Costa Mesa Cars, Inc. d/b/a Autonation Honda Costa Mesa; f/k/a Power Honda Costa Mesa and Autonation, Inc. *and* Michael Applebaum. Case 21–CA–123072

August 6, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On March 14, 2016, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. The General Counsel filed a cross-exception and supporting brief, and the Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decisions in *D. R. Horton*, *Inc.,* 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil*, 361 NLRB 774 (2014), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), that Respondent AutoNation Honda Costa Mesa (Costa Mesa Honda) violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing an arbitration agreement that seeks to have employees waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found that Respondent AutoNation violated Section 8(a)(1) of the Act by maintaining the arbitration agreement at its indirectly-owned dealerships, including Costa Mesa Honda, and by enforcing the arbitration agreement against Charging Party Michael Applebaum.

Recently, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at __, 138 S. Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil*, we conclude that the complaint must be dismissed.[1]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 6, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lindsay R. Parker, Esq., for the General Counsel.
Lonnie D. Giamela, Esq., for the Respondents.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Los Angeles, California, on December 7, 2015. At that time, I admitted into the record a joint stipulation of facts and numerous joint exhibits. (Jt. Exhs. 1, 2.[1])

The original charge in this proceeding was filed by Michael Applebaum (the Charging Party or Applebaum) through his attorney on February 21, 2014, and an amended charge was filed on May 27, 2014.[2] The General Counsel issued the original complaint on September 21, 2015, and an amendment to the complaint was admitted into the record at the hearing on December 7. (GC Exh. 2.) Costa Mesa Cars, Inc. and AutoNa-

[1] We therefore find no need to address other issues presented in the case or raised by the parties' exceptions.

[1] Abbreviations used in this decision are as follows: "Jt. Exh." for joint exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for the Respondents' brief. Although I have included several citations to the record to highlight particular exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

[2] Applebaum withdrew the charges but the General Counsel persisted with the complaint.

tion, Inc. (the Respondents[3]) filed a timely answer denying all material allegations and setting forth defenses.

This is another case applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014). Specifically, the complaint alleges the Respondents violated the National Labor Relations Act (the Act) by maintaining and enforcing agreements requiring employees to resolve employment-related disputes through individual binding arbitration (the "Agreements").[4]

On the entire record, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. CORPORATE STRUCTURE

Respondent AutoNation is a holding company, and is the parent company of Respondent CMC, among other dealerships. AutoNation has a 100 percent ownership interest in Auto Holding LLC, a Delaware limited liability company. Auto Holding LLC has a 100 percent ownership interest in AutoNation Enterprises Inc., a Florida Corporation. Auto Nation Enterprise, Inc. wholly owns Costa Mesa Cars Holding, LLC, a Delaware limited liability company. Costal Mesa Cars Holding, LLC owns Respondent CMC. Auto Nation Enterprises, Inc., also wholly owns AutoNation Dealership Holding Corp., a Florida Corporation. AutoNation Dealership Holding Corp. wholly owns AutoNation Western Regional Management, LLC, a Delaware limited liability company. (GC Exh. 7; Tr. 24–27.)

Respondent AutoNation has no employees for federal income tax purposes. Respondent AutoNation does not comingle funds or other assets with its indirectly owned dealerships; rather the funds of separate corporate entities are segregated. AutoNation treats the dealerships as independent corporations. CMC is a distinct and separate corporate entity from AutoNation. CMC keeps its own books and records, has its own federal tax identification number and maintains its own bank account. The premises where CMC's employees work is not owned or leased by AutoNation. (Jt. Exh. 1 at Exh. 7.)

At all relevant times, Coleman G. Edmunds has been the senior vice president, Deputy General Counsel, and assistant secretary of Respondent AutoNation. He has been an officer of AutoNation since 1998. (Jt. Exh. 1 at Exh. 7.) Aaron Duport has been CMCs' general manager during all relevant times, and an agent of CMC.[5] (Jt. Exh. 1 ¶ 6.)

