No. 20-1791

In the United States Court of Appeals for the Sixth Circuit

GENERAL MOTORS, LLC; GENERAL MOTORS CO.,

Plaintiffs-Appellants,

v.

FCA US LLC; FIAT CHRYSLER AUTOMOBILES N.V.; ALPHONS IACOBELLI; JEROME DURDEN; MICHAEL BROWN,

Defendants-Appellees.

Appeal from the U.S. District Court
for the Eastern District of Michigan
No. 19-cv-13429 (Hon. Paul D. Borman)

Brief of the FCA Defendants-Appellees

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November 12, 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-1791 Case Name: General Motors, LLC v. FCA US LLC

Name of counsel: Steven L. Holley

Pursuant to 6th Cir. R. 26.1, FCA US LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Parent Corporation/Affiliate Name: Fiat Chrysler Automobiles N.V., a publicly traded Netherlands company. Relationship with Named Party: Named Party is a wholly owned subsidiary of FCA North America Holdings LLC, a Delaware limited liability company, which is wholly owned by FCA Holdco B.V., a company incorporated under the laws of the Netherlands, and which, in turn, is wholly owned by Fiat Chrysler Automobiles N.V., a publicly traded Netherlands company with its principal executive offices in London, United Kingdom.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. Parent Corporation/Affiliate Name: Fiat Chrysler Automobiles N.V., a publicly traded Netherlands company. Nature of Financial Interest: Named Party is a wholly owned subsidiary of FCA North America Holdings LLC, a Delaware limited liability company, which is wholly owned by FCA Holdco B.V., a company incorporated under the laws of the Netherlands, and which, in turn, is wholly owned by Fiat Chrysler Automobiles N.V., a publicly traded Netherlands company with its principal executive offices in London, United Kingdom.

CERTIFICATE OF SERVICE

I certify that on November 12, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Steven L. Holley
125 Broad Street
New York, NY 10004

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
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Name of counsel: Steven L. Holley

Pursuant to 6th Cir. R. 26.1, Fiat Chrysler Automobiles N.V.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Parent Corporation/Affiliate Name: Exor N.V., Ferrari N.V., CNH Industrial N.V., and Juventus Football Club, all of which are publicly traded companies.

Relationship with Named Party: Exor N.V. owns ten percent or more of the stock of Fiat Chrysler Automobiles N.V. In addition, Exor N.V. controls Ferrari N.V., CNH Industrial N.V., and Juventus Football Club.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary for this Court to affirm the District Court's orders dismissing the Complaint with prejudice and denying the motion of Plaintiffs-Appellants General Motors LLC and General Motors Company's (collectively, "GM") to alter or amend the judgment, because the allegations are uncomplicated, and the relevant legal principles are well-established.

Should this Court decide to hear oral argument, Defendants-Appellees FCA US LLC and Fiat Chrysler Automobiles N.V. (collectively, "FCA") respectfully request the opportunity to present oral argument.

STATEMENT OF ISSUES

1. The Racketeer Influenced and Corrupt Organizations Act ("RICO") authorizes civil actions only by "[t]he direct victim of th[e] [alleged] conduct"—meaning that persons who claim to have incurred harm "beyond the first step" in the causal chain cannot assert a RICO claim. *Hemi Grp., LLC* v. *City of N.Y.*, 559 U.S. 1, 10 (2010). Here, GM alleged that it incurred higher labor costs as a byproduct of alleged prohibited payments to certain former employees of the United Auto Workers ("UAW") that were facilitated by certain former employees of FCA. GM alleged in its Complaint that the alleged prohibited payments (i) resulted in labor concessions that harmed FCA employees (the first victims), and (ii) were concealed from the Internal Revenue Service ("IRS") (the second victim). Did the District Court correctly dismiss GM's RICO claims for failure to satisfy RICO's direct causation requirement?

2. Did the District Court abuse its discretion in denying GM's motion to alter or amend the judgment that dismissed GM's Complaint with prejudice, thereby precluding GM from filing a proposed amended complaint that merely cast aspersions on FCA that (a) were unsupported by well-pled factual allegations, and (b) did not change the fact that GM's causation theory was indirect and contingent upon harm allegedly incurred by others?

STATEMENT OF THE CASE

GM brought this action under RICO, a statute enacted "[t]o prevent organized crime from obtaining a foothold in legitimate business." *Bachi-Reffitt* v. *Reffitt*, 802 F. App'x 913, 917 (6th Cir. 2020). GM's claims, however, bore no resemblance to what Congress had in mind in enacting RICO. Rather than plausibly alleging that the UAW was a criminal enterprise controlled by FCA, GM focused on goods and services misappropriated by several former UAW employees with assistance from a handful of former FCA employees (most of whom misappropriated funds themselves), which allegedly constituted "prohibited payments" under Section 302 of the Labor Management Relations Act ("LMRA").[1]

On appeal, GM does its best to recast its Complaint as one alleging a conspiracy directed at GM alone. But as the District Court held in a well-reasoned opinion, nothing in the Complaint tied the alleged prohibited payments to negotiation of collective bargaining agreements ("CBAs") between GM and the UAW—much less the outcome of such negotiations, which supposedly placed GM at a competitive disadvantage relative to FCA. GM alleged no "specific facts supporting the allegation that a condition of Defendants' payments to the UAW

[1] While 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, and that those individuals have been indicted and pled guilty as a result of their misconduct, FCA denies that it either directed or approved the alleged prohibited payments.

officials was denial of concessions and benefits to GM." (Order, R.82, PageID#2971.)

This failure was unsurprising given that GM is mentioned nowhere in the indictments, plea agreements, or sentencing memoranda on which GM's Complaint was based. That undermines GM's contention that it was the "intended victim" of a bribery scheme that harmed "GM and GM alone." (Brief 1, 25.) As GM alleged in its Complaint, FCA's hourly workers (victim one) received "less compensation" as a result of "special advantages" FCA obtained from the UAW (Compl. ¶¶ 71, 79, R.1, PageID#36-37, 40-41), and the IRS (victim two) was defrauded because the Individual Defendants failed to report the alleged prohibited payments on tax forms. (*Id.* ¶¶ 65-66, PageID#33.) Thus, GM alleged that it "suffered only an indirect competitive harm." (Order, R.82, PageID#2969.) That was fatal to GM's claims, because a RICO claim will not lie where the alleged "harm flow[s] merely from the misfortunes visited upon a third person by the defendant's acts." *Holmes* v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992).

RICO imposes a strict proximate cause requirement "to assure that RICO is not expanded to provide a federal cause of action and treble damages to every tort plaintiff." *Maio* v. *Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000). To establish proximate causation, a plaintiff must plausibly allege a "'direct causal connection' between the predicate offense and the alleged harm" that does not go beyond "the first step" in the causal chain. *Hemi,* 559 U.S. at 10-11.

The Supreme Court has directed courts to be particularly skeptical of RICO "claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws." *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006). Such skepticism was warranted here, because GM's 95-page Complaint contained no support for the implausible proposition that "$1.5 million" in alleged prohibited payments somehow "inflicted billions of dollars of damages on GM" in the form of higher labor costs. (Compl. ¶¶ 5, 178, R.1, PageID#6-7, 90.) Instead, GM strung together quotes from indictments and plea agreements (none of which mention GM), and sought to besmirch FCA by referencing matters that GM conceded had no connection to its claims (such as FCA's settlement with the U.S. Securities & Exchange Commission ("SEC") on monthly retail sales reporting).

GM criticizes the District Court for adopting an "idiosyncratic view" of RICO's direct causation requirement (Brief 18), but that criticism is entirely unfounded. As the Supreme Court held in *Anza*, only the "direct victim" of a pattern of racketeering activity can assert a RICO claim. 547 U.S. at 457-58. According to GM, any injury, no matter how remote, is sufficiently direct under RICO if the defendant "intended" to harm the plaintiff (Brief 24), a point GM repeats more than 25 times in its brief. But the Supreme Court expressly rejected that argument in *Hemi*, holding that a defendant's "intent" plays no part in deciding whether there is "a sufficiently 'direct relationship' between the fraud and the harm" to the plaintiff. 559 U.S. at 12-13 & n.1.

GM also contends that the District Court abused its discretion in declining to allow GM to file an amended complaint full of baseless allegations that did nothing to cure the defects in GM's claims. GM made the outlandish accusation that FCA paid two "moles" to infiltrate GM and funnel inside information to FCA, paying them with money "stashed" in a "broad network" of secret overseas bank accounts. (Motion, R.84, PageID#2983, 2986, 2988-89, 3001-02.) Those "corporate espionage" claims rested entirely on two unremarkable allegations that suggest no illegality whatsoever:

1. FCA—a Dutch corporation headquartered in the United Kingdom, with subsidiaries that operate facilities in Italy and more than 40 other countries, and with sales to customers in more than 130 countries—maintained "foreign bank accounts" in "countries such as Switzerland, Luxembourg, Liechtenstein, Italy, Singapore, the Cayman Islands, and others." (*Id.*, PageID#2986.)

2. Certain individuals—such as Alphons Iacobelli (whom GM hired after his employment was summarily terminated by FCA without so much as asking FCA for a reference) and Joseph Ashton (a former UAW official who was a member of GM's Board of Directors and has no connection to FCA)—also held or controlled overseas bank accounts. (Am. Compl. ("AC") ¶¶ 35, 43, R.84-2, PageID#3027-28, 3031.)

