

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO
(FCA US LLC)¹**

Respondent

and

SHERI ANOLICK, an Individual

Case 07-CB-213726

Charging Party Anolick

and

BEVERLY SWANIGAN, an Individual

Case 07-CB-213747

Charging Party Swanigan

and

BRIAN KELLER, an Individual

Case 07-CB-213749

Charging Party Keller

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TO THE ADMINISTRATIVE LAW JUDGE**

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¹ Cases 07-CA-213717, 07-CA-213746 and 07-CA-213748 against FCA US LLC (Employer) were severed in an Order Severing Cases which issued on August 27, 2020. (GCX 1(eee))

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I. INTRODUCTION

Respondent violated Section 8(b)(1)(A) of the Act when several of its representatives received assistance and support from Employer representatives, including by charging the UAW-Chrysler Skill Development and Training Program d/b/a UAW-Chrysler National Training Center (NTC) credit cards for personal expenses and by obtaining the payment of salaries of other Respondent employees who were not assigned to work at NTC, but instead served on Respondent's national negotiation committee. For years, Respondent's representatives, along with Employer representatives, engaged in a secretive and unlawful collaboration involving an obscene amount of money. Respondent's actors were included in the conspiracy solely by virtue of their positions with Respondent, and which also allowed them to hold positions with the NTC. Their actions went undiscovered for years, and only became public after the Department of Justice (DOJ), with its substantial resources, made enough progress in its investigation to announce indictments against some of the actors. As a result of the ongoing investigation, the DOJ obtained plea agreements from several high-ranking individuals of Employer and Respondent, and the investigations appear to be ongoing. Contrary to Respondent's likely assertions, the alleged actors were agents of Respondent and remained within Respondent's control throughout the entire period of the unlawful conduct. Similarly, Respondent, along with the Employer, maintained such a level of control of the NTC that Respondent and Employer, by their agreement alone, have decided that the NTC will be dissolved. No representatives of the NTC had input into the decision, and no one from the NTC can oppose Respondent's and Employer's decision to dissolve the NTC. Accordingly, Respondent retained significant control over NTC and Respondent's actors regardless of their secondary responsibilities with NTC.

Respondent violated the Act when its agents received assistance and support from the Employer and the Administrative Law Judge (the ALJ) should so find.

II. BACKGROUND

A. The Employer, Respondent, and NTC Operations

The Employer is a limited liability company with a place of business in Auburn Hills, Michigan and offices throughout the United States, and is engaged in the manufacture, nonretail sale and distribution of automobiles and automotive products. (GCX 1(l) at 3, 1(nn) at 3-4, 1(zz) at 3)² During the calendar year ending December 31, 2019,³ the Employer purchased and received at its various Michigan facilities, goods valued in excess of \$50,000 directly from points outside the State of Michigan. (GCX 1(nn) at 3)

Respondent is a labor organization within the meaning of Section 2(5) of the Act and has maintained several successive collective-bargaining agreements (CBAs) and other relevant agreements with the Employer. (GCX 1(zz) at 3, 1(l) at 3, 2-8, 10-13) Respondent's International executive board consists of eight regional directors, three vice presidents, secretary treasurer, and president. (Tr. 163) Persons at all levels within Respondent have responsibilities in administering the CBAs, including negotiations and resolution of issues. (Tr. 170-171) Bigger issues are discussed with the vice president or senior staff, who can decide an issue; a member dissatisfied with such a decision must either rely upon their representative to decide whether to appeal the decision, or the member may appeal to a public review board. (Tr. 171-172)

² GCX___ refers to General Counsel's Exhibit followed by the exhibit number; RX___ refers to Respondent Exhibit followed by exhibit number; "Tr. _:_:" refers to transcript page followed by line or lines of the unfair labor practice hearing held August 28 and September 10, 2020.

³ All dates are 2020, unless otherwise noted.

“The big three” refers to the domestic auto companies General Motors LLC (GM), Ford Motor Co. (Ford), and the Employer (commonly referred to as Chrysler).⁴ (Tr. 186) Respondent engages in pattern bargaining with the big three, in which Respondent picks one employer as the “strike target” to bargain with to a contract, and then uses that contract as a pattern to bargain with the other two employers. (Tr. 186-188) In 2011, the strike target was GM, and in 2015, the strike target was the Employer, the smallest company of the big three, and it was Respondent’s CBA with the Employer that set the pattern for bargaining with GM and Ford. (Tr. 188-189)

The NTC is a creation of the Employer and Respondent which provides benefits for Respondent’s represented employees including training, health and safety, new hire orientation, world class manufacturing, and more. (Tr. 168, 197, 205, GCX 1(ll) at 4, 1(zz) at 6, GCX 9-13) NTC is part of the joint programs and is governed by the joint activities board, with half of the board from designated Respondent positions, and half of the board from the Employer, as outlined in the national agreements. (Tr. 173, 196, 206, GCX 9-13) The joint activities board determines how joint program funds are spent, including setting the budget. (Tr. 176, 206) The people who approve NTC spending all have positions with either the Employer or Respondent. (Tr. 215-216)

Respondent and the Employer bargain to determine NTC and joint programs funding. (Tr. 197) Respondent retains an interest in NTC and the joint programs operations because represented employees get benefits from joint programs as described above, and retains some control over NTC resources through bargaining. (Tr. 197, 205) Each of Respondent’s NTC representatives held their position at NTC solely because of their position with Respondent, including Respondent’s Vice President General Holiefield (Holiefield) who was NTC co-chair

⁴ About 2009, Chrysler LLC filed for Chapter 11 bankruptcy and sold substantially all of its assets to Chrysler Group LLC. Chrysler Group LLC subsequently merged with Fiat Group to form FCA US LLC.

because of his position as Vice President for Respondent's Chrysler department. (Tr. 192, GCX 17 at 11) Respondent retained the authority to remove each of its representatives from their assignment, including Holiefield, which would also remove each of them from their NTC positions. (Tr. 193-197)

NTC funding is set by the CBAs between Respondent and the Employer, with a negotiated formula based on the number of employees, hours worked, and overtime worked, with the Employer as the only source of funding to NTC. (Tr. 174-176, 213-216, GCX 1(ll) at 4, 1(zz) at 5-6, 11) For example, Respondent and the Employer negotiated in 2015 to change NTC funding. (Tr. 177-178) "Charging back" is the process where Respondent is reimbursed by joint programs for work that Respondent representatives performed in joint programs. (Tr. 165)

B. Respondent Accepts Assistance from the Employer

Beginning around 2009 and continuing through at least 2015, the Employer's Vice President for Employee Relations and lead representative, Alphons Iacobelli (Iacobelli), siphoned over \$1.5 million in cash and gifts to Respondent officials, including Vice President Holiefield (deceased March 9, 2015), who served as Respondent's lead negotiator for the Employer's and Respondent's 2011-2015 CBA. (GCX 1(qq) at 10, GCX 17 at 5, GCX 18) These funds were often conveyed through the Employer-financed entity, the NTC, for personal gain. (Tr. 181) For example, the Employer authorized Respondent officials to charge NTC credit cards for personal expenses. (GCX 1(ll) at 4, 1(zz) at 6, GCX 16 at 6-9, 17 at 6, 9, 19 at 5, 7-8, 20 at 3-4, 21 at 6-10, 22 at 8-12) With the Employer's knowledge and approval, NTC funds were also used to pay the salaries of Respondent employees who were not assigned to work at NTC, but instead administered the Employer's CBA. (Tr. 194-196, GCX 17 at 7, 20 at 6-7, 21 at 10)

