No. 23-1648

United States Circuit Court of Appeals
For the Sixth Circuit

ANDREI FENNER,

Plaintiff,

and

PHILLIP BURNS; JAMES T. CRUNKLETON, III; ANTHONY GADECKI; MATTHEW HENDERSON; JOSHUA HERMAN; CARRIE LYNNE MIZELL; MICHAEL REICHART; KURT ROBERTS; GEORGE STANLEY; and GREGORY WILLIAMS;

Plaintiffs-Appellants,

vs.

GENERAL MOTORS LLC; ROBERT BOSCH GMBH; and ROBERT BOSCH LLC,

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Hon. Thomas L. Ludington / No. 1:17-cv-11661

PLAINTIFFS-APPELLANTS' OPENING BRIEF [REDACTED VERSION]

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-1648 Case Name: Andrei Fenner, et al v. General Motors, LLC, et al

Name of counsel: Steve W. Berman

Pursuant to 6th Cir. R. 26.1, Plaintiffs-Appellants Phillip Burns, et al.
Name of Party
makes the following disclosure:

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

No.

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

No.

CERTIFICATE OF SERVICE

I certify that on September 12, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

All Plaintiffs request oral argument. This appeal involves issues of importance regarding: (1) whether Plaintiffs' state-law claims that Defendants deceptively marketed Duramax trucks as "clean" (and failed to disclose that the trucks caused excessive emissions of pollutants) conflict with federal law, even though Plaintiffs' claims are consistent with federal law and do not challenge any findings by the Environmental Protection Agency ("EPA"); (2) whether Plaintiffs' state-law claims under the laws of those states that are authorized to set their own emissions standards conflict with federal law; and (3) whether the indirect-purchaser rule bars Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, even though Defendants directly deceived Plaintiffs, causing them to suffer damages that are not based on passed-on overcharges by dealers, and even though the dealers did not suffer any damages but instead benefited from the scheme.

I. STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1332 because Plaintiffs and Defendants reside in different states and had supplemental jurisdiction over Plaintiffs' state-law claims under 28 U.S.C. § 1367. The district court also had jurisdiction under 28 U.S.C. § 1332(a)(1), as modified by the Class Action Fairness Act of 2005, because: Plaintiffs and Defendants are citizens of different states; there are more than 100 members of the Class; the aggregate amount in controversy exceeds $5 million, exclusive of attorneys' fees, interest, and costs; and class members reside across the United States.[1]

After receipt on July 12, 2023, of the Final Judgment dismissing with prejudice all of Plaintiffs' claims in the underlying action,[2] Plaintiffs timely filed a Notice of Appeal on July 13, 2023.[3] This Court accordingly has jurisdiction to review the Final Judgment under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES

1. Whether the doctrine of implied preemption bars Plaintiffs' claims under state law.

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[1] 28 U.S.C. § 1332(d)(1)-(2).

[2] Judgment, RE 445, Page ID # 48718.

[3] Notice of Appeal, RE 446, Page ID # 48719.

2. Whether Plaintiffs' state-law claims under the laws of California and other states adopting California's emissions standards are barred by the doctrine of implied preemptions even if claims under other state laws are preempted.

3. Whether the indirect-purchaser rule bars Plaintiffs' RICO claims.

III. STATEMENT OF THE CASE

A. Statement of Facts

This statement of facts sets forth allegations and evidence relevant to the two issues before this Court.

1. Plaintiffs allege that Defendants deceptively marketed Duramax trucks as "clean" even though they designed the trucks so that they emitted excessive NOx during real-world driving.

Plaintiffs allege that Defendants General Motors LLC ("GM"), along with Robert Bosch GmbH and Robert Bosch LLC (collectively, "Bosch"), deceived them and other consumers as to the emissions of NOx from their Duramax trucks during real-world driving. The First Amended Complaint ("Complaint" or "FAC") alleges that "[t]his is what General Motors ('GM') promised when selling its popular Silverado and Sierra HD Vehicles—that its Duramax engines turned 'heavy diesel fuel into a fine mist,' delivering 'low emissions' that were a 'whopping reduction' compared to the prior model and at the same time produced a vehicle with 'great power.'"[4] In contrast to GM's promises, "scientifically valid emissions testing has

[4] FAC, RE 18, Page ID # 892, ¶ 1.

revealed that the Silverado and Sierra 2500 and 3500 models emit levels of NOx many times higher than (i) their gasoline counterparts, (ii) what a reasonable consumer would expect, (iii) what GM had advertised, (iv) the Environmental Protection Agency's maximum standards, and (v) the levels set for the vehicles to obtain a certificate of compliance that allows them to be sold in the United States."[5]

The Complaint emphasizes that Plaintiffs challenge Defendants' deception as to emissions during real-world driving. Plaintiffs allege that "GM sold these vehicles while omitting information that would be material to a reasonable consumer, namely that GM has programmed its Silverado 2500 and 3500 and Sierra 2500 and 3500 Duramax vehicles to significantly reduce the effectiveness of the NOx reduction systems during real-world driving conditions."[6] Plaintiffs also allege that "GM did not previously disclose to Plaintiffs or class members that in real-world driving conditions, the Polluting Vehicles can only achieve high fuel economy, power, and durability by reducing emissions controls in order to spew NOx into the air."[7] And "GM never disclosed … that the emissions materially exceed applicable emissions limits in real-world driving conditions."[8]

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[5] *Id.*, Page ID # 892, ¶ 2.
[6] *Id.*, Page ID # 899, ¶ 14.
[7] *Id.*, Page ID # 900, ¶ 18.
[8] *Id.*, Page ID # 900, ¶ 19.

The Complaint explains that Plaintiffs seek damages for overpayment at the time of sale caused by Defendants' consumer marketing scheme that deceived them into purchasing their trucks. Had GM disclosed that "the vehicle actually emitted unlawfully high levels of pollutants," Plaintiffs "would not have purchased the vehicle or would have paid less for it," so that Defendants' deception caused Plaintiffs to suffer "out-of-pocket losses by overpaying for the vehicles at the time of purchase."[9] Defendants' scheme resulted in "class members overpaying for their vehicles at the time of purchase."[10]

As discussed in the following subsections, Plaintiffs submitted substantial evidence supporting their claims in opposition to Defendants' summary judgment motions.

2. Defendants designed Duramax trucks to use an "online dosing" defeat device that causes the trucks to emit excessive NOx under ordinary driving conditions but not during testing.

The expert testimony of Juston Smithers, along with Defendants' documents and testimony, provide substantial evidence that Defendants designed an "online

[9] *Id.*, Page ID ## 904-905, ¶ 26 (Stanley); Page ID ## 906-907, ¶ 27 (Reichert); Page ID # 908, ¶ 28 (Fenner); Page ID # 909, ¶ 29 (Williams); Page ID # 912, ¶ 30 (Herman); Page ID # 914, ¶ 31 (Burns); Page ID # 916, ¶ 32 (Roberts); Page ID # 918, ¶ 33 (Gadecki); Page ID # 920, ¶ 34 (McAvoy); Page ID # 922, ¶ 35 (Ash); Page ID # 924, ¶ 36 (Henderson); Page ID # 926, ¶ 37 (Crunkleton); Page ID # 927-928, ¶ 38 (Mizell).

[10] *Id.*, Page ID # 1034, ¶ 279(a).

dosing" defeat device in the Duramax trucks to be extensively active during real-world driving but not during testing, resulting in excessive NOx emissions during real-world driving. Smithers explains that he was "asked to evaluate the emissions performance of 2011 – 2016 Duramax 2500 and 3500 trucks and determine whether their emissions performance in the real world differed from their performance in the testing environment, and if so, to identify the circumstances or mechanism leading to the different results."[11] As he explained, he "undertook a rigorous testing program using well-recognized and accepted equipment and methods for measuring emissions in the real world."[12] He and his staff "tested the vehicles over thousands of miles, over various terrain, and in many environmental conditions, providing us with an enormous collection of data that allowed us to engage in a thorough and robust analysis of the vehicles' emissions performance."[13]

Smithers found that "the 2011 – 2016 diesel Duramax 2500 and 3500 vehicles at issue emit NOx in excess of the regulatory standards in circumstances the vehicles commonly encounter in real-world driving."[14] He explained that the "results are also well above the vehicles' performance during regulatory testing."[15] That is because

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[11] Smithers Rep., RE 395-1 (under seal), at 2.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 2-3.

[15] *Id.* at 3.

