

**NATIONAL LABOR RELATIONS BOARD
REGION SEVEN**

FCA US LLC, Respondent Employer,
and
SHERI ANOLICK, Charging Party (Case No. 07-CA-213717)
and
BEVERLY SWANIGAN, Charging Party (Case No. 07-CA-213746)
and
BRIAN KELLER, Charging Party (Case No. 07-CA-213748)

-AND-

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO**, Respondent
Union,
and
SHERI ANOLICK, Charging Party (Case No. 07-CB-213726)
and
BEVERLY SWANIGAN, Charging Party (Case No. 07-CB-213747)
and
BRIAN KELLER, Charging Party (Case No. 07-CB-213749)

**DEFENDANT UAW'S MOTION IN LIMINE TO EXCLUDE PROSECUTORIAL
DOCUMENTS OFFERED FOR THE TRUTH OF FACTS ASSERTED THEREIN WITH
MEMORANDUM OF LAW IN SUPPORT**

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For the reasons set forth below, the United Autoworkers International Union (“UAW” or “Union”) respectfully moves for an Order excluding the indictment and sentencing memoranda documents and limiting the purposes for which the plea agreement documents will be admitted. *See* Judge Jeffrey D. Wedekind, NLRB Div. of Judges Bench Book, § 10-100 (Jan. 2019) (“Judges have authority to rule on motions in limine seeking to limit the issues or evidence to be litigated or presented at a hearing.”) (hereafter, “ALJ Bench Book”). The categories of documents for which UAW seeks an exclusion order or limiting order are set forth in the UAW’s Memorandum in Support.

INTRODUCTION

The General Counsel has alleged that FCA US LLC (“FCA” or “Employer”) has violated Section 8(a)(2) and (1) and that the UAW has violated 8(b)(1)(A) by providing / accepting unlawful assistance to a labor organization or its agents. Specifically, the General Counsel alleges that the Employer (a) authorized Union agents to charge National Training Center (“NTC”) credit cards for personal expenses; (b) paid the salaries of Union officials who were not assigned to work at the NTC, but rather served on Respondent Union’s National Negotiation Committee; and (c) did each of these things for the specific purpose of “obtain[ing] benefits, concessions, and advantages ... in the negotiation, implementation, and administration” of its collective-bargaining agreements with the UAW. *See* Amended Consolidated Complaint (“Amend. Consol. Comp.”) ¶¶ 10-12.

Faced with an absence of direct evidence that either FCA or UAW engaged in or even knew about the underlying misconduct—never mind that either entity intentionally worked to secure benefits or concessions for FCA during bargaining—the General Counsel has suggested that in making his case he will rely upon documents generated in the criminal prosecutions of the individual wrongdoers. Based on similar allegations made in dismissed civil litigation initiated

by the Charging Parties, we assume that these documents will fall into one of three categories: plea agreements, sentencing memoranda, or charging documents (e.g., indictments or informations filed by the government). Although this brief will focus on the plea agreements as the most likely category the General Counsel will seek to use, we will briefly address the inadmissibility of sentencing memoranda and charging documents following our discussion of plea agreements. In short, because all three categories of documents are inherently unreliable hearsay, or even double hearsay, incapable of being cross-examined, they would be excluded from admission under the Federal Rules of Evidence and should be excluded from this hearing.

ARGUMENT

I. Evidentiary Standard

In the exercise of its unfair labor practice jurisdiction, the NLRB applies the Federal Rules of Evidence in so far as practicable. 29 U.S.C. § 160; Board’s Rules and Regulations, Section 102.39. Hearsay evidence is admissible in Board proceedings “if rationally probative in force and if corroborated by something more than the slightest amount of other evidence.” *Midland Hilton & Towers*, 324 NLRB 1141, 1141 n.1 (1997) (citing *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980)). Uncorroborated hearsay, in contrast, is entitled to little weight and should be rejected. *See W.D. Manor Mech. Contractors, Inc.*, 357 NLRB 1526, 1527 (2011); *see also P*I*E Nationwide*, 297 NLRB 454, 455 (1989); *see also Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229-30 (1938) (“Mere uncorroborated hearsay or rumor does not constitute substantial evidence.”). Similarly, double hearsay is inadmissible unless both parts satisfy the Board’s requirements. *See United Autoworkers Local 651 (Delphi/Delco East)*, 331 NLRB 479, 481 (2000) (an employee’s uncorroborated testimony that a second employee told her that he heard a supervisor call her a “voodoo sister” was unreliable hearsay and did not support a finding that the supervisor was in fact hostile to her); *see generally* ALJ Bench Book § 16-802.2.