Based solely on the "existence of foreign bank accounts" (Karis Decl. ¶ 10, R.84-3, PageID#3141-42), GM leaped to the conclusion, which it pled solely on "information and belief," that Iacobelli and Ashton were paid by FCA to spy on GM and somehow ensure that benefits, concessions, and advantages provided by the UAW to FCA were not also provided to GM. (Motion, R.84, PageID#2983, 2986,

2988-89, 3001-02.) While GM asserts on appeal that FCA "made substantial payments" to Ashton between 2010 and 2014 while he was still employed by the UAW (Brief 46), that assertion finds no support in the record below. To the contrary, GM's allegations were based exclusively on what GM's counsel characterized as "sufficiently reliable information concerning *the existence of foreign bank accounts*." (Karis Decl. ¶ 10, R.84-3, PageID#3141-42 (emphasis added).)

The District Court rejected GM's "corporate espionage" theory, holding that the "existence of foreign bank accounts" did not "move GM's claims" that "FCA was bribing individuals to infiltrate GM" "over the line from speculative or conceivable to plausible." (Order, R.92, PageID#3385.) That application of basic pleading standards was entirely proper.

Because GM did not plausibly allege that it was a direct victim of the alleged prohibited payments, and failed to establish that the District Court abused its discretion in declining to allow GM to file an amended complaint, this Court should affirm.

A. GM's Claims

GM brought this action on November 20, 2019, asserting RICO claims as well as unfair competition and civil conspiracy claims under Michigan law, and seeking "billions of dollars" in damages. (Compl., R.1, PageID#94.) GM posited two self-contradictory theories as to how the alleged improper payments injured GM. Although GM criticizes the District Court for "artificially bifurcat[ing]" GM's

theories of alleged harm, GM itself presented them as "analytically distinct" in its Complaint. (Brief 18; *see* Compl. §§ III & IV, R.1, PageID#36-63.)

1. Between 2009 and 2015, FCA Allegedly Made Prohibited Payments to Obtain Concessions From the UAW That the UAW Declined to Provide to GM.

GM alleged that FCA "illegally purchased" the following "benefits, concessions, and advantages" from the UAW, "without regard to the interests of UAW membership" (Compl. ¶¶ 6, 71, R.1, PageID#7, 36-37):

- **World Class Manufacturing:** The UAW allegedly "commit[ted]" to FCA's "World Class Manufacturing" program, which ensured that FCA's "facilities are flexible and competitive with the best in the world." (*Id.* ¶¶ 53, 72, PageID#26-27, 37.)

- **Tier-Two Workers:** The UAW allegedly "privately assured" FCA that the UAW did not intend in 2015 to reinstate a cap on FCA's use of less expensive "Tier Two" employees, a cap that had been lifted in 2009 for both FCA and GM. (Compl. ¶¶ 77-78, PageID#39-40.) Thus, while GM alleged that it "managed to the cap and absorbed corresponding cost increases," FCA purportedly "hired Tier Two workers with abandon." (*Id.* ¶ 78.)

- **Temporary Workers:** The UAW allegedly permitted FCA to use "more lower-priced temporary workers" than GM because "certain UAW leaders did not hold FCA to the contractual limits on the number of temporary workers," but "enforced these temporary worker hiring limits on GM." (*Id.* ¶ 79, PageID#40-41.)

- **Employee Grievances:** The UAW allegedly did not "zealously pursu[e] union grievances and health and safety issues" for FCA employees. (*Id.* ¶ 80, PageID#41.)

GM asserted, without factual support, that "FCA ensured that while these special advantages were conferred on FCA, the same or similar advantages were not

provided to at least GM despite it seeking similar programs and concessions." (Compl. ¶¶ 71, R.1, PageID#36-37.)

GM further alleged that the Individual Defendants "concealed" the alleged prohibited payments by "improperly omitting" them from tax forms filed with the IRS. (*Id.* ¶¶ 65-66, 176(c) PageID#33, 89.) Thus, according to GM, the alleged improper payments not only injured FCA's employees, but "defraud[ed] the United States." (*Id.* ¶ 151, PageID#69-72.)

2. In 2015, FCA Allegedly Agreed to a CBA That Harmed GM (as Well as FCA) in an Effort to Force a Merger With GM.

Every four years, the UAW negotiates a new CBA with each of the three Detroit-based automakers: FCA, Ford, and GM. (*Id.* ¶ 118, PageID#56.) The UAW typically selects one of the automakers as the "lead" in negotiating a CBA. (*Id.* ¶ 119, PageID#56.) The UAW then "exerts pressure on the other two companies to use the first agreement as a 'pattern' for negotiations." (*Id.*) GM for some reason presumed it was entitled to be the lead in negotiating the 2015 CBA, but the UAW "unexpectedly" chose FCA instead. (*Id.* ¶¶ 124-25, PageID#57-58.)

GM alleged that FCA made substantial concessions to the UAW in agreeing to the "richest" CBA "ever negotiated." (*Id.* ¶ 133, PageID#61-62.) According to GM, FCA agreed to such an unfavorable CBA because FCA knew the UAW would extract similar terms from GM via "pattern bargaining," thereby "forc[ing] unanticipated higher costs on GM," which supposedly would further FCA's "takeover scheme" in some unspecified manner. (*Id.* ¶¶ 134-35, PageID#62-63.)

GM did not offer any explanation for (i) why FCA would have needed to resort to bribes to entice the UAW to accept the most union-friendly CBA "ever negotiated" (*id.* ¶ 133, PageID#61-62), (ii) why having higher labor costs would make GM more amenable to merging with FCA, or (iii) why FCA would want to saddle both GM and FCA with unfavorable CBAs if its ultimate goal was to run the merged company profitably.

According to GM, the "insidious fraud" allegedly perpetrated by FCA had very positive effects on tens of thousands of workers: "UAW-represented employees" of all three Detroit-based automakers "greatly benefited from th[e] rich contract" negotiated by FCA. (AC ¶¶ 167-68, R.84-2, PageID#3092-93.)

B. Procedural History

1. The District Court Hears FCA's Motions to Dismiss and GM Seeks Unsuccessfully to Have the District Judge Removed From the Case.

By GM's own account, oral argument on FCA's motions to dismiss did not go well for GM. (Mandamus Pet. 7-8, No. 20-1616.) The District Court expressed considerable skepticism about GM's argument that GM—as opposed to rank-and-file UAW members—was the party most directly injured by the alleged prohibited payments. (Hearing Tr., R.75, PageID#2891-2907.) At the end of the hearing, the District Court took the motions under advisement, and ordered the CEOs of FCA and GM to "meet face-to-face, in good faith, and with good will" to potentially resolve the case. (Order, R.74, PageID#2856, 2858.) The District Court ordered the

parties to report "the results of [their] discussions" on July 1, 2020. (*Id.*, PageID#2859.)[2]

GM declined to comply with the District Court's order, and filed an Emergency Petition for Writ of Mandamus, seeking not only to vacate the order but also to have the case reassigned to a new district judge. On July 6, 2020, a panel of this Court granted GM's petition "to the extent that the district judge ordered that a settlement conference be held face-to-face and dictated who specifically had to attend on behalf of the parties," and denied GM's request for reassignment of the case to a new district judge. (CA6 Order, R.81, PageID#2944.)

2. The District Court Dismisses GM's Complaint With Prejudice.

On July 8, 2020, the District Court granted FCA's motions to dismiss the Complaint, holding that "GM's alleged injuries were not proximately caused by Defendants' alleged violations of the RICO Act." (Order, R.82, PageID#2946-47.)[3]

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[2] The District Court never described GM's lawsuit as a "waste of time and resources" or a "distraction." (Brief 3.) Rather, the District Court reminded the parties that, "[i]f this case goes forward," the "years of contentious litigation" would "divert and consume the attention *of key GM and FCA executives*." (Order, R.74, PageID#2857-58 (emphasis added).) That statement was undeniably true.

[3] The District Court also declined to exercise supplemental jurisdiction over GM's state law claims (Order, R.71, PageID#2850-51), an order GM has not appealed.

First, the District Court correctly rejected GM's argument that "foreseeability of the injury alone … satisf[ies] the RICO proximate cause inquiry." (Order, R.82, PageID#2963.) Although this Court's decision in *Wallace* v. *Midwest Financial & Mortgage Services, Inc.*, 714 F.3d 414 (6th Cir. 2013), mentions "foreseeability," the Supreme Court was explicit in *Hemi* "that in the RICO context, the focus is only on the 'directness of the relationship between the conduct and the harm.'" (Order, R.82, PageID#2964-65 (quoting *Hemi*).) After analyzing controlling Supreme Court precedent, the District Court concluded that "the fact that an injury was foreseeable, or even intended by the defendant, cannot create proximate cause if the injury was not direct." (*Id.*)

Second, the District Court correctly held that GM was not directly harmed under GM's first causation theory that the alleged prohibited payments were made to obtain concessions from the UAW that "cut down on FCA's labor costs, resulting in FCA having lower average per-hour labor costs than GM." (*Id.*, PageID#2968.) As the District Court rightly concluded, GM did not incur injury "at the first step in the causal chain," as RICO requires. (*Id.*, PageID#2963.) Instead, under GM's theory, FCA allegedly "lower[ed] [its] labor costs by inducing UAW officials to act against the interests of workers" who were "paid less" as a result. (*Id.*, PageID#2969, 2971-72.) Thus, "any competitive injury that GM suffered as a result of FCA's advantage in labor costs is an indirect injury," "just like" the alleged "loss

of market share" and loss of "competitive advantage" that the plaintiff alleged, and the Supreme Court rejected, in *Anza*. (*Id.*, PageID#2968, 2971-72.)

