

**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)

**POST-HEARING BRIEF**

**INTRODUCTION**

In the Second Amended Complaint, the General Counsel claims that Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (“UAW”) violated the National Labor Relations Act because (1) agents of UAW allegedly charged personal expenses to credit cards of the National Training Center, a cooperative labor-management committee that is independent from UAW and from Respondent Fiat Chrysler Automobiles (“FCA”), and (2) agents of FCA allegedly “pa[id] the salaries of Respondent Union officials who were not assigned to work at the [National Training Center], but

rather served on Respondent Union’s National Negotiation Committee.” Second Consol. Am. Compl. (“SAC” or “Second Amended Compl.”) ¶ 11. But the General Counsel utterly failed to prove these allegations at trial, and as the trial made clear, there are at least four independent reasons that the Second Amended Complaint must be dismissed.

First, the Second Amended Complaint must be dismissed because the *only* evidence that the General Counsel has offered to support the SAC’s allegations are unreliable statements from a handful of plea agreements from former UAW and FCA officers and employees. As set forth at greater length in UAW’s separate Motion in Limine and the arguments at the hearing, the statements in those plea agreements are pure hearsay, and are not admissible evidence. Indeed, as Counsel for the General Counsel remarkably explained, he chose not to subpoena the people who entered the plea agreements because “we couldn’t consider them to be reliable witnesses” for the General Counsel’s case. 9/10/20 Tr. 220:21-221:2. If the individuals themselves are not “reliable witnesses,” then it goes without saying that their uncontroverted hearsay statements, given for the self-serving purpose of avoiding greater punishment, are not reliable evidence. Once these hearsay plea agreements are properly excluded, there is *no evidence* supporting the Second Amended Complaint, and so it must be dismissed.

Second, even if the hearsay plea agreements were fully admitted for the truth of the factual statements made therein, the General Counsel has not proven the factual allegations of the SAC or shown that the alleged facts make out a violation of the National Labor Relations Act (“NLRA”). As to the allegation regarding misuse of National Training Center (“NTC”) credit cards, the plea agreements contain no evidence that the former UAW officers and employees who misused NTC credit cards did so *as agents of UAW*. UAW does not benefit in any way when individuals acting in their NTC capacities use NTC funds to buy designer shoes or to pay

off their home mortgage, and therefore, such purchases cannot be attributed to UAW. As to the allegation that NTC funds were used to pay the salaries of individuals who served on the UAW national negotiation committee instead of working at the NTC, the plea agreements simply contain no evidence that NTC funds were used to pay the salary of any such person. And finally, even if the factual allegations of the SAC *had* been proven, those facts would not make out the legal violations enumerated in Paragraphs 15 and 16 of the SAC. Thus, the SAC must be dismissed for this second, independent reason.

Third, the SAC must be dismissed because the charges were not served within the time period set forth in NLRA § 10(b), 29 U.S.C. § 160. The evidence at trial showed that the Charging Parties had actual or constructive knowledge of their claims by July 26, 2017, which means the charges had to be filed *and served* by January 26, 2018; instead, the charges were served on January 29, 2018. For purposes of this proceeding, a factual finding as to the date the Charging Parties had actual or constructive knowledge of their claims will allow UAW to make clear on appeal that the charges are indeed untimely.

Finally, the SAC must be dismissed because UAW has denounced and remedied the wrongful conduct alleged in the SAC. Two new collective bargaining agreements (“CBAs”) have been bargained since the CBA that is the subject of the SAC, and far-reaching reforms have been made at both UAW and the NTC. In light of these changes, there is simply neither a justification for nor a need to impose a remedy at this late date.

### **FACTUAL BACKGROUND**

In or around 2017, the Department of Justice began an investigation into “alleged illegal activities among certain individuals associated with the UAW-Chrysler National Training Center.” UAW Ex. 31. The NTC is a tax-exempt labor-management committee formed under

Section 501(c)(5) of the Internal Revenue Code to provide for the “education, training, retraining, and/or placement” of FCA employees who are represented by UAW. GC Ex. 9. To this end, joint programs such as health and safety training, new hire orientation, and World Class Manufacturing classes are offered at the NTC. 9/10/20 Tr. 205:13-19. The NTC was created by collective bargaining between FCA and UAW, but it is a legally separate entity from both FCA and UAW. GC Exs. 9, 11; 9/10/20 Tr. 173:9-13, 205:7-12, 20-23. As agreed during collective bargaining, the NTC is funded by FCA; during the relevant time period, FCA’s funding obligations were determined by a contribution schedule set forth in the CBA that was based on the number of hours worked by FCA employees. 9/10/20 Tr. 174:12-176:10, GC Ex. 11 at 348-50. The NTC is governed by a joint board composed of an equal number of UAW and FCA officers and employees. 9/10/20 Tr. 205:24-206:5.<sup>1</sup>

After the Charging Parties learned of the Department of Justice investigation related to the NTC, they filed an initial (later withdrawn) set of unfair labor practices between August and November 2017, and then, in January 2018, they filed the unfair labor practice charges that are the basis of this case. The government’s investigation ultimately revealed that certain former officers and employees of FCA and UAW who sat on the NTC’s governing board had misappropriated NTC funds and spent them on lavish personal purchases rather than the training and education programs for which they were intended. *See generally* GC Exs. 15-22. A number of these former officers and employers were charged and pled guilty to a variety of crimes. *Id.*

On February 19, 2020, more than two years after the Charging Parties had filed their initial charges in this case, and only after the district court’s dismissal of the Charging Parties’