II. JURISDICTION

At all material times, Respondent Costa Mesa Cars, Inc. (CMC), a California corporation with a place of business in Costa Mesa, California, has been engaged in the operation of an automobile dealership and service shop. The parties admit, and I find, that at all material times, Respondent Costa Mesa Cars has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times Respondent AutoNation, Inc. (AutoNation) a Delaware corporation, with headquarter offices located in Fort Lauderdale, Florida, has, through its indirect subsidiaries including Respondent CMC, been engaged in the business of owning automobile dealerships located throughout the United States. Respondent AutoNation admits that during a representative period, in conducting its business operations, it derived gross revenues in excess of $500,000 and purchased and received at its headquarter offices in Fort Lauderdale, Florida goods valued in excess of $50,000 directly from points outside the State of Florida. In its answer, however, Respondent AutoNation denied it is an employer engaged in commerce.[6] (GC Exh. 1(k).) The parties later stipulated that AutoNation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Jt. Exh. 1 ¶ 5(b).) At the hearing, however, Respondent AutoNation contended it has no employees. More specifically, during opening statements, the Respondent stated that AutoNation "does not employ a single individual." (Tr. 14.) The only witness called at the hearing, Dan Best, the vice president of human resources for AutoNation Corporate Management, LLC, testified that AutoNation has no employees. (Tr. 29–30.)

While factual stipulations are binding, stipulations regarding questions of law are not. See *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917). Because Respondent AutoNation denied it was an employer under the Act in its answer, stated it had no employees in its opening statement, and presented witness testimony on the issue, I decline to bind Respondent AutoNation to the stipulation as to the legal conclusion that it is an employer under the Act.

The General Counsel argues that nothing in the Act's definition of "employer" requires it to have employees. The Act, at Section 2(2), defines "employer" as follows:

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

The Board, in *Operating Engineers Local 487 Health Fund*, 308 NLRB 805, 807–808 (1992), ruled that an entity must not only have employees, but must employ statutory employees to be considered an employer under the Act. Section 2(3) of the Act defines "employee" as follows:

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[3] Costa Mesa Cars and AutoNation are collectively referred to as the Respondents in this decision when discussing matters relating to both of them. Each entity is referred to by its name when needed in order to discuss distinctions between them.

[4] The plural term "Agreements" is used because the amended complaint includes agreements similar to arbitration agreement distributed at CMC. (GC Exh. 2.) With regard to enforcement, however, only Applebaum's agreement is at issue.

[5] Duport is mistakenly identified as Dupree in the complaint.

[6] The General Counsel asserts that the Respondents admitted AutoNation is an employer in its answer. I note, however, that the Respondents denied complaint allegation 4(b), which alleges that "[a]t all material times, Respondent AutoNation has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act." (GC Exhs. 1(g) and (k).)

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

The Supreme Court, in *NLRB v. Bell Aerospace Co. Division*, 416 U.S. 267 (1974), held that managers are also excluded from the definition of "employee" under the Act.

The General Counsel asserts that the signature of Coleman Edmunds, who is an officer of AutoNation and its Deputy General Counsel, appears on the Agreements. While this is true, it does not establish that Edmunds is a statutory employee of AutoNation. Because the General Counsel did not prove AutoNation has any statutory employees, I find the burden to establish AutoNation is a statutory employer, standing alone, has not been met.

The General Counsel contends that AutoNation was a direct participant in the alleged distribution and maintenance of the Agreements. 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).

Though it does not use any particular term of art, the complaint clearly alleges that Respondent AutoNation directly maintained the arbitration agreements, participated in the action to remove the Charging Party's lawsuit to federal court, and participated in filing the motion to compel arbitration. "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the respondent may be put upon his defense." *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100 (1953), quoting from *NLRB v. Piqua Munising Wood Products Co*., 109 F.2d 552, 557 (6th Cir. 1940). Accordingly, I find that if the General Counsel can establish AutoNation directly participated in the conduct ascribed to it, jurisdiction may attach to it as a direct participant with its subsidiary employers, including CMC, in the alleged violations. This is discussed below.[7]

III. FACTUAL BACKGROUND

A. The Arbitration Agreements

On April 19, Peter Vano, AutoNation Western Region Management, LLC's senior director for human resources, sent an email to the general managers of dealerships in California. The email stated:

> 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.
>
> **Roll-Out To All CA Store Associates**
>
> **Promptly email your store's Department Heads using the attached Department Head email template** to:
>
> o Notify them of this distribution process and request that they sign the updated agreement
> o Instruct them to promptly email their Department Associates using the attached Associate email template
> o 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**

[7] The complaint also asserts that Duport is an agent of AutoNation. I find that the General Counsel has established this allegation. As discussed herein, the general managers, including Duport, carried out instructions to disseminate and collect arbitration agreements from employees bearing AutoNation's officer's signature. The other general managers were not alleged as agents of AutoNation, however, so in the event a reviewing authority finds AutoNation's liability is limited to an agency theory based on Duport's actions, the remedy portion of this complaint would only apply to Costa Mesa Cars and AutoNation.

and date of signing as well.

• Deliver all signed agreements to Region HR.

Target Due Date:

• **Monday, April 29, 2013** to obtain signed agreements.

• **Monday, May 6, 2013**, to deliver all signed agreements to Region HR.

(GC Exh. 6, emphasis in original.) Vano instructed the general managers to contact him or their regional human resources representatives with any questions. He included a template for the general managers to pass on to department heads, stating:

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. 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.

(Tr. 24; GC Exh. 6.)

The arbitration agreement (Agreement) attached to Vano's email provides:

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.

(Jt. Exh. 1 at Exh. 6, emphasis in original.) CMC has maintained the Agreement since August 2013. (Jt. Exh. 1 ¶ 7.)

The employees at AutoNation's California subsidiaries received the following memorandum with the Agreement:

> 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.

(GC Exh. 6.)

Since August 25, 2013, certain indirectly-owned dealerships of Respondent AutoNation have utilized identical versions of the Agreement. Edmunds' signature, on behalf of the "Company", appears on those Agreements as well. (Jt. Exh. 1 at Exh. 7.) At least one current employee from each indirectly owned subsidiary dealership of Respondent AutoNation has signed the Agreement or a similar Agreement that contains provisions requiring 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.[8] (Jt. Exh. 1 ¶ 9.)

B. Charging Party's Actions and Litigation

Applebaum received the Agreement at work in May 2013. He did not understand it, so he did not immediately sign it. According to Applebaum, the same afternoon he received the Agreement, Duport called him, asked why he had not signed the Agreement, and told him he needed to sign it to keep his job. Applebaum said he wanted to have his family attorney review it. He took the Agreement home and transmitted it for review by his attorney. Before his attorney could review the Agreement, Duport told Applebaum that he was getting pressure from "corporate" to sign the Agreement and he needed to sign it immediately if he wanted to remain gainfully employed. (Jt. Exh. 1 at Exhs. 6, 7.) Duport denies making the statements Applebaum attributes to him. (Jt. Exh. 2 ¶ 7.)

Applebaum signed the Agreement on May 6, 2013. An image of Edmunds' signature is also on the Agreement for the "Company." (Jt. Exh. 1 at Exh. 9.)

CMC terminated Applebaum's employment in June 2013.[9] On October 31, 2013, Applebaum filed a class action complaint in the Orange County Superior Court of the State of California against AutoNation and CMC, alleging wage-and-hour and other violations on the part of CMC and AutoNation under state law. (Jt. Exh. 1 at Exh. 10.) On December 11, attorneys for AutoNation and CMC removed Applebaum's complaint to the U.S. District Court for the Central District of California, Case 8: 13-cv-0 1927-JVS-RNB. (Jt. Exh. 1 at Exh. 11.) On January 29, 2014, AutoNation and CMC jointly filed a motion to compel arbitration of Applebaum's claims. (Jt. Exh. 1 at Exh. 12.) The parties filed various ensuing motions culminating in an

[8] Signed agreements were retained at the National Payroll Center, a third-party vendor service. The physical location for storing the agreements is not material.

[9] AutoNation had no involvement with Applebaum's termination.

April 8, 2014, order from Judge James V. Selna granting the Respondents' motion to compel. (Jt. Exh. 1 at Exhs. 13–17.) On January 28, 2015, Applebaum voluntarily dismissed his lawsuit following settlement of his claims against the Respondents. (Jt. Exh. 1 at Exh. 18.)

IV. DECISION AND ANALYSIS

A. The Agreements' Prohibition on Class and Collective Legal Claims

Complaint paragraphs 7 and 8 allege that the Respondents have violated the Act by maintaining the Agreements, which require employees to waive their right to resolution of employment-related disputes by collective or class action, in violation of Section 8(a)(1) of the Act.