II. The Plea Agreements Should Be Excluded or Limited because They Contain Inherently Unreliable and Uncorroborated Hearsay

The General Counsel must introduce evidence that FCA provided unlawful assistance to UAW officials for the purpose of obtaining benefits, concessions, and advantages in its collective bargaining with the UAW. *See* Amend. Consol. Comp. ¶¶ 11-13. The General Counsel may seek to prove this alleged fact through the admission of plea agreements entered into between the U.S. Department of Justice and certain former FCA or UAW officials that purport to describe the offenses to which the individuals pled and the acts that the defendants agreed that they were taking in furtherance of those offenses. As we explain below, however, the plea agreements are inadmissible and unreliable hearsay and should be rejected.

A. The Plea Agreements Should Be Excluded because They Are Rank Hearsay with No Valid Exception Under Federal Rule of Evidence 801 or 804.

The UAW anticipates that the General Counsel will seek to admit the plea agreements of former FCA and UAW officials in an attempt to establish substantive facts, including those in the “Factual Basis for Guilty Plea(s)” from each plea agreement. Specifically, the UAW expects the General Counsel will seek to introduce the plea agreements of former FCA employees Alphons Iacobelli, Michael Brown, and Jerome Durden and of former UAW employees Norwood Jewell, Nancy Johnson, Virdell King, and Keith Mickens. The General Counsel might also seek to introduce the plea agreement of Monica Morgan, wife of former, deceased UAW employee General Hollifield.

This use of these documents in their entirety, however, is patently prohibited by the Federal Rules of Evidence and the policy underlying the Rules. Out-of-court statements are not admissible to prove the truth of the matter asserted. Fed. R. Evid. 801, 802. Any effort to admit the plea agreements here to prove substantive facts underlying the conviction would constitute hearsay evidence. Therefore, they should be excluded unless the General Counsel can establish

an exclusion or exception to the general bar on hearsay. Fed. R. Evid. 801(d), 803, 804. Because a review of the possible hearsay exclusions or exceptions the General Counsel might rely upon makes clear that no exclusion or exception applies, the plea agreements should be rejected as substantive evidence. We will address each possible exclusion or exception in turn.

1. The first possible hearsay exclusion the General Counsel may rely upon is the exclusion for statements by employees of an opposing party. Fed. R. Evid. 801(d)(2)(D). However, this exclusion does not apply because the General Counsel cannot establish, as it is contrary to reality, that the admissions made by the former UAW employees in the plea agreements satisfy the two core requirements of Rule 801(d)(2)(D): first, that they were made while the employment relationship existed; and second, that the substance of the statements covers a matter within the scope of the employment relationship. *See* Fed. R. Evid. 801(d)(2)(D). Rather, the statements here (a) were made well after the relevant defendants were no longer employed by the UAW, and (b) were not made on a matter within the scope of the employment relationship, as the criminal conduct at issue fell outside the scope of their employment with UAW. *See Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165, 176 (1997) (F.R.E. 801(d)(2)(D) applies to “statement[s] made by [a party’s] agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship”); *see also* ALJ Bench Book § 16-801.3.¹

2. Nor can the General Counsel meet the hearsay exception covering statements against the declarant’s interest. Fed. R. Evid. 804(b)(3)(A). When the declarant is *unavailable*, as

¹ In addition, none of the pleadings from the individual defendants’ criminal cases would be admissible under the Board’s rules for party position statements or statements in pleadings because the UAW was not a party to the criminal cases and had no role in drafting or approving any of those documents. *Cf.* ALJ Bench Book § 16-803.1.

defined by Rule 804(a), a statement may be admissible if “a reasonable person in the declarant’s position would have made [the statement] only if the person believed it to be true because, when made” it would “expose the declarant to civil or criminal liability.” Fed. R. Evid. 804(b)(3)(A). This exception is inapplicable here for two reasons.

First, in order to rely on this exception, the proponent must establish that the declarant is unavailable. To establish unavailability here, the General Counsel would need to show that he “has not been able, by process or other reasonable means, to procure . . . the declarant’s attendance or testimony.” Fed. R. Evid. 804(a)(5)(B). The General Counsel cannot meet this bar. Counsel had the means and ability to subpoena the live testimony of any of the original declarants. *See* Board’s Rules and Regulations, Section 102.31(a); *see also Lewis v. NLRB*, 357 U.S. 10, 14 (1958) (“The Act makes clear that the issuance of subpoenas is mandatory.”). The fact that some of the individuals may be incarcerated is inapposite. *See* 29 U.S.C. § 161. Indeed, the Board has previously approved the use of videoconference technology to enable live testimony by incarcerated witnesses. *See Mpe, Inc.*, No. 09-CA-084228, 2015 WL 400660, at *1 (2015) (reversing ALJ’s order denying permission to take testimony of incarcerated witness via videoconferencing technology). As all the testimony for the instant hearing will be via videoconference, the fact that potential witnesses may be incarcerated and have to testify via videoconference is hardly disqualifying.

