

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

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

**BRIEF IN SUPPORT RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGE'S DECISION**

Before the Honorable Eleanor Laws, Administrative Law Judge

Submitted By:

Lonnie D. Giamela  
Fisher & Phillips LLP  
444 S. Flower Street, Suite 1590  
Los Angeles, California 90071  
Counsel for Respondents

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Respondents Costa Mesa Cars, Inc. (“CMC”) and AutoNation, Inc. (“AutoNation”) (“Respondents”), through counsel and pursuant to the National Labor Relations Board’s (the “Board”) Rules 102.46 et. seq., file the following brief in support of their Exceptions to the decision of Administrative Law Judge (“ALJ”) Eleanor Laws dated March 14, 2016. Respondents have taken twelve exceptions to the ALJ’s decision. The legal arguments for the exceptions are set forth below.

## **I. INTRODUCTION**

The United States Supreme Court, numerous Circuit Courts of Appeals and the California Supreme Court have consistently found that arbitration agreements containing class action waivers are both enforceable and consistent with the principles of the Federal Arbitration Act (“FAA”). *See Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *CompuCredit Corp v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011); *Circuit City Stores, Inc. v. Adams*, 532 US 105 (2001); *Murphy Oil v. NLRB* 808 F.3d 1013, *en banc petition for hearing pending* (5<sup>th</sup> Cir. 2015); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8<sup>th</sup> Cir. 2013); *Johnmohammadi v. Bloomingdale’s Inc.*, 755 F.3d 1072 (9<sup>th</sup> Cir. 2014); *Iskanian v. CLS Transp. Los Angeles*, 59 Cal.4<sup>th</sup> 348 (2014).

Supreme Court precedent is clear that the FAA and not the National Labor Relations Act (“the Act”) governs the validity of a pre-dispute arbitration agreement between an employer and employee. *See generally Marmet Health Care Ctr. Inc. v. Brown* 132 S.Ct. 1201 (2012). No federal appellate court has enforced the Board’s finding that the Act supersedes the FAA and can render unenforceable an arbitration agreement with a class action waiver. Each and every federal court of appeals to consider the Board’s position on this issue, whether directly or indirectly, has rejected the Board’s argument.

Noteworthy about the ALJ's decision in this matter is the absence of any precedent from a court of law finding either that a class action waiver in an arbitration agreement is unenforceable under the Act or that the bringing of a class action lawsuit is protected activity under the Act. The decision is part of a self-fulfilling cycle of decisions where Administrative Law Judges cite to one another's cases, and the Board's affirmation, with sheer disregard for how these decisions have been treated by reviewing courts.

Perhaps more relevant to this specific matter, the ALJ's decision makes factual conclusions unsupported by the record and an incorrect legal finding on the issue of whether AutoNation may be held liable for the actions of CMC.

## **II. STATEMENT OF FACTS**

### **A. AutoNation, Inc.**

AutoNation, a Delaware corporation, whose office is located in Fort Lauderdale, Florida, has, through its indirect subsidiaries including CMC, been engaged in the business of owning automobile dealerships located throughout the United States. *See Partial Stipulated Record ("PSR")*, at ¶4(a). It does not employ a single individual. *See Administrative Law Judge's Decision ("ALJD")*, at p. 2:28-29. Notably, AutoNation did not employ Applebaum nor has it employed any other individual ever employed by CMC. *Transcript*, at p. 29:14 - p. 30:2.

AutoNation provided the testimony of Dan Best at the evidentiary hearing. Mr. Best, employed by an entity known as AutoNation Corporate Management, LLC, confirmed that AutoNation has no employees and that in his role as Vice President of Human Resources, no individual who works for the entity that distributed the arbitration agreement that Applebaum signed (i.e. AutoNation Western Region Management), reports to him. *Transcript*, at p. 30:7-31:12. The General Counsel does not dispute either of these facts nor does it offer testimony to the contrary.

