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

GENERAL MOTORS LLC; GENERAL MOTORS CO., Plaintiffs, v. FCA US LLC; FIAT CHRYSLER AUTOMOBILES N.V.; ALPHONS IACOBELLI; JEROME DURDEN; MICHAEL BROWN, Defendants.	No. 2:19-cv-13429 Honorable Paul D. Borman District Court Judge Honorable David R. Grand Magistrate Judge

FCA DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO "ENFORCE" RULE 26(d)(1)

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STATEMENT OF ISSUE PRESENTED

Should the Court stay discovery pending resolution of FCA's dispositive motions to dismiss,[1] which are forthcoming, given the Supreme Court's mandate that a plaintiff "is not entitled to discovery, cabined or otherwise," when its complaint is "deficient," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 686 (2009)?

[1] Plaintiffs General Motors LLC and General Motors Co. are referred to collectively as "GM"; Defendants FCA US LLC and Fiat Chrysler Automobiles N.V. are referred to collectively as "FCA"; and Defendants Alphons Iacobelli, Jerome Durden, and Michael Brown are referred to as the "Individual Defendants."

STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITIES

The controlling or most appropriate authorities for the relief that FCA seeks include:

1. *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)
2. *Bah* v. *Attorney Gen. of Tenn.*, 610 F. App'x 547 (6th Cir. 2015)
3. *Hahn* v. *Star Bank*, 190 F.3d 708 (6th Cir. 1999)
4. *Romar Sales Corp.* v. *Seddon*, 2013 WL 141133 (W.D. Mich. Jan. 11, 2013)
5. *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559 (6th Cir. 2003)

PRELIMINARY STATEMENT

This Court should stay discovery pending resolution of FCA's motions to dismiss, which, if granted, will dispose of all of the claims in this case. As GM itself has observed, "a short stay of discovery to permit the Court to consider the merits of a motion to dismiss" "is warranted" to "avoid the need for costly and time-consuming discovery," and will "'not prejudice . . . the opposing party' or unduly delay the action." GM brief in *Feliciano* v. *Gen. Motors LLC*, No. 14-cv-06374, ECF#19 at 2, 2014 WL 6629849 (S.D.N.Y. Oct. 22, 2014). FCA agrees entirely.

GM brought this action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which GM itself has described as "the litigation equivalent of a thermonuclear device." GM Brief in *Chaney* v. *Berkshire Hathaway Inc., et al.*, No. 17-cv-989, ECF#60 at 4, 2017 WL 11140611 (D. Ariz. Sept. 8, 2017). In doing so, GM initiated a case that not only is quintessentially "big"—GM seeks billions of dollars in damages, and already has propounded 55 discovery requests on FCA seeking a wide array of documents covering a period of *more than 10 years*—but predicated on claims that are fatally flawed. As the Seventh Circuit has explained, "RICO cases, like antitrust cases, are 'big' cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim." *Limestone Dev. Corp.* v. *Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008). GM's Complaint is deficient for numerous independent reasons, as will be explained

in detail in FCA's motions to dismiss. Accordingly, GM should not be permitted to embark on massive discovery—and FCA should not be required to bear the significant burdens of responding to such discovery—until the motions to dismiss are decided.

First, permitting GM to commence expansive discovery at the outset of the case will impose significant burdens on FCA, burdens that will be obviated if FCA's motions to dismiss are granted. In fact, given the sheer magnitude of potential discovery in a RICO case and the prospect of treble damages, some judges in the Southern District of New York, which has a great deal of RICO litigation, have adopted an "unvarying practice—in every case, bar none, in which racketeering is alleged—to . . . stay all discovery in the case—*all* discovery, not just RICO-related discovery—until the defendants have had an opportunity to move to dismiss the RICO claims and the Court has decided the motion." *Major, Lindsey & Africa, LLC* v. *Mahn*, 2010 WL 3959609, at *6 (S.D.N.Y. Sept. 7, 2010). GM's assertion (GM Br. 4) that FCA simply can copy the documents it has produced to the U.S. Department of Justice ("DOJ") in connection with the ongoing criminal investigation wrongly assumes that GM is entitled to all of those documents and that the DOJ would not object to FCA producing them to GM while the investigation is underway. In fact, courts routinely deny requests by plaintiffs in civil cases for

"cloned discovery" of materials produced in the course of a pending government investigation. *See infra* at 11-12.