Third, the District Court rightly rejected GM's second causation theory based on FCA's unsuccessful efforts to merge with GM because that theory was "based on an even-more-remote injury" than GM's first causation theory. (*Id.*, PageID#2972.) After explaining the multiple steps in the theory that rendered it impermissibly indirect, the District Court identified "additional holes" in the theory, including independent superseding causes (for example, that "FCA's UAW workforce rejected the first tentative deal struck between FCA and UAW negotiators"), as well as the "difficulty of calculating" any purported damages, which is "exactly the difficulty that animated the [Supreme Court's] announcement of the direct-injury rule" in *Holmes*. (*Id.*, PageID#2972-73.)

Because the District Court dismissed the Complaint on causation grounds, it had no occasion to address FCA's other independent grounds for dismissal, including that (i) the alleged predicate acts of racketeering activity were subject to exclusive jurisdiction of the National Labor Relations Board ("NLRB"), (ii) GM failed to allege that FCA acquired an interest in or control of the UAW as required by RICO Section 1962(b), and (iii) the claims for injuries occurring before November 20, 2015 were time-barred. (*Id.*, PageID#2946-47.)

3. The District Court Denies GM's Motion to Alter or Amend the Judgment.

On August 14, 2020, the District Court denied GM's motion to alter or amend the judgment, in which GM sought permission to file an amended complaint that did nothing to cure GM's pleading failures. The District Court correctly concluded that "[n]either the application of the strict proximate cause standard nor the decision to dismiss with prejudice, rather than without prejudice, was a clear legal error, and GM's newly discovered evidence is too speculative to warrant reopening this case." (Order, R.92, PageID#3375.)

SUMMARY OF ARGUMENT

This Court should affirm the dismissal of GM's Complaint with prejudice and the denial of GM's motion to alter or amend the judgment.

RICO Imposes a Strict Direct Causation Requirement. Based on arguments the Supreme Court rejected in *Hemi* and *Anza*, GM tries to transform RICO's direct causation requirement into a foreseeability and intentionality test. That is not the law. The Supreme Court has expressly rejected the argument that "RICO's proximate cause requirement turn[s] on foreseeability." *Hemi*, 559 U.S. at 12. And this Court, along with every other Circuit to have addressed the issue, has "rejected the argument that the intentional nature of plaintiffs' claims alters the remoteness inquiry." *Perry* v. *Am. Tobacco Co.*, 324 F.3d 845, 850 (6th Cir. 2003). Instead, a RICO plaintiff must allege that it was the "direct victim of th[e] conduct," meaning that it incurred harm at "the first step" in the causal chain. *Hemi*, 559 U.S.

at 10. GM cannot escape that requirement by claiming (Brief 8) that FCA's ultimate goal was "to gain a competitive advantage over [GM]." *Anza*, 547 U.S. at 460.

GM's Two Causation Theories Fail as a Matter of Law. GM's first causation theory was that FCA made prohibited payments to the UAW to obtain "special advantages" that purportedly enabled FCA to "lower[] [its] average hourly labor costs" and "more effectively compete and thrive against GM." (Compl. ¶¶ 5-6, 71, 79, R.1, PageID#6-7, 36-37, 40-41.) The injury that GM claimed to have suffered was, at best, an indirect byproduct of the alleged prohibited payments that, as GM alleged in its Complaint, harmed the "UAW membership" (because they were paid less), and harmed the IRS (because it was deprived of tax revenues). (*Id.* ¶¶ 65-66, 71, PageID#33, 36-37.) GM cannot sidestep the harm to FCA employees alleged in its Complaint by contending—for the first time on appeal—that they were merely deprived of the UAW's "honest services." (Brief 37.) The necessary implication of GM's allegations is that FCA's workers were paid less as a result of the alleged prohibited payments, which is a concrete harm. GM also has no response to the fact that, according to its own allegations, the IRS incurred harm more direct than the harm allegedly incurred by GM.

GM's second causation theory was that FCA, in an effort to force a merger with GM, made concessions to the UAW during negotiation of the 2015 CBA with knowledge that the UAW would extract similar concessions from GM through "pattern bargaining," causing GM to incur "unanticipated higher costs." (Compl.

¶¶ 117, 134, R.1, PageID#55-56, 62.) As an initial matter, there are "multiple steps" that separate the alleged cause (*i.e.*, making prohibited payments to become the lead in negotiating the 2015 CBA) from the alleged injury (*i.e.*, GM incurring higher labor costs), including "independent actions of third … parties." *Hemi*, 559 U.S. at 15. Moreover, GM's second causation theory makes no sense as a matter of economics. Why would the UAW need to be bribed to agree to the "richest" CBA "ever negotiated" (*id.* ¶ 133, PageID#61-62)? And why would FCA negotiate an unfavorable CBA for itself, thereby putting pressure on GM to agree to a similarly unfavorable CBA, in hopes of forcing a merger with GM in which the combined company would be saddled for years with those unfavorable CBAs?[4] The District Court did not reject GM's second causation theory by construing the "facts in the light least favorable to GM." (Brief 20.) Rather, the theory was rejected because allegations that "def[y] common sense" need not be accepted as plausible at the pleading stage. *Deom* v. *Walgreen Co.*, 591 F. App'x 313, 320 (6th Cir. 2014) (quotation omitted).

GM's Motion to Alter or Amend the Judgment Was Unfounded. GM contends that the District Court abused its discretion by not "freely giv[ing] [GM]

[4] The fundamental implausibility of the claim engenders other questions GM cannot answer, including why, if the CBA negotiated between FCA and the UAW was so beneficial to UAW members, did they reject it when it was presented to them for ratification?

leave" to amend its Complaint under Fed. R. Civ. P. 15 (Brief 47) to pursue its "corporate espionage" theory. This argument is wrong three times over. *First*, GM omits the crucial point that it never asked the District Court for leave to amend before judgment was entered against it. Consequently, GM's "argument that the district court should have rescued Plaintiffs by *sua sponte* offering leave to amend the complaint is simply misplaced." *Total Benefits Planning Agency, Inc.* v. *Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 438 (6th Cir. 2008). *Second*, this Court "has been abundantly clear that, once judgment issues, concerns about finality dilute the otherwise permissive amendment policy of the Civil Rules." *Energy Conversion Devices Liquidation Tr.* v. *Trina Solar Ltd.*, 833 F.3d 680, 692 (6th Cir. 2016). *Third*, GM failed to show that the so-called "newly discovered evidence" in its proposed amended complaint "clearly would have produced a different result if presented before the original judgment." *Davis* v. *Prof'l Reps. Org.*, 666 F. App'x 433, 440 (6th Cir. 2016). The inference GM sought to draw—that the existence of foreign bank accounts must mean "corporate espionage" is afoot—is facially implausible. And even if its new allegations were accepted as true, GM's causation theory remained too indirect, as the District Court concluded after reviewing in detail the allegations of GM's proposed amended complaint.

Affirmance on Other Grounds. This Court can affirm the dismissal of GM's Complaint on the alternative grounds that (i) the kind of harm GM allegedly incurred was not the kind of harm that the alleged predicate offenses seek to prevent, (ii) the

alleged predicate acts are subject to exclusive NLRB jurisdiction, (iii) GM fails to allege that FCA acquired an interest in or control of the UAW under Section 1962(b), and (iv) the claims for injuries occurring before November 20, 2015 are time-barred.

STANDARDS OF REVIEW

A. Rule 12(b)(6) Dismissal

This Court reviews "de novo the district court's ruling on a motion to dismiss," and can "affirm on any grounds … even if different from the reasons of the district court." *Hogan* v. *Jacobson*, 823 F.3d 872, 883, 884 n.2 (6th Cir. 2016).

On appeal from an order granting a motion to dismiss, the only relevant question is "whether the complaint states a claim upon which relief could be granted, not whether the plaintiff has stated—or could state—such a claim elsewhere," such as in its appellate brief. *Guzman* v. *DHS*, 679 F.3d 425, 429 (6th Cir. 2012). This Court "review[s] the case presented to the district court, instead of a better case fashioned after a district court's unfavorable order." *Swanigan* v. *FCA US LLC*, 938 F.3d 779, 788 (6th Cir. 2019).

To avoid dismissal, GM was required to plead sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). "[L]abels and conclusions," or "'naked assertion[s]' devoid of 'further factual enhancement'" do not suffice. *Id.*

Courts apply heightened scrutiny to civil RICO claims, and "strive to flush out frivolous RICO allegations at an early stage of the litigation." *Rosenson* v.

Mordowitz, 2012 WL 3631308, at *5 (S.D.N.Y. Aug. 23, 2012).[5] This is so for two reasons. *First*, "[c]ourts look with particular scrutiny at claims for a civil RICO, given the statute's damaging effects on the reputations of individuals alleged to be engaged in RICO enterprises and conspiracies." *Wood* v. *Gen. Motors Corp.*, 2015 WL 1396437, at *4 (E.D.N.Y. Mar. 25, 2015). *Second*, "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). As the First Circuit put it, "[c]ivil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device," and courts must take "particular care" to "prevent[] abusive or vexatious treatment of defendants." *Miranda* v. *Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

Given these exacting standards, "plaintiffs wielding RICO almost always miss the mark." *Gruber* v. *Gilbertson*, 2019 WL 4458956, at *5 (S.D.N.Y. Sept. 17, 2019). That certainly is true of GM's RICO claims in this case.

