

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

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

And

Case 21-CA-123072

MICHAEL APPLEBAUM, an Individual

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO
THE RECOMMENDED DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. Introduction

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this answering brief to Respondent Costa Mesa Cars, Inc.; d/b/a AutoNation Honda Costa Mesa; f/k/a Power Honda Costa Mesa (Respondent CM) and Respondent AutoNation, Inc. (Respondent AN), collectively referred to as Respondents, exceptions to the decision (ALJD) of Administrative Law Judge Eleanor Laws (ALJ Laws), which issued on March 14, 2016. ALJ Laws correctly found that both Respondents violated Section 8(a)(1) of the National Labor Relations Act (the Act) by unlawfully maintaining and unlawfully enforcing arbitration agreements which contain provisions that restrict employees' right to pursue employment claims on a class or collective basis.

The instant case is controlled by current Board law, in particular by the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enforcement granted in part, reversed in part, *D. R. Horton, Inc., v. NLRB*, 737 F.3d 433 (5th Cir. 2013) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enforcement granted in part, reversed in part, *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, 2015 WL 6457613, at*1 (5th Cir. October 26, 2015). Despite Respondents' contentions, these cases remain valid precedent, until such time as the United States Supreme Court overturns the Board's decision, or the Board overrules its decision in a subsequent case. In addition, despite Respondents' assertions, ALJ Laws correctly found that Respondent AN was liable for the underlying unfair labor practices in this case, due to its participation in the unlawful acts.

II. Facts

1. Nature of Respondents' Business and the Relationship between Respondents

At all times material to this matter, Respondent CM, whose facility is located at 2888 Harbor Blvd., in Costa Mesa, California, has been engaged in the operation of an automobile dealership that sells and services vehicles (ALJD 3: 5; Stip. par. 3(a))¹. Respondent CM is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (ALJD 3: 9; Stip par. 5(a)). At all times material to this matter, Respondent AN, a Delaware corporation whose office is located in Fort Lauderdale, Florida, has at all material times, through its indirect subsidiaries, including Respondent CM, been engaged in the business of owning automobile dealerships located throughout the United States (ALJD 3: 14; Stip. par. 4(a)). Respondent AN has admitted that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (Stip. par. 5(b)).

Respondent AN identifies itself as the parent corporation of its various subsidiaries, including Respondent CM. (ALJD 2: 18; Stip. Exh. 14 (Reply in Support of Motion To Compel Arbitration p. 21; and Form 10(k) Report attached to Luba Shur Declaration)). Respondent AN owns Auto Holding, LLC. In turn Auto Holding, LLC has a 100% ownership interest in AutoNation Enterprises Incorporated which has a 100% ownership interest of Costa Mesa Cars Holding, LLC. Costa Mesa Cars Holding, LLC has a 100% ownership interest in Respondent CM. (ALJD 2: 19; Tr. 26-27; GCx 7). Auto Holding, LLC also has a 100% ownership interest in AutoNation Enterprises Incorporated. AutoNation Enterprises Incorporated has a 100%

¹ References to the ALJD include citations to the page and line number. References to the record are as follows: all citations to the transcript will be referred to as "Tr." followed by the appropriate page number. General Counsel's exhibits will be referred to as "GCx," and Joint Exhibits will be referred to by "Jt.x" followed by the appropriate exhibit number. References to the stipulated record are set forth as follows: "Stip." refers to the Partial Stipulation of Facts and will be followed by the relevant paragraph number(s). Exhibits to the Partial Stipulation of Facts, which make up the remainder of the Stipulated Record, are identified as "Stip. Exh.," followed by the Exhibit number, and where appropriate, the title of the document which is referenced.

ownership interest in AN Dealership Holding Corp. and AN Dealership Holding Corp. has a 100% ownership interest in an entity by the name of AN Western Region Management, LLC.

(Id). AN Western Region Management, LLC. (AN Western) provides human resources guidance to indirectly-owned dealerships of Respondent AN, including Respondent CM. (Tr. 24).

Respondent AN's Form 10-K filed with the U.S. Securities and Exchange Commission for the fiscal year ending December 31, 2013, describes Respondent AN's business as follows:

AutoNation, Inc., through its subsidiaries,² is one of the largest automotive retailers in the United States. As of December 31, 2013, we owned and operated 269 new vehicle franchises from 228 stores located in the United States, predominantly in major metropolitan markets in the Sunbelt region. Our stores, which we believe are some of the most recognizable and well-known in our key markets, sell 33 different new vehicle brands...We offer a diversified range of automotive products and services, including new vehicles, used vehicles, "parts and service," which includes automotive repair and maintenance services as well as wholesale parts and collision businesses, and automotive "finance and insurance" products, which include vehicle service and other protection products, as well as the arranging of financing for vehicle purchases through third party finance sources...For convenience, the terms "AutoNation," "Company," and "we" are used to refer collectively to AutoNation, Inc. and its subsidiaries, unless otherwise required by the context. Our store operations are conducted by our subsidiaries.

(Stip. Exh. 14 (Form 10(k) Report attached to Luba Shur Declaration)).

At the hearing, Dan Best, Vice President Human Resources, AutoNation Corporate Management, LLC, (herein D. Best)³ testified through leading questioning, that there aren't any individuals employed by Respondent AN (Tr. 29-30). D. Best made this assertion without testifying to any basis he had for knowledge of Respondent AN's operations, or the operations of any of its subsidiaries.

² Respondent AN publicly lists Respondent CM as one of its subsidiaries in its 10(k) report for the fiscal year ending December 31, 2013. (Stip. Exh. 14 (Form 10(k) Report attached to Luba Shur Declaration)).