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<sup>1</sup> The UAW-Ford and UAW-GM program centers are structured in a similar manner. *See* 9/10/20 Tr. 157:20-158:9, 174:14-175:3.

civil litigation alleging a breach of the duty of fair representation had been affirmed by the Sixth Circuit, the General Counsel issued a consolidated complaint against UAW and FCA. As to UAW, as noted above, the Consolidated Complaint (“Complaint”) alleged that agents of UAW had charged personal expenses to NTC credit cards, and that funds of the NTC were used to pay the salaries of UAW officials who served on UAW’s national negotiation committee instead of working at the NTC. Compl. ¶ 11. The Complaint alleged that these actions breached the union’s duty of fair representation; breached the union’s fiduciary duty towards its members; constituted conduct inherently destructive to employee rights; and coerced and restrained employees. *Id.* ¶¶ 16-17. On August 27, 2020, the General Counsel issued a Second Amended Complaint containing the same allegations. SAC ¶¶ 11, 15-16.

At the hearing, the *only* evidence offered by Counsel for the General Counsel to support the allegations of the SAC was eight plea agreements signed by former FCA and UAW officers and employees. Based solely on those eight plea agreements, the General Counsel now asks the Board to find that all of the factual allegations of the SAC have been proven and that all of the legal violations set forth in Paragraphs 15 and 16 of the SAC have been shown. For the reasons set forth below, however, the General Counsel has not carried his burden of establishing either the facts or the legal violations set forth in the SAC.

## **ARGUMENT**

### **I. The Plea Agreements Must Be Excluded In Their Entirety As Inadmissible Hearsay**

The ALJ should not allow the General Counsel to prove his case using nothing but self-serving hearsay statements made by admittedly unreliable witnesses that Counsel for the General Counsel decided he would rather not call. This trial-by-affidavit tactic has odious roots in the common law – most famously displayed in the treason trial of Sir Walter Raleigh in 1603 – and

is generally cited as the impetus for modern rules on hearsay and confrontation. *See, e.g.*, McCormick on Evidence, § 244 (3d ed. 1984). UAW discusses in detail the inadmissibility of the plea agreement in UAW’s Motion in Limine, which is incorporated in full here. However, a few points warrant additional comment, particularly in light of the record from the hearing.

As an initial matter, the lack of probity and fairness in this approach can hardly be overstated. Counsel for the General Counsel refused to call witnesses at the hearing because, *in his own estimation*, “we couldn’t consider them to be reliable witnesses that we could count on to call as witnesses. You know, other than having the plea agreements as possibly to use to impeach them, not exactly the kind of witnesses that we really could have relied on to call as a witness for our case in chief.” 9/10/20 Tr. 220:21-221:2. Instead, Counsel for the General Counsel chose to rest his entire case on the hearsay statements *of those same, unreliable witnesses* – statements those individuals were required to give to avail themselves of lenient plea agreements – thereby depriving UAW of the chance to “impeach [those witnesses]” or otherwise test their credibility through cross-examination. Simply put, this is outrageous.

Both the Board and numerous federal courts have noted the unreliability of plea agreements, which, properly considered, are a joint statement between the prosecutor and the defendant, each of whom may have different interests. *See, e.g., Lipman Brothers, Inc.*, 147 NLRB 1342, 1360 n.18 (1964) (noting, in refusing to consider any aspect of plea agreement, that “there are many factors, apart from actual guilt, that may have prompted the defendant to enter such a plea, rather than go to trial and incur the expense of litigation in the superior court and perhaps an appellate tribunal as well”); *Turpin v. Kassulke*, 26 F.3d 1392, 1398 (6th Cir. 1994) (affirming exclusion of hearsay statements in plea agreements in part because such statements are made “to avoid criminal liability to the extent possible, not to accept it”); *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”). For these reasons alone, the ALJ should forcefully reject the General Counsel’s tactics and exclude the plea agreements in total.

However, the General Counsel fares no better with technical arguments as to admissibility. Putting aside the transparent end-run around a meaningful adversarial proceeding, the plea agreements – in part or in whole – are not admissible under any theory the General Counsel advanced. Counsel for the General Counsel cannot avail itself of any hearsay exceptions under Fed. R. Evid. 804(b), because that rule requires a threshold showing of witness unavailability. But Counsel for the General Counsel admitted candidly that he made no effort to subpoena or otherwise secure the live testimony of witnesses who clearly were available.<sup>2</sup> Nor can the plea agreement statements be considered party-opponent admissions admissible against UAW, because UAW was not a party to the criminal proceedings, and none of the defendants whom UAW formerly employed were UAW agents or were otherwise authorized to speak on behalf of the Union at the time they pleaded guilty. Thus, the enumerated exemptions under Fed.

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<sup>2</sup> Counsel for the General Counsel speculated that “some of them are in prison, we don’t know which for sure.” This information is publicly available on the Bureau of Prison’s website, *see* <https://www.bop.gov/inmateloc/>, so the Counsel for the General Counsel could have determined the exact status of every individual mentioned in the SAC within seconds. Moreover, it is indisputable that the General Counsel has the authority to issue subpoenas to people in prison. *See, e.g., Rice Lake Creamery Co.*, 151 NLRB 1113, 1145 (1965) (refusing to excuse a party’s failure to subpoena or obtain testimony from incarcerated witness, and noting that given party’s failure to even issue a subpoena, “it appears to me that the Respondent has evinced no real interest in securing [the incarcerated witness’s] testimony”). Indeed, it would have been relatively straightforward to obtain incarcerated witnesses’ testimony here given that the hearing was conducted entirely via videoconference. *See MPE, Inc.*, 9–CA–084228, 2015 WL 400660 (Jan. 29, 2015) (unpublished Board order) (it is appropriate to take testimony of incarcerated witness via videoconference).