B. Denial of Motion to Alter or Amend the Judgment

"The grant or denial of a Rule 59(e) motion is within the informed discretion of the district court, reversible only for abuse." *Huff* v. *Metro. Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). An "abuse of discretion" can be found "only where

[5] GM never disputed "in the district court" FCA's argument that RICO claims are subject to heightened scrutiny, and thus "has forfeited" the issue on appeal. *Adams* v. *Gen. Motors Co.*, 547 F. App'x 661, 665 (6th Cir. 2013).

there is a definite and firm conviction that the trial court committed a clear error of judgment." *Luna* v. *Bell*, 887 F.3d 290, 294 (6th Cir. 2018). The standard "is deferential and requires the reviewing court to lend credence to the district court's determinations." *Proctor* v. *N. Lakes Cmty. Mental Health*, 560 F. App'x 453, 456 (6th Cir. 2014).

ARGUMENT

I. To Avoid Dismissal, GM Needed to Establish That it Was Directly Harmed, Not Merely That the Alleged Harm Was Foreseeable or Intentional.

A civil RICO plaintiff must establish that it was "injured in [its] business or property by reason of a violation." 18 U.S.C. § 1964(c). This requires the plaintiff to "show that a RICO predicate offense not only was a 'but for' cause of his injury, but was the proximate cause as well." *Hemi*, 559 U.S. at 9 (internal quotations omitted).

To establish proximate causation, a plaintiff must plausibly allege a "'direct causal connection' between the predicate offense and the alleged harm." *Id.* at 10-11. The critical question is whether the plaintiff is the "direct victim." *Id.* at 10. Moreover, "[a] plaintiff must allege that the predicate acts," rather than the scheme, "were a proximate cause of the plaintiff's injuries." *Collier* v. *LoGiudice*, 818 F. App'x 506, 511 (6th Cir. 2020); *see Hemi*, 559 U.S. at 13 (same).

GM contends that direct causation under RICO requires only that harm to the plaintiff be "foreseeable" and an "intended" result of the defendant's conduct.

(Brief 30-31.) That is wrong. As this Court explained in *Perry*, foreseeability is "distinct from the requirement of direct injury" under RICO. 324 F.3d at 850. The Supreme Court's decision in *Hemi* could not be more clear on this point. Squarely rejecting the dissent's proposal that "RICO's proximate cause requirement turn on foreseeability," the Supreme Court observed that "*Anza* and *Holmes* never even mention the concept of foreseeability," and explained that, "in the RICO context, the focus is on the directness of the relationship between the conduct and the harm." *Hemi*, 559 U.S. at 12. Under that standard, a RICO plaintiff cannot recover if its alleged injury goes "beyond the first step" in the causal chain. *Id.* at 10.

GM also is wrong that its purported injuries satisfy the directness requirement under RICO because it claims to have been the "intended victim of a corrupt scheme." (Brief 24.) This Court has expressly "rejected the argument that the intentional nature of plaintiffs' claims alters the remoteness inquiry," explaining that "specific intent to harm does not magically create standing or cause … injuries to be direct." *Perry*, 324 F.3d at 850. Seven years after *Perry*, this Court reaffirmed that an allegation that "Defendants intentionally caused the alleged course of events … is not relevant to our directness requirement analysis" under RICO. *City of Cleveland* v. *Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496, 502-03 (6th Cir. 2010); *see Anza*, 547 U.S. at 460 ("A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense.").

Other Circuits likewise have rejected GM's assertion that "foreseeable" or "intentional" conduct satisfies RICO's direct causation requirement. For example, the Fourth Circuit explained that "a court facing a RICO claim should not focus on whether the harm to the RICO plaintiff was a foreseeable result of the defendant's conduct or even whether it was 'the intended consequence[] of [that] behavior,' but rather on 'the directness of the relationship between the conduct and the harm.'" *Slay's Restoration, LLC* v. *Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 493 (4th Cir. 2018) (emphasis omitted) (quoting *Hemi*). "[R]egardless of how foreseeable a plaintiff's claimed injury might be or even what motive underlaid the conduct that caused the harm, the injury for which a plaintiff may seek damages under RICO cannot be contingent on or derivative of harm suffered by a different party." *Id.* at 494.

Similarly, the Second Circuit has held that "foreseeability and intention have little to no import for RICO's proximate cause test," explaining that "this Circuit used to place great weight on foreseeability and intent in our RICO proximate cause jurisprudence, and we relied heavily on both in [*Anza*]," but "[t]he Supreme Court then reversed us, and declined to mention either factor." *Empire Merchs., LLC* v. *Reliable Churchill LLLP*, 902 F.3d 132, 145 (2d Cir. 2018).

None of the cases GM relies on for its "foreseeability" and "intentionality" test undermine RICO's direct causation requirement. In *Wallace*, defendants "fraudulently inflated an appraisal of [plaintiff's] home as part of a scheme to push

him into a high-cost, adjustable-rate mortgage." 714 F.3d at 416. The directness of plaintiff's injury was not seriously at issue—defendants persuaded plaintiff to take an expensive mortgage that pushed him into bankruptcy. As a result, the observation that "Wallace was an intended target of the defendant's alleged scheme," *id.* at 420, did not alter this Court's standard for pleading direct injury under RICO, let alone overturn *Perry* and *City of Cleveland* on a *sub silentio* basis, which the *Wallace* panel had no power to do in any event. *See United States* v. *Burris*, 912 F.3d 386, 406 (6th Cir. 2019) (*en banc*).

The second case GM cites, *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473 (6th Cir. 2013), is even less on point. There, plaintiffs were duped by defendants into making certain investments. There was no question that plaintiffs were directly injured—they invested $90 million and incurred losses totaling more than $16 million. *Id.* at 482. Instead, defendants argued unsuccessfully that "Plaintiffs were well-aware of various aspects of the Mare Lease Program fraud," and thus "Defendants' conduct could not have been a 'substantial and foreseeable cause' of Plaintiffs' losses." *Id.* at 487. GM seizes (Brief 31) on the fact that, in the legal background portion of the decision, the *ClassicStar* panel quoted part of a sentence from *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004), noting that "foreseeab[ility]" is a component of "proximate causation." *ClassicStar*, 727 F.3d at 487. But the *ClassicStar* panel omitted the remainder of the sentence, which

makes clear that a RICO plaintiff must "show a direct injury" even if the alleged harm is "foreseeable." *Trollinger*, 370 F.3d at 615.

Lastly, the Supreme Court's decision in *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008), did not transform the direct causation requirement into an intent-to-harm test. *Bridge* addressed an entirely different issue—namely, whether "first-party reliance" on a misrepresentation is required for a RICO claim predicated on mail fraud. *Bridge*, 553 U.S. at 656. In rejecting the argument that "only those who rely on the misrepresentation can suffer a legally cognizable injury," the Supreme Court quoted the RESTATEMENT (SECOND) OF TORTS for the proposition that, "as a 'general principle … one who intentionally causes injury to another is subject to liability to the other for that injury.'" *Id.* at 656-57 (alterations omitted). This statement has nothing to do with RICO's direct causation requirement. Were there any doubt on that score, it was resolved in *Hemi*, where the plurality rejected the argument that proximate cause under RICO should turn on whether the harm to the plaintiff was the "*intended* consequence[] of defendant's unlawful behavior." 559 U.S. at 12 (emphasis in original).

As a last resort, GM raises the spectre that applying the direct causation requirement of *Hemi* and *Anza* would "immunize racketeers from the very harm their scheme was designed to visit on its intended victim." (Brief 33, 36.) But the parade of horribles GM posits are the same concerns raised by the dissenters and rejected

by the Supreme Court in *Hemi* and *Anza*. *See Hemi*, 559 U.S. at 28-29 (Breyer, J., dissenting); *Anza*, 547 U.S. at 470-71, 474-75 (Thomas, J., dissenting).

II. GM Did Not Even Allege That it Was Directly Harmed by Any Benefits, Concessions, or Advantages That FCA Allegedly Obtained From the UAW.

A. Any Injury to GM Was Indirect.

The allegations of GM's Complaint make clear that any harm it incurred was third in line behind rank-and-file UAW members and the IRS. 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 expense of FCA's hourly workers (victim one). (Compl. ¶¶ 71, 79, R.1, PageID#36-37, 40-41.) GM next alleged that the prohibited payments were omitted from tax forms filed with the IRS, depriving the IRS of tax revenues (victim two). (*Id.* ¶¶ 65-66, PageID#33.)

On appeal, GM argues for the first time that rank-and-file UAW members were not really harmed by the alleged prohibited payments, but merely deprived of the UAW's "honest services." (Brief 30, 37.) Not only is this argument forfeited, it is flatly inconsistent with GM's Complaint. According to GM, as a result of the alleged prohibited payments, FCA obtained greater flexibility to use "temporary workers" and "Tier Two workers," which are "less expensive employees who have a lower wage structure." (Compl. ¶¶ 76, 79, R.1, PageID#39, 40-41.) FCA's ability to use more "lower-priced" workers, if true, harmed UAW members, who were paid

less than they otherwise would have been. (*Id.*) GM also alleged that the prohibited payments caused the UAW to compromise the "handling of worker grievances," with the result that the UAW no longer "zealously pursu[ed] union grievances and health and safety issues." (*Id.* ¶ 80, PageID#41.) Such behavior by the UAW, if it occurred, harmed UAW members, who presumably would have prevailed on more grievances and health and safety issues had they been pursued more zealously. Lastly, GM alleged that, instead of using NTC funds for their intended purpose of training "UAW workers employed by FCA," certain UAW employees misused those funds for "travel" and "dining," "*rather than for the benefit of membership*." (*Id.* ¶¶ 22, 97, PageID#14-15, 48-49 (emphasis added).)

