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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN 'CLEAN DIESEL' MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This document relates to:

Nemet, et al. v. Volkswagen Group of America, Inc., et al., Case No. 3:17-cv-04372-CRB

No. 02672-CRB (JSC)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ROBERT BOSCH LLC'S AND ROBERT BOSCH GMBH'S MOTION TO DISMISS CLASS ACTION COMPLAINT

Hearing Date: TBD
Time: TBD
Courtroom: 6
The Honorable Charles R. Breyer

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I. INTRODUCTION

In the *Napleton* litigation that is part of the same MDL as this matter, this Court denied Bosch's motion to dismiss the RICO claim filed by VW dealers. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 4890594 (N.D. Cal. Oct. 30, 2017) ("*Napleton*"). In its Motion to Dismiss,[1] Bosch acknowledges that this Court's opinion in *Napleton* effectively disposes of its arguments that Plaintiffs have failed to plausibly allege a RICO claim against Bosch, but proceeds to make the same arguments in order "to preserve the issues in the event of appellate review." Bosch Br. at 12. Bosch offers no reason why the Court's decision should be any different here, where identical allegations about the nature of the conspiracy have been made. Similarly, Bosch offers no reason the Court should reconsider its ruling in *Napleton* that it has personal jurisdiction over Bosch GmbH. Both arguments should be dismissed out of hand.

Bosch's sole remaining argument—that Plaintiffs lack RICO standing—also lacks merit. Plaintiffs have alleged compensable RICO injury in the form of overpayment for "clean diesel" vehicles that they never received. And because Defendants' scheme had the purpose and direct result of selling the deceptively marketed Vehicles to Plaintiffs at a false premium, there can be no question that Plaintiffs' injuries were proximately caused by Defendants' misconduct. Therefore, Plaintiffs clearly have standing to allege their RICO claims.

Bosch's motion to dismiss should be denied in its entirety.

II. ISSUES TO BE DECIDED

1. Whether Plaintiffs' payment for "clean diesel" Vehicles—a characteristic that was explicitly promised but never delivered—constitutes injury to "property" within the meaning of 18 U.S.C. § 1964(c).

2. Whether Plaintiffs' injuries were proximately caused by the RICO conspiracy where the scheme had the purpose and direct result of selling deceptively marketed Vehicles to Plaintiffs at a false premium.

3. Whether the Complaint, that differs only by victim, from *Napleton,* plausibly alleges a RICO claim.

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[1] *See* Robert Bosch LLC's and Robert Bosch GmbH's Notice of Motion and Motion to Dismiss Class Action Complaint and Memorandum of Points and Authorities in Support Thereof (Dkt. 4533) ("Bosch Br.").

4. Whether the complaint, that differs only by victim, from *Napleton*, adequately alleges that this Court has personal jurisdiction over Bosch GmbH.

III. SUMMARY OF THE ARGUMENT

Bosch's motion to dismiss should be denied for the following reasons:

Plaintiffs have RICO standing. "RICO standing requires compensable injury and proximate cause." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1055 (9th Cir. 2008).[2] Plaintiffs have plausibly alleged both elements here.

First, Plaintiffs allege they paid a clean-diesel premium, as well as inflated financing, loan, and/or lease fees linked to the price premium on their Vehicles. As this Court held in *Napleton*, such an out-of-pocket loss is a cognizable injury to "property" within the meaning of 18 U.S.C. § 1964(c). 2017 WL 4890594, at *6 (citing *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 976 (9th Cir. 2008)). Bosch's reliance on out-of-Circuit authority is not controlling and, in any event, is readily distinguishable. Plaintiffs have also suffered RICO injury due to the lost expectation of driving an environmentally-friendly vehicle. Bosch's own authority demonstrates that expectancy-based injuries are compensable under RICO where, as here, a defendant makes explicit promises it has no intention of keeping. *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 59 (2d Cir. 1998).

Second, Plaintiffs have satisfied RICO's proximate cause requirement. Defendants' fraudulent scheme was intended to deceptively market and sell "clean diesel" vehicles to consumers such as Plaintiffs, thereby causing out-of-pocket losses to Plaintiffs. Because Defendants' scheme had the purpose and direct result of selling these deceptively marketed Vehicles to Plaintiffs at a false premium, Plaintiffs are the direct victims of the scheme. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658 (2008); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002). In arguing otherwise, Bosch conflates remoteness in the causal chain with remoteness of injury. While there are other parties who were injured by Defendants' racketeering scheme, they were no more directly injured than Plaintiffs. Defendant VW's decision to voluntarily compensate a subset of the directly injured parties is of no consequence. As the Supreme Court has made clear, the proximate

[2] Internal quotations and citations omitted unless otherwise noted.

cause analysis does not dictate that there can be only one direct victim of a defendant's misconduct. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1394 (2014).

Plaintiffs adequately allege a RICO claim. As Bosch acknowledges, its efforts to dismiss Plaintiffs' RICO claim as insufficiently pled are foreclosed by this Court's decision in *Napleton*. Bosch Br. at 12. Bosch offers no compelling reason why the Court should reconsider its decision.

First, Plaintiffs have alleged that Bosch engaged in a pattern of racketeering. Plaintiffs make identical allegations as in *Napleton* about Bosch's knowing participation in the same scheme to defraud. Therefore, Bosch's contention that Plaintiffs do not adequately allege Bosch's participation in the RICO enterprise fails for the same reasons it failed in *Napleton*.

Plaintiffs also allege multiple acts of mailings in furtherance of the enterprise. ¶¶ 206-208, 282-308, 488(e), 488(d), 488(j).[3] RICO does not require that every member of an enterprise use the mails, only that the mails be used by the enterprise as part of the scheme. As the Supreme Court has explained, the "gravamen of the offense is the scheme to defraud, and any 'mailing that is incident to an essential part of the scheme satisfies the mailing element' . . . even if the mailing itself 'contain[s] no false information.'" *Bridge*, 553 U.S. at 647 (quoting *Schmuck v. United States*, 489 U.S. 705, 712, 715 (1989)).

Second, Plaintiffs have alleged that Bosch was part of a RICO enterprise just as the *Napleton* plaintiffs did. "RICO liability is not limited to those with primary responsibility for the enterprise's affairs," but "*some* part in directing the enterprise's affairs is required." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). With VW, Bosch formed an association-in-fact Emissions Fraud Enterprise, which deceived regulatory bodies into issuing certifications that the Vehicles complied with emissions standards. Bosch tested, manufactured and sold the EDC17, which is the emissions control system used by VW in the Vehicles. Bosch was well aware that the EDC17 would be used by VW to cheat on emissions testing. These and other allegations detailed below demonstrate Bosch's participation in the conduct of the enterprise.

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[3] *See* Class Action Complaint in *Nemet, et al. v. Volkswagen Group of America, Inc., et al.*, No. 3:17-cv-4372 ("Complaint"), ECF No. 7. Citations to "¶" in this Opposition refer to the Complaint unless otherwise noted.

Third, Plaintiffs adequately allege that Bosch conspired with VW in violation of RICO. As the Ninth Circuit has explained, "a RICO conspiracy under § 1962(d) requires only that the defendant was 'aware of the essential nature and scope of the enterprise and intended to participate in it.'" *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2016). The same facts that demonstrate Bosch's participation in the Emissions Fraud Enterprise also show its liability under § 1962(d).

The Court has personal jurisdiction over Robert Bosch GmbH. This Court can properly exercise personal jurisdiction over Bosch GmbH under Fed. R. Civ. P. 4(k)(2), as this Court held in *Napleton*. In *Holland Am. Line, Inc. v. Wartsila N. Am., Inc*., 485 F.3d 450, 462 (9th Cir. 2007), the Ninth Circuit explained that the "due process analysis under Rule 4(k)(2) is nearly identical to traditional personal jurisdiction analysis with one significant difference: rather than considering contacts between the Wartsila entities and the forum state, we consider contacts with the nation as a whole." As an active participant in the RICO enterprise, Bosch GmbH knew that it was devising and implementing a defeat device that would be incorporated into Vehicles sold in the United States generally and in California specifically, causing Plaintiffs to pay more for the unlawfully-equipped Vehicles than they otherwise would have paid. Those allegations demonstrate that Bosch GmbH purposefully directed its activities to support fraudulent sales of Vehicles in the United States (and in California in particular).

Nor does Bosch GmbH present *any* evidence that this litigation would impose a significant burden on it. Under these circumstances, exercising personal jurisdiction over Bosch GmbH would not offend due process. As in *Napleton*, plaintiffs "allege that Bosch GmbH and Volkswagen specifically targeted the United States and that hundreds of thousands of defeat devices made their way into the United States." 2017 WL 4890594, at *18. Thus, as in *Napleton*, this Court has personal jurisdiction over Bosch GmbH in this matter.

IV. ALLEGATIONS

A. Bosch develops the EDC17 in close partnership with VW.

Bosch admits that it tested, manufactured and sold the EDC17 used by VW in the Vehicles, which was "tailored and adapted by modifying the sophisticated software embedded within the

electronic control unit ('ECU')" of those Vehicles. ¶ 223. A February 28, 2006 Bosch press release introduced the "New Bosch EDC17 engine management system" as the "brain of diesel injection" which "controls every parameter that is important for effective, low-emission combustion." ¶ 220. The EDC17 offered "[e]ffective control of combustion" and a "[c]oncept tailored for all vehicle classes and markets." *Id.*

The development of the EDC17 was made possible by VW's close partnership with Bosch, "which enjoyed a sizable portion of its annual revenue from manufacturing parts used in Volkswagen's diesel vehicles." ¶ 214. Developing a road-ready ECU is an intensive three- to five-year endeavor, which required Bosch employees to be at VW facilities full-time. ¶ 224.

