JUDICIAL ARBITRATION UNDER AAA ARBITRATION RULES

Pursuant to the 10/16/19 *Settlement of Litigation & Effects Bargaining Agreement* between GM and UAW and the FRCP 41(a) *Voluntary Stipulation of Dismissal with Prejudice* of Case No. 19-cv-00420 (*UAW v. GM*), United States District Court, Northern District Of Ohio, Eastern Division. [As filed and approved by Judge Benita Y. Pearson--4:19-cv-00420-BYP Doc. #37, 12/05/19].[1]

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In the Matter of an Arbitration Between

INTERNATIONAL UNION, UNITED AUTO, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

- and -

GENERAL MOTORS LLC (GM)

****

Dana Edward Eischen, Impartial Arbitrator

APPEARANCES

For the UAW:

BREDHOFF & KAISER, P.L.L.C.
By: Joshua B. Shiffrin, Esq.
J. Alexander Rowell, Esq.
Abigail Carter, Esq.

For GM:

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
By: Scott R. McLaughlin, Esq.

EVERSHEDS SUTHERLAND (US) LLP
By: Michael J. Woodson, Esq.

[1] *See* Attachment A (Joint Ex. 4).

PROCEEDINGS

This arbitration arises out of the Court-approved October 16, 2019 *Settlement of Litigation & Effects Bargaining Agreement* ("Settlement") between International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW ("UAW" or "Union") and General Motors, LLC ("GM" or "Company"), collectively, "the Parties", which resolved most of the issues disputed in *UAW v. GM* United States District Court, Northern District Of Ohio, Eastern Division (Case No. 19-cv-004200.

After mutually designating me to arbitrate two (2) remaining unresolved issues in bifurcated proceedings, held "under AAA Voluntary Arbitration Rules", the Parties submitted and exchanged Stage I arbitration witness lists, potential exhibits, stipulations, mutually agreed hearing rules and prehearing briefs on January 26, 2022.

Stenographically transcribed virtual Stage I arbitration hearings were then conducted on January 31, February 1, February 2 and February 3, 2022, hosted and recorded by Veritext on the Zoom platform. Each of the Parties was represented in those remote hearings by legal counsel and equally afforded a full and fair opportunity to present oral advocacy and evidence in support of their countervailing positions; including direct and cross-examined testimony of sworn witnesses, as well as factual and demonstrative documentation.

Following receipt of the hearing transcripts, the evidentiary record was closed with a round of post-hearing briefs and reply briefs; a process which was completed on May 4, 2022. Due to the size and complexity of the case record, the Parties graciously extended to July 8, 2022 the due date for rendition of my attached Award.

STAGE I SUBMITTED ISSUES

In §3 (c) of their October 16, 2019 Settlement Agreement, the Parties expressly submitted the following two disputed issues to final and binding arbitration, under AAA Arbitration Rules [2], and preserved all their defenses in such arbitration:

> (i) "[W]hether any UAW member actively employed at an Unallocated Plant as of 11/26/18 who chose to accept employment at another GM facility in lieu of layoff from the Unallocated Plant is entitled to MSR [mutually satisfactory retirement] benefits arising out of the loss of his/her position at the Unallocated Plant".
>
> (ii) "[W]hether employees [who?] lost wages between 11/26/18 and 9/14/19 who continued employment with GM should be made whole".

Note: The Parties mutually agreed to bifurcate these proceedings, with presentation of evidence and advocacy addressing substantive arbitrability and merits of the submitted issues in this Phase I arbitrability/merits phase; reserving for potential Stage 2 phase proceedings presentation of evidence and advocacy on the issue of appropriate compensatory remediation, if any.

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[2] **AAA Voluntary Arbitration Rule 3.**

Jurisdiction (Emphasis added)

1). The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

2) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

3) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

BACKGROUND

GM/UAW National Agreement and Plant Closing and Sale Moratorium

GM LLC, an international manufacturer of automobiles and trucks, employs more than 155,000 people to produce and assemble Buick, Cadillac, Chevrolet and GMC branded vehicles in 37 plants around the world. The UAW represents more than 48,000 of the Company's production/maintenance and skilled trade employees at GM plants located throughout the United States. These Parties have a long-standing and sophisticated collective bargaining relationship, memorialized in successive negotiated agreements dating back to 1937-38. The National Collective Bargaining Agreement underlying the present case took effect on November 23, 2015 and remained in effect through September 14, 2019.

For many decades, GM and the UAW have been parties to a series of such National Agreements providing the terms and conditions of employment applicable to GM production and maintenance employees, as well as certain other skilled employees. By custom, practice and tradition, viable side-letter agreements and related "documents", entered into over the years by these Parties around certain particularized issues, have been appended to each such printed National Agreement. One such historical side-letter, titled Plant Closing and Sale Moratorium and euphemistically labeled "Document 13", places limitations, during the term of the applicable National Agreement, upon GM's exercise of certain management rights otherwise reserved solely and exclusively to reasonable management discretion by CBA §3 Recognition, ¶8:

> *. . .[T]he products to be manufactured, the location of the plants, the schedules of production, the methods, processes and means of manufacturing are solely and exclusively the responsibility of [GM]. . .*

The language of "Doc. 13" has evolved over the years since it was first agreed to in 1987. That original version limited GM's management right to close a plant during the term of the CBA, with a single "an Act of God" exemption should an instance of uncontrollable natural forces in operation make compliance with that moratorium "impossible". By 2011, the Parties had added the word “idle” to the moratorium list of restrictions, specified other restrictions related to selling or disposing of a plant during the term of the CBA, and added the phrase “market related volume decline” to the compliance impossibility exemption clause. That language has remained *in haec verba* since 2011, so the October 25, 2015 version of Doc 13 appended to the 2015-2019 CBA reads, as follows (emphasis added):

* * * * * *

> *As a result of your deep concern about job security in our negotiations and the many discussions which took place over it,* ***this will confirm that during the term of the new Collective Bargaining Agreement, the Company will not close, idle, nor partially or wholly sell, spin-off, split-off, consolidate or otherwise dispose of in any form, any plant, asset, or business unit of any type, beyond those which have already been identified, constituting a bargaining unit under the Agreement.***
>
> *In making this commitment,* ***it is understood that conditions may arise that are beyond the control of the Company, (i.e. market related volume decline, act of God), and could make compliance with this commitment impossible. Should such conditions occur, the Company will review both the conditions and their impact on a particular location with the Union.***
>
> *Should it be necessary to close or idle a plant constituting a bargaining unit consistent with our past practice, the Company will attempt to redeploy employees to other locations and, if necessary, utilize Attachment A of Appendix K of the GM-UAW National Agreement or other incentivized attrition programs as agreed to by the National Parties.*

* * * * * *

The GM Supplemental Pension Plan/GM Hourly-Rate Employees' Pension Plan Agreements

The GM Supplemental Pension Plan Agreement and the GM Hourly-Rate Employees' Pension Plan (Exhibits A and A-1 to the National Agreement) expressly are made "parts of" the 2015 National Agreement, with the exception of one major carve-out. (emphasis added):

> Exhibit A, §224.
>
> **The parties have provided for a Pension Plan**. . . by Supplemental Agreements signed by the parties simultaneously with the execution of this Agreement,. **attached hereto as "Exhibit A" . . . and made part(s) of this Agreement as if set out in full herein, subject to all provisions of this Agreement. No matter respecting the provisions of the Pension Plan . . . shall be subject to the grievance procedure established in this Agreement, except as expressly provided in Paragraph (46) of this Agreement. . .**
>
> * * *
>
> Powers of the Umpire:
>
> . . . **The Umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement or any agreements made supplementary hereto;** . . . **The Umpire shall have no power to rule on any issue or dispute arising under the Pension Plan, . . . except with respect only to the question of whether a discharged employee should receive a supplemental allowance pursuant to Section 7 of Article II of the Pension Plan (Exhibit A-1).** Any case appealed to the Umpire on which the Umpire has no power to rule shall be referred back to the parties without decision.

Other salient provisions of the Supplemental Pension Plan Agreement (CBA Exhibit A) pertinent to my findings and determination of the §3(c)(i) "MSR issue" submitted for resolution in this case read as follows (emphasis added):

> **CBA Appendix K**:
>
> The National Jobs Committee may authorize a Special Attrition Plan (SAP) for designated eligible employees or may approve requests from Local Jobs Committees for implementation of such a Plan. Details of the SAP, as well as an explanation of Options, will be jointly presented to all eligible employees.
>
> These options may include: . . . Mutually Satisfactory Retirement (MSR) at age 50 or older with 10 or more years of credited service . . .
>
> * * * * * *

CBA Exhibit A-1, Article II, § 2(b):

An employee who has attained age 55 (age 50 for an employee who is laid off on or after October 1, 1984 as a result of a plant closing where no other Company plants are in the same geographical area) but not age 65 and who has 10 or more years of credited service may be retired under mutually satisfactory conditions as set forth hereinafter in the Standards applicable to such retirement.