GM tries to excise harm to FCA employees from the equation by contending that the labor cost advantages allegedly conferred on FCA were "denied to GM" by the UAW, thereby causing GM to incur "higher labor costs." (Brief 19, 33, 37-39.) As the District Court correctly held, this argument just restates GM's theory that its labor costs were higher than FCA's labor costs because FCA paid its employees less money as a result of the alleged prohibited payments. (Order, R.82, PageID#2969.) By definition, FCA would not have a labor cost "advantage" if the UAW gave GM the same benefits it allegedly gave FCA.

In a similar effort to recast its claims, GM argues that the alleged prohibited payments were made not to secure advantages for FCA itself (with resulting harm to FCA employees), but were instead made to induce the UAW to "refuse" to give

GM "benefits, concessions, or advantages that would reduce its labor costs." (Brief 26.) That is a semantic game, and it is inconsistent with what GM pled in its Complaint, *i.e.*, that "FCA paid millions of dollars in 'prohibited payments and things of value to UAW officers' … and, in return, received 'benefits, concessions, and advantages *for FCA*.'" (Compl. ¶ 3, R.1, PageID#5 (emphasis added).) Moreover, it is pure fiction that the Complaint alleged "repeatedly" and "in specific detail" that FCA "bribed UAW officials to deny benefits" to GM. (Brief 40-41.) At most, the Complaint included a stray allegation that "through its bribery, 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, R.1, PageID#36-37.) The District Court rightly rejected this "conclusory" allegation. (Order, R.82, PageID#2968-69.)

GM also ignores that its alleged injuries not only were contingent on harm allegedly incurred by FCA employees, but also were contingent on harm allegedly incurred by the IRS, which was the only victim of the alleged predicate acts of mail and wire fraud. GM claimed that the alleged prohibited payments "were concealed through acts of mail and wire fraud," by "improperly omitting them from [tax forms] *filed with the IRS*." (Compl. ¶¶ 65-66, R.1, PageID#33 (emphasis added).) As a result, GM alleged that the Individual Defendants "*defraud[ed] the United States*" by concealing "millions of dollars in unreported income." (*Id.* ¶ 151(b), PageID#69-

70 (emphasis added); *see also id.* ¶ 176(c), PageID#89 (Defendant Jerome Durden "filed numerous false IRS Form 990s for the NTC").)

Lastly, GM argues that it does not matter if rank-and-file FCA employees and the IRS were more directly harmed than GM because "[n]o other court has embraced [a] 'strict,' first-in-line view of the proximate cause standard." (Brief 25.) That is patently false. Courts routinely dismiss RICO claims based on theories of harm that "'go beyond the first step' in the causal chain," and are especially vigilant in enforcing RICO's direct causation requirement in cases like this one "brought by economic competitors," *Empire Merchs.*, 902 F.3d at 142, 144:

- *Anza*, 547 U.S. 451: Steel mill supply company could not sue a competitor under RICO for lost sales where defendant defrauded New York State (the direct victim) by not charging New York sales tax on sales to customers, thereby enabling defendant to undercut plaintiff's prices. *Id.* at 453-54, 458-61.

- *Empire Merchs.*, 902 F.3d 132: Exclusive New York distributor of certain alcohol products could not sue a Maryland competitor under RICO for lost sales where defendant defrauded New York tax authorities (the direct victim) by smuggling alcohol into New York without paying excise taxes, thereby enabling the bootlegged alcohol to be sold at a discount. *Id.* at 135-37, 142-44.

- *G&G TIC, LLC* v. *Ala. Controls, Inc.*, 324 F. App'x 795 (11th Cir. 2009): Manufacturer of air conditioners could not sue competitor under RICO for lost sales where defendant defrauded the Fort Benning military base (the direct victim) by obtaining contracts through a bid-rigging scheme. *Id.* at 797-98; *G&G TIC, LLC* v. *Ala. Controls, Inc.*, 2008 WL 4457876, at * 1-*2 (M.D. Ga. Sept. 29, 2008).

- *Sybersound Records, Inc.* v. *UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008): Karaoke record producer could not sue competitor under RICO for lost sales where defendant defrauded musicians (the direct victims) by not paying royalties on copyrighted musical works, thereby enabling defendant to undercut plaintiff's prices. *Id.* at 1147-49.

- *Pik-Coal Co.* v. *Big Rivers Elec. Corp.*, 200 F.3d 884 (6th Cir. 2000): Coal broker could not sue coal company under RICO for lost sales commissions on contract with different coal company that was the low bidder on a coal supply contract, where defendant bribed employees of a power plant (the direct victim) to obtain the contract. *Id.* at 890-91.

In every one of these cases, the defendant engaged in alleged misconduct for the express purpose of competing more effectively against its competitor, just as GM alleged here, but that did not render the competitor's injury "direct" under RICO.

For the same reason, this case is nothing like the narrow category of cases where a defendant uses a "[t]hird party as a vehicle for intentionally inflicting injury on the plaintiff." (Brief 3, 25.) In both cases relied upon by GM—*Empress Casino Joliet Corp.* v. *Johnston*, 763 F.3d 723 (7th Cir. 2014), and *Bridge*, 553 U.S. 639—the "intermediary" incurred no harm at all, leaving the plaintiff as the only person harmed by the alleged conduct. (Brief 30.)

In *Empress Casino*, casinos sued horse racetrack owners for bribing Illinois Governor Rod Blagojevich to impose a tax on five in-state casinos, with the proceeds of the tax placed "into a trust for the benefit of the horseracing industry." 763 F.3d at 725. Unlike here, there were no other victims (the tax injured only the five casinos and no one else) and the harm was direct and non-speculative (no money went to the

state, and the five casinos were harmed "to the tune of 3% of their revenue," which was "easily measured"). *Id.* at 733-34.

Bridge involved competitors who bid on auctioned tax liens. The auctions had a unique feature: because the tax liens were so profitable, there were always "multiple bidders willing to accept the lowest" price at the auction, and thus the county mechanically allocated liens "on a rotational basis" among the tying bidders. 553 U.S. at 642-43. Defendants manipulated the rotational system by submitting multiple bids, guaranteeing them more successful bids than they would otherwise have gotten. *Id.* at 643-44. Contrary to GM's assertion that the county "was itself plainly a victim" (Brief 35), the Supreme Court rejected the notion that the county could suffer injury "if the taint of fraud deterred potential bidders from participating in the auction," labeling that possibility "speculative and remote." *Bridge*, 553 U.S. at 658. The Supreme Court reiterated this point in *Hemi*, stating that the losing bidders in *Bridge* "'were the *only* parties injured by [defendant's] misrepresentations.' The county was not; it received the same revenue regardless of which bidder prevailed." 559 U.S. at 14-15.

B. All Three *Holmes* Factors Confirm That GM's Alleged Harm Is Far Too Remote to Support a RICO Claim.

In *Holmes*, the Supreme Court identified three rationales underlying RICO's proximate cause requirement:

1. the notion that "directly injured victims can generally be counted on to vindicate the law," thereby obviating the "need to grapple with"

complicated causation and damages issues "attendant upon suits by plaintiffs injured more remotely";

2. the factual difficulty of "ascertain[ing] the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"; and

3. the complexity of "apportioning damages among plaintiffs removed at different levels of injury … to obviate the risk of multiple recoveries."

503 U.S. at 269. GM makes no effort to show that the *Holmes* factors support its RICO claims, because it cannot do so.

Factor 1. More Immediate Victims Have Incentive To Sue. As in *Anza* and countless other cases dismissing RICO claims, "the immediate victims of [the] alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." 547 U.S. at 460. In fact, seven actions have been brought by FCA employees arising out of the alleged prohibited payments.[6] Furthermore, three FCA employees "have filed allegations of unfair labor practices with the [NLRB] against both FCA and UAW," which this Court has recognized "is the appropriate forum to

[6] *DeShetler* v. *FCA US LLC*, No. 18-cv-078 (N.D. Ohio); *Sheets* v. *FCA US LLC*, No. 18-cv-085 (N.D. Ohio); *Swanigan* v. *FCA US, LLC*, No. 18-cv-10319 (E.D. Mich.); *UAW Local 961* v. *FCA*, No. 19-cv-10453 (E.D. Mich.); *UAW Local 961* v. *UAW*, No. 19-cv-11780 (E.D. Mich.); *Slight* v. *UAW*, No. 20-cv-1590 (N.D. Ohio); *Baltrusaitis* v. *UAW*, No. 20-cv-12793 (E.D. Mich.). That some of these cases have been dismissed is of no moment: The Supreme Court emphasized in *Hemi* that it is irrelevant whether the more immediate victim "could bring a RICO action"; rather, the question is whether such party "would have concrete incentives to try." 559 U.S. at 12.

adjudicate such claims." *Swanigan*, 938 F.3d at 786. And as GM's Complaint described in detail, the U.S. Department of Justice has been diligently investigating and prosecuting both the alleged prohibited payments and tax fraud.

GM's argument that it does not matter that more direct victims already have sued (Brief 38) just repackages Justice Thomas's dissent in *Anza*—"[t]he mere fact that New York is a direct victim … does not preclude Ideal's claim that it too is a direct victim." 547 U.S. at 465 (Thomas, J., dissenting). As the Supreme Court and this Court both have held, a party alleging remote injury (GM) cannot assert a RICO claim when parties alleging more direct injury (FCA employees) already have sued. *See Anza,* 547 U.S. at 460; *City of Cleveland,* 615 F.3d at 506.

