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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION This Document Relates To: *Saavedra, et al. v. Volkswagen Aktiengesellschaft, et al.*, Case No. 3:16-cv-07214-CRB *Gaines v. Volkwagen Group of America, Inc.*, Case No. 3:17-cv-01114-CRB.	Lead Case No. 3:15-md-02672-CRB CLASS ACTION **PLAINTIFFS' OPPOSITION TO VW'S MOTION TO DISMISS PLAINTIFSS' CONSOLIDATED CLASS ACTION COMPLAINT** Date: September 13, 2019 Time: 10:00 a.m. Courtroom: 6 (17th Floor) Judge: Hon. Charles R. Breyer

Plaintiffs Robert Saavedra, Armando Rodriguez, and Mickey Gaines (collectively, the "Plaintiffs") on behalf of themselves and all others similarly situated, respectfully request that this Court deny the Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint filed on May 23, 2019 (the "Motion;" ECF 6334) by Defendants Volkswagen AG ("VWAG"), Volkswagen Group of America, Inc. ("VWGoA"), and Audi AG ("AUDI;" collectively, "Volkswagen" or "Defendants") for the reasons set forth below.

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I. INTRODUCTION

On behalf of all Volkswagen frontline salespersons ("Salespersons"), Plaintiffs' Consolidated Class Action Complaint (the "Complaint") seeks redress for injuries Salespersons suffered as a result of Volkswagen's world-wide "Dieselgate" fraud. While the contours of this fraud are well-known, its impact on Salespersons has not yet been addressed. Volkswagen's fraud caused the Salespersons significant damages, including lost commissions and other incentive pay, as well as lost employment and economic opportunity.

Volkswagen now moves to dismiss the Complaint on five grounds, none of which withstand scrutiny. *First,* Volkswagen argues that all of Plaintiffs' claims are foreclosed by the class settlement Volkswagen entered into with franchise dealers. But this is a legal impossibility, given that Plaintiffs had no say in that settlement, no notice of the settlement, received no compensation from the settlement, and the rights Plaintiffs seek to vindicate were not at issue in that case. *Second,* Volkswagen argues the Complaint does not adequately plead causes of action for breach of contract, fraud, or negligent interference with prospective economic advantage. But a plain reading of the Complaint, drawing all inferences in Plaintiffs' favor, confirms Volkswagen is mistaken. *Finally*, Volkswagen's Racketeering Influenced and Corrupt Organization Act ("RICO") arguments misapply settled legal principles and this Court's prior decisions. Volkswagen's motion should be denied.

II. BACKGROUND

Between 2009 and 2015, Volkswagen lied to the world about the capabilities of its "clean diesel" engines. Volkswagen's fraud enabled it to sell hundreds of thousands of vehicles (the "Defective Vehicles") that did not meet Environmental Protection Agency ("EPA") emissions standards. Complaint, ¶ 39. To carry out its scheme, Volkswagen engaged in a years-long deceptive marketing campaign and engaged Salespersons to conduct frontline sales. Volkswagen required Salespersons to earn a certification, administered by Volkswagen, before they could sell its vehicles, and then incentivized Salespersons to sell its vehicles by paying them bonuses when they hit sales milestones.

Nearly all of a Salespersons' income comes from commissions and other incentive payments. Complaint, ¶¶ 46-51. Some of these payments come from the dealerships at which Salespersons work; others come directly from Volkswagen. *Id.* Before they could earn any commissions, Volkswagen required Salespersons to obtain certification directly from Volkswagen. *Id.*, ¶ 45. Once certified, Volkswagen tracked Salespersons' performance using its "Customer Service Index" ("CSI"), which tracked how well Salespersons presented Volkswagen's Defective Vehicles and brand to the consuming public. *Id.*, ¶ 52. Volkswagen compensated those Salespersons who achieved high CSIs through its "VW Elite" cash bonus program. *Id.*, ¶ 51.

Sales of Volkswagen vehicles plummeted after they publicly admitted their fraud in October 2015. Complaint, ¶¶ 55-57. While the decline in sales affected both Volkswagen and its dealerships, it also significantly injured the Salespersons. Salespersons not only found their commissions significantly diminished, but were also forced to spend significant time dealing with irate customers who had purchased Defective Vehicles from them. *Id.*, ¶ 62. Those customers lost faith not only in the Volkswagen brand, but also in the Salespersons who sold them the Defective Vehicles. *Id.* Their subsequent refusal to purchase cars from Salespersons deprived Salespersons of not only the commission payments they received from their dealerships, but also the incentive bonuses they received directly from Volkswagen. *Id.*, ¶ 62-63. Salespersons also lost out on the promotions and other employment benefits their dealerships would have conferred on them but for the declining sales caused by Volkswagen's fraud. *Id.*, ¶ 63. Plaintiffs brought the Complaint to recover for these significant injuries.

III. ARGUMENT

A. Plaintiffs' Claims Are Not Released by the Dealer Class Settlement

Volkswagen argues the Dealer Class Settlement forecloses the Salespersons' claims. Volkswagen asserts that, as "agents" and "representatives" of VW dealerships, these workers' claims are encompassed by that settlement's class-wide release. Motion, 9:1-4, 9; ECF 2802 at 9.3 (dealers agreed to release claims "on behalf of themselves and their agents, … [and] representatives" with respect to "all claims related in any way to the TDI matter.") However, the

class members in the Dealer Class Settlement are dealerships, not commissioned salespersons, and Volkswagen's attempt to tie them together is unavailing for several reasons.

1. Defendants Fail to Establish that the Salespersons Are the Dealers' Agents

Volkswagen argues in conclusory fashion that "Plaintiffs were in a classic agency relationship with their dealers." Motion, 9:7. But Volkswagen does not even try to substantiate this statement under basic principles of agency. Instead, Volkswagen offers little more than semantics—that because Plaintiffs are "Sales Representatives," they are "representatives" and, therefore, agents. However, "[t]he name which the parties give to the relation is not determinative." Restatement (Second) of Agency § 13 (1958), Comment B.

For an agency relationship to exist, the agent must "hold[] a power to alter the legal relations between the principal and third persons and between the principal and himself." Restatement (Second) of Agency § 12 (1958). A classic feature of this power is the ability to "bind[] the principal to a third person in contract." *Id*. at Comment A; *see also Pac. Ready-Cut Homes v. Seeber*, 205 Cal. 690, 694 (1928). Likewise, "[a]n agent is a fiduciary with respect to matters within the scope of his agency." Restatement (Second) of Agency § 13 (1958); *see also Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1579 (1994) ("An agent *is* a fiduciary") (emphasis in original). As a fiduciary, the agent has a "duty … to act primarily for the benefit of another in matters connected with [their] undertaking." Restatement (Second) of Agency § 13, Comment A (1958). California courts have long looked to these bedrock principles in deciding agency relationships. *See, e.g., Alvarez v. Felker Mfg. Co*., 230 Cal. App. 2d 987, 999 (1964).

