

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

IN RE: CHRYSLER-DODGE-JEEP )  
ECODIESEL MARKETING, SALES ) NO. C 17-02777 EMC  
PRACTICES, AND PRODUCTS )  
LIABILITY LITIGATION, )  
\_\_\_\_\_ )

San Francisco, California  
Tuesday, August 8, 2017

TRANSCRIPT OF PROCEEDINGS

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1 Tuesday - August 8, 2017

10:05 a.m.

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

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4 **THE CLERK:** Please be seated. Calling Case  
5 3-17-MD-2777, In Re: Chrysler-Dodge-Jeep EcoDiesel Marketing.  
6 Counsel please come to the podium, and state your name for the  
7 record.

8 **MS. CABRASER:** Good morning, Your Honor.  
9 Elizabeth Cabraser, of Liefk Cabraser Heimann & Bernstein,  
10 Plaintiffs' Lead Counsel. With me is my partner,  
11 Mr. David Stelling. And we have various members of the  
12 Plaintiffs' Steering Committee here this morning, as well, who  
13 may wish to appear.

14 **THE COURT:** Great. Thank you.

15 **MS. RENDÉ:** Good morning, Your Honor. Leigh Rendé,  
16 for the United States, here on behalf of the Environmental  
17 Protection Agency. I'll be speaking for the United States  
18 today, but also here is co-counsel Joseph Warren and  
19 Nigel Cooney.

20 **THE COURT:** All right. Thank you, Ms. Rendé.

21 **MR. GIUFFRA:** Good morning, Your Honor. Good to be  
22 in San Francisco again. Robert Giuffra, Sullivan & Cromwell,  
23 for the FCA Defendants. And I'm here with my partner,  
24 Darrell Cafasso.

25 **THE COURT:** All right. Thank you, Mr. Giuffra.

1           **MR. SLATER:** Good morning, Your Honor.

2 Matthew Slater of Cleary Gottlieb, on behalf of  
3 Robert Bosch LLC.

4           **THE COURT:** Great. Thank you, Mr. Slater.

5           Do you all care to announce your presence? We have on the  
6 record your check-ins, so if you have something to add.

7           **MS. JENSEN:** Good morning, Your Honor.

8 Rachel Jensen, Robbins Geller Rudman & Dowd, on behalf of the  
9 plaintiffs.

10          **THE COURT:** Great. Thank you.

11          **MS. JENSEN:** I might be the only one who has accepted  
12 your offer.

13          **THE COURT:** All right. Well, I'll remember that, but  
14 I've got the cards, so we're here. Thank you, everyone, for  
15 showing up. And thank you for providing the very helpful Joint  
16 Case Management Statement. And, as you all know, our  
17 Settlement Master, Ken Feinberg, is here --

18          **SPECIAL MASTER FEINBERG:** (Indicating.)

19          **THE COURT:** -- present, and is prepared to commence  
20 some preliminary meetings right after our CMC has concluded,  
21 and we have reserved the Ceremonial Courtroom -- now entitled  
22 The Thelton E. Henderson Ceremonial Courtroom -- and the  
23 adjacent Robing Room conference room to have some initial  
24 preliminary meetings with you all. And that's on the 19th  
25 floor. So he stands ready to begin business on that front.

1 And I want to thank Mr. Feinberg for accepting the appointment  
2 in this very important case, and for taking the time and coming  
3 out here. So let me acknowledge that.

4 So let me go through some of the issues that I see, and  
5 get some updates from you. Obviously, I want to talk about the  
6 implications and the status of the CARB Conditional Executive  
7 Order, and the EPA's Certificate of Conformity; but before  
8 that, let me make sure I understand some of the pleading issues  
9 that have been raised.

10 The two individual defendants -- is it Marchionne and  
11 Denner that have been named in the Consolidated Complaint?  
12 What is their status? Has service been effectuated? And are  
13 they represented by counsel here? Are they going to have  
14 separate counsel? What do we know in that regard?

15 **MR. GIUFFRA:** Yes, Your Honor. It's Robert Giuffra,  
16 with Sullivan & Cromwell. We'll be representing both of those  
17 individuals, who are FCA executives. And we've worked with the  
18 PSC on issues of service. And that, obviously, has an effect  
19 on the timing of the motion to dismiss answer. And I think it  
20 will all be worked out.

21 **THE COURT:** All right.

22 **MR. GIUFFRA:** We're obviously not agreeing to  
23 jurisdiction as to the non-U.S. individuals or entities at this  
24 point, but service won't be an issue.

25 **THE COURT:** Okay. And that will be worked out in

1 time to comply with the now-extended response date of October 6  
2 to the Consolidated Complaint?

3 **MR. GIUFFRA:** Yes, Your Honor. That's part of the  
4 arrangement we've reached with the PSC. And everything's been  
5 worked out quite well.

6 **THE COURT:** Good. Excellent. Thank you.

7 **MR. SLATER:** Your Honor, I think Mr. Giuffra must  
8 have made a --

9 **MR. GIUFFRA:** Yeah. I'm sorry. I misspoke. I  
10 misspoke.

11 **THE COURT:** Already, we have some point of tension.

12 (Laughter.)

13 **MR. GIUFFRA:** I was taking on more defendants than I  
14 should have.

15 **THE COURT:** I was wondering about that.

16 **MR. SLATER:** Mr. Denner is the CEO of  
17 Robert Bosch GmbH. We do not represent him. He has been not  
18 been served, to my knowledge. I'm not aware of a summons  
19 having been issued for him. I don't know who'll be  
20 representing him if he is ultimately served.

21 **THE COURT:** All right. So you don't know whether you  
22 will be representing him, then?

23 **MR. SLATER:** Correct, Your Honor.

24 **THE COURT:** Let me find out what the status of  
25 service is, then, on Mr. Denner.

1           **MS. CABRASER:** Service has not been effectuated.  
2 We've just begun discussions with Mr. Slater. We'll see if we  
3 can work something out. If not, obviously, we will, if we  
4 must, effect service through the Hague process. And the  
5 Complaint is in the process of being translated.

6           **THE COURT:** And how long do you think that will -- in  
7 your experience -- to effectuate Hague?

8           **MS. CABRASER:** It doesn't -- it's not as complicated  
9 and time-consuming as it used to be. It's still a process.  
10 We're hoping that we can reach an agreement with Bosch, so that  
11 we can shortcut that. But in any event, if it does turn out to  
12 affect those defendants' schedule with respect to responding to  
13 the Complaint, we don't believe that that should affect the  
14 rest of the pretrial and discovery schedules since, you know,  
15 their response to the pleading can come at any time.

16           **THE COURT:** So this may impact the October 6th  
17 response date, and any hearing arising out of any motion?

18           **MS. CABRASER:** We hope it doesn't. We hope that we  
19 can keep that response date for everyone. We'll have further  
20 discussions with counsel to see if that's appropriate or if  
21 that's possible.

22           If we can't get agreement to that, we'll expedite the  
23 Hague service as swiftly as we can; but if we don't have an  
24 agreement, it may be that we have one main response date for  
25 the entities and the Fiat Chrysler individuals, and one other

1 for Bosch.

2 **THE COURT:** All right.

3 **MS. CABRASER:** I hope we don't.

4 **THE COURT:** All right. I hope you don't, either. I  
5 hope you can all work this out, because it seems like needless  
6 sort of spinning of wheels. It seems to me, at least, service  
7 ought to be effectuated. And whether or not there's  
8 jurisdiction -- well, that's another question.

9 But if and when the response to the Complaints are due --  
10 and I anticipate there will be Rule 12 motion in there  
11 somewhere -- are you anticipating -- have you all discussed  
12 whether that's going to be heard on a normal 35-day notice  
13 period, or extended? Have you had any discussions or thoughts  
14 about what the scheduling will be?

15 **MS. CABRASER:** We had sent to the defendants a  
16 proposed schedule of dates. And I believe it was -- if not  
17 exactly the normal cycle, a slight variation on that.

18 They have not gotten back to us on that. So we'll have to  
19 discuss and submit something to Your Honor; hopefully agreed  
20 on. In our view, it shouldn't be a lengthy cycle. As you  
21 noted, as you'll note from the joint statement, the defendants  
22 have already articulated their --

23 **THE COURT:** Right.

24 **MS. CABRASER:** -- defenses to the Complaint.

25 **THE COURT:** Right. You've anticipated some of those.

1           **MS. CABRASER:** Yes.