GM and Bosch "developed and programmed the device to hide the real effects of online dosing during testing and increase its use – and the consequent increase in NOx emissions – when the trucks were operating outside of test cycle boundaries."[16]

Smithers explained that Duramax trucks use "a catalyst technology called selective catalytic reduction (SCR) designed to reduce emissions of NOx from the engine by more than 90% in most real-world driving scenarios."[17] The SCR system in the Duramax trucks neutralizes NOx emitted by the engine combustion chamber ("engine-out NOx") by using a solution called diesel exhaust fluid ("DEF"), which reacts with the catalyst in the SCR to reduce NOx.[18] When online dosing is used for extended periods in real-world driving, the catalyst becomes depleted, resulting in increased NOx emissions.[19] Significantly, because online dosing [redacted].[20] And Smithers' analysis shows that the SCR efficiency in the Duramax trucks in real-world driving

[16] *Id.*

[17] *Id.* at 4.

[18] *Id.* at 12-14. "For the SCR system to reduce NOx and generate low tailpipe emissions, a urea/water solution called diesel exhaust fluid (DEF) must be injected into the exhaust system upstream of the SCR catalyst in proportion to the NOx coming out of the engine." *Id.* at 4.

[19] *Id.* at 58, Figure 11-2.

[20] *See* Perrin Dep., RE 395-14 (under seal), at 156:7-14, 159:1-25.

is often well below the maximum efficiency and below the efficiencies shown on regulated test cycles.[21]

Defendants' documents and testimony show why emissions are much higher during real-world driving than testing. [redacted].[22]

[redacted]

[21] *See* Smithers Rep., RE 395-1 (under seal), at 49, Table 10-2; *id.* at 50, Table 10-5; *id.* at 51, Table 10-8; *id.* at 77, Table 12-9; *id.* at 78, Table 12-10; *id.* at 80, Table 12-15.

[22] Arvan Dep., RE 395-2 (under seal), at 86:17-88:4, 305:2-4 ("[W]e were definitely interested in DEF range"). Arvan also testified [redacted] *Id.* at 93:2-94:4, 95:2-14.

[23] *See id.* at 313:17-23.

[24] The FTP-75 (Federal Test Procedure) cycle was developed by the EPA and is used for emission certification and fuel economy testing of passenger vehicles in the United States. Smithers Rep., RE 395-1 (under seal), at 16 (footnote omitted).

[redacted]:[25]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[25] *See* Darr Dep. Ex. 9, RE 395-16 (under seal), at GMDURAMAX000008757; Darr Dep. Ex. 9A (native), RE 395-17 (under seal), at slide 14; Barren Dep. Ex. 9A, RE 395-18 (under seal), at GMDURAMAX001945477.

[redacted].[27] But that success came at the cost of increased NOx emissions during real-world driving (but not during testing), as shown by Smithers' test results. Those results show that the average city driving emissions of the four Duramax 2500 test trucks was about 3.2 times the federal standard during real-world driving.[28] And Smithers identified numerous specific times when online dosing in Duramax trucks caused excessive NOx emissions during real-world driving that were not revealed during testing under EPA standards. For example:

- At average or cumulative road grades above 2%, "NOx emissions are on average 1137 mg/mile, 2.8 times the HWFET standard of 400 mg/mile for the

[26] Smithers Rep., RE 395-1 (under seal), at 59.

[27] Arvan Dep., RE 395-2 (under seal), at 349:2-8; *see also* Arvan Dep. Ex. 34, RE 395-19 (under seal), at GMDURAMAX931677 ([redacted]

[28] *Id.* The average was calculated by dividing the sum of the total distance tested across the four vehicles by the sum of the average NOx emissions. Smithers Rep., RE 395-1 (under seal), at 33, Figure 9-1.

2500 model test vehicles," while the average results for cumulative positive road grades are "approximately 2.9 times that of the HWFET standard."[29]

- Compared to emissions when not towing, the test vehicles' "NOx emissions … are 23 times and 45 times higher while towing on road grades greater than 2%."[30]

- "PEMS cold start results are about 2.3 times as high as Phase 1 of the FTP-75 and PEMS hot start results are about 6 times as high as Phase 3 of the FTP-75."[31] The 3500 Duramax test truck had cold start results "about 2.8 times as high as Phase 1 of the FTP-75 and PEMS hot start results … about 7.2 times as high as Phase 3."[32]

Finally, Smithers' analysis shows that, apart from any regulatory standards, Duramax trucks emit far more NOx in real-world conditions than when the online dosing system is not activated. Smithers' report includes data showing the vehicles' emissions performance when the defeat device was substantially active, as well as when it was inactive or minimally active. This data allows Smithers to show that the

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[29] *Id.* at 74-75. HWFET stands for the Highway Fuel Economy Test, which simulates highway driving under 60 mph to test fuel economy and emissions. *Id.* at 17.

[30] *Id.* at 98.

[31] *Id.* at 101.

[32] *Id.*

trucks emitted excessive NOx during online dosing without referencing any federal standard.

The primary measure of the vehicles' emissions when the defeat device is substantially inactive is their performance on the FTP-75 and HWFET test cycles. As Smithers found, [redacted][33] Each of Smithers' test vehicles was tested using the FTP-75 and HWFET test protocols and achieved results similar to those GM achieved.[34] Thus, FTP-75 and HWFET test results show the trucks' emissions performance when online dosing is only minimally active, and comparisons of those results to test segments when online dosing is substantially active demonstrate the impact of online dosing on vehicle emissions.

Several sections of his report make these comparisons. For example, Section 9 discusses overall PEMS results in City and Highway driving and provides an overall analysis of the trucks' emissions performance in real world driving, which can be compared to their FTP-75 and HWFET results.[35] Section 10 provides a "flat road analysis," which isolates the Duramax trucks' performance in conditions

[33] *Id.* at 58-63, 68.
[34] *Id.* at 27-31.
[35] *Id.* at 32-46.

comparable to segments of the FTP-75 and HWFET tests.[36] Smithers' flat road analysis shows that even under conditions similar to the dynamometer tests, the trucks emit 1.5 to 12 times more NOx in real world conditions than on the test cycles when run over longer test segments that do not mask the impact of online dosing on NOx emissions.[37] Sections 12 and 13 focus on two scenarios that commonly trigger online dosing—road grades and trailer towing.[38] Both factors place extra strain on the engine, leading to higher engine speeds and loads that trigger online dosing. The results show significant increases in NOx emissions on road grades and during towing, when online dosing is substantially active.[39] By comparing the results the same vehicles achieved on the FTP-75 and HWFET tests (which by design only minimally trigger the online dosing device), Smithers shows the effect of online dosing on real world emissions without relying on any federal emissions standard.

3. Defendants' marketing of Duramax trucks as "clean diesel" and "low emissions" is substantial evidence of the materiality of the undisclosed facts.

As the district court has explained, Defendants' emphasis on low emissions in advertisements and press releases "reveals an understanding that consumers believe

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[36] *Id.* at 47-53.

[37] *Id.* at 48, 68 (discussing effect of catalyst depletion on NOx emissions).

[38] *Id.* at 73-92.

[39] *See id.*; *see also id.* at App'x O (Road Grade and Engine Load Analysis), App'x P (Additional Examples of Online Dosing).

emission levels are material to their purchasing decisions."[40] Similarly, emphasizing the advanced environmental technology employed by modern "clean diesel" or "low emissions" engines shows that Defendants know that emissions control technology (for which consumers pay a premium) is material to a reasonable consumer.

a. GM's advertising and press releases.

Before launching Duramax trucks, GM's marketing and product managers developed messages to resonate with consumers.[41] [redacted]"[44] None of the marketing plans disclosed either the defeat device in the Duramax trucks or excessive emissions released during real-world driving.

Many marketing messages for Duramax trucks concerned low-emissions and the purportedly advanced environmental technology in the trucks.[45] For example,

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[40] *In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1062 (E.D. Mich. 2018).

[41] Schwegman Dep., RE 395-20 (under seal), at 40:22-43:9.

[42] *Id.* at 117:15-25.

[43] *Id.* at 122:5-126:11. *See also id.* at 97:1-24 ([redacted]).

[44] *Id.* at 74:20-75:2, 75:23-76:25.

[45] *Id.* at 54:20-56:2.

[redacted]

[46] RE 395-26 (under seal), at GMDURAMAX000507510-11; RE 395-27 (under seal), at GMDURAMAX000936283.

[47] Arvan Dep. Ex. 7C, RE 395-28 (under seal), at 4.

[48] RE 395-29 (under seal), at GMDURAMAX000506888.

[49] Pierce Dep. Ex. 14, RE 395-30 (under seal), at GMDURAMAX002416471. *See also* Pierce Dep., RE 395-21 (under seal), at 240:2-243:4 ([redacted]).