Second, GM will not be prejudiced by a temporary stay of discovery pending a decision on FCA's motions to dismiss. The Sixth Circuit has made clear that "there is no general right to discovery upon filing of the complaint," as the "very purpose of Fed. R. Civ. P. 12(b)(6) 'is to enable defendants to challenge the legal sufficiency of complaints *without subjecting themselves to discovery*.'" *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003) (emphasis added). This makes perfect sense: "'only a complaint that states a plausible claim for relief' can 'unlock the doors of discovery.'" *Bah* v. *Attorney Gen. of Tenn.*, 610 F. App'x 547, 553 (6th Cir. 2015). GM does not even attempt to explain how it will be prejudiced by staying discovery *as to FCA*, instead asserting that *non-parties* might destroy documents unless they receive document preservation subpoenas. (GM Br. 4.) But FCA informed GM during the parties' Rule 26(f) conference that FCA does not object to GM serving subpoenas on third parties in order to preserve documents, and, on January 14, 2020, GM advised FCA that it was serving such subpoenas on numerous third parties.[2]

[2] FCA reserves the right to move to quash or modify any third-party subpoenas that GM serves in this case if FCA has rights or privileges that those subpoenas, or information responsive to them, may affect.

Third, although FCA is "not required to show a substantial likelihood of success on [its] dispositive motion," *Romar Sales Corp.* v. *Seddon*, 2013 WL 141133, at *2 (W.D. Mich. Jan. 11, 2013), even a quick preview of FCA's motions to dismiss shows that GM's claims are likely to be dismissed, which would obviate the need for any discovery in this action. Indeed, courts already have dismissed claims brought by rank-and-file FCA employees predicated on the same alleged prohibited payments referenced in GM's Complaint—all without permitting the plaintiffs in those cases to engage in discovery. GM's repeated assertion that the Individual Defendants have "admitted" to a "racketeering scheme" (GM Br. at 4, 5) is not true, and even if it were, such admissions would not mean GM has pled the necessary elements of its RICO claims. Contrary to what GM says, none of the defendants in this case has admitted to violating RICO, and none of the indictments or plea agreements even hint that GM was the intended target of, or suffered any injury as a result of, the same alleged prohibited payments.[3]

[3] The DOJ's criminal investigation into the alleged prohibited payments remains open, which is yet another reason to stay discovery pending resolution of FCA's motions to dismiss. Unless and until the Court determines that GM's claims are valid, there is no reason to take the risk that discovery in this case will interfere with an ongoing criminal investigation. When and if appropriate, FCA—and perhaps the DOJ—will brief the standards for staying discovery in a civil RICO case in the face of a related criminal investigation.

BACKGROUND

GM brought this action on November 20, 2019, asserting RICO claims under federal law and unfair competition and civil conspiracy claims under Michigan common law, and seeking "billions" of dollars in damages. GM posits two self-contradictory theories for how improper payments to certain former UAW employees injured GM. *First*, GM alleges that FCA "illegally purchased" certain "benefits, concessions, and advantages" from the UAW, "without regard to the interests of UAW membership." (Compl. ¶¶ 6, 71.) GM then asserts in conclusory terms that "FCA ensured that while these special advantages were conferred on FCA, the same or similar advantages were not provided to at least GM." (Compl. ¶ 71.)[4] *Second*, and with no acknowledgement of the inherent contradiction, GM posits that FCA made *concessions to the UAW* during the negotiation of the 2015 collective bargaining agreement, which the UAW then extracted from GM through

[4] FCA denies that it either directed or approved any alleged prohibited payments. FCA acknowledges that certain former UAW employees and certain former FCA employees improperly used funds belonging to the National Training Center ("NTC") to purchase luxury items for their own personal use (such as in-ground home swimming pools, jewel-encrusted Montblanc fountain pens, a shotgun, and Christian Louboutin shoes), and that those persons have been indicted and pled guilty as a result of their misconduct. For purposes of this brief, it makes no difference whether the alleged prohibited payments were made directly by FCA to the UAW, as GM contends, or were instead facilitated by former FCA employees acting in violation of clear company policies, as the facts will show, because GM's claims fail either way. References to "alleged prohibited payments" in this brief are based on the allegations of the Complaint, and do not constitute an admission by FCA that it made any such payments to the UAW.

so-called "pattern bargaining," all in an attempt by FCA to "force a merger" between FCA and GM. (Compl. ¶ 7.)

