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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

IN RE: VOLKSWAGEN "CLEAN)
DIESEL" MARKETING, SALES) Master File No.
PRACTICES, AND PRODUCTS) 3:15-MD-02672-CRB
LIABILITY LITIGATION.) MDL No. 2672
_____)

San Francisco, California
Thursday, February 25, 2016

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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(Multiple counsel present in the courtroom as reflected in the minutes.)

1 Thursday - February 25, 2016

8:01 a.m.

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

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4 **THE CLERK:** Calling case 15-MD-2672, In re Volkswagen
5 and Clean Diesel Marketing Sales Practices and Products
6 Liability Litigation.

7 Counsel, please make your appearances. Please come
8 forward to the podium.

9 **MS. CABRASER:** Good morning, Your Honor. Elizabeth
10 Cabraser, Lief Cabraser Heimann & Bernstein, plaintiffs' lead
11 counsel.

12 **THE COURT:** Good morning.

13 **MR. VAN EATON:** Good morning, Your Honor. Josh
14 Van Eaton for the United States.

15 **THE COURT:** Good morning.

16 **MR. GIUFFRA:** Good morning, Your Honor. Robert
17 Giuffra, Sullivan and Cromwell, defendants' liaison counsel.

18 **MR. CHASE:** Good morning, Your Honor. Jeffrey Chase
19 with Herzfeld & Rubin, defendants' liaison counsel.

20 **THE COURT:** All right.

21 **MS. DAWSON:** Good morning, Your Honor. Cari Dawson,
22 Alston & Bird defense, liaison counsel.

23 **THE COURT:** Good morning.

24 May I ask a question? I know you're defense liaison
25 counsel but you also have, sort of, a specialty here; right?

1 What is that? Who is your client?

2 **MS. DAWSON:** Porsche Cars North America, Your Honor.

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

4 **MR. SLATER:** Your Honor, Matthew Slater, Cleary
5 Gottlieb Steen & Hamilton, in Washington, D.C. I'll be
6 appearing on behalf of Robert Bosch GmbH and Robert Bosch LLC.
7 I'll be filing a pro hac vice motion imminently, but haven't
8 had a chance to do that yet. Appreciate it if I could appear
9 here today.

10 **THE COURT:** Of course. Thank you very much. I know
11 this is your first appearance.

12 **MR. SLATER:** Yes.

13 **THE COURT:** And you are counsel for Bosch. Is that
14 it, essentially?

15 **MR. SLATER:** Yes.

16 **THE COURT:** They are appearing in the action. They
17 have been sued.

18 **MR. SLATER:** To the extent that it's necessary to say
19 so now, this will be a special appearance to preserve
20 jurisdictional defenses, Your Honor. But we recognize this is
21 important litigation. It's something the company takes very
22 seriously. And we're here to engage and cooperate with this
23 process, yes.

24 **THE COURT:** I appreciate that.

25 **MR. SLATER:** Thank you.

1 **THE COURT:** Thank you very much.

2 I don't know whether I have -- there are a number of
3 people on the phone, obviously, in CourtCall. And they, of
4 course, can't see the fact that this courtroom is filled with
5 the luminaries of the plaintiffs bar. Many are on the
6 plaintiffs' steering committee.

7 And let me take this opportunity to thank those people who
8 are on the plaintiffs' steering committee. It's extremely
9 important that we put together a group of diverse but highly
10 competent counsel representing a myriad of interests that will
11 be evident in this case and necessary in this case. And I want
12 to thank plaintiffs' counsel.

13 I also want to thank the defense counsel because I have
14 received in the submission today -- and we'll talk about it in
15 a moment -- a number of proposed pretrial orders dealing with
16 discovery, dealing with scheduling, dealing with protective
17 orders, dealing with a number of issues.

18 And it's clear to me that in this past month not only has
19 the plaintiffs' steering committee prepared a -- well, I don't
20 think I would say a thin complaint. I don't know how one wants
21 to describe 751 pages.

22 (Laughter)

23 **THE COURT:** But produced a book. And it may be
24 chapter 1.

25 Obviously, they worked very hard preparing the

1 consolidated complaint. But my appreciation goes further than
2 that. It goes to the fact that plaintiffs' steering committee
3 was able to sit down with the defense, and the defense with the
4 steering committee, and work out a number of details which can
5 be enormously time-consuming, which can form an impediment to
6 proceeding. And they have simply been able to surmount any
7 differences that I'm sure occur in every case and were
8 discussed among the parties.

9 That's excellent because I think it's in the best
10 interests of both the plaintiffs and their clients and the
11 defense to proceed as efficiently and as expeditiously as
12 possible in this litigation.

13 So let me go out of order, if I might, and address the
14 issue which, to the Court's view, is the key issue to be
15 addressed in this litigation at the outset, which is
16 remediation; which is, what remedies are being proposed by
17 Volkswagen to address the immediate problem of hundreds of
18 thousands of vehicles on the streets and highways of the
19 United States which are not in compliance with the law.

20 So, Mr. Giuffra, if you want to address that. Really,
21 what I want to know is, as of today, where are we? And where
22 are we with some specificity?

23 In other words, I know through Director Mueller that there
24 have been a number of meetings, that people are engaged in the
25 process. But I want to have -- to the extent you can respond

1 to this, I want to have a much more definite idea of where you
2 are with respect to different classes of vehicles and where you
3 are with, you know, this process at this time.

4 So tell me what you can.

5 **MR. GIUFFRA:** Your Honor, again, we're very pleased
6 with the fact that we were able to work everything out with the
7 other side. And I think that's reflective of the fact that the
8 goal of Volkswagen is to come up with a fair and prompt
9 resolution of all of these matters. And we are obviously
10 working very hard with all of the various stakeholders who are
11 interested in this issue.

12 Now, we have been meeting -- and I have to be careful what
13 I say only because, one, this is a public courtroom and also
14 because we've been in very intense discussions with the
15 Department of Justice, with the Environmental Protection
16 Agency, and with the California Air Resources Board over a
17 remedy.

