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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE CHRYSLER-DODGE-JEEP  
ECODIESEL MARKETING, SALES  
PRACTICES, AND PRODUCTS  
LIABILITY LITIGATION.

Case No. [17-md-02777-EMC](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTIONS TO DISMISS**

Docket Nos. 231-232

United States District Court  
Northern District of California

United States District Court  
Northern District of California

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1 The above-referenced case is a multidistrict litigation (“MDL”). Private Plaintiffs  
 2 (hereinafter, “Plaintiffs”) are individuals or companies who purchased certain trucks marketed  
 3 under the Jeep and Ram 1500 model names. More specifically, these trucks (2014-2016 models)  
 4 had diesel engines that were branded “EcoDiesel.” Plaintiffs have brought class action claims  
 5 against (1) the manufacturers of the cars and their chief executive (the FCA Defendants); (2) the  
 6 companies who manufactured the EcoDiesel engines (the VM Motori Defendants); and (3) the  
 7 companies who supplied the electronic diesel control (“EDC”) units that were used to control the  
 8 emissions from the engines (the Bosch Defendants). The gist of Plaintiffs’ complaint is that  
 9 Defendants concealed the fact that they had installed “defeat devices” in Plaintiffs’ cars – *i.e.*,  
 10 devices that reduced the effectiveness of the emissions control system under conditions which may  
 11 reasonably be expected to be encountered in normal vehicle operation and use. In other words,  
 12 Plaintiffs contend that the vehicles emit excessive emissions under normal driving conditions and  
 13 that the vehicles are in fact not eco-friendly. Based on that allegation, Plaintiffs have brought (1)  
 14 fraud-based claims and (2) warranty-based claims.<sup>1</sup>

15 Currently pending before the Court are two motions to dismiss: one brought by the FCA  
 16 and VM Defendants and the other brought by the Bosch Defendants. Having considered the  
 17 parties’ briefs as well as the oral argument of counsel, the Court hereby **GRANTS** in part and  
 18 **DENIES** in part both motions.

## 19 I. FACTUAL & PROCEDURAL BACKGROUND

### 20 A. Parties

21 The operative complaint is the first amended consolidated consumer class action complaint  
 22 (“FAC”). *See* Docket No. 225 (FAC). The named plaintiffs in the FAC are primarily individual  
 23 consumers but also include a dealer/reseller of motor vehicles (Chatom Motor Co., Inc.).

24 As for Defendants, as indicated above, there are three groups: (1) the FCA Defendants, (2)  
 25 the VM Motori Defendants, and (3) the Bosch Defendants.

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27 <sup>1</sup> The federal government has also brought an action against the FCA entities and the VM  
 28 Defendants, which is a part of this MDL. However, the pending motions challenge the lawsuits  
 filed by Plaintiffs, and not that filed by the federal government.

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The **FCA Defendants** are:

- (1) FCA US LLC (“FCA US”);
- (2) Fiat Chrysler Automobiles N.V. (“FCA N.V.”), the corporate parent of FCA; and
- (3) Sergio Marchionne, the CEO of both FCA US and FCA N.V.

As alleged in the complaint, FCA US is a motor vehicle manufacturer. It distributes and sells motor vehicles under various brands, including Jeep and Ram. *See* FAC ¶ 13. The motor vehicles at issue in the instant case are the 2014-2016 EcoDiesel trucks marketed under the Jeep Grand Cherokee and Ram 1500 model names (the “Class Vehicles”). *See* FAC ¶¶ 1, 14, 105.

The **VM Motori Defendants** are:

- (1) VM Motori S.p.A. (“VM Italy”); and
- (2) VM North America, Inc. (“VM America”).

As alleged in the complaint, FCA N.V. owns both VM Italy and VM America. VM Italy is an auto parts manufacturer. It designed and manufactured the diesel engines at issue in the instant case (*i.e.*, the EcoDiesel). *See* FAC ¶ 19. VM America supports VM Italy customers and activities in North America. *See* FAC ¶ 20.

The **Bosch Defendants** are:

- (1) Robert Bosch LLC (“Bosch LLC”); and
- (2) Robert Bosch GmbH (“Bosch GmbH”), the parent of Bosch LLC.<sup>2</sup>

As alleged in the complaint, the Bosch Defendants developed and manufactured the EDC unit (known as EDC Unit 17) which they supplied to the FCA Defendants and/or VM Defendants for use in the Class Vehicles to control emissions. *See* FAC ¶ 30.

**B. Main Allegations in the FAC**

The main allegations in Plaintiffs’ operative complaint are as follows.

Emission standards for motor vehicles are set by the Environmental Protection Agency

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<sup>2</sup> Plaintiffs have voluntarily dismissed Volkmar Denner, the CEO of Bosch GmbH, without prejudice. *See* Docket No. 234 (notice).

1 (“EPA”) or the California Air Resources Board (“CARB”).<sup>3</sup> Motor vehicle manufacturers must  
2 certify to the EPA or CARB that their motor vehicles comply with the applicable emission  
3 standards. *See* FAC ¶¶ 2, 108.

4 Every motor vehicle sold in the United States must be covered by an EPA-issued  
5 Certificate of Conformity (“COC”) and every vehicle sold in California must be covered by a  
6 CARB-issued Executive Order (“EO”). *See* FAC ¶¶ 2, 108. To obtain a COC or EO, an  
7 automaker “must submit an application, which lists all auxiliary emission control devices installed  
8 in the vehicle, a justification for each, and an explanation of why the control device is not a defeat  
9 device.” FAC ¶ 128. A defeat device is generally “defined as any auxiliary emission control  
10 device ‘that reduces the effectiveness of the emission control system under conditions which may  
11 reasonably be expected to be encountered in normal vehicle operation and use.’” FAC ¶ 128  
12 (quoting 40 C.F.R. § 86.1803-01).

13 “Diesel engines pose a unique challenge” with respect to emissions because “the greater  
14 the power and fuel efficiency [*i.e.*, the benefits of a diesel engine], the dirtier and more harmful the  
15 emissions.” FAC ¶ 110. Notably, “[d]iesel combustion produces NOx”; “NOx pollution  
16 contributes to nitrogen dioxide [and] particulate matter in the air, and reacts with sunlight in the  
17 atmosphere to form ozone. Exposure to these pollutants has been linked with serious health  
18 dangers.” FAC ¶ 111.

19 “Given the [health] risks, minimizing NOx is paramount.” FAC ¶ 112. For the Class  
20 Vehicles, FCA US sought to minimize NOx through the EcoDiesel engine (supplied by the FCA  
21 N.V.-owned VM Motori Defendants). *See* FAC ¶ 113 (alleging that “[e]mission reductions start  
22 in the cylinder with advanced fuel injection strategies” and, “[a]fter the byproducts of combustion  
23 leave the engine, the EcoDiesel® technology treats these emissions using a diesel oxidation  
24

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25 <sup>3</sup> The Clean Air Act (“CAA”) allows California to adopt and enforce its own emission standards  
26 as long as those standards are approved by the EPA. Other states and the District of Columbia  
27 may choose to require that vehicles sold therein meet California’s emissions requirements instead  
28 of the EPA’s. *See In re Volkswagen “Clean Diesel” Mktg.*, MDL No. 2672 CRB (JSC), 264 F.  
Supp. 3d 1040, 1043 (N.D. Cal. 2017) [hereinafter *VW Wyo.*] (noting that “Congress has permitted  
California to adopt its own vehicle emissions standards, which other States may follow”); *see also*  
42 U.S.C. § 7543(b).



1 catalyst, diesel particulate filter, and SCR [selective catalytic reduction]). To control emissions  
2 from the EcoDiesel engine, the FCA entities used Bosch Defendants’ EDC Unit 17. *See* FAC ¶¶  
3 114-15.

4 Bosch’s EDC Unit 17 controls emissions by periodically reading  
5 sensor values, evaluating a control function, and controlling  
6 actuators based on the control signal. Sensor readings include  
7 crankshaft position, air pressure, air temperature, air mass, fuel  
8 temperature, oil temperature, coolant temperature, vehicle speed,  
9 exhaust oxygen content, as well as driver inputs such as accelerator  
pedal position, brake pedal position, cruise control setting, and  
selected gear. Based on sensor input, EDC [Unit] 17 controls and  
influences the fuel combustion process including, in particular, fuel  
injection timing, which affects engine power, fuel consumption, and  
the composition of the exhaust gas.

10 FAC ¶ 116.

11 According to Plaintiffs, the FCA Defendants worked with the VM Motori Defendants and  
12 the Bosch Defendants

13 to customize the EDC Unit 17 to allow Class Vehicles to simulate  
14 “passing” the EPA and CARB [emission] testing. Unlike during  
15 testing, the software [in the EDC Unit 17] disables or restricts  
16 certain of the emission controls during real-world driving  
conditions. When the emission controls are de-activated on the  
road, the Class Vehicles emit up to 20 times the legal limits of NOx.

17 FAC ¶ 123; *see also* FAC ¶ 125 (alleging that all Defendants worked together “to develop and  
18 implement a specific set of software algorithms for implementation in the Class Vehicles, which  
19 enabled FCA to adjust fuel levels, exhaust gas recirculation, air pressure levels, and even urea  
20 injection rates”). Plaintiffs maintain that the software controls used for the EcoDiesel engines  
21 “were concealed from regulators on COC and EO applications for the Class Vehicles, thus  
22 deceiving the EPA and CARB into approving the Class Vehicles for sale throughout the United  
23 States and California.” FAC ¶ 124.

24 On January 12, 2017, the EPA issued a Notice of Violation (“NOV”) against the FCA  
25 entities for failing to disclose eight auxiliary emission control devices – which potentially were  
26 defeat devices (as defined in federal regulations) – in the 2014-2016 Ram 1500s and Jeep Grand  
27 Cherokees. *See* FAC ¶¶ 3, 169. On the same day, CARB also issued a NOV. *See* FAC ¶¶ 4, 169.

28 According to Plaintiffs, not only were government regulators deceived by Defendants but

1 also consumers – *i.e.*, Defendants concealed from consumers the fact that defeat devices were  
2 installed in the Class Vehicles.

3 Notably, the lawsuits comprising this MDL followed in the wake of the Volkswagen  
4 “clean diesel” scandal. In the fall of 2015, the public learned that Volkswagen had installed a  
5 defeat device in 11 million diesel cars sold worldwide, including over 565,000 vehicles sold in the  
6 United States. *See* FAC ¶¶ 156-57. News of the scandal gave rise to considerable civil and  
7 criminal litigation against the company. The civil cases filed in federal courts were transferred to  
8 the Hon. Charles R. Breyer in this District as part of an MDL. Classes of consumers who had  
9 purchased or leased affected Volkswagen vehicles ultimately settled their claims with the  
10 company and other defendants. *See In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and*  
11 *Prods. Liab. Litig.* (“VW 3.0-Liter Settlement Approval Order”), MDL No. 2672 CRB (JSC), 2017  
12 WL 2212783 (N.D. Cal. May 17, 2017); *In re Volkswagen “Clean Diesel” Mktg., Sales Practices,*  
13 *and Prods. Liab. Litig.* (“VW 2.0-Liter Settlement Approval Order”), MDL No. 2672 CRB (JSC),  
14 2016 WL 6248426 (N.D. Cal. Oct. 25, 2016). Other litigation in *Volkswagen* is ongoing. Among  
15 the ongoing matters is a case by Volkswagen-branded franchise dealers against the Bosch  
16 Defendants. The franchise dealers allege that the Bosch Defendants participated in a RICO  
17 enterprise to deceive regulators and consumers about the defeat device used in Volkswagen’s  
18 “clean diesel” vehicles. In October 2017, Judge Breyer entered an order denying the Bosch  
19 Defendants’ motion to dismiss the franchise dealers’ RICO claim. *See In re Volkswagen “Clean*  
20 *Diesel” Mktg., Sales Practices, and Prods. Liab. Litig.* (“VW Franchise Dealers”), MDL No. 2672  
21 CRB (JSC), 2017 WL 4890594 (N.D. Cal. Oct. 30, 2017)

22 C. Claims

23 Based on, *inter alia*, the above allegations, Plaintiffs in the case at bar have asserted the  
24 following nationwide class claims:

- 25 • violation of RICO predicated on mail and wire fraud, *see* 18 U.S.C. § 1962(c)-(d);
- 26 • common law fraudulent concealment; and
- 27 • violation of the Magnuson-Moss Warranty Act (“MMWA”) (breach of both written  
28 and implied warranties). *See* 15 U.S.C. § 2301 *et seq.*

1 Plaintiffs have also asserted state-specific class claims:

- 2 • violation of consumer protection statutes;
- 3 • breach of express warranty; and
- 4 • breach of implied warranty.

5 Although Plaintiffs have raised the various claims noted above, the claims may loosely be  
6 categorized as (1) fraud claims and (2) warranty claims. Plaintiffs' fraud claims, in turn, may be  
7 subcategorized as (a) claims asserting fraud on government regulators (the RICO claim) and (b)  
8 claims asserting fraud on consumers (the common law fraudulent concealment claim and the  
9 claims for violation of consumer protection statutes).

10 In their motions to dismiss, Defendants have challenged all claims. Defendants' motions  
11 raise issues of standing, failure to state a claim for relief, preemption, and personal jurisdiction.

## 12 **II. STANDING**

13 Standing is a threshold jurisdictional requirement derived from Article III's case-or-  
14 controversy condition. *See* U.S. Const. art. III, § 2, cl. 1. To satisfy this requirement, the plaintiff  
15 bears the burden of establishing three elements:

16 First, the plaintiff must have suffered an injury in fact – an invasion  
17 of a legally protected interest which is (a) concrete and  
18 particularized, and (b) actual or imminent, not conjectural or  
19 hypothetical. Second, there must be a causal connection between  
20 the injury and the conduct complained of – the injury has to be fairly  
traceable to the challenged action of the defendant, and not the result  
of the independent action of some third party not before the court.  
Third, it must be likely, as opposed to merely speculative, that the  
injury will be redressed by a favorable decision.

21 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted).

22 Because standing relates to a federal court's subject matter jurisdiction, an assertion that  
23 the requirements of standing are not satisfied is properly raised in a motion brought pursuant to  
24 Federal Rule of Civil Procedure 12(b)(1). *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).  
25 A party moving to dismiss under Rule 12(b)(1) may make a facial challenge, as Defendants do  
26 here, by asserting that “the allegations contained in the complaint are insufficient on their face to  
27 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).  
28 In ruling on a facial challenge, the court “must accept as true all material allegations of the

1 complaint and must construe the complaint in favor of the complaining party.” *Warth v. Seldin*,  
 2 422 U.S. 490, 501 (1975). “At the pleading stage, general factual allegations of injury resulting  
 3 from the defendant’s conduct may suffice . . . .” *Lujan*, 504 U.S. at 561.

4 \* \* \*

5 Defendants contend that Plaintiffs have not satisfied the first element of standing – an  
 6 injury-in-fact. The Bosch Defendants also challenge the second element – asserting that, to the  
 7 extent Plaintiffs were injured, their injury is not fairly traceable to the Bosch Defendants’ conduct.  
 8 Defendants further raise two narrower standing arguments, asserting that Plaintiffs lack standing  
 9 to assert claims under the laws of states in which no named Plaintiff resides or purchased or leased  
 10 a Class Vehicle, and that named Plaintiff Chatom Motor Company, Inc. cannot plausibly allege an  
 11 injury that is traceable to Defendants’ conduct because of the timing of its Class Vehicle purchase.

12 A. Injury-in-Fact

13 The Ninth Circuit has held that when a consumer alleges that he or she would not have  
 14 purchased property, or would have paid less for it, had the seller not misrepresented the property  
 15 or failed to disclose its limitations, the consumer has plausibly alleged an injury-in-fact. *See, e.g.,*  
 16 *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098 (9th Cir. 2013); *Mazza v. Am. Honda Motor Co.*, 666 F.3d  
 17 581 (9th Cir. 2012); *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011).

18 In *Hinojos*, consumers alleged that they would not have purchased “on sale” merchandise,  
 19 or would have paid less for it, had they known that the retailer routinely sold the merchandise at  
 20 the advertised sale price, and that the “original” price did not reflect prevailing market prices. *See*  
 21 *Hinojos*, 718 F.3d at 1101-02. The Ninth Circuit held that, “when, as here, Plaintiffs contend that  
 22 class members paid more for a product than they otherwise would have paid, or bought it when  
 23 they otherwise would not have done so they have suffered an Article III injury in fact.” *Id.* at  
 24 1104 n.3 (internal quotation marks omitted).

25 In *Mazza*, consumers asserted that they would not have purchased Honda’s collision  
 26 mitigation braking system, or would have paid less for it, had Honda disclosed the system’s  
 27 limitations, including that the system might not warn drivers in time to avoid an accident. *See*  
 28 *Mazza*, 666 F.3d at 586-87. The Ninth Circuit held that “[t]o the extent that class members were

1 relieved of their money by Honda's deceptive conduct – as Plaintiffs allege – they have suffered  
2 an injury in fact.” *Id.* at 595 (internal quotation marks omitted).

3 Finally, in *Maya*, plaintiffs alleged that they would not have purchased homes in a new  
4 housing development, or would have paid less for them, had the homebuilders disclosed that they  
5 were marketing the homes to “unqualified buyers” who were likely to default on their home loans  
6 and abandon the properties. *See Maya*, 658 F.3d at 1065-66. The Ninth Circuit held that the  
7 plaintiffs’ economic loss constituted an injury in fact: “Allegedly, plaintiffs spent money that,  
8 absent defendants’ actions, they would not have spent. This is a quintessential injury-in-fact.” *Id.*  
9 at 1069.

10 In the instant case, Plaintiffs allege the same type of economic loss as the plaintiffs in  
11 *Hinojos, Mazza, and Maya*. They contend that they decided to buy and lease the Class Vehicles  
12 based in part on FCA US’s representations that the vehicles were “‘EcoDiesel’ vehicle[s] (i.e.,  
13 reduced emissions).” FAC ¶¶ 34-96. Had Defendants disclosed that the Class Vehicles actually  
14 emitted NOx at levels up to 20 times legal limits; could not achieve advertised towing power,  
15 performance, or fuel economy without cheating emissions tests; and were each equipped with an  
16 emission treatment system that was designed to de-activate during real-world driving conditions,  
17 *i.e.*, a “defeat device,” Plaintiffs contend that they would not have bought and leased the Class  
18 Vehicles, or would have paid less to do so. *See* FAC ¶¶ 34-96 (named Plaintiffs’ individual  
19 allegations); FAC ¶ 123 (allegations regarding on-road NOx emission levels).

20 *Hinojos, Mazza, and Maya* are on point. Nonetheless, Defendants contend that Plaintiffs’  
21 injury allegations are insufficient because (1) the Class Vehicles work as promised; (2) Plaintiffs  
22 cannot base their overpayment theory on a mere regulatory violation; and (3) the allegations of  
23 overpayment are not particular enough.

24 1. Promised Performance of Class Vehicles

25 In support of their overpayment theory, Plaintiffs allege that consumers “paid a significant  
26 premium for the EcoDiesel features that [FCA US] falsely advertised.” FAC ¶ 191. Specifically:  
27 “[C]onsumers paid between \$3,120 and \$5,000 more for the EcoDiesel option than for the  
28 comparable gasoline vehicles. In return, FCA promised power, performance, fuel economy, and

1 environmental friendliness (and vehicles that were legal to drive).” FAC ¶ 191. Focusing on  
 2 these allegations, Defendants contend that Plaintiffs’ overpayment injury is not plausible because  
 3 Plaintiffs do not allege that the “power, performance, or fuel economy of the Vehicles is anything  
 4 other than what was advertised,” or that “any named Plaintiff paid a single penny for *just*  
 5 ‘environmental friendliness.’” FCA/VM Mot. at 21, 23.

6 Defendants reading of the FAC picks apart and separates the four characteristics of the  
 7 EcoDiesel that *together* are alleged to have supported the premium. Plaintiffs allege that the  
 8 EcoDiesel premium was for a car that offered “a ‘green’ alternative to gasoline with reduced  
 9 emissions *coupled with* diesel’s benefits of greater torque, power, and fuel efficiency.” FAC ¶ 6  
 10 (emphasis added). Plaintiffs contend that they did not receive this collection of benefits because  
 11 the Class Vehicles “could not achieve the advertised towing power, performance, and/or fuel  
 12 economy without cheating emission tests.” FAC ¶¶ 34-96. By focusing only on towing power,  
 13 performance, and fuel economy, Defendants segment the allegations in a way that misses the point  
 14 of Plaintiffs’ overpayment theory. Defendants’ argument is meritless.

15 2. More Than Regulatory Violation

16 Defendants next argue that the only injury alleged is a mere regulatory violation;  
 17 specifically, that the Class Vehicles emit NOx at levels that exceed emission limits and contain  
 18 unauthorized defeat devices. Defendants assert that these regulatory violations cannot support  
 19 standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

20 The Supreme Court held in *Spokeo* that “Article III standing requires a concrete injury  
 21 even in the context of a statutory violation,” and that “a bare procedural violation, divorced from  
 22 any concrete harm, [cannot] satisfy the injury-in-fact requirement of Article III.” *Id.* at 1549.  
 23 After articulating this standard, the Court in *Spokeo* remanded the case to the lower court to apply  
 24 the standard in the context of the plaintiff’s action against a consumer reporting agency for  
 25 violation of his rights under the Fair Credit Reporting Act. Before doing so, the Court provided an  
 26 example of a FCRA violation that could be divorced from any concrete harm, noting that a  
 27 consumer reporting agency may disseminate an incorrect zip code for an individual, but that “[i]t  
 28 is difficult to imagine how [that] dissemination . . . , without more, could work any concrete

1 harm.” *Id.* at 1550.

2 In the instant case, Plaintiffs allege more than “a bare procedural violation, divorced from  
3 any concrete harm,” unlike the zip code example in *Spokeo*. *Id.* at 1549. Even if Plaintiffs’ claims  
4 were tied to EPA and CARB emission standards – and as discussed in the preemption analysis  
5 further below, they are not, *see* Part IV.B, *infra* – Plaintiffs allege that they paid money for the  
6 Class Vehicles that they would not have otherwise spent but for Defendants’ misrepresentations  
7 and concealment of material facts. There was no similar expenditure of money in *Spokeo*; this  
8 expenditure “is a quintessential injury-in-fact.” *Maya*, 658 F.3d at 1069; *see also Mazza*, 666 F.3d  
9 at 595 (“To the extent that class members were relieved of their money by Honda’s deceptive  
10 conduct – as Plaintiffs allege – they have suffered an injury in fact.”) (internal quotation marks  
11 omitted). Because Plaintiffs allege a financial injury, *Spokeo* does not support dismissal of their  
12 case.

13 3. Sufficiency of Allegations of Overpayment

14 Defendants assert that Plaintiffs’ allegations of overpayment are not particular enough  
15 because the allegations do not support that (a) Plaintiffs relied on specific advertisements about the  
16 Class Vehicles’ emission levels in making their purchasing decisions; or (b) that the Class  
17 Vehicles have declined in value.

18 a. Identification of Specific Advertisements

19 Defendants have not cited any authority that requires Plaintiffs to identify specific  
20 advertisements upon which they relied in order to sufficiently plead an injury-in-fact for purposes  
21 of establishing standing under Article III. Defendants cite to *Davidson v. Kimberly-Clark Corp.*,  
22 873 F.3d 1103 (9th Cir. 2017), a false advertising case involving “flushable” wipes that were not  
23 in fact flushable. But the only Article III issue addressed there was whether a previously deceived  
24 consumer had standing to seek injunctive relief. *See id.* at 1112-16. Here, in contrast, the  
25 question is whether Plaintiffs have standing to seek damages for a financial injury. Further, even  
26 in the context addressed in *Davidson*, the court did not require the plaintiff to satisfy a particularity  
27 requirement in order to support Article III standing. Defendants also cite to *In re Ford Motor Co.*  
28 *Securities Litigation*, 381 F.3d 563 (6th Cir. 2004), and *Elias v. Hewlett-Packard Co.*, 903 F.

1 Supp. 2d 843 (N.D. Cal. 2012), but those decisions addressed the specificity needed to plausibly  
2 allege certain substantive statutory violations, not to satisfy Article III. *See In re Ford*, 381 F.3d at  
3 570-71 (vague “puffing statements” insufficient to support a Rule 10b-5 securities fraud claim);  
4 *Elias*, 903 F. Supp. 2d at 854-55 (generalized misrepresentations insufficient to plead California  
5 UCL, FAL, and CLRA claims). Whether allegations are sufficient to state a substantive claim,  
6 *e.g.*, fraud or fraudulent concealment or breach of contract, is a separate inquiry from whether the  
7 Court has Article III jurisdiction over the dispute.

8 Not only do Defendants fail to cite authority for their particularity requirement, but such a  
9 requirement is at odds with the principle that Article III requires only “general factual allegations  
10 of injury resulting from the defendant’s conduct” at the pleading stage. *Lujan*, 504 U.S. at 561  
11 (“[O]n a motion to dismiss we presume that general allegations embrace those specific facts that  
12 are necessary to support the claim.”) (internal quotation marks omitted). The Ninth Circuit’s  
13 decision in *Mazza* is instructive. The court noted there that it was “likely that many class  
14 members were never exposed to the allegedly misleading advertisements, insofar as advertising of  
15 the challenged [collision mitigation braking] system was very limited.” *Mazza*, 666 F.3d at 595.  
16 Yet the court concluded that the plaintiffs had adequately pled an injury-in-fact because they  
17 alleged that they “paid more for the [system] than they otherwise would have paid, or bought it  
18 when they otherwise would not have done so, because Honda made deceptive claims and failed to  
19 disclose the system’s limitations.” *Id.* Consistent with *Lujan*, *Mazza* demonstrates that only  
20 generalized allegations of injury are needed to plead an injury-in-fact under Article III.

21 Also instructive is *Counts v. General Motors, LLC*, 237 F. Supp. 3d 572 (E.D. Mich.  
22 2017). Similar to this case, the plaintiffs in *Counts* alleged that they overpaid for cars with “clean  
23 diesel” features. *See id.* at 577-80. On a motion to dismiss, General Motors argued that the  
24 plaintiffs lacked standing “because they did not plausibly allege that [they] saw and relied upon  
25 specific advertisements or other false statements in deciding to buy [GM’s Diesel Cruze].” *Id.* at  
26 584. The *Counts* court rejected this argument, noting that “GM has not established that Plaintiffs  
27 must actually plead reliance in order to establish standing.” *Id.*

28 Plaintiffs do not need to identify specific advertisements on which they relied in order to



1 support an Article III injury-in-fact. But even if they did need to identify specific advertising, they  
 2 have done so. Plaintiffs allege that they relied on FCA US’s representation that the Class Vehicles  
 3 had an EcoDiesel engine. *See* FAC ¶¶ 34-96. One does not need to look far to find this  
 4 representation: as alleged, it appeared on the Class Vehicles themselves, which each had an  
 5 “EcoDiesel” logo that used a leaf and green coloring. *See* FAC ¶ 145. Regardless of whether this  
 6 is sufficient to state a plausible claim of, *e.g.*, fraud, this would be sufficient to establish Article III  
 7 standing.

8         Additionally, Plaintiffs not only allege that they were misled by FCA US’s EcoDiesel  
 9 advertising, but that Defendants concealed that the Class Vehicles were equipped with one or  
 10 more defeat devices and emitted NOx at levels well in excess of legal limits. *See* FAC ¶¶ 34-96,  
 11 123. This is a fraudulent concealment theory. And as discussed in more detail in the Court’s  
 12 analysis of the merits of this theory, *see* Part IV.C, *infra*, a party’s failure to disclose a fact during  
 13 a commercial transaction may be actionable if, *e.g.*, there is a duty to disclose and the fact  
 14 withheld could have justifiably induced the other party to the transaction to have acted differently.  
 15 *See* Restatement (Second) of Torts § 551 (1977) (outlining circumstances in which such a duty to  
 16 disclose arises). Because this concealment theory is not tied to any particular affirmative  
 17 misrepresentations, there is no need as a matter of substantive law – certainly none under Article  
 18 III – to identify specific advertisements to support injury (and Article III jurisdiction) on this basis.  
 19 Allegations of overpayment based on a defendant’s failure to disclose a product’s limitations are  
 20 clearly sufficient to satisfy Article III’s injury-in-fact requirement. *See Maya*, 658 F.3d at 1069  
 21 (injury-in-fact requirement satisfied where plaintiffs alleged that “they would not have purchased  
 22 their homes had defendants made the disclosures”).

23                 b.         Decline in Vehicle Value

24         Defendants also contend that the FAC lacks allegations supporting that Plaintiffs’ Class  
 25 Vehicles have declined in value. For example, Defendants note that the FAC does not identify  
 26 reduced trade-in values for the Class Vehicles.

27         This argument misconstrues the alleged injury. Whether the value of the Class Vehicles  
 28 has dropped is not Plaintiffs’ focus. Instead, like the home buyers in *Maya*, Plaintiffs contend that

1 they overpaid for the Class Vehicles “*at the time of sale.*” *Maya*, 658 F.3d at 1069; *see also* FAC  
2 ¶ 191 (“Class members paid a significant premium for the EcoDiesel features that FCA falsely  
3 advertised.”); FAC ¶ 195 (“[H]ad regulators or the public known the true facts, Plaintiffs . . .  
4 would not have purchased or leased the Class Vehicles . . . or would have paid substantially less  
5 for them.”).

6 Defendants rely on cases in which courts have held that alleged overpayment injuries were  
7 speculative, or needed to be pled with more detail, because they were based on product defects  
8 that had not yet manifested. *See, e.g., Barakezyan v. BMW of N. Am., LLC*, No. 16-cv-00173 SJO  
9 (GJSx), 2016 WL 2840803, at \*4 (C.D. Cal. Apr. 7, 2016) (“Plaintiff has not alleged an economic  
10 injury because he has not alleged the Subject Vehicle failed to perform as advertised . . . .”); *Tae*  
11 *Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 972 (C.D. Cal. 2014)  
12 (“Plaintiffs have not alleged an actual economic injury because they have not had any negative  
13 experience with the [vehicles] . . . .”); *In re Toyota Motor Corp. Unintended Acceleration Mktg.,*  
14 *Sales Practices & Prods. Liab. Litig. (“In re Toyota I”)*, 790 F. Supp. 2d 1152, 1165 n.11 (C.D.  
15 Cal. 2011) (“When the economic loss is predicated solely on how a product functions, and the  
16 product has *not malfunctioned*, the Court agrees that something more is required than simply  
17 alleging an overpayment for a ‘defective’ product.”) (emphasis added); *Contreras v. Toyota Motor*  
18 *Sales USA, Inc.*, No. C 09-06024 JSW, 2010 WL 2528844, at \*2 (N.D. Cal. June 18, 2010)  
19 (overpayment allegations insufficient to support standing where “Plaintiffs do not allege that their  
20 Vehicles have manifested this defect”), *aff’d in part, rev’d in part on other grounds*, 484 F. App’x  
21 116 (9th Cir. 2012).

22 For the reasons stated above, these cases are not persuasive. In any event, Plaintiffs here,  
23 in contrast, have alleged that the Class Vehicles are currently defective. Indeed, they were  
24 allegedly defective when first sold. The Class Vehicles emit NOx at levels up to 20 times legal  
25 limits, and each contains an “emission treatment system [that] was designed to de-activate during  
26 real-world driving conditions,” *i.e.*, a defeat device. FAC ¶¶ 7, 34-96. Because the Class Vehicles  
27 are alleged to have been defective from the outset, Plaintiffs’ overpayment allegations are  
28 plausible and distinguish the instant case from the authorities relied upon by Defendants. *See*

1 *Sloan v. Gen. Motors LLC*, No. 16-cv-07244-EMC, 2017 WL 3283998, at \*2, 4 (N.D. Cal. Aug. 1,  
2 2017) (holding that plaintiffs had sufficiently alleged an injury-in-fact where they alleged that they  
3 overpaid for vehicles with engines that were “inherently defective”); *In re Toyota I*, 790 F. Supp.  
4 2d at 1166 (“As long as Plaintiffs do not simply allege that their Toyota vehicles are ‘defective,’  
5 but rather offer detailed, non-conclusory factual allegations of the product defect, the economic  
6 loss injury flows from the plausibly alleged defect at the pleadings stage.”).

7 The Ninth Circuit’s unpublished decision in *Cahen v. Toyota Motor Corp.*, -- F. App’x --,  
8 2017 WL 6525501 (9th Cir. Dec. 21, 2017), which the FCA and VM Motori Defendants submitted  
9 as a supplemental authority after oral argument, *see* Docket No. 278, is not inconsistent with the  
10 above analysis. The plaintiffs in *Cahen* alleged that they overpaid for vehicles that lacked certain  
11 software security features, which rendered the vehicles susceptible to hacking. But the plaintiffs  
12 did not allege “that any of their vehicles ha[d] actually been hacked, or that they [were] aware of  
13 any vehicles that ha[d] been hacked outside of controlled environments.” *Cahen v. Toyota Motor*  
14 *Corp.*, 147 F. Supp. 3d 955, 959 (N.D. Cal. 2015). Reasoning that the plaintiffs’ alleged economic  
15 injury “rest[ed] solely upon the existence of a speculative risk of future harm,” the district court  
16 dismissed the complaint for lack of Article III standing. *Id.* at 971.

17 The Ninth Circuit affirmed. In doing so, it noted that the plaintiffs “[did] not allege that  
18 any of their vehicles ha[d] actually been hacked,” and that “nearly 100% of cars on the market  
19 include wireless technologies that could pose vulnerabilities to hacking or privacy intrusions.”  
20 *Cahen*, 2017 WL 6525501, at \*2. Against this backdrop, the Ninth Circuit concluded that the  
21 plaintiffs’ overpayment allegations were “conclusory and unsupported by any facts.” *Id.* The  
22 Ninth Circuit also cited favorably to certain observations that the district court had made, which  
23 included that the plaintiffs had failed to allege that the software defect had “a demonstrable effect  
24 on the market for their specific vehicles based on documented recalls or declining Kelley  
25 Bluebook values.” *Id.* The absence of such allegations lent further support to the Ninth Circuit’s  
26 conclusion that the plaintiffs’ “economic loss theory [was] not credible.” *Id.*

27 *Cahen* is consistent with the decisions cited in the preceding paragraphs. Because the  
28 plaintiffs in *Cahen* only alleged that their vehicles *could* be hacked in the future, “something

1 more” was required than general allegations of overpayment. *See In re Toyota I*, 790 F. Supp. 2d  
 2 at 1165 n.11 (“[S]omething more is required than simply alleging an overpayment for a ‘defective’  
 3 product” when “the product has *not malfunctioned*”) (emphasis added). In contrast, when a  
 4 complaint includes concrete allegations of a *current universal* vehicle defect, as the FAC does  
 5 here, those allegations plausibly and specifically support an overpayment theory of injury. This is  
 6 because “[a] vehicle with a defect is worth less than one without a defect.” *Id.* at 1163. Because  
 7 Plaintiffs have offered concrete allegations of current defects in the Class Vehicles, this case is  
 8 distinguishable from *Cahen*.

9 Nor does the *Volkswagen “Clean Diesel”* MDL support a different conclusion.  
 10 Defendants assert that the injury allegations there were more detailed than those here, as the  
 11 consumer plaintiffs in *Volkswagen* alleged, for example, that they had seen reduced trade-in values  
 12 for the affected Volkswagen vehicles. *See* FAC/VM Mot. at 25-26 (citing *Volkswagen* amended  
 13 consolidated consumer class action complaint). The consumer plaintiffs and defendants in  
 14 *Volkswagen* settled their claims before the court considered a motion to dismiss. *See VW 3.0-Liter*  
 15 *Settlement Approval Order*, 2017 WL 2212783; *VW 2.0-Liter Settlement Approval Order*, 2016  
 16 WL 6248426. The *Volkswagen* court accordingly did not consider the sufficiency of the injury  
 17 allegations, let alone rule that the level of detail pled there was required to support an injury-in-  
 18 fact under Article III.

19 4. Theoretical Future Injuries

20 Plaintiffs also allege potential future injuries arising from efforts to bring the Class  
 21 Vehicles into compliance. If the FCA Defendants are not able to devise an emissions fix,  
 22 Plaintiffs contend that the vehicles “will have to be removed from the road.” FAC ¶ 192.  
 23 Plaintiffs also allege that, “even if FCA can bring the Class Vehicles into compliance with  
 24 emission standards, it will not be able to do so without substantially degrading their performance  
 25 characteristics, including their horsepower and/or fuel efficiency and/or maintenance  
 26 requirements.” FAC ¶ 193.

27 Defendants argue that these injuries are too speculative to support standing. If these were  
 28 the only injuries alleged, the Court would have to undertake a closer analysis of such a singular

1 basis for standing. While it is possible that the Class Vehicles may need to be removed from the  
 2 road, or that an emissions fix will materially reduce performance, the likelihood of these outcomes  
 3 is not clear. *See Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (“[W]e have  
 4 repeatedly reiterated that ‘threatened injury must be *certainly* impending to constitute injury in  
 5 fact,’ and that ‘[a]llegations of *possible* future injury’ are not sufficient.”) (second alteration in  
 6 original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). As the analysis above  
 7 demonstrates, however, Plaintiffs do not, in any event, rely on solely these future injuries to  
 8 support standing. Instead, they contend that they suffered economic injury at the time of sale of  
 9 the Class Vehicles. Uncertainty as to the sufficiency of their allegations of future injury, standing  
 10 alone, does not negate the Article III standing with respect to the claims asserted in the FAC.

11 Under the Ninth Circuit’s decisions in *Hinojos*, *Mazza*, and *Maya*, Plaintiffs’ allegations of  
 12 overpayment satisfy Article III’s injury-in-fact requirement.

13 B. Traceability

14 The Bosch Defendants separately argue that Plaintiffs’ alleged economic injury is not  
 15 fairly traceable to them because (1) Plaintiffs have not identified any statement that the Bosch  
 16 Defendants made to Plaintiffs that could support a purportedly inflated price for the Class  
 17 Vehicles; and (2) the Bosch Defendants were not a party to a contract with Plaintiffs and therefore  
 18 have not deprived Plaintiffs of the benefit of their bargain with respect to the Class Vehicles. The  
 19 Court does not find either of these arguments persuasive.

20 The thrust of Plaintiffs’ allegations against the Bosch Defendants is not that these entities  
 21 made misrepresentations directly to Plaintiffs, or that the Bosch Defendants entered into, and then  
 22 breached, contracts with Plaintiffs. Rather, Plaintiffs allege that the Bosch Defendants  
 23 participated in a scheme and conspiracy with the FCA and VM Motori Defendants to develop,  
 24 implement, and conceal software used in the Class Vehicles to cheat emissions tests. *See* FAC  
 25 ¶¶ 215, 231, 238-40. Plaintiffs’ alleged economic injuries are traceable to this conduct in at least  
 26 two ways.

27 First, the hidden software is part of what has rendered the Class Vehicles defective and,  
 28 consequently, worth less. *See In re Toyota I*, 790 F. Supp. 2d at 1163 (“A vehicle with a defect is

1 worth less than one without a defect.”). Because the Bosch Defendants allegedly had a hand in  
2 developing and implementing this software, their conduct plausibly caused Plaintiffs’ economic  
3 loss. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods.*  
4 *Liab. Litig.* (“*In re Toyota II*”), 826 F. Supp. 2d 1180, 1191 (C.D. Cal. 2011) (concluding that  
5 Article III’s traceability requirement was satisfied where the plaintiffs alleged that Toyota’s  
6 “defective designs resulted in devaluation of their vehicles purchased under the guise of defect-  
7 free vehicles”).

