UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S & A CAPITAL PARTNERS, INC., MORTGAGE RESOLUTION SERVICING, LLC, and 1ST FIDELITY LOAN SERVICING, LLC, *Plaintiffs,*	:	No. 15-cv-00293-LTS-JCF
- v. -	:	
JPMORGAN CHASE BANK, N.A., JPMORGAN CHASE & CO., and CHASE HOME FINANCE LLC,	:	**ORAL ARGUMENT REQUESTED**
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AND DEFINE SCOPE OF DISCOVERY AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR PROTECTIVE ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Defendants JPMorgan Chase Bank, N.A., individually and as successor by merger to Chase Home Finance LLC, and JPMorgan Chase & Co. (collectively, "Chase" or "Defendants") submit this Memorandum of Law in opposition to the Motion to Compel and Define Scope of Discovery filed by Plaintiffs S & A Capital Partners, Inc. ("S & A Capital"), Mortgage Resolution Servicing, LLC ("MRS"), and 1st Fidelity Loan Servicing, LLC ("1st Fidelity") (collectively, "Plaintiffs"), and in support of Chase's cross-motion for a protective order.

PRELIMINARY STATEMENT

As this Court has explained, this "is a breach of contract action arising out of a [commercial] relationship between the parties."[1] Notwithstanding this fact, Plaintiffs' motion to compel seeks wide-ranging discovery into matters that are entirely unrelated to the commercial dispute between the parties. Plaintiffs' motion should be denied for three reasons.

First, Plaintiffs are wrong to assert that they are somehow entitled to greater discovery in this action, merely because their principal – Laurence Schneider – has filed a separate *qui tam* action against Chase in a different federal court. This assertion is contrary to law: ample authority holds that the pendency of an allegedly related action does not expand the scope of discovery in the instant case. Nor is it compelled by the Court's order encouraging the parties to "coordinate" scheduling between the two actions. That order merely prohibits unnecessary duplication; it does not expand the scope of discovery in this case.

Second, Plaintiffs' patently defective RICO claim (which Chase has moved to dismiss) does not entitle them to sweeping discovery into matters unrelated to the parties'

[1] Memorandum Opinion & Order (ECF Doc. No. 87), at 2. A true and correct copy of this Order is attached as Exhibit A to the Declaration of Christian J. Pistilli, submitted herewith.

commercial relationship. Separate and apart from their commercial tort and contract claims, Plaintiffs allege that Chase has engaged in criminal mail and wire fraud in connection with two government settlements. On that basis, Plaintiffs seek discovery of extraordinary breadth and burden. Chase respectfully requests that the Court prohibit any discovery regarding the RICO allegations pending a ruling on Chase's motion to dismiss that claim. Compelling such discovery before a decision on the motion to dismiss may require Chase to spend millions of dollars pursuing discovery that will ultimately be in vain, in the likely event that the Court grants Chase's motion. By contrast, a temporary stay on discovery related to Plaintiffs' RICO claim pending a decision on the motion to dismiss will impose no prejudice on Plaintiffs.

Third, Plaintiffs' motion to compel certain loan-related information was filed before the parties' meet-and-confer process was completed. Chase never declined to produce this information; it merely reported that it was incapable of obtaining the requested information without Plaintiffs' identification of the loans at issue. Plaintiffs have now provided loan numbers (or other identifying information), and accordingly Chase has agreed to produce responsive information for those loans.

BACKGROUND

A. Relevant Allegations

In 2009, MRS purchased a pool of distressed mortgage loans from Chase pursuant to a Mortgage Loan Purchase Agreement ("MLPA").[2] Although the total face value of the loans exceeded $150,000,000, MRS paid only $200,000 for the pool. Compl., Pistilli Decl. Exh. B, ¶¶ 38, 40. The crux of Plaintiffs' Complaint is that Chase breached the terms of the MLPA by

[2] Third Amended Complaint (ECF Doc. No. 67) ("Compl."), ¶ 38. The Third Amended Complaint is attached as Exhibit B to the Declaration of Christian J. Pistilli, submitted herewith.

delivering loans that did not conform to Chase's alleged representations regarding their nature and quality. *Id.* ¶¶ 46-79. Plaintiffs also allege that Chase erroneously purported to release liens and forgave debts relating to loans sold to Plaintiffs. *Id.* ¶¶ 103-145.

