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October 28, 2010

VIA HAND DELIVERY

The Honorable Robert E. Gerber
United States Bankruptcy Judge
United States Bankruptcy Court for the Southern District of New York
One Bowling Green
New York, NY 10004-1408

Re: *In re Motors Liquidation Company (f/k/a General Motors Corp.)*, Case No. 09-50026 (REG)

Dear Judge Gerber:

We represent the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") in the above-captioned proceedings. Further to yesterday's correspondence, and to facilitate today's chambers' conference, please find attached the complaint, answer, and motion to strike in the Existing Michigan Litigation.[1]

Respectfully ~~Submitted~~,

James L. Bromley

cc: Heather Lennox, Esq., Jones Day (via email)
Lisa Laukitis, Esq., Jones Day (via email)
Andrew Roth, Esq., Bredhoff & Kaiser P.L.L.C (via email)

[1] Initially capitalized terms shall have the same meanings ascribed to them in my letter to Your Honor dated October 27, 2010. (D.I. 7583.)

Exhibit A: UAW Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Plaintiff, v. **GENERAL MOTORS LLC,** Defendant.	Case No: _____

COMPLAINT

NATURE OF CASE

1. This is an action brought under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, for breach of a labor contract to which the plaintiff International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("the UAW") and the defendant General Motors LLC ("the Company") are parties. The UAW brings this § 301 action to remedy the Company's failure to honor its obligation under that labor contract to make a specified payment into a Voluntary Employees' Beneficiary Association ("VEBA").

JURISDICTION AND VENUE

2. This Court has jurisdiction over this lawsuit pursuant to 29 U.S.C. § 185 and 28 U.S.C. § 1331.

3. Venue lies in this District pursuant to 29 U.S.C. § 185 and 28 U.S.C. § 1391(b).

PARTIES

4. The plaintiff UAW is a labor organization that represents the Company's employees and the employees of various other companies in collective bargaining. As such, the UAW is "a labor organization representing employees in an industry affecting commerce" within the meaning of the statutory provision, LMRA § 301, 29 U.S.C. § 185, authorizing "[s]uits for violation of contracts" between such a labor organization and "an employer." The UAW's principal offices are located at 8000 East Jefferson Avenue, Detroit, Michigan 48214.

5. The defendant Company is a Delaware Corporation that employs various individuals represented by the UAW. As such, the Company is "an employer" within the meaning of the statutory provision, LMRA § 301, 29 U.S.C. § 185, authorizing "[s]uits for violation of contracts" between such an employer and "a labor organization representing employees in an industry affecting commerce." The Company's principal offices are located at 300 Renaissance Center, Detroit, Michigan, 48265, and the Company also has extensive operations within this District.

FACTS

6. On June 22, 2007—during the course of bankruptcy proceedings involving Delphi Corporation ("Delphi")—the UAW, the Company's predecessor corporation (General Motors Corporation or "GM") and Delphi entered into a tripartite Memorandum of Understanding ("MOU"). By Order dated July 19, 2007, the MOU was approved by the Bankruptcy Court presiding over the Delphi bankruptcy proceedings.

7. GM itself went through bankruptcy proceedings in 2009 from which there emerged a new operating company—the defendant herein—called "General Motors LLC" ("the Company"). The Company has assumed all of GM's labor contracts with the UAW, including,

without limitation, the MOU; on information and belief, the Company has done so pursuant to a sales agreement approved by the Bankruptcy Court in the GM bankruptcy proceedings. Accordingly, the Company is contractually required to honor all of GM's contractual obligations under those GM-UAW labor contracts, including, without limitation, GM's contractual obligations under the MOU.

8. Section J.2 of the MOU provides as follows:

> The UAW has asserted a claim against Delphi in the amount of $450 million as a result of the modifications encompassed by this Agreement and various other UAW agreements during the course of Delphi's bankruptcy. Although Delphi has not acknowledged this claim, GM has agreed to settle this claim by making a payment in the amount of $450 million, which the UAW has directed to be paid directly to the DC VEBA established pursuant to the settlement agreement approved by the court in the case of Int'l. Union, UAW et al v. General Motors Corp., Civil Action No. 05-73991.

9. Section K.2 of the MOU, in turn, provides an "effective date" provision for certain terms of the MOU, including Section J.2. Section K.2 provides as follows:

> The parties acknowledge that the following provisions of this Agreement will not become effective until all of the following events have occurred and as of the date when the last of such events shall have occurred: (a) execution by Delphi and GM of a comprehensive settlement agreement resolving the financial, commercial, and other matters between them and (b) the substantial consummation of a plan of reorganization proposed by Delphi in its Chapter 11 cases and confirmed by the Bankruptcy Court which incorporates, approves and is consistent with all of the terms of this Agreement and the comprehensive settlement agreement between Delphi and GM.

10. On July 30, 2009, the Bankruptcy Court presiding over the Delphi bankruptcy proceedings entered an Order confirming a plan of reorganization for Delphi, and on October 6, 2009, the Court entered a further Order explicitly stating that this plan of reorganization "was substantially consummated" on that October 6, 2009 date. This judicially-confirmed and

substantially-consummated plan of reorganization incorporated, approved and was consistent with: (i) all of the terms of the MOU; and (ii) a comprehensive settlement agreement previously executed by Delphi and GM resolving the financial, commercial, and other matters between them. Accordingly, pursuant to Section K.2 of the MOU, the Company's contractual obligation to make the payment to the DC VEBA specified in Section J.2 of the MOU became "effective" *on October 6, 2009*.

11. By letter dated October 29, 2009, the UAW made a written demand that the Company honor its contractual obligation to make the foregoing payment to the DC VEBA as required by the terms of the MOU. By letter dated November 11, 2009, that UAW demand was rejected, and since that time the Company has failed and refused to make the contractually-required payment. The Company thus stands in breach of its contractual obligation under the MOU to make that payment.

CLAIM FOR RELIEF
(Breach of Contract, Under 29 U.S.C. § 185)

12. The allegations in Paragraphs 1 through 11 above are re-alleged and incorporated herein by reference.

13. The MOU is a "contract[ ] between an employer and a labor organization representing employees in an industry affecting commerce" within the meaning of LMRA § 301, 29 U.S.C. § 185.

14. The Company's failure and refusal to make the payment to the DC VEBA specified in Section J.2 of the MOU—as demanded by the UAW in its October 29, 2009 letter—constitutes a breach of the MOU that is remediable in this action brought under LMRA § 301, 29 U.S.C. § 185.

PRAYER FOR RELIEF

WHEREFORE, the UAW respectfully requests that this Court:

(1) Find and declare that the Company is in breach of its contractual obligation under the MOU to make the payment to the DC VEBA specified in Section J.2 of the MOU;

(2) Order the Company to make that contractually-required payment forthwith; and

(3) Order such other and further relief as this Court may deem appropriate.

