[redacted] *Plaintiff,* vs. FCA US LLC c/o CT Corporation Systems, Statutory Agent 4400 Easton Commons Way, Suite 125 Columbus, Ohio 43219 and TRI STATE CONCRETE INC. c/o Dean Dillingham, Statutory Agent 1 Millikin Street, Suite A Hamilton, Ohio 45013 and TRACY WAYNE MOORE 1226 North Frieda Drive Fairfield, Ohio 45014 *Defendants.*	CASE NO. CV 2018-07-1583 COURT OF COMMON PLEAS BUTLER COUNTY, OHIO JUDGE HOWARD **PLAINTIFF'S SECOND MOTION TO COMPEL DEFENDANT FCA US LLC TO RESPOND TO PLAINTIFF'S DISCOVERY AND PRODUCE DOCUMENTS**

On January 22, 2019, the Court directed FCA to "respond fully and completely to all outstanding discovery requests made in this matter and [that it] shall do so by February 5, 2019." FCA did not meet that deadline. Instead, FCA has dribbled out document productions and discovery supplements over the spring and summer. As of today, FCA has *still* not "respond[ed] fully and completely to all outstanding discovery requests made in this matter," as the Court's Order directed. On no fewer than 14 different occasions, Plaintiff and FCA have corresponded about these discovery issues. Plaintiff has even asked FCA on five occasions *by when* it would

provide full and complete responses, but FCA has refused to answer. *See* Composite of Requests (Ex. 1).

With our trial date drawing near, Plaintiff asks the Court to again direct FCA to "respond fully and completely" to six of Plaintiff's original discovery requests: Requests for Production 22, 24, 32, 33, and 57, and Interrogatory 28. The reason Plaintiff selects these six requests is *not* because FCA's responses to the other requests have been complete, but because these six are the most crucial requests on which Plaintiff must focus before trial.

I. STATEMENT OF FACTS

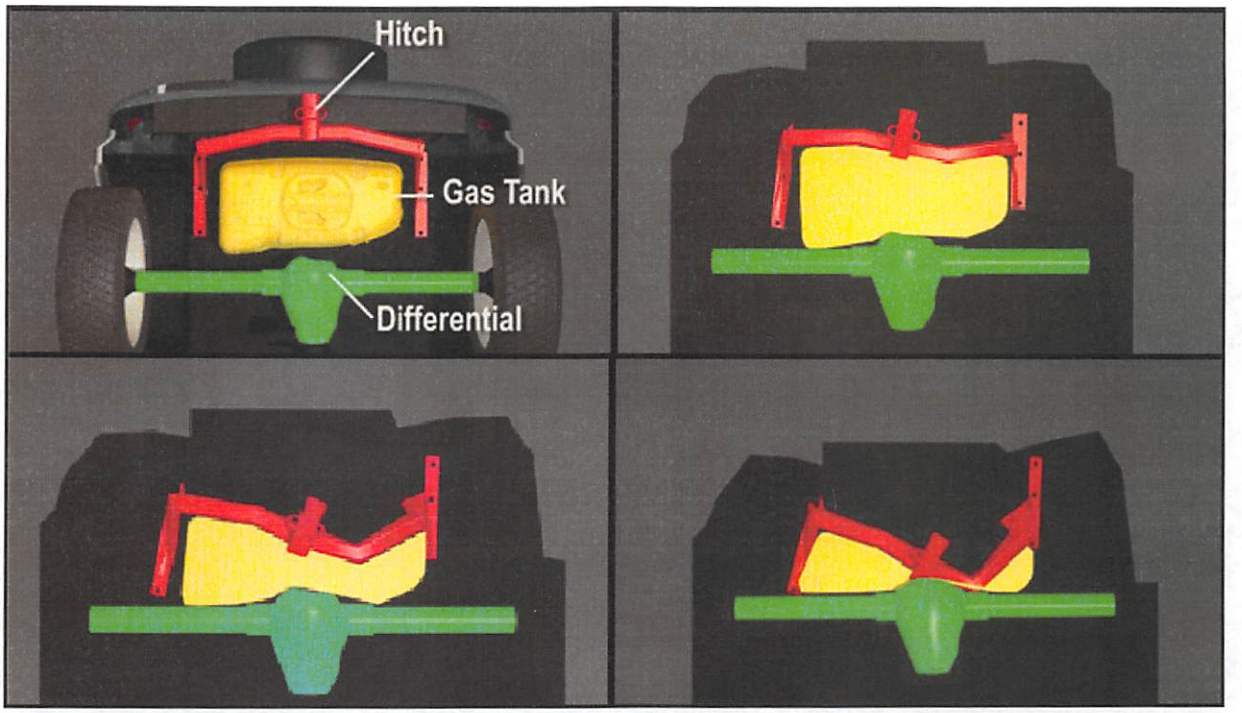
A. Factual Background.