Despite its close relationship with car manufacturers, Bosch takes significant steps to ensure that it had exclusive control over its operations. ¶ 225. Bosch's software is typically locked to prevent customers, like VW, from making significant changes on their own. *Id.* No alterations can be made without either a breach of Bosch's security system or Bosch's knowing participation. ¶ 226. According to one car company engineer,

> Bosch is involved in all the development we ever do. They insist on being present at all our physical tests and they log all their own data, so someone somewhere at Bosch will have known what was going on. All software routines have to go through the software verification of Bosch, and they have hundreds of milestones of verification, that's the structure . . . . The car company is *never* entitled by Bosch to do something on their own."

¶ 227 (emphasis in original source).

Bosch insisted that it control the definition of VW's EDC17 software, test the software using bench top and vehicle testing, and produce the final software release for series production. ¶ 237. Bosch also delivered the software to VW for installation in the Vehicles. *Id.* Given Bosch's firm control over the development of and modifications to EDC17, it is inconceivable that Bosch did not know that the software it was responsible for defining, developing, testing, maintaining and delivering contained an illegal defeat device. *Id.*

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B. Bosch plays a critical role in the defeat device scheme.

Bosch's success was tied to tailoring EDC17 Units to VW's specifications. Engineers and other employees at Bosch GmbH and Bosch LLC worked with VW to develop and implement a unique set of software algorithms that allowed them to surreptitiously evade emissions regulations:

> When carmakers test their vehicles against EPA emission standards, they place the cars on dynamometers (large rollers) and then perform a series of specific maneuvers prescribed by federal regulations. Bosch's customized EDC17 controllers created for Class Vehicles detected test scenarios by monitoring vehicle speed, acceleration, engine operation, air pressure and even the position of the steering wheel. When the EDC17's algorithm detected that the vehicle was on a dynamometer (and, therefore, undergoing an emission test), software code within the EDC17 downgraded the engine's power and performance and upgraded the emissions control systems' performance by switching to a "dyno calibration," temporarily reducing emissions to legal levels. Once the EDC17 detected that the emission test was complete, it would then enable a different "road calibration" that caused the engine to return to full power and efficiency while reducing the emissions control systems' performance, and consequently, caused the car to spew up to 40 times the legal limit of NOX emissions.

¶ 203.

As the company with the technical know-how, Bosch would naturally get blamed if the scheme was discovered. So in furtherance of the fraudulent scheme, Bosch attempted to get a financial shield from VW for its development of the defeat device. In 2008, Bosch wrote VW and expressly demanded that VW indemnify Bosch for anticipated liability arising from the use of the Bosch-created "defeat device," which Bosch knew was "prohibited pursuant to . . . US Law." ¶ 217. VW refused, *id*., which put Bosch in a difficult position. Bosch had already acknowledged that it had developed a defeat device, and it acknowledged that it could readily be used by VW to evade emissions standards. *Id*. It knew (or must have known) that continuing to supply VW with the defeat devices would make it a collaborator in VW's fraudulent scheme.

Despite Bosch's express, written recognition that its software was being used in the Vehicles as a "defeat device" that was "prohibited pursuant to . . . US law," *id*., Bosch supplied VW with approximately 11 million such emission control components over the next seven years. ¶ 214. The

1 decision to cheat was an "open secret" at VW, and it was an open secret at Bosch as well. ¶ 238. In
2 emails sent as early as July 2005 from VW to Bosch, VW discussed emissions measurements for
3 vehicles using the "akustikfunktion" (the code name used for the defeat device) in connection with
4 U.S. emission compliance. ¶ 240.

5 VW and Bosch continued to refine and maintain the EDC17 well after it was integrated into
6 hundreds of thousands of Vehicles by, for example, by working together to calibrate the defeat
7 devices for the Vehicles. ¶ 243. A November 2014 email from Juergen Hintz of Volkswagen AG
8 (VWAG), entitled "Akustikfunktion," relayed a telephone call with a Bosch employee about the
9 "akustikfunktion" and VW's role. *Id.* VWAG's Arenz responded that while he had been responsible
10 for the operation of the "akustikfunktion," Bosch was responsible for its calibration. *Id.* In fact,
11 Arenz disclosed that he planned to meet with Bosch (along with Michael Brand) regarding
12 calibrating the "akustikfunktion" the following week. *Id.* In another email, Hintz wrote that a Bosch
13 employee told him that Bosch would be making certain changes to the "akustikfunktion" based on
14 VW's specifications. *Id.*

15 By 2007, and likely earlier, Bosch was VW's critical partner not only in developing the
16 "akustikfunktion" but also in concealing it, for example, with Bosch employees explicitly confirming
17 that they would remove descriptions of the "akustikfunktion" from specification sheets. ¶ 245. And
18 Bosch was also involved in the scheme to prevent U.S. regulators from uncovering the device's true
19 functionality. ¶ 161. An August 2009 email from VW shared a comment from CARB regarding 2009
20 Volkswagen Jetta TDIs test results that "VW 'blatantly did the wrong thing'" and asked VW if this
21 "is a base strategy from Bosch." VW responded, "yes." ¶ 261. Bosch was also directly involved in
22 the communications with U.S. and California regulators concerning emissions detection and
23 compliance of the Vehicles. ¶ 263 (detailing communications). In addition, Bosch marketed "Clean
24 Diesel" in the United States and lobbied U.S. regulators to approve the Vehicles, a highly unusual
25 activity for a mere supplier. ¶¶ 161, 265.

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C. Defendants' scheme injures U.S. consumers.

Defendants' illegal scheme duped hundreds of thousands of U.S. consumers into buying Vehicles that never should have left the factory, let alone been sold—and at a cost of millions of dollars. ¶ 378. VW's false and misleading advertising campaign deliberately misled consumers into believing that the "clean diesel" engine system was a high performance engine that still managed to be fuel efficient and low-emission. ¶ 379. Indeed, VW's entire marketing campaign focused on convincing consumers that the Vehicles were not merely compliant with emission regulations, but that they exceeded them. ¶ 285. As a result, not only did Plaintiffs and Class members buy and lease Vehicles that they would not have otherwise bought or leased but for VW's blatant fraud, ¶ 379, but they did so in record numbers, ¶ 6, and paid a premium for the Vehicles' purportedly "clean diesel" engines. ¶ 379. In other words, Plaintiffs and Class members not only paid, but *over*paid, for something they didn't receive. ¶¶ 379, 380.

V. ARGUMENT

A. Plaintiffs Have Standing to Allege RICO Claims.

In evaluating whether a plaintiff has statutory standing, courts should consider whether the plaintiff's "interests fall within the zone of interests protected by the law invoked." *Lexmark Int'l*, 134 S. Ct. at 1388. Congress and the Supreme Court have emphasized that RICO is to be "read broadly" and "should be liberally construed to effectuate its remedial purpose." *Odom v. Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir. 2007) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 497-98 (1985)). Reflecting this broad purpose, the statute provides that "*[a]ny* person injured in his business or property by reason of a violation of section 1962" has standing to bring a private cause of action. 18 U.S.C. § 1964(c) (emphasis added). "In other words, RICO standing requires compensable injury and proximate cause." *Newcal Indus.*, 513 F.3d at 1055. Plaintiffs have plausibly alleged both elements.[4] Furthermore, as direct targets of Defendants' massive fraudulent scheme to sell illegal cars to unsuspecting consumers, Plaintiffs are clearly within the zone of interests protected by RICO.

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[4] Statutory standing is examined under Rule 12(b)(6). *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009). As such, a plaintiff need only allege "sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

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1. Plaintiffs allege an injury to "business or property."

An injury is compensable under RICO if it constitutes "harm to a specific business or property interest and if the alleged business or property interest is cognizable under state law." *Newcal Indus.*, 513 F.3d at 1055. As with Article III standing, "general factual allegations of injury resulting from the defendant's conduct . . . suffice." *Mendoza*, 301 F.3d at 1168.