Separate and apart from that narrow commercial dispute, Plaintiffs also more broadly allege that Chase has engaged in a nefarious criminal conspiracy to evade its obligations under a pair of settlement agreements with the federal government – the National Mortgage Settlement ("NMS") and the residential mortgage-backed securities settlement ("RMBS"). *Id.* ¶¶ 201-220. According to Plaintiffs, Chase purported to forgive certain mortgage loans that it no longer owned in a fraudulent effort to obtain "credit" for consumer relief that it was required to provide under the settlements. *Id.* ¶¶ 212-213, 218-220. On that basis, Plaintiffs accuse Chase of committing criminal mail and wire fraud in violation of the RICO statute. *Id.* ¶ 209.

B. Chase's Pending Motion to Dismiss

In November 2015, Chase filed a motion to dismiss Plaintiffs' RICO claim.[3] In its motion, Chase explained that Plaintiffs' RICO allegations failed to state a plausible claim for at least two reasons. First, Plaintiffs do not adequately allege the existence of a RICO enterprise with any identifiable structure or common purpose. *See* Memo., Pistilli Decl. Exh. C, at 7-10; Reply, Pistilli Decl. Exh. D, at 1-4. Second, Plaintiffs do not allege a series of related predicate acts that could amount to or pose a threat of continued criminal activity so as to satisfy RICO's continuity requirement. *See* Memo., Pistilli Decl. Exh. C, at 10-13; Reply, Pistilli Decl. Exh. D, at 4-5. Chase's motion to dismiss Plaintiffs' RICO claim is pending before this Court.

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[3] Chase's motion also sought dismissal of the tort claims as duplicative of Plaintiffs' contract claims and for failure to plead the necessary elements of those claims. Chase's memorandum and reply memorandum in support of its motion to dismiss are attached as Exhibits C and D respectively to the Declaration of Christian J. Pistilli, submitted herewith.

C. The *Qui Tam* Action

The principal of the three Plaintiff entities, Laurence Schneider ("Schneider"), has separately filed a *qui tam* action as relator in the U.S. District Court for the District of Columbia. *See United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A., et al.*, No. 1:14-cv-01047-RMC. Schneider alleges in the *qui tam* action that Chase falsely certified compliance with consumer relief requirements of the NMS and the federal Home Affordable Modification Program, purportedly in violation of the federal False Claims Act.[4] In November 2015, after the federal government and every state named in the complaint declined to intervene in support of Schneider's *qui tam* complaint, Chase filed a motion to dismiss the *qui tam* complaint in its entirety.[5] In its motion to dismiss, Chase argued that the complaint fails on both procedural and substantive grounds for a number of independent reasons. The motion to dismiss is pending.

D. Discovery in This Action

On January 8, 2016, Plaintiffs served document requests on Chase.[6] The document requests attached lists of 314 search terms, 26 custodians, and 15 databases that Plaintiffs demanded Chase include in its search for responsive material. Pistilli Decl. Exh. H, Appendix 1-2. Among the included custodians is Chase chairman and CEO Jamie Dimon. *Id.* Appendix 1.

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[4] A true and correct copy of the complaint in the *qui tam* action is attached as Exhibit E to the Declaration of Christian J. Pistilli, submitted herewith.

[5] A true and correct copy of Chase's memorandum of law and its reply memorandum in support of its Motion to Dismiss Relator's Second Amended Complaint are attached as Exhibits F and G respectively to the Declaration of Christian J. Pistilli, submitted herewith. The federal government and named states' declinations are available on the *qui tam* action docket at ECF Doc. Nos. 24, 25-38, 41, 43, 70, 71, 74, 75, 83, 96, 99, 104.

[6] A true and correct copy of Plaintiffs' First Request for the Production of Documents is attached as Exhibit H to the Declaration of Christian J. Pistilli, submitted herewith.

Chase served objections and responses to Plaintiffs' document requests on February 24, 2016.[7] In its responses, Chase agreed to provide Plaintiffs with substantial discovery relating to Plaintiffs' breach of contract and commercial tort allegations. For example, Chase agreed to produce documents and data regarding:

- Communications with or regarding Plaintiffs;
- Documents relating in any way to the MLPA;
- Data regarding the loans purchased by Plaintiffs from Chase; and
- Documents relating to debt forgiveness letters and lien releases for loans purchased by Plaintiffs.

See Pistilli Decl. Exh. I (Responses 1-3, 6, 8-25, 28, 30, 32). Chase, however, objected to providing Plaintiffs with wide-ranging discovery – entirely unrelated to the commercial relationship between Plaintiffs and Chase – regarding the NMS settlement and the RMBS settlement. It also objected to providing Plaintiffs with discovery relating to debt forgiveness letters and lien releases for loans that were not purchased by Plaintiffs.

