

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

IN RE: VOLKSWAGEN "CLEAN DIESEL")
MARKETING, SALES PRACTICES, AND) **No. C 15-MD-2672 CRB**
PRODUCTS LIABILITY LITIGATION)
_____)

San Francisco, California
Wednesday, January 18, 2017

TRANSCRIPT OF PROCEEDINGS

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1 Wednesday - January 18, 2017

8:10 a.m.

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

3 ---000---

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

7 Counsel, please state your appearances for the record.

8 **MS. CABRASER:** Good morning, Your Honor. Elizabeth
9 Cabraser, Lief, Cabraser, Heimann & Bernstein, plaintiffs'
10 lead counsel on behalf of the PSC, and appearing with me today
11 is my partner David Stelling.

12 **THE COURT:** Good morning.

13 **MR. VAN EATON:** Good morning, Your Honor. Josh
14 Van Eaton for the United States, with my colleague Bethany
15 Engel.

16 **THE COURT:** Okay.

17 **MR. AKERS:** Good morning, Your Honor. Nicklas Akers
18 on behalf of the California Attorney General and the California
19 Air Resources Board.

20 **MR. BERMAN:** Good morning, Your Honor. Steve Berman,
21 member of the PSC, appearing here today as co-lead counsel for
22 the franchise dealers.

23 **THE COURT:** Good morning.

24 **MR. COHEN:** Good morning, Your Honor. Jonathan Cohen
25 for the Federal Trade Commission.

1 **MR. GIUFFRA:** Good morning, Your Honor. Robert
2 Giuffra, Sullivan & Cromwell, for the Volkswagen defendants.
3 Also with me is David Possick, my colleague; and we also have
4 Mike Gallub with the Herzfeld & Rubin firm who is our
5 co-counsel. Good to see you again.

6 **THE COURT:** It's a pleasure.

7 **MS. KENNEDY:** Good morning, Your Honor. Kara Kennedy
8 with Alston & Bird for the Porsche defendants.

9 **MR. SLATER:** Good morning. Matthew Slater of Cleary
10 Gottlieb on behalf of Robert Bosch GmbH and Robert Bosch LLC.

11 **THE COURT:** All right, good morning. Well, thank you
12 very much for attending.

13 As you know, this is the time that is set for the hearing
14 on the final approval of the franchise dealer aspect of the
15 litigation, which is what I want to turn to first. And then,
16 taking advantage of everyone's travels to California, I'd like
17 to get a report from those who wish to report to the Court as
18 to the progress of the litigation to date and where we intend
19 to go from here.

20 So let me remind the parties that we are on CourtCall,
21 which means that you should come to the microphone and speak
22 into it so that those individuals who are not in the courtroom
23 but are participating by way of CourtCall have the opportunity
24 to hear what is being said.

25 So let's start now with the franchise dealer. It was

1 preliminarily approved I believe in December, is that correct,
2 by my recollection?

3 **MR. BERMAN:** That's correct, Your Honor.

4 **THE COURT:** And maybe, Mr. Berman, you'll come forward
5 and you can enlighten us and tell us where we are and why it is
6 your opinion that we should give final approval to the
7 settlement.

8 **MR. BERMAN:** Yes. Thank you, Your Honor.

9 First, with me today is my co-lead counsel Mr. Sox with
10 the red tie, and the class representative, Mr. Bertolet, has
11 traveled all the way from Pennsylvania in support of the
12 settlement because he feels proud to be one of the class reps
13 in this case and this is an important matter for the dealers.

14 Now, Your Honor has been focused, and I would say
15 rightfully focused, on the consumers and the environment, but
16 there were other people hurt by Dieselgate, and that included
17 the dealers, and the dealers have seen the value of their
18 franchises diminished. They have lost revenue from people
19 aren't coming in to get their cars fixed anymore, and they have
20 cars on their lots they can't sell because of Dieselgate.

21 So this settlement, which is a \$1.6 billion settlement, is
22 a substantial recovery for the dealers. It would be in a
23 normal case a huge recovery. Obviously it pales in comparison
24 to the consumer case, but it's one of the largest settlements
25 in class action history.

1 So we have -- and what we did in coming up with the value
2 is we tried to look at how the dealers were harmed. So the
3 first payment of almost \$1.2 billion, that is for the
4 diminished value of the franchises, and that amount was
5 estimated by your expert, Mr. Stockton, and it's contained in
6 his report.

7 But we also knew that the dealers were receiving incentive
8 payments, and we negotiated for those payments to continue. We
9 negotiated -- and those are worth hundreds of millions of
10 dollars as well.

11 We negotiated a deferment of capital that dealers had
12 promised that they would put into the dealerships. They
13 obviously don't have the money right now to be putting capital
14 in, so we obtained that benefit for the class.

15 And we negotiated what will happen to the cars that are on
16 their lots. They're basically going to get paid the same way
17 the consumers get paid.

18 Those were the areas of concern the dealers had. We
19 addressed every single one of those, and it results in an
20 average cash payment of 1.85 million to the dealers with a
21 minimum of 1.07 and a maximum of 3.57.

22 So if you look at why we think final approval is
23 appropriate, not only did we recover a huge portion of the
24 damages, but the reaction of the class has been extraordinary.

25 As of today, 87 percent of the class has elected -- or has

1 signed an individual release, meaning that they will get paid
2 immediately at least 50 percent of what they're owed. So 559
3 out of 644 dealers have signed that release, and what that
4 means is that they don't have to wait for the effective date.
5 So even if you said "I don't approve this settlement," they
6 felt it was fair enough that they wanted to go forward.

7 And I should mention that, these are sophisticated
8 businesspeople who are multimillion-dollar franchises, many of
9 whom had lawyers that we talked to. So the settlement and the
10 fact that they signed individual releases comes from a careful
11 scrutiny.

12 And I would also point out to the Court that not only is
13 Mr. Bertolet here, but we also had a committee of dealers that
14 we worked with of five dealers throughout the country that kind
15 of were semi-elected by the dealers because the dealers kind of
16 know each other, and they worked with us and they also think
17 the settlement is fair.

