

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

FCA US LLC

Respondent Employer

and

SHERI ANOLICK, an Individual

Case 07-CA-213717

Charging Party Anolick

and

BEVERLY SWANIGAN, an Individual

Case 07-CA-213746

Charging Party Swanigan

and

BRIAN KELLER, an Individual

Case 07-CA-213748

Charging Party Keller

-AND-

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO**

Respondent Union

and

SHERI ANOLICK, an Individual

Case 07-CB-213726

Charging Party Anolick

and

BEVERLY SWANIGAN, an Individual

Case 07-CB-213747

Charging Party Swanigan

and

BRIAN KELLER, an Individual

Case 07-CB-213749

Charging Party Keller

**GENERAL COUNSEL’S OPPOSITION TO RESPONDENT EMPLOYER’S MOTION
FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24(b) of the Board’s Rules and Regulations Counsel for the General Counsel (General Counsel) respectfully files this opposition to Respondent FCA US LLC’s (Respondent Employer) Motion for Summary Judgment (Motion) filed on July 29, 2020.¹ The General Counsel has sufficiently pleaded claims supporting violations of the Act and has presented genuine issues of material fact which preclude summary judgment.

I. BACKGROUND

On February 19, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) issued alleging, in pertinent part, that during contract negotiations, Respondent Employer by its agents, gave assistance and support to Respondent Union in order to obtain benefits, concessions, and advantages for Respondent Employer in the negotiation, implementation, and administration of the collective bargaining agreement, in violation of Sections 8(a)(1) and 8(a)(2) of the Act. The Complaint further alleged that Respondent Union by its agents, received assistance and support from Respondent Employer, in violation of Section 8(b)(1)(A) of the Act. On June 18, an Amended Consolidated Complaint and Notice of Hearing (Amended Complaint) issued modifying aspects of the Complaint including by adding additional alleged agents and clarifying some of the allegations including the applicable collective-bargaining agreements.

On March 4, Respondent Employer filed its Answer to the Complaint (Answer) denying the commission of any unfair labor practices. On March 13, Respondent Employer filed a Motion to Dismiss, asserting that the Complaint should be dismissed because the allegations are time-barred under Section 10(b) of the Act. In support of this assertion, Respondent Employer

¹ All dates refer to calendar year 2020, unless otherwise noted.

provided the following exhibits: 1) a document titled Chronology of News Reports and Other Information Available to the Charging Parties Prior to July 29, 2017; 2) a class action complaint filed by the Charging Parties on January 26, 2018; 3) the Charging Parties' response to a motion to dismiss the civil suit filed on July 10, 2018; 4) a July 26, 2017, press release from the United States Attorney's Office Eastern District of Michigan regarding the charging of a former Respondent Employer executive and a wife of a former Respondent Union Vice President; 5) a First Superseding Indictment dated July 26, 2017, but which does not disclose the filing date; 6) a document labeled Overlap Between NLRB Charges and Allegations in *Swanigan v. FCA US LLC*, No. 18-cv-10319 (E.D. Mich.); 7) a document dated July 26, 2017 labeled Letter Regarding DOJ Investigation; 8) a July 27, 2017 email from Respondent Employer CEO Sergio Marchionne. On May 5, the Board denied Respondent Employer's Motion to Dismiss, finding "no merit in the Respondent's contentions that the Board lacks jurisdiction over this matter under Section 10(b) of the Act."

On July 29, Respondent Employer filed the instant Motion. In its Motion, aside from some minor adjustments, Respondent makes the same arguments and presents the same exhibits as stated in its March 4 Motion to Dismiss. Respondent Employer argues that the "initial charges were served more than six months after the Charging Parties admittedly had knowledge of their claims" and the claims were therefore time barred by Section 10(b) of the Act. In support of this assertion, Respondent Employer asserts that the Charging Parties had actual or constructive knowledge no later than July 26, 2017 when the Department of Justice unsealed its indictment of Alphons Iacobelli (Iacobelli) and the criminal information of Jerome Durden (Durden), and issued a corresponding press release. Accordingly, Respondent Employer argues, the Charging Parties were required to file and serve the above-referenced charges by January 26,

2018 but failed to do so. Respondent argues, citing *NLRB v. CNN America, Inc.*, 865 F.3d 740, 764 (2017), that the Board’s May 5 order has no precedential value because the order was issued at the motion to dismiss stage without explanation.

II. ARGUMENT

Respondent’s Motion for Summary Judgment Lacks Merit.

Section 10(b) of the Act bars complaint based on an unfair labor practice occurring more than six months prior to a properly filed charge. However, the Section 10(b) period does not begin to run until “the aggrieved party knows or should know that his statutory rights have been violated.” *John Morrell & Co.*, 304 NLRB 896, 899 (1991), *review denied*, 998 F.2d 7 (D.C. Cir. 1993) (unpublished decision). Notice of the violation must be “clear and unequivocal,” but it can be actual or constructive. *St. Barnabas Medical Center*, 343 NLRB 1125, 1126 (2004). A charging party has constructive knowledge of a violation when it is “on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred.” *See, e.g., Amalgamated Transit Union Local 1433*, 335 NLRB 1263, 1263 n.2 (2001). Knowledge of the violation is imputed to the charging party “where it could have discovered the alleged misconduct through the exercise of reasonable diligence.” *St. Barnabas Medical Center*, 343 NLRB at 1126-27. The party asserting a Section 10(b) defense has the burden of showing such notice. *Id.* at 1127.

Here, Respondent Employer argues that the Charging Parties had actual or constructive notice of a bribery scheme on July 26, 2017, the day that Iacobelli was indicted and that Durden’s criminal information were announced, and therefore the charges are untimely. However, it was not until the public release of Iacobelli’s plea agreement was filed on January 22, 2018, that evidence emerged establishing that the corruption constituted unfair labor

practices. In his plea agreement, Iacobelli pleaded that the *purpose* of the bribes was to give Respondent Employer an advantage in bargaining and contract negotiation, and this admission is critical to the determination that the concealed payments violated Section 8(a)(1) of the Act. Without knowing the underlying purpose, it was impossible for the Charging Parties or the General Counsel to determine whether the payments constituted unlawful interference with employees' representation, unlawful assistance, or was in furtherance of some goal unrelated to the Act, (for example, hush money to cover up a safety concern with Respondent Employer's vehicles). *Cf. Leach Corp.*, 312 NLRB 990, 991 (1993) (where, in a case involving the transfer of employees from one facility to another, the Board began the running of the 10(b) period only upon completion of the transfer process—the earliest point at which the Union in the case could have had clear and unequivocal notice of a violation), *enforced*, 54 F.3d 802 (D.C. Cir. 1995).

Thus, even considering the fact that two of the Charging Parties filed charges prior to the release of Iacobelli's plea, which does not appear to be alleged in the Motion, is of no consequence because the July 2017, indictments merely raised a suspicion of corruption; they did not suggest that any particular unfair labor practices had been committed. Furthermore, Iacobelli's plea agreement also made clear that Respondent Employer transferred money directly into Respondent Union's coffers, purportedly as UAW-Chrysler Skill Development and Training Program d/b/a UAW-Chrysler National Training Center (NTC) salary reimbursements. Prior to this admission, there was no evidence available to the Charging Parties or the General Counsel that Respondent Employer unlawfully assisted Respondent Union by making concealed payments directly to the Respondent Union as an organization. These pieces of information, which did not come to light until January 2018, when Iacobelli's plea agreement was filed in the criminal court docket, made a critical difference in the determination that the charges were

meritorious. *Cf. Morgan's Holiday Markets*, 333 NLRB 837, 837, 841 (2001) (subsequently discovered evidence supporting existence of alter-ego relationship that came to light after charge was dismissed did not toll 10(b) period because there was adequate evidence available at the time of dismissal). Thus, the 10(b) period did not begin until at least January 22, 2018, placing the charges well within the statute of limitations.

The evidence presented at hearing will establish that Respondent Employer has violated Section 8(a)(1) and (2) of the Act as alleged. Notwithstanding the number of exhibits which may affect an Administrative Law Judge's decision, there likely remains some disputes which will turn on the credibility of witnesses, and can which only be resolved by an Administrative Law Judge after a full hearing of the evidence submitted by the parties. Consequently, Respondent Employer's Motion for Summary Judgment should be denied.²

Respondent Employer's reliance upon *NLRB v. CNN America, Inc.*, is misplaced. The relevant portion of *CNN America* addressed the D.C. Circuit's refusal to enforce the Board's order in which the Board required CNN to recognize and bargain with a union. *NLRB v. CNN America, Inc.*, 865 F.3d at 764. Exacerbating the problem was the fact that the Board had failed to explain its order and failed to balance three different factors, which was part of a decades-long dispute between the Circuit and the Board in other cases. *Id.* (citing n. 22) While noting that the Board has repeatedly disagreed with the Circuit and failed to meet the Circuit's requirements, the Circuit remanded the issue for the Board to either vacate its order or to provide sufficient justification as required by the Circuit. *Id.* Respondent Employer provides no cases showing

² In its Motion, Respondent Employer erroneously asserts that the Counsel for the "General Counsel has now disavowed any contention that the Charging Parties or the union membership were harmed in any way by FCA's alleged assistance and support." This claim is not addressed as the issue is not relevant to evaluating the Motion.

that the Board is required to re-evaluate the same arguments under the same set of facts, or that the Board cannot rely on its prior decision on the exact same issue.

III. CONCLUSION

As discussed, Respondent Employer's assertion that summary judgment is warranted based on Section 10(b) of the Act is without merit. Additionally, there are significant factual disputes as evidence will be introduced at trial to dispute the assertions set forth in Respondent Employer's Answer. Based on the foregoing, in addition to the reasons relied upon by the Board in denying Respondent Employer's Motion to Dismiss on May 5, the General Counsel respectfully requests Respondent Employer's Motion be denied.

Dated at Detroit, Michigan, this 12th day of August 2020.

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**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT EMPLOYER'S MOTION FOR SUMMARY JUDGMENT, dated August 12,
2020 by e-file to:**

Office of Executive Secretary/Board

I further certify that on August 12, 2020, I served the above by **electronic mail** or **facsimile** upon the following persons:

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August 12, 2020

Date

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Signature