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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

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

San Francisco, California
Wednesday, January 23, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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

LIEFF, CABRASER, HEIMANN & BERNSTEIN LLP
275 Battery Street - 29th Floor
San Francisco, California 94111

BY: ELIZABETH J. CABRASER, ATTORNEY AT LAW
KEVIN R. BUDNER, ATTORNEY AT LAW
PHONG-CHAU G. NGUYEN, ATTORNEY AT LAW

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

BY: DAVID S. STELLINGS, ATTORNEY AT LAW

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

BY: RACHEL L. JENSEN, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Marla F. Knox, RPR, CRR
Official Reporter

1 **APPEARANCES:** (CONTINUED)

2 For Plaintiffs' Lead Counsel and Chair of Plaintiffs' Steering
3 Committee:

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

5 **BY: STACEY SLAUGHTER, ATTORNEY AT LAW**

6 For Defendants FCA US LLC and Fiat Chrysler Automobiles N.V.:

7 SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004

8 **BY: ROBERT J. GIUFFRA, JR., ATTORNEY AT LAW**
MEGAN BRADLEY, ATTORNEY AT LAW
9 **JONATHAN J. OSSIP, ATTORNEY AT LAW**

10 For Defendant Robert Bosch GmbH and Robert Bosch LLC:

11 CLEARY, GOTTLIEB, STEEN & HAMILTON LLP
2000 Pennsylvania Avenue, NW
Washington, D.C. 20006

12 **BY: MATTHEW D. SLATER, ATTORNEY AT LAW**

13 For U.S. Department of Justice:

14 Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611

15 **BY: LEIGH RENDE, ATTORNEY AT LAW**
JOSEPH WARREN, ATTORNEY AT LAW

16 For State of California Department of Justice:

17 Office of the Attorney General
600 West Broadway, Suite 1800
San Diego, California 92101

18 **BY: JUDITH FIORENTINI, SUPERVISING DEPUTY**
ATTORNEY GENERAL
19 **JON WORM, DEPUTY ATTORNEY GENERAL**

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1 Wednesday - January 23, 2019

10:07 a.m.

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

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4 **THE CLERK:** Calling multi district action 17-2777, In
5 Re: Dodge Chrysler Jeep EcoDiesel Marketing Sales Practices
6 and Products Liability Litigation.

7 Counsel, please approach the podium and state your
8 appearances for the record.

9 **MS. RENDE:** Good morning, your Honor, Leigh Rende for
10 the United States. My co-counsel, Joseph Warren, will be
11 speaking on behalf of the United States today.

12 **THE COURT:** Okay. Thank you, Ms. Rende. Good
13 morning.

14 **MS. CABRASER:** Good morning, your Honor, Elizabeth
15 Cabraser, Plaintiffs' lead counsel and on behalf of the PSC.
16 With me are my partners David Stelling, Kevin Budner, Phong
17 Nguyen and a number of the members of PSC.

18 **THE COURT:** Great. Thank you, Ms. Cabraser.

19 **MS. FIORENTINI:** Good morning, your Honor, Judith
20 Fiorentini on behalf of the Attorney General's Office for the
21 State of California and the California Air Resources Board, and
22 along with me today is my colleague John Worm.

23 **THE COURT:** Great. Good morning. Thank you,
24 Ms. Fiorentini.

25 **MR. GIUFFRA, JR.:** Good morning, your Honor, Robert

1 Giuffra with Sullivan and Cromwell for the FCA Defendants. I'm
2 here this morning with Megan Bradley and Jonathan Ossip, and it
3 is good to see you again.

4 **THE COURT:** Good to see you. Thank you, Mr. Giuffra.

5 **MR. SLATER:** Good morning, your Honor, Matthew Slater
6 of Cleary Gottlieb on behalf of the Bosch Defendants.

7 **THE COURT:** Thank you, Mr. Slater.

8 **MR. FEINBERG:** Good morning, your Honor, Kenneth
9 Feinberg, Settlement Master in this litigation.

10 **THE COURT:** Great. Thank you, Mr. Feinberg. So the
11 first question I have is to Mr. Giuffra, how was Disneyworld?
12 Anything to report?

13 **MR. GIUFFRA, JR.:** It was great, your Honor. I still
14 think the one in California is better.

15 **THE COURT:** Thank you. That is the right answer.
16 Smart lawyer.

17 **MR. GIUFFRA, JR.:** Actually, in another case I had a
18 big discussion with Judge Breyer about this.

19 **THE COURT:** I see. Okay. Well, I try to follow Judge
20 Breyer's footsteps in many ways so.

21 Well, let me first commend and thank the parties for
22 working so hard and efficiently and effectively in trying to
23 resolve this very important case as well as the Special Master,
24 Mr. Feinberg, who has been, I think, instrumental in making
25 sure that the discussions continue on track. I know this has

1 been a complicated case. In some ways less so and in some ways
2 more so than the Volkswagen case. Just looking at the consent
3 decree as well as the settlement agreement as well as the
4 collateral proceedings from the State Attorney General -- the
5 49 State Attorney Generals makes one realize how complicated
6 all the parameters were; and as I get into the consent decree,
7 it made me realize why this is something you couldn't do in a
8 week in terms of hammering out the terms. It is complicated.

9 So as I have stated at the outset, I think the number one
10 goal in this case was to get a fix done because every day that
11 a fix is not done we have 100,000 cars on the road that are
12 emitting excessive matters that are harmful to the environment
13 and to the population. So, I'm very pleased that the parties
14 have come together and reached the resolution they have. I
15 understand there are a couple outstanding matters still, and
16 perhaps I should call upon Mr. Feinberg to give the Court an
17 update as to where we are at.

18 **MR. FEINBERG:** Thank you very much, your Honor. As
19 Your Honor has pointed out, this has been an extraordinarily
20 difficult, complex litigation. We are on the verge of -- I
21 think, in my long experience -- a real great success, and so
22 far the documents that have been filed, the settlement
23 agreement, the consent decree, we are just about there subject
24 to preliminary approval, subject to a fairness hearing but we
25 are on the verge.