18 So for those reasons, we think the settlement should be
19 approved.

20 And I would address very briefly the two types of
21 objections that have come forward, if that's okay with the
22 Court.

23 **THE COURT:** Yes.

24 **MR. BERMAN:** Some of the objectors have argued that
25 the plan of allocation wasn't fair. And the way the plan of

1 allocation came about was first we negotiated the 1.2 billion
2 diminished value payment I'll call it; and then we had to come
3 up with a way to allocate it, and we spent lots of time
4 thinking about it.

5 But to its credit, Volkswagen had thought about allocation
6 when it set up the dealer support program, and its plan of
7 allocation for the dealer support program was based on each
8 dealer's vehicles in operation in the dealer's assigned primary
9 area it's called.

10 And the dealers were living with that. As far as we knew,
11 no one was objecting to that plan of allocation; and since it
12 seemed to capture the business reality of "These are all the
13 Volkswagen vehicles in your area, that's a good measure of your
14 damage," we went with that plan of allocation.

15 There is no way we could have come up with a plan of
16 allocation that would have satisfied 652 dealers 100 percent.
17 So it's not surprising to me that a couple -- and I should say
18 a very small number -- of dealers have concerns with the plan
19 of allocation, but we think it's fair and it was the best plan
20 of allocation we could come up with.

21 The second issue that has come up is the release, and we
22 have a proposed modification to the release that may make it
23 more palatable, but first I just want to take a second to tell
24 the Court why I think the release was adequate without any
25 modification.

1 And that is, there is a misperception, perhaps amongst
2 some of the dealers, that the settlement talks were solely
3 focused about Dieseltgate. And it's clear from the complaints,
4 I think, and the declarations that's not true. When we were
5 negotiating the settlement, there was the Dieseltgate issue,
6 which was certainly probably the foremost issue among the
7 dealers, but there were other issues the dealers were concerned
8 about.

9 For example, some of the dealers believed that Volkswagen
10 had made promises to sell a certain number of cars in the U.S.
11 that they did not meet. Some dealers were concerned with how
12 Volkswagen had been allocating territories. Some were
13 concerned with other issues that were encompassed in both
14 Mr. Napleton's complaint and Mr. Bertolet's complaint. So the
15 complaints and the settlement talks were broader than just TDI.

16 And, in fact, I think the reason that Volkswagen paid such
17 a high percentage of the diminished value damages is because
18 they knew there was more on the table than just those
19 diminished value damages. If there hadn't been more on the
20 table, I don't think we would have gotten the numbers we did
21 get.

22 So we thought at the time that we had the release that
23 covered other claims, that it was justified by the settlement
24 talks and by the complaints that were on file in this case.
25 This is not a case where all of a sudden we added to the

1 release claims that had not been discussed or not present in
2 the litigation; and for that reason, we think the cases that
3 were cited by the Palisades group are inapposite.

4 But here's what we do propose to make sure there's no
5 unfairness whatsoever:

6 In paragraph 9.3 of the settlement agreement, there are
7 items 2 through 5 that contain release of categories other than
8 TDI. What we're proposing to do is to file an addendum to the
9 settlement agreement and a revised proposed order, which I hope
10 we get in by Friday, that would say that the release does not
11 apply in those categories to any person that had a claim with
12 respect to those categories that had been filed prior to
13 April 6, 2016.

14 The April 6, 2016, date is the date the Napleton complaint
15 was filed. So the Palisades litigation, for example, would be
16 able to go forward, and there's one other person out there who
17 also has litigation that would be able to go forward if that
18 dealer chose to do so.

19 So we hope to get that filed by Friday.

20 **THE COURT:** Are you aware of any other objector who
21 has a claim filed subsequent to that date?

22 **MR. BERMAN:** Subsequent to that date?

23 **THE COURT:** Yeah. Subsequent to April 6, 2018 [sic].

24 **MR. BERMAN:** I'd have to let Volkswagen answer that.
25 I'm not aware of any sitting here. The reason I used the

1 April of 2016 date was by then Napleton had, you know, made
2 this a public issue. If someone really had cared about these
3 issues, they would have already been on file.

4 **THE COURT:** And we don't have an objection from
5 somebody who has that claim which claim was manifested after
6 April 6, 2018 [sic]?

7 **MR. BERMAN:** No such objection --

8 **THE COURT:** I mean, 2000 --

9 **MR. BERMAN:** April 6, 2016.

10 **THE COURT:** '16. We're not there yet, right.

11 **MR. BERMAN:** No such objection.

12 **THE COURT:** Okay.

13 **MR. BERMAN:** So unless you have any questions,
14 Your Honor --

15 **THE COURT:** No. I mean, I think that's fine. I don't
16 know whether an objector is here this morning.

17 **MR. BERMAN:** There is an objector. Mr. Smith from
18 Delaware, I believe, is here, and he would like an opportunity
19 to address the Court.

20 **THE COURT:** Okay.

21 Mr. Giuffra.

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

23 About a year ago, I was actually standing at this podium
24 and Your Honor pressed us about trying to address cars on the
25 road, the environment, and I think that Volkswagen clearly has

1 shown that actions speak louder than words. I mean, I promised
2 to do it, but we really did do it.

3 And I think it's important to consider the dealers
4 settlement as part of the overall package of settlements that
5 have been accomplished over the last year. I mean, first we
6 did the 2-liter settlement. The 3-liter settlement is
7 obviously very well along. We've resolved matters with the
8 government entirely, I believe.

9 And the dealers are very important to Volkswagen.
10 Volkswagen has been in operation in the States for 60 years,
11 and we really want to build stronger relationships than we've
12 even had before, and they've been strong, with our dealer
13 network because that's a critical frontline for the company and
14 its sales efforts.

15 So what we've attempted to do here is result in global
16 peace with our dealers and the network, and that's because we
17 realize that the dealers are critical to the success of the
18 brand.