"In the ordinary context of a commercial transaction, a consumer who has been overcharged can claim an injury to her property, based on a wrongful deprivation of her money." *Canyon Cty.*, 519 F.3d at 976. "Money, of course, is a form of property." *Id.* (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979)). Plaintiffs—purchasers and lessees alike—allege they paid a premium for "clean diesel" vehicles they never received. *E.g.*, ¶¶ 10, 14, 379, 506(b)-(c). Plaintiffs further allege they paid inflated financing, loan, and/or lease fees linked to the clean-diesel premium on their Vehicles. ¶¶ 13-14, 23, 37, 56, 61, 76, 93, 107, 506(d). As this Court has already held, an "out-of-pocket loss is . . . a cognizable [RICO] injury to . . . property." *Napleton*, 2017 WL 4890594, at *6.[5] Moreover, as established in Plaintiffs' separately filed Opposition to the Volkswagen U.S. Defendants' Motion to Dismiss ("Opp. to VW") at Section IV.C, Plaintiffs' claims stemming from these out-of-pocket losses are actionable under relevant state law. *See, e.g., Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 364 (9th Cir. 2005) (reversing dismissal of RICO claim alleging a financial loss due to fraudulent inducement, which was actionable under Hawaii law). Accordingly, Plaintiffs have plausibly alleged injury to their business or property interests.[6]

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[5] *See also, e.g., Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 936 (N.D. Cal. 2013) (payment of marked-up fees constitutes injury to property under RICO); *Stitt v. Citibank, N.A.*, 942 F. Supp. 2d 944, 954 (N.D. Cal. 2013) (same); *Newcal Indus., Inc. v. IKON Office Sols., Inc.*, 2011 WL 1899404, at *2-3 (N.D. Cal. May 19, 2011) (payment of fraudulently inflated price to buy out certain accounts constitutes a concrete financial loss for RICO purposes); *Pac. Gas & Elec. Co. v. Howard P. Foley Co.*, 1993 WL 299219, at *3 (N.D. Cal. July 27, 1993) (holding that "excess financing costs are a recoverable element of [RICO] damages").

[6] As discussed at length in Opp. to VW at Section IV.A.1.c, Defendants' contention that Plaintiffs recouped 100% of the clean-diesel premium when they sold their Vehicles ignores Plaintiffs' allegations that Class members could not have recouped the full amount of the premium because subsequent purchasers were only paying for the clean-diesel performance they expected to enjoy in the future, not reimbursing Plaintiffs for past clean-diesel performance. *E.g.*, ¶ 382. Nor do Plaintiffs "assume that the 'clean diesel' premium did not depreciate." Bosch Br. at 8. The

1 Bosch's arguments to the contrary are without merit. As an initial matter, Bosch's reliance on
2 *General Motors* and other out-of-circuit cases "is not the law in the Ninth Circuit." *Napleton*, 2017
3 WL 4890594, at *7. Not only does *Canyon County* clearly hold that overpayment for a consumer
4 product constitutes RICO injury, but courts in this Circuit have also recognized that "benefit-of-the-
5 bargain" damages are available in RICO cases. *See Williams v. Countrywide Fin. Corp.*, 2017 WL
6 986517, at *9 (C.D. Cal. Mar. 13, 2017) (plaintiffs who paid for sham appraisals suffered RICO
7 injury because they did not receive the benefit of their bargain); *In re Morning Song Bird Food*
8 *Litig.*, 2013 WL 12144051, at *6 (S.D. Cal. Sept. 30, 2013) (plaintiffs' purchase of "worthless bird
9 food" was a "concrete financial loss" for which benefit-of-the-bargain damages were available under
10 RICO).

11 Even if *General Motors* had any bearing here, it is readily distinguishable because the defect
12 in that case had not yet manifested. GM purchasers brought economic loss claims on the basis of an
13 ignition switch "that *could* too easily move from the 'run' position to the 'accessory' and 'off'
14 positions, causing moving stalls and disabling critical safety systems (such as the airbag)." *In re:*
15 *Gen. Motors LLC Ignition Switch Litig.* ("*General Motors*"), 2016 WL 3920353, at *1 (S.D.N.Y.
16 July 15, 2016) (emphasis added).[7] The plaintiffs alleged that had they known about this "*latent*
17 defect," "they would have paid fewer than *x* dollars for the car (or not bought the car at all), because
18 a car with a safety defect is worth less than a car without a safety defect." *Id.* at *7. The court held
19 that this type of "speculative, expectation-based" injury was "incompatible with RICO." *Id.* at *16.
20 Similarly, in *Bridgestone/Firestone Tires*—a case the *General Motors* court referred to as
21 "particularly salient," *id.* at 16—the plaintiffs' assertion of RICO injury was "grounded in the
22 possibility of future events," *i.e.,* "the tires that they have unilaterally replaced or may replace in the
23
24
calculation on which Bosch bases this mischaracterization, which admittedly contains a
25 mathematical error, was merely meant to provide an example of how damages might be calculated; it
26 does not purport to calculate each of the Plaintiffs' actual damages. *See* Opp. to VW at 22 n.36.
Regardless, it is only the "fact of damage," not the "amount of damage," that matters to the RICO
27 standing analysis. *Napleton*, 2017 WL 4890594, at *5 (quoting *Mendoza*, 301 F.3d at 1168).

28 [7] Personal injury claims arising from an actual malfunction of GM ignition switches proceeded
on a separate track. *Id.* at *1.

future *may* suffer tread separation; they *may* receive on trade-in or resale of their Explorers (or other vehicles equipped with the Tires) less than they would have received absent the alleged defects." *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 155 F. Supp. 2d 1069, 1091 (S.D. Ind. 2001) (emphasis added), *rev'd in part on other grounds*, 288 F.3d 1012 (7th Cir. 2002). There the court held that "RICO affords a monetary remedy only to plaintiffs who have actually . . . experienced product failure, and not to those who allege a risk (or even a probability) of such loss." *Id.*

By contrast here, Plaintiffs do not allege that the Vehicles had a *potential* defect that may or may not manifest in the *future*. Rather, as this Court has previously noted, Plaintiffs have *already* suffered losses because the "defect"—the intentional failure to comply with emissions requirements—existed *at the point of sale* and persisted throughout every day of ownership. *Napleton*, 2017 WL 4890594, at *3; *see also Bailey v. Atl. Auto. Corp.*, 992 F. Supp. 2d 560, 580-81 (D. Md. 2014) (distinguishing *Bridgestone/Firestone Tires* on the ground that "Bailey does not base her claim on some future loss. Rather, Bailey contends that she suffered the claimed loss at the moment of purchase in reliance upon the false representation that she was not buying a former short-term rental vehicle."). These injuries are neither "expectancy-based," nor "intangible." Bosch Br. at 15. Like the plaintiff in *Bailey*, Plaintiffs' injuries occurred at the time of their purchases when they paid for a "clean diesel" vehicle that they did not get.[8]

To the extent Plaintiffs allege an expectancy-based injury in addition to out-of-pocket losses, this too constitutes compensable RICO injury. As the *General Motors* court acknowledged, "courts have recognized expectation damages under RICO" when a defendant makes a "performance

[8] Bosch's other cited authorities are distinguishable for similar reasons. In *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228-299 (2d Cir. 2008), the plaintiffs based their RICO claim on an "impossible" expectation—a "healthy cigarette." In *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990), the plaintiffs' alleged injury was the "potential financial loss in the future" that might result from cancellation of their insurance policies. Nor is the situation of the lessees "exactly parallel" (Bosch Br. at 9) to the renter in *Oscar v. Univ. Students Co-op. Ass'n,* 965 F.2d 783 (9th Cir. 1992). To begin with, the Ninth Circuit's conception of RICO injury in *Oscar* has been "overturned" by subsequent case law. *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1055 (9th Cir. 2008). And in any event, unlike the inflated monthly payments and associated fees the lessee Plaintiffs paid here, ¶¶ 14, 30, 383, the renter in *Oscar* alleged no out-of-pocket losses. 965 F.2d at 786.

guarantee" it has "no intention of keeping." *General Motors*, 2016 WL 3920353, at *16-17; *see also, e.g., Maiz v. Virani*, 253 F.3d 641, 663-64 (11th Cir. 2001) (acknowledging that "[a] plaintiff injured by civil RICO violations deserves a complete recovery" and recognizing that "in some cases expectancy damages might be appropriate") (quoting *Fleischhauer v. Feltner,* 879 F.2d 1290, 1300 (6th Cir. 1989)). Whereas the "good reputation" and "continuing resale value" of the GM vehicles was "at best implied,"[9] here Defendants made explicit promises—which they knew were false at the time they made them—that the Vehicles were "clean" diesels that not only complied with emissions standards but exceeded them. *E.g.,* ¶¶ 10, 285, 380, 418, 460. Such false promises are concrete enough to render the "lost expectation of driving an environmentally friendly vehicle," ¶ 506(a), non-speculative under RICO. *General Motors*, 2016 WL 3920353, at *16-17 (citing, *inter alia*, *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d at 59 (investors who were fraudulently promised investments with guaranteed yields suffered RICO injury in the amount of the returns they had been guaranteed)).[10]

2. Plaintiffs' injuries were proximately caused by Defendants' racketeering scheme.

The second component of the statutory standing analysis requires a plaintiff to have been injured "by reason of" a RICO violation. 18 U.S.C. § 1964(c). This, in turn, requires a showing that the defendant's violation was both a "but for" cause and proximate cause of the plaintiff's injury.[11] *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). "Issues of proximate cause are generally factual inquiries that are not appropriate for resolution on a Rule 12(b)(6) motion." *Pradhan v. Citibank, N.A.*, 2011 WL 90235, at *6 (N.D. Cal. Jan. 10, 2011); *see also Newcal Indus.*, 513 F.3d at

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[9] *General Motors*, 2016 WL 3920353, at *16-17.