1 Just a few minutes, your Honor, I just want to thank the
2 parties who helped get us to this point. Joe Warren and Leigh
3 Rende -- and I'm going to get in trouble a little bit, your
4 Honor, because there are a lot of other people -- but the
5 individuals that I dealt with on day-to-day basis -- their
6 teams were terrific -- but Joe Warren and Leigh Rende for the
7 United States -- sometimes people say the Government is a dirty
8 word; but I will tell you talk about the Government performing
9 in the public interest, what they did in this case has been
10 remarkable with their entire agency and DOJ teams.

11 Also Judith Fiorentini and Jon Worm representing the State
12 of California and CARB, outstanding; and they were 3,000 miles
13 away, but we were in constant communication to try to make sure
14 that California was protected -- protected in this settlement.

15 Bob Giuffra, representing SCA, and his team -- a lot of
16 people -- but I would be glad to settle any case with Bob in
17 the room. He knows how to get to yes; and he is very, very
18 effective, and he never takes it too personal; and he is a
19 very, very good lawyer. And Matt Slater, representing Bosch --
20 not exactly Bob Giuffra's style -- but in a case like this,
21 Matt was extraordinarily effective in sitting in the second row
22 and watching this case develop; weighing in when necessary and
23 a classic example of a lawyer who knows how to get the job done
24 without posturing and without wasting words.

25 And then, of course, the PSC, Elizabeth Cabraser, Joe Rice

1 and a special word of thanks -- from me at least -- to David
2 Stellings who day-to-day interact acted with me on behalf of
3 the PSC and deserves a tremendous amount of credit in doing the
4 necessary negotiating and work for the PSC with Elizabeth and
5 Joe. David's availability and help was tremendous.

6 Finally, as you pointed out, Judge, a shadow in this case
7 but a huge impact was David Nachman representing the State AGs.
8 David was not a litigant in the case, but his constant
9 interaction with all of the parties, especially the Settlement
10 Master, made it clear that global peace required David's
11 acquiescence and ratification on behalf of the State AGs; and
12 that's what we received.

13 So all in all, Judge, I just wanted to thank these
14 individuals on behalf of the team. They had other people very
15 much in the room, especially the federal government; and they
16 will send back the signal that I appreciate it, of course, and
17 the Court I know appreciates all of their effective work.

18 The settlement that has been docketed, as I say, is on the
19 verge of success. I think Your Honor has a few questions that
20 are very, very important. The legal fee issue, it remains
21 outstanding. I'm confident that we can get it done. With
22 those few caveats, which are important challenges, but we are
23 on the verge of a great success; and I wanted to thank the
24 Court for its oversight, its involvement and its encouragement.
25 Thank you.

1 **THE COURT:** Thank you. Let me echo the remarks that
2 you made, and you know better than anyone, certainly than I,
3 how instrumental each of the parties have been in making this
4 happen; but I want to reiterate my thanks to you, Mr. Feinberg,
5 for outstanding service; and I don't think Mr. Miller would
6 have done any better job than you did. We are not missing
7 anything due to the fact that he seems to be unavailable at the
8 moment. You have been terrific and comply with everything that
9 I have asked for in terms of updates and keeping the Court
10 informed without breaching confidentiality and making sure that
11 all the parts -- there are so many moving parts to this as
12 there was in the Volkswagen case -- to make sure that those are
13 all fitting.

14 So let me just take care of one administrative matter. I
15 did receive, as did you, the letter from Mr. Nachman
16 indicating, number one, the resolution that had been reached
17 between the 49 State's Attorney Generals and Bosch and Fiat
18 Chrysler. Substantial settlements with both monetary and
19 injunctive relief on their parts, not part of this case
20 technically but go hand-in-hand with what you all are doing
21 here, but the most important thing is that he has had a chance
22 to review the settlement papers in this case and indicates his
23 approval thereof; and that it all fits together with what the
24 other State's Attorney Generals have been doing. And so -- we
25 have checked with his office. There is no objection to making

1 this part of the record having filed his letter with exhibits,
2 and I want to make sure none of the parties here have any
3 objection to filing this since it is a comment on the
4 settlement here. Any objection to that?

5 **MR. GIUFFRA, JR.:** No objection from Defendants, your
6 Honor.

7 **MS. CABRASER:** No objection from Plaintiffs, your
8 Honor.

9 **MR. WORM:** No objection.

10 **MR. WARREN:** No objection from the United States,
11 Your Honor.

12 **THE COURT:** All right. Then we will order his letter
13 filed. I think it is important for the public record that the
14 public be able to see the reaction and as well as the --
15 Mr. Feinberg put it -- sort of the shadow of other negotiations
16 that have been going on that are coordinated in a way with what
17 is happening here.

18 So there are two -- I have a number of questions, but
19 there are sort of two outstanding ones that we have to address.
20 One that Mr. Feinberg alluded to is the status of the fee
21 negotiations with respect to the attorney fee for the PSC --
22 members of the PSC -- I understand from Mr. Feinberg that there
23 have been substantive negotiations; that the parties have
24 narrowed their differences to some degree, but they are not
25 there yet. That there is a number that is currently placed in

1 the proposed notice, but I'm going to assume that that is a
2 placeholder number. That is not the final number, and I expect
3 that that not to be the final number. But I am going to direct
4 the parties to -- and Mr. Feinberg to get together and try to
5 resolve that within the next 7 to 10 days. I would like to get
6 that done and have a specific number to be able to announce to
7 the class so we can get comments -- meaningful comments back
8 from the class and the class noticed. It is going to take a
9 few days anyway to get the class notice together, assuming I
10 grant preliminary approval. That is one directive.

11 The other question is now with the shutdown and the effect
12 on the Government's ability to get post notice and get comments
13 through the Federal Register, which is necessary predicate in
14 order for the Government to seek final -- and for the Court to
15 give final approval. And that final approval, I understand
16 why, has to go hand-in-hand with the consumer class action
17 final approval. So I am concerned if we work -- that's why I
18 wanted to ask you, Mr. Warren -- if we work backwards, if we
19 look towards April or May -- I'm thinking maybe May 2nd or
20 May 3rd, which is within the realm of the suggested date set
21 for the final approval hearing. If we work backwards, I don't
22 know how much time you need. I know you need 30 days notice of
23 comment, and sometime after that in order to get something to
24 the Court. Could you help me with the scheduling and how much
25 breathing space do we have?

