondent shall post an appropriate informational notice, as described in the attached appendix 1. This notice shall be posted in all Respondent's facilities where the arbitration policy has been in effect, wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed a facility at which the arbitration policy has been in effect, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since 20 April 1, 2012. The Respondent shall also disseminate, on the first day of notice posting as required herein, a copy of this notice in electronic fashion on the same basis and to the same 25 group or class of employees as the arbitration policy was made available through an electronic communications system including intranet and internet. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

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¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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ORDER

Respondent Kmart Corporation, a subsidiary of Sears Holding Corporation, Hoffman Estates, Illinois, its officers, agents, successors, and assigns, shall

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1. Cease and desist from:

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(a) Maintaining an arbitration policy that waives the right to maintain collective actions in all forums, whether arbitral or judicial, and which applies irrevocably to all employees who fail to opt out.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act:

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(a) Rescind or revise the arbitration policy to make it clear to employees that the policy does not constitute a waiver in all forums of their right to maintain collective actions.

(b) Notify the employees of the rescinded or revised policy, including providing them a copy of the revised policy or specific notification that the policy has been rescinded.

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(c) Within 14 days after service by the Region, post at its Erie, Pennsylvania, and all of its facilities where the arbitration policy has been in effect, copies of the attached notice marked "Appendix 1."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also disseminate, on the first day of notice posting as required herein, a copy of this notice in electronic fashion on the same basis and to the same group or class of employees as the arbitration policy was made available through an electronic communications system including intranet and internet. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility where the arbitration policy has been in effect, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2012.

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¹⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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(d) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 The complaint in case 06-CA-100022 is dismissed.

10 Dated, Washington, D.C. November 19, 2013.

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David I. Goldman
U.S. Administrative Law Judge

APPENDIX 1

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain an arbitration policy that waives your right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, rescind or revise the arbitration policy to make it clear to you that the policy does not constitute a waiver in all forums of your right to maintain class or collective actions.

WE WILL notify you of the rescinded or revised policy, including providing you with a copy of the revised policy or specific notification that the policy has been rescinded.

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

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111
(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.

APPENDIX 2

4/2/12

ARBITRATION POLICY/AGREEMENT

Introduction

The Company, including Sears, Roebuck and Co., Kmart Corporation, Sears Holdings Management Corporation, Sears Holdings Corporation, and all subsidiaries, indirect subsidiaries, and affiliates of Sears Holdings Corporation (collectively, the "Company") understands that employment-related disagreements will arise from time to time. Accordingly, Company has adopted this Arbitration Policy/Agreement ("Agreement"). Under this Agreement, and subject to certain exceptions specified within the Agreement, all employment-related disputes between you ("Associate") and Company that are not resolved informally shall be resolved by binding arbitration in accordance with the terms set forth below. This Agreement applies equally to disputes related to Associate's employment raised by either Associate or by Company.

Accordingly, Associate should read this Agreement carefully, as it provides that virtually any dispute related to Associate's employment must be resolved only through binding arbitration. Arbitration replaces the right of both parties to go to court, including the right to have a jury decide the parties' claims. Also, this Agreement prohibits Associate and Company from filing, opting into, becoming a class member in, or recovering through a class action, collective action, representative action or similar proceeding.

If Associate does not wish to be bound by the Agreement, Associate must opt out by following the steps outlined in this Agreement within 30 days of receipt of this Agreement. Failure to opt out within the 30-day period will demonstrate Associate's intention to be bound by this Agreement and Associate's agreement to arbitrate all disputes arising out of or related to Associate's employment as set forth below.

1. How This Agreement Applies

Except as it otherwise provides, this Agreement applies, without limitation, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, pay, benefits, breaks and rest periods, termination, discrimination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, as amended, Family and Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, and any and all state statutes addressing the same or similar subject matters, and all other state or federal statutory and common law claims ("Covered Claims").