The burdensome nature of discovery contemplated by GM in this case is not a matter of conjecture. Although GM's motion for early discovery is still pending, GM already has served FCA with 55 broad document requests and four interrogatories. (Exs. 1-3.) The discovery GM seeks from FCA is truly massive. Among other topics, GM is asking FCA to locate and produce documents from "January 1, 2009 to the date of the responses to the Requests" (Ex. 1 at 3)—more than a 10-year period—regarding:

- negotiation of the 2009, 2011, and 2015 collective bargaining agreements (Requests 1, 21 (FCA US));
- every communication between FCA's "chairman" and various UAW employees, without regard to the subject of such communications (Requests 19-25 (FCA NV));
- materials from any "internal investigation" of the alleged prohibited payments, as well as all documents produced to government agencies investigating those payments (Requests 4-5, 11 (FCA US));
- "[a]ny communications or analysis concerning a potential merger" between FCA and GM (Request 22, 23 (FCA US)); and
- communications between FCA and Groupe PSA, a company with which FCA recently agreed to merge (Request 25 (FCA US)).[5]

[5] On October 31, 2019—three weeks before GM filed its Complaint—FCA publicly announced its intention to merge with Groupe PSA. Communications between FCA and Groupe PSA have nothing to do with the claims being asserted by GM, all of which relate to events that occurred in the past. To the extent GM is

ARGUMENT

A "plaintiff is not entitled to discovery simply because he filed a complaint," *Price* v. *Milmar Food Grp., LLC*, 2019 WL 1147086, at *3 (E.D. Mich. Mar. 13, 2019), and thus district courts have "broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Hahn* v. *Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999). It is "settled that entry of an order staying discovery pending determination of dispositive motions is an appropriate exercise of the court's discretion." *Williams* v. *Scottrade, Inc.*, 2006 WL 1722224, at *1 (E.D. Mich. June 19, 2006).

In considering a motion to stay discovery pending decision on a motion to dismiss, courts "weigh 'the burden of proceeding with discovery upon the party from whom discovery is sought against the hardship which would be worked by a denial of discovery.'" *Martin* v. *Mohr*, 2012 WL 5915501, at *2 (S.D. Ohio Nov. 26, 2012). Moreover, "[w]hen a stay, rather than a prohibition, of discovery is sought, the burden upon the party requesting the stay is less than if he were requesting a total

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seeking communications between FCA and Groupe PSA regarding FCA's evaluation of GM's claims in this case, such communications are both privileged and attorney work-product and protected from disclosure under the common interest doctrine. GM's efforts to discover communications between FCA and Groupe PSA underscores FCA's belief that this action represents a strategic attempt by GM to disrupt the proposed merger of two GM competitors.

freedom from discovery." *Wagner* v. *Mastiffs*, 2009 WL 5195862, at *1 (S.D. Ohio Dec. 22, 2009).

All factors weigh in favor of a stay here. In light of the exorbitant expense imposed on defendants in responding to broad discovery requests in RICO cases (like the ones GM already has served on FCA), and the highly-damaging nature of RICO allegations (like the baseless ones GM has asserted against FCA), courts in the Sixth Circuit routinely stay discovery pending resolution of a motion to dismiss RICO claims,[6] just as other courts across the country do.[7]

This case thus bears no resemblance to the cases on which GM relies (GM Br. 10-12), where (i) the defendants did "not attempt[] to demonstrate that a stay is

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[6] *See Brown* v. *Tax Ease Lien Servicing, LLC*, 2015 WL 13674856, at *1 (W.D. Ky. July 27, 2015); *Miller* v. *Countrywide Home Loans*, 2010 WL 2246310, at *3 (S.D. Ohio June 4, 2010) (staying discovery and noting that alleged "RICO violations[] have the potential to place a discovery burden on the defendants"); *Melton* v. *Blankenship*, 2007 WL 9718925, at *2 (W.D. Tenn. Dec. 14, 2007) (finding "good cause to stay all discovery" when "the court [had] noted its concerns regarding the RICO claims").