On July 26, 2017, the DOJ secured felony indictments against Iacobelli and Holiefield's widow Monica Morgan (Morgan) and, unsurprisingly, the scandal received widespread media coverage since Holiefield was the International Vice President over Chrysler and was the top Respondent representative on the NTC Board. (Tr. 50-51, 99, 164-165, GCX 17, 18, RX 23) Holiefield was placed on administrative leave in late 2013 or early 2014 because of job performance; prior to this, Respondent did not revoke his authority to act on its behalf. (Tr. 176, 198) The same day that the DOJ announced the indictments against Iacobelli and Morgan, Respondent issued a press release which, it asserts, denounced the misuse of joint program funds and condemned those actions, while simultaneously: 1) disavowing knowledge of the corruption among current leaders; and 2) defending the fairness of the 2011-2015 collective-bargaining agreement on the basis that the agreement was approved by higher-level Respondent officials. (Tr. 181-182, RX 31) The press release stated that "[t]he current UAW leadership had absolutely no knowledge of the alleged fraudulent activities detailed by this indictment until they were brought to our attention by the government." (RX 31) The letterhead included the names of Norwood Jewell (Jewell), who later pleaded guilty as part of the same criminal case involving Iacobelli, and president Dennis Williams, who was charged with federal crimes in approximately August. (Tr. 199-200) In the following months and years, the DOJ continued to uncover further conduct, and brought several charges against the Employer and Respondent representatives which resulted in numerous criminal plea agreements.

On August 8, 2017, the Employer's finance department employee and NTC controller Jerome Durden (Durden)'s plea agreement was filed, in which he pleaded guilty to tax-related crimes between 2009 and 2015, but no reason was given for any payments that benefitted Respondent. (GCX 15 at 2-5, 11)

On August 29, 2017, Virdell King (King)'s plea agreement was filed in which she pleaded to conspiring to violate the Labor Management Relations Act (LMRA), and that while serving as a representative of Respondent, joined a conspiracy from 2012 through 2016 to willfully request, receive, accept, and agree to receive and accept, money and things of value from persons acting in the interest of the Employer. (GCX 16 at 2) This included making thousands of dollars of purchases on her NTC credit cards at the direction of other high-ranking Respondent officials and to benefit other Respondent officials. (GCX 16 at 6-9) King was an assistant director for Respondent who reported to Keith Mickens (Mickens), and was on the NTC joint activities board. (Tr. 168, GCX 16 at 3) King was a member of Respondent's national negotiating committee, and her role in the 2011 negotiations was similar to Mickens, which included collecting reports on negotiations regarding joint programs. (Tr. 166-169; GCX 16 at 3-4) Once again, the plea agreement did not specify a purpose for the payments other than for personal benefit.

On January 22, 2018, the DOJ released Iacobelli's plea agreement, in which he admitted that between in or before January 2009 and continuing through in or after June 2015, he and other Employer co-conspirators delivered prohibited payments to Respondent, including through the use of NTC credit cards, as well as payments and gifts to Respondent officers and employees, in violation of the LMRA Section 302(a).⁵ (GCX 17 at 3, 5, 9) He, along with other Employer executives and employees, also regularly transferred hundreds of thousands of dollars from the NTC to Respondent as alleged reimbursement for salaries of Respondent employees purportedly assigned to NTC even though many of them performed no services at NTC; some of the salary

⁵ Section 302(a) prohibits an employer or person acting in the interest of an employer from paying, lending, or delivering, or agreeing to pay, lend, or deliver, any money or other thing of value to any officer or employee of a labor organization representing its employees or to any officer or employee of a labor organization with the intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of the labor organization.

reimbursements were political gifts to Respondent officials administering the Employer-Respondent relationship. (GCX 17 at 6-7) Between 2012 and June 2015, he “authorized the expenditure of more than \$450,000 to pay for personal purchases made by UAW Vice President General Holiefield and other UAW officials on their NTC-issued credit cards . . . paid for by the NTC using funds provided by FCA.” (GCX 17 at 2, 9) Iacobelli, Durden, and other un-named Employer actors took their actions in the conspiracy “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.” (GCX 17 at 7)

Since that time, several other individuals affiliated with Employer or Respondent have been charged, indicted, pleaded guilty, and received prison sentences and/or paid fines. Several Respondent officials who were responsible for negotiating and administering the Employer and Respondent CBAs pleaded that they accepted money and things of value from the Employer to benefit themselves personally. Similarly, and consistent with Iacobelli’s plea admitting that these “offerings” were done “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”, Michael Brown (Brown), as discussed below, pleaded that the purpose of the conspiracy was to “grease the skids in order to obtain benefits, advantages, and concessions in the negotiation, implementation and administration of the collective bargaining agreements between FCA and the UAW.” (GCX 17 at 7, GCX 20 at 4)

On February 6, 2018, Holiefield’s wife Morgan’s guilty plea was filed for filing a false tax return. (GCX 18)

On April 5, 2018, the guilty plea of Mickens was filed in which he pleaded to conspiring to violate the LMRA, and that from June 2010 through December 2015, while serving as a

representative of Respondent, joined a conspiracy to willfully request, receive, accept, and agree to receive and accept, money and things of value from persons acting in the interest of the Employer. (GCX 19 at 2) This admission included making thousands of dollars of purchases on his NTC credit cards as encouraged by the Employer and other high-ranking Respondent officials and to benefit other Respondent officials. (GCX 19 at 7-8) Mickens was Respondent's regional director under Holiefield and sat on the NTC joint board while also serving as the administrative assistant to Respondent on behalf of Holiefield. (Tr. 165-166, GCX 19 at 4) Mickens served on Respondent's national negotiating committee, attending the 2011 contract negotiations with the Employer where he collected reports on negotiations regarding joint programs. (Tr. 166, GCX 19 at 3) Mickens was considered "senior staff," one of the highest staff positions, and had oversight on issues bargained within joint programs and had oversight of joint programs expenditures involving the Employer. (Tr. 167-168)

On May 25, 2018, the DOJ filed the guilty plea of Brown, who pleaded to misprison of a felony, including that "the purpose of the conspiracy to provide prohibited payments to UAW officials was to grease the skids in order to obtain benefits, advantages, and concessions in the negotiation, implementation, and administration of the collective bargaining agreements between FCA and the UAW." (GCX 20 at 2, 4) This included that from 2009 through 2015, the Employer's executives authorized Holiefield "to offer sham employment status at the NTC to a number of their friends, family, and allies[, and that] numerous individuals were categorized as being on 'special assignment' status to the NTC when, in fact, those individuals did little work or no work on behalf of the NTC." (GCX 20 at 6-7)