Second, factual admissions in the plea agreements are not truly statements against the declarants’ interest. Although they did expose the declarants to criminal liability, they were specifically designed to avoid *further* criminal liability. Indeed, courts have expressly rejected the reliability of plea agreements for purposes of Rule 804(b)(3). *See, e.g., United States v. Vera*, 893 F.3d 689, 693 (9th Cir. 2018) (rejecting the sentencing court’s reliance on coconspirators’

plea agreements in determining facts necessary to sentence the defendant in part because “[a] defendant signing a plea agreement may adopt facts that the government wants to hear in exchange for some benefit, usually a lesser sentence”).² For example, as discussed in more detail *infra* at Part II.C.1, Iacobelli, by pleading to the government’s preferred crime—conspiracy to violate the LMRA—avoided liability for theft from the NTC. He also avoided having to admit to facts that might have subjected him and his co-conspirators to civil suits (including the civil suit eventually brought against him by the NTC) that would seek to return the embezzled funds to the NTC. Therefore, rather than being reliable due to their tendency to inculcate the declarants, they are inherently *unreliable* because they were expressly designed to insulate the declarants from future, more expansive civil and criminal liability.³

² It is worth noting that, in *Vera*, the 9th Circuit held that the district court’s reliance on the codefendants’ plea agreements under Federal Rule of Evidence 804(b)(3) was an abuse of discretion in the context of a sentencing hearing. The rules of evidence are more flexible at sentencing, where “the Confrontation Clause does not apply . . . and district courts have wide latitude when deciding upon which information to rely.” *Vera*, 893 F.3d at 692. The information must just “still have ‘sufficient indicia of reliability to support its probable accuracy.’ U.S.S.G. § 6A1.3(a).” *Id.* The rules of evidence are not strictly applicable. *See* U.S.S.G. § 6A1.3(a). Therefore, in *Vera*, the statements in the plea agreements at issue were deemed unreliable even under a more relaxed standard than that imposed by the federal rules.

³ For substantially the same reasons as those set forth above with respect to Rule 804(b)(3), the plea agreements are also inadmissible under the residual hearsay exception, Federal Rule of Evidence 807. Just as the General Counsel cannot establish that the original declarants are unavailable for purposes of Rule 804(a), he cannot establish that the plea agreements are ‘more probative on the point for which [they are] offered than any other evidence that the [General Counsel] can obtain through reasonable efforts,’ as required by Rule 807(a)(2). The General Counsel would have been able to obtain live testimony—the preferable manner of proof according to the Board’s precedent— “through reasonable efforts.” Furthermore, just as it cannot be said that the plea agreements are “against the interest” of the declarants because they were self-serving statements designed to avoid far more expansive criminal and civil liability, they also cannot be said to be “supported by sufficient guarantees of trustworthiness,” as required by Rule 807(a)(1).

B. Plea Agreements Are Not Admissible, and at a Minimum, Must Be Substantially Redacted to Comply with Fed. R. Evid. 803(22)(C).

To the extent that the General Counsel seeks to admit the plea agreements under Federal Rule of Evidence 803(22)(C), which provides that judgments of conviction are admissible to prove “any fact essential to the judgment,” he should be required to rely only on (a) the record of conviction alone; or (b) only the portions of the plea agreements that establish facts essential to the crimes of conviction, with all other content fully redacted. *See United States ex rel. Miller v. Bill Harbert Int’l Const.*, 608 F.3d 871, 892 (D.C. Cir. 2010) (emphasizing the importance of the fact that the plea records were redacted to include only statements of elemental facts).

A judgment of conviction is a legal document, signed by a judge, that is entirely separate and distinct from a plea agreement. Although Rule 803(22)(C) literally applies only to a judgment of conviction, courts will at times allow a party to use individual statements from plea documents *if* such statements are limited to facts essential to the judgment. *See, e.g., id.* at 892 (affirming the district court’s use of a guilty plea and corresponding Rule 11 memoranda setting forth factual basis for the plea only because “[e]ach of [the facts relied on was] essential to sustain the legal conclusion of BIE’s guilt under Section 1 of the Sherman Act, and therefore fell within the scope of [Rule 803(22)]. Other facts that were not essential to that conclusion . . . were redacted by the district court”); *United States v. Anchor Mortg. Corp.*, No. 06 C 210, 2010 WL 1882018, *4 (N.D. Ill. 2010) (holding that select statements in a plea agreement were inadmissible hearsay because the substantive facts contained therein were not essential to prove the offense of conviction). By so limiting the permissible uses of evidence of final judgments in criminal cases, the Rules reject the admissibility of statements of non-elemental fact underlying criminal convictions—even if those statements are part of official judicial records, like plea

agreements. *Cf.* Fed. R. Evid. 803 Advisory Committee’s Notes (expressly recognizing that this rule “may leave a jury with the evidence of conviction but without means to evaluate it”).

