

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

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

San Francisco, California
Thursday, February 1, 2018

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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1 Thursday, February 1, 2018

10:11 a.m.

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

3 ---000---

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

7 Counsel, please step forward and state your appearances
8 for the record.

9 **MR. SIMMONS:** Good morning, Your Honor. Paul Simmons
10 and Colin King for plaintiff Salt Lake County. And with us is
11 David Quealy from the Salt Lake City District Attorney's
12 Office.

13 **THE COURT:** Good morning.

14 **MR. KING:** Good morning.

15 **MR. GRUBB:** Good morning, Your Honor. I'm Archie
16 Grubb for Hillsborough County Florida.

17 **MR. GIUFFRA:** Good morning, Your Honor. Robert
18 Giuffra, with Sullivan & Cromwell, here for Volkswagen. With
19 me are my colleagues Jud Littleton and Bill Wagener.

20 It's always good to be in San Francisco.

21 **MR. GOLDBERG:** Good morning, Your Honor. Matthew
22 Goldberg on behalf of Porche.

23 **MR. SLATER:** Good morning, Your Honor. Matthew
24 Slater, from Cleary Gottlieb, on behalf of Robert Bosch LLC in
25 the Hillsborough County case.

1 **THE COURT:** Good morning.

2 So, actually, we have sort of like two sets of hearings
3 today: the County's hearing and then the bondholder's hearing.

4 (Technical malfunction disruption.)

5 **MR. BERG:** Good morning, Your Honor. Ian Berg, of
6 Abraham, Fruchter & Twersky, LLP, on behalf of the lead
7 plaintiff in the bondholder action.

8 **MR. GONZÁLEZ:** Good morning, Your Honor. Joseph
9 González on behalf of Michael Horn. I'm joined with my
10 colleague, David Dickieson. We're here for the bondholder
11 action.

12 **THE COURT:** Okay.

13 Well, as indicated, let's do the Salt Lake
14 City/Hillsborough matter first.

15 And I think, having read the papers, what presents, I
16 think, somewhat of a different case -- and I'm trying to make a
17 distinction in my mind whether the difference is a difference
18 that makes a difference -- is the fact that, subsequent to the
19 production of the car and the introduction of the car into the
20 United States, it is alleged that -- that there was some
21 modification or adjustment to the defeat device which made it,
22 from the point of view of the manufacturer, more effective in
23 terms of its operation.

24 Is that right? Have I got that right?

25 **MR. SIMMONS:** That's correct, Your Honor.

1 **THE COURT:** Okay. So the question is, given that set
2 of facts, does that make a difference to the question of
3 whether the Clean Air Act preempts state actions as the Court
4 held in the *Wyoming* case. You know, I mean, I was either right
5 or wrong in *Wyoming*, but I said what I said.

6 And so I don't see any reason -- none has been presented
7 yet. I guess I'll await the wisdom of the appellate courts --
8 that will say I was wrong. If they say I'm wrong, they say I'm
9 wrong. But I think I was right.

10 Not the first judge to give some self-congratulations as
11 to their own wisdom. But it is what it is. And I see no
12 reason to change it.

13 So then the question is, okay, if that's what you see,
14 Judge, that's the way you look at it, what about this -- what
15 about this fact? Does that change it?

16 And the plaintiffs say yes, it does because it doesn't
17 fall within the explicit terms of the preemption.

18 And Volkswagen says no, it doesn't because it doesn't make
19 sense to not allow the preemption to operate given -- and maybe
20 I'm adding these words -- given the state of development of
21 vehicles in the 21st century.

22 So why do I say that? I must tell you -- this doesn't
23 disqualify me in this case, but I have a Tesla. And apologies
24 to foreign manufacturers, but this car mysteriously, in the
25 dead of night, modifies itself.

1 It's something that operates in the ethereal world of the
2 Internet, that I get on my cell phone a bing that says "Your
3 software is being updated." Really? You know, while I sleep.
4 While the car is there in the driveway, it's being modified.

5 I don't go to a gas station. Never go to a gas station.
6 I don't go to a service station or a repairman or a dealer or
7 anything. It just happens.

8 And, thus, whatever the manufacturer did when he
9 manufactured the car, presented it to the authorities in the
10 United States, got the certifications that were obtained, and
11 sent the car out on the road, that car has sort of changed a
12 little bit in its operation.

13 And I think that is the wave of the future, though far be
14 it from me to try to predict where the future is, but it seems
15 to me that that is the state of art of how many cars are being
16 operated and many cars are being repaired and many cars are
17 being modified.

18 Now, I'm not a legislature. I probably think I should be,
19 but given the fact that we have the legislature today, I'll let
20 them do whatever they do, including doing nothing. But I don't
21 think, even though I'm not a legislature, I have to try to take
22 whatever the laws are passed by Congress and give them an
23 appropriate interpretation and application to the reality of
24 today, if possible.

25 I mean, that's sort of my view of a court's role. A lot

1 of judges don't have that view. I do. It's a family view.

2 So the question really is, okay, let's say that's your
3 view, Judge, whether we agree with it or not. Maybe we
4 disagree with it. But it fits or it doesn't fit.

5 I don't know how oblique I am in what I've set down as
6 sort of an interesting discussion. But at least this is what's
7 going on in my mind. And I'd like to hear some comment on that
8 issue from the parties.

9 Mr. Giuffra.

10 **MR. GIUFFRA:** Your Honor, just one housekeeping point.
11 In the *Wyoming* case, the state read Your Honor's well-reasoned
12 opinion and elected not to appeal.

13 In addition, Your Honor, in Alabama, the judge in Alabama
14 agreed with Your Honor's decision in the *Wyoming* case and also
15 addressed this issue of the update theory and rejected, in that
16 case, the state's update theory.

17 As matters now stand, I think Your Honor's *Wyoming*
18 decision has not been questioned by any court thus far. And we
19 think it was obviously well-reasoned.

20 And, in addition, now some of the states are coming up
21 with these update theories as a way to try to end-run Your
22 Honor's decision in the *Wyoming* case.

23 And I would just note, Your Honor, that there are 28
24 counties in Texas trying this. We have two here in this
25 courtroom. And there are obviously 3,000 counties in the

1 United States.

2 And it's worth noting that Hillsborough seeks in this case
3 \$2 billion a year, and Salt Lake, they want \$9 billion a year,
4 notwithstanding the fact that Volkswagen has already paid
5 153 million to Salt Lake and 36 million to Hillsborough.

6 But Your Honor -- and let me start at first principles.
7 There's no question that Section 209(a) of the Clear Air Act
8 applies to the counties. And there's no question that Section
9 209 of the Clear Air Act should be read broadly.

10 The language of the statute is relating to any standard --
11 relating to -- should -- a state or county cannot attempt --
12 attempt to enforce any standard relating to emissions from new
13 motor vehicles or their engines.

14 In this update theory, Your Honor, actually you addressed
15 to some extent in Footnote 8 of your *Wyoming* decision, because
16 *Wyoming* made the same argument.

17 Now, in terms of what the facts are with respect to the
18 update, we actually can look to the -- the VW statement of
19 criminal -- the criminal indictment. And it's attached,
20 actually, to the -- to the county's -- I think it's Appendix 8
21 of their document.

22 And at paragraphs 151 and 152, the Department of
23 Justice -- and we agreed to it -- said the proposed software
24 updates optimized emissions. And, in fact, if Your Honor will
25 recall, in the *Wyoming* case -- and that's in Footnote 8, that

1 you noted -- *Wyoming* actually alleged that what the updates did
2 was lower emissions, not increase emissions.

3 When I looked this morning to double-check in Salt Lake
4 and also in Hillsborough's complaints, they don't allege that
5 the updates increased emissions.