2           **THE COURT:** Well, let me just say this. I do not  
3 want to see one of these elongated schedules, where it's 28, 35  
4 days between each briefing, and suddenly it turns into a 90-day  
5 scheduling process. I don't think that's warranted, where the  
6 defense has already been sort of signaled, and you all have  
7 been through probably many of these arguments before. So I  
8 would like to see a fairly expeditious scheduling. I want to  
9 hear this sooner rather than later.

10           **MS. CABRASER:** I think we can cut to the chase on  
11 that, Your Honor.

12           **THE COURT:** All right. Great. There's also an  
13 October 31st deadline to add parties and claims. Are you  
14 anticipating further claims or parties? I forget if that was  
15 in the CMC statement, and I wanted to --

16           **MS. CABRASER:** You know, it's a savings clause, Your  
17 Honor. Not really at this time.

18           **THE COURT:** Right.

19           **MS. CABRASER:** If something comes up in initial  
20 disclosure or the first tranche of document discovery, and we  
21 need to correct a name or correct a claim, we would do that,  
22 but I don't see any major --

23           **THE COURT:** Right.

24           **MS. CABRASER:** -- changes in the Complaint, and I  
25 don't foresee anything that would shift the scope of discovery.

1           **THE COURT:** Okay. All right. Well, I will adopt  
2 that deadline as a case-management deadline in terms of adding  
3 parties and claims. I do want to settle the pleadings as  
4 quickly as possible, knowing, of course, things arise. You may  
5 have the right to seek leave to amend, but this becomes a  
6 Rule 16 deadline that I will add to the case management.

7           I have a question, Ms. Rendé, with respect to DOJ. I  
8 understand you do represent the EPA in this matter, and the  
9 United States. At this point you don't represent, for  
10 instance, the FTC? They are not involved at this juncture?

11           **MS. RENDÉ:** Correct, Your Honor, not at this moment.  
12 They're not involved.

13           **THE COURT:** All right. And without revealing any  
14 trade secrets or anything, do you anticipate that there will be  
15 participation by the FTC? Are you --

16           **MS. RENDÉ:** At this time, Your Honor, we're not aware  
17 of their -- any interest by them.

18           **THE COURT:** Okay. All right. And what about  
19 California Air Resources Board? I know they're not formally a  
20 part of this case. What's your understanding of their possible  
21 participation?

22           **MS. RENDÉ:** We're working very closely with  
23 California in this matter. I am not sure what their deadlines  
24 are or what their anticipated dates are. They're not -- they  
25 have not currently filed, but we expect to continue working

1 with them --

2 **THE COURT:** Okay.

3 **MS. RENDÉ:** -- in terms of perhaps settlement --  
4 perhaps settlement; perhaps litigation.

5 **THE COURT:** Right.

6 **MS. RENDÉ:** So we're going to continue our  
7 relationship with them, but I can't give you a specific date.  
8 I just don't know.

9 **THE COURT:** All right.

10 **MS. RENDÉ:** I do know that they are listening in by  
11 phone, though.

12 **THE COURT:** But no indication at this point whether  
13 they would formally join the litigation, as opposed to  
14 participating in a settlement discussions?

15 **MS. RENDÉ:** Correct. I don't know a specific date.  
16 I'm not sure of their exact intentions in terms of their  
17 timing.

18 **THE COURT:** Is it a question of timing, or if at this  
19 juncture, to your understanding?

20 **MS. RENDÉ:** I believe it is a question of timing, but  
21 I would hate to speak for CARB here.

22 **THE COURT:** Okay. All right. And this is to  
23 everyone. Are we expecting any other tag-alongs? Any  
24 indication that anything else may be coming in at this point?

25 **MS. CABRASER:** Your Honor, we haven't seen anything

1 recently that would give rise to a tag-along, but obviously, if  
2 the parties -- if anything comes to the attention of any of the  
3 parties, they would notify the Judicial Panel.

4 **THE COURT:** Right.

5 **MS. CABRASER:** And that would come in. We don't  
6 foresee any tag-along coming in that would change the scope of  
7 the case or alter any deadlines that Your Honor sets.

8 **THE COURT:** Okay.

9 **MR. GIUFFRA:** Your Honor, the one possibility that at  
10 least existed when we went before the JPML was the securities  
11 case which is pending in New York.

12 **THE COURT:** Right.

13 **MR. GIUFFRA:** That's before Judge Furman. Last week  
14 Judge Furman dismissed the claim of the plaintiff in that case  
15 to add emissions-related claims to the New York litigation  
16 which had been pending, dealing with product-safety issues.  
17 Now Judge Ferman has given the plaintiffs in that case leave to  
18 amend. And, you know, we'll see what happens with respect to  
19 that; but that is at least the one matter that I'm aware of  
20 that is at least theoretically possible that it could be  
21 brought here.

22 **THE COURT:** Right. So that's still hanging out there  
23 as a possibility?

24 **MR. GIUFFRA:** It's a possibility, but it would be a  
25 separate track, as it is in, for example, the *Volkswagen* case.

1           **THE COURT:** Right, right.

2           All right. And there was mention of some state-court  
3 litigation that's ongoing. Does anybody have any update on  
4 that?

5           **MR. GIUFFRA:** Your Honor, the only thing that we're  
6 aware of is that there's an MDL in Texas in state court that's  
7 in the process of being organized, but that's it at this point.

8           **THE COURT:** Do you foresee any impact upon our case?

9           **MR. GIUFFRA:** Not -- not at this point, no.

10          **THE COURT:** So that's proceeding. That's, like, a  
11 consolidated proceeding in state court in Texas?

12          **MR. GIUFFRA:** Correct, yeah.

13          **THE COURT:** All right. Thank you. So let's talk  
14 about the certification. How final -- with respect to the  
15 2017 -- is it 2018?

16          **MR. GIUFFRA:** '17.

17          **THE COURT:** '17. The CARB's Conditional Executive  
18 Order and the EPA's Certificate of Conformity -- is that kind  
19 of a final action? Are there other -- just help me understand.  
20 With respect to that year, has anything else happened; any  
21 further steps or conditions?

22          **MR. GIUFFRA:** Your Honor, my understanding is that  
23 the purpose of both those certifications, which we're very  
24 pleased were issued by both agencies, is to allow the company  
25 to sell the 2017 vehicles. Obviously, they're still subject

1 to, you know, the government potentially taking some different  
2 position at some later date. That's always a possibility, but  
3 we obviously think that those two approvals are a significant  
4 step forward for FCA. And we obviously are still working with  
5 the government.

6 **THE COURT:** But within that scope, that's the final  
7 agency action?

8 **MR. GIUFFRA:** I believe so. Yes.

9 **THE COURT:** So further certifications are --

10 **MR. GIUFFRA:** I believe that's the final action. We  
11 can sell vehicles now, which is what we were waiting for.

12 And the significance of it, of course, is that while --  
13 you know, we consider this a big milestone even for this case;  
14 but we obviously have a lot more work to do. And the  
15 significance is that this case is about the 2014 to 2016  
16 Ram 1500 and Jeep Grand Cherokees. And the vehicles have the  
17 same engine and they have the same emissions systems as the  
18 2017.

19 The question is -- there are obviously some differences  
20 with the hardware, like the grills may be different as they get  
21 updated over time. And we're in the process now of working  
22 with the EPA and CARB to see whether we can use the calibration  
23 that was developed for the 2017s for the 2014 through 2016  
24 vehicles. And that's a process that's ongoing. And the  
25 company is fully committed to working as hard as we can to get

1 this done as quickly as we can.

2           **THE COURT:** And how long? What's your best estimate  
3 as to the timing of the getting the approvals retrospectively  
4 for those three years?

5           **MR. GIUFFRA:** It's always dangerous when a lawyer for  
6 a regulated party makes estimates about what the government is  
7 going to do. We will respond as promptly as possible to what  
8 the government wants from us. We're hopeful we can get this  
9 done as fast as we can get it done. I think it's a matter of  
10 months. Whether it's, you know, one, two, three, or four, I  
11 leave up to Ms. Rendé -- and CARB, I guess, is not here -- to  
12 indicate.

13           But, you know, we believe that, you know, following the  
14 confirmatory testing by CARB and EPA of the earlier-model  
15 vehicles, since the hardware is the same -- the vehicles all  
16 have what we would consider to be state-of-the-art  
17 emissions-hardware systems. And the question is whether you  
18 can use the same calibration in the earlier vehicles. And if  
19 we can do that, and if the government gives us the approvals,  
20 you know, we expect that the new calibration will be used in  
21 the 2014-through-2016 vehicles.