8 Second, to the extent the Bosch Defendants knowingly concealed the software installed in  
9 the Class Vehicles from regulators and consumers, Plaintiffs’ economic injuries are also fairly  
10 traceable to that conduct. This is because Plaintiffs contend that they would not have bought or  
11 leased the Class Vehicles, or would have paid less to do so, if Defendants had disclosed that the  
12 Class Vehicles were equipped with software used to cheat emissions tests. *See* FAC ¶¶ 34-96; *see*  
13 *also Juarez v. Quintero*, 530 F. Supp. 267, 273 (N.D. Cal. 1981) (holding that plaintiffs’  
14 allegations of economic loss were “fairly traceable to the defendants’ failure to disclose”).  
15 Plaintiffs’ economic injuries are accordingly traceable to the Bosch Defendants’ failure to  
16 disclose.

17 As the above demonstrates, Plaintiffs do not need to identify a statement on which they  
18 relied that was made by the Bosch Defendants to plausibly trace their economic injuries to these  
19 entities. Nor do Plaintiffs need to allege that they had a contract with the Bosch Defendants. The  
20 Bosch Defendants played a role in designing the accused device that caused vehicles to perform in  
21 a way that deceived consumers and regulators, and allegedly did so knowingly and purposefully as  
22 part of a conspiracy with the other Defendants. The injuries suffered by Plaintiffs are sufficiently  
23 traceable to the Bosch Defendants.

24 Faced with nearly identical allegations, the district court in *In re Duramax Diesel*  
25 *Litigation*, No. 17-cv-11661, 2018 U.S. Dist. LEXIS 26543 (E.D. Mich. Feb. 20, 2018), recently  
26 reached the same conclusion. The plaintiffs there alleged that they overpaid for General Motors  
27 diesel vehicles, which GM marketed as having low emissions, but which utilized defeat devices  
28 and actually emitted NOx at levels that exceeded EPA limits. *See id.* at \*4-5. The plaintiffs also

1 alleged that the affected vehicles utilized Bosch’s EDC Unit 17, and that Bosch collaborated with  
 2 GM to develop, manufacture, and test the defeat devices. *See id.* at \*7-9. Although the Bosch  
 3 Defendants argued that the plaintiffs’ injuries were not traceable to their conduct – because Bosch  
 4 did not advertise the vehicles to consumers, establish the vehicles’ price, or enter into vehicle-  
 5 purchase contracts with the plaintiffs – the district court rejected the argument. *See id.* at \*18-25.  
 6 In denying Bosch’s motion to dismiss, the district court reasoned that the plaintiffs allegedly  
 7 “overpaid for their vehicles *because* Bosch worked closely with GM to install working defeat  
 8 devices in the Duramax vehicles.” *Id.* at \*23. The plaintiffs’ injuries were therefore traceable to  
 9 the Bosch Defendants’ conduct. For the reasons stated above, the same is true here.

10 The Bosch Defendants rely on *Koronthaly v. L’Oreal USA, Inc.*, 374 F. App’x 257 (3d Cir.  
 11 2010), and *Young v. Johnson & Johnson*, No. 11-4580 (JAP), 2012 WL 1372286 (D.N.J. Apr. 19,  
 12 2012), in arguing that Plaintiffs’ economic injuries are not traceable to them. These cases are  
 13 factually distinguishable, and the Bosch Defendants’ reliance on them is misplaced.

14 In both *L’Oreal* and *Johnson & Johnson*, consumers alleged that they were misled by  
 15 product packaging into purchasing goods that they believed were unhealthy (lipstick with trace  
 16 amounts of lead in *L’Oreal* and a butter/margarine substitute that contained trans fats in *Johnson*  
 17 *& Johnson*). The consumers asserted that, had they known that the products had these “health”  
 18 defects, they would not have purchased them. *See L’Oreal*, 374 F. App’x at 258-59; *Johnson &*  
 19 *Johnson*, 2012 WL 1372286, at \*1, 3.

20 In each case, the court held that the plaintiffs lacked standing to assert their claims.  
 21 Specifically, each court held that the alleged health defects were speculative, in part because the  
 22 FDA had approved the product labeling. *See L’Oreal*, 374 F. App’x at 259; *Johnson & Johnson*,  
 23 2012 WL 1372286, at \*3. Separately, both courts concluded that the plaintiffs had mistakenly  
 24 relied in part on a benefit-of-the-bargain theory of injury. Both courts held that this was an  
 25 erroneous theory because the plaintiffs did not allege that they had purchased the products  
 26 pursuant to a contract. *See L’Oreal*, 374 F. App’x at 259; *Johnson & Johnson*, 2012 WL  
 27 1372286, at \*1, 4.

28 The Bosch Defendants seize on this last component of the *L’Oreal* and *Johnson & Johnson*

1 decisions – regarding the benefit-of-the-bargain theory – and argue that Plaintiffs must allege that  
 2 they purchased the Class Vehicles pursuant to a contract with them in order to support traceability.  
 3 But the courts in *L’Oreal* and *Johnson & Johnson* never held that a plaintiff must have a  
 4 contractual relationship with a defendant in order to assert a cognizable overpayment injury.  
 5 Instead, those courts simply noted that the plaintiffs there had invoked a benefit-of-the-bargain  
 6 theory of injury, but could not maintain such a theory because they had not entered into contracts  
 7 with the defendants. Here, Plaintiffs do not allege that they entered into contracts with the Bosch  
 8 Defendants, which were then breached. Rather, Plaintiffs assert that the Bosch Defendants played  
 9 a role in designing, implementing, and concealing software that was used in the Class Vehicles to  
 10 cheat emissions tests. This is not a benefit-of-the-bargain theory. It is a theory that sounds in tort  
 11 and “exists independent of any contract.” *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d  
 12 936, 966 (N.D. Cal. 2014). The benefit-of-the-bargain contract analysis in *L’Oreal* and *Johnson*  
 13 *& Johnson* is therefore inapplicable.

14 Further, as is evident from the above summary of *L’Oreal* and *Johnson & Johnson*, those  
 15 decisions were not based on traceability, but on the absence of a concrete injury. Because the  
 16 FDA had approved the product labeling at issue, the courts held that the plaintiffs’ claims of  
 17 overpayment were speculative. That is not the case here, as Plaintiffs allege that each of the Class  
 18 Vehicles contained software that qualified as a defeat device, which is clearly prohibited by  
 19 federal regulations. *See* 40 C.F.R. § 86.1803-01. Regulatory approval of the Class Vehicles does  
 20 not, under these circumstances, break the chain of traceability.

21 For the reasons stated above, the Court rejects the Bosch Defendants’ traceability  
 22 arguments.

23 C. Standing To Bring Certain State-Law Claims

24 Plaintiffs bring claims on behalf of a putative nationwide class and allege injury under the  
 25 laws of the 50 states and the District of Columbia. No named Plaintiff, however, is alleged to  
 26 reside or have purchased or leased a Class Vehicle in seven states or the District of Columbia.  
 27 Defendants assert that claims under the laws of those states and the District of Columbia should  
 28 therefore be dismissed for lack of standing. Plaintiffs respond that the determination of standing



1 with respect to these claims is better addressed after class certification.

2 This Court previously addressed a similar issue in *In re Carrier IQ, Inc., Consumer*  
 3 *Privacy Litigation*, 78 F. Supp. 3d 1051 (N.D. Cal. 2015), which is a decision on which Plaintiffs  
 4 and Defendants both rely. The Ninth Circuit’s intervening decision in *Melendres v. Arpaio*, 784  
 5 F.3d 1254 (9th Cir. 2015), may govern instead of *In re Carrier IQ*. Under either case, however,  
 6 dismissal of the state-law claims at this time is not warranted.

7 1. *In re Carrier IQ*

8 In *In re Carrier IQ*, individuals from 13 different states filed claims against Carrier IQ,  
 9 Inc. under a number of states’ privacy and consumer protection statutes. See *In re Carrier IQ*, 78  
 10 F. Supp. 3d at 1059. On a motion to dismiss, defendants argued that the plaintiffs lacked standing  
 11 to assert claims under state laws from states in which they did not reside. See *id.* at 1065.

12 The Court noted that this dispute turned on an issue for which there was no clear  
 13 precedent; that issue being “whether the Court should adjudicate the standing question now at the  
 14 pre-certification pleading stage as measured by the named plaintiffs only or . . . after deciding  
 15 class certification.” *Id.* at 1068. The Court noted that at that time “the Ninth Circuit recognized  
 16 this question was an open one, expressly declining to reach the ‘difficult chicken-and-egg question  
 17 of whether class certification should be decided before standing.’” *Id.* at 1069 (quoting *Perez v.*  
 18 *Nidek Co.*, 711 F.3d 1109 (9th Cir. 2013)). After reviewing relevant Supreme Court and Ninth  
 19 Circuit precedent, as well as decisions from various district courts and analysis by legal  
 20 commentators, see *id.* at 1069-73, the Court concluded “that it ha[d] the discretion to defer  
 21 questions of standing until after class certification,” which it could decide to exercise on a case-by-  
 22 case basis. *Id.* at 1074.

23 On the facts of *In re Carrier IQ*, the Court declined to exercise this discretion, and instead  
 24 decided, “as a matter of case management, to require the Plaintiffs to present a named class  
 25 member who possesses individual standing to assert each state law’s claims against Defendants.”  
 26 *Id.* The Court did so for several reasons. First, the Court noted that the “number of consumers  
 27 from 35 other states in which state law claims are asserted is vast relative to the claims to which  
 28 the named Plaintiffs have standing.” *Id.* Because of this, the Court expressed “reservations of

1 subjecting the [Defendants] to the expense and burden of nationwide discovery without Plaintiffs  
 2 first securing actual plaintiffs who clearly have standing and are willing and able to assert claims  
 3 under these state laws.” *Id.* Second, the Court reasoned that “given the breadth of the proposed  
 4 class and the number of state law claims asserted on behalf of the class, there is a meaningful risk  
 5 that the requirements of class certification under Rule 23 may not be met or, if they are, subclasses  
 6 may have to be created which would engender delay (adding that any new named plaintiffs would  
 7 likely be subject to another round of discovery and further class certification motion practice).”  
 8 *Id.* at 1074-75. As a result, the Court concluded that “[i]t makes sense to address standing to bring  
 9 some 35 state law claims before class certification,” and in doing so the Court concluded that “the  
 10 named Plaintiffs do not have standing to assert claims from states in which they do not reside or  
 11 did not purchase their mobile device.” *Id.* at 1075.

12 2. Melendres

13 Three months after *In re Carrier IQ*, the Ninth Circuit decided *Melendres*, 784 F.3d 1254.  
 14 That case was an appeal from a district court judgment against Sheriff Joseph Arpaio and the  
 15 Maricopa County Sheriff’s Office, which enjoined them from, among other things, using race as a  
 16 factor in deciding whether to stop any vehicle with a Latino occupant. *See id.* at 1258. The  
 17 injunction applied to stops during both “saturation patrol” – when the defendant officers would  
 18 saturate a particular area for the purpose of enforcing immigration laws – and nonsaturation  
 19 patrols. *See id.* at 1258-59. On appeal, the defendants argued that the plaintiffs lacked standing to  
 20 bring constitutional claims on behalf of class members stopped during nonsaturation patrols,  
 21 because the named plaintiffs had been stopped only during saturation patrols. *See id.* at 1259.  
 22 The Ninth Circuit disagreed. It observed that, “when courts have found a disjuncture between the  
 23 claims of named plaintiffs and those of absent class members, they have not always classified the  
 24 disjuncture consistently, some referring to it as an issue of standing, and others as an issue of class  
 25 certification.” *Id.* at 1261.

26 The “standing approach” treats dissimilarities between the claims of  
 27 named and unnamed plaintiffs as affecting the “standing” of the  
 28 named plaintiff to represent the class. In other words, if there is a  
 disjuncture between the injuries suffered by named and unnamed  
 plaintiffs, courts applying the standing approach would say the

1 disjuncture deprived the named plaintiff of standing to obtain relief  
 2 for the unnamed class members. *See, e.g., Blum v. Yaretsky*, 457  
 3 U.S. 991, 999-1002 (1982). The “class certification approach,” on  
 4 the other hand, “holds that once the named plaintiff demonstrates  
 her individual standing to bring a claim, the standing inquiry is  
 concluded, and the court proceeds to consider whether the Rule  
 23(a) prerequisites for class certification have been met.”  
 NEWBERG ON CLASS ACTIONS § 2:6.

5 *Melendres*, 784 F.3d at 1261-62.

6 After summarizing these two approaches, the court in *Melendres* adopted the “class  
 7 certification approach.” *Id.* at 1262. Accordingly, the court noted that “any issues regarding the  
 8 relationship between the class representative and the passive class members – such as dissimilarity  
 9 in injuries suffered – are relevant only to class certification, not to standing.” *Id.* at 1262 (quoting  
 10 NEWBERG § 2:6).

11 3. Analysis

12 The disjuncture between the claims of named plaintiffs and those of absent putative class  
 13 members in this case is the same type of disjuncture that was at issue in *In re Carrier IQ*. In both  
 14 instances, the named plaintiffs seek to bring claims under the laws of states where they reside or  
 15 transacted with defendants, as well as under the laws of states where they do not reside and where  
 16 they did not transact with defendants, but where other putative class members do or did. *See In re*  
 17 *Carrier IQ*, 78 F. Supp. 3d at 1072 (referring to this as the “sister state” law scenario). The  
 18 disjuncture in *Melendres* was different. The claims there were federal and constitutional claims,  
 19 so standing to assert state-law claims was not at issue. Rather, the disjuncture was factual, with  
 20 plaintiffs who were stopped during saturation patrol seeking to bring claims on behalf of others  
 21 who were stopped during nonsaturation patrol. Ultimately, however, this distinction appears  
 22 immaterial. As in *Melendres*, there is a “disjuncture between the claims of the named plaintiffs  
 23 and absent class members.” *Melendres*, 784 F.3d at 1261. And when such a disjuncture exists,  
 24 *Melendres* requires courts in the Ninth Circuit to apply the “class certification approach.” That is,  
 25 once the named plaintiffs demonstrate their individual standing to sue, as Plaintiffs have done  
 26 here, *see* Part II.A-B, *supra*, the standing inquiry may be concluded; the disjuncture may better be  
 27 addressed in the context of class certification. *See id.* at 1262.

28 Even if *Melendres* does not sweep so broadly as to impose a per se rule, however, and

1 district courts retain discretion to address standing before or after class certification in the “sister  
2 state” law scenario, it is appropriate to defer the standing analysis here. In *In re Carrier IQ*, the  
3 Court chose to address standing before class certification in part because the named plaintiffs had  
4 ties to less than a third of the states for which state-law claims were asserted. (The named  
5 plaintiffs came from 13 states, and there were no named plaintiffs from 35 other states.) *See In re*  
6 *Carrier IQ*, 78 F. Supp. 3d at 1074. Here, the ratio of states with named Plaintiffs to states  
7 without is almost the opposite: the named Plaintiffs reside in or purchased or leased Class  
8 Vehicles in 43 states, and there are no named Plaintiffs for only seven states and the District of  
9 Columbia. As a result, Defendants would need to engage in near-nationwide discovery even if the  
10 Court dismissed the state-law claims for states that do not have a named Plaintiff. There is  
11 therefore less concern here, as compared to in *In re Carrier IQ*, about “subjecting the [Defendants]  
12 to the expense and burden of nationwide discovery without Plaintiffs first securing actual plaintiffs  
13 who clearly have standing and are willing and able to assert claims under these state laws.” *Id.*

14 The other factor considered in *In re Carrier IQ* was whether deferral of the standing issue  
15 could lead to delay at the class certification stage. *See id.* at 1074-75. Deferring consideration of  
16 the standing issue in this case, as in *In re Carrier IQ*, poses a risk of delay at the class certification  
17 stage. But because the number of states without a named Plaintiff is substantially smaller than in  
18 *In re Carrier IQ*, such delay, if any, is likely to be short. Thus, even under a discretionary  
19 standard, the Court chooses to defer consideration of the standing issue for the “sister state” law  
20 claims.

21 D. Dealer Plaintiff Chatom’s Standing

22 Plaintiff Chatom Motor Company, Inc., a vehicle dealer/reseller, alleges that it bought a  
23 Class Vehicle “on or about February 1, 2017.” FAC ¶ 45. Chatom’s purchase was approximately  
24 20 days after the EPA and CARB issued their NOV’s to the FCA Defendants on January 12, 2017.  
25 *See* FAC ¶¶ 4, 169.

26 Defendants argue that Chatom cannot plausibly allege that its purchase was “fairly  
27 traceable” to their conduct so as to support standing. Instead, Defendants argue that Chatom’s  
28 purchase is traceable to its “own decision to purchase the Vehicle despite the EPA’s well-

1 publicized allegations.” FCA/VM Mot. at 26 n.8; *see also* Bosch Mot. at 13.

2 Although Chatom purchased a Class Vehicle after the EPA and CARB issued their NOVs,  
 3 Chatom alleges that, “[a]t the time of purchase, [it] *did not know* that the Class Vehicle . . . emitted  
 4 NOx at levels that are greater than advertised and above legal limits.” FAC ¶ 45 (emphasis  
 5 added). Chatom also alleges that it did not know that the Class Vehicle it purchased “was  
 6 equipped with undisclosed and unauthorized emission control devices designed to cheat emission  
 7 tests,” and that the vehicle “could not achieve the advertised towing power, performance, and/or  
 8 fuel economy without cheating emission tests.” FAC ¶ 45.

9 In considering Defendants’ facial challenge to subject matter jurisdiction under Rule  
 10 12(b)(1), Chatom’s allegations must be taken as true. *See Seldin*, 422 U.S. at 501. Defendants’  
 11 argument is a factual one that turns on, among things, whether news of the EPA and CARB NOVs  
 12 was widespread, and whether Chatom was put on notice of the NOVs. The allegations in the FAC  
 13 do not answer these questions, which are best addressed at a later stage in the proceedings.

14 \* \* \*

15 For all of the reasons discussed above, the Court denies Defendants’ Rule 12(b)(1) motion  
 16 to dismiss for lack of Article III standing.

### 17 **III. RICO CLAIMS**

18 Plaintiffs’ RICO claims are predicated on a fraud-on-the-regulators theory. They allege  
 19 that Defendants formed an enterprise to fraudulently obtain COCs from the EPA and EOs from  
 20 CARB in order to sell the Class Vehicles throughout the United States and California, even though  
 21 the Class Vehicles emitted unlawful levels of NOx and contained illegal defeat devices. Plaintiffs  
 22 contend that they were injured by this enterprise when they purchased the Class Vehicles in the  
 23 stream of commerce.

24 To successfully plead a RICO claim under 18 U.S.C. § 1962(c), Plaintiffs must plausibly  
 25 allege that Defendants participated, directly or indirectly, in (1) the conduct (2) of an enterprise  
 26 that affects interstate commerce, (3) through a pattern (4) of racketeering activity. *See Eclectic*  
 27 *Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Plaintiffs must  
 28 also satisfy RICO’s statutory standing requirements, which require Plaintiffs to plausibly allege

1 (1) an injury to “business or property,” that is (2) “by reason of a violation of section 1962.”  
2 18 U.S.C. § 1964(c).

3 In addition to their RICO claim under § 1962(c), Plaintiffs also seek to pursue a RICO  
4 conspiracy claim under 18 U.S.C. § 1962(d), which provides that “[i]t shall be unlawful for any  
5 person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” In  
6 the alternative to their § 1962(c) claim, and in addition to their § 1962(d) conspiracy claim,  
7 Plaintiffs also seek to pursue a RICO claim against the Bosch Defendants on an aiding and  
8 abetting theory.

9 In considering Plaintiffs’ RICO claims, the Court is mindful of the principle that “RICO is  
10 to be read broadly” and should “be liberally construed to effectuate its remedial purposes.” *Odom*  
11 *v. Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir. 2007) (en banc) (quoting *Sedima, S.P.R.L. v. Imrex*  
12 *Co.*, 473 U.S. 479, 497-98 (1985)).

13 A. Statutory Standing

14 1. RICO’s Injury Requirement

15 To successfully plead a RICO injury, Plaintiffs must satisfy two requirements. First, they  
16 must plausibly allege “a harm to a specific business or property interest.” *Diaz v. Gates*, 420 F.3d  
17 897, 900 (9th Cir. 2005) (en banc). This is “a categorical inquiry typically determined by  
18 reference to state law.” *Id.* Second, they must plausibly allege that their injury has resulted in  
19 “concrete financial loss.” *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008)  
20 (quoting *Oscar v. Univ. Students Co-op Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc)),  
21 *abrogated on other grounds by Diaz*, 420 F.3d 897. Further below the Court considers whether  
22 Plaintiffs’ FAC satisfies these requirements; but first, the Court addresses the theories of injury.

23 a. Theories of Injury

24 Plaintiffs list six injuries in the FAC that were allegedly caused by Defendants’ RICO  
25 enterprise. *See* FAC ¶ 274(A)-(F). First, they allege that, but for Defendants’ scheme to defraud  
26 the EPA and CARB, they could not have purchased or leased the Class Vehicles. *See* FAC  
27 ¶ 274(A). In opposition to the motions to dismiss, Plaintiffs characterize this injury as “damage in  
28 the amount of *all* the money” they spent on the Class Vehicles. Opp’n at 23 (“No consumer could

1 have spent a single dime on the Class Vehicles but for Defendants’ scheme.”). Second, Plaintiffs  
2 allege that as a result of Defendants’ scheme they overpaid “at the time of purchase or lease for  
3 Class Vehicles purportedly having ‘EcoDiesel’ properties and benefits, and meeting applicable  
4 federal and state emissions standards, that did not have these properties or meet these standards.”  
5 FAC ¶ 274(B). Specifically, Plaintiffs allege that they “paid between \$3,120 and \$5,000 more for  
6 the EcoDiesel option than for the comparable gasoline vehicles.” FAC ¶ 191. The other four  
7 injuries are (1) the diminished value of the Class Vehicles; (2) ongoing out-of-pocket and loss-of-  
8 use expenses; (3) payment for alternative transportation; and (4) loss of employment due to lack of  
9 transportation. *See* FAC ¶ 274(C)-(F).

10 There are no factual allegations in the FAC that support these last four theories of injury.  
11 In their opposition to the motions to dismiss, Plaintiffs do not assert otherwise; they focus only on  
12 the first two theories of injury. The Court accordingly does not address whether the last four  
13 theories of injury would be cognizable under RICO if supported by sufficient factual allegations.  
14 Plaintiffs have leave to amend to add allegations to support these injuries if they can do so in good  
15 faith.

16 As to the first theory of injury – that Plaintiffs have been injured in the amount of *all* the  
17 money they spent to purchase or lease the Class Vehicles – the Court does not find this theory to  
18 be plausible. “Determining whether a complaint states a plausible claim for relief . . . [is] a  
19 context-specific task that requires the reviewing court to draw on its judicial experience and  
20 common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Drawing on those sources here, it is  
21 not plausible that Plaintiffs have been injured in an amount equal to the entire purchase price of  
22 the Class Vehicles because they have presumably been using the vehicles and obtaining value  
23 from them. (There are no allegations to the contrary.) Even if Plaintiffs theoretically could not  
24 have purchased and leased the Class Vehicles “but for” the fraud on the regulators, Plaintiffs did  
25 purchase and lease the Class Vehicles, and their use of the vehicles must be considered. *See VW*  
26 *2.0-Liter Settlement Approval Order*, 2016 WL 6248426, at \*17 (“Class Members could only be  
27 entitled to a full refund of the purchase price if they returned their vehicles in the same condition  
28 they received it. Such a scenario is virtually inconceivable as it is highly unlikely Class Members

1 never used their vehicles after purchasing them.”); *Kruse v. Chevrolet Motor Div.*, No. Civ. A. 96-  
 2 1474, 1997 WL 408039, at \*2 (E.D. Pa. July 17, 1997) (“[P]laintiff accepted and used the car for  
 3 approximately one and one-half years, thereby diminishing the value of the car. Awarding  
 4 damages equal to the full purchase price does not take into account the natural depreciation of the  
 5 vehicle from normal usage.”). Because Plaintiffs’ first theory of injury is not plausible, it does not  
 6 support a RICO injury. In the analysis that follows, the Court accordingly focuses on only  
 7 Plaintiffs’ second theory of injury: overpayment at the time of purchase. *See* FAC ¶ 274(B).

8           b.       Injury to “Business or Property”

9           In considering a RICO claim, the Ninth Circuit in *Canyon County* stated that, “[i]n the  
 10 ordinary context of a commercial transaction, a consumer who has been overcharged can claim an  
 11 injury to her property, based on a wrongful deprivation of her money.” *Canyon County*, 519 F.3d  
 12 at 976. *Canyon County* relied on *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), for this point, an  
 13 antitrust case where the Supreme Court interpreted the Clayton Act’s injury to “business or  
 14 property” requirement. The Ninth Circuit has noted elsewhere that, because of similarities  
 15 between the Clayton Act’s injury requirement and RICO’s, these provisions “have been  
 16 interpreted in tandem.” *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002).

17           In *Reiter*, the Supreme Court concluded that the plaintiff had alleged an injury in her  
 18 “property” when “the price of the hearing aid she bought was artificially inflated” due to  
 19 anticompetitive conduct. *Reiter*, 442 U.S. at 342. In reaching this conclusion, the Court reasoned  
 20 that “[i]n its dictionary definitions and in common usage ‘property’ comprehends anything of  
 21 material value owned or possessed[,]” and “[m]oney, of course, is a form of property.” *Id.* at 338.  
 22 Thus, when “a consumer . . . acquir[es] goods or services for personal use, [she] is injured in  
 23 ‘property’ when the price of those goods or services is artificially inflated by reason of the  
 24 anticompetitive conduct complained of.” *Id.* at 339.

25           Under *Canyon County* and *Reiter*, Plaintiffs have plausibly alleged “a harm to a specific  
 26 business or property interest.” *Diaz*, 420 F.3d at 900. That is, “[o]verpayment at the time of  
 27 purchase or lease for Class Vehicles purportedly having ‘EcoDiesel’ properties and benefits, and  
 28 meeting applicable federal and state emissions standards, that did not have these properties or



1 meet these standards.” FAC ¶ 274(B). Because “[m]oney . . . is a form of property,” *Reiter*, 442  
 2 U.S. at 338, Plaintiffs’ alleged overpayment constitutes “a harm to a specific . . . property  
 3 interest.” *Diaz*, 420 F.3d at 900; *see also Canyon Cty.*, 519 F.3d at 976 (in the “ordinary context  
 4 of a commercial transaction, a consumer who has been overcharged can claim an injury to her  
 5 *property*, based on a wrongful deprivation of her money”) (emphasis added).

6 Defendants contend that Plaintiffs’ alleged injury is not an injury to “property,” but instead  
 7 is an injury to an “expectation” interest, which is not an injury that is cognizable under RICO. In  
 8 support of this argument, Defendants rely on *McLaughlin v. American Tobacco Co.*, 522 F.3d 215  
 9 (2d Cir. 2008), and *In re General Motors LLC Ignition Switch Litigation*, No. 14-md-2543 JMF,  
 10 2016 WL 3920353 (S.D.N.Y. July 15, 2016). In *McLaughlin*, a group of smokers alleged that an  
 11 implicit misrepresentation by tobacco companies that “Light” cigarettes were healthier than  
 12 regular cigarettes “led them to buy Lights in greater quantity than they otherwise would have and  
 13 at an artificially high price, resulting in plaintiffs’ overpayment for cigarettes.” *McLaughlin*, 522  
 14 F.3d at 220. To show that their claims were amenable to common proof, the plaintiffs’ expert  
 15 submitted a “loss of value” model in support of class certification, which estimated a loss in value  
 16 of 77.7 percent if the Lights were as harmful as regular cigarettes. *See id.* at 228. In a decision  
 17 reversing the district court’s class certification order, the Second Circuit concluded that the  
 18 smokers could not rely on this model because it was “designed to award plaintiffs damages based  
 19 on the benefit of their bargain,” and “[s]uch damages are generally unavailable in RICO suits.” *Id.*  
 20 at 228. The court reasoned that this restriction followed from the text of § 1964(c), which  
 21 compensates only for injury to “business or property,” not for an injury to a party’s “expectation.”  
 22 *Id.*

23 In *General Motors*, a district court in the Second Circuit relied on *McLaughlin* in  
 24 dismissing a RICO claim brought by owners and lessees of GM vehicles. *See General Motors*,  
 25 2016 WL 3920353, at \*16-17. The plaintiffs in *General Motors* had each alleged that they were  
 26 injured “when they purchased for  $x$  dollars a New GM car that contained a latent defect  
 27 . . . [because] had they known about the defect, they would have paid fewer than  $x$  dollars for the  
 28 car (or not bought the car at all), because a car with a safety defect is worth less than a car without

1 a safety defect.” *Id.* at \*7. “[I]n the face of *McLaughlin*,” the *General Motors* court concluded  
2 that this “benefit-of-the-bargain” theory of injury could not support a RICO claim. *Id.* at \*17.

3 Defendants contend that, like *McLaughlin* and *General Motors*, here, Plaintiffs’ alleged  
4 overpayment for EcoDiesel features and for vehicles that complied with emission standards is an  
5 injury to their expectation interest. The Court disagrees.

6 First, when a plaintiff alleges that he or she overpaid for a good or service because of  
7 anticompetitive or deceptive conduct, the Supreme Court’s decision in *Reiter* and the Ninth  
8 Circuit’s decision in *Canyon County* support that such an injury is one to “property,” not merely  
9 “expectation interests.” *See Reiter*, 442 U.S. at 339, 342; *Canyon Cty.*, 519 F.3d at 976. Those  
10 decisions bind this Court; *McLaughlin* and *General Motors* do not.

11 Second, the injury to expectation interests addressed in *McLaughlin* is distinguishable from  
12 the overpayment injury alleged in this case. The *McLaughlin* court noted that the Light cigarettes  
13 at issue there “ha[d] always been priced the same as full-flavored cigarettes.” *McLaughlin*, 522  
14 F.3d at 228. So smokers did not pay an artificially inflated price for Lights. Indeed, the court  
15 noted that “Defendants’ misrepresentation[s] could in no way have reduced the value of the  
16 cigarettes that plaintiffs actually purchased; they simply could have induced plaintiffs to buy  
17 Lights instead of full-flavored cigarettes.” *Id.* at 229. The smokers, however, alleged an injury to  
18 their “expectation of a safer cigarette,” which the court concluded was an expectation-based injury  
19 that was too speculative to value. *See id.* (“We are asked to conceptualize the impossible – a  
20 healthy cigarette – and then imagine what a consumer might have paid for such a thing.”).

21 This difference between overpayment and expectation-based injury is also evident in the  
22 principal case upon which the *McLaughlin* court relied to support its holding. The *McLaughlin*  
23 court relied on *Heinhold v. Perlstein*, 651 F. Supp. 1410 (E.D. Pa. 1987), where the plaintiff  
24 alleged that he suffered a RICO injury when the defendant induced him to purchase a diamond  
25 ring by misrepresenting how much the ring was worth. *See id.* at 1411. Critically, the plaintiff did  
26 not allege that the diamond was worth less than the amount he paid for it, only that the diamond  
27 was worth less than the defendant had represented, and that the plaintiff therefore lost a “bargain  
28 opportunity” to sell the ring for a profit. *Id.* The court held that this lost bargain was not a

1 recoverable RICO injury. The court reasoned that the parties’ contract “did not cause plaintiff to  
2 lose money, because he concedes that he did not pay more than the fair market value of the ring.”  
3 *Id.* Instead, the only claimed injury was that the plaintiff “lost the benefit of his bargain, *i.e.*, his  
4 expectation interest in the contract.” *Id.* at 1412. Such an injury, the court reasoned, was injury to  
5 an expectation interest, not an injury to business or property as required by RICO. *See id.*

6 In *McLaughlin* and *Heinhold*, then, there was no actual overpayment because the plaintiffs  
7 in those cases did not pay more than the fair market value of the items they purchased. The same  
8 cannot be said here. Plaintiffs allege that they paid a premium for the Class Vehicles; specifically,  
9 they allege that they “paid between \$3,120 and \$5,000 more for the EcoDiesel option than for the  
10 comparable gasoline vehicles.” FAC ¶ 191. Plaintiffs also allege that they did not receive cars  
11 that actually perform as EcoDiesels, *see* FAC ¶¶ 34-96, which, when considered along with the  
12 alleged premium, plausibly supports that they paid more than fair market value for the Class  
13 Vehicles. This is clearly an overpayment injury, and it is distinguishable from the expectation-  
14 based injury in *McLaughlin*.

15 *General Motors*, 2016 WL 3920353, is not distinguishable on the same grounds. The  
16 plaintiffs there alleged that they purchased vehicles with latent defects, *see id.* at \*7, and it is  
17 possible that they paid more than fair market value for those vehicles because a car with a defect is  
18 worth less than one without a defect. *See In re Toyota I*, 790 F. Supp. 2d at 1163. But this  
19 possible overpayment also distinguishes *General Motors* from *McLaughlin*, making the *General*  
20 *Motors* court’s reliance on *McLaughlin* less persuasive. In any event, *General Motors* is  
21 distinguishable from this case in its own way. As discussed below, *see* Part III.A.1.c, *infra*, courts  
22 have held that latent defects are too speculative to satisfy RICO’s concrete injury requirement.  
23 The defects alleged here, in contrast, are not latent – they allegedly exist presently in each Class  
24 Vehicle, and have existed since the vehicles were manufactured.

25 When a plaintiff alleges that he or she overpaid for a good or service because of  
26 anticompetitive or deceptive conduct, under *Reiter* and *Canyon County*, such an injury is one to  
27 “property,” not merely “expectation interests.” The Court concludes that Plaintiffs have  
28 adequately alleged “a harm to a specific . . . property interest.” *Diaz*, 420 F.3d at 900.

c. Concrete Financial Loss

A civil RICO injury also “requires proof of concrete financial loss, and not mere ‘injury to a valuable intangible property interest.’” *Oscar*, 965 F.2d at 785 (quoting *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990)). For example, “out-of-pocket expenditures,” such as costs incurred to repair damaged property, constitute concrete financial loss. *Id.* at 786. In contrast, the loss of “use and enjoyment of [a] leasehold interest,” *id.* at 787, and the loss of “peace of mind,” *Berg*, 915 F.2d at 463-64, are intangible injuries that do not support a RICO claim.

Money has physical form; and the overpayment of money, as Plaintiffs allege, is a tangible injury. But Defendants contend that overpayment, as compared to out-of-pocket costs to repair damaged property, is speculative and thus insufficiently concrete to support a RICO injury. Two Ninth Circuit decisions support the opposite conclusion.

i. *Mendoza and Diaz*

In *Mendoza*, 301 F.3d at 1166, a group of agricultural laborers alleged that certain fruit orchards and packing houses engaged in a RICO enterprise to depress their wages by hiring undocumented workers. The district court dismissed the RICO claim, holding that the laborers’ losses were insufficiently concrete because a “wide range of factors determines the wage for orchard laborers in the Yakima Valley.” *Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at \*10 (E.D. Wash. Sept. 27, 2000). The Ninth Circuit reversed, noting that:

[I]t is important to distinguish between uncertainty in the fact of damage and in the amount of damage. That wages would be lower if, as alleged, the growers relied on a workforce consisting largely of undocumented workers, is a claim at least plausible enough to survive a motion to dismiss, whatever difficulty might arise in establishing how much lower the wages would be.

*Mendoza*, 301 F.3d at 1171. The Ninth Circuit also reasoned that:

[T]he workers must be allowed to make their case through presentation of evidence, including experts who will testify about the labor market, the geographic market, and the effects of the illegal scheme. Questions regarding the relevant labor market and the growers’ power within that market are exceedingly complex and best addressed by economic experts and other evidence at a later stage in the proceedings.

*Id.*

1 Subsequently, in *Diaz*, an en banc panel held that “false imprisonment that caused the  
2 victim to lose employment and employment opportunities is an injury to ‘business or property’  
3 within the meaning of RICO.” *Diaz*, 420 F.3d at 898. In reaching this holding, the court noted  
4 that the “three-judge panel [had] tried to distinguish *Mendoza* on the theory that *Diaz* did not  
5 allege ‘that he lost actual employment, only that he was rendered unable to pursue gainful  
6 employment.’” *Id.* at 900 (quoting *Diaz v. Gates*, 380 F.3d 480, 484 (9th Cir. 2004)). The en  
7 banc court concluded that this distinction was immaterial, reasoning that:

8 There may be a practical difference between current and future  
9 employment for purposes of RICO – for instance, it may be easier to  
10 prove causation or determine damages for a plaintiff who has lost  
11 current employment – but this difference is not relevant to whether  
12 there was an injury to “business or property.”

13 *Id.* at 900-01.

14 ii. Application

15 *Mendoza* and *Diaz* establish a relatively low threshold for plaintiffs to adequately plead a  
16 “concrete” RICO injury. In neither case did the plaintiffs identify a particular dollar amount of  
17 lost wages. Yet the *Mendoza* court concluded that the plaintiffs’ allegations that “wages would be  
18 lower if, as alleged, the growers relied on a workforce consisting largely of undocumented  
19 workers, is a claim at least plausible enough to survive a motion to dismiss, whatever difficulty  
20 might arise in establishing how much lower the wages would be.” *Mendoza*, 301 F.3d at 1171.  
21 And in *Diaz*, the court held that even the loss of a future employment opportunity could constitute  
22 an injury to “property” for purposes of RICO. *See Diaz*, 420 F.3d at 900-01.

23 Plaintiffs’ allegations of overpayment easily clear the threshold established by these cases.  
24 Unlike in *Mendoza* and *Diaz*, Plaintiffs have identified a particular, reasonably narrow range by  
25 which they allegedly overpaid for the Class Vehicles – “between \$3,120 and \$5,000 more for the  
26 EcoDiesel option than for the comparable gasoline vehicles.” FAC ¶ 191. This is a “concrete  
27 financial loss, and not mere ‘injury to a valuable intangible property interest.’” *Oscar*, 965 F.2d at  
28 785 (quoting *Berg*, 915 F.2d at 464). It is also a plausible injury, given that Plaintiffs allegedly  
paid for what turned out to be defective vehicles. *See In re Toyota I*, 790 F. Supp. 2d at 1163 (“A  
vehicle with a defect is worth less than one without a defect.”).

1           The district court in *Duramax* recently reached the same conclusion. *See In re Duramax*  
 2 *Diesel Litig.*, 2018 U.S. Dist. LEXIS 26543, at \*69. The plaintiffs there alleged that they each  
 3 paid a premium “of nearly \$9,000, as GM charged more for its Duramax engine than a comparable  
 4 gas car.” *Id.* The district court concluded that this was a cognizable out-of-pocket injury, because  
 5 the plaintiffs “identif[ied] a specific payment attributable directly to the vehicle component at  
 6 issue which they opted to purchase on the basis of fraudulent conduct.” *Id.* at \*69.

