

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

IN RE CHRYSLER-DODGE-JEEP )  
ECODIESEL MARKETING, SALES )  
PRACTICES, AND PRODUCTS )  
LIABILITY LITIGATION. )  
 ) NO. 17-md-02777 EMC  
 )  
 )  
 )

San Francisco, California  
Friday, October 26, 2018

TRANSCRIPT OF PROCEEDINGS

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1 Friday - October 26, 2018

11:05 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling Multidistrict Action 17-2777, In  
5 Re Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices,  
6 and Products Liability Litigation.

7 Counsel, please approach the podium and state your  
8 appearances for the record.

9 **MS. CABRASER:** Good morning, Your Honor. This morning  
10 the PSC is represented by Elizabeth Cabraser, Rachel Jensen,  
11 Kevin Budner, and David Stelling.

12 **THE COURT:** Great. Good morning. Thank you.

13 **MR. GIUFFRA:** Good morning, Your Honor. Robert  
14 Giuffra, Sullivan & Cromwell, for Fiat Chrysler, along with my  
15 partner Tom White.

16 **MR. SLATER:** Good morning, Your Honor. Matthew Slater  
17 of Cleary Gottlieb with my colleague Patrick Swiber on behalf  
18 of Robert Bosch GmbH and Robert Bosch LLC.

19 **THE COURT:** Great. Thank you, Mr. Slater.

20 I appreciate counsel making themselves available for this  
21 sort of supplemental hearing on the motion to dismiss.

22 I thought given the importance of the issues here, it was  
23 worth having a further hearing because some of the briefing was  
24 done, issues had been raised, and I've been looking at some of  
25 the issues without the benefit of oral argument. So I thought

1 given the importance of this, I should give the parties a  
2 chance to enhance their presentation.

3 We're talking about RICO and whether the federal RICO  
4 claim, to the extent it is predicated on fraud on the EPA as  
5 opposed to fraud on consumers -- which I believe is the theory,  
6 that's how I've understood the RICO part of the claim as  
7 distinct from other claims in this case -- raises some tough  
8 questions, questions that I think are not very clear in the  
9 case law and they sort of can be categorized in two areas.

10 One is this, what's been called, the convergence rule that  
11 you can't have, under wire fraud and mail fraud statutes, fraud  
12 upon a third party that's actionable; that the party that is  
13 defrauded is the one that has the claim and it has to be based  
14 on some loss of property or money. It can't be based on some  
15 theoretical harm like to the Government's interest and  
16 integrity, for instance, *McNally* kind of case and its progeny  
17 that finds its way into some Ninth Circuit cases but then you  
18 have *Bridge*, which seems contrary to that, and yet *Bridge*  
19 really doesn't discuss *McNally*, and I'm not sure.

20 I'd like to get your views as to how we align those two  
21 strings of cases up on the question of third-party reliance  
22 with respect to wire or mail fraud, which is of course the  
23 predicate for the RICO claims here.

24 The other question that was raised in the briefing is -- I  
25 mean, I'll call it preemption, it's not exactly preemption, but

1 sort of displacement of RICO by some substantive statute; the  
2 idea that whatever the statute -- and in this case it's the  
3 Clean Air Act -- has such a comprehensive, self-contained  
4 enforcement scheme that one can infer that Congress did not  
5 intend that the CAA could be enforced via RICO, that that would  
6 be an end-run around the proscriptions and the limitations set  
7 forth by Congress and EPA's authority, et cetera, et cetera.

8 And even there, one could find pretty strong arguments on  
9 either side of the equation. For one, you've got a savings  
10 clause here that's pretty broad that would seem to suggest that  
11 Congress was not trying to insulate the car manufacturers and  
12 protect them in a certain way and say the only thing they could  
13 be subject to would be EPA enforcement or citizen suits  
14 pursuant to the terms of the CAA but not any other way. If  
15 that were the case, why have this broad savings clause that  
16 seems to allow all sorts of suits and potential liability?

17 And, yet, you have the *Sea Clammers* case. That looked at  
18 a very similar savings clause in a slightly different context  
19 but somewhat parallel and said that not only was there not an  
20 implied cause of action under the federal statutes involved  
21 there, but we're not going to allow a 1983 claim, which is a  
22 separate federal statute, even though literally it seems like  
23 the savings clause should have allowed a 1983 claim in *Sea*  
24 *Clammers*. So is that analogous here? The same argument can be  
25 made that a very similar savings clause ought to be construed

1 as to not save a RICO claim? I don't know.

2 So these are questions that I have, and I'd like to hear  
3 your views. Maybe we can start with the whole what do I do  
4 with *McNally* on the one hand and *Bridge* on the other hand.  
5 I'll let you start, Mr. Giuffra.

6 **MR. GIUFFRA:** Thank you, Your Honor. Robert Giuffra,  
7 Sullivan & Cromwell, for the FC defendants.

8 First I want to thank the Court for having today's hearing  
9 because we think these are important and difficult issues.

10 And I want to start with first principles because  
11 Your Honor's order from the other day got us all thinking, and  
12 we think you correctly raised an issue which we had actually  
13 raised on page 12, Note 11 -- Note 11 -- of the reply on the  
14 first motion to dismiss, and that really goes back to the first  
15 principles of *McNally* and what *McNally* stands for.

16 Now, the mail fraud statute -- and obviously to bring a  
17 RICO claim, you need to establish that predicate of a mail  
18 fraud -- talks about obtaining money or property by means of  
19 false or fraudulent pretenses. And *McNally* stands for the  
20 proposition that a benefit that the government derives from the  
21 mail fraud statute has to be limited to the government's  
22 interest as a property holder. Property holder.

23 So the first question that I think the Court needs to  
24 address is: Are these EPA approvals, these certificates of  
25 conformity, are they property? And there's a case which we

1 think the Court needs to look to, which we think -- it's a  
2 Justice Ginsburg decision, and we think it's directly on point  
3 here, and it's called *Cleveland versus United States*,  
4 531 U.S. 12 2000. And in that case the issue had come up as to  
5 whether people had procured video poker licenses by fraud.  
6 They had lied about whether they qualified to get those video  
7 poker licenses, and the question was whether they had engaged  
8 in mail fraud in doing so.

9 And the Supreme Court held that a permit or a license does  
10 not qualify as property because the thing obtained must be  
11 property in the hands of the victim, and in this case the  
12 license is something that the state is giving to someone. And  
13 the Court went on to say that intangible rights of allocation,  
14 exclusion, or control amount to no more than the sovereign's  
15 power to issue some right to do something but it is not  
16 property.

17 So the Supreme Court-- and there are many cases, and I'll  
18 cite them for the Court, have held -- courts have held  
19 repeatedly that a government approval is not property.

20 Now, the plaintiffs' theory in this case, as we understand  
21 it, is one of fraud on the regulators.

22 And I just wanted to hand up to the Court, I've given a  
23 copy to the other side --

24 **THE COURT:** But with resultant harm to consumers, that  
25 there is a property harm suffered. It's not suffered by the

1 government. I don't think they're asserting that. And I agree  
2 with you, I think *McNally* answers that question. There was no  
3 harm to the government dollar-wise because there's no showing  
4 that the kickbacks that were obtained actually cost the  
5 government anything. So I don't think that's controversial.

6 My question is: In light of *Bridge* -- because there was  
7 no obvious harm to the government property in *Bridge* either. I  
8 mean, you know, it was harm to the competing bidders that was  
9 the problem. And so the question was raised: Do you have to  
10 be the person who's defrauded? In that case I think it was a  
11 county or whatever.

12 **MR. GIUFFRA:** Yeah. The issue in *Bridge* was there  
13 were property liens that the government was giving out to  
14 people. Those property liens were property in the hands of the  
15 government.

16 **THE COURT:** But that's not the reasoning of the court.  
17 The court didn't reason that the government suffered a property  
18 harm. The court construed RICO more broadly to say as long as  
19 there is harm caused by, which opened the door to fraud on a  
20 third party, that hurts the plaintiff.

21 **MR. GIUFFRA:** Yeah, but what the court held in the  
22 *Bridge* case was -- first of all, the court doesn't address the  
23 convergence theory and the convergence theory, Your Honor, and  
24 I'll give you some cases, is still good law in this circuit.

25 But beyond all that, the holding in *Bridge* was that to

1 assert a RICO claim predicated on mail fraud, does the  
2 plaintiff have to show first-party reliance, and the court said  
3 no.

4 Now, we found cases post-*Bridge*, and I'll cite a case for  
5 you, *Southern Snow*. And I apologize that a lot of these are  
6 not in the briefs, but I think this process has actually gotten  
7 us further down the line than we were. This is a case  
8 912 F.Supp. 2d 404, 421, Eastern District of Louisiana, 2012,  
9 and it's a RICO case. And in that case competitors had sued a  
10 party over misrepresentations that that party made to the  
11 government to obtain patents, and it had to do with  
12 snow-cone-making machines. And the competitors claimed, as the  
13 plaintiffs do here, that they were harmed by that scheme to  
14 obtain something from the government that gave the person who  
15 was allegedly engaged in the RICO enterprise the ability to get  
16 these patents and then issue and sell these machines.

17 And the court said, no, because you haven't established  
18 mail fraud in the first instance because the property that is  
19 at issue was getting these patent licenses and the patent  
20 licenses are not property in the first instance.

21 And when you look at the way this case has been pled and  
22 argued, you know, so far -- and that's why I gave the Court  
23 this document -- what the plaintiffs have done here very  
24 carefully is they have said they're not basing their claims on  
25 misrepresentations that we made in sales or marketing

1 materials. They're saying that the claim that -- the gravamen  
2 of their RICO claim is that we got the approval from the  
3 government to obtain those COCs, which allowed us to sell the  
4 cars. And that's in their complaint, and I give you all the  
5 documents in this handout. And they make the argument that the  
6 so-called RICO enterprise was formed for the purposes of  
7 fraudulently obtaining COCs from the EPA.

8 And so our basic point is, Your Honor -- and that also  
9 differs -- this case, for whatever reason, it's not the same  
10 way it was pled in *VW*, it's not the same way it was pled in  
11 *Chevy Cruze* where they were more focused on marketing materials  
12 to plaintiffs, but here the claim is a fraud on the regulators  
13 claim, and that's what they've been arguing throughout this  
14 case.

15 And our basic point is, okay, let's accept that allegation  
16 and that claim that you've been putting forward. Well, under  
17 *Cleveland, McNally*, and all of the other cases that interpret  
18 the question of when a license or some approval process can  
19 give a competitor or someone injured by the fact that someone  
20 got the approval to do something, does that give you a claim?  
21 And the courts all say no. They all say that the government  
22 approval itself is not property.

23 **THE COURT:** Is there any Circuit Court authority  
24 post-*Bridge* that addresses the *McNally* convergence theory?

25 **MR. GIUFFRA:** *Southern Snow* is probably the case

1 that's most on point of ones that we found.

2 **THE COURT:** That's not a Circuit Court. That's --

3 **MR. GIUFFRA:** The Ninth, yeah. And that's not -- in  
4 terms of cases in the Ninth Circuit, this is on the question  
5 of, well -- and this was a question Your Honor raised -- is --  
6 and I'll give you these cases. I'll give it to the other side.

7 The question was: Well, is the convergence theory still  
8 good law in the Ninth Circuit? And the convergence theory,  
9 which was first set forth in a case called *Lew*, stands for the  
10 basic proposition that the intent to obtain money or property  
11 must be from the victim of the deceit.

12 And here the plaintiffs have claimed that the allegation  
13 they're raising is that they overpaid for the vehicles, but the  
14 overpayment issue is not something that was obtained from the  
15 victim of the deceit. What was obtained from the victim of the  
16 deceit here was the certificate of conformity.

17 Now, in the cases that I've handed Your Honor, these are  
18 cases 2016, '12, and post-*Bridge* 2010, they all stand for the  
19 proposition that the intent to obtain money or property must be  
20 from the one who is deceived. And a case that I think has some  
21 bearing on this case, there are cases involving, for example,  
22 someone who had gotten customers who wanted flying licenses,  
23 and they lied to the government to get those flying licenses.  
24 And the court claimed that, well, the flying licenses were not  
25 property in the hands of the government so you had no mail

1 fraud claim.

2 In order to bring a RICO case, obviously you need to  
3 satisfy that predicate element of a mail fraud violation, and I  
4 think the problem that the plaintiffs have in this case is the  
5 scope of the mail fraud statute and whether it can apply here.

6 Now, in terms of *Bridge* itself, again, the plaintiff, Cook  
7 County, had a property interest in those tax liens. The tax  
8 liens were valuable property, and they were property in the  
9 hands of the deceived party, the county. Because the way it  
10 worked was they had something which was a one-bidder rule, and  
11 these property -- these liens were valuable because they were  
12 always below market. So if you could get the lien, you could  
13 sell them and make money. And everyone would bid zero percent  
14 in terms of an additional amount of money, and what people did  
15 was they got straw people to be their front people and they got  
16 more liens than they were entitled to. So it was a fraud on  
17 the county because the county --

18 **THE COURT:** What did the county lose? What money did  
19 the county lose?

20 **MR. GIUFFRA:** Well, that's precisely what happened.  
21 When the Supreme Court looked at this issue, what the  
22 Supreme Court looked to was the question of, well, was there  
23 a -- was first-party reliance necessary in order to bring a  
24 claim, and the court said no.

25 The court did not in *Bridge* deal with the whole question

1 of, well, if you're dealing with one of these cases involving a  
2 fraud on the government to get some right to do something,  
3 which is what this case is about, is that the type of case  
4 where a third party can bring a claim. And courts have  
5 repeatedly held -- and it's not just the *Southern Snow* case,  
6 it's other cases, you know, where courts -- I'll give you some  
7 other citations.

8 Now, this is a case which is -- and I apologize. I got my  
9 dates wrong. This is a case called *Kato*, K-A-T-O. It's a  
10 Ninth Circuit case 1989. It was cited in Your Honor's order.  
11 And the court in that case held mail fraud, citing the *Lew*  
12 principle, which we think is still good law, that a mail fraud  
13 against the government must be based on government benefits and  
14 the government's rights as property holders, and there the  
15 issue was these pilot licenses were not property.

16 There's another case called *Leveque*, L-E-V-E-Q-U-E,  
17 283 Fed. 3d 1098, and this is at pages 1102-'03, Ninth Circuit  
18 2002, that a hunting license is not property; and, in fact, the  
19 Ninth Circuit Model Jury Instructions make it clear that  
20 government-issued licenses don't constitute property.

21 There are other cases.

22 **THE COURT:** I don't doubt that line of cases in the  
23 proposition that you assert. My question is: In light of  
24 *Bridge*, I don't see the loss of property or money that was  
25 suffered by the government, by the county there. I mean, this

1 case could have easily been disposed of by saying *McNally*, end  
2 of case, but it didn't. It went on and analyzed it and seemed  
3 to ignore the convergence rule and said, "Well, in fact, you  
4 can have third-party reliance." So the party hurt is a third  
5 party. It wasn't even a party to the transaction. It wasn't  
6 defrauded. And so how do you get to *Bridge*?

7 **MR. GIUFFRA:** Respectfully, Your Honor, *McNally* would  
8 not have worked in *Bridge* because the tax liens were property.  
9 Those tax liens --

10 **THE COURT:** But there's no loss of property. I mean,  
11 in *McNally* itself, these were state funds going to the  
12 insurance companies. There was property but there was no loss  
13 of property.

14 **MR. GIUFFRA:** No, but -- no -- well, in the *Bridge*  
15 case itself, the liens themselves were property. The  
16 government may not have lost money because someone obtained  
17 them.

18 **THE COURT:** Right. And so the party suffering the  
19 loss of property was not the one deceived. The government --  
20 the county was deceived but didn't suffer the loss of property.  
21 It was the competing bidders that lost the property, and the  
22 court said that's okay.

23 **MR. GIUFFRA:** But as I understand the convergence  
24 rule, you've got to show that there's an intent to obtain money  
25 from a party you're deceiving. So in *Bridge*, it was an intent

1 to obtain money. The tax liens were property. Okay? And  
2 there's no question that the county was deceived. The county  
3 had a rule that the people who were the other bidders did not  
4 comply with.

5 Did the county lose money? No, but I don't believe that  
6 the convergence rule requires you to actually lose money if  
7 you -- the person you deceived to lose money. And, again, the  
8 *Bridge* case is narrowly focused on whether there's a  
9 first-party reliance requirement in the context of a RICO  
10 claim.

11 And, in fact, Your Honor, and I cite another case. This  
12 is the District Court decision in *Bridge* post the Supreme Court  
13 decision, 911 Fed. Supp. 2d at 661. And in that case, in the  
14 posttrial decision by the District Court, the court said the  
15 items transferred, the tax liens, were property in the hands of  
16 the county. That's 911 F.Supp. 2d at 661. Therefore, a  
17 *McNally* analysis would not apply.

18 **THE COURT:** So you're saying even if there was no loss  
19 of property, as long as there was some property held by the  
20 victim of the deceit, that *McNally* applies?

21 **MR. GIUFFRA:** Well, would not apply.

22 **THE COURT:** Would not apply.

23 **MR. GIUFFRA:** That's correct, Your Honor. And I think  
24 that's black letter mail fraud law.

25 And I think the other side is straining because there are

1 all the cases that I have cited, including cases from the  
2 Ninth Circuit, which stand for the basic proposition; and if  
3 the fraud -- if you're someone who is derivatively --

4 **THE COURT:** So the difference is that in *McNally* there  
5 was a lien that was sort of held by the county --

6 **MR. GIUFFRA:** In *Bridges*.

7 **THE COURT:** I'm sorry. In *Bridges*.

8 **MR. GIUFFRA:** *Bridge*, singular *Bridge*.

9 **THE COURT:** -- single *Bridge*, and that in this case  
10 there was no property because it's just a licensing, which  
11 other courts have held is not, quote, "property." So the  
12 question is whether there was an intent to obtain property from  
13 the victim who is deceived. That's your interpretation.

14 **MR. GIUFFRA:** And our point is if you apply the  
15 convergence theory, the claim they're making is fraud on the  
16 regulators. Okay. And I handed up the Court all the points  
17 where they claim their theory is now fraud on the regulators,  
18 fraud through the regulators.

19 So what the EPA and CARB with respect to their executive  
20 orders was handing out to Fiat Chrysler was a certificate of  
21 conformity, a license, a right to do something, and that was  
22 not property under many, many cases, including the *Cleveland*  
23 case most notably.

24 And the fact that someone is a competitor, the fact -- I  
25 mean -- and I'll give you another case, Your Honor, which is

1 important. When you look at -- there are other cases where  
2 people claim that, you know, someone got a license to do  
3 something and they, for example, polluted or they were able to  
4 get a license and, therefore, hurt their competitor; and courts  
5 have said, well, you've got to look back to first principles.  
6 Was what the -- was what the government -- was that government  
7 approval property? And if the fraud was on the government, you  
8 defrauded the government to get something and then you used the  
9 something that you got, the license, to hurt your competitors,  
10 that doesn't create a RICO claim.

11 Now, the point which I think is important is if you read  
12 the *Cleveland* case, Justice Ginsburg makes the point that she  
13 was concerned about the sweeping expansion of mail fraud  
14 without a law being passed by Congress, and she references the  
15 rule of lenity.

16 And in both the *Cleveland* case and all the other cases, if  
17 someone lies to the government to get a license or if a car  
18 manufacturer lies to the EPA to get a certificate of  
19 conformity, there are many statutes that apply and that  
20 prohibit such behavior. 1001 in the case of if you lie to the  
21 EPA, you've got to deal with the Clean Air Act and all of the  
22 regulatory rules that come out of that.

23 I mean, I don't want to jump ahead into the  
24 zone-of-interest point but there, again, a point that  
25 Justice Ginsburg was concerned about in a case called *Hemi*, you

1 have a statutory scheme that has very clear rules as to how if  
2 someone violates it, it should be dealt with.

3 **THE COURT:** Yeah, we're going to get there.

4 **MR. GIUFFRA:** Yeah. So then, Your Honor, let me go to  
5 what I think the other side is saying in focusing on *Bridge*.

6 They said, "Well, we were really the intended victim. We  
7 were the intended victim; therefore, the mail fraud statute  
8 should apply to us." Well, that's not true under the  
9 Ninth Circuit's convergence rule, which we think is still good  
10 law. It wasn't true in the *Holmes versus SIPC* case where the  
11 Supreme Court -- and this is sort of the first of the proximate  
12 cause RICO cases -- said that foreseeability is not enough.  
13 You've got to show --

14 **THE COURT:** Well, that's a proximate cause. That's a  
15 different question.

16 **MR. GIUFFRA:** Yeah, but --

17 **THE COURT:** That's a proximate cause question.

18 **MR. GIUFFRA:** Agreed, Your Honor.

19 But I think the problem the other side has at bottom is,  
20 the claim they brought is fraud on the regulators. The  
21 property that -- the certificate of conformity was not property  
22 in the hands of the government. And, yes, the allegation is  
23 that FCA deceived the EPA so you've satisfied the convergence  
24 theory but you can't satisfy the property theory.

25 **THE COURT:** All right. Let me --

1           **MR. GIUFFRA:** And in *Bridge*, as I've noted, as the  
2 first trial court brief made clear, the items transferred,  
3 those tax liens, were property in the hands of the county.

4           **THE COURT:** All right. Let me hear the response.

5           So their way to line up *McNally* and *Bridge* is say *Bridge*  
6 is not inconsistent with *McNally* because there was, quote, an  
7 intent to obtain money or property from the one who is deceived  
8 and there was property there in the form of liens, and other  
9 courts have held that issuing the licenses or approvals is not  
10 property.

11           **MS. JENSEN:** So, Your Honor, I think that's a red  
12 herring. Civil RICO, just to step back for a second, civil  
13 RICO is a lost money claim. Whoever loses the money, they have  
14 the claim. We follow the money.

15           If the government had lost money, of course, then they  
16 would argue that *Anza* and *Hemi* and *Rezner* applied here, but I  
17 think it's really important to address the defendants'  
18 mischaracterization of our claim.

19           We've talked a lot about fraud on the regulators, fraud  
20 through the regulators, but to step back, as alleged in the  
21 second amended complaint, our RICO claim is that the defendants  
22 carried out a scheme to defraud consumers into buying  
23 EcoDiesels that were equipped with defeat devices of which  
24 mailings and wirings were an essential part.

25           Now, the defendants are arguing that it was mission

1 accomplished when they fooled the regulators, when they fooled  
2 the EPA; but it was not mission accomplished until they fooled  
3 the consumers, until the cars were sold.

4 The allegations of the second amended complaint --

5 **THE COURT:** So in order to make your RICO claim, then,  
6 maybe you should clarify this, what do you need to show other  
7 than there was withholding and concealment of information from  
8 the EPA? But you also have to show that, then, consumers were  
9 told X, Y, and Z?

10 **MS. JENSEN:** So the defendants concealed the very same  
11 thing to the regulators that they concealed from the consumers.  
12 In order to carry out the scheme, which occurred over time, it  
13 was a continuous scheme, they had to, first, fool the  
14 regulators and then they had to fool the consumers. In other  
15 words --

16 **THE COURT:** So what do you allege was done to fool the  
17 consumers other than fooling the EPA?

18 **MS. JENSEN:** Well, Your Honor has already approved the  
19 concealment theory. Here we have that they concealed from the  
20 consumers the defeat devices. We also have that they put  
21 EcoDiesel badges on every single one of the vehicles while  
22 concealing the defeat devices. So we have those allegations in  
23 the second amended complaint.

24 And, Your Honor, if I may also hand up a chart, and this  
25 is the RICO allegations that are in the second amended

1 complaint that make it very clear that it wasn't just the EPA  
2 that was fooled. It was the consumers as well, and that was by  
3 design. And we've given this already to the defendants.

4 So the question really here, Your Honor, is whether  
5 plaintiffs are precluded from bringing their RICO claim simply  
6 because the defendants also fooled the regulators.

7 **THE COURT:** Well, does that -- are you saying that  
8 there were -- in order to make your RICO claim, it is not  
9 enough to show that RICO committed fraud upon the regulators,  
10 that you concede that you have to show more than that, that  
11 there was some marketing, some representation or concealment  
12 made to consumers?

13 **MS. JENSEN:** Your Honor, I would frame it slightly  
14 differently, and that is that the way that we have briefed the  
15 issue is that under *Bridge*, the plaintiffs are -- it is  
16 sufficient to make out the RICO claim because the gatekeeper  
17 was fooled, the gatekeeper was deceived.

18 But in this case the scheme --

19 **THE COURT:** Well, that's what's being contested here,  
20 that --

21 **MS. JENSEN:** Right.

22 **THE COURT:** -- under *Bridge*, *Bridge* is distinguishable  
23 because there was an attempt to obtain, quote, "property" from  
24 the deceived victim directly, therefore the convergence,  
25 because the lien, unlike a certificate, a license, et cetera,

1 or patent issued is not property -- is property, a lien is  
2 property; whereas, a certificate allowing the cars to be sold  
3 is not. It's a regulatory function. It's not, quote,  
4 "property."

5 I mean, one could have easily found the other way, that  
6 there's value in these licenses, et cetera, but the court  
7 seemed to suggest that that is not property within the meaning  
8 of the mail and wire fraud.

9 So --

10 **MS. JENSEN:** Right. And, Your Honor, I think our  
11 point here is that it was always that the plaintiffs were the  
12 direct intended victims. It was their money that was taken.  
13 The government didn't suffer any losses. That's the whole  
14 point with respect --

15 **THE COURT:** It has to be money from the party  
16 deceived, at least under the convergence theory, if it's still  
17 good law.

18 **MS. JENSEN:** Well, let me quote from the only  
19 Ninth Circuit published decision since *Bridge*, and that is a  
20 case that, Your Honor, that the defendants handed up in their  
21 packet.

22 **THE COURT:** *Ali*.

23 **MS. JENSEN:** *Ali*, that's right.

24 **THE COURT:** Yeah.

25 **MS. JENSEN:** And if I may just quote from *Ali*.



1 end of 1070, is --

2 **THE COURT:** 1070?

3 **MS. JENSEN:** -- (reading)

4 "The defendants' acquisition of companies with AER  
5 status was part of a larger scheme to defraud Microsoft.  
6 So defendants need not have made a misrepresentation  
7 directly to Microsoft in order to be guilty for mail and  
8 wire fraud."

9 And it says -- and it goes on to say (reading):

10 "Under *Lew*, Microsoft must be the victim from whom the  
11 property was taken."

12 **THE COURT:** I guess I'm trying to get -- how do you  
13 get from that sentence that you just quoted to squaring that  
14 with *Lew*? Well, I guess transfer would involve third-party  
15 distributors. I guess I need to more fully understand what --

16 **MS. JENSEN:** So it is the sentence that I read and  
17 that quote ends with "guilty of mail and wire fraud," and then  
18 the sentence further it says (reading):

19 "Under *Lew*, Microsoft must be the victim from whom the  
20 property was taken."

21 So, in other words, under Ninth Circuit law, under *Ali*,  
22 the only published decision after *Bridge* in the district, says  
23 the defendants need not make a representation directly to the  
24 victim and that the only convergence theory that can be alive  
25 and well at this point is that the victim was the intended

1 victim of the scheme.

2 **THE COURT:** Well, above that it says (reading):

3 "In *Lew* we held that for mail fraud," quote, "'the  
4 intent must be to obtain money or property from the one  
5 who is deceived.'" Defendants made representations  
6 directly to Microsoft in order to obtain AER status, but  
7 the defendants point out that with respect to companies  
8 already certified purchased by defendants, that defendants  
9 made no representation directly to Microsoft; nonetheless,  
10 we conclude there is sufficient evidence to support."

11 And I guess there was an acquisition process. I don't  
12 know if there was some imputation here or some kind of privity  
13 notion. I'd have to look at this more carefully, but that's a  
14 little different than the relationship between the government.

15 And, you know, here it looks like -- and I'm going to have  
16 to look at it -- like something is under the umbrella. I don't  
17 know if it's part of a corporate structure or something. But,  
18 still, it does say (reading):

19 "In *Lew* we held that the mail fraud, the intent must  
20 be to obtain money or property from the one who is  
21 deceived."

22 So if the theory is the one who is deceived is only the  
23 EPA and you have these cases that say, well, a license is not  
24 property in contrast to a, quote, "lien" in *Bridge*, that's a  
25 problem. But if you're saying that the one to be deceived is

1 not the EPA but also the consumers, but that suggests, I mean,  
2 that you need to allege something was represented or said to  
3 consumers or concealed from consumers other than whatever was  
4 done with the EPA.

5 **MS. JENSEN:** Well, yes. In the second amended  
6 complaint, Your Honor -- and I do think under *Bridge* it is  
7 sufficient as *Bridge* held that the party need not rely on the  
8 misrepresentation, that the misrepresentation can be made to  
9 another party.

10 But our second amended complaint does allege throughout --  
11 throughout -- that the plaintiffs lost money from the scheme to  
12 defraud and that they were deceived by buying cars that were  
13 sold under false pretenses.

14 **THE COURT:** So but that claim, then, would have to  
15 look, among other things, to what was said and not said to  
16 consumers.

17 **MS. JENSEN:** Your Honor, we think that the allegations  
18 are clear in the second amended complaint, and this is -- we  
19 tried to be as accurate as possible, Your Honor, in how we  
20 described the scheme, which was ongoing over time and  
21 necessarily involved concealing the defeat devices from not  
22 only the regulators but also the consumers.

23 And we have an allegation in the chart that I've handed up  
24 to you -- this is the second amended complaint, paragraph 331,  
25 this is the bolded portion -- that (reading):

1           "The RICO defendants knew and intended that consumers  
2           would purchase the class vehicles and incur costs as a  
3           result. Plaintiffs' reliance on this ongoing concealment  
4           is demonstrated by the fact that they purchased illegal  
5           and defective vehicles that never should have been  
6           introduced in the U.S. stream of commerce."

7           In other words, the scheme as described in the second  
8           amended complaint involves a deceit upon all. You know,  
9           there's the saying "You can fool all of the people some of the  
10          time and some of the people all the time, but you can't fool  
11          all the people all the time." That quote has been attributed  
12          to everyone.

13           **THE COURT:** All right. So you would have to show, in  
14          order to make a deceit claim on consumers, things we've talked  
15          about before, that either a duty to disclose or affirmative  
16          misrepresentation, it's a half-truth, it's misleading, or  
17          something; not just the mere fact of deceiving the EPA  
18          completes the crime. It's got to be there's some elements, if  
19          you're going to involve deceit on the consumers, that would  
20          have to be shown.

21           **MS. JENSEN:** Well, I guess I would just state it  
22          slightly differently, Your Honor, which is that, again, the  
23          concealment of the defeat devices were from everyone, and so  
24          that it's an ongoing scheme that would have failed if either  
25          the EPA or the consumers knew about the defeat devices. It was

1 by the very nature of it the --

2           **THE COURT:** Well, that's a causation question. I'm  
3 talking about a definitional question of what is covered by  
4 RICO and mail fraud and wire fraud that underpins, and so  
5 there's a critical distinction and, you know, I have to make  
6 sure it's clear because that will affect possible class cert  
7 and possible proof at trial that if you are saying we are  
8 taking on -- alleging not just fraud on the EPA, which resulted  
9 in the enablement of putting these cars on the market, which  
10 then ended up harming consumers, but that consumers were  
11 subject to the deceit.

12           And by that you would have to show, if it's under a  
13 concealment theory, a duty to disclose; if it's a  
14 misrepresentation theory, then you'd have to show, you know,  
15 some misrepresentation, et cetera, et cetera, and all the stuff  
16 about reliance and all those things that come into play.

17           I thought that the beauty of your RICO theory is that you  
18 would obviate all that and didn't need to make that showing as  
19 we would under the consumer stuff, but if you -- but that runs  
20 into this issue that we're talking about. But if I  
21 misunderstood your RICO claim and that it is encompassing -- it  
22 does encompass fraud on consumers and you're prepared to take  
23 on whatever elements are necessary to make that case, which is  
24 more than just fraud on the EPA -- I mean, that may be a big  
25 part of it, and that may be probative but it's not synonymous

1 with it -- then it is a different case. It's not just fraud on  
2 the consumer -- on the regulator.

3 **MS. JENSEN:** Yes, Your Honor. Well, we don't believe  
4 it's necessary to reach the, if you would call it, the  
5 consumer-facing deception under *Bridge*. That's why we've  
6 argued it the way that we have, is that *Bridge* allows us, it's  
7 the last time that the --

8 **THE COURT:** So what is your response, then -- if I  
9 don't --

10 **MS. JENSEN:** Yes.

11 **THE COURT:** -- look at the consumer-facing fraud  
12 issues and you hinge your case on *Bridge* to a certain extent,  
13 what's your response to Mr. Giuffra's argument that *Bridge* --  
14 because you still have *McNally* out there. *Bridge* didn't  
15 overrule expressly *McNally* and you have subsequent cases citing  
16 *McNally* even in the Ninth Circuit, including *Ali* through *Lew*.

17 How do you -- what's your response to, well, *Bridge* is  
18 distinguishable because it didn't address the convergence  
19 theory because the convergence theory was essentially satisfied  
20 there because there was -- the entity being deceived, which was  
21 the county, had property, and they were trying to obtain  
22 property from the county; i.e., these liens? It's a property  
23 interest, which is not present here. So what's your response  
24 to that legal argument?

25 **MS. JENSEN:** Well, Your Honor, as I understand it, the

1 courts have looked to *McNally* and said it wasn't actually  
2 really about convergence.

3 Kevin, would you like to --

4 But if it would be okay with Your Honor, I'd like for  
5 Mr. Budner to address any of those post-*McNally* cases.

6 Go ahead.

7 **THE COURT:** I'll let them finish, then you can.

8 **MR. BUDNER:** Thank you, Your Honor. I appreciate  
9 that, and we meant to flag in advance that I might take this  
10 topic so as not to spring it by surprise, but obviously this  
11 was a somewhat last-minute addition.

12 **THE COURT:** Sure.

13 **MR. BUDNER:** And I will say, just to follow-up on what  
14 Ms. Jensen noted about *McNally*, and I think we properly  
15 characterize *McNally* as addressing one issue, which is what is  
16 property that needs -- what is the property that is taken in a  
17 mail and wire fraud statute.

18 Now --

19 **THE COURT:** And the fact that deceit has to be aimed  
20 at taking property from --

21 **MS. JENSEN:** Sure.

22 **THE COURT:** -- that victim of the deceit, not somebody  
23 else.

24 **MR. BUDNER:** And I think Your Honor's articulation is  
25 exactly what *Lew* took from *McNally*; *Lew* being, of course, a

1 1989 Ninth Circuit case.

2 **THE COURT:** Right.

3 **MR. BUDNER:** Academic footnote here, every other  
4 circuit that has looked at *McNally* and looked at convergence  
5 has rejected it and said that *McNally* does not stand for the  
6 convergence proposition, and I have cites for all of those. I  
7 don't want to waste your time here, but --

8 **THE COURT:** I'm governed by the Ninth Circuit.

9 **MR. BUDNER:** Absolutely.

10 **THE COURT:** And *Lew* was then cited in *Ali* so we'll  
11 have to look at that.

12 **MR. BUDNER:** Absolutely.

13 So I think there are two things to note about the  
14 relationship between *Bridge* and *Lew* and subsequent  
15 Ninth Circuit precedent and *Lew*.

16 First of all, the concepts that we need to distinguish, I  
17 believe, are the party that was deceived as sometimes  
18 distinguished from the intended victim of the scheme. And what  
19 I think you'll find if you look at *Ali* -- and, granted, the  
20 precise quote that Ms. Jensen highlighted for you is a little  
21 bit complicated because it uses some shorthand lingo that is  
22 explained elsewhere or jargon that's explained elsewhere in the  
23 opinion, but I think what you'll find both from *Ali* and from  
24 *Dowie*, which is another 2010, so post-*Bridge*, Ninth Circuit  
25 case, albeit unpublished, is that the way that the

1 Ninth Circuit reconciles *Lew* with *Bridge* is to say that the  
2 intended victim of the scheme has to be the one from whom the  
3 money was taken even if that victim, Microsoft for example in  
4 *Ali*, was not the recipient of the misrepresentation. Right?

5 Because otherwise, and I think here --

6 **THE COURT:** What case holds that?

7 **MR. BUDNER:** That's my interpretation of *Ali*, and I  
8 pulled the specific cases when I came up here earlier so I  
9 don't have them in front of me. But, here, let me go to it  
10 again.

11 And I'm at the first paragraph that ends 1070, and we've  
12 been over this language but let me just highlight it one more  
13 time. (reading)

14 "The defendants' acquisition of companies with AER  
15 status was part of a larger scheme to defraud Microsoft.  
16 So defendants need not have made a misrepresentation  
17 directly to Microsoft" -- Microsoft being the party that  
18 lost money -- "in order to be guilty of mail and wire  
19 fraud. In other words, so long as the misrepresentations  
20 were made in furtherance of a scheme to defraud the third  
21 party and they were the intended victims of that fraud,  
22 then the misrepresentation need not be directed directly  
23 to that victim."

24 And, Your Honor, there is another -- surprisingly there  
25 aren't that many cases that have analyzed the interplay between

1 the convergence theory and *Bridge*; but I will note that one  
2 that has done it, we're in a noncontrolling authority land  
3 here, but it's *Gifford v. Meda*, and it's a case that -- it's a  
4 RICO case that's specific --

5 **THE COURT:** Do you have the name of the case?

6 **MR. BUDNER:** Yes, absolutely. It's *Gifford v. Meda*,  
7 it's Eastern District of Michigan, and it is 2010 Westlaw  
8 1875096.

9 **THE COURT:** And what does it say?

10 **MR. BUDNER:** So here it says that it may be that  
11 *Bridge* did not intend to do away with convergence altogether,  
12 but -- and, I'm sorry, I have the -- this is not the copy that  
13 I thought I had -- but the court in *Bridge* found that, although  
14 the fraudulent misrepresentations were made to the county, the  
15 intended victims of the misrepresentations were the plaintiffs,  
16 whose ability to compete with the defendants was directly  
17 affected by misrepresentations that the defendant made to the  
18 county.

19 So this court too -- and I think this is consistent with  
20 *Ali* and *Dowie* -- says that the way that you reconcile  
21 convergence theory, to the extent it is still an extant theory,  
22 with *Bridge* is to shift it a little bit such that it is not  
23 that the party who loses money must have been subjected to  
24 misrepresentations but they must have been the intended victims  
25 of the scheme to defraud through which mailings and wires were

1 essential.

2 And just to give you a page to anchor that --

3 **THE COURT:** So there was no convergence at that point.  
4 You don't have -- the one who received the fraud, who received  
5 the misrepresentation, need not be the one who was the intended  
6 victim or who lost the money. You can have a separate is what  
7 you're saying.

8 **MR. BUDNER:** I guess I would say that it is an  
9 evolution of the theory of convergence. It may not be  
10 convergence in the pure form as initially articulated by *Lew*,  
11 but I think it is the circuit's, both the Ninth Circuit's and  
12 other courts', attempt to reconcile convergence with the  
13 realities of *Bridge*, which I think, as Your Honor noted -- and,  
14 by the way, there is absolutely no discussion in *Bridge* about  
15 tax liens being property being essential to the holding. I  
16 mean, that, frankly, comes out of nowhere.

17 And so I would -- I absolutely question that analysis and  
18 that reasoning from *Bridge*. You know, so the issue in  
19 *Bridge* -- right? -- is: Who are the victims? Who lost the  
20 money, and were they the ones to whom misrepresentations were  
21 made? The answer was the competing bidders and, no, they  
22 weren't. They weren't the ones to whom misrepresentations were  
23 made.

24 So I think the focus -- trying to analogize the COCs and  
25 EOs here to the tax liens that were given in *Bridge* is just not

1 the right analysis. The analysis is the property that was  
2 defrauded from the ultimate victims of the scheme. Here the  
3 money that plaintiffs overspent to buy their class vehicles,  
4 there the valuable tax liens that the competing bidders did not  
5 obtain.

6 **THE COURT:** Is there a distinction to be drawn -- and  
7 I don't know how principled this would be. *McNally* didn't  
8 involve RICO.

9 **MR. BUDNER:** Say that again.

10 **THE COURT:** *McNally* did not involve RICO.

11 **MR. BUDNER:** Correct.

12 **THE COURT:** It was just a straight mail fraud.  
13 Whereas, *Bridge* does, and *Bridge* is looking at everything  
14 through the lens of RICO.

15 **MR. BUDNER:** I think that's a -- it's a really  
16 important point to draw. When you think about the origins of  
17 the convergence theory, it does come up in a criminal context  
18 with a specific focus on the *mens rea* of the criminal statute  
19 and specific intent, and I think that was what was animating  
20 *Lew* in its initial decision; whereas, in the RICO context, we  
21 are operating under the "by reason of causation" standard.

22 **THE COURT:** And yet the predicate act, the  
23 racketeering, must be comprised of something. It is comprised,  
24 even in *Bridge*, of mail fraud and so unless you can say, well,  
25 Section 1341 means one thing when it's a straight mail fraud

1 prosecution but it means perhaps something different when used  
2 as a predicate for RICO.

3 **MR. BUDNER:** Yeah. I'm not standing here making that  
4 argument. It is a predicate act. I just think it's helpful  
5 context to think about how the convergence theory emerged in  
6 the Ninth Circuit and how it has faded in the RICO context in  
7 analyzing facts that are very similar to these.

8 And I have to say, Your Honor -- and I think Ms. Jensen  
9 made a good point in clarifying this -- we are operating right  
10 now, this discussion is happening in one universe where we are  
11 looking only at the regulator-facing deception that was very  
12 much intended to deceive and victimize the plaintiffs, the  
13 consumers here.

14 We strongly believe, based on Your Honor's previous  
15 ruling, all the briefing, that that is sufficient to state a  
16 RICO claim, but it is certainly not all that we have in our  
17 claim; and I think if we were to --

18 **THE COURT:** In a RICO claim.

19 **MR. BUDNER:** In our RICO claim.

20 **THE COURT:** That you have a RICO piece that is  
21 predicated on consumer-facing fraud.

22 **MR. BUDNER:** We argue -- and the little chart that  
23 Ms. Jensen handed up to you illuminates I think nine or ten  
24 separate paragraphs that make that very clear that they were --  
25 that the consumers were the intended victims and there was

1 consumer-facing deception specifically at the point of sale  
2 where they failed to disclose and fraudulently concealed the  
3 presence of the defeat devices.

4 I think, unless Your Honor has more questions on  
5 convergence -- although I do have one more point, if I may --

6 **THE COURT:** Sure.

7 **MR. BUDNER:** -- on convergence -- and I'll give it  
8 right back to you -- which is just to say that I really do  
9 think the convergence case law in the end really helps us here  
10 because what it does is it focuses on the intended  
11 beneficiaries of the mail and wire fraud statutes, which here,  
12 as the doctrine has emerged from *Bridge*, from *Ali*, from *Dowie*,  
13 is that the intended beneficiaries, those who are the ones the  
14 statute is supposed to cover, are those who were the intended  
15 victims of the scheme.

16 **THE COURT:** And just to give you one more chance,  
17 where do you read that, from *Lew* or anywhere else that you look  
18 to, whether the intended victim lost money, the victim was the  
19 intended victim, that's enough; it doesn't matter to whom the  
20 deceit was directed specifically?

21 **MR. BUDNER:** Yeah, sure.

22 **THE COURT:** How do you decouple that from *Lew* and  
23 *McNally*? Because it says -- *Lew* says the intent must be  
24 obtained property from the one who is deceived.

25 **MR. BUDNER:** So the decoupling question, I think, is

1 an interesting one. I interpret *Ali* as being the -- as its  
2 construction of the convergence doctrine, some 20-plus years  
3 after *Lew*, as being the controlling one on these issues; and  
4 specifically because it addresses the facts here, at least  
5 under this theory of just fraud through the regulators, which  
6 is that the intended victim was different than the recipient of  
7 the deceit.

8 And so if your question is does this interpretation of *Lew*  
9 stand in some tension with *Lew* as initially articulated, I can  
10 say maybe it does. I can see how you would come to that  
11 conclusion, but *Ali* is the most recent published case on this  
12 issue, on the convergence issue, in facts that are analogous  
13 here where we have an intended victim of the scheme who did  
14 lose money. And even setting aside the nondisclosure and  
15 concealment of facts to them, the nondisclosure and concealment  
16 facts to the government was also executed with the intention to  
17 defraud plaintiffs of their money.

18 **THE COURT:** So you're saying *Ali* expands the  
19 convergence doctrine?

20 **MR. BUDNER:** That is exactly what I'm saying. Thank  
21 you for summing it up more articulately than I could.

22 **THE COURT:** All right. Thank you.

23 **MR. BUDNER:** And also, Your Honor, I would direct you  
24 to *Dowie*, which I think is also instructive, where the ultimate  
25 payor was the City of Los Angeles but the fraud was to a

1 separate entity.

2 **THE COURT:** Which case?

3 **MR. BUDNER:** *United States v. Dowie*. And, Your Honor,  
4 we have a full list of cases, which we'll hand to you at the  
5 end rather than have you jot them down, if that's helpful.

6 **THE COURT:** All right. Thank you.

7 **MR. BUDNER:** Okay.

8 **MR. SLATER:** Your Honor, Matt Slater for the Bosch  
9 defendants. Mr. Giuffra may have some comments as well, but  
10 I'd like to take on *Ali* for a moment.

11 *Ali* was dealing with a very different situation than  
12 *Bridge*. It was not an issue about compliance. The issue was  
13 that the property may have passed through other hands but it  
14 was still the party who was deceived and the party whose  
15 property was at issue were converged. That was what happened  
16 in *Ali*. Microsoft was the victim of the deceit. It was  
17 Microsoft's property that was ultimately taken. The fact that  
18 that property went through the hands of other parties in the  
19 process didn't matter.

20 So the analogy in this case would be if EPA was deprived  
21 and property of the plaintiffs was taken through EPA, maybe  
22 that would meet the *Ali* requirement, but that's not what  
23 happened in this case. That's not --

24 **THE COURT:** So the relationship that Microsoft played  
25 with the receivers is different?

1           **MR. SLATER:** Is totally different.

2           And I just want to take on the suggestion that somehow  
3 either we or the Court have been unfair in our representation  
4 of what the plaintiffs' claim is. I mean, even on the handout  
5 that they gave you, you will see that each of these quotes  
6 starts by saying "There was an intent and an effort to  
7 fraudulently obtain certificates of conformity and then pass on  
8 the vehicle" -- "and then sell vehicles to claimants  
9 representing that they were compliant."

10           So the first step and the essential step in the scheme  
11 that they've alleged is fraud on the regulator.

12           Now, the plaintiffs stated in the opposition to  
13 defendants' first round of motions to dismiss, and here I'm  
14 quoting from page 26 of their brief (reading):

15           "Although the misrepresentations the defendants  
16 propagated in sales and marketing materials are an  
17 important aspect of plaintiffs' claims, they do not form  
18 the basis of the RICO allegations."

19           That was their statement to the Court in the motion to  
20 dismiss. Now, on the basis of that, the Court relied on it and  
21 that's -- you know, not surprisingly the Court said in its  
22 opinion that the plaintiffs' RICO claim is fraud on the  
23 regulators. So the Court relied on them. They're estopped, I  
24 think, to that theory.

25           But they reaffirmed their position in response to the

1 pending motion to dismiss where they said at page 2 of the  
2 opposition (reading):

3 "Plaintiffs did not amend or in any way alter the  
4 well-pleaded RICO allegations or the factual predicate for  
5 them other than to delete aiding and abetting."

6 So they didn't change the RICO claim from the first  
7 complaint to the second complaint, and they told you that the  
8 first complaint was only -- the RICO allegation was only based  
9 on fraud on the regulators.

10 Then in their first response to our post --

11 **THE COURT:** Let me ask you.

12 **MR. SLATER:** Yeah.

13 **THE COURT:** If they are now taking the position that  
14 they have sort of two prongs or two legs to their RICO claim --  
15 one is a pure fraud on the regulator, the other takes into  
16 account consumer-facing fraud that incorporates but adds to  
17 that a concealment from or misrepresentations to the public --  
18 do you concede that the second one, the second RICO claim, if  
19 so pled, or if they were allowed to amend to so plead more  
20 clearly, would escape the convergence problem?

21 **MR. SLATER:** No, Your Honor, because the claim that  
22 they're making is still dependent upon fraud on the EPA, and  
23 this goes back to where Mr. Giuffra started.

24 **THE COURT:** What they're saying is not just -- that  
25 may be part of it but not all of it?

1           **MR. SLATER:** Right. So as Mr. Giuffra said, there is  
2 no mail or wire fraud claim. There can be no mail or wire  
3 fraud claim for defrauding the EPA. So the starting point and  
4 the basis for their claim that there was a scheme to defraud is  
5 dependent on the allegation that there was a scheme to defraud  
6 the EPA.

7           And that's certainly the case as to my client because, as  
8 you know, there are no affirmative representations from my  
9 clients on which they rely. So the only way that they bring  
10 Bosch into the supposed RICO scheme is by saying Bosch schemed  
11 with FCA to conceal deceit devices from the EPA. Without that,  
12 we're out of the case; and, frankly, without that, I think  
13 there's no RICO claim.

14           But, again, sticking with first principles, and this is  
15 why the *Southern Snow* case that Mr. Giuffra referenced is so  
16 important, the court there was dealing with claims of supposed  
17 fraud on the Patent and Trademark Office with respect to the  
18 granting of both patents and trademarks, and the court rejected  
19 that claim on the basis that fraud on the PTO is not mail or  
20 wire fraud because it didn't defraud the government of  
21 property. Obviously the patent, the trademark in the hand of  
22 the recipient is property. It's not in the hand of the  
23 government.

24           And then the court rejected the contentions of the  
25 plaintiffs that they could make their claim based on statements

1 to the public that they held valid patents and trademarks, just  
2 like what the plaintiffs are saying here. "Oh, well, you  
3 should look at what the defendant said to the public that they  
4 were compliant and that their vehicles were validly being  
5 sold."

6 And this is what the court said on page 421, I think it's  
7 912 -- yeah, 912 F.Supp. 2d at 421. Here I'm quoting  
8 (reading):

9 "Plaintiffs further argue that defendants'  
10 representations to the public that they had patent and  
11 trademark rights, which defendants allegedly knew to be  
12 premised on false statements to the U.S. PTO, constitute  
13 fraud within the meaning of mail and wire fraud. The  
14 court does not agree with this logic. If fraud in  
15 obtaining patent and trademark rights are insufficient to  
16 establish a RICO violation" -- it cites a case -- "it  
17 would be illogical to conclude that asserting those  
18 patents and trademarks in the marketplace would constitute  
19 a RICO violation. Therefore, since the underlying alleged  
20 fraud on the U.S. PTO does not constitute mail or wire  
21 fraud, the defendants' representations to customers and  
22 competitors regarding its intellectual property rights  
23 cannot constitute RICO violations."

24 And then finally the court rejected the contention that  
25 these conclusions --

1           **THE COURT:** I'm questioning why is that? I don't know  
2 if I agree with that. Why is that?

3           **MR. SLATER:** Because it's dependent on -- the kernel  
4 of the scheme to defraud is --

5           **THE COURT:** The kernel is there but it requires more.  
6 It requires more.

7           **MR. SLATER:** It may require more but it doesn't  
8 require -- but it also can't be sustained with less. So  
9 without the predicate of defrauding the regulator and then  
10 representing to the public that which --

11           **THE COURT:** So you're saying any fraudulent claim,  
12 even directly upon the victim, to the extent it involves a  
13 fraud or deception or deceit, even if it's 2 percent on a  
14 regulator that is not actionable, that would prevent a RICO  
15 claim?

16           **MR. SLATER:** Neither in the *Snow* case nor in this case  
17 is it 2 percent. It's the kernel of what, first, they  
18 allege --

19           **THE COURT:** Isn't it a qualitative judgment how much?  
20 Because you're making a but-for, if it's a *sine qua non*, if  
21 it's a necessary element, that then brings the whole claim  
22 down. No matter how much more is added to that claim, it  
23 doesn't matter whether it's 2 percent or 1 percent or  
24 50 percent, so long as --

25           **MR. SLATER:** To the extent that it is dependent on

1 that claim. If they wanted -- if, as Your Honor suggested, if  
2 they want to plead a totally different claim of mail and wire  
3 fraud to consumers divorced from issues of regulatory  
4 compliance, I don't think they can do it; but that would be a  
5 different claim and, as I said before, they can't make it out  
6 against Bosch. They haven't made it out against Bosch the  
7 Court has already held.

8 **THE COURT:** And apart from a District Court -- is that  
9 the one in Louisiana?

10 **MR. SLATER:** Yes.

11 **THE COURT:** Besides that, is there any Circuit Court  
12 authority that takes it to the step that you're saying; that  
13 says any claim, even if it involves additional elements  
14 necessary to make that claim --

15 **MR. SLATER:** Yes, Your Honor.

16 **THE COURT:** -- with respect to consumers depends on a  
17 claim that is otherwise not actionable, the whole thing is  
18 inactionable?

19 **MR. SLATER:** I think that the other cases that we  
20 cited in the posthearing briefs -- *Ayres*, *Danielsen*, and the  
21 like -- are also dealing with that circumstance. In *Ayres* the  
22 court was dealing with a question of whether failure to  
23 disclose regulatory violations, and so in effect  
24 misrepresentation as to the validity of the transaction, was  
25 sustainable; and in the face of a regulatory scheme that did

1 not allow for private causes of action, the court rejected it.  
2 And it's true in each of those other cases.

3 **THE COURT:** Well, I read *Ayres* as going to the second  
4 question, which we haven't talked about yet --

5 **MR. SLATER:** Right. We haven't.

6 **THE COURT:** -- which is sort of this preemption issue.

7 **MR. SLATER:** But I think the court --

8 **THE COURT:** I didn't see that as a --

9 **MR. SLATER:** Well, I think the court -- I'm sorry,  
10 Your Honor.

11 **THE COURT:** -- definitional analysis of RICO and the  
12 predicate acts.

13 **MR. SLATER:** It is in the sense that the court  
14 concluded that you could not rely on what was in effect a  
15 regulatory violation to prove mail and wire fraud. So it is --

16 **THE COURT:** Well, that was for different reasons.  
17 That's not because of a *McNally* problem. That's because of a  
18 *Sea Clammers*, et cetera, kind of a problem that you have  
19 extensive regulation and, therefore, that precludes an  
20 independent use of those same violations to kind of do an  
21 end-around the regulatory scheme. That's a different question.

22 **MR. SLATER:** I think it is a different question and  
23 we'll get to that as well, but I think that it reflects the  
24 courts struggling with the same general concept.

25 **THE COURT:** All right.

1           **MR. SLATER:** The last thing I wanted to say about  
2 this, the Louisiana case, is that it also addressed  
3 specifically *Bridge* and so it speaks to Your Honor's question.

4           **THE COURT:** Right.

5           **MR. SLATER:** And on 421-'22 it says, quote (reading):

6            "In *Bridge* the Supreme Court held that the injured  
7 party need not demonstrate first-party reliance on the  
8 fraud. Here, plaintiffs contend that injury to the  
9 government is irrelevant. Plaintiffs need not demonstrate  
10 that the customers and competitors injured by defendants'  
11 assertion of patent and trademark rights relied on  
12 defendants' statements to the U.S. PTO in light of the  
13 holding in *Bridge*. However, plaintiffs must still plead a  
14 scheme to defraud upon which the predicate acts of mail or  
15 wire fraud may be based."

16           And here plaintiffs argued that the scheme to defraud  
17 involved defendants' alleged fraudulent statements to the U.S.  
18 PTO. As the case that it relied upon says, they can't  
19 predicate a mail and wire fraud on that basis.

20           **THE COURT:** All right.

21           **MR. GIUFFRA:** Your Honor, can I be heard?

22           **THE COURT:** Just --

23           **MR. SLATER:** There are other -- back to your initial  
24 question about the status of convergence, not that this case  
25 depends on the status of convergence, but there are other

1 Tenth Circuit cases -- Ninth Circuit cases that continue to  
2 recite it.

3 **THE COURT:** That are unpublished.

4 **MR. SLATER:** Unpublished.

5 **THE COURT:** Published *Ali* is the last thing I've seen  
6 here.

7 **MR. SLATER:** *Ali* is the one that I'm aware of, and  
8 I've explained to you why I think that it actually helps us and  
9 is supportive of the Court's analysis.

10 **THE COURT:** All right. I'll take a look at that.

11 And Mr. Giuffra had a short comment he wanted to make.

12 **MR. GIUFFRA:** Your Honor, let me make just one basic  
13 point. In order to bring a RICO claim which seeks treble  
14 damages and attorneys' fees, you must plead as a predicate act  
15 criminal mail fraud. There's not something less than criminal  
16 mail fraud, and the other side was sort of suggesting that.

17 In *Bridge*, the court accepted that the elements of mail  
18 fraud had been pled except there was a question about whether  
19 reliance was an element of mail fraud. Your Honor has done  
20 many criminal cases, as have I. Reliance is not an element of  
21 mail fraud.

22 Now, Your Honor actually, of anyone in this courtroom, hit  
23 on another very important point. The plaintiffs have been  
24 pushing this case from the beginning, including as most  
25 recently in their class cert papers, under a fraud on the

1 regulators theory. The reason they're doing that is because  
2 there was no misrepresentation through the mails by FCA, much  
3 less Bosch, about AECDs and defeat devices; and I dare say had  
4 there been one, it would be front and center in their  
5 complaint.

6 There is no question there's an allegation of  
7 misrepresentations that were made to the EPA and CARB about the  
8 defeat devices and AECDs. There certainly were none to the  
9 regulators.

10 The *Ali* case, Your Honor -- and it's remarkable the way  
11 people are sort of mixing and matching -- on its face the  
12 Ninth Circuit says there were misrepresentations directly made  
13 to Microsoft, and then -- and that's how they got the AER  
14 status, and then they made -- then they tried to circumvent  
15 Microsoft and then they made misrepresentations to the middle  
16 person for Microsoft, and then they went back to making  
17 misrepresentations to Microsoft. So it's just not this case.

18 If the plaintiffs want to come up with a new theory, which  
19 is now a fraud on the consumers about EPA approvals, bring it  
20 on, plead it, then we'll have to go and redo class cert.

21 But the problem here is they can't plead mail fraud. They  
22 don't dispute that the EPA approval is not property. They  
23 don't dispute that convergence is still good law in this  
24 circuit. The only thing they sort of say is, "Well, *Ali* sort  
25 of plays games with whether you need a misrepresentation."

1 There was a misrepresentation to Microsoft.

2 On this question about whether a lien is property, it  
3 clearly is, and that's what the District Court said on remand  
4 from *Bridge* at 911 F.Supp. 2d at 661.

5 So what the plaintiffs are doing here, Your Honor, is  
6 trying to bob and weave and trying to create a RICO claim where  
7 there is not one. Congress never would have possibly intended  
8 that while the federal government -- if you lie to the federal  
9 government, you can do, you know, all the things -- and the  
10 government is here by the way.

11 In *Bridge* one of the arguments that was made by the  
12 Supreme Court was, well, the county wasn't going to prosecute  
13 it. Well, you know, the DOJ is in this courtroom prosecuting  
14 its rights, and what the plaintiffs want to do is play mix and  
15 match with mail fraud and RICO to try to come up with a  
16 thermonuclear form of regulation of --

17 **THE COURT:** Well, all right. That's a nice segue into  
18 this second half, which I briefly want to touch on, which is  
19 this preemption-type argument.

20 And I'd like the plaintiffs to address there's a long line  
21 of cases, *Ayres* and other cases, that suggest -- and the *Sea*  
22 *Clammers* case, even though that's 1983, not RICO -- the notion  
23 that where you have a comprehensive regulatory scheme, that  
24 seems to displace using violations of the underlying statute as  
25 a basis for some other action.

1           **MS. JENSEN:** Yes, Your Honor. Before I do that, could  
2 I respond to a few points that were made?

3           **THE COURT:** Very briefly.

4           **MS. JENSEN:** *Bridge* says in no uncertain terms that it  
5 is necessary and sufficient to fool the gatekeeper. There does  
6 not need to be a misrepresentation to the victim. But here we  
7 have --

8           **THE COURT:** But *bridge* doesn't address *McNally*.  
9 That's the problem. And *McNally* continues to exist. It's  
10 being -- and its progeny is being cited in *Lew* and *Ali*. So the  
11 task is conciliating or reconciling these two cases, and so  
12 I've heard enough on that and I'd like to move on to the next  
13 one.

14           **MS. JENSEN:** Your Honor, if I could, I would like to  
15 just reiterate, though, we don't think it's necessary because  
16 of *Bridge*; but, of course, if you think it's necessary, we have  
17 alleged that. That is in the second amended complaint.

18           **THE COURT:** Okay. All right. What about this, I'll  
19 call it preemption for shorthand, this issue?

20           **MS. JENSEN:** So the issue with the *Ayres* line of  
21 cases, is that, Your Honor, what you would like to hear about  
22 next?

23           **THE COURT:** Yeah. Yeah. The fact that similar to the  
24 statutes that have been deemed to preclude a RICO cause of  
25 action, the Clean Air Act has a fairly comprehensive regulatory

1 scheme. It specifically proscribes when you can have a  
2 citizens suit and when you have a citizens suit, what remedies  
3 are available, et cetera, et cetera. And the argument is,  
4 well, if you invoke RICO, which Mr. Giuffra refers as the  
5 thermonuclear option I guess, that blows everything out of the  
6 water and does a complete end-run around the careful  
7 proscriptions set forth. So what's your response to that?

8 **MS. JENSEN:** Yes, Your Honor. I think Your Honor  
9 already alluded to the point, which is for the Clean Air Act,  
10 there is a savings clause, number one. So that's one thing.

11 But I think just stepping back big picture, the defendants  
12 don't want to say it but what they're really asking this Court  
13 to do is to find that the federal civil RICO claim here is  
14 preempted by the Clean Air Act.

15 So they cite to the Eleventh Circuit's 2000 decision of  
16 *Ayres v. GM*, but they failed to acknowledge the Eleventh  
17 Circuit in 2014 in *Ray v. Spirit Airlines* rejected a very  
18 similar argument to what defendants make here. That's *Ray v.*  
19 *Spirit Airlines*, 767 F.3d 1220.

20 Now, in *Ray* the Eleventh Circuit rejected a similar  
21 argument by Spirit Airlines that consumers civil RICO claims  
22 were precluded by the Airline Deregulation Act and the Federal  
23 Aviation Act. And the Court held, and this is a quote  
24 (reading):

25 "Because federal law does not preempt other federal

1 laws, subsequent legislation could preclude plaintiffs'  
2 claims only if Congress had repealed the provisions of  
3 RICO at least insofar as they authorize plaintiffs'  
4 actions."

5 **THE COURT:** What is the sequence between the Clean Air  
6 Act and RICO? Give me the dates.

7 **MS. JENSEN:** In terms of the dates?

8 **THE COURT:** Yeah. When were their enactments?

9 **MS. JENSEN:** So they were both -- as I understand it,  
10 the current iteration, 1970 for both of them.

11 **THE COURT:** For both of them?

12 **MS. JENSEN:** But there are also -- but there were also  
13 amendments, I believe.

14 **THE COURT:** But the original enactment of RICO was  
15 when?

16 **MS. JENSEN:** Was '63 --

17 **THE COURT:** And the first Clean Air Act?

18 **MS. JENSEN:** -- as I understand it. And I apologize,  
19 I don't have it right in front of me.

20 **THE COURT:** Do you know what -- the Clean Air Act's  
21 first enactment?

22 **MS. JENSEN:** 1970.

23 **MR. GIUFFRA:** I think the point, Your Honor, which  
24 is -- I think the one that's --

25 **MS. JENSEN:** Let me finish my point.

1           **THE COURT:** You'll have your chance, Mr. Giuffra.

2           **MS. JENSEN:** Here the defendants have not overcome the  
3 strong presumption against the repeal of civil RICO by the  
4 Clean Air Act. To the contrary, here the Clean Air Act has a  
5 savings clause that preserves all statutory claims, including  
6 civil RICO, and the Clean Air Act and RICO have different  
7 purposes and different requirements. Certainly the claim that  
8 we've brought under civil RICO, as the defendants have  
9 conceded, the predicate acts are mail and wire fraud, not the  
10 Clean Air Act.

11           So like the ADA that was involved in the *Ray v.*  
12 *Spirit Airlines*, the Clean Air Act is a wholly -- this is a  
13 quote, "a wholly different animal from RICO," although they  
14 were talking about the ADA there but I think the same holds  
15 true here, "and they may peaceably coexist."

16           And so that's why the defendants haven't been able to come  
17 up with one case in the Ninth Circuit or, frankly, any circuit  
18 that holds that the Clean Air Act -- the Clean Air Act  
19 displaces a civil RICO claim.

20           **THE COURT:** How do you distinguish the Clean Air Act  
21 from the line of cases they've cited that starts with *Ayres* and  
22 a number of other cases that look at the coexistence or not  
23 between RICO, where there's a regulatory scheme that is  
24 comprehensive?

25           **MS. JENSEN:** Sure. So in that line of cases, the real

1 concern is what I'd call bootstrapping. In other words, there  
2 was a -- there was not any deceptive conduct that the court can  
3 point to. That's in *Ayres*. That's in *Danielsen*. Both of  
4 those.

5 In *Ayres*, the plaintiff brought a Georgia RICO claim and  
6 could not articulate any deceptive conduct or even any mailings  
7 or wirings. The plaintiff in that case pointed to a Department  
8 of Transportation administrative procedure for determining  
9 whether the defendant had any duty to notify and said, "Well,  
10 look, look at that regulation. Defendants didn't follow that  
11 regulation."

12 But the court expressly found that there was no deceptive  
13 conduct and without any deceptive conduct, hence, there is no  
14 scheme to defraud.

15 **THE COURT:** Well, the alleged deception was failure to  
16 disclose a defect otherwise required by the Safety Act.

17 **MS. JENSEN:** But in that case the court did expressly  
18 find, without any deceptive conduct, the regulation was not in  
19 and of itself enough to create a triable issue of fact -- and  
20 this is on motion for summary judgment -- concerning the mail  
21 or wire fraud.

22 Now, it's important to note that the *Ayres* court expressly  
23 left open the question, and now I'll quote, "what other  
24 circumstances mail and wire fraud might be proved by  
25 nondisclosure of material facts intended to create a false and

1 fraudulent representation."

2 **THE COURT:** In other words, mere violation of the act  
3 without a showing of fraud would not constitute a RICO claim?

4 **MS. JENSEN:** Without any deceptive conduct, that's  
5 right. Without -- so, in other words, the missing element  
6 there is a scheme to defraud, which here we have. We allege  
7 very clearly in the second amended complaint the defendants  
8 carried out a scheme to deceive and defraud consumers and  
9 furthered their scheme through mailings and wires.

10 **THE COURT:** So your point is one we've talked about  
11 before, and that is the RICO claim here is not predicated on a  
12 mere violation of --

13 **MS. JENSEN:** That's correct. That's correct.

14 **THE COURT:** -- of the CAA, but involves an intent to  
15 defraud. Indeed RICO, the predicate act requires specific  
16 intent, and RICO also requires an enterprise engaged in a  
17 pattern of racketeering activity, which again exceeds and adds  
18 to the mere violation and, therefore, it is not converting one  
19 claim and simply putting that in a different clothing and  
20 calling it the same thing. It's a different claim.

21 **MS. JENSEN:** Yes, Your Honor. That's precisely right.

22 **THE COURT:** And one response to that is that the EPA  
23 and the regulations addresses such things as fraud. There are  
24 remedies within the CAA, I believe, for fraudulent conduct.  
25 They can issue cease and desist orders. They can do various

1 things. Maybe not damages but other things.

2 **MS. JENSEN:** Well, Your Honor, and I'd like to address  
3 that in just one moment, the administrative remedies, which is  
4 what the defendants are arguing.

5 But in your original -- Your Honor's first order on the  
6 motion to dismiss, you may recall that Bosch made this similar  
7 argument, "Well, we didn't make any misrepresentations and so,  
8 therefore, we couldn't have had an intent to defraud. We don't  
9 meet the elements of RICO." And Your Honor found that their  
10 involvement in the mere sale of cars with defeat devices is  
11 plausibly deceptive. That's at page 53.

12 And Your Honor is not alone in rejecting this argument by  
13 Bosch. It's a slightly different -- actually, let me back up.

14 Just this week Judge Ludington rejected similar arguments  
15 by Bosch in a case called *Counts v. GM*, which Your Honor has  
16 before you. We submitted it just this week. And in that case  
17 Bosch similarly argued that they couldn't be liable for civil  
18 RICO and argued many of the same points, and Judge Ludington  
19 rejected those.

20 But in terms of the piece of administrative remedies, this  
21 is a -- this is really --

22 **THE COURT:** That case involved a direct deceit of  
23 consumers, not just fraud on the regulators.

24 **MS. JENSEN:** It was a very similar scheme. These  
25 diesel-cheating schemes have all involved deceit on both the

1 regulators and the consumers as part of the ongoing scheme.  
2 And so in that regard, this case is very similar to the *Counts*  
3 Case in which Judge Ludington just rejected the motions to  
4 dismiss. It is similar to the *VW* case in which Judge Breyer  
5 just rejected the motion to dismiss for prior VW owners. And,  
6 in fact, it's consistent with all of the courts around the  
7 country that have ruled on motions to dismiss civil RICO claims  
8 in this diesel-cheating context. It has not been a  
9 disqualifier for the civil RICO claims that the defendants  
10 carried out their scheme to defraud consumers by deceiving both  
11 regulators and consumers.

12 **THE COURT:** Well, but to the extent your case is based  
13 largely and predicated on deceit of the regulators, that does  
14 seem to raise the question about whether such an action, which  
15 is the core of a RICO claim, is displaced given the  
16 comprehensive nature of the CAA and to which your response is a  
17 savings clause is one thing and the difference between the  
18 elements, this is not converting -- making it a *per se*  
19 violation -- a CAA violation is not automatically a *per se*  
20 violation of RICO -- as that might be -- one could argue that  
21 *Sea Clammers* is a little different because that is a case.

22 In a 1983 action, if you take the violation of the acts  
23 there, there were no additional elements other than color of  
24 law, as far as I could ascertain, so that would be an easy  
25 end-around; whereas, here it's not an easy end-around. You've

1 got to add some other elements.

2 **MS. JENSEN:** It's certainly not, not where we have a  
3 scienter requirement and a scheme to defraud that we have to  
4 prove, and I'm sure that the defendants are not going to  
5 stipulate that we only have to prove the elements of a Clean  
6 Air Act here.

7 The difference in the *Danielsen* case where the court was  
8 concerned about an end-run around, the administrative remedies,  
9 so we're kind of moving into the question that you just asked  
10 about, well, what about the remedies under the Clean Air Act,  
11 in that case, again, the plaintiff did not allege any deceptive  
12 conduct and was relying solely on the violation of the Service  
13 Contract Act's wage classification regulations.

14 So what happened there procedurally was that the plaintiff  
15 had already brought a challenge to their wage classification  
16 with the Department of Labor. So they were already in an  
17 administrative proceedings seeking back pay, and they had  
18 appealed the determination to the Board of Service Contract  
19 Appeals; and before the final decision was issued, the  
20 plaintiffs then went into court and filed civil RICO claims  
21 seeking the very same back pay but just trebled.

22 So under the circumstances, the court found that the  
23 plaintiffs were trying to end-run the Department of Labor  
24 administrative proceedings and remedies. And in that case  
25 there was only that mere regulatory violation, which, as we've

1 discussed, Your Honor, is not applicable here.

2 But, in addition to that, there is no administrative  
3 remedy under the Clean Air Act for the losses that we're  
4 seeking here.

5 So to give a little context in --

6 **THE COURT:** Well, which way does that cut? The fact  
7 that Congress did not provide for that remedy, they would  
8 argue, then, it shows that Congress intended not to allow a  
9 damages action by another statute.

10 **MS. JENSEN:** Well, if you look at the cases,  
11 Your Honor, the consistent theme there is that the plaintiff  
12 had administrative remedy for the very losses they were  
13 claiming. They just didn't like it. They wanted it to be  
14 trebled.

15 And so, for instance, in the *Danielsen* case, the SEA  
16 regulations allowed the government to go in and claim and  
17 distribute back pay to the plaintiffs. There was an  
18 administrative remedy provided.

19 Now, here it's different. It's distinguishable because in  
20 this case the Clean Air Act deals with pollution. It doesn't  
21 deal with the fraud to the car owners.

22 The EPA can't recover any losses from fraudulent schemes  
23 that happen to also violate the Clean Air Act. The EPA can  
24 police the air but it has no purview over losses caused by  
25 diesel-cheating schemes. So the EPA can't do this for us and

1 so we have to pursue our own damages, just as Congress  
2 provided, under the savings clause.

3 **THE COURT:** Can the same thing be said about *Sea*  
4 *Clammers*? The violation of the Federal Water Pollution Control  
5 Act and the MPRSA there provided for, at least interpreted by  
6 the Supreme Court, no private right of damages and enforcement  
7 actions could have been brought for civil and criminal  
8 penalties and injunctive relief, and the Court there squelched  
9 any 1983 remedy.

10 **MS. JENSEN:** As Your Honor notes, it did not involve a  
11 RICO claim. It did also not involve the Clean Air Act. And  
12 there the court found that, again, the plaintiff was trying to  
13 essentially bootstrap the violation for a 1983 claim, which, as  
14 you described, Your Honor, is a slightly different animal than  
15 what we're dealing with here.

16 But what I would encourage Your Honor to do is to look at  
17 the *Oregon Natural Resources Council versus U.S. Forest*  
18 *Services* case. This is a Ninth Circuit 1987 case, and the cite  
19 is 834 F.2d 842.

20 **THE COURT:** And what does that case hold?

21 **MS. JENSEN:** And in that case the court described *Sea*  
22 *Clammers* in a way that I think is illuminating, and there the  
23 court said that what was going on was that *Sea Clammers* held  
24 that 1983 was not available to plaintiffs seeking to enforce  
25 the standards that they could enforce pursuant to a citizen

1 suit provision of the Clean Water Act.

2 And so that's distinguishable because here we're not  
3 actually attempting to enforce the Clean Air Act, just as the  
4 court is in the *Oregon Natural Resources* found that the  
5 plaintiffs there were not seeking to enforce the Clean Water  
6 Act even though it had to also do with water quality standards.

7 And so I think that distinction that Your Honor made aptly  
8 in the first order on the motion to dismiss, which is we are  
9 not just seeking to enforce the Clean Air Act, we are not just  
10 pursuing these claims because there was a violation of the  
11 Clean Air Act. And, frankly, Your Honor, plaintiffs should not  
12 be precluded from bringing a civil RICO claim just because it  
13 also happens to violate the Clean Air Act. That should be a  
14 plus on our side, not a disqualifier.

15 I think --

16 **THE COURT:** All right. If you could complete, and  
17 then I want to hear --

18 **MS. JENSEN:** Your Honor, because -- just because the  
19 defendants have violated multiple statutes doesn't mean that  
20 civil RICO is foreclosed where, as --

21 **THE COURT:** Not in and of itself. One looks at the  
22 quality of the underlying statute, and the argument is the more  
23 comprehensive it is in terms of its regulatory scheme, the more  
24 likely it is that Congress intended it to be the exclusive  
25 vehicle.

1           **MS. JENSEN:** Your Honor, that's correct, but  
2 Your Honor has already rejected the notion that there is field  
3 preemption with respect to the state law claims. And so if the  
4 state law claims are not preempted because Your Honor already  
5 found that the EPA does not take over the entire field, it's  
6 hard to understand how, then, a federal statute could be  
7 preempted.

8           But I think it's worth framing this as to where the  
9 defendants are coming from. It's not as though they are  
10 saying, "Wait, Plaintiffs," as in *Danielsen*, "you're just  
11 trying to get around another administrative remedy that is  
12 available to you and treble it."

13           Here what they're saying is, and they acknowledge, there  
14 is actually no administrative remedy under the Clean Air Act  
15 for the losses from a fraud. And so what they're really trying  
16 to do is playing the games of heads, I win; tails, you lose.  
17 They want us to not have a remedy under any federal statute,  
18 and that's really what's going on here.

19           **THE COURT:** All right. Thank you.

20           Mr. Giuffra?

21           **MR. GIUFFRA:** Your Honor, my head is spinning. I  
22 thought we were here originally on a fraud on the regulators  
23 claim. Then I just heard that they're not pursuing I think the  
24 RICO claims based on the Clean Air Act, but it's a little  
25 unclear.

1           They clearly have --

2           **THE COURT:** Well, it's based on the Clean Air Act, but  
3           it's not -- they're saying it's not *ipse dixit*, that any  
4           violations of the Clean Air Act alone does not comprise their  
5           RICO claim as it might under Section 1983 where you don't have  
6           to add any elements to it other than color of law; that here  
7           you have to show fraud, you have to show specific intent, you  
8           have to show racketeering, et cetera, et cetera. And,  
9           therefore, it is not a simple *per se* end-around; it's a more  
10          complicated end-around.

11          **MR. GIUFFRA:** But I think the key point, Your Honor,  
12          is they don't claim that we put out ads that said "Our cars  
13          comply with EPA regulations." The misrepresentation that they  
14          focused on and Your Honor found was the EcoDiesel badge by  
15          itself. Now, they don't claim that -- they don't claim that,  
16          you know, we said anything about undisclosed AECDs to the  
17          press.

18          Let me start with the first proposition that Your Honor  
19          started with this morning, the citizens suit savings clause in  
20          the Clean Air Act, which is 7604(e). Now, the Clean Air Act  
21          was adopted I believe 1970. Plaintiffs never had a private  
22          right of action for fraud on the regulators about undisclosed  
23          AECDs or defeat devices. That wasn't the claim that existed as  
24          of that time.

25          The claim that they are bringing is a claim that is based

1 on the Clean Air Act, which then set out a whole regulatory  
2 regime and had the EPA adopt rules governing what was an  
3 undisclosed AECD and what was a defeat device. And, by the  
4 way, Your Honor, those are very complicated technical issues.

5 The savings clause was put in place to preserve causes of  
6 action like a nuisance claim if you had a smokestack that was  
7 putting out pollution. Well, before the Clean Air Act, someone  
8 could have brought a claim under nuisance law to stop, you  
9 know, someone from having a pollution from a smokestack or  
10 someone polluting into a lake. That would have been a cause of  
11 action that existed under tort law.

12 There wasn't a cause of action that I know that existed as  
13 of the Clean Air Act about undisclosed AECDs.

14 **THE COURT:** So you're saying the savings clause only  
15 saves preexisting claims that existed as of 1970 when the CAA  
16 was enacted?

17 **MR. GIUFFRA:** That's the only conceivable explanation  
18 for it.

19 And then you have to also consider, and other courts have,  
20 that RICO is a general law that applies --

21 **THE COURT:** Well, let me -- what do you mean this is  
22 the only way to construe this? Often savings clauses are very  
23 open-ended; and if the State of California, for instance,  
24 enacted some new -- or the courts of California came up with a  
25 sort of new theory of nuisance or some expanded theory of

1 nuisance or something, some evolving law under California law,  
2 you're saying, that, no, we freeze what it was in 1970 and look  
3 at --

4 **MR. GIUFFRA:** No. No. No.

5 **THE COURT:** I never understood a savings clause saves  
6 only preexisting acknowledged --

7 **MR. GIUFFRA:** No. I'm not saying that. What I'm  
8 saying, Your Honor, is the claim that they're bringing -- it's  
9 a little unclear what the claim they're bringing because I'm a  
10 bit confused. I thought the claim they were bringing when I  
11 walked into court, based on what they had said in all the other  
12 motions to dismiss papers and, as Your Honor pointed out, what  
13 they said in their class cert papers -- and you have the  
14 document, we cited it -- it was fraud on the regulators, and  
15 the claim was we lied to the EPA about whether there were  
16 undisclosed AECDS and defeat devices in these vehicles. That  
17 was the fraud, as I understood it.

18 Now, they now know that that doesn't work because it's not  
19 a property interest. It's a regulatory approval. And the case  
20 I think that's on point on that is *Cleveland*. It's a  
21 Supreme Court decision by Justice Ginsburg.

22 But what I'm saying is you could have a claim, a nuisance  
23 claim, a tort claim, it could evolve over time. The California  
24 Supreme Court could adopt a really strict rule under nuisance.  
25 That would be saved under the savings clause. But the savings

1 clause should not be construed to say that some RICO claim  
2 that's premised entirely on the Clean Air Act suddenly you  
3 don't have to even comply with -- you don't look to the Clean  
4 Air Act because the Clean Air Act is a more specific and  
5 focused law.

6 So --

7 **THE COURT:** Well, so let me ask you. Let's step back  
8 for a moment. What's the harm -- what is the federal interest  
9 harm in allowing a RICO claim to supplement CAA remedies?

10 **MR. GIUFFRA:** A RICO claim is a treble damages remedy  
11 and you have to establish, as a predicate offense, a criminal  
12 mail or wire fraud offense. They can't do that --

13 **THE COURT:** All right.

14 **MR. GIUFFRA:** -- unless they want to try to say --

15 **THE COURT:** But let me ask -- I'm asking on a  
16 theoretical level. Because when one looks at, for instance,  
17 preemption doctrine in the traditional sense, you might look at  
18 how does, for instance, state enforcement or enforcement of  
19 state laws impair a federal interest. Sometimes it disrupts a  
20 delicate balance set by Congress between labor and management  
21 under the NLRA. Sometimes it threatens to disrupt a very  
22 careful scheme of benefits, employee benefits, like ERISA.

23 So what's the harm here in allowing supplemental remedy  
24 such as RICO to enforce the CAA in addition to the EPA's  
25 regulatory actions?

1           **MR. GIUFFRA:** Because when Congress passed the CAA,  
2 Congress was very specific about what kind of private cause of  
3 action can be brought.

4           **THE COURT:** No, I understand that. They proscribed it  
5 and, therefore -- but I'm asking a broader question. Can you  
6 identify a federal interest that would be harmed by allowing  
7 supplemental enforcement?

8           **MR. GIUFFRA:** Yes. The problem would be we'd be  
9 litigating all around the United States about what was an  
10 undisclosed AECD, what was a defeat device. People would be  
11 running into court with treble damage RICO claims, and it would  
12 obviously disrupt the enforcement regime that has been  
13 carefully set up.

14           And, you know, obviously one of the problems would be you  
15 would end up with a situation where a court and the  
16 Ninth Circuit could say, "Well, this is an undisclosed AECD.  
17 It should have been disclosed to the EPA. This is a defeat  
18 device that would maybe be in the Fourth Circuit." And so  
19 you'd have private litigants engaging in essentially  
20 enforcement actions.

21           **THE COURT:** Well, circuit diversity you might run into  
22 even under -- when the EPA brings its suit. You know, you may  
23 have different --

24           **MR. GIUFFRA:** Well, one of the problems here is, you  
25 know, we talk about the normal preemption argument, there's a

1 preemption provision where Congress said you can't bring a  
2 state law cause of action that's going directly to whether  
3 there's been a violation of the Clean Air Act in terms of  
4 things like undisclosed --

5 **THE COURT:** The emission standards.

6 **MR. GIUFFRA:** The emission standards. That's, I  
7 think, clear. So --

8 **THE COURT:** But it's limited, isn't it, to specific  
9 kinds of things?

10 **MR. GIUFFRA:** No. It's a broad preemption provision  
11 and it's intended to prevent exactly what I'm talking about,  
12 which is having conflicting results all around the  
13 United States and upsetting the enforcement scheme and the  
14 regulatory scheme, which is supposed to be governed under  
15 federal law by the EPA.

16 And what the plaintiffs have done in this case is they  
17 say, "Well, we have a misrepresentation claim, which is a tort  
18 claim, which is" --

19 **THE COURT:** Let me ask you. Do you have that  
20 preemption clause? Do you have the language of it?

21 **MR. GIUFFRA:** Section 208 --

22 **THE COURT:** Do you have it by chance?

23 **MR. GIUFFRA:** I don't have it. It's a pretty broad  
24 preemption clause as it's been interpreted. Maybe my colleague  
25 will give it to me.

1           **THE COURT:** Well, it's kind of interesting because if  
2 there is explicit preemption for this kind of action, which I  
3 thought --

4           **MR. GIUFFRA:** Well, preemption only applies to state  
5 law. It doesn't apply --

6           **THE COURT:** But state law governing I thought emission  
7 standards not, let's say, fraud regarding failure to disclose  
8 AECDs or defeat devices.

9           **MR. GIUFFRA:** Well, the way courts have addressed this  
10 issue -- well, first of all, what Section 208 says, 208(a), it  
11 says, quote (reading):

12           "No state or other political subdivision thereof shall  
13 adopt or attempt to enforce any standard relating to the  
14 control of emissions from new motor vehicles or new motor  
15 vehicle engines subject to this part."

16           And so the point is, it's been related -- we could go  
17 through this if Your Honor would like, but it's a fairly broad  
18 preemption provision. It applies to states and it applies --  
19 so that --

20           **THE COURT:** I thought I -- didn't I address this issue  
21 previously and say that this does not preempt --

22           **MR. GIUFFRA:** Yes, you did, Your Honor.

23           **THE COURT:** -- this does not preempt this kind of  
24 action, which has to do with disclosures of very specific  
25 things? It's not setting -- if California wanted to set a new

1 emission standards outside the waiver process that said that, I  
2 could see where that would be preempted.

3 **MR. GIUFFRA:** California is actually excluded from --  
4 when the Clean Air Act was adopted because California was first  
5 in this space, there's actually a provision that allows  
6 California to have regulations that are stricter than the  
7 federal regulations.

8 **THE COURT:** All right. But, generally speaking, my  
9 point is, to the extent there's an express preemption clause  
10 that insulates from state regulation, I could see an argument  
11 that there ought to be an implied preemption of similar -- you  
12 know, any kind of federal action that would do exactly the same  
13 kind of thing; but the fact that it seems to be circumscribed  
14 preemption, and I think I held not field preemption but  
15 circumscribed preemption to the adoption of emission standards,  
16 that suggests that's the little sphere, the confined sphere,  
17 for which I would think auto manufacturers enjoy some immunity  
18 from all sorts of regulations.

19 But to the extent it does not preempt other things and you  
20 have a broad savings clause, that suggests that the door is  
21 fairly open.

22 **MR. GIUFFRA:** No, Your Honor. What it suggests is  
23 that Congress in the Clean Air Act had one narrow -- dealing  
24 expressly with this issue has one narrow citizen suits  
25 provision. It doesn't allow for a damages claim if somebody

1 misleads the EPA, something Congress could have done.

2 I would urge the Court, if you read nothing else when you  
3 go back to chambers, I would read the *Hemi* case. I would read  
4 Justice Ginsburg's concurrence in that case, and that was a  
5 case about whether the RICO law should apply because the fraud  
6 claim in that case was based on something called the  
7 Jenkins Act, and the Jenkins Act is a law that requires people  
8 who sell cigarettes out of state to provide information to the  
9 state where the cigarettes are being sold that would then allow  
10 the state, and in that case New York City was suing, and the  
11 Supreme Court said that no RICO claim could be held under  
12 proximate cause consequences.

13 But what -- proximate cause principles.

14 But what Justice Ginsburg held in that case was you need  
15 to look at the nature and consequences of the fraud. The fraud  
16 there was not disclosing the names of the people who you were  
17 selling cigarettes to, and New York is governed by the  
18 Jenkins Act, and you need to look at the Jenkins Act and you  
19 can't read RICO as a law that goes far beyond the scope of the  
20 Jenkins Act.

21 Similarly in this case, Your Honor can't read the Clean  
22 Air Act and ignore the fact that Congress specified a  
23 particular set of remedies in the Clean Air Act for people and  
24 then use RICO as some sort of an end-run around the Clean Air  
25 Act's carefully balanced structure, and that's clearly what the

1 plaintiffs want to do.

2 And Mr. Slater will talk about all these cases like *Ayres*,  
3 *McCulloch*, and the rest, and that's the same proposition that  
4 is stated in those cases, those zone of interest cases.

5 So in terms of what is going on here at 30,000 feet, the  
6 plaintiffs -- sometimes it's a fraud on the regulators case,  
7 sometimes it's a fraud on the consumers. If it's a fraud on  
8 the consumers, I'd like to know what the fraud was because the  
9 fraud has to be -- if it's the EcoDiesel badge, which is the  
10 one misrepresentation claim Your Honor sustained, then, okay.  
11 That doesn't say anything about defeat devices. It doesn't say  
12 anything about AECDS. They can't cite to something like that.

13 In cases like *VW* and the *Chevy Cruze* case, the plaintiffs  
14 made it quite clear that they were claiming there were  
15 misrepresentations made both to regulators and to consumers for  
16 purposes of the RICO claim. That was true in the *VW* case in  
17 Judge Breyer's decisions and in this *Counts/Chevy Cruze* case.

18 In this case, at least until this morning, the claim that  
19 has been made is that the gravamen of the RICO claim is all  
20 about fraud on the regulators and it's not affirmative  
21 misrepresentations to defendants. And I gave you -- I'm not  
22 going to read them all, but that's what we've been operating  
23 under.

24 And so if they want to suddenly change course, we're going  
25 to have to rebrief -- you should dismiss their RICO claim. Let

1 them file a new one. We'll have to put off the class cert  
2 briefing because we'll have to redo class cert briefing because  
3 our class cert briefing was all premised on the fraud on the  
4 regulators RICO claim, not something else, and let them try to  
5 bring a RICO claim based on the EcoDiesel badge. That will be  
6 an interesting RICO claim.

7 But if it's going to be based on misrepresentations to  
8 EPA, okay, then they're in the problem of they can't even  
9 allege a basic mail fraud claim, and that's the problem they  
10 have.

11 And, again, the savings clause doesn't get them there  
12 because all that does is preserve, you know, existing claims or  
13 even some sort of state law claims. It doesn't allow you to  
14 use RICO because their entire claim is based on the Clean Air  
15 Act, and the Court need look no further than Justice Ginsburg's  
16 concurrence in *Hemi*, which applies directly here.

17 I think Mr. Slater should respond and have --

18 **THE COURT:** I'm going to ask Mr. Slater to respond,  
19 then I'll give you the last word.

20 **MR. GIUFFRA:** He should get the opportunity to respond  
21 to all these cases, but we think the zone of interest cases,  
22 when you actually look at --

23 **THE COURT:** I've read them. I don't need to rehash  
24 those. I understand those cases.

25 **MR. GIUFFRA:** But I think the real problem that they

1 ultimately have is that their RICO claim is based on lies to  
2 the regulators with respect to regulatory regulations; and  
3 Justice Ginsburg in her concurrence in *Hemi*, which is a RICO  
4 proximate cause case, said, no, you shouldn't read RICO to be  
5 broader than the underlying statute that gives them the claim  
6 in the first place, and that's what they want to do.

7 **THE COURT:** All right.

8 **MR. SLATER:** Yeah, if I can pick up Your Honor's  
9 question about what is the federal interest that's harmed. And  
10 the Clean Air Act is a balancing of interest. It's a balancing  
11 of interest between industry and the environment in some  
12 respects, and Congress intended that EPA play a role in  
13 striking that balance, both in terms of developing the  
14 regulations and then in how they enforce those regulations.

15 And if you allow a private plaintiff to come in with a  
16 damage claim, not just a single damage claim but a treble  
17 damage claim, to remedy what is claimed to be a fraud on the  
18 regulator, you are upsetting that balance.

19 **THE COURT:** Well --

20 **MR. SLATER:** And to go --

21 **THE COURT:** -- how do you ascertain that that is such  
22 a careful balance when you have a broad savings clause? That's  
23 the problem I have.

24 **MR. SLATER:** Yeah. I mean, I think *Sea*  
25 *Clammers* addresses that directly where it says that you can't

1 predicate a claim that is saved on the statute itself that has  
2 the savings clause, and that's what they're doing.

3 And *Rancho Palos Verdes*, which we've also cited, is to the  
4 same effect.

5 **THE COURT:** Well, they said you couldn't read that to  
6 create a private cause of action within that statute. There  
7 were two questions in *Sea Clammers*. One is: Is there a  
8 private cause of action? And you can rely on a savings clause  
9 to create an otherwise nonprivate cause of action. That was  
10 clear from Congress' effort.

11 It then went on to hold that you couldn't allow any  
12 statute claim which in the savings clause was not intended to  
13 include such a statute as 1983. There's only one paragraph of  
14 explanation by Judge Thomas. It's not very enlightening, to be  
15 frank, so I don't know what the analysis is.

16 So I understand what *Sea Clammers* held, but my question  
17 is: You're making the argument that there's a careful balance  
18 struck by Congress. You don't want overenforcement. You want  
19 the EPA to have control. You want the regulated car  
20 manufacturers to be subject to regulation but not  
21 overregulation and oversued.

22 On the other hand, you've got a savings clause that allows  
23 any statute or common law to seek enforcement of any emission  
24 standard limitations to seek any other relief which seems  
25 pretty broad. It doesn't -- you don't have that in NLRA. You

1 don't have that in ERISA, that kind of savings clause.

2 So I'm not sure I understand this argument that there's  
3 this carefully crafted balance to sort of insulate and protect  
4 car manufacturers from excessive litigation when there's a  
5 savings clause.

6 **MR. SLATER:** Because the claim here is based on the  
7 Clean Air Act. It may be alleged to sound in RICO but it is  
8 based on the Clean Air Act, and that's why Justice Ginsburg's  
9 concurrence is important, and she was actually quoting the  
10 majority in that case as well. You have to look through the  
11 RICO claim to the act, the underlying statute that the  
12 plaintiff is predicating the claim on, and here that's the  
13 Clean Air Act.

14 And you combine that with *Sea Clammers*, which says you  
15 can't predicate a saved claim on the statute that otherwise  
16 precludes the private right of action. They're trying to  
17 create a private right of action under RICO that Congress did  
18 not provide in the Clean Air Act, and it's worse than the  
19 *Danielsen* case. This is not an end-run around a single damage  
20 claim. This is creating a treble damage claim where no damages  
21 at all are permitted. None.

22 Now, if they have a state law fraud claim --

23 **THE COURT:** It does allow a treble damages only if  
24 additional elements are met; i.e., specific intent to defraud,  
25 not just a violation *per se* but intent to defraud, and a

1 pattern of racketeering activity.

2 **MR. SLATER:** That are separate and distinct from fraud  
3 under the act. Congress provided in the Clean Air Act very  
4 clear remedies, which the EPA is exercising, when the EPA  
5 believes there to have been fraud on the EPA.

6 That's why I say if the plaintiffs have and the Court  
7 suggested it in its first opinion that they might have fraud  
8 claims that are not dependent upon enforcement of the Clean Air  
9 Act standards and fraud on the EPA, they can pursue those state  
10 law remedies; and if they have damages and they can prove that  
11 claim, that's what's left. They can't bring a treble damages  
12 RICO claim.

13 And ultimately what the Court is faced with is  
14 interpreting statutes. This is not an unusual task.

15 **THE COURT:** Normally the rules of presumption are that  
16 you give effect to both statutes. You're hesitant to read the  
17 implicit repeal unless it's very clear that Congress so  
18 intended.

19 **MR. SLATER:** This is not a question of implicit  
20 repeal. And, again, this dovetails to some extent with the  
21 discussion we were having previously, that fraud on the EPA is  
22 not something that can be the subject of a mail and wire fraud  
23 claim. That's why you have to go back to what they're  
24 claiming. That is what their claim is.

25 **THE COURT:** That's why I see that as a separate

1 question. There are two questions here. One is this  
2 preemption notion; the other is whether there's a predicate act  
3 of mail or wire fraud.

4 **MR. SLATER:** The other statutory construction point  
5 that the Court has to take account of, though, is zone of  
6 interest, and that's something that we've pointed out that  
7 *Lexmark*, among others, makes clear that zone of interest is an  
8 independent --

9 **THE COURT:** Well, I understand there's also the  
10 proximate cause question.

11 **MR. SLATER:** Absolutely.

12 **THE COURT:** I mean, there's a third layer behind this  
13 as well, and I haven't lost sight of that.

14 **MR. SLATER:** And as to that, they're far outside of  
15 the zone of interest that Congress was dealing with. There's  
16 no suggestion within a million miles that Congress created the  
17 Clean Air Act in order to provide damage remedies for  
18 plaintiffs who claim that the act was violated, and there's  
19 nothing that they can say to get them out of that hole that  
20 they're in.

21 The Clean Air Act was enacted for the broad purposes, the  
22 broad public interest in the clean air coupled with a balance  
23 with industrial interests. And nowhere in that is there an  
24 interest in protecting consumers as to their vehicles, and  
25 that's another place where *Sea Clammers* brings it home.

1           And as I was starting to say before, if you have private  
2 damage actions that get into the question of whether you did or  
3 didn't adequately disclose, as Mr. Giuffra was saying, AECDs in  
4 a particular case, and if you didn't, you're liable for treble  
5 damages, you are then subjecting manufacturers to different  
6 standards of manufacturing of engines all over the country and  
7 at the pain of treble damage remedies where Congress provided  
8 zero damages, and that's the federal interest.

9           So you look at the zone of interest, you look at the  
10 interests that Congress was trying to balance in this statute,  
11 and it was not interested in doing it one bit through a damage  
12 claim.

13           Thank you, Your Honor.

14           **THE COURT:** All right. Thank you.

15           Ms. Jensen, I'll give you the last word briefly.

16           **MS. JENSEN:** Your Honor, there's a lot to unpack  
17 there, but I think the zone of -- I'll kind of work backwards,  
18 if that's okay, very briefly.

19           The zone of interest in *Lexmark* has nothing to do with  
20 standing. It has to do with standing to pursue a statutory  
21 claim. It would have to in this context deal with whether we  
22 have a standing to bring a Clean Air Act claim, but that is not  
23 what we are bringing. We're bringing a civil RICO claim, which  
24 is predicated on acts of mail and wire fraud with distinct  
25 requirements and distinct, frankly, purposes.

1 Now, Justice Ginsburg in *Hemi* said that you need to stick  
2 to the RICO statute in effect. We stick to the RICO statute  
3 here. The plaintiffs lost money by reason of the defendants'  
4 fraudulent scheme that was directed at the consumers and the  
5 regulators.

6 Lying to the regulators too doesn't negate our civil RICO  
7 claim because that was only one facet of the overall scheme,  
8 which was always intended to sell cars. It's not as though the  
9 defendants were trying to sell cars to the EPA and then go  
10 home. No, the scheme could not be effectuated until  
11 consumers --

12 **THE COURT:** Why don't you address the preemption.  
13 That's what I'm mainly interested in, frankly. The *Ayres* -- I  
14 mean, if you have some other comment that you've heard that you  
15 want to reply to, that's what I'm interested in hearing.

16 **MS. JENSEN:** Sure. I think in terms of the *Ayres*,  
17 it's -- the question there is one of bootstrapping. That's why  
18 I said what I said, which is that the claim that we are  
19 bringing here is not a mere regulatory violation. That makes  
20 all the difference.

21 **THE COURT:** What about the argument that this is going  
22 to be disruptive, if you allow the nuclear option of a RICO  
23 action with treble damages and everything else, that just  
24 blows -- it completely disrupts the carefully constructed  
25 balance that Congress tried to enact in terms of regulating car

1 manufacturers but not overregulating?

2 **MS. JENSEN:** Sure. I understand the defendants like  
3 to call it the nuclear option, but the Supreme Court has been  
4 consistently holding that RICO is to be construed liberally.  
5 Defendants, if you -- Chamber of Commerce, if you don't like  
6 it, go back to Congress.

7 But what I would say is that the world has not blown up in  
8 the last couple of weeks. Just this week in the *Counts v. GM*  
9 case --

10 **THE COURT:** Oh, we've come close to it, haven't we?

11 (Laughter)

12 **THE COURT:** I'm not so sure about that.

13 **MS. JENSEN:** That's true. That is true, Your Honor.

14 But also the *VW* case, the prior owners, and in fact every  
15 single court to look at this issue has not said, "Oh, no, the  
16 world is going to blow up if I uphold the civil RICO claim in  
17 which regulators were necessarily deceived."

18 Now, I would like to address very briefly the issue of  
19 what this means in terms of, for instance, trial. You know,  
20 Mr. Giuffra has raised this issue of, "Well, we didn't make any  
21 affirmative misrepresentations to the consumers and now I'm all  
22 surprised and flummoxed"; but in the second amended complaint  
23 we set forth it all very clearly, and that is in the  
24 allegations that I handed to Your Honor this morning. And of  
25 course they've had that complaint for a long time. It shows

1 that the ongoing scheme, it both deceived regulators and  
2 consumers, and at trial our RICO claim will rise and fall on  
3 common questions about whether the defendants engaged in a  
4 scheme to defraud consumers by concealing the defeat devices.

5 **THE COURT:** But we will have to look at -- if your  
6 theory is both fraud on the EPA and fraud on consumers, not  
7 just a *per se* equation, then one would have to look at what are  
8 the common issues. And I don't want to get into the class cert  
9 now, but I mean, that does imply -- that's why I'm asking the  
10 question.

11 Because if your claim is broader than just the conduct in  
12 front of the EPA, it includes communications or duties owed to  
13 consumers, then that folds into what has to be proven at trial  
14 and whether there are common issues, whether there's  
15 predominance, et cetera, et cetera.

16 **MS. JENSEN:** Yes, Your Honor. Well, I think that,  
17 again, we think that under *Bridge* you don't have to go any  
18 further. It's sufficient that they deceived the regulators.  
19 So I just want to state that clearly.

20 But if Your Honor thinks we need to invoke the  
21 consumer-facing elements, we will. And at trial that means we  
22 will not only prove the falsified emission testing but also  
23 under *Amgen* -- and Your Honor has recognized our concealment  
24 theory in the prior motion to dismiss -- under the objective  
25 personal standard set forth in the Supreme Court's decision in

1 *Amgen*, that's 133 S.Ct. 1184, the common question for the jury  
2 will be whether it would be material to a reasonable consumer  
3 that paid a premium for an EcoDiesel vehicle, whether it was  
4 material that the defendants concealed the cheat devices and  
5 that there was an EcoDiesel badge on every car without  
6 disclosing the defeat device that operated to disable or  
7 degrade the emission controls on the roads.

8 We say yes. The defendants say no. The jury may agree  
9 with us or it may agree with defendants, but it's going to be  
10 the same answer for all because it is an objective --

11 **THE COURT:** That is a different claim than saying all  
12 you have to show for the RICO part of the case is deceit on the  
13 regulators irrespective of whether what consumers were told,  
14 just deceit on the regulators in and of itself, would  
15 constitute a RICO violation.

16 Frankly, that would be an obviously easier claim to  
17 certify, which is why -- I would assume one reason why you  
18 brought that claim. But, in any event, that's why it does make  
19 a difference, the scope of your claim, and whether the first --  
20 the narrower-focused claim legally can survive, and that's why  
21 I'm having this hearing.

22 **MS. JENSEN:** Understood, Your Honor.

23 Again, you know, we think under *Bridge* you don't have to  
24 go any further obviously. But, again, if that is something  
25 that Your Honor believes that we need to, we have that in the

1 second amended complaint. It's already been alleged, and that  
2 would allow for the Court to also consider the uniform  
3 concealment of the defeat devices.

4 And, again, this is just -- the reality is that the scheme  
5 could not succeed. They could not pull off the scheme with  
6 either the regulators or the consumers being aware of this.  
7 They concealed it from all.

8 **THE COURT:** All right. I will retake this again under  
9 submission and resubmit this issue, and I understand that  
10 there's some urgency to get this resolved.

11 Now, there is a possibility that I may have to continue  
12 the class cert hearing if I don't get this out early because  
13 this may impact one way or another, but I will let you know and  
14 I'm going to endeavor to work on this.

15 I will also let you know that I've been in touch with the  
16 special master, Mr. Feinberg, and understand that there are  
17 discussions going on. That's not going to deter me from doing  
18 what I've got to do because my operating assumption is if this  
19 case does not resolve -- I hope it would -- we're going to move  
20 ahead.

21 I will make this one editorial comment. Obviously I  
22 understand this issue is a very important issue to this case.  
23 It affects the scope of the case, the strengths and weaknesses  
24 of the respective sides, the dynamics of the class cert  
25 question; but I think, as obvious from your presentation and my

1 questions, these are not easy -- there's no -- it's not a  
2 slam-dunk.

3       So whichever way I rule, if this case does not resolve, I  
4 have a suspicion that I may not have the last word on this  
5 question, which, in my usual pitch as a mediator, is another  
6 reason why the parties ought to see their way through a  
7 resolution because whatever I do with this, I suspect it is  
8 not -- and if this case does not resolve, this will go on for  
9 sometime, and I highly suspect that another forum will be --  
10 will hear this question, and that could be months, it could be  
11 years from now. So there's a much easier path to get this  
12 resolved, but I'll leave that to Mr. Feinberg and you-all to  
13 handle it.

14           **MR. GIUFFRA:** Thank you very much, Your Honor. Have a  
15 nice weekend.

16           **THE COURT:** You too. Thank you.

17                   (Proceedings adjourned at 1:07 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Saturday, October 27, 2018



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Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
U.S. Court Reporter