

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE EDWARD M. CHEN

IN RE CHRYSLER-DODGE-JEEP)
ECODIESEL MARKETING) Case No. 17 MDL 02777 EMC
SALES PRACTICES, AND)
PRODUCTS LIABILITY LITIGATION)
) San Francisco, California
) Wednesday
) September 27, 2017
) 11:30 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

Plaintiffs' Lead Counsel and Chair of Plaintiffs' Steering Committee:

LIEFF, CABRASER, HEIMANN & BERNSTEIN
Embarcadero Center West
275 Battery Street
29th Floor
San Francisco, California 94111

BY: ELIZABETH J. CABRASER, ESQ.

LIEFF, CABRASER, HEIMANN & BERNSTEIN
250 Hudson Street
8th Floor
New York, New York 10013

BY: DAVID S. STELLINGS, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR

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APPEARANCES: (CONTINUED)

For Plaintiff Albert Sebastian, individually and on behalf of all others similarly situated:

CASEY GERRY SCHENK FRANCAVILLA BLATT
AND PENFIELD, LLP
110 Laurel Street
San Diego, California 92101

BY: DAVID S. CASEY, JR., ESQ.

For Plaintiff Jeffrey Weaver, individually and on behalf of all others similarly situated:

KELLER ROHRBACK, LLP
1201 Third Avenue
Suite 3200
Seattle, Washington 98101

BY: LYNN LINCOLN SARKO, ESQ.

For Plaintiff Chatom Motor Company:

ROBINS KAPLAN, LLP
800 LaSalle Avenue
Suite 2800
Minneapolis, Minnesota 55402

BY: STACEY SLAUGHTER, ESQ.

For Plaintiff GN Systems, Inc., et al:

MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mt. Pleasant, South Carolina 29464

BY: JOSEPH F. RICE, ESQ.

For Plaintiff GN Systems, Inc., et al:

ROBBINS GELLER RUDMAN & DOWD, LLP
655 West Broadway
Suite 1900
San Diego, California 92101

BY: RACHEL LYNN JENSEN, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES: (CONTINUED)

For Plaintiff GN Systems, Inc., et al:

BARON AND BUDD, PC
15910 Ventura Boulevard
Suite 1600
Encino, California 91436

**BY: MARK P. PIFKO, ESQ.
STERLING CLUFF, ESQ.**

For the United States of America - ENRD Division

UNITED STATES DEPARTMENT OF JUSTICE
ENRD, Environmental Enforcement Section
PO Box 7611
Ben Franklin Station
Washington, DC 20044

**BY: LEIGH P. RENDE, ESQ.
JOSEPH WILLIAM CHINN WARREN, ESQ.
ANNA GRACE, ESQ.**

For the California Attorney General's Office and the California
Air Resources Board:

CALIFORNIA DEPARTMENT OF JUSTICE
Public Rights/Consumer
600 W. Broadway
Suite 1800
San Diego, California 92101

**BY: JUDITH FIORENTINI, ESQ.
JON WORM, ESQ.**

CALIFORNIA DEPARTMENT OF JUSTICE
Public Rights/Consumer
455 Golden Gate Avenue
Suite 11000
San Francisco, California 94102

BY: NICKLAS AKERS, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES: (CONTINUED)

For Defendants FCA US, LLC and Fiat Chrysler Automobiles N.V.:
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004

BY: ROBERT GUIFFRA, JR., ESQ.
DARRELL S. CAFASSO, ESQ.

For Defendant Robert Bosch GmbH and Robert Bosch, LLC:
CLEARY GOTTLIEB STEEN AND HAMILTON, LLP
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

BY: MATTHEW D. SLATER, ESQ.

Special Master: THE LAW OFFICES OF KENNETH R. FEINBERG
1455 Pennsylvania Avenue, NW
Suite 390
Washington, DC 20004

BY: KENNETH R. FEINBERG, ESQ.

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1 Wednesday - September 27, 2017

11:31 a.m.

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

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4 **THE CLERK:** Clerk Calling Case 17-MD-02777, In Re
5 Chrysler-Dodge-Jeep Ecodiesel Marketing.

6 Counsel, please come to the podium and state your name for
7 the record. Please also state your name before you speak.

8 **MS. CABRASER:** Good morning, your Honor. Elizabeth
9 Cabraser with Lieff, Cabraser, Heimann and Bernstein, and David
10 Stelling, one of the lead counsel plaintiffs.

11 **THE COURT:** All right. Great. Good morning.

12 **MS. RENDE:** Good morning, your Honor. Leigh Rende
13 for the United States, here with co-counsel Joseph Warren and
14 Anna Grace. I'll be speaking on behalf of the United States as
15 well as EPA.

16 **THE COURT:** All right. Thank you, Ms. Rende.

17 **MR. GUIFFRA:** Good morning, your Honor. Robert
18 Guiffra, Sullivan and Cromwell, for FCA, and with me is my
19 partner Darrell Cafasso.

20 **THE COURT:** Thank you. Good morning, Mr. Guiffra.

21 **MR. SLATER:** Good morning, your Honor. Matthew
22 Slater of Cleary Gottlieb on behalf of Robert Bosch, LLC.

23 **THE COURT:** All right. Thank you, Mr. Slater.

24 And the Attorney General's Office -- State Attorney
25 General's Office is in the room I see. Thank you. Yes, why

1 don't you go ahead and state your appearance?

2 **MS. FIORENTINI:** Good morning, your Honor. Judith
3 Fiorentini for the California Attorney General's Office on
4 behalf of the California Attorney General's Office and
5 California Air Resources Board, and with me is Jon Worm and
6 Nicklas Akers.

7 **THE COURT:** Thank you. Welcome.

8 And our Settlement Master Mr. Feinberg is here. Good
9 morning. And I'm going to ask Mr. Feinberg -- we have, just
10 parenthetically, other parties on the phone that are
11 participating.

12 And we have a list of those, right, Betty, for the record?

13 **THE CLERK:** Yes.

14 **THE COURT:** So what I thought I would do is give
15 Mr. Feinberg a chance to bring me up to date on the status
16 here. I would like to start off on a positive note, and that's
17 on the settlement talks, where things are at?

18 **MR. FEINBERG:** Good morning, your Honor. Kenneth
19 Feinberg, Special Master. On the phone Ms. Camille Biros, my
20 colleague in Washington D.C.

21 A very brief summary at your Honor's request. Ms. Biros
22 and I have met privately and in confidence with each of the
23 parties in this litigation. We have also met privately with
24 representatives of the State Attorneys General, and we have, by
25 audio conference, had a conference call with CARB

1 representatives in California.

2 Each of the parties and each of the participants have been
3 extremely cooperative. We learned a fair amount of the
4 perspective of each of the parties concerning this litigation.
5 Issues are joined in confidence in terms of where each of the
6 sides are coming from at this early stage of the litigation.

7 And at the request of the Special Master the first
8 face-to-face negotiation, discussion of this matter and the
9 issue of settlement, will be on October 12 in Washington D.C.
10 involving the Fiat Chrysler and Bosch Defendants and
11 representatives of the Plaintiffs' Steering Committee.

12 The Government, at my request, will not participate in
13 this initial face-to-face. It's just inefficient and I've
14 learned in the past it's better to schedule in a way that will
15 maximize efficiency and an exchange of information.

16 So that is my report. I'm pleased that everybody who I've
17 asked to be of help has met and has presented their candid --
18 in confidence, their candid assessment of their position in
19 this matter. And it's been very, very helpful to me.

20 And we will now move to the next step, which is a one-day
21 schedule, face-to-face, between the Plaintiffs' Steering
22 Committee, Chrysler, Fiat Chrysler and Bosch, and that will be
23 October 12th in Washington. I will report thereafter, as
24 necessary, to the Court, but that will also be a confidential
25 private day in Washington D.C.

1 And that is my summary report.

2 **THE COURT:** All right. Thank you, Mr. Feinberg. I
3 appreciate that.

4 Let me ask in that regard. I appreciate the parties
5 having filed a pretrial -- proposed pretrial order and
6 stipulated discovery schedule.

7 With respect to -- and I know that there has been some
8 discovery. Some documents have been exchanged, but in order to
9 maximize the value of this next meeting that Settlement Master
10 Feinberg has scheduled, whether there is anything that -- of
11 some urgency that has not been produced that ought to be
12 exchanged in order to make this a -- maximize the fruitfulness
13 and productiveness of these discussions.

14 Ms. Cabraser.

15 **MS. CABRASER:** Thank you, your Honor. Elizabeth
16 Cabraser for plaintiffs.

17 We sent to the Defendants and to Settlement Master
18 Feinberg a list, a very detailed list of documents that we
19 wanted to see on a priority basis for settlement purposes, both
20 with respect to the Fiat Chrysler Defendants and Bosch. We
21 have gotten and we are in the process of getting more of the
22 documents we have requested from Fiat Chrysler.

23 So at this point I think if that continues, we -- we will
24 have what we need for the 12th with respect to Fiat Chrysler,
25 and we appreciate that very much.

1 We have not yet received any of the requested documents
2 and information from Bosch and that -- that really is of some
3 concern to us in terms of maximizing the effectiveness of the
4 upcoming discussions.