On March 1, 2016, Plaintiffs' counsel sent a letter to Chase's counsel raising three principal issues with Chase's responses and objections.[8] *First*, Plaintiffs asserted that Chase was obligated to produce documents relevant to the *qui tam* action, even if those documents are not relevant to this action. Pistilli Decl. Exh. J, at 2. Chase responded on March 16, 2016, explaining that the pendency of the *qui tam* case does not entitle Plaintiffs to greater document

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[7] A true and correct copy of Chase's Objections and Responses to Plaintiffs' First Request for the Production of Documents is attached as Exhibit I to the Declaration of Christian J. Pistilli, submitted herewith.

[8] A true and correct copy of this letter is attached as Exhibit J to the Declaration of Christian J. Pistilli, submitted herewith.

discovery in this case than otherwise would be appropriate under Federal Rule of Civil Procedure 26.[9]

Second, Plaintiffs objected to Chase's request that Plaintiffs provide a list of loan numbers for loans that they purchased from Chase. Pistilli Decl. Exh. J, at 3. In its March 16 letter, Chase explained that Chase's systems architecture does not allow it to compile a list of loans that were purchased by Plaintiffs. Pistilli Decl. Exh. K, at 2. By letter dated April 20, Plaintiffs renewed their objection to Chase's request for loan numbers, and further asserted that they were entitled to data regarding loans not actually sold to Plaintiffs.[10] In response, Chase advised Plaintiffs as follows:

> Chase has every intention of producing relevant, reasonably available loan data for loans that are at issue in this litigation. However, Chase needs to have some ability to confirm that a loan has a nexus to this case before it can provide that customer data to plaintiffs. We do not expect this to be a major issue in practice, and again suggest that any issues would be best resolved by meeting and conferring regarding any loans for which there is a disagreement.[11]

On Friday, May 20, 2016, Plaintiffs finally provided Chase with relevant loan information. Specifically, Plaintiffs provided Chase with a list containing loan numbers for loans sold to MRS pursuant to the MLPA – which Plaintiffs refer to as the "Corrupted List" in their Complaint and document requests. Plaintiffs also provided Chase with "partial" lists of loans purchased by 1st Fidelity and S&A Capital. While these lists did not contain loan numbers, they did include

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[9] A true and correct copy of this letter is attached as Exhibit K to the Declaration of Christian J. Pistilli, submitted herewith.

[10] A true and correct copy of this letter is attached as Exhibit L to the Declaration of Christian J. Pistilli, submitted herewith.

[11] A true and correct copy of the May 13, 2016 email from which this response is excerpted is attached as Exhibit M to the Declaration of Christian J. Pistilli, submitted herewith.

borrower names, property addresses, and social security numbers. Plaintiffs' email requested that Chase "advise asap whether you are willing to work with these lists."[12]

Upon receipt of the loan lists, Chase began the process of investigating whether it would be possible to retrieve loan data from its systems using the information provided by Plaintiffs. Before Chase had the opportunity to respond, however, Plaintiffs filed the instant motion to compel. Having had an opportunity to review the lists provided by Plaintiffs, Chase is now in a position to confirm that it can and will produce responsive data regarding the loans identified on the lists provided by Plaintiffs.

Third, Plaintiffs objected to the number of document custodians Chase agreed to search and to its use of targeted search terms to assist it in identifying potentially responsive documents. Pistilli Decl. Exh. J, at 1. Chase responded that it was "appropriate" both to "limit the scope of electronic discovery to those custodians who are likely to be in the possession of non-cumulative, responsive materials" and to use "search terms to isolate potentially responsive documents." Pistilli Decl. Exh. K, at 1-2. Chase, however, offered to meet and confer with Plaintiffs regarding whether there are additional custodians who are likely to have responsive documents and/or "other practicable search terms" that could be used. *Id.* at 2. To date, Plaintiffs have made no efforts to meet and confer with Chase regarding additional search terms or custodians.

On May 9, 2016, Chase sent Plaintiffs a draft protective order relating to the confidentiality and use of documents produced in discovery. By telephone on May 12, 2016, and in writing on May 13, 2016, Chase informed Plaintiffs that it was "prepared to produce

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[12] A true and correct copy of this email is attached as Exhibit N to the Declaration of Christian J. Pistilli, submitted herewith.

substantially all of the documents it has committed to producing within one week of the entry of an appropriate protective order." Pistilli Decl. Exh. M. To date, however, Plaintiffs have refused to agree to the terms of a protective order that includes appropriate limitations on the use of sensitive Chase documents and data produced in this litigation.