* * * * * *

CBA Exhibit A-1 Appendix D-1, §B:

STANDARDS FOR APPLICATION OF PROVISIONS REGARDING RETIREMENT UNDER MUTUALLY SATISFACTORY CONDITIONS
GENERAL MOTORS HOURLY-RATE EMPLOYEES PENSION PLAN

Article II, Section 2(b) of the General Motors Hourly- Rate Employees' Pension Plan provides that an employee may be retired early under mutually satisfactory conditions providing such employee is otherwise eligible. The following standards have been adopted by the Company as a guide in the application of this provision.

Standards

* * *

B. An employee who is laid off from their last GM employment:

Retirement under mutually satisfactory conditions will be available to an employee who is laid off:

(i) as a result of a plant closing or discontinuance of operations, or

(ii) whose layoff appears to be permanent, and in either case has not been offered suitable work by the Company in the same labor market area in which the employee was last employed by the Company.

* * * * * *

CBA Exhibit A-1 §3 Administration

(a) Board of Administration

(1) There shall be established a central Board of Administration hereinafter referred to as the Board, composed of six members, three appointed by the Company and three by the Union. Each member of the Board shall have an alternate. In the event a member is absent from a meeting of the Board, the alternate may attend and when in attendance shall exercise the duties of the member. Either General Motors LLC or the Union at any time may remove a member or alternate appointed by it and may appoint a member or alternate to fill any vacancy among members or alternates appointed by it.

No person shall act as a member of the Board of Administration or as an alternate for such member unless notice of the appointment has been given in writing by the party making the appointment to the other party.

(2) The Board shall meet at such times and for such periods for the transaction of necessary business as may be mutually agreed upon by its members.

(3) To constitute a quorum for the transaction of business, the presence of four members of the Board shall be required. At all meetings of the Board, the member or members present appointed by the Company shall have in the aggregate a total of one vote to be cast on behalf of the Company and the member or members present appointed by the Union shall have in the aggregate a total of one vote to be cast on behalf of the Union.

(4) The compensation and expenses of the Company members will be paid by the Company and the compensation and expenses of the Union members will be paid by the Union and no part of such compensation or expenses will be paid from the trust fund.

* * *

6) The Board of Administration shall have no power to add to or subtract from or modify any of the terms of this agreement or the Plan, nor to change or add to any benefit provided by said agreement or Plan, nor to waive or fail to apply any requirement of eligibility for a benefit under said agreement or Plan.

(7) Any case referred to the Board of Administration on which it has no power to rule shall be referred back to the parties without ruling.

(8) No ruling or decision of the Board of Administration in one case shall create abasis for a retroactive adjustment in any other case prior to the date of written filing of each such specific claim.

(9) There shall be no appeal from any ruling by the Board which is within its authority. Each such ruling shall be final and binding on the Union and its members, the employee or employees involved, and on General Motors LLC, subject only to the arbitrary and capricious standard of judicial review.

The Union will discourage any attempt of its members and will not encourage or cooperate with any of its members, in any appeal to any Court or Administrative Board or Agency from a ruling of the Board of Administration.

(b) Impartial Chairperson

(1) General Motors LLC and the Union shall mutually agree upon and select an Impartial Chairperson, who shall serve until requested in writing to resign by three Board members.

(2) The Impartial Chairperson will not be counted for the purpose of a quorum, and will vote only in case of a failure of the Company and the Union by vote through their representatives on the Board to agree upon a matter which is properly before the Board and within the Board's authority to determine; provided that the Impartial Chairperson may vote only on matters involving the processing of individual cases, not on the development of procedures.

(3) The fees and expenses of the Impartial Chairperson will be paid one-half by the Company and one-half by the Union,

(c) The Union and General Motors LLC members of the Board of Administration have, in Appendix D, agreed to matters such as but not limited to: (1) procedures for establishing Pension Committees at the Divisions or plants involved; (2) the authority

and duties of such Pension Committees; (3) the procedures for reviewing applications for pensions; (4) the handling of complaints regarding the determination of age, service credits, and computation of benefits; (5) procedures for making appeals to the Board; (6) means of verifying service credits to which employees are entitled under the Plan; (7) methods of furnishing information to employees regarding past and future service credits; (8) the amount of time the Union members of the committees may be permitted to leave their work to attend meetings of the Pension Committees; (9) how disputes over total and permanent disability claims will be handled, including disputes, if any, with respect to whether a disabled pensioner engages in gainful employment; (10) the review of pertinent information about the Plan for dissemination to employees; (11) how pension payments will be authorized by the Board. All such matters are consistent with all other provisions of the Plan and this agreement. **The working out of the procedures outlined in this section shall be the responsibility of the Company and Union members of the Board, and the Impartial Chairperson shall have no power to decide any question with respect thereto.**

(d) Except as provided otherwise in this agreement, the general administration of the provisions of the Plan shall be the responsibility of the Company,

(f) No matter respecting the Plan as modified and supplemented by this agreement or any difference arising thereunder shall be subject to the grievance procedure established in the collective bargaining agreement between General Motors LLC and the Union, except as expressly provided in Paragraph (46) of such collective bargaining agreement.

* * * * * *

CBA Exhibit A-1, Article VI, § 1:

General Motors is the Plan Administrator and has the full authority to construe, interpret and administer the Plan.

* * * * * *

CBA Exhibit A-1 Appendix D:

AGREEMENT IMPLEMENTING SECTION 3(C) OF THE SUPPLEMENTAL AGREEMENT PENSION PLAN, DATED October 25. 2015. BETWEEN GENERAL MOTORS LLC AND THE UAW ESTABLISHED BY BOARD OF ADMINISTRATION

Pursuant to Section 3(c) of the Supplemental Agreement Pension Plan, dated October 25. 2015, between General Motors LLC and the International Union, UAW, the following provisions are hereby established by the Board of Administration, hereinafter referred to as the Board:

A. PENSION COMMITTEES

1. There shall be established for each location having a bargaining unit or units covered by the terms of the National Agreement between the parties dated October 25.2015. a Pension Committee consisting of members appointed by the GM Department

of the International Union and members located at a GM Benefits &Services Center, hereinafter referred to as the Center, as delegated by the GM Employee Benefits Staff of General Motors LLC.

* * *

B. RETIREMENTS

1. Normal Retirement or Early Retirement (Employee Option)

Application for a pension benefit under the provisions of the Pension Plan for normal or early retirement at the option of the employee shall be made by contacting the Center for a retirement package. The retirement package will be provided to the employee or Union member of the Pension Committee as requested. The retirement package contains all documents necessary to initiate a retirement.

2. Early Retirement Under Mutually Satisfactory Conditions

(a) When an employee is to be retired under mutually satisfactory conditions, the retirement package will be prepared by the Center and sent to the Union member of the Pension Committee or Personnel Director, as requested, in accordance with the procedures in Section D.

(b) Retirement under mutually satisfactory conditions will be determined based solely on the Standards as set forth in the Pension Plan applicable to such retirement, only upon the written approval of the Personnel Director or the designated representative of the Personnel Director, and acknowledged in writing by the employee on form HRP-9M.

(c) **Neither the Pension Committee nor the Board shall have any jurisdiction with respect to any questions as to whether any employee retired at the employee's own option or under mutually satisfactory conditions under the Standards set forth in the Pension Plan.**

* * * * * *

The Plants at Issue and the Market-Related Volume Decline

The relevant GM plants in this arbitration are the Lordstown, Ohio Assembly Complex ("Lordstown"); the Warren, Michigan Transmission Operations ("Warren"); and the White March, Maryland Operations ("Baltimore"). [Related employee layoffs at the "D-Ham" Assembly Plant, which straddles Detroit and Hamtramck, Michigan, were also contested by the Union, but the Parties resolved that matter after GM allocated more production to that facility.]

1. The Lordstown Assembly Complex.

The GM Plant in Lordstown, Ohio, *a.k.a.* the "Lordstown Assembly Complex", opened in 1966 and produced the Chevrolet Cruze compact sedan from 2008 through early March 2019. In 2016, the Lordstown Plant also began to manufacture the Chevrolet Cruze D2, a larger and more technologically advanced version of the Cruze compact sedan. As of December 31, 2016, GM employed 2,826 active UAW-represented employees and 381 temporary employees on three shifts at the Lordstown plant.

Ever since the mid-2010's, however, sales of compact sedans have fallen off, as consumer preferences shifted from sedans and compact cars (like the Cruze) to cross-over vehicles and SUVs. As the Cruze sales decline deepened, GM eliminated the third shift at Lordstown in January 2017 and began cutting weeks out of the assembly schedule in an attempt to better match production with sales. Next, in late July 2017, GM and the two separate UAW local unions (UAW Assembly Local 1112 and UAW Stamping Local 1714) at the Lordstown Complex executed the "Lordstown Site Operating Agreement" or "Lordstown MOU", which granted GM additional cost-savings and increased managerial flexibility in overtime assignments and deployment of skilled crafts, together with a merger of the two local unions.