[7] *E.g.*, *James* v. *Hunt*, 761 F. App'x 975, 981 (11th Cir. 2018); *Levy* v. *BASF Metals Ltd.*, 755 F. App'x 29, 31 (2d Cir. 2018); *Jarvis* v. *Regan*, 833 F.2d 149, 155 (9th Cir. 1987); *Lau* v. *Ambani*, 2017 WL 7693353, at *2 n.12 (E.D. Pa. Aug. 11, 2017); *Mortg. Resolution Servicing, LLC* v. *JPMorgan Chase Bank, N.A.*, 2016 WL 3906712, at *1 (S.D.N.Y. July 14, 2016); *Guajardo* v. *Martinez*, 2015 WL 12831683, at *2 (S.D. Tex. Dec. 22, 2015); *Sky Med. Supply Inc.* v. *SCS Support Claims Servs., Inc.*, 2013 WL 12373676, at *1 (E.D.N.Y. June 5, 2013); *Valverde* v. *Xclusive Staffing, Inc.*, 2017 WL 3866769, at *2 (D. Colo. Sept. 5, 2017); *Canyon Cty.* v. *Syngenta Seeds, Inc.*, 2005 WL 8165145, at *1 (D. Idaho Oct. 28, 2005); *Major*, 2010 WL 3959609, at *6.

appropriate in th[e] case," *AFT Mich.* v. *Project Veritas*, 294 F. Supp. 3d 693, 694 (E.D. Mich. 2018), (ii) the defendant's motion to dismiss, even if granted, would not be "wholly dispositive of the case," *Porter* v. *Five Star Quality Care-MI, LLC*, 2014 WL 823418, at *2 (E.D. Mich. Mar. 3, 2014), or (iii) the court already had "indicated that Defendants' motion to dismiss would likely be denied." *Flagg* v. *City of Detroit*, 2008 WL 787039, at *3 n.6 (E.D. Mich. Mar. 20, 2008); *see Malibu Media, LLC* v. *Braun*, 2015 WL 1014951, at *2 (E.D. Mich. Mar. 9, 2015) (same).

I. GM seeks very broad discovery that will impose a substantial burden on FCA.

In a complex civil RICO case, "concerns about the cost and inconvenience of discovery" are presumptively "reasonable." *Guajardo*, 2015 WL 12831683, at *2. That is especially true here, where GM has filed a Complaint that is 95 pages long and GM claims it is entitled to "billions of dollars" in damages. GM has made it abundantly clear that the discovery it seeks in this case will be massive, having already propounded 55 discovery requests to FCA seeking a broad range of documents covering more than a ten-year period. Courts have stayed discovery pending decision on a motion to dismiss where "the breadth of the discovery sought in th[e] action will cover a six-year period." *Integrated Sys. & Power, Inc.* v. *Honeywell Int'l, Inc.*, 2009 WL 2777076, at *1 (S.D.N.Y. Sept. 1, 2009).[8] Given

[8] *See also O'Sullivan* v. *Deutsche Bank AG*, 2018 WL 1989585, at *8 (S.D.N.Y.

that FCA currently is filing motions to dismiss that "may end this action," it "would be unduly burdensome" to require FCA to respond to GM's sweeping discovery requests before those motions have been decided. *Edwards* v. *Standard Fed. Bank, NA*, 2008 WL 4771880, at *1 (E.D. Mich. Oct. 29, 2008).

GM's case should be dismissed in its entirety given the insufficiency of the Complaint. And because "there is a possibility the Court's disposition of the Motion [to Dismiss] will render discovery moot," the Court should stay discovery. *Klein Steel Servs. Inc.* v. *Sirius Prot., LLC*, 2014 WL 923178, at *1 (E.D. Mich. Mar. 10, 2014); *see Prison Legal News* v. *Bezotte*, 2012 WL 5417457, at *1 (E.D. Mich. Nov. 6, 2012) (stay of discovery pending decision on dispositive motions will "prevent time waste and judicial resource[]" waste, and "allow the parties to narrowly tailor discovery to matters that are relevant to the issues before the Court" if any claims survive).