Chase's need for a protective order is reasonable and justified. On May 2, 2016, Chase was contacted by a reporter who inquired regarding specific, confidential details the reporter had apparently obtained from two documents Chase filed under seal in the *qui tam* action. Apart from Schneider and his counsel, the only parties who received these sealed filings were counsel from the Department of Justice and certain state attorneys general, and Judge Collyer herself. Chase is therefore especially reluctant to produce documents in this action in the absence of a protective order.

LEGAL STANDARD

Pursuant to Rule 26(b)(1), parties may obtain discovery regarding "nonprivileged matter[s] that [are] relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "The burden of demonstrating relevance remains on the party seeking discovery." *Henry v. Morgan's Hotel Grp., Inc.*, No. 15-CV-1789 (ER)(JLC), 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016). The proportionality rule, as amended, is intended to "'encourage judges to be more aggressive in identifying and discouraging discovery overuse' by emphasizing the need to analyze proportionality before ordering production of relevant information." *Id.* at *3 (citing Fed. R. Civ. P. 26(b)(1) advisory committee's notes to 2015 amendment); *see also Robertson v. People Magazine*, No. 14 CIV.

6759 (PAC), 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) (amendment "serves to exhort judges to exercise their preexisting control over discovery more exactingly"). Under Rule 26(c)(1), this Court may grant a protective order to protect a party from requested discovery that is oppressive or imposes any "undue burden or expense." Fed. R. Civ. P. 26(c)(1).

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO DISCOVERY THAT RELATES ONLY TO THE SEPARATE *QUI TAM* ACTION.

Plaintiffs argue that Chase should be required to produce documents that may be potentially relevant to the sprawling allegations of the *qui tam* action, even if those documents are not within the scope of proper discovery in this case. Plaintiffs' assertion lacks any authority in law. The pendency of the *qui tam* case plainly does not entitle Plaintiffs to greater document discovery in this case than would otherwise be appropriate under Rule 26, especially given that Chase has moved to dismiss all claims asserted in the *qui tam* case.

Numerous courts have held that the pendency of related proceedings provides no basis to "expand[] the scope of discovery." *Johnson Matthey, Inc. v. Research Corp.*, No. 01 CIV.8115(MBM)(FM), 2002 WL 31235717, at *2 (S.D.N.Y. Oct. 3, 2002) (no basis to "expand[] the scope of discovery" to incorporate material relevant only to a different lawsuit); *accord R. E. D. M. Corp. v. Lo Secco*, 44 F.R.D. 356, 357 (S.D.N.Y. 1968) ("Inasmuch as the evidence sought is appropriately relevant only to the proceedings before [another tribunal in a related case], this Court will not allow the[] limited proceedings before it to be used as a vehicle to obtain such evidence.").

In support of their position, Plaintiffs point to Judge Swain's order stating that the parties are "encouraged to undertake efforts to coordinate informally discovery of common issues of fact, insofar as feasible, that may arise in the [*qui tam*] action pending in D.C." Pistilli

Decl. Exh. A, at 3. Plaintiffs contend that this statement somehow "expands" the scope of discovery in this case "to encompass discovery from both" this case and the *qui tam* case. Mem. 15. But that is not what the order says. Judge Swain ordered only that any "[d]iscovery produced or taken in this action will, subject to any pertinent court orders, be deemed taken in the other action, and vice versa."[13] Although the order thus prohibits duplication of discovery between the two cases, it does not expand the scope of discovery beyond the limits set forth in Rule 26.

Chase agrees with Plaintiffs that Judge Swain's order can be understood as an effort to "eliminate waste and to reduce the costs of discovery and litigation." Mem. 16. But Plaintiffs' expanded interpretation of the order would actually have the opposite effect. Granting Plaintiffs' motion would not only require burdensome discovery not otherwise appropriate in this action, it would require burdensome discovery that may not otherwise be required *at all*. Chase's motion to dismiss the *qui tam* action is currently pending before Judge Collyer. If Judge Collyer dismisses the *qui tam* action – or even just the claims relating to the NMS settlement – there will be no need for any of the expanded discovery Plaintiffs seek here.[14]

Plaintiffs are wrong to assert that Chase "opened the door" to this discovery because it purportedly requested documents in this case relevant only to the *qui tam* action. Defendants' discovery requests only seek information related to the allegations in Plaintiffs'

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[13] This Order (ECF Doc. No. 32), and Judge Francis's Amended Pre-Trial Scheduling Order which contains the same language (at 5), are attached to the Declaration of Christian J. Pistilli as Exhibits O and P respectively.