1 **MR. WARREN:** At this time, your Honor, we anticipate
2 that we have approximately 90 days to complete the public
3 comment period, to review those public comments and to file our
4 motion with the Court. And so we don't see the government
5 shutdown at the present time posing a threat to that schedule.
6 We think that we have a cushion that should allow us to
7 complete that process. Of course, we don't know what the
8 comments will be and their nature and scope. And so, you know,
9 it is a little bit of guesswork as to how much time it will
10 take to review those. We at present think the 90-day period is
11 adequate.

12 If the government shutdown continues, our proposal is that
13 we report to the Settlement Master in a two-week time period,
14 and at that time hopefully -- if we haven't had the opportunity
15 to start the public comment period -- that we will have a
16 proposal for him as to how we should -- how we will be able to
17 do so.

18 **THE COURT:** So 90 days -- if we set the date, for
19 instance, to give ourselves maximum amount of time, May 2nd,
20 May 3rd, that means the target would be to post this in early
21 February or sometime in -- within the first --

22 **MR. WARREN:** Right. I think if we are getting to
23 mid-February and we haven't started the public comment period,
24 that that is a potential threat to being able to be -- to have
25 before Your Honor before the April 29th deadline, our motion

1 for entry. Our ambition would be that we would try to file
2 that a week or two before the scheduled hearing to give you
3 time to review our motion. So we are contemplating 30-day
4 public comment period and 30 days or so for our ability to
5 review those comments and to -- and an additional period for
6 filing our motion with the Court.

7 **THE COURT:** What -- now, is the Federal Register
8 operating only for emergency purposes now or what is -- what is
9 happening?

10 **MR. WARREN:** The Federal Register has provided notice
11 that it is publishing on a limited basis. They will publish in
12 certain instances. For them to do so, they require a
13 certification by the agency that the publication is permissible
14 under the Anti-Deficiency Act. So specifically the DOJ would
15 need to certify that the publication is necessary to safeguard
16 human life, protect property or provide other emergency
17 services consistent with the performance of function and
18 services exempted under the Anti-Deficiency Act.

19 **THE COURT:** Well, let me ask, if push came to shove --
20 I mean, as I stated at the outset of this hearing and in this
21 case, that there is definitely a public health concern that
22 every day that we are not able to get the fix started that is
23 another day of 100,000 cars polluting. It seems to me there is
24 a -- at least a decent argument that getting this thing
25 published for notice of comment might comply or fit within the

1 definition of an emergency under the Anti-Deficiency Act.

2 **MR. WARREN:** At this time, your Honor, we haven't
3 engaged in the analysis to determine whether the exemption
4 would be appropriate or apply in this case in part because we
5 don't currently see the shutdown as being a -- as I said, a
6 threat to our schedule to be done by the end of April; but our
7 hope is, you know, if it does threaten that schedule when we
8 report to the Settlement Master in two weeks, we will have
9 options that we will be able to propose to him that would allow
10 the public comment period to begin in a way that allows us to
11 be finished on time.

12 **THE COURT:** And how long does it take -- assuming the
13 worst case scenario, if the government is not open in the next
14 two to three weeks, and we are still in the same situation --
15 how quickly, can the department, if it seeks to certify an
16 exemption and get it published, is there lag time there?

17 **MR. WARREN:** There are potential other alternatives
18 that might be available to us. For instance, under the
19 Department of Justice's regulations it doesn't necessarily
20 specify that public notice has to be in the form of the Federal
21 Register notice. One option that we might explore is the
22 possibility of some other alternative notice to the public
23 that -- provided it's adequate -- that would allow the public
24 comment period to begin.

25 **THE COURT:** I see.

1 **MR. WARREN:** At this time we really don't know what we
2 will be proposing to the Settlement Master if that should
3 become necessary.

4 **THE COURT:** But you think there are some plan Bs or
5 ways to try to effectuate notice so we can still have the
6 hearing? If I put it towards the end of the period, you all
7 suggest, to get it done.

8 **MR. WARREN:** I don't want to oversell. We hope to
9 have a plan B. We are cautiously optimistic that we will have
10 a plan B. It is possible that we won't have a plan B. The
11 worst case scenario is we would ask the Court for some
12 additional time if that is necessary. That is not our
13 preferred course of action. We don't plan to resort to that.
14 We are, again, cautiously optimistic we will have a plan B if
15 that's necessary.

16 **THE COURT:** Have you looked into the question whether
17 the Court has the jurisdiction and authority to order
18 publication?

19 **MR. WARREN:** We have not looked into that at this
20 time.

21 **THE COURT:** You might look into that.

22 **MR. WARREN:** We will certainly do so.

23 **THE COURT:** All right. Well, I appreciate your update
24 on that. That is the one concern I have because obviously we
25 can't go forward with final approval unless everything comes

1 together; and in the notice that goes out to the class, we will
2 put a date certain in, and I hate to then change it. I mean, I
3 have done it before, but it's not optimal.

4 **MR. WARREN:** We agree with that, Your Honor.

5 **THE COURT:** Okay. Thank you. Appreciate it. Let me
6 just ask a couple of technical -- well, questions to make sure
7 I understand everything. First of all, again, I appreciate the
8 parties responding to the Court's request for supplemental
9 information; and that was very helpful. The exclusions are
10 fairly intricate and very detailed, and I think I understand
11 the rationale part of it is both a matter of incentive and
12 preventing perverse incentives as well as bringing some clarity
13 and limiting the number of potential former owners, et cetera;
14 but I just want to make sure I understand that so long as you
15 are a current owner and your car is operable, you are in the
16 class and eligible for the fix?

17 **MS. CABRASER:** That's correct, your Honor.

18 **THE COURT:** The exclusions are really about who falls
19 into the definition of former owners and lessees who can
20 participate in the payment scheme. Do I have that correct?