Respectfully submitted,

/s/ JULIA PENNY CLARK
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/s/ JEFFREY D. SODKO
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UAW, Office of General Counsel
8000 East Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

Counsel for Plaintiff UAW

DATED: April 6, 2010.

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

County in which action arose Wayne

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America

(b) County of Residence of First Listed Plaintiff Wayne
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Julia Penny Clark, Bredhoff & Kaiser, PLLC, 805 Fifteenth Street, NW, Suite 1000, Washington, DC 20005 (202) 842-2600 (see attachment)

DEFENDANTS

General Motors LLC

County of Residence of First Listed Defendant Wayne
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☒ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity)**:
29 U.S.C. § 185

Brief description of cause:
Breach of labor contract

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23

DEMAND $ Specific Performance of contract

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
April 6, 2010

SIGNATURE OF ATTORNEY OF RECORD
Julia Penny Clark

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

☐ Yes
☒ No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

☐ Yes
☒ No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

Notes :

ATTACHMENT

I.(c) Attorneys

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Jeffrey D. Sodko
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(313) 926-5216

Exhibit B: Purchaser Answer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,	)	2:10-cv-11366-AC-MJH
Plaintiff,	)	
vs.	)	Honorable Avern Cohn Magistrate Judge Michael Hluchaniuk
GENERAL MOTORS LLC,	)	
Defendant.	)	

DEFENDANT GENERAL MOTORS LLC'S ANSWER TO PLAINTIFF'S COMPLAINT

Defendant General Motors LLC ("General Motors"), through its undersigned counsel, and for its Answer to plaintiff International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America's ("UAW") Complaint, responds as follows.

PRELIMINARY STATEMENT

As an initial matter, General Motors notes that plaintiff's Complaint purports to seek damages from General Motors for an alleged payment obligation to the Voluntary Employees' Beneficiary Association ("VEBA") pursuant to the terms of a 2007 UAW-Delphi-GM Memorandum of Understanding (the "2007 Delphi Restructuring MOU") entered into on or about June 22, 2007 by Delphi Corporation ("Delphi"), General Motors Corporation n/k/a Motors Liquidation Company ("Old GM"), and plaintiff. General Motors' sole obligations to the VEBA, however, were comprehensively and definitively set forth in the UAW Retiree Settlement Agreement, dated July 10, 2009 (the "UAW Retiree Settlement Agreement"), entered

into between General Motors and plaintiff. The UAW Retiree Settlement Agreement bars the plaintiff's pursuit of any claim for additional contributions to the VEBA, and in that agreement plaintiff agreed not to seek to make General Motors pay any amounts to the VEBA other than those expressly set forth in the UAW Retiree Settlement Agreement.

The United States Bankruptcy Court for the Southern District of New York presiding over the Old GM bankruptcy proceedings entered an order (the "Sales Order") approving the UAW Retiree Settlement Agreement on July 5, 2009. Pursuant to the terms of that express Order, the express agreement of the parties set forth in the UAW Retiree Settlement Agreement and the Bankruptcy Court's inherent authority to enforce its own orders, the United States Bankruptcy Court for the Southern District of New York has exclusive jurisdiction over any dispute – including this one – regarding General Motors' obligations to the VEBA or involving "the enforcement, implementation, application or interpretation of" the UAW Retiree Settlement Agreement.

ANSWER

General Motors further responds as follows to each of the respective paragraphs of plaintiff's Complaint.

1. General Motors admits and avers that plaintiff purports to bring this action under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, for breach of a labor contract. General Motors denies that it failed to honor an obligation to make a specified payment into a VEBA, and otherwise denies the allegations in paragraph 1.

2. General Motors admits and avers that plaintiff purports to invoke the jurisdiction of this Court pursuant to 29 U.S.C. § 185 and 28 U.S.C. § 1331, which General Motors denies as a legal conclusion, not an averment of fact, and otherwise denies the allegations in paragraph 2.

General Motors further admits and avers that the United States Bankruptcy Court for the Southern District of New York has exclusive jurisdiction over this dispute.

3. General Motors admits and avers that plaintiff purports to invoke venue in this District pursuant to 29 U.S.C. § 185 and 28 U.S.C. § 1391(b), which General Motors denies as a legal conclusion, not an averment of fact, and otherwise denies the allegations in paragraph 3. General Motors further admits and avers that the United States Bankruptcy Court for the Southern District of New York is the exclusive venue for this dispute.

4. General Motors admits and avers that plaintiff is a labor organization that represents certain of General Motors' and other companies' employees for purposes of collective bargaining and that plaintiff's principal offices are located at the address indicated in paragraph 4. General Motors admits and avers that, in the second sentence of paragraph 4, plaintiff purports to quote from LMRA § 301, 29 U.S.C. § 185, and plaintiff asserts it is "a labor organization representing employees in an industry affecting commerce" pursuant to LMRA § 301, 29 U.S.C. § 185. General Motors admits and avers that LMRA § 301, 29 U.S.C. § 185 speaks for itself, and otherwise denies the allegations in paragraph 4.

5. General Motors admits and avers that it is a Delaware limited liability company that employs individuals represented by plaintiff for purposes of collective bargaining, and admits the allegations in the last sentence of paragraph 5. General Motors admits and avers that, in the second sentence of paragraph 5, plaintiff purports to quote from LMRA § 301, 29 U.S.C. § 185, and plaintiff asserts that General Motors is "an employer" within the meaning of that statute. General Motors denies as a legal conclusion, not an averment of fact, that General Motors is "an employer" within the meaning of LMRA § 301, 29 U.S.C. § 185 with respect to

the 2007 Delphi Restructuring MOU at issue. General Motors admits and avers that LMRA § 301, 29 U.S.C. § 185 speaks for itself, and otherwise denies the allegations in paragraph 5.

6. General Motors admits and avers that, after Delphi and certain of its related companies filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code, plaintiff, Delphi and Old GM entered into the 2007 Delphi Restructuring MOU on or about June 22, 2007. General Motors admits and avers that the actions taken by the Court presiding over the Delphi bankruptcy speak for themselves. General Motors otherwise denies the allegations in paragraph 6.

7. General Motors admits and avers that Old GM and certain of its related companies filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York on June 1, 2009. General Motors further admits and avers that General Motors purchased substantially all the assets of Old GM pursuant to the Amended and Restated Master Sale and Purchase Agreement dated as of June 26, 2009 (as amended, the "MPA"), which was approved by the Sale Order entered by the Bankruptcy Court presiding over the Old GM bankruptcy proceedings on July 5, 2009. General Motors admits and avers that the MPA and the Sale Order speak for themselves, and General Motors refers to these documents for a true and complete statement of their contents. General Motors denies that it is contractually required to honor all contractual obligations under the 2007 Delphi Restructuring MOU, and otherwise denies the allegations in paragraph 7.