[50] Schwegman Dep. Ex. 11B, RE 439-3 (under seal), at GMDURAMAX 000506888.

[redacted].[52]

Plaintiffs' marketing expert, Dr. Ashlee Humphreys, evaluated Defendants' marketing efforts using well-established techniques that are generally accepted in the peer-reviewed literature and provide an academically sound methodology for analyzing the marketing approaches employed by or on behalf of Bosch and GM in this case.[53] Dr. Humphreys did not address GM's "regulatory compliance" at all but instead documented what a reasonable consumer considers "low emissions" to be and whether they believed Duramax trucks were "low emissions" vehicles.[54] Summarizing her findings, Dr. Humphreys stated that GM "included the claim that the Duramax Trucks were low emissions vehicles in marketing materials and in communications with key intermediaries such as dealers and the media. This led to

[51] Berger Dep., RE 439-4 (under seal), at 140:12-141:10, 145:7-146:2, 173:5-176:15; Berger Rep., RE 439-5 (under seal), at 38, n.141.

[52] *See* Arvan Dep., RE 395-2 (under seal), at 197:23-199:18, 201:15-208:3.

[53] Humphreys Rep., RE 395-31 (under seal), at 1-2.

[54] *Id.* at 22-23.

expectations on the part of any reasonable consumer that the trucks were low emissions vehicles."[55]

b. Bosch actively fostered the perception that diesel emissions control technology effectively lowered emissions, thereby evincing its understanding that low emissions are material to consumers.

Dr. Humphreys studied Bosch's "megamarketing" campaign to influence public perception about diesel vehicles. She applied her expertise in principles of megamarketing to her review of internal Bosch documents discussing its strategy and to the results it achieved. As she explained, "megamarketing" is "the company-guided action to engineer the social process of legitimation" of a stigmatized product or activity—such as "dirty" diesels or gambling.[56] It "occurs when the company creates and shares a message with intermediaries between the company and its consumers such as the media, experts, NGOs, trade associations and regulators."[57]

Dr. Humphreys applied her expertise to (1) identify Bosch's megamarketing strategy to spread "clean diesel" talking points through intermediaries, (2) trace the dissemination of those talking points through the mass media, and (3) document the concurrent shift in public opinion regarding diesel and the creation of a clean diesel market.[58] Employing methodologies and techniques that are well-established within

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[55] *Id.* at 30.

[56] *Id.* at 4.

[57] *Id.*

[58] *Id.* at 8-21.

the marketing field, she identified and evaluated the scope and effect of the campaign.[59] [redacted].[60] She concluded that Bosch's "megamarketing" "involved formulating a marketing plan for key stakeholders and communicating the messages in press releases and media events. These claims were picked up and disseminated by mass media and communicated through other intermediaries. These efforts contributed significantly to changing public perceptions about diesel and increasing acceptance of diesel technology among buyers of heavy-duty trucks in the United States."[61]

Bosch's documents support Dr. Humphreys' findings. [redacted]

[59] *Id.* at 8-13.
[60] *Id.* at 15-21.
[61] *Id.* at 21-22 (emphasis added).
[62] *Id.* at 8.
[63] *Id.*

[redacted]

[redacted][67]

[redacted]

[redacted]

[redacted]

[64] *Id.*
[65] *Id.* at 10.
[66] *Id.*
[67] *Id.* at 11.
[68] *Id.* at 15.

[redacted]:[72]

[redacted]

4. Plaintiffs' damages model determined overpayment at the point of purchase.

Plaintiffs' expert Edward Stockton quantified consumers' overpayments at the point of purchase for: (1) a "clean diesel" truck that had an emissions reduction technology defect which caused the truck to emit excessive emissions; and (2) a "clean diesel" truck that contained an undisclosed defect that derated the truck's

[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 16.

emissions control system.[73] He identified and measured overpayment damages under these two different factual liability scenarios—the "emissions defect" scenario and the "defeat device" scenario, respectively.[74] Stockton explained that if "Plaintiffs' allegations are proven, I find that Class Members overpaid for Subject Vehicles and suffered economic harm under either scenario described."[75]

Under the emissions defect scenario, "Class Members paid for emissions reduction technology with an undisclosed defect reducing its functionality that did not add a premium emissions-reducing enhancement."[76] Stockton described his methodology and analysis and found that the "Emissions Defect led to overpayment at the time of purchase which amounted to $600 before transactional discounts and $545-$616 in 2020 Dollars in consideration of transactional discounts."[77]

Under the defeat device scenario, Stockton explained that "it is necessary to address the impact that the pre-sale disclosure of the Defeat Device would likely have had upon the marketability of the Subject Vehicles."[78] He estimated how much "Class Members overpaid" with two methods.[79] "First, the Direct Premium Method

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[73] Stockton Declaration, RE 393-31, Page ID ## 39454-39713.
[74] *Id.*, Page ID ## 39458-39459, ¶ 9; *id.*, Page ID ## 39460-39461, ¶¶ 13-14.
[75] *Id.*, Page ID # 39462, ¶ 16.
[76] *Id.*, Page ID # 39462, ¶ 17.
[77] *Id.*, Page ID # 39504, ¶ 121.
[78] *Id.*, Page ID ## 39462-39463, ¶ 18.
[79] *Id.*, Page ID # 39463, ¶ 19.

relies on the list price that GM charged for the diesel engine option in the Subject Vehicles as a baseline of overpayment. Second, the Regression-Based Premium Method estimates how much diesel engines contributed incrementally to market prices through hedonic regression analysis."[80] For the two models, Stockton relied on "GM data to adjust list prices to account for transactional discounts at the retail level."[81] After explaining his methodology and analysis in detail, he found that the "Defeat Device led to overpayment at the time of purchase which amounted to $8,395-$8,595 before transactional discounts and $7,702-$8,616 per-vehicle in 2020 Dollars in consideration of transactional discounts."[82]

B. Procedural History and Rulings Presented for Review

On May 25, 2017, Plaintiffs filed their class action complaint,[83] which was consolidated with another case. On August 4, 2017, Plaintiffs filed their First Amended and Consolidated Class Action Complaint,[84] which Defendants moved to dismiss, followed by full briefing.[85] On February 20, 2018, the district court denied

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[80] *Id.*

[81] *Id.*

[82] *Id.*, Page ID # 39504, ¶ 121.

[83] Class Action Complaint, RE 1, Page ID # 1.

[84] FAC, RE 18, Page ID # 884.

[85] *See* Bosch MTD, RE 44, Page ID # 2096; GM MTD, RE 45, Page ID # 2162; Opposition to GM MTD, RE 54, Page ID # 2281; Opposition to Bosch MTD, RE 55, Page ID # 2658; Bosch MTD Reply, RE 56, Page ID # 2924; GM MTD Reply, RE 57, Page ID # 2945.

Defendants' motions.[86] In relevant part, the court held that the state-law claims were neither expressly nor impliedly preempted by the Clean Air Act ("CAA"), 42 U.S.C. § 4201 *et seq.*[87] The court further held that Plaintiffs sufficiently established standing to bring claims under RICO.[88]

On January 15, 2020, and August 27, 2020, the district court consolidated Plaintiffs' class action with twenty-seven individual cases brought by different counsel "for all purposes, except for trial."[89]

On August 19, 2022, Defendants filed motions for summary judgment.[90] GM argued in part that the Clean Air Act preempted Plaintiffs' state-law claims and that Plaintiffs lacked standing to bring their RICO claims because they were indirect purchasers.[91] Bosch did not argue separately for dismissal on preemption grounds or under the "indirect purchaser" rule but, rather, joined in GM's argument.[92] Plaintiffs

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[86] MTD Order, RE 61, Page ID # 3473.

[87] *Id.*, Page ID ## 3494-3505.

[88] *Id.*, Page ID ## 3483-3488, 3508-3528.

[89] Consolidation Order, RE 144, Page ID # 5854; Opinion and Order, RE 198, Page ID # 11351.

[90] GM's MSJ, RE 365 (under seal); Bosch's MSJ, RE 373, Page ID # 29812.

[91] GM's MSJ, RE 365 (under seal), at 46-51.