On July 23, 2018, the guilty plea of Nancy Johnson (Johnson) was filed in which she pleaded to conspiring to violate the LMRA, and that from 2014 through 2016, while serving as a

representative of Respondent, joined a conspiracy to willfully request, receive, accept, and agree to receive and accept, money and things of value from persons acting in the interest of the Employer. (GCX 21 at 2) This included making thousands of dollars of purchases on her NTC credit card as encouraged by the Employer to benefit herself and other Respondent officials, and confirmed that from 2014 through 2016, the salaries of “a large number of UAW officials and employees, nominally assigned to the NTC, was paid for by FCA through the NTC [] even though senior UAW officials and FCA executives both knew that [those] ‘assigned’ to the NTC spent most of their work time performing tasks for the UAW[.]” (GCX 21 at 6-10) Johnson worked in Respondent’s international education department in 2011. (Tr. 169) From 2014 through 2016, she served in Respondent’s Chrysler department, where she, like persons at all levels within Respondent, had responsibilities in administering the CBAs, including negotiations and resolution of issues. (Tr. 170-171, GCX 21 at 4)

On April 2, 2019, the DOJ filed the guilty plea of former Respondent Vice President Jewell, who succeeded Holiefield, pleading that he joined the conspiracy knowing that the prohibited payments and gifts were made with the intent to benefit Respondent as well as to benefit himself and other officials personally. (GCX 22 at 3) Jewell pleaded to conspiring to violate the LMRA, and that from 2014 to 2016, while serving as a representative of Respondent, joined a conspiracy to willfully request, receive, accept, and agree to receive and accept, money and things of value from persons acting in the interest of the Employer . (GCX 22 at 2-4) This admission included making thousands of dollars of purchases on his NTC credit card, and also approved other Respondent officials to use their NTC credit cards for personal expenses as part of the conspiracy. (GCX 22 at 9-12) Jewell was Respondent’s regional director for region 1C in 2011. (Tr. 169) In 2014, and continuing through 2016, Jewell was Vice President for

Respondent assigned to the Chrysler department, and served as a member of Respondent's national negotiating committee. (GCX 22 at 3-4)

Charging Parties Keller, Swanigan, and Anolick are employees of the Employer represented by Respondent who have worked for the Employer for 21, 20, and 24 years, respectively, and work at three different Employer facilities in Michigan.⁶ (Tr. 49-50, 98-99, 121) On July 26, 2017, Charging Parties Keller and Swanigan first learned from news reports of allegations or indictments against Iacobelli. (Tr. 50-51, 56, 99, RX 23) Charging Party Anolick learned of the allegations in the fall of 2017, but could not identify a more specific date in spite of lengthy examination at hearing. (Tr. 122-123, 138-146) On August 21, 2017, Charging Party Keller filed charges based on the bribery scheme alleging breach of Respondent's duty of fair representation. (Tr. 64, RX 20) Charging Party Swanigan filed a charge on August 21, 2017, but later withdrew it. (Tr. 101, RX 24) On November 21, 2017, Charging Party Anolick also filed charges against the Employer and Respondent. (Tr. 146) In January 2018, Charging Parties Keller and Swanigan learned of Iacobelli's plea agreement, and they filed charges against the Employer and Respondent days later on January 26, 2018, along with Charging Party Anolick. (Tr. 51-52, GCX 1(a), (c), (e), (g), (i), (k)) None of the Charging Parties had any first-hand knowledge of the underlying facts, and did not learn of the facts alleged by the DOJ until Iacobelli's indictment was filed in January 2018.

Respondent presented two witnesses in its defense. Chuck Browning (Browning) has been the Regional Director for Region 1A since 2018, held the position of executive assistant to the president from 2014 to 2018, and held prior positions with Ford. (Tr. 156) Director Catherine Stoej (Stoej) has worked as Respondent's international representative in the benefits

⁶ The hearing exhibits incorrectly included RX 25, Sheri Anolick's affidavit. RX 25 was never offered or received into evidence. Further, the transcript should be corrected to say "I would object [not admit] to the affidavit coming in." (Tr. 148-149) Cf. Tr. 88-90 (sustained objection to the introduction of Keller affidavit).

department since 2015, and served as the administrative assistant, co-lead of NTC, and member of the joint activities board from July 2018 to June 2020. (Tr. 204-206)

On direct examination, Browning testified that there were no improper charge backs related to Holiefield, Mickens, King, Jewell, or Johnson, but on cross examination conceded that Respondent's audits found other individuals whose salaries were charged back to NTC even though they did not work for NTC, which prompted some of Respondent's reforms. (Tr. 165-169, 194-196) Stoev first learned of inappropriate use of NTC credit cards in about 2016. (Tr. 217)

Respondent became aware that Holiefield, King, Mickens, Jewell, and Johnson used joint program funds for improper purposes, including for personal gain, and as a result of several individuals misappropriating funds from NTC, a number of reforms were taken at NTC, including credit card reforms beginning in 2016. (Tr. 181, 210-211) Further, Respondent implemented "major reform initiatives that [Respondent is] implementing across our union[, and our] reform agenda will touch every part of this union and every region." (Tr. 182, RX 32) Finally, during 2019 contract negotiations, Respondent and the Employer decided to dissolve NTC. (Tr. 218) NTC had no role in the decision-making, and has no authority on its own to remain in existence. (Tr. 218)

III. ARGUMENT

A. The Charges were Timely Filed

Section 10(b) of the Act bars issuance of a complaint based on an unfair labor practice occurring more than six months prior to a properly filed charge. However, the Section 10(b) period does not begin to run until "the aggrieved party knows or should know that his statutory rights have been violated." *John Morrell & Co.*, 304 NLRB 896, 899 (1991), *review denied*, 998 F.2d 7 (D.C. Cir. 1993) (unpublished decision). Notice of the violation must be "clear and

unequivocal,” but it can be actual or constructive. *St. Barnabas Medical Center*, 343 NLRB 1125, 1126 (2004). A charging party has constructive knowledge of a violation when it is “on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred.” *See, e.g., Amalgamated Transit Union Local 1433*, 335 NLRB 1263, 1263 n.2 (2001).

Knowledge of the violation is imputed to the charging party “where it could have discovered the alleged misconduct through the exercise of reasonable diligence.” *St. Barnabas Medical Center*, 343 NLRB at 1126-27. The party asserting a Section 10(b) defense has the burden of showing such notice. *Id.* at 1127. As noted by the Board in its August 26 Order, Section 102.2(a) of the Board’s Rules and Regulations provides that the day of the act or event is not to be included in the time computation. Further, “the last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the next Agency business day.” On September 23, Respondent filed a Motion to Reconsider, which the Board denied on October 13.

Here, Respondent will likely argue, as it did in its Motion to Dismiss and in its Motion for Reconsideration before the Board, that the Charging Parties had actual or constructive notice of a bribery scheme on July 26, 2017, the day Iacobelli and Holiefield’s widow were indicted, and therefore the charges are untimely because the charges were not filed and served until January 29, 2018. As noted by the Board in its August 26 Order, Section 102.2 of the Board’s Rules and Regulations provides that the day of the act or event is not to be included in the time computation, and “the last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the next Agency business day.” Accordingly, the Board correctly rejected Respondent’s 10(b) argument - even using Respondent’s preferred date of July 26, 2017.

Further, and contrary to Respondent's assertions, July 26, 2017, is not the controlling date for determining when the Charging Parties had actual or constructive knowledge of the unfair labor practice. It was not until the public release of Iacobelli's plea in January 2018 that evidence emerged establishing that the corruption constituted unfair labor practices. Iacobelli pleaded that the *purpose* of the bribes was "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 this admission is critical to the determination that the concealed payments violated Section 8(b)(1)(A), as explained above. (GCX 17 at 7) Without knowing the underlying purpose, it was impossible for the Charging Parties to judge whether the payments constituted unlawful interference with employees' representation, unlawful assistance, or was in furtherance of some goal unrelated to the Act (e.g. hush money to cover up a safety concern with the Employer's vehicles). *Cf. Leach Corp.*, 312 NLRB 990, 991 (1993) (where, in a case involving the transfer of employees from one facility to another, the Board began the running of the 10(b) period only upon completion of the transfer process—the earliest point at which the union in the case could have had clear and unequivocal notice of a violation), *enforced*, 54 F.3d 802 (D.C. Cir. 1995).

Thus, even considering the fact that the Charging Parties filed charges prior to the release of Iacobelli's plea is of no consequence because the July 2017 indictments merely raised a suspicion of corruption; they did not suggest that any particular unfair labor practices had been committed. Furthermore, Iacobelli's plea agreement also made clear that the Employer transferred money directly into Respondent's coffers, purportedly as NTC salary reimbursements. Prior to this admission, there was no evidence available to the Charging Parties that the Employer unlawfully assisted Respondent by making concealed payments directly to

Respondent as an organization. These pieces of information, which did not come to light until January 2018, made a critical difference in the determination that the charges are meritorious. *Cf. Morgan's Holiday Markets*, 333 NLRB 837, 837, 841 (2001) (subsequently discovered evidence supporting existence of alter-ego relationship that came to light after charge was dismissed did not toll 10(b) period because there was adequate evidence available at the time of dismissal). Thus, the 10(b) period did not begin until at least January 22, 2018, placing the charges well within the statute of limitations.

B. Holiefield, King, Mickens, Jewell and Johnson Were Agents of Respondent

“In determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.” 29 U.S.C. § 152(13). The Board uses common law agency principles in determining agency and does not require overt acts of authorization. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 82-83 (1988). Agency can be found based on either actual or apparent authority and must be established with respect to the specific conduct at issue. *Electrical Workers Local 45*, 345 NLRB 7 (2005) (finding agency based on apparent authority based on employee contact with the agent, the union’s awareness that the agent acted on its behalf, and the union’s allowance of the agent to act on its behalf); *Cornell Forge Co.*, 339 NLRB 733, 733 (2003) (finding the individuals’ conduct could not be attributed to the union where there was no actual or apparent authority to act on behalf of the union); *Teamsters Local 705 (K-Mart)*, 347 NLRB 439, 441 (2006) (affirming without comment that union stewards were agents cloaked with apparent authority based on the elected nature of the position, the processing of grievances, and statements made about the relevant subject). To have apparent authority there must be: (1) manifestation by the principal to a third party; and (2) the third party must believe the extent of

the authority granted to the agent encompasses the prospective activity. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 at 82-83 (1988).

Respondent is likely to argue that Holiefield, King, Mickens, Jewell, and Johnson were not acting as agents of Respondent. This issue could not be further from the truth, and is essentially a red herring. As discussed above, each held some of the highest positions within Respondent related to the Employer, and had tremendous authority in that relationship. During the time period alleged in the Second Amended Consolidated Complaint and Notice of Hearing (Second Amended Complaint), and in which they took their unlawful actions, each continued to hold their position, and continued to take actions with the full authority of their position that were binding upon Respondent. Their actions, including signing collective-bargaining agreements, resolving grievances, and other duties vested within their positions continued until their eventual removal from their positions for various reasons. Other than Holiefield's removal in late 2013 or early 2014, Respondent provided no evidence that King, Mickens, Jewell, or Johnson were ever removed from their positions. Further, as testified by Browning, persons at all levels within Respondent have responsibilities in administering the CBAs, including negotiation and resolution of issues. (Tr. 170-171) Accordingly, since each person continued to hold the responsibilities of their positions during all material times of the unlawful actions, they continued to interact within the authority of their Respondent positions on behalf of Respondent, and their actions were part of a conspiracy that started at the highest levels of Respondent's organization from at least Vice President Holiefield on down, it is beyond dispute that each remained as an agent of Respondent at all material times and continued to act with actual and apparent authority – even in their unlawful conduct with the Employer.

Consistent with the principle of apparent authority, the “Board regularly finds elected or appointed officials of an organization to be agents of that organization. Although the holding of elective office does not mandate a finding of agency per se, it is persuasive and substantial evidence that will be decisive in the absence of compelling contrary evidence.” *Mine Workers Local 1058 (Beth Energy)*, 299 NLRB 389, 389-390 (1990); see also *Jackson Engineering Co.*, 265 NLRB 1688 (1982), *enforced sub nom. Longshoremen’s Local 1814 v. NLRB*, 735 F.2d 1384, 1387-88, 1391-1398 (D.C. Cir. 1984) (adopting the Board’s finding that the union was “properly held responsible for these acts of its highest officers-actions closely related to the conduct of the Union’s business, which would foreseeably yield benefits to the Union itself, and which did in fact yield such benefits” in a “deliberate, flagrant, and very substantial kickback scheme” between the employer and the union. “The ALJ reasoned that the entire arrangement had been engineered by the Union’s highest officials, and in the absence of outright authorization by the Union’s membership, which could hardly be expected to be demonstrable concerning illegal acts, no greater degree of responsibility by the Union could possibly be proven.”) Here, as in *Jackson Engineering Company*, Holiefield, King, Mickens, Jewell, and Johnson took actions which not only benefitted themselves, but also benefitted Respondent as its coffers will be filled with unlawful payments. The conspiracy was conducted from the highest levels of Respondent, and continued with their involvement and willing participation for many years. Similar to *Jackson Engineering Company*, the ALJ should find Respondent responsible for the actions of Holiefield, King, Mickens, Jewell, and Johnson, as alleged.

C. Respondent’s Likely Arguments Regarding NTC

Respondent will likely argue that the NTC is a separate legal entity, and that this somehow absolves it of liability. Similarly, Respondent will likely argue that Holiefield, King, Mickens, Jewell, and Johnson were acting on behalf of NTC and not on behalf of Respondent.

It was no accident that each of these individuals had their NTC positions or were the specific persons selected to be invited into the conspiracy; each held their position with NTC solely because of their positions with Respondent. The converse is not true; they did not hold their positions with Respondent because of their positions with NTC or the joint programs. Further, Respondent had an interest in the operations of NTC as NTC provided, among other things, training and retraining of employees employed by the Employer and represented by Respondent. Accordingly, it is fundamental that each of these individuals - Holiefield, King, Mickens, Jewell, and Johnson - had primary responsibility to Respondent, and that their role at NTC was merely a secondary responsibility related to, and which hinged upon, their position with Respondent.