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act. The rights Section 7 guarantee include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

As a threshold issue, I must determine whether AutoNation directly participated in maintaining the Agreements. I find that 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.[10] In addition, subsidiary entities wholly owned by AutoNation rolled out the Agreements, oversaw their implementation, and maintained them as work rules.[11] Accordingly, I find AutoNation may be held liable if the Agreements violate the Act. *Esmark Inc.,* supra; *Smithfield Foods*, supra.

When evaluating whether a rule, including an arbitration agreement, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

Because the Agreements explicitly prohibit employees from pursuing employment-related claims on a class or collective basis, I find they violate Section 8(a)(1). The right to pursue concerted legal action, including class complaints, addressing wages, hours, and working conditions falls within Section 7's protections. See, e.g., *Murphy Oil USA, Inc.*, supra; *D. R. Horton,* supra;[12] see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)(Section 7 protects employee efforts seeking "to improve working conditions through resort to administrative and judicial forums"); *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948–949 (1942); *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under §7 of the National Labor Relations Act."); *Trinity Trucking & Materials Corp. v. NLRB*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), cert. denied, 438 U.S. 914 (1978). Accordingly, an employer rule or policy that interferes with such actions violates Section 8(a)(1). *D. R. Horton,* supra.; *Murphy Oil*, supra; See also, e.g., *Chesapeake Energy Corp*., 362 NLRB No. 80 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015); *Leslie's Pool Mart, Inc*., 362 NLRB No. 184 (2015).

The Respondents assert that as the lone named putative class member, Applebaum, was not engaged in concerted activity. Established caselaw instructs otherwise. Whether or not there were named plaintiffs other than Applebaum is immaterial since the Act "protects employees who engage in individual action . . . with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB*, 330 F.2d. 683, 685 (3d Cir. 1964). Applebaum's class action lawsuit sought to "enlist the support of fellow employees in mutual aid and protection" and intended to "initiat[e] or induc[e] group action" regarding alleged wage-and-hour violations against the Respondents. *Whitaker Corp*., 289 NLRB 933 (1988). "Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." *D. R. Horton*, supra, slip op. at 3[13]; see also *The Neiman Marcus Group, Inc*., 362 NLRB No. 157 (2015). I therefore find Applebaum was engaged in protected concerted activity when he filed and pursued his class action suit.

The Respondents further assert that the Agreements are voluntary. Even assuming Duport did not tell Applebaum he would be terminated if he did not sign the Agreement, I still find the Agreements were coercive. The instructions to AutoNation's general managers and department heads plainly require management or regional human resources to follow up individually and in-person with employees who do not return a

[10] 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.

[11] The Respondents assert that there was not centralized control over labor relations, interrelation of operations, or common management, ownership, or financial control. These factors, however, go toward single employer status, which is not alleged in the complaint.

[12] The Board in *Murphy Oil* reexamined *D. R. Horton*, and determined that its reasoning and results were correct.

[13] At footnote 5 in *D. R. Horton*, the Board, citing to court decisions, notes, "Employees surely understand what several Federal courts have recognized: that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members." As such, the Board observed that "in a quite literal sense, named-employee-plaintiffs protect the unnamed class members."

signed Agreement within a week's time. This requires management to track who returns the Agreements. It further subjects employees who choose to protect their Section 7 right to engage in class or collective litigation by not signing the Agreement to a one-on-one, in-person follow-up discussion with management. Finally, even if the Agreements are voluntary, they constitute an impermissible prospective waiver of Section 7 rights. *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

Consistent with the Board's precedent, I find the General Counsel has met his burden to prove the Respondents violated the Act as alleged in complaint paragraphs 7 and 8.

B. Enforcement of the Agreement

Complaint paragraph 9 alleges that the Respondents violated Section 8(a)(1) of the Act by enforcing Applebaum's Agreement as detailed above.

As a threshold issue, I find that AutoNation directly participated in enforcing the Agreement. The record, detailed above, is clear that attorneys for AutoNation and CMC jointly sought removal of Applebaum's lawsuit to federal court, jointly filed the motion to compel arbitration, and participated in the ensuing litigation resulting in that motion's success.

It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights. See, e.g., *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 16–17 (1962); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). Here, it is undisputed that the Respondents enforced the Agreement by filing a motion to compel individual arbitration and related documents in Applebaum's wage-and-hour lawsuit. (Jt. Exh. 1 ¶ 14, 16, 18.)

C. Affirmative Defenses

The Respondents contend that Applebaum's complaint is time-barred because "Plaintiff failed to file his complaint within six months of filing his charge with the Board." (R Br. p. 20.) This misconstrues Section 10(b) of the Act, which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Clearly, the Agreement was maintained and enforced within 6 months of the charge and the amended charge. See *PJ Cheese, Inc*., 362 NLRB No. 177, slip op. at 1 (2015). Accordingly, any statute of limitations argument fails.

The Respondents further asserts that the Board acted improperly by failing to give notice prior to revoking Memorandum GC10-06 and by adopting a new rule without soliciting public comments.[14] This affirmative defense was not asserted in the answer, and appears for the first time in the Respondents' posthearing brief. Even considering it on its merits, however, the Respondents' contention fails. General Counsel Memoranda are not considered binding authority, and they do not constitute Board procedure. My decision is based on Board and Supreme Court caselaw, which of course is not governed by the General Counsel's position in any manner.

V. CONCLUSIONS OF LAW

(1) Respondent Costa Mesa Cars, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act and Respondent AutoNation, Inc., is a holding company and CMC's parent company.

(2) The Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing arbitration agreements requiring all employment-related disputes to be submitted to individual binding arbitration.

(3) The Respondents violated Section 8(a)(1) of the Act by asserting the arbitration agreement in litigation the Charging Party brought against the Respondent in order to prevail on a motion to compel arbitration.

(4) Respondent AutoNation is liable for violating Section 8(a)(1) of the Act because it was a direct participant with its subsidiary CMC and other subsidiary dealerships in maintaining and enforcing the arbitration agreements.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the arbitration agreements are unlawful, the recommended order requires that the Respondents revise or rescind them in all of forms to make clear to employees that the arbitration agreements do not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums. The Respondents shall notify all current and former employees who were required to sign the arbitration agreements in any form that they have been rescinded or revised and, if revised, provide them a copy of the revised agreement. Because the Respondents utilized the arbitration agreements on a corporate-wide basis, the Respondents shall post a notice at all locations where the arbitration agreements, or any portion of them requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D. R. Horton,* supra, slip op. at 17; *Murphy Oil*, supra.

I recommend the Respondents be required to reimburse Applebaum for any litigation and related expenses, with interest, to date and in the future, directly related to the Company's filing its motion to compel arbitration in *Applebaum v. AutoNation, Inc. and Costa Mesa Cars, Inc*., Case 8: 13-cv-0 1927-JVS-RNB. [15] Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987), (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[14] The Respondents assert other affirmative defenses in the answer to the complaint, but did not argue any of them at the hearing or in closing briefs.

[15] Any extent to which litigation expenses were resolved by the settlement agreement between the parties shall be determined in the compliance stage.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondents, Costa Mesa Cars, Inc., Costa Mesa, California, and AutoNation, Inc. (AutoNation) a Delaware corporation with headquarter offices located in Fort Lauderdale, Florida, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing arbitration agreements that seek to have employees waive the right to maintain class or collective actions regarding employment-related disputes in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the arbitration agreements in all forms, or revise them in all forms to make clear to employees that the arbitration agreements do not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who signed the arbitration agreements in any form that they have been rescinded or revised and, if revised, provide them a copy of the revised agreement(s).

(c) In the manner set forth in this decision, reimburse the Charging Party for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondents' motion to dismiss his claims and compel individual arbitration in *Applebaum v. AutoNation, Inc. and Costa Mesa Cars, Inc*., Case 8: 13-cv-0 1927-JVS-RNB.

(d) Within 14 days after service by the Region, post at all facilities where it has maintained the arbitration agreements the attached notice marked "Appendix. "[17] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, a Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. March 14, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce arbitration agreements that seek to have employees waive the right to maintain class or collective actions regarding employment-related disputes in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL NOT rescind the arbitration agreements in all forms, or revise them in all forms, to make clear that the arbitration agreements do not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL NOT notify all current and former employees who signed an arbitration agreement in any of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement(s).

COSTA MESA CARS, INC.; D/B/A AUTONATION HONDA COSTA MESA; F/K/A POWER HONDA COSTA MESA AND AUTONATION, INC.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-123072 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.