About a year later, in Spring 2018, GM ended the second shift, laid off more employees, and reduced Lordstown Plant Cruze production staffing to one shift of approximately 1,150 active employees. The Company then approached the consolidated local unions again in October 2018 about additional cost-saving concessions. But those discussions apparently were obviated by GM's unilateral November 26, 2018 "Unallocation Announcement", *infra*, which is the gravamen of the present dispute.

2. The Warren Transmission Plant.

The Warren, Michigan plant produced the “6T70” transmission—a six-speed automatic transmission used in front-wheel-drive and all-wheel-drive vehicles with a transverse powertrain orientation--including sedans like the Chevy Impala, the Cadillac XTS, and the GMC Acadia. When demand for those vehicles declined, GM introduced another product, the "Hydra-Matic 9T50" transmission, which offered improved fuel efficiency and better performance and refinement than the 6T70. Initial demand for the 9T50 transmission was high but demand for the 6T70 continued to decline. Eventually, Volt, Malibu, and CT6 sedan sales volume also declined, which led to less need for the Warren Plant transmissions. Due to the reduced demand for these transmissions, and with the Union’s cooperation, GM eliminated the second shift at Warren in June 2017. As of the November 2018 "Unallocation Announcement", GM employed c. 198 UAW-represented active employees on one shift at the Warren Transmission plant.

3. The Baltimore Transmission Plant.

The White Marsh, Maryland plant ("Baltimore Operations") opened in December 2000 and, at times pertinent to this case, was responsible for building the "Allison 1000" transmission, a six-speed automatic transmission used in trucks such as the Chevrolet Silverado and GMC Sierra. The Baltimore Operations also manufactured some of the GRE electric transmissions for the Cadillac CT6 PHEV. Prior to November 2018, however, GM made long-term plans to replace the Allison 1000 with the GR-10, primarily manufactured at other GM plants in Mexico, Toledo, Ohio and Romulus, Michigan. As of the November 26, 2018 "Unallocation Announcement", *infra*, the Baltimore Operations plant in White Marsh, Maryland employed c. 181 active UAW-represented employees and approximately 50 temporary employees.

The November 26, 2018 Unallocation Announcement

On November 16, 2018, a group of GM's top executives convened a meeting with the chief officers of the UAW, subject to signed non-disclosure agreements. GM's Chair and Chief Executive Officer Mary Barra was accompanied by Vice President of North America Manufacturing Gerald Johnson, Executive Vice President of Global Manufacturing Alicia Boler Davis, and General Counsel Craig Glidden. In attendance for the UAW was then-President Gary Jones, UAW General Counsel Niraj Ganatra, and Vice President and GM Department Director Terry Dittes. Citing the declining market demand for small cars and sedans, GM informed the Union officials that it planned to cease production at several plants, including Lordstown, Baltimore, and Warren.

On November 24, 2018, GM's then-Vice President for Labor Relations, North America Scott Sandefur sent to UAW VP Dittes a list of anticipated "production end dates" for the Lordstown, Baltimore, and Warren plants, all of which were before the September 14, 2018 end date of the 2015 GM/UAW National Agreement. Two days later, GM publicly announced the list of plants which it "unallocate" production, including Lordstown, Baltimore, and Warren in the following press release. (emphasis added):

> ***Increasing capacity utilization*** *– In the past four years, GM has refocused capital and resources to support the growth of its crossovers, SUVs and trucks, adding shifts and investing $6.6 billion in U.S. plants that have created or maintained 17,600 jobs. With changing customer preferences in the U.S. and in response to market-related volume declines in cars, future products will be allocated to fewer plants next year.*
>
> ***Assembly plants that will be unallocated in 2019 include****:*
> *– Oshawa Assembly in Oshawa, Ontario, Canada.*
> *– Detroit-Hamtramck Assembly in Detroit.*
> ***– Lordstown Assembly in Warren, Ohio****.*
>
> ***Propulsion plants that will be unallocated in 2019 include****:*
> ***– Baltimore Operations in White Marsh, Maryland.***
> ***– Warren Transmission Operations in Warren, Michigan***

Consistent with that November 26, 2018 announcement, GM immediately ceased assigning any new production or assembly work to the build out schedules at the Lordstown, Warren and Baltimore plants. After previously assigned work already in the respective production and assembly pipelines at the affected plants was completed, no more production work ever was assigned to or performed at those affected plants. Consequently, production ceased at the Lordstown Complex on or about March 8, 2019, at Baltimore Operations on or about May 3, 2019, and at the Warren, Michigan facility on or about August 1, 2019. However, from those respective cessation of production dates forward, until after the Parties executed the Settlement Agreement and the 2019 National Agreement on October 16, 2019, GM maintained and preserved the safety, security and site integrity of each impacted plant; renewing all applicable permits and keeping major operational components viable for potential restart (including maintaining the alpo-phosphate coating system, urethane system, and robots at Lordstown in ready condition).

At the time of the November 26, 2018 "unallocation" announcement, approximately 1,100 UAW-represented employees were still working at the Lordstown Complex, and approximately 200 at each of the other two affected plants. The record shows that 75-100 bargaining unit employees were still employed for maintenance and upkeep purposes at Lordstown in June 1, 2019. But that count was down to only about 8 people when the Settlement Agreement and 2019 National Agreement were consummated in mid-October 2019. It is undisputed that GM never did resume production at the Lordstown, Baltimore or Warren plants, each of which was officially closed as part of the Settlement Agreement and subsequently sold off by GM.

Retirements and L-35/L-34 Transfers

Soon after the November 26, 2018 "Unallocation Announcement", some senior employees took preemptive action by requesting a "voluntary" seniority-based transfer to another GM plant. Others, who were eligible to do so, elected to take a "normal retirement" under the Pension Plan, in lieu of being "laid off".[3] However, once production ceased, the majority of non-retired formerly active employees were placed in "L-35" leave of absence status under the terms of Appendix A of the National Agreement, *i.e.,* they were "laid off" with health insurance and supplemental unemployment benefits. L-35 status employees also have a contractual right to request a seniority-based "voluntary" transfer to a current available opening in a different GM facility and retain L-35 status until they were transferred. Alternatively, a "laid off" employee could remain in L-35 status and await further developments, including potential offers of a "forced" juniority-based transfer to openings in other GM plants.

As noted, *supra*, some of the more senior Lordstown employee preemptively elected to transfer out, while others took L-35 status but then promptly requested seniority-based "voluntary" transfers elsewhere. The record shows that most of the employees "laid off" from Warren were able and willing to transfer to the GM facility in nearby Flint, Michigan. However, there was no GM plant with current openings anywhere near the "unallocated" Lordstown, Ohio and Baltimore, Maryland plants.

[3] The Parties commonly use the term “laid off” to describe an employee in "L-34" or "L-35" status under Appendix A, but whether with benefits (L-35) or without benefits (L-34) those employees technically are on a formal leave of absence.

Thus, most of those "laid off" employees elected to remain in L-35 status in their home communities and await further developments. Under applicable CBA provisions, L-35 status individuals who decline GM's offer of a transfer to another GM facility with available openings, proffered in reverse-seniority ("juniority"), lose L-35 (with benefits) status and are placed in L-34 (without benefits) status, retaining only seniority-based recall rights at their home plant.

To summarize, most Warren employees relocated to the Flint, Michigan plant, some Lordstown or Baltimore employees took "normal retirements" after November 2018, and some requested a "voluntary" seniority-based transfer to a different GM facility before or after being placed in L-35 (with benefits) status. A significant number of these individual eventually accepted a "forced" juniority-based transfer to GM plants in Arlington, Texas Wentzville, Missouri; and Bowling Green, Kentucky, while the others declined transfer and remained "laid off" in their home communities in L-34 status (without benefits).

Individuals in the latter group, who were otherwise age and service eligible to apply for a mutually satisfactory retirement ("MSR") under the Pension Plan, eventually were allowed to do so as part of the Settlement Agreement. The unresolved issue submitted to arbitration by §3(c)(i) of the Settlement Agreement, *supra*, is whether those employees who accepted "forced" juniority transfers, in lieu of remaining "laid off" in their home communities in L-34 (without benefits) status, are "entitled" to a MSR under the GM Supplemental Pension Plan Agreement and the GM Hourly-Rate Employees' Pension Plan Agreement. *See* 2015 National Agreement Exhibit A-1, Article II, § 2(b) and Appendix D-1, §B.

Grievances/Litigation/Bargaining/Settlement Agreement

On December 4, 2018, the Union at Lordstown filed two grievances claiming GM's "unallocation" of the three plants was a "direct violation of the GM-UAW Agreement". The first grievance alleged "GM has broken its commitment and failed to comply with the intent of the plant closing moratorium in [D]oc. 13," and demanded that the Company "continue production of the Chevy Cruze D2LC at the Lordstown complex.". The other grievance charged GM with violating the 2017 Lordstown Competitive Operating Agreement and demanded that GM "continue to produce the Cruze at Lordstown". From early December 2019 until February 18, 2020, the two sides discussed and disputed, without resolution, whether Doc. 13 applied to or was violated by GM's "unallocation of product" at the affected plants.