³ D. Best did not testify what AutoNation Corporate Management, LLC is, or what its relationship is to Respondent AN.

2. Respondents' May 2013 Roll-Out of the Agreement

On April 19, 2013, Peter Vano, Senior Director Human Resources for AN Western Region Management, LLC., sent an e-mail with various attachments, including an arbitration agreement, herein "Agreement," to all the general managers of Respondent's subsidiary dealerships in California. (ALJD 5:9; Tr. 24). The text contained in the body of this e-mail stated in relevant part as follows.

The Company is rolling out an update to the California Arbitration Agreement to all AutoNation Associates in California. Please review the attachment which includes the updated agreement, along with a memorandum which provides background information and roll-out instructions for all California Associates.

Your help is needed to roll out this updated agreement to all Associates in your store (excluding any Associates covered by a collective bargaining agreement) through the email distribution process outlined below. We ask that you sign the updated agreement as well.

Rollout To All CA Store Associates

Promptly e-mail your store's Department Heads using the attached Department Head email template.

- Notify them of distribution process and request that they sign the updated agreement
- Instruct them to promptly email their Department Associates using the attached Associate email template
- Please be sure the AutoNation Arbitration Program attachment is included.

Ensure that management and/or Region HR follow up in-person/one-on-one with Associates who have not returned the agreement after one week-providing a courtesy copy of the Department head's email, the memorandum and the agreement, since some Associates may not have reliable or regular access to email.

Direct any questions from Associates to Region HR (as noted in the attached memorandum).

Secure all signed agreements returned to you. Please be sure each agreement includes the Associate's PRINTED name and date of signing as well.

Deliver all signed agreements to Region HR.

Due Date:

- Monday, April 29, 2013, to obtain signed agreements.
- Monday, May 6, 2013, to deliver all signed agreements to Region HR.

(ALJD 5:13-6:10; GCx 6)

One of the attachments to Peter Vano's email to the General Managers of the California subsidiary dealerships was instructions for the General Managers to include on the emails regarding the arbitration agreements to the Department Heads. (ALJD 6: 11; Tr. 24; GCx 6).

This attachment stated in relevant part as follows.

Department Heads:

The Company is rolling out an update to the California Arbitration Agreement to all AutoNation Associates in California. Review the attachment which includes the updated agreement, along with a memorandum which provides background information and roll-out instructions for all California Associates.

Roll-Out to All Department Associates

Promptly email (preferably via group email) your Department Associates regarding this roll-out using the attached email template.⁴ Be sure the AutoNation Arbitration Program attachment is included.

Follow up in-person/one-on-one with Associates who have not returned the agreement after one week. Provide a courtesy copy of your email, the memorandum and agreement (two versions), since some Associates may not have reliable or regular access to email. Other store management and/or Region HR may assist with this follow-up as appropriate.

Direct any questions from Associates to Region HR (as noted in the attached memorandum). Secure all signed agreements provided to you. Please be sure each agreement includes the Associates PRINTED name and date of signing as well.

Deliver all signed agreements to my attention.

Due Date: Monday April 29, 2013, to complete the roll-out and deliver signed agreements.

(ALJD 6:16; GCx 6)

⁴ The attached template language to be used by the Department Heads stated in relevant part as follows. Team: As part of AutoNation's Employee Arbitration Program, the Company is rolling out an update to the California Arbitration Agreement to AutoNation Associates in California. Please carefully review the attachment which includes the updated arbitration agreement, along with a memorandum which provides background information and roll-out instructions. (GCx 6).

The memorandum transmitted to the employees at the California subsidiary locations along with the arbitration agreement itself states as follows:

For over a decade, AutoNation has maintained a successful Employee Arbitration Program at all AutoNation dealerships and other entities. The Company developed this program to promote a simpler, friendlier, less-costly system of alternative dispute resolution to resolve disputes between the Company and our Associates that may arise out of the employment relationship. As part of this program, revisions are made to our arbitration agreements from time to time.

Enclosed is the most recent update to the California Arbitration Agreement (in both English and Spanish versions) which is being distributed to all AutoNation Associates in California.

- Please review the Agreement and direct any questions to your Region Human Resources Representative for your location. Your General Manager or Department Head can provide contact information if needed. It is your decision whether to sign the Agreement.
- Signed Arbitration Agreements (English or Spanish version) should be returned to your dealership's Department Head (or Stand-Alone Collision Manager as applicable). Please be sure to also print your name and date the Agreement as indicated.

Signed Arbitration Agreements should be returned by no later than April 29, 2013. Your dealership will follow up directly in approximately one week to ensure that you received this communication.

(ALJD 8:28; Tr. 24; GCx 6).

