No. 20-17480

In the United States Court of Appeals for the Ninth Circuit

ADAM SCHELL; ANDREW M. OLSON; ANGELA MATT ARCHITECT INC.; BENJAMIN TYLER DUNN; BRADLEY CONNER; BRENDAN DALY; BRYAN SHEFFIELD; CATHERINE LAMENZO; DARRYL LECOURS; DEREK WINEBAUGH; EDDIE FIELD; GISBEL DE LA CRUZ; INGRID SALGADO; JENNIFER NEMET; JOHN KUBALA; KEN GALLUCCIO; MARK MILLER; MELISSA ST. CROIX; MICHAEL BOWMAN; MICHAEL SKENA; NORBERT KAHLERT; STEPHEN FRANCK; STEVEN FERDINAND; STEVEN RAWCZAK; SVEN HOFMANN; THOMAS SIEHL III; TONYA DREHER, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

VOLKSWAGEN AG, VOLKSWAGEN GROUP OF AMERICA, INC., AUDI OF AMERICA, INC.; AUDI AKTIENGESELLSCHAFT, (Audi AG); AUDI OF AMERICA, LLC; ROBERT BOSCH, LLC, a Michigan limited liability company; ROBERT BOSCH GMBH, a German corporation,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:17-cv-04372-CRB

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INTRODUCTION

The plaintiffs in this case are victims of one of the largest consumer frauds in history. As purchasers and lessees of Volkswagen "clean diesel" cars, they overpaid thousands of dollars each based on false claims that Volkswagen now admits were intentionally designed to deceive them. The district court, however, set aside the plaintiffs' evidence of substantial out-of-pocket losses and dismissed their complaint under Rule 12(b)(1) for failure to show a cognizable Article III injury.

By dismissing the complaint for lack of jurisdiction, the district court allowed Volkswagen to keep the money that it took from the plaintiffs, effectively rewarding the company for successfully carrying out its egregious fraud. For more than six years, Volkswagen aggressively marketed "clean diesel" cars to "environmentally conscious" consumers in the United States as providing all the performance benefits of diesels but with 95% reduced emissions. What Volkswagen had actually done, however, was secretly install illegal "emissions cheating software" in the cars for the admitted purpose of deceiving consumers and evading emissions tests. Far from being "low emissions," as Volkswagen promised, the cars in fact emitted nitrogen oxide—a toxic pollutant that produces smog and leads to environmental and health problems—at levels as high as 40 times the EPA's legal limit.

After the scheme was finally exposed in 2015, Volkswagen pleaded guilty to criminal fraud and settled with classes of owners and lessees of affected cars. But because the settlements compensated only those who still happened to own or lease their cars as of the date the EPA publicly revealed the fraud, they left out a substantial class of previous owners and lessees who no longer possessed their cars by that date.

This case is a class action by those excluded former owners and lessees to recover money that Volkswagen fraudulently took from them and has yet to return. As the cars' original owners, many of these consumers were among the front-line victims of Volkswagen's fraud. They are not asking for a full refund; their primary claims seek only to recover the additional amount that they paid to Volkswagen based on its fraudulent concealment of its emissions-cheating software. Even so, their injury is substantial—likely *more* substantial in many cases than members of the settlement classes. The plaintiffs typically bought or leased their cars at full new-car prices and likely owned or leased their cars for longer than members of the settlement classes. Plaintiff Michael Skena, for example, overpaid for his new car by about $3,500 and, after owning it for more than four years, traded it in just a few months before Volkswagen's fraud was made public. Even after the money he got for his trade-in, Mr. Skena is still out of pocket by $1,750 as a result of Volkswagen's fraud. Volkswagen has repaid none of that money.

So how did one of the nation's most respected district judges reach the counterintuitive conclusion that these plaintiffs lack any cognizable Article III injury? As an initial matter, Judge Breyer correctly recognized that the plaintiffs almost certainly overpaid, and that they "cannot recover the full value of the premium through resale because of depreciation." 1-ER-29. So the fact that the plaintiffs were injured, the district court rightly determined, "is not speculative here." 1-ER-33. But the court nevertheless predicted that the plaintiffs would have a difficult time *quantifying* their injury and, in attempting to explain precisely why, the court virtually ensured that its prediction would come true.

In this well-meaning but misguided effort to impose economic precision on the plaintiffs' damages, the court went badly astray: It defined the plaintiffs' injury in terms of what it called the "low emissions premium"—that is, a hypothetical amount that the plaintiffs would have "paid specifically for low emissions" as a "fraction" of the "overall premium they paid for diesel vehicles." The problem with that custom-made measure of damages is that Volkswagen did not merely fail to deliver the promised "low emissions" diesel. It delivered the opposite—an egregious polluter equipped with a secret device that allowed it to far surpass legal limits. The district court's "low emissions premium" failed to account for the negative value of those undesirable characteristics—an essential component of out-of-pocket damages at common law. And that led to a more fundamental, and ultimately insurmountable, problem: While there are well-established economic methods for measuring the value of a false claim in a real-world marketplace, there is no measurable market for a judicially constructed premium. As the district court recognized, this "hypothetical" construct made damages "difficult to isolate or measure."

The court then further narrowed the scope of allowable damages in an attempt to incorporate the economics of subsequent resale. Treating the plaintiffs' cars as akin to financial instruments in a marketplace of vehicles, the court held, without authority, that the defrauded plaintiffs had not suffered damages unless their cars experienced a subsequent loss in market value. Acknowledging, however, that a car is "a well-known depreciating asset," the court concluded that the plaintiffs might still be able to show damages if they could prove the rate at which the "low emissions premium" depreciated during their ownership. And it put the burden on the *plaintiffs* to make that showing, requiring them to limit their own damages by quantifying a hypothetical depreciation rate not on the thing they purchased—the car as a whole—but on the specific feature for which they were defrauded.

The court's reasoning led it to an unprecedented conclusion: Despite their obvious out-of-pocket losses due to fraud, the plaintiffs had not "suffered any damages at all," so there was no case or controversy under Article III of the Constitution and hence the court lacked jurisdiction.

Ultimately, the district court's attempt to impose what it saw as economic rigor on the plaintiffs' claims led it to a rule that is not only unsupported by law but economically irrational. Although the court characterized the plaintiffs' claims as "novel," this is really a straightforward consumer-fraud case where the defendant admits to having fraudulently overcharged the plaintiffs. *See United States v. Volkswagen AG*, No. 16-CR-20394, Doc. 68, at 2-7 (E.D. Mich. 2017) (agreeing, as a condition of its guilty plea, not to dispute that it committed fraud). The established measure of damages in such a case is simply the "difference between the price paid … and the value of the thing acquired." Restatement (Second) of Torts § 549, cmt. c. While the task of measuring those damages is aided by experts here, there are well-worn standards and methods for doing so. Proof of damages has never required economic exactitude—especially where any uncertainty is attributable to the defendant's intentional fraud. And the law is clear: What the plaintiffs chose to do with their own cars after Volkswagen defrauded them is of no legal relevance. At most, it is an issue between the plaintiffs and subsequent purchasers.

The issue is even simpler when treated as a question of Article III standing—the plaintiffs *of course* suffered injury when they paid real money for a fake product. By concluding otherwise, the district court closed the courthouse doors on plaintiffs who nobody disputes are victims of fraud. The court's attempt at precision thus accomplished the one result that the common law of fraud is most concerned about avoiding: leaving victims' money in the hands of the party who defrauded them. This Court should reverse.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1332(d). 4-ER-764. The court dismissed the case for lack of jurisdiction on November 12, 2020. 1-ER-3–18. The plaintiffs filed a timely notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) on December 14, 2020. 5-ER-1144. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Does expert evidence showing that Volkswagen fraudulently overcharged the plaintiffs by thousands of dollars, and that the plaintiffs could have recouped at most a portion of that overpayment from resale or trade-in, establish an Article III injury-in-fact sufficient to survive dismissal on the pleadings under Rule 12(b)(1)?

STATUTES AND RULES

No statutes or regulations are pertinent to the issues on appeal.

STATEMENT OF THE CASE

I. Factual background

A. Volkswagen fakes development of "clean diesel" technology by cheating on federal emissions tests.

Volkswagen in the mid-2000s was one of the world's largest carmakers, selling more than ten million cars yearly under Volkswagen, Audi, and other brands.

4-ER-839.[1] The company's global success, however, had long failed to translate to sales in the United States, where its market share had fallen to just 2%. *See* Jack Ewing, *VW Focuses on U.S. Market in Bid to Be World's No. 1 Automaker*, The New York Times, Jan. 7, 2011. https://perma.cc/4V3R-26TQ.

Beginning in 2005, Volkswagen hatched a plan to break into the U.S. market with "a large-scale promotion of diesel vehicles in the United States." 4-ER-847–48; *see United States v. Volkswagen AG*, No. 16-CR-20394, Doc. 68 (E.D. Mich. 2017) ("Plea Agreement" attached as exhibit A), at 53–54; *see* 4-ER-934 (incorporating plea agreement by reference). Diesels at that time made up just 5% of the U.S. market, despite better performance and fuel efficiency than cars with gas engines, largely because they have a reputation for emitting thick, noxious smoke. ER-848–50. Those emissions include nitrogen oxides—toxic chemicals that create smog, cause health problems, and contribute to climate change. 4-ER-793; 4-ER-850; *see In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 603 (9th Cir. 2018).