When evidence of judgments of conviction are admitted under Federal Rule of Evidence 803(22), they are limited to facts establishing the bare elements of the convicted offense. Fed. R. Evid. 803(22)(C); *see, e.g., Bill Harbert Int’l Const.*, 608 F.3d at 892 (in a subsequent civil case, the district court redacted facts other than the essential elements of the crime from document evidencing criminal conviction). Applying that standard to a plea agreement means that a detailed factual basis for the plea that exceeds the minimum facts necessary to satisfy the elements of the offense—such as facts explaining the means by which the defendant committed the offense or references to the alleged conduct of third parties—should be excluded.

In this case, Iacobelli, Jewell, Johnson, King, and Mickens pled guilty to conspiracy to violate the LMRA. The elements of that offense are: (1) Two or more persons conspired to violate the Labor Management Relations Act in violation of 29 U.S.C. § 186(a)(2), (b)(1), and (d)(1); (2) The defendant knowingly and voluntarily joined the conspiracy; and (3) A member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy. 18 U.S.C. § 371; *see, e.g., Iacobelli Plea Part I.A. Durden*, in turn, pled guilty to misprision of a felony, in which the only identified felony is conspiracy to violate the LMRA. *See Brown Plea* at p. 5.⁴ The detailed factual bases and lists of overt acts set forth in

⁴ Jerome Durden was convicted only of Conspiracy to Defraud the United States and Failure to File Tax Return in violation of 18 U.S.C. § 371 and 26 U.S.C. § 7203, respectively. *Durden Plea* at p.1. Neither of these felonies necessarily includes an element of the offense that is relevant to the General Counsel’s Complaint. *See id.* at pp. 2-3 (Elements of the Offenses). Accordingly, none of the facts the General Counsel would seek to introduce from this guilty plea are “essential to the judgment.” F.R.E. 803(22). Accordingly, the UAW moves to have Durden’s guilty plea excluded in its entirety.

Similarly, Iacobelli and Monica Morgan pled guilty to subscribing a false tax return in violation of 26 U.S.C. § 7206(1). Neither the elements of that tax offense nor the factual

each of the plea agreements are not essential to a judgment of conviction for conspiracy to violate the LMRA, meaning that those facts would be inadmissible hearsay.

In *S.E.C. v. Aragon Capital Mgmt., LLC*, 672 F. Supp. 2d 421, 433 (S.D.N.Y. 2009), *aff'd in part, vacated in part on other grounds sub nom. S.E.C. v. Rosenthal*, 650 F.3d 156 (2d Cir. 2011), and *aff'd in part sub nom. S.E.C. v. Rosenthal*, 426 F. App'x 1 (2d Cir. 2011), the Securities and Exchange Commission sought to enter the guilty plea statements of the defendant's co-conspirator (and son) for conspiracy to violate the securities laws as substantive evidence that the defendant had committed securities fraud. 672 F. Supp. 2d at 433. The court held that the co-conspirator's statements were not admissible for that purpose "because the actual transmission of material public information is *not* an element of an insider trading conspiracy, and therefore not essential to a judgment of conviction." *Id.* at 434 (citing Fed. R. Evid. 803(22)).

Here, of course, the General Counsel seeks to do far more than the SEC attempted to do in *Aragon Capital Mgmt.* Specifically, the General Counsel seeks to rely on the factual bases and overt acts set forth in Iacobelli, Jewell, Johnson, King, Brown, and Mickens's guilty pleas to establish all of the elements of the Section 8(a)(2) and (1) and 8(b)(1)(A) violations alleged in the Complaint. The vast majority of the facts detailed in the plea agreements, however, were not essential to the convictions for conspiracy to violate the LMRA and are therefore not admissible under Federal Rule of Evidence 803(22). That the factual bases for the plea agreements go well beyond what was essential to the judgment of conviction can be demonstrated with just a few examples from Iacobelli's plea:

statements underlying it are relevant to the General Counsel's case, and statements related to Morgan and Iacobelli's guilty pleas should likewise be excluded from the evidentiary record of this case.

- The prohibited payments and things of value included paying off the mortgage on the personal residence of a UAW Vice President, personal travel, designer clothing, cases of custom-labeled wine, furniture, jewelry, and custom-made watches. Factual Basis ¶ 8.
- FCA Vice President Alphons Iacobelli and other FCA executives and FCA employees transferred hundreds of thousands of dollars in prohibited payments from FCA, through the NTC, into tax-exempt organizations controlled by UAW officials, including the Leave the Light On Foundation and the Making Our Children Smile Foundation. Factual Basis ¶ 9.
- As part of the same conspiracy, FCA Vice President Alphons Iacobelli and other FCA executives and FCA employees authorized the regular transfer of hundreds of thousands of dollars from the NTC to the UAW, purportedly as reimbursement for the salaries of UAW employees assigned to the NTC. In fact, many of those UAW employees provided no services to the NTC. Factual Basis ¶ 10.
- FCA Vice President Alphons Iacobelli, FCA Director FCA-7, FCA Senior Manager FCA-11, FCA Financial Analyst Jerome Durden, FCA-9 and other co-conspirators acting in the interest of employer FCA paid and delivered more than \$1.5 million in prohibited payments and things of value to UAW officers and UAW employees in an effort to obtain benefits, concessions, and advantages for FCA in the negotiation, implementation, and administration of the collective bargaining agreements between FCA and the UAW. Factual Basis ¶ 11.

Because conspiracy to violate the LMRA does not require that any of the co-conspirators achieved their unlawful objective, none of these facts regarding what payments were made or why those payments were made is essential to the judgment of conviction and are therefore inadmissible under Federal Rule of Evidence 803(22). *See* 29 U.S.C. § 186; 18 U.S.C. § 371; *see also Aragon Capital Mgmt.*, 672 F. Supp. 2d at 434; *cf. Descamps v. United States*, 570 U.S. 254, 270 (2013) (“when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense’s elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment”).

The same can be said for the overt acts listed in each of the plea agreements. Conviction for conspiracy to violate the LMRA requires that one member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy. 18 U.S.C. § 371; 29 U.S.C. § 186. The guilty pleas, however, list many overt acts that might have

advanced the conspiracy. Iacobelli's plea, for example, includes 12 paragraphs of overt acts alleged to be in furtherance of the conspiracy. Iacobelli Plea, Overt Acts ¶¶ 12-23. But because conspiracy to violate the LMRA requires only one overt act, by definition, the extraneous overt acts are not essential to the judgment. *See Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 569 (1951) ("since all of the acts charged [in a conspiracy case] need not be proved for conviction, such a verdict does not establish that defendants used all of the means charged or any particular one") (internal citation omitted); *Columbia Plaza Corp. v. Sec. Nat. Bank*, 676 F.2d 780, 790 (D.C. Cir. 1982) (affirming exclusion of evidence to be entered pursuant to F.R.E. 803(22) because general "verdicts did not themselves provide a basis for concluding that the alleged overt acts involving [plaintiff] were among [the] great number of alleged overt acts . . . proved in those cases"). At least absent an individualized determination by the judge in this case that particular overt acts were proved in the prior criminal proceedings, *see Emich Motors Corp.*, 340 U.S. at 572, the guilty pleas shed no light on which overt act—if any—was essential to the judgment of conviction for conspiracy to violate the LMRA.

More to the point, the UAW contests several of the facts set forth in the plea agreements. To take one example among several, the UAW contests that the payments Iacobelli and other senior FCA officials are alleged to have directed to certain former UAW officers and employees were made to obtain benefits, concessions, and advantages for FCA in the negotiation, implementation, and administration of the collective bargaining agreements between FCA and the UAW. Rather, as the UAW will seek to prove at the hearing if necessary, the primary purpose of the conspiracy to which Iacobelli and the other FCA officials pled was to conceal their own theft and embezzlement of NTC funds. After all, Iacobelli's own embezzlement constituted the single biggest theft of NTC funds by any of the individuals involved in the

conspiracy and underpinned both Iacobelli's conviction for the failure to report additional income of \$861,927 on his 2014 tax return and the requirement that he make restitution of \$835,523 to the United States Treasury for back taxes owed. *See* Iacobelli Plea, Overt Acts ¶ 26 & Sentence ¶ E (Restitution).

In sum, beyond the bare elements of the offenses of which the individuals were convicted, the plea agreements do not establish, and are not admissible to establish, the subsidiary facts the General Counsel seeks to prove.

C. The Statements in the Plea Agreements Should Be Excluded Because They Are Inherently Unreliable.

As discussed above, the Federal Rules of Evidence prohibit the admission of the plea agreements as substantive evidence of most of the statements made therein as hearsay. Although the Board may have discretion to adopt a more flexible attitude toward hearsay than the Federal Rules of Evidence, such flexibility still does not support admitting the evidence at issue here because the factual statements made in these plea agreements (1) are inherently unreliable and, (2) will not be corroborated with other evidence at the hearing. *United Autoworkers Local 651 (Delphi/Delco East)*, 331 NLRB 479, 481 (2000) (overruling judge and dismissing charge because uncorroborated and unreliable hearsay did not support finding that union was hostile to employee); *cf. Rome Elec. Sys.*, 356 NLRB 170 n. 4 (2010) (Board “may consider probative hearsay testimony that is corroborated by other evidence or otherwise inherently reliable”).

1. The Statements of Nonessential Fact Made in the Plea Agreements are Self-Serving and Inherently Unreliable.

Federal courts and the NLRB have recognized what is obvious to anyone familiar with the criminal pleading process: statements made in a plea agreement are self-serving statements made with the object of avoiding more extensive criminal responsibility. Even when it admits the testimony, the Board accords self-serving hearsay little weight. *See, e.g., P*I*E Nationwide*, 297

NLRB 454, 455 (1989) (according little weight to self-serving and unexamined hearsay assertions); *Carpenters Dist. Council of Sabine Area, Local 753*, 248 NLRB 802, 802 fn. 2 (1980) (same).