The Agreement itself that was distributed to employees of Respondent AN's California subsidiary locations, including Respondent CM, as part of the aforementioned roll-out, provides in relevant part as follows (emphasis added):

ARBITRATION AGREEMENT

PLEASE TAKE TIME TO READ AND CONSIDER THIS AGREEMENT

Arbitration of Disputes. ***Both employee signing below (the "Employee") and the Company (as defined below) agree that any claim, dispute, and/or controversy between them which would otherwise require or allow resort to any court or other governmental dispute resolution forum arising from, or related to, or having any relationship or connection whatsoever with Employee's seeking employment with, employment by, termination of employment from, or other association with the Company, shall be resolved***

through mandatory, neutral binding arbitration on an individual basis only. For purposes of this agreement, the ***"Company" is defined as the entity Employee is employed by, together with its parents, subsidiaries, affiliates, predecessors, successors and assigns, and each of their respective owners, directors, officers, managers, employees, vendors, and agents. This Agreement covers all theories and disputes, whether styled as an individual claim, class action claim, private attorney general claim or otherwise, and includes, but is not limited to, any claims of discrimination, harassment, breach of contract, tort, or alleged violations of statute, regulation or ordinance, or any claims in equity.*** Any arbitration hereunder shall be governed by the Federal Arbitration Act (9 U.S.C. §1 et seq., hereinafter the "FAA") and not by any state law concerning arbitration, and, except as modified by this Agreement, in conformity with the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the substantive law governing the claims pled. ***This Agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, and no matter whatsoever will proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class, representative or similar action without the express written consent and agreement of both employee and the Company.*** The class action waiver referenced in this paragraph does not waive Employee's rights under Section 7 of the National Labor Relations Act. Employee will not be retaliated against for concertedly challenging the validity of the class action waiver through class or collective actions seeking to enforce Employee's employment rights.

Claims Excluded from Binding Arbitration, The sole exceptions to the mandatory arbitration provision are claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under Workers' Compensation, claims filed with the state for Unemployment Compensation, and any claims or disputes arising out of any other written contracts between Employee and the Company where the Contract specifically provides for resolution through the courts. Nothing herein shall prevent Employee from filing and pursuing administrative proceedings only before the U.S. Equal Employment Opportunity Commission or an equivalent state agency (although if Employee chooses to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to arbitration).

Waiver of Right to Participate in Class Actions. Employee understands and acknowledges that the terms of this Agreement include a waiver of any substantive or procedural rights that Employee may have to bring or participate in an action on a class, collective, private attorney general, representative or other similar basis. This class action waiver does not take away or restrict the right of Employee to pursue Employee's own claims, but only requires that any such claims be pursued in Employee's own individual capacity, rather than on a class, collective, private attorney general, representative or similar basis.

Severability. If any portion of this Agreement is deemed invalid or unenforceable, It shall not invalidate the other provisions of this Agreement; provided however, that if the provision prohibiting class wide arbitration is deemed invalid or unenforceable, then this entire Arbitration Agreement shall be null and void.

Exclusive Agreement. Any agreement contrary to or modifying, the foregoing arbitration provisions must be entered into, in writing, by the President of the company oral representations made before or after Employee is hired do not alter this Agreement.

Entire Agreement. This Agreement supersedes any and all prior agreements regarding arbitration, including, but not limited to, any arbitration provisions in employment applications.

MY SIGNATURE ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND BY ALL OF THE ABOVE TERMS. I FURTHER UNDERSTAND THAT THIS AGREEMENT REQUIRES ME TO ARBITRATE ANY AND ALL DISPUTES THAT ARISE OUT OF MY EMPLOYMENT; EXCEPT AS EXPRESSLY PROVIDED OTHERWISE HEREIN.

(ALJD 6:46-8:20; Stip. Exh. 6)

D. Best of AutoNation Corporate Management, LLC. testified as to his awareness of the distribution of the Agreement referenced above, and the fact that it was distributed to employees of Respondent CM. (Tr. 38).

3. CP Applebaum is told to Sign the Agreement

CP Applebaum was employed by Respondent CM at the time the aforementioned Agreement was distributed to Respondent CM's employees. In May 2013, CP Applebaum received the Agreement from a co-worker and was informed by that co-worker that all employees had to sign the Agreement. CP Applebaum did not immediately sign the Agreement as he didn't understand the Agreement and wanted his family attorney to review it. (ALJD 9: 21; Stip. Exh 13 (Declaration of Michael Applebaum); Stip. par. 22). Later that same day, Respondent CM's General Manager Aaron Duport (GM Duport) called CP Applebaum on his personal cell phone, upset that CP Applebaum had not signed the Agreement. CP Applebaum

informed GM Duport that he was going to have his family attorney review the Agreement because he did not understand what rights he would be giving up by signing the Agreement. (Id)

That evening CP Applebaum sent the Agreement to his family attorney for review and advice. In the interim, while CP Applebaum was waiting to hear back from his family attorney, GM Duport contacted CP Applebaum again and informed him that “corporate” was putting pressure on him to turn in the agreements and that CP Applebaum was “holding it up.” GM Duport told CP Applebaum that CP Applebaum needed to sign the Agreement immediately if he wanted to “remain gainfully employed.” (ALJD 9:25; Stip. Exh 13 (Declaration of Michael Applebaum); Stip. par. 22). As a result, CP Applebaum signed the Agreement on May 6, 2013. (Id; Stip par. 10).

Once Respondent CM collected the signed version of CP Applebaum’s Agreement and the Agreements signed by its other employees, those signed Agreements were provided electronically to the National Payroll Center for retention. (Jtx 2).

4. Respondents’ Enforcement of CP Applebaum’s Agreement

In about June 2013, Applebaum's employment was terminated by Respondent Costa Mesa. (ALJD 9: 34; Stip par. 11). On October 31, 2013, Applebaum filed a class action complaint in the Orange County Superior Court of the State of California against Respondents, alleging wage-and-hour and other violations under the California Labor Code, the California Industrial Welfare Commission Wage Order, and the California Business and Professional Code. (ALJD 9: 34; Stip. par. 12; Stip Exh. 10). On December 11, 2013, Respondents removed CP Applebaum's complaint to the United States District Court for the Central District of California (Case 8: 13-cv-0 1927-NS-RNB). (ALJD 9: 37; Stip par. 13; Stip. Exh. 11).