7                           iii.     Out-of-Circuit Decisions

8           In arguing that Plaintiffs’ alleged overpayment is insufficiently concrete, Defendants rely  
 9 on certain out-of-circuit decisions where courts have rejected overpayment injury theories under  
 10 RICO. *See Maio v. Aetna, Inc.*, 221 F.3d 472, 488 (3d Cir. 2000) (alleged overpayment for health  
 11 plan that lacked certain qualities and features was not a “tangible economic harm compensable  
 12 under RICO”); *General Motors*, 2016 WL 3920353, at \*1, 7, 16 (alleged overpayment for vehicles  
 13 with defective ignition switch was a speculative, expectation-based injury that was not cognizable  
 14 under RICO); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069,  
 15 1077 (S.D. Ind. 2001) (alleged overpayment for vehicles with “dangerous propensity to suffer  
 16 complete or substantial tread separation” was not sufficiently concrete to satisfy RICO); *Tri-State*  
 17 *Express, Inc. v. Cummins Engine Co.*, No. 99-cv-00220 (HHK), 2000 U.S. Dist. LEXIS 23564, at  
 18 \*19-20 (D.D.C. Sept. 11, 2000) (alleged overpayment for diesel trucks with undisclosed “defeat  
 19 devices” was insufficiently concrete to satisfy RICO).

20           *Maio*, *General Motors*, and *Bridgestone* are distinguishable from this case. The plaintiffs  
 21 in those cases asserted that they overpaid for goods or services that had unmanifested defects. As  
 22 a result, the courts concluded that the plaintiffs had alleged only a *risk* of loss. Specifically, the  
 23 plaintiffs in *Maio* alleged that the quality and features of an HMO plan they purchased were  
 24 falsely advertised by Aetna; but the plaintiffs did not actually allege “that they suffered personal  
 25 injuries, were denied necessary benefits, or received inferior care.” *Maio*, 221 F.3d at 485. The  
 26 Third Circuit reasoned that, “[a]bsent such assertions of diminished benefits or care . . . ,  
 27 [plaintiffs] simply cannot establish as a factual matter that they received anything less than what  
 28 they bargained for . . . and consequently cannot claim that they paid too much for the health

1 insurance they received.” *Id.* at 494. The fact of concrete injury was too uncertain. Similarly, in  
 2 *General Motors*, the plaintiffs purchased vehicles with a *latent* ignition switch defect and asserted  
 3 that they had overpaid for these vehicles. *See General Motors*, 2016 WL 3920353, at \*1, 7. In  
 4 holding that the plaintiffs’ injuries were not cognizable under RICO, the district court referred to  
 5 them as “speculative, expectation-based” damages. *Id.* at \*16. Finally, the plaintiffs in  
 6 *Bridgestone* alleged that their tires “*may* suffer tread separation” which “*may* cause them to suffer  
 7 . . . loss.” *Bridgestone*, 155 F. Supp. 2d at 1091 (emphasis added). In concluding that these  
 8 allegations were insufficient to support an overpayment theory of injury, the court stated that  
 9 “RICO affords a monetary remedy only to plaintiffs who have actually realized the diminished  
 10 value *or experienced product failure*, and not to those who allege a risk (or even a probability) of  
 11 such loss.” *Id.* (emphasis added).

12 Unlike the plaintiffs in *Maio*, *General Motors*, and *Bridgestone*, Plaintiffs allege that their  
 13 Class Vehicles *are currently defective*: that the Class Vehicles currently emit NOx at levels up to  
 14 20 times legal limits and are currently equipped with an “emission treatment system [that] was  
 15 designed to de-activate during real-world driving conditions.” FAC ¶¶ 7, 34-96. The alleged  
 16 defects also affect *all* Class Vehicles. This is therefore not a case where there is a risk that a  
 17 particular vehicle might suffer a defect which might manifest itself at some point in the future.  
 18 Because Plaintiffs allege current and existing defects affecting all Class Vehicles, Plaintiffs’  
 19 allegations of financial loss “are not grounded in the possibility of future events.” *Bridgestone*,  
 20 155 F. Supp. 2d at 1091; *see also In re Duramax Diesel Litig.*, 2018 U.S. Dist. LEXIS 26543, at  
 21 \*58-60 (distinguishing *Bridgestone* on the same basis, and holding that consumers who alleged  
 22 that they overpaid for GM vehicles that were equipped with defeat devices had alleged a  
 23 cognizable RICO injury).

24 To be sure, *Tri-State* is not so distinguishable. Similar to here, the plaintiffs in *Tri-State*  
 25 alleged that they overpaid for trucks that, unknown to them, contained defeat devices that allowed  
 26 the trucks to remain within the EPA’s NOx limits during emissions testing, but to substantially  
 27 exceed those limits during normal driving conditions. *See Tri-State*, 2000 U.S. Dist. LEXIS  
 28 23564 at \*6-7. In rejecting the plaintiffs’ overpayment theory of RICO injury, the *Tri-State* court

1 reasoned that, because the plaintiffs had not sold their trucks for a loss, they had only asserted an  
2 “unrealized injur[y] they anticipate will take place at some indeterminate future time.” *Id.* at \*20.

3 Despite the factual similarities, the Court does not adopt the reasoning in *Tri-State*. The  
4 Court does not agree that overpayment is an unrealized, contingent injury based on events that will  
5 take place in the future for the reasons discussed above; it is instead an injury that has already  
6 taken place. *See* FAC ¶ 274(B) (alleging “[o]verpayment at the time of purchase or lease”); *see*  
7 *also In re Duramax Diesel Litig.*, 2018 U.S. Dist. LEXIS 26543, at \*69 (“The amount by which  
8 Plaintiffs overpaid is not contingent on a future occurrence or on the vagaries of the free market.  
9 It occurred and became determinable at the moment the Plaintiffs paid a premium for a vehicle  
10 component which did not work as had been represented.”). Further, to the extent that the *amount*  
11 of overpayment is susceptible to future factual disputes, that uncertainty does not warrant  
12 dismissal of a RICO claim under the law of this Circuit. *See Mendoza*, 301 F.3d at 1171  
13 (distinguishing between “uncertainty in the fact of damage and in the amount of damage” and  
14 holding that complex questions regarding the latter are “best addressed by economic experts and  
15 other evidence at a later stage in the proceedings”). This is especially so given that Plaintiffs have  
16 identified a particular range of overpayment in their complaint – between \$3,210 and \$5,000 per  
17 Class Vehicle. In sum, the out-of-circuit authority cited by Defendants is either distinguishable or  
18 inconsistent with in-circuit authority.

19 d. RICO Injury Summary

20 Plaintiffs’ alleged overpayment for the defective Class Vehicles is an injury to a “property  
21 interest” because Plaintiffs allege that they have been deprived of their money, which is a form of  
22 property. *See Reiter*, 442 U.S. at 342; *Canyon Cty.*, 519 F.3d at 976. The alleged overpayment is  
23 also a concrete, “out-of-pocket” loss, not a “mere injury to a valuable intangible property interest.”  
24 *Oscar*, 965 F.2d at 785-86 (internal quotation marks omitted). The Court therefore concludes that  
25 Plaintiffs have sufficiently pled an injury to “business or property” that is cognizable under RICO.

26 2. Proximate Cause

27 The Supreme Court has held that the “by reason of” language in 18 U.S.C. § 1964(c)  
28 requires a civil RICO plaintiff “to show that a RICO predicate offense not only was a but for cause



1 of his injury, but was the proximate cause as well.” *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9  
 2 (2010) (internal quotation marks omitted). In analyzing proximate cause under RICO, the “central  
 3 question” is “whether the alleged violation led directly to the plaintiff’s injuries.” *Anza v. Ideal*  
 4 *Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

5 a. Fraud-on-the-Regulators Theory

6 Plaintiffs allege that Defendants’ scheme to defraud the EPA and CARB led directly to  
 7 their overpayment injury, and that their theory of causation is analogous to the one upheld in  
 8 *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 652 (2008). Defendants contend that  
 9 Plaintiffs’ theory of causation is instead more analogous to the ones rejected in *Anza*, 547 U.S.  
 10 451, and *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866 (9th Cir. 2010). The  
 11 Court considers *Bridge*, *Anza*, and *Rezner* below.

12 i. Bridge, Anza, and Rezner

13 In *Bridge*, 553 U.S. 639, the plaintiffs and defendants were regular participants in county  
 14 tax-lien auctions. Multiple bidders in these auctions often made the same bid, which led the  
 15 county to award the liens on a rotational basis. *See id.* at 642-643. To keep bidders from  
 16 manipulating the rotation system, the county had a Single, Simultaneous Bidder Rule, which  
 17 prohibited bidders from using agents or related entities to submit simultaneous bids for the same  
 18 property. *See id.* The plaintiffs alleged that the defendants violated the Rule by arranging for  
 19 related firms to bid on their behalf and by filing false attestations with the county that they  
 20 complied with the Rule. *See id.* at 643-44. As a result of the defendants’ fraud on the county, the  
 21 plaintiffs alleged that the defendants were able to obtain additional liens at the auctions, while the  
 22 plaintiffs in turn obtained fewer. *See id.* The defendants argued that the plaintiffs could not  
 23 demonstrate that their injuries were “by reason of a violation of section 1962” because the  
 24 defendants made misrepresentations to the county, not to the plaintiffs. *Id.* at 644-45, 647  
 25 (quoting 18 U.S.C. § 1964(c)). A unanimous Supreme Court disagreed, holding that first-person  
 26 reliance is not an element of a RICO claim, as “a person can be injured by reason of a pattern of  
 27 mail fraud even if he has not relied on any misrepresentations.” *Id.* at 649. “[T]his is a case in  
 28 point,” the Court observed. *Id.* at 658. “It was a foreseeable and natural consequences of

1 petitioners’ scheme to obtain more liens for themselves that other bidders would obtain fewer  
2 liens.” *Id.*

3 The Supreme Court reached the opposite conclusion in *Anza*, 547 U.S. 451. The plaintiff  
4 there sued its main commercial competitor, alleging that the competitor had engaged in an  
5 unlawful racketeering scheme to gain market share at plaintiff’s expense. *See id.* at 453. The  
6 competitor allegedly did so by “failing to charge the requisite New York sales tax to cash-paying  
7 customers.” *Id.* at 454. This practice allegedly allowed the competitor to reduce its prices without  
8 affecting its profit margin, which in turn caused the plaintiff to lose business. *See id.* The Court  
9 held that the plaintiff’s theory of injury did not satisfy RICO’s proximate cause requirement. *See*  
10 *id.* at 455-56, 460-61. Noting that “[i]t was the State that was being defrauded and the State that  
11 lost tax revenue as a result,” the Court reasoned that the State was the direct victim of the  
12 challenged conduct and could be “expected to pursue appropriate remedies.” *Id.* at 458. The  
13 Court also observed that there were two discontinuities between the RICO violation and the  
14 plaintiff’s injury: first, “[t]he cause of [plaintiff’s] asserted harms . . . [was] a set of actions  
15 (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)”;  
16 second, the plaintiff’s lost sales “could have resulted from factors other than [the competitor’s]  
17 alleged acts of fraud,” as “[b]usinesses lose and gain customers for many reasons.” *Id.* at 458-59.  
18 Finally, the Court noted that RICO’s proximate cause requirement “has particular resonance when  
19 applied to claims brought by economic competitors, which, if left unchecked, could blur the line  
20 between RICO and the antitrust laws.” *Id.* at 460.

21 The Ninth Circuit also rejected a RICO claim on proximate cause grounds in *Rezner*, 630  
22 F.3d 866. The plaintiff there purchased a tax shelter from the defendant, which the IRS  
23 subsequently concluded was unlawful, and which led to an order for plaintiff to pay back taxes.  
24 Bringing a RICO claim against the tax-shelter provider, the plaintiff alleged that the defendant  
25 “engaged in a scheme to defraud the United States of tax revenue through fraudulent tax shelters  
26 that caused injury to purchasers of such shelters.” *Id.* at 868. Reversing the district court’s grant  
27 of summary judgment for the plaintiff, the Ninth Circuit held that the directly injured party was  
28 the United States, not plaintiff, as “[i]t was the United States that lost tax revenue as a direct result

1 of [defendant’s] fraud.” *Id.* at 873. The Ninth Circuit also distinguished *Bridge*, reasoning that  
 2 the plaintiffs there – the losing auction bidders – “were the *only* parties injured by [the  
 3 defendant’s] misrepresentations,” because the county “received the same revenue regardless of  
 4 which bidder prevailed.” *Id.* (quoting *Bridge*, 553 U.S. at 658).

5 ii. Application

6 This case shares similarities with all three of these cases. Of the three, however, it is most  
 7 analogous to *Bridge*. Although Defendants are alleged to have deceived the EPA and CARB by  
 8 concealing defeat devices in COC and EO applications for the Class Vehicles, the EPA and CARB  
 9 are not alleged to have suffered any harm as a result of that deceit. They did not lose tax money  
 10 like the State of New York in *Anza* or the United States in *Reznier*. Instead, Plaintiffs are the ones  
 11 who bought and leased the Class Vehicles and who are alleged to have overpaid for them as a  
 12 result of Defendants’ fraud. Like the losing bidders in *Bridge*, Plaintiffs are in the best position to  
 13 sue to recover those economic losses.<sup>4</sup>

14 There are also other distinctions between this case and *Anza*. First, unlike *Anza*, this case  
 15 does not involve “economic competitors,” and so is not in a context in which RICO’s proximate  
 16 cause requirement “has particular resonance.” *Anza*, 547 U.S. at 460. Because the case does not  
 17 involve economic competitors, RICO’s proximate cause standard need not be applied with the  
 18 same rigor as in *Anza*. Second, in *Anza* there were two “discontinuit[ies] between the RICO  
 19 violation and the asserted injury.” *Id.* at 549. The defendant competitor could have lowered its  
 20 prices for reasons other than its tax fraud, and the plaintiff could have lost sales based on factors  
 21 other than the defendant’s lower prices. *See id.* (“Businesses lose and gain customers for many  
 22 reasons . . .”). Here, there is no analogous layering of intervening independent factors that could  
 23 have caused Plaintiffs’ alleged injury. To be sure, factors other than the EcoDiesel features likely  
 24 impacted the price of the Class Vehicles. But the damage claimed here is the *difference* in price  
 25

26 \_\_\_\_\_  
 27 <sup>4</sup> This is so even though the EPA has filed a civil action against the FCA Defendants and the VM  
 28 Motori Defendants. That action is not for damages, but instead is for injunctive relief and civil  
 penalties authorized by the Clean Air Act and regulations promulgated thereunder. *See United  
 States v. Fiat Chrysler Auto. N.V. et al.*, No. C-17-3446 EMC (Docket No. 1) (May 23, 2017); 42  
 U.S.C. §§ 7523-24; 40 C.F.R. § 86 *et seq.*

1 attributable to the defect, so the alleged overpayment by Plaintiff is tied directly to the loss of  
2 value caused by Defendants.

3 The alleged “fraud on the regulators” plausibly led directly to Plaintiffs’ economic injury.  
4 By deceiving regulators, Defendants were able to sell Class Vehicles that emitted NOx at levels up  
5 to 20 times legal limits and that contained one or more defeat devices. This deceit plausibly  
6 caused Plaintiffs to overpay for the defective Class Vehicles by an amount directly attributable to  
7 the alleged wrongful conduct of the Defendants.

8 b. Direct Relationship Requirement

9 The Bosch Defendants separately argue that they did not proximately cause Plaintiffs’  
10 injury because they lack a direct relationship with Plaintiffs. What matters, however, “is not  
11 whether there is a direct relationship between the plaintiff and defendant, but whether there is a  
12 ‘sufficiently direct relationship between the defendant’s wrongful *conduct* and the plaintiff’s  
13 injury.’” *VW Franchise Dealers*, at \*9-10 (quoting *Bridge*, 553 U.S. at 657). Here, there is such a  
14 connection. As discussed more below in the Court’s analysis of the merits of the § 1962(c) RICO  
15 claim, *see* Part III.B, *infra*, Plaintiffs allege that the Bosch Defendants were involved in  
16 implementing the defeat devices in the Class Vehicles. And those devices are part of what has  
17 rendered the Class Vehicles defective. The Bosch Defendants’ alleged conduct therefore led  
18 directly to each Plaintiff purchasing or leasing “[a] vehicle with a defect.” Such a vehicle is  
19 “worth less than one without a defect.” *In re Toyota I*, 790 F. Supp. 2d at 1163.<sup>5</sup>

20 The Ninth Circuit’s decision in *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass’n*,  
21 298 F.3d 768 (9th Cir. 2002), does not support a different conclusion. The court there held that a  
22 robbery victim could not maintain a RICO claim against a co-schemer of the robbers, where the

23 \_\_\_\_\_  
24 <sup>5</sup> That the Bosch Defendants are not alleged to have played a role in setting the price for the Class  
25 Vehicles does not support a different conclusion. *See* Bosch Mot. at 21. Whatever price was set,  
26 that price was for a defect-free car. That is not what Plaintiffs allege they received. And because  
27 the Bosch Defendants directly contributed to the Class Vehicles’ defects, they directly contributed  
28 to Plaintiffs’ economic injury. Further, as in *Duramax*, “Bosch has provided no authority for the  
proposition that a RICO defendant may avoid liability simply by identifying a separate action by  
its codefendant [here, the setting of the price for the Class Vehicles] which partially contributed to  
the plaintiff’s injury (especially, when, as here, the Plaintiffs allege that the RICO Defendants  
worked together to cause the injury).” *In re Duramax Diesel Litig.*, 2018 U.S. Dist. LEXIS 26543,  
at \*76-77.

1 co-schemer's role was to launder the proceeds of the robbery. *See id.* at 774. Because the co-  
2 schemer's actions took place only after the robbers stole plaintiff's property, the Ninth Circuit  
3 concluded that the co-schemer's conduct "lack[ed] any 'direct relationship' to the armed robbery."  
4 *Id.* The sequence of events in *Oki Semiconductor*, in other words, ruled out the possibility that the  
5 co-schemer's wrongful conduct caused the plaintiff's injury. The same is not true here, where  
6 Plaintiffs allege that the Bosch Defendants were involved in the scheme *from the beginning*. *See,*  
7 *e.g.*, FAC ¶ 250 ("Bosch GmbH and Bosch LLC exercised tight control over the coding and other  
8 aspects of the software . . . . [They] also participated in the affairs of the Enterprise by concealing  
9 the software functions from U.S. regulators . . . ."); *see also VW Franchise Dealers*, 2017 WL  
10 4890594, at \*9 n.2 (distinguishing *Oki* and reasoning that, unlike *Oki*, "the alleged conduct by  
11 Bosch took place before the Franchise Dealers were injured and plausibly led directly to those  
12 injuries"). Unlike *Oki Semiconductor*, there is a close link between Defendants' alleged conduct  
13 and Plaintiffs' injury.

14 Nor does the Ninth Circuit's decision in *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924  
15 (9th Cir. 1994), or the Supreme Court's decision in *Hemi Group*, 559 U.S.1, require Plaintiffs to  
16 have a direct relationship with the Bosch Defendants. Both of those decisions rejected RICO  
17 claims that relied on passed-on injury, which is injury derived from a third party's direct injury.  
18 *See Hemi Group*, 559 U.S. at 990 ("The City's theory . . . requires that we extend RICO liability to  
19 situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth*  
20 party (the taxpayer) to cause harm to the plaintiff (the City)."); *Pillsbury*, 31 F.3d at 930 (holding  
21 that sublessor could not bring a RICO claim against the owners of the building, who allegedly  
22 engaged in a scheme to fraudulently increase rents, because "[t]he directly injured party, [the  
23 master tenant], can sue for the *whole* injury"). As these cases illustrate, passed-on injury requires  
24 an examination of the *relationship between different injured parties*, not the relationship between  
25 a RICO plaintiff and *different members of the RICO scheme*. Neither case held that each  
26 participant in a RICO enterprise must have a direct relationship with the plaintiff directly injured  
27 by that enterprise's conduct.

28

c. Difficulty Apportioning Damages

The Bosch Defendants also argue that difficulty in apportioning damages between the FCA Defendants and them creates the risk of double recovery, which they assert further undercuts the conclusion that they were the “proximate cause” of any alleged RICO injury.

The potential for difficulty apportioning damages is a factor that courts consider as part of the RICO proximate cause analysis. *See Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258 (1992). But the focus in that analysis is on the difficulty of apportioning damages among different *injured parties*, not defendants. *See Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1055 (9th Cir. 2008) (the apportionment question centers on whether “the existence of other *injured parties* creates difficulties of apportionment or risks of multiple recovery”) (emphasis added).

In *Holmes*, for example, a stock manipulation scheme bankrupt two broker-dealers, which in turn prevented the broker-dealers from meeting obligations to their customers. *See Holmes*, 503 U.S. at 270-74. The Court held that an entity representing the customers of the broker-dealers could not pursue a RICO claim against the stock manipulator because the “directly injured . . . broker-dealers . . . could be counted on to bring suit.” *Id.* at 273. By limiting the suit to the directly injured, the Court reasoned that the district court could avoid “hav[ing] to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages.” *Id.*

Similarly, in *Pillsbury* the Ninth Circuit held that an entity that subleased office space could not pursue a RICO claim against owners of the building who engaged in a scheme to fraudulently increase rents. The court reasoned that “the apportionment task need not be taken,” because “[t]he directly injured party, [the master tenant], can sue for the whole injury.” *Pillsbury*, 31 F.3d at 930.

This is a different problem than apportioning damages among multiple co-conspirators. Under Bosch’s reasoning, co-conspirators would automatically escape damages liability simply from the multiplicity of defendants and the problem of apportioning damages among them. Defendants cite no case for this profound proposition save one.

The Bosch Defendants cite a district court decision extending the apportionment inquiry

1 analysis to defendants. *See Koch v. Royal Wine Merchs., Ltd.*, 907 F. Supp. 2d 1332, 1343 (S.D.  
 2 Fla. 2012) (“[The] possibility of multiple recoveries encompasses not only the possibility that  
 3 Defendants would be subjected to multiple claims but also that Plaintiff could recover against  
 4 multiple parties.”). *Koch* is not persuasive. The *Koch* court did not cite support for this position,  
 5 and its analysis is not consistent with the authority cited above. With respect to the apportionment  
 6 inquiry, “[t]he focus on plaintiffs and not members of the RICO scheme is sensible: those injured  
 7 by a RICO enterprise should not be prevented from seeking relief simply because of the  
 8 complexity of the enterprise.” *VW Franchise Dealers*, 2017 WL 4890594, at \*9.

9 d. Fraud on the Market

10 Finally, the Bosch Defendants contend that Plaintiffs impermissibly rely on a “fraud on the  
 11 market” theory, *i.e.*, that if Defendants had disclosed the Class Vehicles’ emissions problems, then  
 12 FCA US and its dealers would have lowered the price of the vehicles. The Bosch Defendants cite  
 13 out-of-circuit decisions which hold that the fraud on the market theory is inapplicable in RICO  
 14 cases. *See, e.g., Lawrie v. Ginn Dev. Co.*, No. 3:09-CV-446-J-32JBT, 2014 WL 4788067, at \*14  
 15 (M.D. Fla. Sept. 19, 2014) (dismissing RICO claim where plaintiffs’ alleged injury “rel[ie]d] on a  
 16 fraud-on-the-market theory”); *In re Schering-Plough Corp.*, No. 2:06-cv-5774 (SRC), 2009 WL  
 17 2043604, at \*20-21 (D.N.J. July 10, 2009) (noting that the fraud on the market theory of injury  
 18 “has been resoundingly rejected outside the context of federal securities fraud litigation” and “is  
 19 not cognizable under RICO”).

20 Defendants’ attempt to invoke the fraud on the market theory sets up a strawman.  
 21 Plaintiffs do not rely on a fraud on the market theory. Fraud on the market is a theory that allows  
 22 plaintiffs in a securities fraud case, in certain circumstances, to invoke a rebuttable presumption of  
 23 reliance rather than prove direct reliance on a company’s misrepresentations. *See Halliburton Co.*  
 24 *v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014). It arose because of difficult causation  
 25 questions inherent in that context. As the Supreme Court explained in *Halliburton*, the theory is  
 26 based on the idea that

27 the market price of shares traded on well-developed markets reflects  
 28 all publicly available information, and, hence, any material  
 misrepresentations. . . . [Thus], rather than scrutinize every piece of

1 public information about a company for himself, the typical investor  
 2 who buys or sells stock at the price set by the market does so in  
 3 reliance on the integrity of that price – the belief that it reflects all  
 public, material information. As a result, whenever the investor  
 buys or sells stock at the market price, his reliance on any public  
 material misrepresentations may be presumed . . . .

4 *Id.* (citations omitted). The theory allows plaintiffs to prove and recover damages, based not on  
 5 each shareholder’s specific reliance upon the securities fraud committed by defendants, but  
 6 derivatively through the discernible effect of the fraud upon the market price of securities.

7 Such a theory is not necessary nor is it invoked by Plaintiffs in the instant case for several  
 8 reasons. First, reliance is not a necessary element of a RICO claim. *See Bridge*, 553 U.S. at 661  
 9 (“[A] plaintiff asserting a RICO claim predicated on mail fraud need not show . . . that it relied on  
 10 the defendant’s alleged misrepresentations.”). Second, to the extent Plaintiffs have asserted  
 11 damages based on reliance, they pin their damages claim not indirectly or derivatively on the  
 12 fraud’s general effect on market prices, but on the fact that they “paid between \$3,120 and \$5,000  
 13 more for the EcoDiesel option than for the comparable gasoline vehicles,” FAC ¶ 191, a premium  
 14 they would not have paid had Defendants disclosed the emissions problems. Their claim for  
 15 damages is not predicated on what would have happened generally to the market price of the class  
 16 vehicles, but more directly on the fact that they would not have paid for something they did not  
 17 get.

18 To be sure, Defendants cite cases which have used the phrase “fraud on the market” to  
 19 mean something else outside the context of securities fraud – as shorthand for a theory of  
 20 overpayment that occurs when a seller’s misrepresentations cause its goods or services to sell for  
 21 an inflated price. Courts using this shorthand have held that such a theory of overpayment is too  
 22 speculative to support a concrete RICO injury.

23 In *Schering-Plough*, for example, insurance companies alleged that a prescription drug  
 24 manufacturer illegally marketed certain of its drugs for off-label uses. *See Schering-Plough*, 2009  
 25 WL 2043604, at \*1. The off-label marketing allegedly caused demand for the drugs to increase,  
 26 which in turn inflated the drugs’ prices. *See id.* at \*1, 4. The court referred to this as a “fraud-on-  
 27 the-market theory” of injury and held that the theory was too speculative to support a RICO claim.  
 28 *Id.* at \*21. Specifically, the court reasoned that “[a]ny perceived price impact attributed to



1 Schering’s off-label marketing is merely speculative and discounts the impact of important  
2 external variables such as the medical judgment of physicians and the preference of patients.” *Id.*  
3 The court also noted that, “[i]n reality, the price[s] of prescription drugs are fixed by  
4 pharmaceutical manufacturers, not the market.” *Id.* Similarly, the court in *Lawrie* reasoned that  
5 the plaintiffs there had impermissibly relied on a “fraud on the market” theory of injury when they  
6 alleged that they overpaid for residential properties due to misrepresentations by the properties’  
7 developers. *See Lawrie*, 2014 WL 4788067, at \*10-11. Citing to *Schering-Plough*, the court held  
8 that this “fraud on the market” theory of injury was not cognizable under RICO. *See id.* at \*10-11  
9 & n.14.

10 For two reasons, these “fraud on the market” decisions are not persuasive here. First,  
11 Plaintiffs’ allegations are materially distinguishable from those in *Schering-Plough* and *Lawrie*.  
12 In those cases, the plaintiffs alleged that they overpaid for defendants’ goods as a result of  
13 defendants’ fraudulent misrepresentations about the goods, but the plaintiffs were not able to  
14 identify their overpayment with specificity. As a result, the plaintiffs in those cases, like securities  
15 fraud plaintiffs, had to rely on a kind of proxy theory to prove their economic injuries – basing  
16 their damages indirectly on the effects the frauds had on market prices for the goods they  
17 purchased. The courts in those cases, however, deemed the market effects of these alleged frauds  
18 to be speculative.

19 Here, in contrast, Plaintiffs have identified a specific range by which they allegedly  
20 overpaid for the Class Vehicles – “between \$3,120 and \$5,000 more for the EcoDiesel option than  
21 for the comparable gasoline vehicles.” FAC ¶ 191. As noted above, these allegations of  
22 overpayment are not based on speculation as to the indirect effect of the fraud on the market but  
23 on the premiums that FCA US directly charged Plaintiffs for the Class Vehicles. The Court must  
24 take these allegations as true in considering the motions to dismiss. *See Iqbal*, 556 U.S. at 678.  
25 And because of these specific, concrete premiums based on a direct chain of causation, the  
26 speculation about market effect that drove the decisions in *Schering-Plough* and *Lawrie* is not  
27  
28

1 present here.<sup>6</sup>

2 Second, *Schering-Plough* and *Lawrie* are at odds with the Ninth Circuit’s decision in  
3 *Mendoza*, 301 F.3d 1163. *Mendoza* involved fraud on the market for labor – with the plaintiffs  
4 alleging that their wages were depressed when the defendants hired undocumented workers. *See*  
5 *id.* at 1166. Similar to the market for prescription drugs in *Schering-Plough*, the Ninth Circuit  
6 acknowledged that “[q]uestions regarding the relevant labor market and the [defendants’] power  
7 within that market are exceedingly complex,” and that it may be difficult to establish “how much  
8 lower the wages would be” as a result of the defendants’ use of undocumented workers. *Id.* at  
9 1171. But the Ninth Circuit, rather than concluding that this complexity warranted dismissal of  
10 the plaintiffs’ RICO claims, reasoned that these questions would be “best addressed by economic  
11 experts and other evidence at a later stage in the proceedings.” *Id.* “That wages would be lower  
12 if, as alleged, the growers relied on a workforce consisting largely of undocumented workers,” is a  
13 claim that the Ninth Circuit reasoned was “at least plausible enough to survive a motion to  
14 dismiss, whatever difficulty might arise in establishing how much lower the wages would be.” *Id.*  
15 Under the law of this Circuit, then, economic injury based on “fraud on the market,” as that phrase  
16 is used in *Schering-Plough*, may be cognizable under RICO if the economic injury alleged is  
17 plausible and not speculative. Thus, even where damages are based on indirect market effects,  
18 such a claim may lie in this Circuit. Given the specific claim of damages and the direct causation  
19 theory alleged by Plaintiffs, Plaintiffs’ RICO claim is not barred by the fraud on the market  
20 theory.

21 Plaintiffs have satisfied RICO’s statutory standing requirements. Their alleged  
22 overpayment injury is an injury to a “property interest,” and the injury is sufficiently concrete to

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23  
24 <sup>6</sup> As part of their “fraud on the market” argument, the Bosch Defendants also rely again on  
25 *McLaughlin*, 522 F.3d 215, where the Second Circuit rejected “a damages theory [that was] based  
26 on an estimate of the ‘price impact’ that a disclosure that Lights were not safer than full-flavored  
27 cigarettes would have had on the market” for Lights. *Id.* at 229. As noted above, the factual  
28 allegations in *McLaughlin* distinguish that case from this one. *See* Part III.A.1.b, *supra*. Further,  
the Second Circuit in *McLaughlin* rejected the plaintiffs’ price impact theory on a motion for class  
certification, and the court’s reasoning turned on a lack of evidence supporting the theory. *See id.*  
at 230. The *McLaughlin* court’s fact intensive analysis is not instructive here given that the Court  
is addressing Defendants’ motions to dismiss and must take the Plaintiffs’ overpayment  
allegations as true.

1 support a RICO claim. Their injury is also directly traceable to Defendants' (including Bosch's)  
 2 alleged scheme to conceal from regulators the fact that the Class Vehicles contained illegal defeat  
 3 devices, which resulted in Plaintiffs buying and leasing defective Class Vehicles.

4 B. Merits of the Section 1962(c) RICO Claim

5 A RICO claim under § 1962(c) requires the plaintiff to allege that the defendant  
 6 participated, directly or indirectly, in (1) the conduct (2) of an enterprise that affects interstate  
 7 commerce, (3) through a pattern (4) of racketeering activity. *See Eclectic Props.*, 751 F.3d at 997  
 8 (citing 18 U.S.C. § 1962(c)). For the reasons that follow, the Court concludes that Plaintiffs have  
 9 satisfied each of these elements as to each Defendant.

10 1. Racketeering Activity

11 Mail and wire fraud are predicate acts that may constitute "racketeering activity." *See* 18  
 12 U.S.C. § 1961. Plaintiffs allege that Defendants engaged in two or more acts of mail and wire  
 13 fraud by, among other things, submitting applications to the EPA and CARB for COCs and EOs  
 14 that concealed defeat devices in the Class Vehicles. *See* FAC ¶¶ 253-54, 258(E).

15 The elements of mail and wire fraud are "(A) the formation of a scheme to defraud, (B) the  
 16 use of the mails or wires in furtherance of that scheme, and (C) the specific intent to defraud."  
 17 *Eclectic Props.*, 751 F.3d at 997. The "scheme to defraud" element is "treated like conspiracy in  
 18 several respects." *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002) (quoting *United*  
 19 *States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992)). "Like co-conspirators, 'knowing  
 20 participants in the scheme are legally liable' for their co-schemers' use of the mails or wires." *Id.*  
 21 (quoting *Lothian*, 976 F.2d at 1262-63). As a result,

22 a defendant may be held liable for mail or wire fraud if (1) the  
 23 defendant was a knowing participant in a scheme to defraud; (2) the  
 24 defendant had the intent to defraud; and (3) a co-schemer committed  
 acts of mail or wire fraud during the defendant's participation in the  
 scheme, and those acts were within the scope of the scheme.

25 *VW Franchise Dealers*, 2017 WL 4890594, at \*12 (citing *Stapleton*, 293 F.3d at 1117).

26 Federal Rule of Civil Procedure 9(b) requires fraud to be pled with particularity. The  
 27 allegations of fraud must be "specific enough to give defendants notice of the particular  
 28 misconduct so that they can defend against the charge." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d

1 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). This requires the plaintiff to  
 2 identify “the who, what, when, where, and how” of the alleged misconduct. *Id.*

3 “The only aspects of wire fraud that require particularized allegations are the factual  
 4 circumstances of the fraud itself.” *Odom*, 486 F.3d at 554. To the extent that the first element – a  
 5 scheme to defraud – requires a showing of the defendants’ state of mind, “general rather than  
 6 particularized allegations are sufficient.” *Id.* However, “[i]n the context of a fraud suit involving  
 7 multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the  
 8 alleged fraudulent scheme.” *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (internal  
 9 quotation marks omitted).

10 a. Knowing Participants in Scheme to Defraud

11 Plaintiffs allege that Defendants engaged in a scheme to deceive regulators into believing  
 12 that the Class Vehicles complied with emission standards when the vehicles in fact did not.  
 13 Defendants did so, Plaintiffs contend, by installing eight auxiliary emission control devices  
 14 (“AECs”) in the Class Vehicles. These AECs are alleged to have activated vehicle emission  
 15 controls under test conditions but to have reduced the effectiveness of the emission controls under  
 16 normal driving conditions, which renders the AECs defeat devices. *See* FAC ¶¶ 127-28; 40  
 17 C.F.R. § 86.1803-01.

18 The allegations in the FAC support that each Defendant knowingly participated in this  
 19 scheme to defraud.

20 i. Bosch GmbH and Bosch LLC

21 Plaintiffs allege that the Bosch Defendants worked with the FCA Defendants to develop  
 22 and implement the hidden AECs in the Class Vehicles. *See* FAC ¶ 240. This is plausible given  
 23 that the AECs are comprised of software that was part of the Bosch Defendants’ EDC Unit 17,  
 24 which is the engine management system that controls the Class Vehicles’ emissions. *See* FAC  
 25 ¶¶ 114-16, 133. Further, Plaintiffs allege that the Bosch Defendants exercised near-total control  
 26 over the EDC Unit 17: They locked the software “to prevent customers, like Fiat Chrysler, from  
 27 making significant changes on their own.” FAC ¶ 133. They also used other security measures to  
 28 “protect vehicle systems against unauthorized access in every operating phase.” FAC ¶ 134.

1 Given this level of control, it is highly plausible that the Bosch Defendants played a role in  
2 developing and implementing the AECs.

3 Additional support for this conclusion comes from allegations that researchers – at the  
4 University of California, San Diego and Ruhr-Universität Bochum in Germany – have analyzed  
5 technical documents showing that code written by the Bosch Defendants was used in a defeat  
6 device found in the Fiat 500X. *See* FAC ¶ 126. Although the Fiat 500X is not a Class Vehicle,  
7 these allegations show that the Bosch Defendants knew how to develop a defeat device, and were  
8 willing to do so. Plaintiffs also allege that researchers have obtained “Bosch software  
9 documentation” which describes parameters and functions that correlate with many of the hidden  
10 AECs in the Class Vehicles. FAC ¶ 174.

11 Despite the Bosch Defendants’ plausible involvement with the hidden AECs, Plaintiffs  
12 allege that the Bosch Defendants did not disclose the AECs to regulators and the U.S. public.  
13 To the contrary, Plaintiffs allege that the Bosch Defendants deceptively promoted “clean diesel”  
14 technology. *See* FAC ¶¶ 122, 138-44. For example, in January 2013 Bosch LLC marketed the  
15 2014 Jeep Grand Cherokee in a PRNewswire press release as “compliant with the most stringent  
16 emission regulations in the world.” FAC ¶¶ 9 & n.5, 122. And Bosch GmbH actively lobbied  
17 lawmakers to push “clean diesel” in the United States. FAC ¶ 139.<sup>7</sup>

18 Together, these allegations plausibly support that the Bosch Defendants were actively  
19 involved in developing the hidden AECs used in the Class Vehicles, and not only concealed  
20 their use but also falsely touted to the market and lawmakers that “clean diesel” vehicles,  
21 including the Class Vehicles, were compliant with emission standards. Plaintiffs have accordingly

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22  
23 <sup>7</sup> The Bosch Defendants assert that their lobbying activities cannot be considered because of the  
24 *Noerr-Pennington* doctrine. Under *Noerr-Pennington*, “those who petition any department of the  
25 government for redress are generally immune from statutory liability for their petitioning  
26 conduct.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). Plaintiffs are not asserting  
27 that the Bosch Defendants’ lobbying activity was unlawful. Instead, they assert that the lobbying  
28 activity helps prove knowledge and intent to participate in the RICO enterprise. Use of the Bosch  
29 Defendants’ lobbying activity in this manner is not barred by *Noerr-Pennington*. *See United Mine  
Workers of Am. v. Pennington*, 381 U.S. 657, 670 n.3 (1965) (“It would of course still be within  
the province of the trial judge to admit this evidence, if he deemed it probative and not unduly  
prejudicial . . . if it tends reasonably to show the purpose and character of the particular  
transactions under scrutiny.”); *VW Franchise Dealers*, 2017 WL 4890594, at \*15 n.4 (rejecting the  
same argument by the Bosch Defendants).

1 pled with sufficient detail that the Bosch Defendants knowingly participated in the scheme to  
2 defraud for purposes of RICO.