[14] In the event that Chase's motion to dismiss the *qui tam* action is denied, Plaintiffs will have the opportunity to pursue appropriate, non-duplicative discovery in that case. Contrary to Plaintiffs' suggestion (Mem. 4, 21), Defendants do not contend as a categorical matter that no witness deposed in this case could be re-deposed in the *qui tam* action. Rather, the parties could address any such purported need at the appropriate time, in the appropriate case.

Complaint. For example, paragraph 145 of Plaintiffs' Complaint alleges that "Chase's conduct" caused Plaintiffs "to face the ire of governmental entities seeking to enforce property maintenance obligations." Pistilli Decl. Exh. B, ¶ 145. Chase therefore requested documents from Plaintiffs relating to communications between Plaintiffs and government regulators regarding Chase, including "any communications with government regulators related to the allegations in paragraph 145 of the [Complaint]."[15] Indeed, all of the Chase document requests cited by Plaintiffs reference specific allegations made in the Complaint in this action, and all but one reference specific paragraphs in the Complaint. Mem. 19-20; Pistilli Decl. Exh. Q (Requests 15-19, 26). Because Chase was plainly seeking discovery relating only to the allegations in *this case*, Plaintiffs' assertion that Chase "opened the door" to discovery regarding the *qui tam* action is meritless.

For the foregoing reasons, the Court should deny Plaintiffs' request to compel Defendants' production of documents in response to Plaintiffs' Document Requests 5, 7, 26, 27, 29, 31, and 33-41, and should order that the scope of discovery in this case does not include discovery relevant only to the *qui tam* action.[16]

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[15] A true and correct copy of Defendants' First Request for Production of Documents to Plaintiffs is attached as Exhibit Q to the Declaration of Christian J. Pistilli, submitted herewith.

[16] This Court's rules require that a motion to compel "set forth the grounds upon which the moving party is entitled to prevail *as to each request or response*." Local Civil Rule 37.1 (emphasis added). Plaintiffs' motion failed to comply with this requirement. In this opposition, Chase has responded to the issues raised by Plaintiffs in their motion, as they have chosen to present them. Chase, however, respectfully submits that it should not be required to produce additional documents in response to a particular document request unless and until it has had the opportunity to respond to a motion that complies with this rule.

II. THE COURT SHOULD DENY PLAINTIFFS' MOTION TO COMPEL AND GRANT CHASE A PROTECTIVE ORDER REGARDING DISCOVERY THAT IS RELEVANT AT MOST TO PLAINTIFFS' RICO CLAIM.

In addition to asserting that Chase should be required to produce documents in this case merely because the requested documents are allegedly relevant to the *qui tam* action, Plaintiffs also complain about Chase's objections to discovery relating to their RICO claims. Mem. 15. Accordingly, Chase hereby requests that the Court (a) deny Plaintiffs' motion to compel discovery on their RICO claim, and (b) stay any discovery relevant solely to Plaintiffs' RICO allegations until such time as the Court rules on Chase's motion to dismiss that claim. *See* Fed. R. Civ. P. 26(c)(1).

To be clear, Chase is *not* requesting a stay of discovery relating to Plaintiffs' contract or commercial tort claims, the latter of which are also the subject of the pending motion to dismiss. The basis of Plaintiffs' commercial tort claims is that Chase allegedly (1) engaged in fraud at the time it entered into the MLPA with MRS, and (2) interfered in various ways with the relationship between Plaintiffs and the borrowers whose loans Plaintiffs purchased from Chase. In its discovery responses, Chase has agreed to provide discovery relating to both the MLPA and the loans that Plaintiffs purchased from Chase. Chase has objected only to discovery relating to Plaintiffs' *separate* allegation that Chase committed criminal RICO violations in connection with the NMS and RMBS settlements.[17]

Courts in this circuit look to three factors in determining whether discovery on a given subject is properly stayed pending a motion to dismiss: (1) whether "the adjudication of

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[17] Contrary to Plaintiffs' suggestion, Defendants never contended that "the exact same conduct is alleged with regard to all claims" in this case. Mem. 15. Defendants' motion to dismiss argues only that Plaintiffs' *tort* claims – not their sprawling RICO claim – are duplicative of their breach of contract claims. *See* Pistilli Decl. Exhs. C & D.

the pending motion to dismiss may obviate the need for burdensome discovery," *Johnson v. New York Univ. Sch. of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002); (2) whether the motion to dismiss has a legitimate "foundation in law," *In re Term Commodities Cotton Futures Litig.*, No. 12 CIV. 5126 ALC KNF, 2013 WL 1907738, at *5 (S.D.N.Y. May 8, 2013); and (3) whether the party seeking discovery can "demonstrate extraordinary prejudice" resulting from a stay, *Chrysler Capital Corp. v. Century Power Corp.*, 137 F.R.D. 209, 211 (S.D.N.Y. 1991). Each of these factors weighs heavily in favor of a limited stay here.