R. Evid. 801(d)(2) do not apply. Finally, despite having the benefit of UAW's Motion in Limine before the hearing, the General Counsel utterly failed to address the applicability of Fed. R. Evid. 803(22) to a situation like this one, where hearsay statements from one proceeding are offered against a third party in an entirely separate proceeding. As noted above, and in UAW's Motion in Limine, this is precisely the type of unfair and unreliable tactic the Federal Rules of Evidence were designed to prevent. Moreover, the General Counsel ignores the plain language of Rule 803(22), which by its own terms limits admissibility – regardless of the circumstances – to only those facts that were “essential to the judgment.” Counsel for the General Counsel did not even *identify* the essential statements he seeks to use and, as UAW points out in its Motion in Limine, it is virtually impossible to identify what such statements would be.

In short, in light of the many factors that, at a minimum, render reliance on plea agreements dubious under any circumstances, the plea agreements should be excluded in their entirety. Once they are excluded, there simply is *no evidence whatsoever* to support any allegation of the Second Amended Complaint, and it therefore must be dismissed.

## **II. Even If The Plea Agreements Were Admitted In Full, The General Counsel Has Not Proved The Allegations Of The SAC**

Even if the plea agreements were admitted in their entirety and for the truth of the factual statements made in them, the General Counsel has not established the factual allegations in Paragraphs 7 and 11 of the SAC, or proved that those allegations suffice to establish the legal violations listed in Paragraphs 15 and 16 of the SAC.

The core allegation of the SAC is that UAW violated the NLRA when its agents accepted financial assistance from FCA, in the form of (1) charging personal expenses to NTC credit cards and (2) accepting NTC reimbursement for salaries of UAW employees who served on the national negotiation committee and did not work at the NTC. SAC ¶¶ 7, 11. The General

Counsel alleges that these purported actions make out a variety of legal violations. But even if the whole 200+ pages of hearsay plea agreements were to be admitted, the General Counsel has not proved either the factual allegations or the legal theories.

1. *Credit card charges.* UAW acknowledges that the plea agreements make clear that certain former officers and employees of UAW charged personal expenses to NTC credit cards. But that misconduct cannot be attributed to UAW itself for two reasons. First, those individuals spent NTC money in their *NTC* roles, not in their UAW roles, and they cannot properly be considered agents of UAW in spending NTC funds. Second, the expenses were *personal* – designer clothes, lavish meals, even the payoff of a home mortgage– and the former officers and employees were self-evidently not acting within the scope of *any* authority they had in making such personal purchases.

The General Counsel’s theory of the case entirely conflates the five named individuals’ UAW roles and their NTC roles, but the record makes clear that they were distinct. The five former UAW officers and employees named in the SAC were all NTC board members (which is why they had access to NTC credit cards). 9/10/20 Tr. 164:19-165:3; 165:23-166:1; 168:3-9; GC Ex. 14 at 172; GC Ex. 22 at 7-8. The record established that when these individuals were acting as NTC board members, making decisions about how to spend NTC funds, they acted on behalf of the NTC – not UAW. 9/10/20 Tr. 173:22-176:10. Indeed, UAW itself had no authority over NTC spending; former UAW President Bob King was not able to get information about NTC spending even when he sought it. 9/10/20 Tr. 176:11-177:10. Given these facts – that the named individuals had authority over NTC money by virtue of their NTC roles, and in those roles, they answered to the NTC and not UAW – it makes no logical or legal sense to conclude that they acted as agents of UAW rather than NTC in spending or misspending NTC funds.

A second, independent reason that the General Counsel cannot prove an agency relationship is that these individuals' purchases of designer clothes, lavish meals, and paying off a home mortgage was never intended to, and never did, benefit UAW. As such, these individuals were not acting within the scope of any UAW authority they had, and their conduct cannot be attributed to UAW. The General Counsel has the burden of proving the agency relationship, "both as to the existence of the relationship and as to the nature and extent of the agent's authority." *Longshoremen ILWU Local 6 (Sunset Line & Twine)*, 79 NLRB 1487, 1508 (1948). Although UAW does not dispute that the individuals named in Paragraph 7 of the Second Amended Complaint were agents of the Union when they were acting within the scope of authority of their UAW positions, the theft of money from the NTC was certainly not a duty of their UAW jobs. The conduct of an employee "is within the scope of employment if, but only if: (a) it is the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master." *Longshoremen ILA Local 1814 v. NLRB*, 735 F.2d 1384, 1395 (D.C. Cir. 1984) (quoting Restatement (Second) of Agency § 228(1), at 504 (1957)). Nothing indicates that the former UAW officers and employees were doing their UAW jobs or trying to serve UAW's interests in stealing NTC funds.