Given these principles, employers typically enter into agency relationships only with supervisory employees.[1] An employee is not an agent of his employer simply by virtue of the fact that he is an employee. *See, e.g.*, N.Y. Lab. Law § 2 ("'[a]gent' of a corporation includes, but is not limited to, a manager, superintendent, foreman, supervisor or any other person employed

[1] *See, e.g., Original Sixteen to One Mine, Inc. v. Fed. Mine Safety & Health Admin.*, 175 F. App'x 825, 827 (9th Cir. 2006) (holding that all miners working at a mine are not agents of the mine operator); *Dekle v. Glob. Digital Sols., Inc*., 2015 WL 5734451, at *2, FN 5, (S.D. Ala. Sept. 30, 2015) (distinguishing between "managers / officers / agents of defendants" and "rank-and-file employees of defendants").

acting in such capacity"). Courts routinely hold that rank and file employees, such as Plaintiffs, are not agents of their employers.[2]

Volkswagen makes no claim that these agency principles are satisfied here. It does not, and cannot, point to Complaint allegations showing Salespersons had the power to alter the legal relations between their respective dealers and third persons, or that the Salespersons were supervisors or managers. Volkswagen does not identify any allegations suggesting Salespersons could sign contracts or consummate sales transactions on behalf of the dealers. The Complaint features no allegations that Salespersons represented the dealers in their dealings with Volkswagen, or that they engaged in any other conduct evincing the power to bind the dealers.

These are basic considerations in agency analysis, but Volkswagen fails to identify any allegations in the Complaint suggestive of an agency relationship. This is hardly surprising, as no such allegations exist. Though it should go without saying, because this is a Rule 12 motion, Volkswagen is not free to make factual arguments that are divorced from the allegations of Plaintiffs' Complaint.[3] *See, e.g., WBS, Inc. v. Croucier*, 762 F. App'x 424, 428 (9th Cir. 2019).

2. The Dealer Settlement Does Not Have Preclusive Effect on the Salespersons under Class Action Preclusion Rules

Even if the Court finds that the release language somehow encompasses non-party Salespersons, that does not resolve the Court's inquiry. As this Court explained in its Order enforcing the Dealer Class Settlement against closely related entities who invested in a Volkswagen franchise dealership, the Court must also address the procedural concerns "founded

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[2] *See, e.g., Original Sixteen to One Mine,* 175 F. App'x at 827 (an "overly-broad standard could potentially reclassify the vast majority of rank-and-file miners as agents—every time an experienced miner tells a less experienced miner 'what to do' on the job, the experienced miner would be acting as the operator's agent."). Likewise, abundant case law in federal and state courts holds that anti-discrimination statutes that define "employer" to include "any agent" of the employer extend liability for discrimination only for supervisors. *See, e.g., Janken v. GM Hughes Elecs*., 46 Cal. App. 4th 55, 67 (1996); *Vance v. Ball State Univ.*, 570 U.S. 421, 458 (2013).

[3] Moreover, it is improper for the Court to decide the agency issue in the context of a pleading challenge. *Borders Online,* the only case cited by Defendants in their analysis of agency principles, firmly establishes this principle. *Borders Online v. State Bd. of Equalization,* 129 Cal.App.4th 1189 (2005) ("[T]he existence of an agency relationship is usually a question of fact, unless the evidence is susceptible of but a single inference"). A "single inference" of agency cannot be drawn here, at the Rule 12 stage. *See Fincher v. St. Paul Fire & Marine Ins. Co*., 595 F.3d 820, 824 (8th Cir. 2010) ("the party relying on the agency relationship has the burden of establishing its existence by clear and satisfactory evidence") (internal quotation omitted).

in the well-recognized concepts of res judicata and collateral estoppel." ECF 4951 at 13:24-27 (citing *Sandpiper Vill. Condo. Ass'n., Inc. v. Louisiana-Pac. Corp*., 428 F.3d 831, 847 (9th Cir. 2005)). The "requirements of identity of the parties, ... adequate notice, and adequate representation apply" in the preclusion analysis. *Sandpiper*, 428 F.3d at 847.[4]

Rigorous application of these principles ensures the party allegedly precluded by the prior resolution of a claim or issue enjoyed a "'full and fair opportunity' to litigate ... in the earlier case." *Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162, 1164 (9th Cir. 1991). Further, a class action settlement may only release claims that are "based on the identical factual predicate as that underlying the claims in the settled class action." *Hesse v. Sprint Corp*., 598 F.3d 581, 590 (9th Cir. 2010) (quoting *Williams v. Boeing Co*., 517 F.3d 1120, 1133 (9th Cir. 2008)). "Put another way, a release of claims that go beyond the scope of the allegations of the operative complaint is impermissible." *Lovig v. Sears, Roebuck & Co.*, 2014 WL 8252583 at *2 (C.D. Cal. Dec. 9, 2014).

By any measure, Salespersons did not have a "full and fair opportunity" to litigate their claims in the dealer proceeding. As non-parties, they were not served with process or other case documents. They did not receive notice of the proposed settlement. They never had a chance to object to, or opt out of, the settlement. They never received any compensation or consideration for the release of any claim. The operative dealer complaint does not address Salespersons, set forth their injuries, or otherwise have anything to do with Salespersons. *See* ECF 1969. Without these crucial factual allegations, any release of Salespersons' claims necessarily goes "beyond the scope of the allegations of the operative complaint." *Lovig*, 2014 WL 8252583, at *2. In short, the dealer proceedings had nothing to do with Salespersons when the dealer case was filed; it had nothing to do with Salespersons when the case was settled; and it has nothing to do with Salespersons now. Accordingly, the Dealer Class Settlement does not bar Plaintiffs' claims.[5]

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[4] "[T]here must be an 'identity of parties' in the original action and in the action sought to be enjoined," under which their interests are "sufficiently parallel." Order Enforcing the Dealer Class Settlement (ECF 4951), 14:2-15; *Sandpiper*, 428 F.3d at 847-848. Salespersons' claims are in no way derivative of or encompassed by the dealerships' claims against Volkswagen, and consequently could not have been released by the Dealer Class Settlement.

[5] Though it should be clear that, as a matter of law, the Dealer Class Settlement does not bar Plaintiffs' claims, because any argument to the contrary necessarily relies upon factual assertions outside the four corners of Plaintiffs' complaint, the matter is not suited for determination on a Rule 12 motion.

3. Volkswagen Fails to Provide Authority Supporting the Extension of a Class-wide Release of Claims to Agents of the Class Members

Volkswagen provides no authority for the proposition that a principal may release the claims of its agents against third parties, let alone that a class-wide release of claims may permissibly extend to class members' agents. This is unsurprising, as the universe of claims that could be extinguished by such treatment of releases is virtually limitless. For this reason, courts view broad releases that extend to non-parties with skepticism.[6]

Volkswagen relies heavily on this Court's Order enforcing the Dealer Class Settlement against closely-related investors in a Volkswagen franchise dealership (ECF 4951), but this Order does not support Volkswagen's position.[7] *See* Motion, 8:23-11:8. It neither addresses whether class releases, as a general matter, extend to class members' agents nor whether the Dealer Class release, in particular, extends to the agents of settling Dealers.

Instead, the Order related to extension of the release to investors that "controlled and funded" class member dealers. ECF 4951, 10:27-11:5. The Order concerns closely related entities, all of which were owned by the same individual and acted in concert, that were investors in the respective Dealer class member. Notably, the investors did not maintain independent business relationships with Volkswagen, as the Salespersons do here. *See* Complaint, ¶¶ 45, 50-52. As a result, any claims held by investor entities are purely derivative of the Dealer claims. In extending the Dealer Class release to these investors, the Court looked to the fact that a single individual controlled all of the entities, including the dealer entity, and was in a position to assess the impact of the settlement agreement for all of the related entities. ECF 4951, 15:1-19.