First, there is a substantial likelihood that highly burdensome and expensive discovery could be avoided if a stay of RICO-related discovery is granted. *See Johnson*, 205 F.R.D. at 434. Plaintiffs seek to compel documents responsive to numerous sweeping requests, including:

- "All documents evidencing communications with the borrowers for whose loans Chase claimed consumer relief pursuant to the Emergency Economic Stabilization Act of 2008, the NMS Consent Judgment, or the RMBS Settlement";
- "Documents sufficient to identify the following information regarding, referring or relating to modifications of all first or second lien mortgage loans for which You claimed consumer relief credits under Exhibit D of the [NMS] Consent Judgment: (i) Borrower name; (ii) Loan number; (iii) Property address; (iv) Original loan amount; (v) Origination date; (vi) Charge off amount; and (vii) Charge off date";
- "All documents regarding, referring or relating to Your communications with the Monitor of the NMS Consent Judgment, or firms and individuals employed by him, discussing [the] RCV1 [database for Chase's charged-off loans]"; and
- "All documents relating to the selection of, and/or criteria for the selection of, and the methodology actually used for the selection of, recipients of debt forgiveness letters, including but not limited to those debt forgiveness letters that were sent by Defendants on or around September 13, 2012, December 13, 2012, and/or January 13, 2013."[18]

[18] Chase has *not* objected to providing Plaintiffs with relevant information regarding debt forgiveness letters that were sent to borrowers for loans that were sold to Plaintiffs. Rather, it (continued…)

Pistilli Decl. Exh. H (Requests 27, 29, 36, 38). These requests are extraordinarily broad and burdensome. Moreover, the requests lack any arguable relevance to Plaintiffs' commercial tort or breach of contract claims. Rather, if relevant to any issue in this case at all, they could only be relevant to Plaintiffs' RICO claim. If Chase were compelled to respond to such requests before a ruling on its motion to dismiss, it could be forced to spend several million dollars undertaking unnecessary discovery, a sum grossly disproportionate to the $200,000 that Plaintiffs paid under the MLPA contract at the heart of this dispute. Compl., Pistilli Decl. Exh. B, ¶ 40; *see* Fed. R. Civ. P. 26(b)(1) (discovery must be "proportional to the needs of the case, considering . . . the amount in controversy"); 8 Fed. Prac. & Proc. Civ. § 2008.1 (3d ed.) (in cases "to recover money[,] the cost of discovery is something the court should have in mind when contemplating limitations on the amount of discovery activity that is appropriate").

The burden of the discovery requested by Plaintiffs is illustrated by the documents that Plaintiffs seek with respect to Patrick "Mike" Boyle, one of the Chase employees who interacted with Plaintiffs. Mr. Boyle has more than 1.4 million electronic documents from the time period from January 1, 2008 through December 31, 2015 – which encompasses some (but not all) of the time-period requested by Plaintiffs in their document requests. Declaration of Phil Verdelho ¶ 15; Pistilli Decl. Exh. H, at 3. As part of its efforts to identify responsive documents, Chase employed a set of targeted search terms designed to capture documents relevant to the commercial relationship between Plaintiffs and Chase, which yielded a total of 27,052 potentially responsive documents. Verdelho Decl. ¶ 21.

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objects only to providing information relating to other borrowers that have no connection to Plaintiffs.

By contrast, the use of Plaintiffs' proposed search terms – which were designed to capture documents related to their RICO allegations and their *qui tam* case – yields a staggering 661,161 documents (including attachments). Verdelho Decl. ¶ 17. Applying a rule of thumb of six pages per electronic document, this equates to almost four million pages of requested materials for Mr. Boyle alone. Based on a standard set of assumptions commonly used by Chase to estimate the cost of document productions, Chase estimates that it would take a team of five full-time reviewers approximately twelve months to perform an initial review of those documents, and the total cost of reviewing and producing Mr. Boyle's documents would be nearly one million dollars. *Id.* ¶¶ 19-20. Assuming that the same costs applied for each of the 26 custodians Plaintiffs have requested, the total cost of reviewing all the custodians' documents, for the period from January 1, 2008 through December 31, 2015, would be approximately $25 million.