Volkswagen proposed to solve that problem with a new line of environmentally friendly "clean diesel" cars. The cars would feature a supposedly

[1] This brief refers collectively to the defendants Volkswagen AG; its subsidiary corporations Volkswagen Group of America, Inc., Audi AG, and Audi of America, LLC; and the defendant employees of those companies as "Volkswagen." It refers to the defendants Robert Bosch LLC and Robert Bosch GmbH collectively as "Bosch." References to Volkswagen, where appropriate, also include the Bosch defendants.

remarkable breakthrough in diesel technology: a new "turbocharged direct injection" diesel engine that Volkswagen promised would preserve the efficient, powerful performance of diesels while "reduc[ing] sooty emissions by up to 90%." 4-ER-848; 4-ER-902. Volkswagen touted the technology as the cornerstone of its strategy for tripling U.S. sales and becoming the largest car seller in the world. 4-ER-847–48.

But there was a problem: The revolutionary technology that Volkswagen promised did not exist. After spending millions on research and development, the company's engineers were forced to conclude that it was not possible to build a cost-effective diesel engine that reduced emissions while preserving performance and fuel efficiency. 4-ER-848; 4-ER-850; 4-ER-855. The "clean diesel" engine that Volkswagen ultimately came up with did not just fail to meet the company's promise of reduced emissions—it emitted nitrogen oxides at up to 40 times EPA limits. 4-ER-857. The cars on which Volkswagen pinned its hopes of conquering the American market could not even legally be sold in the United States. *See* 3-ER-463–64.

Instead of admitting defeat, Volkswagen publicly declared victory—falsely announcing that it had successfully optimized its engines to reduce emissions without sacrificing performance or fuel efficiency. ER-893. To evade EPA emission standards and avoid discovery of its lie, Volkswagen executives authorized installation of sophisticated software in the built-in computer systems of Volkswagen- and Audi-branded cars in "a massive scheme … to cheat on U.S. emissions tests." *Volkswagen*, 895 F.3d at 603; *see* 4-ER-787; 5-ER-1042. The software, developed and sold by Bosch for the "express purpose of beating tests," monitored factors like speed, acceleration, air pressure, and the position of the steering wheel to detect whether the car was undergoing testing. 4-ER-855–57; 4-ER-918–19. When testing was detected, the software temporarily reduced emissions to legal levels by downgrading the engine's power and performance and upgrading its emission-control system. 4-ER-857; Ex. A at 54, 61.

Such a "defeat device" is illegal under U.S. law. *See* Ex. A at 47–48. The Clean Air Act and its implementing regulations prohibit sale of cars in the United States with any device "that reduces the effectiveness of the emission control system" under normal driving conditions. 40 C.F.R. § 86.1803-01; *see* 42 U.S.C. § 7522(a)(3); 40 C.F.R. § 86.1809-10. To obtain the EPA certification required to sell the cars in the United States, Volkswagen intentionally lied to the agency, concealed the device's existence, and falsely certified that the cars complied with federal emissions standards. 4-ER-851–52; 4-ER-859–60; Ex. A at 51–53, 58–59.

B. Volkswagen intentionally defrauds U.S. consumers with false claims of environmental friendliness.

Having obtained EPA approval under false pretenses, Volkswagen began an aggressive marketing campaign to "get [its] clean-diesel power the recognition it deserves as a true 'green' technology." 4-ER-894; Ex. A at 57. Volkswagen marketed low emissions as the "identifying characteristic" of the cars, claiming that, through "millions of dollars in research and development," it had solved the "environmental problems" associated with diesel engines and "ushered in a new era of diesel." 1-ER-31; 4-ER-798; 4-ER-848–49; 4-ER-894. The company falsely touted "[u]ltra low emissions" that reduced nitrogen oxides by 95 percent and met "the strictest EPA standards in the U.S." 4-ER-895; 4-ER-897; 4-ER-902. With slogans like "This ain't your daddy's diesel" and "Diesel—It's No Longer A Dirty Word," the company turned to "clean diesel" as its primary strategy for reaching the growing market of "environmentally-conscious" consumers in the United States. 4-ER-847–48; 4-ER-894; 4-ER-906.

And that strategy paid off. 4-ER-909. "Volkswagen duped half a million Americans," and more than ten million consumers worldwide, "into buying cars advertised as 'clean diesel.'" *Volkswagen*, 895 F.3d at 603. "This was no small-time con: over 475,000 vehicles in the United States alone contained a defeat device." *Id.* Consumers paid thousands of dollars extra for the company's "clean diesel" technology, collectively spending billions purchasing or leasing the fraudulently marketed cars. 4-ER-909. During the period of Volkswagen's fraud, the company sold more diesels in the United States than all other carmakers combined. 4-ER-795. Largely as a result, Volkswagen nearly doubled its sales in the United States between

2007 and 2013. 4-ER-909. And by 2016, Volkswagen had achieved its goal of overtaking Toyota to become the largest carmaker in the world. 4-ER-928.

C. The scheme unravels, and Volkswagen faces consequences.

At the time it began installing the defeat device, Volkswagen was confident that the device was undetectable using existing technology. 4-ER-854. And, for five years, the fraud did go undetected. ER-910. In 2014, however, Volkswagen's scheme began to fall apart when an independent nonprofit, in the course of conducting an unrelated study, discovered by chance that Volkswagen's "clean diesel" cars were emitting nitrogen oxide at up to 40 times the EPA's limit. 4-ER-910–11; Ex. A at 63.

When Volkswagen got wind of the findings, it formed an "ad hoc task force" with the goal of "concealing the defeat device in responding to questions from U.S. regulators, while appearing to cooperate." Ex. A at 63–64. For months, the company fended off the EPA and California authorities by giving "various false reasons for the discrepancies," "including driving patterns and technical issues." *See id.* at 64–65. Meanwhile, it hid or destroyed thousands of documents that would reveal its culpability. *See id.* at 69–72; 4-ER-914–16. Volkswagen's stonewalling came to an end only after a single Volkswagen employee, "in direct contravention of instructions from supervisors," admitted the defeat device's existence. Ex. A at 66.

On September 18, 2015, the EPA announced its finding that Volkswagen had installed defeat devices in Volkswagen- and Audi-branded "clean diesel" cars to cheat on U.S. emissions tests. 4-ER-793; *see* EPA, Notice of Violation, Sep. 18, 2015, https://perma.cc/C8KF-6K5A. Volkswagen was charged with, and pleaded guilty to, three felonies for its involvement in the scheme, including obstruction of justice and conspiracy to commit wire fraud with the intent to defraud buyers and lessees of its cars. 4-ER-928; *see* Ex. A at 48. As a condition of its plea, Volkswagen agreed not to "make any public statement, in litigation or otherwise, … contradicting the facts" underlying those crimes. Ex. A at 31.

The fraud's revelation also spawned civil enforcement actions and numerous private lawsuits, which in 2015 were consolidated in multidistrict litigation in the Northern District of California. 4-ER-793–94. In 2016 and 2017, the court approved class settlements in which Volkswagen agreed to set aside about $10 billion to settle the claims of consumers who owned or leased affected cars at the time the EPA publicly revealed the fraud. *See* 5-ER-1060; *see also* Doc. 3229. The court approved a separate settlement for class claims against Bosch. Doc. 3230. Each of the settlements excluded more than 100,000 consumers who had purchased or leased an affected car but no longer possessed it by the end of the more than six-year period in which Volkswagen successfully concealed the fraud. 4-ER-794; 4-ER-971; 5-ER-1046.

In approving the settlements, the district court noted that "liability [was] not at issue," since "Volkswagen admits to installing and failing to disclose the defeat device in its [diesel] engine vehicles, which it marketed as environmentally friendly."

5-ER-1057. Volkswagen agreed to buy back affected cars from owners who were members of the settlement class, to allow lessee class members to terminate their leases without penalty, and to pay an "additional cash payment for other costs" as restitution. 5-ER-1061; *see Volkswagen*, 895 F.3d at 604. Each of these remedies was tied to the cars' September 2015 trade-in value. *See* 5-ER-1061.

Later, the court held a trial for members of the settlement classes who had opted out of the class settlements. *See* 4-ER-721–22. Volkswagen again "concede[d] that Plaintiffs could meet their burden of proof at trial on all elements of their fraud claims … including false statements or concealments by both Defendants, reliance by Plaintiffs, scienter, and intent to defraud." Doc. 7040 at 2; *see* 4-ER-722. On the question of damages, Volkswagen retained an expert economist at Stanford University, Professor Timothy Bresnahan, who estimated the opt-out plaintiffs' initial overpayment based on the drop in market value of affected cars in the wake of the EPA's announcement. *See* 4-ER-770–71.

II. Procedural background

A. Former purchasers and lessees of "clean diesel" cars file suit.

Shortly after final approval of the class settlements, the plaintiffs here sued Volkswagen and Bosch on behalf of themselves and a class of those who had purchased or leased an affected Volkswagen "clean diesel" car, but who no longer owned or leased it on September 18, 2015, when the EPA made the existence of the defeat device public. Doc. 7. The complaint alleged that class members were injured when they overpaid for their cars as a result of Volkswagen's fraudulent concealment of the defeat device. *Id.* ¶ 5. It asserted claims for common-law fraud, as well as under California law, other state consumer-protection laws, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961. *Id.* ¶¶ 15–16.