6 And so there's no question that the idea of a county
7 regulating the process that Your Honor was just talking about,
8 you know, a car is sitting in a garage, or even when you go to
9 the dealership, you get a software update.

10 One of things that's happened with automobiles over the
11 last 10 or 15 or 20 years is they've become much more like
12 computers than the old steel cars. And so software is
13 constantly being updated just like the software on your
14 computer, the software on your iPhone, the software on your
15 iPad. Everything is always being updated. That's the very
16 nature of software.

17 The idea of Congress in enacting a statute with the broad
18 language of section -- of Section 209 would have ever
19 contemplated that a county should get in the business of
20 regulating updates of software on vehicles -- now let's go back
21 to the main point. The updates related to a defeat device that
22 was installed in the vehicles by the manufacturer. It's not a
23 new defeat device that's being put in the vehicle.

24 In addition, the EPA regulations, which Your Honor cited
25 in the *Wyoming* case, make clear that preemption applies to a

1 standard relating back to the original design by the original
2 engine manufacturer. And that's 59 Fed Register 31,306.

3 And, clearly, if it's the original defeat device, goes
4 back to the original design of it, and you're just updating it,
5 you're not doing something new. It's not something that you
6 want counties to be getting into.

7 And then when you look at the concept of -- and, in fact,
8 what the Alabama court said when they got this particular
9 issue, they said, well, they're trying to artfully plead around
10 your decision in the *Wyoming* case.

11 Now, in, *Wyoming* what Your Honor essentially said, and I
12 think it's true in this case, you didn't deal with expressly
13 the preemption issue. You just dealt with the argument, well,
14 the allegation was that the software updates had actually
15 lowered emissions; therefore, it was not something that had the
16 effect of rendering an emissions control system inoperable or
17 having adverse effect on emissions.

18 And I think the same language applies in the *Wyoming* and
19 Salt Lake statutes. In fact, those statutes, when you look at
20 them -- and this is more of a statutory argument -- they make
21 it clear that what they are focused on is someone who is in a
22 body shop, going in and ripping out the emissions system in the
23 car.

24 And, obviously, that's something that the counties don't
25 want to happen on a one-off basis as opposed to a manufacturer

1 having a software update that it can apply to tens of thousands
2 of cars around the United States.

3 And so, clearly, Your Honor, our view is that the broad
4 language of the Clean Air Act preemption provision applies
5 here. If it doesn't apply here, you know, the provision would
6 become -- would become irrelevant as -- given the fact, as Your
7 Honor correctly pointed out, cars were increasingly having
8 their software being updated.

9 If you were just to look at this in terms of, you know,
10 the notion of -- and they would say, well, this is an end-use
11 regulation. That's their argument under Section 209(d) of the
12 Clean Air Act.

13 The problem they have is that they are still regulating
14 the manufacturer as opposed to somebody in a body shop in their
15 state. It's not -- their regulations are actually directed in
16 this case to actions in Germany as opposed to the actions of
17 somebody who's operating in an automobile -- automobile shop
18 and just ripping it out inside --

19 **THE COURT:** Would it make any difference to your
20 argument if, in fact, rather than the modification coming as a
21 result of some software modification, the owner of the vehicle
22 was told, Come into the body shop? It's like a recall. Go
23 into the body shop and the technician there will do the proper
24 adjustment.

25 **MR. GIUFFRA:** No.

1 **THE COURT:** And so what happens is it comes in and
2 they tweak it, they turn something, they maybe even add
3 something to it, like a governor or something, some device to
4 it.

5 What then happens? Where does that fit?

6 **MR. GIUFFRA:** I think it still goes back to that the
7 state or the county is trying to regulate the manufacturer of
8 the device. They're trying to regulate something that goes to
9 the original design of the --

10 **THE COURT:** So you say even a modification, a
11 subsequent modification of the original device would not give
12 rise to the municipality exercising control as long as the
13 modification is occurring -- is affecting the original device
14 that was manufactured?

15 **MR. GIUFFRA:** Yeah. I would actually rely upon the
16 EPA's own regulation, which says a standard relating back to
17 the original design by the original engine manufacturer.

18 And so in this particular case, we're not disputing this,
19 customers --

20 **THE COURT:** And it still would be, would it not, it
21 still would be a violation of the EPA; in other words, EPA
22 regulation?

23 It's not like, oh, isn't this clever? Now there's no
24 enforcer out there.

25 There still is the United States government, the EPA. If

1 you change it so suddenly it's out of compliance with EPA
2 standards, you have the EPA --

3 **MR. GIUFFRA:** That's what happened in this case.

4 **THE COURT:** And that's what happened in this case.

5 **MR. GIUFFRA:** Volkswagen paid billions of dollars.
6 And, in fact, Salt Lake City and Hillsborough and Utah and
7 Florida got the money. And so essentially what they want is
8 they want to double-dip, they want to pile on. And it makes no
9 sense.

10 And I would just note, Your Honor, that both the EPA and
11 CARB looked at and has expressly said, as reflected -- and
12 again I would look in the plea agreement, which is in the
13 counties' opposition brief -- they put it in the record,
14 Exhibit A.

15 The updates -- and this is paragraphs 46 to 51 of the
16 Statement of Claim in the criminal guilty plea -- improve the
17 existing defeat device operation and precision. There's not a
18 new defeat device that's being put in these vehicles.

19 And the idea that an individual county is going to be in
20 the business of regulating engine manufacturers who are doing
21 updates all around the country makes no sense.

22 As Your Honor pointed out, we already have a federal
23 regime that's in place. And, in fact, if a county or a state
24 wanted to opt in into the California regime, they can also be a
25 177 state and seek penalties.

1 **THE COURT:** Okay. So let me hear from the plaintiffs
2 on that point. Thank you.

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

4 **MR. SIMMONS:** Thank you, Your Honor.

5 Volkswagen argues that the counties are seeking billions
6 of dollars in damages. And I just want to point out that in
7 our third amended complaint our prayer for relief asks for
8 penalties within the range allowed by law, compensatory damages
9 in an amount to be determined at trial.

10 It's up to the trier of fact to determine the proper
11 remedy. And the fact that the potential remedy may be great
12 doesn't have any bearing on liability.

13 Volkswagen is now saying that adding or modifying the
14 engines after they've been in service and on the roads of Salt
15 Lake County and Hillsborough County for some time doesn't -- is
16 still preempted by the EPA.

17 Under Volkswagen's view, there be no end to the preemption
18 and would essentially read Section 209(d) out of the statute,
19 which specifically says that, "Nothing in this part shall
20 preclude or deny to any state or political subdivision thereof
21 the right otherwise to control, regulate, or restrict the use,
22 operation, or movement of registered or licensed motor
23 vehicles."

24 The position that Volkswagen --

25 **THE COURT:** Well, I don't know that. You say it would

1 have no impact? No impact at all?

2 In other words, if I pass a law which says that you can't
3 operate your vehicle on a Spare The Air day, that that would be
4 null and void? You say Volkswagen would say no, you can't do
5 that?

6 **MR. SIMMONS:** No. But --

7 **THE COURT:** I mean, I'm just trying to figure out. It
8 seems to me your argument is awfully broad. You're saying
9 nothing, it's a total nullity. I don't know that it's a total
10 nullity.

11 **MR. SIMMONS:** Well, it seems to us that Volkswagen's
12 argument is awfully broad because they're saying once we put in
13 a defeat device there's nothing that the state --

14 **THE COURT:** That what?

15 **MR. SIMMONS:** That the state or local government can
16 regulate after that as it pertains to emissions.

17 **THE COURT:** I don't know. I don't quite see it, but,
18 I mean, I haven't been thinking that way.