Here, the dealers and the Salespersons are not controlled by the same entities, and their

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[6] *See, e.g., Owens v. SSRMI, LLC*, 2017 WL 2190646, at *2 (M.D. Fla. Apr. 28, 2017) (report and recommendation adopted sub nom. *Owens v. SSRM1, LLC*, 2017 WL 2172089 (M.D. Fla. May 17, 2017)) (broad releases may amount to "side deals" that award defendants with gratuitous releases of claims); *see also Ross v. Lockheed Martin Corp*., 267 F. Supp. 3d 174, 204 (D.D.C. 2017); *Ortiz v. Am. Airlines, Inc.*, 2016 WL 8678361, at *11 (N.D. Tex. Nov. 18, 2016).

[7] Volkswagen breezily cites to just two other cases to support their Dealer Class Release argument. *Borders Online*, 129 Cal.App.4th 1179, sets forth agency principles while *Pension Tr. Fund for Operating Eng'rs v. Dalecon, Inc*., 2014 WL 1007274 (N.D. Cal. Mar. 12, 2014), deals with parties' intent in structuring a release. Neither advances Volkswagen's arguments.

economic interests are entirely distinct, as opposed to the uniform economic interests and claims shared between dealers and investors. The dealers were not in a position to decide whether the Dealer Class Settlement was in the best interest of the Salespersons, because the dealers and Salespersons are at arm's length. As the Order was concerned with the "owners" of the dealer, and not the purported "agents" of the dealer, it is irrelevant to this Motion.

B. Plaintiff Asserts Cognizable Civil RICO Claims.

1. Overview of Civil RICO

The United States Supreme Court has emphasized the breadth of the RICO statute:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to be liberally construed to effectuate its remedial purpose, Pub. L. 91-452, §904(a), 84 Stat. 947. The statute's remedial purposes are nowhere more evident that in the provisions of a private action for those injured by racketeering activity.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985).[8]

RICO's broad provision for a private right of action provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 647 (2008) (quoting 18 U.S.C. § 1964(c)). To recover under RICO, Plaintiffs must thus show that they have "suffered (1) an injury to 'business or property,' that is (2) 'by reason of' a RICO violation." *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 2017 WL 4890594, at *4 (N.D. Cal., Oct. 30, 2017) (Breyer, J.) (hereinafter referred to as "*In Re: Volkswagen: Franchise Dealers*").

To successfully plead a RICO injury, Plaintiffs must satisfy two requirements. First, they must plausibly allege "a harm to a specific business or property interest." *Diaz v. Gates,* 420 F.3d 897, 900 (9th Cir. 2005) (en banc). This is "a categorical inquiry typically determined by reference

[8] *See also, Boyle v. United States*, 556 U.S. 938, 944 (2009) (RICO is to be "liberally construed to effectuate its remedial purposes"). Similarly, the Ninth Circuit has held that, "[a]s Congress admonished and as the Court repeated in *Sedima*, RICO should be *liberally construed* to effectuate its remedial purposes." *Odom v. Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir. 2007) (quoting *Sedima*, 473 U.S. at 497-98).

to state law." *Id*. Second, they must plausibly allege that their injury has resulted in "concrete financial loss." *Canyon Cty. v. Syngenta Seeds, Inc.,* 519 F.3d 969, 975 (9th Cir. 2008) (quoting *Oscar v. Univ. Students Co-op. Ass'n,* 965 F.2d 783, 785 (9th Cir. 1992) (en banc)) (abrogated on other grounds by *Diaz*, 420 F.3d at 897).

As courts have emphasized, "[a] plaintiff injured by civil RICO violations deserves *a complete recovery*[.]" *Maiz v. Virani*, 253 F.3d 641, 664 (11th Cir. 2001); *Pac. Gas & Elec. Co. v. Howard P. Foley Co.*, 1993 WL 299219, at *2 (N.D. Cal. July 27, 1993) ("A plaintiff prosecuting a civil RICO claim is entitled to *complete recovery* for the harm that proximately results from the predicate acts."). Indeed, RICO provides flexible concepts of causation and damages to ensure a defendant is held liable "for the consequences of that person's own acts." *Bridge,* 553 U.S. at 654 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). Accordingly, a civil RICO plaintiff may recover all damages that are the "foreseeable and natural consequence[s]" of the scheme. *Id.* at 658.

In this case, Plaintiffs allege violations of 18 U.S.C. §§ 1962(c) and (d). Section 1962(c) "makes it unlawful for any person employed by or associated with an enterprise engaged in or affecting interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Bridge*, 553 U.S. at 647 (quoting 18 U.S.C. § 1962(c)). To state a RICO claim under this Section, Plaintiffs must plausibly allege that the VW "participated, directly or indirectly, in (1) the conduct, (2) of an enterprise that affects interstate commerce, (3) through a pattern, (4) of racketeering activity." *In Re: Volkswagen: Franchise Dealers*, 2017 WL 4890594, at *11. Section 1962(d) authorizes civil suits brought by anyone "injured . . . by reason of a conspiracy[]" to violate any RICO provision, including § 1962(c). *See Beck v. Prupis*, 529 U.S. 494, 500 (2000) (quoting 18 U.S.C. §§ 1962(d), 1964(c) in tandem).

Volkswagen does not dispute that Plaintiffs have adequately alleged it participated, directly or indirectly, in the conduct of an enterprise that affects interstate commerce through a pattern of racketeering activity. *See* ECF 6334, at pp. 20: 13 – 22: 22. Instead, Volkswagen argues that Plaintiffs have not alleged a cognizable cause of action under RICO for only two reasons: (1)

there is no "direct relationship" between Plaintiffs' injury and Volkswagen's conduct, because the dealers are the "more direct victims" of the unlawful conduct; and (2) Plaintiffs' injuries do not concern "an injury to 'business or property,'" but instead, are "intangible injuries." *See ibid.* Volkswagen is wrong on both accounts.

2. Plaintiffs Allege a Recognized RICO Injury

a. Plaintiffs Allege a Concrete, Tangible Injury to Business and Property.

A RICO injury must be "concrete" or "tangible." *Canyon Cty.,* 519 F.3d at 975; *Diaz*, 420 F.3d at 900. In the Ninth Circuit, however, this requirement sets "a relatively low threshold." *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, and Products Liab. Lit.*, 295 F. Supp. 3d 927, 962 (N.D. Cal. Mar. 15, 2018). As with Article III, Plaintiffs do not need to identify "the amount of damage" so long as "the fact of damage" is based on a plausible theory. *Mendoza v. Zirkle Fruit Co*., 301 F.3d 1163, 1171 (9th Cir. 2002).

Plaintiffs' Complaint proffers extensive allegations of tangible, concrete, financial loss in the form of depressed wages, a reduction in income-earning potential, and lost employment opportunities – ***past, present,*** **and** ***future*** – directly stemming from the frauds perpetuated by Volkswagen. Complaint, ¶¶ 55, 58, 59, 65. In this Court's prior decision concerning the Dealers' RICO claims, the Court explained that "the Franchise Dealers plausibly allege they have lost profits," which was sufficient to allege an injury to their business and property interests. *In Re: Volkswagen: Franchise Dealers*, 2017 WL 4890594 *6. This was hardly surprising, as binding Ninth Circuit authority confirms that allegations of lost or depressed income or employment opportunity suffice to state a plausible claim for "an injury to business or property" under RICO.

For example, in *Mendoza*, a group of agricultural laborers alleged that certain fruit orchards and packing houses engaged in a RICO enterprise to depress their wages by hiring undocumented workers. *Mendoza*, 301 F.3d at 1166. The growers argued these "lost wages" injuries were not concrete or tangible, because "employees would have to show a 'property right' in the lost wages, by showing that they were promised or contracted for higher wages." *Id.* at 1168-69, fn. 4. *Mendoza* explained that this argument was "misplaced in the context of RICO,"

because "[t]his case does not implicate procedural due process; rather, what is required is precisely what the employees allege here: ***a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes***." *Id.* (emphasis added).

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

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

Id. at 900–01.

"[A] legal entitlement to business relations unhampered by [Volkswagen's] schemes prohibited by the RICO statutes" is precisely what this case is all about. *See Mendoza,* at 1168-69, fn. 4. Plaintiffs have seen and continue to see sharply depressed wages and income. Volkswagen's scheme has poisoned Plaintiffs' relationships with their customers, sowing mistrust and discontent, preventing Plaintiffs from earning a livelihood. Simply, Plaintiffs were duped into being an unwitting party to Volkswagen's fraud, passed on myriad other employment opportunities in the process, and Volkswagen's conduct has cost these people their careers. Complaint, ¶¶ 55, 58, 59, 65. As a matter of law, this loss of, and harm to, Plaintiffs' "employment opportunities" is an injury to Plaintiffs' "business and property" interests under the RICO statutes.

Throughout its moving papers, Volkswagen repeatedly argues that Plaintiffs' alleged injuries are nothing more than "loss of some hoped-for future commissions from car sales." *See* ECF 6334, at pp. 21: 4-6; *see also, id.* at pp. 22: 7-111 11: 22. Having so tortured the plain language of Plaintiffs' allegations, Volkswagen then relies heavily on this Court's *In Re: Volkswagen: Franchise Dealers* decision, arguing that Plaintiffs' alleged injuries are nothing more than a loss of "goodwill," which is not a "tangible," "concrete" financial loss. *Id*. at *7. But

in making this argument, Volkswagen ignores Plaintiffs' extensive allegations of concrete ***past, present, and future*** economic loss. Complaint, ¶¶ 55, 58, 59, 65. Indeed, the only similarity between Volkswagen's motion to dismiss here and Bosch's motion to dismiss in *In Re: Volkswagen: Franchise Dealers* is that both defendants argued "that *all* of the … alleged injuries are premised upon a claim for a loss of goodwill." *Id*. (emphasis added). But as the Court correctly noted in *In Re: Volkswagen: Franchise Dealers*, "[t]hat is not so." *Id.* While Plaintiffs' "complaint does include a number of general allegations about how the emissions fraud angered [Plaintiffs'] former customers … those general allegations do not turn all of the asserted injuries into claims for a loss of goodwill." *Id.* The same analysis must apply here.

b. Plaintiffs Adequately Allege Proximate Causation.

The RICO statute provides: "[a]ny person injured in his business or property *by reason of a violation* of [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains." 18 U.S.C. § 1964(c). This "by reason of" language requires a civil RICO plaintiff "to show that a RICO predicate offense not only was a "but for" cause of his injury, but was the proximate cause as well." *Hemi Grp., LLC v. City of N.Y.,* 559 U.S. 1, 9 (2010) (internal quotation marks omitted).

Importantly, the fact that Plaintiffs were not the "direct target" of the conspiracy, or that Plaintiffs' injuries were "merely derived from," and a "secondary effect" of the RICO crimes, is a distinction without a difference under the RICO statutes. *Diaz*, 420 F.3d at 901. As the Ninth Circuit has explained, "[t]he only requirement for RICO standing is that one be a 'person injured in his business or property by reason of a violation of section 1962.'" *Id.* (quoting 18 U.S.C. § 1964(c)). Both the Supreme Court and the Ninth Circuit "have already told us that 'by reason of' incorporates a proximate cause standard, [citation] which is generous enough to ***include the unintended, though foreseeable, consequences*** of RICO predicate acts." *Id.* (quoting *Holmes v. Sec. Investor Prot. Corp*., 503 U.S. 258, 265-68 (1992) (emphasis added). Simply, there is "no room in the statutory language for an additional, amorphous requirement that, for an injury to be to business or property, the business or property interest have been the 'direct target' of the predicate act. The statute is broad, but that is the statute we have." *Id*.

Proximate cause in RICO cases "is *not* the same thing as the sole cause." *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 772-73 (9th Cir. 2002) (emphasis added). "Instead, the proximate cause of an injury is a substantial factor in the sequence of responsible causation." *Id.* "'When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.'" *In Re: Volkswagen: Franchise Dealers*, 2017 WL 4890594, at *8 (quoting *Anza v. Ideal Steel Supply Corp*., 547 U.S. 451, 461 (2006)). "What matters, though, is not whether there is a direct relationship between the plaintiff and defendant, but whether there is a 'sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury . . . .'" *Id.* at *9 (quoting *Bridge*, 553 U.S. at 657 (2008)). Courts consider three non-exhaustive factors in making this assessment:

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

Mendoza, 301 F.3d at 1169. "At this stage of proceedings," the Court's inquiry is limited to whether "there is no set of facts that could be proved to satisfy these requirements." *Id.*

Volkswagen does not discuss or even identify these proximate cause standards. Volkswagen does **not** argue it would be difficult to ascertain the amount of the Plaintiffs' damages attributable to Volkswagen's wrongful conduct. And it does **not** argue the Court would have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. Instead, Volkswagen argues only that there is not a "direct relationship between the injury asserted and the injurious conduct," because the dealers in these MDL proceedings are the more "direct victims" of the alleged wrongful conduct. Motion, at 21:4-24. More specifically, Volkswagen incorrectly argues that this Court has already concluded the dealers are the "more direct victims of the alleged wrongful conduct." *Id.*, at 21:19-24. Building off this faulty premise, Volkswagen then makes an extraordinary leap in logic to argue that, because the dealers are the "*more* direct victims," Plaintiffs' injuries are "indirect." Volkswagen is mistaken on both points.

This Court has never ruled that the dealers were the "more direct victim" when compared

to Plaintiffs. The Court has yet to consider Plaintiffs' claims in any way. But even ignoring this seemingly obvious circumstance, Volkswagen is mistaken that the dealers have been determined the "more direct victim" with respect to any other injured party.