3 ii. VW Italy and VM America

4 FCA N.V. owns both VM Italy and VM America. VM Italy is an auto parts manufacturer,  
5 and VM America supports VM Italy customers and activities in North America. *See* FAC ¶¶ 19-  
6 20. Plaintiffs allege that the VM Motori Defendants designed, calibrated, and manufactured the  
7 EcoDiesel engine used in the Class Vehicles, *see* FAC ¶ 237, and that the VM Motori Defendants’  
8 comprehensive involvement with the EcoDiesel engine ultimately led them to work closely with  
9 the Bosch Defendants and the FCA Defendants “to customize the EDC17 to allow Class Vehicles  
10 to simulate ‘passing’ the EPA and CARB testing.” FAC ¶ 132. The VM Motori Defendants’  
11 involvement with these customization efforts is plausible given that, to run effectively, the  
12 EcoDiesel engines required a careful balancing between engine performance and emission levels.  
13 *See* FAC ¶¶ 110-13. It is therefore plausible that the VM Defendants were responsible not only  
14 for the nuts and bolts of the EcoDiesel engine (managing elements such as power and  
15 performance), but also for how the EcoDiesel engine generated and treated emissions. This  
16 conclusion is supported further by allegations that the VM Motori Defendants participated in  
17 “[e]xhaust after-treatment system development, and [e]nvironmental trips (hot/cold climate, high  
18 altitude, etc.)” FAC ¶ 120. And the VM Motori Defendants’ facilities included a “Rolling dyno  
19 for vehicle emission measurement and 17 engine test benches for emission/performance  
20 development.” FAC ¶ 237. Further, Plaintiffs allege that the VM Motori Defendants “provided  
21 information to FCA [US] for inclusion in the COC and EO applications,” FAC ¶ 237, which also  
22 supports that the VM Motori Defendants were involved with the Class Vehicles’ emissions.

23 Together, these allegations plausibly support that the VM Motori Defendants were  
24 knowing participants in the scheme to deceive regulators into certifying that the Class Vehicles.  
25 They participated in the scheme by developing and customizing the EcoDiesel engine, and by  
26 working with the other Defendants to knowingly customize the EDC Unit 17 to simulate passing  
27 emissions tests.

28

iii. FCA N.V. and FCA US

1  
2 Plaintiffs contend that the FCA Defendants were the ringleaders of the emissions scheme.  
3 They offer the following allegations in support of this position. Plaintiffs allege that the seeds of  
4 the emissions scheme were sown in 2009 when FCA N.V. acquired U.S. automaker Chrysler –  
5 which became FCA US – as part of FCA N.V.’s strategy to increase its North American presence.  
6 *See* FAC ¶ 102. To further that strategy, CEO Sergio Marchionne unveiled ambitious five-year  
7 plans in 2009 and 2014 to sell Jeep and Ram 1500 models with diesel engines. *See* FAC ¶¶ 102-  
8 03. Diesel-powered engines were a strength of FCA N.V.’s in the European market, and Mr.  
9 Marchionne sought to capitalize on this strength in the United States. FAC ¶ 104.

10 Around the same time that Mr. Marchionne announced plans to sell more diesel-engine  
11 vehicles in the United States, emission standards in the United States “were ratcheting up.” FAC  
12 ¶ 104. Certain automakers, including Toyota and Ford, responded by focusing on hybrid and  
13 electric vehicles. The FCA Defendants, along with Volkswagen, Mercedes-Benz, and General  
14 Motors, instead sought to enter the “clean diesel” market, advertising light-duty diesel-engine  
15 vehicles powered by new emission-control technology. *See* FAC ¶¶ 104-06. Specifically, FCA  
16 N.V. used FCA US to “design, market, manufacture and sell the Class Vehicles” under the Jeep  
17 and Dodge brands. FAC ¶ 231. FCA US then advertised the Class Vehicles as a more efficient  
18 alternative to gasoline vehicles, with no loss of power or performance. *See* FAC ¶¶ 106, 145-54.

19 While promoting the new EcoDiesel technology, Plaintiffs allege that behind the scenes  
20 the FCA Defendants were “either unable or unwilling” to develop the emission control technology  
21 needed to bring the EcoDiesel vehicles into compliance with U.S. emission standards. FAC ¶ 123.  
22 “Instead of cutting their losses on ‘EcoDiesel,’ delaying the production of the Class Vehicles, or  
23 coming clean,” Plaintiffs allege that employees at both FCA entities “worked closely with VM  
24 Italy and VM America and Bosch GmbH and Bosch LLC to customize the EDC Unit 17 to allow  
25 Class Vehicles to simulate ‘passing’ the EPA and CARB testing.” FAC ¶ 123.

26 These allegations are sufficient to plausibly support the FCA Defendants’ participation in  
27 the emissions scheme. Given Mr. Marchionne’s focus on expanding FCA’s footprint in the  
28 United States through the sale of diesel-engine vehicles, and the importance of meeting

1 increasingly strict U.S. emission requirements to do so, it is plausible that the FCA Defendants  
 2 would have been involved with customizing the emission software in the Class Vehicles,  
 3 including the hidden AECs. And although the Bosch Defendants are alleged to have maintained  
 4 tight control over the EDC Unit 17, *see* FAC ¶ 133, it is plausible that the FCA Defendants would  
 5 have had some oversight over their work given that the EDC Unit 17 affected vehicle  
 6 performance. *See* FAC ¶¶ 110, 116.

7 Two other allegations also support the plausibility of the FCA Defendants’ involvement  
 8 with the hidden AECs. First, in the study referenced above by researchers at the University of  
 9 California, San Diego and Ruhr-Universität Bochum in Germany, the researchers studied various  
 10 technical documents and concluded that the defeat devices in a Fiat vehicle were “created” by  
 11 Bosch and then “enabled” by Fiat. FAC ¶ 126. In other words, the researchers’ study suggests  
 12 that even if the Bosch Defendants developed the defeat devices, the FCA Defendants ultimately  
 13 put them into use. Second, Plaintiffs allege – and Exhibit 6 to the Cafasso Declaration confirms –  
 14 that in the EPA’s January 12, 2017 NOV to the FCA Defendants for failure to disclose the eight  
 15 hidden AECs in the Class Vehicles, the EPA noted that “*despite having the opportunity to do so,*  
 16 Fiat and FCA failed to refute that the ‘principle effect of one or more of these AECs was to  
 17 bypass, defeat, or render inoperative one or more elements of design installed to comply with  
 18 emissions standards under the [Clean Air Act].’” FAC ¶ 3 (emphasis added) (alteration in  
 19 original). If the FCA Defendants had not knowingly concealed the AECs at issue, it is  
 20 reasonable to infer that they would have disclosed the AECs in discussions with the EPA. Their  
 21 failure to do so further supports the plausibility of Plaintiffs’ allegations that they knowingly  
 22 participated in the scheme to defraud.

23 iv. Mr. Marchionne

24 Mr. Marchionne, as the CEO of FCA N.V. and FCA US, is alleged to have been a  
 25 champion of leveraging FCA N.V.’s strength in diesel engines to promote the sale of light-duty  
 26 diesel engine vehicles in the United States. *See* FAC ¶¶ 103-04, 227-28, 235. He made the sale of  
 27 light-duty diesel-engine vehicles in the United States a part of his 2009 and 2014 five-year plans  
 28 to increase the FCA Defendants’ sales and market share. *See* FAC ¶¶ 102-03. He also “made



1 numerous public statements on behalf of Fiat Chrysler concerning the Class Vehicles, their  
 2 EcoDiesel® engines, and their emissions and performance characteristics.” FAC ¶ 18. With  
 3 respect to emissions, he specifically noted in 2012 that he was still “optimistic about the potential  
 4 of light-duty diesels in the U.S. despite significant emissions challenges.” FAC ¶ 104.

5 Given Mr. Marchionne’s focus on expanding the sale of diesel-engine vehicles in the  
 6 United States, and his awareness of the regulatory challenges that the FCA Defendants faced to  
 7 bring the EcoDiesel vehicles to market, it is plausible that Mr. Marchionne would have known  
 8 about, and maintained oversight over, the modifications to the EcoDiesel engine that implemented  
 9 the hidden AECDs. The allegations are therefore sufficient to support that Mr. Marchionne was  
 10 also a knowing participant in the scheme.

11 v. Rule 9(b)

12 The allegations above not only plausibly support each Defendant’s knowing participation  
 13 in the alleged scheme, but they also answer the “who,” “what,” and “how” questions regarding the  
 14 fraud as required to satisfy Rule 9(b)’s particularity requirement. *See Vess*, 317 F.3d at 1106.  
 15 That is, Mr. Marchionne championed the EcoDiesel project; FCA N.V. used FCA US to design,  
 16 market, manufacture, and sell the Class Vehicles; both FCA entities oversaw and worked closely  
 17 with the VM Motori Defendants and the Bosch Defendants to customize the emissions software  
 18 for the Class Vehicles; and FCA US submitted the COC and EO applications to regulators that  
 19 concealed the eight AECDs that are alleged to constitute defeat devices.

20 As to “where” the fraud took place, Plaintiffs allege that the EcoDiesel engines were  
 21 developed and calibrated in Michigan, *see* FAC ¶¶ 231, 237, which is where FCA US, Bosch  
 22 LLC, and VM America are headquartered, and where Fiat’s Group Executive Committee is based.  
 23 *See* FAC ¶¶ 12, 20, 23, 231, 235. As to “when” the fraud took place, the FAC can reasonably be  
 24 read to support that customization of the EDC Unit 17 took place sometime between 2011 and  
 25 2014. This is based on allegations that the VM Motori Defendants began developing the  
 26 EcoDiesel engine in 2011, FAC ¶ 117, and that “[i]n January 2013, Bosch LLC announced that its  
 27 ‘clean diesel’ technology, including the EDC Unit 17, would be featured in the new 2014 Jeep  
 28 Grand Cherokee 3.0-Liter EcoDiesel®.” FAC ¶ 122. Plaintiffs also allege that customization of

1 the EDC17 was an intensive three- to five-year process. *See* FAC ¶ 132.

2 The Bosch Defendants protest that Plaintiffs have improperly “lumped” the Bosch entities  
3 together, failing to specify what each company’s wrongdoing was. *See* Bosch Mot. at 14. This  
4 “lumping” argument is not persuasive. As Plaintiffs point out, in their FAC, they have alleged that  
5 the Bosch Group – the “umbrella” that covers the Bosch Defendants (among others) – is divided  
6 into four business sectors,” and the business sectors are “grouped not by location, but by function.  
7 [Thus, for example,] [the business sector] Mobility Solutions [formerly Automotive Technology]  
8 includes knowledgeable individuals at both Bosch GmbH and Bosch LLC.” FAC ¶ 25.  
9 Accordingly, if there has been lumping together of the Bosch Defendants in the FAC, that is a  
10 direct result of how the Bosch Group and/or the Bosch Defendants have chosen to operate. Judge  
11 Breyer recently made this very point in the *Volkswagen “Clean Diesel”* MDL. *See VW Franchise*  
12 *Dealers*, 2017 WL 4890594, at \*10 (noting that “it is still difficult to determine which [Bosch]  
13 entity did what” based on the allegations in the franchise dealers’ pleading but the pleading makes  
14 clear that “the blur between Bosch GmbH and Bosch LLC is caused by the way in which  
15 employees at both entities work together on certain projects, including the EDC17 project”); *see*  
16 *also In re Duramax Diesel Litig.*, 2018 U.S. Dist. LEXIS 26543, at \*30 (stating that, “[g]iven  
17 Plaintiffs’ allegation that Bosch employees and constituent entities often blur the legal boundaries  
18 between Bosch subsidiaries, the allegations against the Bosch Defendants are sufficiently  
19 specific”). The Court thus denies Bosch’s argument here as well.

20 b. Specific Intent to Defraud

21 Intent to defraud may be inferred “by examining the scheme itself.” *Eclectic Props.*, 751  
22 F.3d at 997 (quoting *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir. 1984)). Here, given  
23 the plausibility of the allegations that each Defendant knowingly participated in the emissions  
24 scheme, intent to defraud easily follows. This is because the scheme itself involved the  
25 development and use of hidden AECDs in the Class Vehicles; FCA US has failed to refute at this  
26 stage that these AECDs are defeat devices. *See* FAC ¶ 3. Because the AECDs themselves  
27 plausibly have a deceitful purpose, allegations supporting that each Defendant knew about yet  
28 concealed the AECDs also support a plausible claim that each Defendant intended to defraud. *See*

1 *VW Franchise Dealers*, 2017 WL 4890594, at \*15 (holding that the Bosch Defendants’ intent to  
 2 defraud could be “inferred from the scheme itself” where “[n]o one to date in this multidistrict  
 3 litigation has sought to justify, or explain a lawful purpose for, software that effectively turns a  
 4 vehicle’s emissions systems on or off depending on whether the vehicle is undergoing emissions  
 5 testing or being operated under normal driving conditions”); *In re Duramax Diesel Litig.*, 2018  
 6 U.S. Dist. LEXIS 26543, at \*97 (reaching the same holding based on nearly identical allegations:  
 7 “The way in which EDC17 interacted with the Duramax engine is inherently deceptive”).

8 That the hidden AECDs plausibly have a deceitful purpose distinguishes this case from  
 9 *Eclectic Properties*, on which Defendants rely. There, the purchasers of commercial properties  
 10 alleged that the sellers of the properties had engaged in a RICO scheme to inflate the property  
 11 values through sale-leaseback transactions and the payment of inflated rent payments. *See*  
 12 *Eclectic Props.*, 751 F.3d at 994-95. In affirming the district court’s dismissal of the RICO claim,  
 13 the Ninth Circuit held that plaintiffs had failed to sufficiently plead specific intent to defraud for  
 14 purposes of the predicate acts of mail and wire fraud. *See id.* at 997-1000. In reaching this  
 15 conclusion, the Ninth Circuit noted:

16 When companies engage in sale-leaseback transactions that are  
 17 facially legitimate, pay rent and operate legitimate businesses for  
 18 years thereafter, and otherwise act as routine participants in  
 19 American commerce, a significant level of factual specificity is  
 required to allow a court to infer reasonably that such conduct is  
 plausibly part of a fraudulent scheme.

20 *Id.* at 997-98.

21 Unlike the facially legitimate sale-leaseback transactions in *Eclectic Properties*, here,  
 22 Defendants have not explained a legitimate use for the hidden AECDs. The alleged fraud here,  
 23 then, is centered around the use of devices that plausibly had only a deceitful and unlawful  
 24 purpose. That Defendants are alleged to have known about and concealed these devices supports  
 25 the contention that they had specific intent to defraud.

26 Defendants also argue that *Pirnik v. Fiat Chrysler Automobiles*, No. 15-cv-7199 JMF,  
 27 2017 WL 3278928 (S.D.N.Y. Aug. 1, 2017), supports a holding that Plaintiffs have not  
 28 sufficiently pled intent to defraud. *Pirnik* is a securities-fraud suit that is predicated on the

1 EcoDiesel emissions issue. The district court there dismissed the plaintiffs' complaint, without  
2 prejudice, concluding that the plaintiffs had failed to plead a strong inference of scienter.

3 On the whole, their allegations boil down to general claims about  
4 the importance of certain diesel-engine vehicles to the company, the  
5 unremarkable fact that Marchionne received regular reports  
6 regarding emissions tests and that the company had audited its  
7 vehicles for emissions compliance, FCA's awareness that other  
8 automobile manufacturers were facing regulatory scrutiny for using  
9 illegal "defeat devices," and vague statements by confidential  
10 witnesses that emissions reports were "forwarded up" through  
11 "senior" management to reach Marchionne. Conspicuously absent,  
12 however, are any allegations that FCA officials or Marchionne ever  
13 received test results, reports, or other communications indicating  
14 that FCA vehicles were not in compliance with relevant emissions  
15 regulations prior to the EPA's and CARB's notices on January 12,  
16 2017. That dooms Plaintiffs' case for scienter here.

17 *Id.* at \*2 (citations omitted).

18 While *Pirnik* is notable given that the securities-fraud claims there are predicated on the  
19 same factual events at issue here, the decision is not particularly persuasive on the issue of intent.  
20 As a securities-fraud case, *Pirnik* is governed by the Private Securities Litigation Reform Act,  
21 which requires scienter to be pled with "particularity." *Tellabs, Inc. v. Makor Issues & Rights,*  
22 *Ltd.*, 551 U.S. 308, 313 (2007). This heightened pleading standard does not apply in the context  
23 of RICO, where only "general allegations" of a defendant's state of mind are required. *Odom*, 486  
24 F.3d at 554. Rule 9(b) also provides that "[m]alice, intent, knowledge, and other conditions of a  
25 person's mind may be alleged generally." A general allegation of scienter does not require the  
26 level of specificity (*e.g.*, specific allegations that the defendant received actual test results)  
27 required in *Tellabs*.

28 c. Use of the Mails and Wires

The final element of the mail and wire fraud predicate offenses is the use of the mails and  
wires in furtherance of a scheme to defraud. *See Eclectic Props.*, 751 F.3d at 997. "[A]ny  
'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 (second alteration in  
original) (quoting *Schmuck v. United States*, 489 U.S. 705, 712 (1989)). The use of the mails or  
wires instead only needs to be "a step in the plot." *United States v. Garlick*, 240 F.3d 789, 792

1 (9th Cir. 2004) (internal quotation marks omitted).

2 As alleged, Plaintiffs primarily effectuated the emissions scheme by concealing the eight  
3 AECDs at issue from regulators in COC and EO applications. *See* FAC ¶¶ 124, 130-31, 270.  
4 These applications were sent through the mail and interstate wires. *See* FAC ¶ 258(E). The FAC  
5 also includes charts that identify other mailings and wire communications, the dates of the  
6 communications, and their contents. *See, e.g.*, FAC ¶ 259 (alleging that, in September 2013, the  
7 EPA mailed to FCA US “COC and related documents for 2014 Jeep Grand Cherokee”); FAC  
8 ¶ 260 (alleging that, in January 2014, FCA US wired the EPA and CARB “Certification Summary  
9 Information Report with emission test results for 2014 Jeep Grand Cherokee and 2014 Ram  
10 1500”). These alleged communications were all plausibly “step[s] in the plot” to deceive  
11 regulators into certifying the Class Vehicles. *Garlick*, 240 F.3d at 792.

12 Defendants contend that Plaintiffs must identify instances in which *each* Defendant used  
13 the mails and wires in furtherance of the scheme, and that Plaintiffs have not done so. In support  
14 of this position, Defendants cite to cases that have generally stated that “[t]he requirements of  
15 § 1962(c) must be established as to each individual defendant,” *Craig Outdoor Advert., Inc. v.*  
16 *Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027 (8th Cir. 2008), and that, “[w]here RICO claims under  
17 § 1962(c) are asserted against multiple defendants, a plaintiff must allege at least two predicate  
18 acts by each defendant.” *Committee to Protect Our Agric. Water v. Occidental Oil and Gas*  
19 *Corp.*, 235 F. Supp. 3d 1132, 1177 (E.D. Cal. 2017); *accord In re WellPoint, Inc. Out-of-Network*  
20 *UCR Rates Litig.*, 865 F. Supp. 2d 1002, 1035 (C.D. Cal. 2011); *Kerrigan v. ViSalus, Inc.*, 112 F.  
21 Supp. 3d 580 (E.D. Mich. 2015). When the predicate acts are acts of mail or wire fraud, however,  
22 the Ninth Circuit has held that “knowing participants in the scheme are legally liable for their *co-*  
23 *schemers* use of the mails or wires.” *Stapleton*, 293 F.3d at 1117 (emphasis added) (internal  
24 quotation marks omitted). The Bosch Defendants acknowledge as much, arguing that,

25 while “knowing participants” in a fraudulent scheme can be held  
26 liable for their *co-schemers’* use of the mails or wires, *see, e.g.,*  
27 *United States v. Stapleton*, 293 F.3d 1111, 1116-18 (9th Cir. 2002),  
28 such vicarious liability extends only if the Plaintiffs adequately  
plead that each Defendant knowingly participated in the scheme to  
defraud with specific intent to deceive. Plaintiffs have made no  
such showing here.

1 Bosch Mot. at 29 n.9.

2 As noted above, the allegations in the FAC plausibly support that each Defendant was a  
 3 knowing participant in the scheme to defraud the EPA and CARB. Because “knowing participants  
 4 in the scheme are legally liable for their co-schemers use of the mails or wires,” *Stapleton*, 293  
 5 F.3d at 1117 (internal quotation marks omitted), the Bosch Defendants, the VM Motori  
 6 Defendants, FCA N.V., and Mr. Marchionne can all be held liable for FCA US’s use of the mails  
 7 and wires in furtherance of the scheme, which includes FCA US’s submissions of COC and EO  
 8 applications, respectively to the EPA and CARB, for the Class Vehicles. *See* FAC ¶ 258(E); *see*  
 9 *also In re Duramax Diesel Litig.*, 2018 U.S. Dist. LEXIS 26543, at \*99 (applying the same co-  
 10 schemer standard and holding that the Bosch Defendants could be held liable for mail and wire  
 11 fraud based on GM’s use of the mails and wires).<sup>8</sup>

12 2. Pattern of Racketeering Activity

13 A “pattern of racketeering activity” requires the commission of at least two predicate acts  
 14 within a ten-year period. *See* 18 U.S.C. § 1961(5). The FAC easily satisfies this requirement, as it  
 15 identifies multiple mailings and communications in furtherance of the scheme between January  
 16 2013 and November 2016. *See* FAC ¶¶ 258-60. These include the applications for EPA COCs  
 17 and CARB EOs that concealed the AECDs for the 2014–2016 EcoDiesel trucks. *See* FAC  
 18 ¶ 258(E).

19 3. Enterprise Requirement

20 A RICO “enterprise” consists of “any individual, partnership, corporation, association, or  
 21 other legal entity, or any union or group of individuals associated in fact although not as a legal  
 22 entity.” 18 U.S.C. § 1961(4). The Ninth Circuit has referred to this definition as “expansive” and  
 23 “not very demanding.” *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) (quoting  
 24 *Odom*, 486 F.3d at 548).

25 Plaintiffs allege that Defendants engaged in an associated-in-fact enterprise, *see* FAC

26 \_\_\_\_\_  
 27 <sup>8</sup> Plaintiffs alternatively argue that the FAC *does* identify uses of the mails and wires by Bosch  
 28 GmbH, Bosch LLC, and Mr. Marchionne. Because the Court concludes that the allegations  
 plausibly tie each Defendant to FCA US’s use of the mails and wires, the Court does not consider  
 the sufficiency of these separate allegations.

1 ¶¶ 232-34, which is “a group of persons associated together for a common purpose of engaging in  
2 a course of conduct.” *Christensen*, 828 F.3d at 780 (quoting *Odom*, 486 F.3d at 548). Such an  
3 enterprise has three elements: “(A) a common purpose, (B) a structure or organization, and (C)  
4 longevity necessary to accomplish the purpose.” *Eclectic Props.*, 751 F.3d at 997 (citing *Boyle v.*  
5 *United States*, 556 U.S. 938, 946 (2009)).

6 With respect to the “common purpose” element, “[e]vidence used to prove the pattern of  
7 racketeering activity and the evidence establishing an enterprise ‘may in particular cases  
8 coalesce.’” *Boyle*, 556 U.S. at 947 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).  
9 This is such a case. The allegations that plausibly support that Defendants committed multiple  
10 acts of mail and wire fraud also support that they shared a common purpose to “deceive regulators  
11 into believing that the Class Vehicles were eligible for coverage by a COC and/or EO and  
12 compliant with emission standards,” FAC ¶ 230, “in order to sell the Class Vehicles throughout  
13 the United States (and California).” FAC ¶ 232.

14 Of course, Defendants also organized themselves for the more general purpose of  
15 manufacturing and selling vehicles. But that does not shield them from RICO liability. This is  
16 clear from the Ninth Circuit’s en banc decision in *Odom*, 486 F.3d 541. The plaintiff there  
17 brought a RICO claim against Microsoft and Best Buy. *See id.* at 543. Microsoft had invested  
18 \$200 million in Best Buy and the companies had agreed to promote each other’s products and  
19 services. *See id.* While this promotional arrangement was a routine, lawful business dealing, the  
20 plaintiff alleged that the companies also participated in a scheme in which Best Buy would give its  
21 customers Trial CDs of Microsoft’s MSN subscription and, without the customers’ knowledge or  
22 permission, would provide Microsoft with the customers’ debit and credit card information. *See*  
23 *id.* at 543-44. Microsoft would then activate MSN accounts in the customers’ names without their  
24 consent. *See id.* The en banc court concluded that these allegations were “more than adequate to  
25 establish, if true, that Microsoft and Best Buy had a common purpose of increasing the number of  
26 people using Microsoft’s [MSN] service through fraudulent means.” *Id.* at 552. In other words,  
27 Microsoft and Best Buy could not hide behind lawful commercial dealings to avoid RICO  
28 liability. Nor can the Defendants do so here.

1 Defendants rely on two decisions in which district courts have rejected attempts to  
 2 characterize routine commercial dealings as a RICO enterprise. *See Shaw v. Nissan North*  
 3 *America, Inc.*, 220 F. Supp. 3d 1046 (C.D. Cal. 2016); *Gomez v. Guthy-Renker, LLC*, No. 14-cv-  
 4 01425 JGB, 2015 WL 4270042 (C.D. Cal. July 13, 2015). In *Shaw*, the plaintiffs asserted that  
 5 certain Nissan entities and a parts supplier engaged in a RICO enterprise to sell Nissan cars with  
 6 defective timing chains. *See Shaw*, 220 F. Supp. 3d at 1050. In holding that the plaintiffs failed to  
 7 plead a common fraudulent purpose, the district court reasoned:

8 At bottom, both sides seem to agree that the Subject Nissan Vehicles  
 9 were produced with a part that could have been improved in certain  
 10 ways. From this starting premise, Plaintiffs conclude that  
 11 Defendants participated in an enterprise bound by the common  
 12 purpose of fraudulently selling defective vehicles at inflated prices. .  
 . . [H]owever, Plaintiffs have not given us any specific facts that  
 move their allegations from the realm of the possible to the  
 plausible.

13 *Id.* at 1057.

14 Likewise in *Gomez*, plaintiffs allege that a consumer-products company engaged in a  
 15 scheme to charge customers unexpected fees for a “continuity program,” even after customers  
 16 tried to cancel their memberships. *Gomez*, 2015 WL 4270042, at \*1-2. The plaintiffs alleged that  
 17 the company did not act alone, but instead formed a RICO enterprise with third-party payment  
 18 processors and customer-service operators. *See id.* at \*2. Yet the plaintiffs failed to plead specific  
 19 facts supporting that these third parties had taken part in the fraudulent scheme. In dismissing the  
 20 RICO claim, the district court reasoned that “RICO liability must be predicated on a relationship  
 21 more substantial than a routine contract between a service provider and its client.” *Id.* at \*11.

22 The key difference between this case and *Shaw* and *Gomez* is that the specific factual  
 23 allegations that were lacking in those cases are present in this one. This starts with the hidden  
 24 AECDs themselves, which were installed in the Class Vehicles and plausibly had only a deceitful  
 25 purpose – to cheat emissions tests. There were no similar fraudulent devices in *Shaw* or *Gomez*.  
 26 In fact, the timing-chain defect in *Shaw* may have very well been the result of an unintentional,  
 27 negligent design flaw. The same cannot be said of the AECDs as alleged, which turn the Class  
 28 Vehicles’ emission controls on or off depending on whether the vehicles are undergoing emissions



1 testing. Such devices are not developed by accident or as part of routine business dealings.

2 Further, as detailed above, Plaintiffs' allegations plausibly support that each Defendant  
3 participated in developing or implementing the AECDS. Plaintiffs allege that the Bosch  
4 Defendants' software documentation describes parameters and functions that correlate with many  
5 of the hidden AECDS, *see* FAC ¶¶ 174; that the VM Motori Defendants were responsible for how  
6 the EcoDiesel engine generated and treated emissions, and therefore plausibly would have been  
7 involved with implementing the AECDS, *see* FAC ¶¶ 110-13, 120, 237; and that the FCA  
8 Defendants initiated and oversaw development of the EcoDiesel engine and activated the AECDS  
9 in the Class Vehicles. *See* FAC ¶¶ 102-06, 126. These allegations and others in the FAC go  
10 beyond connecting Defendants to each other by way of normal commercial dealings. Rather, like  
11 the allegations regarding Microsoft and Best Buy in *Odom*, Plaintiffs' allegations support that  
12 Defendants shared a common purpose to deceive. *See also In re Duramax Diesel Litig.*, 2018 U.S.  
13 Dist. LEXIS 26543, at \*90 (reasoning that alleged collaboration by Bosch and GM to equip diesel  
14 vehicles with defeat devices was "far from 'routine'" business dealing and plausibly supported a  
15 common purpose to deceive).

16 Plaintiffs have also sufficiently pled that the enterprise had a "structure or organization."  
17 RICO's structural requirement requires only a "relationship among those associated with the  
18 enterprise." *Boyle*, 556 U.S. at 946. Neither a "hierarchy, role differentiation . . . [or] a chain of  
19 command" is required. *Id.* In *Boyle*, for example, the defendant and others participated in a series  
20 of bank thefts. The group was "loosely and informally organized," did "not appear to have a  
21 leader or hierarchy," and did not appear to "ever formulate[] any long-term master plan or  
22 agreement." *Id.* at 941. The defendant was nevertheless convicted of violating § 1962(c), and the  
23 Supreme Court affirmed the conviction. *See id.* at 941-42.

24 Defendants' enterprise had much greater organization than the enterprise in *Boyle*.  
25 Plaintiffs identify specific roles for each Defendant within the scheme, alleging that the FCA  
26 Defendants oversaw the scheme under the guidance of Mr. Marchionne, *see* FAC ¶¶ 102-06, 123,  
27 227-28, 235; that the VM Motori Defendants developed and calibrated the EcoDiesel engine used  
28 in the Class Vehicles, *see* FAC ¶¶ 120, 132, 237; and that the FCA Defendants "worked closely

1 with VM Italy and VM America and Bosch GmbH and Bosch LLC to customize the EDC Unit  
 2 17.” FAC ¶ 123. These allegations provide more than enough detail to support RICO’s structural  
 3 requirement. Moreover, the Defendants had an organized plan of design and manufacture in their  
 4 joint efforts to sell vehicles.

5 As for the longevity requirement, RICO requires only “longevity sufficient to permit [the]  
 6 associates to pursue the enterprise’s purpose.” *Boyle*, 556 U.S. at 946. Plaintiffs have satisfied  
 7 this requirement. They allege that Defendants participated in the emissions scheme over the  
 8 course of three Class Vehicle model years. *See* FAC ¶¶ 1, 230. This was a sufficient amount of  
 9 time to pursue the enterprise’s purpose of deceiving the EPA and CARB into certifying the Class  
 10 Vehicles so that the vehicles could be sold in the United States.

11 4. Conducting the Affairs of the Enterprise

12 The final element Plaintiffs must prove to support their § 1962(c) RICO claim is that each  
 13 Defendant “conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise’s  
 14 affairs.” 18 U.S.C. § 1962(c). In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), the Supreme  
 15 Court reasoned that the word “participate” in § 1962(c) “makes clear that RICO liability is not  
 16 limited to those with primary responsibility for the enterprise’s affairs.” *Id.* at 179. The use of the  
 17 phrase “directly or indirectly” also “makes clear that RICO liability is not limited to those with a  
 18 formal position in the enterprise.” *Id.* Yet “*some* part in directing the enterprise’s affairs is  
 19 required.” *Id.* “[S]imply performing services for the enterprise’ or failing to stop illegal activity,  
 20 is not sufficient.” *VW Franchise Dealers*, 2017 WL 4890594, at \*16 (quoting *Walter v. Drayson*,  
 21 538 F.3d 1244, 1248-49 (9th Cir. 2008)).

22 The allegations in the FAC plausibly support that each Defendant took some part in  
 23 directing the enterprise’s affairs. First, with respect to Mr. Marchionne, Plaintiffs allege that it  
 24 was his focus on diesel that led the FCA Defendants to develop light-duty diesel-engine vehicles  
 25 for sale in the United States. *See* FAC ¶¶ 226-28. Plaintiffs also allege that Mr. Marchionne was  
 26 “at the helm” of the enterprise to illegally circumvent stringent U.S. emission standards. FAC  
 27 ¶ 236. Mr. Marchionne, then, did not simply perform services for the enterprise; he plausibly  
 28 played a role in directing the enterprise’s affairs.

1           The same is true for the FCA Defendants. Led by Mr. Marchionne, Plaintiffs allege that  
2 the FCA Defendants “conspired to install and conceal emission control software in the  
3 EcoDiesel® engines to illegally circumvent stringent U.S. emission standards.” FAC ¶ 236. To  
4 further their efforts, both FCA entities are alleged to have “worked with, and oversaw, VM Italy  
5 and VM America in the development and calibration of the engines at Michigan headquarters,”  
6 FAC ¶ 237, and to have “worked closely with VM Italy and VM America and Bosch GmbH and  
7 Bosch LLC to customized the EDC Unit 17 to allow Class Vehicles to simulate ‘passing’ the EPA  
8 and CARB testing.” FAC ¶ 123. Together, the allegations support that the FCA Defendants were  
9 not simply taking orders, but instead were responsible for orchestrating the scheme.

10           As for the VM Motori Defendants, Plaintiffs allege that they “designed, manufactured,  
11 calibrated, and delivered the EcoDiesel® engine system for inclusion in the Class Vehicles.” FAC  
12 ¶ 22. Although some of this work may have been performed at the behest of the FCA Defendants,  
13 *see* FAC ¶ 237 (alleging that the FCA Defendants “oversaw” the VM Motori Defendants’  
14 development and calibration of the engines), Plaintiffs allege that the VM Defendants were  
15 “deeply involved in the development and testing of all aspects of the engine.” FAC ¶ 119. Given  
16 their technical expertise and the importance of the EcoDiesel engine to the enterprise, it is  
17 plausible that the VM Motori Defendants participated in conducting the enterprise’s affairs.

18           Finally, the Bosch Defendants argue that they were simply performing services for the  
19 enterprise. But given the level of control they are alleged to have maintained over the emissions  
20 software in the Class Vehicles, that conclusion is not sustainable at the pleading stage. Plaintiffs  
21 allege that the Bosch Defendants locked the EDC Unit 17 “to prevent customers, like Fiat  
22 Chrysler, from making significant changes on their own.” FAC ¶ 133. As a result, the Bosch  
23 Defendants would have needed to consent to any customization of the EDC Unit 17, including the  
24 addition of the hidden AECDs. That power of consent and control over the configuration of the  
25 EDC Unit 17 plausibly shifts the Bosch Defendants from “[s]imply performing services for the  
26 enterprise,” *Walter*, 538 F.3d at 1248-49, to taking “some part in directing the enterprise’s affairs,”  
27 *Reves*, 507 U.S. at 179 (emphasis omitted). The district court in *Duramax* reached the same  
28 conclusion. *See In re Duramax Diesel Litig.*, 2018 U.S. Dist. LEXIS 26543, at \*107-08 (“[T]he

1 operation of EDC17 is the apparent heart of the fraudulent enterprise and, because Bosch bears  
 2 primary responsibility for programming EDC17, it knowingly carried out core aspects of the  
 3 alleged enterprise.”) (internal quotation marks omitted).

4 Plaintiffs’ allegations plausibly support each of the four elements of their § 1962(c) RICO  
 5 claim as to each Defendant. The Court accordingly denies Defendants’ motions to dismiss this  
 6 cause of action.

7 C. RICO Conspiracy Claim

8 Plaintiffs also bring a RICO conspiracy claim against each Defendant. To establish a  
 9 RICO conspiracy, Plaintiffs must allege either (1) “an agreement that is a substantive violation of  
 10 RICO,” or (2) “that the defendants agreed to commit, or participated in, a violation of two  
 11 predicate offenses.” *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (citing 18  
 12 U.S.C. § 1962(d)). Plaintiffs’ allegations satisfy the second of these options. For the reasons  
 13 addressed above, it is plausible that Defendants all agreed to commit, or participate in, a violation  
 14 of two or more predicate acts of mail or wire fraud in furtherance of the enterprise.

15 Defendants only arguments for dismissal of the RICO conspiracy claim rely on the same  
 16 arguments they made in the context of § 1962(c). *See* FCA/VM Mot. at 27 n.9; Bosch Mot. at 34-  
 17 35. Because the Court found those arguments unpersuasive in the § 1962(c) context, it reaches the  
 18 same conclusion here. The Court accordingly denies Defendants’ motions to dismiss Plaintiffs’  
 19 RICO conspiracy claim.

20 D. RICO Aider and Abettor Liability

21 Plaintiffs’ allegations are sufficient to support a claim against the Bosch Defendants for  
 22 direct liability under § 1962(c). In the alternative, however, Plaintiffs also seek to hold the Bosch  
 23 Defendants liable for violating RICO under an aiding and abetting theory. *See* FAC ¶¶ 254, 266.  
 24 Such a theory of liability is not available under RICO.

25 While Congress has enacted a general aiding and abetting statute applicable to all federal  
 26 criminal offenses, *see* 18 U.S.C. § 2, it has not done the same for civil offenses. As a result,  
 27 “when Congress enacts a statute under which a person may sue and recover damages from a  
 28 private defendant for the defendant’s violation of some statutory norm, there is no general

1 presumption that the plaintiff may also sue aiders and abettors.” *Cent. Bank of Denver, N.A. v.*  
2 *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994). Instead, Congress has “taken a  
3 statute-by-statute approach to civil aiding and abetting liability.” *Id.* (noting, for example, that the  
4 Internal Revenue Code contains “a full section governing aiding and abetting liability;” that the  
5 Commodity Exchange Act “contains an explicit aiding and abetting provision;” and that “various  
6 provisions of the securities laws prohibit aiding and abetting”).

7 Given that Congress “has been quite explicit in imposing civil aiding and abetting  
8 liability,” *id.* at 183, the Supreme Court in *Central Bank* held that a private plaintiff cannot  
9 maintain an aiding and abetting suit under Section 10(b) of the Securities Exchange Act of 1934,  
10 because “the language of Section 10(b) does not in terms mention aiding and abetting.” *Id.* at 175.  
11 “Congress [knows] how to impose aiding and abetting liability when it [chooses] to do so,” the  
12 Court reasoned, and if “Congress intended to impose aiding and abetting liability, we presume it  
13 would have used the words ‘aid’ and ‘abet’ in the statutory text. But it did not.” *Id.* at 176-77. In  
14 light of the text, and without any persuasive evidence of legislative intent to the contrary, or policy  
15 considerations that would render the textual reading “‘so bizarre’ that Congress could not have  
16 intended it,” *id.* at 188 (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991)), the Court  
17 held that “a private plaintiff may not maintain an aiding and abetting suit under § 10(b),” *id.* at  
18 192.

19 After *Central Bank*, the Third Circuit considered whether a private cause of action for  
20 aiding and abetting a RICO violation could be maintained. *See Rolo v. City Investing Co.*  
21 *Liquidating Trust*, 155 F.3d 644 (3d Cir. 1998), *abrogated on other grounds as recognized in*  
22 *Forbes v. Eagleson*, 228 F.3d 471 (3d Cir. 2001). Like Section 10(b) of the Exchange Act, the  
23 Third Circuit noted that “the text of § 1962 itself contains no indication that Congress intended to  
24 impose private civil aiding and abetting liability under RICO.” *Id.* at 657. The Third Circuit then  
25 noted that it “must interpret and apply the law as Congress has written it,” because *Central Bank’s*  
26 analysis “began and ended with a review of the language of the statute.” *Id.* at 656-57. “Because  
27 the text of the RICO statute does not encompass a private cause of action for aiding and abetting a  
28 RICO violation,” the Third Circuit reasoned, “we have no authority to imply one.” *Id.* at 657.