This is a relatively straightforward product liability case concerning a 2004 Jeep Liberty (the "Subject Jeep"). Since the late 1970s, FCA knew that putting a gas tank in the extreme rear of a vehicle would lead to fires in rear-impact collisions. (Compl. ¶¶ 10-36.) FCA nonetheless did exactly that with its 1993-2004 Jeep Grand Cherokees, 1993-2001 Jeep Cherokees, and 2002-2007 Jeep Liberties. (Compl. ¶¶ 11, 32-35.) Then, when forced to recall these Jeeps with exposed gas tanks, FCA provided customers with a free trailer hitch that not only failed to protect the tank—as FCA knew it would—but made things worse. (Compl. ¶¶ 60-71.)

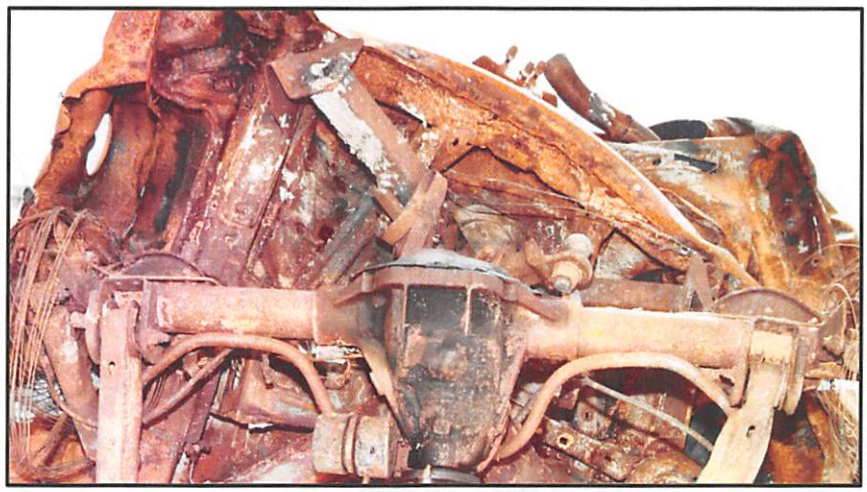
There can be little doubt that the exposed gas tank in these rear-tank Jeeps is, as FCA's own engineer conceded, "vulnerable to rear impact." Estes Dep. 67:10-11 (Ex. 2). Below are two photographs from a 2004 Jeep Liberty that has been purchased to serve as an exemplar vehicle. In these photographs, the gas tank has been wrapped in red tape so that it can be easily identified, but the Jeep is otherwise unmodified. The Court may conclude upon viewing the photographs that this was not a great place to strap 19.5 gallons of gasoline.

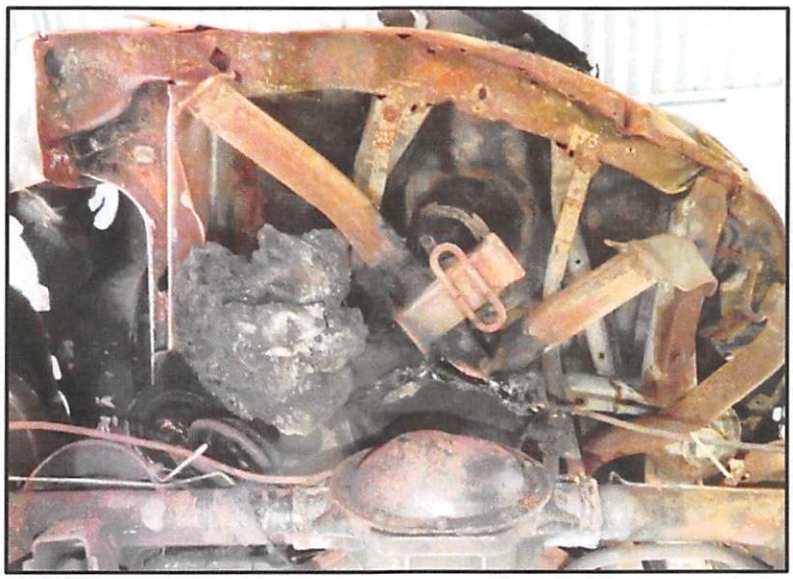
When a recalled Jeep equipped with a trailer hitch receiver gets rear-ended, the trailer hitch frequently buckles in the middle. Then the hitch receiver gets driven forward like a spear—into the area occupied by the plastic gas tank. That plastic gas tank is then pinned between the buckling hitch receiver and the Jeep's rear axle. The buckling metal hitch receiver splits the plastic tank and gasoline is propelled out of tank, creating a volatile vapor that can ignite. Notably, each gallon of gasoline has the energy equivalent of sixty sticks of dynamite. Chrysler, Fiat, and FCA each knew of these facts.