In the *Longshoremen ILA Local 1814* case, a union president in the dockworkers industry made a deal with the employer that if the employer recognized the union, the president would refer additional business to the employer, and would receive kickbacks for doing so. 735 F.2d at 1395-96. Referring additional business to the employer, of course, had the natural effect of increasing the union's membership. *Id.* There, the president was held to be acting as an agent of the union, because his "entering into the kickback arrangement with [the employer] both tended

to accomplish an authorized purpose – the extension of his Union’s membership – and was motivated to an appreciable extent by furtherance of the Union’s interests in dues and payments for pension and welfare benefits, and principally, the extension of its representation of longshoremen.” *Id.* (internal quotation marks and alterations omitted). But here, as the record makes clear, there was no such benefit to the union from the conversion of NTC funds

A case analogous to this one is *Amendolare v. Schenkers International Forwarders, Inc.*, 747 F. Supp. 162, 170 (E.D.N.Y. 1990), where a union president received a kickback when he permitted the employer to hire non-union personnel. The court rejected the argument that this conduct was within the scope of his agency, and found that the president’s conduct could not be attributed to the union itself. The court reasoned that, while the president “certainly had ‘general authority’ to negotiate arrangements with various employers, it can hardly be argued that he had any authority to arrange [the] kickback scheme.” *Id.* The court noted that there was “no evidence that the kickback scheme was a means to an authorized end . . . [n]or is there more than minimal evidence that Local 295 actually benefited from the criminal acts of [the president] and other top officials.” *Id.* at 170 (internal quotation marks and citation omitted). *Amendolare* is closely on point here, because neither UAW nor its members benefitted from the misappropriation of funds from the joint programs. *Id.* Nor is there any reason to think that the former officers and employees *intended* to serve UAW itself – a point emphasized by the fact that when former UAW President Bob King tried to get information about spending of NTC funds, he was stonewalled. 9/10/20 Tr. 176:11-177:10; see *Borg v. Chase Manhattan Bank*, 247 Fed. App’x 627, 640 (6th Cir. 2007) (refusing to attribute employee’s theft to employer where “there is no evidence in the record to suggest that [the employee’s] fraud and forgery was motivated in any part to serve [the employer]”).

Moreover, the fact that the Union has unequivocally denounced the theft, and is continuing to strip any implicated individuals of their union membership for violating UAW's Ethical Practices Code, makes clear that the Union in no way condoned the theft of NTC funds. 9/10/20 Tr. 178:16-182:15; UAW Exs. 27-31. In short, the record evidence is clear that, as a current UAW officer testified, "the individuals [named in the SAC] received personal gain [from their thefts] but, no, the UAW didn't benefit from . . . anything that they were able to gain." Therefore, the General Counsel has not carried his burden of showing that the individuals acted as agents of UAW. 9/10/20 Tr. 181:19-24.

2. *Payment of negotiators' salaries.* The sole allegation of the SAC on the payment of union negotiators' salaries is that agents of FCA "pa[id] the salaries of Respondent Union officials who were not assigned to work at the NTC, but rather served on Respondent Union's National Negotiation Committee." SAC ¶ 11(b). But there is no evidence, even in the plea agreements, that this occurred. With respect to the only five individuals actually named in the SAC, the testimony at trial showed that this allegation was factually wrong. The salaries of General Holiefield, Norwood Jewell, and Nancy Johnson were never charged back to joint programs funds at all. 9/10/20 Tr. 165:17-19; 169:12-25. Keith Mickens and Virdell King's salaries *were* charged back, but that is because 100% of their duties related to the joint programs – indeed, they were the Director and Assistant Director, respectively, of the NTC. 9/10/20 Tr. 165:20-166:8, 167:10-168:2, 168:3-13, 169:8-11. Their CBA negotiation responsibilities related solely to the joint programs, and they continued their normal joint programs related duties while contract negotiations were ongoing. 9/10/20 Tr. 166:18-167:6, 168:22-169:7. Thus, none of the evidence in the case suggested, let alone proved, that, as the SAC alleges, there were any

“Respondent Union officials who were not assigned to work at the NTC, but rather served on Respondent Union’s National Negotiation Committee.” SAC ¶ 11(b).

Nor do the plea agreements support the allegation of the SAC. A few of the plea agreements say that the salaries of certain unidentified individuals were charged back, although they did no joint programs work. GC Ex. 17 at 6-7; GC Ex. 20 at 6-7; GC Ex. 21 at 10. As explained in the footnote, these particular hearsay statements are even less reliable than the rest of the plea agreements, and are clearly inadmissible.<sup>3</sup> But even if these statements were admitted, none of the people who pled guilty asserted that the unspecified individuals who were charged back during unspecified time periods were on any national negotiation committee, or took part in negotiations at all. Without that information, the General Counsel has not proven the allegation in Paragraph 11.

3. Even assuming *arguendo* that the General Counsel had proven all of the facts alleged in the SAC, that would not make out any of the *legal* violations enumerated in Paragraphs 15 and 16. We address the purported legal violations in the order in which they appear in the SAC.

Paragraph 15(a) alleges that UAW breached its duty of fair representation towards its members. However, the General Counsel neither showed nor attempted to show that the misappropriation of NTC funds had any effect on the bargaining or administration of the 2011-

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<sup>3</sup> Both Nancy Johnson and Michael Brown made general statements in their plea agreements that the salaries of some UAW employees who did not work at the NTC were reimbursed by the NTC, but that general information was provided “pursuant to a proffer agreement with the United States,” under an agreement that the information “should not be included in determining defendant’s guideline calculations.” GC Ex. 20 at 5; *see also* GC Ex. 21 at 10. Iacobelli’s lengthy plea agreement included only one equally non-specific paragraph on this topic, and – given the laundry list of other illegal behavior to which he pled – it was clearly unnecessary to any judgment against him. In short, the information regarding salary reimbursements was even less self-inculpatory than the other information in the plea agreements, and is accordingly even less trustworthy.

2015 collective bargaining agreement, or otherwise *in any way* affected UAW's members. Indeed, the General Counsel issued the Second Amended Complaint specifically in order to *drop* the allegation that the purpose of the bribes was to obtain concessions during negotiations. *Compare* Compl. ¶ 12 with SAC. Although some of the plea agreements do say that certain FCA officials attempted to secure concessions or advantages through offering bribes to UAW officers and employees, *none* of the plea agreements say that any such concessions were actually made or advantages given – indeed, the one plea agreement that addresses the issue says the opposite. GC Ex. 22 at 14-15 (Norwood Jewell statement that “his decisions during 2015 collective bargaining negotiations,” the only negotiations in which he participated, “were not affected by the [bribery scheme] or the efforts of Iacobelli”). Moreover, the record evidence at trial made clear that, given the checks and balances built into the system by UAW, the alleged bribery scheme would not have altered either the negotiation or the administration of the collective bargaining agreements. *See infra* at 25-26.

Because there has been no showing that the alleged bribery scheme adversely affected represented employees, there is no basis for finding that UAW's duty to fairly represent those employees has been breached. The duty of fair representation arises as a result of the union's status as the employees' exclusive representative for collective bargaining and grievance handling, and regulates the union's *conduct* towards the workers it represents. Osborne, *Labor Union Law and Regulation*, Ch. 4 (2d ed. 2017). Indeed, from the very first case in which the Board discussed the breach of the duty of fair representation as an unfair labor practice, the Board has made clear that it is focused on whether the union harmed the workers it represented. Thus, in *Miranda Fuel Co.*, 140 NLRB 181 (1962), the Board held that Section 7 of the NLRA prohibits “unfair or irrelevant or invidious *treatment* [of represented employees] by their

exclusive bargaining agent,” that Section 8(b)(1)(A) prohibits a union from “*taking action* against any employee upon considerations or classifications which are irrelevant, invidious, or unfair,” and that a union violates Section 8(b)(2) when, “for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the *union attempts to cause or does cause* an employer to derogate the employment status of an employee.” *Id.* at 185-86 (emphasis added). Here, there has been no showing of invidious treatment, action taken against employees, or any attempt to cause employees harm; certainly, there has been no allegation or proof that the Charging Parties *themselves* were harmed. In other words, while the conduct alleged here may constitute a violation of other laws, it is outside the realm of conduct regulated by the duty of fair representation. Thus, because the General Counsel made the decision to present no evidence about whether the alleged bribery scheme had any effect on anyone, he has failed to establish any breach of the duty of fair representation.

Turning to the next legal claim, Paragraph 15(b) charges that UAW “breached its fiduciary duty” towards its members, but a breach of fiduciary duty claim under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959 must be made by union members against *individual union officers*, not the union as a whole – indeed, the purpose of a suit under Section 501 is to vindicate the interests of the union as a whole. *See* 29 U.S.C. § 501(b); *see also Phillips v. Osborne*, 403 F.2d 826, 831 (9th Cir. 1968) (“Section 501(b) makes it clear that relief granted under Section 501 is for the benefit of the real party in interest, *the union* whose officers are charged with dereliction”) (emphasis added). To the extent the General Counsel merely means to say that UAW breached its duty of fair representation, this duplicates the allegation of Paragraph 15(a) and is meritless for the same reason.

Paragraph 15(c) charges that the Union engaged in conduct “inherently destructive of employee rights.” Although sometimes misused, the phrase “inherently destructive of employee rights” does not describe a standalone cause of action, but rather is a rule about what type of evidence is necessary to demonstrate the anti-union motivation component of a prima facie case of discrimination. As the Supreme Court has explained, it may be unclear in some circumstances whether certain actions by the employer are “innocent . . . actions normally incident to the conduct of a business,” or are unfair labor practices. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963). When that occurs, a judge can proceed in one of two ways: the judge can consider “evidence of a subjective intent to discriminate or to encourage or discourage union membership,” or the judge can determine that the conduct is so “inherently discriminatory or destructive” of employees’ rights to unionize that the conduct speaks for itself and constitutes an unfair labor practice even in the absence of additional “specific evidence [about] subjective intent to discriminate.” *Id.* at 227-28; *see also Contractors’ Labor Pool, Inc. v. N.L.R.B.*, 323 F.3d 1051, 1058 (D.C. Cir. 2003) (reaffirming that concept of “inherently destructive” conduct is only an evidentiary rule to determine employer motivation).

This evidentiary rule simply has no application in this case. The General Counsel’s case against UAW is plainly not about UAW’s anti-union animus or discrimination against the charging parties. Indeed, there are no questions about any party’s subjective intent; the questions revolve primarily around what the facts are. And based on the facts in the record, Paragraph 15(c) does not state any cognizable legal violation.

Paragraph 16 charges that the union violated Section 8(b)(1)(A) by restraining and coercing employees. As explained at more length at pages 25-26, there are no allegations and no evidence that any of the misconduct alleged in the SAC had *any* impact on represented

employees, so the General Counsel cannot mean that employees were restrained or coerced in any tangible sense. Instead, the General Counsel's theory is presumably that UAW coerced and restrained employees by the simple act of accepting unlawful financial assistance from Respondent FCA, through reimbursements for certain union officials' salaries or by its agents charging personal expenses to NTC credit cards. But the General Counsel's theory fails to reckon with the fact that these allegedly misappropriated funds were *NTC funds*, not FCA funds.

The difference is critical. No Board authority of which we are aware has held that an Section 8(b)(1)(A) violation can be made out when the union receives funds from an entity *other than the employer* whose employees the union represents or seeks to represent. Moreover, analogous authority on Section 302 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186, strongly suggests that UAW accepting funds from the *NTC* (as opposed to FCA) would not be a violation of Section 8, even though the *NTC* is funded by FCA.

As the Board has made clear, Section 302 of the LMRA and Section 8 of the NLRA should be interpreted similarly insofar as possible to avoid incongruous results. *Gibbs & Cox, Inc.*, 292 NLRB 757, 770 (1989). In the Section 302 context, courts have several times addressed the situation where an employer funds an independent entity (such as a health and welfare trust) and the independent entity transfers a thing of value to the union. In the seminal case, *Arroyo v. United States*, 359 U.S. 419 (1959), an employer provided checks intended to be deposited into a welfare fund that had been properly created pursuant to LMRA § 302(c)(5). *Id.* at 421-23. A union official who sat on a joint committee established to administer the welfare fund deposited those checks into his personal account. *Id.* The court found no Section 302 violation, because the employer had provided checks to fulfill the funding obligation created by the collective bargaining agreement, even though the funds were later misappropriated. *Id.* at

423. The Supreme Court reaffirmed this portion of *Arroyo*'s holding in *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 588-89 (1993), where the Court explained that as long as funds were delivered to a properly formed trust entity, "[t]he trustees' failure to comply with these [trust] purposes may be a breach of their contractual or fiduciary obligations and may subject them to suit for such breach; but it is no violation of [Section] 302."

Here, as in *Arroyo* and *Demisay*, money was properly provided by FCA to a joint program permitted under Section 302(c). The hearing record established that FCA is required to provide a certain amount of funding (based on hours worked by represented employees) to the NTC per the UAW-FCA collective bargaining agreement, and there is no evidence in the record suggesting that the alleged criminal misconduct in any way influenced the amount of money that FCA provided. 9/10/20 Tr. 174:14-176:2; GC Ex. 11 at 348-50. Once money is properly provided to NTC, misappropriation by Joint Activities Board members "may be a breach of their contractual or fiduciary obligations and may subject them to suit for such breach," *Demisay*, 508 U.S. at 588-89, but it is not a violation of Section 302, and, likewise, it is not a violation of Section 8(b)(1)(A).

This conclusion makes logical sense as well as being consistent with the caselaw. The record made clear that the NTC is in fact a separate entity from both UAW and FCA. It is the NTC's Joint Activities Board – the members of which act on behalf of the NTC – who decide how to spend NTC funds. 9/10/20 Tr. 173:22-174:11, 176:6-10; GC Ex. 11 at 346. The NTC has its own bank accounts, legal counsel, and insurers; it files its own tax documents. 9/10/20 Tr. 208:11-16; GC Ex. 14. Indeed, the NTC's insurer reimbursed the NTC, not FCA, for losses caused by the misconduct alleged in the SAC. 9/10/20 Tr. 210:10-20. Under these circumstances, it mischaracterizes the facts to say that Respondent FCA unlawfully assisted the

union. What FCA did was make lawful payments to the NTC as required by a CBA, and some of the NTC's money was thereafter misappropriated from the NTC by Joint Activities Board members acting unlawfully. There is no apparent relationship between FCA's payments or the subsequent misappropriation and the exercise of Section 7 employee rights, and there is certainly no relationship that is supported by the record. The General Counsel can cite no authority for finding a Section 8(b)(1)(A) violation in such a case, and a novel interpretation of Section 8(b)(1)(A) is not warranted. As such, the General Counsel has failed to establish a violation of Section 8(b)(1)(A).

### **III. The Charges Are Time-Barred**

An additional, independent reason that the charges must be dismissed is that they are time-barred. Section 10(b) of the NLRA, 29 U.S.C. § 160(b), provides that charges must be filed *and served* within six months of the date the charging parties have actual or constructive knowledge of the basis of their claims. *United Kiser Servs., LLC*, 355 NLRB 319, 320 (2010). Here, the Charging Parties had knowledge of the basis of their claims on July 26, 2017, but the charges were not served on UAW until January 29, 2018, six months and four days later.

UAW recognizes the Board previously found in this case that if the Charging Parties learned about the basis for their claims on July 26, 2017, then the deadline for filing and service started to run on July 27, 2017, and the deadline expired on January 29, 2018. The Board reasoned that while the deadline normally would have expired on January 27, 2018, that day was a Saturday, and "Section 102.2 of the Board's Rules and Regulations provides that if the last day of a time period 'is a Saturday, Sunday, or a legal holiday,' then 'the period runs until the next Agency business day'" – and in this case, the next business day was Monday, January 29, 2018. Bd.'s Order Denying Mot. Dismiss at 2 (quoting Bd.'s Rules and Regulations § 102.2). This

holding is doubly flawed. First, under Board precedent, if the 10(b) period began to run on July 27, 2017, it ended on Friday, January 26, 2018. *See MacDonald's Indus. Prods., Inc.*, 281 NLRB 577 (1986) (unfair labor practice occurred 3/4/85; 10(b) period began running 3/5/85; 10(b) period ended on 9/4/85); *Baltimore Transfer Co. of Baltimore City, Inc.*, 94 NLRB 1680, 1682, 1695 (1951) (unfair labor practice occurred 3/26/49; 10(b) period began to run on 3/27/49; 10(b) period ended on 9/26/49); *see also Dun & Bradstreet*, 317 NLRB 84 (1995) (unfair labor practice occurred 4/12/93; 10(b) period began to run on 4/13/93; 10(b) period ended on 10/12/93, so the charge served on 10/13/93 was untimely). Further, even if the 10(b) period had ended on a Saturday, Sunday, or legal holiday, Section 102.2 has no application here. Section 102.2 of the Board's rules, by its terms, applies only to the calculation of "[t]ime requirements for filings with the Agency," and the section explains how to "comput[e] any period of time prescribed or allowed by these Rules." But the time period for filing and service of a charge is set by NLRA § 10(b), 29 U.S.C. 160(b), not by the Board's rules. Moreover, it is *service on UAW* that was late, and Section 102.2 only applies to "filings with the Agency." In short, a section of the Board rules that deals with the computation of a deadline for filing documents with the Board pursuant to a Board-created limitations period has no application here, where the deadline in question is a service deadline set by statute.

In order to correct this mistake on appeal, however, there must be a factual finding that the Charging Parties had actual or constructive knowledge of the basis of their claims by July 26, 2017. For purposes of this decision by the ALJ, UAW is seeking only such a factual finding. As the record and the Charging Parties' testimony showed, the Charging Parties clearly did have actual or constructive knowledge of the basis of their claims on July 26, 2017.

First and most obviously, all three Charging Parties conceded in related civil litigation that they first “discover[ed] evidence of FCA’s violation of the LMRA and the UAW’s breach of its duty of fair representation” with “the public filing of federal indictments against Iacobelli . . . on July 26, 2017[.]” Sec. Am. Compl. ¶ 92, *Swanigan v. FCA US, LLC*, No. 18-cv-10319 (E.D. Mich. 2018), ECF No. 22-3. Consistent with this, both Keller and Swanigan affirmatively testified that they were aware of the indictment of Iacobelli on July 26, 2017, and that they understood that part of the allegation was that the alleged bribery scheme had corrupted FCA-UAW negotiations. 8/28/20 Tr. 55:15-56:2, 66:4-19, 67:3-73:9, 99:16-100:5, 107:11-24.

Although Anolick could not remember the precise date that she learned about the investigation, the record made clear that she had constructive and likely actual knowledge of her claim on July 26, 2017. The Board will deem a party to have had constructive knowledge of the facts underlying a claim on the date that (a) “the conduct in question was sufficiently ‘open and obvious’ to provide clear notice,” or (b) “the filing party would have discovered the conduct in question had it exercised reasonable or due diligence.” *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (quoting *Duke University*, 315 NLRB 1291, 1291 n.1 (1995)). “Where events receive . . . widespread publicity, plaintiffs may be charged with knowledge of their occurrence.” *Ball v. Union Carbide Corp.*, 385 F.3d 713, 722 (6th Cir. 2004); see *Writers Guild of America-West (ABC, Inc.)*, 38 NLRB Advice Mem. Rep. 76 (2011) (“extensive press coverage” provides “constructive notice” of charging party’s unfair labor practice claim). Moreover, “[a] party’s mere ignorance of the circumstances ‘does not constitute due diligence to discover the operative facts of his claims.’” *Garrett R.R. Car*, 289 NLRB 158, 161 (1988) (quoting *Shapiro v. Cook United, Inc.*, 762 F.2d 49, 51 (6th Cir. 1985)).

The conduct underlying Anolick’s claim indisputably became “open and obvious” with the substantial media coverage of Iacobelli’s indictments on July 26, 2017 – coverage more than sufficient to provide “clear notice.” *See Broadway Volkswagen*, 342 NLRB at 1246; *see also* 8/28/20 Tr. 62:25-63:15 (testimony by Keller that “this was certainly a topic of conversation” when he worked at the plant on July 26, 2017). Furthermore, it is indisputable that due diligence would have uncovered the story on July 26, as that is when Anolick’s fellow employees Keller and Swanigan testified to learning of the allegations. *See* 8/28/20 Tr. 55:15-56:2, 99:23-100:5. Anolick’s “mere ignorance of the circumstances” does not stop the clock; hence, the ALJ must impute knowledge to Anolick as of July 26, 2017. *See Garrett R.R. Car*, 289 NLRB at 161.

Further, the most reasonable inference from Anolick’s testimony is that she had actual knowledge of the basis of her claims on July 26, 2017. Anolick testified that she was sure she first heard of the allegations at some point in 2017. 8/28/20 Tr. 122:4-7. She said that she learned the information from the news – which she testified she watches “every day” – and that the story was “breaking news.” 8/28/20 Tr. 122:22-25; *see also* 9/10/20 Tr. 140:13-141:13 (first story she saw was about the Iacobelli indictment). The story about Iacobelli and his coconspirators broke on July 26, 2017, right after he was indicted, which strongly suggests Anolick saw it on the news that very day.<sup>4</sup> *See* 8/28/20 Tr. 99:23-100:5. When she learned about the bribery scheme, Anolick “believed” that “this illegal transfer of money was affecting collective bargaining.” 9/10/20 Tr. 147:23-148:4. Finally, as stated above, Anolick conceded in related civil litigation that she discovered the basis for her claims on July 26, 2017.

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<sup>4</sup> Anolick’s testimony that the news story she watched was “[m]aybe towards the end of 2017” must be mistaken, as the story was not breaking news at that time. 8/28/20 Tr. 122:8-9.

The General Counsel's argument that the 10(b) period did not begin until Iacobelli's plea agreements became public on January 22, 2018 is meritless, as the Board has repeatedly held that proof of wrongdoing is not necessary to start the 10(b) period. *See Safety-Kleen Corp.*, 279 NLRB 1117, 1119 (1986) (tolling limitations period until an "outright confession" of wrongdoing is made would "destroy [the] Section 10(b)" limitations period); *see also IBT Local 814 (Cirker Moving and Storage)*, 15 NLRB Advice Mem. Rep. 25013 (1987) (recommending dismissal of charge as time barred when charge was filed more than six months after charging party received "a copy of the criminal indictment" alleging that improper "payoffs [to the union] had occurred," "even though the indictment did not set forth the specific circumstances of the payoffs").

Further, the General Counsel's contention that the Charging Parties were not aware of the *purpose* of the payments – i.e., that the payments were allegedly made to influence bargaining – until Iacobelli's plea agreements became public is preposterous. All three Charging Parties filed initial charges in 2017, *before* Iacobelli's plea agreement became public. *See* UAW Ex. 20 (Keller and Swanigan August 2017 charge stating that the "Employer and the Union have engaged in bad faith bargaining. For the last six months and for years prior, the Union, in collusion with the Employer has violated its duty of representation and bargained in bad faith by engaging in a bribery scheme that compromised contract negotiations"); UAW Ex. 24 (Swanigan October 2017 charge; same); UAW Ex. 26 (Anolick November 2017 charge that "[s]ince at least 2015, the Employer and the UAW have been colluding and agreeing to terms and conditions of employment because of a bribery scheme"). Further, all three Charging Parties testified that they at least suspected that the purpose of the bribery scheme was to affect bargaining. 8/28/20 Tr. 66:4-19, 67:3-73:9, 107:11-24; 9/10/20 Tr. 147:23-148:4. There is thus no basis for the

argument that the 10(b) period did not begin to run until Iacobelli's plea agreement became public in January 2018. Rather, the 10(b) period began to run on July 27, 2017, and it ended on January 26, 2018.

#### **IV. Finding Liability Or Imposing A Remedy Is Unwarranted Here Because UAW Denounced and Remedied The Unlawful Actions Of Its Former Officers And Employees**

The final reason that the SAC should be dismissed is UAW has taken such extensive remedial measures in the wake of the government's investigation that there is no likelihood of recurrence of the misconduct, and therefore no further action by the Board is necessary. *See Almet, Inc.*, 305 NLRB 626, 629 (1991) (finding that voluntary remedial measures rendered requested remedy unnecessary).

On July 26, 2017 UAW denounced the unlawful actions of its former officers and employees and widely publicized that denunciation. 9/10/20 Tr. 182:8-15, 184:12-16; UAW Ex. 31. Since that time, UAW and FCA have collectively bargained numerous wide-ranging structural reforms to prevent any financial abuses of joint training center funds. Most fundamentally, the separate entity NTC as it currently exists is being dissolved and re-formed as an ERISA trust and a Taft-Hartley trust. 9/10/20 Tr. 212:3-20. The parties have negotiated for "a robust system of internal controls" at the joint programs, "including adequate separation of duties, dual approvals, [and] adherence to established delegations of authority," and annual auditing of all financials by an independent third-party firm. 9/10/20 Tr. 182:24-184:16; GC Ex. 12 at 341. New credit card policies, whistleblower policies, facilities use policies, and vendor review policies have been put into place, and access to NTC credit cards has been substantially tightened, with the result that no one from UAW currently holds an NTC credit card. 9/10/20 Tr. 211:1-21. There is an absolute prohibition on using NTC funds to purchase promotional items,

and UAW has unilaterally banned the NTC from making contributions to charities affiliated with UAW officials. UAW Ex. 32.

UAW has likewise made numerous reforms to its own institutional practices to strengthen both ethical and financial accountability. 9/10/20 Tr. 182:24-184:16; UAW Ex. 32. UAW has expanded both its internal and external accounting staff, implemented stringent new accounting policies and procedures, and implemented a requirement that two different outside firms alternate in conducting annual financial audits. UAW Ex. 32. UAW has also created a completely new structure to ensure that it is as easy as possible for members or any other individuals to raise ethics concerns and to have those concerns thoroughly and independently evaluated. *Id.* In particular, UAW has established a confidential 24/7 ethics hotline, which is run by the third-party compliance and investigations firm Exiger LLC. *Id.* Exiger will also serve as the Ethics Ombudsman and will be responsible for conducting the initial investigation of ethics-related complaints or allegations, and Exiger's work will be overseen by UAW's new Ethics Officer, Wilma Liebman, the former chairman of the NLRB, who has the authority to hold hearings, issue reports, and recommend corrective action. *Id.*

Stepping back, all of the misconduct alleged in the SAC occurred two collective bargaining cycles ago. Since the wrongdoing occurred, a multi-year criminal probe has thoroughly investigated and punished those who stole from the NTC for personal gain. No one has ever shown – either in this litigation, the related civil litigation, or the criminal litigation – that any provision of any collective bargaining agreement, or any decision on the implementation of any collective bargaining agreement, was affected by the misconduct alleged in the SAC. On the contrary, the trial testimony made clear that a handful of corrupt officials could not have affected the outcome either of the bargaining or the contract administration. Bargaining

demands are set by UAW members and by the UAW President's office, and are ultimately approved by the President's office, elected negotiators from the plants, and the members themselves. 9/10/20 Tr. 160:1-164:3. Contract administration issues are appealed to the President's Office, the International Executive Board, and ultimately the Public Review Board, which is made up of labor law experts who are not affiliated with UAW. 9/10/20 Tr. 170:1-173:8. With these systems in place, it is unsurprising that a handful of corrupt officials cannot affect the outcomes of negotiations and administration of the contract.

Under these circumstances – where the misconduct alleged in the SAC occurred two collective bargaining cycles ago; where UAW promptly denounced that misconduct; where the misconduct is not even alleged (must less shown) to have affected members in any way; where individual wrongdoers have long since been punished; where UAW and FCA have collectively bargained to dissolve and fundamentally reform every aspect of the joint programs; and where UAW has overhauled its own financial and ethical structures – no purpose or policy of the NLRA would be effectuated by imposing a remedy simply for the sake of imposing a remedy. UAW therefore asks that the Second Amended Complaint be dismissed.

Respectfully submitted,

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Dated: October 15, 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)

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