1 In support of their aiding and abetting claim, Plaintiffs cite to *Baumer v. Pachl*, 8 F.3d  
2 1341 (9th Cir. 1993), where the Ninth Circuit noted in dicta “that there is some support among the  
3 Circuits for the imposition of aider or abettor liability in the civil RICO context.” *Id.* at 1347  
4 (collecting cases).<sup>9</sup> *Baumer* and the cases it cited predate *Central Bank*, however. And given  
5 *Central Bank*’s holding that “there is no general [statutory] presumption that [a civil] plaintiff may  
6 also sue aiders and abettors,” and the fact that the RICO statute does not use the terms “aiding and  
7 abetting,” the dicta in *Baumer* is not binding.

8 The district court decisions that Plaintiffs have cited are also not persuasive. In *Minnesota*  
9 *Life Insurance Co. v. Philpot*, No. 11-CV-00812 BTM (POR), 2012 WL 4486311 (S.D. Cal. Sept.  
10 27, 2012), the court concluded that the plaintiffs’ allegations, which included the phrase  
11 “conspired with and aided and abetted,” met the standard for knowing participation in a fraudulent  
12 scheme and stated a *primary* RICO violation under 1962(c). *Minn. Life*, 2012 WL 4486311, at  
13 \*10. The court therefore did not consider whether an aiding and abetting theory was cognizable.  
14 And in *Regence Group v. TIG Specialty Insurance Co.*, 903 F. Supp. 2d 1152 (D. Or. 2012), the  
15 court held that aiding and abetting liability is available under RICO; but the court only cited a pre-  
16 *Central Bank* out-of-circuit decision for its holding. *See id.* at 1162 (citing *Cox v. Adm’r U.S.*  
17 *Steel & Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994)). In contrast, district courts in the Ninth  
18 Circuit that have relied on *Central Bank* have held that “[t]he civil RICO statute does not provide  
19 for aiding and abetting liability,” and that “the statute’s silence precludes such a claim.” *Ferrari v.*  
20 *Mercedes-Benz USA, LLC*, No. 15-cv-4379 YGR, 2016 WL 658966, at \*2 (N.D. Cal. Feb. 18,  
21 2016) (citing *Salas v. Int’l Union of Operating Engineers*, No. 12-cv-10506 DDP VBKx, 2015  
22 WL 728365, at \*7 (C.D. Cal. Feb. 18, 2015)).

23 It is clear from *Central Bank* that statutory text is paramount in determining whether a  
24

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25 <sup>9</sup> After noting this support among some circuits, the Court concluded,

26 This being said, the instant case does not require that we address  
27 whether appellants have stated a claim on the basis of aider or  
28 abettor liability. As noted above, the § 1962(c) claim against Pachl  
fails under the Court’s interpretation of the recent *Reves* decision.

*Baumer*, 8 F.3d at 1347 (footnotes omitted).

1 private cause of action for aiding and abetting is available. Congress has used the terms “aid” and  
 2 “abet” on multiple occasions, which led the Court in *Central Bank* to conclude that Congress  
 3 knows how to impose aiding and abetting liability when it wants to. *See also Digital Realty Trust,*  
 4 *Inc. v. Somers*, --- S. Ct. ----, 2018 WL 987345, at \*9 (Feb. 21, 2018) (“When Congress includes  
 5 particular language in one section of a statute but omits it in another, this Court presumes that  
 6 Congress intended a difference in meaning.”) (quoting *Loughrin v. United States*, 134 S. Ct. 2384,  
 7 2390 (2014)). With respect to the civil RICO statute, Congress did not use those terms. And  
 8 Plaintiffs have not cited to any evidence of legislative intent that would support deviation from the  
 9 text. The Court therefore concludes that a private cause of action for aiding and abetting a RICO  
 10 violation is unavailable and grants the Bosch Defendants’ motion to dismiss Plaintiffs’ RICO  
 11 claim for aiding and abetting liability.

12 **IV. CLAIMS FOR COMMON LAW FRAUDULENT CONCEALMENT AND**  
 13 **VIOLATION OF CONSUMER PROTECTION STATUTES**

14 A. Fraud on Consumers

15 While Plaintiffs’ RICO claim focuses on fraud on government regulators, Plaintiffs have  
 16 also brought independent claims targeting fraud on consumers. These claims – specifically, for  
 17 common law fraudulent concealment and violation of consumer protection statutes – are all  
 18 predicated on state law.

19 1. Factual Predicate for Fraud-on-Consumer Claims

20 As an initial matter, the Court must pinpoint what the factual predicate is for the fraud-on-  
 21 consumer claims. There are three basic factual allegations in the FAC:

22 (1) Each named plaintiff decided to buy a Class Vehicle “based in part on FCA [U.S.’s]  
 23 representations that [the truck] was an ‘EcoDiesel’ vehicle (i.e., reduced emissions).”  
 24 FAC ¶ 34 *et seq.* Although the complaint is not the model of clarity, it appears that the  
 25 “EcoDiesel” logo – using a leaf and green coloring – was displayed on each Class  
 26 Vehicle. *See* FAC ¶ 145. Defendants do not dispute the display of the “EcoDiesel”  
 27 logo on the Class Vehicles.

28 (2) Each named plaintiff decided to buy a Class Vehicle based in part on the vehicle’s

1           advertised fuel economy. *See* FAC ¶ 34 *et seq.*

2           (3) Each named plaintiff was not aware that the Class Vehicle was equipped with a “defeat  
3           device.” *See* FAC ¶ 34 *et seq.*

4           With respect to (1), this is an allegation of an affirmative misrepresentation, and not a  
5           fraudulent omission or concealment. Accordingly, to the extent Plaintiffs have characterized their  
6           fraud-on-consumer claims solely as fraudulent concealment claims, *see, e.g.*, FAC ¶ 276 *et seq.*,  
7           that appears to be mistaken. This mistake, however, is inconsequential with respect to the Court’s  
8           ability to adjudicate this claim. Defendants recognize that Plaintiffs have an affirmative  
9           misrepresentation theory based on the EcoDiesel logo displayed on the Class Vehicles and  
10          attacked that theory in the pending motions.<sup>10</sup>

11          As for (2), this allegation does present a fraudulent concealment theory – *i.e.*, Defendants  
12          failed to disclose that the advertised fuel economy could be achieved only because “the emission  
13          treatment technology de-activated under real-world driving conditions.” FAC ¶ 278; *see also*  
14          FAC ¶ 34 *et seq.* (alleging that each named plaintiff “did not know that the Class Vehicle could  
15          perform as advertised only by emitting NOx at levels that are greater than advertised and above  
16          legal limits”). The problem for Plaintiffs is that they have failed to identify what advertising they  
17          saw that promised certain fuel economy or performance, a predicate to Plaintiffs’ specific  
18          concealment theory in this case. *See* Fed. R. Civ. P. 9(b) (providing that “a party must state with

19  
20  
21          <sup>10</sup> The Court notes that, in *Duramax*, the plaintiffs (who are represented by some of the same  
22          counsel who represent Plaintiffs here) “den[ie]d that they were advancing any fraud claims  
23          premised on affirmative representations.” *Duramax*, 2018 U.S. Dist. LEXIS 26543, at \*31-32.

24                               Plaintiffs acknowledge that the consolidated amended complaint  
25                               includes an extended discussion of various advertisements and press  
26                               release which GM issued regarding vehicles equipped with the  
27                               Duramax engine. Those allegations, Plaintiffs explain, are not  
28                               meant to buttress affirmative misrepresentation claims. They are  
29                               meant “to show that Defendants’ omissions were material for  
30                               purposes of claims under consumer protection statutes and RICO.”  
31                               To repeat: “The relevance of those promises is GM’s  
32                               acknowledgment that low emissions are material . . . to a reasonable  
33                               consumer.”

34          *Id.* at \*32-33. In the instant case, Plaintiffs have not – at least not expressly or otherwise clearly –  
35          made a disavowal of an affirmative misrepresentation theory. Of course, they are free to do so.



1 particularity the circumstances constituting fraud or mistake”); *Kearns v. Ford Motor Co.*, 567  
 2 F.3d 1120, 1124 (9th Cir. 2009) (noting that “Rule 9(b) demands that the circumstances  
 3 constituting the alleged fraud be specific enough to give defendants notice of the particular  
 4 misconduct . . . so that they can defend against the charge and not just deny that they have done  
 5 anything wrong”; adding that “[a]llegations of fraud must be accompanied by the who, what,  
 6 when, where, and how of the misconduct charged”) (internal quotation marks omitted). While the  
 7 FAC does refer to FCA U.S.’s website and some blogs operated by a FCA entity, *see, e.g.*, FAC ¶¶  
 8 148-49, 151-55, there is no allegation that any named plaintiff actually saw the website or blogs,  
 9 or any promises contained therein, regarding fuel economy or performance. Nor is there any  
 10 allegation about fuel economy being displayed on the Class Vehicles. *See, e.g., Opperman v.*  
 11 *Path, Inc.*, 84 F. Supp. 3d 962, 984 (N.D. Cal. 2015) (Tigar, J.) (noting that, under California law,  
 12 a claim for fraud is viable where the defendant makes a partial representation that is misleading  
 13 because some other material fact has not been disclosed; but “[a] partial-representation claim  
 14 requires [a plaintiff] to plead reliance on at least some misleading partial representations” – *i.e.*,  
 15 the plaintiff “saw or heard these partial representations and [was] misled by them in such a way  
 16 that [the defendant] should have fully disclosed related information”). Accordingly, for purposes  
 17 of this opinion, the Court cannot consider the factual allegation in (2) as a basis for Plaintiffs’  
 18 fraud claims; it is not sufficiently specific in identifying the advertisements which contained the  
 19 misleading partial representations. Plaintiffs, however, have leave to amend to correct this  
 20 specific deficiency if they can do so in good faith.<sup>11</sup> *See* Fed. R. Civ. P. 11.

21 Finally, with respect to (3), this is another fraudulent concealment theory – *i.e.*, Defendants  
 22 failed to disclose that the Class Vehicles contained defeat devices. Furthermore, this is a  
 23 concealment theory that the Court may consider for purposes of this opinion because this theory –  
 24 unlike the fraudulent concealment theory in (2) above – is not dependent on any advertising by  
 25

26 \_\_\_\_\_  
 27 <sup>11</sup> Starting with ¶ 145 of the FAC, Plaintiffs make various allegations regarding a misleading  
 28 advertising campaign conducted by FCA U.S. However, there are no allegations that any named  
 plaintiff actually viewed any of the identified advertising, with the exception of the EcoDiesel  
 logo that physically appears on the Class Vehicles. Plaintiffs have leave to amend here as well if  
 they can allege in good faith that any such advertising was viewed by a named plaintiff.

1 Defendants. In other words, this is a straight omission/concealment theory. *See, e.g., Daniel v.*  
 2 *Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (in a case where plaintiffs claimed  
 3 fraudulent omission under California law based on car manufacturer’s failure to disclose a rear  
 4 suspension defect, rejecting manufacturer’s contention that plaintiffs could not establish reliance  
 5 because the evidence showed that they did not view any advertising materials prior to purchase;  
 6 noting that plaintiffs offered evidence that they would have been aware of the defect, if disclosed,  
 7 by other means, *i.e.*, through the manufacturer’s authorized dealerships).

8 2. Mr. Marchionne

9 Having identified the factual predicate for the fraud-on-consumer claims, the Court may  
 10 now turn to Mr. Marchionne’s argument that the claims asserted against him should be dismissed  
 11 because Plaintiffs have failed to allege that he engaged in any fraud himself. Mr. Marchionne  
 12 argues, for example, that “Plaintiffs cite to only two statements by [him], both of which express  
 13 intentions to expand FCA operations[;] [t]hose statements are not alleged to have been false or  
 14 misleading in any way.” FCA/VM Mot. at 54.

15 While Mr. Marchionne’s position is not without some merit, *see* FAC ¶ 18 (alleging in  
 16 conclusory terms that “Mr. Marchionne has made numerous public statements on behalf of [the  
 17 FCA entities] concerning the Class Vehicles, their EcoDiesel® engines, and their emissions and  
 18 performance characteristics”), there is enough in the FAC to withstand the 12(b)(6) challenge.  
 19 Plaintiffs’ theory is not that Mr. Marchionne himself made misrepresentations about EcoDiesel but  
 20 rather that he “signed off” on the FCA companies’ statements about EcoDiesel. *Cf., e.g.,* FAC ¶  
 21 261 (in RICO claim, alleging that “FCA [US], *under the direction and control of [FCA N.V.] and*  
 22 *[Mr.] Marchionne*, made misrepresentations about the Class Vehicles on their websites, YouTube,  
 23 and through ads online, all of which were intended to mislead regulators and the public about the  
 24 emission standards and other performance metrics”). In other words, Mr. Marchionne approved  
 25 of, or ratified, the use of the “EcoDiesel” logo on the Class Vehicles, and with knowledge of the  
 26 emissions problem. *See, e.g., Gassis v. Corkery*, No. 8868-VCG, 2014 WL 3565418, at \*4 (Del.  
 27 Ch. Ct. July 21, 2014) (Delaware) (noting that, under the personal participation doctrine, “a  
 28 corporate officer may be held liable in tort only where she is ‘actively involved [in the commission

1 of the tort] in that [she] directed, ordered, ratified, approved or consented to the tort”);  
 2 *Townsend, Inc. v. Beaupre*, 47 Mass. App. Ct. 747, 751 (1999) (Massachusetts) (stating that “[a]  
 3 corporate officer is personally liable for a tort committed by the corporation that employs him, if  
 4 he personally participated in the tort by, for example, directing, controlling, approving, or ratifying  
 5 the act that injured the aggrieved party”); *Huffman v. Poore*, 6 Neb. App. 43, 53 (1997)  
 6 (Nebraska) (stating that, “[o]rdinarily, corporate directors are personally liable, independently of  
 7 statute, for fraud or for false and fraudulent representations which they or their agents made within  
 8 the scope of their employment, or for those which were approved or ratified”; adding that “[a]n  
 9 officer of a corporation who takes part in the commission of a tort by the corporation is personally  
 10 liable for resulting injuries”).

11 To the extent Mr. Marchionne argues that there are insufficient allegations of approval or  
 12 ratification on his part, the Court does not agree. It is a reasonable inference that Mr. Marchionne  
 13 approved or ratified use of the logo because there are allegations in the FAC that he heavily  
 14 promoted diesel within the FCA entities, particularly with respect to the Jeep and Ram brands.  
 15 See FAC ¶ 102 *et seq.*; see also Part III.B.1.a.iv, *supra* (discussing knowing participation in  
 16 scheme to defraud). Mr. Marchionne plausibly would have maintained oversight as to what was  
 17 happening with the diesel engines, including but not limited to the “EcoDiesel” brand and the use  
 18 of defeat devices which were instrumental in passing emissions tests.

19 Finally, even if Mr. Marchionne did not approve or ratify any misrepresentation by the  
 20 FCA companies, Plaintiffs also have, as discussed above, a fraudulent concealment theory.  
 21 Similar to above, given the role that Mr. Marchionne played vis-à-vis diesel engines, it is a  
 22 reasonable inference that he was directly involved with, and therefore knowledgeable about, what  
 23 was happening with the EcoDiesel engines and FCA’s concealment of the defeat devices. The  
 24 Court therefore rejects this challenge raised by Mr. Marchionne.

### 25 3. Bosch Defendants

26 The Bosch Defendants make an argument similar to that made by Mr. Marchionne; that is,  
 27 the Bosch Defendants argue for dismissal on the ground that Plaintiffs have failed to allege that  
 28 the Bosch Defendants made any misrepresentations to the public.

1           The Bosch Defendants have a legitimate argument to the extent Plaintiffs are making a  
2 claim for an affirmative misrepresentation. Notably, the FAC does not contain any allegation that  
3 the Bosch Defendants had a hand in branding the Class Vehicles “EcoDiesel.” In addition, while  
4 there are allegations in the FAC about, *e.g.*, Bosch press releases and promotional events, *see, e.g.*,  
5 FAC ¶¶ 9, 115, 122, 142-43, there is no allegation that any of the named plaintiffs saw the press  
6 releases or participated in the promotional events.

7           That being said, as discussed above, Plaintiffs are not simply relying on an affirmative  
8 misrepresentation theory; rather, they also have a fraudulent concealment theory. The fraudulent  
9 concealment theory is not dependent on any advertising by any defendant, including but not  
10 limited to the Bosch Defendants. As noted in the above discussion regarding RICO liability, *see*  
11 Part III.B.1.a.i, *supra* (discussing knowing participation in scheme to defraud), the FAC alleges  
12 that the Bosch Defendants played a substantial and knowing role in devising and installing the  
13 defeat devices, and concealed that fact from the government and consumers. The Court therefore  
14 rejects the Bosch Defendants’ argument that no claim of concealment is possible absent any  
15 particular advertisement being seen by Plaintiffs.

16           To the extent the Bosch Defendants contend that Plaintiffs have failed to distinguish  
17 between the two Bosch companies – *i.e.*, pinpoint what *each* company’s alleged misconduct was  
18 vis-à-vis the alleged concealment – as discussed above, *see* Part III.B.1.a, *supra*, the Court is not  
19 persuaded. While, in general, “lumping” of defendants is not permissible, Plaintiffs have made  
20 allegations explaining why it is appropriate in the instant case, at least at this stage of the  
21 proceedings. That is, at this early stage in the proceedings, Plaintiffs have essentially been forced  
22 to lump the Bosch companies because the Bosch Defendants have chosen to operate a specific  
23 way, grouping business sectors by function (instead of location), such that plausibly both Bosch  
24 companies played a role with respect to the EDC Unit 17 that was used in Class Vehicles.

25       B.     Preemption

26           Defendants contend that Plaintiffs’ fraud-on-consumer claims, whether based on an  
27 affirmative representation theory (*i.e.*, misleadingly branding the Class Vehicles “EcoDiesel”) or a  
28 fraudulent concealment theory (*i.e.*, failing to disclose the defeat devices in the Class Vehicles),

1 are preempted. Defendants invoke all three species of preemption, namely, express, field, and  
 2 conflict preemption. For each kind of preemption, “[t]he purpose of Congress is the ultimate  
 3 touchstone.” *Nat’l Fed’n of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 724 (9th Cir. 2016).

4 1. Express Preemption

5 “[E]xpress preemption[] arises when the text of a federal statute explicitly manifests  
 6 Congress’s intent to displace state law.” *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th  
 7 Cir. 2013).

8 When confronted with a preemption statute, a court must “‘identify the domain expressly  
 9 pre-empted by that language.’ [A court] use[s] the text of the provision, the surrounding statutory  
 10 framework, and Congress’s stated purposes in enacting the statute to determine the proper scope  
 11 of an express preemption provision.” *Chae v. SLM Corp.*, 593 F.3d 936, 942 (9th Cir. 2010).

12 Where a statute’s language is plain, that is largely where the inquiry both begins and ends. As the  
 13 Supreme Court instructed in *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016),  
 14 evaluation of a “pre-emption provision begins with the language of the statute itself, and that is  
 15 also where the inquiry should end [where] ‘the statute’s language is plain’; “because the statute  
 16 contains an express pre-emption clause, we do not invoke any presumption against pre-emption  
 17 but instead focus on the plain wording of the clause, which necessarily contains the best evidence  
 18 of Congress’ pre-emptive intent.” *Id.* at 1946 (internal quotation marks omitted). However,  
 19 “‘when the text of a pre-emption clause is susceptible of more than one plausible reading, courts  
 20 ordinarily “accept the reading that disfavors preemption.”” *McClellan v. I-Flow Corp.*, 776 F.3d  
 21 1035, 1039 (9th Cir. 2015); *see also Bates v. Dow Agrosiences L.L.C.*, 544 U.S. 431, 449 (2005)  
 22 (stating that, “[e]ven if Dow had offered us a plausible alternative reading of § 136v(b) – indeed,  
 23 even if its alternative were just as plausible as our reading of that text – we would nevertheless  
 24 have a duty to accept the reading that disfavors pre-emption[;] ‘[b]ecause the States are  
 25 independent sovereigns in our federal system, we have long presumed that Congress does not  
 26 cavalierly pre-empt state-law causes of action”).

27 In the instant case, Defendants argue express preemption of the fraud-on-consumer claims  
 28 based on § 209(a) of the CAA. That section provides in relevant part as follows: “No State or any

1 political subdivision thereof shall adopt or attempt to enforce any standard relating to the control  
 2 of emissions from new motor vehicles or new motor vehicle engines subject to this part [42 USCS  
 3 § 7521 *et seq.*]” 42 U.S.C. § 7543(a). Defendants focus on the phrase “attempt to enforce.”  
 4 According to Defendants, Plaintiffs are trying, through their fraud-on-consumer claims, to enforce  
 5 emission control standards. Defendants underscore that “[state] regulation can be as effectively  
 6 exerted through an award of damages as through some form of preventive relief. The obligation to  
 7 pay compensation can be, indeed is designed to be, a potent method of governing conduct and  
 8 controlling policy.” *In re Detroit Diesel Corp. v. AG of New York*, 269 A.D.2d 1 (N.Y. Supreme  
 9 Ct., App. Div. 2000) (internal quotation marks and emphasis omitted). In short, Defendants argue  
 10 that an action for damages for violation of federal emissions standards is effectively an attempt to  
 11 enforce such standards, and therefore is preempted.

12 In assessing this argument, the Court acknowledges first that § 209(a) does preempt  
 13 “attempt[s] to enforce.” 42 U.S.C. § 7543(a). The Court further notes that the “attempt to  
 14 enforce” language seems to have been included because of legislative concern that that “the  
 15 problems faced by the automobile manufacturing industry arising out of identical Federal and  
 16 State standards, separately administered, would be difficult for the industry to meet since different  
 17 administration could easily lead to different answers to identical questions.” H. R. Rep. No. 728,  
 18 90th Cong., 1st Sess., 22 (1967); *cf. Motor & Equip. Mfrs. Ass’n. v. Env’tl. Prot. Agency*, 627 F.2d  
 19 1095, 1109 (D.C. Cir. 1979) (noting that “[t]he debate [over including an express preemption  
 20 provision] sharpened the differences between the states, which wanted to preserve their traditional  
 21 role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic  
 22 disruption latent in having to meet fifty-one separate sets of emissions control requirements”).  
 23 While the effect of divergent results dependent upon variation in state law would be more  
 24 pronounced where states enact varying substantive pollution standards, it appears that Congress  
 25 believed variations in enforcement among states, even of a uniform pollution standard, could  
 26 impose intolerable burdens on manufacturers.

27 Second, the Court takes into consideration that, while § 209(a) uses the broad phrase  
 28 “relating to,” the Supreme Court has given guidance as to what is meant by a standard relating to

1 emission control standards. More specifically, in *Engine Manufacturers Association v. South*  
 2 *Coast Air Quality Management District*, 541 U.S. 246 (2004) [hereinafter, *EMA*], the Supreme  
 3 Court noted as follows:

4 Today, as in 1967 when § 209(a) became law, “standard” is defined  
 5 as that which “is established by authority, custom, or general  
 6 consent, as a model or example; criterion; test.” The criteria  
 7 referred to in § 209(a) relate to the emission characteristics of a  
 8 vehicle or engine. To meet them the vehicle must not emit more  
 9 than a certain amount of a given pollutant, must be equipped with a  
 10 certain type of pollution-control device, or must have some other  
 design feature related to the control of emissions. This  
 interpretation is consistent with the use of “standard” throughout  
 Title II of the CAA (which governs emissions from moving sources)  
 to denote requirements such as numerical emission levels with  
 which vehicles or engines must comply or emission-control  
 technology with which they must be equipped.

11 *Id.* at 252-53.

12 Furthermore, in *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control*  
 13 *District*, 644 F.3d 934 (9th Cir. 2011), the Ninth Circuit relied on *EMA* to caution against an  
 14 overly broad understanding of the phrase “relating to,” albeit as used in § 209(e)(2) instead of §  
 15 209(a). Section 209(e)(2) essentially bars states and political subdivisions thereof from adopting  
 16 and enforcing “standards and other requirements relating to the control of emissions from”  
 17 nonroad engines. *See id.* at 939 (emphasis omitted). The plaintiff in *Jensen* was a for-profit  
 18 agricultural corporation that owned and operated diesel engines, in particular, to provide power to  
 19 irrigation pumps on its farms. It filed suit against the Monterey Bay Unified Air Pollution Control  
 20 District after the District adopted and began to enforce rules regulating diesel-powered engines.  
 21 The rules included ones that required owners and operators to register and pay fees for certain  
 22 diesel engines used in agricultural operations. The plaintiff asserted that these rules were  
 23 preempted by the CAA because, even though they did not directly control emissions, they were  
 24 still *related to* emissions control. The Ninth Circuit disagreed, stating as follows:

25 We find this argument unconvincing. *Jensen* specifically argues that  
 26 because the legislative mission of the District is to “control . . . air  
 27 pollution from all sources [other than motor vehicles],” Rules 220  
 28 and 310 necessarily relate to emissions standards. Under *Jensen*’s  
 logic, *every* rule promulgated by the District relating to nonroad  
 engines and vehicles would be preempted by § 209(e). Such a broad  
 reading of the “relating to” clause would render inconsequential the

1 analysis contained in [EMA], which clarified the breadth of the word  
 2 “standard.” Moreover, the Court did not suggest in [EMA] that the  
 3 statutory mission of the governmental authority has a bearing on  
 whether its air pollution regulations are federally preempted. We  
 therefore decline to embrace Jensen's expansive interpretation of the  
 term “relating to.”

4 *Id.* at 941 (emphasis in original). Given the Ninth Circuit’s holding in *Jensen*, this Court likewise  
 5 does not apply an overly broad reading of the phrase “relating to” as used in § 209(a).

6 Bearing in mind the above, the Court holds that the fraud-on-consumer claims herein are  
 7 not expressly preempted by the CAA.

8 a. Affirmative Misrepresentation Theory

9 The Court addresses first Plaintiffs’ fraud claims based on an affirmative misrepresentation  
 10 theory. As discussed above, the affirmative misrepresentation theory is based on the branding of  
 11 the Class Vehicles as “EcoDiesel,” a logo displayed on the Class Vehicles themselves. According  
 12 to Plaintiffs, “EcoDiesel” conveys that the Class Vehicles are environmentally friendly (*e.g.*,  
 13 reduced emissions) when in fact they are not.

14 The Court holds that the affirmative misrepresentation claims are not an attempt to enforce  
 15 an emissions control standard, and thus not subject to CAA preemption. In reaching this  
 16 conclusion, the Court finds the reasoning of the state court in *In re Volkswagen “Clean Diesel”*  
 17 *Litigation*, 94 Va. Cir. 189 (2016) [hereinafter *VW Va.*], highly persuasive.

18 In *VW Va.*, Volkswagen was sued based on factual allegations similar to those in the  
 19 instant case, *i.e.*, a failure to disclose a defeat device. The state court noted that the CAA  
 20 preemption provision would be a bar to a claim only “if the legal duty that is the predicate of the  
 21 [claim] ‘relates to’ enforcement of new motor vehicle emission standards.” *Id.* at 195. The court  
 22 then held that, with respect to the plaintiffs’ fraud and consumer protection claims, there was no  
 23 CAA preemption.

24 On their face, Plaintiffs’ fraud and [consumer protection] claims do  
 25 not rely on emissions violations or enforcement to make out their  
 26 claims. Instead Plaintiffs’ claims rely upon allegedly false promises  
 27 of compliance, efficiency, and new technology; or concealment of  
 the fact that compliance testing was being circumvented. Although  
 Plaintiffs *reference* the EPA violation notice in support of their  
 28 allegations of falsehood and concealment, their claims ultimately  
 rest on and seek remediation of injuries arising from  
*misrepresentations and concealment* of material facts made to (or



1 hidden from) the Plaintiffs about the compliance, efficiency, and  
technology of their vehicles. . . .

2 Plaintiffs' lack of reliance on emissions standards is further revealed  
3 when one considers whether Plaintiffs even need to assert lack of  
4 compliance in raising their fraud and [consumer protection] claims.  
5 Plaintiffs point to advertising materials and news releases promising  
6 not only compliance with regulations, but also describing new  
7 technologies developed by [VW] and offering improved fuel  
8 economy. Plaintiffs also point to [VW's] public statement that it  
9 had been "dishonest" to consumers in such advertising. As such,  
10 and although emissions compliance or lack thereof *may be further*  
11 *proof of deceit*, it is *the deceit about compliance*, rather than the  
12 need to enforce compliance, that is the gravamen of Plaintiffs'  
13 claims.

14 *Id.* at 196-97 (emphasis added). *VW Va.* thus rested on two points. First, the gravamen of the  
15 complaint was misrepresentation and concealment, not the violation itself of federal regulations.  
16 Second, as a factual matter, the state claims could be established independent of any federal  
17 regulatory standard, even if, as a matter of proof, evidence of regulatory violations would  
18 strengthen the case. *See also Counts v. GM, LLC*, 237 F. Supp. 3d 572, 591 & n.8 (E.D. Mich.  
19 2017) (stating that "the gravamen of Plaintiffs' claims, like in [*VW Va.*], focus on 'the deceit about  
20 compliance, rather than the need to enforce compliance'"; adding that, even though "[p]roof of  
21 noncompliance strengthens Plaintiffs' claims, . . . it is not required for success," *i.e.*, "Plaintiffs  
22 can prove that GM misrepresented the level of emissions produced by the Cruze without proving  
23 regulatory noncompliance"); *cf. VW Wyo.*, 264 F. Supp. 3d at 1056 (noting that "Wyoming is not  
24 attempting to hold Volkswagen liable for *deceptive statements made* to the State's residents; the  
25 State is instead attempting to hold Volkswagen liable for *using* a defeat device in its vehicles" and  
26 thus there was preemption in the case under consideration) (emphasis added).

27 The reasoning in *VW Va.* is equally applicable in the case at bar. Here, as in *VW Va.*,  
28 the wrongful conduct being targeted by Plaintiffs is not Defendants' failure to comply with federal  
law (the CAA), but rather Defendants' *deceit* about the vehicles' emissions. In other words, the  
legal duty underlying Plaintiffs' affirmative misrepresentation claims is not a federal law  
requirement but rather a state tort law prohibiting deception. Furthermore, Plaintiffs may establish  
their affirmative misrepresentation claims without proving a violation of the CAA. For example,  
Plaintiffs could prove that the Class Vehicles are not environmentally friendly (contrary to the

1 “EcoDiesel” label) by offering evidence as to how much NOx is spewed into the air when the  
 2 vehicles are in regular use and then offering expert testimony as to how that amount of NOx poses  
 3 risks to health and safety. While Plaintiffs *could* make reference to emission control standards  
 4 under the CAA to strengthen their case (*e.g.*, “[w]hen the emission controls are de-activated on the  
 5 road, the Class Vehicles emit up to 20 times the legal limits of NOx,” FAC ¶ 123), Plaintiffs might  
 6 nonetheless prove their affirmative misrepresentation claims *without* proof of regulatory  
 7 noncompliance. *Cf. Duramax*, 2018 U.S. Dist. LEXIS 26543, at \*43 (noting that “it is  
 8 conceivably possible that Defendants could simultaneously comply with EPA regulations while  
 9 still concealing material information from consumers”; adding that there is a “significant market  
 10 for environmentally friendly vehicles – which are designed to emit pollution from below the  
 11 regulatory maximums”).

12 The Ninth Circuit’s *McClellan* decision, though a conflict preemption case, is in accord  
 13 with *VW Va*. In *McClellan*, the plaintiff sued a medical device manufacturer. Medical devices  
 14 such as the one at issue in *McClellan* were regulated under the Medical Device Amendments of  
 15 1976 (MDA) to the Food, Drug & Cosmetics Act (FDCA). “The MDA requires that  
 16 manufacturers provide the U.S. Food and Drug Administration with ‘reasonable assurance of the  
 17 safety and effectiveness’ of a device prior to marketing and sale.” *McClellan*, 776 F.3d at 1037-  
 18 38. The plaintiff in *McClellan*, however, did not sue the medical device manufacturer for any  
 19 violation of the MDA but rather for violations of state law only – namely, negligence and strict  
 20 products liability.

21 At trial, the plaintiff asked the court to give certain instructions, including instructions  
 22 telling the jury to consider statutes and regulations in determining reasonable care and instructions  
 23 related to federal law. The district court refused to give the instructions based on obstacle  
 24 preemption. *See id.* at 1039 (noting that obstacle preemption (a kind of conflict preemption)  
 25 arises “when state law stands as an obstacle to the accomplishment and execution of the full  
 26 purposes and objectives of Congress”) (internal quotation marks omitted). On appeal, the Ninth  
 27 Circuit disagreed.

28 The Ninth Circuit noted first that a presumption against preemption applied because “[t]he

1 regulation of medical devices prior to the MDA ‘was left largely to the States to supervise as they  
2 saw fit.’” *Id.* at 1040. The Ninth Circuit then acknowledged a Supreme Court case, *Buckman Co.*  
3 *v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001), which also involved a medical device and where  
4 conflict preemption was found, but explained that *Buckman* was distinguishable. While *Buckman*  
5 reflected that “Congress intended that the MDA be enforced exclusively by the Federal  
6 Government,” *McClellan*, 776 F.3d at 1040, the *Buckman* Court found conflict preemption only  
7 because the fraud claims at issue – asserting fraud on the FDA – “‘exist[ed] *solely* by virtue of the  
8 FDCA disclosure requirements.” *Id.* (emphasis in original). “[W]ere [the *Buckman*] plaintiffs to  
9 maintain their fraud-on-the-agency claims . . . , they would *not* be relying on traditional state tort  
10 law which had predated the federal enactments in question. On the contrary, the existence of these  
11 federal enactments is a critical element in their case.” *Id.* (emphasis added).

12 In contrast, in *McClellan*, the plaintiff’s claim for a negligent failure to warn “did not arise  
13 solely by virtue of the MDA.” In addition, there was “no suggestion that Congress intended to  
14 displace traditional tort law by making all policing of medical labels and warnings the exclusive  
15 province of the FDA.” *Id.* at 1040-41. Finally, the Ninth Circuit underscored that the plaintiff’s

16 requested instructions would not usurp the exclusive federal  
17 enforcement power over the MDA. The allegations at issue occur  
18 outside the context of the regulatory process, unlike in *Buckman*.  
19 Where the plaintiff in *Buckman* alleged that the defendant made  
20 fraudulent representations during the market approval process, to the  
21 FDA, *McClellan*’s requested instructions here have little to do with  
22 direct regulatory interaction with the FDA. *The appellees would*  
23 *have us conclude that any use of federal law to establish a standard*  
24 *of care is an attempt to enforce the underlying federal provisions,*  
25 *but we do not accept that proposition.*

26 *Id.* at 1041 (emphasis omitted and added).

27 As noted above, in the case at bar, Plaintiffs do not assert that violation of federal emission  
28 standards establishes *per se* their affirmative misrepresentation claims; rather, the gravamen of the  
affirmative misrepresentation claims is that Defendants deceived consumers. Thus, the fraud  
claims here do not arise “solely by virtue of” noncompliance with FAA emissions rules; they arise  
out of the alleged deceit practiced on consumers by Defendants. Moreover, the affirmative  
misrepresentation claims, as in *VW Va.*, may be established even if there is no violation of federal

1 regulations.

2 Defendants' reliance on *Detroit Diesel*, 269 A.D.2d at 1, and *Jackson v. GMC*, 770 F.  
3 Supp. 2d 570 (S.D.N.Y. 2011), is unavailing. *Detroit Diesel* is materially distinguishable. There,  
4 the attorney general ("AG") of New York issued subpoenas to car and car parts manufacturers.  
5 The subpoenas were issued on the same day that the federal government filed a complaint against  
6 the manufacturers, as well as consent decrees resolving the case. The federal government had  
7 taken the position that the manufacturers used defeat devices in the cars at issue, which used  
8 heavy-duty diesel engines. The New York AG's subpoena sought, *inter alia*,

9 all testing data generated by each manufacturer in connection with  
10 its compliance with Federal emissions standards; all documents  
11 provided to the EPA with respect to that agency's recently  
12 concluded investigation of electronic engine controls for [heavy-  
13 duty diesel engines]; all correspondence between petitioners and  
14 either the EPA or the Department of Justice relating to the Federal  
15 investigation and the negotiations which led to the execution of the  
16 consent decrees; and all submissions by petitioners in response to  
17 EPA's order to show cause concerning their compliance with the  
18 Federal emissions standards.

15 *Detroit Diesel*, 269 A.D.2d at 4. The AG indicated that documents obtained through the subpoena  
16 would be used to support New York's public comments regarding the federal consent decrees or to  
17 support a motion to intervene in federal court. *See id.*

18 The manufacturers moved to quash the subpoenas, invoking the CAA's preemption  
19 provision (*i.e.*, § 209(a)). The state court agreed with the manufacturers that the AG was barred  
20 from issuing and enforcing the subpoenas because the CAA preemption provision stated that  
21 "[n]o state . . . shall adopt *or attempt to enforce* any standard relating to the control of emissions  
22 from new motor vehicles." *Id.* at 10 (emphasis in original). Given the AG's indication that it  
23 would use subpoenaed documents to comment on the federal consent decrees or intervene in  
24 federal court, this ruling was understandable. This can easily be characterized as a direct attempt  
25 to enforce the federal emissions standard. As the Court in *VW Va.* noted in distinguishing *Detroit*  
26 *Diesel*, the claims there "sought to recover for injuries from the alleged noncompliance itself, or  
27 alleged fraud based on statements or representations made to federal regulators," not deceptive  
28 representations made to consumers. *VW Va.*, 94 Va. Cir. at 196; *see also Counts*, 237 F. Supp. 3d

1 at 591.

2 To be sure, the state court in *Detroit Diesel* went on to find that there was also preemption  
3 of common law claims (not just the subpoenas). Apparently, the AG invoked the prospect of  
4 common law claims in support of his actions. According to the AG, such common law actions for  
5 damages (including fraud and breach of warranty) would not be preempted by the CAA. *See id.* at  
6 5, 10-11. The state court disagreed, rejecting the AG’s position that “Congress, in enacting the  
7 CAA, simply sought to preempt the State enforcement of numerical emission standards  
8 and/therefore, the States remain free to enforce statutory and/or common-law requirements other  
9 than emission standards.” *Id.* at 10-11. In support of this ruling, the state court pointed to  
10 Supreme Court authority noting that “[state] regulation can be as effectively exerted through an  
11 award of damages as through some form of preventive relief. The obligation to pay compensation  
12 can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”  
13 *Id.* at 11 (internal quotation marks and emphasis omitted). The court continued:

14 In pursuing the common-law claims, the Attorney General is not, as  
15 he suggests, attempting to enforce an existing State standard or  
16 pursue a simple common-law claim but, rather, is seeking to use this  
17 State’s common law to penalize the manufacturers for producing  
18 engines *which failed to comply with the Federal standards  
promulgated pursuant to the CAA.* In doing so, the Attorney  
19 General is attempting to enforce those standards[.]

20 *id.* (emphasis added), and so CAA preemption applied.

21 The state court’s holding on the common law claims, however, should be taken in context.  
22 The state court’s ruling on the common law claims appears to have been informed by the AG’s  
23 issuance of subpoenas. That is, the state court essentially indicated that it would not allow form to  
24 be elevated over substance; even though the AG was invoking common law claims, the reality – at  
25 bottom – was that the AG was trying to enforce federal emissions standards, *i.e.*, to penalize the  
26 defendants for not complying with such standards. Again, this appeared to be an attempt to  
27 directly enforce federal standards.