The burden that would be imposed by the discovery Plaintiffs seek is far from proportional to the needs of a case arising principally out of a $200,000 debt sale contract. Compl., Pistilli Decl. Exh. B, ¶ 40. At a minimum, the breadth and burden of the requested discovery weighs heavily in favor of a stay. *See Spinelli v. Nat'l Football League*, No. 13 CIV. 7398 (RWS), 2015 WL 7302266, at *2 (S.D.N.Y. Nov. 17, 2015) ("A stay may . . . have the advantage of simplifying and shortening discovery in the event that some of Plaintiffs' claims are dismissed and others survive, by limiting the scope of the parties' inquiry to claims that have been established as potentially viable." (citing *Nietzke v. Williams*, 490 U.S. 319, 326-27 (1989))); *Hal Leonard Publ'g Corp. v. Future Generations, Inc.*, No. 93 CIV 5290 (JSM), 1994 WL 163987, at *5 (S.D.N.Y. Apr. 22, 1994) ("[e]conomy and efficiency dictate" stay of "costly and possibly unnecessary" discovery related to RICO claim).

Second, Defendants' motion to dismiss plainly has a "foundation in law." *In re Term Commodities Cotton Futures Litig.*, 2013 WL 1907738, at *5 (internal quotation marks omitted); *see also Gandler v. Nazarov*, No. 94 Civ. 2272 (CSH), 1994 WL 702004, at *4 (S.D.N.Y. Dec. 14, 1994) (stay of discovery appropriate where motion to dismiss "is potentially dispositive, and appears to be not unfounded in the law"). It is well-settled that "courts should strive to flush out frivolous RICO allegations," like those in this case, "at an early stage of the litigation." *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996) (citation and quotation marks omitted), *aff'd*, 113 F.3d 1229 (2d Cir. 1997). Here, among other infirmities, and as explained in detail in Chase's briefs, Plaintiffs failed to allege the existence of a valid RICO enterprise. *See* Pistilli Decl. Exh. C, at 7-10; Pistilli Decl. Exh. D, at 1-4. Although Plaintiffs assert the existence of an enterprise consisting of Chase and certain unidentified third-parties, the Complaint fails to plead any facts regarding the supposed interactions among the unnamed members of the purported enterprise or to allege any common purpose the third-parties shared with Chase. Plaintiffs' allegations also fail to satisfy RICO's continuity requirement. *See* Pistilli Decl. Exh. C, at 10-13; Pistilli Decl. Exh. D, at 4-5. Each of these arguments "is potentially dispositive" of the RICO claim, and at the very least is "not unfounded in the law." *Gandler*, 1994 WL 702004, at *4.

Third, Plaintiffs cannot demonstrate any prejudice, much less "extraordinary prejudice," *Chrysler Capital Corp.*, 137 F.R.D. at 211, from a temporary stay of RICO discovery while the Court decides the pending motion to dismiss. As this Court has made clear, when the "viability" of a claim remains "unresolved, a delay in discovery, without more, does not amount to unfair prejudice." *Spinelli*, 2015 WL 7302266, at *2; *see also Chrysler Capital Corp.*, 137 F.R.D. at 211 ("Plaintiffs will not be damaged by the grant of a stay of discovery until the

motion[] to dismiss [is] decided." (citing *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987)).[19]

Accordingly, the Court should deny Plaintiffs' motion to compel and stay any discovery relating solely to Plaintiffs' RICO claim until such time as the Court rules on Chase's pending motion to dismiss.[20]

III. PLAINTIFFS' PREMATURE MOTION RELATING TO THE PRODUCTION OF LOAN DATA SHOULD BE DENIED.

Plaintiffs have separately moved to compel Chase to provide certain information regarding loans sold (or offered for sale) to Plaintiffs. This portion of Plaintiffs' motion is premature. In any event, the Court should deny the motion for the reasons explained below.