19 The dealers are also, Your Honor, critical to the success
20 of the implementation of the 2- and 3-liter settlements because
21 customers go to the dealers, bring their cars back to do the
22 buyback transactions or -- and this will now start with the
23 2-liter Gen 3 cars -- to have the fixes be done. So the
24 dealers are critical to the success of the 2-liter and 3-liter
25 consumer settlements showing that interconnection.

1 Now, this settlement is clearly fair. It should be
2 approved by the Court. And Mr. Berman made the point before
3 about 87 percent of the folks have already signed releases and
4 we paid out my understanding is nearly half a billion dollars
5 already to the dealers.

6 The number of opt-outs in this case, Your Honor, 7
7 opt-outs out of a class of 652. That's less than 1 percent of
8 the class. I mean, very -- 1 percent of the class. Excuse me.
9 So very small amount of opt-outs.

10 The number of objectors that I believe are left, people
11 who haven't signed a release -- I believe Mr. Smith's client
12 has already signed a release, which raises the question of
13 whether he even has standing to get up here and object -- I
14 believe it's just two now that the Palisades issue has been
15 taken care of.

16 And so this settlement reflects Volkswagen's continued
17 commitment to make things right in the United States for its
18 customers, for the environment, and for its dealers to rebuild
19 trust.

20 And, you know, we have 6,000 employees in the
21 United States. We have dealers literally in all 50 states, and
22 the dealers are critical to the continued success of
23 Volkswagen. And the company has obviously spent a tremendous
24 amount of money trying to put the diesel issue behind it in the
25 States.

1 As Mr. Berman said, we're talking about average
2 compensation of \$1.85 million to each dealer. The total amount
3 is about 1.2 in cash compensation.

4 In addition, we've resolved some of these other issues
5 that the dealers have -- for example, how to deal with the cars
6 that they have, the TDI cars that were on their lots -- and
7 that's all been worked out to the satisfaction of the dealers.

8 With respect to the Palisades issue, we're aware that as
9 of that April 4th date, which I believe is the date I have for
10 when the lawsuit was filed -- there was the Palisades
11 complaint, there may be one other -- we're not aware of any
12 other complaints, but the idea would be if you had a pending
13 complaint as of that date of April 4th, you would be carved out
14 from the parts of the settlement dealing with allocation
15 complaints, sales growth incentives, and that kind of thing.

16 But as Mr. Berman pointed out, we paid a substantial
17 amount of money for more than just the resolution of the diesel
18 claims. We wanted to have global peace with our dealer network
19 because our dealer network is so important to the continued
20 success of Volkswagen.

21 In terms of the objections that remain, which I believe
22 are two, they're largely about the allocation formula having to
23 do with whether you should base it on sales or whether you
24 should base it on the number of vehicles in operation in a
25 particular area that's the dealer's area.

1 And car dealers make a lot of money from doing repairs and
2 selling used cars and the like, and so looking at just new car
3 sales is not an appropriate measure. And this is the way --
4 it's the standard in the industry to do it this way and, again,
5 the vote of the dealers, an enormous support for the
6 settlement, confirms that it's overwhelmingly a fair
7 settlement.

8 There's one other objection that's been raised under a
9 California provision, which on its face says you can resolve
10 matters as we have in this case, so we think that's an
11 objection that's not warranted.

12 So in sum, Your Honor, Volkswagen strongly urges the Court
13 to approve this settlement. It's part of an interconnected,
14 interrelated series of settlements, and it's all about trying
15 to make things right in the United States -- customers,
16 dealers, the environment, regulators -- and I think once this
17 settlement is resolved and the remainder of the 3-liter and the
18 government settlements, I think we will have done a substantial
19 amount of work to close the door on the Dieseldate matter for
20 Volkswagen in the United States.

21 So thank you, Your Honor.

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

23 Are there any objectors who wish to be heard this morning?

24 (Hand raised.)

25 **THE COURT:** Yes, sir. Would you come forward, please,

1 and identify yourself.

2 **MR. SMITH:** Good morning, Your Honor.

3 **THE COURT:** Good morning.

4 **MR. SMITH:** Thanks for this opportunity.

5 **THE COURT:** Sure.

6 **MR. SMITH:** My name is Tom Smith. I'm here from Smith
7 Volkswagen in Wilmington, Delaware. I've come a long way to
8 make my points about the allocation method that was used.

9 When Volkswagen first came out with multisupport payments
10 to the dealer on a monthly basis when this debacle first
11 occurred, the formula that they used I tried to understand from
12 out of the gate. I could not understand why our formula that
13 applied to our store and other dealers like us came out to such
14 a small amount of money compared to an average dealer. I
15 consider myself to be an average dealer in sales volume.

16 So I started with the chain of command with our original
17 representative, asked him; went to the regional sales manager,
18 and all the way to the dealer district manager and asked him
19 where the formula came from.

20 And I thought it was mysterious that this formula -- the
21 best I could get when I was just simply trying to get an answer
22 to a question was that this formula was derived somehow from
23 some other type of settlement from Nissan or Toyota, and they
24 applied it because they had very little time to decide how to
25 make a monthly support payment, and so they used this.

1 So I thought, well, I don't know anything myself that
2 Toyota or any of the other manufacturers had that was close to
3 this. There was nothing that I could see that was similar.

4 So I thought, well, I'll check with now the five dealers
5 that were appointed to see if I could get some headway into why
6 this formula was used and whether it would be applied to later
7 settlement funds. If they would have modified it or changed
8 it, I would not have had an objection but they did not.

9 What they failed to do in the support payments through the
10 dealer remediation efforts was to include the automobiles that
11 dealers like us and others sold into open-point areas.

12 Now, Volkswagen did not pay anyone, in my understanding,
13 for any car sold into an open-point area. However, they did
14 pay dealers across areas of influence for cars that other
15 dealers sold into their area. In other words, if I bordered a
16 dealer near me, the cars that he sold into my area I got credit
17 for in the formula. Likewise, the automobiles I sold into
18 their area, they got credit for.

19 Why they then excluded the automobiles that were sold into
20 an open-point, like where Smith Volkswagen is located --

21 **THE COURT:** You have to explain to me, what is an
22 open-point?