Below are screenshots from the animation that accident reconstruction expert Bryant Buchner will testify about when he is deposed on September 17, 2019. It shows how FCA's hitch receiver buckled and speared the gas tank on Mrs. Gilreath's Jeep Liberty.



It happens the same way in real-life collisions. Below are three images from the undersides of Jeep Liberties in which FCA's own hitch receivers installed as part of FCA's "recall" speared the exposed gas tanks. The first is from the 2017 collision in this case. The second and third photographs are from similar collisions in 2018 and 2019, respectively.





Just as FCA knew about the safety issues posed by rear-tank vehicles, FCA knew for decades that collapsing seatbacks were dangerous. (Compl. ¶ 37.) Historical testing shows that FCA's seatbacks repeatedly failed in automotive tests. (Compl. ¶ 40.) Despite FCA's knowledge regarding the danger posed by its faulty seatbacks, FCA continued to manufacture and sell vehicles with seatbacks that put occupants at risk. (Compl. ¶¶ 57-57.)

The seatback defect is particularly dangerous when coupled with an exposed rear gas tank—because when the Jeep is rear-ended, the occupant is thrown rearward, which (1) moves the occupant closer to the fire, (2) disorients the occupant (making escape less likely), and (3)

makes the occupant harder for bystanders to reach (making rescue less likely). The facts of this case exemplify those dangers.

On October 20, 2017, Mrs. Gilreath was driving the Subject Jeep. (Compl. ¶ 80.) A truck driven by Defendant Moore and owned by Defendant Tri-State Concrete Inc. rear-ended the Subject Jeep. (Compl. ¶ 82.) The trailer hitch—FCA's purported fix to the defective rear-tank—buckled and speared the exposed rear tank. (Compl. ¶ 84.) Simultaneously, Mrs. Gilreath's seatback collapsed and her body fell rearward. (Compl. ¶ 86.) The gasoline ignited and Mrs. Gilreath burned to death. (Compl. ¶¶ 87-93.) Two witnesses have testified in deposition that (1) Mrs. Gilreath was lying way back (because of the seat back collapse), (2) she tried to free herself from the burning Jeep, but could not, and (3) that they tried to rescue her, but could not. *See* Calvin Todd Dep. 25:13-26:19, 26:20-24, 53:22-54:9 (Ex. 3); Karl Enzweiler Dep. 12:9-24, 17:23-18:3, 19:3-24 (Ex. 4).

B. FCA Has Not Completely Responded to Discovery.

On January 22, 2019, the Court ordered FCA to "respond fully and completely to all outstanding discovery requests made in this matter and shall do so by February 5, 2019." 01/22/2019 Order (Ex. 5).

By February 5, 2019, FCA had not "fully and completely responded to all outstanding discovery[.]" Plaintiff made numerous attempts to meet and confer regarding FCA's outstanding discovery responses with minimal success. For the sake of brevity, the timeline of Plaintiff's attempts to meet and confer is outlined as follows:

Ex.	Date	Author/Recipient	Summary
6-A	3/1/2019	Plaintiff to FCA	Plaintiff writes FCA about a 38,425-page gap in its production, as well as other issues viewing documents FCA produced

Ex.	Date	Author/Recipient	Summary
6-B	3/1/2019	FCA to Plaintiff	FCA purports to supplement its responses to ROG No. 28 and RPD No. 57. Notably, none of the supplementations to ROG 28 contained a sworn list of other similar incidents.
6-C	3/20/2019	FCA to Plaintiff	FCA purports to supplement its responses to RPD Nos. 20 and 65. By separate correspondence, FCA purports to supplement RPD No. 73
6-D	3/20/2019	Plaintiff to FCA	Plaintiff reminds FCA that complete responses were due under the Court's Order as of February 5, 2019. Plaintiff asks for the ***fourth time*** when FCA intends to complete its discovery. FCA ***never responded.***
6-E	3/27/2019	Plaintiff to FCA	Plaintiff—again—asks FCA when it intends to complete discovery and cites to the Court's Order. FCA ***never responded.***
6-F	4/25/2019	FCA to Plaintiff	FCA continues its piecemeal supplementation by purporting to supplement RPD No. 73
6-G	4/26/2019	FCA to Plaintiff	FCA purports to supplement RPD No. 14
6-H	5/14/2019	FCA to Plaintiff	FCA purports to supplement ROG No. 6. FCA only identified 3 FCA employees with relevant knowledge
6-I	5/23/2019	Plaintiff to FCA	Plaintiff sends a good faith letter outlining the deficiencies in FCA's responses, including, but not limited to issues with RPD Nos. 22, 24, 32, 33, 57 and ROG 28—the discovery requests at issue in this motion. Plaintiff requests complete responses by **6/13/2019**
6-J	6/13/2019	FCA to Plaintiff	FCA purports to respond to Plaintiff's good faith letter by claiming the Court did not order responses to the subject discovery. FCA also claims the subject requests are unduly burdensome without a shred of support or explanation of anticipated costs or expenses
6-K	7/11/2019	Plaintiff to FCA	Plaintiff explains why FCA's objections lack merit and allows an additional 10 days before filing a motion to compel