AutoNation treats CMC, and the other indirectly owned subsidiaries, as independent businesses or corporations. *Id.*, at p. 32:19-23. *See PSR*, at Exhibit 7, ¶3. It exercises no control or supervision over the day-to-day operations and labor decisions of CMC. *Id.*, *ALJD*, at p. 2:29-34. The two entities maintain their own financial books and records. *Id.* AutoNation did not issue any W-2s to any individual from the time period of January 1, 2013 to December 7, 2015. *Transcript*, at p. 33:8-11. No one from AutoNation had any involvement in hiring employees at any of the indirectly-owned dealerships, including CMC. *Id.*, at p. 36:15-19. AutoNation also has no involvement in the decision to terminate employees or setting daily schedules for employees, at any of the indirectly-owned dealerships, including CMC. *Id.*, at p. 36:15-19; 37:1-4. It also has no role in issuance of performance reviews or discipline to any employee of the indirectly-owned dealerships, including CMC. *Id.*, at p. 37:12-24.

CMC was not required to consult (and did not consult) with AutoNation or with AutoNation Corporate Management, LLC regarding the termination of Applebaum. *Transcript*, at p. 37:25-38:3. Finally, CMC was not responsible for providing daily reports to AutoNation regarding employees that had been hired, fired or disciplined. *Id.*, at p. 37:5-11. In short, the evidence indicates that AutoNation did not and does not exercise direct control and supervision over indirectly owned dealership operations including, but not limited, to:

- hiring decisions;
- decisions regarding setting of daily schedules;
- decisions regarding service technicians' wages;
- performance evaluations; and
- disciplinary and termination decisions.

*Id.*, at p. 29:25-30:2; 32:19-23; 33:8-11; 36:15-19; 36:15-19; 37:1-4; 37:12-24; 37:25-38:3; 37:25-38:3; 37:5-11. There is no evidence that there was any co-mingling of funds or shared functions between AutoNation and CMC such that AutoNation would be considered an “alter ego” of CMC or vice-versa.

As it has no employees, AutoNation neither prepared nor distributed the arbitration agreement signed by Applebaum nor any other employee of an indirectly owned dealership. Specifically, a separate entity known as AutoNation Western Region Management distributed the arbitration agreements at issue to CMC and directed the general manager to provide employees the opportunity to read and review the agreement before signing it. *Transcript*, at p. 38:9- 19. *PSR*, at Exhibit 19, ¶4. Of note, the ALJ's decision does not hold AutoNation Western Region Management liable for any actions.

At hearing, AutoNation provided organizational charts demonstrating that it is wholly distinct from AutoNation Western Region Management. AutoNation also does not maintain the hard or electronic copies of the agreements. *Id.*, at p. 38:20-23. *PSR*, at Exhibit 19, ¶7. In fact, the executed copies of the arbitration agreements are maintained by a third-party vendor service for the indirectly-owned dealerships and accessed when necessary by the indirectly-owned dealerships through the National Payroll Center. *Transcript*, at p. 17:12-15; p. 18:8-24; p. 38:24- p. 39:2. AutoNation has therefore demonstrated, without dispute, it has never prepared the arbitration agreements at issue, distributed the arbitration agreements at issue or mandated that employees of an indirectly owned dealership execute the agreement.

**B. Costa Mesa Cars, Inc.**

CMC is a California Corporation that has its facility located at 2888 Harbor Blvd., in Costa Mesa, California. *See PSR*, at ¶3. It has been engaged in the operation of an automobile dealership that sells and services vehicles. *Id.* As mentioned above, CMC is an indirectly owned dealership of AutoNation.

CMC hired Applebaum and was his employer. CMC had direct control over its employees and was not required to (and did not) report to AutoNation for any employment decisions. *Transcript*, at p. 34:1-7. CMC is independently responsible for its daily operations at the dealership. *Id.*, at p. 33:22-25. CMC's salespersons, finance managers and mechanics, such as Applebaum, report to CMC's General Manager. *Id.*, at p. 34:1-7. The general manager at CMC is employed by CMC only. *Id.*, at p. 34:7-8. CMC's employees, i.e., salespersons, technicians,

and finance employees, do not report to anyone at AutoNation. *Id.*, at p. 34:9-13. The General Counsel has conceded all of these points and offered no evidence to the contrary.

Further, CMC has its own independent federal employment tax number, separate and distinct from all other entities and indirect subsidiaries of AutoNation. *Transcript*, at p. 36:6-10. CMC also issued W-2s to the individuals who worked for it for the time period of January 1, 2013 to December 7, 2015. *Id.*, at p. 33:18-21. CMC maintains its own books and accounting records in order to pay taxes separate and distinct from other indirect subsidiaries of AutoNation. *Id.*, at p. 36:11-14. Again, the General Counsel has conceded all of these points and offered no evidence to the contrary.