22           And that's obviously significant, because in the 2017s,  
23 you know, our position has been -- and I don't think there's  
24 been an issue about this yet -- that the new calibration is not  
25 having an effect on the stated fuel economy for the cars or

1 their performance. And that's obviously what the case is  
2 about, you know: If there was going to be an effect on fuel  
3 economy or performance.

4 And so, you know, we believe that we can make the  
5 2014-to-2016 vehicles fully compliant, without having an effect  
6 on either fuel economy or performance. And obviously, that  
7 would be a significant, you know, step forward in this  
8 litigation.

9 **THE COURT:** And would the same AECDs involved in all  
10 of those same years, from 2014 through '17?

11 **MR. GIUFFRA:** Yes, to the extent that it's --  
12 obviously, there's been a recalibration of the vehicles and,  
13 you know, changes with respect to them; but there are a number  
14 of the same AECDs that are in the -- you know, approved  
15 calibration that are in the earlier calibration. There are  
16 just changes with respect to how the vehicles are being  
17 calibrated.

18 And the thing which, you know, I've learned through this  
19 process is that cars have now become like computers. And  
20 there's a very, very complicated process requiring a lot of  
21 testing by a lot of folks.

22 You know, the question of an AECD -- AECDs are  
23 permissible. The question is: Should they have been disclosed  
24 to the regulatory agency or not? And that's the regulatory  
25 issue that we have to deal with in the DOJ litigation --

1           **THE COURT:** Right.

2           **MR. GIUFFRA:** -- and what consequences flow from not  
3 having disclosed those AECDs to the government.

4           But the mere fact that there's an AECD in an  
5 emissions-control unit is hardly -- I mean, you know, you're  
6 allowed to have them. And in fact the reason why you have them  
7 in certain circumstances is to do things like protect the  
8 engine, and assist in things like warm-up, and when it's going  
9 up a hill. It's a fairly complicated and technical area.

10           But I think the bottom line is, from our standpoint, the  
11 last time we were here I said we were hopeful we could get it  
12 done. We have gotten it done. I am not aware of any other  
13 approvals that are required. And we do consider this to be a  
14 significant step forward for both the 2017s, and potentially  
15 for this litigation of the 2014 and '16 vehicles.

16           **THE COURT:** All right. Thank you.

17           Ms. Rendé, what can you tell me about the EPA's process?

18           **MS. RENDÉ:** Sure, Your Honor. And I believe your  
19 initial question was regarding the types of approvals for  
20 MY '17.

21           **THE COURT:** Yes, mm-hm.

22           **MS. RENDÉ:** And so on July 28th, EPA did issue a  
23 Certificate of Conformity for MY '17 vehicles. And CARB did  
24 issue a Conditional Executive Order for the MY '17 vehicles.

25           **THE COURT:** Mm-hm.

1           **MS. RENDÉ:** So we do note that it is a Conditional  
2 Executive Order that CARB issued. So, as I believe Mr. Giuffra  
3 mentioned, there is additional testing that needs to happen.  
4 There are other -- other things that need to occur.

5           **THE COURT:** Do you know what other testing -- when  
6 it's conditional, that means the cars can be sold now, subject  
7 to some further tests, or what?

8           **MS. RENDÉ:** Correct.

9           **THE COURT:** And are these tests conditional -- the  
10 conditions -- the testing that has to be done -- are these sort  
11 of standard kinds of tests that are part of the process, or are  
12 they customized or particularized to this situation? What --

13           **MS. RENDÉ:** Your Honor, I believe that they are  
14 standard testing, but I am not positive. So I can double  
15 check, and get back to you on that.

16           **THE COURT:** So there is a chance that a condition  
17 might not be satisfied, in which case the Executive Order is  
18 then modified or revoked or --

19           **MS. RENDÉ:** Correct. That is the nature of a  
20 Conditional Executive Order.

21           **THE COURT:** And what about an EPA Certificate of  
22 Conformity? Are there any further conditions or is that a kind  
23 of a final agency action?

24           **MS. RENDÉ:** That is a final agency action. That is  
25 my understanding; that the COC was issued without condition.

1           **THE COURT:** Okay. And what about -- do you have any  
2 understanding about the timing with respect to the reviewing  
3 2014, '15, and '16 engines?

4           **MS. RENDE:** Sure. Your Honor, for that process, it  
5 will take a few months. And I would just like to highlight the  
6 fact that the recent Model Year '17 calibrations may be a part  
7 of the remedy.

8           I know that you did ask FCA whether or not they are the  
9 same AECDs in question in the MY '17 models as in the prior  
10 years. And we would say, no, they are not the same AECDs.  
11 They are differently calibrated. They are not the same AECDs.

12           And, while AECDs are permissible, defeat devices certainly  
13 are not permissible, but for a few exceptions.

14           **THE COURT:** So if the hardware is the same -- is the  
15 hardware the same, from your perspective?

16           **MS. RENDE:** That's a good point, Your Honor. There  
17 are differences between the MY '17 vehicles, and the prior  
18 models; and currently the United States and California are  
19 trying to assess what those differences are. We did provide  
20 the defendants with a list of information that we need from  
21 them. And that does relate to the hardware, as you're  
22 mentioning. This information will help us determine what role,  
23 if any, the Model Year '17 calibrations will play in addressing  
24 the problems in the prior models.

25           **THE COURT:** All right. So it still sounds like, from

1 your perspective, your client's perspective, it's still an open  
2 question as to how transferable the 2017 recalibration or fix  
3 is.

4 **MS. RENDÉ:** Exactly. And there are some next steps  
5 if we do get the information that we've requested that would  
6 help us to kind of analyze what we would need to do next.  
7 Testing would need to happen, for example; but the scope of  
8 that testing would depend upon the hardware and any other  
9 differences --

10 **THE COURT:** Mm-hm.

11 **MS. RENDÉ:** -- among the models. So the time line is  
12 uncertain, to get back to your initial question.

13 **THE COURT:** Right, right. All right. So it's going  
14 to take some time; as you say, a few months?

15 **MS. RENDÉ:** Correct. I wouldn't say "a couple  
16 months." A few.

17 **THE COURT:** Not a couple, but a few.

18 **MS. RENDÉ:** A few. Several.

19 **MR. GIUFFRA:** Ha, ha.

20 **THE COURT:** I think I catch your drift. All right.  
21 Good. Thank you. I appreciate that.

22 **MS. RENDÉ:** You're welcome.

23 **THE COURT:** The plaintiffs' perspective, what -- and  
24 this is going to lead us into discovery discussions, but what's  
25 your plan in response to what's happened with respect to the

1 COC, and the Conditional Executive Order?

2 **MS. CABRASER:** Well, our plan is to request and  
3 hopefully to get the data that we -- and more specifically, our  
4 experts -- need to drill down on the meaning of the 2017 Model  
5 Year certification, if any, and its impact, if any, on the  
6 prospects for the 2014 through 2016 model years.

7 At this point -- you know, we're all from Missouri. We  
8 all say, "Show me."

9 And I think it intensifies both the need for and the  
10 utility of getting all of this information, so that we can  
11 analyze it. Our experts can analyze it. We can work with the  
12 DOJ and CARB, and see exactly where we are. That will also  
13 inform settlement discussions, as well as trial preparations.

14 **THE COURT:** Well, so that leads me to discovery, and  
15 the status of discovery plan. There's reference in the CMC  
16 about the parties working on a discovery plan. And that would  
17 be filed, hopefully, shortly. So what's the status of that?

18 **MS. CABRASER:** The status of that is that we continue  
19 to confer on it. We would like to propound our discovery --  
20 our document requests -- ASAP.

21 Of course, we've propounded for settlement purposes an  
22 informal laundry list of information and data that we need.  
23 We'll also ask for that formally for litigation purposes.

24 We're also preparing to make initial disclosures from the  
25 plaintiffs' side. And in *Volkswagen* and other recent cases

1 we've used what we call "Plaintiffs' Fact Sheets" for the named  
2 plaintiffs' proposed class representatives that provide the  
3 essential information about them and their vehicles to the  
4 defendants. So that's under way.

5 And we would hope to get initial disclosures from the  
6 defendants, as well, by the dates set forth in the CMC, but we  
7 do plan to propound formal discovery. We'll be hopefully  
8 receiving documents. We want the documents that have been  
9 produced to the government agencies, and other documents,  
10 particularly the technical documents, so that we can digest  
11 that.