This Agreement is intended to apply to and cover all such disputes that Associate has against Company that Associate could otherwise file in court and all such disputes Company has against Associate that Company could otherwise file in court. This Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. The Arbitrator will not have the authority to determine whether this

Agreement or any portion of it is enforceable, revocable or valid. This Agreement will continue to apply after Associate is no longer employed by Company.

This Agreement does not alter the at-will nature of Associate's employment relationship with Company. Nor is it intended to substitute for, or alter, Company's existing internal procedures for resolving complaints. It does, however, set forth rules and procedures for arbitration that apply with full force and effect to both Associate and Company.

Both parties agree that this Agreement is enforceable under the Federal Arbitration Act, 9 U.S.C. § et seq. ("FAA"). If the FAA is found not to apply, then this Agreement is enforceable under the laws of the state in which Associate is employed. However, both parties agree that there will be no right to bring any dispute covered by this Agreement as a class action, collective action, or in a representative capacity.

2. What Is Not Covered By This Agreement

This Agreement does not apply to claims for workers compensation, state disability insurance and unemployment insurance benefits. This Agreement also does not preclude Associate from filing a claim or charge with a federal, state or local administrative agency such as the Equal Employment Opportunity Commission, the U.S. Department of Labor, or the National Labor Relations Board. Further, nothing in this Agreement excuses either party from bringing an administrative claim before a state or federal agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

This Agreement also does not apply to claims for employee benefits under any benefit plan sponsored by Company and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance; however, this Agreement does not apply to any claims for breach of fiduciary duty, for penalties, or alleging any other violation of the Employment Retirement Income Security Act of 1974, as amended, even if such claim is combined with a claim for benefits.

This Agreement also does not apply to any dispute that is within the jurisdiction of, or amendable to resolution under, any valid collective bargaining agreement with Company.

3. Pending Litigation

This Agreement does not apply in any way to any employment-related single-plaintiff lawsuit or any employment-related class, collective or representative action on file with any court as of April 2, 2012. This agreement does not apply, however, to all lawsuits that are filed after April 2, 2012.

4. Class Action Waiver, Collective Action Waiver, and Representative Action Waiver

Associate and Company agree to bring any dispute in arbitration on an individual basis only. Also, this Agreement prohibits Associate and Company from filing, opting into,

becoming a class member in, or recovering through a class action, collective action, representative action or similar proceeding in court.

Accordingly, if Associate does not opt out of this Agreement as set forth in Section 11 below:

(a) There will be no right or authority for any dispute to be brought, heard, or arbitrated as a class action (“Class Action Waiver”). The Class Action Waiver shall not be severable from this Agreement in any lawsuit in which (1) the complaint is filed as a class action and (2) the civil court of competent jurisdiction in which the complaint was filed finds the Class Action Waiver is unenforceable (and such finding is confirmed by appellate review if review is sought). In such instances, the class action must be litigated in a civil court of competent jurisdiction and not as a class arbitration.

(b) There will be no right or authority for any dispute to be brought, heard, or arbitrated as a collective action (“Collective Action Waiver”). The Collective Action Waiver shall not be severable from this Agreement in any lawsuit in which (1) the complaint is filed as a collective action and (2) the civil court of competent jurisdiction in which the complaint was filed finds the Collective Action Waiver is unenforceable (and such finding is confirmed by appellate review if review is sought). In such instances, the collective action must be litigated in a civil court of competent jurisdiction and not as a collective arbitration.

(c) To the extent permissible by law, there will be no right or authority for any dispute to be brought, heard, or arbitrated as a private attorney general action (“Private Attorney General Action Waiver”). The Private Attorney General Action Waiver shall not be severable from this Agreement in any lawsuit in which (1) the complaint is filed as a private attorney general action and (2) the civil court of competent jurisdiction in which the complaint was filed finds the Private Attorney General Action Waiver is enforceable (and such finding is confirmed by appellate review if review is sought). In such instances, the private attorney general action must be litigated in a civil court of competent jurisdiction and not as a private attorney general arbitration.

Although Associate will not be retaliated against, disciplined or threatened with discipline as a result of his or her filing of or participation in a class, collective or private attorney general action in any forum, either party may lawfully seek enforcement of this Agreement and the Class Action Waiver, Collective Action Waiver, and Private Attorney General Action Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or private attorney general actions or claims. Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver, Collective Action Waiver or Private Attorney General Action Waiver is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

The Class Action Waiver, Collective Action Waiver and Private Attorney General Action Waiver shall be severable when a dispute is filed as an individual action and severance is necessary to ensure that the individual action proceeds in arbitration.

5. Starting the Arbitration

The party wishing to bring any Covered Claim(s) against the other party must do so in arbitration. To start the arbitration, the Associate must submit a written demand for arbitration by certified mail sent to Legal Intake, Sears Holdings Management Corporation, 3333 Beverly Road, B6-300A, Hoffman Estates, IL 60179. In the case of a Company-initiated claim, Company shall notify Associate of its initiation of the arbitration process by serving a demand for arbitration upon Associate by certified and first class mail to Associate's last known home address. Any demand for arbitration by either party shall identify the parties, describe the legal and factual basis of the dispute, and specifically state the remedy being sought. The demand must be sent within the time limits that would apply to the party's claim if it were being resolved in a court and not by arbitration. The sent date will be determined by the date of postmark on the envelope in which the demand is mailed.

The arbitrator shall resolve all disputes regarding the timeliness of sufficiency of the demand for arbitration. A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief.

6. Selecting a Neutral Arbitrator; Payment

- (a) Selection by Mutual Agreement of the Parties. The Arbitrator shall be selected by mutual agreement of Company and Associate. Unless Associate and Company mutually agree otherwise, the Arbitrator shall be an attorney licensed to practice in the location where the arbitration proceeding will be conducted or a retired federal or state judicial officer who presided in the jurisdiction where the arbitration will be conducted. The location of the arbitration proceeding shall be no more than 45 miles from the unit where Associate last worked for Company, unless each party agrees in writing otherwise.
- (b) Selection When Parties Cannot Mutually Agree. If the parties have not agreed upon an arbitrator within 30 days of service of the arbitration demand, then Company will file the initiating party's demand with JAMS. JAMS shall then appoint an arbitrator who shall act under this Agreement with the same force and effect as if the parties had selected the arbitrator by mutual agreement. The location of the arbitration proceeding shall be no more than 45 miles from the unit where Associate last worked for Company, unless each party agrees in writing otherwise.
- (c) Payment. If applicable requires Company to pay the Arbitrator's fees, then Company will pay such fees; otherwise, payment of fees shall be governed by the rules of the organization that administers the arbitration. Where the arbitration is conducted by an organization or arbitrator that does not have rules pertaining to the payment of fees, the Company shall pay the arbitrator's fees.

7. How Arbitration Proceedings are Conducted

In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses. Any disputes in this regard shall be resolved by the Arbitrator, provided, however, that to the extent discovery and presentation of witnesses and evidence would be limited or unavailable under applicable law if the dispute were brought in court, such limitations shall also apply in arbitration.

Both parties will have the right to be represented by an attorney in any arbitration under this Agreement. However, neither party is required to be represented by an attorney. Each party shall pay the fees for his, her or its own attorneys, and any related expenses, including the expenses of witnesses called by such party, depositions, or any other costs that would otherwise be borne by a party were the claims brought in court, subject to any remedies to which that party may later be entitled under applicable law.

If the arbitration is being administered by JAMS then the arbitration shall be conducted according to JAMS Employment Arbitration Rules & Procedures effective July 15, 2009. Notwithstanding anything in the JAMS rules, the Arbitrator will not have the authority to determine whether this Agreement or any portion of its enforceable, revocable or valid. Additionally nothing in the JAMS rules should be construed or interpreted to allow for class, collective, or representative arbitration. If you are unable to access or print the JAMS rules, you may obtain a printout of the rules from your Human Resources representative or from your manager.

8. The Arbitration Hearing and Award

The parties will arbitrate their dispute before the Arbitrator, who shall confer with the parties regarding the conduct of the hearing and resolve any disputes the parties may have in that regard. Within 30 days of the close of the arbitration hearing, any party will have the right to prepare, serve on the other party and file with the Arbitrator a brief. The Arbitrator may award any party any remedy to which that party is entitled under applicable law, including an award of attorneys' fees, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator. No remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Agreement. Within 30 days after the submission of the briefs or as soon as possible thereafter, the Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. Except as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the content or results of any arbitration hereunder without the prior written consent of all parties. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration.

9. Non-Retaliation

It is against Company policy for any Associate to be subject to retaliation because he or she exercises his or her right to assert claims under this Agreement or participates in any way in an arbitration under this Agreement. If Associate believes that he or she has been retaliated against by anyone at Company, Associate should immediately report this by calling Human Resources at 1-888-88Sears or the Ethics Hotline at 1-800-8ASSIST (1-800-827-7478).

10. Enforcement Of This Agreement

This Agreement is the full and complete agreement relating to the formal resolution of Covered Claims. Except as stated in Section 4, above, in the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Collective Action, or Private Attorney General Action Waiver is deemed to be unenforceable, Company and Associate agree that this Agreement prohibits any party from bringing a class, collective or private attorney general action in arbitration.

11. Associate's Right to Opt Out

ACTION IS REQUIRED TO PROTECT YOUR LEGAL RIGHTS TO SUE COMPANY IN COURT AND/OR TO PARTICIPATE IN ANY WAY IN A CLASS ACTION, COLLECTIVE ACTION, OR PRIVATE ATTORNEY GENERAL ACTION.

Arbitration is not a mandatory condition of Associate's employment at Company, and therefore an Associate who does not wish to be bound by the terms of this Agreement may opt out by notifying Company in writing, using the "Arbitration Policy/Agreement Opt Out Form" ("Form") that is attached at the end of this Agreement. If Associate is unable to print it, Associate may also obtain a print-out of the form from Associate's Human Resources representative or manager. The Arbitration Policy/Agreement Opt Out Form must be signed, dated and include Employee ID number. To be effective, the completed Form must be returned to Sears Holdings Legal Intake, 3333 Beverly Road, B6-300A, Hoffman Estates, IL 60179 or fax number 847-286-4511 within thirty (30) days of Associate's receipt of this Agreement (the "Opt-Out Period"). Associate should retain the fax confirmation sheet.

An Associate who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement. By not opting out of this Agreement within the Opt-Out Period, Associate will be deemed to have agreed to be bound by this Agreement, including the arbitration provision and Class Action Waiver, Collective Action Waiver, and Private Attorney General Action Waiver contained herein. Further, should Associate choose to opt out of the Agreement, Associate acknowledges and agrees that Company is no longer bound by the terms of the Agreement and may elect to bring any Covered Claims it has against Associate in a court rather than in arbitration. Associate has the right to consult with counsel of Associate's choice concerning how this Agreement affects Associates rights.

Arbitration Policy/Agreement Opt Out Form

I have reviewed the Arbitration Policy/Agreement, and I elect to opt out of the Arbitration Policy/Agreement. I understand that there will be no adverse employment action taken against me as a consequence of that decision. I understand that this completed Opt Out Form must be returned within 30 days, as provided in the Arbitration Policy/Agreement. The date of its return will be determined by the date of the postmark on the envelope in which the form is mailed. Alternatively, I may fax the form to the number indicated below, and the date of return will be determined by the date the form is faxed. I will retain a copy of the fax confirmation sheet.

By timely returning this signed and completed Opt Out Form, I understand that the Arbitration Policy/Agreement will not apply to me or Company.

Name: _____

Employee Identification Number (11 Digits): _____

Note: You can find your Employee Identification Number next to your name on the My Personal Information (MPI) website, or by calling 1-888-88SEARS.

Note: Please do not provide your Social Security Number (SSN).

Signature: _____

Date: _____

Please return this Opt Out Form to: Sears Holdings Legal Intake, 3333 Beverly Road, B6-300A, Hoffman Estates, Illinois 60179, or fax number 84-286-4511. If you fax this form, retain the fax confirmation.