On January 29, 2014, Respondents jointly filed a Notice of Motion and Motion to Compel Arbitration of Charging Party's wage-and-hour and other claims. (ALJD 9: 40; Stip. par.

14; Stip Exh. 12). Various other motions were filed resulting in the Honorable James V. Selna's April 8, 2014, Order Granting Respondents' Motion to Compel. (ALJD 9:41; Stip par. 19; Stip. Exh. 17). On January 26, 2015, Applebaum voluntarily sought dismissal of his February 2014 charge, the basis for this complaint, filed with the National Labor Relations Board. The Regional Director of Region 21 did not approve Applebaum's withdrawal request. (Stip. par. 20). On January 28, 2015, Applebaum voluntarily dismissed Case 8: 13-cv-0 1927-JVS-RNB. (ALJD 9:43-10:1; Stip. par. 21; Stip. Exh. 18).

Respondent CM and Respondent AN stipulated that since at least about January 29, 2014, they have sought court enforcement of the provisions of the Agreement signed by CP Applebaum by filing the aforementioned Motion to Compel Arbitration on an individual rather than a class-wide basis of the CP Applebaum's wage-and-hour and other claims described above. (Stip par. 24).

5. Respondents' Maintenance of the May 2013 Agreement and Similar Additional Arbitration Agreements

Since about August 25, 2013,⁵ Respondent Costa Mesa has maintained for its employees the Agreement which contains provisions that require employees to resolve certain employment-related disputes exclusively through individual arbitration proceedings and to relinquish any rights they have to resolve disputes through collective or class action. (Stip. par. 7(a)).

In addition to the Agreement cited above, at least one current employee from each indirectly owned subsidiary dealership of Respondent AN has signed the Agreement cited above, or a similar version that also contains provisions that require employees to resolve certain employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve disputes through collective or class action. (ALJD 9:

⁵ August 25, 2013, reflects a date falling within the Section 10(b) period.

10; Stip. par. 9; GCx).⁶ Respondents stipulated that these additional agreements currently remain in effect and have been signed by at least one employee employed at each of Respondent AN's subsidiary dealerships located Nationwide. (Stip. par. 9; Tr. 17, 20, 22).

For instance in July 2013 Respondent CM and Respondent AN's other indirectly owned subsidiary dealerships utilized a virtually identical version of the Agreement for its new-hires as part of its new-hire orientation. (Tr. p. 17; GCx 3).⁷

In addition, Respondents stipulated at hearing that GC-4 is another version of an arbitration agreement that has been used by subsidiary dealerships of Respondent AN for individuals applying to work at Respondent AN's subsidiary dealerships. (Tr. 19-20).

The agreement identified as GCx 4 states in relevant part as follows:

This Arbitration Agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other applicants or other allegedly aggrieved parties, and no matter whatsoever will proceed as a class action, collective action, private attorney general action or any similar representative action (collectively, "Class-Collective Action" or Class-Collective Actions). No arbitrator shall have the authority under this Arbitration Agreement to order any such Class-Collective Action without the express written consent of both me and the company.

Class-Collective Action Waiver. I understand and acknowledge that the terms of this Arbitration Agreement include a waiver of any substantive or procedural rights that I may have to bring or participate in an action on a class, collective, private attorney general, representative or other similar basis. This Class-Collective Action Waiver does not take away or restrict my right to pursue my own claims, but only requires that any such claims be pursued in my own individual capacity, rather than on a class, collective, private attorney general, representative or similar basis.

(GCx 4)

Respondents additionally stipulated that GCx 5 is yet another version of an arbitration agreement that has been utilized by Respondents' subsidiary dealerships for new hires on or after

⁶ At hearing the General Counsel moved to amend paragraphs 7 and 8 of the complaint to include other similar versions of arbitration agreements that have been distributed to Respondents' employees during the relevant time period. (Tr. 6-8).

⁷ The July 2013 agreement contains the same italicized prohibitive language on class and collective actions as set forth above in the Agreement. (GCx 3).

August 2015. Respondents stipulated that GCx 5 is an updated subsequent version of GCx 3 described above and that this is the current arbitration agreement that will be used when an applicant is hired to work at one of Respondents' subsidiary dealerships. (Tr. 21-23). The agreement identified as GCx 5, which is substantially similar to GCx 4, states in relevant part as follows:

This Agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other allegedly aggrieved parties, and no matter whatsoever will proceed as a class action, collective action, private attorney general action or any similar representative action (collectively, "Class-Collective Action" or Class-Collective Actions). No arbitrator shall have the authority under this Arbitration Agreement to order any such Class-Collective Action without the express written consent of both employee and the Company.

Class-Collective Action Waiver. Employee understands and acknowledges that the terms of this Arbitration Agreement include a waiver of any substantive or procedural rights that Employee may have to bring or participate in an action on a class, collective, private attorney general, representative or other similar basis. This Class-Collective Action Waiver does not take away or restrict the right of Employee to pursue Employee's own claims, but only requires that any such claims be pursued in Employee's own individual capacity, rather than on a class, collective, private attorney general, representative or similar basis.

(GCx 5)

6. Respondent AN's General Counsel is Signatory to the Agreement and the other Similar Arbitration Agreements

At all times relevant to this matter, Coleman G. Edmunds (C. Edmunds) has been the Senior Vice President, Deputy General Counsel and Assistant Secretary of Respondent AN. C. Edmunds has done work on behalf of Respondent AN since 1996 and has been an officer of Respondent AN since 1998. At all times relevant to this matter, C Edmunds has been an Agent of Respondent AN within the meaning of the Act. (ALJD 4: 21; Stip. Exh. 7).