18 And I think one important point to, sort of, say at the
19 outset is that any remedy we propose has to meet the approval
20 of the Environmental Protection Agency and the CARB. In fact,
21 when one looks at the actual regulations, they provide very
22 specific requirements for any kind of a car recall, fix, or
23 anything else that we might do.

24 So unlike, for example, in the -- in the BP oil spill,
25 where the company could go right to Mr. Feinberg, give

1 Mr. Feinberg money, and Mr. Feinberg could engage in his claims
2 process, basically, the door for us providing a remedy means we
3 must go through the EPA and CARB.

4 So what has been going on since we were last here is there
5 have been multiple meetings in Washington, D.C. and elsewhere
6 around the country involving senior folks from Volkswagen at
7 the very highest level of the company, very senior folks at the
8 Department of Justice, EPA, and CARB.

9 We've had working group meetings on various topics,
10 including, number one, what would be the remedy for car owners;
11 number two, what would be the approach in terms of remediating
12 the environmental harm that was caused by these cars; and,
13 number three, other issues that would be -- would be addressed
14 in a possible resolution.

15 Now, Mr. Van Eaton who is here could also confirm this,
16 that we've been advised by the Justice Department that they
17 don't want us to engage in our negotiations and discussions
18 over remediation in a public way. In fact, they've asked us
19 not to do that. So I don't want to, sort of, cross them.

20 But I think I can give the Court the following basic
21 points: Obviously, we're committed to resolving these matters
22 as quickly as possible. And the company is obviously focused
23 on rebuilding public trust, particularly with its customers.

24 These meetings have been going on. There are a number of
25 options on the table. There are options with respect to what

1 particular generations of cars and how they would be treated.
2 There are discussions, again, about various forms of
3 remediation. And then there are other issues that we're
4 discussing with the Department of Justice, EPA, and CARB.

5 These are highly complex engineering issues. And the
6 engineers have been meeting, as well, because obviously the
7 things EPA and CARB are concerned about is whether any
8 resolution or remedy will be one that is a durable, lasting
9 remedy. And those discussions are going on.

10 And there's very complicated issues regarding emission
11 systems, onboard diagnostics. And all of that is being dealt
12 with at the standpoint of the engineers.

13 Now, we've also been meeting with Director Mueller. Your
14 Honor referenced that. And I can tell you I am personally
15 speaking with Director Mueller multiple times a week. Director
16 Mueller has met on several occasions with senior members of
17 Volkswagen's board of management. He's met with Volkswagen's
18 engineer who is responsible for this matter. He has been given
19 a briefing -- confidential pursuant to Your Honor's orders --
20 on where the settlement discussions and resolution discussions
21 stand.

22 We provided to Director Mueller copies of the documents
23 that we provided to the Department of Justice, EPA, and CARB
24 pursuant to Your Honor's confidentiality order. So Director
25 Mueller has a pretty good idea of where the framework is for a

1 resolution.

2 We've also -- as Your Honor, I think, knows from prior
3 hearings, we're obviously dealing with other stakeholders.
4 There are other government agencies that are interested in
5 those issues. The company is cooperating with them and
6 providing them with information.

7 Mr. Feinberg continues to develop his protocol. And I
8 spoke to Mr. Feinberg last night. I probably speak to
9 Mr. Feinberg twice a day, including on the weekends. And he is
10 diligently working on the details of a protocol. He has met
11 with company executives. He has received financial information
12 from the company. He has looked at various options for a
13 remedy.

14 And ideally what we would do here is, if we can do it --
15 and that all depends on whether we can reach a resolution,
16 hopefully, through Director Mueller -- we would incorporate
17 that resolution in a court-ordered settlement. And
18 Mr. Feinberg would be the settlement administrator for that
19 process.

20 If we can't reach agreement with the plaintiffs but we can
21 reach agreement with EPA and CARB, then we would go forward
22 with Mr. Feinberg's protocol.

23 But, again, as I mentioned at the outset, the keys to a
24 resolution here is getting EPA and CARB approval on a remedy.
25 And that's -- you know, it's along. We're making a lot of

1 progress. There were meetings last week, and there was a
2 meeting yesterday in Washington, D.C.

3 One other point I should mention, it's important to
4 remember that this matter involves 600-or-so-thousand cars in
5 the United States. It involves another 11 million in the rest
6 of the world and in more than a hundred countries.

7 So this is a very complex situation, where one has to deal
8 with regulatory approvals outside the United States as well as
9 inside the United States; although, the standards are different
10 in different countries.

11 So that's a long way of me saying we're making progress.
12 My belief is that within a month or so I think we'll have
13 something more definitive to say to the Court.

14 The discussions are progressing. There are confidential
15 discussions.

16 And we have provided Director Mueller with the details,
17 for example, of the PowerPoints that have been exchanged with
18 the Department of Justice, the EPA, and CARB. So he's fairly
19 up to speed on the details of those discussions and the
20 framework that we are working on with those agencies.

21 And, again, I've been told by DOJ, EPA, and CARB that we
22 should not be talking publicly about the specifics of the
23 framework that we're moving toward a remedy.

24 That may not be satisfactory to the Court --

25 **THE COURT:** Well, let me make a couple of observations

1 here.

2 First, you have described a process. And I accept that
3 this process is going forward. And I accept that the parties
4 are operating in good faith and exchanging information and
5 trying to arrive at a resolution. And I understand that.

6 I don't think it's my role -- and I think it might be
7 somewhat counterproductive if I were to try to get into the
8 details of what that process is. That is, what exactly is
9 being offered where -- you know, what are the considerations
10 and so forth.

11 Number one, I don't have the expertise. Number two, it's
12 not my role. That's the role of the government. And they have
13 to be satisfied, given all the circumstances, that these
14 vehicles and a proposed fix will be consistent with their goals
15 in terms of policy and environmental concerns. That judgment
16 is a judgment made by the United States government. It's not
17 made by a district court judge. And I appreciate that.