19 But is that your argument, is that the prohibition, the
20 (a), the section (a), the preemption section, has to be read
21 very narrowly because otherwise (d) would be a nullity?

22 I'm just trying to find the argument. I'm just trying to
23 make sure I understand the argument.

24 **MR. SIMMONS:** We are arguing that subsection (a)
25 should be read narrowly. That's --

1 **THE COURT:** For the reason that if you don't, (d)
2 becomes a nullity?

3 **MR. SIMMONS:** Well, first of all, for the reason that
4 it's a preemption provision.

5 **THE COURT:** I understand preemption is read narrowly.

6 **MR. SIMMONS:** Right.

7 **THE COURT:** Okay. But consistent with the purposes of
8 preemption. I mean, there's a reason for preemption.

9 **MR. SIMMONS:** Right. And reason for preemption is to
10 avoid a system where there's 50 different states establishing
11 different --

12 **THE COURT:** But that's exactly what you're suggesting,
13 isn't it?

14 **MR. SIMMONS:** No.

15 **THE COURT:** You're saying, look, if they didn't do the
16 subsequent modification, that software, that whatever it was,
17 hey, we're out. Hillsborough is out, Salt Lake City is out,
18 Mendocino is out, on and on and on. We're out. We can't do
19 anything about it. Say that's right. Whether you agree with
20 it or not, that's what, quote, the law of the court is.

21 **MR. SIMMONS:** Right.

22 **THE COURT:** We're out. But they did something after,
23 afterwards. They did a modification. Now we're back in.

24 **MR. SIMMONS:** Right.

25 **THE COURT:** And I'm trying to figure out -- I

1 understand that is the argument. Now I'm trying to figure out,
2 does that argument make sense? Does that argument make sense,
3 because now you have 3,000 -- I don't even know, how many
4 counties are there? Are there 3,000 counties? There are quite
5 a few.

6 You have many, many, many counties now suddenly empowered
7 to bring actions by virtue of something that was a
8 modification, which, by the way, is still within the ambit of
9 the federal government to regulate.

10 I could understand, sort of, the argument that says, okay,
11 in the first instance the federal government does it, then
12 after that -- you know, they check the car out at the
13 beginning. If it's okay in the beginning, it goes to the
14 states.

15 Let's say Volkswagen were really clever, and what they
16 did -- because this is just a matter of time -- they have a
17 device in their car that only gets -- a defeat device that only
18 gets turned on -- and this is sort of a variation of what
19 happened -- only gets turned on once the car goes to the
20 initial seller or the retailer, the consumer. And they do that
21 by way of a software.

22 They say to the seller, plug it in here, and then in the
23 dead of night it does something to the emissions device. Okay.
24 So it was a modification that occurred subsequent to the
25 initial manufacturing and the sale to the consumer.

1 If they did that, then you would argue, oh, well, now we
2 can do something about that. States can do something.
3 Municipalities can do something.

4 But so can the federal government. And it's basically
5 just an end-run around the federal government. You know,
6 because where the federal government -- had the device been put
7 in and operative in a particular way at the beginning, the
8 federal government would exercise its preemptive rights here.
9 But since it only became operative after the car was sold, now
10 all the states get at it.

11 And I'm sitting here trying to figure out, does that
12 actually make sense? What's the point? What's the point of
13 that? How does that work? Why is that a good regulatory
14 system?

15 What you're suggesting to me just doesn't make any sense.
16 Put another way, I don't even see an added value to the
17 argument other than, well, now there's another litigant out
18 there. Well, that's good. Okay. There'll be 3,000 litigants
19 out there.

20 **MR. SIMMONS:** May I address that, Your Honor?

21 **THE COURT:** Sure.

22 **MR. SIMMONS:** First of all, cases by counties have
23 been pending for several years against Volkswagen. And there's
24 only been a handful of counties that have elected to bring an
25 action. So I don't think that this is going to open the

1 floodgates to thousands of more cases.

2 **THE COURT:** Really? Well, let's think about that.
3 Let's say I rule in your favor.

4 **MR. SIMMONS:** Well --

5 **THE COURT:** Let's say I rule in your favor. What do
6 you think would happen the day after I rule in your favor?

7 You know, I also serve on the MDL Panel. And I listen to
8 defense lawyers all the time oppose MDLs on the theory of,
9 create it and they shall come. You know that, sure, there are
10 very few cases out there now, but if you create an MDL, you're
11 going to see a lot of cases. And you know what? That's sort
12 of true. That's sort of true.

13 Now, I'm not against it because I think you either have a
14 valid claim or you don't. And the argument that, well, it will
15 create an -- incentivize people to make frivolous claims,
16 that's sort of the price you pay in litigation anyway because
17 along with frivolous claims are meritorious claims. And you
18 want to make sure that people have access to meritorious
19 claims.

20 But I don't think the argument really is, look, there are
21 very few claims out there, so don't worry, no floodgates are
22 going to open. I think whichever -- well, if I go in a
23 particular direction.

24 But I don't think that's the issue for me. I think the
25 issue for me is, look at the preemption clause. Am I giving it

1 a proper interpretation or am I not? Not what will happen.

2 **MR. SIMMONS:** So let's look at the preemption clause.
3 It says, "No state or any political subdivision thereof shall
4 adopt or attempt to enforce any standard relating to the
5 control of emissions from new motor vehicles or new motor
6 vehicle engines subject to this part."

7 And another provision of the statute defines new motor
8 vehicle as one for which title hasn't yet passed.

9 Volkswagen's argument is their vehicles are to remain new
10 in perpetuity as long as they're just tinkering with and
11 modifying the defeat device. I don't think that's consistent
12 with the language of the statute.

13 And I wanted to point out that the argument that they're
14 making here today is different from the argument that they made
15 in the hearing on the *Wyoming* case.

16 In that case Mr. Giufffa said:

17 "If this were a situation where we tampered with the
18 vehicles -- you know, if some auto shop tampered with it,
19 in the emissions control system, in the State of Wyoming,
20 they might have something because, under Section 209(d),
21 it says states can, quote, control, regulate, or restrict
22 the use, operation, or movement of registered and licensed
23 vehicles."

24 And then the Court, following up on that, said:

25 "I suppose if they ran into a VW dealer and said, 'By

1 the way, would you mind just disconnecting this device in
2 my car?' you know, and the VW people did that -- I'm not
3 suggesting they did, but, of course, that could be
4 subject -- that's a change in the use of the vehicle after
5 it has gone through the process."

6 And that's what happened here, Your Honor. After --

7 **THE COURT:** I have another question to ask.

8 **MR. SIMMONS:** Yes.

9 **THE COURT:** Okay. I understand that. And I
10 understand basically you're relying on the very precise
11 language of the preemption --

12 **MR. SIMMONS:** Right.

13 **THE COURT:** -- coupled with the definition of what's
14 meant by transfer of title and so forth.

15 **MR. SIMMONS:** Right. And the case law which
16 recognizes that at some point the EPA's exclusive jurisdiction
17 over controlling emissions ends.

18 If, for example -- and this was some of the cases where,
19 for example, the *Allway Taxi* case --

20 **THE COURT:** Well, I've tried to allude to that in
21 the --

22 **MR. SIMMONS:** Right.

23 The Court upheld the regulations there because they didn't
24 apply to new vehicles. They only applied to taxis that had
25 been in use for a while. Even if they establish new emissions

1 standards for those vehicles, that's permissible.

2 **THE COURT:** Let's say I'm a manufacturer and I'm faced
3 with a decision of, should I update my software for the
4 operation of a part that has already been installed and going
5 forward? And I think if I do, I now, under your theory, and
6 depending on the part, will be subject to 50 -- was it 3,000
7 jurisdictions suing me for some aspect of what that
8 jurisdiction thinks I did that runs afoul of the local
9 regulations.