Even if the Court does not dismiss the Complaint in its entirety, a partial dismissal could significantly narrow the scope of appropriate discovery. Just by way of example, claims based on injuries purportedly incurred before November 20,

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Apr. 26, 2018) (plaintiff sought documents in discovery spanning "many years"); *N.M. Oncology & Hematology Consultants, Ltd.* v. *Presbyterian Healthcare Servs.*, 2013 WL 12304061, at *1 (D.N.M. July 11, 2013) (same); *Arriaga-Zacarias* v. *Lewis Taylor Farms, Inc.*, 2008 WL 4544470, at *2 (M.D. Ga. Oct. 10, 2008) (same); *In re First Constitution S'holders Litig.*, 145 F.R.D. 291, 294 (D. Conn. 1991) (same).

2015 are barred by RICO's four-year statute of limitations. If the Court agrees and dismisses those claims, the only claims remaining in the case will be those related to GM's implausible theory that FCA made concessions to the UAW during negotiation of the 2015 collective bargaining agreement in an effort to harm GM.

Lastly, GM cannot contend there is "no undue or unfair burden" on FCA because four of its 55 discovery requests seek documents FCA purportedly already has produced to the DOJ in connection with the criminal investigation into the alleged prohibited payments. (GM Br. 13-14; *see* Requests 4, 5 (FCA US); Requests 2, 3 (FCA NV).) As an initial matter, by focusing on only those four requests, GM tacitly concedes that responding to the other 51 requests will impose significant burdens on FCA. And even with respect to those four requests, GM ignores that courts often deny similar requests for cloned discovery. *See*, *e.g.*, *Ludlow* v. *Flowers Foods, Inc.*, 2019 WL 6252926, at *18 (S.D. Cal. Nov. 22, 2019) ("Asking for all documents produced in another matter is not generally proper."); *King Cty.* v. *Merrill Lynch & Co.*, 2011 WL 3438491, at *3 (W.D. Wash. Aug. 5, 2011) (denying request for "[c]loned discovery").

Cloned discovery is improper for several reasons, which FCA will explain further in a motion for a protective order in the event the Court permits general discovery to proceed. *First*, GM's argument that its request for cloned discovery might "streamline" the case (GM Br. 15) ignores that a plaintiff "is not entitled to

discovery, cabined or otherwise," if its Complaint is "deficient." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 686 (2009). Moreover, far from simplifying matters, allowing discovery to commence immediately will lead to numerous discovery disputes and motion practice, which will waste judicial resources and impose burdens on the parties that will turn out to be entirely unnecessary if FCA's motions to dismiss are granted. *Second*, GM has no basis to presume that all documents produced to the DOJ are relevant to its claims or that GM is entitled to all of those documents. "Government investigations also may be much broader than the limited subject matter of a lawsuit," and the government is not restrained by the proportionality and burden limitations imposed by the Federal Rules of Civil Procedure on civil plaintiffs. *Capital Ventures Int'l* v. *J.P. Morgan Mortg. Acquisition Corp.*, 2014 WL 1431124, at *2 (D. Mass. Apr. 14, 2014). *Third*, GM wrongly presumes that FCA can simply push a button and produce to GM all of the documents produced to the DOJ without any burden. *See In re Term Commodities Cotton Futures Litig.*, 2013 WL 1907738, at *6 (S.D.N.Y. May 8, 2013) (denying cloned discovery, noting burden associated with re-reviewing documents to identify sensitive commercial information).[9] Given that GM and FCA are head-to-head competitors, protecting

[9] GM also speculates that FCA collected a treasure trove of "contemporaneous business records" concerning the "Complaint's allegations" that FCA made available to Groupe PSA in connection with the recently announced merger. (GM Br. 14.) Of course, even if such work product assembled by FCA and its lawyers

sensitive commercial information under an appropriate protective order is particularly important.