28 To the extent *Detroit Diesel* went further than this – *e.g.*, holding that there was  
preemption simply because “the predicate acts underlying the claim[s] [for, *e.g.*, fraud] involve  
alleged violations of Federal emissions standards,” *id.* at 12 (stating that “liability would

1 necessarily be based on the scope of [federal emissions] standards”) – the Court does not find the  
2 case persuasive authority for two reasons.

3 First, as noted above, Plaintiffs in the instant case need not prove noncompliance with the  
4 CAA to prove their affirmative misrepresentation claims.

5 Second, even if noncompliance with the CAA due to the emissions defect were essential to  
6 Plaintiffs’ fraud claim, as noted above, the gravamen of their complaint is not failure to comply  
7 with the CAA but rather deceit about compliance. Noncompliance alone would not establish a  
8 common law fraud claim; deceit must be shown. In this regard, the Court finds *VW Va.* more  
9 persuasive than *Detroit Diesel*.

10 The Court also finds the *Jackson* case cited by Defendants unpersuasive. There, the  
11 plaintiffs were employees of the New York Transit Authority (*e.g.*, employed as bus drivers,  
12 mechanics, etc.). They sued manufacturers of urban transit buses and diesel engines, claiming  
13 injury as a result of their ingestion of harmful diesel exhaust fumes. The plaintiffs’ claims  
14 included claims for negligence and strict product liability. According to the plaintiffs, the  
15 defendants were negligent because, *e.g.*, the vehicles did not meet emissions standards of the  
16 CAA; also, with respect to strict product liability, the design of the buses violated CAA emissions  
17 standards.

18 The *Jackson* court held that the plaintiffs’ claims were preempted by the CAA. Like the  
19 *Detroit Diesel* court, the *Jackson* court focused on the “attempt to enforce” language in the CAA  
20 preemption provision (§ 209(a)): “As ‘it is the essence of the common law to *enforce* duties . . . ,’  
21 it is clear that a state common law action that questions whether a defendant complied with  
22 standards promulgated under the CAA is an example of a state attempting to enforce the CAA,  
23 and is therefore subject to preemption.” *Jackson*, 770 F. Supp. 2d at 575 (emphasis in original).

24 The court added that the CAA preemption provision had language similar to that in the  
25 Airline Deregulation Act of 1978.

26 Under the ADA’s preemption provision, states are expressly  
27 preempted from “enact[ing] or enforc[ing] a law, regulation, or other  
28 provision having the force and effect of law related to a price, route,  
or service of an air carrier . . . .” In *Morales v. Trans World  
Airlines*, 504 U.S. 374, 383-84 (1992), the Supreme Court held that,

1 as a result of such language, “[s]tate enforcement actions having a  
 2 connection with or reference to airline ‘rates, routes, or services’ are  
 3 preempted,” and the Second Circuit has held that state common law  
 4 tort actions come within the meaning of this rule. As a result, by  
 analogy to the ADA’s preemption provision, § 209(a)’s language  
 unambiguously and expressly preempts state common law tort  
 actions, provided that they “relate to” the control of emissions.

5 *Id.* at 576. Finally, the *Jackson* court took note of the *Detroit Diesel* court’s ruling on preemption  
 6 of common law claims. *See id.*

7 Similar to above, *Jackson* is distinguishable from the instant case. In *Jackson*, the  
 8 common law claim was based on injury resulting from noncompliance with federal emissions  
 9 standard. In contrast, in the instant case, the injury from the misrepresentation claims is based on  
 10 the deceptive act of Defendants, not the noncompliance with federal emissions standards *per se* –  
 11 the alleged injury flows not directly from the violation of the CAA, but from Defendants’ deceit.  
 12 Again, *VW Va.*’s analysis in this regard distinguishing *Jackson* is persuasive. *See VW Va.*, 94 Va.  
 13 Cir. at 196 (noting that the plaintiffs in *Jackson*, as well as *Detroit Diesel*, “sought to recover for  
 14 injuries from the alleged noncompliance itself, or alleged fraud based on statements or  
 15 representations made to federal regulators”).

16 Furthermore, the only new point added by the *Jackson* court was that the CAA could be  
 17 analogized to the ADA, as both statutes’ preemption provisions referred to no state enforcement.  
 18 But the CAA is not the ADA; a court must look not only to the text of a provision but also its  
 19 “surrounding statutory framework[] and Congress’s stated purposes in enacting the statute to  
 20 determine the proper scope of an express preemption provision.” *Chae*, 593 F.3d at 942; *see also*  
 21 *Medtronic*, 518 U.S. at 485 (stating that interpretation of statutory “language does not occur in a  
 22 contextual vacuum”). Congress’s findings and declaration of purpose for the CAA highlighted the  
 23 importance of state action in controlling air pollution. For example:

- 24 • “The Congress finds . . . that air pollution prevention . . . and air pollution control at its  
 25 source is the primary responsibility of States and local governments.” 42 U.S.C. §  
 26 7401(a)(3).
- 27 • “The purposes of this title are [*inter alia*] to protect and enhance the quality of the  
 28 Nation’s air resources so as to promote the public health and welfare and the

1 productive capacity of its population.” *Id.* § 7401(b)(1).

- 2 • “A primary goal of this Act is to encourage or otherwise promote reasonable Federal,  
3 State, and local governmental actions, consistent with the provisions of this Act, for  
4 pollution prevention.” *Id.* § 7401(c).

5 Notably, nothing in § 7401 of the CAA suggests that there was an intent on the part of Congress to  
6 displace traditional tort law simply because it might implicate air pollution control. *Cf.*

7 *McClellan*, 776 F.3d at 104 (stating that “there is no suggestion that Congress intended to displace  
8 traditional tort law by making all policing of medical labels and warnings the exclusive province  
9 of the FDA”). Indeed, the text of the CAA preemption provision is reasonably susceptible to a  
10 narrow reading – *i.e.*, that only direct state enforcement of federal emissions standards (wherein  
11 violation of federal standards is the *sine qua non* of the state claim) is barred, not state  
12 enforcement of other laws focused on other wrongful conduct which merely refer to federal  
13 emissions standards. *See McClellan*, 776 F.3d at 1039 (stating that, ““when the text of a pre-  
14 emption clause is susceptible of more than one plausible reading, courts ordinarily “accept the  
15 reading that disfavors preemption”). *Jackson* as well as *Detroit Diesel* did not appear to take this  
16 consideration into account in reaching their holdings.

17 Accordingly, the affirmative misrepresentation claims are not expressly preempted.

18 b. Fraudulent Concealment Theory

19 Likewise, the Court concludes that Defendants’ fraudulent concealment claims are not  
20 subject to express preemption. The fraud at issue here is Defendants’ concealment of the fact that  
21 the Class Vehicles had devices that permitted excessive pollution. Similar to above, there is no  
22 preemption here because the gravamen of Plaintiffs’ complaint still is Defendants’ deceit, not the  
23 violation *per se* of federal emissions standards, and thus this is not an attempt to enforce an  
24 emissions control standard.

25 In addition, there is no preemption here because Plaintiffs need not prove a violation of the  
26 CAA. For example, Plaintiffs need not prove that the devices that permit excessive pollution meet  
27 the formal definition of “defeat device” under the federal regulations. The regulations define  
28 “defeat device” as



United States District Court  
Northern District of California

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an auxiliary emission control device (AECD) that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless:

- (1) Such conditions are substantially included in the Federal emission test procedure;
- (2) The need for the AECD is justified in terms of protecting the vehicle against damage or accident;
- (3) The AECD does not go beyond the requirements of engine starting; or
- (4) The AECD applies only for emergency vehicles and the need is justified in terms of preventing the vehicle from losing speed, torque, or power due to abnormal conditions of the emission control system, or in terms of preventing such abnormal conditions from occurring, during operation related to emergency response. . . .

40 C.F.R. § 86.1803-01.

To prove their fraudulent concealment claims, it is not necessary that Plaintiffs establish that the “defeat devices” in the Class Vehicles meet the above definition – including but not limited to proof that these devices did not fall within the scope of the exceptions identified in the regulation. *See Duramax*, 2018 U.S. Dist. LEXIS 26543, at \*40, 43 n.14 (noting that “Plaintiffs can prevail on their [fraud] claims without proving the existence of a ‘defeat device’ as that term is defined by the EPA”; adding that “defeat device” is a “term that has entered the common parlance” such that not “every use of the term . . . necessarily involves a reference to [the EPA] regulatory definition”). Rather, Plaintiffs may simply prove that there was an EDC unit installed in their Class Vehicles such that the emissions controls for the EcoDiesel engines did not operate as one would expect during normal driving use and would result in more pollution than a reasonable consumer might expect from an eco-friendly vehicle. In short, Plaintiffs could have claims for relief independent and irrespective of the more granular regulation of defeat devices.<sup>12</sup>

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<sup>12</sup> To be sure, the issue of preemption for the fraudulent concealment theory presents a closer call than the affirmative misrepresentation theory. If the fraudulent concealment rested solely on concealment of Defendants’ violation of federal regulations (*e.g.*, use of a defeat device within the meaning of 40 C.F.R. § 86.1803-01), hence making a federal regulatory violation the *sine qua non* of the state tort claim, then a finding of no preemption would rest on just one of VW Va.’s two pillars – the fact that the gravamen of the complaint still focused on deceit of consumers, not the

1 In reaching its holding, the Court acknowledges that, in *VW Wyo.*, Judge Breyer held that  
 2 Wyoming’s claims for violation of state-promulgated anti-tampering and concealment rules were  
 3 preempted by the CAA.<sup>13</sup> The anti-tampering rule provided that no person shall intentionally  
 4 remove, alter, or otherwise render ineffective or inoperative any air pollution control device or  
 5 system which has been installed as a requirement of federal law. *See VW Wyo.*, 264 F. Supp. 3d at  
 6 1045. The anti-concealment rule provided that no person shall cause or permit the installation or  
 7 use of any device, etc. which, without resulting in reduction of the total amount of air contaminant  
 8 released to the atmosphere, shall dilute or conceal an emission from a source. *See id.* Judge  
 9 Breyer held that the state-promulgated rules were attempts to enforce a standard relating to  
 10 emissions control (for purposes of § 209(a)) because (1) the Supreme Court has stated that a  
 11 standard relating to emissions control includes requirements that a vehicle or engine must be  
 12 equipped with a certain type of pollution control device or must have some other design feature  
 13 related to the control of emissions, *see id.* at 1050, 1052, and (2) “[a]lthough the relevant SIP  
 14 [state implementation plan] provisions do not use the term ‘defeat device,’ their application here is  
 15 ultimately predicated on Volkswagen installing such a device in its ‘clean diesel’ vehicles during  
 16 manufacturing.” *Id.* at 1055.

17 *VW Wyo.*, however, is distinguishable from the instant case. In *VW Wyo.*, the conduct  
 18 prohibited by the state-promulgated rules involved attempts to circumvent directly federal  
 19 emissions standards. This could readily be characterized as the state’s direct enforcement of  
 20 federal emissions standards. As stated above, here, the fraud-on-consumers claims do not  
 21 represent such direct enforcement; the element of Defendants’ deceit of consumers still must be  
 22 proven. Judge Breyer’s opinion cannot be read more broadly as preempting fraud claims simply  
 23 because the fraud references misrepresentation about compliance with federal law; as Judge  
 24 Breyer noted, “Wyoming is not attempting to hold Volkswagen liable for deceptive statements  
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27 federal regulatory violation itself.

28 <sup>13</sup> In *State of Alabama v. Volkswagen AG*, No. 01-CV-2016-903390.00 (available at Docket No. 267-1), an Alabama state court reached a similar conclusion.

1 made to the State’s residents.” *Id.* at 1056.<sup>14</sup>

2 c. Summary

3 For the foregoing reasons, the Court concludes that Plaintiffs’ fraud-on-consumer claims –  
4 whether based on an affirmative misrepresentation theory or a fraudulent concealment theory – are  
5 not expressly preempted by § 209(a) of the CAA.

6 2. Field Preemption

7 Even if the Court does not find express preemption, it must still consider whether there is  
8 any implied preemption of Plaintiffs’ state claims. For both kinds of implied preemption – field  
9 and conflict – there is a presumption against preemption in the instant case because the Court is  
10 dealing with areas in which the states have traditionally acted – *i.e.*, air pollution, health and  
11 safety, and consumer protection. The Ninth Circuit has emphasized that, when a court “deal[s]  
12 with an area in which states have traditionally acted, [it must] start with the assumption that a  
13 state’s historic police powers will not be superseded absent a ‘*clear and manifest purpose of*  
14 *Congress.*’” *Chae.*, 593 F.3d at 944 (emphasis added); *see also Atay v. Cty. of Maui*, 842 F.3d  
15 688, 699 (9th Cir. 2016) (noting that, “[p]articularly where a statute regulates a field traditionally  
16 occupied by states, . . . a ‘presumption against preemption’ adheres”). *See, e.g., id.* (stating that  
17 “health, safety, and land use are fields “traditionally occupied by states”); *Chae*, 593 F.3d at 944  
18 (stating that “[c]ontract and consumer protection laws have traditionally been in state law  
19 enforcement hands”); *Pac. Merch. Shipping Ass’n v. Goldstene*, 639 F.3d 1154, 1167 (9th Cir.  
20 2011) (stating that “[s]tates have long sought protect their own residents from the undisputedly  
21 harmful effects of air pollution and other forms of environmental harms”; adding that, “[g]iven the  
22 ‘historic presence of state law’ in the area of air pollution, we apply the well-established  
23 presumption or assumption against preemption”).

24 In applying the presumption against preemption in the instant case, the Court

25 \_\_\_\_\_  
26 <sup>14</sup> Defendants have not argued that Plaintiffs’ fraudulent concealment theory is preempted because  
27 it runs up against § 209(a)’s provision that “[n]o State . . . shall *adopt* . . . any standard relating to  
28 the control of emissions from new motor vehicles.” 42 U.S.C. § 7543(a) (emphasis added). But  
even if Defendants had made such an argument, it would not be persuasive because, under the  
fraud claim herein, the states are not adopting a particular emissions standard but instead  
sanctioning misrepresentations and deceit by Defendants.

1 acknowledges Judge Breyer’s statements in *VW Wyo.* – *e.g.*, that, “although environmental  
2 regulation ‘traditionally has been a matter of state authority,’ the Clean Air Act and amendments  
3 have made ‘the States and the Federal Government partners in the struggle against air pollution,’”  
4 *VW Wyo.*, 264 F. Supp. 3d at 1049 (quoting *Jensen*, 644 F.3d at 938), and that, “[w]ith respect to  
5 emissions from stationary sources, States still have substantial discretion to set and enforce  
6 pollution standards[,] [b]ut the regulation of motor-vehicle emissions has become ‘a principally  
7 federal project.’” *Id.* (quoting D.C. Circuit case, *EMA*, 88 F.3d at 1079).

8 However, these points do not alter the fact that air pollution is still an area in which the  
9 states have traditionally acted, a point that Judge Breyer acknowledged as he still applied the  
10 presumption against preemption in *VW Wyo.* *See id.* at 1048 (“applying the above interpretive  
11 framework (including the presumption against preemption) in determining whether the Clean Air  
12 Act bars Wyoming’s claims”). Moreover, the presumption against preemption in the instant case  
13 applies not only because air pollution and health and safety are at issue, but also because the case  
14 concerns consumer protection, another area falling within the traditional powers of the state.  
15 Unlike the instant case, *VW Wyo.* did not involve an “attempt[] to hold [the car manufacturer]  
16 liable for deceptive statements made to the State’s residents.” *Id.* at 1056.

17 Taking into consideration the above, the Court now turns to the issue of field preemption.

18 Under . . . field preemption, “the States are precluded from  
19 regulating conduct in a field that Congress, acting within its proper  
20 authority, has determined must be regulated by its exclusive  
21 governance.” Field preemption can be “inferred from a framework  
22 of regulation ‘so pervasive . . . that Congress left no room for the  
23 States to supplement it’ or where there is a ‘federal interest . . . so  
24 dominant that the federal system will be assumed to preclude  
25 enforcement of state laws on the same subject.’”

26 *Valle Del Sol*, 732 F.3d at 1022-23.

27 “The regulation of immigration is the quintessential example of field preemption.” *United*  
28 *States v. S. Carolina*, 840 F. Supp. 2d 898, 913 (D.S.C. 2011); *see also Pharm. Research & Mfrs.*  
*of Am. v. District of Columbia*, 406 F. Supp. 2d 56, 64-65 (D.D.C. 2005) (noting that, “[i]n *Hines*  
the Supreme Court found that the immigration system that Congress had enacted in regard to the  
registration of aliens was enacted in order to create ‘one uniform national registration system,’ and

1 that the federal regulation was such that a state law could not be enforced when it interfered with  
 2 the congressional regulation”). Other examples of field preemption relate to the regulation of air  
 3 safety, labor disputes, and pension disputes. *See Goodspeed Airport LLC v. E. Haddam Inland*  
 4 *Wetlands & Watercourses Comm’n*, 634 F.3d 206, 210 (2d Cir. 2010) (addressing air safety);  
 5 *Schoeffler-Miller v. Nw. Airlines, Inc.*, No. 08-cv-4012, 2008 U.S. Dist. LEXIS 93851, at \*6 n.1  
 6 (C.D. Ill. Nov. 17, 2008) (referring to the Labor Management Relations Act and the Employee  
 7 Retirement Income Security Act). Outside of these areas, field preemption is rare.

8 Here, it is clear that Congress did not intend to occupy the field to the extent the field is  
 9 defined (broadly) as motor vehicle emissions: “The CAA’s express preemption provision [§  
 10 209(a)] is followed by a savings clause which explicitly states that ‘Nothing in this part shall  
 11 preclude or deny to any State or political subdivision thereof the right otherwise to control,  
 12 regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles [§  
 13 209(d)].’” *In re Caterpillar, Inc.*, MDL No. 2540, 2015 U.S. Dist. 98784, at \*47-48 (D.N.J. July  
 14 29, 2015) (quoting § 209(d) of the CAA, *i.e.*, 42 U.S.C. § 7543(d)). In *Caterpillar*, the court  
 15 emphasized that, even with “the breadth of federal regulation in the area, the savings clause  
 16 suggests that Congress did not intend to occupy the entire field of motor vehicle regulation.  
 17 Instead, the text of the Act explicitly contemplates continued state involvement in the regulation of  
 18 motor vehicles.” *Id.* at \*48.

19 Left with this predicament, Defendants suggest a narrower field for field preemption – *i.e.*,  
 20 that there is field preemption with respect to *new* motor vehicle emissions (as opposed to  
 21 *registered or licensed* which fall under the rubric of § 209(d)). *See* FCA/VM Mot. at 46.  
 22 Defendants take note that, in *Washington v. GM Corp.*, 406 U.S. 109 (1972), the Supreme Court  
 23 stated: “Congress has largely preempted the field with regard to ‘emissions from new motor  
 24 vehicles’ and motor vehicle fuels and fuel additives.” *Id.* at 114. But this statement was *dicta*. In  
 25 *Washington*, multiple states asked for leave to file a bill of complaint with the Supreme Court  
 26 based on allegations that the country’s four major car manufacturers and their trade association  
 27 had conspired to restrain the development of motor vehicle air pollution control equipment. The  
 28 Supreme Court agreed that it had jurisdiction over the controversy but nevertheless denied leave to

1 file the bill of complaint because of “the availability of the federal district court as an alternative  
2 forum and the nature of the relief requested,” *i.e.*, “corrective remedies . . . must be considered in  
3 the context of localized situations.” *Id.* at 114. The Supreme Court was never called upon to  
4 make and never made a preemption ruling but rather only made reference (in passing) to Congress  
5 “largely” preempting the field in, *e.g.*, new motor vehicle emissions, seemingly as part of its  
6 broader point that both the federal and the state governments played roles in addressing air  
7 pollution. *See also Exxon Corp. v. New York*, 548 F.2d 1088, 1095 n.12 (2d Cir. 1977) (noting  
8 that the above statement from *Washington* was *dicta*). In any event, that Congress “largely”  
9 preempted the field does not equate to field preemption which necessarily means the *entire* field.  
10 Because Defendants have failed to cite any other authority in support of its position that the field  
11 of new motor vehicle emissions has been preempted, the presumption against preemption obtains  
12 here. There is no clear and manifest intent by Congress to apply implied field preemption. *See*  
13 *Chae*, 593 F.3d at 944 (stating that, when a court “deal[s] with an area in which states have  
14 traditionally acted, [it must] start with the assumption that a state’s historic police powers will not  
15 be superseded absent a ‘clear and manifest purpose of Congress’”) (emphasis added). And, as  
16 discussed above, the gravamen of Plaintiffs’ pleading is Defendants’ deceit, not their failure to  
17 comply with new motor vehicle emissions standards. Nothing suggests Congress intended to  
18 broadly preempt the field of deception, even deception which pertains to emissions. Thus, the  
19 Court finds no field preemption under the CAA.

### 20 3. Conflict Preemption

21 Like field preemption, conflict preemption is a kind of implied (as opposed to express)  
22 preemption. There are two kinds of conflict preemption: (1) impossibility preemption and (2)  
23 obstacle preemption. “Courts find impossibility preemption ‘where it is impossible for a private  
24 party to comply with both state and federal law.’ Courts will find obstacle preemption where the  
25 challenged state law ‘stands “as an obstacle to the accomplishment and execution of the full  
26 purposes and objectives of Congress.”’” *Valle Del Sol*, 732 F.3d at 1023. Regarding  
27 impossibility preemption, there is no such preemption where a state requirement falls within (*i.e.*,  
28 does not exceed) a federal requirement. *See Stengel v. Medtronic, Inc.*, 704 F.3d 1224, 1231 (9th

1 Cir. 2012). Regarding obstacle preemption, a court “discern[s] congressional objectives by  
2 ‘examining the federal statute as a whole and identifying its purpose and intended effects.’” *Chae*,  
3 593 F.3d at 943.

4 Defendants do not argue impossibility preemption but rather only obstacle preemption.  
5 Defendants contend that the CAA has an “‘integrated scheme of regulation’” – one that even  
6 contemplates a suit by a private citizen “to enforce its provisions [albeit] only if the EPA has *not*  
7 brought suit ‘to require compliance with the standard, limitation, or order’ at issue, or is not  
8 diligently prosecuting such action.” FCA/VM Mot. at 46-47 (emphasis in original). Defendants  
9 maintain that, given this prescribed scheme of enforcement, Plaintiffs’ claims – which seek to  
10 impose remedies beyond those contemplated by federal law – present an obstacle to the  
11 enforcement of the CAA. The problem with Defendants’ position is that it is predicated on the  
12 assumption that Plaintiffs are seeking remedies “for the same conduct that the EPA is charged  
13 with addressing.” FCA/VM Mot. at 46. As discussed above, for the fraud-on-consumer claims,  
14 Plaintiffs need not prove any CAA violation in order to prove up their claims. More important,  
15 the gravamen of the complaint is Defendants’ deceit; they are not attempting directly to enforce  
16 the CAA. Instead, they seek to recover tort law for wrongful conduct that at most references in  
17 part the CAA. *See also Duramax*, 2018 U.S. Dist. LEXIS 26543, at \*48-49 (noting that “[t]he  
18 EPA is asked with *environmental* protection, not *consumer* protection” and “Defendants have not  
19 provided ‘any basis to conclude[] that a significant federal regulatory goal of the CAA is  
20 consumer protection from false advertising claims regarding emissions compliance, vehicle  
21 efficiency, or implementation of new emissions technology’”) (emphasis in original).

22 C. Common Law Fraud Claims

23 Having concluded that the fraud-on-consumer claims (whether based on common law  
24 fraud or violation of consumer protection statutes) are not preempted, the Court now turns to  
25 Defendants’ specific challenges to the claims for common law fraud. Many, but not all, arguments  
26 are directed at the fraudulent concealment theory specifically.

27 1. Damages

28 To the extent Defendants argue that Plaintiffs have failed to adequately plead damages for

1 common law fraud (whether an affirmative misrepresentation or fraudulent concealment), the  
 2 Court does not agree. Plaintiffs' allegations of damages are not speculative. *See* Part II.A, *supra*  
 3 (addressing injury-in-fact); Part III.A.1, *supra* (addressing RICO injury).

4 2. Intent to Deceive

5 The Court also rejects Defendants' contention that Plaintiffs have failed to adequately  
 6 plead an intent to deceive (whether the theory is an affirmative misrepresentation or fraudulent  
 7 concealment). Plaintiffs have sufficiently pled factual allegations from which a trier of fact could  
 8 reasonably infer an intent to deceive by each of the named defendants. *See* Part III.B.1.a-b, *supra*.

9 3. Affirmative Misrepresentation Theory: Puffery

10 Defendants argue still that, to the extent Plaintiffs have identified any misleading  
 11 advertising, that advertising amounts to puffery which is not actionable. This argument, of course,  
 12 applies to Plaintiffs' affirmative misrepresentation theory only, and not any theory of fraudulent  
 13 concealment (which is not predicated on any advertising). And, as currently pled in the operative  
 14 complaint, the only affirmative misrepresentation at issue is the use of the logo "EcoDiesel" on the  
 15 Class Vehicles.

16 As a preliminary matter, the Court notes that puffery is generally characterized as a  
 17 statement of opinion, as opposed to a statement of fact, on which no reasonable consumer would  
 18 rely. *See, e.g., Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294, 311 (2014) (California) (noting  
 19 that "[a] statement is considered puffery if the claim is extremely unlikely to induce consumer  
 20 reliance").<sup>15</sup> In addition, whether a statement is deemed puffery is generally considered a

21 \_\_\_\_\_  
 22 <sup>15</sup> Neither party contends there is a substantial variation in the state's laws on this issue. *See also*:

- 23 • *Park Rise Homeowners Ass'n v. Resource Constr. Co.*, 155 P.3d 427, 435 (Colo. Ct. App.  
 24 2006) (Colorado) (indicating that puffing is the "expression of an exaggerated opinion –  
 25 as opposed to factual representations – with the intent to sell a good or service") (quoting  
 26 Black's Law Dictionary);  
 27 • *Totz v. Continental Du Page Acura*, 602 N.E.2d 1374, 1383 (Ill. Ct. App. 1992) (Illinois)  
 28 (noting that "[a] contention that statements about a product or service constitute puffing is,  
 in effect, an argument that they were nonactionable statements of opinion as opposed to  
 representations of fact"; adding that "[w]hether a representation will be considered a  
 statement of opinion or a factual representation may depend upon the circumstances of the  
 case" – *e.g.*, "[i]f an individual makes a statement that might otherwise be considered an  
 opinion, but does not specifically express it as his or her opinion, the statement will be  
 considered a factual representation if it would be reasonable for the other party to treat it as



1 question of fact, not law, although there are instances in which the answer is so clear that the issue  
 2 may be decided as a matter of law (*i.e.*, a reasonable trier of fact could reach only one conclusion  
 3 based on the facts alleged and all reasonable inferences in favor of the plaintiff). *See, e.g., Peviani*  
 4 *v. Natural Balance, Inc.*, 774 F. Supp. 2d 1066, 1072 (S.D. Cal. 2011) (California) (denying  
 5 motion to dismiss with respect to defendant’s argument that representations at issue constituted  
 6 nonactionable puffery).<sup>16</sup>

7  
 8 such”);

- 9 • *Lingar v. Live-In Companions, Inc.*, 692 A.2d 61, 64 (N.J. Super. Ct. 1997) (New Jersey)  
 10 (indicating that puffery is an “exaggerated claim[] of quality” or an “unactionable  
 11 [declaration] of opinion” as opposed to a statement “susceptible of personal knowledge”  
 12 and “represented in such a way ‘that the consumer could reasonably treat [it] as [a  
 13 declaration] of fact”);
- 14 • *Davis v. Byers Volvo*, No. 11CA817, 2012 Ohio App. LEXIS 752, at \*25 (Ohio Ct. App.  
 15 Feb. 24, 2012) (Ohio) (stating that “[p]uffery is generally defined as exaggerated blustering  
 16 or subjective boasting upon which no reasonable consumer would rely”) (internal  
 17 quotation marks omitted);
- 18 • *Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 97 (Tenn. Ct. App. 1996) (Tennessee)  
 (indicating that puffing is a “mere statement[] of opinion” or “loose general sales talk” as  
 19 opposed to “a misrepresentation of a material fact . . . upon which the consumer is  
 20 expected to justifiably rely”);
- 21 • *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 462-63 (Tex. Ct. App. 1990) (Texas) (taking  
 22 note of considerations as to whether a statement is puffing or opinion – *e.g.*, the specificity  
 23 of the statement (with “[i]mprecise or vague representations [being] mere opinions”) and  
 24 the knowledge of the buyer and seller (evaluating “whether the seller asserts a fact of  
 25 which the buyer is ignorant or merely states an opinion or judgment on a matter of which  
 26 the seller has no special knowledge and on which the buyer may be expected also to have  
 27 an opinion and to exercise his judgment”).

28 *Cf. Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (in Lanham Act  
 case, noting that “puffing” is “exaggerated advertising, blustering and boasting upon which no  
 reasonable buyer would rely”).

<sup>16</sup> *See also*:

- 22 • *Uop v. Consulting*, CV 950145753, 1997 Conn. Super. LEXIS 1090, at \*4 (Conn. Super.  
 23 Ct. Apr. 24, 1997) (Connecticut) (stating that “[t]he determination as to whether a  
 24 statement is puffery is generally a question of fact”).
- 25 • *Giles v. Inflatable Store, Inc.*, No. 07-cv-00401-PAB-KLM, 2009 U.S. Dist. LEXIS 28382,  
 26 at \*9 n.4 (D. Colo. Apr. 6, 2009) (Colorado) (“find[ing] that, if a statement allegedly  
 27 constituting a deceptive trade practice can reasonably be construed as both fact and  
 28 opinion, whether it is non-actionable puffery is properly a question of fact for the jury”).
- *Bitters v. Golden Lakes Vill. Condo. Ass’n*, No. 50 2011 CA 019486 MB, 2013 Fla. Cir.  
 LEXIS 1153, at \*2 (Fla. Cir. Ct. Feb. 14, 2013) (Florida) (stating that the “argument that  
 any statements concerning the safety and security of the community was mere puffery”  
 simply “raises a material question of fact for the jury”).
- *Evolution, Inc. v. Suntrust Bank*, 342 F. Supp. 2d 964, 972-73 (D. Kan. 2004) (Kansas)  
 (denying “plaintiff’s motion for summary judgment on the basis that plaintiff’s statements  
 were mere puffery”).

1           Given the above parameters, the Court rejects Defendants’ puffery and related arguments.  
 2 First, contrary to what Defendants argue, it is plausible that a reasonable consumer would  
 3 understand “EcoDiesel” to mean environmentally friendly or reduced emissions. While it is also  
 4 plausible that a reasonable consumer would simply understand “EcoDiesel” to mean good fuel  
 5 economy (as Defendants maintain), the fact that there is an equally plausible interpretation in  
 6 Plaintiffs’ favor means that Plaintiffs survive a 12(b)(6) challenge. *See Starr v. Baca*, 652 F.3d  
 7 1202, 1216 (9th Cir. 2011) (noting that, “[i]f there are two alternative explanations, one advanced  
 8 by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff’s complaint  
 9 survives a motion to dismiss under Rule 12(b)(6); [p]laintiff’s complaint may be dismissed only  
 10 when defendant’s plausible alternative explanation is so convincing that plaintiff’s explanation is  
 11 implausible”) (emphasis in original).

12           Second, to the extent that Defendants contend that a claim of “environmentally friendly”  
 13 should still be deemed puffery, this argument cannot be adjudicated as a matter of law at this  
 14

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- 15 • *Keel v. Toledo Harley-Davidson/Buell*, 920 N.E.2d 1041, 1046 & n.2 (Ohio Ct. App. 2009) (Ohio) (stating that there was still a genuine issue of material fact as to whether defendant made representations beyond mere puffing; adding that “[w]hether a representation is deceptive or just puffing depends on the comment and the context in which it was made”).
  - 16 • *Yuzwak v. Dygert*, 144 A.D.2d 938, 939 (N.Y. Supreme Ct. 1988) (New York) (noting that whether a representation by a seller is puffery “is almost always a question of fact for a jury’s resolution”).
  - 17 • *Peterson v. N. Am. Plant Breeders*, 354 N.W.2d 625, 629-30 (Neb. 1984) (Nebraska) (finding that whether statements made by defendant constituted puffery was a fact question).
  - 18 • *Union Ink Co. v. AT&T Corp.*, 801 A.2d 361, 379 (N.J. Super. Ct. App. Div. 2002) (New Jersey) (stating that “[w]hether the advertisements contained material misstatements of fact, or were merely puffing, as alleged by defendants, presents a question to be determined by the trier of fact”).
  - 19 • *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 836 N.W.2d 807, 819-20 (Wis. 2013) (Wisconsin) (stating that “[a] number of courts have refrained from drawing a bright line around puffery in terms of whether it presents a question of fact or of law, recognizing, as we do, that while it is usually a question of fact it can at times be a question of law, and that courts should apply the usual summary judgment standard to figure out which label fits more closely in a given case”).

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 25 *Cf. Newcal Indus. v. Ikon Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008) (in Lanham Act case, stating that “the determination of whether an alleged misrepresentation ‘is a statement of fact’ or is instead ‘mere puffery’ is a legal question that may be resolved on a Rule 12(b)(6) motion[:]; [a] statement is considered puffery if the claim is extremely unlikely to induce consumer reliance”);  
 26 *Cook, Perkiss & Liehe, Inc. v. N. Cal. Coll. Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) (in  
 27 Lanham Act case, noting that the court could “determine as a matter of law whether this alleged  
 28 misrepresentation is a statement of fact, actionable under the Lanham Act, or mere puffery”).

1 stage. At this point in the proceedings, Plaintiffs need only prove that it is plausible that the  
 2 “EcoDiesel” representation is not a representation that is “extremely unlikely to induce consumer  
 3 reliance.” *Demetriades*, 228 Cal. App. 4th at 311; *see also* note 13, *supra*. This is especially so  
 4 where, as alleged, the Class Vehicles can at times omit NOx at 20 times the federal standard.  
 5 Plaintiffs’ allegations suffice. “[A]dvertising statements placed in an ad knowing or intending that  
 6 they are of the type that will affect the consumer’s judgment, are not puffery, but rather constitute  
 7 actionable representations.” *U-Haul Int’l, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1253 (D. Ariz.  
 8 1981) (addressing the analogous federal Lanham Act) (internal quotation marks omitted). Here, it  
 9 is a reasonable inference that Defendants marketed the Class Vehicles as “EcoDiesel” intending  
 10 and expecting to cash in on the consumer interest in “green” products. Notably, the representation  
 11 that the Class Vehicles were environmentally friendly is different in nature from the  
 12 representations that are generally deemed puffery – classic examples being a vague advertising  
 13 claim that one’s product is better than a competitor’s or a boastful, exaggerated description of a  
 14 product. *See, e.g., Davis*, 2012 Ohio App. LEXIS 752, at \*26-27 (noting that, “[i]n general,  
 15 ‘[m]ost statements of puffery consist of vague advertising claims that one’s product is better than  
 16 comparable products offered by competitors’” and “[e]xamples of puffery include ‘boastful  
 17 assertions and exaggerated descriptions,’ such as ‘luxuriously soft,’ ‘the real McCoy,’ and ‘classic  
 18 detail’”); *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 333 (Ind. 2013) (taking note of a prior  
 19 case in which court held that “‘top quality seeds’ was ‘a classic example of puffery’ because it  
 20 ‘contains no definitive statement as to how the product is warranted or any assertion of fact  
 21 concerning the product, but is merely the opinion of’ the seller[;] [b]ut ‘high vitality, vigor[,] and  
 22 germination’ could constitute a warranty, because it was ‘a promise that the seeds will perform in  
 23 a certain manner,’ not merely the seller’s opinion”).

24 The Court acknowledges that a district court reached a different result in a similar case. In  
 25 *Counts*, the court held at the 12(b)(6) phase that “[s]tatements of cleanliness convey ‘inherently  
 26 subjective’ concepts and thus ‘constitute[] nonactionable opinion[s].’” *Counts*, 237 F. Supp. 3d at  
 27 597; *see also id.* at 598 (noting that nothing about “clean diesel” is quantifiable). The court also  
 28 held that that a “claim regarding 90% less emissions, although it includes a statistic, is not

1 quantifiable by itself” and therefore could not be the basis of a fraud claim. *Id.* (stating that  
 2 “assertions that a product has ‘90% less emissions’ raises the question: 90% less than what?”).  
 3 But *Counts* is not binding authority on this Court, and the Court does not find *Counts* persuasive  
 4 on this point. The touchstone of the puffery analysis is not whether a particular representation is  
 5 quantifiable, but the likelihood that reasonable consumers would rely on that representation.  
 6 Quantifiability is one factor, but there are others which may affect consumers’ reaction and  
 7 reliance. In this regard, the record is sparse, and puffery cannot at this juncture be decided as a  
 8 matter of law.

9 Accordingly, the Court denies Defendants’ motion to dismiss the affirmative  
 10 misrepresentation claims on the basis that the representations at issue were simply puffery.  
 11 Whether the “EcoDiesel” representation is puffery cannot be resolved in the current context of the  
 12 instant 12(b)(6) motion.

13 4. Fraudulent Concealment Theory: Cognizability of Fraudulent Concealment Claims

14 With respect to Plaintiffs’ fraudulent concealment theory, Defendants have asserted  
 15 multiple arguments, the first being that some states— specifically, Connecticut, Minnesota,  
 16 Tennessee, and Texas – do not recognize a substantive claim for fraudulent concealment.  
 17 According to Defendants, “fraudulent concealment is not a substantive cause of action, but instead  
 18 operates only to toll the statute of limitations.” FCA/MV Mot. at 52 n.18.

19 Defendants are incorrect. In essence, Defendants are playing a kind of “name game.”  
 20 While there is some state case law indicating that fraudulent *concealment* is not a cause of action  
 21 but rather simply a tool to toll the statute of limitations, Defendants ignore the fact that there is  
 22 also case law still recognizing a claim for fraud based on *omission* or *nondisclosure*. Below are  
 23 cases from each relevant jurisdiction. (Plaintiffs have cited additional authority in footnote 23 of  
 24 their opposition brief.)

- 25 • Connecticut. *See Omega Eng’g, Inc. v. Eastman Kodak Co.*, 908 F. Supp. 1084, 1094-  
 26 95 (D. Conn. 1995) (stating that, “[a]lthough fraudulent misrepresentation involves . . .  
 27 proof [that the defendant made false statements knowingly or recklessly], fraudulent  
 28 nondisclosure involves not a statement, but silence”).

- 1 • Minnesota. *See Powell v. Trans Global Tours, Inc.*, 594 N.W.2d 252, 256 (Minn. Ct.  
2 App. 1999) (stating that “[t]here are four elements of fraudulent nondisclosure: a party  
3 conceals a fact material to a transaction, the fact is peculiarly within the concealing  
4 party’s knowledge, the concealing party knows the other party will act on the  
5 presumption that no such fact exists, and the concealing party has a legal or equitable  
6 duty to communicate the fact”).
- 7 • Tennessee. *See McPherson v. Shea Ear Clinic*, No. W2006-01936-COA-R3-CV, 2007  
8 Tenn. App. LEXIS 265, at \*29-30 (Tenn. Ct. App. Apr. 27, 2007) (stating that  
9 “[n]ondisclosure of a material fact may also give rise to a claim for fraudulent  
10 misrepresentation when the defendant has a duty to disclose and the matters not  
11 disclosed are material”).
- 12 • Texas. *See Jurek v. Kivell*, No. 01-10-00040-CV, 2011 Tex. App. LEXIS 3032, at \*9  
13 (Tex. Ct. App. Apr. 21, 2011) (stating that “[t]he elements of fraud by nondisclosure,  
14 or fraud by omission, are (1) the defendant failed to disclose facts to the plaintiff when  
15 the defendant had a duty to disclose such facts; (2) the facts were material; (3) the  
16 defendant knew of the facts; (4) the defendant knew that the plaintiff was ignorant of  
17 the facts and did not have an equal opportunity to discover the truth; (5) the defendant  
18 was deliberately silent and failed to disclose the facts with the intent to induce the  
19 plaintiff to take some action; and (6) the plaintiff suffered injury as a result of acting  
20 without knowledge of the undisclosed facts”).