Request Nos. 16, 17, 18 and 21. In these four requests, Plaintiffs seek information relating to loans contained on what Plaintiffs refer to as the "Corrupted List." Chase responded to Plaintiffs that it would, among other things, "query the appropriate database(s) and retrieve any reasonably accessible data regarding the loans," upon receipt of a list of loans from Plaintiffs. Plaintiffs objected to this response solely on the ground that Plaintiffs believed they should not have to provide Chase with a list. Nevertheless, on May 20, 2016 – just one week before filing their motion to compel – Plaintiffs provided Chase with the so-called "Corrupted List" referenced in these four requests. Chase is currently retrieving responsive data regarding

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[19] Even a potential need to reopen depositions later as a result of a stay establishes no prejudice, because "any extra cost to plaintiff is more than outweighed by the expense to [the defendant] (and to plaintiff) of conducting discovery on a claim that may be dismissed as legally insufficient." *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV.2120(LMM)(AJP), 1996 WL 101277, at *3 (S.D.N.Y. Mar. 7, 1996).

[20] For the avoidance of doubt, Chase does not concede that Plaintiffs' Document Request Nos. 5, 7, 26, 27, 29, 31, or 33-41 are relevant or proportional to the needs of the case, even assuming *arguendo* that the Court denies Chase's motion to dismiss the RICO claim.

these loans, and will provide responsive data to Plaintiffs. Accordingly, Plaintiffs' motion to compel regarding these four requests should be denied as moot.

Request No. 3. This request seeks information regarding all loans sold or offered for sale to Plaintiffs. Chase responded to this request by stating that it would produce available, non-privileged data regarding any loan purchased by Plaintiffs from Chase, upon receipt of a list of loans from Plaintiffs.[21] Plaintiffs again objected to this response on the ground that Plaintiffs believed they should not have to provide Chase with a list. But on the same day Plaintiffs provided Chase with the so-called "Corrupted List" of loans purchased by Plaintiff MRS, they also provided two other lists of loans, purchased by Plaintiffs 1st Fidelity and S&A Capital. Chase is currently in the process of retrieving available, responsive data regarding the loans on each of these lists, and will provide that data to Plaintiffs. Plaintiffs' motion to compel regarding this request therefore is again largely moot.

To the extent Plaintiffs argue that Chase must identify additional loans sold to Plaintiffs (and produce data regarding those loans), their motion should be denied for two separate reasons.

First, Plaintiffs' request is not reasonable. Chase maintains data regarding mortgage loans that have been charged-off for accounting purposes, like the loans allegedly sold to Plaintiffs, in a database called "Recovery One" or "RCV1." Declaration of Michael J. Zeeb ¶ 2. The RCV1 database is searchable only with a limited set of search parameters, including the loan number and the borrower's social security number. *Id.* ¶ 3. Subject to limited exceptions

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[21] Although Chase's written response was limited to loans purchased under the MLPA, Chase made clear during the subsequent meet-and-confer process that it would produce loan data relating to any loan that has a *bona fide* nexus to the parties' commercial relationship, including other loans purchased by Plaintiffs.

not relevant here, the RCV1 database cannot be queried using the identity of the entity to which a loan has been sold. *Id.* ¶ 4.[22] It simply is not possible for Chase to generate a list of loans that it sold to Plaintiffs. *Id*.

Second, it is entirely appropriate to require Plaintiffs to identify the specific loans that form the basis for their claims. Plaintiffs do not meaningfully dispute that they know which loans they purchased from Chase; nor do they deny that they can easily provide identifiers of those loans or borrowers to Chase.

Request Nos. 28 and 31. Plaintiffs allege that Chase released liens on properties securing debt sold to other (unnamed) entities aside from Plaintiffs and sent debt forgiveness letters to borrowers whose loans had been sold to these other entities. These requests seek information relating to lien releases and debt forgiveness letters, *irrespective of whether the loans were sold to Plaintiffs*. To the extent that these requests seek information relating to loans that were not sold to Plaintiffs, they are overbroad, disproportionate to the needs of the case, and seek irrelevant information. Moreover, it would be especially inappropriate to order the production of this information prior to a decision on Chase's motion to dismiss. *See supra* Part II. To the extent these requests seek data relating to loans that were purchased by Plaintiffs, Chase has already committed to producing this data (subject to the limitations discussed above). The Court should therefore deny Plaintiffs' motion to compel with respect to these requests and order that Chase is under no obligation to provide discovery to Plaintiffs regarding loans with no nexus to them.

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[22] In rare circumstances where "a special Queue or other identifier" was created at the time of a debt sale, it is possible to query RCV1 using that identifier. However, it was not Chase's usual practice to create such identifiers, and Chase has confirmed that no such identifiers were created for any debt sales to the Plaintiffs. Zeeb Decl. ¶ 4.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied in its entirety and Defendants' cross-motion for a protective order should be granted.

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Respectfully submitted,

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