As part of his responsibilities working on behalf of Respondent AN, C Edmunds, has overseen a number of areas within Respondent AN's Legal Department. An image of C. Edmunds signature appears on the Agreement signed by CP Applebaum. (Id). Since August 25,

2013, certain indirectly owned dealerships of Respondent have utilized identical versions of the Arbitration Agreement signed by CP Applebaum. An image of C. Edmunds signature appears on those Agreements as well. Id. (GCx 3; GCx 5).

7. *The Physical Retention of the Agreement and the other Similar Arbitration Agreements*

For the time period of April 2012 through March 10, 2014, Shane Harrison (S. Harrison) worked on behalf of Respondent AN and held the title of Director of the National Payroll Center. As part of his responsibilities working on behalf of Respondent AN, at all times relevant to this matter, S. Harrison's duties included directing and leading the National Payroll Center in the maintenance of the personnel files for Respondent AN's indirectly owned dealerships including, but not limited to Respondent CM. (Stip. Exh. 8). S. Harrison was also responsible for directing and leading the National Payroll Center staff in processing payroll for all indirect subsidiary dealerships of Respondent AN in California (Stip. Exh. 11 (Declaration of Shane Harrison in support of Notice of Removal)).

In connection with these duties, S. Harrison was responsible for leading the maintenance, on behalf of Respondent CM, of the Agreement signed by CP Applebaum in May 2013. As part of his responsibilities as the Director of the National Payroll Center, S. Harrison was also responsible for leading the maintenance, on behalf of other indirectly owned dealerships of Respondent AN, of other identical arbitration agreements to the version referenced above, which were signed by other employees employed at Respondent AN's indirectly owned dealerships. (Id). The agreements referenced above have been maintained either in hard copy in the state of Texas or electronically by the National Payroll Center. (Id).

III. Argument

A. ALJ Laws Did Not Err in Finding that the NLRA Prohibits Class or Collective Action Waivers in Arbitration Agreements

1. D.R. Horton and Murphy Oil remain valid Board precedent and ALJ Laws did not err in concluding that Respondents violated the Act based on these cases

In Respondents' exceptions 1, 2, 7, 9, and 12, Respondents argue that *D. R. Horton* and *Murphy Oil* were wrongly decided and should be overruled. Such arguments should be rejected, however, as these cases are, and will remain, valid Board law until such time as the United States Supreme Court, or the Board itself, expressly overrules them. *See Pathmark Stores*, 342 NLRB 378, fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (Board's administrative law judges are bound to follow Board precedent that the Supreme Court of the United States has not reversed); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enf'd.*, 640 F.2d 1017 (9th Cir. 1981) (same). Moreover [t]he Board is not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties." *Murphy Oil*, supra, slip op at 2 fn. 17, citing *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005), and *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-1067 (7th Cir. 1988). Thus because these cases represent valid Board precedent and are the correct legal standard to apply to this matter, ALJ Laws did not err in applying this legal standard.

In *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), the Board held that a policy or Agreement, that is required as a condition of employment, which precludes employees from filing employment-related collective or class claims against their employer in any forum, arbitral or judicial, restricts employees' Section 7 rights to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. slip op. at 1-7. The Board applied the test announced in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004), and

found that an agreement requiring employees to waive their right to collectively pursue employment-related claims in all forums violates Section 8(a)(1) "because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity." slip op. at 7.

In sum, the *D. R. Horton* Board definitively held that an employer violates Section 8(a)(1) by requiring employees "as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum." *Id.*, slip op. at 1.

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the Board reaffirmed and further clarified its decision in *D. H. Horton*, supra. The Board in *Murphy Oil* reiterated that the NLRB does not create a right to class certification or the equivalent, but as the *D. R. Horton* Board explained, it does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil* supra slip op. at 2. Of significant import, in *Murphy Oil*, supra, the Board adhered to the standard articulated in *D.R. Horton*, supra, despite contrary rulings from the Fifth Circuit and other circuit court rulings, noting that "[t]he rationale of *D. R. Horton* was straightforward, clearly articulated, and well supported at every step." *Murphy Oil*, supra, slip op. at 6, and that "[w]ith due respect to the courts that have rejected *D. R. Horton*, and to our dissenting colleagues, we adhere to its essential rationale for protecting workers' core substantive rights under the National Labor Relations Act." *Id.*, slip op. at 7.

Here, the provisions of the Agreement at issue, and the other similar subsequent agreements mentioned above which remain in effect at Respondent CM's facility and Respondent's other indirectly owned subsidiary dealerships, require an employee to waive his or

her right to engage in class or collective actions of any type and to submit any claims arising out of their employment or application for employment to neutral, binding arbitration, on an individual basis only. Thus these agreements are a clear violation of the principles set forth in *D.R. Horton and Murphy Oil, supra*.

2. *There is no conflict between the FAA and D.R. Horton/Murphy Oil.*

Respondents except to ALJ Laws' application of *D.R. Horton and Murphy Oil* to this case because the current Board precedent violates the principles of the Federal Arbitration Act (FAA) and ignores rulings by the Supreme Court regarding the FAA. These arguments are unpersuasive. In its exceptions, Respondents argue in large part that the Board is bound by *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011) and other related cases.⁸ As ALJ Laws noted in her decision, the Board has already addressed such arguments, "distinguishing that Section 7 of the Act substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions." See ALJD 9:20-30 citing to *Murphy Oil, supra*, slip op. at 7-9; *Chesapeake Energy Corp.*, 362 NLRB No. 80, slip op. at 3 (2015).