The parties have stipulated that CMC's General Manager, Aaron Duport was only an employee of CMC. *PSR*, at ¶6. At no time has the General Counsel provided evidence that Mr. Duport was employed by AutoNation at any time. The parties have further stipulated that CMC maintained a pre-dispute arbitration agreement, but that AutoNation has never required any of CMC's employees to sign a pre-dispute arbitration agreement of any kind nor has it prepared any such agreement. *PSR*, at ¶¶7, 9.

### **C. Charging Party Applebaum**

Applebaum signed a pre-dispute arbitration agreement on or about May 6, 2013. *PSR*, at ¶9. He signed this agreement following the opportunity to confer with counsel. *PSR*, at Exhibit 6. This arbitration agreement was provided to CMC by AN Western Region Management, LLC. *GC 6, Transcript*, at p. 23:23-26:2. The individual who provided the agreement and talking points to CMC is neither employed by AutoNation nor supervised by AutoNation or AutoNation Corporate Management, LLC. The arbitration agreement has specific language excluding claims under the Act brought before the National Labor Relations Board. *PSR*, at Exhibit 9. Applebaum's employment with CMC was terminated on or about June 2013. *PSR*, at ¶10. There is no allegation that Applebaum engaged in concerted activity while employed by CMC.

#### **D. Civil Litigation History**

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. *PSR*, at ¶12. On December 11, 2013, Respondents removed Applebaum's complaint to the United States District Court for the Central District of California. *PSR*, at ¶13. 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. *PSR*, at ¶14. On April 8, 2014, the court granted Respondents' motion to compel. *PSR*, at ¶19.

On January 26, 2015, Applebaum voluntarily sought dismissal of his February 2014 charge filed with the NLRB. Despite this, the NLRB continued to pursue this charge without the assistance of Applebaum. Neither Applebaum nor his representatives participated in the preparation of the partial stipulated record, evidentiary hearing or post-hearing briefs. Of note, Applebaum provided no testimony at hearing. Applebaum voluntarily dismissed his civil lawsuit against Respondents on January 28, 2015.

Applebaum did not provide any evidence of being employed by AutoNation. Of note, there is neither a paycheck, W-2 or similar document issued by AutoNation to Applebaum. Nor is there any correspondence from AutoNation to Applebaum regarding his employment at CMC. Moreover, there is no evidence of any communications between anyone employed by AutoNation Corporate Management and Applebaum regarding his employment at CMC.

### **III. THE ALJ'S CONTINUED APPLICATION OF THE BOARD'S HOLDINGS IN *D.R. HORTON, INC.* 357 NLRB NO. 184 (2012) AND *MURPHY OIL USA, INC.* 361 NLRB NO. 72 (2014) IS IMPROPER (EXCEPTIONS 1, 2, 7, 9 AND 12).**

The ALJ's decision includes a finding that an employer's maintenance of an arbitration agreement, containing a class action waiver, violates Section 8(a)(1) of the Act. *ALJD*, at p.10:39-41. The finding disregards statute and caselaw holding that such waivers are enforceable.

The FAA provides, in relevant part, that a pre-dispute arbitration agreement is enforceable save upon such ground as exist at law or in equity for the revocation of such contract. 9 U.S.C. §2. The FAA is part of a general liberal federal policy favoring arbitration agreements. *Compucredit Corp., supra*, at 669.

Caselaw also runs contrary to the ALJ's finding that there exists a violation of Section 8(a)(1) of the Act. More than twenty-five federal district courts, the Second Circuit Court of Appeals, the Fifth Circuit Court of Appeals, the Eighth Circuit Court of Appeals, the Ninth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals have all provided negative treatment of the Board's decisions in *D.R. Horton* and *Murphy Oil*. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 292 (2nd Cir., 2013); *D.R. Horton, Inc. v. NLRB* 737 F.3d 344, 355, 36 (5<sup>th</sup> Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, *petition for en banc hearing pending* (5<sup>th</sup> Cir. 2015); *Owen v. Bristol Care, Inc.* 702 F.3d 1050 (8th Cir., 2013); *Richards v. Ernst & Young, LLP* 734 F.3d 871, 873-874 (9<sup>th</sup> Cir. 2013); *Davis v. Nordstrom*, 755 F.3d 1089 (9th Cir., 2013); *Johnmohammadi v. Bloomingdale's Inc.*, 755 F.3d 1072 (9th Cir., 2013); *Walthour v. Chipio Windshield Repair, LLC* 745 F.3d 1326 (11<sup>th</sup> Cir, 2014).