21 **MS. CABRASER:** That's correct, your Honor, and really
22 the exclusions, although intricate, are -- relate to a very,
23 very small number of -- for the most part of potential
24 situations that have not occurred. And so really one of the
25 goals of having those exclusions is to give notice to people in

1 advance of the consequences of certain actions so that people
2 can make their decisions on an informed basis. It really is
3 protective and proactive.

4 I would say this: For the majority of the vehicles,
5 approximately 75% of them have a single owner. So the \$3,075
6 per vehicle owner payment is what will go out. There are
7 99,986 VINs in the class at this point; and with respect to
8 vehicles that would have a current and former claim, there are
9 approximately 25,000 of those. So you see the way the numbers
10 work. It is a little bit upside down. It is a very simple
11 class definition with respect to the majority of owners,
12 lessees and former owners and lessees; and then we have a very
13 detailed specification so we don't catch anyone unaware and so
14 that we don't sweep someone into a settlement class definition
15 who does not have a possibility of obtaining something under
16 the settlement if they make a claim. We didn't want to be in
17 that situation.

18 **THE COURT:** And the people who are excluded obviously
19 don't waive --

20 **MS. CABRASER:** They don't waive claims. They have
21 whatever claims they have. They can pursue them or not as they
22 see fit.

23 **THE COURT:** While you are up here, let me ask you: I
24 assume the PSC has looked very closely at the performance
25 testing and is satisfied.

1 **MS. CABRASER:** We have, Your Honor, and we have
2 consulted with our experts; and we are satisfied with the
3 representations contained in the consent decree documents which
4 are also replicated in the class notice with respect to
5 essentially no impact on performance, MPG, et cetera. The idea
6 is that if you drive your vehicle after the AEM, after the fix,
7 the same way under the same conditions that you drove it
8 before, there should be no change, no change is expected.

9 **THE COURT:** So mileage -- the tests indicate that the
10 mileage is not adversely affected?

11 **MS. CABRASER:** The mileage stays within the same
12 average. It stays within the advertised averages; and to the
13 extent and to the -- in the remote possibility that someone
14 might experience some minimal variance, that is baked into the
15 compensation per vehicle number. So that is not a deficit
16 under the settlement; but we didn't have to go to the elaborate
17 lengths we did, for example, in the VW settlement where we were
18 negotiating settlement without knowing what the fix would be,
19 without having the testing results in. Here, we are all very
20 fortunate -- although it complicated the negotiation process --
21 at the end of the day, while we were negotiating, while we were
22 litigating, and while we were preparing for trial, the vehicles
23 were being tested. The emissions repairs were being developed
24 and fixed. The promise at the outset of the case that no
25 buyback would be required because these vehicles could be

1 brought into original compliance was fulfilled. And I think we
2 are all fortunate. We are all beneficiaries of that, the
3 vehicle owners, the environment and the parties that that could
4 come true.

5 But we -- our motto is trust and verify. We did have
6 consulting experts, technical experts. We also had auto
7 industry experts, as you know, looking at the economic aspects
8 of the claims and of the compensation so that we could be
9 satisfied. We not only, you know, looked at the testing of the
10 vehicles for emissions; but we looked at economics testing to
11 make sure that our class members were recovering the originally
12 undelivered portion of that diesel premium. They are getting
13 that back. Thank you.

14 **THE COURT:** Let me ask you, while you are up here, on
15 the notice -- I want to make sure -- I know it's in there, and
16 I have seen it in various places that it is clear to the
17 consumer that for eligible owners to get the 3,075 or the
18 2,460, that it is coupled with their getting the fix.

19 **MS. CABRASER:** That's correct, Your Honor.

20 **THE COURT:** When you look at the various notices, I'm
21 not sure that's -- you kind of have to hunt for that. I'm
22 wondering whether that can be made explicit.

23 **MS. CABRASER:** We are happy to make it clearer. We
24 are happy to make it clearer by front loading it into the
25 notice. We will take a look at that in terms of bold face.

1 Whatever we can do graphically and through placement to make
2 that clear, we will. As you know, we will have a number of
3 days before the notices are actually mailed and e-mailed. So
4 we can take a look at that. We have some blanks to fill in.
5 The schedule, obviously needs to be filled in.

6 And I would note this: That while the long form notice
7 certainly is a long form notice, and it is complicated, part of
8 the reason for that is this class notice is doing triple duty.
9 It is doing duty as the consumer class notice. It is doing
10 duty as the consent decree notice for the United States and for
11 California unlike previous settlements where there were -- not
12 competing notices going out -- but multiple notices going out,
13 which sometimes proved a little challenging for class members
14 or members of the public to navigate. This way it is all in
15 one place; and so, you know, there is some density. We will
16 take one more run-through at it to make sure that we can --
17 well, we can follow the automotive engineering maximum of
18 adding lightness and simplicity wherever we can.

19 **THE COURT:** Good. That's the one thing I thought
20 could be clarified. Otherwise, it's --

21 **MS. CABRASER:** Your Honor, there is another -- there
22 is one issue that was raised this morning with me regarding the
23 notice program, not the content of the notice but the notice
24 program.

25 **THE COURT:** Yes.

1 **MS. CABRASER:** As you know, the main thrust of the
2 notice program is direct notice through mailing of the short
3 form, one-page color postcard notices and emailing as well, and
4 then, of course, social media, multimedia.

5 **THE COURT:** I do have a couple questions about that.

6 **MS. CABRASER:** Media coverage. But the more
7 traditional part of that notice program is the print
8 publication, and this morning FCA raised with me, you know, are
9 these the most cost-effective publications? You know, do we
10 need these publications? How do we get the reach? And I
11 indicated that we would look into that with our notice
12 provider. It won't change the notice program. It won't change
13 the fact that there would be print notice; but, it's a Rule
14 23(c) issue as well as a Rule 1 issue, which is you get the
15 best most reach for the least amount of money and you do it as
16 effectively as possible. So we are going to take a second look
17 at that; and if we need to change the publication mix to
18 improve that, and make it more cost effective, we will do that.
19 But that doesn't change timing. It doesn't change content, and
20 it doesn't change the basic components of the notice program.

21 **THE COURT:** All right. Well, let me ask you -- I'm
22 glad to hear that because I think that is definitely worth
23 looking at -- I just want to make sure I understand that the --
24 through this third party source, IHS Market, you will have or
25 the administrator will have notice by using VIN numbers.

1 **MS. CABRASER:** Yes.

2 **THE COURT:** The most current registered address.

3 **MS. CABRASER:** Yes, that's correct.

4 **THE COURT:** So that presumably people register their
5 vehicles, it is pretty current, at least within a 12-month
6 period I would think.

7 **MS. CABRASER:** Yes, and even more current than that;
8 and there is always a process of re-noticing and re-mailing.
9 No matter how up-to-date an address list is someone has always
10 moved. The average person moves once every 4.5 years. The
11 notice provider knows that they will be re-noticing and that
12 they will be using different techniques to make sure that
13 notices -- direct notices are delivered to everyone that can be
14 reached.

15 **THE COURT:** And the e-mail, what percentage of the
16 class do you think we have e-mail addresses for? Do we have
17 any idea?

18 **MS. CABRASER:** Very high percentage. I don't have the
19 precise figures.

20 **THE COURT:** Most?

21 **MS. CABRASER:** But most class members will have at
22 least one e-mail address, and in our joint response we
23 explained how we find the best e-mail address; and we do
24 everything possible to get past the barriers to people actually
25 reading their e-mails.

1 **THE COURT:** On that, can you explain this first step,
2 the hygiene and verification, however you identify the e-mail
3 addresses currently in use? Do you have any understanding how
4 that actually works?

5 **MS. CABRASER:** I do not have any understanding of how
6 that actually works other than knowing that Angeion, who does
7 e-mail notice, that is the state of the art technique for
8 finding the right and the best e-mail addresses.

9 **THE COURT:** Do you have any idea of what -- if they
10 have been using these techniques, how successful they have been
11 in prior cases? Do we have any track record?

12 **MS. CABRASER:** I know in -- I know in the Volkswagen
13 settlement, where we weren't quite at the state-of-the-art we
14 are today, we had a similar percentage of e-mail addresses for
15 class members; and the e-mail noticing program was very
16 successful. It was done through re-e-mailing using different
17 techniques, and Angeion reviewed those techniques as utilized
18 and reported on by the notice administrator in Volkswagen to
19 come up with their own techniques.

20 So what we do in every case, your Honor, is -- the
21 state-of-the-art is always changing, as you know. Techniques
22 is changing. Technology is changing, and what good notice
23 providers and settlement administrators do is they always build
24 on and learn from the last case. And when we put this out for
25 bid, among the leading providers, that was something we were

1 very interested in; making sure that the state-of-the-art would
2 be used because we are operating under an explicit allowance
3 now to use electronic means of notice under new Rule 23(c)
4 with, of course, all the caveats that go along with it. We
5 can't guarantee that people open their mail rather than putting
6 it in the circular file. I think courts are not yet as
7 comfortable with the idea that e-mail notice is constructive
8 notice and for that reason, we asked the providers to be very
9 transparent about how they do what they are doing and to always
10 improve their techniques.

11 So I will make sure that when Angeion provides its
12 declaration of the implementation of the notice program, that
13 you have a more fulsome explanation of how that mechanism
14 works; or if you would like it now, we can have it submitted
15 to, Your Honor.

16 **THE COURT:** Well --

17 **MS. CABRASER:** If I tried to explain it today, I would
18 mangle it.

19 **THE COURT:** Let's do this: I would like for the
20 record if you could supplement maybe have Angeion provide a
21 supplemental declaration explaining this so we have it for the
22 record and also address -- I'm sort of curious after the fact,
23 will they be able to have some data or verification that it was
24 successful -- how successful was this for future purposes too
25 because we are trying to build, as you know, by the experience

1 here; and we are still sort of a little bit in the dark about
2 how it works, how successful it is; and yet we know that
3 digital communications is so important.

4 **MS. CABRASER:** We will do that, your Honor. We can
5 get that into Your Honor in the next couple of days.

6 **THE COURT:** That would be great. Finally, you
7 mentioned social media. In your supplement there is some
8 mention of that. What -- what can you tell me about -- because
9 there is also a trend in using targeted social media in a
10 number of courts and commentators have extolled how successful
11 it has been. Is there anything you can tell me about what is
12 planned here?

13 **MS. CABRASER:** Yes. Digital banner ads, for example,
14 Facebook, other social media; and social media can't always be
15 measured in terms of reach. So frankly, your Honor, we are not
16 using it as much for due process Rule 23, class notification
17 purposes, as claims marketing because that's where social media
18 excels. Here, we are trying to incentivize and motivate the
19 class members to do something. They have to do something they
20 wouldn't normally do. They have to make an appointment. Bring
21 in a vehicle to get it repaired and file a claim, and the way
22 to motivate people to do that is very succinctly to market it
23 the way you would market any valuable good or service. Here,
24 people can get over \$3,000 by doing something that they ought
25 to be doing anyway; that they ought to want to be doing anyway.

1 So that's really the point of the social media aspect of the
2 notice program.

3 I will say this: That social media has already picked up
4 on this settlement. For example, cars.com has already run a
5 fairly detailed tutorial on the settlement, its benefits and
6 how to make claims based on the information that it already
7 had.

8 There are automotive specialty chat rooms, groups,
9 Facebook groups; and we noticed that they were very active and
10 very proactive in Volkswagen. They are being very active and
11 proactive here. Part of this comes under the so-called earned
12 media, which is really free media, free press coverage, free
13 social media coverage; and then the other part of it is
14 actually done by the notice provider, and it keys and links the
15 class members to the more fulsome information, the official
16 information, that would be provided on the settlement website,
17 the FCA website and we hope the court's website. So there is
18 cross linkage, so that however anyone gets into the process,
19 they can go right to the ultimate source where all the
20 information is, the long form notices, the claim form, et
21 cetera.

22 **THE COURT:** Remind me, is there a place in the --
23 perhaps in the declaration that specifically -- that specifies
24 what that social media campaign is going to look like or what
25 are the components? I can't remember if --

1 **MS. CABRASER:** Generally, yes, in the Weisbrot
2 declaration it is categorically described. If Your Honor would
3 like more detail than that, we can get that to you in the
4 supplemental declaration.

5 **THE COURT:** Why don't you add that to it? It seems to
6 be such -- of growing importance, and I agree with you. It is
7 about claims marketing; making people aware of this process.
8 But these days, the fear of people getting mail, put in the
9 circular file. They get an e-mail. They don't read it.

10 **MS. CABRASER:** This has been an issue; and, frankly,
11 your Honor, we -- we see this with respect to more traditional
12 recall notices. The content and the format is specified in
13 government regulations. They look official. The problem is
14 sometimes the low participation rate reflects that people are
15 not paying attention to them. It kind of looks like bad news.
16 So we don't want --

17 **THE COURT:** Well, there is a lot of stuff that you get
18 that looks official; and it is not official.

19 **MS. CABRASER:** That's right, and people's antennas are
20 up about seemingly official looking junk mail. So the notice
21 providers are aware of that. They always try to navigate
22 around it so that the appearance as well as the content of the
23 messaging gets attention and gets action. That's the point.

24 **THE COURT:** Okay. Great. If you can file something
25 in short order --

1 **MS. CABRASER:** We will, Your Honor.

2 **THE COURT:** That will be helpful. Then let me ask --
3 I have a couple questions about the cars that have been
4 tampered with. I guess that is directed to you, Mr. Giuffra,
5 there is a certain number -- there is a provision for cars
6 that -- whose admissions process has been altered in some way;
7 that might be an obstruction, and I understand that the consent
8 decree addresses that and what happens. I take it those --
9 there is still an obligation to fix it if it doesn't materially
10 prevent -- if the alteration doesn't materially prevent it or
11 the owner reverses the alteration, correct?

12 **MR. GIUFFRA, JR.:** That's correct, your Honor. So far
13 we have been able to determine it is roughly 5% which is more
14 than you would have thought, but it is a large number.

15 **THE COURT:** Do you have any idea these alterations,
16 are they fairly simple to reverse or did somebody add a chip to
17 the processor or --

18 **MR. GIUFFRA, JR.:** I can't say that I'm an expert on
19 how it works. I think there is some confidence that we will be
20 able to do some reversals. You know, going to the question you
21 asked Ms. Cabraser, which I think is a critical question from
22 where you are sitting, FCA has a lot of experience doing
23 recalls. You know, it is not a typical situation where you
24 have a manufacturer that doesn't do a lot of recalls. There
25 are -- literally, you know, millions of cars are being recalled

1 every year; and there is an experienced group of folks at FCA,
2 and they feel pretty confident that they can work it out.

3 With respect to these cars that have been tampered with,
4 we will obviously do our best. Those were terms that were
5 fairly extensively negotiated with the government.

6 On the other question -- which we haven't really talked
7 about but I think is an important one to put on the record --
8 because the settlements are so interrelated, FCA has an
9 obligation under the government consent decrees to reach an 85%
10 take rate.

11 **THE COURT:** Yes.

12 **MR. GIUFFRA, JR.:** And I think that's very important
13 to keep in mind. We have to do that within two years of the
14 effective date. So the company, its dealers and people who are
15 coming to the dealerships all the time is highly incentivized.
16 Just to put the numbers out there, you know, if we miss by 1%
17 on the national recall target, we have to pay \$5.5 million to
18 the government. If we miss the California target, it's
19 \$825,000 per percent to California. So, you know, if you miss
20 by 5%, you are talking about over \$25 million.

21 **THE COURT:** Per car basis, that is several thousand
22 dollars per car.

23 **MR. GIUFFRA, JR.:** It is a lot of money. We are
24 highly, highly motivated to get this job done. Again, you are
25 talking about a business that is very familiar with doing

1 recalls. It knows its customers. Bring them back to the
2 dealership quite frequently. As Ms. Cabraser has said often,
3 next to buying your house, buying your car is something you
4 do -- probably the next biggest purchase. So we have
5 relationships with our customers, and so this is not a
6 situation where the company is not highly incentivized to make
7 this a complete success.

8 I should note for the record -- and this is public
9 information -- you know, Volkswagen has hit its 85% targets.
10 So I think we have a high degree of confidence that we will
11 make the targets.

12 **THE COURT:** And on the incentive question -- I
13 certainly do run the numbers in my head -- it does seem to
14 me -- and I'm sure this was the intent of the structure of this
15 that economically it makes more sense for FCA to get the fix
16 done than to have it fall into that 1% --

17 **MR. GIUFFRA, JR.:** Very much so.

18 **THE COURT:** Although you may have to pay the amount
19 under the PSC settlement agreement, the fix -- the marginal
20 cost of the fix since it is largely a software fix --

21 **MR. GIUFFRA, JR.:** It is entirely a software fix.

22 **THE COURT:** So other than technician time, there is no
23 incremental marginal cost per car. This is not like you have
24 got to put in new catalytic converters or other hardware. So
25 there -- it seems to me -- a fairly minimal cost to FCA to get

1 the fix done.

2 **MR. GIUFFRA, JR.:** The company would like to get 100%
3 if we can get it. We won't get 100%, but we certainly will get
4 85%, and we are incentivized to get 85%; and the way the
5 numbers work out, we are better off hitting that 85% target
6 than ending up at 80%.

7 **THE COURT:** Right. And I will say for the record,
8 that although both in our guidelines as well as per common law
9 in this district, the general skepticism we have about claims
10 made -- settlements and reversions back here I think are
11 mitigated because the incentives are structured such that we do
12 have parallel incentives now on everybody's part to maximize
13 the cars to get fixed. There is no perverse incentive.

14 **MR. GIUFFRA, JR.:** Your typical claims settlement, you
15 don't have an incentive. You don't have to pay more money to
16 the government if you don't reach the target number.

17 **THE COURT:** Right. Right. So let me just say for the
18 record, that that is an important part of this. The fact that
19 this is -- one could argue this is sort of reversionary once
20 since it is claims made, but it is structured very differently
21 than the typical one; and I'm very comfortable with that, and
22 that is one reason why I'm very much inclined to grant
23 preliminary --

24 **MR. GIUFFRA, JR.:** And it worked in Volkswagen.