[10] Bosch also relies on two other opinions in the *General Motors* case, 2017 WL 2839154 (S.D.N.Y. June 30, 2017), and 2017 WL 3443623 (S.D.N.Y. Aug 9, 2017), but neither opinion addressed RICO claims. Moreover, the court's conclusion that consumers who sold or traded in their cars before the GM recall could not have suffered economic loss damages was predicated on the fact that the plaintiffs failed to "articulate a coherent theory of how a plaintiff who bought a vehicle with a concealed defect and sold the same vehicle before the defect was revealed can logically, if not legally, prove that he or she suffered damages." 2017 WL 3443623 at *2. Here, Plaintiffs have plausibly alleged such a coherent theory of damage. *See, e.g,* Opp. to VW at Section IV.A.1.a.

[11] Bosch does not challenge the existence of "but for" causation here, so Plaintiffs will not address it.

1055. If a plaintiff's allegations, taken as true, are sufficient to establish proximate causation, then "the plaintiff is entitled to an opportunity to prove them." *Lexmark Int'l*, 134 S. Ct. at 1391 n.6.

Although proximate cause "is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case," *Bridge*, 553 U.S. at 654-55, this Court has recognized that "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Napleton,* 2017 WL 4890594, at * 8 (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006)). In the Ninth Circuit, three nonexhaustive factors make up this inquiry:

> (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Id. (quoting *Mendoza*, 301 F.3d at 1169). Here, none of the three factors require dismissal.

a. Plaintiffs were direct victims of the scheme.

As this Court has acknowledged, "[w]hat matters . . . is not whether there is a direct relationship between the plaintiff and defendant, but whether there is a 'sufficiently direct relationship between the defendant's wrongful *conduct* and the plaintiff's injury . . . .'" *Napleton*, 2017 WL 4890594, at *9 (emphasis in original) (quoting *Bridge*, 553 U.S. at 657). "Put differently, the proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct. That is ordinarily the case if the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'" *Lexmark Int'l*, 134 S. Ct. at 1390-91 (quoting *Holmes*, 503 U.S. at 268-69).

A brief survey of Supreme Court RICO jurisprudence demonstrates how the requirement of a direct relationship between the violation and the injury is interpreted in practice. In *Anza,* the respondent (Ideal) filed a RICO suit against its principal competitor (National) alleging that National failed to charge its customers sales tax and submitted fraudulent tax returns to the State to conceal its conduct, thereby allowing National to reduce its prices and gain market share at Ideal's expense. 547

U.S. at 454. The Supreme Court held that proximate cause was lacking because "[t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458. In *Hemi Grp., LLC v. City of New York, N.Y.*, New York City filed a RICO suit against an out-of-state online cigarette retailer alleging that the retailer's failure to file required information with the State of New York identifying its sales (which would have enabled the City to recover out-of-state sales tax directly from the purchasers) had injured the City in the form of lost tax revenue. 559 U.S. 1, 6-7 (2010). The Supreme Court again held that there was no proximate cause: "Here, the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file Jenkins Act reports. Thus, as in *Anza,* the conduct directly causing the harm was distinct from the conduct giving rise to the fraud." *Id.* at 11. Indeed, the Court held that causal chain was even more attenuated than in *Anza* because "the City's theory of liability rests not just on separate *actions,* but separate actions carried out by separate *parties*." *Id.* (emphasis in original). By contrast, in *Bridge*, regular bidders at a county's auction of tax liens sued a competitor alleging that the competitor had fraudulently obtained a disproportionate share of the liens by falsely certifying its compliance with the county's single simultaneous bidder rule. 553 U.S. at 644. Even though the alleged fraudulent representations had been directed at the county, the Supreme Court nonetheless held that the proximate cause requirement was satisfied: "Respondents' alleged injury—the loss of valuable liens—is the direct result of petitioners' fraud. It was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens." *Id.* at 658.[12]

Unlike *Anza* and *Hemi*, here the conduct causing the harm is the same as the conduct giving rise to the fraud. Defendants committed predicate acts of mail and wire fraud to carry out their

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[12] The Supreme Court also held in *Bridge* that first-party reliance is not an element of a civil RICO claim and is therefore not required to show proximate cause. *Id.* at 657-58. In any event, Plaintiffs have sufficiently alleged that they relied on Defendants' false representations about VW's "clean diesel" engine and environmental performance. *E.g.,* ¶¶ 378-79, 502; *see also* Opp. to VW at Section IV.C.1. Bosch does not argue otherwise.

fraudulent scheme, including false and misleading communications intended to conceal the defeat devices, and sales and marketing materials which targeted Plaintiffs and other consumers and were intended to misrepresent and conceal the true nature of the "clean diesel" vehicles. ¶¶ 419, 487-88, 494. As in *Bridge*, Plaintiffs' payment of the clean-diesel premium, as well as the lost expectation of driving an environmentally friendly vehicle, are a direct result of these fraudulent acts because Plaintiffs relied on Defendants' misrepresentations and omissions and would not have otherwise purchased or leased the Vehicles. ¶¶ 379, 418.

Despite the indisputably direct relationship between the misconduct and the injury, Bosch argues that proximate cause is lacking because the franchise dealers, not Plaintiffs, bought the Vehicles from VW. *See* Bosch Br. at 9. To begin with, this argument ignores the fact that there may be two or more direct victims of a racketeering scheme—all of whom may be able to show proximate cause between the defendants' conduct and their injuries. *See Lexmark*, 134 S. Ct. 1377. In *Lexmark*, Static Control, a maker and seller of components for the remanufacture of Lexmark toner cartridges, sued Lexmark for falsely misleading consumers to believe that they were legally required to return their empty cartridges to Lexmark instead of purchasing refurbished cartridges from remanufacturers. 134 S. Ct. at 1383-84. While acknowledging that a "strict application" of the proximate cause analysis would not support standing for Static Control because of "the intervening link of injury to the remanufacturers," the Supreme Court noted that the reason for that strict application is that there "ordinarily is a 'discontinuity' between the injury to the direct victim and the injury to the indirect victim, so that the latter is not surely attributable to the former (and thus also to the defendant's conduct), but might instead have resulted from 'any number of [other] reasons.'" *Id.* at 1394 (quoting *Anza,* 547 U.S. at 458-59).[13] By contrast, "[w]here the injury alleged is so integral an aspect of the [violation] alleged, there can be no question that proximate cause is satisfied." *Id.* Because there was no discontinuity between Lexmark's misconduct and Static Control's injury, the

[13] Although the plaintiff's claims in *Lexmark* were brought under the Lanham Act, the Supreme Court's analysis clearly applies to proximate cause for statutory causes of actions generally, including RICO. Indeed, it cites its own RICO jurisprudence repeatedly throughout the opinion. *Id.* at 1390-91.

1 Court held that Static Control had standing despite the existence of other direct victims of Lexmark's
2 misconduct. *Id.*[14] Here, as in *Lexmark*, both Plaintiffs and the franchise dealers can be seen as direct
3 victims of Defendants' scheme who simply suffered different types of damages. *See* discussion *infra*
4 pp. 17-18, 21-22.

5 Perhaps more importantly, Bosch's argument conflates remoteness in the causal chain with
6 remoteness of injury. In *Bridge*, it was inconsequential that the false attestations of compliance with
7 the auction rules had been submitted to the county, not the plaintiffs, because the plaintiffs were the
8 "primary and intended victims of the scheme to defraud" and their injury was a "foreseeable and
9 natural consequence of [the] scheme." 553 U.S. at 650, 658. Here, while the franchise dealers might
10 have been intermediaries in the supply chain between VW and consumers, Defendants' RICO
11 scheme was intended to deceptively market and sell "clean diesel" vehicles to consumers such as
12 *Plaintiffs*, thereby causing out-of-pocket losses to *Plaintiffs*. *E.g.,* ¶¶ 418-19. Because Defendants'
13 scheme had the "purpose and direct result" of selling these deceptively marketed Vehicles to
14 Plaintiffs at a false premium, Plaintiffs are the direct victims of the scheme. *See Mendoza*, 301 F.3d
15 at 1170 (documented employees were the "direct victims of the illegal hiring scheme" because it
16 "had the purpose and direct result of depressing the wages paid to them by the growers").[15]
17

18 [14] To the extent that Ninth Circuit case law suggests that there can only be one direct victim of a
19 racketeering scheme, it has been overruled in this respect by *Lexmark*. In any event, the cases relied
upon by Bosch are distinguishable because in those cases the alleged injury was "purely derivative of
20 'misfortunes visited upon a third person by the defendant's acts.'" *Id.* at 1390-91 (quoting *Holmes*,
503 U.S. at 268-69). *See Oregon Laborers-Employers Health & Welfare Tr. Fund v. Philip Morris*
21 *Inc.*, 185 F.3d 957, 963-64 (9th Cir. 1999) ("[P]laintiffs' claims rely on alleged injury to smokers—
without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying
22 for the medical expenses of those smokers."); *In re WellPoint, Inc. Out-of-Network UCR Rates*
Litig., 903 F. Supp. 2d 880, 902 (C.D. Cal. 2012) (no RICO standing where injury to health
23 providers and medical associations "merely flow[ed]" from health insurers' failure to properly
24 reimburse insurance subscribers). Here, as discussed *supra*, consumers were the direct targets of
Defendants' fraud, and their injuries are not derivative of any injuries to any third parties, if such
25 injuries exist at all.