It is not simply district and circuit courts that have enforced class action waivers in arbitration agreements. The United States Supreme Court, deferring to the FAA, has found unlawful any law prohibiting the use of class action waivers in consumer arbitration agreements. *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 321 (2011). The California Supreme Court, the highest state court in the state which Applebaum worked, has also enforced class action waivers in employment arbitration agreements and struck down the Board's arguments in *D.R. Horton*. *Iskanian v. CLS Transportation Los Angeles*, 59 Cal.4<sup>th</sup> 348 (2014).

The universal disdain given by civil courts, to the Board's rulings in *D.R. Horton* and its progeny, has matriculated into administrative law judges' decisions. Notably, at least one administrative law judge has recognized that the FAA would prevail on the issue of enforceability of a class action waiver as the Board's decision in *D.R. Horton* has "no oxygen" when all appellate court decisions are taken into account. *In re Haynes Building Services*,

*LLP*, (Case No. 31-CA-0939020, JD(ATL)-03-13, at \*13-14, February 7, 2014). Of note, the Board concedes that the *D.R. Horton* rule has met a “skeptical reception” in appellate courts. *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (2015).

The ALJ’s usage of the *Lutheran Heritage* and *U-Haul* standards in her analysis of whether a violation of the Act has occurred, is distinguishable. See *ALJD*, at p. 10:29 – p. 11:14. *Lutheran Heritage Village – Livonia* 343 NLRB 646 (2004); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006). For example, in *U-Haul*, the Board found an arbitration policy unlawful because it prohibited causes of action brought under the Act. Such is not the issue here as there is an express carve-out in the agreement signed by Applebaum for claims brought under the Act. As to *Lutheran Heritage*, the ALJ took no issue with any provision, term or phrase in the arbitration agreement itself. Therefore, the agreement signed by Applebaum does not fall under any of the *Lutheran Heritage* categories of: 1) being construed by employees to prohibit Section 7 rights by employees; 2) being promulgated in response to union action; or 3) being used to restrict the exercise of Section 7 rights by employees. There is nothing in the record to support a factual finding on any of these three factors as required under *Lutheran Heritage*.

A plethora of courts, in addition to numerous administrative law judges, have made findings contrary to the one made by the ALJ on the issue of whether a class action waiver in an arbitration agreement violates the Act. The arbitration agreement in this case contains detailed language indicating that no claim under the Act is covered under the agreement. The ALJ’s decision is neither supported by statute nor caselaw and should be reversed.

**IV. AUTONATION IS NOT A DIRECT PARENT OF CMC NOR DID IT PARTICIPATE IN THE ALLEGED UNLAWFUL ACTIONS OF CMC. (EXCEPTIONS 3, 4 AND 9).**

The ALJ’s decision states that AutoNation is the parent company of CMC when such is not factually complete. See *ALJD*, at p.2:18-26. The factual record is undisputed that AutoNation indirectly owns CMC. There is no evidence that AutoNation is either the direct

parent or the alter ego of CMC. The evidence presented at hearing was that no employee of AutoNation had any involvement in the activities of CMC. There is no record of correspondence from any corporate officer, agent or employee of AutoNation to CMC, either directly or indirectly.

The General Counsel did not offer a single document, witness or alternative form of evidence providing explanation of GC Exhibit 7. In fact, the ALJ's decision presumes that this relationship was the one that existed at the time Applebaum signed the arbitration agreement when the General Counsel did not provide evidence to that effect. The organizational charts applied only to the structure at the time of hearing. Therefore, the ALJ improperly assumed similar corporate structures without having any evidence offered by the General Counsel on that issue.

