

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER

IN RE: VOLKSWAGEN "CLEAN DIESEL")
MARKETING, SALES PRACTICES, AND) No. C 15-MD-2672 CRB
PRODUCTS LIABILITY LITIGATION)
_____) San Francisco, California
Tuesday.
October 17, 2017
9:00 a.m.

TRANSCRIPT OF PROCEEDINGS

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Official Reporter - US District Court
Computerized Transcription By Eclipse

1 Tuesday - October 17, 2017

9:05 a.m.

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

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4 **THE CLERK:** Civil Action C15-MD-2672, In Re
5 Volkswagen Clean Diesel Marketing Sales Practices and Products
6 Liability Litigation.

7 Counsel, please step forward and state your appearances
8 for the record.

9 **MR. BERMAN:** Good morning, your Honor. Steve Berman
10 for the plaintiffs.

11 **THE COURT:** Good morning.

12 **MR. BERMAN:** With me is my partner Tom Loeser.

13 **THE COURT:** Good morning.

14 **MR. SLATER:** Good morning, your Honor. Matthew
15 Slater for Robert Bosch GmbH and Robert Bosch LLC. My partner
16 Carmine Boccuzzi and Albert Lai also of our firm is here with
17 me.

18 **THE COURT:** Good morning.

19 And I understand that our -- do we have CourtCall this
20 morning? Do you know whether people are phoning in?

21 **THE CLERK:** Yes. They are on "listen only" on the
22 line.

23 **THE COURT:** Yes.

24 **THE CLERK:** Yes.

25 **THE COURT:** Okay. So this is part of the MDL

1 litigation and we have followed the practice of permitting
2 people to be able to listen to the proceedings without having
3 to fly out to San Francisco. And my understanding is there may
4 be some people. I don't even know who they are. We get a list
5 afterwards of --

6 **THE CLERK:** (Indicating).

7 **THE COURT:** Oh, well. Lashanda has the list right
8 here.

9 Apparently, we're not all that interesting because there
10 are only five CourtCalls. Though I want to thank the people
11 who are willing to listen to it by CourtCall because I think
12 that that's of some value and I appreciate it.

13 I have, of course, read the submissions. I've already
14 ruled on the sealing -- some sealing aspects of the motion,
15 but, of course, I haven't ruled on the motion itself.

16 So I invite any comments. I ask you not to repeat what is
17 in the papers because I think that -- I think that the papers
18 are well done and that the arguments were fairly presented. So
19 I have a sense of all of that.

20 This has gone through a number of iterations; not too
21 many, but at least enough that -- that I think it's been
22 vented.

23 So, Mr. Slater, do you want to lead off? It's your
24 motion.

25 **MR. SLATER:** If I may, your Honor.

1 And just briefly on the sealing issue, if it would be
2 possible to redact names from the documents that the Court
3 intended to unseal or at least to present that issue to the
4 Court before the documents are unsealed.

5 **THE COURT:** Well, what types of names are we talking
6 about? Do you mean people who may have been involved in -- who
7 allegedly were involved in the process?

8 **MR. SLATER:** Well, the names that I'm concerned about
9 are the names of Bosch employees who are not parties or accused
10 of having done anything in particular in relation to the -- in
11 relation to the proceedings. I don't know whether Volkswagen
12 has any comparable interests.

13 **THE COURT:** Well, they haven't appeared. I mean, I
14 haven't heard from them at this point, have I?

15 **MR. SLATER:** Well, because these were
16 their documents, they submitted the affidavit in support of
17 sealing. I just -- as I say, I'm not here for them. I'm here
18 for --

19 **THE COURT:** I know.

20 **MR. SLATER:** -- for Bosch.

21 **THE COURT:** Let me just tell you sort of an attitude
22 that I have about sealing, which I have written about. It's
23 this.

24 Litigation itself, through a court system, is a public
25 process. What you want to be careful of, in my view, are

1 certain things that sometimes go with the process that are --
2 that I think are unfortunate byproducts of the fact that it's
3 public and that ought not to be public because there is no
4 public interest.

5 There is no public interest in knowing somebody's Social
6 Security number. There is no public interest in knowing the
7 date of birth. There is no public interest in that sort of
8 thing. Those are highly, highly private and ought to remain
9 so.

10 In terms of either participation active or simply being,
11 quote, dragged into it because you're an employee somewhere or
12 that you have some knowledge or that you certainly -- or less.
13 I find that to be not of an overriding public interest, but
14 that -- but that in an effort to have a full disclosure,
15 anything that is the subject matter of the litigation, that it
16 probably, on balance, ought not to be sealed.

17 I know the people who are brought into litigation are
18 sometimes unfairly treated as being a knowing participant. I
19 understand the concerns, but I think overall the public's
20 interest in having public disclosure of information outweighs
21 it.

22 I also think that as a practical matter, it's very, very
23 hard at the beginning of the lawsuit to make that type of
24 redaction because you're not going to go back at the end of the
25 lawsuit and say: Well, this person knew this, or this person

1 knew that. So let's unseal this, or let's unseal that. It
2 becomes too unworkable.

3 I also think that -- that there is something to be gained
4 by public disclosures in that it -- in that perhaps other
5 people may come forward and provide information that may be
6 relevant to the litigation. I don't know. I'm not an
7 investigator. I'm not in that business.

8 But I appreciate -- while I get sealing motions, I think
9 that the Circuit has been pretty clear that it's not -- it's
10 not a favored motion, whatever that means. I mean, I don't
11 think there is a presumption that sealing should occur. And so
12 I must make a -- you know, a judgment as to what should be
13 disclosed.

14 And I am telling you now, because it's only fair to a
15 party to know, that I am predisposed not to seal. I come from
16 a position of not sealing, because of what I think is the
17 overriding public interest.

18 Anyway, I appreciate that. I appreciate what you're
19 saying.

20 Do you want to address any portion of your motion?

21 **MR. SLATER:** Yes, your Honor. Just on that, on that
22 point. Would the Court entertain targeted redactions or is
23 that the end of the subject?

24 **THE COURT:** I think that's the end of the subject.

25 **MR. SLATER:** Okay, your Honor. I just want to be

1 clear. Thank you.

2 Your Honor, at the Court's request, after the conclusion
3 of briefing, the plaintiff submitted a red line of the Second
4 Amended Complaint against its predecessor. So we're now
5 dealing with a third Complaint. There was an original, there
6 was an Amended and now we've got the Second Amended.

7 **THE COURT:** Right.

8 **MR. SLATER:** In our submission, your Honor, the red
9 line corroborates what we showed in our second supplemental
10 brief, which is that the plaintiffs repeatedly changed "Bosch"
11 to "Bosch LLC" and "Bosch GmbH" or they adopted new collective
12 terms and, therefore, they failed to cure the fundamental
13 defect that was charged in the Court's June 23rd order in this
14 case. And that by itself is a sufficient basis to dismiss now
15 with prejudice.

16 But the amendments and as displayed in that red line do
17 more. They are overwhelmingly about the conduct of Volkswagen
18 defendants and not about Bosch. They consist of allegations
19 drawn from Volkswagen's criminal plea agreement in which
20 Volkswagen admitted to creation of a Defeat Device in a highly
21 secretive manner and with assistance from the company IAV, not
22 Bosch.

23 They also go into great detail about the highly
24 contractual bilateral relationship between Volkswagen and its
25 dealers and the alleged ways in which Volkswagen, but not

1 Bosch, has harmed the dealers through that relationship.

2 And they go all over themselves in tying all the
3 plaintiff's alleged harms to reputational injury, not to the
4 concrete financial harm that is required for standing in this
5 case.

6 In that regard they reiterate in Paragraph 271 of the
7 Amended Complaint, Second Amended Complaint that the plaintiffs
8 sold the vehicles at premium prices. So these plaintiffs sold
9 the vehicles at a premium, which contributed in their
10 submission to high goodwill values, and that the absence of
11 current premiums harmed their goodwill.

12 These additional averments that are highlighted in the red
13 line, much as the plaintiffs may try to run away from them,
14 serve to further distance the Second Amended Complaint from a
15 viable claim against the Bosch defendants.

16 Now, first, the plaintiffs lack standing or, in any event,
17 RICO standing. The harms that they allege are speculative,
18 contingent and hypothetical. They are not fairly traceable to
19 the conduct of either of the Bosch defendants.

20 They are also not harms to business or property, which is
21 required under RICO and which is intended, quite intentionally,
22 to be a limiting factor to avoid overreach on the part of what
23 is an *in terrorem* treble damages claim. And that's the only
24 claim that's at issue in this case, your Honor.

25 Cases like *WMX, Waste Management* case, make clear that

1 reputation injuries of the sort that are being claimed here are
2 not injuries to business or property.

3 The cases that the plaintiffs cited in their second
4 supplemental brief, and in fact only in that last brief, which
5 purport to allow RICO standing for goodwill injuries are cases
6 in which the defendants interfered with the dealings with
7 specifically identified customers of the plaintiff.

8 So in the *Newcal against Ikon* case that was the issue or
9 where the plaintiffs were put out of business all together, and
10 that's what was going on in the *Soranno Gasco* case.

11 Far from pleading that sort of injury to business or
12 property here, they have affirmatively pled, and they can't
13 deny, that they benefited from the RICO scheme that they
14 allege. They contend that the object of the scheme was to help
15 them sell more, which they claim they did, and for which they
16 admit they charged premium prices.

17 As the *Brocade* case teaches:

18 "A plaintiff that was an intended and actual
19 beneficiary of the alleged scheme cannot claim RICO
20 injury."

21 The Ninth Circuit en banc in the *Oscar* case reached a
22 similar conclusion, holding that a renter whose property was
23 allegedly declined in value had no RICO standing because at
24 most that would likely lead to a decreased rent, a benefit.

25 **THE COURT:** So let me focus on that a minute.

1 **MR. SLATER:** Yes, your Honor.

2 **THE COURT:** Regardless of -- let's not get into
3 whether Bosch at this point participated in it or not. Though,
4 obviously, that's -- that's an issue. But let's talk about
5 injury just for a minute because that's what I think you're
6 focused on.

7 And you're saying these people, these dealers weren't
8 injured because, one, they sold the cars up until whatever date
9 that was at a premium and so they didn't -- so from that point
10 of view they benefited.

11 And, secondly, that once they couldn't sell these
12 vehicles -- and here is where I get a little lost in the
13 argument -- they suffered no damages or damages would be
14 speculative.

15 What exactly are you saying? Because I thought that there
16 was a point in time, correct me if I'm wrong, that they simply
17 couldn't sell the vehicles in their -- in their present
18 condition. They weren't going to be certified. They weren't
19 going to be smog tested. They weren't going to pass muster in
20 that condition. So a dealer couldn't sell. He had cars to
21 sell. He couldn't sell them.

22 Now, are you saying that's not an injury? And I'm trying
23 to figure out why that's true, why that's not an injury. You
24 have a -- you have a backlog or you -- you're in the business
25 of selling product X. You may have some on the shelf or in the

1 warehouse or on the lot and suddenly you can't sell them. Why
2 aren't you injured by that?

3 **MR. SLATER:** A number of answers, your Honor.

4 **THE COURT:** Yes.

5 **MR. SLATER:** First of all, that's not an injury
6 arising from the alleged scheme. The scheme that they allege
7 is one to sell these vehicles, supposedly fraudulently.

8 The harm that they are claiming of not being able to sell
9 certain vehicles in the future is a result of a stop order from
10 Volkswagen and is not part of the scheme that they allege --

11 **THE COURT:** Doesn't every scheme have -- carry within
12 it the risk that it will be uncovered and -- and thereby
13 injuries will result? I mean, it's --

14 **MR. SLATER:** But the --

15 **THE COURT:** Use the analogy, you know, every
16 commission of a criminal offense includes its concealment and
17 what flows from it.

18 Conspiracies under criminal law go well beyond -- in terms
19 of timing go well beyond the act of -- the commission of the
20 offense. That is, the concealment of the commission, of the
21 commission of the offense frequently -- frequently occurs
22 subsequent to the commission of the substantive offense.

23 And in the civil context when you have a scheme to --
24 civilly to sell a fraudulent or deceptive product, doesn't it
25 include within it the fact that it may be detected and if it's

1 detected, other damages flow from it?

2 **MR. SLATER:** Other damages may, but not -- not
3 damages of this sort. And this is not proximately caused by
4 the scheme itself.

5 **THE COURT:** Why isn't it?

6 **MR. SLATER:** Because it -- it is not a consequence of
7 the actions alleged of these defendants. And maybe I'll come
8 to proximate cause separately, but first of all, we're focused
9 on whether it's a RICO injury.

10 **THE COURT:** All right.

11 **MR. SLATER:** And A RICO injury is different than just
12 any injury. A RICO injury is an injury to business or
13 property. And the allegation here is that their reputation has
14 suffered and that Volkswagen brand has suffered a hit and,
15 therefore, they are not going to be able to sell as many
16 vehicles.

17 Now, that's both a contingent and a speculative injury.
18 And the contingency, to a considerable extent, including with
19 respect to the vehicles that they say they weren't able to
20 sell, is one that Volkswagen has solved. So it was contingent
21 at the time that the Complaint was filed, but that contingency
22 has been eliminated in a way to eliminate the harm.

23 **THE COURT:** Oh, I don't know. I mean, maybe you can
24 make that argument today in this Court, but you sure couldn't
25 have made it a year ago or two years ago. There was -- I mean,

1 from the -- from the moment, from September 15th or 18th, I
2 forget the day, of 2015 -- is that the year?

3 **MR. SLATER:** 15th, yes.

4 **THE COURT:** From that point on the reputation of
5 Volkswagen was -- and the goodwill engendered by the -- by
6 their past business practices and the success of their vehicles
7 suffered an enormous injury.

8 Now, you say: Well, they took care it because they sort
9 of -- and you participated in that, by the way -- bellied up to
10 the bar and engineered a settlement that, quote, restored their
11 reputation.

12 And to that I say: I don't know. I think they went a
13 long way in -- in remedying the wrong by way of the settlement.
14 But if you are asking me to quantify it and to say: Well, now,
15 no harm, no foul, I'm not in that position today. And --

16 **MR. SLATER:** Your Honor, I'm saying two different
17 things. And let me be clear about it.

18 **THE COURT:** Go ahead.

19 **MR. SLATER:** So the first is that a reputational
20 injury is not an injury to business or property.

21 **THE COURT:** Well, their goodwill.

22 **MR. SLATER:** The reputational aspect of goodwill is
23 not a RICO injury to business or property.

24 Second, there was a contingent risk that the vehicles
25 might be worth less, might be more difficult to sell or

1 what-have-you, and even if that was a RICO injury or could be a
2 RICO injury if it materialized, did not materialize and could
3 not materialize because of the settlement and the program that
4 Volkswagen entered into, both with consumers and with dealers.

5 So if at this time they are saying: Well, we still have
6 vehicles on our lot. It's because they chose not to
7 participate in Volkswagen's problem -- program to address that
8 very issue. And so those are two separate issues, your Honor.

9 Now, second, if I can turn to proximate cause. It's
10 necessary to show that the alleged harms arose from the
11 defendant's own conduct. And this is another manifestation of
12 *Brocade* where -- again, where the plaintiffs are intended to be
13 beneficiaries of the scheme as they pled it.

14 Again, their allegation is the object of this scheme was
15 to sell more cars. They are the people who are selling the
16 cars and benefiting from that.

17 But there also must be a direct relationship between the
18 defendant's own conduct and the injury. And that's the Ninth
19 Circuit *Pillsbury Madison* case. It's also in the *Holmes* and
20 the *Anza* cases, among others, from the Supreme Court, which say
21 that the -- the Court shouldn't go beyond the first step in
22 looking at causation.

23 And here, where there are direct alleged targets, EPA or
24 CARB or consumers who might bring claims, Courts should rely on
25 them to be the carriers of that claim.

1 And they also -- those cases also caution, whereas here
2 there will be complicated issues of allocation of potential
3 damages across defendants, but also, importantly, among
4 categories of potential claimants, the Court should be hesitant
5 to get involved. And those are not arguments to which the
6 plaintiffs have responded at all.

7 The Second Amended Complaint also makes the claim in
8 Paragraph 272 that these same injuries would have arisen with
9 or without Bosch. They say that Volkswagen was intent on doing
10 what it was doing and, in fact, was in control of what it was
11 doing and would have done the same whether it was Bosch as
12 supplier or anybody else as supplier. And that, we submit,
13 also breaks the causation chain from a proximate cause
14 perspective in this case.

15 It also pertains to the --

16 **THE COURT:** I'm sorry. I'm looking at -- what --
17 what paragraph is that? 272?

18 **MR. SLATER:** 272.

19 **THE COURT:** Of the?

20 **MR. SLATER:** Second Amended Complaint.

21 **THE COURT:** Of the Second Amended Complaint, thank
22 you.

23 **MR. SLATER:** So they say -- they say if not -- if not
24 Bosch, then VW would have sought out a different supplier and
25 would have done the same thing and the plaintiffs would have

1 suffered the same injuries. And that, we submit, breaks the
2 causative -- the causative chain.

3 It's also necessary, your Honor, for them to demonstrate
4 participation and -- in the direction of a RICO enterprise.
5 And the extensive new allegations concerning the conduct of
6 Volkswagen, drawn from their own plea agreement as well as some
7 of their employees' plea agreements, accentuates the absence of
8 proximate cause. It was Volkswagen's conduct. Volkswagen's
9 determination to create an exploitive Defeat Device, which
10 Volkswagen has admitted, and not Bosch. They show the absence
11 of a RICO enterprise in which Bosch was participating, agreeing
12 with Volkswagen to develop and employ and implement this sort
13 of fraudulent behavior.

14 And if you look at Paragraph 88 of the Second Amended
15 Complaint, for example, which is among the new ones, they say
16 that it was Volkswagen Group of America that submitted the
17 Certificate of Compliance applications on behalf of the various
18 Volkswagen entities.

19 It was Volkswagen that submitted applications for the
20 three-liter describing supposedly compliant specifications and
21 concealing dual calibrations.

22 They talk about extensive coordination in those
23 communications, and they showed those, between Volkswagen
24 and -- and its member companies.

25 But when it comes to Bosch, if you look at Paragraph 400

1 of the Second Amended Complaint, they say: Well, Bosch must
2 have known. But that's not a sufficient basis for a RICO
3 claim, particularly where if you look at the actual allegations
4 of the Complaint, and where if you look at the documents on
5 which those allegations are -- rest, as we've shown in the
6 submissions that we've made, they describe ordinary course of
7 business conduct or nothing to do at all with these vehicles
8 and diesel engines or they are strictly internal Volkswagen
9 documents that show no connection to Bosch at all.

10 And that is not a sufficient basis to demonstrate that
11 there was, first of all, an enterprise in which the parties
12 came together and agreed that they would engage in a combined
13 operation and it's insufficient to -- to demonstrate any
14 fraudulent intent.

15 And there is nothing here that speaks to Bosch saying: We
16 think it's a good idea that you go ahead and engage in
17 fraudulent behavior; that you create a Defeat Device or that we
18 would assist you in doing so.

19 Now, the plaintiffs kind of remarkably, to my mind --

20 **THE COURT:** It's not Volkswagen that created this
21 device, is it?

22 **MR. SLATER:** Yes, it is.

23 **THE COURT:** Well, I mean --

24 **MR. SLATER:** Volkswagen -- Volkswagen admitted that
25 up and down throughout their --

1 **THE COURT:** You're -- I'm sorry. You're saying Bosch
2 had no role whatsoever with the creation of the device?

3 **MR. SLATER:** I'm saying that Bosch, as alleged in the
4 Complaint, was a supplier of a product.

5 The EDC-17 is not a Defeat Device. And the programming
6 that Bosch did at the request of its customer is not Bosch
7 saying: Hey, yes, we think it's a great idea to have a Defeat
8 Device. It's Bosch taking instruction, as it does from its
9 customers, to configure a product, a complicated engineering
10 product in the way that the customer wishes to.

11 **THE COURT:** Well, I understand that. I mean, I --
12 but Bosch had a role, did it not? Whatever that role was, but
13 it had a role in -- I don't know whether the right word is
14 "modifying" or "programming" or -- or "engineering." I don't
15 know what the right word is, but they had a role, did they not,
16 in -- in enabling the device to defeat the regulators? Did
17 they not have a role in it? You're saying they had no role in
18 it whatsoever?

19 I thought what you're saying to me now, what I'm hearing,
20 correct me if I'm wrong, is that they were following, at
21 most -- I'll put it that way. At most, they were simply
22 following the directions of Volkswagen as to how to
23 appropriately program the device. And I'll end the sentence
24 there.

25 **MR. SLATER:** But, your Honor, that is an ordinary

1 course of business --

2 **THE COURT:** It may be -- wait, wait. I'm just trying
3 to parse your argument a bit --

4 **MR. SLATER:** Yes. So --

5 **THE COURT:** -- from having no role in it to, yes, we
6 had a role in it, but the role we had in it was innocuous or
7 innocent or -- or -- because it comported with ordinary course
8 of business and we were -- we lacked the knowledge of what they
9 were -- what they intended to do with this device, what the
10 effect of the programming, and so forth.

11 If that's what you're saying, I understand that, but I
12 need to understand what you're saying.

13 **MR. SLATER:** Yes, your Honor.

14 And -- I mean, Bosch, again, was a supplier to Volkswagen.
15 Volkswagen has made clear that the Defeat Device was in the
16 programming and calibration of the EDC-17. So to that extent,
17 yes, Bosch was involved.

18 But that's true of many of the other cases in which a
19 party may have been involved in conduct --

20 **THE COURT:** So then the question is: When they --
21 since they were involved, what knowledge did they have and what
22 role did they play --

23 **MR. SLATER:** Correct, your Honor. And there's --

24 **THE COURT:** -- in enabling the device to become a
25 Defeat Device? That seems to me a primary issue.

1 And your argument is, is that there is nothing in the
2 allegations to suggest that the role was other than an innocent
3 supplier.

4 **MR. SLATER:** The reason that question is important in
5 a RICO context is that you have to decide is there a sufficient
6 allegation --

7 **THE COURT:** Okay, okay. I understand the argument.

8 **MR. SLATER:** -- of knowledge and intent?

9 And remarkably in this case the plaintiffs continue, even
10 in their second supplemental brief, to rely on a document that
11 has as the centerpiece of this allegation that has nothing to
12 do with the alleged Defeat Device or the alleged acoustic
13 function, which they claim is the Defeat Device in the EDC-17
14 units.

15 And I'm referring to the June 2008 limitation of liability
16 letter, which has to do with gasoline engines, not diesel
17 engines or class vehicles or their EDC-17 control unit. We
18 pointed the Court to the prices in that document, which is in
19 front of the Court. It's incorporated into the Complaint. The
20 Court needs to address it. That speaks specifically to it
21 being a gasoline engine.

22 And even in that context, I don't think that the document
23 says what they claim it says, but it has nothing to do with the
24 allegations of this case.

25 Now, second, and importantly for this question of

1 knowledge and intent, the document doesn't say: Hey,
2 Volkswagen. This is a great idea. Let's go ahead and create a
3 Defeat Device.

4 It says: Hey, Volkswagen. You've asked for certain
5 programming and calibration in this other functionality in a
6 gasoline engine which, if used in certain ways, could be a
7 Defeat Device. And we're staying to you: You need to make
8 sure you don't do it.

9 We do not agree to engage in that conduct. We are not
10 knowing and intentional participants. To the contrary, we are
11 bringing to your attention this action, which you have control
12 over, to ensure that you comply with the law. And that's very
13 significant and important for purposes of, again, addressing
14 this question of: Is there something in the record and in the
15 factual allegations of this case that would lead a Court
16 fairly, within the constraints of *Twombly* and *Iqbal*, to infer
17 and acknowledge an intent to agree in a scheme to defraud and
18 to agree to engage in this conduct.

19 Now, the *WellPoint* case, we think, is also important in
20 this regard. It's not sufficient to show simply that there was
21 a RICO enterprise. I mean, I'm not going to opine on whether
22 the Volkswagen defendants were engaged in a RICO enterprise,
23 but even if they were, that is not a sufficient basis.

24 And, of course, you know, there are fairly hot and
25 notorious allegations floating around, but you can't tar a

1 third party with that brush. You still have to show that there
2 was knowledge and participation in the direction of the
3 enterprise's affairs. And there is nothing in this Complaint
4 that shows that Bosch had a role to participate in making
5 relevant decisions, in controlling the outcome, in deciding
6 what was to be provided to regulators or for that matter what
7 was ultimately provided in the vehicle.

8 The *Eclectic Properties* case -- again, it's a Ninth
9 Circuit case -- shows that when the allegations are consistent
10 with ordinary course of business relations, they fail for RICO
11 purposes.

12 This, your Honor, ties back to your -- to the Court's
13 June 23rd order, where the Court, again, made it clear that the
14 plaintiffs need to particularize the actions of each defendant
15 and what it is that they claim that defendant did to
16 participate in the direction of the affairs of the supposed
17 enterprise, and they haven't done it.

18 In fact, when it gets to the RICO claims, they resort not
19 just to the Bosch defendants, but to the RICO defendants or the
20 RICO enterprise broadly and not specifying the alleged conduct.

21 The last point I want to touch on, your Honor, is just to
22 emphasize that there isn't aiding and abetting liability under
23 RICO. The plaintiffs kind of try to wiggle around that and
24 say: Well, at least there is aiding and abetting. But there
25 isn't.

1 *Central Bank of Denver* makes clear that you can't imply an
2 aiding and abetting civil claim. If looking now specifically
3 at RICO, aiding and abetting is a separate criminal offense.
4 It's 18 U.S.C. Section 2. 18 U.S.C. Section 2 is not a RICO
5 predicate offense. And to fold that into RICO would go against
6 the teachings of *Central Bank of Denver* and we've cited other
7 cases that have so held.

8 With respect to co-schemer, it's not sufficient to show
9 simply that somebody engaged in mail or wire fraud. Again,
10 there has to be a scheme which, in turn, requires a showing of
11 knowledge and intent to participate in that scheme, which is
12 absent here.

13 It's not -- you know, they cite some language from the
14 *Newcal* case to suggest that if you -- if you participate in
15 some fashion in conduct that's ultimately found to be
16 fraudulent, that's sufficient. That's not true. In *Newcal* the
17 defendant was actively involved in defrauding -- allegedly
18 defrauding specifically identified customers. That was the
19 basis of the claim.

20 The facts that were adduced -- that are adduced in this
21 Complaint belie any basis for making a similar conclusion here.
22 They show ordinary course of business supply arrangements and
23 they don't show any evidence, any evidence, of knowledge of a
24 Bosch defendant that VW was engaged in fraudulent conduct
25 either in the creation of the device or in its -- in the

1 dealings with -- with EPA and CARB, which ultimately go to
2 these issues of fraud.

3 Your Honor, we also, obviously, sought dismissal of GmbH
4 on the basis of personal jurisdiction. If the Court has
5 questions, I can answer.

6 **THE COURT:** No.

7 **MR. SLATER:** Okay. Thank you.

8 **THE COURT:** Thank you, Mr. Slater.

9 Mr. Berman.

10 **MR. BERMAN:** Thank you, your Honor.

11 You gave us some homework to do, to separate out the Bosch
12 entities and describe what each entity did, and we did that.

13 Now, what we heard from Mr. Slater today is extraordinary.
14 We're here on a Complaint where the allegations are true, taken
15 true, and the inferences are drawn in our favor. And what
16 Mr. Slater has been doing this morning is arguing inferences,
17 and we're not at that stage. But he's also ignoring the role
18 we allege in the Complaint quite clearly.

19 We allege basically two things: That Bosch GmbH designed
20 the software for the specific purpose of evading the
21 regulators. Bosch LLC not only was involved in that, but they
22 were the ones who went out and lied to the regulators. They
23 were the ones who met with CARB and said: We're meeting the
24 emission standards.

25 So we painstakingly set out the role of each defendant.

1 And I tried to make it easy for your Honor and your clerks.

2 **THE COURT:** That's always a good idea.

3 **MR. BERMAN:** I took all of the new allegations and
4 the allegations that delineated the role of Bosch LLC and Bosch
5 GmbH and I put them in an exhibit for you. And if you peruse
6 those, those specific allegations, you'll see that we allege
7 far more than what counsel indicated here.

8 For example, we know that from these allegations,
9 particularly at Paragraphs 72 to 73, that Bosch GmbH developed
10 the acoustic function. We allege that it's the code name for
11 the Defeat Device.

12 We allege that in Paragraph 80, that Bosch GmbH and LLC
13 used the EDC-17 software to avoid detection by the regulators
14 and create the Defeat Device. That is knowing participation in
15 an enterprise that was fraudulent. That's all we have to
16 allege at this stage.

17 But we went further than that. Paragraph 120, we allege
18 detailed meetings about acoustic calibration that Bosch was
19 responsible for. It was Bosch that decided to remove some of
20 the documentation so the regulators couldn't see it. And we
21 allege that at Paragraph 122.

22 Now, maybe in Germany hiding incriminating evidence from
23 regulators is normal business activity. It's not here in the
24 United States. It's wire fraud. That's not normal business
25 conduct.

1 **THE COURT:** Well -- well, I -- I'm not -- I have no
2 opinion as to what is the normal procedure in Germany. I do
3 share your view that you cannot sweep into -- you can't -- you
4 can't take ordinary business practices -- you can't take
5 conduct X, call it ordinary business practices and then escape
6 liability because X is fraudulent and it's an ordinary business
7 practice. I mean, that doesn't make sense.

8 We're not -- I think it's wrong to necessarily
9 characterize the conduct as an ordinary business practice in
10 order to escape liability. I have no idea whether it's an
11 ordinary business practice or not.

12 But I look at the underlying conduct and try to make some
13 judgment as to whether or not it meets the standard with
14 respect to a RICO violation. And just calling it something
15 isn't going to do it for me. I'm going to look at the
16 underlying conduct and try to figure out.

17 Now, I think that's what your Complaint does, to tell you
18 the truth. I think you -- you know, you look and you say:
19 This is what happened. This is what happened.

20 And so how you characterize it is less important, in my
21 view, at this point than describing what it is and how it works
22 and what its purpose can be and how you achieve what was done
23 here, which was evasion and concealment of an illegal -- of
24 illegal conduct. So that's -- that strikes me as what you're
25 talking about.

1 **MR. BERMAN:** So I think I've made my point then.
2 I'll just -- I'll give you one more example of how this case
3 isn't on -- Mr. Slater cites all these cases. Well, you can't
4 make a RICO case out of normal business conduct. And he
5 attached to his declaration some of the documents we referred
6 to in the Complaint. And I'd just like to pass up one, if I
7 could, your Honor.

8 (Whereupon document was tendered to the Court.)

9 **MR. BERMAN:** This is Exhibit D to Mr. Slater's
10 declaration. And in his brief Mr. Slater talks about, well,
11 this acoustic device, which was at the heart of this whole
12 fraud, is really all about noise control and we're making much
13 about nothing.

14 In the previous pages you can see that they are discussing
15 the acoustic function will affect -- will trigger when there is
16 a change in fuel temperature, oil temperature, path time
17 function. These are all triggers when the acoustic function of
18 the Defeat Device is going to go on and off.

19 And then Exhibit D, at the very top of it he says -- or
20 the document says: Acoustic function generation two, E-189.
21 So that's generation two cars coming into the U.S. And
22 calibrated driving cycles FTP-75 refers to the highway emission
23 standard that these vehicles would have to meet. And it says:
24 Normal operation, vastly different raw emission levels.

25 Now, we infer from this document, I think we're entitled

1 to at this stage, that they are talking here about the fact
2 that the acoustic device goes into operation on the driving
3 cycle test, but that normal operation vastly different emission
4 levels.

5 That is the type of conduct we've alleged in this
6 Complaint that triggers Bosch's participation in RICO
7 liability.

8 And on the very last two pages of the document, again,
9 Mr. Slater talks about normal business activity. Here is
10 Exhibit E, where at the very top the author is saying: Have
11 you spoken with Bosch about the U.S. capacity and when we use
12 the acoustic function, which had an appearance that won't get
13 us in trouble; i.e., let's get rid of this. And the FP sheet
14 for the expansion has been submitted to Bosch and ultimately
15 that FP expansion sheet was not submitted to the regulators.

16 And that's plain from Exhibit F, which says:

17 "Over the course of next week we will completely
18 remove the description for the two FP sheets indicated
19 below from the function description."

20 So we think that we have satisfied the Court's
21 instructions to us to delineate carefully the role of each
22 Bosch entity and, frankly, I apologize I didn't do it in the
23 first instance.

24 **THE COURT:** Let me ask the question about the damage
25 aspect, if you would.

1 **MR. BERMAN:** That's where I was going.

2 **THE COURT:** Mr. Slater makes a point that for RICO
3 purposes there are no damages here because I guess, if I could
4 be fair to Mr. Slater, I think what he is saying is that there
5 was a massive settlement offer -- or there was a settlement
6 offer by Volkswagen. It has been accepted. It has been
7 accepted by in excess of 99 percent of the consumers; a smaller
8 percentage of the franchise dealers, I understand that. But
9 still, the vast majority even of the franchise dealers accepted
10 the settlement. And as to consumers, over 99 percent accepted
11 it.

12 Therefore, really, there are no damages because people are
13 being adequately compensated. I think the answer is adequately
14 compensated by both Volkswagen and I think Bosch has
15 participated in that settlement. Isn't that right? Haven't
16 they? I mean, to some extent.

17 **MR. SLATER:** In the consumer settlement context?

18 **THE COURT:** Yes, yes. In the consumer settlement.

19 So what's your response to that?

20 **MR. BERMAN:** My response, your Honor, is very simple.
21 The Complaint alleges very specific damages suffered by these
22 dealers that has not been compensated.

23 Number one, vehicle inventory, Paragraph 216. So the
24 dealers, yes, they sold cars at a premium, but they paid a
25 premium and they are stuck with these cars on their lots. They

1 are not sellable or they are certainly not sellable at the
2 prices that they thought they would get for them.

3 Paragraph 214. There is a decrease in franchise value.
4 Now, Mr. Slater says: Oh, everything is goodwill. That
5 reminds me of an Abraham Lincoln quote. He said to a jury:
6 How many legs does a dog have if you call his tail a leg?
7 There is four. Saying a tail is a leg doesn't make it a leg.

8 So what he's saying here is this is all goodwill, but
9 that's not what the allegations are. There are fewer
10 non-diesels being bought and there are higher financing
11 obligations because we can't sell our cars. That's a harm that
12 all the dealers have suffered. That's at Paragraph 218.

13 Lost service revenue. There is 200,000 cars that are gone
14 because of this fraud that we would have gotten -- my dealers
15 would have gotten service on. That damage is live and it's
16 pled.

17 There are cars sitting on the lots that are not fixed,
18 that the dealers can't sell. That's also alleged at
19 Paragraph 216 and Paragraph 1.

20 And each of the plaintiffs -- at Paragraph 21 and
21 Paragraph 29, each of the dealer plaintiffs allege very
22 specific damages, and I direct you to that.

23 The issue of goodwill. All right. When we get into this
24 case on the damage phase, there is something that dealers have.
25 It's called franchise rights. And those franchise rights, we

1 allege, were diminished.

2 Take Mr. Napleton. He bought his dealership for something
3 like \$20,000,000 four days before the fraud. Now, his
4 franchise value, his franchise rights have gone down. And
5 franchise rights are not the same thing as goodwill.

6 Last night one of the accounting lawyers in my firm pulled
7 up the 10-K for Auto Nation. And Auto Nation lists its assets.
8 It has inventory, which we claim are injury, suffered injury.
9 It lists its franchise rights separate and apart from goodwill
10 on their 10-K. We allege harm to franchise rights. That is
11 not goodwill.

12 But, your Honor, even if it was goodwill, I think that
13 *Diaz versus Gates* case is right on point.

14 **THE COURT:** Can you give an example of a franchise
15 right that -- that you think is not encapsulated in goodwill?

16 **MR. BERMAN:** Well, franchise right is a specific
17 contractual assignment value --

18 **THE COURT:** And how it's been affected and how it's
19 been damaged by this?

20 **MR. BERMAN:** Well, we allege at those paragraphs that
21 the franchise rights are less valuable than they were because,
22 let's face it, a Volkswagen franchise is being harmed now by
23 the fact it's selling fewer -- well, it sells no diesel cars
24 whatsoever. And when you bought this franchise, you thought
25 you were getting into a very robust diesel market.

1 And, in fact, that's what Volkswagen pitched to all these
2 dealers. We're going to invest in diesel. You're going to
3 benefit from it. That value has gone down.

4 And we also allege at Paragraph 216 that the value of the
5 franchise right has gone down because we're not selling
6 non-diesel cars at the rate we had been because of this fraud.

7 And the notion that we're somehow removed from this, in
8 this fraud we are the most direct victims. We bought the cars
9 directly from Volkswagen. It's hard to imagine a more direct
10 relationship and a more direct injury that flows from this
11 conduct than we have here.

12 **THE COURT:** Okay. Thank you very much.

13 **MR. BERMAN:** Thank you, your Honor.

14 **THE COURT:** Mr. Slater, let me ask you a question on
15 the service contracts because I -- my understanding of the
16 automotive industry is that -- is that dealers -- part of the
17 compensation that a dealer envisions in terms of -- in terms of
18 the business is if I sell car X, I'm going to have -- you know,
19 and I -- I have some relationship with the consumer. That
20 consumer is going to come back to me over the life of the car
21 and I'm going to, you know, oil it up. I'm going to replace
22 parts. I'm going to -- I'm going to do any number of things,
23 including, by the way, taking trade-ins and selling the next
24 car. Because I can talk with that consumer. The consumer has
25 a product. The consumer trusts me. Trusts the product. And I

1 can then sell it. I mean, I'm positioned. I'm positioned to
2 engage in an ongoing business.

3 And if you -- if you have a set of cars that you can't
4 sell, even if Volkswagen takes them back or you trade them in
5 or whatever, you can't sell, I'm -- I'm being denied that.
6 That's an injury I'm suffering.

7 **MR. SLATER:** It's not an actual concrete injury in
8 fact, your Honor. It's -- I hope that I will develop
9 relationships with customers. I hope they will come back.
10 They have no obligation to come back to that dealer. They have
11 no obligation to engage in any contact with that dealer.

12 **THE COURT:** Well, it's a different thing to -- if all
13 we're testing -- and maybe your argument is there has to be a
14 legal obligation. No legal obligation, no damages.

15 Because you're right. There is no legal -- as I
16 understand it, there is no legal obligation for me to go to the
17 dealer that sold me the car and say: You serviced this car --
18 now, as a matter of fact, just based upon my own experience,
19 I've bought cars in Marin County and they are serviced in
20 San Francisco, you know, much to, I guess, the consternation of
21 the Marin dealer. But -- because I have no legal obligation.
22 I will go to a service place that is convenient.

23 But the experience of a dealer and why he has a valuable
24 franchiser -- part of the value of the franchise is the
25 expectation. And if you're telling me that's not enough, the

1 expectation of service contracts. If you say: Look,
2 expectations are very nice. I expect sunny weather. But, you
3 know, that's not actionable.

4 **MR. SLATER:** Correct, your Honor.

5 **THE COURT:** And that's your view.

6 **MR. SLATER:** It's hypothetical, contingent and
7 speculative within the meaning of the law. That's what I would
8 say.

9 **THE COURT:** Okay. Got it. I understand that
10 argument.

11 **MR. SLATER:** Now, if I can go back to the beginning
12 of Mr. Berman's argument, where he said that we're not in the
13 inference stage. That's absolutely wrong.

14 We're at the stage of the case where under *Twombly* and
15 *Iqbal* the issue is, do the facts alleged, and in this case in
16 respect of documents that are incorporated by reference.

17 **THE COURT:** Right. Do they allege with sufficient
18 specificity -- do the facts allege with specific -- with enough
19 specificity that reasonable inferences can be drawn?

20 I mean, you're not saying you don't draw any inferences,
21 are you? Or maybe you are.

22 **MR. SLATER:** No, your Honor. I'm not saying you
23 don't draw any inferences.

24 **THE COURT:** You're saying are the facts there from
25 which you can draw the inferences.

1 **MR. SLATER:** And are those inferences more
2 plausible -- the inferences of wrongful conduct more plausible
3 than the inferences of --

4 **THE COURT:** Right. Okay. I think that's the
5 standard.

6 **MR. SLATER:** Now, looking at the -- the allegations
7 that were recited in oral argument go even beyond the
8 allegations in the complaint. There is no --

9 **THE COURT:** No. It has to be tested the allegations
10 in the Complaint. No argument there.

11 **MR. SLATER:** I want to turn to these documents that
12 were handed up.

13 Exhibit 9 is not a Bosch document. It's an internal
14 Volkswagen document.

15 Exhibit E is not a Bosch document. It's an internal
16 Volkswagen document that talks in the Volkswagen perspective
17 about how Volkswagen needs to hide certain information.

18 Exhibit F was not: Hide this information from the
19 regulators. It was: Bosch, don't include certain information
20 in what you send back to us. We already have that information.
21 "We," Volkswagen. We don't need it back from you.

22 None of these things support any -- anything with respect
23 to knowledge or intent on the part of Bosch.

24 And there are --

25 **THE COURT:** Can I ask you about that?

1 **MR. SLATER:** Yes.

2 **THE COURT:** I understand the argument that these are
3 not Bosch documents, if that's the argument you're making -- or
4 Volkswagen documents.

5 But if there is a document that's a Volkswagen document
6 that shows a conversation between somebody at Bosch and
7 somebody at Volkswagen, are you saying that I couldn't draw an
8 inference from that?

9 **MR. SLATER:** Your Honor, there is no document that's
10 been presented that shows any communication from Volkswagen to
11 Bosch that says the acoustic function is being used to
12 manipulate emissions or, for example, any sharing of something
13 like what was displayed in Exhibit D about an impact on --

14 **THE COURT:** Well, but looking at F, that is an email
15 between Bosch and -- Bosch is a party to the email, right?

16 **MR. SLATER:** Bosch is a party to the email. But it
17 doesn't say anything about --

18 **THE COURT:** All right.

19 **MR. SLATER:** -- what's the underlying issue. There
20 is no suggestion that there's --

21 **THE COURT:** No, no. I understand the argument. I
22 just want to make sure that you're not saying that because a
23 document is a Volkswagen document, therefore, nothing can be
24 said about Bosch in connection with it because it's not a Bosch
25 document.

1 **MR. SLATER:** No. Well --

2 **THE COURT:** I mean, usually documents from one --
3 from Party A to Party -- from A to B are created by A or
4 created by B, but the knowledge with the content, what it said,
5 may very well implicate A and B.

6 **MR. SLATER:** But in this case the limited instances
7 that have been shown of communication from A to B do not
8 communicate --

9 **THE COURT:** I understand the argument.

10 **MR. SLATER:** Okay. Second, you have to take into
11 account the entire record that has been put before you
12 concerning Volkswagen's conduct, including its plea agreement
13 and that of its employees, each of which speak to their
14 specific intent to keep the knowledge, information and
15 intent --

16 **THE COURT:** Let me ask you about that. Now,
17 Volkswagen entered a guilty plea -- pleas in Detroit in
18 connection with the Defeat Device. And they have -- and we
19 have -- we have their plea agreement. We have their
20 recitations and so forth.

21 Are you saying that because in this colloquy that is
22 accepted as an admission against penal interests, admission by
23 a defendant, Volkswagen, that Bosch does not -- is not
24 implicated, are you saying that, therefore -- therefore, the
25 inference is that Bosch had nothing to do with it or Bosch was

1 an innocent party?

2 **MR. SLATER:** What I'm saying, your Honor, is in the
3 circumstance where the documents in front of you talk about
4 Volkswagen's intention to keep the information within
5 Volkswagen and to a small number of people within Volkswagen,
6 when the plea agreement corroborates that, and when the limited
7 communications that do go between Volkswagen and Bosch have
8 nothing to do with any fraudulent conduct, it is not reasonable
9 to infer that Bosch had knowledge and intent necessary to be
10 part of --

11 **THE COURT:** Well, I think the converse. If I accept
12 what you've just said, I think the converse is also equally
13 true. That is, that the absence of Bosch being named in the
14 colloquy is not evidence that Bosch had nothing to do with it.
15 I'm not saying Bosch did. I want to be careful here. But I'm
16 just saying that it's -- you can't draw the inference that
17 because they are not mentioned, therefore, they had no role in
18 it, I don't think you can draw that inference.

19 The only inferences I think that are fair to draw is:
20 What do the words themselves mean? What is the existence of a
21 plan? What -- you know, what did they, that is, or it or
22 Volkswagen do? And then that's a fair platform from which
23 maybe other things can be inferred, depending on other pieces.
24 I don't know. That's what -- that's what the plaintiffs are
25 saying, as I understand their Complaint.

1 But I just -- I'm just -- you know, I have been around
2 long enough to know that plea colloquies are -- first of all,
3 they are negotiated with the United States Attorney.

4 Secondly, they are negotiated with the thought in mind of
5 being very careful not to pull in, whether appropriate or not,
6 other parties into a -- into a guilty plea, because of the
7 enormous implications of a criminal conviction.

8 So it's very -- as a general rule, they are narrowly
9 tailored. And I'm loathe to look at a plea colloquy and say:
10 Look, this wasn't mentioned. Therefore, they didn't do
11 anything.

12 I don't know. I'm not saying that's evidence of guilt.
13 I'm simply saying it may not be evidence one way or the other.

14 **MR. SLATER:** Your Honor, I'm saying it's information
15 that has to be taken into account in looking at the allegations
16 in the Complaint against the totality of the circumstances that
17 are before you, including that colloquy, but also including
18 what I submit are ordinary course of business documents that do
19 not display any knowledge or any intent in respect of
20 fraudulent conduct --

21 **THE COURT:** I do have the argument in mind.

22 **MR. SLATER:** And even if you accept that -- even if
23 you conclude that there is a tie under *Twombly* and *Iqbal*,
24 if -- and under *Eclectic Properties* and a whole bunch of other
25 cases, if the conduct is equally consistent with innocent or

1 fraudulent conduct, the plaintiffs haven't gotten over the line
2 at the pleading stage, and that's where we are now.

3 **THE COURT:** Okay. Thank you very much.

4 **MR. SLATER:** Thank you, your Honor.

5 **THE COURT:** Mr. Berman?

6 **MR. BERMAN:** Yes, your Honor. One second.

7 **THE COURT:** Briefly.

8 **MR. BERMAN:** Not on the argument.

9 But I was sitting in the courtroom today saying, gosh, I
10 have been here so many times, I never noticed these paintings.
11 Could you tell us a little bit of the origin of these?

12 **THE CLERK:** Off the record?

13 **THE COURT:** Off the record.

14 The argument is concluded and submitted.

15 (Discussion held off the record.)
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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.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Tuesday, October 17, 2017