Ex.	Date	Author/Recipient	Summary
6-L	7/12/2019	FCA to Plaintiff	FCA purports to supplement RPD Nos. 23, 40, 60, 65, and 73
6-M	7/18/2019	FCA to Plaintiff	FCA purports to supplement ROG Nos. 6 and 9 and responds to Plaintiff's Second ROGs
6-N	7/19/2019	FCA to Plaintiff	FCA responds to Plaintiff's 7/11/2019 good faith letter by disagreeing that any further response is necessary. FCA still has not answered the simple question of *when it will complete discovery.*

Good Faith Correspondence (Ex. 6).

Plaintiff files the instant motion, seeking an Order compelling FCA to fully and completely respond to Request for Production 22, 24, 32, 33, and 57, and Interrogatory 28.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Scope of Discovery is Broad.

"[T]he scope of pretrial discovery is broad and parties may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter." *Tucker v. CompuDyne Corp.*, 18 N.E.3d 836, 841 (Ohio Ct. App. 2014). Rule 26 specifically states that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Ohio Civ. R. 26(B)(1).

Here, Plaintiff seeks documents and information that are relevant to his claims and reasonably calculated to lead to the discovery of admissible evidence. The categories of outstanding discovery can be distilled down as follows:

1. Documents and communication relating to ***other similar incidents***,

2. Documents and communications relating to the ***rear-mounted gas tanks*** found in the Subject Jeep and substantially similar vehicles, and
3. Documents and communications relating to the ***driver's seats*** found in the Subject Jeep and substantially similar vehicles.

Each of the requests within the above-enumerated categories is directly relevant to Plaintiff's claims. Accordingly, the Court should compel complete responses to Document Request Nos. 22, 24, 32, 33, and 57 and Interrogatory No. 28. Attached as Exhibit 7 is a document that lists, as to each of these six requests, the exact text of the request followed by the exact text of every response and supplemental response that FCA has made.

B. Other Similar Incidents.

1. FCA should produce evidence of other similar incidents.

In products liability cases, other similar incidents ("OSIs") are admissible to show a defendant's knowledge, duty to warn, the existence of a defect, causation, and negligent design. *Taylor v. Freedom Arms, Inc.*, 2009-Ohio-6091, ¶¶ 52-55 (Ohio Ct. App. 2009) (prior incidents involving an allegedly defective firearm were admissible to show "knowledge, duty to warn, existence of a defect, causation, and negligent design . . .").

Plaintiff seeks evidence of other similar incidents involving the Jeeps with exposed rear tanks. Specifically, Plaintiff seeks evidence about rear impact collisions involving the Jeeps that were part of the *same* NHTSA investigation—*i.e.*, the 1993-2004 Grand Cherokees, 1993-2001 Cherokees, and 2002-2007 Liberties [redacted] All these Jeep models had substantially similar characteristics to the Subject Jeep. That is, each had gas tanks located within eleven inches of the extreme rear of the Jeep and hanging down about six inches. [redacted] As the FCA Chairman and CEO

who presided over the NHTSA investigation conceded, these rear-tank Jeeps were similar enough that a problem with one of these Jeep models meant that FCA "has and would look at" the other models. Marchionne Dep. 43:8-17 (Ex. 10). For those reasons and others, other courts have found that these Jeeps with exposed tanks were "substantially similar." *E.g.*, *Chrysler Group, LLC v. Walden*, 792 S.E.2d 754, 763 (Ga. Ct. App. 2016); *cf. Taylor*, 2009-Ohio-6091, ¶ 53 (citing *Renfrom v. Black*, 556 N.E.2d 150 (Ohio 1990) (Ohio also applies the rule of "substantial similarity")).

For the Court's reference, photographs of these Jeeps are below. On each, the exposed rear-mounted gas tanks are circled in red. The Court will note that all have exposed rear gas tanks.

In *Walden*, Chrysler Group (FCA's predecessor) appealed a Georgia trial court's decision to admit OSIs involving the same Jeep models with rear-tank designs at issue in this case. *Id.* at 762. The Court of Appeals rejected the *exact same* argument FCA makes in this case, relying on the *exact same* evidence present here. The court held that:

(1) The various Jeep SUVs had "gas tank[s] located approximately eleven inches from the rear of the vehicle and hanging down about six inches." *Id.*

(2) The NHTSA investigated all the similar Jeep models "in a single defect investigation and defined the defect as 'the placement of the fuel tanks in a position behind the axle and how they were positioned. . . .'" *Id.*

(3) Marchionne's sworn admissions that "tank-related fires with one of the Jeep models would prompt Chrysler to investigate others." *Id.* at 762-63.