The relationship between AutoNation and CMC is important because of the ALJ's finding that AutoNation was a direct participant in the alleged distribution and maintenance of the Agreements. The ALJ's decision utilizes the *Esmark, Inc. v. NLRB* 887 F.2d 739, 756 (7<sup>th</sup> Cir., 1989) decision as the framework of her analysis of the "direct participant" rule. The court in *Esmark* found Esmark (the parent) liable for its direct subsidiary's actions because the president-employee of Esmark had direct involvement in the unfair labor practices. Here, because AutoNation does not have any employees, there can be no finding that it had involvement in a direct or indirect subsidiary's actions. Moreover, the record evidence indicates that AutoNation had no involvement in the preparation, maintenance or distribution of the arbitration agreement executed by Applebaum or employees of other indirectly-owned dealership.

The ALJ's decision cites to Coleman Edmunds' signature on the agreement as one of two bases for its direct participation in the maintenance of the agreement. Unlike *Esmark*, there is no evidence that Edmunds gave direction to anyone regarding the preparation, implementation or maintenance of the agreement, nor that any AutoNation agent or employee had any involvement in same. These factual distinctions are critical to the *Esmark* analysis

because, unlike in that case, here there is no evidence of any affirmative action taken by any agent or employee of the parent company to engage, aid or assist in the actions. Moreover, the *Esmark* standard further requires that the parent be involved in the subsidiary's operations such that the corporate formalities are blurred. *Id.* The ALJ incorrectly ignores this second prong of the standard for, in this matter, AutoNation has demonstrated adherence to corporate formalities and its independence from its indirectly owned dealerships.

The ALJ's decision additionally cites to the filing of a motion in civil court, to enforce the arbitration agreement, as a violation of the Act. The record is undisputed that AutoNation did not employ Applebaum, that it is legally not his employer and that it was improperly named in the litigation. The ALJ's decision cites to precedent that "an employer" violates the Act by enforcing a rule that unlawfully restricts Section 7 rights. The ALJ concurrently finds, however, that AutoNation did not employ Applebaum; therefore the legal authority she cites is inapplicable. As discussed in post-hearing briefing, an improperly named party to a class action litigation cannot be found to violate the Act simply because it seeks to enforce its rights under the arbitration agreement. If the ALJ's decision were affirmed, an individual employee improperly named in a class action litigation who seeks the benefits of the arbitration agreement will be found to have violated the Act by joining in the motion. Such a finding would run contrary to established law and equity. Only an employer of the employee may be held liable for such violations. With no employees and no evidence of any affirmative action taken by any of its employees to prepare, implement or distribute the agreement, AutoNation cannot be held liable for the actions of CMC.

**V. AARON DUPORT IS NOT AN AGENT OF AUTONATION (EXCEPTION 5).**

Footnote 7 of the decision states that Aaron Duport was an agent of AutoNation when providing Applebaum the arbitration agreement for execution and in interactions with Applebaum following said event. Absent from the footnote is any discussion of the theory of agency under Board or civil precedent. The ALJ's decision recognizes that no employee of AutoNation provided the agreement to Duport, instructed Duport on how to disseminate the agreement or how to collect the arbitration agreements.

The only correlation, identified by the ALJ, between AutoNation and Duport is that the arbitration agreement provided to Duport had Edmunds' signature on it. Of note the decision states that Duport received direction from "employees," but does not state that the employees were those of AutoNation. Again, it is implausible how an entity with no employees and wholly independent from its indirectly owned subsidiaries can be held liable for alleged unlawful actions of one or more of its indirect owned subsidiaries.

There is no evidence of any communications between Duport and Edmunds, nor is there more generally any communications prepared by Edmunds anywhere in the record. Respondents provided evidence at hearing that Duport was an employee of CMC, did not report to anyone at AutoNation or AN Corporate Management and did not consult with AutoNation or AN Corporate Management regarding any issues associated with the arbitration agreement ultimately executed by Applebaum.

In *Travelers Ins. Co. v. Morrow*, 645 F.2d 41, 44-45 (10th Cir.1981), the Tenth Circuit stated, "To establish that an agent had apparent authority to bind its principal it must be shown that the principal knowingly permitted the agent to exercise the authority in question, or in some manner manifested its consent that such authority be exercised." Appellate courts have found agency where the individual affirmatively represents he is acting on behalf of a corporate entity, participates in bargaining on behalf of the employer or takes action as a result of a direct instruction from the corporate entity. See *Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. NLRB* 547 F.2d 575. (D.C. Cir. 1976); *NLRB v. Johnson* 442 F.2d 1056 (10<sup>th</sup> Cir., 1973). Here, there is nothing to show that AutoNation gave any authority to Duport to act on its behalf; instead the authority to disseminate the arbitration agreement was being provided by employees of a different corporate entity. Additionally §2(13) of the Act pertains to agents of the employer engaging in conduct ultimately resulting in the employer being held liable for the agent's actions. Here, the ALJ has ruled that AutoNation was not Applebaum's employer nor an employer under the Act. Although Duport's actions can be attributable to CMC, the

actual “employer” in this case, his actions cannot result in AutoNation being held liable as AutoNation is not the alleged “employer.”