To the contrary, in *In Re: Volkswagen: Consumers*, this Court strongly suggested the dealers may not even ***be*** direct victims, let alone the ***most*** direct. In that decision, the Court addressed a motion to dismiss the claims of a putative class of consumers who owned or leased an affected car outside the temporal scope of an earlier settlement. The Bosch defendants argued there were three "more direct victims" of the alleged RICO enterprise than the consumers at issue: (1) consumers who still owned or leased an affected vehicle when the emissions fraud was publicly disclosed, (2) the regulators (EPA and CARB), and (3) Volkswagen dealers. *Id.* at 906. After explaining why the first two groups were not "more direct" victims, the Court explained that the dealers were not "more direct" victims than the consumers because there was a strong possibility the dealers were not even injured by Volkswagen's conduct. *Id.*

Specifically, the Court explained that, on the one hand, "if the dealers sold the cars for a profit then they would not have been injured by the premium." *Id*. On the other hand, while the Volkswagen dealers did allege an overpayment RICO injury, "[i]f the basis for that alleged injury is that dealers did not automatically pass on the entire premium to consumers, then proximate cause could be lacking." *Id*. In concluding that the dealers were not the "more direct" victim, the Court concluded "it [was] appropriate at this stage to presume, as Plaintiffs assert, that dealers passed on the full premium to consumers." *Id*. at 907. In other words, for purposes of evaluating the consumer's claims in *In Re: Volkswagen: Consumers*, the Court not only refuted the notion that the dealers were the ***more*** direct victim, but instead, concluded the dealers were not even ***a*** direct victim, because the Court presumed there was no proximate cause between their injuries and Volkswagen's conduct.

Putting aside Volkswagen's incorrect interpretation of this Court's prior decisions, Volkswagen's argument suffers from a more fundamental infirmity: it ignores the fact that there may be multiple ***direct*** victims of a racketeering scheme—all of whom may be able to show proximate cause between the defendants' conduct and their injuries. After all, this Court has

already held that multiple classes of consumers, as well as the dealers, were all "direct victims," whose injures were all sufficiently alleged to be proximately caused by Volkswagen's conduct under the RICO statutes. *See In Re: Volkswagen: Consumers,* 349 F. Supp.3d at 908; *In Re: Volkswagen: Franchise Dealers*, 2017 WL 4890594, at *18. These conclusions are only logical. As this Court previously explained, "no one other than the Franchise Dealers" could have asserted their injuries. *In Re: Volkswagen: Franchise Dealers*, 2017 WL 4890594, at *8. And just as no one other than the consumers could assert their specific injuries, and no one other than the dealers could assert their unique injuries, no one other than the Salespersons could assert the injuries at issue in this case. There is no "more" of a direct victim for the injuries asserted here, because no other entity "can be counted on to vindicate" the rights at issue. *Mendoza*, 301 F.3d at 1169. Accordingly, Volkswagen's argument that if the dealers' injuries were "more direct" – even if true, which it is not – then Plaintiffs' injuries are indirect, is incorrect as a matter of law.

More than that, Volkswagen's argument that Plaintiffs' injuries are "indirect" rely upon a grossly distorted view of Plaintiffs' allegations. Volkswagen consistently describes Plaintiffs' injuries as "decreased sales by dealers," ECF 6334 at p. 21: 11-2, and suggests Plaintiffs' injuries were suffered "in their role as representatives of their dealers." ECF 6334 at p. 21: 19-20. But a plain reading of Plaintiffs' Complaint confirms Volkswagen is mistaken.

This case is not about dealers' ability to sell cars. This case is about Plaintiffs' ability to earn income, their employment opportunities, their legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes, and how Volkswagen's conduct directly harmed that business and property right. *See* Complaint, ¶¶ 55, 58, 59, 65. While the dealers might have functioned as an intermediary between Volkswagen and Plaintiffs by acquiring the cars that Plaintiffs would ultimately market, promote, and sell to earn income, this circumstance does not change the fact that Volkswagen's RICO violations directly harmed Plaintiffs' employment opportunities. Volkswagen cannot seriously argue that a substantial impact on Plaintiffs' employment and economic opportunities, even if "unintended," was nevertheless a "foreseeable consequence of the RICO predicate acts." *Diaz*, 420 F.3d at 901.

Here, the conduct causing Plaintiffs' harm is the same as the conduct giving rise to the

RICO crimes. Volkswagen committed predicate acts of mail and wire fraud to carry out its fraudulent scheme, including false and misleading communications intended to conceal the defeat devices, as well as sales, marketing, and training materials to Plaintiffs intended to misrepresent and conceal the true nature of the "clean diesel" vehicles. Though it should go without saying, prospective employees making employment decisions must be able to know if they are participating in a fraudulent and unlawful enterprise. After all, when the unlawful and fraudulent activity is uncovered – as it almost always is – it is entirely "foreseeable" that employee will lose income, be it in the form of reduced wages, layoffs and corresponding unemployment, or any number of tangible, concrete harms that would inevitably befall the employee. And that is what happened in this case. Plaintiffs were duped into working for a company engaged in systematic, world-wide fraud, and were injured the moment they made that employment decision. The harm is not speculative, forward-looking, or lacking concrete definition. Plaintiffs *in fact* have lost considerable income and employment opportunity as a result of Volkswagen's RICO violations. Plaintiffs *in fact* continue to lose income and employment opportunities as a result of these crimes. These allegations are sufficient to state a RICO claim.

C. The Complaint Alleges a Viable Negligent Interference with Prospective Economic Advantage Cause of Action

To succeed on a negligent interference with prospective economic advantage cause of action, a plaintiff must plead and prove "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003). Volkswagen attacks the Complaint's negligent interference claim on three fronts: (1) it does not identify the relationships with which Volkswagen's fraud interfered; (2) the economic benefits allegedly interfered with are too speculative; and (3) the Complaint does not state facts establishing that Volkswagen owed Plaintiffs a duty of care. None of these arguments survive scrutiny.

As for Volkswagen's first and second arguments, the Complaint identifies those parties

with whom Plaintiffs had existing economic relationships: the customers to whom Plaintiffs had sold Defective Vehicles, and the dealers who employed Plaintiffs and paid them commissions for each vehicle sold. Complaint, ¶¶ 60-62. As alleged in the Complaint, Volkswagen's fraud destroyed its customers' faith in the salespeople who sold them Defective Vehicles. *Id.*, ¶ 60. These customers angrily confronted Plaintiffs about the fraud, refusing to purchase further vehicles from them and refusing to refer others to purchase vehicles from them. *Id.*, ¶¶ 60-62. Because they were unable to sell both Defective Vehicles and non-defective vehicles, Plaintiffs were unable to earn the commissions from the dealerships for whom they worked, drastically reducing their incomes and undermining their prospects for promotion. *Id.*, ¶¶ 46-49, 63.

In sum, the Complaint identifies at least two groups of individuals with whom Plaintiffs were in business relationships that would have resulted in future economic benefit to Plaintiffs but for Volkswagen's tortious interference. Far from speculative, the damages Volkswagen's fraud caused Plaintiffs are readily ascertainable: sales of Volkswagen's Jetta line, its best-selling models, fell 22% in the months following Volkswagen's fraud admissions, with Passat sales dropping 14%. Complaint, ¶ 56.[9] Because sales dropped, Plaintiffs could no longer earn commissions from the dealerships for which they worked – even from Non-Defective vehicles. Since commissions constituted essentially all of their compensation, this economic loss effectively severed Plaintiffs' ongoing relationships with their employers. *Id.*, ¶ 46.[10]

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[9] Defendants' argument that the drop was caused by the disclosure of the fraud, rather than the fraud itself, assumes that the decline in sales is entirely attributable to lost sales of Defective Vehicles, whereas the Complaint alleges that sales of *all* Jetta and Passat models fell after October 2015. Complaint, ¶ 56.

[10] Volkswagen's argument that Plaintiffs must provide further detail than this relies on a misreading of the very limited and irrelevant authority they cite. In *Damabeh v. 7-Eleven, Inc.* and *Blue Dolphin Charters, Ltd. v. Knight & Carver Yachtcenter, Inc.*, the complaints identified the plaintiff's prospective economic relationships only in the most general terms: "as yet unidentified" prospective customers in *Damabeh* and the "general public" and "tourists" in *Blue Dolphin*. *Damabeh v. 7-Eleven, Inc.*, 2013 WL 1915867, at *10 (N.D. Cal. May 8, 2013); *Blue Dolphin Charters, Ltd. v. Knight & Carver Yachtcenter, Inc.*, 2011 WL 5360074, at *5 (S.D. Cal. Nov. 3, 2011). As noted above, the Complaint goes into greater detail than this, alleging that Volkswagen's fraud interfered with Plaintiffs' ongoing relationships with customers who purchased Defective Vehicles from them and their relationships with the dealers who employed them. Complaint, ¶¶ 46-49, 60-63. As for Volkswagen's "economic benefit arguments, the only authority Defendants cite to the contrary consists of the general rules offered by *Korea Supply Co.* and irrelevant language from *Roth v. Rhodes*. The general rules Volkswagen cites from *Korea Supply Co.* provide no standard for evaluating what constitutes a "speculative expectation" and Volkswagen does not explain how Plaintiffs' relationships with existing customers and their

Volkswagen's argument that the Complaint does not plead facts sufficient to show that Volkswagen owed Plaintiffs a duty of care is similarly unavailing. It is well-established that a duty of care arises, even in the absence of a contract between the parties, where a balancing of the factors identified the California Supreme Court in *Biakanja v. Irving* favors imposing such a burden. *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 838 (2019). Those factors are the following: "the extent to which the transaction [in connection with which the Volkswagen was negligent] was intended to affect the plaintiff, the foreseeability of harm to [the plaintiff], the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958).

All of these factors favor imposing a duty of care on Volkswagen towards Plaintiffs. As alleged in the Complaint, Volkswagen acted negligently towards Plaintiffs when it deliberately misled governmental regulators regarding the performance of Defective Vehicles. Complaint, ¶ 97. Since the purpose of the EPA's awarding Certificates of Conformity is to ensure that only vehicles that meet its emissions standards are sold and operated in the United States, the American public, including Plaintiffs, are the intended beneficiaries of the EPA's testing. *Id.*, ¶ 31. Next, the harm Plaintiffs suffered was entirely foreseeable at the time Volkswagen lied to the EPA: Volkswagen is certainly aware that its Salespersons are compensated almost entirely on commission and that the defeat device scheme would destroy Plaintiffs' ability to earn these commissions. *Id.*, ¶ 100. Similarly, the harm Plaintiffs suffered as a result of Volkswagen's negligence is certain: it consists of the commissions and other incentive payments that Plaintiffs lost as a result of Volkswagen's negligence. Further, Plaintiffs' harm is closely connected to Volkswagen's negligence: if Volkswagen had not lied to the EPA, demand for their vehicles would not have plummeted in the way that it did and Plaintiffs would not have lost out on the

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dealership-employers do not give rise to probable future economic benefits. *Roth v. Rhodes*, meanwhile, is inapposite, as the customer relationships at issue there were entirely speculative, and the portion Volkswagen cites is dicta. 25 Cal. 4th 530, 546 (1994). Ultimately, *Roth* stands for nothing more than the unremarkable proposition that a plaintiff alleging an interference with prospective economic advantage claim must allege a currently-existing relationship that will probably result in future economic benefit. As noted above, the Complaint satisfies this requirement.

various incentive payments, including those for vehicles unaffected by the defeat device fraud, for which they seek recovery. Finally, the moral blame and policy considerations are self-evident: Volkswagen deliberately lied to the government about the environmental impact of the hundreds of thousands of Defective Vehicles it sold in the United States and should be held responsible for *all* of the damage its fraud caused. *Id.*, ¶ 40.

D. The Complaint Sets Forth a Fraud Cause of Action under Both Affirmative Misrepresentation and Fraudulent Concealment Theories

Volkswagen seeks dismissal of Plaintiffs' fraud claim on Rule 9(b) grounds. Volkswagen's argument, however, is built on a highly selective reading of the Complaint that simply ignores the allegations they claim are missing. As set forth in detail below, the Complaint contains each of the allegedly missing elements. In light of the principle that, at the motion to dismiss stage, the Court must "draw inferences in the light most favorable to the plaintiff," these allegations are more than sufficient to state a cause of action for fraud. *Barker v. Riverside Cty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009).

Plaintiffs advance two theories of fraud recovery in the Complaint: affirmative misrepresentation and fraudulent concealment. In order to survive a motion to dismiss, a fraud claim must allege the following elements: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173 (2003) (quoting *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)). A claim for fraud involving a fraudulent concealment theory must allege the same elements, but must also allege that the defendant had a duty to disclose the concealed information. *Burch v. CertainTeed Corp.*, 34 Cal. App. 5th 341, 348 (2019).

1. The Complaint States a Cognizable Claim for Affirmative Misrepresentation

Volkswagen attacks Plaintiffs' affirmative misrepresentation claim for allegedly failing to specify the "who, what, when, where, why, and how" of their fraud.[11] This is simply not the

[11] Defendants separate their argument that the Complaint does not specify the roles played by the various Defendants in the fraud from their argument that the Complaint does not provide the

case. Volkswagen's argument is belied by the Complaint's extensive allegations, which provide exactly the "who, what, when, where, why, and how" Volkswagen claims are lacking:

Who: The Complaint details each Defendant's identity and role in the fraud. The Complaint identifies Volkswagen AG, Audi AG, and Porsche AG as German corporations "in the business of designing, developing, manufacturing, and selling automobiles." Complaint, ¶¶ 11, 14, 15. It identifies Defendant Volkswagen Group of America, Inc. as the entity used by Volkswagen AG, Audi AG, and Porsche AG to advertise, market, and sell their vehicles in the United States. *Id.*, ¶ 13. With regard to the individually-named employees, the Complaint identifies their positions, the years they held those positions, and their particular roles in the fraud. *Id.*, ¶¶ 16-18, 21. Finally, it explains in detail the background and relationship between the various Bosch Defendants along similar veins. *Id.*, ¶¶ 19-20.

What: The Complaint contains literally dozens of paragraphs explaining the what of the fraud. Complaint, ¶¶ 27-65. Those paragraphs identify the "defeat devices" as the mechanism Volkswagen used to disguise vehicle performance, explain how the "defeat devices" operated to mislead the public about the Defective Vehicles' performance, set forth the manner in which Volkswagen developed and propagated misleading advertising materials that portrayed the Defective Vehicles as efficient high-performers, and even identify by name specific misleading marketing campaigns. Complaint, ¶¶ 29, and 32-39.

When: The Complaint alleges that the fraud began "in at least 2009" and ended when Volkswagen publicly admitted to the fraud in September 2015. Complaint, ¶ 28 and 40.

Where: The Complaint describes the locations where the fraud occurred: in the various media through which Volkswagen disseminated its advertising materials and sold its vehicles. Complaint, ¶¶ 32-39. Federal courts in the Ninth Circuit have consistently upheld similar claims under Rule 9(b) challenge.[12]

"who, what, when, where, why, and how" of the fraud. Given how closely related these two arguments are, this Opposition addresses them together.