Respondent, along with the Employer, controlled the creation, purpose, funding, direction, and ultimately, the cessation of operations of NTC. The Employer offered, and the Respondent accepted, “sham employment status to a number of their friends, family, and allies[, and that] numerous individuals were categorized as being on ‘special assignment’ status to the NTC when, in fact, those individuals did little work or no work on behalf of the NTC.” (GCX 20 at 6-7) It is also clear that the Employer used its funds “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.” (GCX 17 at 7 and GCX 20 at 2, 4) Respondent’s assertions that it is not liable for any actions because NTC is a separate legal entity ignores the simple facts of the situation, is counter-intuitive, and should be rejected by the ALJ.

D. The Employer's Underwriting of Respondent Expenses, Such as Employees' Salaries, and Respondent's Acceptance of Such Payments, Violated Section 8(b)(1)(A)

Section 8(a)(2) prohibits an employer from contributing financial or other support to a union, and a union's acceptance of such support likewise violates Section 8(b)(1)(A). *See, e.g., Wells Enterprises, Inc.*, 365 NLRB No. 7, slip op. at 1 n.1 (2016) (transmitting vending machine proceeds and other monies to the union constituted unlawful financial assistance and acceptance of support); *Jackson Engineering Co.*, 265 NLRB at 1688-89 (payment of kickbacks to union official, with union president's knowledge and approval, violated Section 8(a)(2) and 8(b)(1)(A)), *enforced sub nom. Longshoremen's Local 1814 v. NLRB*, 735 F.2d, above. Here, the Employer's payment of Respondent expenses, such as employees' salaries, and Respondent's acceptance of these monies likewise violates Section 8(b)(1)(A). The Employer transferred funds to Respondent purportedly to underwrite the salaries of Respondent employees assigned to NTC when, in fact, those individuals were merely Respondent officials who did not service the NTC. The plea agreements make explicit that these monies were for Respondent's benefit as an organization, not for the benefit of the individuals themselves. In effect, the Employer bankrolled Respondent salaries, or at least surreptitiously channeled money into Respondent's coffers under the guise of legitimate salary reimbursement when, in fact, they were a political gift. Accordingly, such conduct is plainly violative of the Act.

E. The Acceptance of Bribes and Other Payments While Representing Employees Violated the Duty of Fair Representation, Breached Its Fiduciary Duty and Was Inherently Destructive of Section 7 Rights

Exclusive bargaining representatives owe employees a duty of fair representation in recognition of employees' Section 7 right to be represented in matters affecting their employment without arbitrary, irrelevant, or invidious considerations. *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). A union breaches this

duty by engaging in conduct toward employees that is “arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A union’s actions are considered arbitrary where, in light of the factual and legal landscape at the time of those actions, its behavior “is so far outside ‘a wide range of reasonableness’ as to be irrational.” *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (internal citation omitted); see, e.g., *Mine Workers District 5 (Pennsylvania Mines)*, 317 NLRB 663, 663-64 (1995) (depositing backpay resulting from an arbitration award in union’s treasury instead of distributing it to unit employees found “arbitrary and unreasonable”). Thus, unions have a “statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Vaca*, 386 U.S. at 177.

In addition, union conduct that is inherently destructive of statutory rights violates the Act. In order to be classified as inherently destructive, conduct must be “of the sort which would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights.” *Swift Independent Corp.*, 289 NLRB 423, 429 (1988) (sham closing and reopening of plants to evade labor contract found inherently destructive), *enforcement denied on other grounds sub nom. Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989). Thus, the Board has found conduct that undermines the collective-bargaining or arbitral process, or makes it seem a futile exercise from employees’ perspective, inherently destructive. See *Oil, Chem. & Atomic Workers Local 4-23 (Gulf Oil Corp.)*, 274 NLRB 475, 475-76 (1985) (union violated Section 8(b)(1)(A) and 8(b)(3) by expelling and disciplining employee for his adverse testimony at a grievance-arbitration hearing; “[u]nion rules and discipline which are designed to discourage or prevent individuals from testifying or being called as witnesses in

grievance-arbitration hearings are inherently destructive of the contractual arbitral process and are therefore unlawful”); *cf. International Paper Co.*, 319 NLRB 1253, 1266-75 (1995) (finding permanent subcontracting of bargaining-unit work during lockout inherently destructive because, among other things, the impact would extend past the instant labor dispute, it impaired the process of collective bargaining, and it was likely to hinder future collective bargaining; employer’s business justification did not outweigh the incursions on Section 7 rights), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997); *Esmark*, 887 F.2d at 747-49 (agreeing that sham closing and reopening of plants to escape contract could be classified as inherently destructive because it conveyed that collective bargaining was a futile exercise) (cited in *International Paper*, 319 NLRB at 1269-70).

At a time when Respondent was responsible for fairly and honestly representing unit employees in contract negotiations and administration, the same Respondent officials tasked with those representative functions were receiving personal bribes and Respondent’s treasury was being enriched by the Employer as a political gift. While the indictments and plea agreements fail to explicitly reveal any particular Respondent action taken in bargaining or contract enforcement that was detrimental to employees’ interests, it stands to reason that Respondent and its officials cannot have been acting in the good faith interests of employees while simultaneously receiving substantial corrupt payments and bribes from the Employer. In short, the conduct of Respondent and its officials plainly betrayed the core values and obligations enshrined in the duty of fair representation.

Furthermore, this conduct was inherently destructive of employees’ Section 7 rights because it communicated to unit employees that pursuit of the right to bargain collectively is futile, fundamentally undermined the collective-bargaining process, and served no legitimate

purpose. Thus, the payoffs necessarily sowed doubt as to whether Respondent was effectively representing employees' interests in collective-bargaining and contract administration. These doubts are likely to linger in employees' memories and undermine their faith in the collective-bargaining process into the future, thereby discouraging employees from exercising their statutory rights. *Cf. Esmark*, 887 F.2d at 749 (“Workers could wonder . . . why collective representation, with its attendant costs, is worthwhile if their employer can manipulate things so easily by selling assets and restructuring the holding company hierarchy.”). In addition, the payoffs obstructed the *process* of collective-bargaining and undermined the “promotion of an autonomous relationship between the parties.” *International Paper*, 319 NLRB at 1269-70. Finally, the payoffs were so prejudicial to employees' Section 7 right to be represented fairly, as explained above, yet lacked any legitimate organizational purpose. *Cf. American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965) (“[T]here are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required.”) (quoted in *International Paper*, 319 NLRB at 1267).

Accordingly, the payments to Respondent's coffers, including the unlawful chargebacks for Respondent's employees and friends who were not performing work for NTC, as well as the personal bribes to Respondent officials, violated Section 8(b)(1)(A) because they constitute a breach of the duty of fair representation and are inherently destructive of statutory rights. Respondent violated Section 8(b)(1)(A) by accepting unlawful assistance, breaching its duty of fair representation and its fiduciary duty, and engaging in conduct inherently destructive of employee rights, and the ALJ should so find.