21 5. Fraudulent Concealment Theory: Duty to Disclose

22 With respect to Plaintiffs’ fraudulent concealment theory, Defendants argue next that there  
23 can be liability for fraudulent concealment only where there is a duty to disclose, and Plaintiffs  
24 have failed to establish such a duty. The argument is without merit.

25 a. Fiduciary Relationship

26 Defendants contend that a number of states – namely, Massachusetts, Maryland, Maine,  
27 New Jersey, Nevada, Oregon, Pennsylvania, South Carolina, and Tennessee – recognize a  
28 fraudulent concealment claim only where there is a fiduciary relationship between the plaintiff and

1 defendant. *See* FCA/VM Mot. at 54. Defendants are incorrect. Although Defendants do cite  
2 some authority to support their position, there is substantial authority to the contrary – *e.g.*, a  
3 fiduciary relationship is not the only time a duty to disclose arises; also, an affirmative act of  
4 concealment by the defendant effectively negates the duty-to-disclose requirement (*i.e.*, there is a  
5 difference between silence, where a duty to disclose is required, and active concealment, where  
6 there is no such requirement). In this regard, Plaintiffs do not claim that Defendants were simply  
7 silent but rather that they took affirmative steps to conceal the defeat devices – including not  
8 identifying them for the EPA and CARB. (Plaintiffs cite additional authority in footnote 26 of  
9 their opposition brief.) A duty to disclose thus may obtain in a variety of circumstances or indeed,  
10 may not even be required in some situations:

- 11 • Massachusetts. *See Nota Constr. Corp. v. Keyes Assocs.*, 694 N.E.2d 401, 404-05  
12 (Mass. Ct. App. 1998) (“agree[ing] that an action for deceit may not be predicated on a  
13 mere failure to disclose where there is no duty to disclose” but “recogniz[ing] that a  
14 duty to disclose may arise in a number of circumstances” – *e.g.*, as reflected in the  
15 Restatement (Second) of Torts, a defendant has a duty to disclose “facts basic to the  
16 transaction, if he knows that the other is about to enter into it under a mistake as to  
17 them, and that the other, because of the relationship between them, the customs of the  
18 trade or other objective circumstances, would reasonably expect a disclosure of such  
19 facts”) (internal quotation marks omitted).
- 20 • Maryland. *See Lubore v. RPM Assocs.*, 674 A.2d 547, 556 (Md. Ct. App. 1996)  
21 (stating that “[j]ust because the relationship between the parties is not such that a duty  
22 to disclose is owed does not mean that appellant is legally foreclosed from maintaining  
23 a deceit action against appellees” because “[o]ne who conceals facts that materially  
24 qualify affirmative representations may be liable for fraud” and “concealment may  
25 amount to fraud where it is effected by misleading and deceptive talk, acts, or conduct,  
26 or is accompanied by misrepresentations, or where, in addition to a party’s silence,  
27 there is any statement, word, or act on his part, which tends affirmatively to the  
28 suppression of the truth, or to a covering up or disguising of the truth, or to a

1 withdrawal or distraction of a party’s attention from the real facts”).

- 2 • Maine. *See Martin v. Ort*, No. BANSC-CV-2015-195, 2016 Me. Super. LEXIS 15, at  
3 \*9 (Me. Super. Ct. Feb. 3, 2016) (stating that “a failure to disclose or an omission by  
4 silence may be an equivalent to an affirmative false representation if the plaintiff  
5 proves: (1) active concealment of the truth; *or* (2) a special relationship that imposes a  
6 duty to disclose; *or* . . . (3) [a] statutory duty to disclose”; adding that “[e]ven if none of  
7 these elements are present, fraud based on a party’s silence may still be actionable  
8 depending on the facts of the case”) (emphasis added).<sup>17</sup>
- 9 • New Jersey. *See United Jersey Bank v. Kensey*, 704 A.2d 38, 45 (N.J. Super. Ct. 1997)  
10 (indicating agreement with Restatement (Second) of Torts that there is a duty “to  
11 disclose to another ‘facts basic to the transaction, if he knows that the other is about to  
12 enter into it under a mistake . . . and that the other, because of the relationship between  
13 them, the customs of the trade or other objective circumstances, would reasonably  
14 expect a disclosure of those facts”).
- 15 • Nevada. *See Villalon v. Bowen*, 273 P.2d 409, 414-15 (Nev. 1954) (stating that, “even  
16 in the absence of a fiduciary or confidential relationship and where the parties are  
17 dealing at arm’s length, an obligation to speak can arise from the existence of material  
18 facts peculiarly within the knowledge of the party sought to be charged and not within  
19 the fair and reasonable reach of the other party”).
- 20 • Oregon. *See Unigestion Holding, S.A. v. UPM Tech., Inc.*, 160 F. Supp. 3d 1214,  
21 1223-24 (D. Or. 2016) (noting that, “[i]n addition to fraud by affirmative

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24 <sup>17</sup> In their papers, Defendants refer to New Hampshire and not Maine; however, the case cited by  
25 Defendants (*Rared Manchester NH, LLC v. Rite Aid of N.H., Inc.*, 693 F.3d 48 (1st Cir. 2012))  
26 discusses Maine law, not New Hampshire law.

27 In their reply brief, Defendants admit the error but then introduce the new argument that  
28 “[b]oth Maine and New Hampshire” require allegations of a fiduciary relationship. FCA/VM  
Reply at 23 n.27. Although it is not proper for Defendants to inject New Hampshire for the first  
time in reply, they appear to be, in any event, wrong on the merits. *See Benoit v. Perkins*, 104 A.  
254, 256 (N.H. 1918) (stating that “[t]he duty to speak must arise from the circumstances, *or* there  
must be some relation of trust and confidence between the parties upon which to build the duty to  
disclose”) (emphasis added).

1 misrepresentation or omission, there is a third category of fraud recognized under  
2 Oregon law, actual concealment” and, “where ‘fraud is based on actual concealment, as  
3 opposed to simple nondisclosure, a duty to speak is not required”).

- 4 • Pennsylvania. *See Elbeco Inc. v. Nat’l Ret. Fund*, 128 F. Supp. 3d 849, 859 n.6 (E.D.  
5 Pa. 2015) (noting that “[t]he Third Circuit has observed that in cases of ‘active  
6 concealment’ a ‘duty to disclose is not always a required element of common-law fraud  
7 when there has been a material nondisclosure”); *Jeter v. Brown & Williamson*  
8 *Tobacco Corp.*, 294 F. Supp. 2d 681, 688 (W.D. Pa. 2003) (stating that, “[w]hile a  
9 concealment may constitute fraud, mere silence is not sufficient in the absence of a  
10 duty to speak”); *Gnagey Gas & Oil Co. v. Pa. Underground Storage Tank Indemn.*  
11 *Fund*, 82 A.3d 485, 500 (Pa. Commw. Ct. 2013) (stating that “Pennsylvania law  
12 recognizes a difference between active concealment and mere silence in the context of  
13 common law fraud”); *see also City of Rome v. Glanton*, 958 F. Supp. 1026, 1039 (E.D.  
14 Pa. 1997) (recognizing a duty to speak “where the undisclosed fact is basic to the  
15 transaction”).
- 16 • South Carolina. *See Cohen v. Blessing*, 192 S.E.2d 294, 205-06 (S.C. 1972) (finding  
17 that “the complaint states a cause of action for fraud and deceit” because there “a duty  
18 on the seller to disclose termite or insect infestation ‘in the property known to him, but  
19 unknown to, and not readily observable upon reasonable inspection by the  
20 purchaser”); *Holly Hill Lumber Co. v. McCoy*, 23 S.E.2d 372, 378 (S.C. 1942) (stating  
21 that “[n]on-disclosure become fraudulent only when it is the duty of the party having  
22 knowledge of the facts to uncover them to the other” and the duty to disclose arises if  
23 there is a fiduciary or special relationship; but adding that “an informed vendee must  
24 limit himself to silence in order to escape the imputation of fraud” and, “[i]f in addition  
25 to the party’s silence there is any statement, even in word or act on his part, which  
26 tends affirmatively to a suppression of truth, or to a withdrawal or distraction of the  
27 other party’s attention or observation from the real facts, the line is overstepped, and  
28 the concealment becomes fraudulent”).



- 1 • Tennessee. *See Smith v. Pfizer, Inc.*, 688 F. Supp. 2d 735, 752-53 (M.D. Tenn. 2010)  
2 (noting that “defendants ignore the line of Tennessee precedent . . . which held that  
3 ‘each party to a contract is bound to disclose to the other all he may know respecting  
4 the subject matter materially affecting a correct view of it’”); *Benton v. Snyder*, 825  
5 S.W.2d 409, 414 (Tenn. 1992) (stating that, “[g]enerally, a plaintiff seeking to establish  
6 fraudulent concealment must prove that the defendant took affirmative action to  
7 conceal the cause of action” and that “the affirmative action on the part of the  
8 defendant must be something more than mere silence or a mere failure to disclose  
9 known facts[;] [t]here must be some trick or contrivance intended to exclude suspicion  
10 and prevent injury, or else there must be a duty resting on the party knowing such facts  
11 to disclose them”) (emphasis omitted).

12 b. Arm’s Length Transaction

13 Defendants further argue that, in certain states – namely, Alabama, Delaware, Illinois,  
14 Indiana, Kansas, Vermont, and Virginia – a fraudulent concealment claim is not viable if the  
15 parties were engaged in an arm’s-length transaction. *See FCA/VM Mot.* at 54. This argument is  
16 essentially a variant of that above – *i.e.*, that only where there is a fiduciary or special relationship  
17 that gives rise to a duty to disclose is there a viable fraudulent concealment claim. Defendants are  
18 incorrect. As indicated by the authority below (Plaintiffs cite additional authority in footnote 27  
19 of their opposition brief), fraudulent concealment claims can be viable even when there is arm’s-  
20 length transaction between the parties:

- 21 • Alabama. *See Hines v. Riverside Chevrolet-Olds*, 655 So. 2d 909, 918 (Ala. 1994)  
22 (stating that “[a] duty to disclose may arise from a confidential relationship, from a  
23 request for information, or from the particular circumstances of the case”; adding that  
24 “whether a duty to disclose arises in the particular circumstances of the case depends  
25 on the relation of the parties, the value of a particular fact, the relative knowledge of  
26 the parties, and other circumstances” – *e.g.*, “[w]hen the defendant had superior  
27 knowledge of the fact not disclosed and the plaintiff was induced to take action that the  
28 plaintiff might not have otherwise taken . . . , a reasonable person is more likely to find

1 a duty to disclose”), *overruled on other grounds by State Farm Fire & Cas. Co. v.*  
2 *Owen*, 729 So. 2d 834 (Ala. 1998).

- 3 • Delaware. *See Air Prod. & Chem., Inc. v. Wiesemann*, 237 F. Supp. 3d 192, 214-15  
4 (D. Del. 2017) (stating that “[t]he first element of fraud can be established one of three  
5 ways: (1) an overt misrepresentation; (2) silence in the face of a duty to speak; or (3)  
6 active concealment of material facts”) (emphasis added).
- 7 • Illinois. *See Heider v. Leewards Creative Crafts*, 613 N.E.2d 805, 814 (Ill. Ct. App.  
8 1993) (stating that “[m]ere silence in a business transaction does not amount to fraud[,]  
9 [y]et, silence accompanied by deceptive conduct or suppression of material facts gives  
10 rise to active concealment; it is then the duty of the party which has concealed  
11 information to speak”).
- 12 • Indiana. *See Northrop Corp. v. Gen. Motors Corp.*, 807 N.E.2d 70, 87 (Ind. Ct. App.  
13 2004) (stating that “[a] duty to speak may arise when (1) the material fact is known or  
14 accessible only to the defendant and (2) the defendant knows that the plaintiff is  
15 unaware of the fact or cannot reasonably discover the undisclosed fact”).
- 16 • Kansas. *See Bank of Am., N.A. v. Narula*, 261 P.3d 898, 911 (Kan. Ct. App. 2011)  
17 (indicating that “a duty to disclose would arise in cases under three situations: (1) when  
18 a disparity exists between two contracting parties in either bargaining power or  
19 expertise; (2) when a known defect is not known to or is not reasonably discoverable  
20 by the buyer; or (3) when a party knows the other party is entering the contract under a  
21 mistake about important facts and, because of custom in the trade or other objective  
22 circumstances, the other party would reasonably expect disclosure of those facts”).
- 23 • Vermont. *See White v. Pepin*, 561 A.2d 94, 96 (Vt. 1989) (stating that “[t]his Court  
24 has not hesitated to find a duty to disclose material facts where some legal or equitable  
25 duty exists between the parties” – *e.g.*, “where plaintiff had superior knowledge or  
26 means of knowledge, he had duty to disclose to defendant that certain items were not  
27 accurately reflected in corporate records upon which defendant relied in purchasing  
28 shares of the corporation”); *cf. Lay v. Pettengill*, 38 A.3d 1139, 1144 (Vt. 2011)

1 (stating that, “[i]n arm’s-length transactions,’ . . . ‘where facts are equally within the  
2 means of knowledge of both parties, neither party is required to speak, in the absence  
3 of inquiry respecting such matters”).

- 4 • Virginia. *See White v. Potocska*, 589 F. Supp. 2d 631, 642 (E.D. Va. 2008) (stating  
5 that “[a] duty to disclose does not normally arise when parties are engaged in an arm’s  
6 length transaction” but adding that “[a] duty may arise . . . if the fact is material and the  
7 one concealing has superior knowledge and knows the other is acting upon the  
8 assumption that the fact does not exist”).

9 c. Exclusive Knowledge

10 Defendants argue that, to the extent Plaintiffs allege a duty to disclose based on  
11 Defendants’ “exclusive knowledge of material facts not known to [Plaintiffs],” *LiMandri v.*  
12 *Judkins*, 52 Cal. App. 4th 326, 336 (1997), that allegation is insufficient because “it is not enough  
13 to allege . . . that [Defendants] ‘knew or should have known’ [of the problem based simply on]  
14 ‘their involvement in the design, installment, and calibration of the emission treatment  
15 technology.’” FCA/VM Mot. at 53. In support of this argument, Defendants cite *Kampuries v.*  
16 *American Honda Motor Co., Inc.*, 204 F. Supp. 3d 484 (E.D.N.Y. 2016); *Sanders v. Apple Inc.*,  
17 672 F. Supp. 2d 978 (N.D. Cal. 2009) (Fogel, J.); and *Oestreicher v. Alienware Corp.*, 544 F.  
18 Supp. 2d 964 (N.D. Cal. 2008). *See* FCA/VM Mot. at 53-54. In *Sanders*, for example, Judge  
19 Fogel indicated that knowledge of a design defect could not be inferred just because the defendant  
20 manufactured the product because allegations about “exclusive knowledge as the manufacturer . . .  
21 could be made about any alleged design defect in any manufactured product.” *Sanders*, 672 F.  
22 Supp. 2d at 986. *See also Oestreicher*, 544 F. Supp. 2d at 972 (noting that there are policy reasons  
23 militating against a broad duty to disclose – e.g., “[m]anufacturers always have knowledge  
24 regarding the effective life of particular parts and the likelihood of their failing within a particular  
25 period of time,” and “[a] rule that would make failure of a part actionable based on such  
26 “knowledge” would render meaningless time/mileage limitations in warranty coverage”).

27 *Kampuries*, *Sanders*, and *Oestreicher* are all distinguishable from the instant case. In  
28 *Kampuries*, there was an allegedly defective air bag; in *Sanders*, there was an allegedly defective

1 computer display component; and in *Oestreicher*, there was an allegedly defective heat  
 2 management system in a notebook computer. For this kind of defect claim, there is reason to be  
 3 concerned along the lines raised by Judge Fogel in *Sanders*. But the instant case is different  
 4 because the gist of Plaintiffs' complaint is not that the emissions control system in the Class  
 5 Vehicles was broken or flawed which may or may not have been within the actual (as opposed to  
 6 imputed) knowledge of the manufacturer. Rather, the thrust of the complaint is that there was  
 7 purposeful manipulation of the system by the various defendants involved in the design and  
 8 manufacturing process to achieve the deceptive result (*i.e.*, ability to pass the emissions tests but  
 9 no proper emissions control under normal driving conditions). Given the allegation of specific  
 10 manipulation, it is reasonable to infer knowledge on the part of Defendants, which would then  
 11 give rise to a duty to disclose.

12 6. Fraudulent Concealment Theory: Reliance

13 According to Defendants, even if duty to disclose is not an issue, Plaintiffs have failed to  
 14 adequately plead reliance for their common law fraud claims. This argument is ultimately directed  
 15 to Plaintiffs' fraudulent concealment theory, and not their affirmative misrepresentation theory.<sup>18</sup>  
 16 The problem for Defendants is that – as Plaintiffs note – reliance may be presumed (or at least  
 17 inferred) when a defendant's omission is material.<sup>19</sup>

18 For example, the Ninth Circuit has noted that, under California law, “[t]o prove reliance on  
 19 an omission, a plaintiff must show that the defendant's nondisclosure was an immediate cause of

21 <sup>18</sup> Plaintiffs' affirmative misrepresentation theory is based on the use of the “EcoDiesel” logo on  
 22 Class Vehicles. Because the “EcoDiesel” logo is on the face of each Class Vehicle, there is a  
 23 plausible assertion of pervasive advertising from which an inference of reliance could be made.  
 24 *See Tobacco II Cases*, 207 P.3d 20, 40 (Cal. 2009) (in a tobacco case, stating that, “where, as here,  
 a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to  
 plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements  
 or statements”).

25 <sup>19</sup> In *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672  
 26 CRB (JSC), 2018 U.S. Dist. LEXIS 34873 (N.D. Cal. Mar. 2, 2018), Judge Breyer stated, with  
 27 respect to a securities claim, that a presumption of reliance “does not apply when the only  
 28 omission alleged is of the truth that an affirmative misstatement misrepresents.” *Id.* at \*344.  
 However, here, Plaintiffs are not alleging an omission of the truth that an affirmative misstatement  
 misrepresents; Plaintiffs do not claim, *e.g.*, that Defendants made an affirmative misrepresentation  
 that the Class Vehicles did not have defeat devices.

1 the plaintiff’s injury-producing conduct,” and the plaintiff may prove causation “by simply  
 2 proving ‘that had the omitted information been disclosed, one would have been aware of it and  
 3 behaved differently.’” *Daniel*, 806 F.3d at 1225. The California Supreme Court has confirmed  
 4 the same, stating that “a presumption, or at least an inference, of reliance arises wherever there is a  
 5 showing that a misrepresentation was material” and adding that “[a] misrepresentation is judged to  
 6 be material if a reasonable man would attach importance to its existence or nonexistence in  
 7 determining his choice of action in the transaction in question, and as such materiality is generally  
 8 a question of fact unless the fact misrepresented is so obviously unimportant that the jury could  
 9 not reasonably find that a reasonable man would have been influenced by it.”<sup>20</sup> *Tobacco II Cases*,  
 10 207 P.3d at 39 (internal quotation marks omitted).

11 To the extent Defendants assert that Plaintiffs have not sufficiently alleged materiality, *see*

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 13 <sup>20</sup> In their reply brief, the FCA/VM Defendants argue that “California state court decisions  
 14 [regarding reliance] do not apply to claims arising under other states’ laws,” FCA/VM Reply at 21  
 15 n.25; however, these defendants fail to cite to any contrary authority outside of California where  
 an omissions theory was at issue.

16 Furthermore, several jurisdictions that have addressed the question appear to be in accord  
 with California. *See, e.g., Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 206-07 (4th Cir.  
 17 1988) (in discussing South Carolina law, noting that “[t]he dissent would reverse the award of  
 punitive damages on the basis that North Strand failed to prove detrimental reliance on Goodyear’s  
 18 misrepresentation” but stating that “the actionable independent fraudulent act here was not  
 Goodyear’s misrepresentation of its reason for cancellation, but rather its affirmative concealment  
 19 of the extension of the completion date[,] [a]nd, direct proof of reliance on the concealment was  
 not required for it was practically impossible to prove, by direct evidence, reliance on that which  
 had been intentionally concealed”); *Bp Am. Prod. Co. v. Patterson*, 263 P.3d 103, 110 (Colo.  
 20 2011) (noting that “[o]ut-of-state courts have recognized that a jury may presume reliance on a  
 class-wide basis where there is sufficient, common evidence that the defendant concealed a  
 material fact from class members”); *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46,  
 21 74 (D.N.J. 2009) (stating that, “[e]ven if Plaintiffs were required at trial to show evidence of  
 reliance similar to that required in common law fraud claims, that requirement would not render  
 22 class certification inappropriate” because “plaintiffs asserting fraud claims ‘involving primarily  
 failure to disclose’ material information need not demonstrate ‘positive proof of reliance’ in order  
 23 to recover[;] [a]ll that is necessary is that the facts withheld be material in the sense that a  
 reasonable [purchaser] might have considered them important in the making of [his or her]  
 24 decision”); *Cope v. Metro. Life Ins. Co.*, 696 N.E.2d 1001, 1008 (Ohio 1998) (stating that,  
 “[w]hen there is nondisclosure of a material fact, courts permit inferences or presumptions of  
 25 inducement and reliance[;] [t]hus, cases involving common omissions across the entire class are  
 26 generally certified as class actions, notwithstanding the need for each class member to prove these  
 elements”); *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 7 (N.Y. Supreme Ct. 1986) (holding that,  
 27 “once it has been determined that the representations alleged are material and actionable, thus  
 warranting certification, the issue of reliance may be presumed subject to such proof as is required  
 28 on the trial”).

1 FCA/VM Reply at 21 n.25, the Court rejects that argument. There is, at the very least, a question  
 2 of fact regarding materiality in light of the fact that the Class Vehicles were promoted as  
 3 environmentally friendly in the first place. In other words, if Defendants promoted the Class  
 4 Vehicles as such, they believed that such information was material to the consuming public. *See*  
 5 *MyFord Touch*, 46 F. Supp. 3d at 957 (stating that “it is odd for Ford to quibble with materiality  
 6 here when it promoted the MFT system as a desirable component of a vehicle in the first place[;]  
 7 [i]n other words, if the MFT system was so desirable, then it would not be surprising for Plaintiffs  
 8 to consider a problem with the system – particularly a systemic one – a material fact”).

9 To the extent Defendants are making a slightly different argument – *i.e.*, that Plaintiffs  
 10 have not sufficiently alleged that, had the information about the defeat devices been disclosed,  
 11 Plaintiffs would have been aware of it – Defendants still fare no better. Defendants’ reliance on  
 12 *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908 (C.D. Cal. 2010), is unavailing. In *Ehrlich*,  
 13 the court recognized that actual reliance is presumed or at least inferred when an omission is  
 14 material. The court also noted that the plaintiff had sufficiently alleged that the windshield  
 15 cracking defect would have been material to a reasonable consumer looking to purchase the MINI  
 16 car. The defendant argued, however, that the plaintiff had failed to allege that he would have been  
 17 aware of the omitted information if it had been disclosed – *e.g.*, there was no allegation that,  
 18 before he bought the MINI, the plaintiff reviewed a brochure, website, or promotional material  
 19 that might have contained a disclosure of the windshield cracking defect. The court agreed:

20 Given the alleged importance of the cracking defect, had BMW  
 21 chosen to disclose it to prospective buyers, presumably Plaintiff, as  
 22 a member of the buying public, would have been become aware of  
 23 the defect in the course of making his purchasing decision.  
 24 Nevertheless, the Court agrees with BMW that the FAC is devoid of  
 25 allegations that Plaintiff would have plausibly been aware of the  
 26 cracking defect before he purchased his MINI had BMW publicized  
 27 this information.

28 *Ehrlich*, 801 F. Supp. 2d at 920.

The Court is not persuaded by *Ehrlich*. Notably, in *Daniel* – a post-*Ehrlich* case – the  
 Ninth Circuit rejected the car manufacturer’s argument that the plaintiffs would not have been  
 aware of the defect if disclosure had been made because they did not view any advertising

1 materials prior to purchase. The Ninth Circuit pointed out that the plaintiffs had presented  
2 evidence that they interacted with and received information from sales representatives at  
3 authorized Ford dealerships before purchasing the vehicles at issue. *See Daniel*, 806 F.3d at 1226.  
4 Like *Daniels*, here, it is plausible that, had Defendants made a disclosure about the defeat device  
5 to the authorized FCA dealerships, they would have passed on that information to consumers at  
6 the time of the contemplated purchases. *See* FAC ¶ 34 *et seq.* (largely alleging purchases from  
7 authorized FCA dealerships). Moreover, it is worth noting that Plaintiffs’ theory here is that  
8 Defendants *knowingly* installed emissions control defeat devices in approximately 100,000  
9 vehicles, with those vehicles *specifically being marketed* as environmentally friendly. Had  
10 Defendants made the disclosure of a defeat device, it is plausible that the media would pick up that  
11 story, and it would have made national news, particularly in the wake of the Volkswagen scandal  
12 regarding defeat devices.

13 D. Consumer Protection Claims

14 For the reasons stated above, Plaintiffs’ claims for common law fraud cannot be dismissed  
15 at this juncture. The Court now turns to Defendants’ specific challenges to the claims for violation  
16 of consumer protection statutes.

17 1. Joint Appendix

18 As a preliminary matter, the Court takes note that Defendants have provided a joint  
19 appendix (approximately fifteen pages long) in which they suggest that all of the state consumer  
20 protection claims are flawed because (1) Plaintiffs fail to adequately allege reliance (*i.e.*, no causal  
21 connection); (2) Plaintiffs fail to allege a deceptive act, omission, or practice; and (3) Plaintiffs fail  
22 to allege a concrete, nonspeculative loss. *See* FCA/VM Mot. at 55.

23 The Court rejects Defendants’ attempt to make argument via the joint appendix. This  
24 Court, like the court in *Counts*, deems those arguments waived. *See Counts*, 237 F. Supp. 3d at  
25 594 (noting that both parties “attempt[] to ‘raise’ certain state-specific arguments by referencing  
26 appendices attached to their briefing”; adding that the “scattershot effort to raise arguments and  
27 defenses by simply citing to dozens, if not hundreds, of state court cases will not be addressed,”  
28 particularly as the court permitted expanded briefing and a court is not “responsible for combing

1 through appendices in an attempt to *sua sponte* raise and resolve legal arguments which the parties  
2 have not briefed”).

3 That being said, the Court finds that each of these three issues has largely been addressed  
4 above – (1) and (2) in the context of the common law fraud claims and (3) in the context of Article  
5 III standing. Also, with respect to (1), it is not clear that reliance is required for all consumer  
6 protection statutes. *See* Opp’n at 65-66 & n.34.<sup>21</sup>

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8 <sup>21</sup> Below are some examples of case law or other authority indicating that reliance is not required.  
The examples are not exhaustive.

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- 10 • Florida. *See Turner Greenberg Assocs. v. Pathman*, 885 So. 2d 1004, 1009 (Fla. Dist. Ct. App. 2004) (stating that “a demonstration of reliance by an individual consumer is not necessary in the context of [the Florida Deceptive and Unfair Trade Practices Act]”).
  - 11 • Illinois. *See Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996) (stating that, under the Illinois Consumer Fraud Act, “[p]laintiff’s reliance is not an element of statutory consumer fraud, but a valid claim must show that the consumer fraud proximately caused plaintiff’s injury”).
  - 12 • Kentucky. *See Corder v. Ford Motor Co.*, 869 F. Supp. 2d 835, 837-39 (W.D. Ky. 2012) (holding that reliance is not an element of a claim for violation of the Kentucky Consumer Protection Act; noting that loss causation is different from reliance and indicating that the former may be proved through, *e.g.*, a benefit-of-the-bargain theory that the product or service received was not worth what the customer paid for it).
  - 13 • Missouri. *See Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. 2007) (noting that “a fraud claim requires both proof of reliance and intent to induce reliance; the [Missouri Merchandising Practices Act] claim expressly does not” – 15 C.S.R. 60-9.110(4), which addresses concealment or omission or a material fact, provides that “[r]eliance and intent that others rely upon such concealment, suppression or omission are not elements of concealment, suppression or omission as used in section 407.020.1”).
  - 14 • New Jersey. *See Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076, 1086 (N.J. 2007) (stating that “[o]ur statute [the New Jersey Consumer Fraud Act] essentially replaces reliance, an element of proof traditional to any fraud claim, with the requirement that plaintiff prove ascertainable loss”).
  - 15 • New York. *See Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744 (N.Y. 1995) (stating that, “while the statute [N.Y. Gen. Bus. Law § 349(a)] does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm”).
  - 16 • North Dakota. *See* N.D. Cent. Code § 51-15-02 (providing that “[t]he act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice”).
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1 The Court now turns to the specific challenges to the consumer protection claims, as raised  
2 in Defendants' motions.

3 2. Prohibitions on Class Actions

4 Defendants' first substantive argument with respect to the consumer protection claims is  
5 that some states do not allow class actions for violation of their consumer protection statutes.  
6 More specifically, Defendants advance three arguments: (1) that multiple states (Alabama,  
7 Georgia, Louisiana, Mississippi, Montana, and South Carolina) do not allow class actions for  
8 violations of their consumer protection statutes; (2) that two states (Colorado and Tennessee) do  
9 not allow for class actions for damages for violations of their consumer protection statutes; and (3)  
10 that one state (Iowa) requires approval of the attorney general before a consumer protection class  
11 action may be brought.

12 In response to (1) and (2), Plaintiffs argue that a decision is premature; that is, the issues  
13 are better addressed when Plaintiffs move for class certification. Plaintiffs add that, in any event,  
14 Defendants' two arguments do not dispose of Plaintiffs' *individual* claims for relief. Both of  
15 Plaintiffs' responsive arguments have merit.

16 As for (3) – *i.e.*, in Iowa, approval of the attorney general is needed first for a class action),  
17 here, Defendants are in better stead. Iowa Code § 714H.7 provides as follows: “A class action  
18 lawsuit alleging a violation of this chapter *shall not be filed* with a court unless it has been  
19 approved by the attorney general.” Iowa Code § 714H.7 (emphasis added). However, that  
20 deficiency is potentially capable of being cured, and therefore, the Court gives Plaintiffs leave to  
21 amend their Iowa consumer protection claim.<sup>22</sup>

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- 23 • Ohio. *See Delahunt v. Cytodyne Techs.*, 241 F. Supp. 2d 827, 835-36 (S.D. Ohio 2003)  
24 (with respect to the Ohio Consumer Sales Practices Act, holding that “the allegation that  
25 the Defendants engaged in unfair, deceptive, or unconscionable practices or acts in  
26 connection with the sale of Xenadrine RFA-1 indicates that the members of the proposed  
27 class who purchased the product as a result of those practices or acts suffered a cognizable  
28 injury”; also noting that, “[u]nlike a fraud claim, where a plaintiff must allege harm above  
and beyond the misrepresentation and reliance thereon, a cause of action accrues under the  
Consumer Sales Practices Act as soon as the allegedly unfair or deceptive transaction  
occurs”).

<sup>22</sup> Plaintiffs contend that a failure to notify the attorney general is not a proper basis for dismissal

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3. Prohibitions on Actions for Damages and Standing for Injunctive Relief

Defendants argue next that some states (Delaware, Georgia, and Minnesota) do not allow any actions (private or class) for damages and, to the extent Plaintiffs want injunctive relief with respect to these state consumer protection statutes, they lack standing such that the consumer protection claims for these states should be dismissed in their entirety.

As an initial matter, the Court notes that Defendants are wrong on Delaware in that Delaware does provide for damages. Under Delaware law, “[i]f damages are awarded to the aggrieved party under the common law or other statutes of this State, such damages shall be treble the amount of the actual damages proved.” Del. Code Ann. tit. 6, § 2533.

As for Georgia and Minnesota, Plaintiffs do not dispute that damages are unavailable under those states’ consumer protection statutes. *See also* Ga. Code Ann. § 10-1-373; Minn. Stat. § 325d.45. Nevertheless, contrary to what Defendants argue, Plaintiffs do have standing to pursue injunctive relief under Georgia and Minnesota (or even Delaware) law. A plaintiff has standing to seek injunctive relief to address an “ongoing injury,” *Mayfield v. United States*, 599 F.3d 964, 969 (9th Cir. 2010), and, here, Plaintiffs have alleged that they are still suffering ongoing harm based on Defendants’ past conduct – at the very least, the Class Vehicles need to be fixed. *See* Opp’n at 55.

4. Heightened Pleading Requirements re Injury and Scienter

Defendants argue that the consumer protection claims should also be dismissed for those states that have heightened pleading requirements for injury. *See* FCA/VM Mot. at 57-58

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misses the point. In support of this argument, Plaintiffs cite § 714H.6. Under § 714H.6,

All copies of pleadings, orders, judgments, and notices required by this section to be sent to the attorney general shall be sent by certified mail unless the attorney general has previously been provided such copies of pleadings, orders, judgments, or notices in the same action by certified mail, in which case subsequent mailings may be made by regular mail. *Failure to provide the required mailings to the attorney general shall not be grounds for dismissal of an action under this chapter*, but shall be grounds for a subsequent action by the attorney general to vacate or modify the judgment.

Iowa Code § 714H.6(5) (emphasis added). But a failure to notify the attorney general is not the same thing as a failure to get approval of the attorney general. Defendants are arguing the latter.

1 (asserting that there are twenty-five such states). Defendants also argue that there is a heightened  
 2 pleading requirement for scienter in certain states. *See* FCA/VM Mot. at 58-59 (arguing that there  
 3 are fourteen such states). Neither argument is persuasive. Defendants’ injury argument is  
 4 effectively a rehash of its argument above regarding damages, *see* Part II.A, *supra* (addressing  
 5 injury-in-fact); Part III.A.1, *supra* (addressing RICO injury), *supra*, and Defendants’ scienter  
 6 argument is not supported by their citations.

7 To the extent Defendants are trying to make a different argument on scienter – *i.e.*, that a  
 8 defendant in a consumer protection case must have acted with the intent to *deceive* – Plaintiffs  
 9 have, in fact, made allegations regarding such an intent, as discussed above. *See* Part III.B.1.a to  
 10 .b, *supra*. Moreover, Plaintiffs properly assert that not all consumer protection claims actually  
 11 require, as an essential element, an intent to deceive. For example:

- 12 • Arkansas. Defendants rely on the fact that the Arkansas Deceptive Trade Practice Act  
 13 includes the following provision: “Deceptive and unconscionable trade practices made  
 14 unlawful . . . include . . . [k]nowingly making a false representation.” Ark. Code Ann.  
 15 § 4-88-107(a)(1). The problem for Defendants is that the Act goes on to provide that  
 16 deceptive and unconscionable trade practices also include “[e]ngaging in any other  
 17 unconscionable, false, or deceptive act or practice in business, commerce, or trade,” *id.*  
 18 § 4-88-107(a)(10), and, as the Eighth Circuit has held, § 4-88-107(a)(10) does “not  
 19 require knowing or intentional deception.” *Curtis Lumber Co. v. La. Pac. Corp.*, 618  
 20 F.3d 762, 776 (8th Cir. 2010). Moreover, as the Eighth Circuit noted in *Curtis Lumber*,  
 21 yet another provision in the Act – namely, § 4-88-108(2) – makes unlawful “[t]he  
 22 concealment, suppression, or omission of any material fact *with the intent that others*  
 23 *rely upon the concealment, suppression, or omission.*” Ark. Code Ann. § 4-88-108(2)  
 24 (emphasis added). The Eighth Circuit held that § 4-88-108(2) also does not require  
 25 knowing or intentional deception, underscoring that “states with laws virtually identical  
 26 to Arkansas Code § 4-88-108(2) have overwhelmingly concluded that intent to deceive  
 27 is not required.” *Curtis Lumber*, 618 F.3d at 777. “[T]he statute requires only that a  
 28 violator intend for a purchaser to *rely* on his acts or omissions.” *Id.* at 778.

- 1           • Illinois. The Illinois Consumer Fraud Act contains some language similar to that  
2           contained in the Arkansas statute. More specifically, the Illinois statute provides that  
3           the following is unlawful: “Unfair methods of competition and unfair or deceptive acts  
4           or practices, including but not limited to the use or employment of any deception,  
5           fraud, . . . misrepresentation or the concealment, suppression or omission of any  
6           material fact, *with the intent that others rely upon the concealment, suppression, or*  
7           *omission or such material fact.*” 815 ILCS 505/2 (emphasis added). Furthermore,  
8           even though, to show a violation of the Act, a plaintiff must establish, *inter alia*, a  
9           deceptive act or practice *and* intent on the defendant’s part that the plaintiff rely on the  
10          deception, an Illinois federal court has emphasized that those requirements “are not as  
11          strict as they sound . . . The deceptive act and intent requirements can be satisfied by  
12          innocent misrepresentations of a defendant.” *Chow v. Aegis Mortg. Corp.*, 286 F.  
13          Supp. 2d 956, 963 (N.D. Ill. 2003) (stating that, under the Act, “[t]o satisfy the intent  
14          requirement, plaintiff need not show that defendant intended to deceive the plaintiff,  
15          but only that the defendant intended the plaintiff to rely on the (intentionally *or*  
16          unintentionally) deceptive information given”) (emphasis added).
- 17          • Iowa. The Iowa Consumer Frauds Act contains some language similar to the Arkansas  
18          and Illinois statutes above. *See* Iowa Code § 714H.3(1) (providing that “[a] person  
19          shall not engage in a practice or act the person knows or reasonably should know is an  
20          unfair practice, deception, fraud, false pretense, or false promise, or the  
21          misrepresentations, concealment, suppression, or omission of a material fact, *with the*  
22          *intent that others rely upon the unfair practice, deception, [etc.]*”) (emphasis added).  
23          “[I]t is not necessary for the State to prove that the violator acted with an intent to  
24          deceive, as is required for common law”; the only intent required by the statute is that  
25          the defendant act ‘with the intent *that others rely*’ upon his omissions[;] [i]n addition,  
26          there is no requirement under the statute that a violator have knowledge of the falsity of  
27          his or her representations.” *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 771 (Iowa  
28          2004).