8. General Motors admits and avers that plaintiff purports to quote Section J.2 of the 2007 Delphi Restructuring MOU, which speaks for itself, and General Motors refers to that

document for a true and complete statement of its content. General Motors otherwise denies the allegations in paragraph 8.

9. General Motors admits and avers that plaintiff refers to and purports to quote Section K.2 of the 2007 Delphi Restructuring MOU, which speaks for itself, and General Motors refers to that document for a true and complete statement of its content. General Motors otherwise denies the allegations in paragraph 9.

10. General Motors admits and avers that the actions taken by the Bankruptcy Court presiding over the Delphi bankruptcy speak for themselves, denies plaintiff's purported characterization of such actions, and otherwise denies the allegations in paragraph 10.

11. General Motors admits and avers that plaintiff sent a letter to General Motors on or about October 29, 2009 regarding the 2007 Delphi Restructuring MOU, General Motors sent a response letter to plaintiff on or about November 11, 2009, and further correspondence regarding this subject was exchanged by the parties on or about July 27, 2010 and August 31, 2010, the contents of which speak for themselves. General Motors denies that any payment is contractually required under the terms of the 2007 Delphi Restructuring MOU, and General Motors further denies that it is in breach of the 2007 Delphi Restructuring MOU. General Motors otherwise denies the allegations in paragraph 11.

12. In response to paragraph 12 of the Complaint, General Motors incorporates by reference its admissions, averments and denials heretofore made as if fully set forth herein

13. General Motors denies the allegations contained in paragraph 13 as legal conclusions, not averments of fact, and otherwise denies the allegations in paragraph 13.

14. General Motors denies the allegations in paragraph 14 of the Complaint.

15. General Motors denies each allegation in the Complaint that is not expressly admitted above, and further denies that plaintiff is entitled to any of the relief sought in its Complaint or requested in the prayer for relief, or any other relief whatsoever, against General Motors.

AFFIRMATIVE DEFENSES

16. This Court lacks jurisdiction because the United States Bankruptcy Court for the Southern District of New York has exclusive jurisdiction over plaintiff's alleged claim.

17. The United States Bankruptcy Court for the Southern District of New York is the exclusive venue for plaintiff's alleged claim.

18. The Complaint fails to state a claim upon which relief can be granted.

19. Plaintiff's claim is barred by the doctrine of payment, release, accord and satisfaction, novation, or substituted contract.

20. Plaintiff's claim is barred by the doctrine of waiver or estoppel.

21. To the extent that plaintiff's Complaint has not been filed within the applicable statute of limitations period, it is barred.

22. Plaintiff's claim is barred because General Motors' obligations to the VEBA are governed solely by the UAW Retiree Settlement Agreement.

23. Plaintiff's claim is barred because plaintiff agreed in the UAW Retiree Settlement Agreement that it would not seek to make General Motors pay any amounts to the VEBA other than those expressly set forth in the UAW Retiree Settlement Agreement.

24. Plaintiff's claim is barred to the extent that the terms of the 2007 Delphi Restructuring MOU have been superseded, amended, terminated or rescinded by a subsequent agreement between the parties.

25. Plaintiff's claim is barred to the extent that General Motors purchased Old GM's assets free and clear of certain obligations under the 2007 Delphi Restructuring MOU pursuant to the terms and conditions of the Sale Order, the MPA or related documents.

26. Plaintiff's claim is barred to the extent that conditions precedent to certain obligations under the 2007 Delphi Restructuring MOU have not been satisfied.

27. Plaintiff's claim is barred because the Sale Order enjoins this action.

28. Plaintiff's claim is barred because this action constitutes an improper collateral attack on the Sale Order.

29. The Court lacks subject matter jurisdiction over this dispute.

30. Plaintiff's claim is barred by the doctrines of res judicata and/or collateral estoppel.

31. Plaintiff's claim is barred because it has been released or discharged in bankruptcy.

32. Plaintiff's claim is barred for failure or lack of consideration.

33. General Motors reserves the right to assert additional affirmative defenses at such time and to such extent as is warranted by discovery and developments in this case.

WHEREFORE, defendant General Motors LLC prays for judgment on the Complaint in its favor and against plaintiffs as follows:

(a) That plaintiff take nothing by the Complaint and that the same be dismissed with prejudice;

(b) That Defendant recover its costs of suit incurred herein, including reasonable attorney's fees; and

(c) For such other and further relief as the Court may deem proper.

Dated: October 8, 2010

Respectfully submitted,

/s/ Robert S. Walker

Robert S. Walker (Ohio Bar No. 0005840)
(Admitted to E.D. Mich. 8/18/93)
rswalker@jonesday.com
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Counsel for Defendant General Motors, LLC

OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that, on October 8, 2010, I electronically filed the foregoing Defendant General Motors LLC's Answer to Plaintiff's Complaint with the Clerk of the Court using the ECF system; and I hereby certify that I deposited a copy of the foregoing document in the United States mail, postage prepaid, addressed to any non-ECF participants.

/s/ Robert S. Walker

Exhibit C: UAW Motion to Strike

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Plaintiff, v. **GENERAL MOTORS LLC,** Defendant.	2:10-cv-11366-AC-MJH **Honorable Avern Cohn** **Magistrate Judge Michael Hluchaniuk**

PLAINTIFF'S MOTION TO STRIKE "AFFIRMATIVE DEFENSE" OF LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Federal Rule of Civil Procedure 12(f), Plaintiff International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") moves to strike the "affirmative defense" of lack of subject matter jurisdiction asserted by Defendant General Motors LLC ("GM") in its Answer (Dkt. 5). The grounds for this Motion to Strike are fully set forth in the accompanying Memorandum of Law.

Pursuant to Local Rule 7.1, undersigned counsel states that he had a telephone conference with counsel for GM in which he explained the nature of this Motion and its legal basis and requested but did not obtain concurrence in the relief sought.