12 **THE COURT:** Is your propounding of that request  
13 conditioned on reaching a stipulated discovery plan, or is that  
14 something you're going to go forward on?

15 **MS. CABRASER:** Well, we'll prepare it and we'll  
16 propound it, at least, to give the defendants a heads-up, which  
17 I believe they already have from our laundry list, on what we  
18 want. It's not going to be any surprise.

19 But I also expect within the very near future, the parties  
20 can agree on a discovery plan. We had a fairly detailed  
21 schedule that we proposed to the defendants after reaching  
22 agreement on it with the DOJ; but they said, fairly enough,  
23 that they didn't have enough time to really digest that and get  
24 back to us more specifically before this morning's conference.  
25 So hopefully we can use later on today to do some productive

1 work there.

2           **THE COURT:** All right. Well, I certainly hope that's  
3 the case, because you will be meeting with Mr. Feinberg right  
4 after this. And, you know, he's going to be talking about  
5 scheduling and moving things along on that track. And  
6 obviously, there has to be a meaningful exchange of information  
7 to make that productive. And so this is something that has to  
8 happen soon rather than later, because I think in your  
9 discussions with Mr. Feinberg, I suspect you're going to have  
10 some concrete dates to work with that are going to be just  
11 around the corner.

12           So response, Mr. Giuffra?

13           **MR. GIUFFRA:** Yeah. Your Honor, let me -- I just  
14 want to clarify is a couple of things on the record.

15           On the California Air Resources Board conditional  
16 approval, if you look at the second page, which we submitted to  
17 the Court, in the third paragraph it talks about how the list  
18 of vehicles can be certified conditionally, subject to various  
19 conditions. And essentially what it says is that we have to  
20 provide certain durability data.

21           And the importance of the durability data is to show that  
22 whatever the new calibration is, that it can work and be  
23 durable. And we have to do it within 30 days of the  
24 conditional order.

25           Then further down in point two, there's an issue with

1 respect to the selective catalytic reduction system's  
2 inducement strategy. And that has to be done in accordance  
3 with something that is specified in a letter.

4 And then going down on point three, within 45 days after  
5 the date of the conditional order, which is what we're  
6 referring to, we have to give them some results on what is  
7 called "OBD": On-board diagnostics. And, Your Honor, that's  
8 the lights that are on the car that go off when the system  
9 isn't working properly.

10 So I would describe this as the CARB wants to just get a  
11 bit more testing, to be certain that the system works. But I  
12 think when you just look on the face of the Order, that process  
13 should be done, you know, within the next two months. And  
14 presumably --

15 And the risk, obviously, that we're bearing is that, you  
16 know, if we sell the vehicles, and it turns out that the tests  
17 don't conform to what CARB wants, then the certification  
18 becomes -- you know, then the cars become uncertified, and then  
19 we have an issue to deal with.

20 **THE COURT:** So those conditions will be either  
21 satisfied or not, probably within about a 60-day time frame?

22 **MR. GIUFFRA:** That would be my assessment, Your  
23 Honor.

24 **THE COURT:** Okay.

25 **MR. GIUFFRA:** My second point's on the hardware

1 issue. The hardware issue with the vehicles is that, as I  
2 understand it, the engines and the emissions-control systems on  
3 the vehicles are essentially the same 2014 to 2016, versus  
4 2017.

5 The issue is that the vehicles, themselves, have different  
6 hardware. And, you know, an example that has been given is,  
7 for example, the grillework is different. So that we're going  
8 to be providing the DOJ, the EPA, and CARB with information  
9 about the hardware on those vehicles, you know, and a lot of  
10 detail to see whether the hardware differences, like different  
11 grillework, has an effect on the emissions systems.

12 With respect to Ms. Cabraser's question about giving them  
13 data -- she gave us some information that she wanted  
14 informally. And I'll state on the record that, you know, we're  
15 in the process of gathering that information to the extent we  
16 can. We want to be cooperative with the PSC. We think this is  
17 a case where, you know, the more information we give them, it  
18 gives them an ability to assess the case; things like, you  
19 know, how much do the cars cost; how many there are.

20 Also there's this highly technical data with respect to  
21 the valuations of cars that we've already gone about getting  
22 the information for. Our expert, I think, has worked  
23 previously with their expert. So, you know, we can move that  
24 ball forward.

25 And then, similarly, on the whole question of discovery,

1 you know, thus far, you know, there have been no problems in  
2 negotiating any of the various orders. And I don't think there  
3 will be any problems working through a discovery order with the  
4 PSC. So I think, you know, it will be full speed ahead on, you  
5 know, getting the discovery process moving.

6 The testing process will go forward while the briefing  
7 process. And hopefully in two months we'll have a better idea  
8 of where this case actually stands, because again, based on  
9 what I said previously, the fact that we can actually fix these  
10 vehicles -- you know, the central premise of the Complaint is  
11 that we can't; or if we can fix them, there's an impact on  
12 performance or on mileage per gallon. And if there isn't, then  
13 the case looks different than if there is.

14 And so, you know, within the next two months I think we'll  
15 know sort of which bucket this case falls within.

16 **THE COURT:** And discovery, of course, will include  
17 the testing data, and then all of that pertains to the  
18 certification?

19 **MR. GIUFFRA:** Yes. We would obviously be prepared to  
20 share that information with the PSC. They obviously need to be  
21 persuaded that, for example, if we get a fix that's approved,  
22 that it doesn't have an effect on performance or on miles per  
23 gallon. That's obviously critical, and we have to share that  
24 information with them.

25 **THE COURT:** All right. Good. All right.

1           **MR. GIUFFRA:** Okay?

2           **THE COURT:** I'm pleased to hear that.

3           What about from Bosch's perspective?

4           **MR. SLATER:** Your Honor, if I can just very briefly,  
5 I just want to ensure that the Court has in mind that Bosch is  
6 very differently situated to FCA. And, while these discussions  
7 that we've been having about what FCA has done as to  
8 certification for Model Year '17 is very important, very  
9 encouraging, it also points to some of the differences between  
10 Bosch and FCA.

11           Bosch is not regulator facing. All of the certification  
12 work is done by the OEM; in this case, FCA.

13           Bosch is not consumer facing. We don't sell our equipment  
14 to customers -- to consumers. We sell it to the OEM.

15           And, third, it's then up to the customer to figure out how  
16 to configure the vehicle to meet emission requirements, as well  
17 as all of the other performance requirements and objectives  
18 that the customer has.

19           And Bosch supplies, in this case, an engine control unit,  
20 including software that enables its customers to comply with  
21 emissions requirements. And I think that we shouldn't --

22           **THE COURT:** "Customers" being the end user?

23           **MR. SLATER:** No. The customer being the vehicle  
24 manufacturer.

25           **THE COURT:** Oh.

1           **MR. SLATER:** So among the significant implications of  
2 what EPA and CARB has done is that it verifies what we have  
3 said all along, which is that Bosch provides the equipment --  
4 the technology -- to enable its customers -- the vehicle  
5 manufacturers -- to meet emissions requirements as they see  
6 fit. And, as the discussion that we just had about grillework,  
7 for example, indicates, there are all kinds of things that the  
8 manufacturer does in the process of configuring the vehicle  
9 that goes well beyond anything that Bosch is involved with, and  
10 makes it essentially impossible for Bosch to know what will or  
11 won't be the ultimate output from the tailpipe of what its  
12 customers do.

13           **THE COURT:** On the other hand, the Complaint alleged  
14 more than just a supplier of equipment that's 100 percent  
15 calibrated and manipulated by FCA. I'm not saying that's  
16 essentially true or proven at this point; but I mean, the  
17 Complaint certainly seems to appoint a different role or a  
18 large role.

19           **MR. SLATER:** The Complaint actually alleges that the  
20 calibration was tightly controlled by FCA and VM Motori, which  
21 at this point is an FCA subsidiary.

22           The Complaint also, Your Honor -- I just want to make note  
23 now, in case we have to come back to it at some later stage --  
24 on some critical issues in respect to the RICO claim,  
25 affirmatively states that the plaintiffs are not able to plead

1 their claim without discovery. And we think that's wrong. And  
2 we think that RICO is being used improperly as a bludgeon, when  
3 there is no RICO claim. You don't get discovery to find a  
4 claim. You get discovery if there is a claim. And we think it  
5 will be important to test that at a relatively early stage in  
6 this case; at least in respect to Bosch.