The factual statements contained in the plea agreements the General Counsel seeks to admit—which, as set forth above, are not essential to the judgments of conviction—are exactly the type of inherently unreliable and self-serving hearsay statements that are either excluded or accorded minimal weight. In *Turpin v. Kassulke*, for example, the Sixth Circuit recognized that technically inculpatory statements made to law enforcement are made “to *avoid* criminal liability to the extent possible, not to accept it.” 26 F.3d 1392, 1398 (6th Cir. 1994) (emphasis in original). In affirming a district court order excluding such statements, the court recognized that “the rationale supporting the hearsay rule’s against-penal-interest exception—that persons generally will not make damaging statements against themselves unless they are true”—does not apply to such statements. *Id.* (internal alterations and quotation marks omitted). The Board reached a similar conclusion in *Detroit Newspapers Agency*, 342 NLRB 223, 248 (2004). There, the ALJ found that an employee did not actually engage in the misconduct for which he was discharged, even though he has previously pled *nolo contendere* and paid restitution related to the alleged misconduct. *Id.* The ALJ reasoned that, in the right circumstances, a negotiated plea is not inconsistent with a denial of participation in the underlying charged conduct. *Id.*

Beyond their self-serving nature, the nonessential fact statements made in plea agreements are inherently unreliable because no one has an incentive to contest them. As the U.S. Supreme Court has observed:

The meaning of [plea colloquies and trial transcripts] will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. . . [D]uring plea hearings, the

defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations.

Descamps, 570 U.S. at 270; *see also Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016) (“Statements of ‘non-elemental fact’ in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he ‘may have good reason not to’”).

The Supreme Court’s observations about the reliability of fact statements made during the plea process certainly apply here. To return to the example of Alphons Iacobelli, Iacobelli had every incentive to cooperate with the government and plea to the conspiracy and tax charges because doing so enabled him to avoid the consequences of his own theft and embezzlement from the NTC. That theft dwarfed the payments that Iacobelli allegedly directed to UAW officials. *See Iacobelli Plea, Overt Acts*, at ¶ 25 (“Between 2011 and 2015, Alphons Iacobelli received hundreds of thousands of dollars in compensation from the NTC”). Indeed, as has been alleged in civil litigation brought by the NTC against Iacobelli, Iacobelli’s own theft from the NTC netted him at least the following: \$187,145 to pay personal expenses accrued on his personal credit card; \$259,298 to pay personal expenses accrued on his NTC credit card; \$44,491.36 to pay his daughter’s outstanding student loan balance; \$868,736 to pay the personal expenses accrued on his wife’s personal credit card; and \$275,000 to purchase a 2013 Ferrari 458 Spider automobile. *See Complaint* ¶¶ 19-24, *The UAW-Chrysler Skill Dev. & Training Program v. Iacobelli*, Case No. 2018-166226-CZ (Mich. Oakland Cnty. Cir. Ct. June 8, 2018). Notwithstanding what is obviously personally motivated theft, it was to the Government’s benefit, and thus, Iacobelli’s, to frame his actions as done not just for personal gain, but as actions taken to benefit FCA. By pleading to the government’s preferred crime—conspiracy to

violate the LMRA—Iacobelli avoided having to answer criminally for his theft from the NTC. At the same time, Iacobelli managed to avoid having to admit the underlying facts of his own theft, potentially insulating him and his co-conspirators from civil suits (including the civil suit eventually brought against him by the NTC) that would seek to reclaim the embezzled funds.

In sum, the plea agreements the General Counsel seeks to admit and rely on to establish substantive wrongdoing in this case are—like all plea agreements—nothing more than negotiated compromises between prosecutor and defendant made for the purpose of avoiding criminal liability. *See Newton v. Rumery*, 480 U.S. 386, 409-410 (1987) (Stevens, J., dissenting) (“The plea bargain represents a practical compromise between the prosecutor and the defendant that takes into account the burdens of litigation and its probable outcome The defendant admits wrongdoing for conduct upon which the guilty plea is based and avoids further prosecution.”). Accordingly, the factual statements made in those plea agreements are inherently unreliable self-serving hearsay and should be excluded from the record or accorded only minimal weight.

2. *The Statements of Nonessential Fact Made in the Plea Agreements Are Uncorroborated by Other Evidence at the Hearing.*

In addition to their self-serving nature, the hearsay statements contained in the plea agreements will be uncorroborated by other evidence. In appropriate situations, the Board will admit hearsay if it is “rationally probative in force” and “corroborated by something more than the slightest amount of other evidence.” *Midland Hilton & Towers*, 324 NLRB at 1141 n.1. Uncorroborated hearsay, in contrast, is “entitled to little weight” even if it is admitted. *W. D. Manor Mech. Contractors, Inc.*, 357 NLRB 1526, 1527 (2011); *see generally* ALJ Bench Book at § 16-802.1.

The fact statements made in the plea agreements are exactly the type of uncorroborated statements that should be excluded or accorded minimal weight because there is no other

evidence to corroborate these self-serving statements. As the UAW understands it, the General Counsel does not intend to offer any corroborating evidence to shore up the factual statements made in the various plea agreements, including the statement that payments to UAW officials were made “in an effort to obtain benefits, concessions, and advantages for FCA in the negotiation, implementation, and administration of the collective bargaining agreements between FCA and the UAW” and the statements suggesting that the payments were made with FCA money. *See* Iacobelli Plea, Factual Basis ¶¶ 9, 11. Absent reliable corroborating evidence, these fact statements should be excluded or accorded virtually no weight.

Indeed, there exist factual discrepancies in the plea agreements themselves. For example, Virdell King’s plea states that, in 2011 and 2015, she served as a member of the UAW national negotiating committee responsible for the collective bargaining agreements between the UAW and FCA. King Plea, Factual Basis ¶ 4. Norwood Jewell’s plea agreement, in contrast, states that “In 2014, Virdell King was reassigned into an administrative role by Norwood Jewell and did not participate in the actual negotiating process between UAW and FCA.” Jewell Plea, Factual Basis, ¶ 9. Both of those statements cannot be true, and absent the ability to cross-examine the declarants, there is no way to explain the discrepancy.

To take another example, three of the plea agreements—Iacobelli’s, Brown’s, and Johnson’s—state that NTC funds were directed to UAW officials to obtain benefits, concessions and advantages in the negotiation, implementation, and administration of collective-bargaining agreements between FCA and the UAW. Iacobelli Plea, Factual Basis at ¶ 11; Brown Plea at p.4; Johnson Plea, Factual Basis at ¶ 13. A corresponding statement that the purpose of these payments to influence the UAW’s collective-bargaining activities is, however, conspicuously absent from the pleas of King, Mickens, Morgan, and Jewell. King Plea, Factual Basis ¶¶ 1-15;

Mickens Plea, factual Basis pp. 2-5; Morgan Plea, Factual Basis ¶ 1; Jewell Plea, Factual Basis, ¶¶ 1-17. The absence of this key fact from this set of plea agreements calls into question whether the purpose of these payments was to influence UAW collective bargaining or contract administration. It also casts serious doubt on the idea that the UAW understood that the purpose of these payments was to affect its collective bargaining activities. After all, the only UAW employee to admit to the alleged purpose behind these payments was Nancy Johnson, the government's key cooperating witness and the beneficiary of multiple sentence reductions stemming from her cooperation. *See, e.g., United States v. Johnson*, Case No. 2:17CR20406, Dkt. No. 218 (Sept. 13, 2019) (Order amending criminal judgment to reduce Johnson's sentence from 12 months to 5 months because of continuing cooperation with the U.S. attorney); *see also id.* Dkt. No. 176 at pp. 8-9 (government sentencing memorandum describing Johnson's ongoing cooperation). Because of the inconsistent statements regarding the purpose of these payments in the various plea agreements, this one statement in the Iacobelli, Brown, and Johnson plea agreements cannot be considered reliable evidence that the payments were made for the purpose of influencing UAW collective bargaining.

The inconsistencies in the plea agreements underscore the problem with relying on uncorroborated hearsay to establish key facts in the case: absent live testimony, there is no opportunity to examine witnesses about any inconsistencies or ambiguities and the judge cannot assess witness credibility and resolve the factual disputes that are sure to arise in any complicated unfair labor practice proceeding. This is significant because "Board law 'expresses a strong preference for live oral testimony.'" *Westside Painting, Inc.*, 328 NLRB 796, 797 (1999) (quoting *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996)). The Board's preference for live testimony is rooted in its acknowledgement that "live oral testimony enables

the judge to observe the demeanor of the witness to determine the witnesses' veracity," which is particularly important in Board proceedings because "a judge is often presented with situations where there is conflicting testimony and credibility determinations are central to the resolution of the case." *Id.*

Here, as mentioned above, if the General Counsel wants to establish the facts set forth in the plea agreements, he has the ability to do so without relying on suspect, negotiated plea agreements: the General Counsel can subpoena the live testimony of Iacobelli, Brown, Durden, King, Johnson, Mickens, Morgan, and Jewell. *See supra* at Part II.A.2 (citing authority); *see also Lewis v. NLRB*, 357 U.S. 10, 14 (1958) ("The Act makes clear that issuance of subpoenas is mandatory."). This would enable the Respondents to cross-examine those witnesses and the judge to assess those witnesses' credibility. The General Counsel should be required to use that authority instead of relying on suspect out-of-court statements of what supposedly happened at the NTC.