The instant case does not present a conflict between the FAA and the NLRA because, as the Board explained in *D.R. Horton*, slip op. at 12, which was reaffirmed in the *Murphy Oil* case, *supra* at slip op. 1, "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." The Board's explanation is sound because Section 2 of the FAA "provides that arbitration agreements may be invalidated in whole or in part" for the same

⁸ In *Concepcion*, the Supreme Court struck down a California rule prohibiting class or collective action waivers in arbitration agreements because the rule was viewed as an obstacle to Congress' intent in passing the FAA.

reasons any contract may be invalidated, including if they are unlawful or contrary to public policy. *D.R. Horton*, slip op. at 11. Inasmuch as the Agreement is unlawful under the NLRA and against public policy, it should not be enforceable under the FAA.

In *D.R. Horton*, supra, the Board also emphasized that finding an arbitration policy, which prohibits collective or class action, unlawful does not conflict with the FAA because the “intent of the FAA was to leave substantive rights undisturbed.” Thus, the Agreement is unlawful because it prohibits employees from exercising their § 7 right to engage in concerted activity, a substantive right, which the Supreme Court in *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 567 (1978), held includes “seek[ing] to improve working conditions through resort to administrative and judicial forums.”

Clearly, as was the case in *D.R. Horton, Inc.*, supra and *Murphy Oil*, supra, here, the concern is not with the FAA or with arbitration. The Board’s rulings neither evince nor are they motivated by any hostility to arbitral resolution of disputes. Importantly, the General Counsel does not take the position here that employees cannot be required to arbitrate their work-related disputes. Respondents’ actions here, however, are cut from a different cloth entirely in that they prohibit employees from exercising their statutory rights to engage in collective legal action to protest their terms of employment. The illegality here rests not on the requirement that claims be arbitrated, but rather that such claims must be arbitrated individually. When such a requirement is insisted upon, as a condition of employment, it contravenes the essential rights granted by § 7 of the Act.

The Board in *D.R. Horton* also emphasized that finding an arbitration policy, such as that at issue here, unlawful does not conflict with the FAA because “the intent of the FAA was to leave substantive rights undisturbed.” *Id.* Although Respondent may argue that the waiver is not

of substantive rights but, rather, of procedural rights, these agreements require employees to forego substantive rights under the NLRA—namely, employees’ right to pursue employment-related claims in a collective or class action. The Board in *D.R. Horton* distinguished claims arising under the Act from others, finding that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. Slip. op. at 11-12.

Here, just like in *D.R. Horton*, supra, and *Murphy Oil*, supra, the Agreement and the other agreements at issue require Respondents’ employees to waive their right to engage in concerted activity for mutual aid and protection in that the Agreement prohibits all class or collective action in any forum. The FAA makes clear that an arbitration agreement may be set aside on “grounds that exist at law or in equity for the revocation of any contract.”⁹ Inasmuch as the agreements require employees, as a condition of employment, to waive rights guaranteed under the NLRA, Respondents have maintained agreements that may be revoked and should not be enforced under the FAA. Accordingly, the agreements are unlawful because they act to prohibit employees from exercising their substantive Section 7 right to engage in collective legal activity in any forum.

B. ALJ Laws Did Not Err in Finding that Respondent AN is the Parent of Respondent CM and that Respondent AN was a Direct Participant in the Unlawful Actions

Respondents assert that ALJ Laws erred in finding that Respondent AN is the parent of Respondent CM and that it was a direct participant in the unlawful actions. Despite these contentions, the evidence is clear that Respondent AN is in fact the parent company of Respondent CM and a multitude of other subsidiary companies and that it did in fact directly

⁹ 9 U.S.C. § 2.

participate in the unfair labor practices at issue here. The Agreement signed by Applebaum as well as the agreements identified as GCx 3, and GCx 5 contain the signature of Respondent AN's Deputy General Counsel who happens to be an officer of Respondent AN. Moreover the Agreement signed by Applebaum and the other arbitration agreements in effect are maintained in a centralized location by an entity, the National Payroll Center, which provides personnel and payroll services on behalf of Respondent AN.

In its 10(k) report, Respondent AN states that "the terms "AutoNation," "Company," and "we" are used to refer collectively to AutoNation, Inc. and its subsidiaries...and that "Our store operations are conducted by our subsidiaries." Respondent CM, like the other numerous dealerships, are subsidiaries of its parent company, Respondent AN, and thus their business operations are conducted for and on behalf of Respondent AN. Respondent CM did not independently issue the Agreement to its employees but rather the Agreement was distributed to employees at the direction of AN Western Region Management LLC., yet another corporate entity under the control of Respondent AN.

In its very own memorandum describing the updated Agreement issued to employees at all of Respondent AN's California subsidiary locations, Respondent AN states that for over a decade, it has "maintained a successful Employee Arbitration Program all AutoNation dealerships and other entities."

Although Respondent AN attempts to shield itself beneath a corporate veil, the evidence discussed above makes clear that Respondent AN , albeit potentially acting through its subsidiaries, directly participated in the unlawful action when it distributed the Agreement and the other like agreements to all of its employees at its subsidiary locations nationwide. Those

agreements are maintained at the behest of Respondent AN and Respondent AN has admitted in the parties Partial Stipulation, that those agreements remain in effect.