On February 26, 2019, the Union initiated a LMRA §301 breach of contract action against GM in the United States District Court for the Northern District of Ohio. In *UAW v. GM*, Case No. 19-cv-00420, ("the Doc. 13 Case"), the UAW alleged that GM's "unallocation" of the plants violated Document 13 and sought injunctive relief requiring GM to "[r]escind its decision to close [the Unallocated Plants]" and "[t]ake no further steps to close these plants during the term of the Agreement." That lawsuit also demanded "damages to make affected employees whole for all losses resulting from the Company's breach of contract, including, but not limited to, back wages and benefits."

In response, GM sought to dismiss the case on grounds that "the CBA prescribes mandatory grievance arbitration procedures that apply to this dispute" and "both UAW Lordstown grievances were still open and unresolved". When the UAW local unions withdrew their grievances, GM filed its own grievance claiming UAW "violated the National Agreement by filing litigation against GM rather than submitting its Document

13 claim to the grievance-and-arbitration procedure" and that the disputed product allocation decisions were permitted by §3,¶ 8 of the 2015 National Agreement and by the October 25, 2015 Document 13 letter.

Against that background, the UAW and GM began bargaining, in the summer of 2019, for a successor to the 2015 National Agreement, which expired by its terms on September 14, 2019. During that round of bargaining, the Parties also negotiated over many of the disputed issues arising from the November 2018 "Unallocation Announcement", including "effects bargaining" for former employees from the impacted plants, whether Document 13 would be retained remain in the new National Agreement, and resolution of the related grievances and lawsuits. The resulting *Settlement of Litigation & Effects Bargaining Agreement*, dated and signed October 16, 2019, included the Parties mutual promise to arbitrate, "under AAA Arbitration Rules", the two specifically submitted unresolved issues and "to preserve their defenses in such arbitration".

POSITIONS OF THE PARTIES

The following summaries of the respective countervailing positions are edited from the prehearing and posthearing briefs:

ARBITRABILITY

GM

By reserving its defenses, GM did not clearly and unmistakably waive its right to have a court determine the substantive arbitrability of the provisions of Document 13 or the MSR under the Pension Plan. Although the Parties identified Document 13 several times in their Settlement Agreement – even exempting the unallocated plants from its reach – they did not identify Doc. 13 as an issue to be arbitrated. The Parties never agreed to arbitrate alleged Doc. 13 violations in the Settlement Agreement for the commonsense reason that the Settlement Agreement settled any such Doc. 13 dispute. Thus, the Union's Doc. 13 claims are not arbitrable because the plain language of the Settlement Agreement prevails.

The Arbitrator also should issue an award in favor of GM on the MSR issue because it is not arbitrable as a matter of law and as a matter of contract under the National Agreement and Pension Plan Agreements. What GM did agree to was to allow the Union to make its case to an arbitrator that it had some contractual basis to arbitrate the MSR. In turn, the Union allowed GM to preserve all legal defenses available to it, including, the fact that the MSR is simply not arbitrable. Indeed, the Union's MSR claim is not arbitrable under any of the alternative theories the Union has offered.

UAW

The Settlement Agreement affirmatively states that both parties "agree[d] to arbitrate" two specified substantive issues, thereby creating a fresh arbitration agreement. This arbitration is not being held before the parties' Umpire under the rules pertaining to that procedure. Rather, this is an altogether new and different arbitration procedure, as is apparent from the language in the Settlement Agreement stating that the arbitration is to be held "under AAA Labor Arbitration Rules." The plain language and bargaining history of the Settlement Agreement establish beyond peradventure that the Parties agreed to arbitrate the merits of both of those issues.

The Settlement Agreement statement that the parties "preserve their defenses," language can only be read as a reference to substantive defenses. GM puts forth as its central defense the extravagant contention that GM never consented for the arbitrator to actually decide either submitted question but only for him to declare his powerlessness to decide them. If that arbitrability defense was being preserved, the entire arbitration component of the Settlement Agreement would be illusory. GM makes other separate non-arbitrability arguments for each of the two issues that the Settlement Agreement specifically refers to arbitration. The arguments have no merit and GM has not proved its non-arbitrability affirmative defense with respect to either the MSR or Document 13 issues.

MERITS

UAW

The Company's actions in relation to the "Unallocated plants" in November 2018 and thereafter violated Document 13. The plants at Lordstown, Baltimore, and Warren were not identified for closure prior to signing the 2015 National Agreement. Therefore, under the plain language of Document 13, those plants were not to be closed or idled during the term of the 2015-2019 National Agreement unless a condition "beyond the control of the Company" makes compliance with the commitments in paragraph 1 of Document 13 "impossible". Notwithstanding this language and the Parties' related past practice, GM unilaterally announced in November of 2018 that these plants would be closed. Nothing "beyond the control of the Company" occurred with respect to the market for the Cruze between August 2018 and November 2018 that rendered GM's continued compliance with Document 13 "impossible"; particularly when national bargaining for a new agreement— including over the Document 13 exceptions list— was set to begin in July 2019. It simply was not "impossible" for GM to continue some production at the three plants for another ten months, rather than abruptly and unilaterally closing the plants

If GM had followed the established contractual process, the earliest these three plants would have closed would have been in the 2019 National Agreement bargaining round when, as in past instances of plant closures, the Parties may have agreed to put the three facilities on the Document 13 exceptions list. Had that occurred, the employees at the plants (1) would have remained employed through at least September 14, 2019, when the 2015 agreement expired, and (2) would have been offered the typical set of options that are offered in the event of a plant closing, including the contractually required MSR retirement option. Instead, GM acted in violation of Document 13 by unilaterally closing the plants prior to the end of the 2015 National Agreement. The affected employees who relocated away from their home plant in order to continue their employment with GM should now be made whole by the Arbitrator.

Further, UAW-represented employees at Lordstown, Warren and Baltimore with ten years of service, who were not offered suitable employment in the same labor market area, were contractually entitled to an MSR option as a result of the "unallocation" decision. All of those employees who were eligible should have been permitted to take an MSR retirement at the time of the plant "unallocation" closures, because the triggering conditions in the Pension Plan had been met. Yet, despite clear evidence that the plants were discontinuing operations, GM did not make an MSR available to eligible affected employees following its November 26, 2018 announcement. Instead, those employees were left to make difficult decisions about their future, including for some the necessity of relocating to another part of the country to continue their GM employment. Those employees who relocated to another GM facility to avoid indefinite layoff should not be left worse off than the employees who remained on indefinite layoff but ultimately were permitted to apply for an MSR after the new National Agreement was settled.

For the foregoing reasons, and in light of the evidence that was adduced at the hearing in this matter, the Arbitrator should find (1) otherwise eligible employees who were actively employed at an Unallocated Plant as of November 26, 2018, and who chose to accept employment at another GM facility in lieu of layoff from the Unallocated Plant, are entitled to MSR benefits arising out of the loss of their positions at the Unallocated Plant, and (2) employees at the Unallocated Plants who lost wages between November 26, 2018 and September 14, 2019, and who continued employment with GM, are entitled to be made whole. In addition, the Arbitrator should retain jurisdiction to determine an appropriate remedy in this matter.

GM

Even if, *arguendo*, the Doc. 13 violation claim was arbitrable in these proceedings, "unallocate" is not synonymous with "close" or "idle". GM did not close Lordstown, Warren, and Baltimore prior to agreement with the Union as part of the October 2019 collective bargaining, a fact also recorded in the Settlement Agreement. Moreover, Doc. 13 does not prohibit GM from planning to close plants after ending production or studying other options with regard to such plants. Finally, if *arguendo*, GM is found to have closed or idled the plants in question, the case record clearly demonstrates that market declines made continued production impossible and, in compliance with Doc. 13, GM met with the Union, discussed the conditions and impact on certain plants, and relocated employees to other locations--which the Union now tries to make the basis of its unsustainable MSR case.

The Union failed to meet its burden of proving that it was not impossible for GM to continue to allocate product to the involved plants. GM amply demonstrated that the unallocation was due to market related volume decline beyond the control of the Company and the Union simply has no evidence that controverts GM's position that it was losing unsustainable amounts of money at Lordstown. With respect to Warren and Baltimore, the Union attempts to argue that the unallocation to these plants was due to design decisions made by GM but that argument simply does not address the market related decline that led to this decision. And nothing in Doc. 13 states the market related decline must be directly attributable to specific plants. Accordingly, the Arbitrator should issue an award in GM's favor that compliance with Doc. 13 was impossible under these circumstances.

