

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

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

San Francisco, California
Tuesday, December 19, 2017

TRANSCRIPT OF PROCEEDINGS

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8 **BY: JON F. WORM**

9 Also Present: Kenneth Feinberg, Special Master

10 Appearances According to the "Confirmed Telephonic Appearance
11 Schedule":

12 Leslie Allen
13 Camille S. Biros
14 Megan B. Bradley
15 Kathryn P. Caballero
16 Laurel M. Carnes
17 Erik Dyhrkopp
18 Jodi W. Flowers
19 Holly Froum
20 David Shepardson
21 Mike Spector
22 Caroline Stanton
23
24
25

1 Tuesday - December 19, 2017

11:16 a.m.

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

3 ---000---

4 **THE CLERK:** Please be seated. Calling Case
5 17-MD-2777, In Re: Chrysler-Dodge-Jeep EcoDiesel Marketing
6 Sales Practices and Products Liability Litigation. Counsel,
7 please come to the podium and state your name for the record.

8 **MS. CABRASER:** Good morning, Your Honor,
9 Elizabeth Cabraser, for plaintiffs. And several members of the
10 PSC will state their appearances as they are coming to the
11 rescue to argue today.

12 **THE COURT:** All right. That's why it's good to have
13 a backup team, I suppose.

14 **MS. CABRASER:** Absolutely.

15 **THE COURT:** Thank you.

16 **MS. SLAUGHTER:** Stacey Slaughter, Your Honor, for the
17 plaintiffs.

18 **THE COURT:** Thank you, Ms. Slaughter.

19 **MS. JENSEN:** Good morning, Your Honor.
20 Rachel Jensen, from Robbins Geller Rudman & Dowd, on behalf of
21 the plaintiffs.

22 **THE COURT:** Thank you, Ms. Jensen.

23 **MS. CAPPIO:** Good morning, Your Honor. Gretchen
24 Freeman Cappio, from Keller Rohrback, for the PSC.

25 **THE COURT:** Great. Good morning.

1 **MR. BUDNER:** Good morning, Your Honor. Kevin Budner,
2 from Lief Cabraser, on behalf of the PSC.

3 **THE COURT:** All right, Mr. Budner.

4 **MS. RENDÉ:** Good morning, Your Honor. Leigh Rendé,
5 for the United States, along with co-counsel Joe Warren.

6 **THE COURT:** All right. Thank you, Ms. Rendé,
7 Mr. Warren.

8 **MS. FIORENTINI:** Judith Fiorentini, for the
9 California Attorney General's Office, and the California Air
10 Resources Board. And with me is my colleague, Jon Worm.

11 **THE COURT:** Thank you, Ms. Fiorentini, Mr. Worm.

12 **MR. GIUFFRA:** Good morning, Your Honor.
13 Robert Giuffra, with Sullivan Cromwell, for the FCA Defendants,
14 along with my partner, Darrell Cafasso. And it's good to see
15 you again.

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

17 **MR. SLATER:** Your Honor, Matthew Slater, with my
18 partner Carmine Boccuzzi, of Cleary Gottlieb, on behalf of
19 Robert Bosch GmbH, and Robert Bosch LLC.

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

21 **SPECIAL MASTER FEINBERG:** Good morning, Your Honor,
22 Kenneth Feinberg, Court-appointed Settlement Master in this
23 matter. Thank you.

24 **THE COURT:** Thank you, Mr. Feinberg. So why don't we
25 start, since you are here -- I did review the case-management

1 conference statement here. We might as well take care of that
2 before we dive into the motion. So as I understand it, the
3 parties have met with you? And maybe you can give the Court a
4 brief update.

5 **SPECIAL MASTER FEINBERG:** Yes, Your Honor. The
6 parties met in morning before this conference. Term Sheets
7 offered by Chrysler and the PSC have been exchanged. We had a
8 brief summary discussion this morning about the Term Sheets,
9 involving the PSC, the Government, CARB, Fiat Chrysler, Bosch;
10 a very -- I think, a very healthy discussion of how we might
11 get to "Yes" in this matter. We have very, very sophisticated
12 counsel who have done this before.

13 We are scheduled to meet in January in Washington, one
14 full day, with Fiat Chrysler and the Government; one full
15 settlement day with Fiat Chrysler, Bosch, and the PSC. We're
16 looking for different substantive ways to secure an early
17 comprehensive settlement. We shall see.

18 But everybody, in good faith, is certainly trying to
19 figure out how we might achieve a comprehensive settlement,
20 even before the motions to dismiss are decided, and even before
21 the testing protocol is -- not finalized; it's been
22 finalized -- but even before the test results are made known.
23 So we are everybody in good faith moving forward. We shall
24 see.

25 I'll have a better sense of it, Your Honor, at the end of

1 January, after we've had a couple of full days in Washington
2 engaged in settlement discussions.

3 **THE COURT:** Are days -- have you already selected the
4 days?

5 **SPECIAL MASTER FEINBERG:** I have offered up about
6 half a dozen or seven or eight days.

7 **THE COURT:** Okay.

8 **SPECIAL MASTER FEINBERG:** And they're going to get
9 back to me -- Fiat Chrysler, Bosch, and the PSC -- with a good
10 day; and a separate day with Fiat Chrysler and the Government,
11 including CARB. And we should know those dates before the end
12 of the year, and I'll relay that to the Court, as well.

13 **THE COURT:** You all right. Thank you.

14 **SPECIAL MASTER FEINBERG:** Thank you. I appreciate
15 it.

16 **THE COURT:** Let me ask. Any comments from the
17 parties with regard to that process? And particularly, I
18 was -- it raised my -- piqued my interest when Mr. Feinberg
19 mentioned the possibility of possible settlement or serious
20 progress prior to any ruling by this Court on a motion to
21 dismiss. Okay? So there's laughter. That doesn't sound like
22 quite an endorsement, but --

23 **MR. GIUFFRA:** I was just thinking about the stack of
24 paper, Your Honor.

25 **THE COURT:** I'm thinking about the stack of paper,

1 too.

2 **MS. CABRASER:** Right.

3 Your Honor, Elizabeth Cabraser.

4 That's obviously up to the Court's calendar. We'll take a
5 quick denial of the motions, of course. I don't think that
6 would impede settlement discussions.

7 But no comments on Mr. Feinberg's presentation. I think
8 it's accurate.

9 We do have a separate matter of the testing protocol, and
10 we'll address that when the Court wishes.

11 **THE COURT:** All right. All right. I will in a
12 minute, but let me see if either FCA or anyone else have any
13 comments.

14 **MS. RENDÉ:** No, Your Honor, no comments on what
15 Mr. Feinberg said.

16 **THE COURT:** Let me ask. I understand that testing
17 protocol has been finalized. Has testing actually begun?

18 **MR. GIUFFRA:** Yes, Your Honor. It's Robert Giuffra
19 for FCA. Testing has begun.

20 **THE COURT:** And by the time you all meet in
21 January -- it sounds like probably this is the second/latter
22 half of January. Do the parties anticipate that there will be
23 a fair amount of data from that testing at that point, that
24 might inform where this is going, and the likelihood of --

25 **MR. GIUFFRA:** Your Honor, obviously, data is being

1 generated through the tests. And as it goes forward, we'll
2 have data that will become available. We will be providing
3 that as per the protocol to the plaintiffs.

4 I mean, again, FCA remains confident that it believes it
5 has a fix that will make these cars certifiable; meet the
6 certified standard.

7 Where we stand right now is we're obviously doing the
8 testing. We've worked out the issue with the protocol. The
9 plan is to test literally around the clock.

10 It -- my understanding is it will take about three months
11 for all of the FCA testing to be done. And then there's about
12 a month of EPA and CARB confirmatory testing.

13 You know, as we go forward with the process, you know, we
14 would -- we presumably -- you know, we're basically testing a
15 recalibration that's based on a recalibration that's --
16 calibrations already been approved for the 2017s. And the
17 2014s to 2016s have the same engine and emissions system as the
18 2017s, so we don't expect any problems.

19 But presumably it's -- as we go forward with the process
20 and share data with the Government, you know, if there are any
21 problems, they will be identified relatively early in the
22 process.

23 But you know, our goal is obviously to try to get this
24 wrapped up as quickly as we can.

25 **THE COURT:** And has --

1 The 2017 testing data -- as I recall, we were talking
2 about that being shared or made available to the PSC; but what
3 is the status of that information?

4 **MR. GIUFFRA:** Your Honor, actually, that -- Mr. Rice
5 raised that request with me out in the hallway. And I'll just
6 check with the client, and get back to the PSC, you know,
7 within the next day or so.

8 **THE COURT:** Is it still under discussion?

9 **MR. GIUFFRA:** Yes.

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

11 Why don't we talk briefly about the issue that's been
12 raised in the case management conference statement about the
13 information with respect to the testing protocol that appears
14 to be in dispute as to whether it's going to be provided fully,
15 or some redacted form, and timing, et cetera? It was about
16 sharing that with the PSC.

17 **MR. GIUFFRA:** Yes, Your Honor. Again, as I think you
18 know, we've tried to be as reasonable as possible throughout
19 this process, and being as cooperative. And we produced, I
20 believe, about 700,000 pages of documents already to the PSC.

21 Now, as a matter of, you know, law, our view is that the
22 protocol is a settlement communication between us and the
23 Department of Justice over the settlement of litigation that is
24 now pending before Your Honor over the eight undisclosed AECDs,
25 and the emissions that arise out of them. And we think that

1 the protocol, itself, is covered by Rule 408.

2 We also believe that, you know, to the extent there's an
3 issue that's relevant with respect to the protocol, one can
4 divide it up into two separate topics or buckets.

5 In our view -- and I don't think Ms. Cabraser would
6 disagree with us -- it is a core governmental function to
7 determine whether a recalibration of an emissions system
8 satisfies, you know, EPA and CARB standards. This is like, you
9 know, not something that private plaintiffs have really any
10 right or business in getting involved in.

11 Now at the same time, to the extent that the recalibration
12 has an effect on the performance of the vehicles -- miles per
13 gallon, the -- you know, how -- the driveability of the
14 vehicles -- that's something that clearly could impact a
15 consumer, and it's something that the PSC would have an
16 interest in.

17 So in an attempt to --

18 **THE COURT:** Would not?

19 **MR. GIUFFRA:** It would have an interest in.

20 **THE COURT:** Would have an interest in.

21 What about the actual emissions? I mean, that's part of
22 this lawsuit.

23 **MR. GIUFFRA:** Well, Your Honor --

24 **THE COURT:** Don't the consumers have an interest in
25 that aspect of performance, as well?

1 **MR. GIUFFRA:** Well, you're preëmpting me a little bit
2 on my argument on the motion to dismiss.

3 I think to the extent that the cars satisfy or don't
4 satisfy emissions standards, that claim is preëmpted by the
5 Clean Air Act, because the Clean Air Act doesn't provide for a
6 private right of action for consumers. The only private right
7 of action that consumers have under the Clean Air Act is if the
8 Government doesn't bring a lawsuit, but the Government here
9 obviously has brought a lawsuit.

10 So the proposal that we put forward, which we think is
11 eminently reasonable and fair, would be the following. We
12 would be prepared to provide the portions of the settlement
13 communications protocol that's been negotiated in a document
14 that contains lots of CBI -- and the document, itself, provides
15 that we get back to the Government by the 30th -- identifying
16 the confidential business information that's in it; but we
17 would produce the protocol, pursuant to a highly confidential
18 designation to the PSC. The portions of the protocol that
19 relate to testing for fuel economy; something that's called
20 "NVH," which is called "noise vibration and harshness," and
21 driveability.

22 And we would provide those portions of the protocol,
23 including the attachments that are related to that, because
24 it's a very technical document with attachments. And we'd
25 share that with the PSC.

1 And we're not prepared to share with the PSC the portions
2 of the protocol that relate to the emissions testing, and what
3 our -- what our emissions recalibration is, because we don't
4 think that the PSC has any business getting into that.

5 And candidly, you know, we don't want to see the PSC
6 making mischief with respect to a process that's a core
7 regulatory process, and something that they have no right to be
8 involved in.

9 **THE COURT:** So if they have no right to be involved,
10 how would they create mischief?

11 **MR. GIUFFRA:** Well, I don't know, Your Honor. I
12 think the concern would be -- the concern would be that they
13 would be -- that they don't have any -- it's not relevant to
14 their claims whether or not or how we're doing the emissions
15 testing. It's just not relevant.

16 Let me give you the second piece of what we're offering.
17 We'll give them portions of the protocol relevant to
18 consumer-facing issues. That would be miles per gallon, NVH,
19 and driveability.

20 We would also be prepared to share with the PSC on a
21 rolling basis -- so not waiting until the end -- portions of
22 the test results that relate to those consumer-impacting or
23 -facing elements of the protocol; and again, fuel economy, NVH,
24 and driveability.

25 So they would get the data. They could look at the data.

1 They could analyze the data. And they could assess, you know,
2 what the import of the data would be on the things that are
3 actually relevant to claims that they might have.

4 **THE COURT:** And so they would not have information
5 about actual emissions -- the actual emissions; the testing
6 data on emissions?

7 **MR. GIUFFRA:** At least, not on a going-forward basis.

8 Obviously, at the end of the day we could discuss -- once
9 the Government has concluded what it's done, we could consider
10 whether to share that information with them.

11 I will tell you that in the VW case, I don't recall the
12 PSC getting copies of test data, protocols, and things like
13 that. I do not remember that.

14 Now, maybe someone will correct me.

15 **THE COURT:** But the end data, I think you would
16 concede, is something that could be relevant. And it should
17 be -- at the end of the day, shouldn't be that turned over?
18 Shouldn't that be made available?

19 **MR. GIUFFRA:** I don't want to make a judgment one way
20 or the other about that today.

21 I mean, I think --

22 Again, Your Honor, I think one of the misnomers in this
23 case -- and not to get out in front of a motion to dismiss --
24 is to the extent that the PSC is claiming that the vehicles
25 don't meet emissions standards -- and I don't think they're

1 going to say that -- their claims are clearly preëmpted. And
2 you don't need to look further than Judge Breyer's decision in
3 the Wyoming case and other cases dealing with Section 209(a) of
4 the Clean Air Act.

5 And, in fact, this morning we won a case in *VW* -- for *VW*
6 in Alabama dealing with whether Alabama could bring a claim; an
7 environmental claim. And the Court there said it was
8 preëmpted, because it related to the setting of emissions
9 standards; something that is preëmpted under Section 209(a) of
10 the Clean Air Act.

11 And so I think there's a line that is -- that the Congress
12 has given to the regulators. And there's a line that Congress
13 has said, *No, you can't get* --

14 You know, because obviously, they could have --
15 theoretically, one could have a consumer claim. There are
16 issues in this particular consumer claim that I'll talk -- case
17 that I'll talk about.

18 But I think in terms of what we're proposing to do with
19 the protocol, we're being -- well, we can take the position
20 it's a settlement communication, and try to, you know, joust
21 about whether it should be turned over or not. And again, if
22 Your Honor's considering having us turn over the entire thing,
23 I'd like to at least have the opportunity to submit a letter to
24 the Court on why we don't think they should get the entire
25 protocol.

1 What we think is a fair compromise is to give the PSC the
2 portions of the protocol that are related to matters that are
3 clearly -- that are not preëmpted by the Clean Air Act, so that
4 the emissions-standards stuff would be off the table, and
5 things related to -- you know, that impact consumers, like
6 miles per gallon that the car generates post the recalibration
7 of the car would be something that we would be prepared to
8 share with the PSC; and in addition, to try to make the ball
9 move down the field faster, share the test data with them on
10 those items on a rolling basis.

11 **THE COURT:** And driveability -- would that include
12 power?

13 **MR. GIUFFRA:** Yes. Power. Torque.

14 And, in fact, Your Honor -- and I'll talk about this in a
15 little bit. When you actually look at the advertisements that
16 Fiat Chrysler ran about these cars, to the extent there were
17 advertisements, they were focused on miles per hour and torque.
18 They never talked about emissions.

19 **THE COURT:** All right. And let me hear from the PSC.

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

21 Well, obviously, the consumers had a great deal of
22 interest in whether or not these cars met government emissions
23 standards; they bought the cars because they did.

24 We don't think defendants cheated on emissions standards
25 just to see if they could get away with it, and just to fool

1 the Government. They did it so they could fool the Government
2 so they could cheat our owners into buying these cars. So,
3 yes, we do have an interest in the emissions.

4 That said, we have also said consistently we don't have
5 any interest in interfering with the work of EPA and CARB in
6 testing these cars for emissions compliance. That's their
7 bailiwick.

8 Our bailiwick is making sure that any emissions fix
9 doesn't break our owners' cars, in terms of all of the aspects
10 that Mr. Giuffra mentioned.

11 In order to have the information necessary to try to
12 negotiate a settlement on an informed basis, we do need to see
13 on a confidential basis under Rule 408 the entire testing
14 protocol, because we need to see the context. We need to see
15 what they're testing for in all of these areas, and what they
16 aren't, so we know as we're negotiating what we are and are not
17 going to have data on at the end of the day. I think it's
18 essential to the process.

19 We understand the concern about confidentiality.

20 To move the process along to get the access that we need,
21 I would certainly be willing to represent that I would review
22 the entirety of the protocol on a confidential basis. That
23 would help me determine whether what Mr. Giuffra is offering is
24 sufficient for our purposes; and, of course, if it is, that we
25 have an agreement.

1 If it turns out that we need extra items or there are
2 extra questions that we have about the protocol, then we could
3 proceed on that basis.

4 But we're very concerned about seeing something that are
5 just little slivers and parts of the protocol, and not
6 understanding how the testing protocol works, because at the
7 end of the day if a fix is achieved, that protocol will be
8 implemented, and our class members one more time will be left
9 holding the bag with whatever the outcome. And if they need to
10 be compensated for shortfalls in any of these attributes, we
11 want to be able to make sure that that happens.

12 Folks that got fooled here are consumers. And I'm not
13 going to reargue everybody's argument -- and I'm running out of
14 breath -- but just to say that with respect to whether or not
15 environmental responsibility mattered to our Class, it mattered
16 enough to our Class and Fiat Chrysler knew that it mattered
17 enough to our Class that every single vehicle had a beautiful
18 EcoDiesel badge. That was the marketing. That was the
19 advertisement. It went with every vehicle. That was part of
20 the package that our folks bought.

21 They don't have that today. They don't have that eco. If
22 they could get that eco back, that's wonderful; but they also
23 need to keep the rest of the package they bought.

24 **THE COURT:** Well, and that's what I understand
25 Mr. Giuffra to be saying; that you would get information on all

1 of the actual performance aspects of the vehicle: Its
2 durability, its driveability, its economy, miles per gallon.

3 But it sort of assumes that you're leaving it totally in
4 the hands of EPA and CARB to make sure that the emissions part
5 of it -- this is contingent upon the emissions part being met.
6 And you don't need to know that, as long as the EPA is good
7 with it, and CARB is good with it; unless you're going to
8 second-guess their tolerance of the emissions standards, I
9 think, if I understand what they're saying.

10 **MS. CABRASER:** I think with respect to tolerance and
11 emissions standards, it's either going to meet the original
12 emissions standards -- and we know what those are -- or it
13 isn't.

14 If it's going to meet the original emissions standards,
15 then it's all of these other factors that we have to address.

16 If it's not going to meet the original emissions
17 standards, well, then we're in *Volkswagen* world, and we're
18 going to need to address that contingency in the settlement
19 discussions; but we don't know the answer to that yet.

20 In *Volkswagen*, we weren't as insistent on getting the
21 protocol, because we knew that if the emissions weren't a
22 hundred percent met to original standards, we had the safety
23 valve of buy-back. That was a given then.

24 It's not a given at this point in this litigation, so we
25 do need to be attentive to the protocol, to avoid selling

1 consumers short.

2 **THE COURT:** All right. Let me ask Mr. Giuffra this
3 specific question. Doesn't the PSC have an interest in seeing
4 what the emissions testing protocol, standards, et cetera, are,
5 if it is something other than meeting the existing standards?

6 In other words, if there was going to be some
7 interpretation or alteration, as I understand that there was
8 some leeway given in the *Volkswagen* case on a settlement basis,
9 to meet the standards -- the little, slight bending of the
10 rules -- doesn't the PSC have an interest in being able to see
11 whether that's happening, or not?

12 **MR. GIUFFRA:** Your Honor, in this case we intend to
13 fix the vehicles so that they're 100 percent compliant with EPA
14 and CARB rules. There's no --

15 **THE COURT:** Existing applicable rules?

16 **MR. GIUFFRA:** Yeah, with Tier 2, Bin 5, which is the
17 emission standard that would apply.

18 (Reporter requests clarification.)

19 **MR. GIUFFRA:** Tier 2, Bin 5. B-i-n.

20 I didn't know what it was two years ago, and now I do.

21 But basically, I think actually Ms. Cabraser actually made
22 the point for us. The claim is that we cheated the Government.
23 Okay? The issue here is consumers do not -- they have -- the
24 Congress didn't give them a right to bring an action based on
25 emissions standards. That's the whole point of Section 209(a)

1 of the Clean Air Act. And to the extent we can fix the cars to
2 that certified Tier 2, Bin 5 standard, that's something that
3 the Government has to decide.

4 You've got two of the most expert -- probably the most
5 expert regulators in the world with EPA and CARB who have the
6 most experience.

7 **THE COURT:** So will you produce enough of the
8 protocol to make it clear that is the standard that's being
9 tested for?

10 **MR. GIUFFRA:** Whew! I'd have to look at the
11 protocol. I mean, that's what we're testing for. Maybe we
12 could provide that basic information.

13 I don't -- I'm trying to --

14 **THE COURT:** Well, it may make sense to meet and
15 confer. I mean, if that's the case, maybe I'm hearing that you
16 don't have as much interest in going below that. If you knew
17 that they were going to meet the Tier 2, Bin 5 as a predicate
18 to all of this, and then you see how their performance is,
19 having met that emissions standard, is there something more
20 that?

21 **MS. CABRASER:** Your Honor, it's important that we see
22 the entire protocol, so we know it holistically; because if
23 we're going to get bits and pieces, I don't know what the rest
24 of it is.

25 If they're giving us everything except the protocol for

1 compliance with the original emissions certified, and I can see
2 that from the document, then I know everything they're testing
3 for and that original certificate -- compliance emissions is
4 part of that -- and we're going to get the rest, then that's
5 maybe satisfactory.

6 And, no, our claim isn't that they cheated the Government.

7 Our claim is that they cheated us.

8 And so, you know --

9 **THE COURT:** Well, there is a RICO claim that suggests
10 that they cheated government. It's fraud to regulators.

11 **MS. CABRASER:** In order to -- it was a means to an
12 end.

13 **THE COURT:** Right.

14 **MS. CABRASER:** You know, nobody cheats the Government
15 for its own sake. They cheat it to make a profit by cheating
16 others. So that's where we are.

17 And, you know, fool me once, you know, shame on you. Fool
18 me twice, shame on me.

19 I want to make absolutely sure that our owners aren't
20 being fooled twice. And the way to do that is to ensure the
21 integrity of the protocol, and either file an *in camera* for
22 review of the Court, confidential review of the whole thing;
23 and then production under 408 of the relevant portions.

24 **THE COURT:** All right. So why not, to shortcut this,
25 because we've got a lot to go through, have a confidential

1 review by designated counsel? It might be Ms. Cabraser,
2 herself, or even somebody else, or something -- but a very just
3 to look it, and show what it is that you think should not be
4 provided.

5 And maybe once she sees that, and she's assured that a
6 testing standard is what she believes it should be, and that
7 that's what is being tested for, and that therefore any
8 certification by EPA and CARB will satisfy that concern, then
9 we can obviate this whole thing. Maybe she doesn't need --
10 then nothing needs to be produced.

11 But I think, you know, she would like to see the context
12 of it.

13 And your fear about, you know, pertinent information,
14 trade-secret information, confidential business information
15 leaking out can be obviated with a very tightly sealed
16 procedure with very limited access. And it could be just
17 viewed, you know, without producing it; just viewed in the
18 office.

19 **MR. GIUFFRA:** One other alternative --

20 **MS. CABRASER:** I'd be happy to do that, Your Honor.

21 **MR. GIUFFRA:** One other alternative --

22 The Government obviously knows what's in the document.
23 Right? So they would obviously see the redaction.

24 So the Government could say, Okay. This is related to the
25 topics you're talking about. And this is not related to the

1 topics you're talking about. This is related to emissions.

2 This is related to consumer issues.

3 That's one alternative.

4 Mr. Feinberg could look at it.

5 I just think it's a dangerous precedent, not only in this
6 case. It didn't happen in VW. There were other
7 automobile-manufacturer cases that are out there. And I'm
8 involved in many different cases not involving automobiles, but
9 banks, pharmaceutical companies. All kinds of companies have
10 relationships with regulators. And private plaintiffs don't
11 have the right or the ability to get into the interstices of
12 the dealings on topics that are clearly, by Congress, given to
13 the regulators' absolute discretion.

14 The PSC and private plaintiffs have absolutely no right to
15 have any role, whatsoever, with respect to the setting of
16 emissions standards or whether we meet emissions standards.
17 The emissions standards were set by the Government. And if the
18 Government had wanted to give the Plaintiffs' Bar the ability
19 to challenge how the emissions standards were being set or
20 whether we're meeting them, they would have done so. Congress
21 did exactly the opposite.

22 So I think it's a dangerous precedent to allow private
23 plaintiffs to get underneath the tent in something that's this
24 highly regulated, and something where Congress has clearly
25 spoken and said, *No. This is something for the exclusive*

1 *jurisdiction of the regulators.*

2 **THE COURT:** Let me ask the Government. What's your
3 view on this question?

4 **MS. RENDÉ:** Your Honor, we do view the protocol as
5 something that is protected under PTO 6 relating to settlement
6 communications. And there would be concern about any potential
7 chilling effects.

8 However, with this particular document, FCA has proposed
9 an option for sharing information with the PSC. We don't
10 oppose that approach; but more importantly, the Government is
11 not going to stand in the way of FCA sharing information with
12 the PSC.

13 **THE COURT:** So you don't object if, for instance,
14 Ms. Cabraser is allowed to look in a confidential setting at
15 the unredacted documents, and have a meet-and-confer with FCA
16 about what they might then share, or what they might be
17 satisfied with.

18 **MS. RENDÉ:** That is one option. And perhaps
19 California would have a couple of confidentiality concerns that
20 they can work out with Ms. Cabraser. And I'm sure they can
21 discuss that a little further with Your Honor.

22 But that being said, another possible option is to have a
23 redacted version of the protocol shared. And then, as the PSC
24 has questions, we can answer. Perhaps titles, headers would be
25 kept in; something that would be informative, so at least maybe

1 some information gaps could be pointed out.

2 **THE COURT:** So redacted --

3 The redacted version has not been provided to PSC yet?

4 **MS. CABRASER:** No.

5 **MS. RENDÉ:** That's the point, Your Honor. The
6 protocol was just approved on December 7th. And according to
7 the protocol, as indicated in the joint CMC statement, FCA has
8 until December 30th to indicate which portions of the protocol
9 it views as covered by the confidential-business-information
10 protections provided by EPA regulations.

11 **THE COURT:** Well, depending on how extensive those
12 redactions are, if there is enough information left in there,
13 such as subheadings and headings and things that -- but missing
14 are certain details, maybe, from that, PSC might be able to get
15 that context. It may or may not.

16 But that might then sharpen the focus, if that doesn't
17 resolve it, to sit down and see what's in dispute; because
18 right now we don't really know how extensive those redactions
19 are.

20 **MS. RENDÉ:** And if Your Honor were to set perhaps a
21 deadline for that exchange, that would be helpful, as well.

22 **THE COURT:** Okay.

23 **MR. GIUFFRA:** Your Honor, if I could just be heard
24 for a second, we would be prepared --

25 You know, today is, I believe, Tuesday. I mean, I don't

1 want to -- I don't want to make problems. I think I'm pretty
2 sure we could probably get the PSC a redacted version of the
3 protocol with the headings exposed.

4 And then if Ms. Cabraser has an issue about what she
5 doesn't have, then we have a ripe controversy and we can deal
6 with it.

7 **THE COURT:** How quickly could you get that to them?

8 **MR. GIUFFRA:** I'd say by Friday, I think we could
9 probably do it. Today's Tuesday. I don't think it's going to
10 take very long.

11 **THE COURT:** Okay. The 22nd? Why don't we do that as
12 a first step, so you can see? And it may just depend on how
13 much you redact and how much you leave in, knowing that the
14 PSC's concern is that the predicate to all of the other testing
15 be that it meets an emissions standard, particularly -- I
16 assume if it's going to meet the existing Tier 2, Bin 5, and
17 you are satisfied with that, at least that's an anchor. And
18 that's the predicate that's set.

19 So when you do the redactions, Mr. Giuffra, I think it's
20 important to make sure that you err as much as you can -- as
21 much as, obviously, as your client's comfortable with -- in
22 giving that kind of assurance.

23 And if there is not that assurance there, then what I
24 would ask you to do is send me a joint letter. And maybe send
25 me the document, with redactions. And then I can look at it.

1 But this way, it would be an intelligent discussion; a
2 specific discussion.

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

4 **MS. FIORENTINI:** Your Honor, this is
5 Judith Fiorentini, for CARB. I'd like to weigh in --

6 **THE COURT:** Yes.

7 **MS. FIORENTINI:** CARB may have some redactions that
8 it might need to make that are confidential. I'd be happy to
9 share what those are generally with Ms. Cabraser, and that
10 might give her some comfort.

11 But there is some confidential information in there that's
12 part of CARB's deliberative process and testing processes that
13 we would not --

14 **THE COURT:** So maybe you can do the redaction in a
15 different color, and show that that's a CARB redaction versus
16 an FCA redaction, and explain to the PSC why --

17 **MS. FIORENTINI:** Absolutely.

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

19 As long as we can get some context for that: What those
20 are, why those are.

21 If that can happen quickly, and if we can come back to
22 Your Honor with the document redacted -- and redacted so that
23 you can resolve any remaining dispute that we have before we're
24 scheduled to start meeting after the first of the year -- that
25 would be very helpful.

1 **THE COURT:** All right. Can CARB also participate in
2 that Friday deadline?

3 **MS. FIORENTINI:** Yes.

4 **MS. CABRASER:** Okay.

5 **THE COURT:** Why don't you all get back to me after
6 you've had a chance to look at it, and then meet and confer?
7 There's a holiday period -- but early January?

8 If you can't resolve it, submit a joint letter to me. And
9 I will want to see the unredacted version of the documents
10 by -- I don't know -- January 5th, 8th. I don't want to cut
11 into people's -- I don't know what your schedules are over the
12 holidays.

13 **MS. CABRASER:** I think they were already obliterated,
14 Your Honor, so it's just fine.

15 **THE COURT:** All right. January 5th.

16 **MS. FIORENTINI:** Thank you, Your Honor.

17 **THE COURT:** Any submission.

18 Otherwise, I'm hoping you all can work it out. And I'm
19 hopeful that perhaps as part of intermediate step, you consider
20 Ms. Cabraser's proposal that a representative actually look at
21 those redacted matters, not being turned over officially, but
22 to assure for themselves that it's not needed.

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

24 **THE COURT:** Okay. All right. Anything else with
25 respect to the CMC at this point that I need to discuss?

1 **MS. RENDÉ:** Briefly, Your Honor, I just want to state
2 something for the record. I want to make sure that Your Honor
3 is aware that the test protocol does require FCA to alter
4 several vehicles by reflashing them with new software
5 calibrations. Mr. Feinberg is aware of this. The parties are
6 aware of this. We just wanted to make sure that Your Honor is
7 also aware of this.

8 **THE COURT:** That -- that -- I'm sorry. That the.

9 **MS. RENDÉ:** The test protocols requires FCA to alter
10 several subject vehicles with reflashing of the hardware.

11 **THE COURT:** No hardware.

12 **MS. RENDÉ:** Make sure that Your Honor is aware.

13 **THE COURT:** Right. I think that has been represented
14 to me.

15 **MS. RENDÉ:** Good.

16 **THE COURT:** And do you expect that there will be some
17 meaningful testing data by the time everybody meets in late
18 January; that there will be some things that might inform where
19 this is going, and that might affect the settlement
20 discussions?

21 **MS. RENDÉ:** Our hope is that there will be the
22 provision of data on a rolling basis. I'm not quite sure of
23 the exact deadlines for those.

24 **THE COURT:** Okay.

25 **MS. RENDÉ:** That would depend upon how testing is

1 going.

2 **THE COURT:** Okay.

3 **MR. GIUFFRA:** Your Honor, as I said, we will -- I
4 will look into as soon as this hearing is over the 2017 data.
5 And we'll also look into giving the PSC on a rolling basis the
6 data that is relevant to what we consider the consumer-facing
7 test --

8 **THE COURT:** All right. Why don't we use the same
9 date -- the 22nd -- to resolve and produce that 2017
10 information? And if there's a dispute, let me know by the 5th
11 of January if there's a problem. I just want to make sure that
12 that's on track.

13 **MR. GIUFFRA:** I'm just not sure I can get you an
14 answer by Friday on the test. That's my only -- I just --
15 that's something -- you know, that question was raised.

16 **THE COURT:** Okay.

17 **MR. GIUFFRA:** I'm assuming the data exists. I just
18 don't want to run it -- you know, I may be able to get an
19 answer by then. I just can't be sure I can. I will try. I
20 guarantee -- with the holidays, you never know when people are
21 living.

22 **THE COURT:** All right. Well, let's put it this way.
23 Let me know by the 5th if there's a problem.

24 **MR. GIUFFRA:** Yeah. We will. We will. We will.

25 **MS. RENDÉ:** And while we're discussing time line, I

1 just wanted to be clear to Your Honor. As we mentioned, the
2 test protocol was finalized on December 7th. And our
3 understanding that is that FCA has begun testing as of
4 yesterday -- I'm sorry -- as of Sunday, I believe, the 17th.
5 So with that in mind, we do anticipate FCA's completion of
6 their portion of the test protocol by the end of March.

7 **THE COURT:** Okay.

8 **MS. RENDÉ:** And that would mean, assuming all --
9 assuming there are no setbacks, then the Government would then
10 have 30 days to complete their analysis. So roughly we're
11 looking at -- an idea of the viability of the fix by the end of
12 April.

13 **THE COURT:** Good. All right. It's good to have a
14 clear time line. Thank you.

15 All right. Why don't we go on and address the motions
16 before the Court at this point?

17 Obviously, we're not going to address every single issue
18 raised in these hundreds of pages of briefing here, but I do
19 want to get -- make sure I understand some sort of general
20 things about this case.

21 So my first question is directed to the PSC. And that is,
22 as I understand it now based on the briefings and looking at
23 the Complaint, that there are sort of two distinct fraud
24 claims. The state-law fraud, concealment, perhaps a statutory
25 consumer rights is focused on concealment from the consumers

1 either statements made or half-statements made or no statements
2 made to the consumers which resulted in their purchasing a
3 vehicle either they otherwise would not have purchased, or
4 paying more than what they deserved.

5 But the RICO claim is based on sort of, quote, "fraud on
6 the regulators"; that is, the wrongful conduct that underpins
7 the RICO claim does not turn on what consumers heard or
8 thought, but it's really on the fact that by committing and not
9 revealing defeat devices, et cetera, et cetera, to CARB and
10 EPA, that the defendants were able to get these cars to the
11 market which otherwise wouldn't have gotten to the market, and
12 then that resulted in the purchases of these vehicles.

13 Am I right that there are sort of two strands? Two sort
14 of different lenses by which to view the alleged allegations of
15 concealment?

16 One is focused on the regulators. The other is on
17 consumers, depending on whether you're looking at RICO versus
18 the state-law concealment fraud common law claims? Or do I
19 have that mixed up?

20 **MS. CABRASER:** No. I think -- I think that that
21 is -- that is a way to look at it, Your Honor. And Ms. Jensen
22 will talk about RICO. RICO focuses on cheating the regulators
23 as the means to the end of getting to the market, and then
24 cheating the consumers.

25 The continuing story line there, though, is obviously

1 fraudulent concealment through the cheat device, cheating the
2 regulators, cheating the consumers.

3 With respect to the state-law and common-law claims, that
4 really sound both in misrepresentation, concealment -- I'm
5 happy to talk about fraudulent concealment, because that's a
6 silent fraud. And I can't speak a lot, but it happened below
7 the waterline. And then Ms. Cappio will talk about the
8 consumer-act claims. So we can deal with that that way.

9 But really the gist of RICO is the breach versus intending
10 model in concealing something or cheating. You know, the
11 regulatory watchdogs, in order to get past them to get into the
12 marketplace to cheat the consumers.

13 **THE COURT:** So as I understand the RICO claim, then,
14 it doesn't require, for instance, if you were to demonstrate
15 fraud on the regulators successfully having been accomplished,
16 getting these vehicles to pass emissions, to pass and on to the
17 market, it is not your burden to then further prove
18 misrepresentations or concealment from the actual end
19 consumers, and reliance thereon, et cetera, et cetera?

20 **MS. CABRASER:** That's right. There's just no
21 first-party reliance requirement in RICO. That's what the
22 Supreme Court unanimously held in *Bruce versus McGovern*
23 (phonetic).

24 **THE COURT:** Right. Distinct from your common-law
25 fraud claim?

1 **MS. CABRASER:** Somewhat. Somewhat distinct from
2 common law; but in California, which I think everyone agrees
3 applies, there is fraud on the consumer, which likewise does
4 not require a representation. It requires an omitted or
5 concealed material --

6 **THE COURT:** Where there is a duty or circumstances
7 that require concealment --

8 **MS. CABRASER:** That's right. There are three ways to
9 do that. You can either have some sort of relationship, like a
10 fiduciary or contractual relationship. There's a contractual
11 relationship here.

12 Or you can make a partial disclosure. You know. Do some
13 marketing that also gives rise to the duty to disclose the rest
14 of the story. We can market the tip of the iceberg. You've
15 got to talk about what's under the waterline. That certainly
16 applies here.

17 And then if a defendant intentionally fails to disclose
18 certain facts known only to it, and the plaintiff could not
19 have discovered, that gives rise to the duty to disclose. And
20 that's really what --

21 **THE COURT:** Even if there are no partial disclosures
22 or half-truths?

23 **MS. CABRASER:** Correct, correct. So if I know that
24 I've cheated on -- if I have a defeat device in my car, I've
25 cheated on emissions so that I can get into the marketplace,

1 there's no way for the plaintiff, who's a consumer making
2 choices, but doesn't own a testing lab to discover that, then I
3 have that duty.

4 And I'm just reading from CACI 1901, the California jury
5 instruction on concealment, which is the current definitive
6 state of California law on this.

7 So sometimes people think there has to be a fiduciary
8 relationship. That's not the law in California.

9 **THE COURT:** You're just -- that's an alternative way
10 of --

11 **MS. CABRASER:** Yes.

12 **THE COURT:** -- of predicating a cause of action. I
13 assume that also requires -- I think it requires that the fact
14 concealed has to be of significance; has to be material, such
15 that it would make a difference to an average.

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

17 **THE COURT:** Consumer.

18 **MS. CABRASER:** That's right. That's the objective
19 materiality question of fact reasonable consumer standard that
20 would be determined by the finder of fact here. And it would
21 be whether someone would have acted differently if they'd had
22 all of the information.

23 Then again, there's an also substantial-factor test. So
24 this could be one of many important considerations to a
25 consumer. It need not be the decisive one, but if it's

1 something a reasonable consumer would have wanted to know to
2 put into the -- put into the decision-making process, either
3 there was a duty to disclose it, and it certainly wasn't
4 disclosed here.

5 But there's also a fourth prong, which, again, happens
6 rarely, but it happens here; that the defendant prevented the
7 plaintiff from discovering certain facts. And when you put a
8 defeat device in a vehicle, you're preventing discovery that
9 the vehicle is not as represented and sold.

10 **THE COURT:** And let me -- this is kind of setting up
11 what we're going to be discussing. With respect to the injury,
12 the injury is largely the same under the RICO. The end
13 result -- the injury -- is the same. Right? I mean --

14 **MS. CABRASER:** It's economic loss, which can be --
15 the statutory for it is injury for damage to business or
16 property.

17 But the courts say that's any kind of economic loss.

18 And here we, of course, say people wouldn't have bought
19 the vehicle at all if they'd known; or at the very least, they
20 were paying for a diesel premium. These vehicles were more
21 expensive than their gas counterparts that they certainly
22 didn't get. You know. So we have damage then. We have
23 ongoing damage right now. They're not. They don't have the
24 vehicles that they bought.

25 **THE COURT:** Under the first prong, if the assertion

1 is the consumer wouldn't have bought the vehicle at all, and
2 now they're stuck with it, and yet it's not like this is a
3 completely valueless or worthless piece of property. It's --
4 presumably, it's being used; being driven.

5 It may be not what you thought you were going to get, but
6 how does one --

7 Unless you're going to ask for a rescission, which --

8 I mean, what's the remedy?

9 **MS. CABRASER:** It's, as it indicates, to prove
10 economic loss, you use a damages analysis.

11 There are a number of aspects to that. There's the
12 premium that was paid for what wasn't delivered.

13 There's the delta between the utility and value of what
14 you bought, and what you actually got.

15 And -- and those would be the typical -- the typical
16 losses, I think.

17 **THE COURT:** So in the end, it's still an overpayment.
18 I mean, however you look at it, you paid more.

19 **MS. CABRASER:** It's over. It's over. Yes. That's
20 right. When you pay too much.

21 And you could also say from a reasonable-consumer
22 standpoint, *I had a choice in the marketplace. I was shopping*
23 *for trucks or SUVs. If I had known that about this SUV, I*
24 *would have put all of my money elsewhere. I wouldn't have*
25 *bought this vehicle, at all. So --*

1 **THE COURT:** Well, that's why I asked. And in that
2 case, you don't get all of your money back; do you?

3 **MS. CABRASER:** You would have to prove to the trier
4 of fact what the reasonable economic loss would be under those
5 circumstances. And those models do factor in utility, and use
6 of the vehicle. So, you know, you're not getting what you paid
7 for. You're not getting what you wanted. You paid too much
8 for it. You got something.

9 And so that would be analyzed at the damages phase.

10 But the fact of damage and injury is established.

11 The quantum of it?

12 Well, we have to develop the case, and see how that works
13 out.

14 And I believe Ms. Slaughter has more on injury-in-fact,
15 which we're talking about at this stage of the case.

16 **THE COURT:** All right. Well, let's talk. Let's --
17 why don't we start with our freestanding -- you know, since
18 it's your motion, Mr. Giuffra.

19 Knowing what we know and understand of plaintiffs'
20 theory -- and that is they've purchased a vehicle either they
21 wouldn't have purchased, or at the end of the day they paid a
22 premium; paid more for something than it's actually worth. And
23 that seems like that's pretty straightforward. Isn't it?
24 Isn't that some economic injury that should provide some basis
25 for injury-in-fact understanding?

1 **MR. GIUFFRA:** No, Your Honor; and certainly not under
2 RICO.

3 And what's interesting is a lot of comparisons of this
4 case to *Volkswagen*.

5 But what's not in this Complaint -- and the Complaint is
6 very long complaint: 376 pages. And, Your Honor, when you
7 look at it, 263 pages are just listing out of state-law claims.

8 The claims that relate to the individual plaintiffs here
9 are -- they run from -- they run from pages 9 to 52. 43 pages
10 of boilerplate. Pages 9 to 52. 43 pages of boilerplate.

11 Every single plaintiff alleges exactly the same thing.
12 And what they allege is in the most conclusory terms; is
13 something that doesn't meet Article III standing, and also
14 doesn't meet clearly what just a higher burden that you have to
15 meet in order to bring a RICO case.

16 And I think Your Honor actually adverted to the issue that
17 you're faced with. *Do I allow a CAFA, state-law-based class*
18 *action to go forward here, or do I actually allow a RICO claim*
19 *with treble damages and attorneys fees to apply in a case*
20 *that's literally about eight undisclosed AECDS?* That's what
21 it's about at this point.

22 Now let's look at what's not alleged in the Complaint.
23 The Department -- the EPA and CARB issued a Notice of Violation
24 almost a year ago. Almost a year ago. There isn't a single
25 allegation in this Complaint that these vehicles have declined

1 in value by one penny beyond normal depreciation. This is not
2 a situation where a single plaintiff is alleging they can't
3 sell the vehicles. That was an allegation in VW. There was
4 massive market-value diminution upon the filing of the -- of
5 the NOV's. People couldn't sell their vehicles.

6 Here there's no allegation that people can't sell the
7 vehicles. There's no allegation that people can't legally
8 drive the vehicles, going to your point. You've got something.
9 You've got something you can use.

10 There's no allegation that the vehicles aren't safe to
11 drive.

12 There's no allegation, Your Honor, of any diminution in
13 performance.

14 What I was going back with Ms. Cabraser about before --
15 there's no allegation that these cars are not delivering
16 exactly the miles per gallon that were promised to consumers.

17 **THE COURT:** Well, except that's not the only thing
18 that these consumers claim they were looking for. It's not
19 just miles per gallon. It's not just horsepower. It's also in
20 combination with meeting certain emissions standards.

21 **MR. GIUFFRA:** Well, that's another --

22 **THE COURT:** That's the allegation.

23 So, you know, it's clear that they're alleging that they
24 didn't get what they thought they were getting.

25 Whether there's enough there to actually state a claim for

1 fraud and specificity -- that's another question.

2 But assuming that that's true, you're saying that they
3 have to prove that they then tried to sell the car, or there's
4 actually been a documented diminution in value of the car
5 because of this disclosure? Otherwise, there's no damage.

6 And they've alleged, in somewhat more conclusory terms,
7 that they -- whatever the value of the car is, they paid more
8 than what they would have paid for getting something that they
9 didn't get.

10 **MR. GIUFFRA:** Well, the allegation, Your Honor, is
11 based on the difference between the cost of a diesel car,
12 versus a gas car; and that's the premium they're asserting.

13 But, of course, they got a diesel car. And diesel cars
14 have better miles per gallon than the gas cars. And these
15 diesel cars are providing better miles per gallon than gas
16 cars.

17 The point that the other side is glossing over -- and I
18 think Your Honor -- and I actually -- I put this together
19 because I thought it would be helpful, if I could hand up this
20 up to the Court.

21 (Whereupon a document was tendered to the Court.)

22 **MR. GIUFFRA:** And all it is is -- this is a
23 description of the ads that are actually cited -- supposedly
24 cited in this Complaint.

25 And they are found, Your Honor, on very relatively small

1 number of pages really; only paragraphs 145 to 154 of the
2 Complaint.

3 And what you find out, Your Honor, is there was no
4 national advertising campaign. Nothing.

5 There -- the only thing that they ultimately can point to
6 is a vague label -- "EcoDiesel" -- which we say means "fuel
7 economy," and is obviously puffery.

8 There are no ads, whatsoever, about compliance with EPA or
9 CARB rules. Nothing. There are no ads that they cite, if
10 Your Honor looks, from any television commercials.

11 Okay. What they cite, Your Honor, are a series of
12 websites of FCA, and blogs on those websites. And then they
13 take snippets.

14 And most of the blogs, if you look at them, are focused on
15 miles per gallon, and are focused on performance. And they
16 take a few snippets.

17 The only one that actually talks about Tier 2, Bin 5 is
18 from a V.M. Motori engine specification. And no one alleges
19 that any of these plaintiffs went on to the V.M. Motori
20 website, and looked to see what the engine specifications are.

21 **THE COURT:** All right. So that goes to the merits,
22 for instance, of a state-law concealment claim, because you're
23 saying there wasn't pervasive advertising. There wasn't,
24 therefore, exposure. There wasn't, therefore, reliance on any
25 statement.

1 I understand that argument, but I don't see how that --
2 that's at the 12(b)(6) stage. I don't see how that defeats an
3 allegation of standing.

4 I mean, that goes to whether there were -- whether they
5 met all of the requirements of the substantive claims, but I
6 don't see why that's an Article III question.

7 **MR. GIUFFRA:** Well, Your Honor, they don't even
8 allege -- not one of the plaintiffs -- they relied upon any
9 statement by FCA. They don't cite, you know, of one of these
10 websites that they supposedly went on. They don't cite an ad.

11 All they do in the Complaint, if you look at the
12 paragraphs that I cited -- and that's pages 9 through 52.
13 They'll say "EcoDiesel."

14 And then the plaintiffs will add in, *i.e.*, you know, *low*
15 *emissions*, saying, *That's what people must have understood it*
16 *to mean.*

17 Well, the law is pretty clear in the Ninth Circuit that in
18 order to bring a claim based on overpayment -- and that's what
19 this is. It's a claim on overpayment -- you need some sort of
20 objective present harm.

21 And these vehicles have performed exactly as they were
22 represented to perform. There was no representation made about
23 emissions compliance.

24 Now, maybe in the future if we have to fix these vehicles,
25 and the miles per gallon is not what it was represented to be,

1 they might have a claim; but they don't have one sitting here
2 today.

3 And the case called *Davidson* in the Ninth Circuit, 2017,
4 at 873 Fed. 3d. at 1112 says that you need to have false
5 information that causes a higher price.

6 And they don't point to any false information that caused
7 a higher price. And you need that in order to bring a claim
8 based on --

9 **THE COURT:** What about the concealment prong that I
10 had the conversation with Ms. Cabraser about?

11 **MR. GIUFFRA:** Well, the problem with the concealment
12 prong that they're focused on is they need to point to some
13 statement, and then you can provide all of the information.

14 **THE COURT:** That's not the only way. That's the
15 half-truth route.

16 The other route is you had exclusive information that was
17 of value that was material to the other side of the bargain,
18 and you didn't disclose it.

19 **MR. GIUFFRA:** Well, in fact, the immateriality of the
20 information that we're talking about is reflected by the fact
21 that in the last year, these cars have not gone down in value,
22 notwithstanding the fact that --

23 **THE COURT:** Well, how do I know that?

24 **MR. GIUFFRA:** Because they don't allege,

25 Your Honor --

1 **THE COURT:** Well, but I don't know that they haven't
2 alleged that that's true.

3 Isn't that a question of fact?

4 I mean, how am I supposed to make that determination here
5 at a 12(b)(6)?

6 And why is that an Article III question?

7 Again, this sounds like a merits question, whether they've
8 stated a cause of action or not.

9 **MR. GIUFFRA:** They have to allege some sort of
10 concrete financial injury that their plaintiffs have suffered.

11 None of the plaintiffs claim --

12 And they could have said, *Well, I brought my car to the*
13 *XYZ Dealership, and I tried to trade it in. And instead of*
14 *getting what I thought I was going to get, which was \$25,000*
15 *for the truck, he only offered me \$22,000; and that was in*
16 *excess of the reasonable depreciation that I should have*
17 *expected on my truck.*

18 And these folks are extremely sophisticated. And I
19 guarantee you, Your Honor, that they would have made such an
20 allegation, as they did *Volkswagen*. In *Volkswagen* the
21 Complaint was --

22 And we put before Your Honor the paragraphs from the
23 *Volkswagen* Complaint in our motion to dismiss, in the brief.

24 And the allegations in this Complaint bearing no
25 resemblance, whatsoever, to the highly particularized

1 allegations in *Volkswagen*.

2 So, for example, in *Volkswagen* the PSC said that someone,
3 you know, traded in their vehicle on a date. Despite the fact
4 that it was in, you know, pristine condition, they only got
5 \$17,000.

6 Someone else, you know, said they tried to sell their car.
7 They couldn't get -- no one would buy it. They said that the
8 dealership repeatedly refused to purchase the vehicle.

9 Someone else said they tried to -- they were offered only
10 \$13,000, and they thought the value was higher than that.

11 No one is making an allegation like that here.

12 The only allegation here is that they supposedly suffered
13 a concrete --

14 I mean, it's literally boilerplate of what we argue,
15 saying the direct and proximate result of defendants'
16 misconduct would not have purchased the vehicle or paid less
17 for it, had defendants not concealed the existence of the
18 unauthorized emissions-control devices. It's the Complaint, 34
19 to 76. It's the same literal allegation repeated throughout.

20 And then one person says --

21 **THE COURT:** Well, the main allegation is they would
22 have paid less. They wouldn't have paid this amount for the
23 car or the truck, had they known that it had these
24 emissions-control devices on there.

25 And you're saying, well, that may not have been -- there's

1 no evidence that this affected actual market value in the used
2 market, as there was in VW. It was a stronger case, where, you
3 know, it's easier to prove economic damage; where you can show
4 that the value of what you had, like stock, has been impaired
5 by disclosure of some defect or some problem.

6 And here they rely solely on the --

7 I repeated allegations, *I would have paid this much; I*
8 *would have paid less.*

9 **MR. GIUFFRA:** But they obviously had the ability to
10 allege the kind of particularized facts, which are just facts.

11 I tried to sell the car.

12 **THE COURT:** Is that necessary for Article III
13 standing?

14 **MR. GIUFFRA:** I think you have to at least allege a
15 concrete economic harm of some sort, other than just basically
16 regurgitating legal standards and words.

17 Now, so, for example, they claim --

18 And I think the reason the price of these cars has not
19 gone down is that the market doesn't care that about the fact
20 that they have eight undisclosed AECDS, because the cars are
21 performing -- the trucks are performing exactly the way
22 consumers wanted them to perform.

23 And that's why this case is a different case. There isn't
24 -- there's no materiality.

25 So let's take the cases that they cite. A case called

1 *Hinojos*, which is a case involving -- it's a Ninth Circuit case
2 from 2013, where Kohl's basically told people, you know, the
3 price for the goods is X. And we're giving you a discount of
4 Y. In fact, the price of the goods was lower than X, and so
5 people paid more money. They suffered a concrete injury.

6 A case call *Kwikset*, which is a very well-known California
7 case involving whether locks -- and the locks all said, "Made
8 in the U.S.A." And they weren't made in the U.S.A.

9 And the California Supreme Court drew the analogy to a
10 fake Rolex. And if someone sells you a fake Rolex, you
11 obviously have a claim for the fake Rolex.

12 Here, people got trucks.

13 And if you tried to sell a fake Rolex, you'll give \$50 for
14 the fake Rolex.

15 That's not the case here. Those folks got a truck. They
16 can sell the truck. The truck hasn't gone down in value. The
17 truck is performing exactly the way it was -- it was -- it
18 was -- it was represented it would perform.

19 **THE COURT:** Well, interesting.

20 And in *Kwikset* -- the language in *Kwikset* is that the
21 economic harm is the same. The consumer has purchased a
22 product that he or she paid more for than he or she otherwise
23 would have been willing to pay. It doesn't say, "because in
24 the secondary market these locks worthless, because they really
25 weren't made in the U.S.A."

1 There are no allegations that I can see in there that
2 there was a used-lock market that showed that those Kwikset --
3 before the disclosure and after the disclosure there was a
4 delta there.

5 It used the very language that the consumer paid more than
6 what he or she otherwise would be willing to pay, if it had
7 known there wasn't -- the "Made in the U.S.A." designation was
8 false.

9 **MR. GIUFFRA:** Well, Your Honor, if you look to
10 products cases -- and this is a products case -- in the *Toyota*
11 case which is from the Central District of California, which we
12 cite, 708 F. Supp. 2d. at 1165, the Court makes it clear that
13 in a case where you're alleging overpayment, you have to do
14 something more.

15 And so when you look at cases where there is an allegation
16 of overpayment --

17 In the *Toyota* case, there was impact of the supposed
18 defect on performance.

19 Here, whether these cars were eco, whether they were, you
20 know -- there's no impact alleged on the performance of the
21 vehicles.

22 And if you look at another case which is from the
23 Central District of California involving *Barakezyan versus BMW*,
24 there was an issue because there was a loud braking noise when
25 the car was being braked. And the Court said no standing,

1 because there wasn't any allegation of an objectively
2 diminished value of those vehicles; for example, trading your
3 car in at a loss.

4 And there wasn't any allegation in that case, where the
5 Court found no standing, of the fact that the person wasn't
6 unable to drive the vehicle.

7 And then in another case from the Central District of
8 California, *Tae Hee* -- T-a-e Hee -- *versus Toyota* -- these were
9 all recent cases: 2014, 2016, 2017 -- the Court also held no
10 overpayment standing. And that's at 922 Fed. Supp. 2d. at 972.
11 And the Court held while the person claiming there was brake
12 defects, but they didn't allege that they had experienced the
13 brake defect, and they hadn't experienced a loss at sale.

14 So in this case, you know, the best the other side can do
15 is focus on, you know, this "eco" term. And courts have
16 repeatedly held that terms like that are puffery.

17 If you look to the *Ford* case from the Sixth Circuit.
18 "Ford cars are extremely safe" -- held to be puffery.

19 The case from Michigan -- Eastern District of Michigan,
20 2017; an emissions case where the allegation was that the claim
21 was that the claim was the cars were clean, high-quality,
22 efficient combustion. And the Court held that all of those
23 terms were puffery.

24 In the *H-P* case, which is your own case, Your Honor, from
25 2012, the issue was whether H-P devices were ultrareliable.

1 So we have a case where there's no national advertising
2 campaign, where they have to go into -- literally, into
3 websites to try to find something they can latch onto. And the
4 only thing they can focus on is "eco."

5 And there's no allegation by any of the, you know, merely
6 50 plaintiffs that anybody can't sell the vehicles; has lost
7 money; the cars have gone down in value.

8 **THE COURT:** Is generally the question whether
9 something is deemed puffery and inactionable, versus enough of
10 a statement of fact --

11 Is that, itself, a question of fact?

12 **MR. GIUFFRA:** No. In fact, there are many cases
13 where the Ninth Circuit and courts all around the country and,
14 including cases -- including Your Honor's case, *H-P*,
15 903 F. Supp. 2d., 854 to -55, 2012, where you said the word
16 "ultrareliable" in the context of a case involving H-P was a
17 matter of puffery.

18 "Puffery" usually defined as a statement which so general,
19 that no reasonable consumer would take it literally.

20 So when someone says "eco," and Ms. Cabraser or someone on
21 the plaintiffs' side will say, *That really meant "eco" in an*
22 *environmental* -- and I say, *Well, no, it meant "eco" in the*
23 *context of fuel economy* -- right? -- we're even debating it.
24 No consumer could think that the term "EcoDiesel" meant that
25 these cars were somehow compliant with Tier 2 being --

1 **THE COURT:** Why -- why isn't that question -- since
2 it could be interpreted one of perhaps two different
3 directions, why isn't that a question of fact?

4 **MR. GIUFFRA:** Because -- because --

5 **THE COURT:** I mean, sometimes it's so clear. And
6 perhaps *H-P* was one of those, where no reasonable juror could
7 otherwise disagree; and therefore, that automatically becomes a
8 question of law, even if in the general realm it's a question
9 of fact.

10 But where you have sort of competing terms -- you know.
11 What does "EcoDiesel" mean? Does it really mean clean air, or
12 does it just mean good gas mileage? -- why isn't that something
13 that a jury could determine whether that's inactionable
14 puffery, and just opinion, and goes to another -- a different
15 issue than actual emissions?

16 **MR. GIUFFRA:** Well, Your Honor, in the *Counts* case,
17 again, which I would ask the Court to take a look at -- it's
18 237 F. Supp. 3d. at 598. Eastern District of Michigan. 2017.
19 I think it involves Mercedes.

20 The issue there was whether the term "clean" -- "clean
21 diesel" -- was puffery. And the Court held it was puffery as a
22 matter of law, because it was too vague and too general a
23 statement to be one that would be a fact that someone would
24 make a decision to make a purchase based on.

25 And so the key question on the overpayment here is: Was

1 the -- you need to have some something that was -- you need a
2 material statement. Right? There's no material statement that
3 these folks can point to that was communicated to Class Members
4 that was false.

5 **THE COURT:** Well, there may be issues about if
6 there's a statement, it has to be --

7 Oh, this gets later on to a class certification -- but
8 that it has to be a fairly prevalent -- generally, it has to be
9 prevalent enough so you can presume that the Class was commonly
10 exposed to it, et cetera, et cetera, as in the *Tobacco II* case.
11 And that's one issue.

12 But as I understand, part of their theory -- one of the
13 main theories -- is not so much reliance on actual
14 misrepresentations or partial representations. It is the
15 concealment -- affirmative concealment of a material fact that
16 would have been important to consumers, in which case it kind
17 of doesn't matter whether individual plaintiffs relied on
18 EcoDiesel or not.

19 If facts that were material were withheld from them for
20 which there is a duty to disclose -- and that may depend on
21 other factors -- then it kind of doesn't matter, you know,
22 whether it was puffery or not.

23 **MR. GIUFFRA:** Well, can I answer?

24 Two things.

25 Number one, there's no allegation in the Complaint that

1 FCA had any obligation to disclose anything to consumers.
2 There's certainly not an EPA regulation that said, *You have to*
3 *do an international advertising campaign, whether you're*
4 *complying with Tier 2, Bin 5.* I'm not aware of such a
5 regulation, at least, in terms of your ads. Okay? There's no
6 allegation that we made a misstatement in broad advertisements
7 of that nature.

8 In addition, when you look at a case involving a
9 nondisclosure, you need some sort of a duty.

10 The courts have looked to: Well, was there a product
11 defect that affected safety?

12 If there is just a mere design issue, which is what you're
13 talking about here --

14 And I believe, Your Honor, in the *GM* case which you
15 decided very recently, made that -- drew that distinction
16 between a design defect, which is presumably what it would be.
17 This is the *Sloan versus General Motors* case, which you decided
18 2017. You made the distinction. And you actually dismissed
19 that case, where you did find standing on an overpayment
20 theory, but then dismissed the case because they didn't allege
21 a safety risk.

22 And plaintiffs here do not allege a safety risk. They
23 allege an emissions issue; but as Your Honor quite properly
24 noted, the alleged misconduct by FCA was directed to the
25 Government. And the Government is in this courtroom

1 vindicating its right.

2 **THE COURT:** So materiality of a -- of a nondisclosed
3 fact exclusively within the province of the defendant is not
4 enough, unless it involves safety?

5 **MR. GIUFFRA:** I am not aware of a case where a court
6 has held that --

7 Whether it has been no economic injury shown by any
8 plaintiff, or alleged by any plaintiff --

9 And that's this case. Nobody has alleged any economic
10 injury, other than in the broadest and most conclusory terms.
11 Nobody has said they can't sell the vehicle. Nobody has said
12 it's gone down in value. Nothing like that. And not to you
13 and to this case.

14 And then -- and then where you're talking about, you know,
15 no obligation to disclose -- at least, that I'm aware of under
16 law -- that a nondisclosure may be an issue with us versus the
17 Government, but there's no allegation that it affects the
18 safety of the vehicles. And it's obviously something that goes
19 to design.

20 I think they have a serious problem with just straight
21 standing.

22 We'll talk in a minute about standing under RICO.

23 And again, Your Honor could dismiss a RICO claim, and then
24 have a CAFA class action, which maybe where Your Honor -- some
25 of the questions Your Honor asked made me think that maybe that

1 was something you at least wanted to think about, because I do
2 think they have serious RICO causation issues here.

3 But you have a case where they don't allege a
4 misstatement. They don't allege reliance. They don't allege
5 any loss. And the best they do is say, "We overpaid," in the
6 most general and conclusory terms.

7 **THE COURT:** All right. Let me hear from plaintiffs
8 with respect to number one, the absence of any objective
9 evidence of loss in value or economic loss, other than the
10 statement, "I paid more than I would have paid"; whether that
11 is significant at all legally. And on the duty-to-disclose
12 question which underpins a concealment claim, what about the
13 fact that if safety is not involved, then there's no duty?

14 Someone want to address that?

15 **MS. SLAUGHTER:** Yes. Stacey Slaughter.
16 Robins Kaplan.

17 I had a great speech prepared for you on Article III
18 standing, but it seems we're getting right to the point.

19 And the one case I did not hear Counsel talk about was
20 your own case a couple of months ago, *Sloan versus General*
21 *Motors*.

22 **THE COURT:** They did just mention it in a slightly
23 different context.

24 **MS. SLAUGHTER:** In a slightly different context,
25 because in that case the plaintiffs, just as we have, alleged

1 an overpayment injury. When the plaintiffs bought these
2 vehicles that were branded with the EcoDiesel badge, they
3 didn't know the truth, and the defendants didn't tell them.
4 The defendants didn't tell them they intentionally designed the
5 emissions-control system to deactivate under real-world driving
6 conditions, and that it would spew increased amounts of
7 nitrogen oxides into the environment, and that it couldn't
8 deliver that combination of diesel power fuel economy with
9 clean emissions.

10 These were not environmentally friendly diesels, and they
11 never have been. And that's what plaintiffs were buying. They
12 were injured the day they paid for that vehicle, the day they
13 paid for something they didn't get, and the day they paid a
14 premium for it.

15 And we do have an allegation in the Complaint at paragraph
16 180 on that premium, but we don't need that. We are right in
17 line with a number of cases that overpayment injury is
18 sufficient. We don't have to get into the fact issues.

19 **THE COURT:** Does that overpayment need to be alleged
20 as manifested in some objective ways, as it was in the *VW* case,
21 where there was some objective manifestations of the value
22 having been diminished as a result of nondisclosure, and things
23 like nondisclosure?

24 **MS. SLAUGHTER:** Well, here's the way I look at it.
25 Here's how we know that the injury is real. If the defendants

1 could be achieved this power fuel economy with clean emissions,
2 then why didn't they do it? Why didn't they deliver that in
3 2014, in 2015, and in 2016 to the plaintiffs?

4 They didn't do it because they couldn't do it. And that's
5 why the plaintiffs are injured: Because they got something and
6 they paid for something that wasn't -- that wasn't what they
7 thought they were buying, because defendants concealed this.

8 And because Counsel's gone outside of the record on
9 this -- and I don't think you have to go to the facts here, but
10 I was stunned that Counsel said that no consumer could think
11 that "EcoDiesel" meant "environmentally friendly," because,
12 Your Honor --

13 **MR. GIUFFRA:** That's not what I said.

14 **MS. SLAUGHTER:** If you would, here's a document
15 from --

16 (Whereupon a document was tendered to the Court.)

17 **MS. SLAUGHTER:** The defendants' own marketing
18 material, when they decided to brand --

19 **THE COURT:** Is this alleged in the Complaint?

20 **MR. GIUFFRA:** No, Your Honor, it's not.

21 **MS. SLAUGHTER:** No, Your Honor, it's not. It's
22 confidential. It's confidential. And that is why, you know,
23 we're not going to talk about it on the record, except to say
24 that the defendants clearly understood through marketing
25 research that "EcoDiesel" had a specific meaning to consumers,

1 and it was important to them.

2 **THE COURT:** Well, what is your answer to my legal
3 question?

4 That is: Is the question of whether a statement is
5 deemed, you know, actual puffery, versus a statement of
6 sufficient fact upon which a consumer can rely --

7 Is that, in the first instance, a fact question which can
8 only be determined as a matter of law -- if it's so clear that
9 no jury could find otherwise -- or is that something like
10 contract interpretation or patent interpretation that is in the
11 first instance a question of law for a Court to determine?

12 Is the puffery question a question of fact or a question
13 of law?

14 **MS. SLAUGHTER:** I believe it's a question of fact
15 whether there was important to consumers when they were making
16 this purchase; whether that EcoDiesel --

17 **THE COURT:** Whether it was not important.

18 Whether they could reasonably rely on it.

19 **MS. SLAUGHTER:** And whether they could reasonably
20 rely on it.

21 **THE COURT:** Or was it too much in the nature of an
22 opinion, that nobody could rely on it? That's a question of
23 fact?

24 **MS. SLAUGHTER:** I think that's a question of fact,
25 Your Honor.

1 **THE COURT:** Do you have any example or cases that
2 have looked at that question?

3 **MS. SLAUGHTER:** Not off the top.

4 But what I can tell you is I liken it --

5 I distinguish, for example, the *Birdsong* case as one of
6 the cases. You know, there the iPods were inherently
7 defective. The plaintiffs' only injury was there if they used
8 the iPods in an unsafe manner, so the Ninth Circuit found
9 there's no injury-in-fact.

10 Here, every single day the plaintiffs are driving these
11 vehicles that they bought, thinking they were environmentally
12 friendly.

13 **THE COURT:** Well, the distinction is *Birdsong* assumes
14 potential misuse for the way it's used by the consumer; and
15 that's what made the injury somewhat speculative, because it
16 was conditioned on certain conditions, certain use.

17 Whereas your allegation here is these cars were defective
18 as soon as it came off the showroom, so there was no condition
19 precedent. There was no intervening circumstance.

20 And, to cut to the chase, there are many other cases that
21 talk about, *Well, brakes haven't failed yet, or -- et cetera,*
22 *et cetera.*

23 And it seems to me those cases are different because
24 you're saying, *Well, this sudden acceleration or the brake*
25 *problem may have happened in 1 percent of the cases.* It may be

1 1 percent too much, because it may kill people, but it's not --
2 you don't know that your car is going to be affected.

3 Whereas your assertion is that in this case 100 percent of
4 the cars are afflicted with this problem, so you don't have
5 speculativeness. You don't have a chain of causation leading
6 to it. So I'm not so concerned about that.

7 I guess my question is -- you also -- to the extent you
8 are relying on various assertions -- and now we're kind of
9 getting into the merits, and, I think, away from Article III,
10 but we might as well talk about it.

11 You have -- you're kind of caught on the one hand between
12 sort of puffery; that is, things that are so general that maybe
13 someone can't rely on it.

14 To the extent you're relying on advertisements, this
15 doesn't seem to be -- it's not clear to me how pervasive. You
16 have to rely on a representation or misrepresentation.

17 Maybe you can for these plaintiffs -- and I'm looking
18 ahead at class certification -- but there may be an issue about
19 whether or not one can assume that everybody in the Class, as
20 in the *Tobacco II* case, was exposed, because the campaign was
21 so pervasive, so prevalent -- unlike the *Mazza* case, where it
22 was not -- that could present a problem.

23 But I think as I understand your claim, you're also
24 asserting a concealment. It doesn't matter what puffery. Even
25 if they hadn't said "EcoDiesel," the fact that they withheld

1 and concealed the fact of these alleged defeat devices, which
2 meant that the car could not perform and could not have the
3 same torque and horsepower and gas mileage without defeating
4 the emissions control --

5 And that is a claim that's sort of independent on this
6 whole puffery; isn't it?

7 **MS. SLAUGHTER:** You're absolutely right, Your Honor.
8 And I think we have both the concealment and the fraudulent
9 statements.

10 But here, you know, I go back to your *Sloan* case. There
11 General Motors had touted dependable, long-lasting,
12 high-quality engines. The issue there was that the oil tension
13 rings were defective. And the plaintiffs alleged that over
14 time, that causes excessive oil consumption, and that the
15 engines would fail.

16 Dependable, long-lasting, high-quality. That's what the
17 consumers expected.

18 **THE COURT:** Well, what about Mr. Giuffra's point that
19 the duty to disclose there was grounded on the question of
20 whether its safety was at issue; the implication that if there
21 is not any safety issue, there is no duty to disclose? What's
22 your response to his interpretation?

23 **MS. SLAUGHTER:** Well, no plaintiff --

24 Again, we are at the Article III standing phase.

25 No plaintiff had even alleged that they experienced any

1 engine fires, or that had occurred in their cars. And, in
2 fact, not a single plaintiff --

3 I think your Order notes that.

4 None of the plaintiffs had said their vehicles actually
5 experienced even excessive oil consumption, or damage from
6 that. So that would be my response.

7 And I don't want to take up my colleagues' time. We have
8 Gretchen, as well, who's going to speak on one of the issues
9 that Your Honor asked about.

10 **THE COURT:** Well, and whoever is going to deal with
11 this question -- the other question I asked Mr. Giuffra was --
12 I said, *Must there be objective evidence of devaluation or loss*
13 *of value, other than subjective, "Well, this is more than I*
14 *would have wanted to pay for it"?*

15 **MS. SLAUGHTER:** At the pleadings stage, no. For
16 Article III standing, no.

17 **THE COURT:** All right.

18 Let her finish.

19 **MS. CABRASER:** Yeah. Ms. Cappio's going to talk
20 about your actual loss question.

21 I just wanted to reiterate that I think there's been a
22 conflation of two issues here.

23 The requirement that there be a defect -- a safety
24 defect -- comes from a particular line of Consumers Legal
25 Remedies Act cases. Those are actually up in the Ninth Circuit

1 right now, but it doesn't relate at all to the necessary
2 elements of a cause for fraud by concealment under California
3 Civil Code 1710, which is what we've alleged here. The CACI
4 Jury Instruction does not reference it as an element, because
5 it isn't one. And I believe --

6 **THE COURT:** That was a statutory question in that
7 case under the consumer -- the CLRA.

8 **MS. CABRASER:** It would be limited to the CLRA.

9 The *Falk versus GM* case that we cited in our opposition --
10 that was a speedometer case. It wasn't a safety case; but
11 obviously under the CLRA representing, you know, you have a
12 speedometer that works, when it doesn't.

13 With respect to puffery, just sticking to the allegations
14 of the Complaint I would reference Your Honor to paragraph 145
15 on page 67, and 146. And those are the graphics of the
16 EcoDiesel badge and the EcoDiesel promotion. And I don't think
17 you could find a more pervasive marketing campaign than one
18 that carries the main message of the campaign on every single
19 vehicle in a uniform way. And that's EcoDiesel.

20 **THE COURT:** Well, see, now that's one of those things
21 that's -- probably it gets closer to the pervasiveness, because
22 it's a label. It seems targeted, pervasive. The question
23 is --

24 **MS. CABRASER:** It's pervasive.

25 **THE COURT:** That doesn't answer the question whether

1 it's puffery; whether it's --

2 **MS. CABRASER:** When it has a green leaf on the badge,
3 we think that probably means ecological or environmental to a
4 reasonable consumer, rather than fuel economy; but again, I
5 think that emphasizes the factual nature of the question.

6 And I think evidence such as the use of "EcoDiesel"
7 because of marketing consultant says that is the way to sell
8 environment and green sales to consumers, that would come under
9 the case.

10 If Your Honor wishes more effusive pleading on that, of
11 course, we can amend the Complaint to detail that. And I think
12 that will put an end to any notion that this would have been
13 mere puffery, and nonpervasive, or a partial representation
14 that gave rise to no duty to disclose the whole truth about
15 cheating diesels.

16 Thank you.

17 **THE COURT:** Thank you.

18 **MR. GIUFFRA:** Your Honor, if I could just on this one
19 point --

20 **THE COURT:** Yeah.

21 **MR. GIUFFRA:** Look. The plaintiffs have the burden
22 of pleading standing. It's their burden.

23 Your Honor asks the question. I am quite confident that
24 the law is that whether something is puffery or not is a
25 question of law for the Court. And it's whether an objective

1 consumer or an objective stockholder or an objective, you know,
2 person would deem the information to be too general to rely
3 upon. It's not a subjective test.

4 And so you can't say, *I subjectively felt like I overpaid,*
5 *and therefore I have standing to bring a case in federal court.*
6 That is clearly not true.

7 In multiple cases -- the *Counts* case, the *Ford* case, and
8 the *H-P* case that Your Honor decided -- always treat puffery as
9 a question of law based on what an objective standard is. And
10 that's the rule.

11 *Spokeo*, which is a Supreme Court case, holds that a
12 regulatory violation doesn't give the plaintiff ability to seek
13 standing. They don't dispute that. They don't dispute any of
14 the things I said about no diminution of value pled; nobody was
15 able to steal their vehicle. None of that was disputed.

16 Now let's look to the *Sloan* case. In *Sloan* -- Your
17 Honor's case -- you said, *Well, a defective product typically*
18 *will have a lower fair market value.* It's got to be a defect
19 that's material to investors [sic] -- I mean, to consumers.

20 And the issue in this case is consumers have known about
21 this problem for a year. And they couldn't amend their
22 Complaint right now probably to say that there's been any
23 diminution of value, other than normal depreciation, based upon
24 my knowledge of the facts.

25 Similarly, in the *Kwikset* case the Court emphasized

1 materiality, and said you need -- you know, you need to have
2 exposure to ads, and need to have some sort of objective
3 inflation in the value of the good; not something that's just
4 someone's subjective view.

5 And here you're talking about a bottom eight undisclosed
6 AECDS. And consumers don't view that as material. Otherwise,
7 the price of these cars would be different.

8 It's not VW, where the vehicles, you know, couldn't be
9 fixed -- there's no allegation -- and where the market price
10 there had been a substantial diminution in value.

11 You also need some sort of a duty to disclose. And
12 there's no duty to disclose immaterial facts.

13 Let me make one other point or two other points.

14 **THE COURT:** You know, it's interesting. You bring up
15 the lack of similar allegations here that were in VW, but the
16 allegations about, you know, sort of the problems of reselling
17 a vehicle, or the diminution -- I mean, that preceded the whole
18 settlement. That was in the beginning of the case; I mean,
19 even before the whole fix, and expiration, and --

20 **MR. GIUFFRA:** Day One.

21 **THE COURT:** From Day One.

22 And so this case is parallel, in the sense that it's --
23 maybe the degree is different; maybe the number of AECDS, and
24 how they operated, et cetera, et cetera. And after performance
25 may be different.

1 But it if there was undisputed some economic loss in
2 *Volkswagen* because of the same kind of thing -- that you could
3 only achieve these performance standards by sort of cheating on
4 the emissions -- why can't one infer? You know, you can assume
5 maybe it's less. Maybe it's a fraction of the kind of
6 diminution in *Volkswagen*, because there weren't so many cars,
7 et cetera, et cetera. But why isn't that a fair inference?

8 **MR. GIUFFRA:** Because they haven't pled it,
9 Your Honor.

10 **THE COURT:** But you know, you also infer -- draw
11 inferences in favor of the plaintiff on a 12(b)(6) motion.

12 Any reasonable inferences, I mean.

13 **MR. GIUFFRA:** You still have to have a plausible
14 pleading of some diminution in value.

15 **THE COURT:** Well, I'm just saying: Why doesn't the
16 VW experience lend plausibility to their theory that they did
17 pay more than they should have paid?

18 **MR. GIUFFRA:** Because, Your Honor, they have had
19 months to write this Complaint, and all they have is generic,
20 boilerplate pleadings, which I think is very telling.

21 Let me make just two observations on "eco."

22 "Eco" -- if you want to even say it had some environmental
23 connotation -- okay?

24 Diesel vehicles don't use gasoline, so there's less
25 greenhouse-gas effects.

1 And, in fact, if you read -- to the extent there are
2 things in those in those blog posts, that's what they talk
3 about. They don't talk about -- they don't talk about NO_x.

4 The second point would be to the extent this is a
5 state-law nondisclosure case, nondisclosure of fact that you
6 have AECDS in these vehicles and defeat devices -- if that's
7 the claim they're putting forward, they're walking right into
8 preemption. Right into it.

9 **THE COURT:** Well, I'm going to get to preemption, but
10 before we do that, let's finish up with the RICO causation.
11 You said you want to address it.

12 **MR. SLATER:** Yeah, Your Honor. Can I be heard for a
13 second?

14 **THE COURT:** Yeah.

15 **MR. SLATER:** I'm going to try not to repeat anything
16 that's been said. And -- but before we switch to RICO
17 causation, I wanted to point out there's another component of
18 Article III standing, which is traceability. And there's
19 nothing that's been said this morning that would trace the
20 injuries that have been alleged, even if they were Article III
21 injuries, to any conduct on the part of Robert Bosch GmbH, or
22 Robert Bosch LLC.

23 There is no allegation of advertisement. There's no
24 allegation even that Bosch knew what the emissions
25 configuration or output was of these vehicles, so that you

1 could somehow concoct an obligation to disclose something with
2 respect to a process in which they're not a party.

3 And we started the discussion this morning with extended
4 colloquy concerning the protocols for testing. You may notice
5 that Bosch has no role in that process. That is strictly
6 between the manufacturer and between the EPA and CARB.

7 **THE COURT:** But the allegations are that Bosch
8 originated the software. I don't know if you want to call it a
9 "conspiracy," or "aiding and abetting," or a "RICO scheme," or
10 whatever it is; an enterprise. But the general allegation is
11 that Bosch was part of the genesis this -- of these so-called
12 "defeat" -- these putative "defeat devices."

13 **MR. SLATER:** Your Honor, the well-pleaded Complaints
14 don't come close to supporting that kind of allegation. What
15 they say is that Bosch supplied the emission -- the engine
16 control unit, EDC17; something which Judge Breyer has
17 acknowledged is not, itself, a defeat device.

18 They say that there is programming in that -- in that unit
19 that FCA calibrated in a way that led to the undisclosed AECDs
20 that were alleged by EPA and CARB; but not that Bosch had some
21 independent duty of disclosure to EPA or CARB, or indeed any
22 role in that process with EPA and CARB.

23 **THE COURT:** Well, I thought --

24 **MR. SLATER:** And certainly -- and certainly Bosch has
25 no role, and there's no allegation that Bosch had any role, in

1 setting pricing. And there's nothing that Bosch did or could
2 have done that would have affected the pricing that FCA
3 recommended to its dealers, and ultimately that the dealers
4 decided to charge on a case-by-case basis to consumers.

5 So it's really not possible to trace the alleged
6 Article III injury to actions of Bosch, and that's an
7 independent basis for --

8 **THE COURT:** All right. All right.

9 Let me hear if there's a response to that; that
10 traceability question -- from an Article III perspective can be
11 fairly traceable to Bosch.

12 **MS. SLAUGHTER:** Your Honor, for Article III purposes,
13 all we need to show is that each defendant had some -- was some
14 link in the chain here. It's not onerous. And that's in the
15 *Maya versus Centex* case we cited in the brief from
16 Ninth Circuit.

17 And we have done that. We have alleged how each and every
18 defendant played a role in putting this defeat device in the
19 Class Vehicles, and targeting -- targeting these two U.S.
20 consumers.

21 **THE COURT:** You want to be specific and tell me where
22 here your strongest allegations are in the Complaint about
23 Bosch, and their role, and there being the link?

24 **MS. SLAUGHTER:** I actually have a handout for you,
25 Your Honor, if you would like that.

1 **THE COURT:** Okay.

2 (Whereupon a document was tendered to the Court.)

3 **THE CLERK:** Do you have any extra copies?

4 **MS. CAFFESE:** May I see one?

5 **MS. SLAUGHTER:** So, Your Honor, I had planned to use
6 this with my jurisdiction argument, but you'll see that I put
7 both personal jurisdiction and standing on this slide, because
8 the role with the EcoDiesel device and the Class Vehicles
9 supports both arguments there.

10 And there are many allegations in the Complaint where we
11 talk about each defendant's role. And the allegations that
12 I've listed as too numerous to list, so we've just listed that
13 role there in the first column.

14 There are other allegations, as well, in the Complaint
15 where we talk about how the defendants worked together and
16 coordinated. And I don't want to steal Ms. Jensen's --

17 **THE COURT:** Aren't there allegations that Bosch
18 developed and wrote the software for the EDC17, and that
19 they -- the Bosch defendants -- exerted near-total control over
20 that, and, in fact, locked down the software to prevent
21 customers like FCA from making some of the changes on their
22 own, and installed other security measures which prevented
23 other alterations to be made?

24 And Bosch, honestly, has been involved with other
25 manufacturers -- at least, it is so alleged -- in doing this

1 similar thing? I mean, isn't that the gist of what --
2 therefore their participation was knowing, active, and
3 affirmative?

4 **MS. SLAUGHTER:** You're absolutely correct. So
5 paragraph 250 alleges Bosch GmbH's complicit role and control
6 over the design of the EDC Unit 17, as well as in paragraph
7 251. So you're absolutely correct. We do allege that. So --

8 **THE COURT:** So therefore, at least traceability for
9 Article III purposes -- your assertion is that the FAC
10 adequately depicts an active participant in this chain?

11 **MS. SLAUGHTER:** We believe it does, Your Honor.

12 **THE COURT:** All right. Let's go on to --

13 And maybe this is a nice segue into whatever
14 proximate-cause issues are that parties want to discuss with
15 respect to RICO.

16 **MR. GIUFFRA:** Your Honor, you know, if nothing comes
17 out of this argument, we think that the Court should take a
18 very hard look at this RICO claim, because the idea that the
19 plaintiffs can bring a RICO claim based on undisclosed AECDs in
20 an alleged defeat device, we think, goes very, very far.

21 Obviously, on the standing question, with respect to RICO
22 you have a higher standard under RICO than you do under
23 Article III. The courts have all recognized that.

24 And here, you know, overpayment theory is not sufficiently
25 concrete. You need to have -- you can't have a RICO theory

1 based on, you know, a subjectively inflated price.

2 You need to show -- and I think Judge Breyer's decision in
3 the *Bosch* case was clearly demonstrated why, in that case, they
4 actually did have allegations of some sort of RICO injury when
5 they talked about the fact that it was a stop-sale order so
6 that the dealers couldn't sell the cars. They talked about how
7 they were stuck with all of this inventory that they couldn't
8 sell.

9 Here, again, no allegation of a decrease in market value.

10 But on proximate causation -- that is a critical issue in
11 this case.

12 Now, the allegation under RICO is a claim of lying to the
13 EPA and CARB. That's clearly what it is.

14 The opposition on page 26 and page 37 say -- on 26 -- that
15 the misrepresentation -- and I don't think you can find them in
16 marketing materials -- do not form the basis for their RICO
17 allegations.

18 They also say at page 37 that RICO is not rooted in the
19 concealment of the defeat devices. So it's a nonconcealment
20 claim.

21 The claim the plaintiffs have made --

22 **THE COURT:** What are you reading from?

23 **MR. GIUFFRA:** The plaintiffs' opposition at page 26
24 and 37. 26 -- it's that misrepresentations in marketing
25 materials do not form the basis of the RICO allegations.

1 That's what plaintiffs say at page 26.

2 **THE COURT:** Right, because it's about concealment
3 from the regulators, not misrepresentations to the consumers --

4 **MR. GIUFFRA:** Correct.

5 **THE COURT:** -- with respect to RICO.

6 **MR. GIUFFRA:** Correct. And that's what they say on
7 page 37. They say the RICO claim is not "rooted" -- that's in
8 quotes -- in, quote, "concealment of defeat devices." That's
9 at page 37.

10 So the claim they have is one based --

11 **THE COURT:** From consumers.

12 But it is rooted in concealment from regulators.

13 **MR. GIUFFRA:** Agreed 100 percent.

14 The question then becomes: Because the claim is that the
15 EPA is the victim, does that give them the -- can they
16 establish the required proximate causation?

17 And there are three cases that we think are directly on
18 point.

19 **THE COURT:** They rely on *Bridge*, so maybe you ought
20 to discuss *Bridge*.

21 **MR. GIUFFRA:** Yeah. And the case we should look at,
22 Your Honor, is a case called *Rezner*. R-e-z-n-e-r. It's a
23 Ninth Circuit case, 630 F. 3d. 874, 2010. And it discusses
24 *Bridge*. And it discusses *Anza*, which is the other
25 Supreme Court case that deals with these issues of proximate

1 causation in the RICO context.

2 And what *Rezner* -- in *Rezner*, the plaintiff was a victim
3 of a tax-shelter promoter. Okay? So he lost money by
4 investing in a tax-shelter promoter. And the Court held that
5 the defendant's conduct was to -- was to defraud the IRS, and
6 that the IRS was the victim. And the Court made it clear that
7 because the Government hadn't in that case had brought its own
8 action to vindicate the Government's interest as a victim of
9 the fraud.

10 And the Court distinguished the *Bridge* case, because in
11 the *Bridge* case the Supreme Court said, at page 553 U.S. at
12 658, that the only parties that were injured were the
13 participants in the auction fraud over tax liens; not the
14 Government. The Government didn't suffer any injury.

15 But in -- in the *Rezner* case the Ninth Circuit said, *Yes,*
16 *that's right.*

17 But when you look at *Bridge*, there's no injury to the
18 Government; whereas in *Rezner* the IRS suffered an injury, just
19 as the EPA and CARB did here.

20 And then the question become --

21 And the Ninth Circuit made the point, Well, you know, who
22 is the party that's -- that's the --

23 Can the immediate victim of the supposed fraudulent scheme
24 vindicate its rights?

25 And the Court was relying upon the *Anza* case of the

1 Supreme Court at 547 U.S. 459-61, 2006, where you had a
2 situation where some businesses were basically defrauding the
3 New York State tax authorities, and then using the proceeds to
4 compete with their competitors. And the competitors sued.

5 And the Supreme Court said that even though the
6 competitors were damaged because the guy -- people were
7 cheating on their taxes, were using the money to compete
8 against them, the Court said, quote, *There is no need to*
9 *broaden the universe of actions that are harm to permit RICO by*
10 *parties indirectly harmed.*

11 (As read.)

12 And the Court made the point, which was also repeated in
13 the *Rezner* case, that if the Government was harmed, and the
14 Government could vindicate its rights, they were the immediate
15 victim, and there was no RICO standing.

16 This is exactly that case.

17 **THE COURT:** But part of what the Court was looking at
18 in *Anza* was the fact that the chain of causation would get
19 to -- the plaintiff in that case involved potential other
20 intervening factors. The Court emphasized that there were a
21 number of reasons why the price was lowered, unconnected with
22 the pattern of fraud. Quote, unquote. It could have received
23 cash flow from other sources, or concluded additional sales
24 would justify a smaller profit margin.

25 So -- and there was this discontinuity between the RICO

1 violation and the asserted injury, because other factors could
2 have affected that.

3 So -- and that's typical proximate-cause analysis. You
4 look at how many links in that chain. And I think what the
5 Court said in *Anza* was there are too many links in that chain.

6 It didn't say that you can never have standing, just
7 because someone else has standing.

8 **MR. GIUFFRA:** No; but Your Honor, if you look at the
9 *Rezner* case, which interprets and reads and is the governing
10 law in the Ninth Circuit on this question, which talks about
11 *Bridge* and talks about *Anza* -- and again, 630 Fed. 3d. at
12 874 -- the victim of the alleged RICO scheme was the
13 Government, because the Government was defrauded; but the other
14 victim of the RICO scheme was the person who actually dealt
15 with the stock -- with the -- with the tax-shelter promoter.
16 And that person lost money. That person didn't get the benefit
17 of the tax, you know, deal that they thought they were getting.

18 And the Ninth Circuit said that that party did not have --
19 could not bring a claim under RICO, because the immediate
20 victim had already brought its own claim to vindicate its
21 rights. And that case was the Government, just as it is here.

22 So to the extent -- and again, the other problem the
23 plaintiffs have is: In the RICO context, you need to show some
24 concrete financial loss.

25 And then, for example, in the *Cannon* case, where

1 Your Honor was dealing with Wells Fargo, there were unlawful
2 kickbacks to insurers which affected the amount of money that
3 consumers were paying. And it was actually pled with some, you
4 know, plausibility.

5 Here it's all, you know, very ephemeral, subjective, *We*
6 *paid too much*, even though no one allegation that their
7 vehicles went down in value.

8 But I think the *Rezner* case, which is the leading case in
9 this Circuit dealing with proximate causation and RICO, is
10 directly on point, because you can't think of someone more of a
11 victim than someone who bought a tax shelter, and it turned out
12 it wasn't a valid tax shelter; and then they lost money.

13 And the Court said you couldn't bring a RICO case in that
14 context, because we don't want to let the scope of RICO expand
15 that much.

16 So we think that the *Rezner* case is directly on point.

17 Now, there are other issues with the RICO claim in this
18 case which I could talk about if Your Honor would like me to.

19 **THE COURT:** Well, I'd like to hear the response to
20 the *Rezner* opinion; the idea that the immediate victim has
21 brought suit, and that that can break the chain of proximate
22 cause.

23 **MS. JENSEN:** Yes, Your Honor. Rachel Jensen, on
24 behalf of the plaintiff.

25 I understand that the defendants here don't like our RICO

1 theory, but the defendants in the *Bridge* case also didn't like
2 the RICO theory there.

3 And unanimously the Supreme Court ruled that even though
4 the misrepresentations -- the lies, if you would -- were made
5 to the Government instead of the plaintiffs, that was still
6 actionable. And it did find proximate cause.

7 The defendants have picked up on this line of cases: The
8 *Anza* case, which I'll note predates *Bridge*, and then the *Rezner*
9 case.

10 But these cases are easily distinguishable, both on the
11 ground that Your Honor mentioned, which is because there were
12 other attenuating factors.

13 So, in other words, in the *Anza* case, the pricing of the
14 products could have been for any number of reasons.

15 And here, in *Rezner*, the issue was tax revenues. And that
16 could have caused -- other things could have caused the injury
17 there.

18 Not only that, but I think there's a very big distinction
19 to be made in these cases between where the Government loses
20 its own revenues, versus the Government isn't a means to an
21 end, as it is here.

22 So in other words, where the RICO conspiracy or RICO
23 theory has to do with defrauding the Government of its own tax
24 revenues -- so that's *Anza*. That's *Rezner* -- it has its own
25 direct injury of the same moneys.

1 So here, as in *Bridge* and the other cases that we cite,
2 again, the Government is just a means to the end.

3 Fiat and the other defendants couldn't get their products
4 on the market, unless they had the COCs and the EOs, so they
5 cheated the Government to cheat the consumers.

6 And here, even though the EPA the DOJ has sued, they are
7 not asserting these same monetary damages.

8 And, in fact --

9 **THE COURT:** Why does that make a difference, from a
10 proximate-cause perspective?

11 **MS. JENSEN:** Sure. Because one of the factors is
12 whether there can be a more direct victim that will vindicate
13 this same injury. And here, even the defendants concede --
14 this is now page -- excuse me -- page 12 of their Reply -- that
15 neither EPA nor CARB has a monetary or proprietary interest in
16 their regulatory approvals.

17 In terms of proximate causation, the courts are concerned,
18 among other things, about multiple people lining up to get the
19 same money. And in the *VW* case Judge Breyer found, under very
20 similar allegations, as Your Honor is aware, that there was
21 proximate cause. And I think it provides a very good blueprint
22 for purposes of Your Honor's analysis here; but in that case,
23 there was a stop sale. And what that meant in practical terms
24 was that the dealers weren't stuck holding the bag [sic] --
25 well, I'm sorry. The fact that there is no stopped sale here

1 means that the dealers aren't stuck holding the bag; it's the
2 consumers.

3 So, in other words, there's two different lines of cases.

4 One is where -- the *Anza* and the *Rezner* that they're
5 citing -- that has to do with multiple steps in the causal
6 links where it's attenuated, where the damages maybe have been
7 caused by independent factors, and there's other people you can
8 line up and ask for that money back.

9 And here --

10 **THE COURT:** For that same money?

11 **MS. JENSEN:** For that same money.

12 **THE COURT:** And therefore there's a risk of multiple
13 or double recovery --

14 **MS. JENSEN:** Exactly.

15 **THE COURT:** -- where, if the Government is suing as a
16 sort of a *parens patriae*, and not seeking damages, I suppose,
17 in the sense that the PSC is seeking damages or the consumer is
18 seeking damages here, there's not that overlapping, double
19 recovery, which might inform the proximate-cause analysis.

20 **MS. JENSEN:** That's correct, Your Honor. Here, the
21 injury is not derivative of the Government's. It is an
22 independent injury. It is directly caused by the RICO
23 violations here. And the plaintiffs are the only ones who can
24 assert those injuries in order to get compensation for that
25 money.

1 **THE COURT:** All right. Thank you. I appreciate
2 that.

3 Time is running short here. I do want to get to the
4 preemption question, which is the larger -- I know there are
5 millions of other questions about whether cause of action can
6 be stated, et cetera, et cetera, and how it varies from state
7 to state, which we will have to look at; but I do want to get
8 to the question of preemption.

9 And so I guess my first question in that regard is: Isn't
10 it significant -- and I direct this to the PSC. Isn't it
11 significant that the Clean Air Act, Section 209, doesn't just
12 preempt varying standards, which is an obvious thing? You
13 don't want multiple different standards from -- 50 different
14 standards by which manufacturers need to comply.

15 But even if you have a singular standard, it prohibits and
16 puts a bar on states', quote, "attempt to enforce an otherwise
17 singular standard."

18 That seems pretty broad; doesn't it?

19 So why shouldn't that be given force, if what you're
20 attempting to do is predicated on a violation of federal
21 standards? If that is a predicate or a base to a state claim
22 of action, why shouldn't that fall within the purview of the
23 preemptive attempt to enforce language?

24 **MR. BUDNER:** Your Honor, Kevin Budner, for the PSC.

25 And I think some of the language that you just used,

1 Your Honor, is an important point of distinction. And that was
2 the issue of whether or not plaintiffs' state-law claims are
3 predicated on or based on a violation of the Clean Air Act.
4 And respectfully, we submit that they're not.

5 And I would argue that that's really defendants' argument
6 in a nutshell. They argue that without -- without the Clean
7 Air Act, plaintiffs don't have any state-law claims.

8 That's simply not true. Plaintiffs are here today, at
9 least with respect to the state-law claims, not because the
10 Class Vehicles are noncompliant with the Clean Air Act, but
11 because the defendants cheated their customers by lying and
12 misrepresenting the true nature of the EcoDiesel vehicles. To
13 the extent that the Clean Air Act is relevant, it's not because
14 the vehicles are noncompliant, but because the defendants lied
15 about the compliance.

16 **THE COURT:** Well, now, the lie is, *We guarantee you*
17 *we complied with Clean Air Act. We are a compliant in all 50*
18 *states.*

19 Okay. You can say the gravamen of the Complaint is lying
20 about that, but how is that really any different than, *We*
21 *really didn't comply?* I mean, don't you have to prove the
22 noncompliance, in order to prove the lie?

23 **MR. BUDNER:** I take your point, Your Honor.

24 And I think now we're distinguishing between the fraud and
25 CPA claims on the one hand, which -- really, the Clean Air Act

1 could not exist, at all. It's just about telling the
2 plaintiffs, *You're getting an EcoDiesel vehicle. You're*
3 *getting a reduced-emissions vehicle*, and then -- when, in fact,
4 those vehicles were neither, and they contained devices that
5 may have rendered the emissions controls inoperative under most
6 situations.

7 **THE COURT:** So the fraud -- the alleged fraud that
8 does not turn on compliance with the Clean Air Act are
9 EcoDiesel. So why don't you specify which ones those are --

10 **MR. BUDNER:** Sure.

11 **THE COURT:** -- that are independent?

12 **MR. BUDNER:** Yeah. So I think it's -- and you really
13 have to look at the Complaint in its totality, but there are a
14 number of allegations about the ways in which the defendants
15 made partial representations and concealed material facts about
16 the true characteristics of the vehicles; and not just the
17 emissions characteristics, but also the miles per gallon, and
18 the performance, which, you know, as we know now, are all part
19 of a tethered package. You couldn't -- you know, they're
20 related to one another.

21 I would --

22 **THE COURT:** Well, but if it's -- if we achieve *X*
23 miles per gallon and *X* horsepower, and the assertion is that --
24 but not without violating the Clean Air Act, then you've
25 brought the Clean Air Act in on a side rule.

1 **MR. BUDNER:** Sure. I would say that it's not without
2 violating the Clean Air Act. It's not without not delivering
3 the reduced emissions that they promised. And so it's --

4 **THE COURT:** What's the reduced emissions promised,
5 other than complying with the Clean Air Act?

6 **MR. BUDNER:** Well, Your Honor, I think this relates,
7 again, to what the badge "EcoDiesel" embodies, and what the
8 defendants did and did not say in their advertising and in
9 their marketing.

10 And to that end, Your Honor, if I could just drop a quick
11 footnote on something I heard from FCA earlier about the
12 Internet and the source of some of these partial omissions,
13 partial representations, you know, if you look -- and I believe
14 it's -- I left my Complaint over there, but in the 146 to -- or
15 145 to 155 range, when you look at all of the footnotes there
16 which cite the sources of those representations, what you see
17 is a lot of FCA's own website.

18 And I would submit to Your Honor that it's pretty
19 commonplace nowadays to go to a manufacturer's website before
20 you purchase a vehicle. So to say that these are some
21 incidental or ancillary representations -- I don't think is a
22 fair representation. These are the kinds of things that
23 consumers are seeing and relying on when they're making their
24 purchasing decisions.

25 So that was a long --

1 **THE COURT:** That's a different issue.

2 I'm asking about preemption. So I'm looking at paragraph
3 146, second bullet point of an alleged fraudulent statement.
4 *Equipped with diesel oxidization catalyts, et cetera, et*
5 *cetera. The EcoDiesel V6 engine will be emissions compliant in*
6 *all 50 states.*

7 So that sounds like it's getting close to saying, *We're*
8 *complying.* And that make it sound like it overlaps with the
9 CAA.

10 **MR. BUDNER:** Sure, Your Honor. And I understand
11 that.

12 And those specific kinds of representations -- the *We're*
13 *compliant with the CAA* kinds of representations -- are
14 addressed in three cases that I'd like to discuss; but let's
15 set those aside for a second, because I think that the other
16 state-law claims -- the fraud and the CPAs -- survive without
17 any statement that the vehicles were CAA compliant. They
18 survive on the basis of the defendants' representations that
19 the vehicles were clean; that they had reduced emissions.

20 And there are -- if you're looking for specific --

21 **THE COURT:** That are not tied to the CAA?

22 **MR. BUDNER:** That are not tied to the CAA.

23 I mean, Your Honor, you know, if you look, for example, at
24 the marketing document that Ms. Slaughter handed up earlier,
25 you'll see that FCA knew that EcoDiesel --

1 **THE COURT:** Well, I'm not going to look at that.

2 **MR. BUDNER:** Okay. Fair enough.

3 **THE COURT:** But I'd like you to show me where in
4 these paragraphs, between 145 and --

5 **MR. BUDNER:** Sure. If you'd indulge me a second, let
6 me grab the Complaint from the desk.

7 **THE COURT:** Yeah.

8 **MR. BUDNER:** And, Your Honor, I apologize for not
9 having memorized all 1976 paragraphs in this Complaint, but I
10 do have a fair number of them. Hopefully we can get to that
11 later.

12 **THE COURT:** So starting with 145, it says *FCA's*
13 *misleading advertising campaign*. And it starts off with the
14 EcoDiesel emblem that's green.

15 **MR. BUDNER:** Sure.

16 **THE COURT:** Then it talks about "clean" -- quote,
17 unquote -- "diesel."

18 And then 147 is *efficient, environmentally friendly truck*
19 *without sacrificing* --

20 So are those the kinds of things you're saying are
21 essentially fraudulent statements that are not tied -- and
22 therefore not preëmpted -- to CAA?

23 **MR. BUDNER:** That's entirely right, Your Honor.

24 And I think that those allegations track very closely the
25 kinds of allegations that were advanced in the three cases in

1 which courts have analyzed defeat -- diesel defeat device
2 emissions claims and the preemption thereof. And those three
3 cases are the Virginia *Volkswagen* case cited extensively in our
4 Opposition; *Counts versus General Motors*, which opposing
5 counsel mentioned a little bit earlier, out of the
6 Eastern District of Michigan; and another case which we don't
7 actually cite in our papers, but Bosch cites in their papers.
8 And I have a copy which I'm happy to provide to the Court. We
9 provided a copy to defense counsel yesterday. And that's *Felix*
10 *versus Volkswagen*. And that comes out of the Appellate
11 Division of the New Jersey Superior Court.

12 And what all three of those courts said when they looked
13 at very similar allegations was that the gravamen of the
14 complaint was that there was misrepresentations about the
15 ability of the technology to deliver on the reduced-emissions
16 promise. And they also go on to say that statements about
17 misrepresentations about compliance are also not preempted.

18 But I think, sticking to the core of what we're discussing
19 right now, the gravamen of the Complaint is, *You told us that*
20 *we were getting an EcoDiesel vehicle. You told us it's going*
21 *to be reduced emissions, and that it was this new technology*
22 *that allowed for this wonderful trio of characteristics. And*
23 *that, as it turns out, was a lie, and/or, at best, a partial*
24 *representation.*

25 **THE COURT:** Would you argue that even statements that

1 say, *The emissions of EcoDiesel engine data sheet meet*
2 *Tier 2, Bin 5 requirements* would not -- even though it
3 expressly now references that, that's still not preëmptive,
4 because the focus and gravamen of the Complaint is on the
5 misrepresentation, and not the actual compliance; or do you
6 concede that that is preëmpted?

7 **MR. BUDNER:** I'm sorry. Could you repeat that last
8 question?

9 **THE COURT:** Is it your position that's not preëmpted,
10 because the gravamen of the Complaint -- even though it
11 directly incorporates the Clean Air Act standards --

12 **MR. BUDNER:** Yes.

13 **THE COURT:** -- it nonetheless is actionable, because
14 the gravamen of the Complaint focuses on the misrepresentation
15 about that, and not the actual compliance?

16 **MR. BUDNER:** That's entirely correct, Your Honor.

17 And let me --

18 **THE COURT:** What case -- what authority is your best
19 authority for that proposition, even though you basically have
20 to prove it did not meet Tier 2, Bin 5 -- i.e., that it
21 actually violated the Clean Air Act -- nonetheless, that's not
22 an enforcement of the Clean Air Act law within the meaning of
23 Section 209?

24 **MR. BUDNER:** Yeah.

25 **THE COURT:** What's your strongest authority?

1 **MR. BUDNER:** Yeah. So let me answer that question
2 directly and with a quote from the Virginia Volkswagen case.
3 *Quote, It is the deceit about compliance, not the fact of*
4 *compliance, that is the gravamen of plaintiffs' claims.* And
5 that is before a long discussion, concluding that the claims
6 were not preëmpted.

7 A similar quote: *As such, and although emissions*
8 *compliance or lack thereof may be further proof of deceit, it's*
9 *the deceit about compliance rather than the need to enforce*
10 *compliance that is the gravamen of plaintiffs' claims.*

11 You get similar quotes from the *Counts v. General Motors*
12 *case. Da, da, da, da. Rather, the gravamen of plaintiffs'*
13 *claims, like in Volkswagen, focus on the deceit about*
14 *compliance, rather than the need to enforce compliance.*

15 And then the *Felix* case, as well, *Plaintiffs do not seek*
16 *to enforce EPA emissions standard before --*

17 Well, I'll skip that part.

18 *It may well be that plaintiffs will prove their vehicles*
19 *failed to comply with EPA emissions standards, but the gravamen*
20 *of plaintiffs' claims -- and I skipped a clause there --*
21 *centers on VW's alleged deceitful, fraudulent practices, and*
22 *its alleged breach of a duty not to mislead consumers.*

23 And so, Your Honor, I would submit that this has been
24 addressed by these three courts; but I would also note that to
25 the extent, Your Honor, we're skeptical about basing the

1 state-law fraud or CPA claims or warranty claims on statements
2 about compliance, those could be excised, and the claims would
3 still stand based on the general misrepresentations about the
4 vehicles' ability to achieve reduced emissions.

5 **THE COURT:** Now, the irony there is that the more you
6 get away from the specificity of where you comply with Tier 1,
7 Bin 5, which is very specific, and not puffery, you begin to
8 get into that grey area of puffery or not when you say, *Well,*
9 *it's clean diesel,* whatever that means. It's so --

10 **MR. BUDNER:** Yeah. And you're right, Your Honor; but
11 I think that the big-picture point here is that the fraud and
12 CPA claims are based on all of this. And they're -- none of it
13 is preëmpted. And I think if you look to those three cases, I
14 hope you that find they're reasonably persuasive. Obviously,
15 we have.

16 And not -- I mean, they're -- if you look at what their
17 source material is, I mean, this is all Supreme Court binding
18 precedent. They're interpreting *EMA*. They're interpreting
19 *Cipollone*. They're interpreting *Bates*. They're interpreting
20 Title II of the Clean Air Act. And all of them reach the
21 conclusion that when you -- and going specifically to the
22 compliance point, when you say that when you voluntarily -- I
23 mean, no Government regulation forced the defendants to go out
24 on the affirmative, and market to the consumers that they were
25 CAA compliant. They took that up on their own. I mean, these

1 kinds of statements that are being called out are not from
2 applications to the Government.

3 **THE COURT:** No. I understand that. And that's the
4 question. Does the scope of the preemption clause cover
5 situations where noncompliance with federal regulation is an
6 important part of the case -- it may be even critical part of
7 the case -- and yet it is -- the violation and noncompliance is
8 not a sufficient condition to satisfy the cause of action,
9 because what satisfies the cause of action is lying, or fraud,
10 or concealment about that; and therefore, there's an additional
11 element?

12 So when you -- when the state creates a cause of action
13 that requires a wholly different element in addition to the
14 element that otherwise was preempted, does that take it out of
15 the Section 209?

16 **MR. BUDNER:** Well --

17 **THE COURT:** That's the way I see it.

18 **MR. BUDNER:** Your Honor, I would -- just to buttress
19 some of the additional paragraphs that we reviewed about the
20 defendants' misrepresentations that are separate and apart from
21 the statements about compliance, I would note that they said,
22 for example, that their emissions systems would lead to
23 virtually no NO_x exiting the tailpipe, and would be, you know,
24 30 percent more fuel efficient than comparable vehicles.

25 And I have to rely a little bit on a paraphrasing of

1 Complaint, because I can't look through every --

2 **MR. GIUFFRA:** Your Honor, I'm not aware of any --I'm
3 not aware of any advertisement that says that.

4 **THE COURT:** Well, we'll -- for a moment.

5 There is an allegation about no emissions.

6 **MR. BUDNER:** Let me direct Your Honor to paragraph
7 143. And this, I think, is relevant, and will preëempt -- pun
8 intended -- perhaps one of the arguments that we can expect
9 from Bosch. And this was a statement from Bosch at a public
10 event that was promoting the Class Vehicles. And Bosch stated,
11 quote, *Bosch emissions-control system helps ensure that*
12 *virtually no particulates and minimal oxides of nitrogen --*
13 *NO_x -- exit the tailpipe, and that a Jeep Grand Cherokee or Ram*
14 *1500 Diesel's engine provides a fuel economy that is, quote,*
15 *30 percent better than a comparable gasoline engine.*

16 And these are concrete statements about the
17 characteristics -- the emissions characteristics of the Class
18 Vehicles that were misrepresentations, and that concealed
19 material facts, irrespective of whether these vehicles met the
20 clean -- complied with the Clean Air Act.

21 **THE COURT:** All right. Let me hear from Mr. Giuffra.
22 Thank you.

23 **MR. GIUFFRA:** Your Honor, I will be brief.

24 You know, my head is sort of spinning this morning. When
25 we first got here we had Ms. Cabraser saying, *I must see the*

1 *entire protocol dealing with, you know, your emissions testing.*

2 That was critical to their case.

3 Then earlier we heard about how this was an omissions
4 case; not a misstatement case.

5 And now we're hearing, *Well, no, it's back to being a*
6 *misstatement case*, even though none of the plaintiffs allege
7 that they looked at any of these adds or looked at any of these
8 websites.

9 So, you know, you can't have it both ways. And the
10 problem is the Complaint ultimately is internally inconsistent,
11 because on the one hand the statements --

12 And the only statement that they can point to that was
13 broadly disseminated was EcoDiesel. That is it.

14 And they don't even allege that anybody looked at any of
15 these websites.

16 They don't allege anybody who relied --

17 You know, the best they can do is this they have this
18 thing: EcoDiesel. We thought that meant low emissions; and
19 that's something somehow different than compliance with the
20 Clean Air Act.

21 Now, we argue that's puffery.

22 But to the extent the other side wants to focus on what
23 this is about, the case is about emissions, and compliance with
24 federal and state emissions standards. That's what it's about.

25 And the law could not be clearer, as Your Honor pointed

1 out, that any attempt to enforce emissions standards, whether
2 through the Government doing it or through private plaintiffs,
3 is preëmpted.

4 And when the Congress set up the Clean Air Act, it didn't
5 provide for a private cause of action. The only private cause
6 of action that's allowed is if these folks don't bring a
7 lawsuit.

8 So what is being done here is they are ignoring --
9 okay? -- the fact that the gravamen of this case, and the
10 reason it was brought, was because the EPA and CARB filed
11 Notices of Violations against FCA. That's the gravamen of the
12 case.

13 And, you know, Your Honor, I would urge you to --

14 **THE COURT:** Well, but that, alone, would not have
15 made the case. They're not suing directly to enforce. They're
16 saying because there were either misrepresentations or
17 concealment about the putative defeat devices being used. So
18 that's -- maybe it's one component, but it's one of two
19 components.

20 **MR. GIUFFRA:** Well, let's talk about that point.

21 Number one, on the issue of noncompliance, and, I mean,
22 whether you do or don't comply with the emissions standards --
23 Judge Breyer's decision in Wyoming, which I would urge the
24 Court to look to, actually talks about and says, *Well, you*
25 *know, I looked at this Counts decision; I don't know whether*

1 *it's really on point.*

2 He broadly talks about a case called *Buckman*, which is a
3 Supreme Court case; and it talks about how claims based on
4 misrepresentations to the FDA in product approval is preëmpted.

5 This is a case based on misrepresentations to the EPA and
6 CARB, based on getting a certification for EPA. It's no
7 different than *Buckman*.

8 And, in fact, Judge Breyer, in the Wyoming case, says that
9 the Court's analysis in *Buckman* -- and *Buckman* was an implied
10 preëmption case -- was instructive in terms of knowing what the
11 scope of Section 209 was.

12 And we'll send Your Honor the Decision from the Alabama
13 Court today, rejecting Alabama's ability to bring a case
14 against VW because of preëmption.

15 In addition, now they cite the *VW* cases. The difference,
16 of course, is *VW* -- and we think that this is not the *VW* case.
17 You had a nationwide advertising campaign. The plaintiffs
18 alleged that people looked at the ads on the nationwide
19 advertising campaign, and they were misled by those ads.

20 That is not this case.

21 This is a case where, on the one hand, they're sometimes
22 arguing fraud; but then they say, *Well, it's not really a*
23 *fraudulent statement, because we're not claiming that for RICO.*
24 *We are not claiming that because, well, it's eco, and eco is*
25 *kind of puffery, or they say it's an omission case.*

1 And the only thing that wasn't omitted that I can find in
2 this Complaint is that we didn't disclose eight AECDs, and one
3 or more of them may have been defeat devices, which is exactly
4 the allegation that the Government has made against FCA.

5 And so when you're saying you didn't disclose something
6 that relates directly to emissions standards, not even --

7 And the Supreme Court --

8 And the Section 208 talks about relating to the standard.
9 So clearly, nondisclosure of whether something applies to the
10 standard relates to the standard.

11 That is preëmpted.

12 And Congress, you know, clearly could have provided for
13 some sort of a private right of action for bringing these types
14 of cases. The only thing it provided for was that the EPA
15 doesn't bring an action.

16 And so if you look at cases like the New York
17 Attorney General case, which we cite; the *Jackson* case --

18 New York Attorney General was an attempt by the
19 Attorney General to bring a claim that was based on violations
20 of the-- of the Clean Air Act. And the Court said that was
21 preëmpted. That's an Appellate Court in New York.

22 And then the *Jackson* case was a decision of the Southern
23 District of New York, where schoolchildren claimed that they
24 were hurt by diesel-bus emissions. And the Court said that was
25 preëmpted.

1 So the courts have looked broadly at the scope of 209
2 preemption. Courts, including Judge Breyer next door, have
3 ruled it has broad scope. Courts are now increasingly -- we
4 got the case in Alabama for VW -- reading it broadly.

5 And to the extent there have been any cases that have gone
6 the other way, in the *Counts* case the Court was literally
7 dancing on the head of a pin, saying that if it related to the
8 emissions standards, it was preempted, but -- or defeat
9 devices, and whether you had a defeat device in the car, that
10 was preempted; but if it was something sort of maybe where you
11 talked about emissions, generally, that might not be preempted.

12 Well, I haven't seen an allegation here, other than
13 EcoDiesel, that talks about emissions. And we argue that
14 emissions can include CO₂ emissions. And, in fact, in the
15 actual blog sites that they cite, that's what's being
16 discussed.

17 So to the extent there are any cases that go the other
18 way, there are cases in VW where there was a national
19 advertising campaign talking about clean diesel, compliance
20 with emissions standards. People said they relied on that, and
21 that the ads were run literally on the Super Bowl. They were
22 not things like this, where you had to go into a website and
23 literally look into a government -- a company-created blog.

24 **THE COURT:** But that goes -- that doesn't go to
25 preemption, it seems to me. The breadth of the advertising

1 goes to whether or not, you know, there was a cause of action,
2 et cetera, et cetera.

3 You'd have to look at the substance of the Complaint. And
4 it appears that some cases that say that if the focus is on the
5 deceit rather than the compliance, it's not going to be --

6 **MR. GIUFFRA:** Exactly. I agree.

7 **THE COURT:** Other cases seem to suggest that if you
8 have to incorporate and you can only prove your case by showing
9 a violation, then it is preëmpted. It's --

10 **MR. GIUFFRA:** But the problem the other side has,
11 Your Honor, is that they are claiming that what was not
12 disclosed to consumers was the fact that you weren't complying
13 with EPA standards.

14 **THE COURT:** Right. That's what I want to ask,
15 because it seems to me a big part of your case is on the
16 concealment, because there are potential problems. You haven't
17 alleged that all of the things that -- the advertising
18 campaigns that are set forth in paragraph 145 on -- there's no
19 allegation that any of the named plaintiffs ever saw any of
20 those things. The only thing they allegedly saw was the
21 "EcoDiesel" label.

22 So if you have to rely largely on concealment, what is it
23 that is concealed? How would you --

24 **MR. BUDNER:** Software --

25 **THE COURT:** -- step up?

1 **MR. BUDNER:** Software that rendered the
2 emissions-control systems inoperable or compromised in many
3 real-world driving conditions. A concealed and hidden feature
4 of the vehicle that undermined and contravened the reasonable
5 expectation of consumers who purchased EcoDiesel vehicles, who
6 researched those vehicles and saw many representations about
7 their ability to achieve reduced emissions. And I think that
8 this run-on sentence has gone on long enough.

9 **MR. GIUFFRA:** Your Honor, I concur.

10 **THE COURT:** That's a fairly long sentence.

11 **MR. BUDNER:** But let --

12 **MR. GIUFFRA:** I'm sorry. I think what he just said
13 actually answers the question, because if you read the *Counts*
14 case, the *Counts* Court said that the nondisclosure of the
15 existence of the defeat device, which is what the -- which is
16 what plaintiffs' counsel just said was what was not disclosed
17 is preëmpted. I'm virtually certain. I'm looking for the
18 page, but I'm virtually certain that that was the distinction
19 that the Court made; that if it was about the existence of a
20 defeat device, that was preëmpted. And that's clearly what the
21 Court talked about.

22 And then they found, well, there might be something
23 separate from that; some sort of different kind of
24 advertisement.

25 **MR. BUDNER:** Your Honor, I don't think he's going to

1 find that quote. I think the decision --

2 **MR. GIUFFRA:** Well, let me look.

3 **MR. BUDNER:** All right. I'll wait for you.

4 **MR. GIUFFRA:** Yes, Your Honor. It says -- this is at
5 page 15, 8, at 89 to 90. And the Court said, *To the extent the*
6 *plaintiffs are seeking damages based --*

7 *Quote, To the extent that plaintiffs are seeking damages*
8 *based solely on GM's alleged violations of the Clean Air Act,*
9 *those claims are preëmpted.* That's what the Court said.

10 Well, the violation of the Clean Air Act is having an
11 undisclosed defeat device in your vehicle. That's against the
12 Clean Air Act.

13 And then the Court goes down further, thus -- and in
14 quotes, *To the extent that plaintiffs are suing GM for*
15 *manufacturing a vehicle that emits more than a certain amount*
16 *of NOx, in violation of the EPA regulations, or that is not*
17 *equipped with properly functioning, federally mandated*
18 *emission-control technology, their claims are preëmpted by the*
19 *Clean Air Act.* That's what the Counts Court said.

20 **THE COURT:** Then it goes on to say, *But if the*
21 *gravamen of the Complaint or fraud claim is focusing on deceit*
22 *about the compliance rather than the need for compliance, that*
23 *is not preëmpted.*

24 **MR. BUDNER:** Your Honor, let me just -- let me --

25 **THE COURT:** So -- and that's what the argument is

1 here, if you're focusing --

2 Even though it sort of incorporates by reference
3 compliance, although the Court does go on to say, *If the*
4 *plaintiffs can prove that GM misrepresented the level of*
5 *emissions without proving regulatory noncompliance.*

6 So how can you do that here?

7 **MR. GIUFFRA:** That's the point.

8 **THE COURT:** How will you be able to prove a
9 misrepresentation about the level of emissions, without
10 proofing regulatory noncompliance in this case?

11 **MR. BUDNER:** Sure. Your Honor, regardless of what
12 label you affix to the software, we don't need to call it a
13 "defeat device." We don't need to analyze whether it meets the
14 term-of-art definitions for how it's defined under the Clean
15 Air Act.

16 What we're looking at is a concealed part of the way the
17 engine functions that causes the engine to emit more than a
18 reasonable consumer --

19 **THE COURT:** But how is that different from a defeat
20 device?

21 **MR. BUDNER:** Well, I guess my point is it's -- we're
22 obviously talking about the same --

23 **THE COURT:** Just because it avoids the words you put
24 in the definition, you get around preëmption? There's got to
25 be more to it than that.

1 **MR. BUDNER:** Well, I guess, Your Honor, what I'm
2 trying to say -- and perhaps inartfully -- is that obviously
3 we're talking about the same software. There's only one
4 software. There's only one software that governs the emissions
5 control.

6 My point is that software was used to achieve greater
7 emissions, or to -- or to cause the vehicles to emit more than
8 a consumer would have expected, based on the representations --
9 partial representations that were the benefit of the bargain
10 that they were buying EcoDiesel cars.

11 **THE COURT:** You're starting to rely on "based on
12 representations." Now you're not talking about -- that's the
13 half.

14 Then you're going to get into issues about: Well, how
15 prevalent were these representations? Were they actually seen?

16 And, you know, you haven't articulated how each of your
17 plaintiffs have seen anything, other than the word "EcoDiesel."

18 So I was trying to look at, *Okay. Let's assume they*
19 *didn't see anything.*

20 **MR. BUDNER:** Okay. Let's.

21 **THE COURT:** You've got a claim.

22 **MR. BUDNER:** Yes, we do have a claim.

23 **THE COURT:** And how is that kind of different?
24 You're saying in the claim is concealed this software which
25 rendered the emissions control inoperative or impaired under

1 many conditions, which is a defeat device.

2 **MR. BUDNER:** Yeah. So, Your Honor, are you saying if
3 you -- if they haven't seen anything, if you strip the
4 EcoDiesel badge, if you assume they haven't been exposed to any
5 representations -- partial representations about the vehicle;
6 if they're just buying it with no expectation of reduced
7 emissions?

8 **THE COURT:** If you're asserting a pure concealment
9 claim, how was that not preëmpted, I guess, is the bottom line?

10 **MR. BUDNER:** Well, I guess --

11 **THE COURT:** It seems to be based on concealing the
12 fact that they installed the defeat devices.

13 **MR. BUDNER:** So, Your Honor, I think the way I can
14 approach this is by taking a step back, and describing how we
15 get to a concealment claim. And one of the ways we get to a
16 concealment claim is a duty to disclose when you make
17 representations that are partially or entirely untrue. And
18 that's what we have here.

19 **THE COURT:** I'm not there. I'm assuming there is a
20 duty.

21 **MR. BUDNER:** Okay.

22 **THE COURT:** I'm assuming you don't have to show any
23 misrepresentation. You don't even have to show a partial
24 untruth. You don't have to say anything.

25 But this is such material -- and the knowledge was

1 exclusively in the hands of the defendant.

2 And there are a lot of cases that say even without a
3 fiduciary duty, if you have, you know, those factors,
4 completely one-sided analysis of an important material fact,
5 you've got a duty to disclose that.

6 **MR. BUDNER:** Okay.

7 **THE COURT:** I'm assuming that's true. And I'm
8 assuming you stated a claim there.

9 My question is: Isn't that claim sort of squarely within
10 the bullseye of the Clean Air Act?

11 **MR. BUDNER:** I think not, Your Honor, because I think
12 what it comes down to is if there's a duty to disclose to
13 consumers that the emissions-control systems don't function in
14 the way that one would expect them to.

15 And, in fact, those emissions-control systems do not
16 function in the way the consumers would expect them to. And
17 certainly would expect them --

18 I'll leave it there.

19 Then it's about the mis -- it's about --

20 The gravamen of the plaintiffs' claims, as in *Counts*,
21 *Virginia Volkswagen*, and *Felix*, is not whether or not vehicles
22 complied with the Clean Air Act, but whether the defendants
23 made -- and perhaps I'm treading back into waters that you're
24 trying to avoid here -- but made misrepresentations about or
25 concealed material facts about the qualities of the vehicle.

1 **THE COURT:** All right.

2 **MR. GIUFFRA:** Just one basic point. And I think
3 Your Honor has hit on it exactly. The problem here is that
4 when you look at the cases -- *Counts*, for example -- if the non
5 -- the nonconcealment in this case is the failure to comply
6 with EPA regulations, and having illegal defeat devices.
7 That's the concealment.

8 If you've got some broader, you know, emissions theory
9 that you want to push, you know, *Counts* suggests that maybe
10 that is not preëmpted; but the problem is the plaintiffs don't
11 have a broader emissions theory that they can push. Other than
12 to label "EcoDiesel," they can't site anything that FCA said
13 that any plaintiff in this case relied upon, talking about
14 emissions.

15 And emissions is a pretty amorphous thing when you're
16 dealing with diesel vehicles, because you can have CO₂
17 emissions; NO_x emissions.

18 And so in this case their theory is either that they --
19 that either the emissions -- their claim is "EcoDiesel" either
20 meant that they met the Clean Air Act, and therefore they
21 didn't, so that's preëmpted that claim; or that there's some
22 claim of lower emissions than what the Clean Air Act requires.
23 It has to be tied back to the -- to the Clean Air Act, because
24 the Clean Air Act is the governing law in the EPA regulations
25 about: What are emissions that are high, or low, or in

1 between?

2 So it's not just about emissions in some amorphous way.

3 It's got to be emissions tied to the Clean Air Act.

4 And so their claims, unlike in *Volkswagen*, at least, as
5 some courts have found, where you had a national advertising
6 campaign all about the great technology, and clean, and all of
7 this stuff, and there were allegations of reliance -- that's a
8 different case than the case here where at the end of the day
9 we're left with a claim about EcoDiesel, and whether that's
10 puffery or not objectively; and even what it means. And they
11 put up something that they can do something -- or it's a case
12 where they're preëmpted. They can't have it both ways.

13 **MR. BUDNER:** Your Honor, may I respond to that?

14 **THE COURT:** All right. Last word.

15 **MR. BUDNER:** Sure. And thank you for that.

16 I would -- to the extent I haven't been able to articulate
17 this point as clearly as I would have liked, I would encourage
18 you to look at the underlying allegations in *Counts*, Virginia
19 *Volkswagen*, and *Felix*, because they are substantively the same.

20 The idea that reliance is somehow a factor that should be
21 considered in preëmption analysis is a novel one, and one that
22 I think Your Honor has already rejected here in the commentary
23 today.

24 There were a few other misrepresentations or, from my
25 perspective, misrepresentations from opposing counsel in the

1 course of this. And one, I think, goes to what has been dubbed
2 "the general inconsistency of the Complaint."

3 Well, Your Honor, it's true that, as you mentioned earlier
4 in this hearing, the RICO claims and the state-law, common-law,
5 fraud, and CPA claims are based on different things. And
6 they're allowed to be based on different things. And there's
7 no argument that RICO has been preëmpted, because of course
8 RICO is federal law. That's not inconsistency. That's careful
9 pleading.

10 Moreover, there was a notion that Judge Breyer's decision
11 in Wyoming's case -- the *Volkswagen* Wyoming case somehow came
12 to bear here because of implied preëmption, or *Buckman*, or the
13 fact that there were representations -- misrepresentations to
14 the Government. I think it's irrelevant because, again,
15 state-law claims aren't about misrepresentations to the
16 Government. That's RICO.

17 **THE COURT:** That's a RICO claim.

18 **MR. BUDNER:** That's RICO. That's irrelevant.

19 And Judge Breyer, himself, looked at *Counts* and said, *You*
20 *know what? The grounds that Counts distinguished their claims*
21 *on are, in fact, distinguishing grounds.* The State of Wyoming
22 was -- without judging on the merits of that distinction, the
23 State of Wyoming was attempting to enforce a federal standard.
24 And they were saying --

25 And I respect Mr. Giuffra's going to say, *We pass no*

1 *judgment* -- what Judge Breyer said, which is, *I, Judge Breyer,*
2 *don't judge one way or another whether Counts was correct,*
3 *because I don't have to. It's irrelevant.* And it was
4 irrelevant.

5 And I assume that the same will be true of the Alabama
6 case, although I haven't seen it.

7 I would also encourage Your Honor -- *Detroit Diesel* and
8 *Jackson* were bought up. I do think -- I think we need to move
9 on, but they are pretty thoroughly and distinguished in *Counts,*
10 *Virginia VW,* and in *Felix.* And, Your Honor, I think if you
11 looked carefully at our allegations and compared them to the
12 allegations in those claims, you'll find that the gravamen of
13 our Complaint is not the compliance, it's not on whether or not
14 the car's CAA compliant, and therefore, that our state-law
15 claims are not preëmpted.

16 Thank you, Your Honor.

17 **THE COURT:** All right. Thank you, counsel. This was
18 helpful. I appreciate it. I'm taking the matter under
19 submission, and wish you a happy meeting, a productive meeting
20 with Mr. Feinberg.

21 Let's talk about when we should resume getting together
22 here. It probably should be sometime after you've had a chance
23 to meet with Mr. Feinberg, and make some progress, and give me
24 time to get over what we just discussed. And so I'm thinking
25 sometime in February.

1 **MR. GIUFFRA:** Weather's always nice here in February.

2 **THE COURT:** Well, better than New York.

3 **MR. GIUFFRA:** Further east.

4 **THE COURT:** How are we on the 8th, Betty?

5 (Discussion off the record.)

6 **THE COURT:** House about morning of the 7th?

7 **THE CLERK:** 10:00 o'clock?

8 **THE COURT:** 10:00?

9 **MS. RENDÉ:** That's fine for the Government,
10 Your Honor.

11 **MS. CABRASER:** We have scheduling problems on the
12 plaintiffs' side -- I apologize, Your Honor -- for the 7th.

13 I think we have the 8th or 9th of that week, or the week
14 after that.

15 **THE CLERK:** How about the 5th? Is there a problem?

16 **MS. CABRASER:** The 5th is not a problem.

17 **MR. GIUFFRA:** The 9th would be good.

18 **MS. CABRASER:** The 5th or the 9th.

19 **MR. GIUFFRA:** The 9th would be great.

20 **MS. CABRASER:** The 9th would work, Your Honor.

21 **THE COURT:** 10:00 in the morning, the morning of the
22 9th?

23 **MS. CABRASER:** That's Saturday?

24 **THE COURT:** We can do Saturday.

25 **MR. GIUFFRA:** I think I'm going to take my wife here.

1 That's why the 9th would be great.

2 **THE COURT:** Anything to accommodate you.

3 **THE CLERK:** So February 9th at 10:00 o'clock.

4 **MR. GIUFFRA:** Thank you.

5 **THE COURT:** Great. Good. Thank you, everyone.

6 (At 1:42 p.m. the proceedings were adjourned.)

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

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December 19, 2017

Signature of Court Reporter/Transcriber Date

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Lydia Zinn

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