Factor 2. GM's Alleged Damages Are Speculative and Would Be Difficult To Quantify. As the Seventh Circuit has observed, any attempt to prove that a defendant "pays lower wages than some competitors … would be very hard to attribute to particular" RICO predicate offenses. *Baker* v. *IBP, Inc.*, 357 F.3d 685, 692 (7th Cir. 2004). Ascertaining the amount of harm that FCA's alleged conduct purportedly inflicted on GM would be not only difficult but inherently speculative, a point GM does not address in its brief. A disparity in average hourly wages between FCA and GM could be due to a wide variety of reasons, such as number of hours worked by employees or the seniority level of those employees. Teasing out the amount of harm to GM directly attributable to the alleged prohibited payments—assuming GM could ever surmount its proximate cause obstacles—would require

the same kind of "intricate, uncertain inquiries" that the Supreme Court stated in *Anza* should not be allowed to "overrun[] RICO litigation." 547 U.S. at 459-60; *see Empire Merchs.*, 902 F.3d at 143 (same); *City of Cleveland*, 615 F.3d at 506 (same); *Slay's*, 884 F.3d at 495 (same).

Factor 3. Risk of Multiple Recoveries. Allowing GM's RICO claims to proceed would raise the significant possibility of multiple recoveries, another point GM fails to address. Setting aside that the DOJ investigation is ongoing and poses a direct risk of multiple recoveries (Brief 1), GM itself has asserted that "*all* stakeholders in the U.S. auto industry, including manufacturers, suppliers, the UAW, and employees" could bring a RICO claim for treble damages against FCA based on the conduct described in the Complaint. (Compl. ¶ 12, R.1, PageID#10 (emphasis added).)

To compute damages in this case, "the court would be required to anticipate all potential plaintiffs who sustained indirect injuries in order to prevent multiple recoveries." *Barr Labs., Inc.* v. *Quantum Pharmics, Inc.*, 827 F. Supp. 111, 116 (E.D.N.Y. 1993). Under GM's view of the world, that would be a very large group, and asking a court to grapple with such a complex problem "is simply unjustified." *Holmes*, 503 U.S. at 269.

III. GM Failed to Allege Any Connection Between the Alleged Prohibited Payments and the Harm GM Claims to Have Suffered as a Result of the 2015 CBA Negotiations.

GM does not like it that FCA was open about its desire to merge with GM, and made several attempts to do so. (Brief 9-10.) But the fact that FCA in 2015 "pursued a full-court press media strategy" and "enlisted hedge funds and activist investors to support" its efforts to merge with GM was perfectly legal, and the Complaint did not allege that these actions had any connection to the alleged prohibited payments. (Compl. ¶¶ 104, 108, R.1, PageID#50-52.) In fact, GM expressly alleged that, "[a]t the time" of the 2015 CBA negotiations, FCA and UAW "leaders knew the federal government was actively investigating past FCA-UAW CBAs," and therefore did not permit any past alleged prohibited payments to affect their negotiating positions. (*Id.* ¶ 134, PageID#62.)

In a complete about-face from its first theory of harm involving the period between 2009 and 2015, GM alleged that FCA made unspecified *concessions to the UAW* during the 2015 CBA negotiations, knowing that the UAW would extract the same concessions from GM as a result of "pattern bargaining," thereby increasing GM's labor costs, which supposedly would make GM more amenable to merging with FCA. (*Id.* ¶¶ 104, 132-38, PageID#50, 61-63.) The District Court correctly held that this theory does not satisfy RICO's direct causation requirement, including because it does not depend on the alleged prohibited payments at all.

First, GM tries to connect FCA's pursuit of a merger with GM (which is not illegal) to the alleged prohibited payments by speculating that FCA must have bribed the UAW to become the lead in the 2015 CBA negotiations. (Brief 11; Compl. ¶ 7, R.1, PageID#7.) But GM never comes to grips with the fact that bribes would not have been necessary to entice the UAW to select FCA as the lead in the 2015 CBA negotiations if it were true that the UAW knew FCA would agree to the most union-friendly CBA in history, which the UAW could then use in pattern bargaining with GM and Ford. Indeed, if the UAW believed it could negotiate the best deal with FCA, it had every reason—likely a legal duty—to select FCA as the lead in the 2015 CBA negotiations, without regard to the alleged prohibited payments. *See Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 74 (1991) (discussing union's "duty of fair representation"). Thus, as in *Anza*, the UAW's selection of FCA as the lead in the 2015 CBA negotiations "in no sense required" the UAW to have been bribed by FCA, as GM alleged. 547 U.S. at 459; *see Oceanic Expl. Co.* v. *Phillips Petroleum Co.*, 352 F. App'x 945, 952 (5th Cir. 2009) ("Because Oceanic fails to plead facts plausibly demonstrating that it would have had an opportunity to replace ConocoPhillips in the Timor Gap in the absence of bribery, we conclude that the causal link is 'overly attenuated.'").

GM's sole response is that identifying "'holes' in GM's 'logic'" is somehow off limits at the motion to dismiss stage. (Brief 20.) To the contrary, as the Supreme Court held in *Anza*, such an inquiry is required. 547 U.S. at 459-60 ("The element

of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation."); *see Empire Merchs.*, 902 F.3d at 143-44; *City of Cleveland*, 615 F.3d at 506. Even outside of the RICO context, this Court has made clear that "[t]he plausibility of an inference depends on a host of considerations, including *common sense* and the strength of competing explanations for the defendant's conduct." *16630 Southfield Ltd. P'ship* v. *Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013) (emphasis added). Courts need not accept as true allegations that "def[y] economic reason." *Atl. Gypsum Co.* v. *Lloyds Int'l Corp.*, 753 F. Supp. 505, 514 (S.D.N.Y. 1990) (dismissing RICO claim); *see Deom*, 591 F. App'x at 319-20 (allegations "def[ying] common sense and economic reality" held "facially implausible").

Second, using the alleged prohibited payments to induce the UAW to select FCA as the lead in the 2015 CBA negotiations is many steps removed from any purported injury to GM, and contingent upon the independent actions of numerous third parties:

1. After being selected as the lead, FCA made various concessions to the UAW that resulted in a very union-friendly CBA. (Compl. ¶¶ 117, 129, R.1, PageID#55-56, 59.) FCA's willingness to agree to a CBA that benefited UAW members was neither illegal nor dependent upon the alleged prohibited payments.

2. UAW members rejected the original CBA agreed to by FCA and the UAW, requiring FCA to sweeten the CBA further. (*Id.* ¶ 131, PageID#61.) Nothing about the independent actions of thousands of

UAW members in rejecting the original CBA was dependent upon the alleged prohibited payments.

3. GM negotiated its own CBA with the UAW which was better than "the FCA pattern by about $400 million" (*id.* ¶ 137, PageID#63), but GM allegedly was required to accepted certain concessions made by FCA as a result of the "economic force of pattern bargaining and threat of strike" by GM workers (*id.* ¶ 135, PageID#62-63). The independent choices GM made in negotiating its CBA with the UAW, and the independent actions of thousands of GM workers in threatening to strike, were not dependent on the alleged prohibited payments.

4. At the end of this long chain of events, GM says it incurred "unanticipated higher costs." (*Id.* ¶ 134, PageID#62.)

GM's ability to craft a story that begins with the alleged prohibited payments and ends with purported harm to GM does not transform GM's alleged injuries into direct ones. RICO does not authorize plaintiffs to "pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes*, 503 U.S. at 287 (Scalia, J., concurring); *see Hemi*, 559 U.S. at 9, 15 (RICO causation theory too "attenuated" where "multiple steps … separate the alleged fraud from the asserted injury"); *Slay's*, 884 F.3d at 495 ("potential intervening causes" broke causal chain).

IV. The District Court Did Not Abuse its Discretion in Denying GM's Motion to Alter or Amend the Judgment.

A plaintiff "who seeks to amend a complaint *after* losing the case must provide a compelling explanation to the district court for granting the motion," based

on "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Leisure Caviar, LLC* v. *U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615, 617 (6th Cir. 2010) (emphasis in original). In deciding whether to grant such a motion, a district court must "consider[] the competing interest of protecting the finality of judgments and the expeditious termination of litigation," and "ought to pay particular attention to the movant's explanation for failing to seek leave to amend prior to the entry of judgment." *Id.* at 615-16 (internal quotation omitted). District courts have "considerable discretion in deciding whether to grant Rule 59 motions." *Clark* v. *United States*, 764 F.3d 653, 661 (6th Cir. 2014). The District Court acted well within that discretion here.

First, GM is wrong that the District Court abused its discretion by failing to anticipate that GM might want to amend its Complaint and not *sua sponte* giving GM another bite at the apple. GM—a major corporation represented by experienced counsel—was "not entitled to an advisory opinion from the Court informing [it] of the deficiencies of the complaint and then an opportunity to cure those deficiencies." *Winget* v. *JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 573 (6th Cir. 2008). Where, as here, a "Plaintiff never filed a proper motion to amend [its] complaint" before judgment was entered against it, a "district court d[oes] not abuse its discretion … by failing to rule on a motion that was never before it." *Bunn* v. *Navistar, Inc.*, 797 F. App'x 247, 257 (6th Cir. 2020); *see Total Benefits*, 552 F.3d at 437-38.