The Union asserts that the Settlement Agreement provides the sole basis for arbitrability of the MSR Pension Plan issue. But UAW cannot and did not carry the burden of its extraordinary claim that GM implicitly agreed in the Settlement Agreement to arbitrate disputed entitlements to Pension Plan MSR benefits, even though the Parties clearly exempted the Pension Plan from arbitration under the CBA. The Pension Plan contains a detailed dispute resolution procedure that governs any effort to dispute unpaid pension benefits under the Pension Plan. GM has not waived that procedure and the Union has no right to now attempt an end run of those Plan provisions, to which it agreed when it bargained the 2015 CBA with GM.

Moreover, because GM's unallocation decision was not the same as a closing, any arguable claim of "entitlement" to an MSR under the 50/10 provision was not triggered until after bargaining in October 2019. Nor did the Union prove that there were any "laid off" employees who sought but were denied MSR benefits, or that any such employees would have been otherwise eligible for MSR benefits. Instead, it offered generalized testimony that UAW Benefit Reps called Fidelity on behalf of other employees who supposedly wanted MSR benefits, and these reps were told MSR was not available. The Union's real complaint here appears to be that GM offered employees at the unallocated plants jobs at other locations instead of MSR benefits (assuming any would have been otherwise eligible). Fundamentally, the Union contends that GM should have offered those employees the choice between working or not working and being paid MSR benefits, instead of the CBA choice between working or going on L34 status. But nothing in the MSR provisions in the Pension Plan requires this.

Based upon all of the foregoing and notwithstanding neither submitted issue is substantively arbitrable, the Union failed to carry its burden of proof on the merits of either claim. Therefore, the Arbitrator should issue an award in GM's favor on all issues.

DISCUSSION

My determinations of the Phase I threshold substantive arbitrability and merits issues are based upon impartial analysis of the record evidence and grounded in established principles of contract interpretation/application generally accepted in labor-management arbitral jurisprudence.

STANDARD OF PROOF/ BURDENS OF PERSUASION

"Preponderance of the record evidence", the civil law quantum of proof standard, governs disposition of both GM's affirmative defense of nonarbitrability and the merits of UAW's claim that GM breached their Document 13 contract. Those respective ultimate burdens to present persuasive evidence that is "more credible and convincing than that presented by the other party, or which shows the fact to be proven is more probable than not" do not shift. School District No. 1, County of Denver 120 LA 816, 825 (Gaba, 2004). But, the burden of coming forward with rebuttal evidence sufficient to avoid an adverse decision can ebb and flow back and forth as the case record is developed.

"Preponderance of the evidence" does not mean presentation of more witnesses or taking up a greater length of time in the hearing, but rather the qualitative weight and effect the evidence of record has on the mind of the impartial decision maker. In sum, the party with the burden of persuasion on a disputed issue must present preponderant evidence of sufficient weight and character to convince an impartial and objective decision-maker that its version of the facts, contract language and authorities is the correct one. Beverage Concepts, 114 LA 340, 344 (Cannavo, (1999); Lewis & Clark Cnty 114 LA 35, 38 (Calhoun, 2000); U.S. Dept. of Ag. 120 LA 1560, 1566 (Briggs, 2005); City of Cincinnati, 69 L.A. 682, 685 (Bell, 1977); Entex, 73 L.A. 330 333 (Fox, 1979).

SUBSTANTIVE ARBITRABILITY

Who Decides "Gateway" Subject Matter Jurisdiction Disputes?

The Federal Arbitration Act reflects the basic principles that "arbitration is a matter of contract" and that arbitration clauses in contracts must be enforced "according to their terms." Thus, in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964) and progeny, the Supreme Court established that because "[a party] has no obligation to arbitrate issues which it has not agreed to arbitrate . . . "a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty."

However, the Court also made clear that parties have every right to authorize an arbitrator rather than a court to determine arbitral jurisdiction and authority. *See* Nolde Bros. V. Bakery & Confectionery Workers Local 358, 430 U.S. 243, 94 LRRM 2753 (1977). More recently, the Court articulated the tautological corollary that such a "delegation provision," is an "additional, antecedent agreement and the FAA operates on this additional arbitration agreement just as it does on any other." Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, at 70, 130 S. Ct. 2772, 177 L.Ed.2d 403 (2010). Accordingly, contracting parties "may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).

That said, to be effective such a delegation provision must ***"clearly, unmistakably* and *without reservation"*** articulate agreement of the contracting parties to have their arbitrator rather than a court decide jurisdictional disputes around substantive arbitrability. (emphasis added). *See* First Options of Chi., Inc. v. Kaplan,

514 U.S. 938, 944 (1995); Cleveland Elec. Illuminating Co. v. Util. Workers Union, Local 270, 440 F.3d 809, 813 (6th Cir. 2006) [Citing Vic Wertz Distrib. Co. v. Teamsters Local 1038, 898 F.2d 1136, 1140 (6th Cir. 1990).

Moreover, **the party contending that an arbitrator has been authorized to decide threshold substantive arbitrability 'bears the burden of demonstrating clearly and unmistakably that the parties agreed to have the arbitrator decide that threshold question'.** . .” (emphasis added). Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg., 765 F.3d 396, 408 (5th Cir. 2014) [quoting ConocoPhillips, Inc. v. Local 13–0555 United Steelworkers Int'l Union, 741 F.3d 627, 630 (5th Cir. 2014)].

These are exacting standards, but virtually every Circuit Court now holds that **incorporating the American Arbitration Association's (AAA) arbitration rules in the arbitration clause** (as the Parties did in this case) **constitutes clear and unmistakable evidence that the parties agreed without reservation to arbitrate the issue of gateway arbitrability**. (emphasis added). *See* Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 846 (6th Cir. 2020).[4]

[4] *Citing* Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11–12 (1st Cir. 2009); Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208–09 (2d Cir. 2005); Richardson v. Coverall N. Am., Inc., (3d Cir. 2020); Simply Wireless, Inc v. T-Mobile US, Inc. 877 F.3d 522, 527–28 (4th Cir. 2017)]; Petrofac, Inc. v. Dyn McDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1272–73 (7th Cir. 1976) (relying on the incorporation of the AAA Rules to find that the parties had agreed to binding arbitration); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Brennan v. Opus Bank, 796 F.3d 1125, 1130–31 (9th Cir. 2015); Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1246 (10th Cir. 2018); Terminix Int'l Co., LP v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327, 1332 (11th Cir. 2005); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1372–73 (Fed. Cir. 2006); Chevron Corp. v. Ecuador, 795 F.3d 200, 207–08 (D.C. Cir. 2015). *See also* Preston v. Ferrer, 552 U.S. 346, 361–63 (2008); C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418–20 (2001).

Decisional Standards in Threshold Arbitrability Dispute Resolution

Clear guidelines for courts and arbitrators tasked with resolving subject matter arbitrability/jurisdictional challenges were laid down by the Supreme Court of the United States in two seminal decisions: United Steelworkers of America v. Warrior & Gulf Navigation Co., 353 U.S. 574 (1960) and AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986).[5]

Warrior & Gulf teaches that the merits of a labor-management contract interpretation dispute presumptively are subject to the promise to arbitrate unless the particular subject matter or issue is carved out or exempted from the arbitration clause by express language. AT&T Technologies again endorsed the Warrior & Gulf presumption/express language exclusion test for determining substantive arbitrability but also highlighted the admissibility and potentially dispositive effect of "most forceful" collateral evidence that a particular disputed subject matter or issue is not in fact covered by the agreement to arbitrate.

Warrior & Gulf is premised upon a presumption of arbitrability, which means, *inter alia*, that any doubts about subject matter jurisdiction should be resolved in favor of arbitrability, unless the literal language of an agreement to arbitrate clearly excludes or carves out the disputed subject matter from arbitration. *Op. cit.* 363 U.S. 582-83. AT&T Technologies reaffirmed that Warrior & Gulf literal language test but also emphasized that "a purpose to exclude a particular subject matter or a particular claim"

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[5] *See* The Common Law of the Workplace, §2.23: *Substantive Arbitrability* (NAA/BNA: 19998, 2005) and Ch. 13: *Challenges to Arbitrability* in Labor and Employment Arbitration, (Matthew Bender & Co., Inc., New York: 1990, 1992, 1996).

could also be proven persuasively by "most forceful evidence" other than the express wording of the arbitration clause.

Thus, when read together, Warrior & Gulf and AT&T Technologies establish a three (3)-pronged sequential inquiry for correct disposition of a timely challenge to substantive arbitrability:

> 1) Is there a contract provision calling for arbitration of disputes arising under the Agreement?;
>
> 2) If so, is the subject or issue(s) in dispute excluded expressly and specifically from that arbitration agreement?;
>
> 3) If not, is there other "forceful evidence" that the Parties agreed to exclude the subject in question from arbitration?

THE PRIMACY OF PLAIN LANGUAGE

Arbitrators and courts alike presume that clearly understandable contract language says what it means and means what it says, despite the contentions of one of the parties that something other than the apparent meaning was intended. *See* Hecla Mining Co., 81 LA 193,194 (1983) (LaCugna):

> . . . It is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probable intent, and to putative intent, always governs. Clear language is the arbitrator's lodestar, his guiding light. He can neither ignore it, nor modify it; on the contrary, he must give it its full force and effect.

See also, Weil-McClain, 86 LA 784, 786 (1986) (Cox); Houston Publishers Ass'n, 83 LA 767, 776 (1984) (Milentz; Parker White Metal Company, 86 LA 512, 516 (Ipavec, 1985); Anaheim Union School District, 84 LA 101, 104 (Chance, 1984); Safeway Stores, 85 LA 472, 476 (Thorp, 1985); Metropolitan Warehouse, 76 LA 14, 17-18 (1981) (Darrow, 1981); National Linen Service 95 LA 820, 824 (Abrams, 1990; Michigan Department of Social Services, 82 LA 114, 116 (Fieger, 1983).

Interpreters of a contract also must believe that the Parties did not mean to write gibberish or include a word, phrase, or clause in their contract with the intent that it be ignored, superfluous, voided or rendered meaningless by interpretation. John Deere Tractor Co., 5 LA 631, 632 (Updegraff, Arb., 1946) and Gen. Tel Co. of the Southwest, 86 LA 293, 295 (Ipavec, 1985):

> It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.
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> It is a rule of contract interpretation that each word and phrase of a contract is to be given meaning on the theory that if the parties to the contract had not intended to give each word and phrase meaning they would have deleted such language in order to assist the eventual interpreter.

An arbitrator who finds words in a contract to be clear and unambiguous should enforce their plain meaning, even though one of the Parties might later assert a different meaning. This "Plain Meaning Rule" can be seen as both practical and equitable: it brings order to contract construction by discouraging disputes over clear and unambiguous contract words and, if the language really is clear and unambiguous, both parties to a contract should have known and understand exactly how they were bound when they executed the contract. Thus an arbitrator may rightly invoke the legal fiction of mutual literacy by makers of solemnly negotiated written contracts like the Settlement Agreement in this case. "The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest." Sanyo Manufacturing Corp. 109 LA at 190. It also is worth noting that the GM and UAW A-team negotiators who crafted, agreed to, and signed off on the final language of the Settlement Agreement, including its arbitration provision, were seasoned, knowledgeable bargaining table veterans, not novices, rookies or tyros.

SUBSTANTIVE ARBITRABILITY ANALYSIS

The Delegation Provision

The express language of §3 (c) plainly and unambiguously commits GM and the UAW "to arbitrate, and preserve their defenses in such arbitration, to be held under AAA Labor Arbitration Rules", two specifically and plainly described disputed issues that were not resolved by other provisions of their Settlement Agreement:

> *"(i) whether any UAW member actively employed at an Unallocated Plant as of 11/26/18 who chose to accept employment at another GM facility in lieu of layoff from the Unallocated Plant is entitled to MSR benefits arising out of the loss of his/her position at the Unallocated Plant and (ii) whether employees [who] lost wages between 11/26/18 and 9/14/19 who continue employment with the company should be made whole.*"

In accordance with the holding of Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 846 (6th Cir. 2020) and every other Circuit, *supra* at p. 25, n.5, that Settlement Agreement incorporation by reference of AAA Voluntary Arbitration Rule 3, **"clearly, unmistakably and without reservation"** grants me the authority to decide all of the various "gateway" disputes presented by GM's substantive arbitrability objections around "[my] **jurisdiction, including the** existence, **scope**, or validity **of the arbitration agreement**".

Correct disposition of GM's timely and properly raised subject matter jurisdiction and scope of arbitral authority ("substantive arbitrability") objections requires a carefully nuanced application of the Supreme Court's authoritative holdings in the Warrior & Gulf and ATT Technologies decisions, *supra* at pp. 25-26.

The MSR "Entitlement" Issue

Under the Warrior and Gulf express language test, the plain unadorned language of §3 (c)(i) does not expressly exclude from arbitration the disputed Pension Plan issue of MSR "entitlement" described therein. On its face, that language purports to submit that very question for arbitral determination, thus granting me jurisdiction to decide the various disputes surrounding that issue, not the least of which is whether the scope of my arbitral authority extends to evaluating and potentially granting such Pension Plan benefit claims. The language of the submission alone does not complete that analysis, because it begs the question presented by ATT Technologies, *i.e.,* Does other "more forceful evidence" demonstrate persuasively that the Settlement Agreement submission language, standing alone, is not a grant of arbitral authority to decide the merits of disputed claims of "entitlement" to MSR benefits under the Pension Plan?

In my considered opinion that ATT Technologies question must be answered in the affirmative. The plain language of the GM/UAW National Agreement and the GM Pension Plan Agreements itself, with one singular exception not here applicable, effectively immunizes such Pension Plan benefit disputes from arbitral consideration and determination. Instead of being subject to traditional grievance arbitration under the CBA or otherwise, the Pension Plan provides a detailed claims procedure for such benefits, designates General Motors as the exclusive "Plan Administrator" cloaked with "full authority" to construe, interpret and administer the Pension Plan, and grants the "Board of Administration" and "Pension Committees" created by that Board exclusive unappealable authority to make the necessary determinations regarding an award of pension benefits, including MSR benefits.

Under AT&T Technologies rubric, I hold the GM/UAW National Agreement/GM Pension Plan Agreement administrative terms and conditions are themselves "most forceful evidence" that the arbitral jurisdiction conferred upon me by §3(c)(i) of the Settlement Agreement does not include authority to arbitrate disputed claims of entitlement to Pension Plan MSR benefits. Those Pension Plan administrative provisions, which establish the only agreed-upon way such claims for MSR benefits to be asserted, assessed, disputed, and appealed, cannot properly be ignored, rewritten, rescinded or abrogated by me under the guise of interpreting §3(c)(i). Thus, it would be improper for me to anoint myself as a *de facto* Plan Administrator or an ersatz one-man Board of Administration with authority to administer, interpret and apply the Pension Plan's MSR benefit provisions. Indeed, using arbitral authority conferred upon me by §3(c) to determine and potentially award disputed MSR benefit entitlement claims would be antithetical to the very essence of those National Agreement and its appended Pension Plan provisions. That conclusion is predicated upon the Supreme Court's unequivocal "Steelworkers Trilogy" standard for gauging the legitimacy of a labor-management arbitrator's award:

> **[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.** He may of course look for guidance from many sources, yet **his award is legitimate only so long as it draws its essence from the collective bargaining agreement. ..."** Steelworkers v. Enterprise Wheel & Car Corp, 363 U.S.593, 597 (1960). (emphasis added).
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> *See also*:
> "[W]hatever temptations the statesmanship of policymaking might wisely suggest, **construction must eschew interpolation and evisceration** and the [arbitrator] must not read in by way of creation". *Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 533 (Felix Frankfurter, 1947). (emphasis added).
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> "To have a right to do a thing is not at all the same as to be right in doing it". *A Short History of England* (G. K. Chesterton 1917).

The "Lost Wages/Make Whole" Issue

It is firmly established that "lack of arbitral jurisdiction and authority is an affirmative defense, for which the party seeking to avoid arbitration under a contractual arbitration provision must shoulder the burden of persuasion." ATT and CWA, 4671489-AAA, 2020 BNA LA 1235 (Eischen, 2020); U.S. Dept. of the Army Watervliet Arsenal and Nat'l. Federation of Fed. Emps., Local 2109, FMCS #10812FSIP 92-2, 1993 BNA LA Supp. 114171 (Eischen, 1993). GM's contention that the UAW must prove that the language of §3(c)(ii) does not preclude arbitral determination whether the October 25, 2015 Document 13 Letter was violated, is a dog that will not hunt. To the contrary, such a colorably-covered subject or issue, which is not explicitly excluded or carved-out from arbitration by the arbitration clause, presumptively is arbitrable.

Even if, *arguendo*, a reasonable doubt about the scope of my arbitral authority under §3(c)(ii) had been persuasively raised by GM, it would have been resolved in favor of such coverage. Instead, GM simply suggested that because §3(c)(ii) does not expressly assert an alleged violation of Document 13 as the basis for UAW seeking "lost wages/make whole" damages for the period November 26, 2018-September 14, 2019, considering or determining any such Document 13 violation claim is precluded in this arbitration. That erroneous contention is a false major premise that ignores the record evidence and turns the governing presumption of arbitrability and burdens of persuasion principles the Supreme Court laid down in Warrior & Gulf and AT&T Technologies on their heads. In the final analysis, GM was unable to persuasively establish that aspect of its substantive arbitrability affirmative defense objections in this case record.

Under Warrior & Gulf analysis, it is evident beyond cavil that the submission language of §3(c)(ii) does not expressly exclude from arbitration the UAW's claim that an award of "make whole/lost wages" compensatory damages for the described class of employees is warranted by GM's alleged violation of the October 25, 2015 Document 13 letter. Under AT&T Tech. analysis, the express limitation of that claim for "make whole/lost wages" damages to the time period **between 11/26/18 and 9/14/19**" is forcefully persuasive evidence that UAW's Document 13 violation allegation is within the scope of my arbitral jurisdiction and authority under the Settlement Agreement.