18 On the other hand, I have some real concerns, and I want
19 to voice them today.

20 First, unlike a number of cases or class actions, this is
21 an ongoing problem. We are not -- we are not looking at a
22 situation where the damage has been caused and what is the
23 appropriate compensation for the damages.

24 If it were just that and you had a very complicated series
25 of formulas to address that, I would certainly understand that

1 we could take a fair amount of time and whatever would be
2 required to come to a rational, reasoned judgment as to the
3 appropriate remedy.

4 But that's not this case. It may be part of this case,
5 but it's not this whole case. And the reason it's not this
6 whole case is, as you point out, 600,000 vehicles are on the
7 road today, out of compliance with national EPA standards
8 that -- in some cases, a heightened standard by, I think, eight
9 states as well.

10 So it's an ongoing harm that has to be addressed. And
11 that gives a sense of urgency. And it's not just that these
12 vehicles on the road can't be sold or can't be crated. It's
13 not just that. It is the fact that they are polluting; and,
14 therefore, we must address it.

15 I am concerned about a couple of other things. I am
16 concerned about, as the cliché goes, the perfect being the
17 enemy of the good.

18 No one is looking to Volkswagen to come up with a perfect
19 solution that answers all these problems. But there are
20 solutions, perhaps, that can be addressed, that would be less
21 than perfect but can be addressed with greater immediacy.

22 That is that, certain decisions may have to be made by the
23 company that will not be the most -- let's see, not be the most
24 advantageous economically for the company. But it's a decision
25 that they must make in what I call the very near future.

1 And I want to be careful that the process not be confused
2 with the result. That is, that you don't look at this thing
3 and say, well, we're engaged in this process so let it just
4 play out. Because I have found that process is a function of
5 how much time people have available to fill.

6 The old story about lawyers is that, you know, if you give
7 them a year to do something, it will take them a year to do
8 something. If you give them 30 days to do something, they'll
9 do something in 30 days. It may not be what they would have
10 done in a year, but it will get done.

11 And so I want to tell Volkswagen that there are a couple
12 of things that I want to accomplish.

13 First of all, I think that by March 24th, when I plan to
14 have the next hearing in this matter, I want a definite answer
15 from Volkswagen and EPA whether or not they've achieved a
16 resolution of these vehicles, a remediation of these vehicles;
17 whether they can do so technologically and within the
18 parameters that EPA believes acceptable to them. But I want to
19 know that before March 24th.

20 I think that this matter has gone on since -- at least we
21 know that Volkswagen's knowledge of this process, that is,
22 those people in the highest management and ownership positions
23 were aware of it from at least September 18th. I don't know
24 how much before that. I'm not interested in that point at this
25 point, because it seems to me six months is long enough to

1 determine whether or not there is an engineering process that
2 can be utilized by Volkswagen and would be acceptable to the
3 United States government. And that's the amount of time I've
4 given you. So I want to have a definite answer as to that
5 question not later than March 24th.

6 In that process, I want Director Mueller to meet with what
7 I consider to be the ownership and management, top ownership
8 and management. So I want him to meet -- and he's willing to
9 go to Germany -- with members of the management board and
10 members of the executive committee of the supervisory board.

11 There are two boards, I understand, in the control and
12 management of Volkswagen. I want a meeting to take place with
13 members of those two groups and Director Mueller.

14 I want to make sure -- so you might ask: Why is that
15 important? I'll tell you why, in my judgment, it's important.

16 Volkswagen is going to make decisions here. And those
17 decisions are going to have serious consequences to the
18 company. And I want to make sure that before they make their
19 final decisions with respect to what they can do and what they
20 cannot do, they understand -- at the highest levels, they
21 understand the consequences of that decision.

22 I have complete faith in you, Mr. Giuffra, of being able
23 to communicate that. I understand that. But there's a big
24 difference between a lawyer saying something, who's been hired
25 to represent their interests and give their judgment, and have

1 someone like the settlement master appointed by the Court to
2 talk to them about it. And, of course, you would be present.
3 And, of course, it would be confidential.

4 **MR. GIUFFRA:** Your Honor, if I could just -- actually,
5 just to give you some more information, Director Mueller has
6 met with management board members of Volkswagen on two separate
7 occasions within the last month. He's also met within the last
8 month with the lead engineer who's actually working on the fix.
9 He's been given, literally, slide PowerPoints describing the
10 technical aspects of the fix.

11 **THE COURT:** That's fine. But I want him to meet with
12 the executive committee of the supervisory board.

13 **MR. GIUFFRA:** That can be arranged.

14 **THE COURT:** That's what I want.

15 **MR. GIUFFRA:** That can be arranged.

16 **THE COURT:** I want it to be at that level.

17 Because, you see, I don't know and nor should I know how
18 companies operate. Every company is a little bit different.
19 There are all sorts of forces that go into decision-making
20 processes by owners, and all sorts of concerns.

21 And as you correctly point out, this is a 600,000-car
22 problem here, and it's an 11 million-car problem elsewhere for
23 Volkswagen. How they're resolving those, obviously, is outside
24 the scope of the Court's inquiry.

25 But it's important that the decision-maker know that if

1 they can't come to a resolution within the time period
2 prescribed by the Court, there will be certain things that will
3 happen.

4 And it seems to me that all you have to do -- and I'm not
5 telling you how to practice law, but show them the complaint
6 and show them the discovery schedule, and explain to them that
7 that is going forward, that is proceeding; and, therefore, it
8 is in their interests sooner rather than later.

9 And I'm defining what "sooner" means. The Court is doing
10 that. And whether I'm reasonable, unreasonable, I don't know.
11 I try to be reasonable. But it looks to me like six months is
12 enough time to make those types of determinations at least
13 initially.