Second, contrary to GM's assertion, leave to amend need not be "freely" granted after a judgment has been entered against a plaintiff because of the "liberal" amendment policy of Fed. R. Civ. P. 15. (Brief 47.) "[O]nce judgment issues, concerns about finality dilute the otherwise permissive amendment policy of the Civil Rules." *Energy Conversion*, 833 F.3d at 692. GM never mentions the "heav[y] burden" standard articulated by this Court in the post-judgment context. *Mich. Flyer LLC* v. *Wayne Cty. Airport Auth.*, 860 F.3d 425, 431 (6th Cir. 2017).

Nor is this case anything like *Bledsoe* v. *Community Health Systems, Inc.*, 342 F.3d 634 (6th Cir. 2003) (Brief 47-48), which "concerned a situation where the plaintiff included all of the relevant elements in his complaint but lacked notice of a heightened pleading standard until the moment the district court dismissed the complaint." *Energy Conversion*, 833 F.3d at 692 (discussing *Bledsoe*). RICO's direct causation requirement is well-established: *Anza* was decided in 2006 and *Hemi* has been on the books for a decade. Moreover, as in *Energy Conversion*, "[e]ven after [FCA] moved to dismiss the complaint largely based on [GM's] failure to plead [direct causation as required by *Hemi* and *Anza*], [GM] did not amend the complaint," but instead sought leave to amend "[o]nly after the district court rejected [GM's] argument and dismissed the case." 833 F.3d at 691. The "unusual" circumstances in *Bledsoe* plainly are not present here. *Ohio Police & Fire Pension Fund* v. *Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 844 (6th Cir. 2012).

Third, GM's allegations of "corporate espionage" were not supported by a single well-pled factual allegation, and thus GM's "newly discovered evidence" would not have led to a "different result." *Davis*, 666 F. App'x at 440. GM argues on appeal that "newly discovered accounts indicate that, between 2010 and 2014, FCA and FCA NV made substantial payments" to Ashton while he was Vice President for the UAW's GM Department. (Brief 46.) That is an unsupported embellishment of the allegation in GM's proposed amended complaint, made solely on "information and belief," that in exchange for his alleged cooperation with FCA, "Ashton obtained control over at least one foreign account in the Cayman Islands in his individual name and/or in the name of a business entity that he apparently controls." (AC ¶ 43, R.84-2, PageID#3031.)

The sum total of GM's factual submissions to the District Court was a declaration from its counsel that provided no documentary evidence to bolster its conclusions. The declaration stated that GM retained unspecified "third parties" with unspecified "credentials" who supposedly discovered unspecified "reliable information" about the existence of foreign bank accounts. (Karis Decl. ¶ 8, R.84-3, PageID#3141.) GM did not deign to identify these third parties, state their credentials, or provide any basis to assess whether the unspecified "information" they allegedly learned was in fact "reliable." For all anyone knows, "[p]erhaps these confidential sources have axes to grind. Perhaps they are lying. Perhaps they don't even exist." *Higginbotham* v. *Baxter Int'l, Inc.*, 495 F.3d 753, 757 (7th Cir. 2007).

Nor did anything in GM's proposed amended complaint support GM's contention that "Ashton and Iacobelli infiltrated GM" to (i) "gather and funnel highly confidential information to the FCA Defendants and their co-conspirators at the UAW" (Motion, R.84, PageID#3001), or (ii) "ensure that Ashton imposed higher costs on GM, rather than the same benefits it provided to FCA" (AC ¶ 88, R.84-2, PageID#3052). The grand conspiracy concocted by GM rested entirely on the unremarkable allegation that FCA—which operates through subsidiaries in more than 130 countries around the world—had foreign bank accounts in some of the same countries as Iacobelli and Ashton (or companies with which they are purportedly connected). (*Supra* 4.) Even if true, that coincidence is insufficient to state a claim.

GM's theory is remarkably similar to allegations this Court rejected in *16630 Southfield*. There, plaintiff sued a bank contending its denial of his application to refinance a loan was discriminatory based on his Iraqi origin. But the Complaint "allege[d] facts that are merely consistent with liability (*i.e.*, being Iraqi and being denied a loan extension) as opposed to facts that demonstrate discriminatory intent." 727 F.3d at 505. The inference GM asks this Court to draw—namely, that the existence of foreign bank accounts means those accounts must have been used to facilitate "corporate espionage"—is even less plausible. GM almost certainly has

bank accounts in a number of foreign jurisdictions, but that hardly is a basis to accuse GM of engaging moles to infiltrate FCA and steal its confidential information.[7]

The plaintiff in *16630 Southfield* attempted to bolster his claim with speculation, "alleging 'upon information and belief' that [the bank] has refinanced delinquent borrowers who 'were Caucasian.'" 727 F.3d at 506. GM similarly speculated "on information and belief" that FCA used foreign bank accounts to "secretly" provide money to Iacobelli and Ashton "in exchange for intentionally infiltrating GM, both to impose asymmetrical costs on GM through the 2015 collective bargaining agreement and to pressure GM to merge with FCA NV." (Motion, R.84, PageID#2987-89.) But "[t]hese 'naked assertions devoid of further factual enhancement' contribute nothing to the sufficiency of the complaint," and thus must be "ignore[d] when evaluating a complaint's sufficiency." *16630 Southfield*, 727 F.3d at 506. Moreover, GM's proposed amended complaint contained zero factual allegations as to what information Ashton and Iacobelli supposedly passed on to FCA, who at FCA supposedly received that information, or how the information supposedly was used by FCA to harm GM in the 2015 CBA negotiations. Indeed, it is impossible that Iacobelli was passing confidential GM

[7] According to GM's public filings with the SEC, as of December 31, 2019, GM operates through subsidiaries in 35 countries, including in many of the countries it contends are hotbeds for money laundering, such as Switzerland, Italy, and Singapore. (GM Form 10-K, Exhibit 21, tinyurl.com/y477tv4u).

information to FCA during the 2015 CBA negotiations because, as GM itself confirms, GM did not "hire[] Iacobelli to work in its labor relations department" until "January 2016." (AC ¶ 182, R.84-2, PageID#3098.)

GM's insistence that foreign bank accounts must have existed for the sole purpose of enabling FCA to orchestrate a nefarious plot to injure GM comes nowhere close to pleading a valid claim. As this Court has held, "conclusory allegations, unsupported by facts, are not sufficient to survive a 12(b)(6) motion." *Stuart* v. *Lowe's Home Centers, LLC*, 737 F. App'x 278, 282 (6th Cir. 2018). This is especially true where the "claim can succeed only if the court 'make[s] inference upon inferences to provide the' facts missing from their complaint." *U.S. ex rel. Harper* v. *Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 438 (6th Cir. 2016). Consequently, the District Court was well within its discretion to deny GM's motion to alter or amend the judgment.

V. GM's Complaint Failed to State a Claim for Numerous Additional Reasons.

Dismissal of GM's Complaint can be affirmed on numerous alternate grounds. *See Hogan*, 823 F.3d at 884 n.2 (court can "affirm on any grounds").

A. GM's Alleged Injuries Do Not Represent the Kind of Harm the Alleged Predicate Offenses Seek to Prevent.

GM's arguments on appeal rest almost exclusively on arguments made in the *Hemi* and *Anza* dissents, but even there GM runs into difficulty: an argument made by Justice Breyer in his *Hemi* dissent provides an easy basis for affirmance. In

Justice Breyer's view, the proximate causation required by RICO does not exist where, as in *Anza*, "the *kind of harm* that the plaintiff alleged is not the *kind of harm* that the [predicate offenses] primarily seek to prevent." *Hemi*, 559 U.S. at 28 (Breyer, J., dissenting) (emphasis in original). Justice Scalia and Judge Winter of the Second Circuit have made the same point. *See Holmes*, 503 U.S. at 287-89 (Scalia, J., concurring); *City of N.Y.* v. *Smokes-Spirits.com, Inc.*, 541 F.3d 425, 459-60 (2d Cir. 2008) (Winter, J., dissenting), *rev'd, Hemi*, 559 U.S. 1.

GM alleged two predicate offenses: (i) violation of Section 302 of the LMRA; and (ii) mail and wire fraud. (Compl. ¶¶ 65, 170, R.1, PageID#33, 81.) Neither seeks to prevent the "kind of harm" alleged by GM in its Complaint.

Section 302 of the LMRA "makes it a crime for an employer to willfully give money to a labor union." *Ohlendorf* v. *UFCW*, 883 F.3d 636, 640 (6th Cir. 2018). The statute is intended to protect "employees," *id.* at 642, by "protect[ing] the integrity of *employees'* collective bargaining representatives," *Sinclair Refin. Co.* v. *Atkinson*, 370 U.S. 195, 205 (1962) (emphasis added). The kind of harm GM alleged (economic injury to a competitor of the employer) is not the kind of harm that Section 302 of the LMRA seeks to prevent (corruption of the collective bargaining process that detrimentally affects unionized employees). In fact, with respect to the 2015 CBA, GM alleged that "UAW-represented employees greatly benefited" from actions allegedly taken by FCA. (AC ¶¶ 167-68, R.84-2, PageID#3092-93.)

With the Section 302 violation out of the picture, the alleged mail and wire fraud predicate offenses can be disposed of easily. Under RICO, GM may only recover for the "harm caused by [the] predicate acts," and not by the scheme in general. *Hemi*, 559 U.S. at 13. GM alleged that the Individual Defendants committed mail and wire fraud by failing to include the alleged prohibited payments on tax forms "filed with the IRS," and thereby "defraud[ed] the United States." (Compl. ¶¶ 65-66, 151(b), R.1, PageID#33, 69-70.) GM does not contend that this alleged tax fraud caused any harm to GM—in fact, GM has expressly disavowed "claiming harm caused by that underpayment of taxes" (Opp., R.64, PageID#2331)—so it is unnecessary to decide whether the harm at issue is the type that federal mail and wire fraud statutes were designed to prevent.