7 So it may turn out -- and we will and we have been and  
8 will continue to work very coöperatively with the PSC and with  
9 the FCA defendants. It may turn out that the negotiated  
10 schedule has some differences between FCA defendants and  
11 Bosch's as we move forward. And I just wanted to make note of  
12 that now. We're obviously in the middle of the process. I  
13 don't want to presume the outcome, but I did want to make sure  
14 the Court is aware of our different situation.

15 **THE COURT:** All right.

16 **MR. SLATER:** Thank you.

17 **THE COURT:** In the interest of fairness to all sides,  
18 Ms. Cabraser, do you have any comments you'd like to make? I  
19 will hear that.

20 **MS. CABRASER:** Thank you, Your Honor.

21 We don't wish to or intend to preargue the motions to  
22 dismiss at this point.

23 I will note that, from our perspective, the civil RICO  
24 allegations against the Bosch defendants as they stand in the  
25 Complaint would survive, we believe, a motion to dismiss, and

1 are well founded; have to do with, of course, behind-the-scenes  
2 non-consumer-facing, for the most part, activity by the Bosch  
3 defendants together with the FCA defendants, as is usual in a  
4 civil RICO claim.

5 Obviously, more discovery will help us flesh out any  
6 number of claims in the Complaint, but this is not a situation  
7 where we need to do discovery to make out the claims. We  
8 believe they stand.

9 And we understand Bosch's position, very similar to what  
10 it has been in the past; but we do believe that the Bosch  
11 defendants were a necessary and facilitating part of what  
12 turned out to be a fraud by concealment on the government and  
13 on those who bought or leased the Class Vehicles.

14 Thank you.

15 **THE COURT:** And I take it Bosch is participating in  
16 this meet-and-confer with regard to the discovery plan?

17 **MS. CABRASER:** Absolutely, absolutely.

18 **THE COURT:** All right. Ms. Rendé, do you have any  
19 comments you'd like to make at this point?

20 **MS. RENDÉ:** I'd just like to confirm with Your Honor  
21 that -- or just let Your Honor know that the United States also  
22 expects to continue working well together with the PSC and  
23 defendants on the discovery schedule. We hope to get that  
24 filed very shortly.

25 **THE COURT:** All right. And I will indicate that

1 there was a proposed order -- both a preservation order, and an  
2 order regarding nonwaiver, I guess, of privileges that I intend  
3 to sign. I think that was entered.

4 The preservation order, by the way -- there was some  
5 reference in there about preservation of ESI or not by the  
6 federal government. I wasn't sure I understood if there was an  
7 issue or a problem brewing there.

8 **MS. RENDÉ:** Your Honor, I'm looking at Exhibit A of  
9 the document that you referenced.

10 **THE COURT:** Mm-hm.

11 **MS. RENDÉ:** And, yes, in paragraph 10 of that exhibit  
12 we are putting the parties on notice that the following  
13 information in paragraph 10 is not reasonably accessible to the  
14 United States. And just as we mentioned in here, we are  
15 informing them that we're not preserving this ESI because it is  
16 not reasonably accessible to the United States.

17 **THE COURT:** All right. Now, has that been a matter  
18 of discussion, then, between the parties as to whether that's  
19 going to be an issue -- problematic issue with respect to this  
20 case?

21 **MS. RENDÉ:** I will note that we did work with both  
22 sets -- we did work with the PSC and defendants.

23 And, as you'll note below paragraph 10(k), there is  
24 additional language in there where the defendants contend that  
25 they do not have information sufficient to determine whether or

1 not the above-referenced ESI is reasonably accessible, and they  
2 reserve all rights.

3 **THE COURT:** So it's still an open question, I guess.

4 Remind me what happened in *Volkswagen*. Was there a  
5 similar issue that arose in the *Volkswagen* case, do you know?

6 **MS. RENDÉ:** I can't tell you off the top of my head,  
7 but I do believe that was discussed in *Volkswagen*. I'm not  
8 sure how or whether it was memorialized. I believe it was.  
9 I'm just not sure in which -- whether it was memorialized in a  
10 PTO. I don't know.

11 **THE COURT:** And this issue about preserving ESI,  
12 whether it's on a server, or on various machines --  
13 essentially, this is something endemic to the federal caliber  
14 of quality of systems that the federal government uses, or at  
15 least the agencies involved here?

16 **MS. RENDÉ:** We're speaking on behalf of the  
17 Environmental Enforcement Section and EPA here.

18 **THE COURT:** All right. Sure it wasn't sent to Canada  
19 or something like that?

20 (Laughter.)

21 **THE COURT:** I've heard some stories about that. All  
22 right. That's another issue.

23 Let's talk about timing. The plaintiff and the  
24 Plaintiffs' Steering Committee has suggested we actually set a  
25 trial date now for March of 2019.

1 Defendants are resistant to that on several grounds. My  
2 goal actually at this point would be to set at least a  
3 class-cert. schedule, because that's usually the first thing I  
4 do in class-cert. cases, because there are so many variables  
5 that can happen between now and then, that to then set the  
6 actual trial date gets a little risky, although I'm not averse  
7 to setting a trial date, necessarily; but I think what I want  
8 to do is talk about a time frame for class cert., knowing  
9 there's going to be some motions work.

10 I anticipate -- you know, I don't know how many grounds  
11 that we have to go through if there is a motion to dismiss and  
12 it succeeds to some extent; whether there would be, then, leave  
13 to amend, then yet one more round. But as discovery  
14 proceeds --

15 And let me make clear now that as far as I'm concerned,  
16 discovery is open. We don't need to wait further events in  
17 this case. In view of the interest in getting a resolution,  
18 starting both tracks -- both the litigation track, as well as  
19 the settlement track -- that can't go. That can't progress  
20 without discovery. And the fact that we still have cars on the  
21 road continues to remind us of the urgency of getting some kind  
22 of resolution here. So as far as I'm concerned, discovery's  
23 open. I obviously want a discovery plan, and know that the  
24 parties are on track; but you don't need any further order from  
25 me to commence discovery.

1           And that's also to enable us to anticipate -- once we get  
2 through the pleadings stage, assuming that the case survives  
3 the pleadings stage, we need to set a class cert. And so I  
4 want to hear your thoughts on what the reasonably earliest  
5 point when you think you may be ready to file class cert.

6           **MS. CABRASER:** Your Honor, assuming that -- since  
7 discovery is open now, assuming that we get the discovery that  
8 we request -- and I don't see any reason to believe that we  
9 won't -- and assuming that we have gone through the  
10 motion-to-dismiss cycle by the end of this year, which I think  
11 we would do with an October 6th response date from the  
12 defendants, and a regular briefing cycle, that would enable us  
13 to file an opening brief on class certification early next  
14 year. And that would enable the class-certification briefing  
15 cycle to be completed probably by the middle of next year.

16           And, you know, this may involve expert reports, so there  
17 may be some wrinkles later in terms of expert discovery; but I  
18 think in this case, the class-certification motion, since it's  
19 not a merits motion, is going to be based on determination  
20 basically of whether the common questions of fact or law with  
21 respect to the defendants' conduct and product predominate over  
22 any entirely individualized questions. And, while I'm not  
23 prearguing class certification, we think that's the case.

24           The defendants have made their anti-certification  
25 preargument in the CMC.

1 But in any event, I think we can go through the briefing  
2 on that by mid 2018.

3 And, of course, a ruling on class certification is likely  
4 to be subject to a Rule 23(f) petition by one or both sides,  
5 but the Ninth Circuit has been relatively expeditious in  
6 deciding those.

7 **THE COURT:** That's been my experience.

8 And so sounds like what you're anticipating is filing  
9 early next year, but a somewhat elongated or quasi-elongated  
10 scheduling, because of possible expert testimony and some work  
11 that has to be done between the opposition brief and the  
12 opening brief and then reply brief; not just your typical  
13 35-day period, which often happens in class cert.

14 **MS. CABRASER:** Right. I'd love to do it on a typical  
15 briefing cycle, but despite the best will, you know, of the  
16 parties and best efforts of the parties, it's possible that one  
17 or both sides may need more time --

18 **THE COURT:** Okay.

19 **MS. CABRASER:** -- because of experts.

20 **THE COURT:** All right. Mr. Giuffra.

21 **MR. GIUFFRA:** Your Honor, you know, we sometimes like  
22 to talk about what happened in the *Volkswagen* case, although  
23 this may be a situation where the sequel is not as good as the  
24 original for some folks; but in this case we will have  
25 significant class-certification arguments. Class certification

1 was never dealt with in the *Volkswagen* case. There were never  
2 motions to dismiss in the *Volkswagen* case.

3 But in this particular case, when you look at the products  
4 we're talking about, you're talking about half-ton trucks,  
5 essentially. And people buy half-ton trucks for lots of  
6 reasons. And, you know, reliance is an important element in  
7 most if not all of the plaintiffs' claims.

8 And there obviously were different ads that were out in  
9 the -- that were communicated to consumers. People had  
10 different reasons for buying these trucks. People's losses, to  
11 the extent there are any losses -- and again, if the  
12 calibration works, there wouldn't really be, in our view, any  
13 losses -- but we think that this is a case where there will be  
14 significant class-certification issues.

15 Just to flag another one, you know, the plaintiffs want to  
16 have a nationwide class action. They have got named plaintiffs  
17 from 30 states.

18 Your Honor issued a case -- I believe it's called  
19 *Carrier* -- 2015, which I was actually reading last night. And  
20 you dealt with that issue of standing, and what the scope of  
21 the class issues should be on the motion to dismiss.

22 But you know, I think we will have, you know, significant,  
23 significant class-certification issues. And so I think that  
24 that is something that we should definitely put into the  
25 schedule.

1           **THE COURT:** All right. But their nationwide  
2 certification issues, I take it, are on federal bases?

3           **MS. CABRASER:** Yes, Your Honor. The nationwide class  
4 certification is based on the plaintiffs' civil RICO claims.  
5 Reliance is not an element of civil RICO claims, according to  
6 the Supreme Court. And I think that's pretty good -- pretty  
7 good authority. So the nationwide class, well represented by  
8 people from a number of states. And civil RICO claim is really  
9 our lead claim.

10           I'm told that, based on our estimates of discovery being  
11 obtained on a rolling basis, assuming discovery is flowing,  
12 even if it's not absolutely complete, we could file our opening  
13 class certification briefing in late February. So that would  
14 be the early 2018, just to put a slightly finer point on it.

15           **THE COURT:** Okay.

16           **MR. GIUFFRA:** Your Honor, I do think this is a  
17 case -- you know, the civil RICO gets thrown around a lot. I  
18 think that the pleading requirements for civil RICO are fairly,  
19 you know, high and specific. And we think this is a case where  
20 there will be significant issues to deal with at the  
21 motion-to-dismiss stage as to whether we can even plead civil  
22 RICO, including, you know, trying to -- did they engage in, we  
23 think, an impermissible group pleading? And without going into  
24 the particulars of who did what in any alleged RICO conspiracy.  
25 So we'll deal with those issues.

1           **THE COURT:** Right.

2           **MR. GIUFFRA:** But the bigger issue is that I think  
3 class cert. in this case will be significant. It was not an  
4 issue in the VW case, at all.

5           **THE COURT:** Well, knowing that there's a possibility  
6 that the class-cert. question may hinge to some degree on what  
7 happens on the motion to dismiss, and whether there's another  
8 iteration, I'm inclined to assume that we will have a good  
9 sense of the pleadings; that the pleadings will be largely  
10 settled one way or the other by the beginning of the year.

11           And if you can file something by late March, and typically  
12 -- and you would anticipate, like, 28 days between briefs, or  
13 how much time to respond to expert evidence and prepare a  
14 position?

15           **MS. CABRASER:** I would think four weeks between the  
16 briefs. That's a 28-day schedule. It should be ample,  
17 particularly if we're filing in March, as opposed to February.  
18 That gives us a bit more time to get in some stray discovery,  
19 and get the experts organized.

20           **THE COURT:** So if we set a date, for instance, in mid  
21 March, and give you an extra time just in case there are more  
22 pleadings to be filed -- just take an example, let's say  
23 March 15. And you have 28 days for a response, opposition.  
24 That gets you to April 12. And then reply, another 28 days?

25           **MR. GIUFFRA:** I would be -- Your Honor, in terms of

1 the opposition brief, in my experience typically what will  
2 happen would be we would probably try to take the depositions  
3 of the named plaintiffs before the class cert. --

4 **THE COURT:** Yes.

5 **MR. GIUFFRA:** -- was filed. So that would get that  
6 done. I think there are about 49 people or something. That's  
7 the number that's in my head.

8 **THE COURT:** Right.

9 **MR. GIUFFRA:** The issue then would be, obviously,  
10 they would have experts.

11 **THE COURT:** Right.

12 **MR. GIUFFRA:** We would get the expert reports in,  
13 say, mid March. They might have experts on, you know, three or  
14 four different topics. The process of getting experts for  
15 class certification and getting through the reports and getting  
16 them to do analyses, particularly in a case like this, which is  
17 going to involve, *What were the ads? Who saw them?* -- you  
18 know, all of this kind of, you know, analysis that would have  
19 to be done could take some time.

20 So, you know, in my experience, 60 days is probably the  
21 minimum amount of time that we have on a case of this kind of  
22 complexity, in terms of having to, you know, get experts. And  
23 they'll want -- once we put on our expert reports, say, in 60  
24 days, they'll want to, you know, depose those experts. Their  
25 experts will put in reports. And the process just generally,

1 you know, takes time, having been through this, you know, more  
2 times than I'd care to remember; but I think it's at least 60  
3 days, realistically.

4 **THE COURT:** Your thoughts?

5 **MR. GIUFFRA:** That would be standard in most big  
6 cases.

7 **MS. CABRASER:** Well, it may be standard in some big  
8 cases. I think we can do better than that here.

9 The reason that I say that is the parties will be pretty  
10 well familiarized with the issues and information in this case,  
11 by virtue of the settlement-discussion process. And I think  
12 more likely than not, we know each other's experts. I think  
13 we'll be more familiar with the experts before the  
14 class-certification motion is filed than would typically be the  
15 case, say, in an antitrust litigation, for example, where  
16 people hold things pretty close to their vest until the  
17 briefing cycle starts.

18 And so that's why I say I think the briefing cycle can be  
19 more expedited, with the understanding that if the unexpected  
20 happens, and the defendants or even the plaintiffs, for that  
21 matter, do need more time because they're hit with an  
22 unexpected expert, or something that they need to dig into  
23 before they can respond, we can come to Your Honor and ask for  
24 a variance or an extension of that schedule.

25 But I think it's a good idea to keep us on a fairly tight

1 schedule.

2 I do expect the named plaintiffs will have been deposed to  
3 the extent the defendants want to do that in advance of class  
4 cert. Defendants will certainly have the plaintiffs' fact  
5 sheets with the basic information very soon. So that doesn't  
6 need to be extended.

7 And I think to the extent we need to -- you know, we need  
8 to question an expert or get more information on an expert that  
9 they're using, we'll do that on an expedited basis, and would  
10 anticipate that they'd cooperate.

11 So it's up to Your Honor, but I would say the 28-day  
12 schedule for the opening brief, the opposition brief, and then  
13 the reply brief, with the understanding that if that proves to  
14 be unworkable for either side, relief would be granted.

15 **MR. GIUFFRA:** Your Honor, if I could just be heard  
16 for one second on that, the one concern I would have would be  
17 what you would have to get done in that 28-day period would be,  
18 number one, potentially retain experts; and then also depose  
19 the other side's experts, because we would get the other side's  
20 expert reports, say, on March 15th. Then we'd have to go out  
21 and get experts, presuming that we hadn't predicted every  
22 expert the other side wanted. They would have to do expert  
23 reports.

24 And think about this. The plaintiffs -- right now it's  
25 August. Their experts can work on the class-certification

1 issues for, you know, literally months and months and months.  
2 And then they want to try to jam us in to a very, very short  
3 period of time.

4       Only -- you know, and one -- I mean, again, I think 60  
5 days is the bare minimum.

6       Another thing that could be done -- I mean, on the damages  
7 side, I don't really know who their expert would be. I know  
8 who their consulting expert is, based on other experiences; but  
9 I don't know who their damages expert, you know, would be.

10       But there would be other experts on class certification.  
11 If the plaintiffs wanted to try to speed this process up, you  
12 know, either give us the expert reports before the brief, tell  
13 us who the experts were so we can see: Well, they've hired  
14 Professor Jones, who does this. Then we could go find  
15 Professor Smith, who is sort of the contra person to  
16 Professor Jones, and get that process moving, you know, sooner.

17       But I still think, realistically, you know, no one, you  
18 know, having been through this -- the process that would have  
19 to go on in that period between the filing of the class-cert.  
20 brief and the filing of the opposition brief would be, number  
21 one, analyzing everything that's in it. Number two, analyzing  
22 all of the expert reports. Taking depositions of the experts.  
23 And then getting our own expert reports done. Then putting it  
24 all into a brief.

25       And the idea of doing that in four weeks, I think,

1 realistically, in a case of this complexity, is just not  
2 realistic. I just don't think you can get that much done.

3 **THE COURT:** All right. What about the idea of sort  
4 of advance disclosure of expert reports in advance of actually  
5 filing a brief? Is that not feasible? Do you have any  
6 thoughts on that, Ms. Cabraser?

7 **MS. CABRASER:** We could do that, but it would be a  
8 couple of weeks or so before the actual brief would be filed.  
9 So that would give another -- you know, another 14 days to the  
10 defendants to prepare their opposition. That would effectively  
11 give them six weeks' -- six weeks' opposition schedule.

12 **THE COURT:** All right. What about that, Mr. Giuffra?

13 **MR. GIUFFRA:** I still think, Your Honor, we need a  
14 little bit more time on the back end. I just think  
15 realistically, just writing a brief -- again, think about it.  
16 The plaintiffs can start preparing their class-cert. brief  
17 today.

18 We would then get -- what? -- 28 days to do all of this  
19 work: Take depositions, put together reports, and then prepare  
20 a brief.

21 And the problem, of course, having been through this, is  
22 when you write your own brief, you have to get the depositions  
23 all done. You have to get the transcripts. You have to  
24 analyze them. You have to have your experts look at it. Then  
25 the experts have to take into account what the other side's

1 experts say. It's just a process that takes a lot of time, for  
2 better or for worse.

3 **THE COURT:** All right. Here's what we'll do. I'm  
4 going to set a March 15th filing date for the opening brief.

5 Plaintiffs will do an expert disclosure two weeks in  
6 advance of that.

7 The opposition will be due on April 26th.

8 That gives you a full, according to my calculations, six  
9 weeks plus two. That essentially gives you eight weeks.

10 **MR. GIUFFRA:** If we can at least get something --

11 And if there's a problem, Your Honor, as Ms. Cabraser  
12 said, you know, we'll come back to the Court as soon as we know  
13 that maybe we need --

14 Look. In this, we've had a good working relationship.  
15 And I think that no one wants to be jamming anyone. I'm just  
16 trying to be realistic.

17 **THE COURT:** And then do you need more than four weeks  
18 to file a reply?

19 **MS. CABRASER:** Well, Your Honor, we would like to  
20 have that -- the same two weeks that the defendants get for an  
21 advance peek on their experts. So we would like their experts  
22 to be disclosed, as well, before their class-cert. opposition  
23 is due, so we can start that process. And if they do that,  
24 then we can work with the four-week --

25 **THE COURT:** Okay.

1           **MS. CABRASER:** -- reply cycle.

2           **MR. GIUFFRA:** That's fine.

3           **THE COURT:** All right. So then your reply will be  
4 due May 24th. Right, Betty? Is that right?

5           **THE CLERK:** Yes, Your Honor.

6           **THE COURT:** And then I'm going to need some time to  
7 look at this. So I'm going to suggest June 14th as a hearing  
8 date. Is that open to us, Betty?

9           **THE CLERK:** Yes.

10          **THE COURT:** June 14th, on our law-and-motion  
11 schedule.

12          **MS. CABRASER:** Okay. And then for the defendants'  
13 expert disclosure date?

14          **THE COURT:** That's two weeks in advance of the --

15          **MS. CABRASER:** Their opposition?

16          **THE COURT:** Yeah. And we'll get that in a minute  
17 order.

18          **MS. CABRASER:** Thank you very much, Your Honor.

19          **MR. GIUFFRA:** Thank you, Your Honor.

20          **THE COURT:** So that hopefully will give you all  
21 plenty of time, but it does give us a firm date.

22           And I will say with respect to trial setting, the  
23 March 2019 date is not unrealistic, in my view; that provided  
24 we get through class cert. by sometime mid 2018, and then there  
25 may be summary-judgment motions following from that, some

1 further discovery.

2           And I know there's going to be some issues about  
3 defendants' consent, and all of that; but just to let you know  
4 that to the extent that trial is an option here and it's going  
5 to be awaiting, I am looking in that -- sort of that early 2019  
6 time frame, if we get to that point.

7           **MS. CABRASER:** Thank you, Your Honor. We had  
8 extensive discussions with the DOJ. And it was very important  
9 to us that we request a trial date that enabled all of the  
10 plaintiffs to move jointly, so that we could have a joint  
11 trial, as appropriate. And that's what we came up with. We're  
12 obviously more than willing to be prepared for trial on a  
13 sooner schedule, if that becomes feasible from the Court's  
14 perspective.

15           The other thing that I would note on the defendants' point  
16 about consenting to trial in this jurisdiction, we would be  
17 happy to, if necessary, refile the operative pleading -- the  
18 Consolidated Amended Complaint -- as an amendment to one of the  
19 underlying cases that was originally filed here, which  
20 eliminates the problem. Of course, there can also be a  
21 stipulation that eliminates the problem.

22           **THE COURT:** Right.

23           **MS. CABRASER:** Or since that Complaint or any  
24 amendment to that Complaint is a freestanding Complaint filed  
25 in this District, it could simply be given its own civil action

1 number.

2           **THE COURT:** And that's what I had in mind. And  
3 that's why I say my intent -- if this case does not resolve  
4 through the good offices of Mr. Feinberg, there will be a trial  
5 here, whether it's all of the cases, or only those that were  
6 filed originally here, or for which I retain jurisdiction, et  
7 cetera. My intent is to try this case in early 2019.

8           **MS. CABRASER:** Thank you, Your Honor.

9           **THE COURT:** But I don't need to set a date right now.

10           As we get down the road, you know, once we get to class  
11 certification, just know that it's not going to be another two  
12 years after that. It's going to follow fairly quickly.

13           **MS. CABRASER:** Thank you, Your Honor.

14           **THE COURT:** So at this point, let me set another  
15 further status conference for two months out, which is  
16 October 3rd; specially set October 3rd, if that works with Lead  
17 Counsel.

18           That would be about the date that the opposition is due or  
19 that the response to the Complaint is due. So you'll have a  
20 good-enough sense of what that's going to look like. You'll  
21 have had a chance by then to have engaged in, I think, some  
22 meaningful discussions with the Settlement Master. And you  
23 will have heard back from CARB, and we'll have a better sense  
24 of where things are going. So does that work?

25           **MS. RENDÉ:** If I may, Your Honor.

1           **THE COURT:** Yes.

2           **MS. RENDÉ:** I'd just like to note -- I believe you're  
3 aware of this, but I just want to make sure that the  
4 United States has not agreed to an extension of October 6th, in  
5 terms of an answer to the Complaint.

6           **THE COURT:** Oh, okay. I didn't know that.

7           **MS. RENDÉ:** Okay. It wasn't clear, so I wanted to  
8 make sure you were aware of that.

9           **THE COURT:** Okay.

10          **MS. RENDÉ:** We're still in discussions with the  
11 defendants about that --

12          **THE COURT:** Okay.

13          **MS. RENDÉ:** -- but we have not come to an agreement.

14          **THE COURT:** Oh, all right. Well, I take it if you  
15 don't come to an agreement, I'll hear about that in some  
16 fashion or another.

17          (Laughter.)

18          **MS. RENDÉ:** Correct.

19          **THE COURT:** Entry of default judgment, or something?  
20 Is that the --

21          **MS. RENDÉ:** In addition, Your Honor, I just wanted to  
22 let you know regarding the proposed trial date of March 2019 --

23          **THE COURT:** Yes.

24          **MS. RENDÉ:** -- we have provided the PSC and  
25 defendants with this date, and it is doable for us; but as far

1 as the U.S. is concerned, it is already an expedited schedule.

2 **THE COURT:** Okay.

3 **MS. RENDÉ:** Thank you.

4 **THE COURT:** So don't expedite it anymore than that?

5 **MS. RENDÉ:** Thank you, Your Honor.

6 **MR. GIUFFRA:** You know, Your Honor, just to put a  
7 marker down, I mean, our position would be -- and look. I  
8 think from the standpoint of the company, we want to work very  
9 closely with the DOJ, and try to resolve this matter.

10 **THE COURT:** Yep.

11 **MR. GIUFFRA:** And that's a top priority for the  
12 company. We want to get our calibration, hopefully, approved  
13 for the 2014s through 2016s, and then deal with whatever  
14 regulatory issues we have with the Department of Justice. And  
15 that's a top priority. The company wants to be as cooperative  
16 as it can with the Department of Justice.

17 In terms of this idea of a joint trial, just to put a  
18 marker down, we think that the complaints are different; the  
19 issues are different.

20 One is a regulatory complaint, you know. *You should have*  
21 *disclosed an AECD to us.*

22 And the other complaint is more of a consumer-based class  
23 action, where you need to show things like damages, and the  
24 like.

25 And so, you know, we think that the idea of a joint trial

1 is something that we would oppose. We don't think it's  
2 something that would make sense. And we think it's something  
3 that hopefully the Court will never have to deal with.

4 And I'd also note that, you know, the Department of  
5 Justice filed the lawsuit against FCA in Michigan. And so that  
6 would also be an issue at least to take into account, in terms  
7 of this idea of a joint trial.

8 I think, you know, the PSC is a different issue.

9 And I think the way this case may play out, hopefully this  
10 will reach a resolution with the DOJ, and then we'll work and  
11 see where we are with the PSC.

12 But I think the idea of a joint trial between -- with the  
13 Department of Justice, and their Department of Justice  
14 regulatory issues, and the PSC, with their consumer-faced  
15 issues, is really not a practical one. And also given the fact  
16 that the case --

17 **THE COURT:** But there are obviously overlapping  
18 factual issues.

19 **MR. GIUFFRA:** Some, yes. Some, but I don't think  
20 they're quite the same, because in the one case the issue is,  
21 you know, *You didn't disclose AECDs*. There are just issues  
22 that are different that the government cares about, that are  
23 not issues for the PSC.

24 So, for example, have these vehicles emitted any excess

25 NO<sub>x</sub>?

1           Okay. That's something that is a government issue. The  
2 government will ascertain what the amount is. We'll work with  
3 the government. And if there was excess NO<sub>x</sub>, there would be a  
4 need to remediate that excess NO<sub>x</sub>. That's something we would  
5 deal with the government on; not the PSC.

6           **THE COURT:** Why wouldn't that be that be within the  
7 purview of the PSC injunctive relief?

8           **MR. GIUFFRA:** Well, because the PSC doesn't have --  
9           You know, if somebody bought a car -- right? -- they  
10 either got or didn't get the car they got, or they suffered  
11 some damage because the miles per gallon were different.

12           Whether there was some, you know, excess NO<sub>x</sub> that went out  
13 into the universe, into the world -- that's a governmental  
14 issue. And in the VW case which we like to cite, those issues  
15 were dealt with by the government's settlement.

16           **THE COURT:** But in litigation, you're saying that's  
17 completely irrelevant and immaterial to any consumer class  
18 action case, whether a car pollutes beyond legal requirements?

19           In other words, it's only a matter of miles per hour and  
20 horsepower?

21           **MR. GIUFFRA:** No.

22           What I'm saying, Your Honor, is the issue of remediation  
23 with respect to that excess NO<sub>x</sub>, in terms of the environment  
24 generally, is an issue for the government. It could be an  
25 issue they'll claim some damage from the fact that the car or

1 truck emitted some excess NO<sub>x</sub>. And we'll have to deal with  
2 that issue.

3 I'm just making the point that the issues that the  
4 regulators deal with and the issues that the PSC deals with are  
5 different issues.

6 So for example, again, on the PSC [sic] front -- I mean,  
7 on the DOJ front there's an issue of -- you know, they're  
8 seeking penalties. That's not an issue that the PSC would deal  
9 with in this case. So I just think that the issues are  
10 different. And so the idea of a joint trial just doesn't  
11 really make -- I don't think it would be workable, or  
12 practical, or make sense.

13 **MS. CABRASER:** Your Honor, may I respond briefly?

14 **THE COURT:** Yes.

15 **MS. CABRASER:** The questions of fact are almost  
16 entirely the same with respect to the government and the class  
17 plaintiffs' claims.

18 And, yes, it is important from a consumer standpoint  
19 whether or not the EcoDiesels, which is how these vehicles were  
20 marketed, were, in fact, environmentally responsible. That  
21 matters a great deal. Whether they were sold as represented or  
22 not matters a great deal to the owners.

23 And, as we emphasized in the *Volkswagen* matter, and has  
24 proved true in the practical sense, the owners or lessees are  
25 the ones in possession of these vehicles. And any remedy

1 that's going to be effective is going to require their  
2 participation, and, as a practical matter, is also going to  
3 require their compensation.

4 The reason that we propose the joint-trial concept -- and  
5 it is a concept at this point -- I think going --

6 And, you know, going through the pleadings exercise, going  
7 through the class-certification process will clarify those  
8 common issues and bring them into higher relief; but the  
9 joint-trial model was used quite successfully in the *Deepwater*  
10 *Horizon* case, where, as here, the United States Government and  
11 several states had civil penalties in mind. There, it was the  
12 Clean Water Act. Here, it's the Clean Air Act. But yet the  
13 questions of fact, which were not admitted, which were not  
14 conceded there in *Deepwater*, and we assume aren't going to be  
15 conceded or admitted here in *FCA*, needed to be tried.

16 There, it was a three-phase bench trial in admiralty and  
17 on the federal statutory claims. And the parties waived a  
18 jury. And Judge Barbier conducted those trials. Those trials  
19 were jointly prosecuted by the PSC, the DOJ, and, to a lesser  
20 extent, the states. And they were conduct, with Phase One  
21 basic -- there, it was a more arithmetic division of  
22 responsibility under admiralty law, but there's a rough analogy  
23 to this case.

24 Who's responsible for doing what, or not doing what? And  
25 to whom are they responsible?

1           Here, unlike *Deepwater*, we think that certain damages  
2 questions could also be determined in Phase One; but really  
3 that does remain to be seen as the litigation develops.

4           So we're not asking, obviously, for any trial-structure  
5 ruling by the Court today, and we haven't proposed a formal  
6 trial plan; but we thought it was important to let Your Honor  
7 know what we and the DOJ are thinking about organizing the case  
8 for trial, and a reason why we both submitted that beginning  
9 that trial process in early 2019 would be doable.

10           **THE COURT:** All right. Well, obviously, I'm not  
11 going to make any rulings at this point until the time comes,  
12 but I will indicate my tentative or my initial observation, in  
13 that there are certain critical factual issues that are pivotal  
14 to all of the cases, whether it's the United States' cases or  
15 the PSC actions. And perhaps the differences might warrant  
16 some phasing or something else: Bifurcation, trifurcation.  
17 Maybe. Maybe not.

18           But from where I sit right now, Mr. Giuffra, you're  
19 probably going to have to convince me that some kind of joint  
20 trial is not going to be appropriate. It does seem to me  
21 fairly evident that there are common issues of fact that we  
22 don't want to sit through two trials and have two different  
23 findings of fact on, on some key issues here, but that's just  
24 an observation at this point.

25           Yeah, Mr. Slater.

1           **MR. SLATER:** As long as we're engaged in  
2 observations, I just want to make sure the Court is aware that  
3 Bosch is not a defendant in the DOJ case.

4           **THE COURT:** Right. Well, that's just one more twist.  
5 But obviously, you're here on the other case, and the  
6 consolidated case. So let's see where that plays out.

7           Now, obviously, this whole discussion can be obviated, if  
8 you can reach a resolution, which is why Mr. Feinberg is here.  
9 And that's where I'm going to send you now at the conclusion of  
10 this CMC to start your work session with Mr. Feinberg. Leni,  
11 my judicial assistant, is back there (indicating), to escort  
12 you up -- those of you who are going to be participating up to  
13 the 19th floor Ceremonial Courtroom, where I think Mr. Feinberg  
14 will do a general session first. And then there's a facility  
15 back there for caucusing.

16           And so with that, I believe that's what I set out to  
17 accomplish today. This has been very helpful. We've got a  
18 schedule. I would like to hopefully see a discovery plan  
19 that's agreed to soon. That's what I'm expecting.

20           And the case-management conference, by the way, on the 3rd  
21 will be at 10:00 a.m.; the same time in the morning. So until  
22 then, good luck.

23           (At 11:17 a.m. the proceedings were adjourned.)  
24  
25

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

3

4

*Lydia Zinn*

5

August 8, 2017

Signature of Court Reporter/Transcriber      Date

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Lydia Zinn

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