B. The court initially concludes that the plaintiffs have standing.

The defendants moved to dismiss, arguing primarily that the plaintiffs could not have suffered Article III injury because they sold or traded in their cars before the fraud became public and therefore did not experience a resulting drop in the cars' market values. Docs. 4533, 4534. The court denied the motion, holding that it had jurisdiction over the plaintiffs' claims. 1-ER-22.

The court began its opinion by acknowledging that the plaintiffs' claims were based on "a well-accepted theory of injury (overpayment)." *Id.* "When a consumer overpays for a product because of the seller's conduct," it noted, "the overpayment is ordinarily 'a quintessential injury-in-fact'" for Article III purposes. 1-ER-25 (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011)).

Here, however, the Court saw a "novel twist" in the plaintiffs' claims. 1-ER-22. The plaintiffs "acknowledge[d] that the price of the cars was likely inflated not only when they purchased them, but also when they resold them." *Id.* But they also alleged that "they did not recover all of their overpayment through resale because a portion of the premium they paid for a low-emission vehicle depreciated." *Id.* Without citation to authority, the court concluded that the plaintiffs could only have been injured, if at all, through the effects of depreciation. *See id.*

"[V]ehicle depreciation," the court wrote, "is a fact of life: as vehicles age they decline in value." 1-ER-25. "[A]ssuming the depreciation rate is fixed," it noted, "a higher purchase price will invariably lead to a higher depreciation amount." 1-ER-26. Thus, "when a premium is charged for a depreciating asset, the premium will plausibly increase the total amount by which the asset depreciates." 1-ER-29. "And if the premium is for a feature that the asset does not actually have, then the original purchaser cannot recover the full value of the premium through resale because of depreciation." *Id.* "The amount of the premium that is unrecoverable," it concluded, "plausibly constitutes overpayment." *Id.*

The court, however, noted its doubt that the plaintiffs' "overpayment would have been equivalent to the entire cost" of Volkswagen's "clean diesel" package, which "also included features that [the plaintiffs] received" like "high fuel economy" and "exceptional performance." 1-ER-31–32. The overpayment, it suggested, "may have only represented a fraction of the $6,000 average premium paid" for that package. 1-ER-32. And the court predicted that it "may be challenging for Plaintiffs to prove the amount that they paid specifically for low emissions" based on that premium. 1-ER-31. "But what matters at the pleading stage is that the fact of damage, rather than the amount of damage, is not speculative." 1-ER-23. Under these circumstances—"where consumers each purchased a car, a well-known depreciating asset, where they each paid a premium for a feature they did not receive, and where they resold the cars before learning that the feature was missing"—the court concluded that the plaintiffs had "alleged an injury that is sufficiently concrete to survive a Rule 12(b)(1) motion to dismiss for lack of Article III standing." 1-ER-22–23.

C. The plaintiffs' experts use established methods to estimate out-of-pocket damages.

"To streamline adjudication of issues that [had] been raised with respect to damages," the court ordered the parties to pick four of the twenty-eight named plaintiffs, who would be required to "offer proof of damages before the case proceed[ed] further." 1-ER-21. The court allowed the parties to engage in discovery "as reasonably needed to prove and defend against the selected plaintiffs' claims of damages." *Id.*

The parties agreed to randomly select four named plaintiffs, resulting in the selection of two former "clean diesel" owners and two former lessees. 1-ER-5. The parties conducted discovery with respect to those plaintiffs' damages, including the exchange of written reports by five experts and depositions of those experts and the selected plaintiffs. They then filed submissions on the evidence of damages and cross-motions to exclude the opinions of opposing experts. 1-ER-5–10.

The plaintiffs' submission on damages offered expert opinions identifying several established methods for estimating the plaintiffs' out-of-pocket damages based on the amount that they overpaid at the time of purchase, but this Court need consider only one of those methods for purposes of this appeal. The plaintiffs provided a report by Ted Stockton, an economist with extensive experience in the automotive industry, on whose opinion the district court relied in approving the class settlements, who used a "diminished-value proxy" method to determine damages. *See* 3-ER-460–61; 3-ER-470; *see* 5-ER-1060–61. The plaintiffs contended that, if they were entitled to those overpayment damages, no further showing was necessary. 3-ER-397–98. But in the event that the court required them to show the amount by which they were able to mitigate that overpayment through resale or trade-in, the plaintiffs also offered a concrete method for accounting for that mitigation. They argued that even applying that more conservative method, they did not, and could not have, recovered the full amount of their overpayments given the substantial effects of depreciation on their cars' value. *See* 3-ER-469.[2]

Overpayment at time of purchase or lease. The intended targets and primary victims of Volkswagen's fraud were the original purchasers and lessees of its

[2] Although this case has not yet reached the class-certification stage, Mr. Stockton explained that his method could determine economic harm on a class-wide basis. 2-ER-361.

fraudulently marketed cars, who paid a higher purchase price or increased lease payments because of the fraud. The plaintiffs' expert, Mr. Stockton, measured the amount of those overpayments using a common and well-established "difference-in-differences" regression analysis, which looks to the change in a product's value in a competitive market immediately after its true nature is publicly disclosed. 3-ER-378–79; 3-ER-380–81; 4-ER-770–71. A significant drop in market price relative to comparable products suggests the value that the market ascribed to the fraud. 3-ER-475–76. If, for example, revelation of the fraud caused a product's market price to fall by 15% more than would be expected from ordinary depreciation, a reasonable inference would be that the fraud was responsible for inflating the pre-exposure price by approximately that amount. 3-ER-476.[3]

Here, Mr. Stockton measured the decline in market value of affected Volkswagen cars in the period immediately after the EPA publicly revealed the existence of the defeat device in September 2015, separating out the effect of ordinary depreciation by comparing the observed price drop to the change in market value of

[3] This method is called a "difference-in-differences" analysis because it measures the *difference* between two *differences* in market values over time—the difference in the values of affected products both before and after the fraud was revealed, and the difference in the values of unaffected products over the same period. It is a form of regression analysis that measures the degree to which the affected products drop in value after the revelation differs (*i.e.*, regresses) from ordinary depreciation.

comparable cars over the same period. 3-ER-478–79. He found that Volkswagens equipped with the defeat device lost significantly more value following revelation of the fraud, with Volkswagen-branded cars losing an additional 12.1% in value and Audi-branded cars an additional 6.7%. 2-ER-192. Mr. Stockton then applied those percentages to the purchase prices and lease payments for the plaintiffs' cars to calculate the amount they overpaid. *Id.* He concluded that each of the plaintiffs overpaid for their cars by between $2,697 and $3,553 as a result of Volkswagen's fraud. *Id.*

Partial recoupment of overpayment. Because Volkswagen successfully hid its fraud from the public for more than six years, a significant number of the cars' original purchasers had already sold or traded in their cars by the time the fraud became public in September 2015. 4-ER-756. Although Mr. Stockton took no position on the legal relevance of those resales and trade-ins, he noted that, from "an economic perspective," they may have "allow[ed] consumers to recapture or mitigate some of the original overpayment." 3-ER-495.

But he concluded that, even if some plaintiffs might have been able to "'pass on' some of the premium to subsequent buyers," it is "unlikely, if not impossible, for them to pass on the entirety of the premium." 3-ER-469. Because cars begin depreciating rapidly immediately after purchase, even a plaintiff who resold her car the day after purchasing it would already have lost a significant amount of the fraud-related overpayment to depreciation—an amount that could not be recouped. *See* 4-ER-798; 4-ER-926; 5-ER-1098.

Mr. Stockton explained that a car's depreciation rate can be determined using either individual plaintiffs' sales information or industry data sources. 3-ER-495. And application of that rate to the plaintiffs' cars, he wrote, was "straightforward." 3-ER-496. First, he calculated the car's value at resale as a percentage of its original purchase price. *Id.* Second, he applied that percentage to the plaintiffs' initial overpayment to estimate the amount of the overpayment recovered. *Id.* If, for example, a consumer purchased a car for $40,000 and resold it for $30,000, the car retained 75% of its value at resale. If the overpayment attributable to Volkswagen's fraud was $10,000, the plaintiff could have recovered 75% of that, or $7,500, from the resale, leaving $2,500 of unrecouped damages.

D. The court excludes the plaintiffs' expert opinions and dismisses the case for lack of Article III standing.

After reviewing the evidentiary submissions, the district court granted Volkswagen's motions to exclude the plaintiffs' experts and dismissed the case for lack of Article III standing. 1-ER-3. The court began by repeating its view that it "may be challenging for Plaintiffs to prove the amount that they paid specifically for low emissions" if the overall diesel package "also included features that Plaintiffs received," "like strong fuel economy and better driving performance." 1-ER-5. This time, however, the court treated the plaintiffs' ability to prove the amount of that "low-emissions premium"—and to calculate a specific rate of depreciation for that premium—as *necessary* to the plaintiffs' standing. "[O]nly the low emissions premium's decline in value would be a concrete injury," it wrote, "and proving that injury may be difficult or impossible." *Id.*

Based on that conclusion, the court brushed aside Mr. Stockton's diminished-value analysis as "not relevant" because he "did not attempt to calculate a low emissions premium." 1-ER-16. The analysis, the court wrote, "principally relies on the effects of disclosure, including brand effects, even though Plaintiffs resold their cars before disclosure." 1-ER-17. The court also rejected Mr. Stockton's depreciation analysis as "not reliable," calling it "plainly wrong" "that the value of an emissions premium declines at the same rate as the overall vehicle." 1-ER-16.