**VI. THE ARBITRATION AGREEMENT EXECUTED BY CHARGING PARTY WAS DONE ON A VOLUNTARY BASIS (EXCEPTION 6).**

Applebaum was neither coerced nor forced to sign the arbitration agreement he ultimately executed. The only evidence, offered by the General Counsel, is Applebaum’s declaration. The General Counsel elected not to call Applebaum as a witness during hearing nor any other employee who signed the arbitration agreement to determine whether these agreements were entered into on a voluntary basis. Respondents request a finding, irrespective of the decision in *On Assignment Staffing Services* 362 NLRB 189 (2015), that the Board failed to present sufficient evidence that Applebaum signed the agreement involuntarily. The following supports Respondents’ position on this matter

1. The ALJ’s decision refers to “AutoNation’s general managers” but AutoNation has no employees and therefore did not employ any general managers. This is an incorrect description of the general managers.
2. There is no evidence that anyone from CMC advised Applebaum that execution of the agreement was a condition of employment.
3. There is no evidence that Applebaum was required to sign the arbitration immediately, or even the day of, him being provided the arbitration agreement.
4. There is no correspondence drafted by Peter Vano or anyone that could be directly or indirectly connected with CMC indicating that this agreement was a condition of employment.
5. Despite full access to him, the Board did not provide testimony of Applebaum to confirm he involuntarily signed the arbitration agreement.
6. Despite full access to all of Respondents’ witnesses, the Board did not provide any testimony that CMC required Applebaum to sign it.

7. There is no evidence that CMC's employees, or any employee of an indirectly owned dealership, were disciplined, terminated or adversely affected for refusing to sign the agreement.

There must be some modicum burden of proof that is required by the Board to prove that the arbitration agreement was involuntary. The Board did not put on any evidence at hearing on what occurred during the implementation of the arbitration agreement. The ALJ cannot now retroactively go back and make presumptions of what occurred without any evidence to cite to. This finding must be overturned.

**VII. RESPONDENTS EXCEPT TO THE ALJ'S CONCLUSION THAT A VOLUNTARY WAIVER OF THE RIGHT TO BRING A CLASS ACTION LAWSUIT IS NONETHELESS AN IMPERMISSIBLE WAIVER OF RIGHTS UNDER THE ACT (EXCEPTION 7).**

The ALJ's decision acknowledges that there may likely be insufficient evidence for a finding that Applebaum signed the agreement on an involuntary basis. In response, the ALJ makes a sweeping one line conclusion that "even if the Agreements are voluntary, they constitute an impermissible prospective waiver of Section 7 rights." See *ALJD*, at p.11:38-40. The ALJ's citation to *On Assignment Staffing Services* is distinguishable on three grounds. First, the arbitration agreement does not have an "opt-out" provision that was reviewed and scrutinized by the Board in the *On Assignment Staffing Services* case. Second, the arbitration agreement in this case excludes claims under the Act which thereby avoids requiring an employee to provide opinion on "unionism" that was found unlawful by the Board in *On Assignment Staffing Services*. Lastly, there is no evidence in this case that execution of the arbitration agreement was required of employees like was the factual history in *On Assignment Staffing Services*. Applebaum was presented with an arbitration agreement that carved out claims under the Act. He had ample opportunity to consult with an attorney and decide whether he wanted to execute it. There is no evidence that he would have suffered an adverse employment action had he not signed the agreement or, alternatively, sought to negotiate it.