- 1           • Kentucky. Even Defendants’ cited authority indicates that a defendant need not have  
2           the intent to deceive; gross negligence is enough. *See Scanlan v. Sunbeam Prods., Inc.*,  
3           690 Fed. Appx. 319, 333 (6th Cir. 2017) (stating that, “[i]n order to establish a  
4           violation of the [Kentucky Consumer Protection Act], plaintiffs must show that the  
5           defendant’s actions were (1) intentional *or* (2) grossly negligent”) (emphasis added).
- 6           • Louisiana. The Louisiana statute covers not only fraud but also unfair conduct, which  
7           does not necessarily require an intent to deceive. *See, e.g.*, La. Rev. Stat. § 51:1405(A)  
8           (providing that “[u]nfair methods of competition and unfair or deceptive acts or  
9           practices in the conduct of any trade or commerce are hereby declared unlawful”);  
10          *Mabile v. BP, P.L.C.*, No. 11-1783, 2016 U.S. Dist. LEXIS 129540, at \*76-78 (E.D.  
11          La. Sep. 22, 2016) (stating that “it is clear that [the Louisiana Unfair Trade Practices  
12          Act] claims are not limited solely to allegations of fraud, but may be independently  
13          premised on a range of non-fraudulent conduct”). Moreover, even if Plaintiffs’  
14          consumer protection claims were predicated on a fraud/deceit theory, it still is not clear  
15          that an intent to deceive, as opposed to a capacity or tendency to deceive, is required.  
16          *See Industrias Magromer Cueros Y Pielas S.A. v. La. Bayou Furs*, 293 F.3d 912, 922  
17          (5th Cir. 2002) (holding that the LUTPA “does not require an intent to obtain an  
18          advantage or to cause a loss”; “[t]he statute merely requires a showing of ‘some  
19          element of fraud, misrepresentation, deception or other unethical conduct on [a]  
20          defendant’s part”). Defendants have cited to a case in which a court stated that “[a]  
21          defendant’s motivation is a critical factor; the actions must have been taken with the  
22          specific purpose of harming the competition.” *Elliott Co. v. Montgomery*, No. 6:15-  
23          02404, 2016 U.S. Dist. LEXIS 148523, at \*14 (W.D. La. Sep. 28, 2016). However,  
24          that statement regarding motivation or purpose seems to be driving at the point that the  
25          “LUPTA does not prohibit sound business practices, the exercise of permissible  
26          business judgment, or appropriate free enterprise transactions.” *Id.* at \*15. In any  
27          event, case law generally emphasizes that what is an unfair or deceptive act must be  
28          evaluated on a case-by-case basis. *See, e.g., id.* at \*14; *Nursing Enters. v. Marr*, No,

1 30,776-CA, 719 So. 2d 524, 528 (La. Ct. App. 1998).

- 2 • Minnesota. *See Church of the Nativity of Our Lord v. WatPro, Inc.*, 474 N.W.2d 605,  
3 612 (Minn. Ct. App. 1991) (noting that “Minnesota courts have held that a finding of  
4 negligent or unintentional misrepresentation violates” the Minnesota Consumer Fraud  
5 Act). Even Defendants’ authority is not really to the contrary, indicating that it is the  
6 intent that others rely, not the intent to deceive, that is important. *See Parkhill v. Minn.*  
7 *Mut. Life Ins. Co.*, 188 F.R.D. 332, 344 (D. Minn. 1999) (noting that the Minnesota  
8 Consumer Fraud Act “prohibits ‘the act, use, or employment by any person of any  
9 fraud, . . . misrepresentation, misleading statement or deceptive practice, *with the intent*  
10 *that others rely thereon*”) (emphasis added).
- 11 • New Mexico. Even Defendants’ authority shows that, in effect, negligence is enough  
12 to support a violation. *See U.S. ex rel. Custom Grading, Inc. v. Great Am. Ins. Co.*,  
13 952 F. Supp. 2d 1259, 1267-68 (D.N.M. 2013) (stating that the false or misleading  
14 representation must have been knowingly made and that “requirement is met if a party  
15 was actually aware that the statement was false or misleading when made, or in the  
16 exercise of reasonable diligence should have been aware that the statement was false or  
17 misleading”) (internal quotation marks omitted). New Mexico courts have held that  
18 there is no requirement of an intent to deceive. *See Ashlock v. Sunwest Bank of*  
19 *Rosewell, N.A.*, 107 N.M. 100, 102 (1988) (rejecting the argument that the knowingly  
20 made requirement means that the statement must have been made with the intent to  
21 mislead; adding that applying the statute to all misleading or deceptive statements,  
22 “whether intentionally or unintentionally made,” ensures that the statute “lends the  
23 protection of its broad application to innocent consumers”), *overruled on other*  
24 *grounds by Gonzales v. Surgidev Corp.*, 120 N.M. 133 (1995).
- 25 • North Dakota. This is another example of a statute that uses language regarding an  
26 intent that others rely, not an intent to deceive. *See N.D. Cent. Code § 51-15-02*  
27 (providing that “[t]he act, use, or employment by any person of any deceptive act or  
28 practice, fraud, false pretense, false promise, or misrepresentation, *with the intent that*

1            *others rely thereon* in connection with the sale or advertisement of any merchandise,  
 2            whether or not any person has in fact been misled, deceived, or damaged thereby, is  
 3            declared to be an unlawful practice”) (emphasis added).

4            5.        Economic Loss Doctrine

5            According to Defendants, the consumer protection claim under North Carolina law must be  
 6            dismissed because it is barred by the economic loss doctrine. The doctrine “prohibits recovery  
 7            for economic loss in tort. . . . [S]uch claims are governed by contract law” instead. *Buffa v.*  
 8            *Cygnature Constr. & Dev., Inc.*, No. COA16-237, 2016 N.C. App. LEXIS 1334, at \*9 (N.C. Ct.  
 9            App. Dec. 30, 2016); *see also Artistic Southern Inc. v. Lund*, 2015 NCBC 109, at \*34-35 (N.C.  
 10            Super. Ct. Dec. 9, 2015) (noting that, under the doctrine, purely economic losses are not  
 11            recoverable under tort law; rather, there must be injury to person or property before imposing tort  
 12            liability).

13            The rationale for the economic loss rule is that the sale of goods is  
 14            accomplished by contract . . . . To give a party a remedy in tort,  
 15            where the defect in the product damages the actual product, would  
 16            permit the party to ignore and avoid the rights and remedies granted  
 17            or imposed by the parties’ contract. [However,] [w]here a defective  
 18            product causes damage to property other than the product itself,  
 19            losses attributable to the defective product are recoverable in tort  
 20            rather than contract.

21            *Buffa*, 2016 N.C. App. LEXIS 1334, at \*9-10.

22            However, in *MyFord Touch*, this Court previously held that the economic loss doctrine is  
 23            not a bar to a statutory consumer protection claim. *See In re MyFord Touch Consumer Litig.*, 46  
 24            F. Supp. 3d 936, 967 (N.D. Cal. 2014) (holding that North Carolina’s consumer protection statute  
 25            “gives rise to a duty independent of the contract and therefore should not be barred by the  
 26            economic loss rule”); *see also Coker v. DaimlerChrysler Corp.*, 617 S.E.2d 306, 319 (N.C. Ct.  
 27            App. 2005) (Hudson, J., dissenting) (supporting the view that claims under consumer protection  
 28            statute “are exempt from the economic loss rule because the rule is judicial, not legislative, and  
 must give way to specific legislative policy pronouncement allowing damages for economic  
 loss[;] [i]n other words, by enacting a remedy for economic losses suffered by reason of an act  
 deemed wrongful by the statute, the legislature has effectively preempted the economic loss rule

1 for those cases covered by the act”).<sup>23</sup>

2 6. Privity

3 Defendants maintain that privity of contract is required to state a claim under the Idaho and  
4 Kentucky consumer protection statutes.

5 With respect to Idaho, the Court is not persuaded. Admittedly, there is an Idaho Supreme  
6 Court case stating that, “[i]n order to have standing under the Idaho Consumer Protection Act, the  
7 aggrieved party must have been in a contractual relationship with the party alleged to have acted  
8 unfairly or deceptively.” *Taylor v. McNichols*, 243 P.3d 642, 662 (Idaho 2010). But it is not clear  
9 from *Taylor* what kind of contractual relationship the court was contemplating; in other words, it  
10 is not clear that the court was necessarily requiring a direct contract between the plaintiff and  
11 defendant (immediate privity). For example, *Taylor* cited the following in support of the above  
12 statement: (1) Idaho Code § 48-608(1) which provides that “[a]ny person who purchases or leases  
13 goods or services and thereby suffers . . . ,” *id.*, and (2) *Haskin v. Glass*, 640 P.2d 1186, 1189  
14 (Idaho Ct. App. 1982), which states that “a claim under the ICPA must be based upon a  
15 contract.” *Taylor*, 243 P.2d at 662. Arguably, § 48-608(1) and *Haskin* simply reflect that a  
16 plaintiff’s claim must ultimately be founded on a contract; they do not necessarily require that the  
17 contract must be one entered into by the plaintiff and defendant directly. Here, Plaintiffs appear to  
18 have contracts with, *e.g.*, dealers that resulted in the Class Vehicles being purchased. *See, e.g.*,  
19 FAC ¶ 34 (“Dealers act as FCA’s agents in selling automobiles under the Fiat Chrysler name and  
20 disseminating vehicle information provided by Fiat Chrysler to customers.”). The case cited by  
21

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22 <sup>23</sup> Defendants rely on *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614 (M.D.N.C. 2006),  
23 but that court specifically recognized that “the North Carolina appellate courts have not yet  
24 decided whether to extend the economic loss rule to claims based on frauds or unfair trade  
25 practices.” *Id.* at 627 (adding that the court’s decision was limited “to cases such as the instant  
26 case involving allegations of a defective product where the only damage alleged is damage to the  
27 product itself and the allegations of unfair trade practices are intertwined with the breach of  
28 contract or warranty claims”); *see also Artistic Southern*, 2015 NCBC 109, at \*58 n.13 stating that  
“it is unclear whether the economic loss doctrine applies broadly to bar unfair and deceptive trade  
practices claims as a matter of law [as] North Carolina appellate courts have not expressly  
extended the doctrine to bar all such claims[;] [m]oreover, in *Coker* . . . , although the majority  
opinion did not reach the issue, now-Supreme Court Justice Hudson, in a dissenting opinion,  
rejected application of the economic loss rule to Chapter 75 claims because the economic loss rule  
is judicial, not legislative, and must give way to specific legislative policy pronouncement  
allowing damages for economic loss”).



1 Defendants is not to the contrary, focusing on the fact that a “contemplated transaction with no  
2 contract” is insufficient for a consumer protection claim. *Moto Tech, Ltd. Liab. Co. v. KTM N.  
3 Am., Inc.*, No. 1:13-cv-00165-BLW, 2013 U.S. Dist. LEXIS 175581, at \*10 (D. Idaho Dec. 9,  
4 2013). These cases do not address the situation where a contract is with a defendant’s dealer.

5 As for Kentucky, however, Plaintiffs have the weaker position. The case cited by  
6 Defendants states that “[c]laims may only be brought under the [Kentucky Consumer Protection  
7 Act] by individuals who personally purchase goods or services from a merchant.” *Keaton v. G.C.  
8 Williams Funeral Home, Inc.*, 436 S.W.3d 538, 546 (Ky. Ct. App. 2013). As noted above, here,  
9 Plaintiffs have purchased Class Vehicles from dealers. But the *Keaton* court went further and  
10 required that the plaintiffs have a direct contractual relationship with the defendant. According to  
11 the court, the plaintiffs did not have standing to bring a consumer protection claim against a  
12 subcontractor because there was no immediate contract between the plaintiffs and the  
13 subcontractor. The plaintiffs had a contract with the contractor only, not the subcontractor. *See*  
14 *id.* The fact that the subcontractor seemed to have a close relationship with the contractor – the  
15 two companies had “common owners” – did not impact the court’s decision. *Id.* Specifically, in  
16 *Keaton*, the plaintiffs’ mother was buried in a plot different from the one she had purchased next  
17 to her husband. The mother was eventually reinterred in the correct plot. The plaintiffs filed suit  
18 against both the funeral home and the cemetery. One of the claims asserted was violation of the  
19 Kentucky Consumer Protection Act. The court held that the plaintiffs did not have a claim against  
20 the cemetery because they did not have a contract with the cemetery; rather, the only contract the  
21 plaintiffs had was with the funeral home who then subcontracted with the cemetery to perform the  
22 interment. The court stated that because there was no privity of contract between the plaintiffs and  
23 the cemetery, they lacked standing to pursue a claim against the cemetery. Arguably, the situation  
24 here is distinguishable because the dealers who sold the Class Vehicles acted as agents for FCA.  
25 However, Plaintiffs do not cite any cases employing agency theory for the Kentucky Consumers  
26 Protection Act.

27 The Kentucky case cited by Plaintiffs, *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897 (Ky.  
28 2008), appears consistent with *Keaton*. There, the defendant, a used car dealer, argued that the

1 plaintiffs did not have consumer protection claim because there was an incomplete sales  
 2 transaction. The Kentucky Supreme Court rejected the defendant’s argument but only because the  
 3 statute simply required that a person “purchase” a good or service, and purchase was defined  
 4 broadly as “taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest,  
 5 issue or reissue, gift, or any other voluntary transaction creating an interest in property.” *Id.* at  
 6 902. The court continued:

7 Under the facts of this case, [the plaintiffs] took the Camaro, at least  
 8 for a time, following a period of negotiations and after giving value  
 9 by signing over title to the Nissan. At the very least, [the plaintiffs]  
 10 had an equitable interest in the Camaro equal to the value of the  
 11 Nissan. So we conclude that a purchase was made at least for  
 purposes of the KCPA, which is designed to provide broad  
 protection to consumers victimized by unlawful and deceptive trade  
 practices.

12 *Id.* at 902-03. It added: “[T]he absence of a finding of a valid contract is not fatal to a claim for  
 13 unfair trade practices under the [Kentucky Consumer Protection Act] as it would be to a breach of  
 14 contract claim” because “[n]othing in the KCPA . . . explicitly requires that a binding contract be  
 15 reached.” *Id.* at 903. *Craig & Bishop* does not provide much guidance for the instant case  
 16 because it does not address liability via agency. Indeed, in *Craig & Bishop*, there was a direct  
 17 relationship between the plaintiff and defendant, even if not a formal contractual one. In contrast,  
 18 in the case at bar, there is no direct relationship between Plaintiffs and Defendants, only a  
 19 relationship between Plaintiffs and the dealers.

20 In sum, the Court finds in Plaintiffs’ favor on the Idaho claim and Defendants’ favor on the  
 21 Kentucky claim. Accordingly, the Court dismisses the Kentucky consumer protection claim.

22 7. Punitive Damages

23 According to Defendants multiple states bar punitive damages as relief – namely,  
 24 Maryland, Maine, Minnesota, Nebraska, South Dakota, and West Virginia. Defendants also argue  
 25 that Oklahoma requires malice or evil intent for punitives, and Plaintiffs have failed to allege such.

26 Plaintiffs have agreed to dismiss their claims for punitives under Nebraska and West  
 27 Virginia law (without prejudice). *See* Opp’n at 69. They have also conceded that Maryland,  
 28 Maine, Minnesota, and South Dakota do not allow for punitives. *See* Opp’n at 69-79. This

1 resolves all of the states identified by Defendants, except for Oklahoma.

2 As to Oklahoma, Plaintiffs have adequate alleged malice. As noted above, Plaintiffs’  
3 theory is that there was specific manipulation of the emission control system which resulted in  
4 NOx emissions up to twenty times the legal limit. Hence, the motion to dismiss the Oklahoma  
5 claim for punitive damages is denied.

6 8. Identification of False Advertisements

7 Defendants also argue for dismissal of the New York consumer protection claim on the  
8 ground that New York law requires all allegedly false advertisements to be identified. As  
9 discussed above, Plaintiffs have identified one specific affirmative misrepresentation – *i.e.*, the use  
10 of the “EcoDiesel” logo on the Class Vehicles. Accordingly, the motion to dismiss the New York  
11 consumer protection claim is denied.

12 9. Attorney General Approval

13 Finally, Defendants argue that at least one state (Mississippi) requires the approval of the  
14 state attorney general before a private suit may be filed for violation of the consumer protection  
15 statute. Plaintiffs concede but ask the Court for leave to amend. *See* Opp’n at 70. Leave is  
16 granted.

17 **V. WARRANTY CLAIMS**

18 In addition to the fraud-on-consumer claims, Plaintiffs have brought claims for breach of  
19 warranty. Plaintiffs’ warranty claims are as follows: (1) breach of express warranty under state  
20 law; (2) breach of implied warranty under state law; and (3) breach of written and implied  
21 warranties under federal law (*i.e.*, a violation of the MMWA).

22 A. State Law Warranty Claims: Preemption

23 Defendants argue that the state law warranty claims (both express and implied) should be  
24 dismissed because of preemption. In addressing this argument, the Court begins by identifying the  
25 factual predicate for the warranty claims.

26 For breach of express warranty, the warranties at issue are two emission control warranties,  
27 which, as expressly alleged in the FAC, federal law *requires* manufacturers to provide: (1) a  
28 “Performance Warranty” and (2) a “Defect Warranty.” *See, e.g.*, FAC ¶ 453 (allegations

1 regarding claim for breach of express warranty under California law). For breach of implied  
2 warranty, the Class Vehicles are allegedly not in merchantable condition because their design  
3 violated state and federal laws; furthermore, the Class Vehicles are allegedly not fit for their  
4 ordinary purpose because they were built to evade state and federal emission standards. *See* FAC  
5 ¶ 465 (allegations regarding claim for breach of implied warranty under California law).

6 Based on the factual predicate of the warranty claims, the Court agrees with Defendants  
7 that there is preemption – more specifically, that the warranty claims are expressly preempted by  
8 the CAA. In so holding, the Court finds *Caterpillar*, 2015 U.S. Dist. 98784, and *VW Va.*, 94 Va.  
9 Cir. at 189, persuasive authority.

10 In *Caterpillar*, the plaintiffs sued a diesel engine manufacturer, asserting that the emissions  
11 control system used in the engine was “defective and render[ed] [their] vehicles inoperative on  
12 account of repeated and endemic engine failure, deratings [*i.e.*, decrease of engine horsepower and  
13 speed], and shutdowns.” *Caterpillar*, 2015 U.S. Dist. LEXIS 98784, at \*2-3. According to the  
14 plaintiffs, the emission control system – known as “CRS” – was “unable to maintain reliable  
15 thermal management of exhaust temperatures as required to achieve regeneration under all  
16 operating conditions and applications. As a result, the CRS’s protective measures frequently and  
17 repeatedly render[ed] the vehicles inoperable and require[d] remediation by authorized Caterpillar  
18 technicians using proprietary Caterpillar equipment and methods.” *Id.* at \*10. The plaintiffs’  
19 claims included claims for breach of warranty.

20 The defendant argued, *inter alia*, that the warranty claims were preempted by the CAA (§  
21 209(a)). The court found that most warranty claims were not preempted because the defendant  
22 had “*voluntarily* assumed the warranty obligations.” *Id.* at \*43 (emphasis added). Thus, the  
23 requirements imposed by the warranty had nothing to do with the requirements of the CAA, *see*  
24 *id.* at \*42-43, and there could be no enforcement of federal emissions standards via the warranty.

25 There was one warranty claim, however, that the court did find to be preempted, more  
26 specifically the claim for breach of the *statutorily mandated* Federal Emissions Control Warranty  
27 (“FECW”). Preemption was warranted here, the court explained, because

28 the FECW was *not* voluntarily undertaken. [Rather,] [i]t is

1 mandated by federal law [42 U.S.C. § 7541(a)(1)] as part of the  
 2 statutory and regulatory scheme to ensure compliance with motor  
 3 vehicle emissions standards. The CAA authorizes the federal  
 4 government to pursue violations of warranty provisions in federal  
 5 court or administratively. Accordingly, the FECW is part of the  
 6 enforcement scheme under the CAA. As discussed *infra*, to trigger  
 7 the manufacturer’s obligations under the FECW, *the emissions-*  
 8 *related parts or components must cause the vehicle or engine to not*  
*conform to EPA regulations.* It is therefore untenable for Plaintiffs  
 to argue that there can be no preemption because their claims do not  
 relate to the ability of the Engines to comply with EPA standards or  
 depend upon a showing of non-conformity. In light of the Supreme  
 Court’s interpretation of the term “standard” in *EMA*, permitting  
 Plaintiffs’ claim for a breach of the FECW would be “an attempt to  
 enforce [a] standard relating to the control of emissions from new  
 motor vehicles or . . . engines.”

9 *Id.* at \*44-45 (emphasis added). In other words, given the mandatory nature of the express  
 10 warranties and the enforcement scheme of the CAA in respect thereto, state claims for breach of  
 11 those express warranties completely overlapped with the CAA.

12 In *VW Va.*, the court also determined that warranty claims asserted by the plaintiffs were  
 13 preempted by the CAA. The court explained as follows: “Here, the relief sought in each of the  
 14 injunctive counts, Lemon law claims, warranty claims, and public nuisance claims directly relates  
 15 to enforcement of emissions standards because the basis for the breach or nuisance is violation of  
 16 the federal emissions standards.” *VW Va.*, 94 Va. Cir. at 197. In other words, the legal duty that  
 17 was the predicate of these claims was compliance with CAA emissions standards. Indeed, unlike  
 18 the claims of fraud and deception discussed above, noncompliance with the CAA emissions  
 19 standards constitutes the breach-of-warranty claim. *See id.* (noting, *e.g.*, that “the Virginia Lemon  
 20 Law and breach of warranty claims cite Plaintiffs having to drive an ‘illegal’ vehicle or one that  
 21 fails to comply with emissions regulations as the source of their injury”).

22 Plaintiffs argue that, in the instant case, the warranties were voluntarily adopted and  
 23 therefore their warranty claims are really based on contract. But that argument has no force for the  
 24 express warranty claim because that claim is based on a “Performance Warranty” and a “Defect  
 25 Warranty,” both of which – as alleged in the FAC – are required by federal law. Plaintiffs’  
 26 reliance on *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), is unavailing. There, the Supreme  
 27 Court did note that “[a] manufacturer’s liability for breach of an express warranty derives from,  
 28 and is measured by, the terms of that warranty. Accordingly, the ‘requirements’ imposed by an

1 express warranty claim are not ‘imposed under State law [the language used in the preemption  
2 provision at issue],’ but rather imposed *by the warrantor*.” *Id.* at 525 (emphasis in original). But  
3 in the instant case, the warranties at issue *are* required by federal law. And a finding of violation  
4 of a CAA emissions standard necessarily results in a breach of warranty without any intervening  
5 independent and volitional conduct (*e.g.*, deceit and misrepresentation) by the Defendants.

6 As for the implied warranty claims, Plaintiffs’ voluntariness argument is irrelevant because  
7 the voluntariness question applies to express warranties only. In other words, a defendant can  
8 voluntarily adopt only an express warranty. Implied warranties obtain irrespective of a  
9 defendant’s volition. The problem for Plaintiffs is that their implied warranty claims are entirely  
10 predicated on compliance with federal emissions standards (EPA or CARB). Breach of the  
11 implied warranty is synonymous with violation of federal emissions standards, and thus, this  
12 amounts to direct enforcement of federal emissions standards preempted by the CAA.

13 Accordingly, the Court dismisses Plaintiffs’ state law warranty claims (both express and  
14 implied) based on express preemption.

15 B. Federal MMWA Warranty Claim

16 Defendants take the position that, if the state warranty claims are preempted, then the  
17 federal warranty claim must be dismissed as well, not because of preemption *per se* but because  
18 the federal warranty claim is ultimately based on state law. *See* FCA/VM Mot. at 49 (arguing that,  
19 “[b]ecause Plaintiffs do not adequately plead state warranty claims, their MMWA claim fails  
20 along with all of their state warranty claims”).

21 Defendants’ position is problematic. The MMWA provides in relevant part that “[a]  
22 consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply  
23 with any obligation . . . under a written warranty [or] implied warranty . . . may bring suit for  
24 damages and other legal and equitable relief.” 15 U.S.C. § 2310(d) (emphasis added).

25 Admittedly, if a plaintiff cannot state a claim for breach of warranty under state law, then it makes  
26 sense that the plaintiff cannot state a MMWA claim either. *See also id.* § 2301(7) (defining  
27 “implied warranty” as “an implied warranty arising under State law”). However, in the instant  
28 case, there is no contention that Plaintiffs have failed to state a substantive claim for breach of

1 warranty under state law; rather, the only challenge that Defendants have made to the state  
2 warranty claims is that such claims are preempted. Preemption is a question entirely independent  
3 of the merits of breach of warranty claims. Defendants have cited no case holding that MMWA’s  
4 effective incorporation by reference to state warranty claims is meant to refer to anything other  
5 than the merits of such claims. Absent case authority so holding, the Court is not persuaded that a  
6 finding of CAA preemption should vitiate a MMWA claim. After all, the MMWA is a federal law  
7 and its incorporation of state law to create a *federal* cause of action would, if anything, counsel  
8 against preemption, at least in the absence of a clear congressional directive.

9 The cases that Defendants cite in their brief, *see* FCA/VM Mot. at 49, are distinguishable  
10 precisely because they do not address the issue of whether preemption of a state warranty claim *by*  
11 *itself* is a reason to dismiss a MMWA claim. For example, the court in *Meaurit v. Pinnacle*  
12 *Foods Grp., LLC*, No. C 09-04555 CW, 2010 U.S. Dist. LEXIS 43858 (N.D. Cal. May 5, 2010),  
13 concluded that the state warranty claims were preempted by a federal law, but it also held that the  
14 plaintiffs had failed to state a claim for relief, under state law, for breach of warranty. *See id.* at  
15 \*32-33. Therefore, dismissal of the MMWA claim could have rested on failure to state a claim for  
16 relief alone (and not preemption).

17 Accordingly, although the Court finds preemption of the state claims for breach of  
18 warranty (express and implied), there is no reason why the MMWA warranty claim cannot  
19 continue at this juncture.

## 20 VI. PERSONAL JURISDICTION

21 The final issue for the Court is whether it has personal jurisdiction over the foreign entities  
22 that have been sued – *i.e.*, FCA N.V., VM Italy, and Bosch GmbH. Plaintiffs do not claim general  
23 jurisdiction over any of these foreign entities. Therefore, the only question for the Court is  
24 whether there is specific jurisdiction – at least a *prima facie* case of such.<sup>24</sup> *See Data Disc, Inc. v.*  
25 *Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977) (stating that, “[i]f [a] court

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26  
27 <sup>24</sup> Plaintiffs may not rely on RICO, 18 U.S.C. § 1965(b), to supply a basis for personal  
28 jurisdiction. *See Elsevier, Inc. v. Grossman*, 77 F. Supp. 3d 331, 343 (S.D.N.Y. 2015) (explaining  
that “a district court relying on § 1965[(b)] may only exert this jurisdictional pull over defendants  
‘residing in any other district,’ not foreign defendants”).

1 determines that it will receive only affidavits or affidavits plus discovery materials, . . . a plaintiff  
 2 must make only a prima facie showing of jurisdictional facts through the submitted materials in  
 3 order to avoid a defendant's motion to dismiss”).

4 Specific jurisdiction must be evaluated on a claim-by-claim basis. The relevant claims that  
 5 have survived dismissal, as discussed above, are (1) violation of RICO and (2) (for the most part)  
 6 the fraud-on-consumer claims.<sup>25</sup>

7 Under Ninth Circuit law, there is a three-prong test for analyzing a claim of specific  
 8 jurisdiction:

- 9 (1) The non-resident defendant must purposefully direct his  
 10 activities or consummate some transaction with the forum or  
 11 resident thereof; or perform some act by which he purposefully  
 12 avails himself of the privilege of conducting activities in the  
 13 forum, thereby invoking the benefits and protections of its laws;
- 14 (2) the claim must be one which arises out of or relates to the  
 15 defendant's forum-related activities; and
- 16 (3) the exercise of jurisdiction must comport with fair play and  
 17 substantial justice, i.e. it must be reasonable.

18 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Because the RICO  
 19 and fraud-on-consumer claims are all predicated on torts, a purposeful direction analysis applies  
 20 instead of a purposeful availment analysis. *See id.* “A showing that a defendant purposefully  
 21 directed his conduct toward a forum state . . . usually consists of evidence of the defendant's  
 22 actions outside the forum state that are directed at the forum, such as the distribution in the forum  
 23 state of goods originating elsewhere.” *Id.* at 803.

24 In the instant case, the dispute between the parties centers on the purposeful direction  
 25 factor. The foreign entities argue that Plaintiffs must show purposeful direction with respect to  
 26 each of the states where the lawsuits comprising the MDL were initially filed. *See FCA/VM Mot.*  
 27 at 50 n.15 (citing *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 699 (9th Cir. 2011) (stating that  
 28 “[a] district judge exercising authority over [MDL] cases transferred for pretrial proceedings

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<sup>25</sup> While the MMWA claim has survived dismissal, it has been asserted against FCA US only and not any foreign entity. *See FAC* ¶ 286 (“Plaintiffs bring this action on behalf of themselves and the Nationwide Class against FCA US LLC.”).



1 ‘inherits the entire pretrial jurisdiction that the transferor district judge would have exercised if the  
2 transfer had not occurred”)); *see also In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig.*,  
3 MDL No. 2753, 2017 U.S. Dist. LEXIS 192108, at \*23 (D.N.H. Nov. 14, 2017) (stating that, “[i]n  
4 multi-district litigation based on diversity jurisdiction, ordinarily personal jurisdiction in the  
5 transferee court is based on the jurisdiction of the transferor court”); *In re Testosterone*  
6 *Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings*, No. 14 C 1748, 2016  
7 U.S. Dist. LEXIS 142235, at \*430 (N.D. Ill. Oct. 10, 2016) (stating that, “[t]o establish that this  
8 Court has personal jurisdiction over Besins in this MDL proceeding, plaintiffs bear the burden of  
9 showing that the transferor courts where their cases originated would have personal jurisdiction  
10 over Besins”); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. C 02-1486  
11 PJH 2005 U.S. Dist. LEXIS 30299, at \*7 (N.D. Cal. Nov. 7, 2005) (stating that, “[i]n MDL actions  
12 such as this one, the court is entitled to exercise personal jurisdiction over each defendant only to  
13 the same degree that the original transferor court could have”); *In re Ski Train Fire in Kaprun,*  
14 *Aus.*, 257 F. Supp. 2d 717, 723 (S.D.N.Y. 2003) (noting that, “[i]n a multi-district litigation, the  
15 transferee court must apply the law of the transferor forum in determining issues of personal  
16 jurisdiction”).

17 In response, Plaintiffs counter that this approach is not necessary because this Court may  
18 evaluate the foreign entities’ contacts with the United States, and not each transferor court, under  
19 Federal Rule of Civil Procedure 4(k)(2). *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1158-59  
20 (9th Cir. 2006) (explaining that Rule 4(k)(2) “is commonly referred to as the federal long-arm  
21 statute” because it allows a plaintiff “to look to the aggregate contacts of a defendant with the  
22 United States as a whole instead of a particular state forum”).

23 The exercise of Rule 4(k)(2) as a federal long-arm statute requires  
24 the plaintiff to prove three factors. First, the claim against the  
25 defendant must arise under federal law. Second, the defendant must  
26 not be subject to the personal jurisdiction of any state court of  
27 general jurisdiction. Third, the federal court's exercise of personal  
28 jurisdiction must comport with due process. . . .

. . . . The due process analysis is identical to [the typical minimum  
contacts analysis], except here the relevant forum is the entire  
United States.

1 *Id.* at 1159.

2 Plaintiffs argue that (1) they have asserted a federal claim (the RICO claim<sup>26</sup>), (2) the  
3 foreign entities have disavowed that they are subject to the personal jurisdiction of any state court  
4 of general jurisdiction, and (3) they have adequately alleged minimum contacts once the United  
5 States as a whole is considered. Plaintiffs add that, under the doctrine of pendent jurisdiction, the  
6 Court may exercise pendent personal jurisdiction over the state law claims because they share a  
7 factual predicate with the RICO claim (*i.e.*, the claims arise out of a common nucleus of operative  
8 facts). *See* Opp'n at 71 n.40 (citing *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066,  
9 1076 (9th Cir. 2011) (stating that, “[u]nder the doctrine of pendent personal jurisdiction, the court  
10 may also exercise jurisdiction over the balance of CollegeSource’s claims, which ‘arise[] out of a  
11 common nucleus of operative facts’ with the misappropriation claim [over which there was  
12 specific jurisdiction]”); *see also* *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174,  
13 1181 (9th Cir. 2004) (“adopt[ing] the doctrine of pendent personal jurisdiction”).

14 In reply, the foreign entities do not challenge any of Plaintiffs’ arguments except for (3)  
15 above; that is, they maintain that there are insufficient minimum contacts with the United States  
16 because Plaintiffs have simply alleged in conclusory terms that the foreign entities purposefully  
17 directed conduct toward the United States as a whole.

18 The Court finds that Plaintiffs have adequately established a prima facie case of specific  
19 jurisdiction. As to Bosch GmbH’s contacts with the United States, there are sufficient contacts in  
20 light of the appropriate “lumping” together of Bosch GmbH and Bosch LLC discussed above. *See*  
21 Part III.B.1.a.i, *infra*.

22 As for FCA N.V. and VM Italy, their argument that the FAC does not spell out precisely  
23 what each company’s contacts with the United States were (with reference to the RICO enterprise  
24 “to install customized emission treatment software (EDCs) in the EcoDiesel®’s engine diesel  
25 controls so that the Class Vehicles could ‘pass’ the EPA and CARB testing,” FAC ¶ 229) is not  
26 without some basis. Nevertheless, Plaintiffs have made out a sufficient showing because the

27 \_\_\_\_\_  
28 <sup>26</sup> Plaintiffs also make reference to the MMWA claim but, as noted above, that claim has not been  
asserted against any foreign entity. Rather, the only defendant for that claim is FCA US.

1 whole point of the enterprise was to get Class Vehicles into the U.S. market and sell, through  
2 deception, defective vehicles to U.S. customers. There are multiple allegations in the operative  
3 complaint regarding the direct participation of the foreign entities in this enterprise. *See, e.g.*,  
4 FAC ¶ 16 (alleging that FCA N.V. approved elements of design and/or strategies related to  
5 emission compliance for the Class Vehicles and imported Class Vehicles into the United States);  
6 FAC ¶ 17 (alleging that the FCA entities developed and disseminated owners’ manuals, warranty  
7 booklets, and promotional materials relating to the Class Vehicles for distribution in the United  
8 States); FAC ¶ 96 (alleging that the FCA entities worked closely with the VM Defendants “to  
9 develop and calibrate the EcoDiesel® engines for the Class Vehicles and to gather information for  
10 submission to regulators in the COC and EO applications by FCA [US]”); FAC ¶ 237 (alleging  
11 that the VM Defendants “worked jointly on the manufacturing and/or assembling the engines for  
12 the Class Vehicles in the United States” and “provided information to FCA [US] for inclusion in  
13 the COC and EO applications”). These allegations of engaging in a jointly conceived and  
14 implemented plan to manufacture and sell defective vehicles, while purposefully concealing such  
15 defects, into the United States in violation of federal and state law constitutes conduct sufficient to  
16 be deemed purposefully directed at the United States so as to constitute minimum contacts. *See In*  
17 *re Volkswagen “Clean Diesel” Mktg.*, MDL No. 2672 CRB (JSC), 2017 U.S. Dist. LEXIS  
18 179652, at \*771-72 (N.D. Cal. Oct. 30, 2017) (holding that there was personal jurisdiction over  
19 Bosch GmbH because it intentionally designed and/or approved a defeat device to evade U.S.  
20 emission requirements and its employees lobbied U.S. regulators and lawmakers about the  
21 benefits of “clean diesel” technology); *cf. L.A. Gem & Jewelry Design, Inc. v. An & Assocs. Co.*,  
22 No. CV17-2417-CAS(JEMx), 2017 U.S. Dist. LEXIS 201918, at \*19 (C.D. Cal. Dec. 6, 2017) (in  
23 copyright infringement case, stating that, “[h]ere, the Canadian defendants target the United States  
24 with their advertising, employ fully interactive websites selling the infringing products that cater  
25 to customers in the United States, and ship the infringing products to the United States[;] [o]n this  
26 record the Court easily finds that defendants targeted the United States”).

27 The Court therefore denies the foreign entities’ motions to dismiss on the basis of lack of  
28 personal jurisdiction.

**VII. CONCLUSION**

For the foregoing reasons, the Court grants in part and denies in part Defendants’ motions to dismiss. The main rulings of the Court are below:

**Standing**

- Plaintiffs have satisfied Article III’s standing requirements.

**RICO claim**

- Plaintiffs’ RICO claim and RICO conspiracy claim are well pled.
- Plaintiffs’ claim for aiding and abetting a RICO violation is dismissed because a private cause of action for aiding and abetting a RICO violation is unavailable.

**Common law fraud claims**

- Plaintiffs have leave to amend the common law fraud claims (as well as the consumer protection claims) to clarify that the claims are not purely fraudulent concealment claims but also affirmative misrepresentation claims.
- Plaintiffs have leave to amend the common law fraud claims (as well as the consumer protection claims) to include additional factual predicates for their fraud-on-consumer claims (*e.g.*, misleading advertisements regarding fuel economy or performance).
- The affirmative misrepresentation theory, as pled, applies only with respect to the FCA/VM Defendants, not to the Bosch Defendants. The fraudulent concealment theory, as pled, applies to all Defendants.
- Neither the asserted affirmative misrepresentation claims nor the asserted fraudulent concealment claims are preempted.
- Plaintiffs have adequately pled an affirmative misrepresentation theory – *e.g.*, they have sufficiently pled an intent to deceive on the part of all Defendants, and whether the “EcoDiesel” logo amounted to puffery is for purposes of this motion a question of fact that cannot be decided at this juncture of the proceedings.
- Plaintiffs have adequately pled a fraudulent concealment theory – *e.g.*, fraudulent concealment is a cognizable claim, and Plaintiffs have sufficiently alleged, *inter*

United States District Court  
Northern District of California

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*alia*, a duty to disclose (or an active concealment rendering such a duty moot) and reliance.

**Consumer protection claims**

- The consumer protection claims, as pled, are not preempted.
- Plaintiffs’ Iowa claim is dismissed but with leave to amend (*i.e.*, so that Plaintiffs may allege that the filing of the class action claim has been approved by the Iowa attorney general).
- Plaintiffs do not dispute that damages are unavailable under Georgia and Minnesota’s consumer protection statutes.
- Plaintiffs have adequately alleged an intent to deceive or an intent to deceive is not an essential element of a claim for violation of certain state consumer protection statutes. *See* Part IV.D.4, *supra*.
- Plaintiffs’ North Carolina claim is not barred by the economic loss doctrine.
- Plaintiffs’ Kentucky claim is dismissed because Kentucky law has a privity requirement that not been met.
- Plaintiffs have agreed to dismiss their claims for punitives under Nebraska and West Virginia law. They have also conceded that Maryland, Maine, Minnesota, and South Dakota do not allow for punitives. Plaintiffs have adequately alleged malice as required under Oklahoma law to obtain punitive damages.
- Plaintiffs’ Mississippi claim is dismissed but with leave to amend (*i.e.*, so that Plaintiffs may allege the approval of the state attorney general).

**Warranty claims**

- The state law warranty claims are preempted; however, there is no basis to dismiss the federal warranty (*i.e.*, MMWA) claim.

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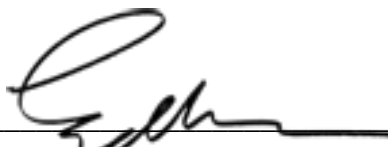
**Personal jurisdiction**

- Plaintiffs have established a prima facie case of personal jurisdiction over the foreign entities.

This order disposes of Docket Nos. 231 and 232.

**IT IS SO ORDERED.**

Dated: March 15, 2018



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EDWARD M. CHEN  
United States District Judge