For those reasons, the court granted Volkswagen's motion to exclude Mr. Stockton's report and other evidence of damages. 1-ER-3. "Without any injury," it concluded, the plaintiffs "lack standing, which means the Court lacks jurisdiction and must dismiss this case." *Id*.

SUMMARY OF ARGUMENT

I. Damages in a fraud case are based on the amount that the plaintiffs overpaid, measured by the "difference between the price paid … and the value of the thing acquired." Restatement (Second) of Torts § 549, cmt. c. There is no real dispute that the plaintiffs here overpaid based on Volkswagen's fraud. The plaintiffs quantified that overpayment, using expert evidence, at thousands of dollars each. That is far more than is required to establish an Article III injury.

The district court's rejection of that evidence was based on its adoption of the wrong legal standard for damages. The court required the plaintiffs to prove damages based on a so-called "low emissions premium," which it defined as the fraction of Volkswagen's higher diesel prices attributable specifically to low emissions. That standard, however, disregarded the impact of the defeat device and resulting *higher* emissions—critical facts bearing on the "value of the thing acquired." The district court's decision to ignore that reality resulted in a test that was impractical to apply and, because it failed to account for relevant negative characteristics of the plaintiffs' cars, economically irrational. The test also imposed an overly stringent burden on the plaintiffs to precisely quantify damages, especially given that any uncertainty here is attributable to Volkswagen's decision to engage in fraud.

II. Because the plaintiffs' evidence of overpayment itself establishes their injury, there is no need to go further. The law is clear that any amounts that the plaintiffs may later have recouped from third parties by reselling or trading in their cars do nothing to reduce the damages they suffered at the time of the fraud. The district court's contrary view assumed, without authority, that defrauded plaintiffs do not suffer damages until they have realized a subsequent loss in market value.

resulting from revelation of the fraud. That may make sense when the fraud is about securities or other financial instruments, but not when it is about consumer products like cars. And even if third-party payments could mitigate the plaintiffs' damages, it would be Volkswagen's burden to show that mitigation. It has made no effort to do so here.

In any event, expert evidence establishes that, because cars rapidly depreciate in value, the plaintiffs suffered substantial out-of-pocket losses *even after* taking resales into account. The district court's holding that the plaintiffs must prove depreciation specifically of the "low emissions premium" was again based on its use of the wrong standard for damages. It also made little economic sense, given that nonexistent "low emissions" cannot depreciate in any meaningful way. And it wrongly forced the plaintiffs to bear the burden of the uncertainty caused by Volkswagen's fraud.

III. At a minimum, the plaintiffs have demonstrated Article III injury. Overpayment is a concrete financial injury whether or not it was later recouped on resale. Even if there were no evidence of overpayment, the plaintiffs would still be injured for Article III purposes because there is no dispute that they were deprived of the benefit of the bargain when they paid for something they did not receive. For that reason alone, this Court should reverse. To provide guidance on remand, however, the Court should enumerate the district court's errors with respect to the measure of damages.

STANDARD OF REVIEW

In reviewing a district court's dismissal for lack of jurisdiction under Rule 12(b)(1), this Court reviews "the district court's legal conclusions de novo." *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1234 (9th Cir. 2008). The district court's exclusion of the plaintiffs' expert opinions as irrelevant under Federal Rule of Evidence 402 was a decision "primarily of law, and the standard of review is thus de novo." *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000). The court's exclusion of other aspects of those opinions as unreliable under Rule 702 is reviewed for abuse of discretion. *See United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir.1997) (en banc). "A district court abuses its discretion when it bases its decision on an erroneous view of the law," *id.*, or "rules in an irrational manner," *United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2000).

ARGUMENT

I. The plaintiffs were injured when they overpaid as a result of Volkswagen's fraud.

The long-established standard for out-of-pocket damages in fraud cases is the "difference between the price paid … and the value of the thing acquired," where the "value of the thing acquired" is the market value it would have had if the "characteristics that affect its value were known." Restatement (Second) of Torts § 549, cmt. c; *see Bagdasarian v. Gragnon*, 192 P.2d 935, 940 (Cal. 1948). It is, in other words, "the difference between what was paid and what a reasonable consumer would have paid at the time of purchase" absent the fraud. *See Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015). That is the same standard that the district court applied at the opt-out trial, holding that the "proper measure of economic damages" from Volkswagen's fraud was "the amount Plaintiffs paid for their cars, less the actual fair market value of those cars at the time of sale." 4-ER-747–48. The difference reflects the amount that the plaintiffs overpaid because of the fraud—that is, the injury "proximately caused by the misrepresentations of the defendant." *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1437 n.2 (9th Cir. 1987).

There is no real dispute that the original purchasers and lessees of Volkswagen "clean diesel" cars, including the plaintiffs here, overpaid for those cars as a result of Volkswagen's concealment of the defeat device. Volkswagen accepted the fact of overpayment for purposes of both the class settlements and the opt-out trial. *See* 4-ER-755; 5-ER-1097–98. The alternative—that the plaintiffs paid nothing extra for the reduced emissions and environmental friendliness that Volkswagen marketed as the cars' identifying characteristic—is simply not believable. *See* 3-ER-463 (noting that it "would have been economically irrational" to include the defeat device if not for some perceived marketing benefit); 1-ER-31. "Accordingly, all consumers who purchased or leased" the affected cars before disclosure of the defeat device "overpaid at the point of original purchase or lease." 3-ER-464. And the fact that the plaintiffs "paid more for [their cars] than they otherwise would have paid" is itself enough to establish their Article III standing. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012).

But the plaintiffs went well beyond the minimum required to show standing here. They also quantified their overpayments with expert evidence demonstrating that Volkswagen fraudulently overcharged them by thousands of dollars each. Mr. Stockton's "diminished value proxy" method used a regression analysis to estimate the market value attributable to Volkswagen's concealment of the defeat device. 3-ER-475. He found a market reaction that was "negative and highly significant," with affected Volkswagen-branded cars losing an extra 12.1% in value and Audi-branded cars an extra 6.7% compared to competing models. 2-ER-192. By straightforward application of those rates to the purchase price of the plaintiffs' cars, Mr. Stockton concluded that each plaintiff suffered an out-of-pocket injury of up to $3,500. 3-ER-479–80.

A. The district court used the wrong legal measure of damages.

The district court did not question the established principle that a post-revelation "decline in market prices" is evidence of "the magnitude of overpayment at the time of initial purchase," 1-ER-7—a principle that both Volkswagen and the court endorsed in the class settlements and the opt-out trial. *See* ER-1100 (noting, for purposes of the class settlements, "strong evidence of excess depreciation" after revelation of the fraud); *see also* 4-ER-770–71. But the court rejected Mr. Stockton's use of the diminished-value method here as "not relevant" to a showing of the plaintiffs' damages because "he did not attempt to calculate a low emissions premium"—a concept that the court defined as the amount that the plaintiffs "paid specifically for low emissions" as a fraction of the "overall premium they paid for diesel vehicles." 1-ER-5; 1-ER-16; *see also* 1-ER-31–32. Based on that relevance determination, the court concluded that the plaintiffs had failed to prove that they overpaid for their cars. There are at least three major problems with that conclusion.[4]

1. The district court—by requiring the plaintiffs to prove the amount they "paid specifically for low emissions"—artificially limited them to only one of the "characteristics that affect [their cars'] value": low emissions. Restatement (Second) of Torts § 549, cmt. c. That might have been enough if Volkswagen had sold ordinary diesels disguised as low-emissions ones. In that case, the difference between the price paid and value received would have been just the marginal value of the missing low emissions. But Volkswagen's fraud was much worse than that. Its cars did not just fail to deliver the promised low emissions—they contained illegal emissions-cheating software that allowed them to emit up to 40 times the legal limit. 3-ER-857. Those

[4] In addition to dismissing for lack of jurisdiction under Rule 12(b)(1), the district court granted Volkswagen's motion to exclude Mr. Stockton's expert opinion as irrelevant under Federal Rule of Evidence 402. 1-ER-11; 1-ER-13; 1-ER-17–18. For the same reasons that this Court should reverse the district court's dismissal, it should also reverse the court's exclusion of Mr. Stockton's opinion.

additional facts are relevant "characteristics" that would have impacted the cars' value had Volkswagen not concealed them. *See* 2-ER-367.

Volkswagen's expert, Dr. Lorin Hitt, grounded his opinion on the same error. Dr. Hitt based his critique of the plaintiffs' evidence on the premise that the plaintiffs "must establish that buyers actually paid a market premium … that was *directly tied* to low [nitrogen oxide] emission." 2-ER-146; *see also* 2-ER-90 (damages must be "attributable solely to … the low [nitrogen oxide] premium"). He derived that premise not from any economic principles, but from the district court's "conceptualization" of an "overpayment structure," where the "primary source of damages" was depreciation of a low-emissions premium. 2-ER-87–88; *see* 2-ER-145 (noting that Dr. Hitt's "low [nitrogen oxide] emissions premium" is "conceptually identical" to the district court's "low emissions premium"). As a consequence, he did not consider the negative value of the defeat device or associated illegal emissions. On the contrary, he cited Mr. Stockton's consideration of the "ultimate effect of the Defeat Software" on car prices as a reason for concluding that the diminished-value method "cannot reliably estimate economic harm related to the low [nitrogen oxide] emissions feature." 2-ER-184–85; *see also* 2-ER-185.