Moreover, as set forth above, a prospective waiver solely to bring class action claims (as opposed to claims under the Act) is not a waiver of Section 7 rights. This is particularly true for if Congress had intended to exempt Section 7 rights from the coverage of the FAA or to confer a non-waivable right to a class action in the context of Section 7 rights, it could have easily done so. The fact that Congress did not, nor has not do so, creates an irrefutable presumption that Congress did not intend to grant Section 7 rights any greater status than other statutory rights. *See D.R. Horton, supra*, 737 F.3d at 349, and 362 (the NLRA could never have envisioned class action waiver prohibitions because it was enacted “prior to the advent in 1966 of modern class action practice”). Litigants do not have a substantive right to have claims adjudicated under class or collective action procedures. Instead class proceedings are simply elective procedural devices that are created by rules and laws which may be waived. *Italian Colors, supra*, 133 S. Ct. at 2309 (Rule 23 of the Federal Rules of Civil Procedure does not “establish an entitlement to class proceedings for the vindication of statutory rights”). Here, the tailored agreement protected Section 7 rights and allowed Applebaum to make a reasoned, voluntary decision on whether he wanted to sign the agreement.

**VIII. RESPONDENTS EXCEPT TO THE ALJ’S CONCLUSION THAT THE STATUTE OF LIMITATIONS DEFENSE IS INAPPLICABLE AND/OR UNMERITORIOUS. (EXCEPTION 8).**

The ALJ’s decision on Respondents’ statute of limitations affirmative defense fails to recognize that the defense has various sub-parts. Respondents except to the decision on the grounds that the ALJ must find that the statute of limitations on a charge regarding Applebaum’s execution of the agreement elapsed prior to its filing. The maintenance and enforcement of the arbitration agreement are separate alleged violations of the Act that must be analyzed and examined separately. Respondents request that the Board make a ruling that the statute of limitations relating to Applebaum’s execution of the agreement lapsed prior to the filing of his charge.

**IX. THE DUE PROCESS RIGHTS OF RESPONDENTS AND THIRD PARTY DEALERSHIPS WHO ARE NOW SUBJECT TO THE ALJ'S ORDER HAVE BEEN VIOLATED. (EXCEPTION 10)**

Respondents maintain that the remedies issued by the ALJ are improper as no violation of the Act has occurred. The issuance of any remedy against Respondents or entities not a party to the charge, is improper.

The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce.” *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-08 (1959). Only the Board is responsible for conducting a full inquiry and framing the issues. *Id.* at 307. However, the Board has no authority to investigate alleged unfair labor practices on its own initiative. 29 U.S.C. § 160(b); *National Licorice Co. v. NLRB*, 309 U.S. 350, (1940). The Board's investigatory machinery may only be initiated by a filing of a charge. Here, Applebaum sought to withdraw his charge prior to the conducting of the hearing. The General Counsel did not provide evidence that Applebaum sought to proceed with the hearing in this matter. Applebaum did not participate in any way in the instant matter following his request to have his charge withdrawn. *See Transcript, generally (noting failure to appear) and Case Record (noting no filing of post-hearing briefs by Charging Party)*. The ripeness of this argument could only arise once a decision from the ALJ had been issued because the time period for Applebaum to reverse course and participate in this matter ended there. The General Counsel offers no basis for the legal authority in proceeding with this matter against Respondents.

Additionally, although not clear, Respondents understand the ALJ's remedies to include all of AutoNation's indirectly owned dealerships ceasing to use an arbitration agreement with a class-action waiver, and rescinding any current version of the arbitration agreement. Such would be a wholly improper extension of the ALJ's jurisdiction over this complaint. Specifically, as the ALJ acknowledged, there is corporate independence from AutoNation and its indirectly owned dealerships. *ALJD*, at p. 2:28-34. These indirectly owned dealerships were not provided notice of any charge, complaint or hearing and, accordingly,

their due process rights were violated if required to take action regarding individuals who they, not AutoNation or CMC, employ. *NLRB v. Quality C.A. T.V., Inc.* 824 F.2d 542 (7<sup>th</sup> Cir., 1987); *Alaska Roughnecks and Drillers Ass'n v. NLRB* 555 F.2d 732 (9<sup>th</sup> Cir., 1977). None of these indirectly owned dealerships were referenced by Applebaum or General Counsel in a charge, complaint or any post-hearing briefing. An example of the due process violation is that these dealerships will now need to post notices in worksites indicating that unfair labor practices took place even though these dealerships had no ability to defend themselves at hearing and are neither operated by nor directly owned by AutoNation.

Respondents and indirectly owned dealerships of AutoNation are entitled to due process. Applebaum, the charging party, had no desire to proceed with his charge yet this matter proceeded. Upon having a hearing, numerous parties had orders indirectly issued against them that will require actions be taken on their parts. The ALJ's decision should be vacated on these grounds.

**X. RESPONDENTS EXCEPT TO THE REMEDIES ISSUED BY THE ALJ TO THE EXTENT THAT VIOLATE PREVIOUSLY ISSUED COURT ORDERS OR PRIVATE AGREEMENTS BETWEEN RESPONDENTS AND CHARGING PARTY. (EXCEPTION 12)**

This case results from a February 2014 charge filed by Applebaum against Respondents. On January 26, 2015, Applebaum voluntarily sought dismissal of his February 2014 charge filed with the National Labor Relations Board, but the dismissal was rejected. *ALJD, at p.1, fn. 2*. The underlying civil action was dismissed and resolved prior to the evidentiary hearing. Applebaum entered into a settlement agreement with Respondents resolving his claims in the underlying civil matter. He voluntarily withdrew the charges and does not seek any relief for himself in this matter. He neither participated in the hearing or any post-hearing briefs. He has waived any right for individual recovery in this matter. This issue was stipulated to between the parties in this case, prior to the hearing.

## XI. CONCLUSION

This case is not just the traditional *D.R. Horton* case. It presents the Board with two unique issues: 1) the inappropriate holding of AutoNation liable for CMC's actions even though it had no involvement in such actions; and 2) the improper remedy violating the due process rights of Respondents and third-parties who received no notice of the charge, complaint or hearing. Respondents request that the Board grant its exceptions to the ALJ's findings and reverse the ruling accordingly.

Respectfully submitted,

Dated: April 11, 2016

Respondents

By:

Lonnie Giamela

FISHER & PHILLIPS, LLP  
Counsel for Respondents

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21**

**AUTONATION, INC; COSTA MESA CARS )**  
**INC. dba AUTONATION HONDA COSTA )**  
**MESA FKA POWER HONDA COSTA MESA )** Case No. 21-CA-123072  
)  
**and )**  
)  
**MICHAEL APPLEBAUM, )**  
**An Individual )**

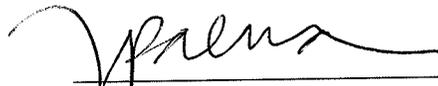
**CERTIFICATE OF SERVICE**

I hereby certify that on April 11, 2016, I e-filed the foregoing **BRIEF IN SUPPORT RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** using the Board's e-filing system, and immediately thereafter served it by mail upon the following:

Lindsay Parker  
National Labor Relations Board, Region 21  
888 S. Figueroa Street, Ninth Floor  
Los Angeles, CA 90017  
Email: [Lindsay.parker@nlrb.gov](mailto:Lindsay.parker@nlrb.gov)  
Email: [olivia.garica@nlrb.gov](mailto:olivia.garica@nlrb.gov)

Shane Stafford  
Shanberg, Stafford & Bartz LLP  
19200 Von Karman Avenue Suite 400  
Irvine, California 92612  
Email: [sstafford@ssbfirm.com](mailto:sstafford@ssbfirm.com)

Dated this 11th day of April, 2016, at Los Angeles, California.

  
\_\_\_\_\_  
Vanessa Palma

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**and )**  
**MICHAEL APPLEBAUM, )**  
**An Individual )**

**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2016, I e-filed the foregoing **BRIEF IN SUPPORT RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** using the Board's e-filing system, and immediately thereafter served it by mail upon the following:

Lindsay Parker  
National Labor Relations Board, Region 21  
888 S. Figueroa Street, Ninth Floor  
Los Angeles, CA 90017  
Email: [Lindsay.parker@nlrb.gov](mailto:Lindsay.parker@nlrb.gov)  
Email: [olivia.garica@nlrb.gov](mailto:olivia.garica@nlrb.gov)

Shane Stafford  
Shanberg, Stafford & Bartz LLP  
19200 Von Karman Avenue Suite 400  
Irvine, California 92612  
Email: [sstafford@ssbfirm.com](mailto:sstafford@ssbfirm.com)

Gary Shiners  
Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570-0001

Dated this 25th day of April, 2016, at Los Angeles, California.



Vanessa Palma