Respectfully submitted,

Jeffrey D. Sodko (P65076)
jsodko@uaw.net
Associate General Counsel, International Union, UAW
8000 East Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

/s/ ANDREW D. ROTH_____
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Bredhoff & Kaiser, PLLC
805 Fifteenth Street, N.W., Suite 1000
Washington, DC 20005
(202) 842-2600

Counsel for Plaintiff UAW

Dated: October 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Robert S. Walker
rswalker@jonesday.com
Jones Day
North Point
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Plaintiff, v. **GENERAL MOTORS LLC,** Defendant.	2:10-cv-11366-AC-MJH **Honorable Avern Cohn** **Magistrate Judge Michael Hluchaniuk**

MEMORANDUM OF LAW IN SUPPORT OF THE UAW's MOTION TO STRIKE GM's "AFFIRMATIVE DEFENSE" OF LACK OF SUBJECT MATTER JURISDICTION

STATEMENT OF ISSUE PRESENTED

Whether this Court should strike GM's "affirmative defense" of lack of subject matter jurisdiction and affirm that subject matter jurisdiction over this action lies under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

There is no case law authority on point, but the existence of this Court's jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the invalidity of GM's asserted "affirmative defense" of lack of subject matter jurisdiction is shown on the face of the relevant labor agreements and the corroborating facts set forth in the attached Declaration of Daniel Sherrick.

Plaintiff International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") submits this Memorandum of Law in support of its Motion to Strike the "affirmative defense" of lack of subject matter jurisdiction asserted by Defendant General Motors LLC ("GM") in its Answer to the UAW's Complaint. *See* Answer (Dkt. 5), ¶¶ 16, 29.

As set out below, this Court plainly has jurisdiction over this action for breach of a 2007 labor contract between the parties under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. And, contrary to GM's assertion, this action does **not** present any "dispute" of the kind that lies within the exclusive jurisdiction of the United States Bankruptcy Court for the Southern District of New York pursuant to a separate, 2009 labor contract between the parties. GM's asserted "affirmative defense" of lack of subject matter jurisdiction therefore is insufficient as a matter of law, and should be stricken by this Court under Federal Rule of Civil Procedure 12(f).

INTRODUCTION AND SUMMARY OF ARGUMENT

UAW filed this action against GM in this Court on April 6, 2010.[1] The sole claim asserted by the UAW in its Complaint is that GM is in breach of a 2007 labor contract between the parties (and Delphi Corporation) under which GM is obligated to make a specified, $450 million payment to an entity known as the "DC VEBA." *See* Compl. (Dkt. 1), ¶¶ 8, 10-11, 14.

The "DC VEBA" – the Defined Contribution Voluntary Employees' Beneficiary Association – is a trust created in 2006 pursuant to a settlement agreement approved by the court in the class action lawsuit *Int'l Union, UAW v. General Motors Corp.*, Civil Action No. 05-

[1] The Court approved a stipulation between the parties extending the time for the UAW to serve the Complaint until October 4, 2010 (Dkt. 3). Service of the Complaint was accomplished on September 17, 2010 (Dkt. 4).

73991 (E.D. Mich.) – a lawsuit commonly referred to by the parties as *Henry I*. *See UAW v. General Motors Corp.*, 497 F.3d 615, 624 (6th Cir. 2007). The purpose of the DC VEBA was to help fund retiree health benefits, by providing dental coverage and mitigating the costs that GM retirees would have to bear going forward for retiree medical coverage. *See* Ex. 1, Declaration of Daniel Sherrick ("Sherrick Dec."), at ¶ 5.[2] As alleged in the Complaint, GM was obligated to make a $450 million payment to the DC VEBA when the conditions triggering that obligation were satisfied on October 6, 2009. Compl. (Dkt. 1), ¶ 10. GM's failure to make this $450 million payment to the DC VEBA in response to an October 29, 2009 demand letter from the UAW prompted this lawsuit to enforce and collect upon that payment obligation to the DC VEBA.

On October 8, 2010, GM filed its Answer to the Complaint (Dkt. 5). GM's Answer begins with a "Preliminary Statement" asserting that the instant lawsuit by the UAW presents a "dispute" that lies within the exclusive jurisdiction of the United States Bankruptcy Court for the Southern District of New York pursuant to the terms of a 2009 agreement between the parties approved by that Bankruptcy Court on July 5, 2009. *See* Answer (Dkt. 5), at 1-2. Consistent with this assertion, GM's Answer purports to state an "affirmative defense" of lack of subject matter jurisdiction over the UAW's Complaint. *Id.* at ¶¶ 16, 29. The UAW has now moved to strike this purported "affirmative defense" pursuant to Federal Rule of Civil Procedure 12(f).

Although motions to strike affirmative defenses generally are disfavored, *see Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953), "lack of subject matter jurisdiction" is not genuinely in the nature of an "affirmative defense" to a plaintiff's cause of action. *See* Fed. R. Civ. P. 8(c). Had GM the courage of its convictions regarding this

[2] The district court approved the *Henry I* settlement agreement, and that district court decision was affirmed by the Sixth Circuit in the published opinion cited in text.

Court's putative "lack of subject matter jurisdiction" over this action, GM presumably would have raised that jurisdictional issue in the normal course through a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). Having decided for whatever strategic reasons to eschew such a Rule 12(b)(1) motion to dismiss, GM hardly can maintain that the UAW's Motion to Strike is an inappropriate procedural vehicle for raising and having this Court resolve the basic, threshold issue—drawn into question by GM's Answer—of whether this Court has subject matter jurisdiction over this action.

Furthermore, while courts ordinarily will not consider matters outside the pleadings in ruling on a motion to strike, that general rule has no application where, as here, the issue presented by the motion is one of subject matter jurisdiction. *See Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003); *Montez v. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir. 2004) ("In general, where subject matter jurisdiction is being challenged, the trial court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case.").

That being said, we note at the outset that almost all of the evidentiary materials relevant to the UAW's Motion to Strike are already part of the record that may properly be considered by this Court in ruling on the Motion, because those evidentiary materials are specifically referenced in the pleadings and are integral to the claims or defenses raised by the parties. *See Greenburg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999) (noting that even when ruling on a Rule 12(b)(6) motion, the court may consider documents referenced in the pleadings and integral to the claim where the authenticity of those documents is not in dispute). The 2007 labor contract setting forth GM's $450 million payment obligation to the DC VEBA is specifically referenced in the UAW's Complaint and is, of course, integral to the UAW's breach

of contract claim. *See* Compl. (Dkt. 1), ¶¶ 6-10. Likewise, the 2009 agreement that GM invokes as the basis of its putative "affirmative defense" of lack of subject matter jurisdiction is specifically referenced in GM's Answer and is integral to that asserted "affirmative defense." *See* Answer (Dkt. 5), at 1-2. Nevertheless, to buttress and confirm the conclusion readily apparent on the face of these 2007 and 2009 labor agreements that this Court **does** have subject matter jurisdiction over this action, this Motion is accompanied by the Declaration of Daniel Sherrick making a few additional factual points that bear on this jurisdictional issue, as is perfectly appropriate under the well-established case law cited above.

As we develop below, GM's contention that this Court lacks subject matter jurisdiction over this action is wholly lacking in merit. This lawsuit is a garden-variety, breach-of-a-labor-contract action brought by the UAW to resolve a dispute between the UAW and GM over the proper interpretation and application of a 2007 labor agreement between the parties (and Delphi Corporation) – *i.e.*, a dispute over whether, under the terms of that 2007 labor agreement, the conditions necessary to trigger GM's $450 million payment obligation to the DC VEBA have been satisfied, such that GM's failure to make that payment to the DC VEBA constitutes a breach of the 2007 agreement. This contract dispute between the UAW and GM falls squarely within this Court's subject matter jurisdiction under Section 301 of the LMRA, which confers jurisdiction on the district courts over suits for "violation of contracts between an employer and a labor organization." 29 U.S.C. § 185.

At the same time, GM's reliance on the provisions of a subsequent, 2009 agreement between the parties is entirely misplaced. That 2009 agreement sets forth and limits GM's payment obligations to a different retiree health benefit fund altogether – the so-called "New VEBA" – and says nothing at all about the existence *vel non* of the previously-negotiated $450

million payment obligation to **the DC VEBA** that the UAW seeks to enforce and collect upon in this lawsuit. That being so, it is plain that, contrary to GM's assertion, *see* Answer (Dkt. 5), at 2, this LMRA § 301 action does **not** present any "dispute" regarding "the enforcement, implementation, application or interpretation" of the 2009 agreement that lies within the exclusive jurisdiction of the United States Bankruptcy Court for the Southern District of New York under the terms of that 2009 agreement.

FACTUAL BACKGROUND

A. The 2007 MOU

The UAW is a labor organization that represents the employees of various employers in collective bargaining, including GM employees. Compl. (Dkt. 1), ¶ 4. On June 22, 2007, the UAW, GM's predecessor corporation (General Motors Corporation, or "Old GM"), and Delphi Corporation ("Delphi") entered into a tripartite Memorandum of Understanding ("2007 MOU") to resolve a number of outstanding labor issues that had arisen during the course of Delphi's then-ongoing bankruptcy proceedings. *Id.* at ¶ 6. In addition to establishing lower wage and benefit rates for UAW-represented Delphi employees and granting Delphi additional flexibility to close or sell many UAW-represented facilities, the 2007 MOU allowed Delphi to terminate its obligation to provide retiree medical benefits and to freeze its pension plan. *See* Ex. 1, Sherrick Dec., at ¶ 7. Those actions would trigger the "GM-UAW Benefit Guarantee," which had been negotiated by the UAW in 1999 and provided for Old GM to take over Delphi's obligations regarding retiree health care, and would result in many new participants in the DC VEBA that had been established in 2006 pursuant to the *Henry I* settlement. *Id.* at ¶¶ 4-7.

Thus, in Section J of the 2007 MOU, the parties agreed to several provisions "in partial consideration for the UAW entering into this Agreement and in consideration for the releases to

be provided" in that Agreement, including that Old GM would make a payment of $450 million "to be paid directly to the DC VEBA." Sherrick Dec. Ex. A, 2007 MOU, at § J. This payment was specifically for the purpose of settling a claim by the UAW "in the amount of $450 million as a result of the modifications encompassed by this Agreement and various other UAW agreements during the course of Delphi's bankruptcy." Compl. (Dkt. 1), ¶ 8 (quoting Section J.2 of 2007 MOU).

Pursuant to the terms of the 2007 MOU, this $450 million payment obligation to the DC VEBA would be triggered upon the occurrence of the following events:

> (a) execution by Delphi and GM of a comprehensive settlement agreement resolving the financial, commercial, and other matters between them; and
>
> (b) the substantial consummation of a plan of reorganization proposed by Delphi in its Chapter 11 cases and confirmed by the Bankruptcy Court which incorporates, approves and is consistent with all of the terms of this Agreement and the comprehensive settlement agreement between Delphi and GM.

Id. at ¶ 9 (quoting Section K.2 of 2007 MOU).

The 2007 MOU was approved by the bankruptcy court presiding over the Delphi bankruptcy on July 19, 2007. *Id.* at ¶ 6.

B. The 2008 Settlement Agreement

On February 21, 2008, the UAW and Old GM entered into a settlement agreement to resolve the class action lawsuit *Int'l Union, UAW, et. al. v. General Motors Corp.*, Civil Action No. 07-14074 (E.D. Mich.) ("2008 Settlement Agreement") – a lawsuit commonly referred to by the parties as *Henry II*. The *Henry II* court approved the 2008 Settlement Agreement on July 31, 2008. *See* Ex. 1, Sherrick Dec., at ¶ 8.

Pursuant to the terms of the 2008 Settlement Agreement, a new VEBA – aptly named "New VEBA" – was created. Sherrick Dec. Ex. B, 2008 Settlement Agreement, at § 1 (defining

"New VEBA"). The 2008 Settlement Agreement eliminated GM's obligation to provide retiree medical insurance benefits with respect to claims incurred on or after January 1, 2010, when the New VEBA would go into effect and begin providing those benefits. Ex. 1, Sherrick Dec., at ¶ 8 & Ex. B at § 2.

The 2008 Settlement Agreement set forth the full extent of GM's payment obligations to the New VEBA, and thus barred the imposition of any "additional" payment obligations to that New VEBA. Sherrick Dec. Ex. B, 2008 Settlement Agreement, at §§ 2, 5.B, 8, 14. In addition, fifteen days after the New VEBA became operational (*i.e.*, on January 16, 2010), the DC VEBA – referred to as the "Existing External VEBA" in the 2008 Settlement Agreement – would transfer all of its assets and liabilities to the New VEBA, and would then be terminated. *Id.* at § 12.C. But although the 2008 Settlement Agreement took cognizance of the DC VEBA in this respect (and other respects not relevant here), it was completely silent on the issue of the $450 million payment obligation to the DC VEBA set forth in the 2007 MOU: it did **not** purport to modify or extinguish that payment obligation to the DC VEBA, or otherwise deal with that payment obligation to the DC VEBA in **any** way.

C. The 2009 Settlement Agreement

In June 2009, Old GM filed for bankruptcy, and from that bankruptcy emerged a new operating company, Defendant GM. Compl. (Dkt. 1), ¶ 7. Pursuant to a sales agreement approved by the bankruptcy court in the Old GM bankruptcy proceedings, GM assumed the obligations of Old GM with respect to its labor contracts with the UAW, including the obligations in the 2007 MOU. *Id.*

On July 10, 2009, UAW and GM entered into another settlement agreement ("2009 Settlement Agreement") that superseded the 2008 Settlement Agreement and modified some of

its terms in order to resolve certain outstanding issues that had arisen during the Old GM bankruptcy. *See* Sherrick Dec. Ex. C, 2009 Settlement Agreement.