But the proper standard for measuring damages, and the one that Mr. Stockton applied, is not "limited to the failure to provide low-[emissions] features." 2-ER-367. Rather, it looks to "the change in the market value … that corresponds to the difference in attributes between the vehicles as delivered and the vehicles that consumers believed they had acquired." *Id.*; *see* Restatement (Second) of Torts § 549, cmt. c. That difference in attributes includes not just the absence of positive attributes for which Volkswagen charged consumers—"primarily, low levels of regulated emissions"—but also the presence of "negative attributes that [Volkswagen] concealed" from them, "including a Defeat Device intended to elude detection" and consequent excess emissions. 3-ER-463; *see* 2-ER-363–65. Indeed, Volkswagen and the district court recognized in both the class settlements and the opt-out trial that Volkswagen's concealment of the defeat device is the relevant fraud on which to base damages. *See* 5-ER-1062 (the settlement "provides recovery for the losses … as a result of Volkswagen's use and subsequent disclosure of the defeat device"); *see also* Docs. 7712 at 13, 7063 at 3.

Take, for example, a hypothetical posited by the district court: the sale of counterfeit Louis Vuitton purses. *See* 1-ER-12. Suppose that, instead of counterfeit purses, Louis Vuitton itself markets a premium line of purses as "cruelty free," designed to take advantage of growing public concern about mistreatment of animals. The company touts the purses as being made from a newly designed luxury "vegan" leather that has all the qualities of high-quality real leather without the use of animal products. But the public learns that the claim is a lie: The "vegan" leather is not only made from animal skins, but comes from a factory farm notorious for its failure to meet minimal humane-treatment standards under U.S. law. It would miss the point, in that case, to require defrauded consumers to prove a "vegan leather premium" with evidence of the amount they paid "specifically for vegan leather" over other Louis Vuitton purses. That test would ignore the full extent of the fraud and the real-world value of the fake vegan leather that purchasers actually received.

The same would be true if food marketed as "kosher" failed not only to satisfy kosher standards but also U.S. health codes. Or if "fair trade" coffee beans, marketed as providing coffee farmers a living wage, were actually harvested by slave labor and thus illegal to import. In each of these cases, a company is marketing a supposedly premium product to consumers who care about a particular marketed characteristic, but the product, in reality, fails to comply even with minimum standards. The measure of a consumer's damages in such a case is the difference in value between the promised premium quality and the reality of the product actually received—a product that is worse than anyone reasonably could have expected.

2. With the scope of the relevant fraud in mind, it is also apparent that the district court's assumption that the value of "low emissions" must be limited to a "fraction" of the "overall premium [the plaintiffs] paid for diesel vehicles" was arbitrary. Dr. Hitt again adopted this same assumption in his opinion. *See, e.g.*, 2-ER-365 (stating that, to calculate "any premium they paid for the one feature [the plaintiffs] did not receive—the low [nitrogen oxide] emissions feature—the value of the features they did receive must be assessed and subtracted"). As Mr. Stockton explained, however, there is no economic reason why the diminution in the vehicles' values caused by the defeat device could not have exceeded the entire value of the "overall" diesel premium. 2-ER-365–66. It is possible that diesels with illegally high emissions, despite having better fuel economy and performance, might be worth even *less* than comparable gasoline cars—just as it is possible that fraudulent "vegan" leather purses may be worth less than real leather ones. *See id.* The "low emissions premium" adopted by the district court and applied by Dr. Hitt ignored that possibility.

3. As a consequence of the first two problems, the "low emissions premium," as the district court itself recognized, is "difficult to isolate and measure." 1-ER-12. If a plaintiff paid $3,000 more for a Volkswagen "clean diesel" than she would have paid for a comparable gasoline car, then the district court's rule would require her to prove the fraction of that $3,000 she "paid specifically for low emissions" instead of for other features of diesel engines such as fuel economy or performance. 1-ER-31. That is like estimating the value of a particular feature in a house ("spare bedroom premium") by taking the house's total price ("overall house premium") and subtracting out the value of all unrelated features (carpeted floor, large backyard, etc.). Even if that were possible, a much better option—given the availability of a large housing market in the United States—would be to use market data to find the value that the *market* attributes to spare bedrooms.

Mr. Stockton's diminished-value analysis uses such a market-based approach. Rather than estimating the value of Volkswagen's fraud by artificially delimiting a fraction of the overall diesel premium, it isolates the value that the market *actually attributed* to Volkswagen's false claims by comparing the market's valuation of cars before and after the EPA's announcement of the defeat device's existence. *See* 2-ER-367; 3-ER-476. Both before and after the announcement, the cars' market value included the value of diesel features unrelated to Volkswagen's fraud, like fuel economy and performance. 3-ER-399. But although the value before the announcement included the value of low emissions, the value after included instead the negative value of illegally high emissions and a defeat device. *Id.* The difference between the before and after values singles out the value attributable specifically to characteristics of Volkswagen's fraud—the effect, in other words, of Volkswagen's failure to disclose the defeat device at the time of sale. *Id.*

As Dr. Hitt recognized, "Mr. Stockton's method" is thus designed to "estimate a premium that captures the total effect of all factors related to the disclosure of the Defeat Software." 2-ER-185. Attempting to subtract out additional value to isolate a judicially constructed "low emissions premium" would make the measurement a *less* accurate reflection of the fraud's real-world effect on the cars' market value, not a more accurate one.

B. The court's rejection of the diminished-value analysis was economically irrational.

The district court concluded that Mr. Stockton's diminished-value analysis failed to measure the "low emissions premium," and was thus "not relevant" to damages, because it "relie[d] on the effects of disclosure, including brand effects." 1-ER-17. Volkswagen and its expert, Dr. Hitt, made a similar point below, arguing that the value Mr. Stockton measured went "well beyond" a low-emissions premium by including "the harm to the Volkswagen and Audi brands in the aftermath" of the announcement. Doc. 7706 at 16 (emphasis omitted).

"Excluding diminished value that relates to perception of the brand," however, would be an "illogical and economically irrational" way to measure value. 3-ER-388. Many products—including cars—are valued on "perception of the brand's differentiating high quality." *Id.* If it comes out that the public's perception was based on fraud, Mr. Stockton explained, "clearly the products would be worth less." 3-ER-388. And Dr. Hitt agreed, noting that consumers' perception of intentional fraud "may affect their choice" and "potentially affect economic outcomes." 2-ER-85. That economic impact is no less real because it is based on "brand effects." An owner of Enron stock in 2001 would find no comfort in writing off the company's plummeting value as just the effect of its bad reputation.

Indeed, the district court acknowledged that "[c]ustomers still in possession of their fraudulent vehicles at the time of disclosure were harmed by that reaction." 1-ER-17. But it nevertheless concluded that the plaintiffs here were not similarly injured because they had "resold their cars before disclosure." *Id.* "The pertinent market value does not rely on the public's reaction to news that vehicles were fraudulent," it held, because the plaintiffs no longer possessed their cars by the time of that news. *Id.*

That conclusion misses the point of the diminished-value method. Mr. Stockton recognized that the plaintiffs here "disposed of their vehicles prior to the revelation" of Volkswagen's fraud and thus "would not have been directly affected by a post-revelation decline in resale value." 3-ER-475. But "post-revelation price depreciations are still relevant" as "a reasonable proxy for overpayment *at the time of initial purchase*." *Id.* (emphasis added); 3-ER-476. As Mr. Stockton explained, the "entire aim" of the method "is to determine from the market's response to the revelation of the Defeat Device how the market would have responded … when the vehicles were new." 3-ER-388–89; *see Blackie v. Barrack*, 524 F.2d 891, 909 n.25 (9th Cir. 1975) (noting that a price drop when fraud is revealed is "circumstantial evidence" of value at time of purchase). The district court, and Volkswagen, recognized that fact in the opt-out trial. *See* ER-751 (noting that the method "can be used to extrapolate what the fair market … would have been at the time of sale"); 4-ER-770–71.

What may have driven a different intuition by the district court here is that, although the false promise of "low emissions" would likely increase price at the time of purchase, the existence of the concealed defeat device and the resulting brand effects would not. But if that was the court's basis for rejecting Mr. Stockton's analysis, it is again economically irrational. Fraud can affect prices even without increasing them; it can also artificially maintain prices by covering up negative information. *See, e.g.*, *In re Vivendi, S.A. Secs. Litig.*, 838 F.3d 223, 257 (2d Cir. 2016). Economically, the two kinds of fraud are equivalent: Both keep a product's price higher than it otherwise would have been, both cause that price to fall when the fraud is revealed, and both injure consumers with a price that would have been lower if the company had told the truth. *See id.* Indeed, a company's attempt to hide bad information from the public is, in the securities-fraud context, "the prototypical fraud case." Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 Wash. U. L. Rev. 487, 524 (2015).

That principle applies here. As explained, Volkswagen's fraud included concealing "negative attributes," such as the existence of the defeat device. ER-463. Volkswagen artificially inflated the value of its cars by preventing the market from reacting to those negative attributes, and the plaintiffs, as a consequence, paid more than they would have if the fraud had been disclosed at the time of sale. The district court erred in failing to recognize that economic reality.

C. The court imposed an overly stringent burden on the plaintiffs to precisely prove damages.

The district court's rejection of Mr. Stockton's evidence as "not relevant" was also legal error because it imposed the wrong burden on the plaintiffs to show damages. Plaintiffs are not required to prove their damages "with scientific certainty." *Bazemore v. Friday*, 478 U.S. 385, 400–01 (1986). Rather, the "law requires only that some reasonable basis of computation of damages be used." *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 938-39 (9th Cir. 1999). That principle, which holds true even for purposes of proving damages at summary judgment or at trial, is all the more relevant for purposes of demonstrating a cognizable Article III controversy at the outset of the case. Here, Mr. Stockton's diminished-value regression analysis provides a "reasonable, accurate, and conservative" basis for computing damages. 3-ER-399.