Indeed, when that emphasized text is considered in the historical context of its genesis, evolution and placement in the Settlement Agreement, Document 13 inclusion is the only reasonable explanation for that time period limitation in the § 3(c)(ii) submission language.[6] In that context, it is clear that the phrase "whether employees [who] lost wages between 11/26/18 and 9/14/19 who continue employment with the company should be made whole" in the Settlement Agreement refers to the UAW's persistent claim that employees from the "unallocated" plants would not have been laid off during that time period if GM had abided by its obligations under Document 13. Moreover, that is the only reading that gives meaning to all of the terms of the Settlement Agreement without transforming the header of §3 into a titular non sequitur and rendering the "as modified below" caveat in §2 meaningless.

[6] Significantly, the concurring opinion of Justice Brennan emphasizes that such "bargaining history" often is a useful source of "more forceful" collateral evidence in contract interpretation dispute resolution, specifically including gateway subject matter arbitrability issues. *See* AT&T Technologies, 106 S. Ct. at 1422.

Connecting all of the dots, from the UAW's initial meetings with the Company following the "Unallocation Announcement", to the UAW's federal lawsuit seeking a "make-whole" remedy for alleged breach of Document 13, and through each of UAW's bargaining proposals that sought a make-whole remedy, there could have been no reasonable question in anyone's mind that the Settlement Agreement reference to a make-whole remedy for the period 11/26/18 to 09/14/19 was the UAW's Document 13 violation claim.

Both the plain language of the Settlement Agreement and the available extrinsic evidence persuasively demonstrates that the Parties did not exclude but, rather obviously, submitted for arbitral determination the merits of UAW's unresolved claim that GM violated the October 25, 2015 Plant Closing Moratorium in the facts and circumstances around the "unallocated" Lordstown, Baltimore and Warren plants.

MERITS ANALYSIS

At the end of the day, the crux of this convoluted case comes down to a garden variety dispute over the interpretation and application of the literal language of the October 25, 2015 Document 13 letter. In parts most pertinent to this discussion, the governing provisions of that document read as follows (emphasis added):

> ...this will confirm that during the term of the new Collective Bargaining Agreement, the Company will not **close, idle**, nor partially or wholly sell, spin-off, split-off, consolidate or otherwise dispose of in any form, any plant, asset, or business unit of any type, beyond those which have already been identified, constituting a bargaining unit under the Agreement . . . In making this commitment, it is understood that conditions may arise that are beyond the control of the Company, (*i.e.* market related volume decline, act of God), and could make compliance with this commitment **impossible..** . . .

Under the "Plain Meaning Rule", the ordinary and popular vernacular meanings of each of the unambiguous contractual words "**close**", **"idle"** and **"impossible"** are dispositive of the disputed Document 13 "lost wages/make whole" issue submitted for my determination in this arbitration.[7] In that regard, the New Oxford American Dictionary, 3rd Edition (August 2010) defines those emphasized contractual words as follows:

> **close** | verb: [no object] (of a business, organization, or institution) to cease to be in operation or accessible to the public, either permanently or at the end of a working day or other period of time: *the factory is to close with the loss of 150 jobs*.
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> **idle** | verb: [no object] to take out of use or employment, (especially of a machine or factory) not active or in use: *assembly lines standing idle for lack of spare parts*.
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> * * *
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> **impossible**| adjective: not able to occur, exist, or be done: *a seemingly impossible task*.

"There is a heavy presumption that [such contract language] is intended to mean what [a reasonable lay person] will read it to mean, not what a lawyer can by remote inference import into it". City of Meriden, 48 LA 137, 142 (Summers, 1967). Therefore, in my considered judgment, GM's creative use of the jargon "unallocated" to describe a strategic management decision to curtail and eventually cease production at the subject plants before September 14, 2019 has no significance whatsoever in determining whether GM thereby breached its Document 13 commitment to not "idle" or "close" those plants during the term of the 2015 National Agreement.

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[7] *See* D. Nolan, Arbitration Law and Practice (1979), N.8 at 168; Walter Jaeger, Williston on Contracts, § 618 at 705 (4th Ed. 1961). The Restatement (Second) of Contracts is in accord: "In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one".

In addition, I found decisional guidance in Umpire Thomas Roberts' working definition of an "idled" plant and memorably prescient wisdom in his concise summary of GM's Document 13 commitments in the so-called "Fiero Decision"--the only other Document 13 arbitration of record between these Parties. *See* UAW Local Union No 653/GM Chevrolet-Pontiac-Canada Group, Decision V-4, Grievance #509134, Appeal Case V-1 (March 26, 1990):

> [The plant] remains in a level of maintenance sufficient to permit the acceptance of a new product or activity, there remains a thread of plant bargaining unit activity and an intent to abandon any thought of the placement of future bargaining unit work in the facility has not been demonstrated . . .(at p.15).
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> The Union is correct when it states the Corporation should be held to its pledge not to "play with the language" when designating plants as either, idled, subject to possible reopening, open because a small segment of the bargaining unit remains in existence, or closed. The impact of any such action upon the job security, income maintenance and other benefits won for its membership at the bargaining table requires the enforcement by the International Union of strict compliance with the constraints of all applicable contractual. . . (at p.17).

As the moving party alleging that GM breached its Document 13 commitments to refrain from closing or idling the plants in contention during the term of the 2015 National Agreement, UAW has the burden of proving every material aspect of that claim. At the threshold of that determination, however, we are met by GM's affirmative defense that Document 13 did not apply at all in the facts and circumstances that gave rise to the November, 26, 2018 "Unallocation Announcement".

As GM correctly points out, Document 13 does impose some express time-limited restrictions on the exercise of certain management rights reserved §3 ¶8; but, it does not completely bar ever closing or idling a plant during the term of a National Agreement. Document 13 always has contained a *force majeure* clause, excusing noncompliance “in the event of conditions beyond the control of the Corporation, such as an act of God”.

And, from 2007 forward, that *force majeure* language also contains a second explicit exception for compliance impossibility caused by "market related volume decline".

As the Party relying upon that exculpatory clause to avoid Document 13 compliance, GM, bears the burden of persuasion that the market-related volume decline exception applies in the facts and circumstances of this case. GM's invocation of that '*force majeure*' escape clause "is equivalent to asserting an affirmative defense". 30 Williston on Contracts, § 77:31 (4th ed. 2012). *See also* Akers Motor Lines, Inc., 51 LA 955, 962 (Dunau, 1968). ("Since the Company invokes the exception and has superior access to the relevant information, it was the Company's burden to establish 'operational infeasibility'".); Musicians Local, 4672068-AAA, 2021 LA 430 (Meyers, 2021). Further, "[w]hen the parties have themselves defined the contours of *force majeure* in their agreement, those contours dictate the application, effect, and scope of *force majeure*. . . 30 Williston on Contracts § 77:31.

Most significantly, successful recourse to either of the Document 13 "beyond the control" exceptions requires persuasive proof by GM that the invoked exception made continued compliance with Document 13 impossible, *i.e.*, *not able to occur, exist, or be done*. New Oxford American Dictionary, *op. cit.* Thus, to avoid its commitment to not close or idle plants during the term of the 2015 National Agreement, GM must prove, by a preponderance of probative record evidence, that the market related volume decline for small sedans like the Cruze: (1) "ar[o]se" during the term of the Agreement, (2) was "beyond the control of the Company," and (3)"ma[d]e compliance with the [Document 13 moratorium] commitment impossible."

Even granting GM the benefit of the doubt about the first two points, the record does not contain a single scintilla of evidence that the market related volume decline made it objectively impossible for GM to postpone idling or closing the subject plants until after the September 14, 2019 expiration date of the 2015 National Agreement. The crystal clear contractual requirement that GM must prove objective impossibility of compliance to prevail in its *force majeure* affirmative defense cannot rightly be ignored or read out of Document 13. GM was unable to carry that heavy burden of persuasion.

Persuasive proof of impossibility of performance is not the "result of a mere subjective determination on the part of the promisor." Kansas City Philharmonic Ass'n, 78 LA 762, 766 (Madden, 1982). It cannot be gainsaid that declining profit margins and projected lack of marketability of certain products are rational bases for GM management's decision to curtail and eventually cease production of the those products. But financial imperatives, inefficiency and impracticality simply are not synonymous with the more stringent standard of objective impossibility of performance mutually agreed to by these Parties.

GM might find adherence to the high contractual standard it agreed to in the Document 13 onerous and the "impossibility" shoe surely pinches painfully in a case like this. But the proper place to seek contractual relief is at the bargaining table not through unilateral self-help or in the arbitration forum. An arbitrator cannot properly disregard such clear contractual language or legislate an arbitral amendment to force-feed either Party's notions of "fairness", "equity" or even "reasonableness". To do so would violate the rights of the Parties and usurp their proper roles to negotiate, draft and administer their own collectively bargained agreement(s). *See* Clean Coverall Supply Co. 47 LA 272, 277 (Whitney, 1966); Continental Oil Co. 69 LA 399, 404 (1977).