23 **MR. SMITH:** An open-point is an area that Volkswagen
24 has determined that they need representation for a dealer but
25 they don't have it. That is considered an open-point. I am

1 parked right next to an open-point. I am one and a half miles
2 approximately from an open-point.

3 And the way people buy cars, obviously, in a general
4 geographic area, it is natural that I sell cars over into this
5 open-point area. They were excluded for me just like they were
6 for other dealers, but the simple question they would have had
7 to ask is: Well, are there any dealers in this group that are
8 so grossly affected by not paying them in an open-point area,
9 that it's just grotesque?

10 And I came out being one of those people. I have averaged
11 over 200 cars a year in these years that they measured, of the
12 five years, into an open-point. That's a thousand cars.

13 **THE COURT:** Let me ask you a question. In your
14 dealership, what percentage of your sales are sales of cars in
15 the open-point area?

16 **MR. SMITH:** I have --

17 **THE COURT:** And I don't know quite how -- I don't know
18 whether the measure is number of cars or value of cars, or
19 something like that, but can you give me some idea?

20 **MR. SMITH:** I can, Your Honor. For example, in the
21 year 2013 -- I had to extract this information from our
22 Volkswagen representative, and he could only go back so far;
23 but in the year 2013, which is one of the settlement years, we
24 sold 542 Volkswagens, 207 of them were sold into the open-point
25 area.

1 In 2014, we sold 513 new Volkswagens and 214 were sold
2 into open-point area.

3 In years prior to that, which were included, years '12,
4 '11, and '10, year '12, 2012, 594 in new cars sold, 487 in new
5 cars sold, and in 2010, 399. I suspect that at least 200 of
6 those cars out of each one of those years would have been in
7 this calculation. That's a detail that Volkswagen has and they
8 chose not to use in this allocation formula.

9 **THE COURT:** So you say your experience with your
10 dealership is that approximately somewhere in the neighborhood
11 of 30 or 40 percent of your sales is into the open-point?

12 **MR. SMITH:** In one year 43 percent.

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

14 **MR. SMITH:** And so it makes a big difference. It's
15 1,000 cars --

16 **THE COURT:** I understand.

17 **MR. SMITH:** -- times 10, \$10,000. Even with the
18 original support payment, a 10,000-dollar a month figure, I am
19 an average dealer, I expected a figure of somewhere around \$1.8
20 million. Instead, I'm at the 1.252 number.

21 I just think it's grossly unfair. It would have been so
22 easy to ask someone about if there were any outliers that were
23 grossly affected by this settlement thing. They could have
24 included us.

25 Heavens, with the amount of dollars that are involved

1 here, this turns out to be such a small amount of money in
2 terms of all that's involved with the EPA and the Justice
3 Department. It's the difference between -- when this is done
4 today, this is going to be either 100 percent right according
5 to the Court, which it won't be for me; or when it's done
6 today, it will be 100 percent wrong, and it will stay that way
7 forever. And I just -- I had to come out here to do this, to
8 say this.

9 **THE COURT:** I appreciate you coming here. I don't
10 know that things are either 100 percent right or 100 percent
11 wrong. I mean, these are efforts made in a very complicated
12 area to try to achieve some sort of equity, and I understand
13 your concern is that you feel you are being -- that you're not
14 receiving that equity, that fairness that ought to be given.

15 Do you have a sense of how much you would have gotten had
16 the formula included your open points?

17 **MR. SMITH:** Yes, I do. It would have been, with my
18 calculation of the 200 additional cars, 1.962.158 dollars
19 compared to the 1 --

20 **THE COURT:** You're going to have to do the math for
21 me. What is the total --

22 **MR. SMITH:** The total amount of money?

23 **THE COURT:** -- that you would have gotten had the
24 open-point been --

25 **MR. SMITH:** Calculated.

1 **THE COURT:** -- calculated?

2 **MR. SMITH:** My calculation is 1,962,158. That's
3 approximately 1,000 cars more that I would have been paid for
4 on the 10-dollar per car formula. It's enough to bring me out
5 here to California from Delaware.

6 **THE COURT:** Well, a lot of things bring people out to
7 California, you know.

8 **MR. SMITH:** I like California, but --

9 **THE COURT:** You better get out of here before the
10 rains come.

11 **MR. SMITH:** -- it's not a social call.

12 But I think the Court has the power to fix this even at
13 this late date; and if it's not fixed for this particular
14 dealership or others that may still be in limbo about what to
15 do about this, it could still be fixed for them. This is all
16 about us as the dealers. Or other things that come down the
17 road with possibly Robert Bosch, it could be modified then so
18 that more of our customers are included.

19 These customers in this open-point area, I can't
20 understand how Volkswagen could exclude them because they've
21 encompassed almost everyone. These cars sold into person's
22 other areas of responsibility come out to a simple ZIP code.
23 If one car gets sold in the state of Georgia in your area of
24 influence, they know all the data.

25 So I don't see how they overlooked it or reasonably could

1 have overlooked it, and that's what I wanted to say today and
2 that's why I'm out here in California.

3 **THE COURT:** Well, thank you very much.

4 I think I should turn to Volkswagen and get their
5 response.

6 **MR. SMITH:** Thank you.

7 **MR. GIUFFRA:** Your Honor, we very much appreciate
8 Mr. Smith making the trip out to California, and he obviously
9 cares about Volkswagen and his dealership, and we appreciate
10 everything he has done.

11 Just as a procedural matter, my understanding is that
12 Mr. Smith has signed a release, does not have a claim anymore,
13 and has gotten his money. So he does not have standing any
14 longer to object. That's point one.

15 Point two is, in any settlement you can obviously pick a
16 formula for how you calculate the amount of damages that are
17 going to be paid for compensation to class members. In this
18 case we did not use a formula based on the amount of sales. We
19 based it on registered vehicles in operation in someone's
20 primary area of influence. So that's sort of your geographic
21 area that you're responsible for. And that's because retail
22 customers tend to go to the local dealer for things like
23 service, maintenance, warranty work, and that's a higher margin
24 business actually than new car sales. And we think it's a
25 better barometer of what the impact of this was, and obviously

1 the vote of the class members, the small number of opt-outs,
2 and also the high number of folks who've already submitted
3 releases.