[92] Bosch's MSJ, RE 373, Page ID ## 29813, 29833.

filed oppositions to Defendants' motions[93] and Defendants replied on December 16, 2022.[94]

On June 1, 2023, the district court directed Plaintiffs to show cause as to why Plaintiffs' state-law claims should not be dismissed pursuant to *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851 (6th Cir. 2023) (hereafter, *Ford*).[95] Plaintiffs responded to the show-cause Order on June 28, 2023.[96] GM also filed a response, in which Bosch joined.[97]

On July 12, 2023, the district court issued an Order ("SJ Order"), entering summary judgment for Defendants and dismissing all complaints "with prejudice because Plaintiffs' state-law claims are impliedly preempted by the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and Plaintiffs lack statutory standing for their RICO claim because they are indirect purchasers."[98] The court entered judgment the same day.[99]

Plaintiffs filed a timely notice of appeal on July 13, 2023.[100]

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[93] MSJ Oppositions, RE 386, Page ID # 35297; RE 389 (under seal).

[94] Bosch's MSJ Reply, RE 415, Page ID # 46995; GM's MSJ Reply, RE 417 (under seal).

[95] Show Cause Order, RE 433, Page ID # 48077.

[96] Plaintiffs' Show Cause Responses, RE 439 (under seal); RE 441, Page ID # 48427.

[97] GM's Show Cause Response, RE 442, Page ID # 48623; Bosch's Concurrence and Joinder, RE 443, Page ID # 48698.

[98] SJ Order, RE 444, Page ID # 48077.

[99] Judgment, RE 445, Page ID # 48718.

[100] Notice of Appeal, RE 446, Page ID # 48719.

IV. SUMMARY OF THE ARGUMENT

Plaintiffs' state-law claims do not conflict with federal law and, therefore, are not preempted. Expert testimony of Juston Smithers, along with Defendants' own documents and testimony, provide abundant evidence that GM and Bosch designed an "online dosing" defeat device in the Duramax trucks to be extensively active during real-world driving but not during EPA-mandated testing, which resulted in excessive NOx emissions during real-world driving. That evidence shows that the online dosing function [redacted] active in virtually *all* scenarios outside the test protocols—*i.e.*, during real-world driving. And the evidence shows that the emissions reduction technology was defective, causing the spewing of excessive emissions. Substantial evidence also shows that Defendants marketed Duramax trucks as "clean" with "low emissions" and with advanced emissions reduction technology, but they did not disclose to Plaintiffs or putative class members the defeat device in the trucks or its deleterious impact on NOx emissions during real-world driving or that the emissions reduction technology was defective, causing excessive emissions.

Plaintiffs' claims of deception under state laws do not conflict with any EPA findings or otherwise conflict with federal law. Smithers demonstrates that the Duramax trucks are not clean by comparing emissions while online dosing is active to emissions when it is not active. In addition, he shows that real-world emissions

frequently and substantially exceed federal standards. Reliance on those federal standards is consistent with federal law rather than in conflict. Indeed, the CAA explicitly authorizes citizen suits.[101] Section 7604 of the CAA states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."[102]

Given the substantial evidence that Plaintiffs presented, this case is readily distinguishable from *Ford*, which the district court relied on in dismissing the state-law claims. The Court stated in *Ford* that the state-law claims were "*necessarily* premised on violations of federal law, namely a failure to follow the testing procedures set by the EPA."[103] Here, in contrast, Plaintiffs do not challenge any EPA findings and the claims are not premised on violations of federal law. Instead, Plaintiffs challenge Defendants' failure to disclose the Duramax trucks' emissions during real-world driving, not any failure to follow testing procedures. Thus, conflict preemption does not bar any claim.

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[101] *See* 42 U.S.C. § 7604.

[102] 42 U.S.C. § 7604(e).

[103] 65 F.4th at 865.

Plaintiffs' claims under certain state laws are not barred by preemption for an independent reason. The CAA waives preemption of emissions standards enacted by the State of California. The Act also permits any other state to adopt and enforce admissions standards if they are identical to California's. When the trucks were sold, numerous states had enacted emissions standards identical to California's standards. The CAA permits citizen suits to enforce these standards, so claims under those state laws are not preempted.

Nor does the indirect-purchaser rule bar Plaintiffs' RICO claims. That rule applies only to claims by indirect purchasers under the theory that direct purchasers suffered injuries that they passed on to indirect purchasers. Plaintiffs do not assert such a pass-on theory but instead seek damages for overpayments due to Defendants' efforts at deceiving them to buy "dirty" trucks. Indeed, no automobile dealer has ever sued a manufacturer for purported losses in defeat device cases for a simple reason—dealers *benefited* from the schemes. And as the Supreme Court recently explained, "*Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic antitrust law tells us that the mere fact that an antitrust violation produces two different classes of victims

hardly entails that their injuries are duplicative of one another."[104] Here, dealers were not victims at all, leaving consumers as the only victims.

V. ARGUMENT

A. The De Novo Standard of Review Applies

"Summary judgment determinations are reviewed de novo."[105] Defendants must "show that there is no genuine dispute of material fact and that they are entitled to judgment as a matter of law."[106] Moreover, this Court has explained that "[w]hether a federal law preempts state law is a legal question we review de novo."[107] This Court has also explained that "[w]e review a district court's grant of summary judgment under a *de novo* standard…. This principle aside, *de novo* review would be proper here because the question whether a plaintiff has standing to sue under the Sherman and Clayton Acts is one of law."[108] Dismissal of RICO claims for lack of standing is also reviewed de novo.[109]

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[104] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (citation and internal quotation marks omitted).

[105] *Rieves v. Town of Smyrna, Tenn.*, 67 F.4th 856, 862 (6th Cir. 2023).

[106] *Id.*

[107] *Torres v. Precision Indus., Inc.*, 995 F.3d 485, 491 (6th Cir. 2021).

[108] *Bodie-Rickett & Assocs. v. Mars, Inc.*, 957 F.2d 287, 289 (6th Cir. 1992).

[109] *Saia v. Flying J. Inc.*, 2017 WL 6398013, at *3 (6th Cir. July 11, 2017) (unpublished).

B. Plaintiffs' State-Law Claims Are Not Preempted

The district court erroneously ruled that Plaintiffs'' state-law claims are impliedly preempted under the doctrine of conflict preemption. The district court stated that "the Sixth Circuit dismissed seemingly identical claims as impliedly preempted by the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6201 *et seq.*, and its corresponding regulations for emissions testing…."[110] But the plaintiffs' claims in *Ford* are not similar, let alone identical, to the claims in this case.

1. *Ford* held that the plaintiffs' claim that Ford provided fraudulent fuel economy data to the EPA was impliedly preempted.

In *Ford*, the Court held that the plaintiffs' state-law claims conflicted with federal law and, thus, were preempted. It explained that state law may be preempted "'to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"[111] The Court concluded that "plaintiffs' claims inevitably conflict with the EPCA and its regulatory scheme."[112]

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[110] SJ Order, RE 444, Page ID # 48703 (citing *Ford*).

[111] 65 F.4th at 860 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

[112] *Id.* (footnote omitted).

The plaintiffs claimed that Ford "intentionally submitted false fuel economy testing figures for certain vehicles to the [EPA]. Plaintiffs claim that this, in turn, led the agency to provide an inaccurate fuel economy estimate to consumers, which induced consumers (including plaintiffs) to buy those vehicles."[113] Thus, the case "center[ed] on allegations that Ford cheated on its fuel economy and emissions testing for certain truck models, including the F-150 and Ranger."[114]

Describing the regulatory framework for fuel economy testing, the *Ford* court noted that statutes and regulations "mandate that manufacturers follow a complex testing methodology set by the EPA."[115] It stated that manufacturers "produce testing data that the EPA uses in its own fuel economy calculation."[116] The court then explained that "[o]nce the EPA is satisfied with the fuel economy figure, it adopts that figure as its own."[117] "Pursuant to this testing regime, Ford conducted testing and provided the resulting figures to the EPA for the 2018, 2019, and 2020 F-150 and 2019 and 2020 Ranger trucks. The EPA then published its fuel-economy

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[113] *Id.* at 854.
[114] *Id.*
[115] *Id.* at 854.
[116] *Id.*
[117] *Id.* at 856.

estimates for those vehicles."[118] But the plaintiffs claimed that "Ford committed fraud in its testing."[119] The district court dismissed the complaint.

Affirming the dismissal, this Court agreed with Ford "that plaintiffs' fraud-on-the-agency claims are impliedly preempted because those claims conflict with the EPA's testing and fraud-policing authority set forth in the EPCA and with the fact that the EPA is responsible for the fuel economy figures."[120] It pointed to case law "addressing similar fraud-on-the-agency claims in the context of implied preemption" (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)), as "the seminal case."[121]

The Court concluded that "*Buckman* and its progeny apply with equal force here—the regulatory scheme governing the EPA's approval of fuel economy estimates preempts plaintiffs' state-law claims."[122] After discussing how "the EPCA and its corresponding regulations set the standards for testing that a manufacturer *must* follow," the Court stated that "the fuel economy figure is the EPA's own; it is not adopted or published unilaterally by Ford (or by any other manufacturer)."[123]

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[118] *Id.* at 857.
[119] *Id.*
[120] *Id.* at 860.
[121] *Id.*
[122] *Id.* at 862.
[123] *Id.*

The Court provided four ways in which "plaintiffs' claims inevitably conflict with this regime."[124] "First, because the EPA accepted Ford's testing information and published its estimate based on that information, plaintiffs' claims essentially challenge the EPA's figures."[125] "Second, allowing juries to second-guess the EPA's fuel economy figures would permit them to rebalance the EPA's objectives."[126] "Third, as the EPA has the authority to approve or reject fuel economy figures, its 'federal statutory scheme amply empowers the [agency] to punish and deter fraud.'"[127] "Finally, state-law claims would skew the disclosures that manufacturers need to make to the EPA."[128]

Rejecting the plaintiffs' attempt "to rescue their case by arguing that Ford committed fraud on consumers, not just the agency," the Court held that "[m]ere reliance on the EPA estimates, without making any further disclosures about a vehicle's supposed real-world fuel economy, is not enough."[129] The Court stated that "complaining about how Ford uses [fuel economy] estimates is 'tantamount to

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[124] *Id.* at 862-63.
[125] *Id.* at 863.
[126] *Id.*
[127] *Id.* (citation omitted).
[128] *Id.* at 864.
[129] *Id.* at 866.

permitting plaintiffs to challenge the EPA estimates themselves,' which plaintiffs cannot do."[130]

2. In contrast to *Ford*, Plaintiffs' claims that Defendants deceived consumers as to NOx emissions during real-world driving are not fraud-on-the-agency claims and do not conflict with federal law.

None of the reasons for this Court's preemption holding in *Ford* apply in this case. Plaintiffs do not challenge EPA estimates or other findings. Instead, Plaintiffs claim that Defendants concealed material facts about NOx emissions by Duramax trucks during real-world driving that were not revealed during testing by GM under EPA regulations. They allege that Defendants marketed Duramax trucks as using "clean" technology with "low emissions," even though Defendants knew that the trucks were not low-emissions vehicles during real-world driving, and that the EPA testing procedure did not reveal those excessive emissions. In deceiving Plaintiffs, Defendants did not repeat or rely on any EPA "estimates," for the simple reason that the EPA does not publish such "estimates" regarding emissions.

Examining the reasons articulated in *Ford* for finding preemption shows that Plaintiffs' claims here are not preempted.

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[130] *Id.* at 866 (citation omitted).

a. This Court's reasons for applying *Buckman* in *Ford* do not apply to Plaintiffs' claims against GM and Bosch.

In *Ford*, this Court held that *Buckman* applied because "the fuel economy figure is the EPA's own; it is not adopted or published unilaterally by Ford (or by any other manufacturer)."[131] But this case does not implicate *any* figure relating to emissions during real-world driving that is "the EPA's own." The district court and Defendants have not identified any EPA findings concerning the effects of online dosing during real-world driving, because the EPA has made no such findings. Indeed, examining the four reasons in *Ford* as to why "Plaintiffs' claims inevitably conflict with" the EPA regulatory regime shows that Plaintiffs' claims here are not preempted.[132]

First, this Court explained that "because the EPA accepted Ford's testing information and published its estimate based on that information, plaintiffs' claims essentially challenge the EPA's figures."[133] Here, Plaintiffs do not challenge any EPA figures.

The district court erroneously ruled that this case is similar to *Ford* because "manufacturers must adhere to EPA regulations to obtain a COC [certificate of conformity] by providing details about their emissions tests and any AECDs they

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[131] *Id.* at 862.

[132] *See id.* at 862-63.

[133] *Id.* at 863.

use."[134] Such a finding by the EPA means that GM satisfied COC requirements, not that the Duramax trucks are "clean" during real-world driving. And as explained above, Defendants [redacted].[135] Specifically, substantial evidence shows that [redacted] but was active during virtually *all* driving outside test protocol boundaries—*i.e.*, during real-world driving.[136] Therefore, the EPA's issuance of a Certification of Conformity based on testing that did not reveal the excessive emissions of NOx during real-world driving does not conflict with Plaintiffs' claims.[137] Indeed, the district court stated in an earlier order that "it is conceivably possible that Defendants could simultaneously comply with EPA regulations while still concealing material information from consumers."[138]

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[134] SJ Order, RE 444, Page ID # 48714.

[135] *See supra*, § III(A)(2) (discussing Smithers' expert testimony).

[136] *Id.*

[137] Another district court quoted a previous ruling by the district court in this case when it ruled that the "mere fact that the Trucks passed the Regulators' scrutiny is not the end of the story. Rather, 'it is conceivably possible that Defendants could simultaneously comply with EPA regulations while still concealing material information from consumers.' *In re Duramax Diesel Litig.*, 298 F. Supp. 3d at 1062." *Bledsoe v. FCA US LLC*, 2023 WL 2619132, at *17 (E.D. Mich. Mar. 23, 2023).

[138] *In re Duramax*, 298 F. Supp. 3d at 1062. *Accord*, *Bledsoe*, 2023 WL 2619132, at *17 (adopting quotation from *Duramax*).

Ford is distinguishable because Defendants did not advertise Duramax trucks as meeting COC standards. Rather, they sold them as "clean," which was not tied in any way to COC compliance. In contrast, "Ford's advertisements relied solely on the EPA estimates to proclaim that the Ranger was the 'most fuel-efficient gas-powered midsize pickup in America' and that the F-150 had a 'best-in-class EPA-estimated highway fuel efficiency rating of 30 mpg.'"[139] Moreover, Ford's "[m]ere reliance on the EPA estimates, without making any further disclosures about a vehicle's supposed real-world fuel economy, is not enough."[140] No such "mere reliance" is at issue here.

Second, *Ford* stated that "allowing juries to second-guess the EPA's fuel economy figures would permit them to rebalance the EPA's objectives."[141] Again, Plaintiffs here will not ask a jury to second-guess any EPA emissions figures or rebalance any EPA objectives.

Third, this Court stated in *Ford* that the EPA "has several statutory and regulatory ways to police suspected fraud and monitor compliance *with its testing procedures*."[142] But this case does not involve EPA testing procedures and the

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[139] 65 F.4th at 866.

[140] *Id.*

[141] *Id.*

[142] *Id.* (emphasis added).

district court and Defendants have *not* shown that policing fraud against consumers as to emissions during real-world driving is "the responsibility of the EPA," let alone that it bars consumer actions for damages. Because Plaintiffs' claims do not require proof that the EPA was defrauded, the EPA's police powers are irrelevant.

Conversely, even if Defendants' actions also violated federal law for reasons apart from the fraud on consumers, *Ford* does not support the proposition that fraud committed on an agency inexorably preempts any parallel consumer fraud claim. Indeed, consumer emissions cases are frequently filed in parallel with cases brought by federal and state agencies. Several recent emissions cases involving regulatory action *and* class action consumer claims show that federal regulators (including the EPA and FTC) believe that state-law claims by consumers are consistent with (and complement) regulatory enforcement authority, with consumers getting extremely large recoveries in addition to federal fines.[143] These cooperative and parallel efforts

[143] *See* FTC's Final Status Report on Consumer Compensation, *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 3:15-md-02672 (N.D. Cal. Jul. 27, 2020), RE 438-6, Page ID # 48134 (describing complementary settlements by regulators and the private bar, in which "DOJ, EPA, CARB, and their partners primarily addressed the environmental problems, whereas the FTC and the private bar primarily addressed consumer harm, including measures that fully compensated the victims of Volkswagen's unprecedented deception"); Plea Agreement in *United States v. Volkswagen AG*, No. 2:16-cr-20394 (E.D. Mich. Mar. 10, 2017), RE 438-7, Page ID # 48139 (declining to impose restitution due to consumer settlement and crediting defendant the $11 billion value of the consumer settlement in sentencing); DOJ Press Release, "Volkswagen to Spend Up to $14.7

to curtail diesel emissions cheating and compensate consumers for their economic harm demonstrate that there is no conflict between the CAA (or EPA's regulations) and state-law claims here. And the district court's reference to the EPA "extracting a $1.45 billion settlement payment from Volkswagen in 2017 for its violations of the CAA"[144] overlooks that Volkswagen also agreed to pay roughly ***$11 billion*** to settle consumer class action claims.[145]

Fourth, this Court stated in *Ford* that "state-law claims would skew the disclosures that manufacturers need to make to the EPA."[146] Here, in contrast, testing

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Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles" (June 28, 2016), RE 438-8, Page ID # 48226 (describing Volkswagen's "two related settlements" with the U.S. and California); Settlement Agreement and Release (Amended), *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 3:15-md-02672 (N.D. Cal. Feb. 16, 2017), RE 438-9, Page ID # 48236 (resolving class claims against Bosch); DOJ Press Release, "In Civil Settlements with the United States and California, Fiat Chrysler will Resolve Allegations of Cheating on Federal and State Vehicle Emission Tests" (Jan. 10, 2019), RE 438-10, Page ID # 48279 (describing concurrent settlements between Fiat Chrysler and the federal government regarding federal claims, and California regarding California claims, while noting that the "settlement also does not resolve any consumer claims or claims by individual owners or lessees"); Mercedes Consent Decree, RE 393-2, Page ID # 37311 (relieving defendant of "emission modification" requirements if "provisions in a related Class Action Settlement are equivalent to the [modification] requirements" of the consent decree).

[144] SJ Order, RE 444, Page ID # 48713.

[145] Plea Agreement, RE 438-7, Page ID # 48149 (noting Volkswagen's payment of "approximately 11 billion" in settlement of consumer class action claims as a factor in Volkswagen's sentencing).

[146] 65 F.4th at 864.

documentation submitted by GM to the EPA is irrelevant to Plaintiffs' claims, because it does not address the effects of online dosing during real-world driving. The district court erroneously found that "these claims would compel manufacturers to over-document their submissions, despite the EPA's satisfaction, resulting in an unnecessary burden on manufacturers and the EPA's evaluation process."[147] The regulatory regime for emissions compliance does not govern disclosures relating to emissions performance *during real-world driving*. Nothing in *Ford* supports the conclusion that a manufacturer can deceive consumers about real-world emissions but escape liability by maintaining that it will need to over-document submissions for COC compliance in the future, even though such real-world data is not required by federal law. In sum, the claims in *Ford* involved the accuracy of figures that the EPA adopted, but EPA-adopted figures are not at issue here.

b. This Court's further reasoning in *Ford* does not support the district court's preemption ruling.

The Court's discussion in *Ford* of Supreme Court cases that the plaintiffs cited also demonstrates that the state-law claims in this case are not preempted. This Court distinguished *Medtronic* because the claims in *Ford* were "*necessarily* premised on violations of federal law, namely a failure to follow the testing procedures set by the

[147] SJ Order, RE 444, Page ID # 48714.

EPA."[148] In contrast, Plaintiffs' claims here are not based on whether GM followed test procedures or other EPA requirements. Instead, they are based on Defendants' failure to disclose the trucks' real-world NOx emissions, while falsely marketing Duramax trucks as "clean." As a result, those claims exist apart from federal law.

The Court distinguished *Silkwood* on the ground that "Congress intended that the EPCA be enforced by the federal government."[149] Here, in contrast, the EPA has no power to police fraud on consumers that does not require proof that Defendants violated federal law. Moreover, the EPA neither adopts, publishes, nor requires manufacturers to disclose emissions test results. Nor do FTC regulations govern emissions-related advertising.

Moreover, unlike the EPCA, the CAA explicitly authorizes citizen suits.[150] In addition to authorizing citizen suits, section 7604 contains a savings clause that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law *to seek enforcement of any emission standard* or limitation or to seek any other relief (including relief against

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[148] 65 F.4th at 865 (citing *Medtronic v. Lohr*, 518 U.S. 470 (1996)).

[149] *Id.*

[150] *See* 42 U.S.C. § 7604.

the Administrator or a State agency)."[151] This Court has applied that savings clause in two cases. In *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, the Court explained that "section 7604(e) expressly preserves actions under any statute not only to seek enforcement of emission standards, but to seek 'any other relief.'"[152] In another case, the Court stated that section 7406(e) is a "citizen suit provision" and that "the Report of the Senate Committee on Public Works explained that the citizen suit provision of the Clean Air Act 'would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available.'"[153] Therefore, even if Plaintiffs' claims implicated federal law—which they do not—Congress plainly did not bar Plaintiffs from seeking relief based on emissions standards.

In *Ford*, the Court next distinguished *Levine* on the basis that "under the federal regulatory scheme at issue, the manufacturer bore the responsibility for the label's contents, and the regulations permitted unilateral alteration of the label."[154]

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[151] 42 U.S.C. § 7604(e) (emphasis added). Moreover, the manufacturer—not the EPA—must warrant to consumers that the emission control system is "free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life." 42 U.S.C. § 7541(a)(1).

[152] 874 F.2d 332, 343 (6th Cir. 1989).

[153] *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 691 (6th Cir. 2015) (quoting S. Rep. No. 91-1196, at 38 (1970)).

[154] 65 F.4th at 864 (citing *Wyeth v. Levine*, 555 U.S. 555, 658-73 (2009)).

The Court held that, unlike regulatory provisions at issue in *Levine*, "the regulatory scheme governing fuel economy standards *requires* the EPA to approve those figures and publish them as its own."[155] This case is like *Levine*, not *Ford*, because nothing required Defendants to market Duramax trucks as "clean" and Defendants' marketing was not based on any EPA findings.

This Court also distinguished *Levine* on the basis that "Ford has no authority to modify or update the fuel economy figures for its vehicles once the EPA has accepted those figures. It *must* go through the EPA, which has already balanced several objectives in reaching its figures."[156] But here, nothing barred Defendants from disclosing that the trucks' online dosing system resulted in excessive NOx emissions during real-world driving that were not revealed during testing. Moreover, the regulation governing vehicle labels for a Certificate of Conformity states that the "provisions of this section shall not prevent a manufacturer from also reciting on the label … any other information that such manufacturer deems necessary for, or useful to, the proper operation and satisfactory maintenance of the vehicle (or engine)."[157] Indeed, the district court and Defendants have not cited any federal law (or EPA

[155] *Id.* at 865.
[156] *Id.* at 866.
[157] 40 C.F.R. § 86.1807-01(b).

finding) that bars GM from unilaterally disclosing excessive NOx emissions during real-world driving.

Finally, *the Ford* Court stressed that federal law preempted the plaintiffs' claims because Ford's advertisements "relied solely on the EPA estimates to proclaim that the Ranger was the 'most fuel-efficient gas-powered midsize pickup in America' and that the F-150 had a 'best-in-class EPA-estimated highway fuel efficiency rating of 30 mpg.' Mere reliance on the EPA estimates, without making any further disclosures about a vehicle's supposed real-world fuel economy, is not enough."[158] Here, in contrast, Defendants did not rely on *any* EPA estimates when they allegedly deceived consumers as to emissions during real-world driving but instead merely marketed the trucks as "clean." Thus, this case does not rest on any EPA findings as to emissions during real-world driving.

As the district court held earlier in this litigation, "Plaintiffs can prevail without showing that the subject vehicles violate EPA regulations. The gravamen of their state-law claims is that they purchased a vehicle which polluted at levels far greater than a reasonable consumer would expect."[159] Plaintiffs' claims are separate from any fraud on the EPA and "consumers believe emission levels are material to their purchasing decisions separate and apart from the regulatory maximum emission

[158] 65 F.4th at 866.

[159] 298 F. Supp. 3d at 1062.

standards."[160] Because Plaintiffs allege "they purchased a vehicle which polluted at levels far greater than a reasonable consumer would expect"—*not* that "the subject vehicles violate EPA regulations"—their claims do not conflict with federal law.[161]

c. The district court erroneously concluded that Plaintiffs' claims are "intertwined" with violations of federal law and, thus, preempted.

The district court erred in concluding that Plaintiffs' claims "are inextricably intertwined with alleged violations of the CAA."[162] In particular, the court erred when it stated that "Plaintiffs' allegations about 'defeat devices' concealing excess emissions from the EPA hinge solely on the violation of EPA regulations, as confirmed by Plaintiffs' emissions expert, Juston Smithers."[163] Plaintiffs' claims do not rest on the federal definition of a defeat device. Throughout this case (and the parallel *Counts* litigation), the district court recognized that "defeat device" is "a term of art, a stand-in for the idea of a hidden vehicle component that, through obfuscation, allows for 'the appearance of low emissions without the reality of low emissions.'"[164] That is what the evidence shows here, whether or not online dosing

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[160] *Id.*

[161] *Id.* at 1061-62.

[162] SJ Order, RE 444, Page ID # 48708.

[163] *Id.*, Page ID ## 48710-48711 (citing Smithers' conclusion that the trucks contain a defeat device as defined in federal regulations).

[164] *Counts v. Gen. Motors, LLC*, 2017 WL 1406938, at *3 (E.D. Mich. Apr. 20, 2017) (footnote omitted).

as used in the Duramax trucks constitutes a defeat device within the meaning of the regulations. Thus, "Plaintiffs could prevail upon their fraudulent concealment claim without proving GM's noncompliance with EPA regulations."[165]

The district court further erroneously based its ruling on its statement that "Plaintiffs repeatedly testified that *their only concern* for emissions output was regulatory compliance."[166] In fact, Plaintiffs did not testify that their only concern for emissions output was regulatory compliance. In the testimony that the court cited, Plaintiffs were asked what concerns they had at the time of sale. At that time, they had no reason to be concerned that Defendants had designed and implemented an online dosing system that resulted in excessive NOx emissions during real-world driving. Moreover, even if Plaintiffs were concerned that the trucks meet regulatory standards, that does not undermine the district court's earlier statement in this matter that "Plaintiffs can prevail without showing that the subject vehicles violate EPA regulations."[167] Indeed, Plaintiffs need only prove that their trucks polluted at greater levels than a reasonable consumer would have expected.

Moreover, Plaintiffs' use of federal emissions standards as a benchmark for determining whether the Duramax trucks were "clean" does not conflict with any

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[165] *Id.* at *4.

[166] SJ Order, RE 444, Page ID # 48711 (emphasis added).

[167] *In re Duramax*, 298 F. Supp. 3d at 1062.

other provision of the CAA or any finding by the EPA. Congress has authorized common-law suits to enforce emissions standards,[168] which means that Plaintiffs' use of federal emissions standards to prove that Duramax trucks are *not* clean does not conflict with, or stand as an obstacle to, federal law. Plaintiffs do not seek to impose different standards than those imposed by federal law but instead employ those standards to show Defendants deceived them. *See Fabian v. Fulmer Helmets, Inc.* (no conflict preemption where plaintiffs' claims that defendant "misrepresented its helmets as 'DOT approved' through its marketing materials … would turn on what Fulmer Helmets said about its products" and "not add a new requirement that interferes with what Standard 218 already requires").[169]

In any event, Plaintiffs need not rely on the federal standards to prove that the Duramax trucks are not "clean." Rather, they can prove that Defendants' wrongful conduct resulted in the Duramax vehicles emitting NOx at a far greater level than a reasonable consumer would expect by comparing vehicle emissions when the defeat devices are active to emissions when they are inactive, *regardless of the federal standard*. As noted above, Smithers can make that showing even if federal standards are not used.[170]

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[168] *See* 42 U.S.C. § 7604(e).

[169] 628 F.3d 278, 283 (6th Cir. 2010).

[170] *See supra*, § III(A)(2).

C. Claims Arising in California and States That Have Adopted California's Emissions Standards Are Not Preempted in Any Event

The claims of some Plaintiffs and putative class members are not preempted for the independent reason that they arise out of California state law (or the laws of states that have adopted California's emissions standards). The CAA expressly waives preemption of emissions standards enacted by the State of California.[171] Likewise, the Act permits other states to adopt and enforce emissions standards if they are identical to California's.[172] When the Duramax trucks were sold, the following states had emissions standards identical to California's standards: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. The CAA permits citizen suits to enforce these standards.[173] In contrast, the EPCA was at issue in *Ford* and does not contain this express carve-out, so this Court did not consider the issue. Here, the waiver additionally weighs against preemption of claims by Plaintiffs and class members from California and other states that have adopted identical standards.

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[171] 42 U.S.C. § 7543(b)(1).

[172] 42 U.S.C. § 7507. *See also California v. EPA*, 940 F.3d 1342, 1345 (D.C. Cir. 2019); *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conserv.*, 79 F.3d 1298, 1302 (2d Cir. 1996) (discussing the waiver provisions).

[173] 42 U.S.C. § 7604(a).

D. The Indirect-Purchaser Rule Does Not Bar Plaintiffs' RICO Claims

Plaintiffs' RICO claims are not barred by the indirect-purchaser rule. That rule applies only if an indirect purchaser asserts a pass-on theory of liability, but Plaintiffs make no such claim. In *Illinois Brick Co. v. Illinois*, the Supreme Court stated that "[h]aving decided that in general a *pass-on theory* may not be used defensively by an antitrust violator against a direct purchaser plaintiff, we must now decide whether *that theory* may be used offensively by an indirect purchaser plaintiff against an alleged violator."[174] Similarly, the Court stated that "[b]ecause *Hanover Shoe* would bar petitioners from using respondents' *pass-on theory* as a defense to a treble-damages suit by the direct purchasers (the masonry contractors), we are faced with the choice of overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempt to use this *pass-on theory* offensively."[175] The Court then held that "[w]e thus decline to construe § 4 to permit offensive use of a *pass-on theory* against an alleged violator that could not use the same theory as a defense in an action by direct purchasers."[176] The Court explained that "either we must overrule *Hanover Shoe* (or at least narrowly confine it to its facts), or we must preclude

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[174] 431 U.S. 720, 726 (1977) (emphasis added).

[175] *Id.* at 728-29 (emphasis added) (citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)).

[176] *Id.* at 735 (emphasis added).

respondents from seeking to recover on their *pass-on theory*. We choose the latter course."[177]

This Court has recognized that the indirect-purchaser rule applies only when the plaintiff seeks passed-on damages. In *Trollinger v. Tyson Foods, Inc.*,[178] former employees of a poultry plant alleged the plant owner "violated RICO by engaging in a scheme with several employment agencies to depress the wages of Tyson's hourly employees by hiring illegal immigrants." The district court "dismissed the case for lack of statutory standing because, in its view, plaintiffs neither alleged a sufficiently direct injury nor advanced a sufficiently plausible theory of damages."[179]

This Court reversed, explaining that the Supreme Court's decision in *Holmes* "follows a course marked by a long line of Supreme Court cases denying antitrust standing *to plaintiffs who suffer derivative or 'passed-on' injuries*."[180] The Court then stated that it "has hewed to the same path before *Holmes* and since in denying RICO standing to parties who suffer derivative or passed-on injuries."[181] This Court

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[177] *Id.* at 736 (emphasis added).
[178] 370 F.3d 602, 605 (6th Cir. 2004).
[179] *Id.* at 612.
[180] *Id.* at 613 (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992)).
[181] *Id.* at 614.

explained that "indirect purchasers lack standing under RICO and the antitrust laws to sue *for overcharges passed on to them by middlemen*."[182]

The Court next explained that "we cannot agree that plaintiffs' alleged injury is exclusively derivative."[183] Instead, it held that the "direct employment relationship between Tyson and plaintiffs distinguishes this dispute from the *Holmes* line of cases, where the plaintiffs had no relationship with the defendants except through intermediaries."[184] The Court explained that "[d]amages to the employees (the difference between what they earned and what they would have earned) would be more easily ascertained than damages to the union (the value of lost bargaining power? lost influence? lost dues?)."[185] As the Court explained, in "view of these realities, the law cannot count on a more 'directly injured victim[ ]' to 'vindicate the law as [a] private attorney [ ] general' because, unlike *Holmes* where the directly injured broker-dealers could sue and did sue, the union has not sued and it is not clear that the union could sue."[186]

Similarly here, Plaintiffs' injuries are not derivative, let alone exclusively derivative, of any injuries to dealers. Plaintiffs have a direct relationship with GM

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[182] *Id.* at 616 (emphasis added).
[183] *Id.* at 615.
[184] *Id.* at 616.
[185] *Id.* at 618.
[186] *Id.*

because GM directed its advertising at them and other consumers to deceive them to buy Duramax trucks. And the dealers of those trucks have not sued either GM or Bosch, because they *benefited* from Defendants' scheme.

To Plaintiffs' knowledge after investigation, no automobile dealer has ever sued a manufacturer of vehicles with defeat devices for alleged overpayments by the dealers to the manufacturer. The only case in which dealers sued for alleged injuries caused by defeat devices in vehicles they sold sought damages the dealers allegedly suffered after the scheme was revealed.[187] As the district court in that case stated, the "dealers benefited from selling the TDIs" and "thus unknowingly benefited from the scheme. What the dealers implicitly claim now is that they had a right to continue benefiting from racketeering activity—that is, to keep selling noncompliant TDIs until 2027."[188] But "[t]heir losses from the TDI line's discontinuation were not 'by reason' of the emissions fraud; they were by reason of the fraud's discovery."[189] The Ninth Circuit then affirmed because "the mere possibility that the initial fraud would

[187] *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2019 WL 6749534 (N.D. Cal. Dec. 6, 2019), *aff'd*, 842 F. App'x 112 (9th Cir. 2021).