II. GM will not be prejudiced by a brief stay of discovery.

This case is in its very early stages, and GM will not be prejudiced by a relatively brief stay of discovery pending a decision on FCA's motions to dismiss. Given that GM sat on its hands for more than two years after the first indictments arising out of the alleged prohibited payments,[10] GM cannot now claim it will be prejudiced by a brief stay while the Court decides FCA's motions to dismiss. Indeed, GM does not even pretend that it will be prejudiced if discovery from FCA is stayed pending resolution of FCA's motions to dismiss; instead, GM asserts only that "discovery is necessary to *preserve vital third-party evidence*" (GM Br. 1 (emphasis added)), an issue GM has addressed on its own by serving subpoenas on numerous third parties.

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exists, it would be protected from disclosure under the common interest doctrine. FCA will address this issue further in a motion for protective order, if necessary, in the event this case proceeds to discovery.

[10] Indeed, before GM filed its Complaint, three of the five actions brought by rank-and-file FCA employees concerning the alleged prohibited payments had already been dismissed and those dismissals affirmed by the Sixth Circuit. *See Swanigan* v. *FCA US, LLC*, 2018 WL 4030815 (E.D. Mich. Aug. 23, 2018), *aff'd*, 938 F.3d 779 (6th Cir. 2019); *DeShetler* v. *FCA US LLC*, 2018 WL 6257377 (N.D. Ohio Nov. 30, 2018) (dismissing two actions), *aff'd*, 2019 WL 5095761 (6th Cir. Oct. 11, 2019).

A. GM does not even attempt to argue that it will be prejudiced by staying discovery as to FCA.

Setting aside GM's multi-year delay in filing this action, GM does not—and cannot—claim it would be prejudiced by a brief stay of discovery pending decision on FCA's motions to dismiss. "[A] stay pending determination of a dispositive motion that potentially eliminates the entire action will neither substantially nor unduly delay the action, should it continue." *Spinelli* v. *NFL*, 2015 WL 7302266, at *2 (S.D.N.Y. Nov. 17, 2015). Accordingly, "the passage of a reasonable amount of time, without any other form of attendant prejudice, cannot itself constitute prejudice sufficient to defeat a motion to stay discovery." *O'Sullivan*, 2018 WL 1989585, at *9; *see Botkin* v. *Tokio Marine & Nichido Fire Ins. Co.*, 956 F. Supp. 2d 795, 802 (E.D. Ky. 2013) (a "delay of discovery, without more, is not prejudicial").

Moreover, the Sixth Circuit has held that "there is no general right to discovery upon filing of the complaint," as the "very purpose of [Rule] 12(b)(6) 'is to enable defendants to challenge the legal sufficiency of complaints *without subjecting themselves to discovery*." *Yuhasz*, 341 F.3d at 566 (emphasis added). After the Supreme Court's decisions in *Twombly* and *Iqbal*, the Sixth Circuit has emphasized that "'only a complaint that states a plausible claim for relief' can 'unlock the doors of discovery.'" *Bah*, 610 F. App'x at 553; *see New Albany Tractor, Inc.* v. *Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011) ("The

language of *Iqbal*, 'not entitled to discovery,' is binding on the lower federal courts."); *Agema* v. *City of Allegan*, 826 F.3d 326, 332 (6th Cir. 2016) (same).

Any contention that GM needs discovery to "further analyze" its claims or respond to FCA's motions to dismiss (GM Br. 8, 17-18) is fundamentally misguided. "No amount of discovery can affect whether a complaint states a claim for purposes of Rule 12(b)(6)." *Russell* v. *Tribley*, 2011 WL 4387589, at *5 (E.D. Mich. Aug. 10, 2011). The Sixth Circuit has held that "a party 'may not use the discovery process to obtain the facts necessary to state a claim after filing suit.'" *Powers* v. *Merck & Co.*, 773 F. App'x 304, 306 (6th Cir. 2019) (brackets omitted). For this reason, GM itself has argued that the notion that a plaintiff needs discovery to oppose a motion to dismiss is "nonsensical." GM brief in *Feliciano* v. *Gen. Motors LLC*, No. 14-cv-06374, ECF#21 at 5, 2014 WL 7250016 (S.D.N.Y. Nov. 12, 2014). FCA agrees.