26 [15] See *also, e.g., C&M Cafe v. Kinetic Farm, Inc.*, 2016 WL 6822071, at *7-8 (N.D. Cal. Nov.
18, 2016) (plaintiff C&M café was direct victim of identity theft scheme, the aim of which was to set
27 up imposter food delivery website and charge customers higher prices, because the "enterprise
specifically targeted C&M by creating the imposter website, displaying C&M's trademarks and
28 menu, and diverting deliveries away from C&M's direct delivery ordering system. . ."); *In re*

1 Furthermore, Bosch ignores important differences between the injuries suffered by the
2 franchise dealers and those suffered by Plaintiffs—differences that distinguish this case from those in
3 which a plaintiff's injuries were found to be too "indirect" to support proximate cause. For example,
4 in *Pillsbury, Madison & Sutro v. Lerner*, the Ninth Circuit emphasized that the subtenant's payment
5 of inflated rent due to the sham sale of the building was too indirect because it was entirely
6 contingent on the injury suffered by the master tenant—who could sue for the "whole injury." 31
7 F.3d 924 (9th Cir. 1994). Here, in contrast, neither Plaintiffs nor the franchise dealers suffered the
8 "whole injury"; both groups suffered direct injuries as a result of Defendants' conduct, but each
9 suffered injuries that the other did not. For example, Plaintiffs who purchased new Vehicles paid a
10 "new vehicle premium" for their cars that disappeared the moment they drove the Vehicles off the
11 lot, and, by definition, cannot have been recouped in a subsequent sale. ¶ 13. Dealers, who by
12 definition resold cars at a profit prior to the fraud's discovery, did not suffer this same injury, but did
13 suffer from the loss in re-sale value and the inability to sell their inventory after the stop-sale order—
14 injuries not suffered by Plaintiffs in this action.
15 Bosch also ignores Plaintiffs' allegation that the dealers were members of the Emissions
16 Enterprise themselves (although innocent members without knowledge of its fraudulent activities). ¶
17 473; *see Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008) ("One can be 'part' of an enterprise
18 without having a role in its management and operation."). Bosch cites no case where a party directly
19 injured by the RICO enterprise nevertheless is barred from recovery simply because an unwitting
20 member of the enterprise also suffered injury.
21 In any case, any suggestion by Bosch that the franchise dealers are the "more direct victims
22 of the fraud," Bosch Br. at 9, is foreclosed by Bosch's repeated binding admissions elsewhere in this
23 MDL. In its motion to dismiss the franchise dealers' case, Bosch asserted that proximate cause was
24
25 *Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 804 F.3d 633, 645 (3d Cir. 2015) ("the presence
of intermediaries, doctors and patients [did not] destroy[] proximate causation" because the drug
26 manufacturer's misrepresentations about drug safety were deliberately aimed at the third party
payors (TPPs) who covered the cost of the drug); *In re Neurontin Mktg. & Sales Practices Litig.*, 712
27 F.3d 21, 37 (1st Cir. 2013) (proximate cause requirement was satisfied where TPP was the "primary
and intended victim" of drug manufacturer's scheme to fraudulently inflate the number of
28 prescriptions for which the TPP paid).

lacking because the dealers did not—indeed *could not*—plead that they were directly injured by the alleged racketeering scheme. *See* Bosch Defendants' Motion to Dismiss Volkswagen-Branded Franchise Dealer Amended and Consolidated Class Action Complaint, Dkt. No. 4141, at 18 (Oct. 20, 2017). According to Bosch, the dealers could not be the direct victims of the fraud because their complaint alleged that the scheme was intended to "mislead *consumers* about the environmental aspects of the Affected Vehicles." *Id.* at 19 (emphasis added). Bosch then went on to assert that the dealers were, in fact, "beneficiaries of the alleged scheme" because their ability to sell the vehicles at a premium resulted in "increased profits" as well as "goodwill and franchise rights." *Id.* As beneficiaries of the alleged scheme, in Bosch's view the dealers could claim no injury. *Id.* Similarly, in its answer to the dealers' complaint, Bosch alleges that the dealers are barred from bringing suit because they "benefitted financially" from the racketeering scheme. *See* Bosch Defendants' Answer to Second Amended Volkswagen-Branded Franchise Dealer Complaint, Dkt. No. 4672, at 81 (Sixth Affirmative Defense) (Jan. 19, 2018). These statements constitute judicial admissions that are binding on Bosch and prevent it from taking a contrary position in this litigation. *See Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).[16] To permit Bosch to take wildly inconsistent factual positions in the same litigation would undermine the judicial process.

Nor, contrary to Bosch's contentions, Bosch Br. at 9-10, were consumers who owned or leased Vehicles after September 18, 2015, more directly injured than Plaintiffs. Both sets of plaintiffs are consumers who were deceived by Defendants' fraudulent scheme, and both sets of plaintiffs were injured by the scheme, albeit at different points in the timeline and in different amounts. The fact that Defendants have voluntarily chosen to compensate only a subset of these consumers is of no consequence to the proximate cause analysis. Plaintiffs prosecuting civil RICO actions are entitled to "complete recovery for the harm that proximately results from the predicate acts." *Pac. Gas & Elec.*

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[16] A holding that these statements are judicial admissions and therefore binding on Bosch in this action would, of course, not have any preclusive effect on the dealers' ability to argue to the contrary in that action. *See Am. Title Ins. Co.*, 861 F.2d at 226 (noting that judicial admissions are binding on the party who makes them).

Co., 1993 WL 299219, at *2 (citing *Holmes*, 503 U.S. at 267). Indeed, given that some of the members of the Settlement classes are further removed in the causal chain than Plaintiffs because they purchased their vehicles from other consumers, they were arguably *less* immediately injured than Plaintiffs.[17]

b. It will not be difficult to ascertain the amount of damages attributable to Defendants' wrongful conduct.

As to the second *Mendoza* factor, "at this stage it is sufficient that the relationship between [Plaintiffs'] alleged injuries and Bosch's alleged violation is not 'speculative in the extreme.'" *Napleton*, 2017 WL 4890594, at *8 (quoting *Canyon Cty.*, 519 F.3d at 982). Moreover, "questions as to the amount of damage, as opposed to the plausibility of damage, are best resolved at a later stage in the litigation." *Id.* (citing *Mendoza*, 301 F.3d at 1171).

Here, contrary to Bosch's argument, Bosch Br. at 10, the relationship between Plaintiffs' injuries and Bosch's alleged violations is far from "speculative in the extreme." Plaintiffs plausibly allege that the emissions fraud led directly to the clean-diesel premium, which led directly to Plaintiffs' overpayment for "clean" vehicles they never received and, indeed, would not have even been able to purchase absent Defendants' fraud.[18] Bosch's claim that it had no "dealings of any kind" with Plaintiffs, including no role in determining or charging the clean-diesel premium, Bosch Br. at 11, is no defense. As this Court has already held, there is no requirement that Plaintiffs and Bosch have a direct relationship. *Napleton*, 2017 WL 4890594, at *9. Nor must there be a direct

[17] Bosch mentions in passing "the government's claims against VW" as further evidence that a "plethora" of more direct victims exist. Bosch Br. at 10. Bosch gives no detail on what injuries the "government" suffered that were more direct than those suffered by consumers. In any case, since the United States is not a "person" with standing to seek treble damages under 18 U.S.C. § 1964(c), *United States v. Bonanno Organized Crime Family*, 879 F.2d 20, 27 (2d Cir. 1989), the remoteness or lack of remoteness of its injuries is not relevant to the analysis.

[18] Even if the higher price for the Vehicles could conceivably be connected to "reasons unconnected to the asserted pattern of fraud," Bosch Br. at 11, Bosch proposes no such reasons. And in any event, questions involving such market forces are "exceedingly complex" and better left to the experts to be addressed through expert evidence at a later stage in the proceedings. *Mendoza*, 301 F.3d at 1170-71.

1 relationship between each RICO defendant's conduct and the plaintiff's injury; proximate cause
2 requires only a direct relationship to the "injurious conduct" generally. *Holmes*, 503 U.S. at 268.
3 Even if there were such a requirement, Plaintiffs have satisfied it. Just like in the franchise
4 dealers' case, Plaintiffs allege that "Bosch partnered with Volkswagen to implement the defeat
5 device," *Napleton*, 2017 WL 4890594, at *9, in the Vehicles. *E.g.,* ¶¶ 456-65, 480. This conduct, in
6 turn, led Plaintiffs to believe the Vehicles were "clean" and "environmentally friendly" in addition to
7 being fuel efficient and high-performing, and to pay a premium for that combination of
8 characteristics. *E.g.*, ¶¶ 20, 25, 29, 286, 291, 292, 379, 418, 427. The decision to charge a clean-
9 diesel premium is not "contrary" to Bosch's goal of selling more defeat devices. *See* Bosch Br. at 11.
10 If Bosch had not conspired with VW to deceive regulators and consumers into believing that the
11 Vehicles were compliant with—and indeed, exceeded—emissions regulations, they would have sold
12 far fewer defeat devices because none of the Vehicles would have been legally saleable. ¶¶ 188-90.