The Court held that "[s]imply because the other incidents involved different Jeep models does not make them inadmissible." *Id.* at 763 (citing *Ford Motor Co. v. Reese*, 684 S.E.2d 279 (Ga. Ct. App. 2009)).

There is another critical reason for the Court to require FCA to produce the requested information—Plaintiff is *conducting discovery*, not yet seeking to admit evidence. *E.g.*, *Kroft v. Broan-Nutone, LLC*, 2012 WL 13026969, at *3 (S.D. Ohio Apr. 5, 2012) (allowing plaintiff to obtain discovery of different models in product liability case, over defendant's objection, where other models share "pertinent characteristics" to the accident-causing model); *accord Roe v. Planned Parenthood Sw. Ohio Region*, 912 N.E.2d 61, 67 (Ohio 2009) ("The information sought need not be admissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence."). If FCA wants to later argue that evidence is not *admissible* because one exposed-tank Jeep is not similar to another, FCA can make that argument to the Court. But FCA

should first *produce the evidence*, so that the Court will have something to look at when it makes its rulings about substantial similarity. It is not appropriate for FCA to unilaterally decide what is similar, and what is not, and to withhold evidence on that basis. Deciding what is substantially similar is a role for the *Court*, not FCA. *See St. Paul Fire & Marine Ins. Co. v. Baltimore & O.R. Co.*, 195 N.E. 861, 864 (Ohio 1935); *see also Odom v. Welsh Co.*, 1988 WL 121032, at *3 (Ohio Ct. App. Nov. 10, 1988).

2. FCA's response to Interrogatory No. 28 is incomplete.

> [28] Identify all customer complaints, customer comments, letters, emails, messages, claims (litigated and non-litigated), warranty claims, and other notice of any collision in which a 1993-2004 Jeep Grand Cherokee, 1993-2001 Jeep Cherokee, or 2002-2007 Jeep Liberty leaked fuel after being struck in the rear. (This interrogatory includes, but is not limited to, information from FCA's CAIR database, the CAIR record, inspection reports, and photographs related to CAIR). Please include in your response a detailed description of the incident, including date and location, alleged injury, vehicle model and year, VIN number for the vehicle, name of the plaintiff/customer and the plaintiff's attorney (if any), and when you first became aware of the incident.

P.'s 1st ROG No. 28 (Ex. 11).

This request seeks information that is directly relevant toward proving a material part of Plaintiff's case—FCA's knowledge of the existence of a defect. While FCA produced a list of *some* OSIs created by its counsel in response to Plaintiff's Requests for Production, FCA has not provided a complete Interrogatory response—and FCA does not even claim that it has. Rather, FCA appears to be withholding the requested evidence and information based on its unilateral assessment that the other Jeep vehicles are dissimilar.

Specifically, instead of substantively responding, FCA provides that [redacted] This

response is not really a response at all, which is not proper. Plaintiff seeks a complete response to ROG 28.

3. FCA's response to Request for Production No. 57 is incomplete

> [57] Produce customer correspondence, claims (litigated and non-litigated), and other notice of any incident (without regard to whether the incident culminated in a lawsuit) involving post-impact fire or post-impact gasoline leakage in a 1993-2004 Jeep Grand Cherokee, 1993-2001 Jeep Cherokee, or 2002-2007 Jeep Liberty. This request includes, but is not limited to, information from FCA's CAIR database, the CAIR record, inspection reports, and photographs related to CAIR. This request is limited to occasions on which any such Jeep was struck in the rear.

P.'s 1st RPD No. 57 (Ex. 13).

Similar to ROG 28, RPD 57 seeks documents relating to OSIs. In response to RPD 57, FCA objected and refused to completely respond, [redacted] Nevertheless, FCA has supplemented its original response *four times* by producing various documents.[1] FCA ***refuses*** to tell Plaintiff when it intends to complete discovery, so Plaintiff has no idea what documents, if any, are outstanding. In order for Plaintiff to move forward with depositions in this case, FCA must produce *all* responsive documents. Accordingly, an order compelling FCA to produce all documents responsive to RPD 57 is warranted.

C. Discovery Regarding Rear-Mounted Gas Tanks.

FCA knew about the dangers of rear gas tanks for decades but put exposed gas tanks in the rear of its Jeeps anyway. (Compl. ¶¶ 10-36.) FCA also knew its trailer hitch did nothing to

[1] This sort of piecemeal production is wasteful and improper. *E.g.*, *Oleoproteinas Del Sureste, S.A. v. French Oil Mill Mach. Co.*, 202 F.R.D. 541, 546 n. 11 (S.D. Ohio 2000) (discouraging piecemeal production of documents and describing as untimely and dilatory); *see also Kennoy v. Synchrony Bank*, No. 3:16-CV-2034, 2017 WL 2215279, at *3 (M.D. Pa. May 19, 2017) (noting that "judicial economy is best accomplished by the avoidance of piecemeal litigation, including piecemeal discovery."); *Del Valle v. Bechtel Corp.*, No. 06-3654, 2008 WL 4107325, at *2 (Mass. Super. July 30, 2008) (finding that the goal of efficiently using judicial resources "clearly disfavors extended and piecemeal discovery").