In her decision, ALJ Laws notes that

Under the direct participation theory of liability, “a parent corporation may be held liable for the wrongdoing of a subsidiary where the parent directly participated in the subsidiary's unlawful actions.” *Esmark Inc. v. NLRB*, 887 F.2d 739, 756 (7th Cir. 1989). A parent company may be derivatively liable for a subsidiary’s actions when the parent or other affiliated corporation disregards the separateness of its subsidiary or affiliated corporations and exercises direct control over specific transactions. *American Electric Power Co.*, 302 NLRB 1021, 1023 (1991), enf. mem. 976 F.2d 725 (4th Cir. 1992). In such cases, the Board may “permissibly find that a parent corporation should not be permitted to act through its subsidiaries to the detriment of the subsidiaries' workforce and yet escape liability for acts which it has mandated.” *Esmark Inc.*, supra at 757; See also *Smithfield Foods*, 347 NLRB 1225 fn.2 (2006); See also *American Electrical Power Co.*, 302 NLRB 1021, 1023 (1991).¹⁰ ALJD 4:27

Based on the rationale set forth above, ALJ Laws found that Respondent AN directly participated in maintaining the agreements because:

Edmunds’ signature on the Agreements on the Respondents’ behalf demonstrates that AutoNation directly participated in effectuating and maintaining the Agreements. No other manager or supervisor for any of the subsidiaries is signatory to the Agreements. In addition, subsidiary entities wholly owned by AutoNation rolled out the Agreements, oversaw their implementation, and maintained them as work rules. Accordingly, I find AutoNation may be held liable if the Agreements violate the Act. *Esmark Inc.*, supra; *Smithfield Foods*, supra. ALJD 10: 20. It would follow that if Edmunds’ signature does bind employees of the subsidiaries to the agreement, and AutoNation must have participated in maintaining and enforcing the Agreements; otherwise nobody signed the Agreements on behalf of Costa Mesa Cars or the other subsidiaries. ALJD 10:F10.

Thus, as discussed above, because Respondent AN had a heavy hand in carrying out the unfair labor practices at issue in this matter which occurred at Respondent CM’s facility and the facilities of various other subsidiary dealerships, Respondent AN was a direct participant in these actions, and ALJ Laws was correct to hold Respondent AN liable for the unfair labor practices which transpired.

¹⁰ Although ALJ Laws did not find Respondent AN to be an “employer” under the Act, a point to which General Counsel takes exception, she noted that jurisdiction over Respondent AN still attaches via the direct participant or agency theory. ALJD 5:1; Fn 7.

C. ALJ Laws Did Not Err in Finding that Aaron Duport is an Agent of Respondent AN

In their fifth exception to ALJ Laws' decision, Respondents contend that ALJ Laws improperly found General Manager for Respondent CM, Aaron Duport to be an agent of Respondent AN. In footnote 7 of her decision, ALJ Laws found that Respondent AN was additionally liable for the unlawful maintenance of the Agreement at Respondent CM's facility because Duport, acted as an Agent of Respondent AN. In support of this theory, ALJ Laws relied upon the fact that the general managers of the subsidiary dealerships "carried out instructions to disseminate and collect arbitration agreements from employees bearing AutoNation's officer's signature." ALJD 5: Fn 7.

The Board may find an agency relationship between the purported agent and the principal where the agent possesses either actual or apparent authority to act on the principal's behalf. [A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. *Wal-Mart Stores*, 350 NLRB 879, 884 (2007) citing *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336 (2004), quoting *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 446 fn. 4 (1991).

In *Wal-Mart*, the Board further explained:

For responsibility to attach under either theory of agency, it is not necessary that the principal expressly authorize, actually desire, or even know of the action in question. A "principal is responsible for its agent's actions that are taken in furtherance of the principal's interest and fall within the general scope of authority attributed to the agent." *Tyson Fresh Meats*, supra, 343 NLRB at 1337, quoting *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984). Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's

manifestations to the agent that the principal wished the agent to undertake those actions. See Restatement 2d, Agency, § 33.

ALJ Laws was correct in making this finding as General Manager Duport distributed the unlawful agreements to his employees at the behest of Respondent AutoNation and then as directed by his parent corporation, proceeded to follow up with Charging Party Applebaum when Applebaum did not immediately sign the agreement. At each step of this process, Duport was following the directives of Respondent AutoNation. Thus Respondents' exception to this particular finding by ALJ Laws should be disregarded.

D. The Voluntariness of the Agreements is Irrelevant under the Current Board Precedent

In their Exceptions 6 and 7, Respondents take issue with ALJ Laws' failure to find that CP Applebaum voluntarily signed the Agreement and her conclusion that "even if the Agreements are voluntarily, they constitute an impermissible prospective waiver of Section 7 rights." ALJD 11:38. ALJ Laws did not spend much time in her decision on the voluntariness of the agreements at issue because the current Board precedent makes the voluntariness of agreements of this nature irrelevant.

As an initial matter the evidence establishes that the agreements were not voluntary. ALJ Laws credited the declaration of CP Applebaum in which he stated that he was told by General Manager Duport that he would be terminated if he didn't sign the Agreement. ALJD 9:22; 11:30. Moreover, in her decision, ALJ Laws noted that even assuming that Duport did not tell CP Applebaum he would be terminated if he didn't sign the Agreement, she still found the agreements to be coercive in that the instructions attached to the agreements required human resource personnel to follow up individually and in person with employees who did not return a

signed agreement within a week's time. ALJD 11:32. Although the agreements do not expressly state that employees are required to sign them in order to continue their employment with Respondents, CP Applebaum provided evidence showing that he was informed by his General Manager that his employment would be terminated if he didn't sign the Agreement.