13 **c. There will be no need to adopt complicated rules apportioning damages.**

14 Not only are "[i]ssues of proximate cause . . . generally factual inquiries," *Pradhan*, 2011 WL
15 90235, at *6, but the Ninth Circuit has found that questions regarding "whether the existence of
16 [more direct] victims would create a risk of multiple recovery . . . . [is a] factual question, which we
17 cannot resolve on a Rule 12(b)(6) motion." *Newcal Indus*., 513 F.3d at 1055. Here, nothing in the
18 Complaint suggests a risk of multiple recoveries, and to the extent Bosch argues otherwise, it merely
19 highlights the factual nature of the inquiry.
20 Bosch suggests that "difficulties of apportionment" exist due to the fact that Plaintiffs "claim
21 injuries in respect of Affected Vehicles for which, by definition, compensation has already been
22 provided by the VW Defendants and the Bosch Defendants to other parties." Bosch Br. at 11. But
23 nowhere does Bosch explain why the relevant injuries are those "in respect of" particular Vehicles. It
24 was not the Vehicles that were injured, but the consumers—and any consumers who were directly
25 injured by Defendants' scheme are entitled to "complete recovery for the harm that proximately
26 results from the predicate acts." *Pac. Gas & Elec. Co.*, 1993 WL 299219, at *2. As discussed *supra*,
27 both Plaintiffs and the consumers who owned their Vehicles when the fraud was revealed were
28

deceived by Defendants' fraudulent scheme, and both sets of plaintiffs were therefore directly injured by the scheme at different points in the timeline and in different amounts—which by definition means no overlap exists.

Nor does the possibility of the franchise dealers recovering damages create a risk of multiple recovery. As argued *supra*, Section V.A.2.a, both Plaintiffs and the dealers were injured, but each suffered injuries the other did not. To the extent the dealers were injured *after* the fraud was revealed and the stop-sale order issued, because they had excess inventory they could no longer sell, this is not a more direct injury than that suffered by Plaintiffs. It is simply different in kind. It presents no risk of multiple recovery of the sort that "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts." *Holmes*, 503 U.S. at 269. Indeed, because the dealers' excess inventory never entered the consumer stream, no Plaintiff in this action is claiming damages relating to those Vehicles. *See In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d at 38 n.11 ("There are, of course, other potential victims of Pfizer's scheme, such as uninsured individuals who paid for their own prescriptions. But any such injury would be different in kind from Kaiser's injury and could not be considered 'multiple' in that respect."). To the extent there might exist some need to allocate damages between Plaintiffs in this action and the franchise dealers with respect to cars sold before the fraud became public, Bosch waived that argument when it admitted facts to the contrary in answering the dealers' complaint. *See supra,* Section V.A.2.a. Even if the Court were inclined to ignore this admission, making any such determination would require intensive factual analysis inappropriate at the pleadings stage. *See Newcal Indus.*, 513 F.3d at 1055.

* * *

In sum, Plaintiffs' allegations of lost money in the form of overpayment for "clean diesel" vehicles, as well as the lost expectation of driving an environmentally friendly car, constitute compensable RICO injury. And because Defendants' scheme had the purpose and direct result of selling the deceptively marketed Vehicles to Plaintiffs at a false premium, there can be no question

that Plaintiffs' injuries were proximately caused by Defendants' misconduct. Therefore, Plaintiffs have standing to allege their RICO claims.

B. Plaintiffs allege a plausible RICO claim.

1. Bosch engaged in a pattern of racketeering.

In order to establish that Bosch engaged in predicate acts of mail and wire fraud, Plaintiffs need only allege that "Bosch was (1) a knowing participant in a scheme to defraud, (2) that Bosch participated in the scheme with the intent to defraud, and (3) that a co-schemer's acts of mail and wire fraud occurred during Bosch's participation in the scheme and were within the scope of the scheme." *Napleton*, 2017 WL 4890594, at *13. Plaintiffs have met their burden.

a. Plaintiffs adequately allege that Bosch knowingly participated in a scheme to defraud.

Bosch first makes the irrelevant argument that Plaintiffs "do not adequately plead that Bosch LLC or Bosch GmbH made even a single misrepresentation with the specificity required by Rule 9(b)." Bosch Br. at 14. This Court rejected that same argument in *Napleton*, explaining that "each member of the scheme does not need to make a separate misrepresentation" because "'statements and acts of coparticipants in a scheme to defraud [are] admissible against other participants.'" 2017 WL 4890594, at *12 (quoting *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002)).

Bosch next incorrectly contends that Plaintiffs "do not plausibly allege that the Bosch Defendants knowingly participated in the VW German Defendants' alleged scheme." Bosch Br. at 15. In particular, Bosch erroneously argues that "Plaintiffs' allegations amount to nothing more than an assertion that a supplier worked closely with its customer to develop a complex product." *Id.* at 17. To the contrary, Plaintiffs allege that Bosch GmbH and Bosch LLC, "working with Volkswagen *for the express purpose of manipulating vehicle emissions*, programmed the software in the EDC17 so that it became a defect device." ¶ 11 (emphasis added). Similarly, Plaintiffs allege that the "purpose of the defeat device was to evade stringent U.S. emissions standards. Once Bosch GmbH and VW perfected the defeat device, therefore, VW, Bosch GmbH and Bosch LLC turned their

attention to deceiving U.S. regulators." ¶ 253. As this Court already held, such allegations support a RICO claim against Bosch:

> The allegations support that Bosch knowingly participated in this scheme by working with Volkswagen to implement the defeat device that made the scheme possible, and by promoting "clean diesel" technology in the United States.
>
> *First*, the allegations support that Bosch exercised near-total control over modifications to the EDC17. For example, Volkswagen and Bosch agreed in a 2005 contract that Bosch would retain control over the EDC17 software; that Bosch would test and carry out any modifications necessary in order to integrate Volkswagen modules; that any modules developed by Volkswagen could not be installed without Bosch's written approval; and that only if everything met Bosch's standards would Bosch "deliver[ ] the final complete software product for VW to use in combination with a BOSCH control unit." (SAC ¶¶ 108-110 (alteration in original).)
>
> Bosch's tight control over the EDC17 is further supported by allegations that Bosch typically locked the EDC17 to prevent customers like Volkswagen from making significant changes on their own. (*Id.* ¶¶ 79, 103.) An engineer from another car company has also confirmed that Bosch is heavily involved in software development, and that "[t]he car company is never entitled by Bosch to do something on their own." (*Id.* ¶ 105 (emphasis omitted).)
>
> Taking these allegations as true and construing them in the Franchise Dealers' favor, *Ass'n for L.A. Deputy Sheriffs v. Cty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011), an inference arises that Bosch was not a mere parts supplier that "innocently suppli[ed] a product that was misused by VW," as Bosch contends. (Dkt. No. 2864 at 47.) Rather, because the Franchise Dealers plausibly alleges that Bosch controlled all modifications to the EDC17, the Franchise Dealers' complaint supports an inference that Bosch must have known about and approved the changes that converted the EDC17 into a defeat device.

2017 WL 4890594, at *13. Plaintiffs in this matter make precisely the same allegations,[19] but Bosch does not even try to explain why the Court should reach a different result here.

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[19] Paragraphs 108-110 in the *Napleton* complaint are the same as paragraphs 231-233 in the *Nemet* complaint. Similarly, paragraphs 79, 103, and 105 in the *Napleton* complaint make the same allegations as paragraphs 225 and 227 in the *Nemet* complaint.

Bosch next asserts that email communications "do nothing to add plausibility to the allegation that the Bosch Defendants knowingly participated in the VW German Defendants' alleged scheme." Bosch Br. at 17. Yet again, this Court held otherwise in *Napleton*, noting that "[i]nternal Volkswagen emails also support that Bosch was involved in the scheme," in particular a November 2006 email from Dieter Mannigel, a member of Volkswagen's Software Design team in the U.S. Diesel Engines division, to Hanno Jelden, head of Volkswagen's Powertrain Electronics division, about the 'US07' project. 2017 WL 4890594, at *13.[20] After reviewing the contents of the email,[21] this Court held that it shows that Bosch was a strategic partner in the scheme:

> The express references in this email to the "acoustic function," the "US07" project, and the importance of not getting caught illustrate Volkswagen's deception in undertaking the emissions scheme. But the email also casts Bosch as a strategic partner in the scheme. The "issue"

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[20] This Court may take judicial notice of that court-filed email in assessing Bosch's motion to dismiss in this action. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). The email at issue is readily verifiable, because Bosch filed it and relied on it in these MDL proceedings. Alternatively, if the Court were to rule that it cannot consider the email at this juncture, Plaintiffs request leave to amend the Complaint to discuss it.

[21] The email reads:

> Have you spoken with Bosch about the issue of US07 ...?
>
> This issue is slowly becoming critical....
>
> I came away from our meeting with Mr. Krebs [who joined Volkswagen from Audi in 2005, SAC ¶ 118] with the following:
>
> - When we use the "acoustic function," it should have an appearance that won't get us in trouble....
>
> ....
>
> - He is very skeptical about its implementation on the U.S. market: for one thing due to the very critical liability situation....
>
> In my opinion, the requirement of "nondiscoverability" has neither been met for today's function nor the planned expansion.
>
> The FP sheet for the expansion has been submitted to Bosch.
>
> How do we proceed?

Id. at *14 (quoting Dkt. No. 4175-5 at 3).