* * *

To summarize, the General Counsel seeks to establish the bedrock facts of his case—*i.e.*, that the UAW received and accepted financial support from FCA in connection with ongoing contract negotiations for the collective-bargaining agreements between the parties—through the introduction of uncorroborated, self-serving, and inherently unreliable plea agreements, rather than the live testimony that would be the best evidence of what actually happened. For these reasons, the General Counsel's intended use of these plea agreements falls far short of the Board's evidentiary standards. *See* ALJ bench Book § 16-802. Accordingly, the plea agreements should be excluded in their entirety as unreliable hearsay. In the alternative, at a minimum, the

plea agreements should be admitted only for the limited purpose of showing the bare facts established in the elements of each offense.

III. Sentencing Memoranda Are Not Evidence and Should Be Excluded in their Entirety

It is unclear to the UAW whether the General Counsel will attempt to establish any of the facts alleged in the Complaint through the introduction of sentencing memoranda introduced in the various criminal proceedings. Nevertheless, out of an abundance of caution, the UAW explains below why the introduction of such documents for the purpose of establishing contested facts would be plainly improper.

Sentencing memoranda and presentence reports are nothing more than argumentative documents setting forth one party's position as to the legal import of various factors on the appropriate sentence to give to a criminal defendant who has already been convicted of a crime. As such, they are "not evidence and [are] not a legally sufficient basis for making findings on contested issues of material fact." *United States v. Quintana*, 340 F.3d 700, 704 (8th Cir. 2003) (internal quotation marks omitted; emphasis omitted). And, under longstanding NLRB precedent, "arguments in the parties' briefs are not evidence" and cannot serve as the basis for establishing contested facts. *Hamilton Park Health Care Ctr.*, 2017 WL 3580356, at *1 n.4 (2017) (rejecting as evidence arguments regarding corporate structure made in parties' arbitration briefs in a related proceeding); *see also Elec. Data Sys. Corp.*, 305 NLRB 219, 262 (1991) ("as the General Counsel's 10(j) petition and briefs would contain only allegations and assertions by the Government . . . they are not evidence"). Because the sentencing memoranda produced in the criminal cases are merely the parties' arguments about the import of the sentencing factors on the defendants' convictions, they do not contain evidence and should be excluded from this unfair labor practice proceeding in their entirety.

Nor can it be argued that the sentencing memoranda of the individual defendants may be admitted as statements against the penal interest under Federal Rule of Evidence 804(3)(A). As explained *supra* at Part II.A.2, these witnesses are not unavailable. And, perhaps more importantly, the statements in the sentencing memoranda are facially for the purpose of avoiding or minimizing criminal punishment (the defendants were, by this point, already convicted), and therefore do not tend to expose the defendant to criminal liability. *Cf.* Fed. R. Evid. 804(3)(A).

In short, the sentencing memoranda do not contain evidence and, in any event, would not be admissible under the Federal Rules. Accordingly, they should be excluded in their entirety.

IV. Charging Documents Are Not Evidence and Should Be Excluded in their Entirety

Finally, it is also unclear to the UAW whether the General Counsel intends to introduce any of the charging documents to establish the facts alleged in those documents. But again, out of an abundance of caution, the UAW explains why introduction of the charging documents for this purpose would be plainly improper.

“It is ‘hornbook law’ that indictments are not evidence of guilt.” *United States v. Sardelli*, 813 F.2d 654, 657 (5th Cir. 1987). The NLRB has similarly long recognized the obvious fact that the allegations appearing in a Board complaint are not evidence of the wrongdoing alleged. *See, e.g., Keller Mfg. Co.*, 272 NLRB 763, 781 (1984) (complaint’s allegations that employee engaged in union activity and that employer knew of it were “not evidence” of those facts); *Elec. Data Sys. Corp.*, 305 NLRB at 262 (allegations made in General Counsel’s Section 10(j) petition and briefs were not evidence of the wrongdoing alleged therein); *see generally* ALJ Bench Book § 16-801.3 (the General Counsel’s formal papers “generally do not constitute substantive evidence unless they contain an admission”). Because there is nothing that even arguably

constitutes evidence contained in the charging documents from the criminal cases, those documents should be excluded in their entirety.

CONCLUSION

The sentencing memoranda and charging documents should be excluded from this proceeding in their entirety. The plea agreements should be excluded from the proceedings, or, in the alternative, should be substantially redacted to omit all statements of fact that are not essential to establishing the elements of the crimes to which the defendants pled.

Respectfully submitted,

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Dated: August 26, 2020

**NATIONAL LABOR RELATIONS BOARD
REGION SEVEN**

FCA US LLC, Respondent Employer,
and
SHERI ANOLICK, Charging Party (Case No. 07-CA-213717)
and
BEVERLY SWANIGAN, Charging Party (Case No. 07-CA-213746)
and
BRIAN KELLER, Charging Party (Case No. 07-CA-213748)

-AND-

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO**, Respondent
Union,
and
SHERI ANOLICK, Charging Party (Case No. 07-CB-213726)
and
BEVERLY SWANIGAN, Charging Party (Case No. 07-CB-213747)
and
BRIAN KELLER, Charging Party (Case No. 07-CB-213749)

STATEMENT OF SERVICE

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