4 But to go to the question of the open-point, what an
5 open-point is is an unallocated area. It's an area where
6 Volkswagen has the ability to put in another dealership and
7 give that dealership that area, but someone like Mr. Smith is
8 able to sell cars to people who live in that unallocated area.

9 And obviously Volkswagen will change, to the extent it can
10 under its dealer agreements, you know, what can go on in an
11 open-point. And it's clear that under the dealer agreements
12 that Mr. Smith and other people had, he had no exclusive right
13 to sell cars into the unallocated or open-point area.

14 So essentially what he's doing is, one, complaining about
15 a formula that was the subject of a lot of negotiation, that
16 was based on the same formula that was done to provide the
17 customer support payments, a formula that we think best
18 addresses the injury to dealers looking at their overall
19 activity: Warranty work, not just sales work but also, you
20 know, maintenance and things like that.

21 And so what he's essentially saying is "I had this
22 unallocated area that Volkswagen didn't put somebody in. I was
23 given the ability to sell into the unallocated area, and I
24 should get additional compensation even though that's not my
25 area." It's just not his area, but it's a place where he can

1 sell vehicles.

2 And so if he had wanted to opt out and litigate this
3 issue, he could have done so. He signed the release, has
4 gotten compensated, and so we think that this is a claim where
5 essentially a class member is challenging the allocation
6 formula.

7 And obviously reasonable people can disagree, but we think
8 that the fact that so many class members, like Mr. Smith, have
9 signed releases indicates that this is a fair method. And the
10 law only requires the Court to approve a fair and reasonable
11 settlement, and reasonable people can disagree about what's
12 reasonable but this is clearly a fair and reasonable
13 settlement, and he shouldn't have signed his release if he
14 wanted to litigate this issue.

15 **THE COURT:** Thank you.

16 Any other objectors?

17 **MR. DANHI:** Good morning. Victor Danhi on behalf of
18 Arent Fox on behalf of the Palisades group.

19 I just wanted to confirm that Palisades Volkswagen did not
20 object to the settlement overall. It was just the scope of the
21 release. Subject to the agreement that's been reached with
22 Volkswagen and plaintiffs' counsel, we will withdraw our
23 objection but only once we've seen the amendment to the
24 settlement agreement and the revised proposed order. So I just
25 wanted to go on record.

1 **THE COURT:** Well, that's fine. I appreciate your
2 comments, and I accept the representations of the parties that
3 they will draft a modification or addendum to the proposed
4 release. It will keep your claim intact as designed; that is
5 to say, by virtue of the dates.

6 And what you're representing to me is if that does occur,
7 you will withdraw your objection?

8 **MR. DANHI:** That's correct, Your Honor.

9 **THE COURT:** Okay. So I would appreciate if the
10 parties can furnish me that addendum by Friday of this week.

11 **MR. DANHI:** Thank you, Your Honor.

12 **THE COURT:** And do you think you can do it by then?

13 **MR. GIUFFRA:** We will, Your Honor.

14 **MR. BERMAN:** Yes, we can do that, Your Honor.

15 **THE COURT:** All right. So is there anything further
16 on this matter?

17 (No response.)

18 **THE COURT:** Okay. I will take the objections under
19 submission and I will issue an order soon. And when I say
20 "soon," I mean soon. Thank you very much.

21 Let me turn to some of the other issues because there have
22 been a number of filings, and I think it might be useful to
23 give the parties who are here and those who are participating
24 by telephone a further understanding as to the progress of the
25 settlement of a number of the issues raised by the litigation.

1 Let me call on the government, Mr. Van Eaton.

2 **MR. VAN EATON:** Thanks very much, Your Honor.

3 I'm actually thrilled that you noticed we had some extra
4 filings since we were last here. We have continued to be very
5 busy.

6 From the beginning of this case, you were very clear to us
7 in your instruction to address the cars on the road equipped
8 with the defeat devices in violation of the Clean Air Act.

9 As you know, the EPA and their partners at the California
10 Air Resources Board shared that view and that priority, shared
11 the Court's concern, and the pollution caused by the excess
12 emissions from those cars became their top priority.

13 As you know, in September of 2015, which seems an eternity
14 ago now, the notice of violation was issued. The United States
15 then filed its complaint in January of last year --
16 January 4th, just over a year ago -- and shortly thereafter,
17 our case was transferred into this multidistrict litigation and
18 you implored us to get to work, so we got to work.

19 This is a case --

20 **THE COURT:** I appointed Director Mueller to make sure
21 everybody got to work.

22 **MR. VAN EATON:** You did that too and he did.

23 The remarkable facts in this case required a remarkable
24 response; and, you know, we have now, Your Honor, filed three
25 partial consent decrees that if ultimately entered by the Court

1 will resolve all of the claims alleged against Volkswagen in
2 the United States complaint.

3 We believe that together these three settlements provide a
4 comprehensive resolution by addressing the harm to human health
5 and the environment by removing the cars from the road or
6 fixing them in the first two consent decrees; requiring a
7 punitive and hopefully a deterrent \$1.45 billion civil penalty,
8 which is the largest ever under the Clean Air Act; and by
9 imposing a tailored injunctive relief program consisting of
10 required changes in corporate governance for Volkswagen, the
11 introduction of third-party testing, and creation of an
12 independent auditor to oversee the various required changes
13 from the consent decree.

14 The first consent decree you're very familiar with. We
15 addressed the 2-liter vehicles, which is the largest group of
16 vehicles, approximately half a million cars. We lodged that
17 consent decree in June. Your Honor entered that in October.
18 We are months after we had filed our complaint, and that is now
19 in the process of being implemented. The buyback program could
20 cost up to \$10 billion. That's ongoing.