B. GM's concern about obtaining discovery from non-parties does not justify commencing burdensome discovery against FCA.

The only potential prejudice to which GM refers is that potentially discoverable information held by "non-parties" might be destroyed if GM does not send document preservation subpoenas directing those non-parties to "preserv[e] documents." (GM Br. 4, 15.) GM already has sent subpoenas to those non-parties, but even if that had not happened, the concern that *non-parties* might not retain potentially relevant documents has no bearing on whether GM should be permitted

to commence discovery against FCA. Aware of its legal obligations, FCA has taken steps to preserve potentially discoverable information, unlike in *Malibu Media*, relied on by GM, where "defendant's hard drives and other electronic storage devices" would likely be "lost if discovery is stayed, prejudicing [plaintiff] in proving its case." 2015 WL 1014951, at *2.

GM's speculation that it might learn the identities of additional third parties during discovery (GM Br. 16-17)—a potentiality in every case—does not justify burdening FCA with discovery at this stage of the case. That is particularly true given that GM's Complaint is subject to dismissal in its entirety.

III. FCA's motions to dismiss are strong.

"Defendants are not required to show a substantial likelihood of success on their dispositive motion. . . . The appropriate standard is 'good cause'—no more and no less." *Romar*, 2013 WL 141133, at *2 (staying discovery). Accordingly, the Court need "not predict the outcome of Defendant's motion," but instead need only undertake an "initial review" to determine whether the "motion to dismiss 'is potentially dispositive, and appears to be not unfounded in the law.'" *Boelter* v. *Hearst Commc'ns, Inc.*, 2016 WL 361554, at *5 (S.D.N.Y. Jan. 28, 2016).

As an initial matter, GM's assertion that its claims must be valid because it quotes from "admissions" in "criminal plea agreements" is wrong. (GM Br. 13.) That certain former FCA employees and former UAW employees have admitted to

engaging in misconduct does not mean that GM has pled RICO claims that can withstand a motion to dismiss. FCA's motions to dismiss will provide multiple, independent grounds to dismiss the Complaint. *See Integrated Sys.*, 2009 WL 2777076, at *1.

It is not feasible to repeat all of those grounds here, but one example should suffice: U.S. Supreme Court precedent mandates that "proximate cause inquiries under RICO" are "not to go beyond the first step" of a causal chain. *Hemi Grp., LLC* v. *City of N.Y.*, 559 U.S. 1, 10 (2010). At best, the harm allegedly suffered by GM was the third step in the causal chain alleged in the Complaint. According to GM, as a result of the alleged prohibited payments, FCA obtained "special advantages" from the UAW that allowed FCA to "lower[] [its] average hourly labor costs," at the direct expense of FCA's hourly workers (victim one). (Compl. ¶¶ 71, 79.) GM further alleges that the Individual Defendants "concealed" the alleged prohibited payments by omitting them from tax forms filed with the IRS, thereby defrauding the U.S. government (victim two). (Compl. ¶¶ 65-66.) GM alleges that it was the third victim because, as a result of a complex and speculative sequence of events, the alleged prohibited payments supposedly allowed FCA to "more effectively compete and thrive against GM." (Compl. ¶¶ 5-6, 71, 79.) This is a perfect example of alleged "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts," which the U.S. Supreme Court has said

cannot support a RICO claim. *Holmes* v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992).

It does not matter that GM says that it was the intended target of the alleged prohibited payments. (GM Br. 7.) The Sixth Circuit has "rejected the argument that the intentional nature of plaintiffs' claims alters the remoteness inquiry"—"specific intent to harm does not magically create standing or cause . . . injuries to be direct." *Perry* v. *Am. Tobacco Co.*, 324 F.3d 845, 850 (6th Cir. 2003).

In short, there are fatal flaws in the claims that GM asserts in this case. Those flaws should be addressed by the Court before GM is permitted to embark on a massive discovery campaign that will impose serious burdens on FCA and waste judicial resources.

CONCLUSION

The Court should stay discovery pending resolution of FCA's motions to dismiss.

Dated: January 24, 2020

Respectfully submitted,

/s/ Steven L. Holley

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: None.

Respectfully submitted,

/s/ Steven L. Holley

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