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

RESPONDENTS' ANSWER TO GENERAL COUNSEL'S EXCEPTION TO 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

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 answer to the General Counsel's Exception to the decision of Administrative Law Judge ("ALJ") Eleanor Laws dated March 14, 2016.

The General Counsel makes a single exception to the ALJ's decision, specifically that the ALJ erred that AutoNation is not an employer under the National Labor Relations Act (the "Act"). The exception is irrelevant to the legal conclusion of the ALJ as the General Counsel admits it is not proceeding under a joint liability theory.

The General Counsel's exception fails to take four critical facts into consideration. First, AutoNation both in its answer to the complaint and in paragraph 5(b) to the Partial Stipulation of Facts maintained that it never employed Charging Party Michael Applebaum ("Applebaum"). Second, AutoNation presented evidence at hearing that it does not have any statutory employees for the purposes of the Act. General Counsel offered no evidence to the contrary. Third, General Counsel represented and stipulated to the ALJ at hearing that the Board was not making the argument that AutoNation was a joint-employer of Applebaum of any individual, but that it was instead was sought to be held liable under a direct participant theory. *Transcript, at p. 11:25; p. 34:17-22.* General Counsel's exception appears to deviate from the representations made by counsel at hearing. Lastly, as the ALJ correctly pointed out, the signature of Coleman Edmunds on the pre-dispute arbitration agreement does not demonstrate that he was an employee of AutoNation.

AutoNation takes the position that although it engages in the requisite commerce under Section 2(2) of the Act, it does not have any employees as defined in Section 2(3) of the Act that would make it responsible for an unfair labor practice. This position is consistent throughout the pleadings and hearing as AutoNation has always disputed it employed any individual. It also provided testimony at hearing to this effect and produced documents to General Counsel confirming this. *See Transcript, at p. 29:22- p.30:2; p. 33:8- p. 34:*17. The Administrative Law Judge's findings are consistent with AutoNation's position that it did not

employ any individuals even though it engages in the requisite commerce to be an employer under Section 2(2) of the Act. This unique distinction is what the ALJ used to bind AutoNation as a "direct participant" under the argument that a direct participant need not actually employ the charging party to be held responsible. AutoNation disagrees with the ALJ's finding that it was a direct participant in the alleged unlawful acts in this matter.

Finally, contrary to the argument and caselaw cited by General Counsel, at no time did counsel for Respondents stipulate or represent at hearing that AutoNation actually has employees. Quite the contrary, the opening statement and almost all of the testimony offered by AutoNation at the evidentiary hearing was to support its position that it could not be held liable under a joint-employer theory. AutoNation, throughout the processing of the charge, filing of the compliant and at hearing has exhaustively maintained it has no employees under the Act. General Counsel can point to nothing in the record where AutoNation waivers on this point.

Respondents request that the Board adopt the ALJ's finding on this issue and decline to adopt the exception offered by the General Counsel.

Respectfully submitted,

Dated: May 9, 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 May 9, 2016, I e-filed the foregoing **RESPONDENTS' ANSWER TO GENERAL COUNSEL'S EXCEPTION TO ADMINISTRATIVE LAW JUDGE'S DECISION** using the Board's e-filing system, and immediately thereafter served it by mail upon the following:

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1015 Half Street SE
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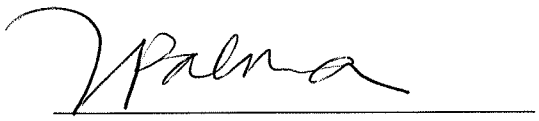
Dated this 9th day of May, 2016, at Los Angeles, California.



Vanessa Palma

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 May 23, 2016, I e-filed the foregoing **RESPONDENTS' ANSWER TO GENERAL COUNSEL'S EXCEPTION TO ADMINSTRATIVE LAW JUDGE'S DECISION** using the Board's e-filing system, document previously served on May 9, 2016:

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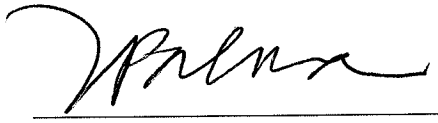
Dated this 23rd day of May, 2016, at Los Angeles, California.



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