14 Now I turn to the government, and I say to the government,
15 there's a concurrent responsibility with respect to the
16 government. And that is that they must address this problem
17 with the necessary resources in order to be responsive to
18 Volkswagen in an expedited way.

19 I don't want to hear, "Well, we've given this to the
20 government, and we don't have a response from the government."
21 And, you know, it's -- I've got a pretty good emissary.

22 (Laughter)

23 **THE COURT:** Talk to the government about this.

24 But I want to say that in some sense the Court represents
25 the public. It's an independent branch that must weigh in on

1 this matter. And then it expects the government to be
2 responsive to Volkswagen to meet these types of deadlines.

3 In terms of the merits of any particular proposal, I have
4 no opinion at this point. At some point I'm going to have to
5 have some opinion, but I hope only after there is something
6 resolved and I look at it and I get opinions as to whether or
7 not it's an appropriate resolution. I'm not there yet because
8 I've seen no resolution. And I want to see some efforts made
9 to see whether or not we can arrive at a resolution.

10 So there is a deadline. And the deadline is before
11 March 24th. And I want to know -- I have no idea what you're
12 going to say then, but I want to know from the government and I
13 want to know from Volkswagen what exactly is the status of
14 attempts to offer remedial measures.

15 Because I think also, by the way, that Mr. Feinberg, his
16 hands are tied. He cannot offer a protocol and -- he can't
17 offer a protocol without the company saying, "These are the
18 things that we can do." The company hasn't said that, as you
19 advised me.

20 So we've stopped that process. And the only process
21 that's going to go forward is the litigation process, unless
22 Volkswagen and the government are able to achieve a resolution.

23 Now, it may be, because I'm not completely naive, it may
24 be that there is no resolution between the government and EPA.
25 That's entirely possible. And, if so, Volkswagen then has to

1 determine what are the options; what's available to it; what
2 are they going to offer.

3 As I said, this is a case in which liability has been
4 conceded. The extent of which I'm not going to address. The
5 circumstances I'm not going to address. But liability has been
6 conceded; and, therefore, the question is the remedy. And
7 there may be different remedies that VW has to consider. And I
8 want them to consider it as soon as possible, given the context
9 of where we are. So thank you.

10 I'm not inviting you to comment. I'm inviting you to
11 communicate to your client.

12 (Laughter)

13 **THE COURT:** And I feel confident that will take place.

14 **MR. GIUFFRA:** Your Honor, it will happen immediately
15 after the hearing.

16 **THE COURT:** Thank you very much.

17 **MR. GIUFFRA:** Thank you.

18 **THE COURT:** Now let's turn to the agenda.

19 The Court has received, before it commented, a series of
20 proposed pretrial orders, a discovery schedule, an order
21 regarding motions to remand, and a stipulated protective order.
22 I've reviewed those. They are entirely satisfactory. And the
23 Court would enter them unless somebody wishes to comment on
24 those documents.

25 There is also a proposed order with respect to state

1 actions, and I'm considering that. I don't need any discussion
2 on that at this time.

3 I received a master case list. And I have received a
4 proposed protocol for common benefit work and expenses. Thank
5 you. It's very good. It will be the model for many such
6 cases. I think it probably was the model for other cases.

7 (Laughter)

8 **THE COURT:** But one of the advantages, obviously, of
9 picking counsel who have done this in the past is that they
10 understand that to set up a protocol for expenses and
11 compensation, and so forth, at the outset saves countless hours
12 at the end in trying to figure out what is fair and what is
13 appropriate under the circumstances. So I want to thank again
14 the plaintiffs, because that is a plaintiffs' matter, for doing
15 that.

16 I think we've already addressed the issue for service on
17 Bosch. If there are jurisdictional issues, that's something
18 that can be brought to the attention of the Court.

19 But it may very well be something that can be worked out
20 by the parties in connection with having deferred that issue
21 pending further proceedings. I don't know. That's a matter
22 that, obviously, Bosch and the plaintiffs' steering committee
23 should discuss.

24 Yes.

25 **MR. SLATER:** Yes, Your Honor, Matt Slater. I don't

1 want to be misunderstood. We're not here accepting service on
2 behalf of Bosch.

3 **THE COURT:** I understand --

4 **MR. SLATER:** Thank you. But we will engage in the
5 plaintiffs --

6 **THE COURT:** Engage with the plaintiffs because of
7 course --

8 **MR. SLATER:** Of course.

9 **THE COURT:** -- it's important that you do so. And you
10 may be able to postpone, ultimately, or at least initially,
11 some of those issues in an effort to try to move this forward
12 on the merits. That's a matter --

13 **MR. SLATER:** We'll --

14 **THE COURT:** That's a matter that you should discuss.

15 **MR. SLATER:** Thank you.

16 **THE COURT:** Okay. All right.

17 So let me turn to you, Ms. Cabraser. Are there other
18 issues that you wish to address?

19 **MS. CABRASER:** Thank you, Your Honor, yes. Elizabeth
20 Cabraser for plaintiffs. I will run through them very quickly,
21 just some various items that are mentioned in the joint
22 proposed agenda.

23 And first, thank you, Your Honor, for thanking the
24 plaintiffs' steering committee. They are sitting very quietly
25 today, but they are not spectators in the process. They are

1 active participants, and everything --

2 **THE COURT:** I would assume that some of them may have
3 said something during the course --

4 (Laughter)

5 **MS. CABRASER:** Yes. And the fact that we have been
6 able to come to court with mostly stipulated orders and a lot
7 accomplished today is entirely due to the efforts of the
8 plaintiffs' steering committee.

9 With respect to the resolution efforts, our contacts and
10 discussions with settlement master at least mirror those that
11 Volkswagen counsel has mentioned. Obviously, they are
12 confidential. But I can tell you literally it is a daily
13 process.

14 And we appreciate the deadline the Court has given. We
15 have done our best to outline the various scenarios, to cost
16 them out, and will continue to refine that process.

17 With respect to some of the organizational and
18 housekeeping matters, we filed the consolidated complaints on
19 Monday. On time, barely. And to expedite the --

20 **THE COURT:** If I had given you more time, would the
21 complaint have been longer or shorter?

22 (Laughter)

23 **MS. CABRASER:** You know, I'm -- I'm not going to
24 answer that. It would have had fewer typos --

25 (Laughter)

1 **MS. CABRASER:** -- at least.

2 But to expedite the filing of that complaint as a
3 consolidated complaint for the proceedings, we filed it
4 directly into the MDL docket. It is styled as an original
5 action for filing in the Northern District of California. The
6 lead representatives are residents of the Northern District of
7 California, this division. And so in due course we'll ask the
8 Court to give us a civil action number in the proceedings. We
9 didn't want to go through the regular filing process related to
10 the Court and go through that process. And this way we were
11 able to get it served immediately.

12 And thank you, Your Honor, for putting it on the website.

13 With respect to the website and with communications to the
14 plaintiffs and class members in general, one of the items we
15 referenced in our joint agenda was the prospect of a Rule 23(d)
16 order regarding a mechanism for the Court to share case
17 information with members of the proposed classes.

18 Obviously, the basic information is on the website. And
19 that is public. But not all class members are aware of that.
20 And so we have begun a discussion with the defendants that
21 would enable us to bring to the Court for consideration a
22 proposed order and a proposed letter to the class members that
23 establishes that direct line of communication; advises them of
24 the website; gives them the basic information about the
25 existence of these proceedings.

1 The defendants do communicate in a standardized way with
2 the classes. And we're not suggesting that that is improper.
3 These are customers of the defendants.

4 Those letters don't advise on this litigation or reference
5 its existence. And, again, we're not suggesting that's
6 improper. But we are suggesting, given the fact that the class
7 is very interested in this litigation and the resolution of
8 this problem, and what their rights and abilities are to
9 participate, that it would make sense, we believe, for the
10 Court, if it so chooses, utilizing the same list that
11 defendants have and use to make that direct communication.

12 That can be done by defendants using their lists. It can
13 be done by giving the lists to a third party. Those would only
14 be used for court-authorized communications.

15 But it would begin the process of keeping everyone in the
16 class advised in a very contemporaneous way of what we're
17 doing. We're trying to make this as public and transparent a
18 proceeding as we possibly can. And I think giving the class
19 members the website, for example, enables them to follow along
20 in real time.

21 So we're not asking for a ruling today. Obviously, we
22 have to --

23 **THE COURT:** I think it's a good idea if you would
24 forward -- if you haven't done already -- a proposed letter to
25 defense for their comments as to what you would like them to

1 send or some third party to send.

2 I'm perfectly satisfied with defense sending out this
3 letter. But I need some comments from the defense as to --

4 **MS. CABRASER:** Sure.

5 **THE COURT:** -- both the propriety of it and the
6 content. Maybe you can agree on the content and have somewhat
7 of a disagreement on the propriety or the necessity.

8 Let me just point out, though, that one of the problems
9 that occurs in MDL cases -- and telling you this is somewhat
10 ironic -- is that there is a proliferation of state actions.
11 And people have a right to file wherever the appropriate --
12 under venue requirements and jurisdiction and so forth.

13 Nevertheless, there is a great advantage to trying to have
14 as much coordination and as much awareness of all customers
15 that there is this litigation ongoing, and what it is about,
16 and whether if they are to follow it or join it it's in their
17 interests to do so. So I think in the interests of -- from an
18 informational point of view, which ultimately leads to certain
19 consequences in terms of the participation, it makes some
20 sense.

21 Nevertheless, if there is a concern -- and I think it's a
22 good idea to get the letter to them because maybe once they see
23 the letter there either may or may not be a concern. And, as I
24 said, it seems to me perfectly satisfactory if Volkswagen sends
25 it out, if they wish. Maybe they don't have to. It can be

1 some third party. But, as I say, the devil is in the details.
2 Look at the letter and see where you are at that point.

3 I will be available to hear this on an expedited basis --

4 **MS. CABRASER:** Great.

5 **THE COURT:** -- because if there is a prophylactic
6 effect of having this information out there, I would rather do
7 it sooner than later.

8 **MS. CABRASER:** Thank you, Your Honor. We will proceed
9 with that process.

10 Along the same lines, we are also discussing a potential
11 tolling agreement. Even though under the federal class action
12 equitable tolling doctrine the class allegations toll statutes
13 of limitations for defined class members, we think it will also
14 help people understand whether or not they need to file their
15 own cases if we have a tolling agreement with respect to the
16 state law claims, for example.

17 This is done in many MDLs. And I think it's particularly
18 appropriate here. We're getting many questions from class
19 members: Do I have to file my own action? Do I have to do
20 something to join the class action? Et cetera.

21 These are procedural questions that are familiar to us but
22 they are not familiar to the class members. So having a
23 tolling order in place reassures folks that they don't need to
24 do something individual, and will help control a proliferation
25 of state court actions.

1 With respect to coordination, we do have a brief report on
2 the California Judicial Council coordination proceedings. A
3 coordination order was just entered you, I believe, yesterday.
4 We'll get that to Your Honor if you don't already have it.

5 I believe the cases were assigned to Judge Mary Wiss, here
6 in San Francisco -- or over there in San Francisco County
7 Superior Court. And it's our view that there ought to be a
8 close coordination. Obviously, that's up to Your Honor to meet
9 with Judge Wiss.

10 But, obviously, we can share discovery and we can try to
11 stay on the same schedule. We are doing the same sorts of
12 outreach with respect to other collections of state court
13 actions.

14 There are parallel class proceedings in Canada involving
15 the same cars. This is a North America market at least with
16 respect to the U.S. and Canada.

17 There is a leadership order in the Canadian proceedings in
18 Ontario. And the co-lead and liaison counsel have communicated
19 to us that they are generally desirous to coordinating with
20 respect to discovery, to coordinating between judges, to the
21 extent appropriate. That has been a very preliminary
22 discussion.

23 And we can provide Your Honor with the orders from the
24 Canadian proceedings. Obviously, they're at the complaint
25 stage as we are. But I think it would be a great savings of

1 time and effort to utilize the same discovery under appropriate
2 protective orders.

3 And, of course, on the resolution side these are the same
4 models of vehicles sold under the same marketing campaign, with
5 emission standards that are very, very similar to those adopted
6 in the U.S. So Canada is much more like the U.S. than the
7 European Union countries in that regard.

8 So that's where we are on transborder coordination with
9 respect to Canada.

10 We submitted Pretrial Order Number 9, the discovery plan.
11 It's obviously a compromise of views with respect to timing.
12 It was -- I won't say -- it was hard fought in a very civil way
13 and hard won.

14 The ability to progress from documents to depositions and
15 to trial is going to depend on some determinations of some very
16 basic matters involving the German privacy laws with respect to
17 ESI.

18 We have an ESI vendor in place. We have translation
19 services in place. We're going to work to the closest possible
20 extent with DOJ Civil in that regard.

21 If Your Honor would like a report or update on the German
22 privacy issue, we would defer to the DOJ on that. We're told
23 there may be a solution to that coming soon.

24 But, obviously, our decision on the litigation front would
25 be to move from documents to depositions to any trial

1 proceedings as soon as we can.

2 So the fact that we have an ultimate document deadline at
3 the end of this year does not mean necessarily, and in
4 plaintiffs' view, at least, should not mean that we can't
5 proceed through the rest of the case during document process.

6 There's prioritized discovery. We expect to receive -- to
7 start receiving the documents that have been produced to the
8 government within 48 hours of this court's entry of the
9 protective order. So that process is starting.

10 We have rolling deadlines for the rest of the discovery.
11 In -- in the order. But we do expect, if we can't resolve
12 issues that enable us to expedite the custodial deposition
13 process, the fact deposition process, and the expert process,
14 to be able to come to either Your Honor or Judge Corley for a
15 resolution of disputes.

16 We're not, obviously, ready in the process to do that
17 today. We thought it was better to reach basic agreement on
18 what can happen and then hopefully expedite various aspects of
19 the pretrial process as we go along.

20 So unless Your Honor has any other questions -- oh, and,
21 yes, in terms of coordination with the state agencies, we were
22 able to have a series of telephonic and in-person meetings with
23 the California attorneys general staff handling the civil
24 actions and the environmental actions.

25 Ms. Weaver can give you a short report on that process, if

1 you would like.

2 **THE COURT:** I would. Thank you.

3 Thank you, Ms. Cabraser.

4 **MS. WEAVER:** Good morning, Your Honor.

5 **THE COURT:** Good morning.

6 **MS. WEAVER:** So, of course, without waiving any common
7 interest or joint prosecutorial privileges, I can tell you that
8 we have met with the California Attorney General's Office both
9 on its own behalf on behalf of the attorney general and the Air
10 Resources Board. We anticipate, speaking on behalf of the PSC,
11 cooperation going forward.

12 I can say there have, as you are aware, been public
13 reports of concerns around the German privacy law and the
14 production of documents. And I can say it is the PSC's opinion
15 that all parties on the plaintiffs' side would benefit by the
16 production of those responsive documents so we can move
17 forward.

18 That is what I can say at this time. It is my hope on
19 March 24th we will be talking more about results and less about
20 process.

21 **THE COURT:** Thank you.

22 Any further comments from plaintiffs' steering committee?
23 Does anyone -- Mr. Boies. Yes.

24 **MR. BOIES:** Thank you, Your Honor.

25 **THE COURT:** Sure.

1 **MR. BOIES:** One item on the agenda is Jones Day
2 documents, the Jones Day issue. And that's a little bit
3 cryptic. But what it has to do with is --

4 **THE COURT:** Jones Day is conducting for Volkswagen an
5 internal investigation. And that's what you want to address?

6 **MR. BOIES:** Exactly, Your Honor.

7 **THE COURT:** Okay.

8 **MR. BOIES:** And it has to do with the expedition of
9 document production.

10 As Ms. Cabraser says, Pretrial Order Number 9 represented
11 a compromise of where we thought we would like to be and they
12 would like to be. And I think it is a reasonable compromise.

13 But it's dependent on our ability to really conduct the
14 remainder of the pretrial work during this year while discovery
15 is still going on. That is, in turn, dependent on our ability
16 to get the documents that are easily accessible.

17 There are a very large quantity, I'm told, in the
18 neighborhood of 100 terabytes of data that have been made
19 available to Jones Day --

20 **THE COURT:** I guess that's a lot.

21 (Laughter)

22 **MR. BOIES:** That is a lot. That is a lot.

23 **THE COURT:** "Tera" seems to suggest a lot.

24 **MR. BOIES:** Exactly.

25 **THE COURT:** And something I don't want to have to look

1 at.

2 (Laughter)

3 **MR. BOIES:** Mega --

4 **THE COURT:** I've mastered enough of technology just to
5 understand that aspect.

6 **MR. BOIES:** I've gone through a stage where mega was a
7 lot. And then giga was even more. And now tera --

8 **THE COURT:** What will be the next generation?

9 **MR. BOIES:** Some younger person knows --

10 (Laughter)

11 **MR. BOIES:** -- but I don't.

12 But this is a very large quantity of material. We would
13 like to get access to it immediately. We believe that it has
14 been given for this process; it can be given for our process.

15 There are some German privacy issues that have to be
16 addressed. But we are prepared if necessary -- we don't think
17 it should be necessary. It would be a terrible waste. But if
18 necessary we'll go to Germany and review the documents there if
19 we have to do that. Because so much of it is going to be done
20 with computer-assisted review, that is a practical solution if
21 we have to do it.

22 But we want to get -- we want to get access to that
23 material. There are, like, 82 custodians whose materials have
24 been made available to Jones Day. We want to have access to
25 those records. And we want to have that done promptly.

1 **THE COURT:** Do you know whether Jones Day has these
2 documents in the United States?

3 **MR. BOIES:** My understanding is that they do not. My
4 understanding is that Jones Day -- but that's an imperfect
5 understanding, and defendant really needs to address that.

6 **THE COURT:** And Jones Day is not here at this
7 proceeding.

8 **MR. BOIES:** They are not. Although, this is not, I
9 think, something against Jones Day.

10 **THE COURT:** Right.

11 **MR. BOIES:** We're just trying to get the Volkswagen
12 documents.

13 **THE COURT:** That's right.

14 Well, I guess I have a couple of things to say. Number
15 one, overall, I favor, strongly favor disclosure under
16 appropriate safeguards of privacy concerns. But disclosure
17 nevertheless.

18 Number two, I am in favor of doing things expeditiously
19 rather than postponing it for some long period of time because
20 I think that the value, then, of the information diminishes
21 over time. And it takes you into very different directions
22 that had you had this information at the outset you would not
23 have had the necessity of pursuing certain avenues.

24 After having said that, I would like you, Mr. Boise, or
25 members of your committee, to meet with Volkswagen to see

1 whether or not there can be some agreement as to those
2 concerns. And if not, I'll rule on it. And I'm prepared to
3 hear it on the 24th. So there's a deadline.

4 And, you know, in terms of filing documents just -- I
5 always like to let lawyers work out their own schedules. And I
6 know we have a series of rules; 35 days and so forth. As far
7 as I'm concerned, see if you can work it out, okay, in terms of
8 addressing these issues.

9 And I think, Mr. Giuffra, do you want to respond to that?

10 **MR. GIUFFRA:** Yes, Your Honor.

11 **THE COURT:** Yes.

12 **MR. GIUFFRA:** I was a bit perplexed by Mr. Boise's
13 comments because I thought we had worked this particular issue
14 out.

15 In Proposed Pretrial Order 9, which Your Honor has before
16 you, we are, as Ms. Cabraser indicated, to start producing
17 documents within 48 hours. And we will do so. And there will
18 be tens of thousands of documents.

19 And the plan is that within two days we produce all what
20 we're calling the U.S. prior productions. And then on
21 May 15 -- April 15, tax day, we begin producing non-U.S. prior
22 productions to government agencies.

23 And so the plan is -- and we've agreed to begin producing
24 the very documents that Mr. Boise is talking about pursuant to
25 a schedule.

1 I would add -- and this is an important caveat -- there is
2 a carve-out in Pretrial Order Number 9 that was negotiated with
3 the plaintiffs' steering committee and in consultation with the
4 United States government.

5 And Your Honor, as a former prosecutor, knows that the
6 prosecutors don't like private plaintiffs and people, sort of,
7 front-running their investigation. And there is obviously a
8 criminal investigation here.

9 And so my point, Your Honor, is the carve-out that we
10 reached is that to the extent we are producing documents
11 pursuant to subpoena, to the criminal authorities, those
12 documents are treated differently than documents otherwise.
13 But the documents are Volkswagen documents. And, ultimately,
14 they will receive all of the documents.

15 Jones Day, just to put it on the record, has been retained
16 by the supervisory board of Volkswagen. It's conducting an
17 independent investigation. It is being directed by a
18 six-member special committee.

19 Jones Day has been directed to proceed as quickly as
20 possible. And they are doing so. They've also been told they
21 must cooperate with the U.S. Department of Justice. And they
22 are doing so.

23 The U.S. Department of Justice wants that cooperation to
24 be done in a confidential way because they have their own law
25 enforcement considerations.

1 It's not a situation where, well, if you produce the
2 documents to the Department of Justice, you know, they'll never
3 get it. Of course they will get the documents. It's just a
4 question of timing and dealing with all of the competing
5 considerations.

6 So I really think that this is something that's a
7 nonissue. It's provided for in the pretrial order. And, as I
8 said, on tax day they will be getting German documents.

9 Just to add a couple of other points, we have been working
10 well with the plaintiffs' steering committee. We have agreed
11 on everything. There's no disputes before the Court. We have
12 agreed, on all the issues that Ms. Cabraser raised, to meet and
13 confer with them. And I'm hopeful that we can reach agreements
14 as long as both sides are reasonable.

15 On this question of German data privacy that was raised, I
16 think that's an issue that will be resolved. And they will see
17 that it is being resolved. There has been a lot of effort on
18 the German side.

19 And, again, you know, we have tended to be very parochial
20 in the United States. Well, in Germany and Europe data privacy
21 is a very, very big thing. In fact, there are criminal laws
22 that deal with data privacy in Germany.

23 And in this particular case the issue is the following:
24 Volkswagen allows its employees to use the Volkswagen computer
25 system for personal communications. As a result, under German

1 law, that makes it a data -- it makes it a -- sort of similar
2 to Google or AT&T, it's all communications provider.

3 You can't, under German law, without violating German
4 criminal law, just willy-nilly produce documents that are on
5 such a telecommunications system.

6 That being said, we have, with a lot of work by German
7 lawyers, U.S. lawyers, and also in consultation with government
8 agencies, established a protocol whereby employees will consent
9 to the transfer of data to the United States.

10 If an employee refuses -- and so far no one has -- counsel
11 and discovery consultants will sit with that employee, and
12 searches will be done and data will be segregated.

13 To the extent there will be any redactions, it's going to
14 be sensitive personal information. You know, someone's racial
15 or ethnic origin, health, something like that. And through the
16 protocol we're hopeful we can work this all out.

17 We've agreed in the document that's before the Court to
18 have a meet and confer with the other side on St. Patrick's Day
19 to discuss the German data privacy issues. So I really think
20 there will not be any issue.

21 We've been operating under the principle: cooperate with
22 the plaintiffs; avoid unnecessary issues.

23 We obviously have a lot of stakeholders here, from the
24 Department of Justice; the state attorneys generals; EPA; CARB;
25 plaintiffs' lawyers in the United States; regulators outside

1 the United States. We are trying to balance all those issues.

2 And I think, ultimately, Your Honor, we want to get to a
3 resolution as quickly as possible. And we are working very,
4 very hard at all levels in the company to do so.

5 I think today the fact there were no disputes is
6 reflective of the fact that at the highest levels in the
7 company they have told us to cooperate, be reasonable, and try
8 to work everything out so that we can move this matter forward.

9 And, ideally, Your Honor, we would like to avoid
10 litigation. We would like to resolve the litigation. And we
11 would like Director Mueller to be the person who, along with
12 the Court, has -- has resulted in a global U.S. resolution with
13 regulators and, also, plaintiffs lawyers.

14 And if that's not possible, we are very much prepared to
15 go forward if we get the relevant approvals from EPA and CARB
16 with Mr. Feinberg's protocol.

17 And he has received many, many options from Volkswagen of
18 different resolutions. It's just a question of getting EPA and
19 CARB approval, and then we can go forward. Obviously, the
20 devil is in the detail.

21 **THE COURT:** Well, okay. Let me make a couple of
22 observations.

23 First, I don't feel I'm in any position to decide this
24 issue today. That's number one.

25 Number two, I certainly do appreciate the fact that you've

1 been able to resolve a number of issues in a collegial way,
2 which require the cooperation of Volkswagen and the plaintiffs
3 in doing so. And I think that there's an important concern for
4 the Court that it proceed in that particular way.

5 I don't know whether this ultimately will be an issue or
6 not. And I don't want to -- I don't want to comment on it
7 until I see whether it is an issue or not. There may be some
8 agreement and so forth in terms of timing, and whatnot, as to
9 these particular documents. I appreciate all of that.

10 It's actually the last thing that you said that I want to
11 comment on because you say, well, Volkswagen has given a number
12 of protocols to Mr. Feinberg. And I'm sure that's true in the
13 sense that here are some other options that we're considering.

14 **MR. GIUFFRA:** Right.

15 **THE COURT:** But what is meaningful is what ultimately
16 Mr. Feinberg would release to the public as saying, "Here's the
17 menu. Here are the options." I don't think he's in a position
18 to do that today because I have been advised he is not.

19 So while a number of things are under consideration, I
20 just want to come back to where I started, which is of course
21 the end, which is that Volkswagen must make certain elections
22 as to how they're going to proceed. Among them, I would
23 suggest, would be precisely which protocols would be offered to
24 the public. Having said that, I don't want -- it's in the
25 context of everything else that I've said. And I just want to

1 urge you to take that message back.

2 And I think we understand -- at least the Court has an
3 understanding; the public does too -- why Mr. Feinberg hasn't
4 been able to proceed further as of today. But, hopefully, that
5 will change.

6 **MR. GIUFFRA:** Rest assured, Your Honor, Mr. Feinberg
7 is working very hard. And, again, we're working extremely hard
8 with EPA and CARB. And I think that once we get a resolution
9 with EPA and CARB on a remedy, I think everything will flow
10 from there.

11 **THE COURT:** I do want to, once again, point out it may
12 be that your resolution is not EPA's resolution. And I think
13 if there is a difference by March 24th, as to the position of
14 the parties, we have to address that. And we have to take
15 action with respect to it.

16 So, you know, if in fact you're not able to arrive at an
17 agreement -- and that's certainly possible -- then litigation
18 will move forward quite quickly.

19 But I don't want to -- I don't want to be like King Lear.
20 You know, I will do such things. What they are, I know not
21 yet, but they will be the terrors of the earth.

22 That's not the Court's role. But it is the Court's role
23 to set deadlines and to keep people on those deadlines. And
24 that's what I'm trying to do today.

25 So thank you, Mr. Giuffra.

1 **MR. GIUFFRA:** Thank you very much, Your Honor.

2 **THE COURT:** Any comments?

3 **MR. BOIES:** Your Honor, can I just clarify one thing?

4 **THE COURT:** Sure.

5 **MR. BOIES:** And I totally appreciate this is not to be
6 decided. And the reason for raising it was just to alert the
7 Court to the issue.

8 We will work with counsel for Volkswagen. And he's
9 entirely correct that we've had a lot of cooperation. But this
10 is a very important issue. And the documents that we're
11 talking about are not the documents that have been provided for
12 in what we agreed to.

13 **THE COURT:** Let's debate that issue on the 24th, if we
14 have to.

15 **MR. BOIES:** We will, Your Honor.

16 **THE COURT:** Anyway, any further comment?

17 All right. Thank you for your -- yes, Ms. Cabraser.

18 **MS. CABRASER:** One last matter.

19 **THE COURT:** Yes, of course.

20 **MS. CABRASER:** This is not even -- this is just mega,
21 just megabytes (indicating).

22 **THE COURT:** Just megabytes, okay.

23 **MS. CABRASER:** These are the corrected master case
24 listings that --

25 **THE COURT:** They will be deemed filed.

1 **MS. CABRASER:** Okay. These are the correct ones. And
2 a handy-dandy USB flash drive is included --

3 **THE COURT:** Wonderful.

4 **MS. CABRASER:** -- at no extra cost. And thank you to
5 the defendants --

6 **THE COURT:** I'm going to hold you to that "no extra
7 cost."

8 (Laughter)

9 **THE COURT:** I don't want to see that on the bill.

10 **MS. CABRASER:** We'll cover that one. Thank you.

11 **THE COURT:** All right. Okay. Thank you. We're in
12 recess now.

13 (At 9:03 a.m. the proceedings were adjourned.)

14 - - - -

15 **CERTIFICATE OF REPORTER**

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

18 DATE: Thursday, February 25, 2016

19
20 *Katherine Sullivan*

21
22 _____
23 Katherine Powell Sullivan, CSR #5812, RMR, CRR
24 U.S. Court Reporter
25