

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

**COSTA MESA CARS, INC.; d/b/a
AUTONATION HONDA COSTA MESA; f/k/a
POWER HONDA COSTA MESA and
AUTONATION, INC., Respondents**

Case 21-CA-123072

And

MICHAEL APPLEBAUM, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S CROSS EXCEPTION

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On March 14, 2016, Administrative Law Judge Eleanor Laws issued her Decision in this matter. Pursuant to the Board's Rules and Regulations, Series 8 as amended, Section 102.46, Counsel for the General Counsel of the National Labor Relations Board hereby files the following cross exception:

Exception No. 1

1. Counsel for the General Counsel excepts to ALJ Laws' conclusions on pages 3 (lines 20-42) and page 4 (lines 1-25) of her decision that Respondent AutoNation, Inc., is not an Employer within the meaning of Section 2(2) of the Act.

Respectfully submitted,

/s/ Lindsay R. Parker

Lindsay R. Parker
Counsel for the General Counsel
National Labor Relations Board

DATED this 25th day of April, 2016.

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**BRIEF IN SUPPORT OF COUNSEL FOR THE GENERAL COUNSEL'S CROSS
EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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On March 14, 2016, Administrative Law Judge Eleanor Laws issued her Decision in this matter. Pursuant to the Board's Rules and Regulations, Series 8 as amended, Section 102.46, Counsel for the General Counsel of the National Labor Relations Board hereby files the following cross exception and its argument in support of its cross exception:

Exception No. 1

1. Counsel for the General Counsel excepts to ALJ Laws' conclusions on pages 3 (lines 20-42) and page 4 (lines 1-25) of her decision that Respondent AutoNation, Inc., Respondent AN, is not an employer within the meaning of Section 2(2) of the Act.

Argument¹

On page 3 (lines 20-42) and page 4 (lines 1-25) of her decision, ALJ Laws finds, despite the fact that Respondent AutoNation, Inc., Respondent AN, stipulated to its being an employer within the meaning of Section 2(2) of the Act, that the General Counsel did not meet its burden to establish that Respondent AN is an employer within the meaning of the Act. Regardless of this finding, ALJ Laws did still go on to find that the Board's jurisdiction could attach to Respondent AN because it directly participated in the maintenance and enforcement of the unlawful agreements at issue in this matter and because established agents of Respondent AN carried out the unfair labor practices at issue in this matter. ALJD p. 5: Fn 7; p. 10:20-27; Fn 10.

Counsel for the General Counsel excepts to ALJ Laws' finding that Respondent AN is not an employer within the meaning of the Act. Respondent AN admits in the parties' stipulation which was mutually drafted and signed by Respondents' Counsel and the General Counsel, that it is an employer within the meaning of Section 2(2) of the Act.

Although ALJ Laws declined to bind Respondent AN to its own admission in the parties'

¹ General Counsel's complete statement of the relevant facts in this matter are included in the General Counsel's answering brief to Respondents' exceptions, which is being filed concurrently with this filing.

stipulation, an admission by a party's counsel is binding and ALJ Laws erred in failing to bind Respondent AN to this admission.

It is long settled that a party is bound by admissions of its counsel. *Oscanyan v. Arms Co.*, 103 U.S. 261, 263-264 (1880). A judicial admission is a representation that is “ ‘conclusive in the case’ ” unless the court allows it to be withdrawn. *Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264 (4th Cir.2004) (quoting *Keller v. United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir.1995) (further defining judicial admissions as “formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them”)). Judicial admissions include “intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law.” *Id.* at 264–65. “[A] lawyer's statements may constitute a binding admission of a party[]” if the statements are “ ‘deliberate, clear, and unambiguous[.]’ ” *Fraternal Order of Police Lodge No. 89 v. Prince George's Cnty., Md.*, 608 F.3d 183, 190 (4th Cir.2010) (quoting *Meyer*, 372 F.3d at 265 n. 2). Respondent AN by its counsel admitted in the parties' stipulation that it is an employer within the meaning of the Act and made no attempts prior to hearing or during the hearing to disavow itself of that admission.

Section 2(2) of the Act defines an Employer as follows.²

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

² Even assuming arguendo that Respondent does not have any “employees,” nothing in the above cited definition requires that an employer has to *directly* employ employees.

Although Respondent AN asserts that it has no employees, the presumption when an employer admits that it is an employer under the meaning of the Act, is that that it employs employees. The evidence presented in this matter establishes that Respondent AN represents itself to the public as an employer of the employees of its subsidiary entities. As the parent of its subsidiary companies, Respondent AN initiated and exerted control over the distribution and maintenance of the arbitration agreements at issue in this case, and its subsidiaries acted at the behest of its parent corporation in distributing, maintaining and effecting those agreements.

In sum, the full record in this case shows that Respondent AN has represented itself as an employer of its subsidiary employees and Respondent AN's heavy involvement in the distribution, maintenance and enforcement of the agreements at issue lend further support to its employer status over these employees. Finally, Respondent AN, by its counsel, admitted in the parties' joint stipulation that it is an employer in this case. Accordingly ALJ Laws erred when she declined to find that Respondent is an employer within the meaning of the Act.

Respectfully submitted,

/s/ Lindsay R. Parker

Lindsay R. Parker
Counsel for the General Counsel
National Labor Relations Board

DATED this 25th day of April, 2016.

STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Cross Exception and Brief in Support of Counsel for the General Counsel's Cross Exception to the Administrative Law Judge's Decision was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on April 25, 2016, and that each part was served with a copy of the same document by e-mail.

I hereby certify that a copy of Counsel for the General Counsel's Cross Exception and Brief in Support of Counsel for the General Counsel's Cross Exception to the Administrative Law Judge's Decision was served by e-mail, on April 25, 2016, on the following parties:

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Respectfully submitted,



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