B. GM Failed to Adequately Allege Predicate Acts of Racketeering Activity.

To state a claim under Sections 1962(b) and 1962(c), GM had to plausibly allege that FCA committed "predicate offense[s]" that were "part of a 'pattern of racketeering activity.'" *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2096-97 (2016). As noted, GM alleged two predicate offenses: (i) violation of Section 302 of the LMRA; and (ii) mail and wire fraud. There are problems with both.

1. The NLRB Has Exclusive Jurisdiction Over the Alleged Predicate Offenses.

The NLRB has exclusive jurisdiction over any conduct that "arguably" constitutes an unfair labor practice. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959). This Court has held that, under the *Garmon* rule, a federal court may "adjudicat[e] a RICO action based upon conduct that is arguably protected or prohibited by the NLRA if under the circumstances (1) RICO operates as an independent federal remedy and (2) the labor questions in the case amount to no more than collateral issues." *Trollinger*, 370 F.3d at 610. "[W]hen a RICO action depends upon a federal-law predicate offense and a violation of that predicate law may be found only if the defendant's conduct violates the NLRA, the federal district courts lack jurisdiction under *Garmon* because the NLRA issues in the case would be anything but collateral." *Id.* at 610-11.

GM's assertion that CBAs negotiated by FCA with the UAW were infected by the alleged prohibited payments is not merely a "collateral issue[]." *Id.* That assertion of bad faith lies at the core of GM's case. Such claims predicated on bad faith bargaining between an employer and a union fall within the NLRB's exclusive jurisdiction. *See Adkins* v. *Mireles*, 526 F.3d 531, 542 (9th Cir. 2008) ("Appellants' RICO claims rest on their allegation that the Union had bargained in bad faith … and a consistent body of labor law requires that the NLRB has exclusive jurisdiction to regulate [that] activity."); *Martin* v. *Lake Cty. Sewer Co.*, 269 F.3d 673, 680 (6th

Cir. 2001) (dismissing "claim alleg[ing] bad-faith bargaining" because such a claim is "an unfair labor practice claim over which the NLRB has exclusive jurisdiction").

Courts in this Circuit already have held that claims based on the very same alleged prohibited payments that lie at the heart of GM's case are "unfair labor practice claim[s] over which the NLRB has exclusive jurisdiction." *DeShetler* v. *FCA US LLC*, 2018 WL 6257377, at *10 (N.D. Ohio Nov. 30, 2018); *see Swanigan* v. *FCA US, LLC*, 2018 WL 4030815, at *4 (E.D. Mich. Aug. 23, 2018) (same).

2. GM Failed to Plead the Requisite Elements of Mail and Wire Fraud.

GM's mail and wire fraud claims fail because GM did not allege that FCA made a "material misrepresentation" to the IRS or anyone else, *United States* v. *Petlechkov*, 922 F.3d 762, 766 (6th Cir. 2019), let alone with the particularity required by Rule 9(b), *see Grubbs* v. *Sheakley Grp., Inc.*, 807 F.3d 785, 804 n.5 (6th Cir. 2015) ("[P]redicate acts of mail or wire fraud must be pled with particularity" under Rule 9(b).). Courts routinely dismiss RICO claims based on mail and wire fraud where, as here, the "allegations amounted to nothing more than 'vague allusions' to misrepresentations." *Crawford's Auto Ctr., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 945 F. 3d 1150, 1159 (11th Cir. 2019).

GM's mail and wire fraud claims also fail because GM did not allege that FCA made any misrepresentations with fraudulent intent. *See Perlman* v. *Zell*, 185 F.3d 850, 854 (7th Cir. 1999) ("The word 'fraud' in the mail-fraud statute means deliberate, material misrepresentations.").

C. GM Failed to Allege That FCA Acquired an Interest in the UAW Through a Pattern of Racketeering Activity.

"A violation of § 1962(b) requires that the RICO defendant acquire or maintain an interest in, or control of, an enterprise *through* (or by way of) the pattern of racketeering activity." *Advocacy Org. for Patients & Providers* v. *Auto Club Ins. Ass'n*, 176 F.3d 315, 328 (6th Cir. 1999). Yet GM failed to allege (i) that FCA acquired an interest in or control of the UAW, or (ii) that GM suffered an independent "acquisition or control" injury distinct from any injury flowing from the alleged predicate acts.

1. GM Did Not Allege That FCA Acquired an "Interest" in or "Control" of the UAW.

As a matter of law, GM's allegation that FCA gained some influence over certain UAW bargaining positions does not support a claim that FCA "acquire[d] or maintain[ed] an interest in or control of" the UAW, *Advocacy Org.*, 176 F.3d at 328, a union with more than 400,000 active members that has negotiated approximately 1,150 contracts with roughly 1,600 employers (*see* uaw.org/about).

Section 1962(b) was enacted "to prohibit the takeover of a legitimate business through racketeering, typically extortion or loansharking." *Stolow* v. *Greg Manning Auctions Inc.*, 258 F. Supp. 2d 236, 246 (S.D.N.Y. 2003). "The type of 'interest' contemplated in § 1962(b) is not just any 'interest' but a proprietary one, such as the acquisition of stock, and the 'control' contemplated is the power gained over an enterprise's operations by acquiring such interest." *Whaley* v. *Auto Club Ins. Ass'n*,

891 F. Supp. 1237, 1240 (E.D. Mich. 1995). As explained in the leading RICO treatise, "'control' connotes domination, such as the 'kind of power that an owner of 51% or more of an entity would normally enjoy,'" and does not encompass a defendant's "mere[] influence[]" over an enterprise. Hon. Jed. S. Rakoff & Howard W. Goldstein, RICO: CIV. & CRIM. LAW & STRATEGY § 1.06(2) (rev'd ed. 2019). GM did not come close to meeting that standard. *See Cont'l 332 Fund, LLC* v. *Albertelli*, 317 F. Supp. 3d 1124, 1144 (M.D. Fla. 2018) (allegation that "Defendants bribed [someone] to gain influence on [a company's] decision-making process" insufficient to plead that "Defendants gained any interest" in or control over the company).

2. GM Did Not Allege a Separate "Acquisition or Maintenance" Injury.

GM's Section 1962(b) claim is also deficient because GM did not "allege an 'acquisition or maintenance' injury" that was "separate and apart from the injury suffered as a result of the predicate acts of racketeering activity." *Aces High Coal Sales, Inc.* v. *Cmty. Bank & Tr. of W. Ga.*, 768 F. App'x 446, 458 (6th Cir. 2019). Rather, GM alleged that it incurred the very same harm from FCA's alleged control of the UAW that GM purportedly incurred from the alleged predicate acts. (*Compare* Compl. ¶ 162, R.1, PageID#79, *with id.* ¶ 178, PageID#90.)

D. RICO's Four-Year Statute of Limitations Bars GM's Claims Premised on Conduct Occurring Before November 20, 2015.

Civil RICO claims are subject to a four-year statute of limitations, which begins to run when a plaintiff discovered or "should have discovered an injury to himself" or herself. *Rotella* v. *Wood*, 528 U.S. 549, 551, 559 (2000). The Supreme Court "ha[s] been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Id.* at 555.

With the exception of harm GM allegedly incurred as a result of its entry into the 2015 CBA—which was ratified on November 20, 2015 (Compl. ¶ 136, R.1, PageID#63), four years to the day before GM filed this action—all of GM's claims are time-barred. The Complaint established that GM knew or should have known before November 20, 2015, of "special advantages … conferred on FCA" by the UAW and that the UAW had not conferred "the same or similar advantages" on GM "despite it seeking similar programs and concessions." (*Id.* ¶ 71, PageID#36-37.) GM admits that it knew "[b]y 2015" that "FCA slashed its labor costs to $47," which GM claims was "$8 less on average per hour than GM ($55)." (*Id.* ¶ 83, PageID#42-43.) Likewise, GM's assertion that, "[b]y 2015, Tier Two workers made up around 42 percent of the UAW membership at FCA—double the proportion of Tier Two workers at GM" (*Id.* ¶ 78, PageID#40), was widely reported, including in a January 28, 2015 *Detroit Free Press* article entitled "Fiat Chrysler has most 2nd-tier workers." (MTD Ex. 4, R.41-5, PageID#942-43.)

GM's assertion that it did not discover the alleged pattern of racketeering activity until 2017 when indictments arising out of the alleged prohibited payments were unsealed does not mean that the RICO claims did not accrue when GM's alleged injuries were incurred. As GM successfully argued in a prior case, "[t]he Supreme Court has rejected the argument that the RICO statute of limitations begins to run only when a claimant discovers *both* an injury and the racketeering activity." *Crown Chevrolet* v. *Gen. Motors, LLC*, 637 F. App'x 446 (9th Cir. 2016).

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's orders dismissing the Complaint with prejudice and denying GM's motion to alter or amend the judgment.

Respectfully submitted,

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November 12, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 12,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

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Dated: November 12, 2020

CERTIFICATE OF SERVICE

I certify that on November 12, 2020, the foregoing brief was electronically filed with the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record.

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Dated: November 12, 2020

ADDENDUM OF RELEVANT LOWER COURT DOCUMENTS

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