

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*

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

Tuesday, October 17, 2017