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> discussed appears to be how to implement the "acoustic function" in the U.S. without being discovered. And Mannigel asks if Jelden has "spoken with Bosch about the issue," suggesting that Bosch might be able to help hide the "acoustic function" from U.S. regulators. Further, from the statement that "[t]he FP sheet for the expansion has been submitted to Bosch," it is also reasonably inferable that Volkswagen had already requested that Bosch modify the EDC17 to implement the "acoustic function."

Id. at *14. Since the issue of Bosch's participation in the scheme is identical in this litigation, this Court's discussion of Mannigel's email applies equally here.

Bosch erroneously argues that this Court misconstrued that document, which Bosch contends "does not suggest an inference that 'Bosch' was aware of the function requested or its legality." Bosch Br. at 18. Any purported inference that Bosch was not aware of the "function" or its illegality is inconsistent with the wealth of allegations cited by this Court in the *Napleton* order. Taking Plaintiffs' "allegations as true and construing them in the Franchise Dealers' favor, *Ass'n for L.A. Deputy Sheriffs v. Cty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011)," this Court explained that "because the Franchise Dealers plausibly alleges that Bosch controlled all modifications to the EDC17, the Franchise Dealers' complaint supports an inference that Bosch must have known about and approved the changes that converted the EDC17 into a defeat device." *Id*. at *13. The same result holds true here.

Finally, Bosch also incorrectly argues that Plaintiffs have not alleged a duty to disclose, because "the duty to disclose must be tied to a separate relationship between the plaintiff and the defendant." Bosch Br. at 19. Once again, Bosch misunderstands RICO. As this Court explained in *Napleton*, Bosch can be liable for the predicate acts of mail and wire fraud if "a co-schemer's acts of mail and wire fraud occurred during Bosch's participation in the scheme and were within the scope of the scheme." 2017 WL 4890594, at *13. Bosch does not contend that VW did not have a duty to disclose or that VW or did not make misrepresentations, so Bosch's argument that it did not have a separate duty to disclose is irrelevant under RICO.[22]

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[22] Bosch cites two inapposite decisions by this Court. In *Dufour v. BE LLC*, 2010 WL 2560409 (N.D. Cal. June 22, 2010), this Court held that the plaintiffs did not allege facts to support a duty of disclosure by *any* defendant but did not hold that each member of a RICO enterprise must have an

1 **b. Bosch acted with specific intent to defraud.**

2 Bosch incorrectly asserts that the Complaint does not allege that Bosch acted with specific
3 intent to defraud. Bosch Br. at 20-22. Bosch's argument ignores this Court's ruling that the *Napleton*
4 plaintiffs' allegations demonstrated an intent to defraud:

5 > Bosch's intent to defraud reasonably can be inferred from the scheme
6 > itself. *See Eclectic Props.*, 751 F.3d at 997 ("[B]y examining the
> scheme itself the court may infer a defendant's specific intent to
7 > defraud.") (internal quotation marks omitted). No one to date in this
> multidistrict litigation has sought to justify, or explain a lawful purpose
8 > for, software that effectively turns a vehicle's emission systems on or
> off depending on whether the vehicle is undergoing emissions testing
9 > or being operated under normal driving conditions. But according to
10 > the allegations in the complaint, that is the function for which Bosch
> allowed its EDC17 to be used for years in Volkswagen's vehicles.
11 > Further, not only did Bosch authorize this use of its EDC17, but it
> promoted "clean diesel" technology despite knowing that the low NOx
12 > emissions levels that Volkswagen reported to U.S. regulators, and
13 > promoted to U.S. consumers, were false. The Franchise Dealers'
> pleadings satisfy the intent requirement.

14 2017 WL 4890594, at *15. Plaintiffs here make the same allegations. *See*, *e.g.*, ¶¶ 217-281.

15 **c. The mails and wires were used in furtherance of the scheme to defraud.**

16 Bosch misapprehends RICO when it asserts that "while Plaintiffs have alluded to a number of
17 mailing and wirings by Bosch LLC and Bosch GmbH, none of those are instrumental to the
18 purported scheme to defraud regulators and consumers about the existence of a defeat device in the
19 Affected Vehicles." Bosch Br. at 22-23. Under RICO, Bosch need not make any such mailings or
20 wirings in order to be liable. Instead, Bosch is liable under RICO if "a co-schemer's acts of mail and
21 wire fraud occurred during Bosch's participation in the scheme and were within the scope of the
22 scheme." *Napleton*, 2017 WL 4890594, at *12.

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26 independent duty to disclose (or made misrepresentations) to RICO plaintiffs. In fact, this Court declined to dismiss RICO claims in that action. And in the other case cited by Bosch, *Mahurin v.*
27 *Lehman Bros.*, 2000 WL 356377 (N.D. Cal. Mar. 30, 2000), the plaintiff failed to allege that sole defendant was in a confidential or fiduciary relationship to support a claim for constructive fraud.
28 The duty to disclose in the context of a RICO or conspiracy claim was not addressed.

Bosch does not even address the plethora of mailings by VW that furthered the purposes of the Enterprise. As this Court stated in *Napleton*:

> The complaint alleges numerous misrepresentations by Volkswagen to U.S. regulators and consumers. These include Volkswagen's applications for certification of the affected vehicles, which Volkswagen submitted to EPA and the California Air Resources Board (CARB) for each model year, and which misrepresented that the vehicles complied with EPA and CARB's emission requirements (SAC ¶¶ 86-88, 423(b)); falsified emission tests (id. ¶ 423(f)); and sales and marketing materials, including advertising, websites, product packaging, brochures, and labeling, which all misrepresented or concealed the affected vehicles' emission levels (id. ¶¶ 160-88, 423(k)). All of these misrepresentations are alleged to have been made through the use of the mails and wires. All of these misrepresentations also occurred during Bosch's participation in the scheme and were within the scope of the scheme so as to support co-schemer liability. *Stapleton*, 293 F.3d at 1117-18.

Id. at *15. Plaintiffs here make the same allegations.[23]

d. Whether Bosch aided and abetted the predicate acts is irrelevant, because it is liable as a co-schemer under RICO.

Bosch argues that Plaintiffs' allegations of aiding-and-abetting do not support their RICO claims. Bosch Br. at 25-26. That argument is irrelevant because, as demonstrated below, Plaintiffs adequately allege that Bosch is liable under RICO as a co-schemer. In *Napleton*, this Court explained that RICO co-schemers are liable for each other's actions under *United States v. Stapleton*, 293 F.3d 1111 (9th Cir. 2002), and that "RICO requires more than aiding and abetting conduct to give rise to liability." 2017 WL 4890594, at *13. As shown in Section V.B.2, below, Plaintiffs adequately allege Bosch's liability as a RICO co-schemer, just as in *Napleton*, so there is no need for Plaintiffs to argue that Bosch is liable as an aider-and-abettor.

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[23] The allegations in paragraphs 86-88, 160-88, 423(b), 423(f), and 423(k) of the *Napleton* complaint are the same as allegations in paragraphs 206-208, 282-308, 488(e), 488(d), and 488(j) of the *Nemet* complaint, respectively.

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2. Bosch was part of a RICO enterprise.

a. Bosch participated in the RICO enterprise.

Bosch incorrectly argues that "Plaintiffs fail to plausibly allege that the Bosch Defendants had the necessary 'common purpose' to form an enterprise with the VW German Defendants." Bosch Br. at 27. That argument again ignores this Court's ruling that the *Napleton* plaintiffs adequately alleged the same enterprise alleged here. *Napleton*, 2017 WL 4890594, at *16. As to the "common purpose" element, this Court stated:

> First, "[e]vidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'" *Id.* at 947 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)). This is such a case. The allegations that Bosch knowingly participated with Volkswagen in the scheme to defraud also support that Bosch and Volkswagen shared a common purpose to design, manufacture, and sell the "clean diesel" vehicles "through fraudulent [certifications], false emissions tests, [and] deceptive and misleading marketing ... materials, and [to derive] profits and revenues from those activities." (SAC ¶ 408.)

Id. at *16. Plaintiffs here make identical allegations and thus adequately allege "common purpose."[24]

Bosch next incorrectly asserts that "Plaintiffs fail to allege that the common purpose of the RICO enterprise caused their injury" because "the Bosch Defendants had no role in determining this alleged premium . . . , which ran contrary to the Bosch Defendants' alleged purpose to sell more EDC17s." Bosch Br. at 28. As discussed at p. 19, above, there is nothing implausible about Plaintiffs' allegations. If Bosch had not conspired with VW to deceive regulators and consumers into believing that the Vehicles were compliant with emissions regulations, they would have sold far fewer defeat devices because none of the Vehicles would have been legally saleable. ¶¶ 188-90

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[24] ¶ 473 ("At all relevant times, the Emissions Enterprise . . . was an ongoing and continuing organization consisting of legal entities, including the Volkswagen Defendants, their network of dealerships, the Bosch Defendants, and other entities and individuals associated for the common purpose of designing, manufacturing, distributing, testing, and selling the Class Vehicles to Plaintiffs and the Nationwide Class through fraudulent COCs and EOs, false emissions tests, deceptive and misleading sales tactics and materials, and deriving profits and revenues from those activities. Each member of the Emissions Enterprise shared in the bounty generated by the enterprise, *i.e.*, by sharing the benefit derived from increased sales revenue generated by the scheme to defraud Class members nationwide.").