Like the 2008 Settlement Agreement, the 2009 Settlement Agreement dealt "comprehensively and definitively," *see* Answer (Dkt. 5), at 1, with the issue of GM's payment obligations to **the New VEBA**. *See* Sherrick Dec. Ex. C, at §§ 2, 5.B, 8, 14. And, like the 2008 Settlement Agreement, the 2009 Settlement Agreement provided that the New VEBA would become operational on January 1, 2010, and that fifteen days later (*i.e.*, on January 16, 2010), the DC VEBA – again referred to as the "Existing External VEBA" in the agreement – would transfer all assets and liabilities into the New VEBA and would terminate at that point. *Id.* at § 1 (defining "Implementation Date"), §§ 2, 12.C.

Moreover, like the 2008 Settlement Agreement, the 2009 Settlement Agreement is completely silent on the issue of the $450 million payment obligation to the DC VEBA set forth in the 2007 MOU: it does **not** purport to modify or extinguish that payment obligation to the DC VEBA, or otherwise deal with that payment obligation to the DC VEBA in **any** way.

The 2009 Settlement Agreement was approved by the bankruptcy court presiding over the Old GM bankruptcy on July 5, 2009. *See* Ex. 1, Sherrick Dec., at ¶ 12. And, section 26.B of the 2009 Settlement Agreement provides that the GM bankruptcy court shall retain exclusive jurisdiction "to resolve disputes arising out of or relating to the enforcement, implementation, application or interpretation of this Settlement Agreement." Sherrick Dec. Ex. C, 2009 Settlement Agreement, at § 26.B.

D. Satisfaction of the Conditions Precedent to GM's $450 Million Payment Obligation to the DC VEBA

On July 30, 2009, the bankruptcy court in the Delphi bankruptcy entered an order confirming a plan of reorganization for Delphi, and on October 6, 2009, the bankruptcy court

issued another order finding that the Delphi plan of reorganization "was substantially consummated." Compl. (Dkt. 1), ¶ 10. That plan of reorganization incorporated, approved, and was consistent with (1) all the terms of the 2007 MOU; and (2) a comprehensive settlement agreement previously entered into by Delphi and Old GM in September 2008 that resolved the financial, commercial, and other matters between them. *Id.* Accordingly, the conditions set forth in Section K.2 of the 2007 MOU were satisfied as of October 6, 2009, and GM's contractual obligation under the 2007 MOU to make the $450 million payment to the DC VEBA became effective as of that date. *Id.*

By letter dated October 29, 2009, UAW made a written demand to GM to honor this contractual obligation and make the required payment to the DC VEBA. *Id.* at ¶ 11. By letter dated November 11, 2009, GM refused to do so, *id.*, and that payment obligation to the DC VEBA thus remains outstanding.

ARGUMENT

Federal Rule of Civil Procedure 12(f) is the procedural mechanism by which a party may move to strike an affirmative defense. *See* Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."). An affirmative defense may be stricken when it is "insufficient as a matter of law." *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 689 (N.D. Ohio 2010). A defense is insufficient when "it is impossible for a defendant to prove a set of facts in support of the affirmative defense that would defeat the complaint." *United States v. Quadrini*, No. CIV. 07-13227, 2008 WL 1743348, at *2 (E.D. Mich. Apr. 11, 2008) (attached as Exhibit 2); *see also Williams v. Provident Inv. Counsel, Inc.*, 279 F. Supp. 2d 894, 905 (N.D. Ohio 2003) (to be sufficient, an affirmative defense "must withstand a Rule 12(b)(6) challenge").

For the reasons set forth below, GM's "affirmative defense" of lack of subject matter jurisdiction is insufficient as a matter of law and should thus be stricken. And, for those same reasons, this Court should affirm that it **does** have subject matter jurisdiction over this action.

A. It Is Clear That This Court Has LMRA § 301 Jurisdiction Over This Action, and the Nature of the Contract Dispute Lying Within This Court's Jurisdiction Is Equally Clear.

The sole claim contained in UAW's Complaint is for breach of the 2007 MOU based on GM's failure to make the required $450 million payment to the DC VEBA. Section 301(a) of the LMRA provides a federal forum for suits for "violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185(a). On its face, the 2007 MOU is a "contract[ ] between an employer and a labor organization representing employees in an industry affecting commerce." This lawsuit for breach of the 2007 MOU thus arises under LMRA § 301(a), and, in turn, falls within this Court's original jurisdiction under 28 U.S.C. § 1331. *See, e.g., Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451-52, 457 (1957) ("Plainly, [LMRA § 301(a)] supplies the basis upon which the federal district courts may take jurisdiction [over actions for breach of a labor contract]. . . . A case or controversy arising under § 301(a) is, therefore, one within the purview of judicial power as defined in Article III"); *Paper, Allied Indus., Chem. & Energy Workers Int'l Union v. Air Prods. & Chems., Inc.*, 300 F.3d 667, 672 (6th Cir. 2002) ("Section 301(a) of the Labor Management Relations Act vests federal courts with jurisdiction to examine alleged violations of contracts between certain employers and labor organizations."); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1293 (6th Cir. 1991) ("The LMRA § 301(a), 29 U.S.C. § 185(a), extends the jurisdiction of the federal courts to cases involving alleged breaches of collective bargaining agreements.").

In short, it is abundantly clear on the face of the UAW's Complaint and the 2007 MOU that the UAW has properly invoked this Court's LMRA § 301 jurisdiction.

The nature of the contract dispute lying within this Court's LMRA § 301 jurisdiction is equally clear. The UAW's Complaint alleges that the 2007 MOU provides for a $450 million payment to the DC VEBA upon the occurrence of certain conditions specified in Section K.2 of the 2007 MOU, and that those specified conditions were fully satisfied as of October 6, 2009. *See* Compl. (Dkt. 1), ¶¶ 8-10. GM has denied these allegations. *See* Answer (Dkt. 5), ¶¶ 8-10. Accordingly, the dispute before this Court is over what the conditions specified in Section K.2 of the 2007 MOU entail and whether those conditions were in fact fully satisfied as of October 6, 2009. This dispute over the proper interpretation and application of the 2007 MOU is grist for the judicial mill under LMRA § 301, as the above-cited cases illustrate.

B. GM's Effort to Defeat This Court's LMRA § 301 Jurisdiction By Invoking the 2009 Settlement Agreement Between the Parties Fails Utterly

In the face of the foregoing, GM has asserted in its Answer, as an "affirmative defense," that this Court lacks subject matter jurisdiction over the UAW's claim to enforce and collect upon the $450 million payment obligation to the DC VEBA arising under the 2007 MOU. *See* Answer (Dkt. 5), ¶¶ 16, 29. The basis for this putative "affirmative defense" of lack of subject matter jurisdiction is set forth in a "Preliminary Statement" at the very outset of GM's Answer. *Id.* at 1-2.