[12] *See, e.g., MacDonald v. Ford Motor Co.*, 37 F. Supp. 3d 1087, 1096 (N.D. Cal. 2014); *also Herremans v. BMW of N. Am., LLC*, 2014 WL 5017843, at *10-11 (C.D. Cal. Oct. 3, 2014); *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1190-91 (C.D. Cal. 2010); *and Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088, 1097 (N.D. Cal. 2007).

Why: The Complaint also explains the "why" of Volkswagen's fraud: it designed and installed the "defeat devices" to deceive the Environmental Protection Agency and consuming public, including Plaintiffs, in order to sell more cars in the United States. Complaint, ¶ 27.

How: Finally, the Complaint explains how Volkswagen defrauded the public, including Plaintiffs. It did so by designing and using "defeat devices" to trick governmental regulators into allowing it to sell Defective Vehicles in the United States, then advertised the Defective Vehicles to the American public, including Plaintiffs, through a multimillion-dollar advertising campaign. Complaint, ¶¶ 28-29 and 32.

Volkswagen's next argues that the Complaint does not satisfy Rule 9(b) because it does not explain the circumstances in which the Plaintiffs "saw or heard" Volkswagen's misleading advertisements. This argument also misses the mark. Volkswagen misapplies this Court's earlier holding in this matter, arguing that the Complaint fails to provide "linking allegations" that tie Volkswagen's misrepresentations to Plaintiffs' reliance. Specifically, this Court noted that the complaint it dismissed lacked "allegations that any named plaintiff saw these advertisements and relied on the promises contained within them." *In re Volkswagen: Consumers,* 349 F. Supp. 3d at 915. Here, Plaintiffs allege that they "were among the members of the public taken in by Volkswagen's global fraud," which consisted of Volkswagen's seven-year advertising campaign that involved "Super Bowl commercials, social-media messages, and print advertising." Complaint, ¶¶ 44 and 32. They also allege that they relied on the misrepresentations made therein in deciding to sell Volkswagen cars instead of pursuing other careers. *Id.*, ¶ 110. Combined with the Complaint's allegations that Volkswagen maintained the fraud between 2009 and 2015, the Complaint's allegations regarding Plaintiffs' exposure to misleading advertising material satisfies Rule 9(b).

2. The Complaint Also Sets Forth a Cognizable Claim for Fraudulent Concealment

Volkswagen also attacks the Complaint's fraudulent concealment claim, arguing that the Complaint does not set forth facts establishing that they had a duty to disclose their fraud to Plaintiffs, and that the Complaint does not allege that Plaintiffs detrimentally relied on Volkswagen's fraudulent omissions. Both of these arguments are misguided.

First, it is important to draw a distinction between Plaintiffs' affirmative misrepresentation and fraudulent concealment theories. The distinction is important because while fraud claims "[t]ypically . . . must be accompanied by the who what when where, and how of the misconduct charged, . . . claims based on an omission 'can succeed without the same level of specificity required by a normal fraud claim.'" *MacDonald*, 37 F. Supp. 3d at 1096 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)); *see also Herremans*, 2014 WL 5017843, at *9 ("When a claim rests on allegations of fraudulent omission, . . . the Rule 9(b) standard is somewhat relaxed because 'a plaintiff cannot plead either the specific time of [an] omission or the place, as he is not alleging an act, but a failure to act'") (quoting *Washington v. Baenzinger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987)).[13]

In any event, Volkswagen's argument that the Complaint does not plead facts sufficient to establish a duty to disclose is mistaken, because it focuses only on the duty to disclose within the context of fiduciary relationships. It is well-established that a duty to disclose may arise even absent a fiduciary relationship "'in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff.'" *Bigler-Engler v. Breg, Inc.*, 7 Cal.App.5th 276, 311-12 (2017) (quoting *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 294 (1970)).

Here, the Complaint plainly alleges – and indeed, describes in detail – a transaction between Salespersons and Volkswagen: Volkswagen's incentive compensation programs that

[13] Numerous courts in the Ninth Circuit have concluded that pleadings similar to those found in Plaintiffs' Complaint are sufficient to plead fraudulent concealment. For, example, the complaint in *MacDonald* sufficed in light of the "inherent limitations of an omission claim" because it identified the "'who' [as] Ford, the 'what' [as Ford's] knowledge of a defect, the 'when' [as] prior to the sale of [affected vehicles], and the 'where' [as] the various channels of information through which Ford sold [affected vehicles]." *MacDonald*, 37 F. Supp. 3d at 1096. Likewise, in *Herremans*, the complaint identified the who, what, why, and how of the defendant's fraud in terms strikingly similar to Plaintiff's Complaint. *Herremans*, 2014 WL 5017843, at *10. The Complaint's specific allegations on these points are laid out in detail above and no reasonable reader of the Complaint could be unclear about who committed the fraud, what they did that constitutes fraud, why they committed their fraud, or how they did it.

rewarded Plaintiffs for good performance. Complaint, ¶¶ 50-53. Essentially a sales bonus, the VW Elite program tied Plaintiffs' financial well-being directly to the sale of cars containing the defeat devices. In the context of these incentive programs, Volkswagen was obligated to inform Plaintiffs about the "defeat devices." Yet, Volkswagen repeatedly disclosed certain facts, but not others, to Plaintiffs by way of its marketing campaign. Complaint, ¶¶ 32-39; *Bigler-Engler,* 7 Cal.App.5th at 311-12. Volkswagen knew that it was the only one who knew about the defeat devices and that Plaintiffs could not have discovered their existence. Complaint, ¶¶ 28-29; *Bigler-Engler,* 7 Cal.App.5th at 311-12. Finally, the Complaint alleges that Volkswagen actively concealed its fraud from Plaintiffs. Complaint, ¶¶ 28-29; *Bigler-Engler,* 7 Cal.App.5th at 311-12. Thus, Volkswagen had a duty to disclose the defeat devices' existence and purpose.

Volkswagen's argument that the Complaint does not plead detrimental reliance on concealed information is also mistaken. The Complaint alleges that Plaintiffs were exposed to Volkswagen's deceptive advertising campaign and that they relied upon the material misrepresentations and omissions made therein. Complaint, ¶¶ 44, 37, 110. Further, the Complaint alleges that all three named Plaintiffs obtained their Volkswagen certifications while Volkswagen was actively engaged in its deceptive marketing campaigns. *Id.*, ¶ 53. These are exactly the allegations Volkswagen claims are missing.

Volkswagen also argues that Plaintiffs could not have suffered any recoverable harm because Plaintiffs' commissions only dropped after the fraud became public. This argument simply ignores the Complaint's allegations that Volkswagen's fraud hamstrung Plaintiffs' ability to sell any Volkswagen vehicles by destroying their credibility with customers and requiring Plaintiffs to spend their working hours dealing with angry TDI owners instead of selling cars. Complaint, ¶¶ 59-63. Volkswagen's argument that its fraud did not harm Plaintiffs assumes that Plaintiffs could have found new jobs, without any loss of income, immediately after Volkswagen admitted its fraud. Volkswagen's argument also ignores the fact that no Salesperson, including Plaintiffs, would have elected to take an employment opportunity with as employer engaged in systematic, world-wide fraud, causing them to forego other employment and career opportunities. Plaintiffs staked their livelihoods and reputation to Volkswagen, and could not simply jump from

one job to another. *Id.*, ¶ 59. These allegations show that Volkswagen's fraudulent concealment, upon which Plaintiffs reasonably relied, continued to harm them even after Volkswagen admitted their fraud.