1 Finally, Bosch again ignores this Court's *Napleton* ruling when it erroneously claims that
2 Plaintiffs "fail to allege the requisite structure and organization for a RICO enterprise." Bosch Br. at
3 28. In *Napleton*, this Court ruled that the structural requirement was satisfied:

4 RICO's structural requirement requires only a "relationship among
5 those associated with the enterprise." *Boyle*, 556 U.S. at 946 (neither a "hierarchy, role differentiation ... [or] a chain of command" is
6 required). This element is satisfied here, as made clear by contracts between Volkswagen and Bosch (SAC ¶¶ 108-13), and a spreadsheet
7 that tracked Bosch's work for Volkswagen on the EDC17, which is alleged to include 8,565 entries from hundreds of Bosch employees (*id.*
8 ¶ 107).

9 2017 WL 4890594, at *16. Plaintiffs make identical allegations about the contracts between
10 Volkswagen and Bosch, *see* ¶¶ 231-36, and about the spreadsheet that included 8,565 entries from
11 hundreds of Bosch employees, ¶ 230. Thus, Plaintiffs adequately allege the requisite structure and
12 organization of the Enterprise.

13 **b. Bosch played a part in directing the affairs of the Enterprise.**

14 Bosch erroneously claims that the "Complaint also does not plausibly allege that either Bosch
15 LLC or Bosch GmbH participated in the 'conduct' of the alleged enterprise." Bosch Br. at 29. In
16 *Napleton*, this Court explained that a RICO defendant need only play some part in directing a RICO
17 enterprise's affairs to be found liable:

18 Finally, "[i]n order to 'participate, directly or indirectly, in the *conduct*
19 of [an] enterprise's affairs,' one must have some part in directing those affairs." *Reves*, 507 U.S. at 179 (emphasis added) (quoting 18 U.S.C. §
20 1962(c)). This requirement does not limit RICO liability "to those with primary responsibility for the enterprise's affairs," nor does it require a
21 participant to exercise "significant control over or within an
22 enterprise." *Id.* at 179 & n.4 (emphasis omitted). But "*some* part in directing the enterprise's affairs is required," *id.* at 179, and "[s]imply
23 performing services for the enterprise," or failing to stop illegal activity, is not sufficient. *Walter v. Drayson*, 538 F.3d 1244, 1248-49
24 (9th Cir. 2008).

25 2017 WL 4890594, at *16. This Court then ruled that the *Napleton* plaintiffs adequately alleged that
26 Bosch played some part in directing the enterprise's affairs:

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> As alleged, Bosch's role was more than "[s]imply performing services for the enterprise," or failing to stop illegal activity. *Id.* In their 2005 agreement, Bosch and Volkswagen agreed that Bosch's approval would be required before any Volkswagen modules could be implemented in the EDC17. Through this approval right, Bosch had the final say as to whether to implement the defeat device. (*See* SAC ¶ 110 ("Only if everything met Bosch's standards would it then deliver the final complete software product for VW to use in combination with a BOSCH control unit.") (internal quotation marks omitted).) Bosch's final-approval right made it "indispensable to achievement of the enterprise's goals," and provided it with a position in the "chain of command" of the enterprise, both factors that support an inference that it had a role in conducting the enterprise's affairs. *Walter*, 538 F.3d at 1249.

Id. at *17. Plaintiffs here make the same allegation, which, as in *Napleton*, establishes that Bosch played some part in conducting the enterprise's affairs. *See* ¶ 233 ("Only if everything met Bosch's standards would it then 'deliver[] the final complete software product for VW to use in combination with a BOSCH control unit.'") (citation omitted).

3. Plaintiffs plausibly allege a RICO conspiracy.

Contrary to Bosch's argument, *see* Bosch Br. at 31, Plaintiffs adequately allege a RICO conspiracy. In *Napleton*, this Court rejected Bosch's argument that the plaintiffs failed to allege a RICO conspiracy:

> The same allegations that demonstrate Bosch's participation in the enterprise support [plaintiffs'] conspiracy claim. It is plausible that Bosch was aware of the scheme because it exercised near-total control over modifications to the EDC 17. And Bosch's intent to participate in the scheme is inferable from its alleged willingness to let Volkswagen use the modified EDC17 in its vehicles for years.

2017 WL 4890594 at *17. For the same reasons, Plaintiffs here adequately allege a conspiracy. *See*, *e.g.*, ¶¶ 214, 225-227, 237, 238, 240.

C. Plaintiffs allege personal jurisdiction over Bosch GmbH.

There is no merit to Bosch GmbH's argument that this Court lacks personal jurisdiction. Bosch Br. at 32-34. This Court may exercise personal jurisdiction over Bosch GmbH for the same reasons it ruled in *Napleton* that "[p]ersonal jurisdiction over Bosch GmbH is proper under Federal

1 Rule of Civil Procedure 4(k)(2)." 2017 WL 4890594, at *17.[25] Rule 4(k)(2) applies when (1) the
2 claim against the defendant arises under federal law; (2) the defendant is not subject to the personal
3 jurisdiction of any state court of general jurisdiction; and (3) the federal court's exercise of personal
4 jurisdiction comports with due process. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d
5 450, 461 (9th Cir. 2007).

6 As in *Napleton*, the first two elements are not in dispute. 2017 WL 4890594, at *17. As to the
7 third factor, the same analysis this Court applied in *Napleton* applies here:

8 Bosch and Volkswagen are alleged to have intentionally designed the
9 defeat device to evade U.S. emission requirements. (*See, e.g.*, SAC ¶
10 73 ("Volkswagen engineers, working with Bosch Diesel Systems ...
11 adapted Audi's 'akustikfunktion' concept ... for Volkswagen and Audi
12 models to be sold in the U.S."); ¶ 81 (Bosch and Volkswagen
13 customized the EDC17 so that the affected vehicles could "detect[ ]
14 test scenarios" that were used in the United States).) Employees at
15 Bosch GmbH, working as part of Bosch's Diesel Systems division,
16 also lobbied U.S. regulators and lawmakers about the benefits of
17 "clean diesel" technology. (*Id.* ¶¶ 143, 147, 149-50, 154.) This conduct
18 all "connects [Bosch GmbH] to the forum in a meaningful way."
Walden v. Fiore, 134 S. Ct. 1115, 1125 (2014). The Franchise Dealers'
suit also "arises out of or relates to the defendant's contacts with the
forum," so as to support specific jurisdiction. *Daimler AG v. Bauman*,
134 S. Ct. 746, 754 (2014) (citation omitted). "But for" Bosch GmbH's
approval of a defeat device targeted at the U.S. vehicle market, it is
reasonable to conclude that the Franchise Dealers would not have
suffered injuries tied to that device.

19 *Id.*

20 Bosch GmbH erroneously argues that jurisdiction is improper under Rule 4(k)(2) because it
21 "alleged contacts with the United States are equally 'scant, fleeting, and attenuated.' *Axiom Foods*,
22 874 F.3d 1064, 1072." Bosch Br. at 34 (footnote omitted). In *Axiom Foods, Inc. v. Acerchem Int'l,*
23 *Inc.*, 874 F.3d 1064 (9th Cir. 2017), the plaintiffs alleged that an employee of Acerchem UK, which
24 does not conduct business in the United States, sent an email newsletter that allegedly infringed
25 plaintiffs' copyright. The Ninth Circuit held that personal jurisdiction could not be exercised under

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27 [25] Bosch notes that the Complaint does not invoke Rule 4(k)(2), *see* Bosch Br. at 34, but Bosch
28 does not cite any authority that requires Plaintiffs to cite to a particular rule in alleging personal
jurisdiction.

Rule 4(k)(2). The Court stated, "Appellants do not satisfy the third requirement. According to the evidence produced, the sole contact between Acerchem UK and the United States is the newsletter. Although Appellants maintain that Acerchem UK sent the newsletter to '[a]t least 70 recipients with companies in the United States, other than California,' Appellants fail to explain the relationship between the 70 recipients and their respective companies." *Id.* at 1072. *Axiom Foods* is inapposite, because as in *Napleton*, Plaintiffs "allege that Bosch GmbH and Volkswagen specifically targeted the United States and that hundreds of thousands of defeat devices made their way into the United States." 2017 WL 4890594, at *18.

Finally, Bosch argues in a footnote that the "'primary concern' of the Court in assessing personal jurisdiction must be 'the burden on the defendant,' which is substantial in this case." Bosch Br. at 34 n.16 (quoting *Axiom Foods*, 874 F.3d at 1068). But Bosch GmbH does not identify *any* burden, let alone a substantial burden.[26]

VI. CONCLUSION

Most of Bosch's Motion to Dismiss can be disposed of by reference to this Court's opinion in *Napleton*, as Bosch's arguments fail for the same reasons this Court reached its conclusions in that case. Bosch's only new argument, that Plaintiffs here lack RICO standing, is also meritless. Thus, Bosch's Motion should be denied in its entirety.

[26] *See Napleton*, 2017 WL 4890594, at *18 ("Bosch GmbH argues that it would be burdened by defending in the United States as opposed to in Germany. (Dkt. No. 2864 at 64.) But '[u]nless such inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction.' *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1481 (9th Cir. 1986). The inconvenience identified here, that Bosch GmbH is headquartered in Germany, is not an inconvenience of this magnitude.").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2018, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Steve W. Berman
STEVE W. BERMAN