F. The Plea Agreements Are Admissible for the Truth of the Matter Asserted

The ALJ directed at hearing that the parties examine the use of the plea agreements which were admitted into evidence. In its Motion in Limine to Exclude the plea agreements, Respondent argued that the plea agreements should be excluded or limited because they: 1) contain inherently unreliable and uncorroborated hearsay; 2) are rank hearsay with no valid exception under Federal Rule of Evidence (Fed. R. Evid.) 801 or 804; 3) are not admissible and, at a minimum, must be substantially redacted to comply with Fed. R. Evid. 803(22)(C); should be excluded because they are inherently unreliable because they are self-serving and uncorroborated by other evidence.

In Board proceedings, the Fed. R. Evid. is not controlling. *Consolidated Edison Co. of New York v. NLRB*, 305 US 197, 229-230 (1938) (the statute provides that the rules of evidence are not controlling; the obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order); see also *Calandra Photo, Inc.*, 151 NLRB 660, 671-672 n. 29 (1965); *Times Union, Capital Newspapers*, 356 NLRB 1339, 1339 n.1 (2011) (statement against interest); *United Rubber Workers Local 878 (Goodyear Tire & Rubber Co.)*, 255 NLRB 251, 251 n.1 (1981) (admission by a party opponent); *Alvin J. Bart and Co.*, 236 NLRB 242, 242-244 (1978). Cf. *Richardson v. Perales*, 402 U.S. 389, 402 (1971) (finding that a written report by a licensed physician may be received as evidence by the trial examiner despite its hearsay character and an absence of cross-examination, and despite the presence of opposing testimony or testimony by the claimant, and relying on the fact that “the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination”)

It is proper for the Board to take official notice of the entire criminal proceedings, including the plea agreements. *Kings Harbor*, 239 NLRB 679, 679-680 (1978) (official notice of criminal proceedings to disbar an atty from practicing before the Board); *Berkshire Knitting Mills*, 46 NLRB 955, 999, 1002 (1943) (considering plea agreements of 157 persons who were convicted or pleaded guilty to 168 offenses based on guilty pleas); *Aronsson Printing Company*, 13 NLRB 799, 824-825 (1939) (considering guilty pleas of 6 individuals). Cf. *Bob's Ambulance Service*, 183 NLRB 961 (1970) (remand for further hearing to receive criminal record); *Republic Steel Corp.*, 9 NLRB 219, 387-389 (1938) (granting leave to reopen record and considering evidence of convictions and guilty pleas supplemented by an examination of the criminal dockets of several courts). In *Republic Steel Corp.*, the Board noted:

We will not attempt to try before the Board accusations [of violence] which did not result in convictions or sentences upon pleas of guilty. To receive evidence upon such matters would raise a mass of collateral issues which the Board is not equipped to handle. The Board, of course, does not have the facilities for investigation and prosecution [of acts of violence] that the local law-enforcement agencies possess. Nor, as an administrative matter, can the Board attempt to determine the merits of allegations of several hundred various crimes. We think also that the Board is entitled to rely upon the local law-enforcement agencies for proof of such matters.

Consideration of criminal proceedings has been considered acceptable even if the documents did not exist at the time of the hearing. *Ralphs Grocery Co.*, 360 NLRB 529, 529, 536-537 (2014) (adopting the judge's decision to admit documents arising from a criminal indictment *even though they were not in existence at the time of the hearing*; as noted by Judge Kocol, "It seems the better approach is to consider [the] Plea Agreement, especially because the Board's ruling rests on an incomplete understanding of that document."); see also, *Overnite Transportation Company*, 133 NLRB 1488, 1489 (1961) (reopening the record to receive newly discovered evidence including guilty plea).

1. The Plea Agreements are Admissible as an Admission by a Party-Opponent

Respondent argues that the plea agreements are not admissions by a party opponent because the plea agreements were: 1) made after the employment relationship ended; and 2) not made on a matter within the scope of the employment relationship. As noted in the Division of Judges Bench Book, January 2020, § 16-801.3, Admission or Statement by Opposing Party:

Establishing that declarant was an agent of a party. As indicated in FRE 801(d)(2), the declarant's own statement may be considered but is insufficient by itself to establish that he/she was acting as an agent of a party. Thus, there must be independent direct or circumstantial evidence that an agency relationship existed and that the statement was made within the scope of the agency relationship. See, e.g., *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 116 (5th Cir. 2003); *U.S. v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir. 1982); *Jones v. Discount Auto Parts, LLC*, 2017 WL 1396477, at *5 (M.D. Fla. April 19, 2017); and *Ungerbuehler v. FDIC*, 2010 WL 3732205, at *7 (E.D. Ky. Sept. 20, 2010), and cases cited there.

For Board cases addressing whether a sufficient independent showing was made, see, e.g., *U.S. Ecology Corp.*, 331 NLRB 223, 225 n. 12 (2000) (individual's statement to employee was inadmissible hearsay as the employee's description of the individual as a "supervisor" was insufficient by itself to find that he was an agent of the employer), *enfd.* 26 Fed. Appx. 435 (6th Cir. 2001); and *Laborers Local 270*, 285 NLRB 1026, 1028 (1987) (statements by business manager's wife were inadmissible hearsay as the evidence failed to establish that she was an agent of the respondent union based on either actual or apparent authority or ratification). See also *Delchamps, Inc.*, 330 NLRB 1310, 1318 (2000) (supervisor's statement to employee was admissible nonhearsay as the employer failed to show that the supervisor's employment had terminated before he made the statement).

Fed. R. Evid. 801(d)(2) provides that a statement is not hearsay if it:

[I]s offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Adoption is part of the admission by a party. Even if a document is not expressly “vouched for” by the party it need only be shown by implication that business was conducted in a fashion that the statement was adopted, and to that extent, a statement is receivable against the principal as an adoptive admission. *Pekelis v. Transcon. & W. Air, Inc.*, 187 F.2d 122, 128 (2d Cir.1951), *cert. denied*, 341 U.S. 951 (1951). See also *U.S. v. Ganadonegro*, 854 F. Supp. 2d 1088, 1121 (D.N.M. 2012) (“the United States has ‘manifested that it adopted or believed to be true’ these statements by presenting them in federal court before a jury to secure a conviction.”) (citing *United States v Kattar*, 840 F.2d 118 at 130–31 (1988) (“The Justice Department here has, as clearly as possible, manifested its belief in the substance of the contested documents; it has submitted them to other federal courts to show the truth of the matter contained therein.”)).

Here, Respondent adopted the truthfulness of the facts within the plea agreements by its subsequent actions. As noted by Browning, Respondent’s audits found other individuals whose salaries were charged back to NTC even though they did not work for NTC, which prompted some of Respondent’s reforms, and Stoeys first learned of inappropriate use of NTC credit cards in about 2016. (Tr. 165-169, 194-196, 217) Respondent’s own witnesses testified that after it became aware that Holiefield, King, Mickens, Jewell, and Johnson used joint program funds for improper purposes, and as a result of several individuals misappropriating funds from NTC, a number of reforms were taken at NTC, including credit card reforms beginning in 2016. (Tr. 181, 210-211) Further, Respondent implemented “major reform initiatives that [Respondent is] implementing across our union[, and our] reform agenda will touch every part of this union and every region” and, during 2019 contract negotiations, Respondent and the Employer decided to dissolve NTC. (Tr. 182, 218, RX 32) Respondent’s numerous and extreme reforms, implemented after the discovery of the improper chargebacks and use of NTC credit cards,

demonstrates that it acknowledged and adopted the truthfulness of the facts contained within the plea agreements consistent with the requirements under Fed. R. Evid. 801(d)(2)(B).