lessen that danger but, nevertheless, installed the hitch receivers as a "recall." (Compl. ¶¶ 60-71.) Plaintiff requested, among other things, communications and other documents related to design changes, fuel leakage, gas tank damage, fuel system integrity, and discussion of the safety of rear-mounted gas tanks. P.'s 1st RPD Nos. 22, 32, 33 (Ex. 13). These documents and communications regarding rear-mounted gas tanks on the Subject Jeep and other similar vehicles are relevant. FCA should respond fully.

1. FCA's response to Request No. 22 is deficient.

> Produce all documents addressing or reflecting consideration of design changes to the fuel system of the Grand Cherokee, Cherokee, or Liberty without regard to whether the suggestions were actually adopted. This request is limited to changes related to gas tank placement (as it relates to safety or protection upon impact), gas tank reinforcement, gas tank protection (including but not limited to shields, hitches, or other devices considered for its protection), post-impact gasoline leakage, the potential for post-impact gasoline leakage, or post-impact fire.

P.'s 1st RPD No. 22 (Ex. 13).

This request is directly relevant to Plaintiff's case. FCA moved the gas tank from the extreme rear to midship of the Grand Cherokee in 2005 and the Liberty in 2008. FCA considered moving the Grand Cherokee's gas tank from the rear to midship for the 1999 model year but, ultimately, decided against it. FCA's reasons for not moving the Grand Cherokee's gas tank until 2005, and the Liberty's gas tank until 2008, despite knowledge of the danger posed, are unclear because FCA will not produce these documents. These reasons are important, and evidence about them is discoverable.

It is well-settled, black letter law that evidence about moving the gas tank is admissible. The Ohio Supreme Court has held that Rule 407, which addresses subsequent remedial measures, "is not applicable to products liability cases premised upon strict liability in tort." *McFarland v. Bruno Mach. Corp.*, 626 N.E.2d 659, 664 (Ohio 1994). Thus, Plaintiff's request

seeks documents that are relevant and reasonably calculated to lead to the discovery of admissible evidence. FCA must completely respond.

FCA produced some documents but appears to have withheld many others based on objections that the Jeep Cherokee and Jeep Grand Cherokee [redacted] FCA has not explained why an exposed rear gas tank could be safe in one Jeep, but dangerous in another. Moreover, whether one Jeep with an exposed rear tank is substantially similar to another Jeep with an exposed rear tank is an issue for the Court to decide—not for FCA to unilaterally decide and use as grounds for withholding the information in discovery. *See St. Paul Fire & Marine Ins. Co.*, 195 N.E. at 864; *see also Odom*, 1988 WL 121032, at *3. The Court should therefore compel a complete response to ROG 22.

2. FCA's responses to Request Nos. 32 & 33 are deficient.

> [32] Produce all communications and other documents discussing, evaluating, or analyzing fire, fuel leakage, gas tank damage, or fuel system integrity in the 1993-2004 Grand Cherokees, 1993-2001 Cherokees, or 2002-2007 Liberties in connection with rear impact collisions. This request excludes (i.e. does not seek) communications exchanged with outside counsel in connection with a then-pending case but includes (i.e. does seek) internal FCA documents, even if these documents were later sent or provided to outside counsel.

P.'s 1st RPD No. 32 (Ex. 13).

> [33] Produce all communications or other documents discussing, evaluating, or analyzing the advantages, disadvantages, costs, or safety of rear-mounted gas tanks (i.e. gas tanks mounted behind the rear axle or rear wheels) compared or contrasted to midships tanks (i.e., tanks mounted forward of the rear axle or rear wheels). This request encompasses the years 1978 (the year of the Baker memorandum) to 2017 (the year of the subject collision). This request includes but is not limited to meeting minutes, agendas, or summaries from the Executive Committee, Finance Committee, Critical Product Problem Review Group, Board of Directors, Fuel Tank Core Group, Rear Impact Tech Club, High Speed Rear Impact Tech Club, Fuel Systems Tech Club, Fuel Supply Department, or the FMVSS 301 Steering Committee.

P.'s 1st RPD No. 33 (Ex. 13).

The evidence requested in these requests goes to the heart of this case: these documents will show what FCA knew about the dangers of exposed tanks, and when FCA knew it. FCA has refused to supplement its response to either request since the Court's Order. Instead, FCA contends it already produced documents responsive to these requests, which is dubious. *See* 6/13/2019 Wright to Baskam Letter (Ex. 6-J). By way of example, FCA has produced suspiciously few emails concerning gas tank damage from rear-end collisions or gas tank placement in Jeep models at issue. FCA should be required to confirm that it has produced all responsive documents, *including emails*.

