

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

Washington, D.C.

ALTON SANDERS, an individual, Charging
Party,

vs.

24 HOUR FITNESS USA, INC., Charged Party.

Case 20-CA-35419

**EMPLOYER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION**

Marshall B. Babson
SEYFARTH SHAW LLP
620 Eighth Avenue
New York, NY 10018
Telephone: (212) 218-5500

Garry G. Mathiason
LITTLER MENDELSON, P.C.
650 California Street, 20th Floor
San Francisco, CA 94108
Telephone: (415) 677-3146

Counsel for 24 Hour Fitness USA, Inc.

Counsel for 24 Hour Fitness USA, Inc.

Daniel L. Nash
AKIN GUMP STRAUSS
HAUER & FELD LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, DC 20036-1564
Telephone: (202) 887-4067

Counsel for 24 Hour Fitness USA, Inc.

Date: January 3, 2013

Pursuant to the National Labor Relations Board’s Rules and Regulations, including Section 102.46 thereof, 24 Hour Fitness USA, Inc. (hereinafter “the Employer” or “the Respondent”) respectfully files the following Exceptions to the Administrative Law Judge’s Decision issued by Administrative Law Judge William Schmidt (hereinafter “the ALJ”) on November 6, 2012.

No.	Page(s)	Exception
1.	5:8-10	The Employer excepts to the ALJ’s finding that its Arbitration Policy is currently or has been since January 1, 2007 “imposed as a condition of employment.”
2.	5:11-13	The Employer excepts to the ALJ’s finding that “[t]he heart of Respondent’s arbitration policy has always provided that ‘any employment-related dispute between a Team Member and 24 Hour Fitness’ must be submitted to final and binding arbitration.”
3.	5:18-29	The Employer excepts to the ALJ’s finding that in 2005, the Company added language to the Policy that has “banned” class and other forms of concerted actions and the “ban” has been a condition of employment since 2007.
4.	5:19-21	The Employer excepts to the ALJ’s finding that the revised language set forth in the 2005 version of the Employer’s Arbitration Policy “sought to effectively preclude employees from combining their identical or closely related employment disputes against Respondent.”
5.	5:31-36	The Employer excepts to the ALJ’s finding that the provision in the Arbitration Policy stating that “[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties” bars concerted employee activity.
6.	5:39-42	The Employer excepts to the ALJ’s finding that the handbook policies are “effectively . . . a condition of employment applicable to all current employees immediately and to future employees on their first day of work.”
7.	8:33-36, 10:37-39	The Employer excepts to the ALJ’s finding that the Arbitration Policy contained a “class action ban.”

No.	Page(s)	Exception
8.	8:35-36, 9:7-20, n. 5	The Employer excepts to the ALJ's finding that the Employer took action to enforce the "class action ban" in the matter of <i>Beauperthuy v. 24 Hour Fitness USA, Inc.</i> , No. 06-715 S.C. (N.D. Cal.).
9.	14:17-24	The Employer excepts to the ALJ's conclusion that the right to engage in a class or collective action is protected, concerted activity under Section 7 of the NLRA.
10.	14:26-15:12	The Employer excepts to the ALJ's conclusion that the Federal Arbitration Act does not permit an employer to enter into an arbitration agreement with an employee in which the employee agrees not to bring or participate in a class or collective action.
11.	14:27-30	The Employer excepts to the ALJ's conclusion that <i>AT&T Mobility LLC v. Concepcion</i> , 131 S.Ct. 1740 (2011), and <i>CompuCredit v. Greenwood</i> , 132 S.Ct. 665 (2012), "have little, if anything, do with arbitration in the context of the employer-employee relationship."
12.	16:1-3	The Employer excepts to the ALJ's conclusion that "Respondent's arbitration policy serves to restore the imbalance between the individual worker and the corporate employer by prohibiting employees from pursuing the resolution of work place disputes with concerted legal actions and by imposing broad nondisclosure requirements."
13.	16:10-14	The Employer excepts to the ALJ's finding that "both the class action ban and the nondisclosure restriction contained in Respondent's arbitration policy unlawfully limit Respondent's employees from exercising their Section 7 right to commence and prosecute employment-related legal actions in concert with other employees."
14.	16:15-17	The Employer excepts to the ALJ's conclusion that "Respondent's arbitration policy unlawfully requires its employees to surrender core Section 7 rights by imposing significant restraints on concerted activity regardless of whether employee opts to be covered by it or not."
15.	16:17-18	The Employer excepts to the ALJ's finding that the "opt-out process designed by the Respondent is an illusion."
16.	16:18-21	The Employer excepts to the ALJ's conclusion that "[t]he requirement employees must affirmatively act to preserve rights already protected by Section 7 rights [<i>sic</i>] through the opt-out process is . . . an unlawful burden on the right of employees to engage in collective litigation that may arise in the future."

EMPLOYER'S EXCEPTIONS TO THE ALJ'S DECISION

No.	Page(s)	Exception
17.	16:41-47, n. 9	The Employer excepts to the ALJ's statement that he "would be startled to learn that the number of employees who made a conscious, fully-informed decision to be bound by Respondent's highly self-serving arbitration policy even came close to the infinitesimal number of employees who actually opted out."
18.	16:25-32, 17:1-2	The Employer excepts to the ALJ's conclusion that the "arbitration policy limits the assistance the opted-out employee may obtain from fellow workers even in pursuit of their own individual claims."
19.	17:6-8	The Employer excepts to the ALJ's conclusion that "the nondisclosure requirement in Respondent's arbitration policy imposes extreme limitations on activities protected under Section 7."
20.	17:43-18:16	The Employer excepts to the ALJ's conclusion that the "nondisclosure" provision has a "chilling effect" on Section 7 rights.
21.	18:18-23, 19:4-6	The Employer excepts to the ALJ's conclusion that by maintaining and enforcing the Arbitration Policy, the Company has violated, and is continuing to violate, Section 8(a)(1) of the Act.
22.	18:39-46, n. 10	The Employer excepts to the ALJ's conclusion that the Arbitration Policy's incorporation by reference of Rule 20 of the Federal Rules of Civil Procedure does not preserve an avenue for employees to join in a concerted judicial action.
23.	19:17-20:2, 20:29-21:5	The Employer excepts to the ALJ's order that the Employer "notify 'all judicial forums wherein the (arbitration policy) has been enforced that it no longer opposes the seeking of collective or class action type relief.'"
24.	19:17-20:2, 20:29-21:5	The Employer excepts ALJ's order that the Employer withdraw any pending motion for individual arbitration and request any appropriate court to vacate its order for individual arbitration granted at the Employer's request if a motion to vacate can still be timely filed.
25.	19:17-20:2, 20:29-21:5	The Employer excepts to the ALJ's denial of Respondent's motion to dismiss Paragraph 5 of the Complaint.
26.	20:10-21:24	The Employer excepts to the ALJ's remedy to the extent that it exceeds the statute of limitations period set forth in Section 10(b) of the National Labor Relations Act.

EMPLOYER'S EXCEPTIONS TO THE ALJ'S DECISION

No.	Page(s)	Exception
27.		The Employer excepts to the ALJ's failure to find and conclude that since 2007, Respondent's Arbitration Policy has not covered newly hired Team Members within their first thirty days of employment.
28.		The Employer excepts to the ALJ's failure to find and conclude that the Arbitration Policy is a voluntary, bilateral agreement.
29.		The Employer excepts to the ALJ's failure to find and conclude that the Arbitration Policy is lawful under the Federal Arbitration Act.
30.		The Employer excepts to the ALJ's failure to find and conclude that the Arbitration Policy is lawful under the Rules Enabling Act.
31.		The Employer excepts to the ALJ's failure to find and conclude that the National Labor Relations Board lacked a quorum when it issued its decision in <i>D.R. Horton</i> , 357 NLRB No. 184 (2012).
32.		The Employer excepts to the ALJ's issuance of a remedy that does not provide Respondent's Team Members hired prior to January 1, 2007 with a thirty-day window to opt out of the Arbitration Policy.
33.		The Employer excepts to all rationales, findings, conclusions and recommendations of the ALJ that are inconsistent with the Exceptions set forth above.

Respectfully submitted,

SEYFARTH SHAW LLP

LITTLER MENDELSON P.C.

By /s/ Marshall B. Babson

By /s/ Garry G. Mathiason

MARSHALL B. BABSON

GARRY G. MATHIASON

AKIN GUMP STRAUSS
HAUER & FELD LLP

By /s/ Daniel L. Nash

DANIEL L. NASH

Attorneys for 24 Hour Fitness USA, Inc.

STATEMENT OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On January 3, 2013, I served the within document(s):

EMPLOYER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is oazevedo@littler.com.

SERVICE LIST:

National Labor Relations Board
Division of Judges
Email: via e-filing
<https://www.nlr.gov/>

Carmen Leon, Esq.
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735
Tel: (415) 356-5130
Email: carmen.leon@nlrb.gov
Jill.Coffman@nlrb.gov
Frances.Tsang@nlrb.gov

Judith A. Scott
SERVICE EMPLOYEES INT'L UNION
1800 Massachusetts Avenue, NW
Washington, DC 20036
Tel: (202) 730-7455
Email: judy.scott@seiu.org

Michael Rubin
Caroline P. Cinotta
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
Email: mrubin@altshulerberzon.com
ccincotta@altshulerberzon.com

Cliff Palefsky
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Ave
San Francisco, CA 94133-4628
Tel: (415)421-9292
Email: CP@mhpsf.com

Willis J. Goldsmith
Kristina A. Yost
JONES DAY
222 East 41st Street
New York, New York 10017
Tel: (212) 326-3939
Email: wgoldsmith@jonesday.com
kyost@jonesday.com

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION
CENTER
1615 H Street, NW
Washington DC 20062
Tel: (202) 463-5337
Email: rconrad@uschamber.com
skawka@uschamber.com

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 3, 2013, at San Francisco, California.


Olivia Pearl Azevedo

Firmwide:116147767.1 034670.1251