E. Plaintiffs Sufficiently Allege a Breach of Contract Claim

Volkswagen argues that Plaintiffs' breach of contract claim fails because Plaintiffs do not "identify the specific provision of the contract allegedly breached by defendant." *See* Motion, 11:20-22. But the relevant authorities do not impose the rigid and restrictive pleading requirements that Volkswagen suggests.

Plaintiffs state a breach of contract claim because the Court is "able generally to discern at least what material obligation of the contract the defendant allegedly breached." *Langan v. United Servs. Auto. Ass'n*, 69 F. Supp. 3d 965, 979 (N.D. Cal. 2014). "[I]t is unnecessary for a plaintiff to allege the terms of the alleged contract with precision." *Id.* "The majority rule in district courts in this circuit rejects application of [a heightened pleading standard for breach of contract claims] in federal actions; rather, the sufficiency of the complaint is governed according to the Federal Rules of Civil Procedure and federal law interpreting those rules."[14] *James River Ins. Co. v. DCMI, Inc.*, 2012 WL 2873763, at *3 (N.D. Cal. July 12, 2012) (Alsup, J.) (citing *Boland*, 685 F.Supp.2d at 1102 n. 7). Thus, pleadings are sufficient where they put the opposing party "on notice as to th[e] basis for [the pleading party]'s claim." *Id.* It is unnecessary to "specifically describe the duties of the parties" with respect to contractual terms. *James River Ins. Co.*, 2012 WL 2873763, at *3.

Here, the Complaint sufficiently alleges the existence of an enforceable contract. It alleges that Plaintiffs entered into an agreement with Volkswagen pursuant to which they would complete trainings and obtain certifications to sell Volkswagen automobiles. Complaint, ¶ 80. In return, Volkswagen agreed to provide marketable, legally-complaint vehicles for the Salespersons to sell,

[14] California pleading requirements do not apply in federal court. *Boland, Inc. v. Rolf C. Hagen (USA) Corp.*, 685 F.Supp.2d 1094, 1102 n. 7 (E.D. Cal. 2010). Indeed, federal courts have routinely refused to apply California contractual pleading requirements in federal cases. *See, e.g., Cayo v. Valor Fighting & Mgmt. LLC,* No. C 08–4763, 2008 WL 5170125 *2 (N.D. Cal. Dec. 9, 2008); *Downtown Plaza LLC v. Nail Trix, Inc.,* No. C 08–cv–2001, 2008 U.S. Dist. LEXIS 97129, *3–*4 (E.D. Cal. Nov. 26, 2008); *Kassa v. BP W. Coast Prods., LLC,* No. C 08–02725, 2008 WL 3494677, *4, (N.D. Cal. Aug. 11, 2008).

and to pay Plaintiffs bonus compensation for each Volkswagen car they sold. Complaint, ¶¶ 81-82.

The Complaint alleges that Volkswagen breached the contract by failing to provide marketable, legally-complaint vehicles. Complaint, ¶¶ 87-92. The breach frustrated the Salespersons' ability to perform under, and reap the benefits of, the contract. Complaint, ¶¶ 89-91. Thus, at minimum, the Court is "able generally to discern at least what material obligation of the contract the defendant allegedly breached." *Langan,* 69 F. Supp. 3d at 979. As Plaintiffs sufficiently allege that they experienced damages as a result of the breach, they have alleged all necessary elements for a breach of contract claim. Complaint, ¶ 92; *see also James River Ins. Co.*, 2012 WL 2873763, at *4.

Plaintiffs further allege that Volkswagen breached the implied covenant of good faith and fair dealing. Under California law, every contract carries with it an implied covenant of good faith and fair dealing. *See Carma Developers, Inc. v. Marathon Development California, Inc*., 2 Cal. 4th 342, 371 (1992). A claim for breach of the implied covenant of good faith and fair dealing requires the same four elements as a breach of contract claim, "except that instead of showing that defendant breached a contractual duty, the plaintiff must show, in essence, that defendant deprived the plaintiff of a benefit conferred by the contract in violation of the parties' expectations at the time of contracting." *Boland*, 685 F. Supp. 2d at 1101 (citing *Carma Developers*, 2 Cal. 4th at 372-73). Here, Plaintiffs allege that Volkswagen deprived Salespersons of their benefit (commissions, and marketable, legally-complaint vehicles), by frustrating their ability to sell the cars Volkswagen trained and paid Salespersons to sell. Complaint, ¶ 89. Nothing more is required to successfully plead a breach of contract claim.

F. Plaintiffs Should Be Given Leave to Amend to the Extent Necessary

If the Court is inclined to dismiss any of the claims, Plaintiffs request that they be granted leave to amend, as such leave should be granted unless "the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

While Plaintiffs are confident the allegations in the operative satisfy Rule 8 and 9's pleading requirements, there are numerous additional facts Plaintiffs can plead that would bolster

their claims even further. For example, though not pled in Plaintiff's Complaint, the record in this case makes clear that following the publication of Volkswagen's fraud, Volkswagen issued "stop sale" orders to its American dealers. *In re Volkswagen "Clean Diesel": Franchise Dealers,* 2017 WL 4890594 at *6. This stop sale order impacted anywhere between 25 and 40 percent of available cars on lots. This factual allegations demonstrates that Volkswagen *directly* prevented Salespersons from earning income.

Likewise, additional allegations can be pled that detail how Volkswagen's fraud harmed Salespersons economic and employment opportunities in a manner that far exceeds bottom-line income earning potential. In sum, Volkswagen had long been considered a premier car company for salesperson employment opportunities. Volkswagen Salespersons could generate more income because Volkswagen charged a premium for their "clean" vehicles, which would result in higher commissions. Volkswagen Salespersons who decide to embark on a career with Volkswagen undergo extensive, uncompensated training on "clean" vehicles – training that is required by Volkswagen – in electing this economic and employment opportunity. But now, that time, energy, and investment in Volkswagen is for naught. The training and time commitment put towards selling "clean" vehicles is, apparently, irrelevant to the products they *in fact* sell. Like any other employment situation, choosing where one will work considers the potential for growth, advancement, and future success. No rational person would have elected to work for Volkswagen had they known they were joining a world-wide fraud, all but ensuring that, eventually, the investment in their careers would have been for naught. Rather than realize increased growth and opportunity as their tenure with Volkswagen advanced, Salespersons saw their economic and employment investments crumble.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss in its entirety.

Date: July 8, 2019

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Date: July 8, 2019

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Date: July 8, 2019

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SIGNATORY ATTESTATION

The e-filing attorney hereby attests that concurrence in the content of the foregoing document and authorization to file the foregoing document has been obtained from the other signatories indicated by a conformed signature (/s/) within the foregoing e-filed document.

Date: July 8, 2019

/s/ *Carolyn H. Cottrell*
Carolyn H. Cottrell

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States District Court, Northern District of California, in *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* (Case No. 3:15-md-02672-CRB) and *Saavedra, et al. v. Volkswagen Aktiengesellschaft, et al.* (Case No. 3:16-cv-07214-CRB) by using the Court's CM/ECF system on July 8, 2019. Service will be accomplished by the Court's CM/ECF system.

Date: July 8, 2019

/s/ *Carolyn H. Cottrell*
Carolyn H. Cottrell