25 **THE COURT:** Yes, and we have a history of it working

1 there too. So back to the tampered cars, if the car cannot be
2 fixed -- and it's excused because it is not, quote, operable
3 per the consent decree and the owner won't reverse -- they
4 won't get the benefit of the settlement, will they; but they
5 are still start of the class; right? They are going to be
6 releasing --

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

8 **THE COURT:** So they have an incentive to cooperate
9 because they are relinquishing any right they may have. If
10 they want the \$3,075 and the fix, they are going to have to
11 give up whatever they did?

12 **MR. GIUFFRA, JR.:** Correct. And also the way it works
13 in the government settlement in terms of meeting that 85%
14 number and the penalty we would have to pay, we are not getting
15 a dollar-for-dollar deduction. We are only getting a partial
16 benefit.

17 **THE COURT:** 50%, it is a half credit.

18 **MR. GIUFFRA, JR.:** Yeah. So we are again incentivized
19 to try to make it work for the cars that have been tampered
20 with.

21 **THE COURT:** All right. Those are the questions I
22 have. I think what we need is -- I would like hopefully for
23 you all to see if you can resolve that last piece with the help
24 of the Special Master so we can have a clear number and a
25 number that class members can -- can see in very clear terms.

1 Perhaps, some tuning up of the notice provision. Make sure
2 that it is clear.

3 **MS. CABRASER:** We will do that.

4 **THE COURT:** And then the supplemental declaration from
5 the claims administrator about the questions I have asked about
6 the social media plan and how the e-mail notice program works
7 and whether there is a way after the fact we can get some data
8 about how effective it has been, when that is possible.

9 **MS. CABRASER:** We will get that going today,
10 Your Honor. We know the Court is very interested in beginning
11 to get data through the mechanism of the Northern District's
12 class action settlement guidance so that it has data to work
13 with in terms of evaluating future settlements. This is a
14 developing frontier, and we appreciate this because it
15 incentivizes the notice providers and settlement
16 administrators, not only to utilize the state-of-the art but to
17 develop improved techniques to demonstrate delivery.

18 As I say, traditionally the courts have assumed that
19 anything sent by first class mail is received and opened,
20 whether it is or not; and that is a huge presumption. And at
21 some point, I think we will be able to get to that presumption
22 with electronic notice as well. Rule 23 says start that
23 process, and we will start that process; and we will see -- we
24 will see what the notice provider can give the Court on that.

25 **THE COURT:** Great. Well -- so let me just say, in

1 looking at the factors that the Court is to look to in terms of
2 granting preliminary approval, you know, I think those are all
3 met here. The compensation to the class is considerable. It
4 is substantial. It includes the fix, which is part of the very
5 important public policy concerns that we have talked about from
6 the outset of the case; and in view of the risks involved in
7 this litigation, we all know we were in the midst of a motion
8 to dismiss as well as a motion for class certification with --
9 and I had already articulated some of the complicated issues
10 therein that speaks to some of the risks -- so weighing the
11 benefits potentially available to the class, to the actual
12 settlement here against the risks, it appears to me that this
13 is a very adequate and reasonable and fair resolution from
14 everything that I have seen.

15 Obviously with respect to the consent decree, we will have
16 to wait for the notice and comment period. We want to do that,
17 and obviously I would have to wait and see what the reaction of
18 the class is and see what kind of objections we will receive,
19 which I will look at, if and when we get to that point, as well
20 as opt out rates and everything else. But from every
21 indication -- and in terms of the process -- as we know, this
22 has been a very hard fought process. The parties have spent
23 considerable time. The Plaintiffs have done a great deal of
24 investigation into this case, and this was negotiated clearly
25 at arm's length through the offices of probably one of the best

1 settlement officers, mediators, in the country, Mr. Feinberg.
2 Both from a procedural perspective as well as substantive, I
3 don't see any problem with this at least until I hear
4 objections and see what the notice and comment period bears
5 out; but I would very much like to have in the final notice
6 process a clear number on attorneys' fees, and I hope the
7 parties can get that resolved in short order. And with the
8 clarification on the notice issues, I would fully expect to --
9 that that will confirm my tentative view that this will be
10 approved.

11 So if you -- I'm going to use -- Angie, how -- are we
12 available May 3rd?

13 **THE CLERK:** May 3rd is a Friday.

14 **THE COURT:** Yeah. We can specially set this for the
15 final approval hearing May 3rd, maybe at 10:00. That's all in
16 anticipation of my getting out the order of preliminary
17 approval, which I don't see any barrier to that; but I would
18 like to have everything tied up. That won't affect the notice.

19 **MS. CABRASER:** We can start to fill in the blanks,
20 your Honor.

21 **THE COURT:** And get the administrator going. I guess
22 there are two blanks in there, and if you can get both of those
23 in and get something to us in a couple of days on the notice
24 just to give me the final piece of assurance, I'm ready to
25 approve -- give preliminary approval.

1 **MS. CABRASER:** Thank you so much, your Honor. We will
2 get to work on those items. And if I could just take a second
3 to express my appreciation to the Settlement Master. Of
4 course, to the Court throughout this process, to counsel for
5 the Defendants, for the United States, for California and for
6 the multistate AG group. This was a very complicated, very
7 hard fought negotiation; but if it is approved and implemented
8 in the end, all of the effort will have been worth it because
9 the solution will be an elegant one driven by the consumers,
10 properly incentivized; implemented by Fiat Chrysler and
11 monitored and enforced by the government agencies. The fact
12 that it will be able to be done without removing vehicles from
13 the road is an environmental plus. As we know, the fact that
14 it could be done with minimal inconvenience to the consumers is
15 also a plus because we know that but for the undelivered
16 environmental benefit, these are vehicles that the typical
17 owners and lessees would greatly prefer to keep and continue to
18 use. The settlement enables them to do that.

19 **THE COURT:** Thank you.

20 **MR. GIUFFRA, JR.:** Your Honor, if I could just add a
21 couple points. In terms of what Fiat Chrysler will do, we
22 actually have our website, which we think we can get up and
23 running within a week of preliminary approval; and that will
24 allow consumers to register for updates and get information and
25 start the process. We also have a call center, which is

1 operational, as of today actually. So we are ready to get this
2 show on the road, so to speak.