[188] *Id.* at *2.

[189] *Id.*

be discovered and ultimately cause the cessation of the TDI line and buyback program is not sufficient to establish proximate cause" under RICO.[190]

Similarly here, there is no basis in the record to support a finding that GM dealers suffered *any* injury for which they could sue Defendants under RICO. The dealers benefited from the sales and any injuries allegedly suffered after disclosure of the scheme was revealed were not proximately caused by the scheme. Thus, this case is similar to *Bridge v. Phoenix Bond & Indemnity Co.*, in which the Supreme Court held that the plaintiffs had standing to sue under RICO where "the District Court and the Court of Appeals concluded that respondents and other losing bidders were the *only* parties injured by petitioners' misrepresentations."[191] The Court explained that the defendants "quibble … that the county would be injured too if the taint of fraud deterred potential bidders from participating in the auction. But that eventuality, in contrast to [the plaintiffs'] direct financial injury, seems speculative and remote."[192] *Bridge* did not address the direct-purchaser rule but nonetheless demonstrates that Defendants here must, at minimum, show that dealers suffered compensable RICO injuries in order for that doctrine to apply.

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[190] *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 842 F. App'x 112, 114 (9th Cir. 2021).

[191] 553 U.S. 639, 658 (2008).

[192] *Id.*

In contrast to dealers that benefit from a defeat-device scheme (and thus suffer no RICO injury), direct purchasers in antitrust cases that pass on overpayments do *not* benefit from the violations and are proper plaintiffs under the direct-purchaser rule. Moreover, in such antitrust cases, the wrongdoing occurred before the initial sale. In contrast, Plaintiffs here allege injuries caused by deceptive marketing aimed at consumers that occurred (or continued to occur, including at the time of sale) *after* the dealer acquired the truck. Moreover, the manufacturers in antitrust cases did not cause downstream purchasers to buy products by deceiving them as to the products' qualities. They only overcharged the first purchaser without any deception.

As a result, Plaintiffs' damages are not based on hypothesized passed-on overcharges but rather are "the amount of overpayment for the engine bundle that was not delivered: the 'clean' diesel with power, torque, and fuel economy."[193] The models presented by Edward Stockton do not measure passed-on damages from dealers hypothesized by Defendants but instead measure the overpayments allegedly caused by Defendants' fraud on the consumers at the point of purchase.

Such damages are compensable under RICO. In *Reiter v. Sonotone Corp.*, the Supreme Court held that a consumer "is injured in 'property' when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct

[193] *Counts v. Gen. Motors, LLC*, 606 F. Supp. 3d 547, 582 (E.D. Mich. 2022).

complained of."[194] Here, as in *Reiter*, the prices that Plaintiffs and class members paid were artificially inflated "by reason of" the consumer marketing scheme, *not* because of pass-through damages or any wrongs by Defendants against GM dealers.

Plaintiffs do not claim that the indirect-purchaser rule can never apply in RICO cases. The rule applies if a defendant defrauds the first purchaser in a chain of distribution, who then charges higher prices to a second purchaser down the distribution chain without the manufacturer defrauding the second purchaser. The second purchaser's claim would involve only pass-through damages.[195] But that is not the situation here. Indeed, before issuing its summary judgment ruling, the district court held: "This suit does not involve 'derivative or passed-on harm[.]'"[196]

But in a terse summary judgment ruling, the court held that the rule bars the RICO claims. That holding rests on a misunderstanding of the Supreme Court's ruling in *Apple Inc. v. Pepper*.[197] In *Apple*, consumers sued Apple for charging "too

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[194] 442 U.S. 330, 339 (1979). This Court has applied *Reiter*'s interpretation of "injured in his business or property" to a RICO claim. *See Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 564 (6th Cir. 2013).

[195] *See, e.g.*, *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842 (3d Cir. 1996) (clients of attorneys who bought photocopies at allegedly inflated prices were indirect purchasers who lacked standing to sue under RICO, where clients only alleged passed-on damages and did not claim that defendants defrauded them directly).

[196] *In re Duramax*, 298 F. Supp. 3d at 1075 (citation omitted).

[197] 139 S. Ct. 1514 (2019).

much for apps."[198] The Supreme Court explained that the "sole question presented at this early stage of the case is … whether the consumers were 'direct purchasers' from Apple."[199] Noting that "[i]t is undisputed that the iPhone owners bought the apps directly from Apple," the Court held that "under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization."[200] The Court explained that "if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator."[201]

The district court here based its standing ruling on the preceding quotation from *Apple*. But that statement explains what is *necessary* for the rule to apply (*i.e.*, the plaintiff must be an indirect purchaser), not what is *sufficient*. If the rule were that formalistic, an indirect purchaser could not sue under RICO even if it were the only defrauded party in the chain of distribution.

Moreover, the Supreme Court's reasoning in *Apple* demonstrates that the mere presence of an intermediary seller does not necessarily mean that the rule applies. In particular, the Court rejected Apple's argument that "*Illinois Brick* allows consumers

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[198] *Id.* at 1518.
[199] *Id.* at 1520.
[200] *Id.*
[201] *Id.* at 1521.

to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party."[202] The Court explained that Apple's argument, if adopted, "would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way."[203] Similarly here, Defendants' argument would mean that manufacturers can insulate themselves from liability by devising a deceptive scheme that harms *only* consumers, not dealers, so that no one could seek relief under RICO.

The Supreme Court in *Apple* also explained that the indirect-purchaser rule does not apply unless the plaintiff seeks passed-on overcharges. The Court stated that "[t]his is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain."[204] The Court explained that "*Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic antitrust law tells us that the 'mere fact that an antitrust violation produces two different classes of victims hardly entails

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[202] *Id.*

[203] *Id.* at 1523.

[204] *Id.* at 1524-25.

that their injuries are duplicative of one another.' 2A Areeda & Hovenkamp ¶ 339d, at 136."[205] The Court further explained that "some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a 'common fund,' as that term was used in *Illinois Brick*."[206] That is because the "consumers seek damages based on the difference between the price they paid and the competitive price. The app developers would seek lost profits that they could have earned in a competitive retail market. *Illinois Brick* does not bar either category of suit."[207]

As in *Apple*, any suit by a dealer against a manufacturer of vehicles with defeat devices would rely on a fundamentally different theory of harm than asserted by consumers and, thus, dealers and consumers would not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*. And this Court has also recognized that application of the *Illinois Brick* rule does not rest solely on whether the plaintiff is an indirect purchaser. In *In re Auto. Parts Antitrust Litig.*, this Court explained that the settlement agreement at issue "excludes those persons and entities

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[205] *Id.* at 1525.

[206] *Id.*

[207] *Id.*

that purchased anti-vibration rubber parts 'directly or for resale.' If Plaintiffs are indirect purchasers who did not timely elect to be excluded from the settlement class, the settlement agreements bar their direct-purchaser lawsuit."[208] This Court held that the plaintiffs "acknowledge that their purchases were 'two or more steps removed' from the alleged violator. Plaintiffs are thus indirect purchasers. Accordingly, they fall within the settlement class defined above and are barred by the settlement agreements from maintaining their federal antitrust claims as the named Plaintiffs in the direct-purchaser lawsuit."[209]

This Court then explained that to "circumvent the plain meaning, Plaintiffs argue that, as a matter of law, we should treat them as direct purchasers under the ownership-or-control exception to the antitrust-standing rule of *Illinois Brick* …. We find their theory unpersuasive."[210] This Court stated that "[w]hether Plaintiffs can maintain their direct-purchaser lawsuit under the ownership-or-control exception of *Illinois Brick* is a question of antitrust standing…. It is not a question that bears on our interpretation of the settlement agreements."[211] In other words, mere proof that a plaintiff is an "indirect purchaser" is insufficient to establish that the plaintiff lacks

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[208] 997 F.3d at 682.

[209] *Id.* at 683 (citation omitted).

[210] *Id.*

[211] *Id.*

standing. Proof that the plaintiff seeks passed-on damages is also required, but Plaintiffs here do not seek such damages and, therefore, have RICO standing.

VI. CONCLUSION

Plaintiffs respectfully request that this Court reverse judgment for Defendants based on the erroneous summary judgment rulings that Plaintiffs' state-law claims are preempted and that Plaintiffs lack standing to pursue their RICO claims.

DATED: September 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 27, 2023, I electronically filed the foregoing document using the CM/ECF system. I further certify that I served the foregoing document via email to all registered case participants on this date because it is a sealed filing and therefore cannot be served via the CM/ECF system.

DATED: November 27, 2023

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446	07/13/2023	48719	Notice of Appeal