FCA also justifies its refusal to supplement its production by claiming: "[t]o search for every document, over decades, that mention the term 'gas tank' would be unduly burdensome and disproportionate to the needs of the case. FCA US maintains its responses and objections to this request." (*Id.*) FCA's 'proportionality' objection is, to be polite, non-meritorious. Deanna Gilreath burned to death. Many victims before her burned to death. Multiple victims *after* her have burned to death. More victims of this defect and this hitch receiver *will* burn to death, unless FCA conducts a real recall. FCA can—and should—produce the evidence.

Regardless, Ohio does not follow the "proportionality standard," but instead, the broader "reasonably calculated" standard. *See* Ohio Civ. R. 26(B)(1) (stating that "[p]arties may obtain discovery regarding any matter, not privilege, which is relevant" or "reasonably calculated to lead to the discovery of admissible evidence."). The sought-after evidence is indisputably relevant and reasonably calculated to lead to the discovery of admissible evidence, and therefore discoverable under Ohio Civil Rule 26. FCA must fully respond and produce the evidence.

D. Discovery Regarding Seat Back Testing.

FCA knew about defects in its seat backs but continued to manufacture and sell vehicles with defective seat backs. (Compl. ¶¶ 37, 40, 57). Thus, documents relating to seat back testing on 2002-2007 Jeep Liberties and vehicles equipped with a similar driver's seat are relevant and within the scope of permissible discovery.

1. FCA refuses to completely respond to Request for Production No. 24.

> [24] Produce all reports, video, and other documents relating to tests that involved seat back strength or seat back performance on 2002-2007 Jeep Liberties or other vehicles equipped with a similar driver's seat. This request encompasses tests that FCA or its employees *ran* or *discussed running*, without regard to FCA's avowed "purpose" for the test. As to test types, this request includes, but is not limited to, development tests, validation tests, certification tests, compliance tests, physical tests, computer-simulated or computer-aided tests, litigation tests, sled tests, simulations, and tests involving a "mule." As to documentation, this request includes, but is not limited to, test requests, video, video or film analysis, crash test letters, compliance reports, and Proving Grounds Test Summaries.

P.'s 1st RPD No. 24 (Ex. 13).

In response to RPD 24, FCA initially agreed to produce *some* documents in the future at an undisclosed date and time, but objected on two key grounds.[2] [redacted]

[2] FCA also asserted a litany of boilerplate objections, which is often viewed as improper and constitutes a failure to comply. *See In re Meggitt*, 2018 WL 1121585, at *4 (Bankr. N.D. Ohio Feb. 27, 2018) (finding that "generalized 'boilerplate' objections are generally viewed by courts as improper and essentially useless."); *see also Old Reliable Wholesale, Inc. v. Cornell Corp.*, 2008 WL 2323777, at *1 (N.D. Ohio June 4, 2008) (finding that "extensive use of a boilerplate objection constitutes a failure to comply . . .").

[redacted] Neither of these grounds is a proper basis for withholding documents.

a. FCA must produce documents within its control, but in JCI's possession.

The plain language of Rule 34 of the Ohio Rules of Civil Procedure entitles Plaintiff to discovery on documents "that are in the possession, custody, *or control* of the party upon whom the request is served." Ohio Civ. R. 34 (emphasis added). That certain documents are not within FCA's *possession*, but instead JCI—their contractual agent—is simply not a valid basis for objection or withholding.

[redacted] That being said, FCA has clearly *not* tried, and has cleverly avoided attesting that it has produced *all* responsive documents in its *possession, custody, and control*. It is telling that FCA contends only that the responsive documents are not within its "possession." FCA must be compelled to fully respond.

[3] The Terms and Conditions ("T & C") are governed by Michigan law. *See* Terms and Conditions, ¶ 26(a) (Ex. 15). "'The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate.'" *City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 113 (Mich. 2005) (quoting *McIntosh v. Groomes*, 198 N.W. 954 (Mich. 1924)). "'[I]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning . . .'" *Id.* (quoting *New Amsterdam Cas. Co. v. Sokolowski*, 132 N.W.2d 66 (Mich. 1965). The T & C clearly and unambiguously *require* JCI to preserve the information sought and to provide it to FCA on demand. *See* T & C, ¶ 29 (Ex. 15).

b. FCA must produce documents relating to similar driver's seats.

Instead of producing documents relating to seat back strength or seat back performance on 2002-2007 Jeep Liberties or other vehicles equipped with a similar driver's seat, FCA took the position that *no other vehicle had similar seats.* Specifically, FCA noted that the combination and placement of various seat components renders all other models substantially dissimilar. FCA's overly restrictive interpretation would allow it to withhold information on other seats based on minor differences, such as a seat with different "feet," *i.e.*, the part that mounts the seat to the floorboard. Notably, Plaintiff already narrowed this request by seeking any seat involving similar "reclining mechanisms" or "seat backs." *See* 10/30/2018 Butler III letter, p. 4, ¶ 6(d) (Ex. 15).

FCA's objection based on the purported uniqueness of the Subject Jeep's driver seat system is not proper for the same reason argued above in Section II.A.1. That is, the Court—*not FCA*—is the final arbiter of "substantial similarity." *See St. Paul Fire & Marine Ins. Co.*, 195 N.E. at 864 (Ohio 1935) (a determination of "substantial similarity" goes to the weight of the evidence rather than the admissibility, and the decision is within the discretion of the trial court); *see also Odom*, 1988 WL 121032, at *3 (Ohio Ct. App. Nov. 10, 1988) (trial court must decide issue of substantial similarity). If, for example, any defendant could withhold documents by claiming the sought-after documents were dissimilar to the allegedly defective product without any scrutiny from the court, no plaintiff would *ever* be able to obtain evidence of OSIs.

Despite these objections, and many others, FCA has supplemented its response to RPD 24 *three times*. At the same time, FCA ***refuses to tell Plaintiff when it will complete discovery.*** This creates a quandary whereby Plaintiff is unable to push the case forward because FCA may come forward with additional documents under the guise of a "rolling" production. This dilemma

is particularly concerning since the Court ordered "FCA to respond fully and completely to all outstanding discovery requests made in this matter and shall do so by February 5, 2019." *See* Order (Ex. 5). FCA claims the Order "did not order a further response to [this] request[]." *See* 6/13/2019 Wright to Baskam letter (Ex. 6-J). Whether FCA misunderstood the Order or is engaging in deliberate obfuscation is unclear. However, one thing is clear: ***FCA has not complied with its discovery obligations***. FCA must not be permitted to shroud the sought-after data from review based on its *own* conclusions of dissimilarity.

E. FCA's Document Dump.

FCA opposed Plaintiff's first motion to compel, in large part, by relying on the "thousands of pages of responsive documents" it either produced or agreed to produce. The size of FCA's production is not indicative of the content—many relevant, non-privileged communications and documents appear to remain outstanding. Courts widely acknowledge the impropriety of such a "document dump" as a delay tactic. *See United States v. Quebe*, 321 F.R.D. 303, 312 (S.D. Ohio 2017) (finding that the defendant's production of over 340,000 pages was "the epitome of a 'document dump' and its attendant ills: misdirection, obfuscation, and delay."); *see also Stooksbury v. Ross*, 528 F. App'x 547, 550 (6th Cir. 2013) (finding that "the near 40,000–page discovery submission was an unresponsive 'document dump'"); *Scott Hutchison Enterprises, Inc. v. Cranberry Pipeline Corp.*, 318 F.R.D. 44, 54 (S.D.W. Va. 2016) ("The term 'document dump' is often used to refer to the production of voluminous and mostly unresponsive documents without identification of specific pages or portions of documents which are responsive to the discovery requests.").

As any trial lawyer knows, the *volume* of documents produced is not what matters. No lawyer is going to put thousands and thousands of documents before a jury—the jury would fall

asleep and the Court would run short of patience. What matters are the few *important* documents. It does no good—and is irrelevant—for FCA to cite the sheer volume of documents produced, as though producing a sufficient volume of unimportant papers could satisfy a discovery request. What Plaintiff needs are those few *important* documents—and to get them, Plaintiff must push FCA to respond *fully and completely* to the discovery requests.

For example, if there are 1,000 documents that are responsive to a particular request, it would not be sufficient for FCA to produce 995 of them but withhold the five important documents. If FCA were to do that, FCA could then come before the Court—similar to its response to Plaintiff's first Motion to Compel—and lament, for example, that it had produced *995 documents in response to one request alone!* The *volume* of documents produced is not what is important—instead, what matters is whether FCA produced or withheld the five documents that are actually important. Requiring FCA to produce *all responsive documents* is the only way to ensure that FCA produces the five important documents in addition to the 995 documents that it will produce willingly.

III. CONCLUSION

Plaintiff respectfully requests that the Court order FCA to respond fully and completely to the discovery requests identified within two weeks of the Court's Order. Specifically, as noted above, Plaintiff seeks full responses to:

1. Request for Production Nos. 22, 24, 32, 33, and 57; and
2. Interrogatory No. 28.

As to each of these six requests, FCA should be required to affirm that FCA has "produced all responsive documents and information in its possession, custody, or control."

Respectfully submitted this 22nd day of August 2019,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel of record with a copy of Plaintiff's Second Motion to Compel Defendant FCA US LLC by e-mail and by depositing it in the United States Mail with adequate postage affixed thereon and addressed as follows:

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