

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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

MDL No. 2672 CRB (JSC)

\_\_\_\_\_  
This Order Relates To:  
Dkt. Nos. 2864, 4175  
\_\_\_\_\_

**ORDER DENYING BOSCH’S MOTION  
TO DISMISS THE VOLKSWAGEN-  
BRANDED FRANCHISE DEALERS’  
SECOND AMENDED AND  
CONSOLIDATED CLASS ACTION  
COMPLAINT**

The Court in this multidistrict litigation has considered claims by consumers, car dealers, investors, States, and federal agencies against Volkswagen AG and related entities based on Volkswagen’s “clean diesel” emissions fraud. The emissions fraud remains the subject here, but the primary focus shifts to the conduct of two other defendants, Bosch GmbH and Bosch LLC, referred to here collectively as “Bosch.” Plaintiffs are the owners of certain Volkswagen-branded franchise dealerships (the “Franchise Dealers”). They contend that Bosch conspired with Volkswagen to develop and implement the defeat device that Volkswagen used in its “clean diesel” vehicles to evade U.S. emission standards. By doing so, the Franchise Dealers allege that Bosch participated in a racketeering enterprise in violation of the federal RICO statute, 18 U.S.C. § 1962(c), and also conspired to violate that statute, *id.* § 1962(d).

Currently before the Court is Bosch’s motion to dismiss the Franchise Dealers’ Second Amended Complaint. (Dkt. Nos. 2864, 4175.) Bosch’s arguments for dismissal divide into five categories. (1) Justiciability: Bosch contends that the Franchise Dealers lack Article III standing and, alternatively, that the case is moot. (2) Statutory standing: Bosch contends that the Franchise Dealers cannot assert a RICO private cause of action because they have not suffered an injury to their “business or property by reason of” the alleged RICO enterprise. (3) The merits of the

1 § 1962(c) RICO claim: a RICO claim has four elements and Bosch contends that the Franchise  
 2 Dealers have not satisfied any of them. (4) The merits of the § 1962(d) RICO conspiracy claim.  
 3 And (5) Personal Jurisdiction over Bosch GmbH. As detailed below, the Court concludes that the  
 4 Franchise Dealers' claims are well pled and that none of Bosch's arguments warrant dismissal at  
 5 the pleading stage. Bosch's motion to dismiss is accordingly DENIED.

## 6 BACKGROUND

### 7 I. The Defeat Device Scheme<sup>1</sup>

8 In or around 2006, Volkswagen began working on a line of environmentally-friendly diesel  
 9 engine vehicles for sale in the United States. (Dkt. No. 3594: SAC ¶ 57; SOF ¶¶ 31-32.) Diesel  
 10 engines are generally more fuel efficient than gasoline engines, but historically have emitted  
 11 greater amounts of air pollution, including nitrogen oxides (NOx). (SAC ¶¶ 61, 64.) With its  
 12 "clean diesel" vehicles, Volkswagen claimed to have solved this pollution problem, stating that the  
 13 engine in its vehicles would "help[] reduce sooty emissions by up to 90% compared to previous  
 14 diesel engines." (SAC ¶ 180; *see also id.* ¶ 61.)

15 During the design process, though, it became apparent to Volkswagen's engineers that the  
 16 company's "clean diesels" would not be able to meet U.S. emission requirements given certain  
 17 budget and engineering constraints. (*Id.* ¶ 63; SOF ¶ 33.) Rather than altering the design,  
 18 Volkswagen decided to develop and install software in these vehicles to evade U.S. NOx emission  
 19 standards. (SAC ¶ 71; SOF ¶ 33.) The software is able to detect whether each vehicle is  
 20 undergoing emissions testing, or being driven normally on the road. During emissions testing the  
 21 vehicle's emission-control system will perform in a mode that enables the car to satisfy NOx  
 22 emission standards. But when the vehicle is on the road, the software reduces the effectiveness of  
 23 the emission controls, causing the vehicle to emit NOx at levels up to 40 times higher than legal  
 24 limits. (SAC ¶¶ 71, 81, 191; SOF ¶ 34.) Programmed in this manner, the software constitutes an

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25  
 26 <sup>1</sup> Earlier this year, Volkswagen AG pled guilty to three felonies for its involvement in the  
 27 emissions scheme. (*See United States v. Volkswagen AG*, No. 16-CR-20394, Dkt. 68 (E.D. Mich.  
 28 Mar. 10, 2017).) The Franchise Dealers have attached the plea agreement to their complaint.  
 Citations to SOF are to the Statement of Facts therein. Citations to SAC are to the Second  
 Amended Complaint.

1 EPA-prohibited defeat device. (SAC ¶¶ 85-86 (citing 40 C.F.R. § 86.1803-01).)

2 The original concept for the defeat device can be traced back to Audi AG, which is a  
3 subsidiary of Volkswagen AG. (SAC ¶ 72; SOF ¶ 35.) Before the U.S. emissions scheme, Audi  
4 allegedly had started using similar software in diesel vehicles sold in Europe to deactivate  
5 additional fuel injection during emissions test. (SAC ¶ 72.) Audi engineers used the additional  
6 fuel injection to eliminate a noise problem that its vehicles had during normal driving conditions.  
7 Since the software was related to the goal of reducing engine noise, it became known as the  
8 “acoustic function” or, in German, the “akustikfunktion.” (*Id.*) The Franchise Dealers contend  
9 that Volkswagen eventually adapted Audi’s “acoustic function” concept for use in the “clean  
10 diesels,” starting with vehicles released as part of Volkswagen’s “US ‘07 project.” (*Id.* ¶ 73.)

## 11 **II. Bosch’s Involvement**

12 The defeat device in Volkswagen’s “clean diesels” is part of each vehicle’s electronic  
13 control unit: a sophisticated computer that manages engine and emission controls. Bosch designed  
14 and manufactured this computer, which is known as the EDC17. (*Id.* ¶¶ 76, 98.) The EDC17 is  
15 not inherently a tool for deceit; it is widely used by automakers that operate modern diesel  
16 engines. (*Id.* ¶¶ 77, 98.) But the EDC17 is highly customizable and there is no dispute that it was  
17 modified into a defeat device here.

18 The Franchise Dealers contend that Bosch and Volkswagen worked together to transform  
19 the EDC17 into a defeat device. The specific allegations involving Bosch are discussed below,  
20 but generally the Franchise Dealers contend that Bosch exercised near-total control over the  
21 EDC17, and that Volkswagen could not have modified the EDC17 without Bosch’s involvement  
22 and approval. The Franchise Dealers also allege that Bosch helped conceal the defeat device from  
23 regulators and lobbied U.S. and California lawmakers about the benefits of “clean diesel”  
24 technology.

## 25 **III. The Franchise Dealers**

26 The Franchise Dealers are four businesses that each operate a Volkswagen-branded  
27 franchise dealership. They are Napleton VW Orlando, Napleton VW Sanford, and Napleton VW  
28 Urbana (the “Napleton Dealership Group”), and J. Bertolet, Inc. (SAC ¶¶ 17-29.) Each of the

1 Franchise Dealers purchased “clean diesel” vehicles from Volkswagen and sold those vehicles to  
2 consumers. The Franchise Dealers did not learn that the “clean diesels” each included a defeat  
3 device until the fall of 2015, when EPA issued two Notices of Violation of the Clear Air Act and  
4 announced that Volkswagen had admitted to deliberately cheating on emissions tests. (SAC  
5 ¶ 224; SOF ¶¶ 64, 67.) Immediately following those Notices, Volkswagen issued a stop-sale  
6 order, which effectively prevents the Franchise Dealers from selling the affected vehicles they still  
7 have in inventory. (SAC ¶¶ 4, 21, 29, 285.) Not only can the Franchise Dealers no longer sell  
8 these vehicles, but they allege that the market value of the vehicles has also dropped. (*Id.* ¶ 10.)

9 The Franchise Dealers also named Volkswagen as a defendant in this lawsuit, but  
10 J. Bertolet, Inc. and a class of other franchise dealers settled with Volkswagen earlier this year.  
11 (*See* Dkt. No. 2807 (Final Approval Order).) The three entities in the Napleton Dealership Group  
12 opted out of the settlement. (*See* Dkt. No. 2807-1 at 2 (Opt-Out List).) As part of the settlement,  
13 Volkswagen agreed to pay each class member approximately \$1.85 million, and to repurchase the  
14 class members’ inventory of affected vehicles at their net wholesale cost unless regulators approve  
15 a fix. (Dkt. No. 2807 at 5-6.) In its motion for final approval, counsel for the class asserted that  
16 the total recovery “exceeds even the top end of . . . [the franchise dealers’] exposure.” (*Id.* at 14-  
17 15.)

#### 18 **IV. Procedural History**

19 In June of this year, the Court issued an order addressing Bosch’s motion to dismiss the  
20 Franchise Dealers’ First Amended Complaint. (Dkt. No. 3366.) In that order, the Court did not  
21 consider the merits of the Franchise Dealers’ claims, but instead instructed the Franchise Dealers  
22 to amend their complaint to more clearly identify conduct undertaken by Bosch GmbH on the one  
23 hand, and Bosch LLC on the other. After the Franchise Dealers filed their Second Amended  
24 Complaint, Bosch and the Franchise Dealers each submitted a supplemental brief. (Dkt. Nos.  
25 3665, 3732.) In considering Bosch’s motion to dismiss the Second Amended Complaint, the  
26 Court has reviewed those supplemental briefs, two other supplemental briefs on RICO’s “injury”  
27 requirement (Dkt. Nos. 3371, 3372), and the briefing on Bosch’s motion to dismiss the First  
28 Amended Complaint, which raised many arguments that were not addressed in the June order

1 (Dkt. Nos. 2864, 2983, 3052, 4175).

## 2 DISCUSSION

3 As noted above, Bosch’s arguments for dismissal divide into five categories: (1)  
4 justiciability; (2) statutory standing; (3) § 1962(c) merits; (4) § 1962(d) merits; and (5) personal  
5 jurisdiction over Bosch GmbH. The Court addresses these categories in turn.

### 6 I. Justiciability

#### 7 A. Article III Standing

8 Standing requires a plaintiff to show that “he or she suffered ‘an invasion of a legally  
9 protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or  
10 hypothetical.’” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders*  
11 *of Wildlife*, 504 U.S. 555, 560 (1992)). “At the pleading stage, general factual allegations of  
12 injury resulting from the defendant’s conduct may suffice . . . .” *Lujan*, 504 U.S. at 561.

13 Bosch contends that the Franchise Dealers have alleged only conjectural and hypothetical  
14 injuries because they have not sold any of the affected vehicles for a loss since the fraud was  
15 disclosed. The reason the Franchise Dealers have not sold any of the affected vehicles, though, is  
16 because Volkswagen issued a stop-sale order. (SAC ¶¶ 4, 21, 29, 285.) That means that the  
17 Franchise Dealers—whose business it is to sell cars—cannot sell the affected vehicles for *any*  
18 price. This amounts to a “clear deprivation” of an “owner’s right to sell his property on terms he  
19 wishes,” *Ybarra v. Town of Los Altos Hills*, 370 F. Supp. 742, 748 n.6 (N.D. Cal. 1973), *aff’d*, 503  
20 F.2d 250 (9th Cir. 1974), which constitutes a concrete and particularized injury.

21 Cases cited by Bosch are not on point because they involve scenarios in which a product  
22 defect never manifests. *See, e.g., Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999)  
23 (“Plaintiffs have not alleged that their ABS brakes have malfunctioned or failed.”); *In re Toyota*  
24 *Motor Corp. Hybrid Brake Mktg., Sales Practices and Prods. Liab. Litig.*, 915 F. Supp. 2d 1151,  
25 1157 (C.D. Cal. 2013) (plaintiff has not presented “any evidence that the ABS in his vehicle  
26 malfunctioned or failed . . . .”). That is not the situation here, where the defeat device has made  
27 the affected vehicles unsaleable.

**B. Mootness**

1            **B. Mootness**  
2            Bosch also argues that the Franchise Dealers have not suffered a cognizable injury because  
3 of the Volkswagen settlement, which, as noted above, has or will provide class members with a  
4 total recovery that “exceeds even the top end of . . . [their] exposure” from the emissions fraud.  
5 (Dkt. No. 2807 at 14-15.) Bosch contends that the settlement has or will make the Franchise  
6 Dealers whole and extinguishes any live controversy.

7            This argument is better cast as one of mootness than of standing. The contention is not  
8 that the Franchise Dealers were never injured, but that their injuries do not or will not continue and  
9 that the case is therefore moot. *See Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th  
10 Cir. 1999) (“The requisite personal interest that must exist at the commencement of the litigation  
11 (standing) must continue throughout its existence (mootness).” (quoting *U.S. Parole Comm’n v.*  
12 *Geraghty*, 445 U.S. 388, 397 (1980))). The Volkswagen settlement, however, has not mooted the  
13 Franchise Dealers’ action against Bosch for two reasons.

14            First, the Napleton Dealership Group, which includes three of the four named plaintiffs,  
15 opted out of the Volkswagen settlement, so they will not receive settlement benefits. They  
16 therefore retain the “requisite personal interest that must exist” to litigate this case. *Id.* Second,  
17 although the other named plaintiff, J. Bertolet, Inc., is a party to the Volkswagen settlement, J.  
18 Bertolet, Inc. retains a claim for treble damages under RICO. That claim presents a live  
19 controversy even if the Volkswagen settlement completely satisfies J. Bertolet, Inc.’s actual  
20 damages from the emissions fraud.

21            The most relevant authority on this second point is *Flintkote Co. v. Lysfjord*, 246 F.2d 368  
22 (9th Cir. 1957). There, the plaintiff settled a Clayton Act claim with all but one of the named  
23 defendants for \$20,000 prior to trial. *Id.* at 373. The case against the remaining defendant  
24 proceeded to trial, where the jury awarded the plaintiff actual damages of \$50,000 for injuries  
25 arising from the conspiracy. *Id.* at 373, 397. In calculating treble damages, the district court  
26 trebled the \$50,000 jury award and then subtracted the \$20,000 settlement (leading to a \$130,000  
27 judgment). On appeal, the defendant argued that the district court should have first subtracted the  
28 \$20,000 settlement from the jury award and then trebled that, smaller, amount (leading to a

1 \$90,000 judgment). The Ninth Circuit affirmed the district court’s judgment and held that any set-  
2 off for amounts previously paid in settlement should occur after the damages awarded are trebled.  
3 *Id.* The court reasoned that the alternative approach would not provide the plaintiff with full  
4 satisfaction of his claim, and would discourage settlements and lessen the incentives for private  
5 antitrust actions in contravention of Congress’s intent in making treble damages available. *Id.*

6 Like the Clayton Act, RICO includes a mandatory treble damages provision. *See* 18  
7 U.S.C. § 1964(c) (“Any person [sustaining a RICO injury] *shall* recover threefold the damages he  
8 sustains . . . .”) (emphasis added). And the Ninth Circuit has explained that the Clayton Act and  
9 RICO are to be “interpreted in tandem.” *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th  
10 Cir. 2002). The Seventh Circuit has also expressly adopted the *Flintkote* rule in the RICO context.  
11 *See Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987) (“[S]etting-off damages *after*  
12 *trebling* is more likely to effectuate the purposes behind RICO.”). Under this rule, the Franchise  
13 Dealers’ case is not moot. Even if the amount of the Volkswagen settlement is equivalent to the  
14 Franchise Dealers’ actual damages, full satisfaction of their claim would be three times that  
15 amount.

16 Bosch argues that the situation here is distinguishable because the Volkswagen settlement  
17 by itself makes J. Bertolet, Inc. whole, whereas the settlement in *Flintkote* was only a partial  
18 settlement. Bosch contends that there is accordingly no injury that could be trebled here. (Dkt.  
19 No. 3052 at 13.) The Ninth Circuit has not addressed whether *Flintkote* would still apply if the  
20 plaintiff settles with a joint defendant for an amount that covers all actual damages, but another  
21 district court has applied *Flintkote* in such a scenario. *See In re Nat’l Mortg. Equity Corp. Mortg.*  
22 *Pool Certificates Sec. Litig.*, 636 F. Supp. 1138 (C.D. Cal. 1986). In doing so, the court there  
23 reasoned that it made no difference that the plaintiffs’ “actual damages were completely, rather  
24 than only partially, satisfied . . . . because the critical factor is that the ‘full satisfaction’ to which  
25 treble damage claimants are entitled is ‘three times the proven actual damages’ [and] any award  
26 less than that amount constitutes an incomplete recovery.” *Id.* at 1152. The district court’s  
27 approach in *In re National Mortgage* is consistent with *Flintkote*, and this Court accordingly  
28 adopts it. Full satisfaction of a civil RICO claim includes a trebling of actual damages, so unless a

1 plaintiff settles with a joint tortfeasor for three times actual damages, the plaintiff's claim against  
2 the non-settling defendant is not moot.

3 Bosch also relies on *Commercial Union Assurance Co. v. Milken*, 17 F.3d 608 (2d Cir.  
4 1994) in support of its mootness argument. The Second Circuit there held that a RICO claim was  
5 moot after the plaintiffs recouped their actual losses during the litigation, even though they did not  
6 recover treble damages. *Id.* at 612-613. *Commercial Union* is contrary to the Ninth Circuit's  
7 decision in *Flintkote*. *Flintkote* is binding here.

8 Because J. Bertolet, Inc. has not recovered treble damages, its action is not moot. The  
9 Napleton Dealership Group's action is not moot either, as the members of that group opted out of  
10 the Volkswagen settlement.

## 11 **II. Statutory Standing**

12 Congress has narrowed the scope of injuries that can trigger a civil RICO violation,  
13 specifically limiting standing to those who have suffered (1) an injury to "business or property,"  
14 that is (2) "by reason of" a RICO violation. 18 U.S.C. § 1964(c). Bosch contends that the  
15 Franchise Dealers have not satisfied either of these requirements.

### 16 **A. Injury to Business or Property**

17 RICO's injury standard requires the plaintiff to plead "a harm to a specific business or  
18 property interest," which is "a categorical inquiry typically determined by reference to state law."  
19 *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc). Personal injuries do not qualify under  
20 RICO. In *Oscar v. University Students Co-op. Ass'n*, for example, the Ninth Circuit held that an  
21 apartment tenant failed to allege an injury to business or property when she claimed that  
22 neighborhood drug dealers caused her "personal discomfort and annoyance." 965 F.2d 783, 787  
23 (9th Cir. 1992) (citation omitted), *abrogated on other grounds by Diaz*, 420 F.3d 897. The Ninth  
24 Circuit reached a similar holding in *Berg v. First State Insurance Co.*, concluding that "a personal  
25 injury in the form of emotional distress" is "not a claim for an injury to property as [RICO]  
26 requires." 915 F.2d 460, 464 (9th Cir. 1990). These decisions reflect the judicial understanding  
27 that, by enacting RICO, Congress sought "to thwart the organized criminal invasion and  
28 acquisition of legitimate business enterprises and property," not to supplement the "[a]mple law



1 already [in] existe[nce] to provide recovery for wrongfully inflicted personal injuries.” *Oscar*, 965  
2 F.2d at 786 (quoting *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991)).

3 Not only must a RICO plaintiff adequately plead an injury to a specific business or  
4 property interest, but the injury must also be “tangible” or “concrete.” *Canyon Cty. v. Syngenta*  
5 *Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008); *Diaz*, 420 F.3d at 900. An out-of-pocket loss  
6 satisfies this requirement. In *Canyon County*, for example, the court noted that “[i]n the ordinary  
7 context of a commercial transaction, a consumer who has been overcharged can claim an injury to  
8 her property, based on a wrongful deprivation of her money.” 519 F.3d at 976.

9 An out-of-pocket loss is not required, however, for a financial loss to be tangible or  
10 concrete. And in fact, the Ninth Circuit has allowed much more abstract losses to move beyond  
11 the pleading stage. In *Mendoza*, for example, a group of agricultural workers brought a RICO  
12 claim against agricultural companies that allegedly hired undocumented immigrants. The  
13 agricultural workers argued that this practice depressed their wages. 301 F.3d at 1166. In  
14 dismissing the complaint, the district court had held that the workers’ losses were speculative and  
15 not concrete because many intervening factors could have interfered with their wages. *Id.* at 1170-  
16 71; *see also Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at \*9-10  
17 (E.D. Wash. Sept. 27, 2000). The Ninth Circuit reversed, noting that:

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

23 *Mendoza*, 301 F.3d at 1171 (citation omitted). The Ninth Circuit also reasoned that:

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

*Id.*

1           The en banc panel in *Diaz*, 420 F.3d 897, extended *Mendoza*. The *Diaz* court held that  
2 “false imprisonment that caused the victim to lose employment and employment opportunities is  
3 an injury to ‘business or property’ within the meaning of RICO.” *Id.* at 898. In reaching this  
4 conclusion, the court noted that the “three-judge panel [had] tried to distinguish *Mendoza* on the  
5 theory that Diaz did not allege ‘that he lost actual employment, only that he ‘was rendered unable  
6 to pursue gainful employment.’” *Id.* at 900 (quoting *Diaz v. Gates*, 380 F.3d 480, 484 (9th Cir.  
7 2004)). The en banc court concluded that this distinction was untenable, reasoning that:

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

12 *Id.* at 900-01.

13           Applying these standards here, the Franchise Dealers have plausibly alleged multiple  
14 injuries to their business and property interests, and these injuries are sufficiently concrete to  
15 survive a motion to dismiss. The stop-sale order has prevented the Franchise Dealers from selling  
16 their inventory of affected vehicles. (SAC ¶¶ 4, 21, 29, 285.) As noted above, this amounts to a  
17 “clear deprivation” of an “owner’s right to sell his property on terms he wishes.” *Ybarra*, 370 F.  
18 Supp. at 748 n.6. Further, as a result of this deprivation, the Franchise Dealers plausibly allege  
19 that they have lost profits, have incurred inventory carrying costs, have had to purchase  
20 replacement inventory, and have lost servicing revenues from the vehicles they could not legally  
21 sell. (See SAC ¶ 441(c), (d), (f), (i).) The Franchise Dealers also allege that they overpaid for the  
22 “clean diesels,” believing they were compliant with U.S. emission standards. (*Id.* ¶ 441(a).) This  
23 out-of-pocket loss is also a cognizable injury to the Franchise Dealers’ property. *Canyon Cty.*,  
24 519 F.3d at 976; see also *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390,  
25 396 (1906) (city suffered injury to property by paying more for water pipes than they were worth  
26 as a result of anticompetitive conduct). The mirror image injury is also cognizable: the value of  
27 the Franchise Dealers’ inventory of affected vehicles declined in value after the fraud was  
28 disclosed. See *Oscar*, 965 F.2d at 786-87 (reasoning that, unlike a renter, “one might measure an  
owner’s loss by the diminution in fair market value” of property).

1           There will be some overlap among these injuries; there may also be offsets to certain  
2 injuries, such as if the Franchise Dealers paid for alternative inventory but then successfully sold  
3 that inventory for a profit, or if independent market forces caused a drop in profits or a decline in  
4 the value of the affected vehicles. But these issues center on the amount of damage, not its  
5 existence. As in *Mendoza*, the Franchise Dealers “must be allowed to make their case through  
6 presentation of evidence, including experts who will testify about the . . . market . . . and the  
7 effects of the illegal scheme.” 301 F.3d at 1171.

8           There is one exception, which is the Franchise Dealers’ alleged loss of goodwill. Goodwill  
9 is “the positive reputation a business may enjoy in the eyes of the public that creates a probability  
10 that old customers will continue their patronage.” *In re Thomas*, 246 B.R. 500, 505 (E.D. Pa.  
11 2000); *see also* Cal. Bus. & Prof. Code § 14100 (defining the “good will” of a business as “the  
12 expectation of continued public patronage”). Damage to goodwill has been recognized as an  
13 intangible injury. *See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944  
14 F.2d 597, 603 (9th Cir. 1991) (recognizing that “intangible injuries, such as damage to ongoing  
15 recruitment efforts *and goodwill*, quality as irreparable harm”) (emphasis added). RICO, however,  
16 requires more than “mere injury to a valuable intangible property interest,” *Oscar*, 965 F.2d at 785  
17 (internal quotation marks omitted), so a loss of goodwill is not recoverable.

18           In the Franchise Dealers’ First Amended Complaint they explicitly alleged a loss of  
19 goodwill. (*See* Dkt. No. 1969, FAC ¶ 381(f).) In their Second Amended Complaint, loss of  
20 goodwill has become “[l]oss of sales associated with replacement vehicles for existing customers.”  
21 (SAC ¶ 441(g).) While cast in different language, the theory is the same: the emissions fraud  
22 reduced the likelihood that old customers would return. That is goodwill.

23           The Franchise Dealers note that California recognizes goodwill as a property interest, as  
24 explained in *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). To support  
25 RICO standing, though, an injury must not only be to a “specific business or property interest,”  
26 but the injury must also result in a “tangible” or “concrete” financial loss. *Diaz*, 420 F.3d at 900;  
27 *Canyon Cty.*, 519 F.3d at 975. Goodwill is an intangible injury, *Rent-A-Center*, 944 F.2d at 603,  
28 and so does not satisfy this standard.

1 Bosch argues that *all* of the Franchise Dealers’ alleged injuries are premised upon a claim  
2 for a loss of goodwill. (*See* Dkt. No. 2864 at 37-38.) That is not so. The complaint does include a  
3 number of general allegations about how the emissions fraud angered the Franchise Dealers’  
4 former customers. (*See, e.g.*, SAC ¶ 266 (“[The] Franchise Dealers . . . are now faced with their  
5 most loyal and engaged customers feeling profoundly betrayed by Volkswagen . . .”) (emphasis  
6 omitted).) But those general allegations do not turn all of the asserted injuries into claims for a  
7 loss of goodwill. For example, the Franchise Dealers’ claim of lost profits is not predicated solely  
8 on a loss of sales to former customers, but also on allegations that the Franchise Dealers could not  
9 legally sell their inventory of “clean diesels” after Volkswagen issued the stop-sale order.  
10 Likewise, the Franchise Dealers allege that the market value of the “clean diesels” declined, not  
11 solely because of a loss of goodwill, but also because the demand for those vehicles  
12 understandably dropped once EPA disclosed that the vehicles did not comply with U.S. emission  
13 standards. The Court accordingly rejects Bosch’s reading of the complaint as asserting only  
14 injuries to goodwill.

15 Bosch also cites to certain out-of-circuit cases for the proposition that only out-of-pocket  
16 losses are recoverable under RICO. *See, e.g., In re Bridgestone/Firestone, Inc. Tires Prods. Liab.*  
17 *Litig.*, 155 F. Supp. 2d 1069, 1090 (S.D. Ind. 2001) (to satisfy RICO’s injury requirement, “a  
18 plaintiff must prove an actual, concrete monetary loss (*i.e.*, an ‘out-of-pocket’ loss)”). As noted  
19 above, that is not the law in the Ninth Circuit. *See Diaz*, 420 F.3d at 898, 900 (loss of employment  
20 and employment opportunities may constitute a RICO injury); *Mendoza*, 301 F.3d at 1166, 1171  
21 (allegations of depressed wages may constitute a RICO injury).

22 Citing to *In re: General Motors LLC Ignition Switch Litigation*, No. 14-md-2543, 2016  
23 WL 3920353, at \*7, 16-17 (S.D.N.Y. July 15, 2016), Bosch also argues that a decline in the value  
24 of the affected vehicles is a “benefit-of-the-bargain defect theory” that is too speculative to support  
25 a RICO injury. The *General Motors* court reached this holding in the consumer context, reasoning  
26 that a harm to a consumer’s expectation interest is not a harm to a “property” interest for purposes  
27 of RICO. *See id.* at \*17 (consumers who purchased vehicles with a latent defect could not “bring  
28 a RICO claim for harm to ‘property’ based on the benefit-of-the-bargain defect theory pressed

1 here”). In reaching this holding, the court expressly noted that a different result may be warranted  
2 “for a RICO claim against New GM by *dealers* in GM-branded vehicles who expected to be able  
3 to sell their stock at a certain price and received lower prices when New GM’s concealment was  
4 revealed.” *Id.* (emphasis added). In other words, GM dealers could plausibly allege a harm to  
5 their “business,” if not their “property,” because of a decline in the value of their inventory of GM  
6 vehicles. This latter scenario is similar to the one alleged here. *General Motors* therefore does not  
7 counsel against the Franchise Dealers’ claim.

8 The Franchise Dealers have plausibly alleged multiple tangible injuries to their business  
9 and property interests. They will accordingly be allowed to “make their case through presentation  
10 of evidence.” *Mendoza*, 301 F.3d at 1171. The one exception is that the Franchise Dealers may  
11 not pursue a theory of harm to goodwill, which is an intangible injury that cannot support a RICO  
12 claim.

### 13 **B. Injury “By Reason” of a RICO Violation**

14 A plaintiff asserting a private cause of action for a RICO violation must also satisfy a  
15 causation requirement: the plaintiff must plausibly allege at the pleading stage that the RICO  
16 violation was a “but for” cause and proximate cause of its asserted injuries. *Canyon Cty.*, 519  
17 F.3d at 981.

#### 18 **1. “But For” Causation**

19 The allegations plausibly support that, “but for” the alleged enterprise, the Franchise  
20 Dealers would not have suffered the injuries they allege. Each injury stems from the defeat  
21 device, which when discovered led to a drop in the value of the “clean diesels” and the stop-sale  
22 order.

23 Bosch argues that “but for” causation is lacking because the Franchise Dealers have  
24 alleged that Volkswagen could have accomplished the emissions fraud by using a different  
25 electronics supplier. (*See* SAC ¶ 272 (“Had Bosch not agreed to develop and supply the  
26 EDC17 . . . either VW could not have sold its [‘clean diesel’ vehicles] . . . , or VW would have  
27 sought out a different supplier.”) (emphasis added).) This argument is based only on speculation.  
28 No other suppliers are identified in the complaint, and the Franchise Dealers elsewhere allege that

1 Bosch's EDC17 was "integral to Volkswagen's entire diesel strategy," and that the emissions  
 2 fraud "could not have been accomplished without years of collaborative work" between  
 3 Volkswagen and Bosch. (SAC ¶ 99.)

## 4 2. Proximate Cause

5 "When a court evaluates a RICO claim for proximate causation, the central question it  
 6 must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal*  
 7 *Steel Supply Corp.*, 547 U.S. 451, 461 (2006). Three nonexhaustive factors are considered as part  
 8 of this inquiry:

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

14 *Mendoza*, 301 F.3d at 1169.

15 Each of these factors supports a direct connection between Bosch's alleged RICO violation  
 16 and the Franchise Dealers' alleged injuries. First, there are no more direct victims of the wrongful  
 17 conduct because the Franchise Dealers bought the affected vehicles directly from co-schemer  
 18 Volkswagen. To the extent the Franchise Dealers overpaid for the affected vehicles, or those  
 19 vehicles declined in value, or the Franchise Dealers lost profits from not being able to sell those  
 20 vehicles, no one other than the Franchise Dealers can assert those injuries.

21 As for the second factor, at this stage it is sufficient that the relationship between the  
 22 Franchise Dealers' alleged injuries and Bosch's alleged violation is not "speculative in the  
 23 extreme." *Canyon Cty.*, 519 F.3d at 982 (affirming dismissal of RICO claim where it was "not  
 24 clear how [private] companies' hiring of undocumented immigrants would increase demand for  
 25 health care and law enforcement within Canyon County" as compared to if the companies hired  
 26 legally authorized workers). Unlike in *Canyon County*, the allegations here support that the  
 27 emissions fraud led directly to the stop-sale order, which led directly to the Franchise Dealers'  
 28 inability to sell their inventory of "clean diesel" vehicles. And as noted in *Mendoza*, questions as  
 to the *amount* of damage, as opposed to the plausibility of damage, are best resolved at a later

1 stage in the litigation. *See* 301 F.3d at 1171.

2 Third, there is no reason to currently conclude that this case will require the Court “to  
3 adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.” *Id.* at  
4 1169. Courts have found that this factor is implicated in cases involving “passed-on” injury,  
5 which is “injury derived from a third party’s direct injury.” *Id.* For example, in *Holmes* the Court  
6 held that an entity representing customers of broker-dealers could not pursue a RICO claim against  
7 a stock manipulator who bankrupt the broker-dealers because, among other things, the “directly  
8 injured . . . broker-dealers . . . could be counted on to bring suit[.]” *Holmes v. Sec. Inv’r Prot.*  
9 *Corp.*, 503 U.S. 258, 273 (1992). By limiting the suit to the directly injured, the Court reasoned  
10 that the district court could avoid “hav[ing] to find some way to apportion the possible respective  
11 recoveries by the broker-dealers and the customers, who would otherwise each be entitled to  
12 recover the full treble damages.” *Id.*

13 Similarly, in *Pillsbury* the Ninth Circuit held that a law firm that subleased office space  
14 could not pursue a RICO claim against past and present owners of the building who engaged in a  
15 scheme to fraudulently increase rents. The court reasoned that “the apportionment task need not  
16 be taken,” because “[t]he directly injured party, [the master tenant], can sue for the *whole*  
17 injury[.]” *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 930 (9th Cir. 1994). Here, there is  
18 no passed-on injury, as the Franchise Dealers purchased the affected vehicles directly from  
19 Volkswagen. Their claims, then, are not derivative.

20 Keeping with the third factor, Bosch argues that to resolve this action the Court will need  
21 to engage in speculation to determine the degree of the alleged loss attributable to Bosch as  
22 opposed to Volkswagen. (Dkt. No. 2864 at 34-35.) Difficulty apportioning damages between  
23 defendants, however, is not a factor that is considered in the proximate cause analysis. Instead, the  
24 apportionment question centers on whether “the existence of other *injured parties* creates  
25 difficulties of apportionment or risks of multiple recovery.” *Newcal Indus., Inc. v. Ikon Office*  
26 *Solution*, 513 F.3d 1038, 1055 (9th Cir. 2008) (emphasis added); *see also Holmes*, 503 U.S. at 269  
27 (“[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules  
28 apportioning damages *among plaintiffs* removed at different levels of injury from the violative acts

1 . . . .”) (emphasis added). The focus on plaintiffs and not the members of the RICO scheme is  
 2 sensible: those injured by a RICO enterprise should not be prevented from seeking relief simply  
 3 because of the complexity of the enterprise.

4 Bosch makes two other proximate cause arguments. First, Bosch asserts that the Franchise  
 5 Dealers do not satisfy the proximate cause standard because they have alleged a direct relationship  
 6 only with Volkswagen, not with Bosch. (Dkt. No. 2864 at 33-36.) What matters, though, is not  
 7 whether there is a direct relationship between the plaintiff and defendant, but whether there is a  
 8 “sufficiently direct relationship between the defendant’s wrongful *conduct* and the plaintiff’s  
 9 injury . . . .” *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 657 (2008) (emphasis added).  
 10 In *Bridge*, for example, the plaintiff, a bidder on tax liens, did not have a direct relationship with  
 11 the defendant, a competing bidder. But the Court held that the plaintiff satisfied RICO’s  
 12 proximate cause requirement because there was a sufficiently direct relationship between the  
 13 defendant’s wrongful conduct of making misrepresentations to the auctioneer, and the plaintiff’s  
 14 injury of losing out on other bids as a result of those misrepresentations. *Id.* at 643-44, 657-58.

15 Here, irrespective of whether the Franchise Dealers have a direct relationship with Bosch,  
 16 there is a sufficiently direct connection between Bosch’s alleged *conduct* and the Franchise  
 17 Dealers’ alleged injuries. Specifically, the Franchise Dealers allege that Bosch partnered with  
 18 Volkswagen to implement the defeat device in Volkswagen’s “clean diesel” vehicles. That  
 19 conduct, in turn, has made the Franchise Dealers’ inventory of those vehicles unsaleable.<sup>2</sup>

20 Finally, Bosch argues that proximate cause is lacking because its preconceived purpose  
 21 was not to injure the Franchise Dealers. Whether a RICO defendant intended to injure the  
 22 plaintiff, however, is not part of the proximate cause calculus. *See Hemi Grp., LLC v. City of New*

23 \_\_\_\_\_  
 24 <sup>2</sup> In *Oki Semiconductor Co. v. Wells Fargo Bank, National Ass’n*, 298 F.3d 768 (9th Cir. 2002),  
 25 not only was there no direct relationship between the plaintiff and the RICO defendant, but the  
 26 plaintiff’s injury also was not directly caused by the defendant’s conduct. The defendant there  
 27 employed an individual who laundered the proceeds of an armed robbery at plaintiff’s  
 28 manufacturing plant. The court held that the employee’s conduct was not a direct cause of the  
 plaintiff’s injury because her “financial wizardry” took place only after her co-conspirators stole  
 plaintiff’s hardware. *Id.* at 774. And only “[i]n a tenuous way” could her conduct even “be  
 considered a ‘but for’ cause of [plaintiff’s] loss.” *Id.* Here, in contrast, the alleged conduct by  
 Bosch took place before the Franchise Dealers were injured and plausibly led directly to those  
 injuries.



1 *York*, 559 U.S. 1, 12 (2010) (“The dissent would . . . find that the City has satisfied [RICO’s  
2 proximate cause] requirement because the harm is foreseeable [and] it is a consequence that Hemi  
3 intended . . . [But] [o]ur precedents make clear that in the RICO context, the focus is on the  
4 directness of the relationship between the conduct and the harm.”) (internal quotation marks  
5 omitted); *Diaz*, 420 F.3d at 901 (“There is . . . no room in the [RICO] statutory language for [a]  
6 . . . requirement that . . . the business or property interest have been the ‘direct target’ of the  
7 predicate act.”); *Pillsbury*, 31 F.3d at 929 (“The existence of specific intent does not answer the  
8 question of whether the injury is specifically direct.”).

9 In certain shareholder derivative actions, courts have held that injury to the company was  
10 not proximately caused by the fraud of management because the alleged injuries “were neither the  
11 ‘preconceived purpose’ nor the ‘specifically-intended consequence’ of the RICO defendants’  
12 acts.” *In re Am. Exp. Co. S’holder Litig.*, 39 F.3d 395, 400 (2d Cir. 1994); *see also Brocade*  
13 *Commc’ns Sys., Inc. Derivative Litig.*, 615 F. Supp. 2d 1018, 1043 (N.D. Cal. 2009) (dismissing a  
14 Special Litigation Committee’s RICO claim against the company’s former CEO for granting  
15 fraudulent stock options because plaintiff “fail[ed] to allege that any injuries suffered by Brocade  
16 were the ‘preconceived purpose’ or ‘specifically-intended consequence’ of [the CEO’s] acts”  
17 (quoting *In re Am. Exp.*, 39 F.3d at 400)). But given that directness, not foreseeability or purpose,  
18 is the governing standard for RICO proximate cause, the Court declines to apply these holdings  
19 outside of the shareholder derivative context.

20 The Franchise Dealers have adequately pled that their injuries were directly caused by  
21 Bosch’s alleged RICO violation. No one other than the Franchise Dealers can assert the injuries  
22 they have alleged; questions as to the exact amount of damages are not so speculative as to  
23 warrant dismissal; and there is no reason to currently believe that this case will require the Court  
24 “to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.”  
25 *Mendoza*, 301 F.3d at 1169.

### 26 **III. Merits of the RICO Claim**

#### 27 **A. Preliminary Matter: Looking at the Bosch Defendants’ Collective Conduct**

28 A RICO claim under 18 U.S.C. § 1962(c) includes four elements. Before turning to those

1 elements, though, the Court addresses the requirement that the § 1962(c) elements “must be  
2 established as to each individual defendant.” *Craig Outdoor Advert., Inc. v. Viacom Outdoor,*  
3 *Inc.*, 528 F.3d 1001, 1027 (8th Cir. 2008). In a June order, the Court held that the Franchise  
4 Dealers had not satisfied this requirement because their First Amended Complaint “blur[ed] the  
5 lines between the conduct of Bosch GmbH on the one hand, and Bosch LLC on the other.” (Dkt.  
6 No. 3366 at 2.)

7 The Franchise Dealers have made an effort in their Second Amended Complaint to identify  
8 which Bosch entity took which alleged actions. But for the most part it is still difficult to  
9 determine which entity did what. The Second Amended Complaint has made clear, though, that  
10 the reason for this difficulty is not conclusory or vague pleading on the part of the Franchise  
11 Dealers; rather, the blur between Bosch GmbH and Bosch LLC is caused by the way in which  
12 employees at both entities work together on certain projects, including the EDC17 project.

13 The Franchise Dealers allege that both Bosch GmbH and Bosch LLC operate “under the  
14 umbrella of the Bosch Group, which encompasses some 340 subsidiaries and companies.” (SAC  
15 ¶ 39.) The Bosch Group in turn is divided into four business sectors: Mobility Solutions,  
16 Industrial Technology, Consumer Goods, and Energy and Building Technology. (*Id.*) Mobility  
17 Solutions is the unit at issue here; it supplies parts to the automotive industry. And within  
18 Mobility Solutions is Bosch’s Diesel Systems division, “which develops, manufactures and  
19 applies diesel systems.” (*Id.*)

20 As alleged, each of Bosch’s sectors and divisions is “grouped not by location, but by  
21 subject matter.” (*Id.*) The result is that Bosch’s Diesel Systems division includes employees from  
22 both Bosch GmbH and Bosch LLC. (*Id.*) The Franchise Dealers also allege that “[r]egardless of  
23 whether . . . individual[s] works for Bosch LLC in the U.S. or Bosch GmbH in Germany, the  
24 individuals often hold themselves out as working for ‘Bosch.’” (*Id.*) Further, although  
25 communications, legal agreements, and other documents sometimes refer to a specific Bosch  
26 entity, “Bosch documents and press releases often refer to the author as ‘Bosch’ without  
27 identifying any particular Bosch entity.” (*Id.*)

28 Some of these allegations about the structure of Bosch’s sectors and divisions also

1 appeared in the First Amended Complaint. But the Second Amended Complaint has added  
2 additional detail and has clarified that, as best the Franchise Dealers can tell at this stage in the  
3 litigation, employees in Bosch’s Diesel Systems division do not commonly divide themselves  
4 along corporate lines. These allegations support a plausible inference that the knowledge of, and  
5 action undertaken by, employees of Bosch’s Diesel Systems division can be attributed to both  
6 Bosch GmbH and Bosch LLC.

7 Treating Bosch GmbH and Bosch LLC as a collective unit does not prejudice the Bosch  
8 Defendants. A key justification for requiring plaintiffs to separately plead allegations of fraud as  
9 to each defendant is notice. *See Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (“To  
10 comply with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of  
11 the particular misconduct which is alleged to constitute the fraud charged so that they can defend  
12 against the charge . . .”). Notice is not a problem here. Each Bosch Defendant participated in  
13 conducting the affairs of the Diesel Systems division, and each Bosch Defendant accordingly is on  
14 notice that it may potentially be held responsible for the conduct of that division.

### 15 **B. The Section 1962(c) Elements**

16 To state a RICO claim, the Franchise Dealers must plausibly allege that Bosch  
17 participated, directly or indirectly, in (1) the conduct, (2) of an enterprise that affects interstate  
18 commerce, (3) through a pattern, (4) of racketeering activity. *Eclectic Props. E., LLC v. Marcus*  
19 *& Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) (citing 18 U.S.C. § 1962(c)). The Court  
20 addresses these elements below in reverse order.

#### 21 **1. Element 4: Racketeering Activity**

22 RICO defines “racketeering activity” as any of the predicate acts listed in 18 U.S.C.  
23 § 1961(1). Those predicate acts include mail and wire fraud, which are the acts that the Franchise  
24 Dealers contend Bosch committed. *See id.* (citing 18 U.S.C. § 1341 (mail fraud), § 1343 (wire  
25 fraud)).

26 Mail and wire fraud are identical offenses except for the particular method used to  
27 disseminate the fraud. *Eclectic Props.*, 751 F.3d at 997. The elements are (1) a scheme to  
28 defraud, (2) the use of the mails or wires to further that scheme, and (3) the specific intent to

1 defraud. *Id.* The “scheme to defraud” element requires “an affirmative, material  
2 misrepresentation.” *United States v. Green*, 592 F.3d 1057, 1064 (9th Cir. 2010) (quoting *United*  
3 *States v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986)). But the misrepresentation does not need to  
4 be made through the mails or wires; rather, the use of the mails or wires only needs to be “a step in  
5 the plot.” *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2004) (internal quotation marks  
6 omitted). The misrepresentation also does not need to be made to the RICO plaintiff, but instead  
7 may be made to a third-party. *See Bridge*, 553 U.S. at 661 (bidder on public tax liens had standing  
8 to assert RICO claim against a competing bidder who made misrepresentations to the auctioneer,  
9 which deprived plaintiff of other bids; “a plaintiff asserting a RICO claim predicated on mail fraud  
10 need not show . . . that it relied on the defendant’s alleged misrepresentations”).

11 The “scheme to defraud” element of mail and wire fraud is “treated like conspiracy in  
12 several respects.” *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002) (quoting *United*  
13 *States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992)). As a result, each member of the scheme  
14 does not need to make a separate misrepresentation. As explained in *Stapleton*:

15 Just as acts and statements of co-conspirators are admissible against other  
16 conspirators, so too are the statements and acts of co-participants in a scheme to  
17 defraud admissible against other participants. We also apply similar principles of  
18 vicarious liability. Like co-conspirators, “knowing participants in the scheme are  
legally liable” for their co-schemers’ use of the mails or wires.

19 *Id.* (quoting *Lothian* 976 F.2d at 1262-63).

20 Based on these principles, the *Stapleton* court concluded that a defendant may be held  
21 liable for mail or wire fraud if (1) the defendant was a knowing participant in a scheme to defraud;  
22 (2) the defendant had the intent to defraud; and (3) a co-schemer committed acts of mail or wire  
23 fraud during the defendant’s participation in the scheme, and those acts were within the scope of  
24 the scheme. *Id.* at 1117-18.

25 Bosch takes issue with the application of *Stapleton* here. Bosch notes that in *Stapleton* the  
26 Ninth Circuit addressed mail and wire fraud in the criminal context. And if *Stapleton* is applied in  
27 the civil context, Bosch asserts, it will effectively allow civil RICO liability for aiding and  
28 abetting, which Congress has not explicitly authorized. *See Cent. Bank of Denver, N.A. v. First*

1 *Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994) (holding that there is no implicit aiding  
2 and abetting liability in federal civil statutes, but rather Congress has “taken a statute-by-statute  
3 approach”); *Pa. Ass’n of Edwards Heirs v. Righenour*, 235 F.3d 839, 840 (3d Cir. 2000)  
4 (applying *Central Bank of Denver* in interpreting RICO and concluding that the “statutory text  
5 does not provide for a private cause of action for aiding and abetting”).

6 Bosch misconstrues the RICO statute. First, § 1962(c) makes it unlawful to participate in  
7 “a pattern of racketeering activity.” This is a criminal offense. Section 1964(c) separately  
8 provides for a civil action for “[a]ny person injured in his business or property by reason of a  
9 violation of section 1962 . . . .” Whether a violation of § 1962 is asserted as a civil or criminal  
10 offense, the definition of “racketeering activity” remains the same: it is defined as any of a number  
11 of criminal offenses, including murder, kidnapping, bribery, counterfeiting, and (as relevant here)  
12 mail and wire fraud. *See* 18 U.S.C. § 1961(1). The civil RICO statute, then, incorporates the  
13 crimes of mail and wire fraud in their entirety. It therefore cannot be that *Stapleton’s*  
14 interpretation of mail and wire fraud applies in the criminal context, but not in the civil RICO  
15 context.

16 Second, *Stapleton* does not allow civil RICO liability for aiding and abetting. *Stapleton*  
17 interpreted only the mail and wire fraud statutes, which are the predicate acts of “racketeering  
18 activity.” But racketeering activity is only one element of a RICO claim under § 1962(c), and the  
19 Supreme Court has expressly held that another RICO element requires *more* than the type of  
20 conduct that would trigger aiding and abetting liability. In *Reves*, the Court interpreted  
21 § 1962(c)’s requirement that each member of a RICO enterprise “participate . . . in the conduct” of  
22 the enterprise’s affairs. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). The petitioners argued that  
23 “Congress used ‘participate’ as a synonym for ‘aid and abet.’” *Id.* at 178. The Court disagreed,  
24 holding that “participate” in the context of § 1962(c) has a narrower meaning: unlike aiding and  
25 abetting, which “comprehends all assistance rendered by words, acts, encouragement, support, or  
26 presence,” *id.* (quoting Black’s Law Dictionary 68 (6th ed. 1990)), the Court reasoned that to  
27 “participate . . . in the conduct” of an enterprise’s affairs requires “some part in directing those  
28 affairs,” *id.* at 179. *Reves*, then, makes clear that RICO requires more than aiding and abetting

1 conduct to give rise to liability. *Stapleton*'s interpretation of the predicate acts of mail and wire  
2 fraud does not change that.

3 In arguing against co-schemer liability for mail and wire fraud, Bosch also relies on  
4 *WellPoint*. In discussing RICO's "pattern" element, the district court there held that "[w]here  
5 RICO is asserted against multiple defendants, a plaintiff must allege at least two predicate acts by  
6 each defendant." *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 865 F. Supp. 2d 1002,  
7 1035 (C.D. Cal. 2011). The *WellPoint* court went on to note, though, that "the complaint need not  
8 identify false statements made by each and every individual," but rather the plaintiff need only  
9 "identify the role of each defendant in the alleged fraudulent scheme." *Id.* at 1036 (citation  
10 omitted). *WellPoint*, then, is not necessarily inconsistent with *Stapleton*. And to the extent  
11 *WellPoint* is inconsistent, the Ninth Circuit's *Stapleton* decision controls.

12 In sum, the Franchise Dealers can satisfy their burden of demonstrating that Bosch  
13 engaged in the predicate acts of mail and wire fraud with allegations that Bosch was (1) a knowing  
14 participant in a scheme to defraud, (2) that Bosch participated in the scheme with the intent to  
15 defraud, and (3) that a co-schemer's acts of mail and wire fraud occurred during Bosch's  
16 participation in the scheme and were within the scope of the scheme. *Stapleton*, 293 F.3d at 1117-  
17 18. The allegations supporting each of these elements are considered below.

18 **a. Knowing Participant in a Scheme to Defraud**

19 The scheme, as alleged, was to misrepresent to U.S. regulators and the public that  
20 Volkswagen's "clean diesel" vehicles complied with U.S. emission standards and were  
21 environmentally friendly. (See SAC ¶¶ 1, 408-09.) The allegations support that Bosch knowingly  
22 participated in this scheme by working with Volkswagen to implement the defeat device that made  
23 the scheme possible, and by promoting "clean diesel" technology in the United States.

24 First, the allegations support that Bosch exercised near-total control over modifications to  
25 the EDC17. For example, Volkswagen and Bosch agreed in a 2005 contract that Bosch would  
26 retain control over the EDC17 software; that Bosch would test and carry out any modifications  
27 necessary in order to integrate Volkswagen modules; that any modules developed by Volkswagen  
28 could not be installed without Bosch's written approval; and that only if everything met Bosch's

1 standards would Bosch “deliver[] the final complete software product for VW to use in  
2 combination with a BOSCH control unit.” (SAC ¶¶ 108-110 (alteration in original).)

3 Bosch’s tight control over the EDC17 is further supported by allegations that Bosch  
4 typically locked the EDC17 to prevent customers like Volkswagen from making significant  
5 changes on their own. (*Id.* ¶¶ 79, 103.) An engineer from another car company has also  
6 confirmed that Bosch is heavily involved in software development, and that “[t]he car company is  
7 never entitled by Bosch to do something on their own.” (*Id.* ¶ 105 (emphasis omitted).)

8 Taking these allegations as true and construing them in the Franchise Dealers’ favor, *Ass’n*  
9 *for L.A. Deputy Sheriffs v. Cty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011), an inference  
10 arises that Bosch was not a mere parts supplier that “innocently suppli[ed] a product that was  
11 misused by VW,” as Bosch contends. (Dkt. No. 2864 at 47.) Rather, because the Franchise  
12 Dealers plausibly alleges that Bosch controlled all modifications to the EDC17, the Franchise  
13 Dealers’ complaint supports an inference that Bosch must have known about and approved the  
14 changes that converted the EDC17 into a defeat device.

15 Internal Volkswagen emails also support that Bosch was involved in the scheme. In a  
16 November 2006 email, for example, Dieter Mannigel, a member of Volkswagen’s Software  
17 Design team in the U.S. Diesel Engines division, emailed Hanno Jelden, head of Volkswagen’s  
18 Powertrain Electronics division, about the “US07” project. (SAC ¶¶ 118, 128; Dkt. No. 4175-5 at  
19 3.)<sup>3</sup> As noted above, that project involved the design of the first iteration of “clean diesels” for  
20 sale in the United States. (SAC ¶ 73.) Mannigel’s email reads:

21 Have you spoken with Bosch about the issue of US07 . . . ?

22 This issue is slowly becoming critical . . . .

23 I came away from our meeting with Mr. Krebs [who joined Volkswagen from Audi  
in 2005, SAC ¶ 118] with the following:

24 - When we use the “acoustic function,” it should have an appearance that won’t

25 <sup>3</sup> Bosch has attached this email and 15 other documents to its motion to dismiss. (*See* Dkt. No.  
26 4175, Exs. A-P.) The Court considers these documents as part of the complaint pursuant to the  
27 “incorporation by reference” doctrine because “plaintiff’s claim depends on the contents of [the]  
document[s], the defendant attach[ed] the document[s] to its motion to dismiss, and the parties do  
28 not dispute the authenticity of the document[s].” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.  
2005). The Court previously permitted Bosch and Volkswagen to redact information from these  
exhibits that identifies non-parties who are not relevant to the dispute. (*See* Dkt. No. 4147.)

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get us in trouble . . . .

.....

- He is very skeptical about its implementation on the U.S. market: for one thing due to the very critical liability situation . . . .

In my opinion, the requirement of “nondiscoverability” has neither been met for today’s function nor the planned expansion.

The FP sheet for the expansion has been submitted to Bosch.

How do we proceed?

(Dkt. No. 4175-5 at 3.)

The express references in this email to the “acoustic function,” the “US07” project, and the importance of not getting caught illustrate Volkswagen’s deception in undertaking the emissions scheme. But the email also casts Bosch as a strategic partner in the scheme. The “issue” discussed appears to be how to implement the “acoustic function” in the U.S. without being discovered. And Mannigel asks if Jelden has “spoken with Bosch about the issue,” suggesting that Bosch might be able to help hide the “acoustic function” from U.S. regulators. Further, from the statement that “[t]he FP sheet for the expansion has been submitted to Bosch,” it is also reasonably inferable that Volkswagen had already requested that Bosch modify the EDC17 to implement the “acoustic function.”

Other communications between 2005 and 2015 support Bosch’s involvement in developing and implementing the defeat device. In a November 2005 email, a Volkswagen employee sent a meeting agenda to other Volkswagen and Bosch employees. Among the agenda items was the “Emission Result[s] of the Current Acoustic / Driving Behavior Calibration” with respect to “Baseline Measurement . . . without NOx Catalyst.” (Dkt. No. 4175-7 at 4.) And in a November 2014 email chain, a Volkswagen employee also explained to colleagues that “Bosch will be bringing up with Team 1 the topic of SW use of the acoustic function by VW” in the “context of gasoline hydraulic components.” (Dkt. No. 4175-8 at 4.) While this latter email does not directly tie Bosch to the diesel defeat device, it supports the inference that Bosch knew about the “acoustic function” more generally, and that Volkswagen collaborated with Bosch on its use.

Allegations also support that Bosch participated in the scheme by promoting “clean diesel” technology in the United States. The Franchise Dealers allege that following the launch of the



1 EDC17 in 2006, Bosch hired a lobbying firm, mcapitol Managers, to promote its “clean diesel”  
2 products in Washington D.C. and with EPA. (SAC ¶ 143.) Bosch also organized and hosted a  
3 two-day “California Diesel Days” event in April 2009 in Sacramento, and invited lawmakers,  
4 journalists, executives, and regulators to the event, which featured Volkswagen’s vehicles “as  
5 ambassadors of ‘Clean Diesel’ technology.” (*Id.* ¶ 147.) Bosch also presented in June 2007 on  
6 “meeting the demands of U.S. emission legislation, where it focused on lowering emissions in  
7 diesel vehicles.” (*Id.* ¶ 154.)

8 Bosch argues that its lobbying and promotional activities focused on promoting “clean  
9 diesel” generally, and were not tied directly to Volkswagen. As noted above, though, Bosch used  
10 Volkswagen’s vehicles as exemplars at certain promotional events. Further, Volkswagen was the  
11 biggest diesel-vehicle manufacturer in the world (*id.* ¶ 92 n.24), and made a strategic decision in  
12 2005 to “launch a large-scale promotion of diesel vehicles in the United States” (*id.* ¶ 57). Given  
13 Volkswagen’s prominence in the “clean diesel” space, and Bosch’s use of Volkswagen’s vehicles,  
14 it is reasonable to conclude that by promoting “clean diesel” Bosch sought to increase demand for  
15 Volkswagen’s vehicles.<sup>4</sup>

16 **b. Intent to Defraud**

17 Bosch’s intent to defraud reasonably can be inferred from the scheme itself. *See Eclectic*  
18 *Props.*, 751 F.3d at 997 (“[B]y examining the scheme itself the court may infer a defendant’s  
19 specific intent to defraud.”) (internal quotation marks omitted). No one to date in this multidistrict  
20 litigation has sought to justify, or explain a lawful purpose for, software that effectively turns a  
21 vehicle’s emission systems on or off depending on whether the vehicle is undergoing emissions  
22 testing or being operated under normal driving conditions. But according to the allegations in the  
23

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24 <sup>4</sup> The *Noerr-Pennington* doctrine does not bar consideration of Bosch’s lobbying activities. (*See*  
25 *Dkt. No. 2864 at 51.*) Under that doctrine, “those who petition any department of the government  
26 for redress are generally immune from statutory liability *for their petitioning conduct.*” *Sosa*, 437  
27 F.3d at 929 (emphasis added). Here, the Franchise Dealers are not asserting that Bosch’s lobbying  
28 activity was unlawful. Instead, they contend that Bosch’s lobbying activity proves its knowledge  
of, and intent to participate in, the emissions fraud. *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.”).

1 complaint, that is the function for which Bosch allowed its EDC17 to be used for years in  
 2 Volkswagen’s vehicles. Further, not only did Bosch authorize this use of its EDC17, but it  
 3 promoted “clean diesel” technology despite knowing that the low NOx emissions levels that  
 4 Volkswagen reported to U.S. regulators, and promoted to U.S. consumers, were false. The  
 5 Franchise Dealers’ pleadings satisfy the intent requirement.<sup>5</sup>

6 **c. Volkswagen’s Acts of Mail Fraud or Wire Fraud Within the**  
 7 **Scope of the Scheme**

8 The complaint alleges numerous misrepresentations by Volkswagen to U.S. regulators and  
 9 consumers. These include Volkswagen’s applications for certification of the affected vehicles,  
 10 which Volkswagen submitted to EPA and the California Air Resources Board (CARB) for each  
 11 model year, and which misrepresented that the vehicles complied with EPA and CARB’s emission  
 12 requirements (SAC ¶¶ 86-88, 423(b)); falsified emission tests (*id.* ¶ 423(f)); and sales and  
 13 marketing materials, including advertising, websites, product packaging, brochures, and labeling,  
 14 which all misrepresented or concealed the affected vehicles’ emission levels (*id.* ¶¶ 160-88,  
 15 423(k)). All of these misrepresentations are alleged to have been made through the use of the  
 16 mails and wires. All of these misrepresentations also occurred during Bosch’s participation in the  
 17 scheme and were within the scope of the scheme so as to support co-schemer liability. *Stapleton*,  
 18 293 F.3d at 1117-18. The Franchise Dealers have accordingly satisfied the “racketeering activity”  
 19 element of their civil RICO claim.<sup>6</sup>

20  
 21  
 22 <sup>5</sup> The Franchise Dealers also contend that certain communications between Bosch and U.S.  
 23 regulators support an intent to defraud. As pled, the Court disagrees. Most of the alleged  
 24 communications between Bosch and regulators do not explicitly reference emissions, or otherwise  
 25 plausibly relate to emission-control systems or the defeat device. (*See generally* SAC ¶¶ 115, 135,  
 140.) The link between Bosch’s communications with regulators and the fraudulent scheme is  
 therefore missing.

26 <sup>6</sup> There is no issue here involving the extraterritorial reach of RICO. The allegations support that  
 27 Volkswagen used the U.S. mails and wires in furtherance of the scheme, and Bosch does not deny  
 28 that the use of the U.S. mails and wires is the focus of those statutes. “If the conduct relevant to  
 the statute’s focus occurred in the United States, then the case involves a permissible domestic  
 application even if other conduct occurred abroad . . . .” *RJR Nabisco, Inc. v. European Cmty.*,  
 136 S. Ct. 2090, 2101 (2016).

1                   **2. Element 3: A Pattern of Racketeering Activity**

2           A “pattern of racketeering activity” requires the commission of at least two predicate acts  
3 within a ten-year period. 18 U.S.C. § 1961(5). “Evidence of multiple schemes is not required . . .  
4 and, indeed, proof of a single scheme can be sufficient so long as the predicate acts involved are  
5 not isolated or sporadic.” *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004) (citing *H.J. Inc. v.*  
6 *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989)). The predicate acts here were not isolated or  
7 sporadic: the Franchise Dealers allege that Volkswagen misrepresented the emission levels of  
8 multiple vehicle models over the course of a decade. Bosch does not contend otherwise.

9                   **3. Element 2: An Enterprise that Affects Interstate Commerce**

10           To state a RICO claim, the plaintiff must connect the alleged racketeering activity with the  
11 conduct of an “enterprise” that affects interstate or foreign commerce. 18 U.S.C. § 1962(c). The  
12 Franchise Dealers allege that Bosch and Volkswagen were part of an associated-in-fact enterprise.  
13 *See* 18 U.S.C. § 1961(4). Such an enterprise has three elements: (1) a common purpose, (2) a  
14 structure or organization, and (3) longevity necessary to accomplish the purpose. *Boyle v. United*  
15 *States*, 556 U.S. 938, 946 (2009). Each element is satisfied here.

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

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

1 Third, the Franchise Dealers allege that Bosch and Volkswagen’s emissions scheme  
2 extended over the course of a decade, as the companies worked together to customize the EDC17  
3 for use in a variety of Volkswagen-branded vehicles offered in model years 2009 through 2016.  
4 (SAC ¶¶ 36, 40.) The enterprise, then, had a longevity necessary to accomplish its purpose. *See*  
5 *Boyle*, 556 U.S. at 946 (an enterprise “must have some longevity, since the offense proscribed by  
6 [§ 1962(c)] demands proof that the enterprise had ‘affairs’ of sufficient duration to permit an  
7 associate to ‘participate’ in those affairs through ‘a pattern of racketeering activity’”).

#### 8 4. Element 1: Conducting the Affairs of the Enterprise

9 Finally, “[i]n order to ‘participate, directly or indirectly, in the *conduct* of [an] enterprise’s  
10 affairs,’ one must have some part in directing those affairs.” *Reves*, 507 U.S. at 179 (emphasis  
11 added) (quoting 18 U.S.C. § 1962(c)). This requirement does not limit RICO liability “to those  
12 with primary responsibility for the enterprise’s affairs,” nor does it require a participant to exercise  
13 “significant control over or within an enterprise.” *Id.* at 179 & n.4 (emphasis omitted). But “*some*  
14 part in directing the enterprise’s affairs is required,” *id.* at 179, and “[s]imply performing services  
15 for the enterprise,” or failing to stop illegal activity, is not sufficient. *Walter v. Drayson*, 538 F.3d  
16 1244, 1248-49 (9th Cir. 2008).

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

1           **C.       Section 1962(c) Merits Conclusion**

2           The Franchise Dealers’ allegations are sufficient to satisfy the four elements of their  
3       § 1962(c) RICO claim. They have plausibly alleged that Bosch partnered with Volkswagen to  
4       implement the defeat device in the affected vehicles, and by doing so participated in the conduct  
5       of a years-long enterprise to defraud U.S. regulators and consumers.

6           **IV.     Merits of the RICO Conspiracy Claim**

7           The Franchise Dealers also allege that Bosch and Volkswagen engaged in a conspiracy to  
8       commit a RICO violation in violation of 18 U.S.C. § 1962(d). “[A] RICO conspiracy under  
9       § 1962(d) requires only that the defendant was ‘aware of the essential nature and scope of the  
10      enterprise and intended to participate in it.’” *United States v. Christensen*, 828 F.3d 763, 780 (9th  
11     Cir. 2015) (quoting *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004)). The same  
12     allegations that demonstrate Bosch’s participation in the enterprise support the Franchise Dealers’  
13     conspiracy claim. It is plausible that Bosch was aware of the scheme because it exercised near-  
14     total control over modifications to the EDC 17. And Bosch’s intent to participate in the scheme is  
15     inferable from its alleged willingness to let Volkswagen use the modified EDC17 in its vehicles  
16     for years.

17          **V.     Personal Jurisdiction over Bosch GmbH**

18          Finally, Bosch GmbH seeks dismissal for lack of personal jurisdiction. At the pleading  
19     stage, the Franchise Dealers “need only make a prima facie showing of jurisdictional facts.”  
20     *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011) (quoting *Brayton*  
21     *Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010)). They have done so  
22     here.

23          Personal jurisdiction over Bosch GmbH is proper under Federal Rule of Civil Procedure  
24     4(k)(2). Referred to as the federal long-arm statute, Rule 4(k)(2) applies when (1) the claim  
25     against the defendant arises under federal law; (2) the defendant is not subject to the personal  
26     jurisdiction of any state court of general jurisdiction; and (3) the federal court’s exercise of  
27     personal jurisdiction comports with due process. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*,  
28     485 F.3d 450, 461 (9th Cir. 2007).

1           The first two elements are not in dispute: the Franchise Dealers’ RICO claim arises under  
2 federal law, and where (as here) the defendant does not identify a state court of general  
3 jurisdiction, the second element is also satisfied. *Id.* at 462 (“[A]bsent any statement from [the  
4 defendant] that it is subject to the courts of general jurisdiction in another state, the second  
5 requirement of Rule 4(k)(2) is met.”).

6           The Court’s exercise of personal jurisdiction over Bosch GmbH also comports with due  
7 process. Bosch and Volkswagen are alleged to have intentionally designed the defeat device to  
8 evade U.S. emission requirements. (*See, e.g.*, SAC ¶ 73 (“Volkswagen engineers, working with  
9 Bosch Diesel Systems . . . adapted Audi’s ‘akustikfunktion’ concept . . . for Volkswagen and Audi  
10 models to be sold in the U.S.”); ¶ 81 (Bosch and Volkswagen customized the EDC17 so that the  
11 affected vehicles could “detect[] test scenarios” that were used in the United States).) Employees  
12 at Bosch GmbH, working as part of Bosch’s Diesel Systems division, also lobbied U.S. regulators  
13 and lawmakers about the benefits of “clean diesel” technology. (*Id.* ¶¶ 143, 147, 149-50, 154.)  
14 This conduct all “connects [Bosch GmbH] to the forum in a meaningful way.” *Walden v. Fiore*,  
15 134 S. Ct. 1115, 1125 (2014). The Franchise Dealers’ suit also “arises out of or relates to the  
16 defendant’s contacts with the forum,” so as to support specific jurisdiction. *Daimler AG v.*  
17 *Bauman*, 134 S. Ct. 746, 754 (2014) (citation omitted). “But for” Bosch GmbH’s approval of a  
18 defeat device targeted at the U.S. vehicle market, it is reasonable to conclude that the Franchise  
19 Dealers would not have suffered injuries tied to that device. *Myers v. Bennett Law Offices*, 238  
20 F.3d 1068, 1075 (9th Cir. 2001).

21           Bosch GmbH contends that this case is like *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564  
22 U.S. 873 (2011). There, the Court held that New Jersey’s courts could not exercise personal  
23 jurisdiction over a foreign manufacturer of a product, where the manufacturer had not specifically  
24 targeted New Jersey and no more than four of the manufacturer’s machines ended up in New  
25 Jersey. *Id.* at 877-78 (plurality opinion). Because the jurisdictional inquiry here is under Rule  
26 4(k)(2), the proper analogy would be if Bosch GmbH had not specifically targeted the United  
27 States, and no more than four (or some other minimal number) of Bosch’s EDC17s had ended up  
28 in the United States. That is not what is alleged here. Instead, the Franchise Dealers allege that

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1 Bosch GmbH and Volkswagen specifically targeted the United States and that hundreds of  
2 thousands of defeat devices made their way into the United States.

3 Bosch GmbH also has not “present[ed] a compelling case that the presence of some other  
4 considerations would render jurisdiction unreasonable.” *Burger King v. Rudzewicz*, 471 U.S. 462,  
5 477 (1985). Bosch GmbH argues that it would be burdened by defending in the United States as  
6 opposed to in Germany. (Dkt. No. 2864 at 64.) But “[u]nless such inconvenience is so great as to  
7 constitute a deprivation of due process, it will not overcome clear justifications for the exercise of  
8 jurisdiction.” *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1481 (9th Cir.  
9 1986). The inconvenience identified here, that Bosch GmbH is headquartered in Germany, is not  
10 an inconvenience of this magnitude. Bosch GmbH also notes that Germany “has a significant  
11 sovereign interest in regulating [its] behavior.” (Dkt. No. 2864 at 64.) The Court agrees, but there  
12 is no conflict with the sovereignty of Germany here, as the Franchise Dealers bring this case for  
13 conduct that was specifically targeted at the United States, based on Bosch GmbH’s alleged  
14 violation of U.S. law.

15 **CONCLUSION**

16 The Franchise Dealers have satisfied the pleading requirements necessary for this litigation  
17 to continue. The motion to dismiss is DENIED.

18 **IT IS SO ORDERED.**

19 Dated: October 30, 2017

20  
21 

22 CHARLES R. BREYER  
23 United States District Judge  
24  
25  
26  
27  
28