The evidence introduced at hearing established that Holiefield, King, Mickens, Jewell, and Johnson were Respondent's agents at all material times related to the allegations. Respondent provided testimony that Holiefield's authority was not removed until he was placed on administrative leave in late 2013 or early 2014, but provided no evidence at hearing that King, Mickens, Jewell, or Johnson were ever removed from their positions, and, more pointedly, during any of the times material to the allegations. Accordingly, unless Respondent successfully argues in reliance upon the truthfulness of the plea agreements, then it follows that King, Mickens, Jewell, and Johnson's plea agreements were each made by the party in an individual or representative capacity and is an admission by a party opponent for the additional provisions of Fed. R. Evid. 801(d)(2)(A), (C), or (D), and the ALJ should so find.

2. The Plea Agreements are Admissible Under Fed. R. Evid. 803(22) as a Judgment of a Previous Conviction

Respondent argues that the plea agreements should be substantially redacted in order to comply with Fed. R. Evid. 803(22)(C) for a judgment of a previous conviction. Respondent argues that the evidence should be limited to either the record of the conviction alone, or "only the portions of the plea agreements that establish facts essential to the crimes of conviction, with all other content fully redacted." Respondent correctly states that the elements of the conspiracy to violate the LMRA include that: 1) two or more persons conspired to violate the LMRA; 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.

Notwithstanding that the third element includes actions taken for the purpose of advancing or helping the conspiracy, Respondent argues that all of the facts included in the plea agreements should be redacted or ignored because they were not essential to the conviction for conspiracy to violate the LMRA. Respondent provided several examples from Iacobelli's plea agreement, and argued that "because conspiracy to violate the LMRA requires *only one overt act*, by definition, the extraneous overt acts are not essential to the judgment." (emphasis added) Further, because the guilty pleas list several overt acts without describing which was *the* essential act for the judgment of conviction for conspiracy to violate the LMRA, that they all should be ignored. Respondent's argument is illogical. Although it is true that any one of the actions taken could have been a sufficient action taken to advance the conspiracy, it does not negate the objective reasons why they were included in the plea agreements – that any of the underlying facts in the pleadings which demonstrated that an actor advanced the purposes of the conspiracy are each and all appropriately considered as an element of the crime if they arguably advanced the conspiracy. This would include each of the facts in which the Employer offered to provide, and did provide, assistance to Respondent, and those actions in which Respondent accepted that assistance, which includes the facts which are also relevant to the Second Amended Complaint. The plea agreements provide substantial support for each other, and collectively show the reasons for the conspiracy – the Employer offered, and the Respondent accepted, sham employment status to a number of Respondent's family and allies under false "assignments" to NTC and paid for Respondent's personal expenses on NTC credit cards – all "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." Accordingly, the plea agreements are admissible, including for the relevant facts included within,

for the truth of the matter asserted, and the ALJ should so find, as a judgment of a previous conviction under Fed. R. Evid. 803(22).

3. The Plea Agreements are Admissible Under Fed. R. Evid.'s Residual Exception

The residual exception provides an additional method that counters the general rule that hearsay is generally inadmissible because it is inherently unreliable. *American Tissue Corp.*, 336 NLRB 435, 435 n.3 (2001) (affirming without comment, the judge's determination that employee Flores was entitled to make whole relief, which was based, in part, on the judge conditionally admitting Flores's affidavit because Flores was out of country). The judge stated the requirements for the residual exception:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Here, the plea agreements provide evidence of material fact and are more probative on the points offered than any other evidence that can be procured through reasonable efforts. The number of plea agreements which corroborate each other cannot be ignored. This is not a case reliant upon one plea agreement; here, there are at least seven relevant plea agreements to date which corroborate each other regarding the relevant facts related to the conspiracy to violate the LMRA. The sheer number of plea agreements, each made under penalty of a felony conviction, support a finding that they have equivalent circumstantial guarantees of trustworthiness sufficient to allow the Board to consider them as reliable evidence. Further, Respondent and the

Employer took actions in secret, and were only publicly discoverable after the DOJ, with its significant resources and years of development, were able to uncover after substantial effort and under the heavy influence of criminal investigations. The Board could not obtain the same or comparable evidence and lacks the ability under the Board's Rules to compel evidence which implicates criminal conduct, as here, that could, and did, result in incarceration. Further, it would not be reasonable to cause the Board to try to recreate the entire factual records of the underlying criminal cases as part of a Board proceeding. As noted by the Board in *Republic Steel Corp.*, 9 NLRB 219, above, the Board does not have the facilities for investigation and prosecution of criminal actions which law-enforcement agencies possess; the Board is entitled to rely upon law-enforcement agencies for proof of such matters. The interest in justice is best served by the admission of the pleas into evidence. The underlying facts of the plea agreements, which were part and parcel of the criminal conduct which was admitted and was the basis for criminal penalties, is crucial in enforcing employees' rights under the Act. To ignore such egregious behavior, and thereby failing to provide represented employees with an appropriate remedy, would leave those employees without assurance of their rights, which they so desperately need after the Employer's and Respondent's outrageous and unlawful actions.

Respondent was aware in advance of trial that the criminal proceedings and plea agreements were at issue and had sufficient time in advance of trial to prepare to meet it. The charges were filed on January 23, 2018, just three days after Iacobelli's plea agreement was filed. GCX 1(a), (c), (e), (g), (i), (k), 17) On February 19, the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint), issued, which alleged conduct of both Employer and Respondent, including actions of two Employer and four Respondent actors, all of which, with the exception of Holiefield (deceased) had already pleaded guilty as part of the

DOJ investigations. (GCX 1(y) at 3-4, GCX 15-19, GCX 22) On March 4, Respondent filed its Answer to the Complaint, asserting among other things, its defense to the Charging Parties' civil lawsuit (which it later specifically referenced in further detail in its July 27 Motion to Dismiss). (GCX 1(cc) at 5-6, 1(pp) at 2-3) On June 18, the Amended Consolidated Complaint and Notice of Hearing (Amended Complaint) issued, which added Employer actor Brown and Respondent actor Johnson, each of which had also pleaded guilty as part of the DOJ probe, and explicitly referenced the "plea agreements in federal case 2:17-cr-20406-PDB-RSW." (GCX 1(ll) at 3-5, GCX 20, 21) On July 2, Respondent filed its Answer to the Amended Complaint, in which it "admitted that Virdell King, Keith Mickens and Nancy Johnson used NTC credit cards for personal expenses" and again referenced its defense of the Charging Parties civil lawsuit. (GCX 1(oo) at 5-6) On July 27, in its Motion to Dismiss, Respondent explicitly asserted that the DOJ probe was at issue, and asserted the July 26, 2017 notice of Iacobelli's indictment was a fact to be considered, and asserted that it used the same defense in response to the Charging Parties civil lawsuit which was filed on January 26, 2018; this demonstrated that Respondent knew that the plea agreements were at the heart of the matter raised by the Charging Parties in both the civil lawsuit and the instant unfair labor practice charges. (GCX 1(pp) at 2-3) On August 12, Respondent's argument, including the importance of plea agreements, was addressed in the Opposition to Respondent's Motion to Dismiss. (GCX 1(uu) at 5-6) On August 21, Respondent filed its Amended Answer to the Amended Consolidated Complaint which again referenced its defense of the civil lawsuit during which it asserted the date of Iacobelli's indictment as a defense. (GCX 1(zz) at 7-8) On August 26, Respondent filed a Motion in Limine to Exclude the plea agreements. Each of the individuals who entered plea agreements have been explicitly referenced in the numerous documents described above, with Morgan by inference to her