PHASE I AWARD

1) The issue submitted by Settlement Agreement §3(c)(i) is not substantively arbitrable in these proceedings.

2) The issue submitted by Settlement Agreement §3(c)(ii), is substantively arbitrable in these proceedings.

3) a) GM idled the Lordstown, Ohio Plant on March 8, 2019, in violation of the October 25, 2015 Document 13 letter.

b) Lordstown, Ohio Plant employees who continued employment with GM should be made whole for lost wages, if any, between 03/08/19 and 09/14/19.

4) a) GM idled the White Marsh, Maryland Plant on May 03, 2019, in violation of the October 25, 2015 Document 13 letter.

b) White Marsh, Maryland Plant employees who continued employment with GM should be made whole for lost wages, if any, between 05/03/19 and 09/14/19.

5) a) GM idled the Warren, Michigan Plant on August 1, 2019, in violation of the October 25, 2015 Document 13 letter.

b) Warren, Michigan Plant employees who continued employment with GM should be made whole for lost wages, if any, between 08/01/19 and 09/14/19.

6) Whether, or to what extent, such compensatory remediation is warranted in individual cases is remanded to the Parties for further evidentiary development, discussion and possible resolution.

7) On and after the sixtieth (60th) day following the date of this Phase I Award, either Party may invoke my retained jurisdiction and authority to make or confirm such remedial determinations in Phase II of these bifurcated proceedings.

Dana E. Eischen

S/Dana Edward Eischen

On this 6th day of July 2022, I, DANA E. EISCHEN, do hereby affirm and certify, upon my oath as Arbitrator and pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I executed and issued the foregoing instrument, which is my Phase I Award, pursuant to the 10/16/19 *Settlement of Litigation & Effects Bargaining Agreement* between GM and UAW in Case No. 19-cv-00420 (*UAW v. GM*), USDC, Northern District Of Ohio, Eastern Division.

ATTACHMENT A

Settlement of Litigation & Effects Bargaining Agreement

1) Document 13 – Maintain present language subject to the UAW-GM Administrative Letter – Plants Exempted from Document No. 13 Plant Closing and Sale Moratorium (Baltimore Transmission, Lordstown Assembly Complex, Warren Transmission & CCA Fontana)

2) Effects bargaining proposal as offered by Company 10/15/19 (Excerpts from the Minutes of Sourcing Subcommittee – Subject: Doc. 13 Resolution)

   a) Agreed as modified below

3) Document 13 Litigation (UAW v. GM, USDC, NDOH, Case No. 19-cv-00420)

   a) Dismiss lawsuit with prejudice

   b) Withdrawal of Company's Par. 55 grievance and arbitration over whether Company breached the contract

(c) Upon the occurrence of (a) and (b), the Parties agree to arbitrate, and preserve their defenses in such arbitration, to be held under AAA Labor Arbitration Rules, specifically (i) whether any UAW member actively employed at an Unallocated Plant as of 11/26/18 who chose to accept employment at another GM facility in lieu of layoff from the Unallocated Plant is entitled to MSR benefits arising out of the loss of his/her position at the Unallocated Plant and (ii) whether employees lost wages between 11/26/18 and 9/14/19 who continue employment with the company should be made whole.

4) App. A Litigation (UAW v. GM, USDC, NDOH, Case No. 19-cv-00013)

   a) Dismiss lawsuit with prejudice

5) Doc. 144 grievance is at Local level and will be resolved per parties' grievance and arbitration procedure

A.C.
E.S
TAC
TKK
M.P.
MM
KDF
MC
JK
M.S
OS

10-16-19
4:10pm

10/16/19
4:10

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NEW

EXCERPTS FROM THE MINUTES OF SOURCING SUBCOMMITTEE

SUBJECT: Doc 13 Resolution

The parties had numerous discussions regarding the impact on employees that have been displaced or reduced to layoff as a result of the "Unallocation" announcements on November 26, 2018. As a result of these discussions the parties have agreed to the following understandings and provide impacted employees with the following options:

- Carry over Doc 13 to be included in the 2019 UAW-GM National Agreement

- Economic Consideration:
  - SAP for active/L34* employees from unallocated plants
    - Retirement eligible active OTS & Skilled from unallocated plants
      - $75,000 - OTS
      - $85,000 - Skilled
  - Grow Ins
    - Active/L34* employees from unallocated plants:
      - 28 yrs service** – $3,000/month/max 24 months (~60%)
      - 29 yrs service** – $3,250/month/max 12 months (~65%)
      - Employees who take the grow in package will be eligible for health care benefits

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DATE INITIALED: OCT 16 2018

INITIALED BY PARTIES:

- Buy Outs
  - Active/L34* employees from unallocated plants, not retirement eligible:
    - 0 – 5 yrs service $7,500
    - 5 – 10 yrs service $22,500
    - 10 – 20 yrs service $67,500
    - 20 – 27 yrs service $75,000

- L34's currently on lay off may choose one of the following:
  - Employees remaining on L34 status from the 2015 Agreement will be provided with one job opportunity
  - Employees on L34 status who meet the eligibility criteria (50/10 and other applicable age/service combinations) will be provided with an MSR upon application.
  - Employees on L34 status may remain on this status pending reaching MSR eligibility

- Training
  - Tuition assistance applied across all grow ins, buy outs and L34's to a maximum of:
    - 1 – 3 yrs service $6,400
    - 3 – 4 yrs service $7,400
    - 4+ yrs service $8,400

- Employees from unallocated plants that have accepted relocation are released from the obligation to repay any monies outlined in the promissory note if they accept an SAP/Buy out/Grow in.

- Doc 13 Litigation and any related grievances including but not limited to GM's grievance are dismissed/withdrawn with prejudice (see document attached)

* Active population as of November 26, 2018 who remain active and does not include temporary

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employees or individuals who already retired, voluntarily separated or passed away. In addition, all employees from unallocated plants who are on L34 status.
**Years of service as of September 14, 2019.

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Doc. No. 13

PLANT CLOSING AND SALE MORATORIUM

GENERAL MOTORS LLC

October 25, 2015

Mr. Terry Dittes
Vice President and Director
General Motors Department
International Union, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214

Dear Mr. Dittes:

Subject: Plant Closing Moratorium

As a result of your deep concern about job security in our negotiations and the many discussions which took place over it, this will confirm that during the term of the new Collective Bargaining Agreement, the Company will not close, idle, nor partially or wholly sell, spin-off, split-off, consolidate or otherwise dispose of in any form, any plant, asset, or business unit of any type, beyond those which have already been identified, constituting a bargaining unit under the Agreement.

In making this commitment, it is understood that conditions may arise that are beyond the control of the Company, (i.e. market related volume decline, act of God), and could make compliance with this commitment impossible. Should such conditions occur, the Company will review both the conditions and their impact on a particular location with the Union.

Should it be necessary to close or idle a plant constituting a bargaining unit consistent with our past practice, the Company will attempt to redeploy employees to other locations and, if necessary, utilize Attachment A of Appendix K of the GM-UAW National Agreement or other incentivized attrition programs as agreed to by the National Parties.

Very truly yours,

D. Scott Sandefur

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OCT 16 2015

DATE INITIALED:

INITIALED BY PARTIES:

NEW

UAW-GM ADMINISTRATIVE LETTER

PLANTS EXEMPTED FROM DOCUMENT NO. 13 PLANT CLOSING AND SALE MORATORIUM

GENERAL MOTORS LLC

DATE

Mr. Terry Dittes
Vice President and Director
General Motors Department
International Union, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214

Dear Mr. Dittes:

Pursuant to our commitments in Document No. 13, the following facilities have been identified as plants closing during the term of the 2019 GM-UAW National Agreement:

Baltimore Transmission
Lordstown Assembly Complex
Warren Transmission
CCA Fontana

Very truly yours,

D. Scott Sandefur
Vice President
GMNA Labor Relations

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OCT 16 2019

DATE INITIALED:

INITIALED BY PARTIES: CAB MEY

Approved.
/s/ Benita Y. Pearson on 12/5/2019
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), Plaintiff, v. GENERAL MOTORS, LLC, Defendant.	Case No. 4:19-cv-00420 Hon. Benita Y. Pearson

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a), Plaintiff International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Defendant General Motors, LLC hereby stipulate to the voluntary dismissal of the above-captioned action with prejudice.

Respectfully submitted,

/s/ Joyce Goldstein
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Attorneys for General Motors, LLC

Approved.
/s/ Benita Y. Pearson on 11/22/2019
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), Plaintiff, v. GENERAL MOTORS, LLC, Defendant.	Case No. 4:19-cv-00013 Hon. Benita Y. Pearson

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a), Plaintiff International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Defendant General Motors, LLC hereby stipulate to the voluntary dismissal of the above-captioned action with prejudice.

Respectfully submitted,

/s/ Joyce Goldstein
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