5 **THE COURT:** All right. Well, let's talk about that.

6 Now, you have formal -- I thought I read somewhere that
7 there are formal document requests that are now outstanding?

8 **MS. CABRASER:** Yes. There are formal document
9 requests that are outstanding, as reported in the status
10 conference statement, with respect to all of the Defendants.
11 Some of those documents have already been produced, again, by
12 Fiat Chrysler Defendants. There are about 520,000 pages thus
13 far.

14 Again, we have not received anything from Bosch. The
15 formal deadline for that response hasn't yet passed though.
16 It's coming up.

17 **THE COURT:** When is that?

18 **MS. CABRASER:** It's next week, I believe.

19 **THE COURT:** So the deadline is prior to the
20 October 12th?

21 **MS. CABRASER:** I believe it's October 6th. So it
22 would be just prior to the meeting.

23 Again, though, we have been operating on two fronts,
24 although there is a very -- you know, very significant
25 intersection of those sets; the formal discovery process and

1 then also the informal information requests under Rule 408
2 through the Settlement Master.

3 **THE COURT:** All right. And so what you were hoping
4 for is earlier production of certain key priority documents?

5 **MS. CABRASER:** We are.

6 **THE COURT:** How voluminous? Just briefly. How big
7 of a production is that?

8 **MS. CABRASER:** I don't think it is voluminous, your
9 Honor. I can't give you a page estimate on that.

10 **THE COURT:** All right. And the nature -- I don't
11 think there is a problem disclosing the nature of the priority
12 documents. Just what kind of documents are they? Are they
13 correspondence? Are they files?

14 **MS. CABRASER:** Basic correspondence and files. This
15 would correlate with the same categories of documents that
16 we've requested from Fiat Chrysler.

17 And, again, both -- all of the Defendants received those
18 requests at the very, very beginning of the settlement process.
19 And with the assistance of the Settlement Master, just in terms
20 of urging that those documents be produced, they have been
21 forthcoming from Fiat Chrysler, just not yet from Bosch. And I
22 don't -- I'm not aware of the reason for that.

23 So I'm not -- I'm not complaining, but it would be
24 helpful.

25 **THE COURT:** All right. Well, maybe I should hear

1 from Mr. Slater.

2 **MR. SLATER:** Your Honor, the -- in terms of the
3 requests that were made through Mr. Feinberg that came from the
4 Plaintiffs, they were in the nature of -- a couple of requests
5 in the nature of all documents.

6 And so I think we're going to have to have some more
7 discussions with them about what's realistically at issue,
8 but --

9 **THE COURT:** Have you met-and-conferred about that at
10 all?

11 **MR. SLATER:** We're involved in discussions now, but
12 as Ms. Cabraser said, the formal document responses are not due
13 until -- we'll have to confirm with one another the dates. I
14 think we've got a slightly different idea.

15 **THE COURT:** What's your idea?

16 **MR. SLATER:** I think it's due on the 10th of October.
17 She mentioned the 6th.

18 **THE COURT:** Well --

19 **MR. SLATER:** We will compare our calendars.

20 **THE COURT:** Okay. My concern are the, what we call
21 the priority documents for settlement conference, for mediation
22 purposes. Producing those two days before the settlement
23 conference seems less than ideal, to put it mildly.

24 So I -- let's put aside the formal -- I'm not sure that's
25 critical. They are either going to be produced in whole or in

1 response, some response, formal response to the formal document
2 request, either on the 6th or the 10th.

3 But my concern is getting whatever priority documents that
4 you all can agree to that would facilitate your meeting with
5 Mr. Feinberg done in a timely way, and I would like to know
6 whether there is a problem there.

7 **MR. SLATER:** There are two issues I would say, your
8 Honor. One is, I don't think there has been prioritization
9 from the Plaintiffs. It's been kind of an all documents
10 request.

11 And second is one that I mentioned at the previous status
12 conference; that the Complaint itself discloses that they are
13 seeking discovery to find claims as opposed to discovery to
14 support claims, and we have a concern about that. That's an
15 issue that we'll need to work out with them as well.

16 **MS. CABRASER:** Your Honor, we would -- it would be
17 very helpful to us, just in terms of categorizing the requests,
18 if we could have the documents that Bosch has produced to the
19 Government. That's what we've gotten and are getting as part
20 of our request from the Fiat Chrysler Defendants.

21 If we had that from Bosch as well, that would be most
22 useful and that would be the easiest and least -- you know, I
23 don't think there is any burden, but that would be the easiest
24 and least burdensome for Bosch to produce.

25 And, of course, we're happy to follow up with Mr. Slater

1 after this status conference and continue to meet-and-confer
2 about that, but that would help us complete the picture; that
3 we would have what the Government has had. That's typically
4 the first tranche of the first set of discovery produced in
5 litigation.

6 **THE COURT:** And that's already gone through a
7 privilege screen and everything else?

8 **MS. CABRASER:** We would assume so, yes.

9 **THE COURT:** So hearing what you just heard, is there
10 a problem producing that tranche of documents?

11 **MR. SLATER:** Documents that have been produced by the
12 Government reflect what the Government is interested in
13 receiving and their priorities and their investigation --

14 **THE COURT:** You mean, to the Government?

15 **MR. SLATER:** To the Government, yes. Reflect what
16 they're investigating, what they are interested in.

17 As you know, we're not a Defendant in the Government's
18 case here and so I have reservations about that sort of just
19 rummaging around in the Government's files, again, in support
20 of -- or in search of trying to figure out what the claim is.
21 There really isn't a fundamental factual claim regarding Bosch
22 that concerns the FCA vehicles, and that's among our concerns,
23 your Honor.

24 **THE COURT:** You think the consolidated Complaint
25 doesn't say anything about Bosch? I'm not sure I understand

1 your theory.

2 I mean, you may move to dismiss on legal grounds, but I'm
3 not sure -- you're saying there is no documents that are
4 supported by any scope that the relevance -- relevancy scope
5 under Rule 26 that ought to be produced? I'm not sure what
6 you're saying here.

7 **MR. SLATER:** What I'm saying is, your Honor, that the
8 Complaint itself says in a number of paragraphs that the
9 Plaintiffs don't have information on subject A, B or C and they
10 need discovery to flesh it out.

11 We think that the way that our system works is you have a
12 claim and then you do discovery in support of the claim. You
13 don't do discovery in search of the claim.

14 And, yes, Bosch is mentioned in the Complaint, no doubt
15 about that. There are allegations that are made about Bosch,
16 but in terms of allegations concerning something that Bosch did
17 in respect of FCA vehicles, it's awfully thin.

18 And it would be helpful to know what the Plaintiffs think
19 they have, and in a little bit more specificity from them,
20 about documents that they might think they need for a
21 settlement discussion.

22 And, again, Ms. Cabraser and I can discuss, and her teams,
23 and we will; but that's where the concern lies, your Honor.

24 **THE COURT:** All right. Well, I'll give you a brief
25 chance to respond.

1 **MS. CABRASER:** Well, I'm puzzled, given the
2 allegations in the Complaint with respect to Bosch's
3 participation in the development of the software and systems at
4 issue.

5 If Mr. Slater wants a more specific set of priority
6 requests to respond to in advance of the settlement conference,
7 I'm sure we can give him that.

8 I do think that having the documents that were produced to
9 the Government is a baseline for us. It's not for rummaging
10 around. But it helps us present the complete picture of the
11 participation of each of these Defendants, including Bosch,
12 from the outset for purposes of having informed settlement
13 discussions.

14 **THE COURT:** Well, I'm not sure if Mr. Slater is
15 portending a general objection to discovery, document
16 discovery, at all on the grounds that the requests don't meet
17 the fairly broad relevancy standard under Rule 26(b). If
18 that's the case, we -- maybe we ought to address that right now
19 because I -- I find that not a plausible -- from what I
20 understand. Maybe I'm misunderstanding your position, but I
21 don't -- I don't see how one could plausibly say, based on the
22 fairly comprehensive consolidated Complaint, that there is no
23 document production that's -- that meets the standard of
24 Rule 26(b).

25 **MR. SLATER:** Your Honor, we are not taking the

1 position that there is no document discovery that can take
2 place. We think that there ought to be metes and bounds to
3 discovery in this case.

4 We would like to have the opportunity, in terms of
5 discovery, to respond with our responses and objections. Then
6 we'll go through the process with the Plaintiffs and, if need
7 be, come to the Court if we can't resolve it.

8 **THE COURT:** Let me ask Ms. Cabraser. When do you
9 need -- in order to be helpful for the October 12 meeting, what
10 time frame would you need this set of priority documents by?

11 **MS. CABRASER:** We would certainly like them before
12 the 12th. If it's a matter of good faith logistics in terms of
13 getting them to us, we -- we could -- and if Mr. Slater says
14 the 10th, we can work with the 10th. The earlier in the day
15 the better.

16 We don't think that's the case with respect to the
17 documents produced to the Government, because we can get those
18 sooner and we would prefer to get those sooner. It would be
19 better for us to have a few days to digest and reflect before
20 going to settlement conferences, but, you know, at this point
21 this is -- is news. So we will work with Mr. Slater.

22 **THE COURT:** Let's do this. Since you're here, I'm
23 going to direct you to meet-and-confer after this case
24 management conference to work this out. What I'm talking about
25 is a pre-settlement meeting on the 12th of certain sets of

1 priority documents.

2 You're going to have see if you can negotiate the metes
3 and bounds and timing of that, but I'd like some production to
4 take place. My expectation is there is going to be some
5 production and production that, hopefully, will be manageable,
6 but meaningful and helpful to the process.

7 And I'd like a report back by letter by the end of Friday
8 at -- well, 4:00 o'clock on Friday, whether you've reached an
9 agreement or not. If you haven't reached an agreement, I would
10 like you to set forth where the dispute is or what the problem
11 areas are, issues or document categories or whatever is in
12 dispute. And if need be, either I or the magistrate judge, who
13 is Judge Corley in this matter, will resolve that because I --
14 I don't want that to stand in the way of the meeting.

15 I understand it's not the end-all-be-all, but I think we
16 ought to move things along. And so that's what I'm going to
17 order.

18 **MS. CABRASER:** Thank you, your Honor.

19 **MS. SLATER:** Your Honor, are you talking about in
20 respect of what they identify as their priorities, not all of
21 their documents?

22 **THE COURT:** Correct. That's correct. That will take
23 its normal course. If you have any objections, we will deal
24 with it.

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

1 **THE COURT:** All right. Thank you. That's helpful.

2 **MS. CABRASER:** Thank you, your Honor.

3 **THE COURT:** All right. So with respect to -- I want
4 to get an update about the fix; the 2017 fix, the 2014, 2016
5 examination by the Government of the proposed fix and the
6 timing of that.

7 I think the expectation -- the last time we were here the
8 expectation is that we would have a good idea by December, I
9 think is what was indicated.

10 What is the status of that?

11 **MS. RENDE:** Leigh Rende for the United States.

12 Currently, your Honor, the United States and California
13 are working very closely together to reach an agreement with
14 FCA on a testing protocol so that it can be implemented.

15 It is still an open question as to whether Defendant's
16 proposed fix, that is the MY '17 reflash, will work. So this
17 testing protocol will help us analyze what the impact will be
18 on the MY '14 through '16 vehicles.

19 **THE COURT:** And is it expected that the testing
20 protocol is going to differ? Obviously, it must for the 2014
21 through '16, as opposed to the 2017 protocol that was followed.

22 **MS. RENDE:** Correct. This is a different process
23 from the MY '17 certification. So this is a testing protocol
24 solely related to assessing whether the proposed fix will work
25 or what the impact of the proposed fix will be for the earlier

1 vehicles.

2 So the MY '17 testing, that was -- or the MY '17 analysis
3 was for certification purposes.

4 **THE COURT:** Yeah. So explain to me what -- again,
5 what the difference is?

6 I mean, you've gone through testing the vehicle for 2017.
7 What needs to be done that's different for 2016, for instance?

8 **MS. RENDE:** I apologize if I'm misunderstanding your
9 question, but I think that you're looking for this kind of
10 explanation.

11 FCA sought certification for their MY '17 vehicles, which
12 is wholly separate from the enforcement action currently before
13 you related to the MY '14 through '16 vehicles.

14 **THE COURT:** Right.

15 **MS. RENDE:** So there is that certification process
16 and examination that has already occurred. A certificate has
17 been issued for those vehicles.

18 And so right now FCA has proposed a fix for the earlier
19 vehicles, and FCA's proposal is to reflash the earlier vehicles
20 with MY '17 calibration software.

21 **THE COURT:** Right.

22 **MS. RENDE:** And so this current testing protocol that
23 we are looking into right now is to figure out exactly how the
24 MY '17 reflash would work on these earlier vehicles.

25 **THE COURT:** All right. Maybe my question is -- stems

1 from the fact that I thought it was represented by Chrysler
2 that the hardware -- that the cars are essentially the same,
3 2014, '15, '16, '17; that there were no material differences in
4 them.

5 So I'm trying to understand what the complexities are in
6 reflashing or testing the 2014, '15 and '16 vehicles.

7 **MS. RENDE:** I see, your Honor.

8 So the last time we were here we did mention that we were
9 seeking information from the Defendants about the hardware
10 differences.

11 The Defendants did provide us with information and based
12 on that, we see that there are few substantive -- pardon me, a
13 few substantive differences. And so right now this is part of
14 what we're taking into account while working with California to
15 develop the testing protocol.

16 **THE COURT:** So there are material differences in
17 hardware in the various years?

18 **MS. RENDE:** There are differences. The materiality
19 will be unknown until we see what the end result is of the
20 testing. That's my understanding of it.

21 **THE COURT:** I see. And were there differences in
22 software configuration as well?

23 **MS. RENDE:** Yes. The software is different, but the
24 proposed fix would be a wholesale reflash of the software.

25 **THE COURT:** So they would all be uniform. So it's

1 really the difference in the hardware that drives the potential
2 variability?

3 **MS. RENDE:** It's one of the factors.

4 **THE COURT:** What's the timing? The last time we were
5 here I think the parties estimated December, early December we
6 would have -- I don't know if testing would be completed or
7 progress would be made so we would have a pretty good idea
8 where this is going.

9 **MS. RENDE:** Sure. To be clear, the United States
10 represented that it would be about several months, and we did
11 not give a specific month during the hearing.

12 We are working hard with FCA to reach agreement on
13 testing. And by "we" I mean EPA and CARB. Working with them
14 to reach an agreement on the testing protocol, as well as to
15 procure the right vehicles for testing.

16 The process is being developed now and we will not know
17 the time frame until we agree on the test protocol and until
18 the correct vehicles are procured.

19 So with that said, we stand by what we said at the prior
20 hearing, which is that an analysis will take several months.

21 **THE COURT:** And your -- what does "several months"
22 mean? Are we talking spring or --

23 **MS. RENDE:** It's -- honestly, it's hard to say
24 because the technical aspects of the testing protocol and the
25 vehicle procurement will play a role in the timing.

1 So this is something that we're trying to work out with
2 the Defendants to move this as quickly as we can. We know that
3 it's in the interest of all parties to move this quickly.

4 So until we know -- until we're able to get more details
5 and work more details out, it's really hard to put an end date
6 on the time frame.

7 **THE COURT:** It is also in the interests of the public
8 because as of this point, it appears that we have hundreds of
9 thousands of non-compliant cars so that every day or every
10 month it goes on. That's why there is some urgency. And I
11 also think that the course of this litigation may be affected
12 by the outcome of this.

13 When will there be at least some indication that there is
14 a reason for optimism? I mean, I know you may not have the
15 final last word, but will we know by December whether there's
16 reason for the optimism that Mr. Guiffra has expressed?

17 **MS. RENDE:** Our hope is by the next hearing we will
18 be able to give you more information on the timing. Between
19 now and then, whenever the next hearing will be, we're going to
20 be working -- continue to be working closely with California
21 and diligently with them to come to an agreement on the
22 protocol with FCA.

23 So by that point we should have more details on the
24 technical aspects of the testing protocol and vehicle
25 procurement for the testing.

1 **THE COURT:** I'm just curious. When you say "vehicle
2 procurement," I'm curious, what's the problem there?

3 **MS. RENDE:** There are certain -- there are certain
4 technical requirements that EPA and CARB are requiring for the
5 vehicles to ensure that we get a full picture of the impact
6 that the MY '17 reflash will have on the subject vehicles.

7 **THE COURT:** All right. Let me ask Ms. Fiorentini
8 whether from the State's perspective, from CARB's perspective
9 whether you have any additional insight? I'm particularly
10 interested in the timing.

11 Well, you've heard my questions. I would like to get
12 CARB's view.

13 **MS. FIORENTINI:** Judy Fiorentini for the California
14 Air Resources Board.

15 We concur entirely with what my colleague, Leigh Rende
16 from U.S. DOJ, has shared with the Court.

17 CARB and EPA are working quite together quite closely to
18 establish a protocol and to procure the vehicles that will be
19 needed for testing.

20 **THE COURT:** And do you have any -- maybe you can help
21 me with the understanding in terms of what are the complexities
22 of testing protocols?

23 I mean, I don't know if you can explain that in
24 layperson's terms, but just so I have some idea what it is that
25 you're up against. What's the problem?

1 **MS. FIORENTINI:** There are some hardware differences
2 between the model years. So obtaining vehicles that are a
3 representative sample of those different model years and model
4 types with a sufficient number of mileage in order to be able
5 to test the vehicles to see if the 2017 reflash would be a good
6 fit for those vehicles and how they would operate or change the
7 characteristics of the vehicles.

8 **THE COURT:** All right. So other than the actual
9 vehicles themselves and making sure they are appropriate and
10 representative, is there anything special about the testing
11 protocol? What you're testing for? The parameters?

12 It seems like that wouldn't be that -- that would be
13 fairly well known.

14 **MS. FIORENTINI:** The protocol is going to vary for
15 model year depending on the differences in the -- the hardware
16 for the vehicles.

17 **THE COURT:** Do you have a different view with respect
18 to timing and when you think this can be accomplished and when
19 you will have some indicator as to whether things are going
20 well?

21 **MS. FIORENTINI:** Not a different view. I think that
22 the parties are working together in good faith to try to
23 establish the protocol and procure the vehicles as quickly as
24 possible.

25 So I -- I don't have a different view on that or a

1 different sense of timing than what has been represented.

2 We're working together very, very hard and with, you know,
3 an understanding that these vehicles are on the road to come up
4 with the quickest and fastest way to make a determination.

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

6 **MS. FIORENTINI:** Thank you.

7 **THE COURT:** Mr. Guiffra, let me ask you. Maybe this
8 is already covered by the testing, but I understand there has
9 been certification of the 2017 vehicles.

10 Has there been -- I think we talked before last time. I
11 think the Plaintiffs expressed a concern that notwithstanding
12 satisfaction of emissions standards, that there may be
13 performance, durability, other compromises or degradation.

14 First of all, do you have any comment on that? Have you
15 produced whatever data that the Plaintiffs, I'm sure, will be
16 interested in?

17 **MR. GUIFFRA:** Let me see if I can take a number of
18 topics your Honor raised.

19 Number one, Fiat Chrysler is confident that the software
20 calibration for the model year 2017 vehicles can be used
21 successfully in the 2014 to 2016 vehicles and nothing has
22 happened to change that confidence, which is a strong
23 confidence. We think we can get this done.

24 Number two, and I think it's important to sort of
25 understand what we're talking about here. The engines are the

1 same in the 2017s, the 2014s, the 2015s and the 2016s. They
2 are VX three-liter engines and they are the same across all
3 four, you know, years worth of vehicles.

4 The emissions control systems are the same. The hardware
5 in the emissions control systems is the same in all of the
6 vehicles.

7 The issue that has been raised, and we made clear at the
8 last hearing, is that there are differences in things like the
9 grill on the 2017 versus maybe the 2014.

10 And so what is being looked at now is the extent to
11 which -- and we do not believe there will be any impact on
12 performance, miles per gallon. But we do not believe that --
13 there will be an impact, but the Government, as is their right,
14 they are the expert agency and they are doing their job, are
15 trying to ascertain whether, you know, if the 2017 has this
16 type of a grill and the 2014 has that type of a grill, does
17 that have an affect on fuel economy and performance. And we're
18 going through the process.

19 Now, another point that was raised, and maybe just to put
20 it in layman's terms, the 2017s are, obviously, new vehicles.
21 What the Government is trying to do, and we think this is
22 perfectly appropriate, is look at a 2014 vehicle that's on the
23 road and see, well, if you reflash the vehicle, what would be
24 the effect on the amount of excess knocks and what would be the
25 effect on performance and what would be the effect on miles per

1 gallon.

2 So what Fiat Chrysler has been asked to do is go out and
3 purchase vehicles that are, say, I believe the numbers are
4 100,000 to 115,000 miles on them. So these are cars that --
5 these are trucks that have been, you know, driven fairly
6 extensively. Maybe surprisingly, or not surprisingly, it's not
7 so easy to buy a truck that's, say, 100,000 or 105,000 miles.
8 There are not that many of them when you narrow the parameters
9 that much.

10 So we're working with the Government to trying to address
11 that. So yesterday, for example, the Government sent us a
12 detailed letter and that's being reviewed by Fiat Chrysler.
13 We're sending them another letter back on Friday. There are
14 teams of people at Fiat Chrysler who are working on this
15 project to get it done properly.

16 Similarly, at the last hearing there was a discussion
17 about the conditional approval from CARB. And there has been
18 more back-and-forth with CARB and we're hoping that will become
19 a finalized approval for the 2017 vehicles.

20 But, you know, nothing that has happened in the last, you
21 know, number of weeks is surprising. It's consistent with what
22 normally goes on with this sort of an approval process. There
23 is a lot of back-and-forth with engineers on both sides.

24 I think, as Ms. Fiorentini mentioned, there is good faith
25 on both sides. We're cooperating with the Government. The

1 Government is making reasonable requests of us and we're trying
2 to go forward and get to an end result that will be the
3 reflashing of these vehicles using the 2017 certification.

4 As I said I think the last time I was here, that was an
5 important milestone because getting that approval of the 2017s,
6 we think gives us a calibration that can be used for the
7 earlier model vehicles.

8 **THE COURT:** What's your sense of what we'll know,
9 let's say, a month and a half, two months from now?

10 **MR. GUIFFRA:** My belief is and what I'm told is that
11 we should have a better handle on this in terms of precise date
12 within, you know, a month or two. That would be my
13 understanding.

14 **THE COURT:** Precise date for --

15 **MR. GUIFFRA:** I don't want to say to you, your Honor,
16 the Government will approve it by Christmas. That would be a
17 nice Christmas present for Fiat Chrysler, but, you know, I've
18 learned, having worked on these types of cases, it takes awhile
19 sometimes for things to happen.

20 And the Government has an important, you know, public
21 responsibility, which is to assure itself, using all of its
22 technical sophistication and expertise, that the fix will work.
23 And that's perfectly appropriate and there will be questions
24 back and forth.

25 I mean, it's a very technical process. These vehicles

1 have lots of lines of code and they have to make sure it's all
2 going to work properly. Lots of testing.

3 But I think the thing that has made it, you know, is the
4 fact that you're testing vehicles that are already on the road
5 and that means you have to buy the vehicles and then see how
6 they work.

7 **THE COURT:** Well, I understand that. But I would
8 think that if it's a matter of finding the right vehicles in
9 the U.S., with the resources available to the Defendants, I
10 guess I'm having trouble understanding why -- and you already
11 have a certification and a testing protocol and standards that
12 have been gone through for the 2017. I'm still having trouble
13 understanding why this is going to take months.

14 **MR. GUIFFRA:** I don't think it should take months,
15 your Honor. We think it should take weeks. It just could take
16 a number of weeks. The Government will --

17 **THE COURT:** I'm hearing from Ms. Rende it will take
18 months.

19 **MR. GUIFFRA:** -- ultimately control the timing.
20 The Government will control the timing.

21 I gather we've gotten the vehicles they wanted us to get
22 and we've collected them. That took some time. And we're
23 obviously working with them on the test protocol.

24 The other thing to make your Honor, perhaps, feel a little
25 bit better than the case next door, you know, there wasn't even

1 a fix proposed at this point in the matter, and even there you
2 have fixes that are currently being looked at by the
3 Government. So -- so -- and that's all public.

4 So this is very far along in terms of a process where we
5 actually have a calibration that the company is confident
6 should work for these vehicles and it only involves a reflash,
7 as opposed to replacing --

8 **THE COURT:** Where are you in the acquisition of
9 vehicles?

10 **MR. GUIFFRA:** I believe we've -- I checked on this
11 last night. My understanding is, I believe, that we have the
12 vehicles they have requested. They may want additional
13 vehicles as we go forward. I don't know that.

14 **THE COURT:** All right.

15 Let me ask Ms. Rende. If that's the case, does that
16 revise your -- if vehicles as requested that you need are, in
17 fact, able to be fulfilled quickly, does that -- where does
18 that leave you in terms of time frame?

19 **MS. RENDE:** If the Defendants have, in fact, procured
20 the vehicles that we did request exactly to the specifications,
21 that would surely affect the timing in terms of narrowing the
22 range.

23 I'm not sure. I mean, Mr. Guiffra said weeks. I'm not
24 sure if that -- I'm not sure exactly what that pertains to.
25 But obtaining the appropriate vehicles is part of what is

1 causing our uncertainty.

2 So if they have, indeed, procured them, that would help us
3 greatly in figuring out when we might be able to have an
4 assessment completed.

5 **THE COURT:** Does that make the December projection --
6 I know you didn't necessarily concur in that, but does that
7 make the December target a viable time frame?

8 **MS. RENDE:** Given that it's the end of September now,
9 I do not think that December is likely, but that depends. And
10 as I've mentioned before, it is still an open question. We're
11 in the process of developing the protocol.

12 So it could very well be December. It could be after
13 December. We will know more after we hear from the Defendants
14 on the vehicles that Mr. Guiffra indicated that they have
15 procured.

16 **THE COURT:** All right. And I hate to make
17 Ms. Fiorentini keep popping up here, but the point was raised
18 about the CARB conditional approval. I just want to get an
19 update on that.

20 Where is that? How is that progressing for the 2017?

21 **MS. FIORENTINI:** Judith Fiorentini, your Honor.

22 The conditional approval is progressing. There are still
23 two remaining technical issues that CARB and FCA are working to
24 resolve, but -- progress is being made, but it's -- we're still
25 awaiting further information and some further testing.

1 **THE COURT:** Any idea as to the time frame on that?

2 **MS. FIORENTINI:** I can't give you a sense of the
3 timing. It's going to depend on the information that's
4 provided and the review of that information.

5 **THE COURT:** All right. Ms. Cabraser, you were
6 wanting to stand, it looks like.

7 **MS. CABRASER:** Well, this may -- your Honor, this may
8 be a moot point now, depending on the state of vehicle
9 procurement. But as we have mentioned to the DOJ, if it turns
10 out there is a difficulty in procuring vehicles that have the
11 specifications that EPA and CARB need for their testing, number
12 one, you know, it's not up to us to interfere with their
13 testing protocols and their specifications, but our Plaintiffs
14 and class members are the owners of these vehicles. So if the
15 vehicles to these specifications exist, they have them and
16 we're happy to do whatever we can to get those vehicles to the
17 appropriate agency so that they can do their testing.

18 I -- this was the first I had heard that the desire was
19 for vehicles in the 100,000 to 150,000 mile range. We're happy
20 to look for those. That's a relatively high mileage vehicle,
21 but not for a diesel pickup.

22 **THE COURT:** All right. Any comments, Ms. Rende,
23 regarding the offer of assistance?

24 **MS. RENDE:** We did speak with the PSC last night and
25 Ms. Cabraser did offer that assistance.

1 So in light of that and in light of what Mr. Guiffra just
2 said today, I think we have more discussions to be had about
3 the status of the vehicles. And our hope is that the process
4 will be sped up a little bit more here so that by the next
5 hearing we will have a more accurate date that will be more in
6 line with what we're all hoping.

7 **THE COURT:** All right. Well, that's, obviously, my
8 concern and my preference.

9 I would hope that this process will not be impeded by
10 things that seems to me is not insurmountable and should not
11 be -- hold everything up, given the fact that we have over
12 100,000 vehicles on the road right now that appear not to meet
13 the emissions standards.

14 All right. So let's talk about the timeline here. I
15 appreciate the parties have proposed jointly a timeline.
16 Inasmuch as I would like to see a class certification hearing
17 earlier than June, I understand the sequence of these things,
18 such as getting through the round of pleading work and I've got
19 a couple of adjustments on dates that I want to talk about in a
20 moment.

21 But assuming we have a hearing on the motions to dismiss
22 or motion to dismiss, that's going to occur sometime December.
23 I'll tell you right now I'm going to propose a December 19th
24 date to give us some time to absorb the briefing.

25 In fact, what I'm going to suggest is that the opposition

1 to the motion to dismiss be moved up a day to November 6th and
2 that the replies be due on the 28th instead of the 30th, so
3 that I've got sufficient time between then and December 19th to
4 absorb the briefing and then to be prepared for the hearing.
5 That then gives you, once we rule on that, you know, a couple
6 of months to file class cert.

7 And you've got a somewhat elongated schedule for class
8 certification, but part of that is because there is going to be
9 some expert declarations and things and that always requires
10 some period. So I'm willing to -- with respect to the --
11 except for the modification that I just mentioned, I'm prepared
12 to adopt the timeline proposed by the parties.

13 I do want to talk about, in addition, though, a trial date
14 because the -- first of all, the Government is proposing a
15 phasing with respect to trying liability first and -- well,
16 maybe I should hear from the parties more precisely what it is
17 that you anticipate would be the first phase trial, briefly
18 what that's going to look like, and then I want to talk about
19 the timing of that because I want to get that on track sooner
20 rather than later.

21 So let me hear what you envision to be phase one, what
22 that trial is going to look like and how long you think that's
23 going to be. I mean, I know it's hard because we have
24 pleadings and you've got discovery, but you have been through
25 this sort of before, at least some aspects of this. So I want

1 to get a sense from the parties.

2 **MS. CABRASER:** Your Honor, Elizabeth Cabraser for the
3 Class Plaintiffs.

4 For us, that trial is really an everything trial. It's
5 liability and it's damages.

6 The phasing idea was worked out so that we could have a
7 joint trial or a simultaneous trial, if you will, with the
8 Government Plaintiffs to deal with the conduct -- you know,
9 knowledge, conduct, liability issues, which are common both to
10 the Government claims and the Class claims.

11 The Government, as you'll hear, has injunctive relief and
12 other remedies that we don't. Our remedies, while they might
13 sound in equity, they are essentially damages remedies;
14 restitution, damages, economic loss, benefit of the bargain.
15 There is a whole bundle of theories and claims, but they sound
16 in the damages remedies that the owners and lessees of these
17 cars would have.

18 And so the idea is that both those -- those claims and the
19 Government remedial claims are going to turn on determinations
20 with respect to the same conduct. And at least in discussions
21 this far -- thus far we have potentially envisioned having that
22 trial, to the extent it can be, a bench trial to the Court.

23 I don't have a number of days or a number of hours today,
24 but I would anticipate that by the time -- you know, if we are
25 litigating past the class certification stage and getting into

1 trial, at that point the claims will have been focused both
2 with respect to the class and the Government and we'll have a
3 much better idea of how to schedule the trial in terms of trial
4 days than we really do now.

5 **THE COURT:** What work will need to be done post class
6 -- if the class is certified, between that and the actual
7 trial?

8 **MS. CABRASER:** The way class certification works
9 these days, your Honor, virtually nothing because everything
10 that's -- that's merits is also related to class certification.

11 The experts essentially are coming in at the class
12 certification stage, not with respect to their ultimate
13 opinions on quantification of damages, but certainly with
14 respect to their methodologies.

15 And so I would think that after class certification, it's
16 only going to be a matter of several months to finish out any
17 remaining discovery and motions. That puts us right into the
18 pretrial motions, motions in limine, anything that is left of
19 *Daubert* motions with respect to trial experts.

20 **THE COURT:** Right. And all that can be done
21 in limine as either part of an early pretrial conference or in
22 conjunction with the pretrial conference.

23 So that's why I'm wondering, frankly, whether there is a
24 reasonable way to get this case tried before the end of 2018
25 instead of waiting until 2019.

1 **MS. CABRASER:** From the Class Plaintiffs'
2 perspective, we could do that. Assuming the same level of
3 cooperation and good faith in discovery and moving the case
4 along that we've all experienced so far.

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

6 Let me hear from the Government. Ms. Rende, if you have
7 any additional thoughts.

8 **MS. RENDE:** Yes, your Honor.

9 I know you mentioned the Government had proposed phasing.
10 I would note that the phasing of the United States case was
11 jointly proposed by us as well as the FCA defendants.

12 And you did ask as to what would be envisioned in the
13 different phases. As far as our case is concerned, we would be
14 focusing on the liability of the Defendants under the Clean Air
15 Act in phase one.

16 And for phase two, we envision that being focused on civil
17 penalties and injunctive relief and the various statutory
18 components.

19 **THE COURT:** And likely be a bench trial as opposed to
20 the first phase being a jury trial?

21 **MS. RENDE:** Yes. A bench trial is what we would
22 prefer.

23 **THE COURT:** And any reason why -- I know the proposal
24 was early 2019, why late 2018 is not doable in light of the
25 extensive discovery that's going to go into this case pre-Class

1 cert?

2 **MS. RENDE:** I'm sorry. Did you just ask why end of
3 2018 is not doable?

4 **THE COURT:** Yeah. Is that doable from your
5 perspective?

6 **MS. RENDE:** To be quite frank, early 2019 is much
7 preferable to the end of 2018, but we will, of course, abide by
8 the date your Honor orders.

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

10 Mr. Guiffra.

11 **MR. GUIFFRA:** Your Honor, I'm a big believer in being
12 practical. And I think it's important to look at where we are
13 in this case.

14 We're basically moving forward on three tracks. Track one
15 is we're trying to get the software calibration approved with
16 the Government. If that software calibration is approved by
17 the Government -- and it's the Government's responsibility to
18 make the judgment, not the Plaintiffs', not, you know, the
19 Court's. It's a Government function. Obviously, they can come
20 back later and question that. It will have all sorts of
21 consequences for this case, including what damages the
22 Plaintiffs actually have.

23 The second track we're working on is the settlement track
24 with Mr. Feinberg. Lord knows, Mr. Feinberg is one of the most
25 persuasive people in America in terms of settling lawsuits.

1 **THE COURT:** That's why I hired him.

2 **MR. GUIFFRA:** Exactly.

3 The third one is the litigation track. And I think it's
4 important to keep in mind that we are all working on all of
5 these tracks right now.

6 So I have -- you know, people in my law firm are working
7 on a Motion to Dismiss, which is due on October 6th. We think
8 we actually have grounds to dismiss all -- you know, all or
9 parts of that Complaint. It's a 367-page Complaint. I'm sure
10 Bosch will have, you know, claims that it will want to make on
11 its Motion to Dismiss.

12 We've worked out a schedule through -- on Class
13 certification through June 14, 2018. Now, I've done a lot of
14 cases in my time, but normally after Class certification, there
15 could be a 23(f) appeal. You could have the -- obviously,
16 there is going to be a need for fact discovery in this case.
17 There are witnesses that are going to be outside of the United
18 States. Then you would have summary judgment. Then you would
19 have experts.

20 And the notion that all of that, you know, in the real
21 world is going to be done in a matter of months is, I think,
22 unrealistic. And I think the notion that the discovery on
23 Class certification is going to be the same as the merits
24 discovery is not realistic either.

25 Moreover, your Honor, this notion of a phased trial, I

1 think, tends to muddle things a bit. The Government has
2 different claims than the Plaintiffs do. So one of the
3 Government's claims is that FCA did not disclose AECDs to the
4 Government. Whether these AECDs were or were not disclosed to
5 the Government is a regulatory issue that the Government has
6 brought a case about.

7 I'm not sure that consumers have a claim about whether an
8 AECD was or was not disclosed. And, in fact, whether an AECD
9 was or was not disclosed to the Government and whether it
10 should have been or should not have been is a very complicated
11 issue.

12 And the idea that we're going to, you know, try the cases
13 together when they involve different types of issues, I think
14 is really putting the cart before the horse at this point.
15 It's the kind of issue where I think I would want to see some
16 briefing for the Court.

17 So your Honor would -- for example, let's just go through
18 the issues that you'll deal with in the normal course. There
19 is a 300-plus page Complaint. You will decide what claims
20 survive that Complaint.

21 Then we'll go through Class certification. We'll see what
22 issues are ripe for Class treatment. That's something that
23 would be the subject of a trial potentially involving the PSC.

24 The Government doesn't have to worry about Class
25 certification. The Government just has to worry about, you

1 know, going forward with the case and if they have a liability
2 case against FCA with respect to the non-disclosure of AECDS or
3 whether something was a defeat device or whether they can get
4 an injunction or whether there is some penalty that should be
5 paid because of undisclosed AECDS or defeat devices. That's a
6 different issue than the consumer issue, which is, you know:
7 What did you tell the consumer when they bought the car? What
8 was the advertising? Can you fix the car? If you can fix the
9 car, is there an impact on performance and there is an impact
10 on --

11 **THE COURT:** There's obviously going to be some
12 factual overlap.

13 **MR. GUIFFRA:** But I think it's a mistake to assume --
14 I think there would actually be less than one would think. And
15 I think at this point to assume there is going to be some joint
16 trial is not really realistic.

17 So, for example, if you look at the damages theories of
18 the Plaintiffs in their consolidated Complaint at
19 Paragraph 181. They say, well, the cars can't be fixed. Well,
20 that's the issue that we have been discussing all morning,
21 which is, can the cars be fixed? If the cars can be fixed with
22 a software flash, their case looks different.

23 Then they say the cars can't be fixed without having an
24 impact on performance, including miles per gallon. That's
25 something we'll know the answer to presumably within the next

1 number of months. Once that is resolved, the case looks
2 different.

3 Then they claim, well, even if there was no impact on
4 performance and even if you can fix the cars, they claim that
5 they have some -- you know, that people paid a premium for
6 these vehicles. Well, our view is, you know, that that is
7 speculative damages and that's something we would litigate
8 about. It would be the subject of motions -- you know, summary
9 judgment motions and the like.

10 **THE COURT:** Much of what you say that's uncertain now
11 will be much less uncertain or be much more certain come time
12 of the Class certification and, therefore, even at that point
13 we're several months away from trial. So we'll have a pretty
14 good idea what's in, what's out, what's going to be tried and
15 so --

16 **MR. GUIFFRA:** My recommendation would be for the
17 Court to put off the question of setting a trial date. Put off
18 the question, which we would like to get briefing on, whether
19 there should be a joint trial and when would it be practical,
20 given the completely different --

21 **THE COURT:** So you have not agreed then in principle
22 to the -- their proposed phase one that was contained in the
23 proposed pretrial order at Page 3?

24 **MR. GUIFFRA:** Well, what we say is that -- that the
25 case against the FCA Defendants and the United States could

1 proceed through a multi-phased approach.

2 I'm not sure whether we have agreed, and I don't think we
3 have agreed, that there should be a joint trial of the United
4 States and the Plaintiffs' Steering Committee against the FCA.
5 And so I think that's something that would need to be worked
6 out.

7 Maybe I'm misreading what we wrote, but I think that's how
8 I understood what we had committed to.

9 And I think ultimately in this case, realistically, the
10 Government piece of it probably will be settled before we ever
11 get to the question of a joint trial.

12 **THE COURT:** Well, the reason why I read it that way
13 is because it says:

14 "Phase one will focus on resolution of the issues
15 relating to the alleged liability of Defendants as
16 well as any damages to Class Plaintiffs."

17 That's why I assumed that -- you know, that there was
18 going to be a consolidated -- more or less consolidated trial
19 for phase one.

20 **MR. GUIFFRA:** Your Honor, I -- you know, again, I
21 apologize if that's how the Court read it and that's how it
22 reads.

23 I think our position is at this point that it's premature
24 to discuss a trial date or what would be tried when, at least
25 until you, one, deal with the Motion to Dismiss so you know

1 what claims are in the case, at least until we know what
2 happens with respect to the fix and we know what the impact of
3 the fix is.

4 And I would imagine that the Government would want to
5 know, you know, what the issues the Government is going to try
6 and then the issues that the PSC is going to try.

7 And so I think they are different. And I would -- for
8 example, I can't tell you that we would try the case to the
9 Court in a case involving the PSC. Maybe that would be a jury
10 trial. I don't know. I haven't thought those issues through.

11 Because we're actually focused on seeing if we can get the
12 cars fixed, as opposed to things -- you know, and dealing with
13 the Motion to Dismiss in terms of litigation, as opposed to
14 thinking about what kind of a trial structure we would have,
15 you know, sometime down the road if it ever gets to that.

16 So I just think that the idea that we're going to be, you
17 know, trying these cases together when they involve different
18 issues is something that's premature to be dealt with at this
19 point in time.

20 **THE COURT:** Well, you know, obviously, trial is sort
21 of the backstop of the whole process. And that's if a
22 negotiated resolution is not found, trial is the way we resolve
23 things.

24 And as I've stated from day one, until there is a --
25 unless and until there is a settlement in hand, I'm proceeding

1 on a trial track, and I want to proceed expeditiously in light
2 of the -- of the nature of the alleged violations here and the
3 public interest in getting this resolved sooner rather than
4 later.

5 Let me ask if --

6 **MR. GUIFFRA:** Your Honor, if I could just be heard on
7 one point?

8 **THE COURT:** Yes.

9 **MR. GUIFFRA:** I just think -- maybe I didn't state
10 this clearly enough -- until you know what the issues are to be
11 tried, it's hard to really know whether you can have a joint
12 trial. It's hard to know whether -- when you can have that
13 trial.

14 And I think that normally, in my experience, the first
15 thing you do in a case is you take a look at the Complaint.
16 You decide what claims go forward.

17 We're not moving against the Government's Complaint.
18 We're going to be answering the Government's Complaint. They
19 have claims that I would describe as regulatory claims. They
20 do not -- a buyer of a truck doesn't have a claim against the
21 FCA because of the non-disclosure of an AECD. They just don't.
22 Now, maybe Ms. Cabraser will try to argue that they do, but I
23 don't think that they do.

24 So there are different issues and there are all sorts of
25 questions about the impact on what a trial would look like if

1 you jam those issues together.

2 But until this case is further down the road and we
3 actually know what the issues are to be tried, it's hard to
4 say, you know, that you would have them both together.

5 I could envision a scenario where we settled with the
6 Government and did not settle with the PSC and there could be a
7 situation about, well, what are the damages? And are there
8 damages here and how does one go about calculating them?

9 I could also envision a scenario where we would settle
10 with the PSC. So I just don't know.

11 A lot of it does turn on whether or not we have a -- the
12 calibration for the 2017s works for the earlier vehicles and if
13 it does, if there is an impact on performance or not. And if
14 there is no impact on performance and it does work, this case
15 looks a lot different than it would if the opposite were true.

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

17 **MS. CABRASER:** Yes, your Honor. Elizabeth Cabraser
18 for the Class Plaintiffs.

19 We did think we had a joint -- joint proposal, a joint
20 trial proposal with phasing for the Government claims.

21 And not to pre-argue all the motions to come, but we do
22 believe, as stated in the Federal civil RICO claim, that what
23 the Defendants said and didn't say, did and didn't do with
24 respect to obtaining certification for these vehicles is very
25 much an essence of the consumer claims.

1 Lying to or withholding material information from a third
2 party that results in damage to the first party, the plaintiff,
3 is the gist of a RICO claim. And in that respect it is
4 different from a consumer claim that would depend more on
5 affirmative statements or advertising.

6 So we have both types of claims. So the conduct of the
7 defendants vis-a-vis the regulators, we viewed as the core
8 conduct that was relevant to everyone's claims and was worth
9 trying once. It's always a good thing, in our view, not to try
10 the same question twice, not to try the same conduct twice.

11 And so it's our -- it was, I thought, the joint intent,
12 and at least it's still our hope, that we can do that at the
13 trial.

14 Now, it's true. Exactly what that trial looks like is
15 going to depend on what happens between now and then on both --
16 on the regulatory front, the settlement front and with respect
17 to the motions. And that, in our view, doesn't prevent the
18 Court from setting a target trial date and from at least
19 articulating, if it is your Honor's view, that to the extent it
20 is necessary or appropriate or constructive to have a joint
21 trial of the remaining questions that are germane to both
22 buckets of claims, that that should be done. Just so that we
23 are all going forward with the same general idea of what is to
24 come and we can make all the decisions that we have to make
25 between now and then accordingly.

1 Thank you.

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

3 Ms. Rende, do you have a comment?

4 **MS. RENDE:** Your Honor, I would just like to note
5 that your reading of that paragraph on Page 3 of the proposed
6 schedule is in line with our reading of the jointly proposed
7 language.

8 That said, we do agree with Ms. Cabraser that it is more
9 efficient to have these cases tried jointly. And the issues of
10 common fact do overlap with the PSC in phase one specifically.

11 **THE COURT:** All right. Mr. Slater, you have a
12 comment?

13 **MR. SLATER:** Yeah. I don't want to repeat what
14 Mr. Guiffra said, but I agree with it.

15 Specifically, with respect to Bosch. Bosch is not a
16 defendant in the Government's case and we would object to
17 having a joint trial of the Government's case against FCA with
18 the Plaintiffs' case against FCA and Bosch in the event that
19 the case survives the Motion to Dismiss.

20 Just to be --

21 **THE COURT:** So how would you structure it then?

22 **MR. SLATER:** There would be two different trials.

23 **THE COURT:** Two different trials. What's the first
24 trial?

25 **MR. SLATER:** There is one trial with respect to the

1 Government's claims against the FCA. There is a separate trial
2 of whatever claims are left of the consumer claims against the
3 FCA and Bosch.

4 **THE COURT:** So even though there are underlying facts
5 that may inform both and, indeed, in Ms. Cabraser's view, that
6 there is almost a direct incorporation or relevance of -- in a
7 RICO context of the claims brought by the Government as they
8 relate to the consumer claim, you would have this Court try
9 those same facts twice because you don't want to be joined the
10 second -- in the first action?

11 **MR. SLATER:** Because the facts are not the same. The
12 claim against FCA is not a claim against Bosch.

13 And the proposition that she stated assumes a lot of
14 things that have yet to be established, including, importantly,
15 through motion practice that's scheduled over the next couple
16 of months.

17 And so in that respect I would -- again, without repeating
18 what Mr. Guiffra said, going through the process, taking it
19 step-by-step and then establishing a trial schedule in light of
20 what is actually to be tried would make a lot more sense.

21 With respect to the schedule itself, I just wanted to be
22 sure the Court understands that the schedule in respect to
23 Class certification is exactly the schedule that the Court set
24 at the last status conference and the pretrial order that came
25 out of it. So we didn't -- we didn't come up with that and

1 propose it now. It's what the Court had established.

2 And at that same conference, and I don't have my
3 transcript with me, but I thought the Court had suggested a
4 trial date of mid-2019 in light of the issues that are being
5 discussed now.

6 **THE COURT:** Did I? Did I -- I don't have my notes.
7 Did I suggest mid-2019?

8 **MR. SLATER:** By mid-2019. That's my recollection,
9 your Honor. I may be mistaken.

10 **THE COURT:** Anybody else besides me have a
11 recollection? Not that I'm bound by it, but I'm sort of
12 curious.

13 **MR. GUIFFRA:** Your Honor, can I be heard for one
14 second?

15 **THE COURT:** Yeah.

16 **MR. GUIFFRA:** One other point that I think is
17 important to focus on.

18 Ms. Cabraser just assumed that there is a RICO claim that
19 has been sustained here. Again, we don't know if there is a
20 cognizable RICO claim. We, in fact, don't think there is a
21 cognizable RICO claim.

22 So the -- in our view, the correct way to proceed would be
23 let's get the Motions to Dismiss decided. You know, and that's
24 a process that will be done by the end of the year. We will
25 know by the end of the year, presumably, where we stand on the

1 fix. And then the Court can go and decide whether there needs
2 to be a joint trial.

3 Again, I read this paragraph, which I think could be
4 written in a more clear way, but a lot of it is referring to,
5 you know, if liability is established. Then it talks about
6 assessment of penalties under the Clean Air Act. The
7 Plaintiffs can't assess penalties under the Clean Air Act and
8 appropriate injunctive relief. That's not something the
9 Plaintiffs can do.

10 So what I would suggest, your Honor, is let's get to the
11 end of the year. Let's have the Motions to Dismiss decided.
12 See where we are on the fix. And then we can actually identify
13 what the issues that would need to be tried at a trial would
14 be, specifically delineate them, and then both sides can say
15 whether they should be tried at a joint trial or not.

16 But at this point we're sort of setting a trial date,
17 a joint -- presuming a joint trial without knowing what issues
18 will be set to be tried, whether there is a RICO case or not,
19 you know, and all of those very -- and whether there is any
20 damages.

21 So it just seems that to set a date -- now I understand
22 why your Honor might want to set a date to sort of get the
23 parties to keep moving, but I can assure the Court that it is
24 very much in FCA's interest to get the emission modification
25 approved as fast as possible. And we are working in good faith

1 with Mr. Feinberg to see if we can do something to get the case
2 wrapped up.

3 But I think to set a trial date and presume a trial will
4 be a joint one would be -- based on the fact we don't even know
5 what the issues are to be tried, would be putting the cart well
6 before the horse. And so --

7 **THE COURT:** There is a bit of an irony here, and that
8 is to the extent that we decide not to have a joint trial, to
9 have separate trials, to have a separate U.S. Government trial
10 and a separate Plaintiffs' trial, or if different things sort
11 of drop out in different ways, that suggests, frankly, an even
12 earlier start to this thing. Because I'm not going to line up
13 three different trials in three phases and not start until
14 mid -- frankly, if we're going to phase it and slim it down, as
15 I'm hearing from your side of the ledger, I might advance it
16 even quicker.

17 So maybe I will refrain from setting a specific date right
18 now because I may advance it even more if we end up phasing
19 this thing.

20 But I will tell you right now, my intent is after I -- you
21 know, from what I've heard, it makes -- at least at first
22 blush, it makes sense to do a consolidated trial, the way it's
23 set forth in the statement. And -- and if I'm going to do it
24 that way, depending on what's -- you know, I know the scope of
25 it may depend on motions practice and everything else. My

1 intent would be to get this to trial either -- frankly, either
2 December or January. December of '18 or January of 2019. If I
3 ended up being convinced that this is going to be a slimmer
4 trial, we're going to phase it, we're just going to do the
5 Government's liability phase first and then it makes sense to
6 separate it out, I might even advance that because we may not
7 need as much discovery.

8 So what I'm going to direct the parties to do is to hold
9 their calendars open at this point for December and January of
10 2018 and 2019. I won't set a date yet because I want to see
11 where we're at, but that is -- that is my target at this point.

12 **MS. RENDE:** If I may, your Honor.

13 I know you saw my reaction before when I heard you say
14 late 2018. I do just want to be clear of the Government's
15 position. Of course, we will abide by the date that is set by
16 your Honor.

17 But given that we do have international Defendants, we
18 anticipate extensive expert discovery in this trial. Our
19 preference is for 2019, early 2019 as you had recommended
20 before. Just confirming that.

21 **THE COURT:** Okay. Well, I understand your position
22 and let's -- that's why I'm going to wait a bit to see how
23 things sort of play out, but I'm just giving you an indication
24 of where I'm headed at this point. So be prepared just in
25 case.

1 I think we'll address this, perhaps in greater detail, the
2 next time we reconvene, which I do want to address at this
3 point.

4 Obviously, we're going to be here on December 19th, but I
5 think it would make some sense to get an update as to how
6 things are going prior to then. So sometime in, perhaps, the
7 second week of November? That's like a month and a half from
8 now.

9 **THE CLERK:** November 14 we have to do it in the
10 afternoon. November 14 at 2:30.

11 **MR. GUIFFRA:** Your Honor, I have to be in Europe.

12 **MS. CABRASER:** That will work for Class Plaintiffs,
13 your Honor.

14 **THE COURT:** All right.

15 **MS. RENDE:** That will also work for the United
16 States.

17 **THE COURT:** All right.

18 **MR. GUIFFRA:** Yeah. I have to be in -- your Honor, I
19 need to be in Europe on the 14th. I can do later in the week,
20 but I have to be in Europe on the 14th and it's something I
21 can't get out of.

22 **THE COURT:** All right.

23 (Discussion held off the record between the Court and
24 the Courtroom Deputy.)

25 **THE COURT:** How about November 7th?

1 **MR. SLATER:** I've got conflicts on that day, your
2 Honor.

3 **THE COURT:** You've got?

4 **MS. SLATER:** I've got commitments out of the country
5 on that date, as well on the 7th. And we have a hearing in
6 another matter on the 17th. But the 14th, 15, 16, those would
7 all be okay.

8 **MS. CABRASER:** And those are exactly the dates, your
9 Honor, that are conflicts on the Class Plaintiffs' side. I'm
10 wondering about November 8th.

11 **THE COURT:** Okay. What about the 8th?

12 **MR. SLATER:** I actually have to look at an airline
13 schedule to see if there is some way I can get here. I can do
14 that, if you'd like.

15 **THE COURT:** Why don't you check?

16 **MR. GUIFFRA:** I believe I can do the 8th and the 9th,
17 your Honor.

18 **THE COURT:** What time do we have on the 8th, Betty?

19 **THE CLERK:** We can do it at 10:00 o'clock.

20 **MR. GUIFFRA:** On the 8th?

21 (Brief pause.)

22 **MR. SLATER:** If I'm reading this, your Honor, it's
23 possible to arrive here the morning of the 8th.

24 **THE COURT:** Okay. Great. I appreciate your
25 accommodation. So we'll do it at 10:00 o'clock on the 8th.

1 Okay? Great.

2 And just so I can anticipate, we're going to see Motions
3 to Dismiss, two sets of motions? Is that what we're seeing, is
4 one consolidated or two separate?

5 **MR. GUIFFRA:** There definitely will be separate
6 motions. That is one question I wanted to ask the Court about.
7 I've spoken to Ms. Cabraser. We would like to get 75 pages for
8 the opp for our motion.

9 Again, I'm not someone who likes to write long briefs, but
10 there are so many different issues and they are pretty
11 complicated. There are issues about particular state claims
12 that are brought. So it's just going to take some number of
13 pages.

14 The Complaint is 367 pages long and I do think this Motion
15 to Dismiss process will at least serve the function of slimming
16 down the case substantially we think.

17 **THE COURT:** Your view, Ms. Cabraser?

18 **MS. CABRASER:** Well, as I now understand it, that
19 could mean 100, maybe 150 pages worth of motions from the two
20 defendants.

21 **THE COURT:** Is there going to be some overlap in the
22 motions between -- with respect to the Defendants?

23 **MR. GUIFFRA:** We have not been coordinating our
24 activities at all in terms of the defense of this. And so
25 we're writing our own brief. We will make our own arguments.

1 We think our arguments are different than their arguments.

2 And you know, for example, your Honor, we have issues
3 about standing and whether there is an injury pled.

4 We have issues about, you know, state warranty claims and
5 whether they are preempted by the Clean Air Act.

6 We have issues about whether a RICO claim has been pled.
7 And that's very complicated, having been down that road myself,
8 you know, several times.

9 There's issues about standing in states where no one has
10 purchased a vehicle. There's issues about various state law
11 fraud claims that are going to have to be dealt with on a
12 state-by-state basis.

13 There are issues involving individual Defendants, like
14 Mr. Marchionne, who is the CEO of FCA and whether they have --
15 whether the claims against him should be dismissed.

16 There are personal jurisdiction arguments we have with
17 respect to certain entities, including FCA N.V. and VM Motori,
18 which is the entity that built the engine.

19 So there is a lot to cover given the size of the
20 Complaint. So 75 pages against a 367-page Complaint, where we
21 think we have seven separate arguments to make, is a lot.

22 **THE COURT:** Let me ask Mr. Slater. Are you also
23 asking for an enlarged brief? I mean, it sounds like many of
24 the theories you may end up piggybacking on.

25 **MR. SLATER:** I would not say "piggybacking." I think

1 that there are -- I mean, the legal issues are the legal
2 issues.

3 But as Mr. Guiffra said, the status and the posture of the
4 parties are different and it's worth paying attention to those
5 differences, both on the FCA side and then as between FCA and
6 the Bosch Defendants.

7 **THE COURT:** I know you may have certain arguments
8 that are particular to your client.

9 **MR. SLATER:** Yes.

10 **THE COURT:** What I'm asking is, some of the ones that
11 Mr. Guiffra mentioned are some of the ones that you may want to
12 join in.

13 What I don't want to do, frankly, is see double sets of
14 briefing on the same issue with slightly different, you know,
15 authorities and -- I mean, that ought to be coordinated, it
16 seems to me.

17 **MR. SLATER:** I think that we had been -- as you said,
18 we had been proceeding on the basis that we would be filing
19 separate motions and I think built the schedule with that in
20 mind. It would be pretty difficult at this point to combine
21 them between now and next Friday.

22 I have -- I'm totally confident that 75 pages would be
23 enough for our brief. I think ours will be less than 65, but
24 certainly more than what the Court's rules provide. I would
25 say, you know, maybe 65 would be sufficient.

1 **THE COURT:** On issues that are particular to your --
2 you mean, just generally?

3 **MR. SLATER:** In general, your Honor, yes. Yeah.

4 **MS. CABRASER:** Your Honor, we would obviously want an
5 equal number of pages to respond to each of the briefs. And,
6 frankly, sometimes it takes more pages to debunk an argument
7 and to explain why it's wrong than to make it. We'll go with
8 whatever your Honor decides. We have to write it, but you have
9 to read it.

10 We don't oppose the page requests that the Defendants are
11 making and -- as long as we have enough pages to respond to
12 those.

13 I do think if these are going to be over-long opening
14 briefs -- and we're going to see two opening briefs that, you
15 know, even despite best efforts are going to be duplicative --
16 that the reply briefs ought to be true reply briefs, ought to
17 be quite short and not used to make new arguments or add to the
18 pages.

19 **THE COURT:** All right.

20 **MR. GUIFFRA:** Your Honor, just one point.

21 **THE COURT:** Yes.

22 **MR. GUIFFRA:** We're representing, you know, multiple
23 entities as well as the individuals. So you're not going to be
24 seeing a whole series of other lawyers appearing.

25 So, for example, Mr. Marchionne is an individual Defendant

1 in this case. If he were being separately represented, he
2 would have the right to get 25 pages, I think, under the
3 Court's rules.

4 So we're basically combining VM Motori a separate entity,
5 Marchionne a separate entity, FCA N.V. a separate entity, and
6 then FCA U.S. a separate entity all in one brief represented by
7 the same law firm. And we'll be doing that, obviously, in an
8 efficient way.

9 Again, I start out where I began -- I end where I began.
10 We would not want to overload the Court. I recognize that a
11 long brief is not as good as a more -- you know, a more
12 finely-tuned brief, but I wanted just the Court to know that
13 that's why we need the pages.

14 I wouldn't want to say we can do 15 pages in the reply
15 brief if I have to represent -- you know, deal with all these
16 people and deal with a 75-page opposition brief. I think the
17 Court will benefit from having all the legal argument because I
18 do think this is a case where there are going to be --

19 **THE COURT:** Is there any reason why you can't
20 consolidate or coordinate the overlapping arguments from --
21 with Mr. Slater?

22 **MR. GUIFFRA:** I think, your Honor -- and maybe this
23 is an important point to get out.

24 They are a separate entity than we are and that's actually
25 an important point in the case, I believe particularly for

1 Mr. Slater. And so we have not been coordinating, cooperating
2 or doing anything vis-a-vis each other in connection with --

3 **THE COURT:** You have parallel interests.

4 **MR. GUIFFRA:** We have parallel interests, yes.

5 But my only concern would be, you know, we've got
6 people -- it's the 26th of September. The brief is due in 10
7 days. We've got our brief. They have got their brief. And I
8 have no idea even what arguments he's making. I could guess,
9 but we have had zero discussion about the defense of the -- you
10 know, the Motions to Dismiss.

11 **THE COURT:** Okay. I'll give you the last word.

12 Is your intent to file one consolidated opposition or what
13 is your --

14 **MS. CABRASER:** At this point, your Honor, if we're
15 going to get two separate briefs, I think it's -- in fairness
16 we're going to need two separate responses.

17 We are better able on our side, I guess, having gotten the
18 arguments from two sides, to see where they overlap and not to
19 repeat arguments in separate briefs. So that's something that
20 we can do, I guess, more than they are saying they can do at
21 that point.

22 So I would represent to the Court that while we probably
23 need two opposition briefs and we need to be able to go up to
24 the same total pages as the Defendants, we would consolidate
25 our arguments. We would not repeat them. And we would

1 indicate in a particular brief where we have responded to those
2 arguments in another one, rather than giving you two sets of
3 the arguments.

4 That's something -- I don't know to what extent we will be
5 able to do that, but to the extent we can, we will do that.
6 And that would help us reduce the pages below the allowance and
7 we'll certainly make every effort to do it.

8 **THE COURT:** If they are both making the same
9 argument --

10 **MS. CABRASER:** Yes.

11 **THE COURT:** -- to standing or preemption --

12 **MS. CABRASER:** That's right.

13 **THE COURT:** -- you can do a consolidated response.

14 **MS. CABRASER:** Yes. We can respond just once.

15 **THE COURT:** All right. I'm going to allow the moving
16 parties to file opening briefs up to 60 pages apiece, opening
17 briefs. I'm going to allow the Plaintiffs 75 pages in
18 opposition. And any replies will be subject to a limitation of
19 25 pages each.

20 So it would behoove the -- though you're not required to,
21 I understand different parties, different representation, but
22 you could certainly economize and get more bang for your buck
23 if you coordinate at least the overlapping arguments rather
24 than each citing the same cases over again.

25 I mean, so, you know, you might want to think about doing

1 that. But that's what we'll do to keep this within -- give you
2 extra space to argue, but not make this so burdensome that it
3 becomes difficult to manage. So that's what I will order at
4 this point.

5 Anything further at this point?

6 **MS. RENDE:** Your Honor, I'm just confirming that your
7 order just applies to both Defendants and the PSC, correct, in
8 terms of the pages?

9 **THE COURT:** Yes. I thought there was -- there was
10 not going to be a Motion to Dismiss with respect to the
11 Government, right?

12 **MR. GUIFFRA:** Yes. That's one motion you don't have
13 to worry about, your Honor, or Ms. Rende.

14 **MS. RENDE:** I just wanted to confirm. Thank you.

15 **MR. GUIFFRA:** We're answering the Government's
16 Complaint.

17 **THE COURT:** All right. Good. That will save a few
18 hours of work.

19 Thank you. Appreciate it. So we'll see you back here on
20 November 8th? Is that what we said?

21 **THE CLERK:** November 8th at 10:00 o'clock.

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

23 **THE CLERK:** Court is in recess.

24 (Proceedings adjourned.)
25

CERTIFICATE OF OFFICIAL REPORTER

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

Debra L. Pas

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

Thursday, September 28, 2017