Mr. Stockton's method is "commonly used by economists," and by courts, to determine price impact. ER-772; *see, e.g.*, *Blackie*, 524 F.2d at 909 n.25. Securities-fraud cases, for example, have long looked to the market's reaction to revelation of fraud as "circumstantial evidence" of the true value of the stock on the date of the transaction. *See, e.g.*, *Blackie*, 524 F.2d at 909 n.25; *Harris v. Am. Inv. Co.*, 523 F.2d 220, 226-27 (8th Cir. 1975). The same approach was taken by Volkswagen's own expert, Professor Bresnahan, and accepted by the district court, to estimate overpayment in the opt-out trial. *See* 4-ER-770–71. Like Mr. Stockton, Professor Bresnahan measured damages using a "difference-in-differences" regression analysis to examine the impact on the market for affected cars following revelation of Volkswagen's fraud. 4-ER-770. Employing that method, he found that the opt-out plaintiffs had overpaid by up to about $2,700. 4-ER-775.[5]

The only basis that the district court identified for distinguishing Mr. Stockton's analysis from Professor Bresnahan's is that Mr. Stockton did not control for "brand effects." 1-ER-17. But even if the court were correct that brand effects should have been excluded, its "view of the evidentiary value of the regression analyses was plainly incorrect." *Bazemore*, 478 U.S. at 400–01. "Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Id.* "While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors must be considered unacceptable as evidence." *Id.* Such an analysis can still "serve to prove a plaintiff's case." *Id.*

[5] Volkswagen argued below that Mr. Stockton's analysis differed from Professor Bresnahan's because the two experts relied on different datasets for aspects of their analysis. *See* 3-ER-478. In rejecting Mr. Stockton's opinion as irrelevant, however, the district court did not rely on those distinctions, none of which cast doubt on the basic soundness of the diminished-value method.

If anything, the diminished-value method provides a conservative estimate of value here. If Volkswagen had disclosed the defeat device and illegal emissions levels at time of purchase, it is unlikely that any reasonable consumer would have bought them. 4-ER-760–61. Indeed, consumers *could not* have bought them: "The excess emissions represent an operation condition that is sufficiently abnormal such that it does not meet requirements for entry into commerce as a new vehicle." 3-ER-463; 3-ER-478. Given that the cars could not legally be sold, a reasonable valuation of the cars at time of purchase would, in fact, be $0. 3-ER-388–89. After the cars had already been on the road for years, however, it was much less likely that the government would prohibit owners from continuing to drive them. *See id*. That, plus the expectation that Volkswagen would likely compensate owners or provide a fix, likely lessened the defeat device's impact on market price at the time it was revealed. *See id*.

Requiring any greater precision in measuring damages would be particularly inappropriate here, where "the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1170 (9th Cir. 2013). Volkswagen chose to install an illegal device to allow its cars to pollute at rates far above EPA limits. As Mr. Stockton points out, the cars are thus "outside the normal market," with no "direct measures" available to estimate their value at time of sale. ER-399. In similar cases, "where a defendant's fraudulent conduct … caused an artificial market of long duration," courts have long approved looking to diminished value "at the date of discovery of the fraud" as a measure of damages. *Harris*, 523 F.2d at 226. And especially because any uncertainty is attributable to the defendant, it is enough that "the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Pac. Shores Props.*, 730 F.3d at 1170–71. The district court erred as a matter of law by requiring more here.

II. Although they are not required to prove it, the plaintiffs did not, and could not have, recovered their overpayments by reselling or trading in their cars.

Because the plaintiffs suffered an injury at the time they overpaid for their cars, and their claims accrued at that time, there is no need for this Court to decide whether they recouped those overpayments by later reselling or trading in their cars. Black-letter law holds that Volkswagen has no further interest in how the plaintiffs dispose of the cars that it fraudulently passed off to them. The plaintiffs therefore need not prove that they failed to recover the full amount of their overpayments—not to show damages, and certainly not to show Article III injury. And even if they were required to make that showing, they have done so here.[6]

[6] At a minimum, evidence of recoupment is unnecessary for the lessee plaintiffs. They were damaged by inflated per-month lease rates but, "[u]nlike former owners, … did not have the opportunity to resell the class vehicles because they did not own them." 1-ER-33. The Court should therefore reverse as to the lessee

A. The plaintiffs need not prove the amount, if any, that they recouped from reselling or trading in their cars.

1. The district court recognized that the plaintiffs' claims rest on "a well-accepted theory of injury (overpayment)." 1-ER-22. But it saw a "novel twist" in the facts of this case. Many of the plaintiffs resold or traded in their cars before Volkswagen's fraud became public, it wrote, and the cars' prices were therefore "likely inflated not only when they purchased them, but also when they resold them." *Id.* To show Article III injury under these circumstances, the court held that the plaintiffs would need to show that they "did not recover all of their overpayment through resale because a portion of the premium they paid for a low-emission vehicle depreciated." *Id.*

What is novel here, however, is not the plaintiffs' claims, but the district court's holding that consumers who have in fact been defrauded—who were actually tricked into paying money for a fake product—have not suffered an injury that is cognizable in federal court. Nobody would consider requiring defrauded purchasers of phones or toasters to prove that the products lost value on a public market, or that the fraudulently obtained overpayment had depreciated in value, before recovering the money fraudulently taken from them. In such cases, plaintiffs must show that they

plaintiffs based on the evidence of overpayment alone. *See* 1-ER-36 ("If the amount of Plaintiffs' lease payments increased because of the 'clean diesel' premium, then Plaintiffs were plausibly injured.").

overpaid on the date of purchase—period. "In the eyes of the law, a buyer forced to pay more than he or she would have is harmed at the moment of purchase, and further inquiry into such subsequent transactions, actual or hypothesized, ordinarily is unnecessary." *Kwikset Corp. v. Superior Ct.*, 246 P.3d 877, 893 (Cal. 2011).

As the district court and Volkswagen recognized during the opt-out-trial, the plaintiffs' damages for fraud are measured by "the difference in actual value *at the time of the transaction* between what the plaintiff gave and what he received." *All. Mortg. Co. v. Rothwell*, 900 P.2d 601, 609 (Cal. 1995); *see* ER-751; Doc. 7197, at 9 n.2. That is true whether calculating damages for common-law fraud under California law, *All. Mortg. Co.*, 10 Cal. 4th at 1240; violations of the California Consumers Legal Remedies Act, *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 820-21 & n.6 (9th Cir. 2019); violations of RICO, *Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083, 1087 (9th Cir. 2002); or restitution under the Unfair Competition Law and False Advertising Law, *Pulaski & Middleman*, 802 F.3d at 989.

Given that the plaintiffs' claims accrued at the time of purchase, the "fact of subsequent reimbursement" is no longer "of any concern to the wrongdoer[]." *Adams v. Mills*, 286 U.S. 397, 407 (1932). It is black-letter law that Volkswagen is not entitled to credit against the plaintiffs' claims based on payments that the plaintiffs later received from others. When "a tort defendant makes a payment toward his tort liability, it of course has the effect of reducing that liability." Restatement (Second) of Torts § 920A, cmt. a. But "[p]ayments made to or benefits conferred on the injured party from *other* sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." *Id.* § 920A(2) (emphasis added). Such payments "are known as collateral-source benefits" or "pass-on sales," and "[t]hey do not have the effect of reducing the recovery against the defendant." *Id.*, cmt. b; *Kwikset*, 246 P.3d at 893. "Under the collateral source rule, the tortfeasor is not entitled to be relieved of the consequences of its tort by some third party's compensation to the victim." *Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1134 (9th Cir. 2003).

That understanding is backed by a "long line" of U.S. Supreme Court decisions. *Clayworth v. Pfizer, Inc.*, 233 P.3d 1066, 1073 (Cal. 2010). As Justice Holmes explained in *Southern Pacific Co. v. Darnell-Taenzer Co.* in declining to reduce damages for railroad overcharges that the plaintiff had passed on to its customers, the "general tendency of the law, in regard to damages at least, is not to go beyond the first step." 245 U.S. 531, 533-34 (1918). Where the "plaintiffs suffered losses … when they paid," their "claim .... accrued at once," and the law "does not inquire into later events." *Id.* at 534; *see also Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968) (disallowing pass-through damages reductions); *Adams*, 286 U.S. 407 (holding that agents were entitled to recover illegal fees for which their clients had already reimbursed them). Similarly, this Court and state supreme courts have long held that, because damages in common-law fraud claims are calculated at the time of sale, plaintiffs "need not account for benefits received after purchase." *Pulaski & Middleman,* 802 F.3d at 989; *see, e.g.*, *Nguyen*, 932 F.3d at 820-21 ("potential post-purchase value" irrelevant); *Siverson v. United States*, 710 F.2d 557, 559 (9th Cir. 1983); *Kwikset*, 246 P.3d at 893; *Clayworth*, 233 P.3d at 1073; *Hotaling v. A.B. Leach & Co.,* 159 N.E. 870 (N.Y. 1928).

The district court cited no contrary authority in support of its conclusion that the plaintiffs, despite having been defrauded out of money, have not "suffered any damages at all." ER-12. Its holding, however, seems rooted in the law of securities fraud, where courts hold that in-and-out traders, who both buy and sell stock at an inflated price, cannot recover based on overpayment alone. *See Dura Pharm. v. Broudo*, 544 U.S. 336, 348 (2005). But that rule is a "departure from common law" that is "based on the tailored application" of causation principles to securities-fraud claims. *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 183 (2d Cir. 2007). Securities are investment vehicles, the value of which is just "the price at which they may later be sold." *Id.* Purchasing an investment at an inflated price is thus "'offset by ownership of a share that *at that instant* possesses equivalent value.'" *Id.* (quoting *Dura*, 544 U.S. at 342). The rule, however, "does not govern" in a common-law fraud case, in which damages depend on "the extent that the purchase price overstated … value *on the date of sale*." *Id.*

The view that "overpayments induced by fraud are only cognizable" injuries "if they can be measured according to some independent, objective market" makes little sense in the common-law context. *Kwikset*, 246 P.3d at 893 n.18. Cars and other consumer products are nothing like securities, for which price is the only relevant feature. They are complex objects with "various tangible and intangible qualities" that drive purchasing decisions. *See id.* at 889. In many consumer-fraud cases, such as one about mislabeled "organic" milk, there is unlikely to be a functioning aftermarket on which the product can be valued and easily resold. *See id.* at 893. Even if such a market exists, defrauded consumers may be unwilling or unable to resell, and should not be required to do so before recovering damages. *See id.* And even when they do resell, consumers face transaction costs and reduced prices from depreciation and other market effects. *See id.* In those cases, unlike an in-and-out sale of stock, "there still has been a loss of money." *Id.* Reducing damages to reflect third-party payments thus fails to fully compensate the injured party while also failing to fully punish the wrongdoer—the twin purposes of out-of-pocket damages. *See* Restatement (Second) of Torts § 920A, cmt. b.

It is true that ignoring compensation from third parties can in some cases result in "double compensation for a part of the plaintiff's injury." *Id.* § 920A, cmt. b. "But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor." *Id.* "The rationale for the rule" is that "public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source." *Green v. Denver Rio Grande W. R.R. Co.*, 59 F.3d 1029, 1032 (10th Cir. 1995). To allow Volkswagen to escape compensating the plaintiffs for its admitted fraud because the plaintiffs may have received partial compensation from other sources would give Volkswagen a windfall—rewarding it, in effect, for its intentional fraud.

2. Even if Volkswagen were entitled to reduced damages for payments made by third parties after accrual of the plaintiffs' claims, it would have the burden of proving the amount of that reduction. In cases where a mitigation defense applies, "[t]he defendant has the burden of proving by a preponderance of the evidence … the amount by which damages would have been mitigated." Manual of Model Civil Jury Instructions for the Ninth Circuit § 5.3. As courts have recognized, "it is sensible to require the defendant to prove those items which go to reduce the plaintiff's recovery, as plaintiffs would have little incentive to do so." *Carnation Co. v. Olivet Egg Ranch*, 189 Cal. App. 3d 809, 818 (Ct. App. 1986). The district court itself followed that principle in the opt-out trial, holding that the plaintiffs there had "no obligation to adduce evidence that would reduce their compensation." 4-ER-742. There is no reason for a different rule in this case.

Even assuming any entitlement to reduced damages, Volkswagen has not even attempted to meet its burden to identify them. Its expert, Dr. Hitt, suggested only that the depreciation rate of "low emissions" *might* be different from the depreciation rate of the car as a whole. But neither Volkswagen nor its expert have identified evidence of the rate at which a car's "low emissions" depreciate. *See, e.g.*, 2-ER-82 (acknowledging that Dr. Hitt did not calculate depreciation).

Volkswagen responded to this point below by arguing that, regardless of the burden of proof on mitigation, the "burden of proving an injury-in-fact" under Article III "is squarely on Plaintiffs." Doc. 7706 at 13. The district court appeared to agree. *See* 1-ER-12. But although it is true that the plaintiffs have the burden of showing an Article III injury, their overpayment is—standing alone—more than sufficient to meet that burden. "[P]aying more than [a product] is worth" is a clear example of an "economic injury sufficient to establish Article III standing." *George v. Omega Flex, Inc.*, 874 F.3d 1031, 1032 (8th Cir. 2017); *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (overpayment is a "quintessential injury-in-fact"). That is true even if Volkswagen is entitled to an offset to damages as a result of money the plaintiffs later recouped. Standing is "not an accounting exercise." *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013). Rather, it recognizes the right to "complain that *some particular aspect* of the relationship is unlawful and has caused injury." 13A Wright & Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 2008 & Supp. 2020).

Thus, the fact that an injury may be offset or "outweighed by other benefits … does not negate standing." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 96 n.10 (2d Cir. 2017).

The district court also concluded that Volkswagen's recoupment argument was not really about "mitigation," but about whether, "given that Plaintiffs sold their vehicles or had their leases terminate before Volkswagen's fraud became public, Plaintiffs suffered any damages at all." 1-ER-12. But this is not a case where the "costs and benefits arose out of the same transaction." *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015). In those circumstances, where the plaintiffs' excess payments are simultaneously offset by a corresponding benefit, it is possible that "there was never an injury in the first place." *Alig v. Quicken Loans Inc.*, 990 F.3d 782, 792 n.9 (4th Cir. 2021). Here, in contrast, "there is no doubt that Plaintiffs actually paid" the overcharge, "and thus were injured." *Id.* This case therefore follows the "general rule that benefits conferred upon a plaintiff … cannot defeat standing." *Id.* Evidence of recoupment goes, at most, to damages—where Volkswagen has failed to meet its burden of proving mitigation.

B. The plaintiffs proved that they did not, and could not have, recouped their full overpayments.

1. Even assuming that the plaintiffs bear the burden of showing that they were unable to recoup the full amount of their overpayments, they have made that showing here. As the district court recognized, there is a "relationship between vehicle purchase price and depreciation: assuming the depreciation rate is fixed, a higher purchase price will invariably lead to a higher depreciation amount." 1-ER-26. Given a 10% depreciation rate, for example, a $30,000 car would depreciate by $3,000, while a $20,000 car would depreciate by only $2,000. Because of depreciation, Mr. Stockton concluded that it is "unlikely, if not impossible" that the plaintiffs could have recouped "the entirety of" their overpayments at resale or trade-in. 3-ER-469. That alone shows Article III injury by demonstrating the "fact," if not the "amount," of injury. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002).

The plaintiffs again went beyond the minimum required to show standing here. After determining the amount of the plaintiffs' overpayments, Mr. Stockton went on to account for any proceeds from subsequent resale or trade-in of their cars. His analysis showed that individual plaintiffs suffered out-of-pocket losses of up to $1,750 *even after* accounting for resale or trade-in. *See* 3-ER-474; 3-ER-499. Indeed, many of the original purchasers here likely lost *more* in economic terms than the subsequent purchasers who were members of the settlement classes because, as the original owners of the affected cars, they bore the brunt of the cars' depreciation. "New cars typically lose about 20% of their value the moment they're driven off the lot." 4-ER-798; *see also* 4-ER-926; 5-ER-1098. That, combined with the fact that the plaintiffs owned their cars for as long as six years before revelation of the defeat device, makes it likely that many of the cars had already lost most of their value by the time of resale.

A hypothetical makes clear how the plaintiffs were injured as a result. Suppose that a counterfeiter sells Alice what purports to be the latest Apple iPhone (another rapidly depreciating asset) for $1,000. In reality, the phone is a cheap knockoff worth only $100, meaning that Alice overpaid by $900. Three years later, Alice resells the phone to Ben on the secondary market, recouping $200. But immediately after, the company's fraud is exposed, rendering the counterfeit phone worthless. In that scenario, the $900 overcharge attributable to the fraud is effectively split between the two consumers: Ben is out of pocket from the fraud by $200, while Alice, even after resale, is out the remaining $700. Compensating only Ben because he happened to own the phone at the time the fraud was revealed would fail to compensate the consumer who suffered the greater injury, leaving most of the fraudulently obtained overpayment in the hands of the wrongdoer.

That is not far from what happened here. Plaintiff Michael Skena, for example, bought his Volkswagen for about $27,000 (overpaying by about $3,500), owned it for more than four years, and received just $12,000 for it when he traded it in a few months before Volkswagen's fraud became public. *See* 3-ER-474; 3-ER-480; *see* Doc. 7673 at 8–9. The subsequent owner, who owned the car for only two months before revelation of the fraud, was entitled under the class settlements to buyback and restitution remedies worth more than 110% the car's value. 5-ER-1061. But although Mr. Skena had lost about half of his $3,500 overpayment to depreciation, *see* 3-ER-499, he received nothing from Volkswagen.

As the district court recognized, compensating Mr. Skena and the other plaintiffs excluded from the class settlements for the portion of their overpayments lost to depreciation would not lead to "double recoveries" against Volkswagen. 1-ER-49. The settlements explicitly compensated class members based on the already-depreciated value of their cars at the time the fraud was exposed, not for depreciation that occurred prior to exposure. *See* 5-ER-1060 (setting the cars' "price as of September 2015"). As Mr. Stockton explained at the time, the values of the cars in September 2015 "do not fully account for the effects of the original overpayment by the consumer that occur between the time of purchase and September 2015." 5-ER-1099. For that reason, the district court recognized that members of the settlement classes "would not have recovered [the] portion of the premium" that, by the time the fraud was revealed, had already been lost to depreciation. 1-ER-49. The settlements, in other words, compensated class members for *their* injuries, not for the injuries of previous owners.

2. The district court rejected Mr. Stockton's depreciation analysis on the ground that it "assume[d] that the value of an emissions premium declines at the same rate as the overall vehicle." 1-ER-16. The court asserted that "[c]ar features and characteristics are likely to affect depreciation to different degrees." *Id.* And it speculated that "low emissions premium may play less of a role in vehicle depreciation" than other features. *Id.* The court's conclusion, however, suffers from the same flaws as its rejection of the evidence of overpayment: It applies the wrong legal test, reaches an economically irrational result, and misapplies the plaintiffs' burden on damages.[7]

First, the depreciation analysis the district court required hinged on its erroneous use of the "low emissions premium" as the test for damages. The court treated "low emissions" as a "feature[]" that could depreciate over time in the same way as the car's tires or its speaker system, suggesting that "low emissions might hold a relatively stable value over a vehicle's lifetime compared to features that naturally wear down." 1-ER-16. Volkswagen's expert, Dr. Hitt, also followed the district court's approach. *See* 2-ER-133 (the plaintiffs must "show that the premium for the low [nitrogen oxide] emissions depreciated between acquisition and disposal"). But, as already explained, the relevant fraud here is not just a false claim of low emissions—it is concealment of the defeat device and associated emissions far above the EPA's limit. Those negative aspects of the cars are not "feature[s]" that hold "value" or

[7] This Court should both reverse the district court's dismissal under Rule 12(b)(1) and its exclusion of Mr. Stockton's opinion on depreciation under Federal Rule of Evidence 702. *See* 1-ER-11; 1-ER-13. The court's decision to exclude Mr. Stockton's opinion was an abuse of discretion both because it was based on legal error and because it was economically irrational. *See Henderson*, 241 F.3d at 646.

"naturally wear down" like tires or speakers. Because the district court erred in requiring the plaintiffs to show a "low emissions premium," it erred in requiring them to show depreciation of that premium too.

Second, the approach to depreciation used by Volkswagen's expert and the district court is not economically rational in the context of this case. Dr. Hitt used the term "depreciation" to mean "physical deterioration of a product." 2-ER-160. "In particular," he wrote, "the depreciation rate of a product or a component of a product depends on how well the product or component continues to operate with use or time." *Id.* A car's "tires deteriorate with use over a relatively short period," for example, while "[o]ther components, such as sunroofs or Bluetooth connectivity, may retain more of their value over their useful life and deteriorate little." *Id.* Here, Dr. Hitt complained that the plaintiffs had "provided no evidence that the low [nitrogen oxide] emissions feature … experiences *any* depreciation during the first few years of usage." 2-ER-161. But it is nonsensical to talk about deterioration of a low-emissions "feature" because, in reality, no such feature existed in the plaintiffs' cars. A fake component cannot "deteriorate" or change how it "operate[s] with use or time."

The district court acknowledged the difficulty of applying depreciation "to a non-physical feature like low emissions," but it dismissed that point by defining "depreciation" as "shorthand for the changing value that consumers might place on low emissions." 1-ER-16. Assuming, however, that the "value that consumers might place" on low emissions could "depreciate," in that sense, at a different rate than the car as a whole—a proposition for which neither the district court nor Dr. Hitt cited any evidence—the district court's "shorthand" for depreciation makes no sense as applied to the relevant fraud in this case: Volkswagen's concealment of the defeat device. The "value that consumers might place" on the defeat device could not have changed during the period of the plaintiffs' ownership because consumers in the real world were—as a result of Volkswagen's fraud—not even aware of it during that time.

Even if "depreciation" of low emissions or the defeat device made sense and could be measured, it would have no relevance here because it would not "indicate[] the degree to which a consumer has recovered overpayment." 2-ER-316. The only way that the plaintiffs could have recouped any portion of their initial overpayment in the real world was by selling their entire cars. "Low emissions" and the defeat device are not separable components that can be independently resold—they are integral components of the plaintiffs' cars. Such components do not have a value of their own, but affect the value "of the entire vehicle," making "the vehicle's overall depreciation rate a reasonable measure for estimating mitigation." 3-ER-392. Attempting to instead measure the depreciation of the components themselves makes no more sense than calculating separate depreciation rates for the car's reliability, its color, or the fact that it has four doors—it is "detached and irrelevant" to "consumers' ability to recover some of their overpayment." 2-ER-323. Regardless of whether it is possible to do so in the abstract, such an approach would measure "something that is different from what consumers are able to recoup, and that's not the right thing to be measuring." 2-ER-315–16.

Third, even assuming the possibility that fake low emissions or the defeat device might have "depreciated" in some sense at a different rate than the car as a whole, and that the difference is relevant to the plaintiffs' damages, the district court nevertheless erred in dismissing the case. The court adopted a measure of damages that both it and Volkswagen's expert recognized to be "difficult or impossible" to precisely quantify. 1-ER-5; *see* 2-ER-173 (acknowledging that there is no reason to believe it "possible to separate the depreciation of any alleged premium from the depreciation of the vehicle overall"). But the solution to that problem, assuming that the district court's test is the correct one, is not to let Volkswagen keep the proceeds of its fraud. The law does not require absolute precision in calculating damages. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). It requires, as noted above, "only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *Marsu*, 185 F.3d at 938-39.

Here, the only reasonable basis on which to estimate the "depreciation" of the relevant characteristics of a car is to look to the depreciation of the car as a whole.

That approach, Mr. Stockton explained, is "wholly consistent with common practice within the retail automotive industry, which relies on overall vehicle depreciation rates for many purposes." 3-ER-379. Volkswagen provided no evidence of a different rate; nor did it suggest an alternative method by which the rate could reliably be measured. Given that the plaintiffs "had no other practicable way to prove" the depreciation rate of a nonexistent feature, it was reasonable to rely on the car's total depreciation as the best-available estimate of that rate. *Ridgeway v. Walmart*, 946 F.3d 1066, 1089 (9th Cir. 2020).

Any uncertainty about the accuracy of the depreciation rate should be borne by Volkswagen, the party that committed the fraud and the one with the burden of proof on its recoupment defense. *See Carnation Co.*, 189 Cal. App. 3d at 814 n.3. Volkswagen's decision to affirmatively conceal the defeat device from the public meant that the device's effect on market value over the period of the fraud was "not directly observable." 2-ER-368. Volkswagen alone had the ability to avoid the resulting uncertainty as to the plaintiffs' damages by not committing fraud. "[I]t would be a perversion of fundamental principles of justice" to allow it to rely on that uncertainty "to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for [its] acts." *Pac. Shores Props.*, 730 F.3d at 1170-71.

III. The plaintiffs have demonstrated Article III injury.

At a minimum, reversal is necessary because the plaintiffs have demonstrated Article III injury for purposes of standing. Their overpayments are a concrete financial harm that is a "quintessential injury-in-fact." *Maya*, 658 F.3d at 1069. And that is true whether or not they recouped some or all of their losses when they resold or traded in their cars. As noted, the fact that an injury may be "outweighed by other benefits does not negate standing." *Allco*, 861 F.3d 96 n.10. And that would be true even if, unlike here, the benefits were "sufficient to defeat a claim for damages." *Id.*

Even without evidence of overpayment, the plaintiffs would still have standing. The price that they paid, whether inflated or not, was for a car that Volkswagen marketed as low emissions and environmentally friendly. Volkswagen does not dispute that the cars it actually sold the plaintiffs "were anything but." *Volkswagen*, 895 F.3d at 603. As a result of the fraud, in other words, the plaintiffs did not get what they paid for. That, standing alone, is an "actual economic harm … emanating from the loss of their benefit of the bargain," and a cognizable Article III injury. *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 723 (5th Cir. 2007). Indeed, the plaintiffs allege that they would not have bought their cars at all if they had known about the fraud. Where, as here, a defendant's fraud causes plaintiffs to purchase a product "when they otherwise would not have done so, they have suffered an Article III injury in fact." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013). The district court therefore erred in dismissing the plaintiffs' claims for lack of jurisdiction under Rule 12(b)(1).

To be sure, a remand on the narrowest jurisdictional ground would risk putting the plaintiffs back in the same position below when it comes to showing damages at the summary-judgment stage. A decision that enumerates the district court's errors and provides guidance on the proper measure of damages would thus further judicial economy in this long-running litigation. Still, the plaintiffs have shown standing, and reversal on that basis, at least, is required.

CONCLUSION

This Court should reverse the district court's decision dismissing this case under Rule 12(b)(1) and its order to exclude Mr. Stockton's expert opinion, and should remand to the district court for further proceedings consistent with this Court's guidance.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

The plaintiffs are aware of the following cases currently pending in this Court that arise out of the same multi-district litigation in the Northern District of California. As far as the plaintiffs are aware, none of these cases raises legal issues related to those in this case.

PRGE&J Ret. Sys. Admin. v. Volkswagen AG, et al., No. 20-15564

Diana Carballar, et al v. Volkswagen Group of America, No. 20-16977

Adam Schell, et al v. Volkswagen AG, et al., No.20-17480

Rebecca Nation v. BMW of North America, LLC, No. 21-55108

Lawrence Kalbers v. Volkswagen AG, No. 20-56316

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7(B) because it contains 14,000 words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I electronically filed the foregoing opening brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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