21 I wanted to make Your Honor aware that within the last two
22 weeks, EPA approved the first emissions modification that the
23 company had submitted to the regulators for approval. By doing
24 so, that will allow car owners who wish to keep their vehicles
25 to do so and have them modified rather than sell them back.

1 Those vehicles are the Generation 3 2-liter vehicles which are
2 the model year 2015 cars.

3 And I understand from Ms. Cabraser and PSC that, you know,
4 the class members are already availing themselves of that
5 option.

6 That first consent decree also established a very
7 important remedial measure, which is a \$2.7 billion mitigation
8 trust to fund NOx-reducing projects around the country. We are
9 in the process now of implementing that, identifying a trustee,
10 and we will be filing additional papers with the Court to
11 establish the trust and get it operational so the states can
12 start using those funds to make their air cleaner.

13 In addition, work is also underway implementing the
14 additional \$2 billion investment into the zero emission vehicle
15 infrastructure.

16 So after that was entered, we turned immediately to
17 seeking a resolution for the approximately 80,000 3-liter
18 vehicles. The second partial consent decree relating to those
19 vehicles we filed with the Court in December, just last month,
20 which was two months after the entry of the first settlement.

21 Right now, Your Honor, it is undergoing the public comment
22 process. We published in the Federal Register. And as we did
23 with the first settlement, at the conclusion of that comment
24 period, we anticipate filing a motion requesting Your Honor to
25 enter the decree as an order of the court.

1 I just wanted to briefly kind of outline the framework of
2 the 3-liter consent decree because we haven't appeared since we
3 filed that. In some ways it's very similar to the 2-liter
4 decree, but there are some different challenges that we faced,
5 and so it has a little bit of a unique component to it.

6 So for the older vehicles, which we refer to as the
7 Generation 1 vehicles, the 3-liter decree offers the same
8 options as the 2-liter did, which is to say buyback, lease
9 terminations, modifications, ultimately if they're proposed and
10 approved.

11 The wrinkle with the 3 liters was there were newer
12 vehicles which we refer to as Generation 2 vehicles, which
13 Volkswagen believed was technically feasible to repair those
14 vehicles so they could be brought fully into compliance with
15 the certified emission standards. So the regulators thought
16 that if that could happen, it should happen.

17 So if Volkswagen successfully demonstrates that that
18 solution be achieved, then the consent decree does not require
19 Volkswagen to buy those vehicles back. If they cannot achieve
20 those technical standards, then the framework would revert back
21 to the similar framework with the buyback, lease terminations,
22 and emissions modification. We estimate that that program
23 could cost up to an additional \$1 billion to implement.

24 Additionally, under the 3-liter consent decree, Volkswagen
25 is required to fund an additional \$225 million into the trust

1 that is in the process of being established under the first
2 consent decree to fund additional NOx-reducing projects.

3 The re-call rate in the 3-liter consent decree is the same
4 as it was in the 2-liter. It's 85 percent with penalty
5 payments into the trust fund for every percentage point that
6 they come up short.

7 So by allowing Volkswagen to bring these vehicles into
8 compliance with the certified emission standards where it's
9 technically feasible to do so, we think that that is a good
10 resolution tailored specifically to address the environmental
11 concerns associated with those cars, and we look forward to
12 considering the public comments on that and filing an
13 appropriate motion with the Court at that time.

14 And then after dealing with the cars on the road, we then
15 turned immediately to crafting the critical aspect of any
16 enforcement action which, you know, this is. You know, we have
17 spent a lot of time addressing the consumers and the
18 environment; and, you know, it's important, I think, from the
19 Justice Department's perspective to keep in mind that this is
20 an enforcement action. This is a civil enforcement action. So
21 an important part of this is punishing the offender and taking
22 steps to assure that something like this never happens again.

23 So last week we filed a third partial consent decree with
24 the Court, and we think it achieves those objectives. It was
25 part of a set of coordinated federal resolutions pertaining to

1 all of the 2- and 3-liter vehicles; and as a total, the
2 resolutions contain \$4.3 billion in penalties resolving civil
3 and criminal claims, including claims of the U.S. Customs and
4 Border Patrol and alleged violations of the Financial
5 Institutions Reform, Recovery, and Enforcement Act, known as
6 FIRREA, all of which were resolved in separate agreements that
7 we did not file before Your Honor.

8 Under this third settlement, Volkswagen and Porsche
9 defendants agreed to pay \$1.45 billion to resolve EPA's Clean
10 Air Act civil penalty claim. It is, as I mentioned earlier,
11 the largest ever civil penalty in the Clean Air Act. The
12 payment will be due under the terms of the decree within 30
13 days of entry by the Court, plus interest from the date of
14 lodging.

15 In addition and importantly, the consent decree requires
16 Volkswagen to take very specific actions to prevent similar
17 violations from taking place again. Some of the measures
18 include a suite of specific corporate governance measures, an
19 independent third party to perform annual in-use testing of
20 vehicles -- this is the type of testing that was used initially
21 to uncover Volkswagen's cheating by independent third
22 parties -- and, finally, retention of an independent auditor to
23 perform an audit of the many aspects of the injunctive relief
24 over the course of the consent decree to ensure that the
25 company is actually implementing those measures.

1 As with the 3-liter decree, we look forward to considering
2 public comments. I believe that it has been submitted and we
3 expect it to be published in the Federal Register, and our
4 comment period will begin I think this week. So you'll hear
5 from us in an appropriate time after we hear from the public.

6 And I guess just in conclusion, Your Honor, it's important
7 for auto makers to do business in the United States to know
8 that they have a duty to follow the laws, the environmental
9 laws that were enacted to prevent and to protect the American
10 people and prevent harmful pollution. They have a duty to play
11 fairly with their competitors and deal honestly with the
12 customers.

13 And we think that these settlements together provide a
14 mechanism to, first, make the environment whole by removing the
15 cars and offsetting the air emissions, to hold Volkswagen
16 accountable for its violations of law and its breach of the
17 public trust, and to require meaningful change and oversight
18 designed to prevent this from happening again.