husband Holiefield. As noted at hearing, the addresses of the individuals are unknown, as some, if not all, are currently incarcerated as part of the plea agreements. The hearing did not open until August 28. Accordingly, Respondent cannot reasonably assert that it was uninformed or unaware that the plea agreements would be offered into evidence, or that the plea agreements were the heart of the Charging Parties' cases since they filed the instant charges just three days after Iacobelli's plea was filed – and the same day that they filed their civil lawsuit. The plea agreements are admissible under the residual exception.

Further, as the Supreme Court found in *Richardson v. Perales*, 402 U.S. at 402, above, the fact that Respondent had the ability to subpoena any of the witnesses who pleaded guilty, but failed to do so, is a factor that the Court has found which weighs in favor of allowing an administrative agency to consider documentation as evidence even assuming it was hearsay and without cross-examination. An adverse inference can be drawn against Respondent that testimony of Iacobelli, King, Brown, and even more so for King, Mickens, Jewell, and Johnson, would have been damaging to Respondent's case, and would have been consistent with the facts in the plea agreements. Furthermore, Respondent failed to call *any* witness to refute any of the facts contained in any of the plea agreements, to even address any allegations that Respondent's actors, including Holiefield, King, Mickens, Jewell, or Johnson used NTC credit cards for personal purchases, or accepted chargebacks to the Respondent for salaries of other persons who were not working for NTC. Accordingly, an adverse inference should be drawn against Respondent based on its failure to call any witness to refute any of the allegations. See *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999), *enfd. mem.* 205 F.3d 1324 (2d Cir. 1999) (drawing an adverse inference against the respondent union where it failed to call its president to testify); and *Vigo Industrial, LLC*, 363 NLRB No. 70, slip op. at 5 (2015) (drawing

an adverse inference from the failure of the General Counsel or charging party union to call the individual who served as the union co-chair of the particular labor-management committee meeting at issue), and cases cited there. See also *Global Contact Services, Inc.*, 29–RC–134071, unpub. Board order issued April 28, 2015 (2015 WL 1939736), at n. 1 (union’s business agent may reasonably be presumed to be favorably disposed to union).

Finally, and contrary to Respondent’s assertion, the plea agreements were corroborated by evidence at hearing, including by Respondent’s own witnesses. On cross examination, Browning conceded that Respondent’s audits found individuals whose salaries were charged back to NTC even though they did not work for NTC, which prompted some of Respondent’s reforms. (Tr. 165-169, 194-196) He also testified that Respondent became aware that Holiefield, King, Mickens, Jewell, and Johnson used joint program funds for improper purposes, including for personal gain. (Tr. 181) Stoej testified that she learned of inappropriate use of NTC credit cards in about 2016. (Tr. 217) They each testified about reforms which Respondent took after the allegations surfaced, including issuing its press release which, it asserts, denounced the misuse of joint program funds and condemned those actions. (Tr. 181-182, 210-211, 218, RX 31) Respondent found actions during its audits including the misuse of NTC credit cards and the improper chargebacks, which support the facts in the plea agreements, and further support the conclusion that the plea agreements contain circumstantial guarantees of being trustworthy. Surely, if the facts underlying the indictments, plea agreements, and all the other information in the criminal cases were false, Respondent would not have taken such actions. Accordingly, each of these actions were an admission against Respondent’s interest regardless of the language in the plea agreements. Moreover, it is telling that Respondent does not attack the truthfulness of the substance of the plea agreements; instead, it attacks the admissibility of what are clearly

truthful statements from multiple persons who held the highest positions within the Employer and Respondent. Although these actions were hidden from the public for years, Respondent, by its objections, attempts to continue to conceal the truth from the public. The plea agreements are admissible, including for the facts contained therein. Even if they were considered hearsay, the plea agreements, testimony at hearing, and documentary evidence introduced, including that introduced by Respondent, demonstrate that the plea agreements are trustworthy and should be admitted, including for the truth of the matter asserted within, and the ALJ should so find.

IV. CONCLUSION

Based on the foregoing reasons and the record evidence considered as whole, Counsel for the General Counsel respectfully submits that Respondent has violated Section 8(b)(1)(A) of the Act by: (1) accepting unlawful assistance from the Employer; (2) breaching its duty of fair representation and fiduciary duty; and (3) engaging in conduct inherently destructive of employee rights under the Act as alleged in the Second Amended Complaint. The ALJ should so find and recommend that the Board fashion an appropriate remedy which would require Respondent to: cease and desist from such unlawful conduct; post an appropriate Notice to Employees at all facilities in which it represents employees pursuant to the collective-bargaining agreements alleged in the Second Amended Complaint, a proposed copy of which is attached. The ALJ should order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Dated at Detroit, Michigan, this 15th day of October 2020.

Respectfully submitted,

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Cases 07-CB-213726, 07-CB-213747, and 07-CB-213749 was served via E-Gov, E-Filing, and Electronic Mail, on this 15th day of October 2020, on the following:

Via E-Gov, E-Filing:

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Administrative Law Judge
National Labor Relations Board
Division of Judges
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October 15, 2020

Date

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Signature

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NOTICE TO EMPLOYEES

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, A FEDERAL LAW, GIVES YOU THE RIGHT TO:

- Form, join or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT restrain or coerce you in the exercise of the above rights.

WE WILL NOT receive financial inducements from FCA US LLC (Employer) by accepting authorization from the Employer's agents to charge UAW-Chrysler Skill Development and Training Program d/b/a UAW-Chrysler National Training Center (NTC) credit cards for Union agents' personal expenses.

WE WILL NOT receive financial inducements from the Employer by accepting payment of the salaries of Union officials who were not assigned to work at the NTC, but rather served on the Union's National Negotiation Committee.

WE WILL NOT fail to fairly represent you for reasons that are arbitrary, discriminatory, or in bad faith.

WE WILL NOT breach the fiduciary duty and duty of fair representation we owe to you.

WE WILL NOT engage in conduct inherently destructive of employee rights under the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

International Union, United Automobile, Aerospace
and Agricultural Implement Workers of America
(UAW), AFL-CIO

(Labor Organization)

Dated: _____ **By:** _____
(Representative) (Title)