However even absent Respondents' requirement that employees sign the agreements in order to remain employed, once Respondents' employees sign the agreements, voluntarily or not, the agreements becomes a term and condition of employment because they require employees to prospectively waive their Section 7 right to engage in concerted activity. See *Bristol Farms*, 363 NLRB No. 45, slip op. at 1 (2015) citing to *On Assignment Staffing Services*, 362 No. 189, slip op. at 4-5 (2015); *Nijjar Realty, Inc.*, 363 No. 38, slip op. at 2 (2015) citing to *On Assignment Staffing Services*, supra at 4-5. Thus although the evidence presented establishes that the agreements were not voluntary, ultimately whether or not the agreements were voluntary is irrelevant under the current Board standard and Respondents' exceptions on these points should be disregarded.

E. The Complaint is not Barred by Section 10(b) of the Act

Respondents take exception to ALJ Laws' disregard for their statute of limitations defense. Respondents contend that the ALJ must find that the statute of limitations on a charge regarding CP Applebaum's execution of the agreement elapsed prior to its filing. It is undisputed that the original charge in this matter was filed more than 6 months after CP Applebaum signed the Agreement. Nevertheless, under well-established principles, Respondents' statute-of-limitations defense lacks merit. The complaint allegations are premised on the Respondents' *maintenance* and *enforcement* of the Agreement, not the execution of the Agreement. It is well-established that an employer violates § 8(a)(1) of the Act by maintaining

an unlawful rule within 6 months of the filing of a charge, regardless of when the rule was first promulgated. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Similarly, an employer violates the Act by enforcing an agreement within 6 months of a charge being filed, even if the agreement was not entered into during the § 10(b) period. *Teamsters Local 293 (R.L. Lipton Distributing)*, 311 NLRB 538, 539 (1993).

In the instant case, Respondents' admit to maintaining the agreements at issue within the 10(b) period. Despite the fact that CP Applebaum signed the Agreement outside the statute of limitations period, the matter was brought within the 10(b) period when Respondents filed their Motion to Compel enforcing CP Applebaum's Agreement. Thus, the ALJ properly rejected Respondents' 10(b) arguments.

F. The Remedies Granted by ALJ Laws are Warranted, Consistent with Current Law, Do not Violate the Due Process Rights of Respondents and Third Party Dealerships, and are Needed to Remedy the Act

In its exceptions 10 through 12, Respondents except to the recommended remedies awarded by ALJ because CP Applebaum has already settled his claims with Respondents, sought to withdraw the underlying unfair labor practice charge and did not participate in the litigation proceedings. Respondents also argue that ALJ Laws' order violates the due process of Respondent AN's indirectly owned dealerships which were not provided notice of nor the opportunity to participate in the investigation of the charge, complaint or hearing. General Counsel asserts that ALJ Laws' proposed remedies are appropriate and just to remedy the unfair labor practices of Respondents, and consistent with Board precedent in similar cases.

With respect to Respondents' contention that it was improper for the General Counsel to proceed with this matter without CP Applebaum's involvement in the proceedings, it is within a Regional Director's discretion to decline to approve a withdrawal request based on a non-Board settlement agreement, where agency policy so dictates. In *Independent Stave Co.*, 287 NLRB 740

(1987), the Board reconfirmed that the Board's jurisdiction over settlement agreements requires it to enforce public interests, not private rights, and to reject private settlements that are repugnant to the Act or Board policy. *Id.* at 741. Regional offices have discretion as to whether or not to approve withdrawal requests based on non-Board settlements. See *Casehandling Manual* (Unfair Labor Practice Proceedings) Sec. 10140.1. Thus although it is not in dispute that CP Applebaum settled his claims with Respondents and sought to withdraw his Board charge, the Agency chose to pursue this matter to further the protections and policies of the Act.¹¹

As for Respondents' contentions that Respondent AN's indirect subsidiary dealerships were not afforded due process by ALJ Laws' recommended remedies, this argument is also without merit. In its Complaint, General Counsel alleged that Respondent AN had unlawfully maintained as a condition of employment the unlawful agreement which Applebaum, and other similar agreements¹² signed at its other automobile dealerships located throughout the United States. Thus Respondent AN, the parent corporation, who distributed the unlawful agreements to its subsidiary locations, was put on notice that its subsidiary dealerships, where these agreements were in effect, could be affected by the ALJ's Order and proposed remedies. Thus no due process rights have been violated and ALJ Laws' recommended remedies are appropriate here.

¹¹ ALJ Laws does in fact acknowledge the settlement agreement reached by the parties in making her recommendations with respect to the appropriate remedies. In this regard she notes that to the extent that litigation expenses were resolved by the parties' settlement agreement, those matters would be taken into account during the compliance stage. (ALJD 13:45 FN 15). What is more, this matter does not only affect CP Applebaum but also the numerous other employees whose Section 7 rights have been restricted by the unlawful agreements maintained and if necessary enforced by Respondents. Thus the General Counsel had legitimate policy reasons for pursuing these allegations, with or without the involvement of the charging party.

¹² At hearing, the General Counsel moved to amend the complaint to include other similar agreements. Respondent did not object to this amendment and ALJ Laws accepted the amendment.

IV. Conclusion

In light of the above, and the record as a whole, General Counsel requests that the Board affirm the decision of ALJ Laws and find that Respondents violated the National Labor Relations Act as alleged in the complaint, and order the remedies recommended by ALJ Laws.

DATED AT Los Angeles, California, this 25th day of April, 2016.

Respectfully submitted,

/s/ Lindsay R. Parker

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