19 So the cost of all three of these civil settlements is up
20 to approximately \$17.375 billion, and it is our sincere hope
21 that this will send a message to Volkswagen and to others that
22 would consider gaming the system that it does not pay to cheat.

23 So, Your Honor, subject to your questions at this point
24 about any of those settlements that have been filed, that's all
25 I have.

1 **THE COURT:** Well, I thank you for that report.

2 I note that while issues have been resolved in terms of
3 Volkswagen's conduct, there remain individuals who have been
4 charged criminally for violations of the law who were
5 associated with Volkswagen, and those matters have not been
6 resolved; is that correct?

7 **MR. VAN EATON:** That is correct, Your Honor. There
8 were some Indictments announced last week.

9 **THE COURT:** Right. So in addition to all of the
10 sanctions that have been imposed upon Volkswagen, there still
11 remains what I would characterize as individual responsibility,
12 responsibility of individuals who participated in the
13 alleged -- because we're talking about a criminal case -- the
14 alleged wrongful conduct.

15 **MR. VAN EATON:** Correct.

16 **THE COURT:** And I think that that coupled with what
17 you have done may very well provide a startling disincentive
18 for wrongful conduct to proceed. Both were important, at least
19 in the Court's view, as to what I've observed. Thank you very
20 much.

21 **MR. VAN EATON:** Thank you, Your Honor.

22 **THE COURT:** So let me turn back to the civil side for
23 just a moment.

24 Ms. Cabraser, do you have any observations you wish to
25 make at this time as our leader of the Plaintiffs Steering

1 Committee?

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

3 Just briefly, a snapshot of where we are on the
4 implementation of the 2-liter settlement. And Mr. Giuffra has
5 got more precise and probably up-to-date statistics than I do,
6 but I'll just give you a general impression.

7 As Your Honor knows, the 2-liter settlement was approved
8 on October 25th to go into operation as soon as practicable
9 thereafter. We're now three months into a very active claims
10 process. There are 20 months to go.

11 Although the claims process itself extends out until
12 September of 2018, virtually all of the 2-liter class members
13 registered as early as possible, and we now have approximately
14 95 percent of the class participating in the process. There
15 have been over 451,000 registrations, and there have been over
16 383,000 claims under submission.

17 In response to that, nearly 267,000 offers for buyback or
18 emissions modification have already been made, and those offers
19 that have already been made to the class members total more
20 than \$4.7 billion.

21 It is estimated, I believe, that in this month, January
22 alone, over 60,000 actual buybacks will be accomplished. And
23 as Your Honor has heard, the first of the emissions
24 modifications has been approved and class members have already
25 begun to go in for that modification process.

1 This has been the farthest thing from a self-executing
2 settlement. To make this settlement work has required the
3 active engagement of literally thousands of people at
4 Volkswagen and in the claims supervisor's office. It's
5 required the entire dealer network of Volkswagen dealers, and
6 we thank those dealers because they're on the frontline of this
7 process trying to make it work for the class members.

8 Because this is like a day-long house party at which
9 everyone showed up in the first five minutes, there have been
10 some challenges in getting the process up and running, and
11 Your Honor is aware of those. The claims supervisor submits
12 regular reports.

13 But I think it is noteworthy that three months into the
14 process, with this level of participation, which we understand
15 to be unprecedented, the system is ramping up, staffing
16 increases constantly, procedures are streamlined constantly,
17 and we rely on the class members themselves when they report in
18 to us about their experiences to use what they say to make the
19 process better on an ongoing basis.

20 Every firm in the PSC and many other firms are engaged
21 literally on a daily basis, seven days a week, working with the
22 class members to help them through the process, and we've
23 fielded many, many thousands of communications in that respect,
24 which we continue to do.

25 So this is a participatory process that requires active

1 engagement, not only by Volkswagen and its dealers and the
2 claims supervisors and the regulators, but the class members
3 themselves.

4 And we are at this point encouraged that the process will
5 continue to improve and to become more efficient, and we hope
6 to use what we have learned in this process when we turn to
7 claims administration for 3 liters.

8 We understand that we are under a continuing
9 confidentiality order with respect to a proposed 3-liter
10 resolution. We are working toward our deadline of
11 January 31st, 2017, to submit papers for this Court's
12 preliminary review and we hope approval of that settlement.

13 It does track the structure that Mr. Van Eaton laid out
14 with respect to the different generations of 3-liter vehicles,
15 and it also puts finite time limits on the process of achieving
16 a fully emissions-compliant repair for the Generation 3
17 vehicles such that class members will know exactly how long
18 they will be waiting to learn if there is a fully
19 emissions-compliant repair for their cars or not.

20 And, obviously, to the extent full compliance cannot be
21 accomplished, the buyback as well as restitution and
22 modification features of the 2-liter settlement will be in
23 place.

24 This is a complicated settlement because of the different
25 generations, because of the need as always to interact with the

1 regulators, and we believe that we are on track; and we will
2 also have a proposed resolution of the class claims, the
3 consumer claims, with respect to the Bosch defendants for
4 consideration as well to add to the compensation that would be
5 provided to the class members.

6 Thank you.

7 **THE COURT:** Thank you.

8 Mr. Giuffra, any final comments?

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

10 I think we are now three months into what is likely the
11 largest, biggest, most complex buyback of a product in U.S.
12 history, and I believe since we're the most litigious country
13 in the world, probably in the world history, and I think we've
14 made, you know, substantial, substantial progress.

15 Obviously there's going to be bumps in the road. The
16 company has 700 employees working on this full-time. There are
17 people in the dealerships also executing, again, this huge
18 complex buyback. And whenever there's a complaint, for
19 example, raised with the Court or with PSC, we move on it as
20 quickly as we can.

21 And Ms. Cabraser gave you some of the data. Let me give
22 slightly just some additional data.

23 She mentioned the 383,000 unique claims that have been
24 filed. We currently have approximately 160,000 appointments
25 that have been scheduled for people to actually execute on the

1 buyback, and they'll receive \$3.3 billion.

2 The question that Ms. Cabraser asked me last night and
3 I've gotten additional information, this is as of January 17,
4 there have been 66,877 people who have completed either their
5 buyback or their lease terminations, and that has resulted in
6 the payment out from Volkswagen of \$1.2 billion.

7 By the end of January, we expect to complete 96,000
8 buybacks/lease terminations, so we're well on the road when you
9 actually think three months into, again, probably the most
10 complex and biggest buyback in U.S. history.

11 Now, Mr. Van Eaton made an important point about the fix,
12 and that's always been an important part of this process for
13 VW. There are customers who want to keep their cars, they like
14 their cars, get them fixed. And it was very important that on
15 January 6th the EPA and the California Air Resources Board,
16 after doing a thorough, thorough analysis, approved the Gen 3
17 2-liter fix.

18 That applies to roughly 70,000 vehicles. It covers the
19 model year 2015 VW Beetle, Beetle Convertible, Golf, Golf
20 SportsWagon, Jetta, Passats, and the Audi A3.

21 And then there are deadlines that are specified in the
22 relevant documents for Volkswagen to make submissions for the
23 Gen 1 and the Gen 2 2-liter. The first one is in January 27
24 for the Gen 1 2-liter. This is submission deadline for carbon
25 EPA. And then for Gen 2, it's March 3, 2017, and there are a

1 lot of people working on that.

2 On the 3-liter settlement, Your Honor, as Ms. Cabraser
3 said, I think we're making, you know, very good progress.
4 We're on track to file the papers on January 31st. We have a
5 signed term sheet that's 34 pages long, and we've made a
6 tremendous amount of progress.

7 When I listened to Mr. Van Eaton talk about all that had
8 been accomplished in the last year, I sort of now know why I
9 feel five years older, because I feel like we've done five
10 years of work in one.

11 And I want to thank Director Mueller, Mr. Quarles, and Ari
12 Savitzky of the Director's firm, Wilmer Cutler, for all that
13 they did because they spent as much time as we did working
14 this, listening to phone calls from people, and bringing
15 everyone together, because there were literally thousands of
16 points that had to be negotiated. And I, quite frankly, have
17 never seen anything like, you know, something of this
18 complexity.

19 I'd also like to thank all of our co-counsel. Everybody
20 worked very, very well. We did not adopt the adversarial mode
21 here. Everyone tried to -- I think led by Your Honor's
22 direction -- tried to work the problem out, solve the problem.

23 And that's obviously in Volkswagen's interest. Volkswagen
24 wants to be a successful car company in the United States,
25 build on its traditions in the United States. It was, you

1 know, one of the leading car companies in the United States
2 for, you know, the last 60 years and we want to continue to do
3 that and to rebuild the trust, and that's what we're very
4 committed to.

5 And we also want to thank the Court for all you did for
6 sort of pressing everyone to accomplish so much in such a short
7 period of time. So thank you very much on behalf of the
8 company.

9 **THE COURT:** Thank you.

10 Let me just take a moment sort of to complete the point
11 that the parties have all made in that the devotion, the
12 service, the energy that, of course, the lawyers have given to
13 this litigation have brought us to the point where we are
14 today.

15 But the implementation of the settlement is in many
16 respects nearly as complicated as the negotiations surrounding
17 what mechanisms and terms should be implemented, and the
18 success in the implementation while not perfect, because
19 anything that humans touch is going to have some imperfections,
20 has steadily improved over time. And I think that really the
21 credit in part obviously goes to the people who have been hired
22 to implement the program, but none of this would have worked
23 without the dealers.

24 The dealers are the face of Volkswagen, and they are the
25 individuals who have to interface with the consumer. And so

1 it's interesting that in a service industry, which -- a product
2 service industry, which this is, the automotive industry, that
3 it does come down to the willingness and the attitude of those
4 people on the road or at the stores and the showrooms and the
5 repair facilities, and so forth, to relate to the public.

6 I have received reports that dealers have been welcoming
7 to consumers who come back. Obviously consumers who come back
8 have different attitudes. Maybe the universal attitude is that
9 they're upset, they're upset with what happened. This was an
10 unanticipated event in their life at the time that they
11 purchased the vehicles.

12 Nevertheless, I think that the dealers have been
13 sympathetic, have been efficient, have been welcoming, and have
14 given the consumers some added satisfaction that through this
15 process, their concerns have been listened to, have been
16 addressed, and have some type of solution.

17 Is it the perfect solution? Well, there's no such thing
18 as a perfect solution to an imperfect problem or a problem
19 that's very difficult, but I want to simply say that the Court
20 is grateful to those people who interface with the consumer
21 because I think that that is an added measure of satisfaction
22 that can be given to people who feel, and justifiably so, that
23 they were wronged by this transaction.

24 So I know that some dealers are here today, some may be on
25 the telephone. They haven't been, you know, all that vocal in

1 this whole process, but they are indispensable and they have
2 rendered a great service.

3 And I want to thank, of course, counsel of the Plaintiffs
4 Steering Committee, who saw this as a problem and worked out a
5 resolution of it, Mr. Berman and others, and thank, of course,
6 the parties for devoting the energy.

7 So as we know, January 31st is one of those deadlines that
8 the Court just simply isn't going to move, and we'll anticipate
9 filings on or before that date with respect to the 3-liter
10 cars, and then we will have a hearing for preliminary approval
11 on Valentine's Day. Valentine's Day. So bring your Valentine
12 to San Francisco, and we will hear this matter for a
13 determination as to whether or not preliminary approval. It
14 will be 8:00 o'clock on February 14th, and I anticipate with
15 respect to the dealers that I'll have an opinion out shortly.

16 So thank you. We're in recess.

17 (Proceedings adjourned at 9:13 a.m.)

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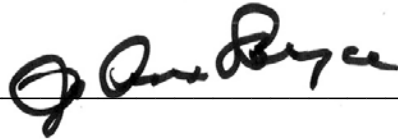
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CERTIFICATE OF REPORTER

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

DATE: Thursday, January 19, 2017



Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter