

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. 15-MD-02672 CRB  
PRODUCTS LIABILITY LITIGATION, )

BRS, )  
 )  
Plaintiff, )  
 )  
VS. ) NO. C 16-3435 CRB  
 )  
VOLKSWAGEN AG, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

San Francisco, California  
Friday, July 7, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Movant Puerto Rico Government Employees and Judiciary  
Retirement Systems Administration:

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Official Reporter, U.S. District Court

(Appearances continued, next page)

**APPEARANCES, CONTINUED:**

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1 Friday - July 7, 2017

1:06 p.m.

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

3 **THE CLERK:** Calling Civil Actions C-15-MD-2672, in re  
4 Volkswagen Clean Diesel Marketing Sales Practices, and Products  
5 Liability litigation. And Case No. C-16-3435, BRS versus  
6 Volkswagen AG, et al.

7 Counsel, please state your appearances for the record.

8 **MR. BERG:** Your Honor, Ian Berg of Abraham Fruchter &  
9 Twersky, on behalf of lead plaintiff Puerto Rico Government  
10 Employees and Judiciary Retirement Systems Administration.

11 **THE COURT:** Good afternoon.

12 **MR. GIUFFRA:** Good afternoon, Your Honor. Robert Giuffra,  
13 Sullivan & Cromwell, for the Volkswagen defendants. And with me  
14 is my colleague Casey Dennis (Phonetic), who is a student at  
15 Yale Law School. So this is his first sort of appearance in  
16 court.

17 **THE COURT:** Yale Law School.

18 **MR. GIUFFRA:** Don't hold it against him.

19 **THE COURT:** No, no, I have had very good clerks from Yale.

20 **MR. GIUFFRA:** May be some here (Indicating).

21 **THE COURT:** They're not there now. But --

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

23 **MR. JOSEPH:** Your Honor, Gregory Joseph for Martin  
24 Winterkorn.

25 **THE COURT:** Thank you.

1           **MR. GONZALEZ:** Good afternoon, Your Honor. Joseph Gonzalez  
2 with Schertler & Onorato, on behalf of Michael Horn, with my  
3 colleague lead counsel David Schertler.

4           **MR. SCHERTLER:** Good afternoon.

5           **THE COURT:** Good afternoon.

6           Well, thank you for being so accommodating. I'm sorry I had  
7 an irreconcilable conflict, as they say, this morning so I had  
8 to postpone. So I apologize. And I think a number of you came  
9 from the East Coast, and it's inconvenient. And I regret that.

10           The -- I have gone through the various briefs and so forth.  
11 I have a couple of questions. And, and, and I want to make an  
12 assumption for our discussion this afternoon.

13           My assumption is that the Court would rule that the  
14 attachments to the offering memoranda are not to be considered  
15 in connection, as part of a false statement or  
16 misrepresentation. That would be actionable.

17           The offering memo -- and I'll put this in an order so you  
18 will have my reasons, but essentially the offering memoranda,  
19 there is a big caveat on it which says: Look, you can only  
20 really rely on what's here.

21           Now, I understand that there is a reference in the offering  
22 memoranda too, that there are other things out there that form a  
23 part of the solicitation in a way. But they're there to say by  
24 -- by way of explanation or further explanation. It's not by  
25 way of: These are the representations and you should include

1 these in the representations.

2 So, for the argument today, the parties should assume that  
3 I'm only looking at the offering memoranda. Let's start with  
4 that.

5 Secondly, and I think this is where I want to start the  
6 discussion, I'm -- as to Mr. Winterkorn, I am -- the complaint  
7 doesn't, in my view, adequately represent -- adequately allege  
8 what he knew, when he knew it.

9 And, you know, one has to take into account that there is  
10 some lapsing of time between when a memorandum is published or  
11 written and then circulated, and when the individual actually  
12 looks at it. I mean, there is a reasonable amount of time.

13 I think that receipt of -- I'm going to say the Gottweis --

14 **MR. GIUFFRA:** Yes, Your Honor, the Gottweis memo, which is  
15 dated --

16 **THE COURT:** May 23.

17 **MR. JOSEPH:** May 23.

18 **MR. GIUFFRA:** And the offering memorandum, of course, is the  
19 15th.

20 **THE COURT:** Well, the offering memorandum and the purchase  
21 is -- the offering memorandum is the 15th, the purchase is the  
22 same day, assumably.

23 **MR. BERG:** Correct.

24 (Reporter interruption)

25 **THE COURT:** Now that I've just all gotten to know you so

1 well that I know who's speaking. So --

2 (Reporter interruption)

3 **THE COURT:** So please forgive me, to all those people who  
4 are listening to these proceedings by telephone, I will make  
5 sure that the parties speak into a microphone. So that they can  
6 be heard by you.

7 I don't think there is any mystery to these dates. The  
8 question is what can one be -- what, what can one reasonably  
9 assume that a person knew as of a particular day?

10 But I think I have another question, well, that's sort of  
11 tied to that, which is: Assuming I would find that  
12 Mr. Winterkorn is a -- within a control group or a control  
13 officer, do the plaintiffs have to allege that he had scienter?  
14 That he had scienter?

15 And if the answer to that is yes, what evidence is there  
16 that as of -- and I'll give you the dates, May 15, May 23rd, he  
17 had scienter? And I also am saying, and this is another issue  
18 that -- I just sort of have a lot of things in mind -- is that  
19 if the first offering, if there's not enough evidence of  
20 scienter and so forth and liability as to the first offering,  
21 then are the plaintiffs going to be in a position where they're  
22 going to amend and substitute a plaintiff in who is a part of  
23 the second or third offering?

24 And that is the sort of question I ask, because I want to  
25 just figure out in my own mind: Where does the litigation go?

1 And I know litigation goes, depending on what's done, you know,  
2 the allegations of the parties and so forth.

3 But to spend hours and hours and hours talking about this  
4 plaintiff who is only part of the first offering, as I  
5 understand it, if there's another one in the wings on offering  
6 No. 2, that's at a later date, and it's much easier to assume  
7 that certain -- that there's certain extent -- certain knowledge  
8 out there as of a particular date, rather than the first date.

9 So I guess my question to plaintiff's counsel would be the  
10 first one, which involves Mr. Winterkorn. And if you would come  
11 forward, that would be great.

12 **MR. BERG:** Well, Your Honor, as I understood your questions,  
13 I think there's two. One is with respect to whether or not  
14 Mr. Winterkorn -- whether or not there was scienter to show that  
15 Mr. Winterkorn was involved in the first offering.

16 And then the second question is: If there's not, and he is  
17 just a defendant as a control person, does that attack scienter  
18 as a whole for the entire offering?

19 Do I have those two questions correct?

20 **THE COURT:** Yeah, okay. You can answer those. Good start.

21 **MR. BERG:** Okay. First, with respect to Mr. Winterkorn's  
22 involvement in the first offering, and the scienter and his  
23 knowledge, I believe in the ADR case, the facts that supported  
24 scienter went earlier back than just the Gottweis memorandum.

25 I think there was -- I think the scienter went back to 2008,

1 and his involvement was in being a micro-manager of his top  
2 executives that he brought in, and that they had -- they had  
3 some knowledge going back to 2008. So I think that there's more  
4 to it than just that memorandum to indicate his scienter, as I  
5 think we addressed in our papers. But if not, we would like to  
6 have a chance to kind of amend and clarify in another  
7 proceeding.

8 But to get the to the second question, and why I think that  
9 might not matter, is Mr. Winterkorn's scienter is not essential  
10 with the claims, if he is just a defendant as a control person.  
11 Because you would still have scienter on behalf of the  
12 companies, and its Volkswagen and Volkswagen of America and  
13 Volkswagen of America Finance, as well as other senior  
14 executives, including defendant Horn. Which, in your latest  
15 ruling last week in June, June 28th in the ADR case, you found  
16 that there was scienter as to Mr. Horn.

17 And I think that's an even stronger case here, where he was  
18 in control of Volkswagen of America and Volkswagen of America  
19 Finance, which issued --

20 **THE COURT:** On May 23rd? Or May 15th? Mr. Horn? How was  
21 he? I thought he didn't really come on board until May 24th.

22 I may be off on these dates. So if I am, please correct me.

23 **MR. BERG:** I would direct you to the order that you just put  
24 out on June 28th. But I think you laid out a number of facts  
25 taking his scienter before May 14th, 2014. May 15, 2014. And



1 here, the first offering is May 23rd.

2 I have that order on my table, if I can go back and grab it  
3 (Indicating).

4 **THE COURT:** Sure. Of course. So what I'm interested in  
5 your finding, is what allegations are there to show that  
6 Mr. Horn knew about the device scheme before the e-mail, before  
7 the May 15th e-mail?

8 **MR. BERG:** Right. And while I look for those, I think  
9 there's two important points to make. One is that since the  
10 time our complaint was filed, there's been additional facts that  
11 have come out in the news. And some of those were incorporated  
12 into the ADR amended complaint. And I am taking for granted  
13 that those facts still exist in the universe, whether or not  
14 they are in our complaint, and that we would be able to put  
15 those, those same facts into our complaint.

16 But, but I also point, regardless of the scienter of  
17 Mr. Horn, there's still the scienter of the company and  
18 Volkswagen Group of America and Volkswagen of America Finance,  
19 where it doesn't have to be limited to a named defendant or to  
20 the top executive, but it just has to be executive officers.

21 **THE COURT:** Well, where is evidence to support scienter as  
22 to the Volkswagen Group of America Finance?

23 **MR. BERG:** Well, I believe in your original order you found  
24 there was scienter as to the company with regard -- with --  
25 consistent with regard to Volkswagen, either through defendant

1 Winterkorn or through corrective scienter, or through their  
2 executives. With Volkswagen of America Finance, they're the  
3 actual issuers of the offerings, the bond offerings. And  
4 they're controlled by Volkswagen Group of America, which had  
5 notice of the 400- or 500,000 cars, and the scheme in general.

6 So I'm not sure I understand the binary question as to  
7 whether or not some people had scienter at some time versus --  
8 the scienter is all-encompassing. If Volkswagen knew that it  
9 had this emissions scandal, the same would be true for  
10 Volkswagen, Volkswagen Group of America, and from the top  
11 executives that are controlling all of those entities. They're  
12 delineated in their legal standpoint, but it's still controlled  
13 by the same people, the same executives with the same underlying  
14 emissions scheme.

15 **THE COURT:** Maybe I should hear from Mr. Joseph, first, as  
16 to Mr. Winterkorn.

17 **MR. JOSEPH:** Thanks, Your Honor.

18 First let me address the timing issue that you identified,  
19 because I think the complaint may answer it. Because while the  
20 memo is dated May 23rd, which is a Friday, 2014, it says in  
21 Paragraphs 171 and 173 at 311 that it was in his weekend  
22 reading, which would be the 24th or 25th. So even if he didn't  
23 get to it on the weekend, that would be the earliest possible  
24 time that he could have gotten to it.

25 On the control person claim, I believe, Your Honor, under

1 your prior ruling -- and is it pronounced "Hui"? You know, they  
2 have to show specific facts of actual control. And now we are  
3 not talking anymore about VWAG or a company that he is an  
4 officer or a director of; we are talking about offering  
5 documents that come from a subsidiary of a subsidiary in a  
6 language that he's not familiar with. I'll not say he's not  
7 familiar. He is not comfortable in English. His English, I'm  
8 sure, is much better than my German, but he wants to speak in  
9 German when you talk to him.

10 So the specific facts are not there. I cannot answer the  
11 question by saying (Inaudible) scienter, independent scienter,  
12 so I'm not going to make a representation to you about that.

13 He didn't sign the offering memorandum. And therefore, even  
14 if one were to consider the attachments, they're just the  
15 financial statements, that are before the date in May, in any  
16 event.

17 So Your Honor, those are, I think, the answers I have got  
18 concisely to your questions. I just -- I wanted to point out, I  
19 want to make -- but I don't want to answer --

20 **THE COURT:** Go ahead.

21 **MR. JOSEPH:** Well, I just want to say that I want to return  
22 to personal jurisdiction, which I've been notably unsuccessful  
23 on before.

24 But let me just point out to Your Honor that in the ADR  
25 decision, that principally relied on SEC Rule 12g3-2(b), and

1 that was the reason I believe the Court concluded there was  
2 personal availment. Your Honor wrote the opinion and knows what  
3 Your Honor's conclusion was.

4 That rule doesn't apply to this kind of an offer. And  
5 therefore, there was not -- if that was the ground for personal  
6 availment, there is no personal availment on that ground.

7 And I will also say that in terms of reasonableness, there's  
8 a specific warning in the offering memorandum, at -- Roman at  
9 Page 6, saying that you shouldn't assume you're going to have  
10 personal jurisdiction over officers and directors of VWAG.

11 And therefore, it's an assumption-of-risk issue. It's not  
12 unreasonable that they actually be bound by the conclusion that  
13 the risk that they were put on notice of materialized.

14 If you have any other questions, I'm happy to answer them.

15 **THE COURT:** Do you want to go, Mr. Giuffra?

16 **MR. GIUFFRA:** Yes, I would, Your Honor.

17 **THE COURT:** Go ahead.

18 **MR. GIUFFRA:** Because I think there is a number of points  
19 Your Honor raised that I can respond to.

20 Number one, Your Honor asked a good question and a practical  
21 question: What happens if you were to dismiss the claims of  
22 this plaintiff?

23 Well, we only have one plaintiff in this case, which is the  
24 Puerto Rico pension plan. And we don't have any other  
25 plaintiffs. And they have had plenty of time to try to get

1 other plaintiffs. And the rule is the plaintiff who is the --  
2 the named plaintiff must state a claim.

3 And this plaintiff doesn't state a claim on at least three  
4 grounds. They can't allege reliance. And I can talk about  
5 that, and it's pretty open and shut case. They have got an  
6 issue with respect to whether there is a misstatement, which I  
7 can talk about. And then they have the scienter argument that  
8 Your Honor just raised.

9 Now, the reason why they only have one plaintiff is that  
10 these bonds have largely matured, or are traded at or above par  
11 now.

12 This particular plaintiff lost, I believe, \$66,000 on a  
13 transaction that was done in October of 2015. So, there's not  
14 much here. But when you look at it in terms of the key issues  
15 on reliance, which they have to plead, they can't plead reliance  
16 because of the nature of this transaction. It's a private  
17 placement of securities.

18 The trade date, which is the key date as far as this  
19 plaintiff (Indicating) is concerned, is the 15th of May. And  
20 Your Honor can get that right from the certification attached to  
21 the complaint, which has a schedule which talks about the trade  
22 date.

23 And it references -- I can hand it up to the Court if it's  
24 helpful. You can have my copy.

25 **THE COURT:** Was it in the pleadings?

1           **MR. GIUFFRA:** Yes, it's Exhibit A to Exhibit 2, it's right  
2 here. And it says the trade date for these transactions was the  
3 15th.

4           (Document handed up to the Court)

5           **MR. GIUFFRA:** So that's the operative date as far as this  
6 plaintiff is concerned.

7           Now, the plaintiff has to be able to establish that they  
8 actually relied on a statement that was made that they claim was  
9 false. Again, it's a securities case. You have to plead  
10 falsity, and you have to plead scienter. They can plead  
11 neither.

12           And they can't plead reliance. They can't plead reliance  
13 because the nature of this transaction is a private placement, a  
14 144A offering, that was sold only to what are called qualified  
15 investment funds. And that's called a QIB. You need to have  
16 \$100 million in investments in order to buy these types of  
17 securities.

18           Okay. And courts have repeatedly held, whether it's the  
19 *Health South* case, *Enron*, 144A offerings are not traded in an  
20 efficient market.

21           And there are other cases that we've cited in our papers  
22 making it quite clear that these are -- you don't get the  
23 benefit of the basic versus (Inaudible) insufficiency argument.

24           Then they come back and say: Well, you should give us the  
25 benefit of *Affiliated Ute*, which applies in the case of an

1 omission. And the problem they have here, this case is a mixed  
2 case where they allege both non-disclosure as well as false  
3 statements. And they have 18 pages in their complaints.

4 Paragraph 198 to 230, where they discuss -- it's captioned  
5 "Misleading Statements." So they don't get the benefit of  
6 *Affiliated Ute*.

7 They have an argument here about fraud creating the market.  
8 Well, that's a theory that hasn't been recognized by the Ninth  
9 Circuit, in a case called *Nuveen* (Phonetic), made it clear it  
10 isn't. And that only applies in a situation where we have  
11 patently unmarketable securities.

12 It's nevertheless -- well, let's plead actual reliance. The  
13 problem with that, of course, is they want to bring a class  
14 action, and then we basically won't be able to certify the class  
15 if the only thing you have is actual reliance. And they don't  
16 even plead actual reliance by this plaintiff in this complaint.

17 At most, what they say is: Well, there's a statement in the  
18 offering memorandum that the investors acknowledge that they  
19 rely only on the information in the offering memorandum. But  
20 the offering memorandum, as Your Honor -- it's a very thick  
21 document (Indicating), which I actually was reading closely last  
22 night on the way out here.

23 And, you know, again, you have to plead -- you have to plead  
24 a false statement. And if you actually look at what it says in  
25 it, okay, the offering memorandum says nothing about, you know,

1 that we're complying with U.S. environmental laws. It says we  
2 have to comply with them. It says that's something you need to  
3 do.

4 It says at Paragraph 201 that if you don't comply with U.S.  
5 environmental laws, that there will be penalties that would be  
6 meted out by the government. And that's in the section of the  
7 offering memorandum --

8 **THE COURT:** Let's, let's take a look at 201(a). Okay? Page  
9 57. What you cite. Says:

10 "Volkswagen's top priority for research and development  
11 in..."

12 Various years.

13 "...was to develop engines and drive train concepts to  
14 reduce emissions and to develop and expand modular  
15 longitudinal tool kit platforms..."

16 Et cetera, et cetera.

17 So you say that's true. And yeah, it may very well be true.  
18 It may very well be true. But what they are arguing is, to put  
19 that statement in context, they should have, they should have  
20 disclosed the fact that they have these cars that were  
21 antithetical to that.

22 I mean, when you say: Look, this is what we're about, we're  
23 doing X. And in order to judge are they doing X, you have to  
24 put X in a context. And the context it should have been placed  
25 in was that while they are developing engines and drive trains



1 to reduce emissions, they're also developing and selling cars to  
2 conceal the true state of emissions. So that's their -- that's  
3 their -- well, number -- that's their argument.

4 As I understand it, their argument is one of omissions. Is  
5 that when you take the statements as to what VW was doing, they  
6 may be true. They may be true. But, the -- the truth or  
7 falsity of the statement -- or anyway, the context of the  
8 statement in the entirety of what the corporation is doing is  
9 important to disclose to the public if the statement, itself, is  
10 important to disclose.

11 It was Volkswagen that put that in. Volkswagen. Okay.  
12 They said: This is the sort of thing we want. Whether it was  
13 individually relied upon is another statement, another issue.  
14 But this is what we want the public to know. The potential  
15 purchaser of these bonds. We want them to know what VW is  
16 doing.

17 So they say: Well, I'll tell you what we're doing. We're  
18 developing concepts to reduce emissions. While at the same  
19 time, they are developing devices to conceal the true state of  
20 the emissions.

21 Isn't that -- isn't that -- isn't that what they're saying?  
22 I mean, whether it's true or not, isn't that what they were  
23 saying?

24 **MR. GIUFFRA:** The misstatements they allege in the  
25 complaint -- the primary misstatement, Your Honor, is one you've

1 already rejected, which is that the first quarter of 2014  
2 financial statements were false because they didn't disclose --

3 **THE COURT:** Forget the financial statement.

4 **MR. GIUFFRA:** That's gone. That's gone. So all they are  
5 left with, okay, are -- and this is just falsity. Remember, as  
6 I said before, they've got the show reliance, they've got to  
7 show a misstatement, and got to show --

8 **THE COURT:** You have to be careful of the word "falsity"  
9 because it's broader than what some people would think. Some  
10 people would think like a perjury prosecution. Some people  
11 would think if a person says A, you're going to have to prove  
12 not A.

13 So if the statement is: We are developing engines and drive  
14 train concepts to reduce emissions, for that to be false, we  
15 would have to show that VW wasn't doing that. Well, they were.  
16 I don't know. I believe, actually, they were.

17 **MR. GIUFFRA:** If you look at the full disclosure in the  
18 offering memorandum, it's in the context of CO2. Not in the  
19 context of NOx. And there's not a single allegation in this  
20 complaint --

21 **THE COURT:** Now we're sort of moving. But I just want to  
22 see that we're all on the same page, that, that -- so we could  
23 have a slightly -- a better discussion, I think, is, is that the  
24 gravamen of their complaint, in what you have identified is if  
25 you take a look at 201(a), if you look at 201(b), a focal point

1 of VW's current and future development activities is and will be  
2 innovative mobility concepts, and the reduction of fuel  
3 consumption and emissions of the leak.

4 If you look at those two, and maybe even (d):

5 "Volkswagen's vehicles must comply with increasingly  
6 stringent requirements concerning emissions."

7 Let's take that one as an example. That's absolutely true.

8 We know that.

9 **MR. GIUFFRA:** And in fact --

10 **THE COURT:** But in order to put it in the context, shouldn't  
11 you add a couple of words to that, so it reads: "Volkswagen's  
12 vehicles must comply with increasingly stringent requirements  
13 concerning emissions. However, to date, we've been able to get  
14 away with that by installing the defeat device which can't be  
15 detected by the regulators."

16 I mean that, by the way, is a complete statement, and puts  
17 that first statement in context. So what they are saying -- and  
18 of course, not going to do that, and I understand that. Or  
19 didn't do it. They didn't do it.

20 So is the question is: The gravamen of their complaint is  
21 that these representations in the context of what was occurring  
22 at the time needed the context of what was occurring at the time  
23 in order to make the statements meaningful. And that's their  
24 argument. Or accurate. That's their argument.

25 **MR. GIUFFRA:** Okay, can I have --

1           **THE COURT:** Yes, go right ahead.

2           **MR. GIUFFRA:** Answer No. 1 would be: These are risk factors  
3 and warnings, and two courts in this district that we cite, the  
4 *LeapFrog* case and the *Zeid* case make the point that if the --  
5 unless the actual warning is false, and the warning was true,  
6 you do have to comply. And if you don't comply, you're subject  
7 to penalties, which is what Volkswagen said. It's not an  
8 actionable misstatement.

9           Number two, the statements you're focused on, Your Honor,  
10 which is the -- that it was a focal point. And that's the quote  
11 of the VW R&D. They haven't pled any facts that it wasn't the  
12 focal point of VW R&D, particularly in the context of CO2.

13           **THE COURT:** Now, when you talk about risk, the risk of what?  
14 Could you flesh that out a bit?

15           **MR. GIUFFRA:** The allegation -- what they do is they take a  
16 statement, which is a warning (indicating quotation marks),  
17 which says: Among the other things we need to do is comply with  
18 environmental laws, and if we don't, that's a -- we can be  
19 subject to penalties.

20           That disclosure doesn't say: We're not violating the --  
21 we're not violating the environmental laws. If we had said  
22 that, then they would have a misstatement or they would have  
23 scienter and reliance? That's a different question.

24           But if the statement just says: We have -- giving a  
25 cautionary -- I's have argued this type of an argument many,

1 many times. If it's just a pure warning, okay, and the warning  
2 is accurate on its face, multiple courts, including two in this  
3 district, have held that is not an actionable misstatement.

4 **THE COURT:** And the warning being what?

5 **MR. GIUFFRA:** The warning being you have to comply with the  
6 environmental laws, and if you don't comply with the  
7 environmental laws, you're subject to penalties, which is at  
8 Page 24 of the offering memorandum.

9 **THE COURT:** And you say it's a warning because you are  
10 saying to the purchaser that environmental laws may change? Is  
11 that what -- I want you to explain to me why it's a warning.

12 **MR. GIUFFRA:** It is a warning because you are basically  
13 saying the risks when you buy these bonds, among the risks that  
14 you're faced with is that we may not be complying with  
15 environmental laws.

16 And if we're not, the company is subject to --

17 **THE COURT:** You say the cases say that? I'm surprised they  
18 say that. I could understand if the cases are saying -- oh, I  
19 have to look at them -- I can understand if the cases are saying  
20 or should say that since the enforcement of environmental laws,  
21 since the -- no. Since the creation of regulations relating to  
22 the environment are the task of a third party that Volkswagen  
23 doesn't control, therefore there is a risk that a third party  
24 could change the rule.

25 Let's say the next day EPA wakes up and says: You know what

1 you're going to have do with all your cars? You're going to  
2 have to do A, B and C.

3 Which they've never done before, or -- never done before.  
4 Well, that's too bad for the bondholders, you know, because  
5 Volkswagen's not at fault. What they've done is simply identify  
6 a third party out there who has control over the situation. So  
7 I understand that.

8 And it is a warning, as I understand the word "warning" --  
9 that's why I'm asking you this question -- warning in that  
10 context means: What are you telling the buyers? You're telling  
11 -- or the prospective purchasers? You are telling them that  
12 there is a risk that these rules and regulations may change.  
13 And if they do -- and this, by the way, came up all -- in the  
14 context of solar energy all the time because of the favorable  
15 treatment that solar energy was given at a certain period of  
16 time in our nation's history.

17 And, and the idea was: Well, you'd better tell the  
18 purchaser out there that he or she is at risk, because these  
19 regulations may change.

20 **MR. GIUFFRA:** No, Your Honor. In fact --

21 **THE COURT:** You don't mean that.

22 **MR. GIUFFRA:** No.

23 **THE COURT:** Okay.

24 **MR. GIUFFRA:** Again, we have three grounds to rely on:  
25 Reliance, misstatement and scienter. But on the misstatement

1 grounds, which is what we are talking about right now --

2 **THE COURT:** Right.

3 **MR. GIUFFRA:** -- the law is quite clear, because public  
4 companies in their disclosures will repeatedly say: We're  
5 subject to all these laws, and if we violate them as Volkswagen  
6 did, we may be subject to penalties.

7 That would mean if you put a risk factor out there, and it  
8 turns out you have a violation, and you haven't disclosed the  
9 violation at the time you put out the risk factor, there's a  
10 misstatement.

11 And in fact, the law is to the contrary. The law is that  
12 number one, unless the risk factor, itself, and the disclosure  
13 around the risk factor is false, it's not false.

14 And so, here, there's no disclosure saying: We're not in  
15 violation of the law. All the disclosure is saying: We're  
16 subject to all these laws --

17 **THE COURT:** Yeah, but you have to tie the other thing in  
18 there and say: We are now endeavoring to ensure that our cars  
19 are -- are in compliance with lower emission standards or  
20 improving the emission standards.

21 **MR. GIUFFRA:** That's not what the disclosure says. Again,  
22 Your Honor, if you could take just the risk factor, find a  
23 violation, and say there's a misstatement because you said we  
24 may be subject as to these risks and you haven't disclosed  
25 what's going on at the company at the time, that would mean in

1 every single case plaintiffs would be able to point to a risk  
2 factor and turn it into a misstatement, when it was supposed to  
3 be something that was -- when it's an affirmative statement  
4 that: This is a risk buying this security. If you buy this  
5 security, we're subject to environmental laws.

6 And the actual disclosure at Page 24 talks about if we're  
7 not in compliance, we could have to pay penalties. And much of  
8 the disclosure is directed to European penalties related to CO2.

9 **THE COURT:** Maybe so. But let me ask this question, then.

10 So you're telling me, if you say: By the way we are subject  
11 to environmental laws, and we are -- as long as we don't say:  
12 We're in compliance with environmental laws, then we haven't  
13 made a false statement.

14 **MR. GIUFFRA:** That's what the law has been, at least in my  
15 experience. And it says -- and it talks about, it says -- this  
16 is the actual, this is Page 24 of the offering memorandum.

17 It says:

18 "A violation of applicable regulations."

19 So it says, the lead-in is -- and I always think it's  
20 important to look at the document.

21 **THE COURT:** Go ahead.

22 **MR. GIUFFRA:** It says (As read)

23 "Regulatory legal and tax-related risks."

24 And at 2.1, this is all on Page 24:

25 "We are subject to a range of different global regulatory



1 and legal requirements that are constantly changing."

2 Talks about CO2. Doesn't talk about NOx.

3 But then it says:

4 "A violation of applicable regulations..."

5 Presumably that's a violation of Volkswagen.

6 "...could lead to the imposition of penalties, fines,  
7 damages, restrictions on and revocations of our permits  
8 and licenses, restrictions on..."

9 **THE COURT:** Now, to put that in context, to make it a -- a  
10 -- I think, you see, I think that when somebody reads that,  
11 isn't it fair to assume that they think that the company is not  
12 knowingly violating the law at that point? Knowingly violating  
13 the -- the emission standards.

14 For example, you could say: The company is liable for  
15 taxes. Tax law, they must pay taxes. Okay, everybody must pay  
16 taxes.

17 **MR. GIUFFRA:** Your Honor, I read a case, and I referenced  
18 this before, that the Second Circuit affirmed regarding UBS.  
19 UBS had a disclosure that says: If we are found to violate tax  
20 laws we may be subject to fines, et cetera, et cetera. It was a  
21 warning.

22 In that case, literally, the company entered into a deferred  
23 prosecution agreement with the U.S. Department of Justice for  
24 allegedly assisting its customers in evading U.S. taxes. The  
25 allegation was that senior management at the highest levels of

1 the bank knew about it. And that, that warning was a warning.  
2 It wasn't the fact that you didn't also disclose that you were  
3 in violation of the law --

4 **THE COURT:** Well, but it deferred prosecution. You are as  
5 much of an expert as I am in this area. Deferred prosecution  
6 agreements are not concessions by a defendant that they did  
7 violate the law.

8 **MR. GIUFFRA:** Well, in fact, in fact --

9 **THE COURT:** Go ahead.

10 **MR. GIUFFRA:** In fact, they often are. You have to make --

11 **THE COURT:** They often are, but it's not an *ipso facto*  
12 thing. It's not because a deferred -- one of the criticisms in  
13 that procedure is that it doesn't exact an admission from a  
14 defendant that they violated the law.

15 To the contrary, they simply say: Look if we do A, B, C and  
16 D -- and by the way, it could be negotiated in the agreement.  
17 I'm not saying that they're always one way or the other. And I  
18 didn't look at the UBS agreement.

19 **MR. GIUFFRA:** That's one, they had admissions that there  
20 was, there was activity at the bank, the bank was involved --

21 **THE COURT:** But there may be a different interpretation.  
22 Anyway, I'll take a look at it.

23 **MR. GIUFFRA:** My other point, my other point, Your Honor,  
24 that we cite is a case is *In re UBS Securities*, 2014. The point  
25 is that these warnings, every company makes warnings like: We

1 are subject to all these laws, and if we are found to have  
2 violated them, we may be subject to penalties.

3 If that was all you needed to have a false statement case,  
4 every single case would be a slam-dunk false statement case for  
5 plaintiffs.

6 Now, what Your Honor is focused on are the two disclosures  
7 about focal point and top priority. And our point there would  
8 be, number one, they don't plead that anyone relied on those  
9 particular disclosures, in a massive thick document  
10 (Indicating).

11 Number two, we believe that those statements, in and of  
12 themselves, are puffery, they are not a statement of fact. It's  
13 a top priority of the company, it's a focal point of our  
14 research. The main point is that they are not saying that we're  
15 not in violation of environmental laws.

16 And you know, a good case, Your Honor, it is a Sixth Circuit  
17 case involving Ford where they said quality and strong R&D  
18 pipeline, you know, for Ford, same kind of thing. That was  
19 deemed to be puffery and non-actionable.

20 And the other point, Your Honor, which you recognized in  
21 your decision last week, is that a company does not have an  
22 obligation to accuse itself of wrongdoing.

23 **THE COURT:** No, it doesn't. I agree with that. I agree  
24 with what I said. As a matter of fact, absolutely right. There  
25 is no doubt in my mind.

1 But look at Paragraph E of Page 58. Page 58 of the  
2 complaint. Sorry, of the complaint. I know you would like to  
3 go back to -- it does quote, it does quote the offering memo,  
4 but I don't know where it is in the offering memorandum. So I'm  
5 looking at Paragraph E of Paragraph 201.

6 I think everything in that paragraph is true.

7 **MR. GIUFFRA:** (Inaudible)

8 **THE COURT:** Right. It's true. It goes on line after line  
9 after line, discussing the importance of the regulations, and,  
10 and what it does, and how stringent it is. And they impose  
11 standards for diagnostic systems, on and on and on.

12 But to put it in context, it is the argument of the  
13 plaintiffs that to put that statement in context, they should  
14 disclose that Volkswagen has devoted resources to defeating  
15 those standards. Defeating the disclosure of the failure to  
16 meet the standards.

17 That -- in other words, you can -- this wasn't just a --  
18 Mr. Giuffra, I really am sympathetic to your position, if it  
19 were like a boilerplate throw-away line. Then I would have to  
20 try to figure out: Well, it's in everything, it's just that --  
21 it's a nodding of the head, it's a doffing of the top hat. I  
22 mean, you know, I could understand that.

23 But this goes on line after line after line, and I don't  
24 think I'm exaggerating it. The standards for emissions control.  
25 That is discussing the structure, the framework, the mechanism.

1 And then they don't disclose, because again, I would say they  
2 don't have to blow the whistle on themselves, of the fact that  
3 they are devoting resources and have devoted resources to  
4 feeding it.

5 So, so it's clear, or to try to make it a little clearer  
6 what I'm saying, it's not that they have to disclose wrongdoing.  
7 It's a question, when you disclose doing something which --  
8 well, when you say to the prospective purchaser: Look at all  
9 this out there --

10 **MR. GIUFFRA:** It's a risk.

11 **THE COURT:** Look at all this out there they have in place,  
12 the government has in place for monitoring our emissions. The  
13 failure to say: And by the way, we have installed devices which  
14 defeat this process, that is a misstatement by omission. I  
15 think. And I know you disagree.

16 **MR. GIUFFRA:** My only point, Your Honor, is that the  
17 opposition in our brief, opposition 28, we cite a series of  
18 cases including two from this district, *LeapFrog* and *Zeid*, which  
19 we think take the position that a warning, when you say: We are  
20 subject to all these -- we're subject to all these regulations,  
21 and if we don't follow the regulations there may be penalties  
22 and fines --

23 **THE COURT:** Okay.

24 **MR. GIUFFRA:** That, in and of itself, doesn't mean you have  
25 an obligation to disclose any violations of law that you are

1 engaged in, because that would mean in every company in doing  
2 this kind of an offer is going to disclose all --

3 **THE COURT:** So I will reread those cases. If they came from  
4 this district, they have to be good.

5 **MR. GIUFFRA:** I agree, Your Honor. The next thing  
6 Your Honor is saying, or just a couple of points there which  
7 have been talked about.

8 **THE COURT:** Sure.

9 Then I'll turn to you (Indicating).

10 **MR. GIUFFRA:** Okay. These bonds are issued by an entity  
11 called VW Group of America Finance. Okay. Not VWAG, which is  
12 the guarantor. And VW Group of America, which is where Mr. Horn  
13 worked, is not a guarantor of these bonds at all.

14 Now, there's no allegations in this complaint that Horn or  
15 Winterkorn were involved in the preparation of the offering  
16 memorandum. Nothing.

17 They've got to plead, Your Honor, that there was knowledge  
18 of -- you know, Winterkorn or Horn or someone involved in  
19 actually doing this offering memorandum. And group pleading in  
20 this circuit is not good law, and we cite cases at Page 27 of  
21 our opposition brief.

22 But they've got to plead somebody new. So who are the two  
23 people they point to? They point to Professor Dr. Winterkorn.  
24 And all they have on Professor Dr. Winterkorn is the Gottweis  
25 memo, which, as Mr. Joseph pointed out, is dated the 23rd.

1 Well, the transaction -- and I gave you the --

2 **THE COURT:** I think, not to spend a lot of time on this, but  
3 I think that's absolutely true. I think that if it relied -- if  
4 it rested on the Gottweis memo and that was it, the defendant  
5 wins.

6 **MR. GIUFFRA:** Second, Your Honor, on Mr. Horn, all they have  
7 there is on the 15th that he got a memo. And again, there's no  
8 allegation that he was involved in this offering, even knew  
9 about the offering. And the only thing that Dr. Winterkorn was  
10 alleged to have done is sign the first quarter financial  
11 statement. There's no allegation --

12 **THE COURT:** But that is out.

13 **MR. GIUFFRA:** Yeah, and that's out. So Your Honor, our  
14 point is: They don't point to a single human being on the face  
15 of the earth who had scienter with respect to the statements  
16 that they're talking about.

17 If the statements they're talking about are either these  
18 warnings or, you know, top priority (indicating quotation  
19 marks), they've got to focus on a specific human being that knew  
20 about it.

21 Now, the notion of collective scienter, which we don't need  
22 -- Your Honor has applied in some circumstances, and has not  
23 applied in other circumstances in this case, and you applied it  
24 in the context of, you know, all the advertisements and all of  
25 the emissions statements on cars.

1 But you did not apply it in the context of the securities  
2 disclosures which were the offering which -- which were the  
3 financial statements. You did not. And that made good sense,  
4 because the whole notion of collective scienter -- which I have  
5 doubts about whether it is correct but I'm not going to argue  
6 that under the PSLRA -- is one where the statement has to be one  
7 that's so important and so dramatically false that someone who  
8 is responsible for the document must have known it was -- must  
9 have known it was false.

10 They don't allege who was involved in doing this, in doing  
11 this financial -- this offering memorandum. They don't allege  
12 whether someone who knew top priority (indicating quotation  
13 marks) was wrong or not wrong, or even whether it wasn't a top  
14 priority. So they can't plead scienter. Whether you want to  
15 disagree with me about falsity, they can't plead scienter.

16 And then of course the principled ground --

17 **THE COURT:** If it were just the second and third offering  
18 memorandum, would you concede that might be a difficult -- that  
19 might be an easier way for them to prove scienter?

20 **MR. GIUFFRA:** It's a different case. Not this case.

21 **THE COURT:** I understand.

22 **MR. GIUFFRA:** The problem they have, Your Honor, is they  
23 have one plaintiff. And where I started out, Your Honor, these  
24 bonds, people didn't lose a lot of money on these bonds and some  
25 people have made money on these bonds. And the bonds are now



1 currently trading either at or above par. And a lot of them  
2 have actually been redeemed. And this plaintiff lost  
3 1.5 percent on their transaction. So, the fact that they can't  
4 get another plaintiff to come in here is telling.

5 But beyond all that, they've got to establish -- and  
6 Your Honor has a decision which is absolutely correct, which  
7 stands for the proposition -- it's the *Autozone* case from  
8 2009 -- that the lead plaintiff has to state a claim.

9 They don't allege that this lead plaintiff even looked at  
10 the sentences. Again, it's two sentences in a massive document  
11 (Indicating). They don't allege that he relied on those or that  
12 the pension fund relied on those two sentences in a massive  
13 document.

14 And so if this lead plaintiff cannot state a claim, they're  
15 done. They can't come in and say -- and they actually said in  
16 their brief: Oh, give us a chance to find someone else.

17 Well, the plaintiffs' lawyers are not the party interest  
18 here. It's the plaintiff. If their plaintiff doesn't have a  
19 claim, you know, and someone else doesn't come in, it's over.

20 And the idea that you can sort of: Well, we didn't plead a  
21 claim on the first one when we actually bought, but then, but  
22 maybe we could plead something on the second and third when we  
23 haven't got a plaintiff who bought in the second and third  
24 offerings --

25 **THE COURT:** I don't know. I don't know whether they do or

1 not.

2 **MR. GIUFFRA:** They have to come in and bring one up.

3 **THE COURT:** Well, I understand that. If what you are saying  
4 is they don't have one in this case, you are right.

5 **MR. GIUFFRA:** So again --

6 **THE COURT:** So, so the question is whether they would be  
7 allowed to amend, whether -- whether they could bring it on  
8 behalf of somebody who's in group 2 or group 3. I don't know.

9 **MR. GIUFFRA:** But right now --

10 **THE COURT:** If they do, we will see you back here.

11 **MR. GIUFFRA:** Correct, Your Honor. And I come to  
12 San Francisco a lot, and I like coming to San Francisco.

13 **THE COURT:** I know you do. So does your family.

14 **MR. GIUFFRA:** Yeah, but actually now that the weather's  
15 getting -- in the wintertime we'll be out here again, sure.

16 **THE COURT:** I'll set a date, maybe set a date in December.

17 **MR. GIUFFRA:** Ideally when the San Francisco Ballet is  
18 performing.

19 **THE COURT:** Well Misty Copeland is coming.

20 **MR. GIUFFRA:** That's when we want to come.

21 **THE COURT:** Good, well, I'll get you that date.

22 **MR. GIUFFRA:** So to sum up, Your Honor, they can't prove  
23 reliance, I think they can't prove a misstatement, and they  
24 can't prove scienter. And when you look at the scienter  
25 allegations, they point to Horn and Winterkorn. And I think

1 just in our colloquy, it's pretty clear that they don't have  
2 sufficient pleading of scienter for Horn and Winterkorn as of  
3 the date of their trade, which is, on their own document, is the  
4 15th of May.

5 Thank you.

6 **MR. BERG:** Your Honor, I'm eager to get to reliance and  
7 misstatement, but I certainly want to start with scienter --

8 **THE COURT:** Yeah.

9 **MR. BERG:** -- and standing. Now on better footing.

10 In your January 4th, 2017 ADR order, you say plaintiffs  
11 alleged that Horn acted with scienter because he knew through an  
12 email dated May 15, 2014. Our class period starts May 23rd,  
13 2014.

14 What I think I heard you saying is that the time period of  
15 May 15th to May 23rd when the first offering occurred might not  
16 be enough time to digest the information and to act upon it. I  
17 don't know that there is support for that in any circumstance.  
18 But I'll point that this is a special circumstance where you are  
19 doing an offering.

20 And the offering comes from Volkswagen of America Finance,  
21 which is a special entity formed for the sole purpose of issuing  
22 these bonds, and is controlled by Volkswagen of America.

23 So if you go to your June 28th, 2017, order in the ADR case,  
24 you talk about allegations in the complaint support that  
25 Mr. Horn had actual control over Volkswagen Group of America,

1 and Volkswagen of America.

2 So here, you have a person who you found to have actual  
3 control over the entity essentially controlling the offering,  
4 who knows that there is an offering going out to investors which  
5 contained information, who was aware more than a week before  
6 that there is this emissions scandal that is going to cause a  
7 material impact on the company.

8 So while eight days might not be enough time to digest  
9 information in another context, in the context of an offering,  
10 it certainly is.

11 And I'll add to that by going back to your January 4th,  
12 2017, order with respect to defendant Winterkorn. And certainly  
13 you talk about the memo on May 23rd which you have already  
14 addressed, but you also say in 2011, there's an internal  
15 whistleblower who warned the company, including Winterkorn's  
16 confidante and Volkswagen's then head of development, that the  
17 company was illegally manipulating reported emissions data.

18 So I think that's enough to show that Winterkorn had  
19 scienter before May of 2014. But even if it's not, you're  
20 pointing to a senior executive at Volkswagen who certainly does.

21 And it's wrong to say that we have to point to a specific  
22 person to show scienter. There is corporate scienter. There  
23 are securities cases where the company is the only defendant in  
24 the case, without an individual defendant, and you showed the  
25 scienter through the top executives.

1           And the notion that nobody at Volkswagen, nobody at  
2 Volkswagen of America including Mr. Horn who received the email  
3 or the people writing the emails to Mr. Horn, knew about this  
4 emissions scheme is not supported. Some, some executive knew,  
5 and you have to show that the entities knew through their  
6 executives.

7           It doesn't have to be defendant Winterkorn, which we think  
8 your order says may have known in 2011 due to his control over  
9 his confidants and his lieutenants that he brought in from  
10 (Inaudible) to do this work. But certainly, Mr. Horn knew a  
11 week in advance, but also knew that this offering was taking  
12 place. So, I think that's enough to show scienter.

13           But with regard to standing, let's not forget, Mr. Giuffra  
14 knows better than anyone, having helped write the legislation,  
15 but the PLSRA, the counsel or lead plaintiff -- this case was  
16 filed by a plaintiff who did have standing in some of the other  
17 offerings. And we all come before you, as the statute says that  
18 we should, to see who should control this case on behalf of all  
19 plaintiffs and all claims alleged.

20           And what we argue in terms of standing is it is an adequacy  
21 issue to be addressed at class certification, and that the lead  
22 plaintiff here has standing to bring the claims on behalf of all  
23 with the same set of concerns. So, you know, I think that  
24 addresses that.

25           To get to the -- the misrepresentations in the claim, I

1 think you are exactly right, that this case is about the  
2 omission, and then the misrepresentations that support the  
3 omission.

4 And the *Vivendi* case, Second Circuit, is right on point to  
5 making that analysis, and the difference between a case where  
6 you have misrepresentations that fall short so you try to claim  
7 that they're omissions versus a fundamentally omissions-based  
8 case where you have a network of smaller lies supporting the  
9 broader fraud.

10 And I think if you take it in context, that addresses  
11 reliance, in the sense that you would be able to rely on  
12 *Affiliated Ute* and the omissions case.

13 But let's not forget, in that same circuit, in the Second  
14 Circuit, you're allowed to invoke both presumptions, *Affiliated*  
15 *Ute* and *Basic*, regardless of whether or not it's predominantly  
16 an omissions case.

17 And to get to the risk factor -- I'm trying to be quick  
18 here -- I think if you look to *Apple*, you'll see that when you  
19 make a statement, it has to be reasonably believed. And there  
20 can't be information that you have available to you, that you  
21 know, that contradicts what you're saying.

22 And when they put forth all of these representations about  
23 compliance and environmental compliance, they don't have  
24 information that supports that. And they have contradictory  
25 information that goes counter to that.

1           And it goes right back, I think it's Judge Pollack who says:  
2           You cannot warn that you may fall in a hole, knowing full well  
3           that the Grand Canyon lies one step ahead of you.

4           So I think that's the better analogy in terms of  
5           representation versus the risk factors, and the cases that  
6           Mister --

7           **THE COURT:** So it's a bit like the Grand Canyon. I'll  
8           concede that.

9           **MR. BERG:** We believe it was. Are there any questions?

10          **THE COURT:** No. I think I want to hear from other counsel  
11          who want to address as to Mr. Horn.

12          **MR. GONZALEZ:** Thank you, Your Honor.

13          **THE COURT:** Sure.

14          **MR. GONZALEZ:** A quick clarification. Plaintiffs' counsel  
15          is trying to push the purchase date out to May 23rd. They're  
16          saying in their own pleadings the purchase date is May 15. It  
17          says that in their pleadings, it says that in the memorandum.  
18          So it's May 15. They're stuck with that date.

19          The reality is it doesn't matter, though. Because even if  
20          it was the 23rd, look, the case law is very clear: You have a  
21          chance to digest information. It says there's an omissions  
22          issue. And CEOs, part of a multi-national company, are allowed  
23          to digest that information.

24          So, and the case law speaks of weeks, sometimes even months.  
25          Eight days, certainly not sufficient, and they haven't cited to

1 a single case where they showed that it was.

2 Finally, on the scienter point, they're relying on the ADR  
3 opinion, the January ADR opinion. And in the January ADR  
4 opinion, the Court did find scienter with respect to Mr. Horn.

5 But it's critical to keep in mind that the Court relied on  
6 facts post-dating the receipt of the May 15th email sometimes by  
7 years. And so all of that collectively gave forth to an  
8 inference of scienter that wasn't too time-specific, but it  
9 didn't need to be, in that context. Here, it does need to be  
10 time specific. And they haven't shown that.

11 Finally, the statements. So, they haven't alleged a  
12 material omission or misstatement specific as to Mr. Horn. The  
13 only statement that they have is something that took place a  
14 year later, April 27, 2015. And it is in the context of a  
15 social responsibility report.

16 And truly, the statements that are alleged against him are  
17 classic puffery. But the bottom line is what they have is a  
18 logic problem. You can't claim that you relied on a statement  
19 that occurred a year after you effected the purchase. And they  
20 haven't addressed that point, Your Honor.

21 **THE COURT:** Thank you.

22 **MR. BERG:** Your Honor.

23 **MR. GIUFFRA:** Just --

24 **MR. BERG:** (Inaudible)

25 **THE COURT:** Go ahead.



1       **MR. BERG:** I take exception --

2       **THE COURT:** You might want to stay up here.

3       **MR. BERG:** I take exception to the characterization of the  
4 purchase date versus an order date. Because the offering was  
5 completed on May 23rd. And that's important --

6       **THE COURT:** The trade date, said the trade date was May 15.

7       **MR. BERG:** But the trade date is putting in the order, but  
8 the offering date --

9       **THE COURT:** Pardon?

10       **MR. BERG:** The offering didn't complete until May 23rd. So  
11 there's an order in place for the shares. And that's important  
12 for two reasons. Because if you disclose the truth, you have  
13 the opportunity to cancel that order. But more important, it  
14 goes to the pricing of the bond.

15       If you purchase a bond from corporate debt, you have a  
16 pricing matrix: Yield, maturity, length. But it's primarily  
17 based on credit rating. And if this information had come out,  
18 Volkswagen -- when the information did come out, Volkswagen's  
19 credit rating went down.

20       So, if the information came out when Mr. Horn learned it on  
21 May 15th, then the credit rating of Volkswagen goes down, and  
22 the price is cheaper. And when you're buying bonds, that's a  
23 major consideration. And when you go to purchase bonds, you  
24 know exactly what price you are paying for a AAA, a AA, or a  
25 BBB. And that's what you get.

1           And that's -- there's damages that lie in there, in the fact  
2           that this offering that completed May 23rd wouldn't have been  
3           done at that same credit rating.

4           **MR. GONZALEZ:** Briefly, Your Honor.

5           By Page 37 of plaintiff's opposition, it states, quote -- or  
6           plaintiff, quote:

7           "...placed its purchase order on May 15, 2014."

8           By its very terms, Rule 10b-5 has to do with the purchase or  
9           sale of a security.

10          So, thank you.

11          **MR. GIUFFRA:** Your, Honor just a couple of things.

12          **THE COURT:** Yeah.

13          **MR. GIUFFRA:** Again, you've got to focus on the plaintiff  
14          before you. And that's something I think the other side would  
15          like to gloss over.

16          The notion that someone who doesn't have a claim can somehow  
17          represent a class of people, additional offerings, clearly is  
18          not right.

19          **THE COURT:** No, I don't agree with that. I mean, if he  
20          doesn't -- if May 15th or May 23rd, not to -- doesn't present a  
21          claim, then this plaintiff is out. Because you can't -- you  
22          can't make him --

23          **MR. BERG:** Agreed.

24          **THE COURT:** Yeah, everybody agrees.

25          **MR. GIUFFRA:** Okay, good. And the point there, Your Honor,

1 is to the extent there is a case you should look at, it's the  
2 *Countrywide* case, which talks about -- this is Judge Pfaelzer's  
3 case, which two -- one is in 2012 --

4 **THE COURT:** Wasn't that cited before the -- there's another  
5 case.

6 **MR. GIUFFRA:** Another case called *NECA*, which is a Second  
7 Circuit case.

8 **THE COURT:** There was a Ninth Circuit case.

9 **MR. BERG:** (Inaudible)

10 **THE COURT:** I'm sorry?

11 **MR. BERG:** *Melendez* (Phonetic), your Honor.

12 **THE COURT:** Yes.

13 **MR. GIUFFRA:** That's a Ninth Circuit case.

14 **THE COURT:** Welcome to the Ninth Circuit.

15 **MR. GIUFFRA:** Yes, we are. But the issue there was -- and  
16 they weren't dealing with securities, and it didn't deal with,  
17 you know, the kind of issues that we're talking about here.  
18 That was a case where the named plaintiff could assert a claim.  
19 And the question was in the context of, you know, racial  
20 profiling by the police, whether this person could represent a  
21 class of people who were being racially profiled by the police.

22 That's a different issue than whether someone can represent  
23 someone who -- in offerings that they didn't participate in,  
24 about disclosures they didn't see.

25 And so, you know, I think you don't have to reach that issue

1 in this case because their plaintiff doesn't state a claim,  
2 can't.

3 And he made the point before about reliance. The key there  
4 is in a case in this circuit, it's got to be primarily an  
5 omissions case. They have 18 pages of false statements. You  
6 and I have been going back and forth about the false statements  
7 that they allege in their -- that are in the offering documents.  
8 They don't get the benefit of *Ute*.

9 At best, Your Honor, they've got to rely upon actual  
10 knowledge -- or, I mean, actual reliance. And they don't even  
11 plead that or say that they relied on a particular document.

12 **THE COURT:** I don't know that I agree with that. I don't  
13 know that you could rely on *Ute*.

14 **MR. BERG:** Just to address *Countrywide* very quickly, within  
15 *Countrywide* is the same test that's used, the same set of  
16 concerns. But Judge Pfaelzer draws a distinction between  
17 mortgage-backed securities and corporate debt, saying corporate  
18 debt is the same issue where the same person is responsible for  
19 payments, whereas mortgage-backed securities draw upon different  
20 pools of mortgages, so each tranche is essentially different  
21 because you're relying on different mortgages packaged together.  
22 So I think even within *Countrywide*, Judge Pfaelzer draws that  
23 distinction. And that's enough here.

24 **MR. GIUFFRA:** Your Honor, one other scienter point, which a  
25 lot of time has been spent on. With respect to Mr. Horn,

1 there's no allegation that he had any involvement with VW Group  
2 of America Finance at all; that he was involved in this  
3 offering. His name doesn't appear in the offering memorandum.  
4 He was not a board member of VW Group of America Finance. Okay.  
5 Dr. Winterkorn was also not a board member of the entity that  
6 was actually doing the offering.

7 And so, if you want to try -- the law is pretty clear.  
8 You've got to have scienter of someone involved in this offering  
9 document. And they don't allege a single person who was  
10 involved in the offering document had any scienter. And the  
11 best they can do is point to Richard Horn because he's the CEO  
12 of the overall company. Okay.

13 You're left with sort of this debate about -- you're left  
14 with this debate about the 23rd and what he knew on the 23rd.  
15 Which is, by the way, after the date they purchased the shares,  
16 based on their own certification.

17 And similarly, with Horn, there is not a single allegation  
18 that he had anything to do with VW Group of America Finance.  
19 Much less this offer. So they can't connect it up to him.

20 **THE COURT:** Mr. Joseph, do you want to add anything to this?

21 **MR. JOSEPH:** Just one sentence. Because we have gone on too  
22 long.

23 **THE COURT:** I want to justify the trip out here.

24 **MR. JOSEPH:** It's not appropriate to engage in guilt by  
25 association because one of his subordinates knew. The whole

1 point of having trusted subordinates is that they deal with  
2 problems, and everything isn't elevated to the CEO. If there is  
3 an inference, it's not a strong inference, as required by the  
4 PSLRA.

5 Thank you, Your Honor.

6 **MR. BERG:** I would only add to that that if --

7 **THE COURT:** Speak into the mic.

8 **MR. BERG:** If the question is how high up the chain does it  
9 go for the entity scienter, even if Your Honor was convinced  
10 that Mr. Winterkorn, Dr. Winterkorn -- I mean no disrespect --  
11 did not have scienter, the association, the question is how far  
12 up to the executives did it go.

13 And it seems from your previous orders on allegations in our  
14 complaint that it went up to his top lieutenants and the people  
15 in charge of the scheme. And that should be enough for the  
16 company.

17 And with respect to Volkswagen of America Finance, the same  
18 officers and directors that are -- that run that entity, as  
19 alleged, are from Volkswagen of America. There's a lot of  
20 cross-over there. It is a special-purpose entity form just to  
21 issue these offers. So there are senior enough executives at  
22 both, which Mr. Horn controlled, according to your order.

23 **THE COURT:** If I have -- are you going to be able to get  
24 another plaintiff?

25 **MR. GIUFFRA:** Your Honor, the only point I would point, the

1 things he just said, they're not in the complaint. They're not  
2 in the complaint.

3 **THE COURT:** Well, he wants leave to amend.

4 **MR. GONZALEZ:** Your Honor, if I could briefly --

5 **THE COURT:** Yes.

6 **MR. GONZALEZ:** Thank you.

7 Just to follow up on what Mr. Giuffra said, there is  
8 absolutely no allegation whatsoever that Mr. Horn had anything  
9 to do with the offering memoranda, that he looked at it, that he  
10 was connected to it, that he signed it, connected to him in any  
11 way, whatsoever. And so clearly, under *Janus* (Phonetic), he  
12 couldn't qualify as a statement maker with respect to it.

13 Thank you.

14 **THE COURT:** Okay. Anything further?

15 **MR. BERG:** No, I just -- I just point you to your own  
16 finding that he controlled -- that Mr. Horn controlled  
17 Volkswagen of America, which controlled the offer.

18 Thank you.

19 **THE COURT:** Okay. Thank you very much. I'm going to take  
20 the matter under submission.

21 **MR. JOSEPH:** Thank you.

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

23 **THE COURT:** Thank you.

24 (Proceedings concluded)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

*Belle Ball*

\_\_\_\_\_/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Friday, July 7, 2017