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

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

Before the Honorable Eleanor Laws, Administrative Law Judge

Submitted By:

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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 reply brief in support of their Exceptions to the decision of Administrative Law Judge ("ALJ") Eleanor Laws dated March 14, 2016.

I. THE GENERAL COUNSEL HAS FAILED TO ACKNOWLEDGE OR DISTINGUISH CASELAW PROFERRED BY RESPONDENTS.

The parties acknowledge that this case resembles a line of cases headlined by *D.R. Horton, Inc.* 357 NLRB 184 (2012) and *Murphy Oil USA, Inc.* 361 NLRB 72 (2014). The General Counsel's Answer to Respondents' brief is limited to a singular, limited argument that since the United States Supreme Court has not yet overturned Board precedent, it must remain valid. *See Pathmark Stores*, 342 NLRB 378 (2004). The Board is in essence creating a self-fulfilling legal doctrine as it has continuously lost before Circuit Courts of Appeal on the issue of the legality of class action waivers in arbitration agreements. By not appealing any such decisions, it is implicitly insulating itself from having to reverse decisions such as *D.R. Horton, Inc.* and *Murphy Oil*. Additionally, the authority for the Board to not overturn a decision absent United States Supreme Court intervention is not civil appellate law precedent, but instead the Board's own precedent.

It is important for the Board to acknowledge that nowhere in the General Counsel's answer is there any citation to civil appellate law precedent supporting the Board's position, specifically any appellate decision after *D.R. Horton* was issued that supports the Board's traditional position on the issue of class action waivers in pre-dispute arbitration agreements. It is as equally important for the Board to acknowledge that not a single district court nor Circuit Court of Appeal has issued a publishable, citable decision that supports the Board's findings.

As set forth in the opening brief, 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*. The California Supreme Court has also provided negative treatment to the decision. Recognizing the outcome before the Ninth Circuit based on its precedent, Respondents maintain that the Board should overturn the ALJ's ruling and limit the reversal to those jurisdiction where Circuit Courts of Appeal have reversed findings in *D.R. Horton*, *Murphy Oil* and its progeny.

II. AUTONATION WAS NOT A DIRECT PARTICIPANT OF THE ALLEGED UNLAWFUL ACTIVITY.

General Counsel's Answer to Respondents' opening brief contends that AutoNation was a direct participant in the alleged unlawful conduct. The answer does not address the factual distinction, identified in Respondents' opening brief between the instant matter and *Esmark, Inc. v. NLRB* 887 F.2d 739, 756 (7th Cir., 1989). Specifically, in *Esmark*, an employee of the parent company was responsible for directly participating and affecting the unfair labor practices of its subsidiary. Here, AutoNation has no employees and therefore could not have directly participated in the unlawful conduct alleged. General Counsel cites to an AutoNation governmental filing, but the citation supports AutoNation's position that its indirectly owned subsidiaries and not the indirect parent operate the stores. The electronic correspondence offered by General Counsel were not prepared by Mr. Coleman Edmunds, an officer of AutoNation or an employee of AutoNation. The citation to Shane Harrison's participation again reflects that Mr. Harrison is not employed by AutoNation nor did AutoNation maintain the arbitration agreements executed by employees of an indirectly owned dealership. There is simply no factual evidence that an employee of AutoNation, as opposed to one of its indirect subsidiaries or indirectly owned dealerships, participated in the alleged unlawful activity.

III. AARON DUPORT IS NOT AN AGENT OF AUTONATION .

General Counsel takes the position that Aaron Duport ("Duport") is an agent of AutoNation. There is no evidence in the record that Duport communicated with any employee, officer, or director of AutoNation. There is no evidence that Duport prepared any communications to any individual not employed by CMC. There is no evidence expressly

stating that Duport was acting on behalf of AutoNation, that he was to represent himself as acting on behalf of AutoNation or that he was to act in a manner that was authorized by any employee, officer or director of AutoNation. Duport distributed the agreement, on behalf of CMC, to ensure that CMC employees reviewed and executed the pre-dispute arbitration agreement. Of note, Duport did not distribute the agreement to anyone other than an employee of CMC further demonstrating that his actions were on behalf of CMC and not any other entity.

General Counsel's citation to the *Wal-Mart Stores* 350 NLRB 879 (2007) decision is distinguishable. In *Walmart*, there was evidence that employees of the parent were giving direction to the employees of the subsidiary to carry out actions that were alleged to be unlawful labor practices. Here, there is nothing drafted by AutoNation directing Duport to act in a certain fashion. The correspondence cited by both General Counsel and Judge Laws, as testified to by Dan Best at hearing, was drafted by an employee of another indirect subsidiary of AutoNation. There is again no evidence that AutoNation prepared the agreement, gave direction to Duport or any third-party or alternatively that said entity had any involvement in the unlawful acts alleged in this case. 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.

IV. GENERAL COUNSEL CONCEDES PART OF RESPONDENTS' STATUTE OF LIMITATIONS DEFENSE

The Parties agree that part of Respondents' statute of limitations defense is valid, specifically that neither respondent can be held liable for Charging Party's execution of the arbitration agreement containing the pre-dispute arbitration agreement. Respondents request that the Board reverse the ALJ's order and issue a finding consistent with the parties' agreement.

V. THE DUE PROCESS RIGHTS OF RESPONDENTS AND THIRD PARTY DEALERSHIPS WHO ARE NOW SUBJECT TO THE ALJ'S ORDER HAVE BEEN VIOLATED.

General Counsel provides no authority to support its position that the due process rights of third-party dealerships have not been violated. Notable about the General Counsel's argument is five-fold: 1) it concedes no notice was given to the entities to whom the ALJ's order will extend to; 2) it concedes that the charge filed by Applebaum did not include any other indirectly owned dealership other than CMC; 3) it concedes that the Board's complaint was never amended to include the other indirectly owned dealerships; 4) it concedes that the indirectly-owned dealerships were never provided notice of the hearing; and 5) that the indirectly-owned dealerships "could have" been held liable even though there was never any contention in any pleading, stipulation, pre-hearing brief or argument at hearing that indirectly owned dealerships other than CMC were sought to be held liable for the unlawful actions alleged in this case. The ruling should be limited in scope to Appelbaum, CMC and AutoNation as it applies to the operations at CMC.

VI. CONCLUSION

Respondents request that the Board grant its exceptions to the ALJ's findings based on the arguments set forth in their opening and reply briefs.

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 **REPLY 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:

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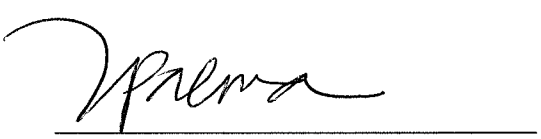
Dated this 9th day of May, 2016, at Los Angeles, California.



Vanessa Palma

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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 **REPLY BRIEF IN SUPPORT RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** using the Board's e-filing system, document previously served on May 9, 2016:

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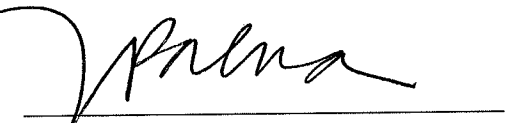
Dated this 23rd day of May, 2016, at Los Angeles, California.



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