3 On my -- on behalf of the company, I want to thank the
4 Court and Mr. Feinberg. You know, I was looking back to see
5 when I first came here, and I think it was about the summer of
6 2017; and at that time on behalf of Fiat Chrysler I expressed
7 the desire to get a global settlement. It is not easy to get a
8 global settlement; and we have a global settlement with the
9 Department of Justice, with California, the 49 other states;
10 and Mr. Nachman does deserve a substantial amount of credit.
11 He certainly nudged everyone along during the course of the
12 process as well as our friends at the PSC. We can all go to
13 Disneyworld together.

14 **MS. CABRASER:** I have never been to Disneyworld,
15 your Honor.

16 **THE COURT:** Well, here is your chance.

17 **MR. GIUFFRA, JR.:** They used to have the commercial at
18 the end of the Super Bowl. They'd say, Where are you going?
19 You'd say, I'm going to Disneyworld.

20 I also want to thank Mr. Feinberg. There is a reason that
21 he is the pre-eminent Settlement Master in the United States;
22 and I think Your Honor's order getting him involved in the
23 Department of Justice part of this played an important role in
24 bringing this all together.

25 One other point, which is worth bearing in terms of the

1 timing of all this, in this case we know sitting here today
2 that we have a fix and the fix worked. That wasn't true in VW.
3 VW it was all contingent on a lot more testing. Just to give
4 you an example, in the settlement in VW, there was almost
5 another year of testing. We know -- and I said at the outset,
6 you always get nervous when you are a lawyer and you say to the
7 Judge -- We are confident, your Honor, that we are going to
8 have a fix here that won't require buyback. That actually
9 happened. And we knew because we had done the recalibration of
10 the 2018 vehicles. We were reasonably confident -- very
11 confident that that would work out; and that, in fact, turned
12 out to be the case. Plus on top of that, we have done a
13 substantial amount of additional testing, and I think we gave
14 all the test data to the PSC. The Government has it, and I
15 think consumers can be confident that the performance of the
16 vehicles will not be affected. Miles per gallon will not be
17 affected.

18 Again, on behalf of the company, I want to thank
19 Your Honor. I want to thank Mr. Feinberg. I want to thank
20 everyone in this room. I think this is a good settlement for
21 Fiat Chrysler. It is a good settlement for consumers, and it
22 is a good settlement for the environment; and I think it shows
23 that the judicial system and the court system can work and deal
24 with a very complicated problem and resolve it in a fast way.
25 So thank you very much.

1 **THE COURT:** Thank you. I will note that the mediator
2 has indicated to me that your ability to get the settlement
3 documents done by January 10th does beat the VW case by, I
4 think, 16 days or something like that.

5 **MR. FEINBERG:** That's correct.

6 **THE COURT:** So --

7 **MR. GIUFFRA, JR.:** Don't tell Mr. Miller.

8 **THE COURT:** I won't tell Mr. Miller, but I did tell
9 Judge Breyer that. That was very important to the Court.

10 **MR. GIUFFRA, JR.:** Now we know where that deadline
11 came from.

12 **THE COURT:** Now you know. We are being transparent
13 here. I understand that you have a plane to catch. I was
14 toying with the idea of saying, Well, you are not leaving here
15 until you settle that last piece. I guess that would be cruel
16 and unusual. I won't do that here. I am going to assume that
17 you all will, as you have 99% of this case, resolve this; and
18 you can resolve this last piece.

19 **MR. GIUFFRA, JR.:** I think that is fair to say,
20 your Honor. We all get along well, and we are all
21 professionals; and we will come to a fair resolution.

22 **THE COURT:** Good. For the record, I'm going to
23 indicate my intent to approve subject to these two pieces of
24 the puzzle being filled in. I want to get the final order of
25 preliminary approval out as quickly as possible. You should

1 proceed as if we are going to do this and get the administrator
2 ready to go, and we will hopefully get this show on the road.
3 And depending on the Federal Register situation, I will wait to
4 hear from the mediator, I guess, from Settlement Master where
5 we are at; and if something more needs to be done --

6 **MR. GIUFFRA, JR.:** I would be happy to have someone do
7 some research on the question of whether Article III can direct
8 Article II.

9 **THE COURT:** Let would be an interesting question and
10 one that could have some --

11 **MS. CABRASER:** That would be plan C.

12 **THE COURT:** That would be plan C, but it is a plan.
13 So if necessary, I may ask the parties to provide some
14 supplemental briefing if we get to that point; and it is
15 looking like we are still not getting anywhere nationally in
16 terms of resolving the shutdown, we will have to start thinking
17 in early February what to do because I really don't want to
18 delay this. I don't want to have to move the date. That's why
19 I'm setting this on the last date possible based on the period
20 you suggested, May 3rd. I don't want to have to move that. It
21 is disruptive to the class and delays the process so.

22 **MS. CABRASER:** Right. And I think the May 3rd date
23 will be -- it is out there. It is already out there and that
24 we will prepare to launch -- prepare accordingly, get,
25 Your Honor, everything else that you need and have requested

1 and go from there and thank you very much.

2 **THE COURT:** Thank you. Let me, again, thank --
3 especially Ms. Rende and Mr. Warren, who are here I assume
4 without compensation at risk -- like everybody else, but I
5 really appreciate that plus everything you have done to make
6 this case happen. Thank you.

7 **MS. CABRASER:** We add to that, your Honor. I think it
8 is important for everyone to know that in this case there
9 wasn't a government shutdown that affected us. The government
10 counsel and representatives continued to work; to work for the
11 environment; to work for the public; to work for consumers as
12 well as, and we appreciate that.

13 **THE COURT:** Thank you. All right. We will --
14 hopefully next time we see you will be at the final approval
15 hearing on May 3rd.

16 **MR. GIUFFRA, JR.:** Thank you very much, your Honor.

17 **MS. CABRASER:** Thank you.

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

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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: Thursday, January 24, 2019.



Marla F. Knox, RPR, CRR
U.S. Court Reporter