In that "Preliminary Statement," GM begins by describing the UAW's Complaint herein as follows: "[P]laintiff's Complaint purports to seek damages from General Motors for an alleged payment obligation to **the** Voluntary Employees' Beneficiary Association ("VEBA") pursuant to the terms of [the 2007 MOU]." *Id.* at 1 (emphasis added). And, based on this characterization of the UAW's Complaint, GM proceeds to argue that the instant contract dispute

between the parties over that payment obligation lies within the jurisdiction of the GM bankruptcy court rather than this Court because: (i) GM's "sole obligations to **the** VEBA . . . were comprehensively and definitively set forth in [the 2009 Settlement Agreement approved by the GM bankruptcy court]"; (ii) that 2009 Settlement Agreement "bars the [UAW's] pursuit of any claim for additional contributions to **the** VEBA"; and (iii) the GM bankruptcy court "has exclusive jurisdiction over any dispute – including this one – regarding General Motors' obligations to **the** VEBA." *Id.* at 1-2 (emphasis added).

With all due respect to GM, this line of argument in derogation of this Court's LMRA § 301 jurisdiction over the instant contract dispute is wholly fallacious. As a threshold matter, GM's argument rests on a characterization of the UAW's Complaint as seeking to enforce a "payment obligation to **the** VEBA" that glosses over entirely the critical distinction between **the DC VEBA** created in 2006 under the *Henry I* settlement, *see supra* pp. 3-4, and **the New VEBA** subsequently created in 2008 under the *Henry II* settlement, *see supra* pp. 8-9. This distinction is a critical one because, as set out in the margin, the UAW's Complaint, on its face, seeks to enforce a GM "payment obligation to" **the DC VEBA** as opposed to a GM "payment obligation to" **the New VEBA**.[3]

Against this background, GM's invocation of the 2009 Settlement Agreement in support of its jurisdictional argument is a particularly ripe red herring. On its face, that 2009 Settlement

[3] *See* Compl. (Dkt. 1), ¶ 10 ("Accordingly, pursuant to Section K.2 of the MOU, the Company's contractual obligation to make the payment to the DC VEBA specified in Section J.2 of the MOU became 'effective' *on October 6, 2009*") (emphasis in original); *id.* at ¶ 11 ("By letter dated October 29, 2009, the UAW made a written demand that the Company honor its contractual obligation to make the foregoing payment to the DC VEBA as required by the terms of the MOU."); *id.* at ¶ 14 ("The Company's failure and refusal to make the payment to the DC VEBA specified in Section J.2 of the MOU—as demanded by the UAW in its October 29, 2009 letter—constitutes a breach of the MOU that is remediable in this action brought under LMRA § 301, 29 U.S.C. § 185."); Prayer for Relief, *id.* at p.5 (seeking to compel GM "to make the payment to the DC VEBA specified in Section J.2 of the MOU").

Agreement deals "comprehensively and definitively" with GM's "payment obligations to" **the New VEBA** and bars the UAW from seeking to impose on GM any additional "payment obligation to" **the New VEBA.** *See* Sherrick Dec. Ex. C, 2009 Settlement Agreement, at §§ 2, 5.B, 8, 14. But inasmuch as the UAW does **not** seek in this lawsuit to enforce any GM "payment obligation to" **the New VEBA** or to impose on GM any additional "payment obligation to" **the New VEBA –** but rather seeks **only** to enforce a GM "payment obligation to" **the DC VEBA** arising under the 2007 MOU – the 2009 Settlement Agreement simply does not come into play in this litigation at all.

Indeed, the most telling (and indisputable) fact in this regard is that the 2009 Settlement Agreement – like the 2008 Settlement Agreement that preceded it – does not say a word one way or the other regarding the existence *vel non* of GM's $450 million payment obligation to the DC VEBA arising under the 2007 MOU. *See* Sherrick Dec. Ex. C, 2009 Settlement Agreement; *supra* p. 10. That being so, there plainly is nothing to GM's assertion that this lawsuit to enforce that payment obligation to the DC VEBA under the 2007 MOU presents a "dispute" regarding "the enforcement, implementation, application or interpretation" of the 2009 Settlement Agreement that lies within the exclusive jurisdiction of the GM bankruptcy court. *See* Answer (Dkt. 5), at 2. Rather, as we have shown, the "dispute" between the parties in this case pertains solely to "the enforcement, implementation, application or interpretation" of the 2007 MOU and, in particular, the provisions of that 2007 MOU dealing specifically with GM's $450 million payment obligation to the DC VEBA.

To be sure, on January 16, 2010, several months *after* GM's $450 million payment obligation to the DC VEBA at issue in this litigation was triggered, the assets and liabilities of the DC VEBA were transferred to the New VEBA in accordance with section 12.C of the 2009

Settlement Agreement, and the DC VEBA was terminated. *See* Ex. 1, Sherrick Dec. ¶ 18 & Ex. C at § 12.C. Thus, as a practical matter, should the UAW prevail on the merits of its breach of contract claim in this litigation, the $450 million payment that GM will be required to make in satisfaction of its payment obligation to the DC VEBA under the 2007 MOU will flow into the coffers of the New VEBA. But that fact cannot somehow transform this perfectly-proper LMRA § 301 action to enforce GM's $450 million payment obligation to the DC VEBA under the 2007 MOU into an improper action to enforce a payment obligation to the New VEBA in derogation of the 2009 Settlement Agreement. To the contrary, that fact simply reflects the reality that one of the assets transferred from the DC VEBA to the New VEBA on January 16, 2010 was GM's then-outstanding $450 million indebtedness to the DC VEBA under the 2007 MOU—an indebtedness that, as we have shown, the 2009 Settlement Agreement does not address in any way.

In any event, under the terms of the 2007 MOU, GM's $450 million payment obligation to the DC VEBA ripened ***on October 6, 2009***, and the UAW made a timely, written demand that GM make that contractually-required payment to the DC VEBA ***on October 29, 2009***—a demand which GM promptly rejected in breach of its contractual payment obligation to the DC VEBA. *See* Compl. (Dkt. 1), ¶¶ 10-11. Had GM honored its contractual payment obligation to the DC VEBA upon the UAW's timely demand, then the $450 million payment at issue would have gone into the DC VEBA, which still existed as of that date. *See* Ex. 1, Sherrick Dec., at ¶ 17. GM cannot profit by its own contractual breach by now attempting to recast its $450 million payment obligation to the DC VEBA under the 2007 MOU as a payment obligation to the New VEBA that does not survive the 2009 Settlement Agreement.

* * *

The short of the matter is this: It is abundantly clear on the face of the 2007 MOU and the 2009 Settlement Agreement that the instant lawsuit to enforce GM's $450 million payment obligation to the DC VEBA under the 2007 MOU presents a "dispute" relating to the proper interpretation and application of the 2007 MOU that falls squarely within this Court's LMRA § 301 jurisdiction, and does ***not***, as GM contends, present any "dispute" relating to the proper interpretation and application of the 2009 Settlement Agreement that lies within the GM bankruptcy court's exclusive jurisdiction. We would be remiss, however, if we did not conclude our submission by setting out the record evidence outside the four corners of those two labor agreements that further belies GM's contention on this jurisdictional issue.

As previously noted, *supra* at p. 10, the 2009 Settlement Agreement was modeled closely on the parties' 2008 Settlement Agreement resolving the *Henry II* litigation, and the two agreements are intentionally identical in many respects – **including** in respect to the "comprehensive[ ]" provisions in the 2009 Settlement Agreement pertaining to GM's "payment obligations to" the New VEBA that GM now contends, as the predicate for its jurisdictional defense, "definitively" speak to and resolve the UAW's breach of contract claim in this case to the point of extinguishing that claim altogether. *Compare* Sherrick Dec. Ex. B, 2008 Settlement Agreement, at §§ 2, 5.B, 8, 14 *with* Sherrick Dec. Ex. C, 2009 Settlement Agreement, at §§ 2, 5.B, 8, 14.[4] Yet GM's own actions in the aftermath of the 2008 Settlement Agreement show that

[4] The parties structured the 2009 Settlement Agreement to track the 2008 Settlement Agreement as closely as possible while only making the necessary modifications to the terms of the 2008 Settlement Agreement. *See* Ex. 1, Sherrick Dec., at ¶ 11. Indeed, in order to keep the agreements as identical as possible, if an entire section of the 2008 Settlement Agreement had become moot or was no longer applicable, the parties simply listed that section as "reserved" in the 2009 Settlement Agreement rather than deleting the section so that even the paragraph numbering could remain the same. *Id.*

GM itself does not believe that these "comprehensive[ ]" provisions in both the 2008 and 2009 Settlement Agreements had the dramatic effect that GM now argues they did.

In April 2010, for example, GM filed a 10-Q with the Securities and Exchange Commission ("SEC") in which GM acknowledged that its contingent $450 million payment obligation to the DC VEBA under the 2007 MOU remained extant and was unaffected by the terms of the 2008 Settlement Agreement. Specifically in this regard, GM stated in its 10-Q filing that "[a]s a result of the 2008 UAW Settlement Agreement becoming effective in September 2008, Old GM remeasured the obligations and plan assets of its UAW hourly retiree medical plan and Mitigation Plan using updated assumptions in September 2008," and that those remeasured obligations and plan assets "included," among other things, "a $450 million payment to the New VEBA which was contingent upon substantial consummation of a plan of reorganization (POR) by Delphi Corporation (Delphi)."[5] *See* Ex. 3, General Motors Company Form 10-Q (April 7, 2010), at 52.[6]

GM does not attempt to explain in its "Preliminary Statement," and cannot possibly explain, how the "comprehensive[ ]" provisions in the 2009 Settlement Agreement pertaining to GM's "payments obligations to" the New VEBA had the effect of barring or extinguishing the UAW's claim in this lawsuit for enforcement of GM's $450 million payment obligation to the DC VEBA under the 2007 MOU when, by GM's own admission to the SEC, the identically-worded provisions in the 2008 Settlement Agreement did **not** have that effect.

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[5] While GM's 10-Q filing speaks in terms of a "$450 million payment to the New VEBA," GM's use of that terminology is unsurprising in light of the fact that by the date of its 10-Q filing the transfer of assets from the DC VEBA to the New VEBA had been accomplished and the DC VEBA had been terminated, such that as a practical matter the $450 million payment would indeed flow into the coffers of the New VEBA rather than the DC VEBA. *See supra* pp. 16-17.

[6] For the Court's convenience, the relevant excerpt from GM's April 2010 10-Q is attached as Exhibit 3. The complete document is publicly available on GM's website at: http://www.gm.com/corporate/investor_information/sec/.

Along the same lines, GM and the UAW engaged in a series of discussions and negotiations in the immediate aftermath of the 2008 Settlement Agreement pertaining to GM's then-contingent $450 million payment obligation to the DC VEBA under the 2007 MOU. These discussions and negotiations between the parties, which are detailed in the accompanying Declaration of Daniel Sherrick, focused on the issue of whether the $450 million payment obligation to the DC VEBA should remain contingent on Delphi's emergence from bankruptcy, as set forth in Section K.2 of the 2007 MOU, or whether that condition should be removed and the money paid immediately by GM. *See* Ex. 1, Sherrick Dec., at ¶¶ 13-16. Obviously, it would have been pointless for GM to have engaged in such discussions and negotiations with the UAW regarding removal of the contingency had GM been of the view that its $450 million payment obligation to the DC VEBA under the 2007 MOU had already been wiped off the books altogether by the "comprehensive[ ]" provisions in the 2008 Settlement Agreement relating to GM's "payment obligations to" the New VEBA. For GM to take that position now in this lawsuit based on the identically-worded provisions in the 2009 Settlement Agreement smacks of revisionist history.

It is equally noteworthy that in the negotiations between GM and the UAW leading up to the 2008 Settlement Agreement, the funding for the New VEBA was calculated and re-calculated literally dozens of times, with GM's and the UAW's actuaries sharing these calculations at every step. *Id.* at ¶ 9. In all of these calculations, GM's $450 million payment obligation to the DC VEBA under the 2007 MOU was included as a funding source. *Id.* In other words, for purposes of determining funding levels for the New VEBA, the parties had a clear mutual expectation that this $450 million would in fact be paid to the DC VEBA when the conditions stated in the 2007 MOU were satisfied, and would then be transferred to the New VEBA in accordance with

Section 12.C of the 2008 Settlement Agreement. *Id.* This additional item of negotiating history evidence is yet further corroboration of the point that the "comprehensive" provisions of the 2008 Settlement Agreement pertaining to GM's "payment obligations to" the New VEBA – incorporated *in haec verba* in the 2009 Settlement Agreement – were **not** intended by the parties to extinguish GM's $450 million payment obligation to the DC VEBA under the 2007 MOU.

CONCLUSION

For the foregoing reasons, this Court should strike GM's "affirmative defense" of lack of subject matter jurisdiction and affirm its LMRA § 301 jurisdiction over this action.

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Dated: October 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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