10 I think if I thought that, I might give some thought to
11 not issuing the software. It could be safety related or it
12 could not be safety related. It could make a car more
13 efficient, less efficient, responsive to X, Y, or Z. You know,
14 I mean, where the headlines aim? How long do the headlights
15 stay on? How far does the seat go back?

16 I mean, I just wonder, even as a matter of policy, whether
17 you want to open up the door to all of these other
18 jurisdictions suing as a result of the software update.

19 **MR. SIMMONS:** That may not make sense as a matter of
20 policy, but Congress has said that's okay. The only thing
21 they've restricted is emissions.

22 **THE COURT:** All right. Well, that's probably the
23 right answer.

24 Let me ask another question, if I might --

25 **MR. SIMMONS:** Okay.

1 **THE COURT:** -- while I have you here.

2 There's a fraud allegation in your complaint; right?

3 Maybe it's his. Isn't there a fraud allegation?

4 **MR. SIMMONS:** I believe there is. I think that's our
5 second claim for relief.

6 **THE COURT:** And I'm trying to figure out -- you say
7 the county was defrauded?

8 **MR. SIMMONS:** Yes.

9 **THE COURT:** On what basis? You didn't buy any car --
10 you're not saying as a consumer, are you?

11 **MR. SIMMONS:** No. But we were kept in the dark that
12 all of these vehicles were on county roads, emitting
13 pollutants, causing the --

14 **THE COURT:** Where is your reliance? What is it?

15 Do you say that, had you known this, you wouldn't have
16 allowed Volkswagens to be on your roads?

17 **MR. SIMMONS:** Right.

18 **THE COURT:** Pass a law saying no Volkswagen come on --

19 **MR. SIMMONS:** No, but we would have required them to
20 be fixed so that they didn't -- so that they complied with the
21 emissions standards.

22 **THE COURT:** In an area that is -- that was preempted?
23 I'm talking about before any modification.

24 **MR. SIMMONS:** Right. Preempted for new vehicles.
25 Correct.

1 **THE COURT:** I don't know. I was trying to figure out
2 the fraud claim because it didn't seem to me you bought any
3 cars.

4 **MR. SIMMONS:** No, I don't know if the county bought
5 any --

6 **THE COURT:** Well, I mean, you're not suing as a
7 consumer.

8 **MR. SIMMONS:** No, no.

9 **THE COURT:** Okay.

10 **MR. SIMMONS:** If I may, Your Honor, after the Court
11 issued its ruling in the *Wyoming* case, Volkswagen Group of
12 America's corporate representative was deposed in the Texas MDL
13 on these issues, and he provided some insight into exactly what
14 happened.

15 Volkswagen argues that the recall simply improved the
16 emission controls. The language that he quoted, I believe, was
17 that they were post recalls. This was, after the consent
18 decree came down, Volkswagen did do recalls that improved the
19 emissions.

20 There were some recalls in 2015 that may also have
21 improved emissions when Volkswagen revealed the EPA's breathing
22 down their neck and knew they had to do something.

23 But the fixes we're talking about, the corporate
24 representative testified that there are three levels of what he
25 called field fixes, the last one being a recall. And before

1 there were even recalls, they discovered a problem with the
2 emission system.

3 The defeat device, which was supposed to turn off the
4 emission controls when the vehicle was on the road, wasn't
5 turning off the emission controls. And they were suffering
6 mechanical failures and hardware failures.

7 And so they came up with two solutions. The first one,
8 the vehicles were designed to start in -- in the test mode.
9 No, excuse me. I think -- they were designed to start in test
10 mode, and they weren't checking out of test mode after they
11 were on the road.

12 So they came up with two solutions. One was to have them
13 start in road mode, or what we call cheat mode, where the
14 defeat device was stopping the emissions controls.

15 And the other solution was to add a steering wheel
16 alignment program that would detect better when the vehicle was
17 being operated on the roads, when the operator was turning the
18 steering wheel.

19 And both of those fixes were designed specifically to make
20 the defeat devices work better and, hence, cause more emissions
21 and more pollution.

22 The Court's concern about opening the floodgates is also
23 tempered somewhat by the fact that we're talking about a subset
24 of all of the vehicles. Not all of them received these fixes.
25 Not all of them were subject to recalls. So it's a limited

1 number.

2 **THE COURT:** Do we know, do we have any idea what the
3 number is?

4 **MR. SIMMONS:** We don't for Salt Lake County. In the
5 deposition taken in Texas, Volkswagen had numbers of the
6 vehicles that were subject to recalls in Texas, and it was not
7 a substantial number of the total number of vehicles.

8 The federal regulation that they're relying on involved a
9 different preemption provision. It applied to non-motor
10 vehicles. And the wording of the preemption provision for
11 non-motor vehicles is broader than 209(a). It also referenced
12 209(a) in that opinion, but it's not exactly on point.

13 The other issue that I wanted to address, if I may,
14 briefly, is -- our third claim for relief is for violations of
15 what's called the Utah Pattern of Unlawful Activity Act. It's
16 essentially a state RICO act.

17 And they've attacked that claim on the grounds that we
18 didn't allege a separate -- a separate enterprise from the
19 defendants. And I just wanted to point out that that's both
20 factually and legally wrong.

21 We allege that the German companies, the parent
22 corporations who we haven't named in our lawsuit, were the
23 enterprise, and that the defendants were the ones that were
24 participating in and receiving proceeds from the enterprise.

25 But as a legal matter, Utah law is clear that the

1 defendant and the enterprise can be the same under the Pattern
2 of Unlawful Activity Act.

3 That was the *State vs. Hutchings*, a case that they don't
4 cite in their brief, and which the federal case that they
5 relied on didn't cite either. But that was clearly on point.

6 And the pattern of unlawful activity claim addresses
7 different concerns from the -- from the emissions or the
8 pollution air quality claims. It addresses concerted criminal
9 activity within the state.

10 So we would ask the Court to deny their motion as it
11 relates to the subsequent modifications of the vehicles and to
12 also deny their motion as it relates to that claim.

13 Thank you.

14 **THE COURT:** Mr. Giuffra, briefly, I would like you to
15 answer one question.

16 **MR. GIUFFRA:** Okay.

17 **THE COURT:** The prohibition on the so-called
18 preemption clause says "No state or any public subdivision
19 thereof shall adopt or attempt to enforce any standard relating
20 to the control of emissions" -- and then the operative
21 language -- "from new motor vehicles or new motor vehicle
22 engines subject to this part."

23 Plaintiff says these aren't new motor vehicles. It's as
24 simple as that.

25 And then when you read it in conjunction with (d), it's

1 clear that states, subdivisions, and so forth, retain certain
2 rights in connection with enforcement.

3 So is this a new motor vehicle? Why should I treat it as
4 a new motor vehicle? What's your argument?

5 **MR. GIUFFRA:** Okay. The answer, Your Honor, starts
6 with one basic proposition. And I'd like to call the Court's
7 attention to 42 U.S. Code 7521(a)(1). And what that does is
8 give the EPA administrator -- that's 42 U.S.C. 7521(a)(1). And
9 it gives the EPA administrator the ability to regulate the
10 emissions controls of a vehicle over its useful life. And
11 that's the way the regulations work.

12 So Volkswagen -- and there's another regulation which I
13 will call the Court's attention to. This is a regulation as
14 opposed to a statute, 40 C.F.R. 85.1903. And that's an
15 emissions defect information report. And that's 40 C.F.R.
16 85.1903.

17 So the way the system is set up by statute is that the
18 EPA, insofar as the manufacturer is concerned, the
19 manufacturer, once it gets that vehicle complied, has to assure
20 compliance throughout its life.

21 If there's a defect with the system, you have to do a
22 report to the EPA. You can't be making changes in emissions
23 control systems without going back to the EPA.

24 And I think, as Your Honor will recall, when we were here
25 almost two years ago to the day and we were talking about,

1 well, could VW do a fix of these vehicles without getting the
2 EPA involved, and the answer was no.

3 So the way the courts and the way the regulations all work
4 together is the EPA regulates emissions vis-a-vis the
5 manufacturer.

6 The provision they are relying, which is 209(d), is a
7 regulation that is focused on the movement after a new vehicle
8 is bought, meaning and it's also focused at conduct that occurs
9 in a state, on a one-off basis in a state.

10 So if someone goes in and they rip the emissions control
11 off -- system in a one-off basis, yes, the state can stop that.
12 That makes perfect sense.

13 And, in fact, the way the EPA regulations in the Clean Air
14 Act talk about stationary pollution sources and mobile
15 emissions sources, mobile emissions sources are regulated by
16 the EPA, and stationary emissions sources are regulated by the
17 states.

18 And so the way the EPA has dealt with that language is it
19 goes back to the original motor -- the original motor that's in
20 the vehicle, the regulation that Your Honor cited in *Wyoming*,
21 and they can't sit and say the engine is the same engine that
22 was in the original car, the software is the same software
23 that's in the original car, it's just being updated and
24 changed.

25 We're not coming in after the fact and adding a defeat

1 device in the vehicles, you know, after they've left Germany.
2 It was already in the vehicles by the time they left Germany.

3 Let me make a few other points, Your Honor.

4 If they were right, okay, if they were right, the orders
5 that Your Honor signed approving the updates and the fixes to
6 the 2-liters and the 3-liter vehicles would be tampering
7 because you obviously changed the vehicles. You directed it
8 was okay to change the calibration on the software in the 2-
9 and 3-liter vehicles.

10 In addition, 209(d), which is the provision that they rely
11 upon and needs to be read in conjunction with 209(a), talks
12 about use, operation, and movement of the vehicle. That's not
13 what is occurring when a manufacturer is updating a preexisting
14 software system in a car.

15 So, in addition, you know, this obviously is an issue
16 that's been decided by the court in Alabama, and now Your Honor
17 has it. But we think that the correct reading of the statute,
18 the regulations all looked at together, plus just general
19 concepts of implied preemption, the idea that 3,000 counties
20 are going to be getting in the business of regulating software
21 updates to cars makes absolutely no sense when it's directed at
22 a manufacturer as opposed to an individual customer or someone
23 who's operating in a body shop.

24 Let me also make the point that the other side, they talk
25 about increased emissions. I went back and looked at their

1 complaints. They don't make any allegation about increased
2 emissions caused by these updates. And, in fact, the EPA and
3 CARB directed to the opposite.

4 He's citing some deposition where -- you know, which is
5 not in his complaint. And my understanding is that there is no
6 allegation by anybody, including the regulators, that any of
7 these updates caused increased emissions whatsoever.

8 And, ultimately -- and another point, Your Honor, they
9 have no response to the fact, when you look at their own
10 statutes, they don't refer to manufacturers. They refer to car
11 owners. And they don't -- they're directed not at
12 manufacturers on the face of the statutes.

13 With respect to whether they can bring some sort of a
14 state action, that's just another way to try to end-run the
15 federal law. And courts have repeatedly rejected the idea that
16 you can take a fraud claim and somehow end-run preemption.

17 And if you look at the *Allway Taxi* case, which he cited,
18 it talks about how the regulation in that case was permissible
19 because, as the court said, the burden of compliance was on the
20 individual owners and not on manufacturers and distributors.

21 And so, clearly, the way the courts have looked at these
22 Clean Air Act issues in the context of mobile source emissions
23 is that the EPA, which is -- which by statute can promulgate
24 and does promulgate regulations requiring manufacturers to
25 maintain the compliance of vehicles through their useful life,

1 is the entity that has to regulate updates to the emissions
2 control systems that occur over the useful life of the vehicle.

3 And the idea that we're going to let 3,000 counties bring
4 their own claims -- and, in fact, as I just noted at the
5 beginning, the fact that Your Honor's own approval of the 2L
6 and 3L fixes under their theory would be tampering with the
7 vehicles, which makes absolutely no sense.

8 **THE COURT:** The only one tampering with the Court's
9 opinion will be the Circuits.

10 **MR. GIUFFRA:** Well, maybe. Maybe they won't appeal,
11 just like *Wyoming* did.

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

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

14 **THE COURT:** Okay. Yes.

15 Anything further on this issue?

16 **MR. GRUBB:** Your Honor, if I may speak briefly for
17 Hillsborough County, try to address some of the points and
18 arguments. I'll try to be brief.

19 **THE COURT:** Well, if they've been covered, I mean, if
20 there's some similarity. So you don't have to address those.
21 Okay.

22 **MR. GRUBB:** Okay.

23 **THE COURT:** But if you have something in addition to
24 what has been covered, please feel free to speak.

25 **MR. GRUBB:** Okay. Thank you.

1 You said in your *Wyoming* order that in some cases the
2 dividing line between Section 209(a) and Section 209(d) is
3 difficult to decipher. And I think what we're talking about
4 today is that dividing line.

5 I think the *Allway Taxi* case is controlling precedent up
6 to a point, but I also think we're dealing with an
7 unprecedented situation in that I don't think the Court in
8 *Allway Taxi* or in the *Engine Manufacturers* case that was later
9 in the District of Columbia could have foreseen a situation
10 where a manufacturer would institute a program of recalls and
11 field fixes on used cars to further tamper with the car's
12 emission control systems.

13 And our allegation is not that these were mere patches;
14 but these were new efforts, new attempts to evade the emissions
15 regulations, and as such, takes them out of the umbrella of
16 209(a) and puts them under --

17 **THE COURT:** Are they still actionable under the Clean
18 Air Act?

19 **MR. GRUBB:** Yes, I think they are.

20 **THE COURT:** So you're saying now we're going to have a
21 double-barrel enforcement.

22 **MR. GRUBB:** And I think that the Clean Air Act
23 contemplates -- there's a point when you're dealing with new
24 cars, before you get to that dividing line that you spoke of,
25 Your Honor, where the EPA has exclusive right to enforce these

1 regulations, and everything else is preempted.

2 But I think the Clean Air Act also speaks to cooperation
3 between states and the federal government. And I think when
4 you get to 209(d), by its plain language, deals only with new
5 vehicles. And now we're talking about used vehicles that then
6 you could have the possibility of co-enforcement.

7 Certainly, EPA could still come in --

8 **THE COURT:** You envision a system where EPA and
9 Hillsborough County will be cooperating, and San Mateo County
10 and Mendocino County, and 3,000 counties will all be
11 cooperating in some kumbaya world of cooperation and it will
12 all work just wonderfully?

13 **MR. GRUBB:** First of all, Your Honor, I don't know how
14 many of these 3,000 counties have environmental --

15 **THE COURT:** Well, if I rule your way, we may find out.

16 **MR. GRUBB:** Right.

17 **THE COURT:** That's one possibility.

18 **MR. GRUBB:** I understand. But I think that -- you
19 know, I don't know how that would work in the real world.

20 **THE COURT:** Well, that is a good idea to try to figure
21 out. Every now and then a judge is called upon to try to
22 figure out whether whatever he or she does is going to work in
23 the real world. Every now and then. It doesn't happen all the
24 time.

25 **MR. GRUBB:** And I understand. But at the same time we

1 have to look at what Congress did in 209(a) and 209(d). And,
2 you know, if they've never passed a law that didn't have
3 unintended consequences, I don't know what it is.

4 But I think that the way that these regulations are
5 written, you know, 209(d) clearly contemplates that states and
6 local governments can enforce their regulations.

7 **THE COURT:** I understand that argument. And that's
8 been well made.

9 **MR. GIUFFRA:** Your Honor, can I make one point?

10 **THE COURT:** Well, I don't know that counsel is
11 finished. I don't know, Mr. Giuffra. I want to give counsel
12 his opportunity.

13 **MR. GRUBB:** Okay. A few more points.

14 One goes to the definition of new vehicles that has been
15 endorsed by the EPA and has been addressed in some of the case
16 law where equitable or legal title to which has been
17 transferred to an ultimate purchaser. And we've had that here
18 where ultimate purchaser means the first owner.

19 And, as I believe you've noted, this is consistent with
20 the dictionary definition of having existed or been made but a
21 short time. In our case we're talking about vehicles that were
22 on the road for several years before they were recalled.

23 It's clear that the legislative intent applies to newly
24 manufactured products and not to cars that have been on the
25 road several years. And I think this is consistent with *Allway*

1 *Taxi.*

2 But for the sake of argument, you know, I know and
3 understand, certainly, that with respect to our claim on new
4 vehicles you're not going to do anything inconsistent with your
5 *Wyoming* order, and I respect that.

6 On this claim related to the used vehicles that were
7 recalled, obviously this is a much smaller class. But let's
8 say for the sake of argument you dismiss that.

9 Is there still a claim under the county rules as it
10 pertains to used and resold vehicles? Because there is
11 language in there in, I believe, *Allway* and in *Engine*
12 *Manufacturers* where they said, you know, a situation where this
13 would be permissible would be in cases where a vehicle had been
14 resold or recertified.

15 What if the original owner has resold his vehicle to
16 another person and then they bring their vehicle in pursuant to
17 the recall? Again, a smaller class.

18 But at some point if Volkswagen is employing new field
19 fixes and recalls through that doing new defeat devices, then
20 does this come outside the umbrella of EPA preemption and
21 become a situation where the county can enforce?

22 And maybe that's on resold vehicles that have then been
23 modified subject to the recall. And I think the county and
24 Volkswagen could identify what those vehicles are.

25 **THE COURT:** Well, I think they can. I'm sure you're

1 right. They can be identified.

2 Thank you very much.

3 **MR. GRUBB:** Okay.

4 **THE COURT:** Mr. Giuffra, one minute.

5 **MR. GIUFFRA:** One minute.

6 Your Honor, I should have answered your question more
7 precisely before. Section 209(a), the other side focuses on
8 the word "new motor vehicles" or "new motor vehicle engines."

9 I would urge the Court to focus on the words "relating
10 to," because clearly what relates to a new motor vehicle --

11 **THE COURT:** Thank you very much. I've got it. Thank
12 you.

13 **MR. GIUFFRA:** You're welcome, Your Honor.

14 **THE COURT:** I understand "relating to."

15 That matter is submitted.

16 I'm now going to turn to the bondholder's case.

17 And I want to thank the parties for the argument on both
18 sides. It was helpful.

19 **MR. SIMMONS:** May we be excused, Your Honor?

20 **THE COURT:** Oh, absolutely, unless you would like to
21 stay. And you're more than welcome.

22 (Pause)

23 **THE COURT:** Would counsel now restate your appearances
24 on the bondholder's suit.

25 **MR. BERG:** Ian Berg, of Abraham, Fruchter & Twersky,

1 on behalf of the lead plaintiff.

2 **MR. GIUFFRA:** And it's Robert Giuffra, Sullivan &
3 Cromwell, for the Volkswagen defendants.

4 **MR. GONZÁLEZ:** Joe González on behalf of Michael Horn.
5 I'm joined with my colleague, David Dickieson.

6 **THE COURT:** So let me start out by saying that I have
7 read the briefs and I have the arguments in mind. And the real
8 question is, is there anything you feel compelled -- I don't
9 have any questions for anybody.

10 So is there anything that you feel compelled to say that
11 isn't in your briefs? And, if so, I'll give you that
12 opportunity.

13 Plaintiff.

14 **MR. BERG:** Very briefly, Your Honor.

15 I think a lot of the arguments in defendants' brief,
16 particularly on the reply, are limited to the merits of
17 scienter rather than the pleading requirements of scienter.

18 I think some of the information has been characterized as
19 rumors or what was in the ICCT West Virginia report and whether
20 or not that had an impact.

21 And I think in a lot of the cases that you're used to
22 dealing with -- I've certainly had my share in front of you
23 before -- you're dealing with the question of if there is
24 scienter; whereas, here we're dealing more with the question of
25 when there might have been.

1 And I think discovery, limited discovery, is appropriate
2 to figure out what exactly was known in March and April leading
3 into the May bond offering.

4 **THE COURT:** I think your colleague -- Mr. Giuffra,
5 let's give him an opportunity.

6 **MR. GONZÁLEZ:** Your Honor, I don't think that's fair.
7 This is their second time --

8 **THE COURT:** Okay. You represent?

9 **MR. GONZÁLEZ:** Michael Horn, Your Honor.

10 **THE COURT:** Right. Okay. Thank you.

11 **MR. GONZÁLEZ:** I don't think that's fair, Your Honor.
12 This is their second time around, and they've had an
13 opportunity to cure the deficiencies in their pleadings and
14 they haven't.

15 Truth is, that's what they've alleged. They've alleged
16 that there was some kind of rumor being dispersed, the content
17 of which they really haven't alleged.

18 They said that there was a study and that there was a
19 rumor about the study and that various people got it. And
20 that's a rumor, especially when they're not really alleging
21 what the content of that rumor is.

22 So this is their second time around. We're going on two
23 years in this case now, and they still haven't gotten it. And
24 so, you know, for that reason, it should be subject to
25 dismissal.

1 We also point out that they haven't answered the basic
2 question that we posed both in our motion to dismiss and our
3 reply that, look, this is a false equivalence. An unverified,
4 unwritten rumor about an unpublished study is not the same
5 thing as an email from a VW employee stating that there are
6 possible emissions noncompliance issues and warning of
7 financial consequences.

8 And no amount of discovery is going to change that that's
9 a false equivalence. And no amount of discovery is going to
10 change the fact that we know what the study itself said.

11 So assuming, which they don't allege, but assuming that
12 for some reason Michael Horn had the exact knowledge that was
13 in this unpublished study, there still wasn't sufficient
14 scienter.

15 The study says itself, in very clear language, this is
16 limited and that bigger conclusions should not be drawn.
17 Nothing about financial consequences. Nothing about potential
18 mass noncompliance. Nothing about that.

19 And so I don't think it's fair, at this point, for them to
20 ask for yet another opportunity to either amend their pleadings
21 or to seek limited discovery.

22 **THE COURT:** Go ahead.

23 **MR. GIUFFRA:** Your Honor, I'd like to just direct the
24 Court to one topic, and that's it.

25 When I went back through the transcript of the argument we

1 had last July, you and I went back and forth a substantial
2 number of times about the actionability of the statements that
3 were at issue.

4 And the statements that were at issue were the
5 environmental risk factors that were in the disclosures and
6 what we had talked about in terms of R&D development that
7 Volkswagen was engaged in.

8 And I think it's important, when you look at this case, we
9 do not believe under settled law -- and I think that becomes
10 clearer when you look at the Second Circuit's decision in
11 *Waggoner* that the *Ute* presumption can apply here.

12 And I'm not asking the court -- and you can't obviously
13 look back to decisions when you have an amended complaint. But
14 they've made new allegations in their -- in their amended
15 complaint where they've made it clear that they can prove
16 direct reliance.

17 It's not impossible, as in a case like *Ute*, where the
18 party who allegedly defrauded the plaintiff said nothing.

19 And in this case, you're talking about an offering
20 memorandum that was provided to highly sophisticated investors.
21 There is not a single allegation in this complaint that any of
22 those folks read the R&D disclosures, that they read the
23 environmental R&D disclosures.

24 And the issue in this case is they don't plead any kind of
25 fiduciary duty or obligation to disclose anything.

1 And what this is, is this is a 10(b)(5)(B) case, an
2 affirmative misrepresentation case. It's not about -- they
3 don't allege VW had a duty to the sophisticated investors who
4 bought these bonds.

5 And so the problem, Your Honor, is by saying, well, it's
6 primarily about omissions because you didn't disclose the
7 defeat device issue, the flaw in that argument, and something
8 that the Second Circuit, I think, does a good job of pointing
9 out, is that in the District Court decision in the *Waggoner*
10 case, the *Barclays* case, the issue in that case was that
11 Barclays had said they had these dark pools that were
12 transparent, and they hadn't disclosed to investors that, in
13 fact, they were not as transparent as they said and that
14 certain investors were being prioritized over others.

15 And in that case the District Court said the heart of the
16 case -- the heart of the case was the omission, the fact that
17 you didn't say how you were actually operating the dark pool.

18 In this case Your Honor said, well, part of the case is
19 you may have said you were trying to comply with law on
20 environmental laws, and you may have been trying to do R&D
21 related to environmental issues, but the heart of the case,
22 Your Honor said, was, well, you didn't disclose the wrongdoing.

23 In every misrepresentation case that I deal with -- *Enron*,
24 *HealthSouth*, *WorldCom* -- the heart of the case is always
25 some -- something that wasn't disclosed, that you concealed the

1 fraud.

2 In the example of the *Maker* case, which always gets
3 bandied about, you know, GM says they have sold a million cars,
4 but they sold none. The undisclosed fact is the center of the
5 fraud.

6 And here it's that we concealed the emissions fraud. But
7 it would eviscerate the reliance requirement if all you had to
8 do was plead that the heart of the case was the -- was the
9 omitted fact.

10 **THE COURT:** So let's say I'm a company and I give you
11 an offering.

12 **MR. GIUFFRA:** Okay.

13 **THE COURT:** And the offering omits certain things in
14 it. Okay?

15 And I have you sign -- or I don't know that I have you
16 sign, but let's put that aside for the moment. But I say to
17 you, if you buy my security, you are relying on what I've told
18 you about the security in the offering memo, period. End of --
19 that's what it says. Okay?

20 Is that enough?

21 **MR. GIUFFRA:** No. And that's been rejected, in fact,
22 by the courts. And they've actually said that in the case of
23 direct reliance -- and I'll cite the case for Your Honor, the
24 *Crago* case, Northern District of California, June 12, 2017.
25 The fact that you read it --

1 **THE COURT:** That wasn't my case.

2 **MR. GIUFFRA:** No, it's not. It was not your case.

3 But you don't plead actual reliance when you just say, you
4 know, I signed -- I signed the offering memo.

5 The problem in this case --

6 **THE COURT:** No, no, no. I'm saying slightly something
7 else. I'm saying that you say to the prospective purchaser, by
8 purchasing this security, you are representing to me -- me,
9 company, offeror -- that you are relying only on what's in this
10 document.

11 **MR. GIUFFRA:** That's correct. That's what occurs in
12 all of these --

13 **THE COURT:** And you're saying that's not enough.

14 **MR. GIUFFRA:** Correct. And the cases say that. They
15 make it quite clear --

16 **THE COURT:** So, in other words, there is no such thing
17 as sort of like estoppel, that the company can come in and say,
18 wait a minute, wait a minute, you haven't proved reliance
19 because all you're saying is that you bought the security and
20 that I told you that if you buy this security, you're relying
21 on the document. And that's not good enough.

22 Have I --

23 **MR. GIUFFRA:** No, Your Honor.

24 **THE COURT:** Have I garbled that beyond any
25 recognition?

1 **MR. GIUFFRA:** Your Honor, there have been dozens and
2 dozens and dozens of 10(b) cases arising out of offering
3 memorandums. They have it all around the United States.

4 If you want to plead direct reliance, okay, which is what
5 they have to plead if they're not going to rely on either *Ute*
6 or *Basic*. And they have a problem with *Basic* because this is
7 not an efficient market, because it's a private placement,
8 which is why they had to try to jump it into *Ute*.

9 If they can plead direct reliance, they would have to say
10 that I looked at the offering memorandum, I looked at the
11 disclosures about environmental risk, I looked at the
12 disclosures about your R&D, and I relied upon them to buy this
13 bond. Okay.

14 They don't plead that in this complaint. And that's what
15 the --

16 **THE COURT:** Well, no, I assume they didn't do that. I
17 mean, let's assume for the sake of our discussion they didn't
18 do that.

19 **MR. GIUFFRA:** No.

20 **THE COURT:** But let's say the offeror says to them,
21 "By purchasing the security, you are representing to me that
22 you are relying only on these things."

23 **MR. GIUFFRA:** But, Your Honor, that doesn't do it.
24 You have to specifically --

25 **THE COURT:** All right. I have to think about that.

1 **MR. GIUFFRA:** Let me give you -- let me give you --

2 **THE COURT:** So there is no sort of estoppel?

3 **MR. GIUFFRA:** No. Not that I'm aware of.

4 The reason -- the problem the folks have on the other side
5 is they can't rely on *Basic* because, Your Honor, there is no
6 efficient market in these bond cases.

7 So in these types of bond cases -- and they happen every
8 day -- what the plaintiff will say is, I relied on the offering
9 memorandum, on the alleged misstatement, to buy the security.

10 They don't make that allegation in this case. They don't
11 make it for one reason or another.

12 What they did add to their amended complaint, in paragraph
13 226 -- what they allege in -- excuse me. At 349, excuse me,
14 they said they can demonstrate they were aware of the alleged
15 misrepresentations because they had the offering memorandum.
16 They admit it.

17 It's not like in the *Ute* case where the Indians were
18 dealing with, one, people who were making market in the
19 securities. They never said anything to them about how they
20 were actually dealing in that market, how they were basically
21 taking the stock, buying it from the Indians for, say, \$100 and
22 selling it to someone else for \$200.

23 And in that case, because they were making the market, the
24 Supreme Court in *Ute* said there was a relationship of trust
25 between the Indians and the person who had set the market in

1 the securities.

2 They don't allege any kind of fiduciary duty or any
3 special relationship with Volkswagen that obligated Volkswagen
4 to say anything.

5 So, look, if Volkswagen had not said anything about
6 anything, they couldn't have -- they couldn't -- they have to
7 tie it, in order to have a claim, to the offering memorandum.

8 And the reason you and I went back and forth in July was
9 what they tie it to are the environmental risk factors and the
10 environmental R&D disclosures.

11 And so what they're now saying, well, you know, this is
12 primarily an omissions case. And Your Honor said that, it's
13 the heart of the case, the omission.

14 In every fraud case involving a misrepresentation the
15 heart of the case is what you didn't tell the other side. But
16 that doesn't suddenly allow you to get into -- into -- into
17 rely upon the *Ute* presumption, because, otherwise, you would be
18 writing reliance out of the securities laws. And so what
19 people have to do in a case like this is say, "I relied upon
20 these particular disclosures," and they didn't say it.

21 And I think, Your Honor, if you were to look at the Ninth
22 Circuit cases, right, dealing with *Ute*, none of them -- none of
23 them are cases involving -- in all of the cases, they're all
24 cases where *Ute* was not held to apply where there was a case
25 involving both misrepresentations and omissions.

1 And I would urge the Court to look at a case called
2 *Loritz*. It's Central District of California 215. It's
3 completely ignored by the plaintiffs. It's 2015 Westlaw
4 6790247.

5 In that case --

6 **THE COURT:** 679?

7 **MR. GIUFFRA:** It's 6790247, Central District of
8 California 2015.

9 In that case the plaintiff, as in this case, claimed the
10 environmental risk factors were misleading because they
11 didn't -- because they omitted that the defendant had not
12 complied with environmental laws.

13 And the court refused to apply *Ute* because the rationale
14 behind *Ute* didn't apply because it was not impossible for the
15 plaintiff to say that they did rely. And so this plaintiff
16 clearly can say, "I relied upon what was in the offering
17 memorandum," and they haven't pled that.

18 And so what they've got, Your Honor -- and you're in
19 exactly the same position as --

20 **THE COURT:** Well, I'm assuming that that's correct.
21 I'm assuming the assertion that the plaintiffs did not rely on
22 the offering memo is correct.

23 **MR. GIUFFRA:** They have not pled that they relied upon
24 the environmental disclosures or --

25 **THE COURT:** I think I need to know because I think --

1 you're saying that they have failed to plead. And that -- I'm
2 not arguing that, that they relied upon the offering memo.

3 But, of course, if they were going to come back to me and
4 say, "Well, we did; I'm sorry it's not there," you know, I
5 don't know why I wouldn't give them leave to amend, if that's
6 where we are.

7 **MR. GIUFFRA:** That would be fine if they did that, but
8 they don't have anything that required reliance --

9 **THE COURT:** So I'm asking plaintiff's counsel, have I
10 missed something?

11 **MR. BERG:** I think so.

12 **THE COURT:** Okay.

13 **MR. BERG:** If you look at paragraph 349 of the
14 complaint.

15 **THE COURT:** Paragraph 349 of the first amended
16 complaint?

17 **MR. BERG:** Yes. It says direct purchasers -- only the
18 direct purchasers of the bonds also directly relied on false
19 and misleading offering memorandums based on the express
20 uniform acknowledgment and representation that, by accepting
21 the offering memorandum, each offering investor relied on the
22 information contained in this document.

23 And in a brief they made the point that -- in paragraph
24 349 and in our briefs we make the point that that's
25 misstatements and omissions.

1 **THE COURT:** All right. Anything else?

2 **MR. BERG:** Just briefly.

3 I mean, I tried very much to stick to your only say new
4 things, and I just have one point to make to each of the
5 opposing counsel.

6 You raised the question about estoppel. That same
7 representation in the offering memorandum was used to dismiss
8 claims of false statements that were outside of the offering
9 memorandum. And that's addressed more in our briefs.

10 But I would like --

11 **THE COURT:** Well, I think that's generally why it's
12 put in.

13 **MR. BERG:** Right.

14 **THE COURT:** To cabin the field of representations,
15 actual representations.

16 **MR. BERG:** Right. So if you're signing a statement
17 that says, "I'm relying only on this information," and that's
18 used to preclude claims on other information, it does also say
19 that you did rely on that information.

20 But I want to get back to, again, the assertion that there
21 was a rumor about what the West Virginia report may have been.
22 I think our complaint makes clear that we allege that once the
23 rumor, using their term, once the rumor -- once the information
24 that this report was coming out was known, that Defendant Horn
25 and others were in the process of formulating a regulatory

1 response.

2 And I think that's the difference here, is that they know
3 that to an extent their emissions scheme is going to be exposed
4 and they're going to have to address it with regulators.

5 And when you're doing an offering, the standard is still
6 material information. It's still whether or not it affects the
7 total mix. You don't need that special relationship that
8 Mr. Giuffra was talking about.

9 Thank you.

10 **THE COURT:** All right.

11 **MR. GONZÁLEZ:** Briefly, Your Honor. Referring to
12 paragraph 170 and 171 of the amended complaint, that's not
13 precise. There's no particularity to this information. No
14 context.

15 It's that some executives at some point asked for some
16 follow-up information regarding this rumor. That's far and
17 away from not even close to the pleading standard of the PLSRA.
18 That's our first point.

19 The second point is this. If they're linking scienter to
20 the report, the report itself was published -- well, it's dated
21 May 15th, 2014. And so that begs the question. If it was out
22 in the public by then, they had the exact same information.

23 So the reality is the report didn't give anybody that
24 indication or -- and if it did, then it would be devastating to
25 their case.

1 **THE COURT:** Thank you.

2 Mr. Giuffra, finally, last word.

3 **MR. GIUFFRA:** Last words.

4 In order to plead direct reliance, they need to plead that
5 someone from Puerto Rico, who is their plaintiff, Mr. Smith,
6 read the offering memorandum at all, which they don't plead at
7 paragraph 349.

8 All they say is it was -- all it says is direct purchasers
9 relied on false -- it's just generic pleading without any
10 particularized pleadings.

11 And they have to plead that someone who bought these bonds
12 actually read the offering --

13 **THE COURT:** Well, he says that's what they did.

14 **MR. GIUFFRA:** No, but, Your Honor?

15 **THE COURT:** That's what that allegation means.

16 **MR. GIUFFRA:** But if you read it, it says
17 accordingly -- what it says is they relied on the false and
18 misleading offering memorandum based on the acknowledgment.
19 That doesn't do it.

20 And, in fact, the *Crago* case --

21 **THE COURT:** Do you understand his argument?

22 **MR. BERG:** I understand it. I don't agree with it.

23 **THE COURT:** Well, I mean, what he's saying is that the
24 argument -- he's saying that the allegation is a conclusion, is
25 a conclusory term.

1 **MR. GIUFFRA:** Correct.

2 **THE COURT:** And he's saying what it misses is that
3 plaintiff must say, I read this piece and thereupon relied on
4 what it said.

5 And he says, "I relied on what it said," but he doesn't
6 indicate that he read it. Now, I'll try to deal with that in
7 some cosmological way. But, I mean, I'm just trying to figure
8 out whether, if I gave you leave to amend, asking the question
9 directly, would the amendment say that your client read that
10 document? Yes or no?

11 **MR. BERG:** I can't answer that.

12 **THE COURT:** You can't answer that. Okay. That's
13 fair. You're not your client. I mean, I understand that.

14 **MR. BERG:** If we were at trial and I submitted as
15 evidence --

16 **THE COURT:** Fortunately, we're not at trial.

17 **MR. BERG:** I understand that. That's my point. But
18 if I submitted as evidence a declaration from someone in Puerto
19 Rico saying, "I read this offering memorandum," that would be
20 evidence towards reliance, that would be waved.

21 Here, the pleading standard is --

22 **THE COURT:** They're making a point of it. So I want
23 to deal with that. Anyway --

24 **MR. GIUFFRA:** Your Honor --

25 **THE COURT:** Anyway, I'll try to figure out how to deal

1 with that.

2 **MR. GIUFFRA:** Your Honor, we've been asking them to
3 plead direct reliance for over a year. He's standing here
4 today, he can't say whether the people who are actually the
5 plaintiffs read it.

6 And I would urge the Court to look at the *Crago* case. The
7 *Crago* case says that the fact that somebody read and understood
8 an account agreement doesn't plead actual reliance on the
9 documents.

10 And there's another case which we cite, *Turbobien*, also in
11 California. You've got to plead reliance with particularity.

12 Even sitting here today, they have a generic conclusory
13 direct reliance allegation. *Ute* clearly doesn't apply.

14 So what the Court should do is dismiss the complaint. Let
15 them try to plead direct reliance, because they can't rely on
16 the only two presumptions that would otherwise apply.

17 **THE COURT:** Thank you. We're in recess.

18 Submitted.

19 (At 11:24 a.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

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

DATE: Friday, February 2, 2018

Katherine Sullivan

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter