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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

IN RE CHRYSLER-DODGE-JEEP)
ECODIESEL MARKETING, SALES) Case No. 17-MD-02777-EMC
PRACTICES AND PRODUCTS)
LIABILITY LITIGATION,)
_____)

San Francisco, California
Thursday, August 2, 2018

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on the following page)

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(And all other appearances as indicated in the minutes.)

1 Thursday - August 2, 2018

1:03 P.m.

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

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4 **THE CLERK:** Recalling 17-MD-02777, In re
5 Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices and
6 Products Liability Litigation.

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

9 **MS. JENSEN:** Good afternoon, Your Honor. Rachel
10 Jensen from Robbins Geller on behalf of the plaintiffs.

11 **THE COURT:** All right. Thank you, Ms. Jensen.

12 **MR. BUDNER:** Good afternoon, Your Honor. Kevin Budner
13 on behalf of the plaintiffs.

14 **THE COURT:** Thank you, Mr. Budner.

15 **MS. CABRASER:** Good afternoon, Your Honor. Elizabeth
16 Cabraser for the plaintiffs.

17 **THE COURT:** All right. Thank you, Ms. Cabraser.

18 **MR. MCDEVITT:** Good afternoon, Your Honor. Ryan
19 McDevitt from Keller Rohrback for the plaintiffs.

20 **THE COURT:** Good afternoon.

21 **MR. GIUFFRA:** Good afternoon, Your Honor. Robert
22 Giuffra from Sullivan & Cromwell for the Fiat Chrysler
23 defendants.

24 **THE COURT:** Thank you, Mr. Giuffra.

25 **MR. SLATER:** Good afternoon, Your Honor. Matthew

1 Slater of Cleary Gottlieb on behalf of Robert Bosch GmbH and
2 Robert Bosch LLC.

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

4 Let's address the RICO issue first, and the question of, I
5 guess, proximate cause. Whether you characterize EPA and CARB
6 as the direct victim and therefore the plaintiffs as sort of
7 the secondary victim or not, it seems to me this case is
8 different from *Anza* and *Holmes* and the other cases that have
9 looked at proximate cause in the sense that in a lot of those
10 cases where there are proximate cause problems, the plaintiffs'
11 harm, the injury, the damages, suffered were dependent and
12 derivative upon somebody else's injury, and that is, typically
13 you had Victim A suffered some kind of loss. As a result,
14 somebody related to Victim A, Victim B, suffered from
15 derivative loss, and the magnitude of that loss is dependent,
16 to a certain extent, on what happened to A, the amount of loss,
17 or may depend on certain market conditions, some intermediary
18 force came into play, and so you have to go through this fairly
19 complicated analysis of derivative harm.

20 And here although the fraud was directed -- the alleged
21 fraud was directed at the regulators, there is no claim that
22 the plaintiff, the consumer, harm is based on some monetary
23 loss or derivative or a function of the amount, the quantity of
24 monetary loss suffered by the EPA or CARB. They were only
25 really a role of sort of a gatekeeper and their decision was

1 more or less kind o a binary decision. So the assessment of
2 damages, if any, suffered by the consumers is just -- seems to
3 me, just a straight typical analysis of damages.

4 So I don't see the kind of complexity that kind of
5 bedeviled the courts in *Holmes* and *Anza* and some of these other
6 cases, and therefore it seems to me, especially if you look at
7 the -- what people refer to as the *Holmes Factors* and in
8 particular, the difficulty in ascertaining the damages, the
9 amount of damages attributable to the violation, this just
10 doesn't seem to be one of those cases.

11 But I'll let you argue to the contrary, Mr. Giuffra.

12 **MR. GIUFFRA:** Thank you very much, Your Honor. And we
13 very much appreciate you hearing from us today.

14 I was actually in a similar position about maybe two
15 months ago when I appeared before Judge Breyer in a similar
16 situation where he had not fully dismissed a Complaint. The
17 other side went and repled, and applying the Ninth Circuit rule
18 which allows to you basically go -- to go look at the entire
19 Complaint, he actually reconsidered his decision on a critical
20 issue in our bondholder securities case.

21 And the RICO claim is an important one in this case. It
22 will affect the scope of, obviously, class certification. And
23 respectfully, Your Honor, I think that Your Honor's decision --
24 there are parts of it that cannot be squared with each other
25 when they're looked at. And also I think there are cases that

1 Your Honor did not consider that I think are directly on point
2 in the context of RICO.

3 Now, the plaintiffs don't need a RICO claim to recover for
4 the alleged injury in this case. They have their state common
5 law claims. They have their federal warranty claims. And the
6 Government here has already sued to vindicate the state's
7 sovereign interest.

8 And the issue that I think we have here is the claim has
9 been denominated as "fraud-on-the-regulators." And what the
10 courts have looked to is well, is there -- is the fraud on the
11 first victim, is that -- can that be viewed as something which
12 is really affecting the second victim.

13 Now, when Your Honor was dealing with preemption, which is
14 obviously a critical issue in this case, Your Honor repeatedly
15 held that plaintiffs were not seeking to recover for a
16 regulatory violation.

17 So if you look at page 76, you say, "The wrongful conduct
18 being targeted by plaintiffs is not defendants' failure to
19 comply with federal law, the Clean Air Act, but rather their
20 deceit about the vehicles' emissions."

21 And then at 78, the Court goes on to say, "Plaintiffs do
22 not assert that violations of federal emission standards
23 establishes per se their affirmative misrepresentation claims;
24 rather, the gravamen of the affirmative misrepresentation claim
25 is that the defendants deceived consumers."

1 And then you say, "The fraud here did not arise solely by
2 virtue of noncompliance with FAA emissions rules. They arise
3 from the alleged deceit practice on defendants by consumers."

4 And then in trying to -- in distinguishing the *Jackson*
5 case, which is a preemption case --

6 **THE COURT:** We weren't discussing the RICO claim in
7 conjunction --

8 **MR. GIUFFRA:** No. But the point, Your Honor, is that
9 you're describing the claim that the plaintiff has is one based
10 on misrepresentations/omissions that are directed between the
11 buyer of the vehicle and the seller of the vehicle, Fiat
12 Chrysler.

13 Now, what the courts have held -- and in the context of
14 this you, say well, in this case, the injury from the
15 misrepresentation claim is based on the deceptive act of
16 defendants, not their noncompliance with the Clean Air Act.

17 But what we have in this case, in our view, is a situation
18 where when you look at -- when you look at the standard -- and
19 it basically -- the question is you can't just sort of glob
20 everything together, but you have to look at well, is this a
21 one-step or two-step case.

22 Well, fraud-on-the-regulators allegedly committed by Fiat
23 Chrysler was not disclosing some AECDs, auxillary emission
24 control devices. And, by the way, you can have an auxillary
25 emission control device, and it's perfectly permissible, in

1 fact -- and I would urge the Court to take a look at -- I think
2 it's Footnote 3 -- no, it's actually Footnote -- yeah.
3 Footnote 3 of the Opposition Brief where the plaintiffs say,
4 "We're not even alleging, as part of our claim, that there was
5 a defeat device in the vehicles."

6 So the question becomes was this a case where there was a
7 fraud on the EPA, and then the second step, which is what
8 accomplished the fraud on the plaintiffs, as Your Honor said,
9 in dealing with the issue of preemption was the
10 misrepresentations or the omissions at the point of sale. And
11 that is a different step.

12 And what the Supreme Court held in a case called *Hemi*,
13 which postdates the *Bridge* case, is you can't just glob
14 everything together saying the general tendency of the law is
15 to not go beyond the first step. Well, the alleged
16 fraud-on-the-regulators was the first step, and the second step
17 was the alleged misstatements, omissions, whatever, with
18 respect to the consumers. But they're not the same.

19 And what the courts have held in the context of RICO is
20 well, who is the direct victim? And the direct victim in this
21 case with respect to the fraud-on-the-regulators was clearly
22 the regulators, not consumers.

23 And what the plaintiffs want to do is ignore the fact that
24 cases like *Hemi*, which is a 2010 case which postdates the
25 *Bridge* case and I don't believe is cited by the Court,

1 explicitly rejects the notion that you can sort of take a
2 foreseeability argument, oh, you know, if you are cheating the
3 regulators because you're not disclosing AECDS, it's
4 foreseeable that that's going to have an effect on consumers
5 down the road.

6 The issue is well, who was defrauded by the first act, and
7 in cases -- a case which Your Honor references but doesn't
8 distinguish at page 38 of your decision, which is the key page
9 where you apply the relevant law, is *Rezner*, which postdates
10 the *Bridge* case. It's a Ninth Circuit case. And in that case,
11 basically the victims of a -- of a tax shelter scheme tried to
12 sue the promoters, and the Ninth Circuit said that the victims
13 of the tax shelter scheme were -- could not -- didn't have --
14 couldn't establish that they were the direct victims of the
15 fraud on the Government with respect to taxes and the
16 collection of taxes.

17 And the court said, you know -- they took -- the court, in
18 a decision that we think is squarely on point here -- that, you
19 know, there was no proximate causation because if you can
20 sell -- let's -- you have a situation in *Rezner*. You're
21 selling fraudulent tax schemes. The victim of the fraudulent
22 tax schemes is the government because the government collects
23 less money, but the other victim of the fraudulent tax scheme
24 is the person who you sell the fraudulent tax scheme to. And
25 the Ninth Circuit in that case said there was no proximate

1 causation.

2 It's almost on all fours with this case because in that
3 case, you had -- like in this case, the customer, the person
4 who was the promoter's customer, was defrauded. They took tax
5 deductions they shouldn't have, and the court said no, that
6 wasn't sufficient. They were not the direct victim of the
7 scheme. The victim of the RICO scheme was the IRS.

8 And so, you know, we think that case is directly and
9 squarely on point.

10 The best the plaintiffs can do in this case is to say,
11 well, you know, you have to establish that the government has
12 to lose tax revenue in order for the government -- in order to
13 qualify as a direct victim. That's clearly not correct because
14 the Supreme Court has repeatedly held that the government
15 suffers an injury when its laws are violated, and clearly there
16 is a lot more going on with respect to the Clean Air Act than
17 just protecting emissions coming out of the back of -- the
18 customers who buy cars.

19 **THE COURT:** Well, on the other hand, it is not
20 impossible -- it is not the rule that if you're second in the
21 chain, there automatically is no standing, no proximate cause.
22 I mean, *Lexmark* shows that.

23 **MR. GIUFFRA:** But in this case -- as Your Honor
24 recognizes and in your decision dealing with the issue of
25 preemption, there is a second step here that is critical, and

1 Your Honor repeatedly -- and that's why I read those pages, you
2 know, 76, 78, and 82.

3 In order to deal with the fact that the Clean Air Act has
4 a preemption provision, which says -- and Congress clearly made
5 the decision that individuals should not be able to go and
6 enforce the Clean Air Act, that that was the province of the
7 government, your Honor said well, the injury that was suffered
8 by the plaintiff here was at the point of sale. That was an
9 injury that was suffered because Fiat Chrysler --

10 **THE COURT:** That was with respect to the non-RICO
11 claims.

12 **MR. GIUFFRA:** Correct, but the analysis is exactly the
13 same and it applies directly here. When you --

14 **THE COURT:** Well, but the focus of any particular
15 legal claim can be on one set of facts that may be different
16 from another set of -- I mean, you can have state cause of
17 action and federal cause of action.

18 **MR. GIUFFRA:** Correct, but in this case, the question
19 was well, who was the direct victim. The claim --

20 **THE COURT:** The victim under one cause of action may
21 be indirect or it may be direct, but it may be a different
22 analysis under a different -- it depends on the theory of the
23 case.

24 **MR. GIUFFRA:** Exactly the same analysis would apply in
25 the *Rezner* case. Think about -- the *Rezner* case is a Ninth

1 Circuit case. It postdates the *Bridge* case.

2 So if someone is out selling -- is out selling tax
3 shelters to, you know, innocent people, they buy the tax
4 shelter, they take a deduction on their tax return, and then
5 the federal government says no, you can't have that tax
6 deduction and you owe interest and penalties because of that
7 fraudulent -- that fraudulent tax shelter that you sold to us,
8 and then the victim, like the customer here of the vehicles,
9 brings a claim -- Ninth Circuit in a case postdating *Bridge*
10 said that that claim was one that was -- the claim was not --
11 they were not a direct victim and that there was no proximate
12 causation and that was because the victim of the tax promoter's
13 scheme was ultimately the IRS.

14 And so it's analogous to what occurred in this case. And
15 the plaintiffs, in order to try to end run that case say, well,
16 you know, the government -- you're not alleging the government
17 is losing tax revenue. But that's clearly not right because
18 the government has a sovereign interest in making sure that the
19 air is clean. It helps everyone, not just the people who drive
20 around in their cars.

21 And so -- and a case like *Hemi* doesn't turn on whether the
22 government does or doesn't get revenue.

23 So what the plaintiffs are ending up having to do here is
24 the other -- the other point of analysis -- of differentiation,
25 they say, well, the EPA is not seeking in this case, you know,

1 compensation for the car owners.

2 That's true, but the government is also vindicating its
3 sovereign rights by seeking injunctions. They can force us to
4 do various things with respect to the cars, including in the
5 *Volkswagen* case forcing a buy-back which benefits consumers.
6 They can require us to have warranties that benefit consumers.
7 And --

8 **THE COURT:** But that doesn't necessarily make
9 consumers whole. It goes a long ways, but it may not make them
10 completely whole --

11 **MR. GIUFFRA:** Consumers can be made whole by bringing
12 their common law claims and their warranty claims, and we're
13 not saying -- Your Honor held that they could do that.

14 But the problem here is that RICO is -- every -- every
15 false advertising case, every products liability case can't
16 just be a RICO case. So what is this case about as we sit here
17 today?

18 The case today is that Fiat Chrysler didn't disclose
19 AECDS. The plaintiffs are saying in their Brief -- and I want
20 to make sure that I got -- you have it. Footnote 3. They
21 don't even -- they claim they do not have to plead that -- the
22 existence of any defeat devices. That's because what they're
23 saying is well, there was somehow a misrepresentation because
24 the vehicles had, you know, this EcoDiesel badge, albeit that
25 only 25 percent of them had the green one with the leaf and the

1 other 75 percent were red.

2 But when you look at what happened in the -- in the
3 cases -- and the cases that we've been dealing with, the
4 Supreme Court cases, the only case where -- that I'm aware of
5 of the ones that we're talking about where a RICO case was
6 upheld for proximate causation is the *Bridge* case. *Hemi* wasn't
7 upheld, and in *Anza*, the claim was not upheld.

8 And in *Bridge*, it's not a case where the government was
9 acting in its sovereign capacity. What was happening there was
10 the county was running an auction for tax liens and they had a
11 rule, not a law, but a mere regulation -- a regulation
12 governing how the process would work, and the government was
13 indifferent because they were getting the money no matter what,
14 and the party that was being cheated were the other
15 participants in the -- in bidding on the tax liens.

16 That's different than in a case like *Rezner* where the
17 government is being cheated out of taxes. It's different than
18 the case like this one where the government is being cheated
19 out of allegedly the ability to have clean air and have a Clean
20 Air Act enforced properly.

21 Another point that the courts look to is well, does the
22 party that is -- is the government in the best position or the
23 party that's the victim, the direct victim, in a position to
24 vindicate the rights. Clearly in this case, the federal
25 government is actively vindicating the federal government's

1 interest in making sure that the environmental laws are fully
2 upheld.

3 So in *Bridge*, the government was indifferent. It did not
4 care whether the law was or wasn't -- wasn't vindicated --

5 **THE COURT:** Is it accurate that the government
6 suffered no conceivable harm in *Bridge*?

7 **MR. GIUFFRA:** I don't really think the government has
8 suffered any harm in *Bridge* at all. They were just -- they
9 were getting their money no matter what from the people who
10 were bidding for the tax liens.

11 The only -- the only harm was the people who were
12 participating in the auctions. And that's -- that was the
13 ground the government -- the court ruled on and, in fact, that
14 was the distinction that the Ninth Circuit, post *Bridge*, relied
15 upon.

16 So when Your Honor in your -- in your decision at page 38,
17 which is the key page -- 38 into 39 -- where you apply -- and
18 you cite -- you rely upon *Anza*. You cite *Bridge*. You don't
19 distinguish *Rezner*, which we think is the case that is most on
20 point, and it's a post-*Bridge* case from the Ninth Circuit.

21 But you basically say well, this -- that the -- the first
22 thing you say is that unlike *Anza*, this is a case that doesn't
23 involve economic competitors. Well, in *Rezner*, you were not
24 dealing with economic competitors. You were dealing with
25 someone who was selling tax shelters to someone else, like

1 selling a car in violation of the law allegedly here.

2 The second point you made, which I think is a key point,
3 is you said well, in *Anza*, there is not a discontinuity between
4 the alleged RICO violation and the asserted injury. And then
5 you go on to say that here, quote, "There is no analogous
6 layering of intervening, independent factors that could have
7 caused plaintiffs' alleged injury," close quote.

8 **THE COURT:** What about that? I mean, that still is
9 one of the first factors under the *Holmes* test. You look at
10 the difficulty in ascertaining the plaintiffs' damages, and
11 here where it's not -- my opening point, where it's not
12 derivative, it's not dependent, it's not a function of somebody
13 else's market reaction, somebody else's harm, the calculation
14 of damages is like any other, you know, consumer fraud case or
15 any other damages case.

16 **MR. GIUFFRA:** Let me see if I can go back to the first
17 principles.

18 What the Supreme Court has said, you have to look at the
19 RICO violation in this case. That's step one. What is the
20 RICO violation?

21 The RICO violation that they're alleging is
22 fraud-on-the-regulators. That's how it's denominated in your
23 decision, that's how it's denominated their briefs.
24 Fraud-on-the-regulators. They have other claims that are
25 fraud-on-consumers claims and we're not disputing -- you've

1 upheld many of those. And the question is well, does the
2 fraud-on-the-regulators -- is the government the direct victim
3 or are the buyers of the cars the direct victims?

4 When you look at the analogy that I'm drawing between the
5 case involving the seller of the tax shelter and the buyer of
6 the tax shelter and the government, if -- if the plaintiffs'
7 theory were correct, say, on the calculation of damages, the
8 Ninth Circuit should have come out the other way. But, in
9 fact, the Ninth Circuit said that the government, the IRS, was
10 the direct victim of the scheme, which was a scheme like -- to
11 try to evade taxes. The promoters were selling -- were
12 selling -- selling bad tax shelters.

13 So it's exactly like this case. I don't see how you can
14 distinguish it --

15 **THE COURT:** Let me hear -- all right. So *Rezner* --

16 **MR. GIUFFRA:** So the point would be, Your Honor, we
17 think that the *Rezner* case is on point, number one. And
18 second -- and I think this is maybe the point when you look at
19 a case like *Hemi* which focuses on what is the first step and
20 the second step, Your Honor's own decision in -- in dealing
21 with preemption talks about how that the -- the misleading of
22 the EPA with respect to whether there are AECDs or not in the
23 vehicles is a different injury than the injury that the
24 plaintiffs are alleging here which is one based at the point of
25 sale.

1 And so that second step means that the consumers are not
2 the direct victims of the harm.

3 **THE COURT:** All right. We neglected to hook in Court
4 Call so we are doing that now.

5 (Pause in proceedings)

6 **THE COURT:** We don't need to take roll, Operator.

7 **MR. GIUFFRA:** I think the point, Your Honor, is -- and
8 the reason why I was focused on what Your Honor argued with
9 respect to preemption was you recognized in your opinion
10 repeatedly that the plaintiffs' alleged injury was separate and
11 apart from the regulatory noncompliance. And your analysis in
12 the preemption part was about the injury: What was the injury?
13 And the claim was that the injury was one that was different.
14 It was caused by the advertising, the omissions at the point of
15 sale.

16 In order to establish proximate causation for purposes of
17 RICO, they've got to establish that the injury was the same.
18 And, in fact, that's not what they're alleging. They're
19 alleging a different issue.

20 **THE COURT:** I don't know if they have to allege that
21 it's the same. The question is whether it was proximately
22 caused.

23 Assuming we all accept that under the RICO theory that the
24 consumers were not the direct victim, that the direct victims
25 were the regulatory agencies --

1 **MR. GIUFFRA:** That's the end of the analysis.

2 **THE COURT:** Well, I don't think it's quite the end of
3 the analysis. Proximate cause does not necessarily say once
4 you go beyond one link, that's it. That's why the court went
5 on in *Holmes* to talk about some of the factors that one looks
6 to, and it often is the case that once you go beyond that first
7 link, you have problems in terms of calculating damages. You
8 have problems with overlapping damages and duplicative damages.
9 You have a number of problems that are enumerated, but that
10 doesn't mean for sure that's it.

11 Now, I know the *Lexmark* case was a Lanham Act case and not
12 a RICO case, but they both hinge on proximate cause which is
13 grounded upon common law. They all come from the same source
14 so it's fair to cite a case like *Lexmark*.

15 That case was somewhat unique because the derivative harm
16 was derivative. It wasn't direct. It was derivative harms to
17 the plaintiffs -- was that there was a one-to-one relationship.
18 They only made parts and they were directly harmed by the harm.

19 But, I mean, it does illustrate the point that under some
20 circumstances, you can go beyond that first link.

21 **MR. GIUFFRA:** But the point is, Your Honor, in your
22 analysis of preemption, you're talking about the injury. The
23 injury has got to be the same under all the theories. You
24 can't have a different theory of injury under one --

25 **THE COURT:** And the injury, even under the RICO claim,

1 I assume, is going to be based on the same analysis and does
2 not depend on somebody else's injury. It does not depend on
3 how much injury a dealer suffered or how much damages the
4 government suffered. This is a direct, calculable injury to
5 the -- even if you call it the indirect victim.

6 **MR. GIUFFRA:** But the point is the Supreme Court has
7 said that in order to establish that the victim of a RICO cause
8 of action was injured by reason of the action, the RICO
9 enterprise, you've got to establish that they were the direct
10 victim.

11 And the alleged improper conduct under the
12 fraud-on-the-regulators part of this is not disclosing AECDs to
13 the EPA and CARB. And Your Honor, in the preemption part of
14 your decision, said well, that's not something that they can
15 seek to recover on because that's preempted by the Clean Air
16 Act.

17 And at the same time, they are now coming back and
18 saying -- and, in fact, Your Honor said they suffered a
19 different injury. The injury that they suffered, the plaintiff
20 suffered in this case, was the advertising injury, the
21 EcoDiesel label, which is the affirmative misrepresentation
22 that was sustained in this case. That has absolutely nothing
23 to do with whether, you know, there was an undisclosed AECD in
24 these vehicles. It's a completely different injury.

25 **THE COURT:** Well, I don't know. It's the same injury.

1 At the end of the day, they paid allegedly for a car they
2 didn't get. They paid for a car with qualities that they
3 didn't get.

4 **MR. GIUFFRA:** Again, the *Rezner* case is directly on
5 point because --

6 **THE COURT:** Let me ask the plaintiffs to respond.

7 **MR. SLATER:** Could I be heard briefly?

8 **THE COURT:** Briefly.

9 **MR. SLATER:** I just want to pick up on the questions
10 you asked at the outset.

11 First of all, with respect to *Bridge* itself -- and I'm at
12 553 U.S. 645 -- the district court specifically found that the
13 governmental body did not suffer any injury.

14 So the only injured party there were the other bidders in
15 the process. They were both the direct victims and the only
16 injured party, and that case was not a proximate cause case.
17 That was not in dispute. The only issue was since the
18 plaintiffs in that case had not themselves relied on the
19 fraudulent statements, could they nonetheless claim
20 compensation under the RICO claim for their direct injury.

21 In the other cases in which we've been looking at, whether
22 it's *Hemi* or *Anza*, there wasn't -- or *Rezner* -- there wasn't a
23 derivative damage claim. It's not as if what the plaintiffs
24 were claiming in those cases were somehow derivative of the
25 injury or the damage suffered by the other part.

1 In the case of *Hemi*, New York State suffered a tax loss.
2 The tax loss that New York City was claiming for in that case
3 was not derivative of New York's tax law. New York City had
4 its own tax claim which it was claiming, and the court said,
5 "No, I'm sorry, it's indirect. You're an indirect victim
6 because the fraud was perpetrated on New York State. And your
7 injury was derivative of that -- of that fraud, not that your
8 damages are derivative of the damages that were suffered by
9 New York."

10 And similarly in *Anza*, the issue was not that the -- the
11 competitor was claiming for some of the tax loss that was
12 suffered by the municipality, but that its injury was
13 derivative of the direct claim against -- the direct fraud --

14 **THE COURT:** Even if we don't call it derivative of the
15 amount of damages suffered by the direct victim, in those
16 cases, there are intermediary factors that have to be
17 considered, whether it's market reaction, whether it's, you
18 know -- it wasn't a straight -- as in the *Lexmark* case, sort of
19 a one-to-one direct chain --

20 **MR. SLATER:** In *Rezner*, the direct fraud was
21 perpetrated on the United States government. The claim that
22 was made by the plaintiff was "I was also" -- "I was" -- "I
23 suffered an injury because of the fraud," and the court said
24 no, the direct -- the direct victim of that fraud was the U.S.

25 And they're not saying that they are suffering -- their

1 claim is that the U.S. government was defrauded. For purposes
2 of their RICO claim, they are claiming that the U.S. government
3 was defrauded. And from that step, there are several steps
4 before you get to their injury, including decisions by the
5 intermediate marketers as to what price they would charge and
6 then all the market factors that go into deciding the price
7 that would be paid, and then how much of that, if any, was
8 actually attributable to the fraud that was perpetrated on the
9 government. Again, indirect.

10 So in none of these cases is it a passed-on damage, which
11 is where you started this line of questioning. In all of those
12 cases, the claim was rejected because -- notwithstanding that
13 the plaintiff had a distinct injury, but they were not the
14 direct victim of the fraud --

15 **THE COURT:** Let me hear from the plaintiffs on the
16 *Rezner* case. Thank you.

17 **MS. JENSEN:** Good afternoon, Your Honor. Rachel
18 Jensen for the plaintiffs.

19 This is a little bit like *deja vu* all over again because
20 the last time we were here, we were talking about the same
21 cases on RICO, and Your Honor had the same, I thought,
22 appropriate comments about it, and nothing's changed. The
23 Second Amended Complaint hasn't changed, the case law hasn't
24 changed, the cases the defendants are citing hasn't changed.

25 But I do think perhaps we need to step back for a moment,

1 and that is that they have now tried to reframe what you call
2 the gatekeepers, right, the regulators as the victims, and this
3 is kind of a classic cops-and-robbers scenario. The cops
4 aren't the victims just because that's who the robbers are
5 trying to get away from. It's still the bank depositors who
6 lost money.

7 And here what we are talking about is a fraud that was --
8 it was to obtain certificates of conformity and executive
9 orders in order to sell the cars to the driving public. EPA
10 and CARB were just the gatekeepers.

11 And so that's why this case is just like *Bridge*. This
12 case, unlike the other ones that the defendants are arguing
13 about, the regulators lost no money, and Mr. Giuffra said that
14 that was not what those cases turned on. But as we point out
15 in our Opposition to the Motions to Dismiss on page 8, they --
16 both *Hemi* and *Rezner* explicitly distinguished *Bridge* for this
17 precise reason.

18 And I will read from *Hemi*, which is a case -- I think
19 Mr. Giuffra might have misspoke when he said that Your Honor
20 didn't cite that case. Your Honor did cite that case on page
21 36 of your decision.

22 But in *Hemi*, it's stated that *Bridge* was distinguishable
23 because there the plaintiffs were the only parties injured by
24 petitioner's misrepresentations. The county was not. It
25 received the same revenue regardless of which bidder prevailed.

1 So there, like here, the government entity involved was
2 not the victim of the misrepresentation. It was just the
3 vehicle by which -- pardon the pun -- the petitioners there
4 were able to get the bids. And that's the way we see this
5 working and that's, in fact, how it did work.

6 Same with *Rezner*. In *Rezner*, the Ninth Circuit
7 distinguished *Bridge* stating that there *Bridge* was different
8 because the losing bidders could meet RICO's causation
9 requirement, obviously talking about proximate cause, to the
10 contrary of what Mr. Slater said, even though the fraud was
11 perpetrated against the third party, the county, because the
12 losing bidders were the only parties injured by petitioner's
13 misrepresentations. The county was not. It received the same
14 revenue regardless of which bidder prevailed.

15 So here, like *Bridge*, and unlike the government entities
16 in *Hemi* and *Rezner*, there was no loss. The regulator was not
17 injured.

18 And I would point out, as we did in the papers, that the
19 defendants used to agree with this position. In fact, in their
20 Reply on the last go-around on the Motions to Dismiss, they
21 said, "Well, hold on, we couldn't have defrauded the government
22 because they had no proprietary interest." In other words, we
23 couldn't -- there is no actionable fraud against these
24 government entities because they didn't lose any money. And
25 that's at page 12, note 11.

1 So, in other words, they're now saying well, the
2 government -- it was the fraud on the government. The
3 government's the direct victim. That is not what they were
4 saying before. And the cases that they are citing turned on
5 where a government entity lost money and therefore was a
6 victim.

7 I do want to point out as well that *Anza* and *Bridge* --

8 **THE COURT:** So the key is whether or not the direct
9 victim, where it is a governmental agency, lost money and that
10 is the only kind of injury that is sort of cognizable for
11 purposes of a proximate cause analysis?

12 **MS. JENSEN:** That's what these cases are turning on.

13 I would say there is one more key element that
14 distinguishes this case from some of the other ones, the
15 *Anza* -- and this is exactly what Your Honor pointed out. That
16 in those cases, there is also independent marketplace factors.
17 There are independent actors in the marketplace. So, in other
18 words, in *Anza*, we didn't know whether the loss was because
19 they weren't paying taxes or maybe it was because there were
20 other factors that allowed them to lower their prices.

21 **THE COURT:** Well, that goes to the causation questions
22 and the complication under the first factor of *Holmes* where
23 you've got a number of, as I said, intervening or intermediary
24 factors to consider. Some of it is market reaction, some of it
25 is how various cost -- cost savings are taken into account,

1 etc., etc.

2 **MS. JENSEN:** That is exactly right, Your Honor.

3 And even in *Anza*, the Supreme Court noted -- and this, of
4 course, predates *Bridge* as well. But in *Anza*, the court said
5 you have to look at the motivating factors, which goes to
6 exactly Your Honor's point, which is that we are looking at
7 these issues because we're trying to avoid problems like how do
8 you ascertain damages that are only partially attributable,
9 that are way down the road, that are too remote. How do you
10 apportion damages amongst perhaps competing plaintiffs, which,
11 again, is not a factor here because the regulators didn't lose
12 any money so we're not talking about New York State going after
13 their own tax dollars and some of the other -- in of the other
14 cases.

15 So, again, I would say Your Honor is spot on in looking at
16 those motivating factors. That's something that *Anza* talked
17 about, that's something that *Holmes* talked about. That's also
18 something that *Mendoza*, the Ninth Circuit case, also looked at.

19 And there is a case that cited *Mendoza* that I think is
20 also helpful on this point. And there, like here -- and this
21 is *Williams vs. Mohawk Industries*, 465 F.3d 1277, where the
22 defendants there also argued -- and it was a case about hiring
23 illegal workers. They said well, look, the real -- the real
24 victims of the scheme, if anyone, is the United States because
25 of their interest in -- in enforcing immigration laws. And the

1 court there didn't buy it and said but as plaintiffs aptly
2 point out, the United States is responsible for all federal
3 criminal laws, which includes RICO's other predicate acts.

4 So under *Mohawk's* theory, the United States would arguably
5 be the most direct victim. And it says, "It's consistent with
6 civil RICO's purposes to expand enforcement beyond federal
7 prosecutors with limited public resources to turn victims, here
8 the legal workers, into prosecutors as private attorneys
9 general."

10 So that's -- that's --

11 **THE COURT:** Well, that underscores -- and I don't know
12 whether the courts have looked at this or not, but it seems to
13 me when the claim is some violation or defrauding of a
14 governmental agency in its regulatory role, not in its
15 proprietary role, that proximate cause by common sense ought to
16 turn in part upon whether you determine who are the primary
17 beneficiaries of that regulatory scheme.

18 If the primary beneficiaries of the regulatory scheme are
19 consumers or renters or workers or immigrants or whatever,
20 businesses, to say that well, you can't have proximate cause
21 because they're one step removed seems to me would be
22 inconsistent with the purpose of whatever that regulatory
23 scheme is.

24 So I guess I'm asking are there cases that say in
25 determining whether there is proximate cause when you have a

1 regulatory agency as the purported victim, that you look to the
2 purpose of that regulatory scheme to determine or not whether
3 somebody falls within the zone of interests of the intended
4 beneficiaries, and if they do, the court might be more inclined
5 to find proximate cause? Any cases that look at it that way?

6 **MS. JENSEN:** Yes, Your Honor. And I was hoping to
7 find some good language in *Bridge*. But -- and I think there
8 is.

9 But one of the cases that comes to mind is actually to
10 distinguish a case the defendants cited in their Reply, and
11 that is the -- is that the Third Circuit 1999 case of *Callahan*,
12 and in that case, among other reasons, the court -- the Third
13 Circuit now in a case predating *Bridge* found there was no
14 proximate causation and in part because it had some of the
15 independent factors that Your Honor was talking about,
16 independent marketplace factors that distinguished it from
17 *Bridge* and put it more in the camp of *Anza*. But among other
18 things, the court said well, look, you beer distributors aren't
19 necessarily the intended beneficiary of this Pennsylvania rule
20 that only allows people to have one distributorship of beer
21 because the policy underlying that Pennsylvania law was
22 actually temperance. So that was one of the things that the
23 court looked at, and so I hope that addresses Your Honor's
24 point.

25 But I would say more generally speaking, that the courts

1 do hold consistently that civil RICO is to be interpreted
2 liberally, and the purpose of having civil RICO at all is to
3 empower and enable private attorneys general, and that is the
4 language that I read from you from *Mohawk*. That is also in the
5 Ninth Circuit case *Mendoza*, and that's at 301 F.3d at 1169.

6 **THE COURT:** All right. Let me -- let's go on to talk
7 about the other --

8 **MR. GIUFFRA:** Can I just make one point?

9 **THE COURT:** Yeah.

10 **MR. GIUFFRA:** The victims of a violation of the Clean
11 Air Act are the public at large. People who buy cars become
12 victims theoretically of a violation of the Clean Air Act when
13 they are misled by someone who is selling them the cars.

14 And Your Honor, at page 82 of the decision, when you were
15 discussing the injury in this case, said, quote, "The alleged
16 injury flows not directly from the violation of the Clean Air
17 Act, but from defendants' deceit."

18 Now, they may say well, you're standing here making the
19 same arguments again. *Hemi*, Your Honor, did not distinguish
20 and you reference -- you cited it for a general proposition so
21 I was wrong about that, but you certainly didn't distinguish it
22 and you certainly didn't distinguish *Rezner* in your decision.

23 But the point is we have Your Honor's analysis on
24 preemption and Your Honor's analysis of what of the injury
25 theory of the plaintiff is in order to survive and get around

1 the preemption rules, and so plaintiffs speak outside of both
2 sides of their mouth because in order to evade the Clean Air
3 Act preemption bar, they say, "Well, our injury is separate and
4 apart from the government's injury. Our injury occurs at the
5 point of sale when we're misled." That's how they get past the
6 preemption provisions in the Clean Air Act. But now when
7 they're trying to argue RICO injury, they're claiming some
8 special injury that they suffered directly when an AECD is put
9 in a car and not disclosed to the EPA and that makes no sense.

10 They only suffered injury, as Your Honor found, because of
11 the deceit later on, and that's a separate injury. They're not
12 a direct victim of the fraud-on-the-regulators.

13 So if FCA had not put an EcoDiesel tag on any of these
14 cars, what's their injury? They wouldn't -- what would they be
15 pointing to? So our point is you can't reconcile the Clean Air
16 Act and how it's structured in the preemption provisions, and
17 that's why we're here, because Your Honor's decision said that
18 there was -- that the alleged injury flows not directly from
19 the violation of the Clean Air Act.

20 But in order to establish that they are a direct victim of
21 the fraud-on-the-regulators, they have to make the opposite
22 argument. And I urge the Court to look, for example, at
23 Footnote 3 of their Opposition Brief where they say, "Well, we
24 don't even need to prove that there was an illegal defeat
25 device in the vehicles in order to prevail," because they're

1 focused on the point of sale for some of their claims. But
2 there has to be a consistency in the theory of injury that the
3 plaintiffs are putting forward.

4 **THE COURT:** Why does there have to be consistency if
5 you have two different theories and each theory focuses on a
6 different aspect of the injury, characterizes it in a different
7 way? Is there some sort of estoppel or something? I mean, is
8 there election of remedies, you can't choose inconsistent
9 remedies?

10 **MR. GIUFFRA:** Well, the Clean Air Act doesn't allow
11 consumers to bring a claim when the federal government has
12 brought its own claim alleging that there was some regulatory
13 violation. You can't do that. That's preempted, barred, and I
14 don't think there is a dispute about that.

15 All you can do is -- and what they're trying to do here is
16 say they suffered a separate injury. And Your Honor's entire
17 analysis on preemption is premised on the notion -- and you
18 rely upon the *Volkswagen* Virginia case which went off on the
19 fact that there were ads and the falsity of the ads was
20 separate and apart from whatever went on with respect to the
21 regulators.

22 But now they're claiming -- because they have to get past
23 RICO proximate causation -- that the injury they suffered is
24 really the same one as the injury that is suffered by the
25 regulators, and that doesn't make sense. You can't have

1 completely diametrically opposed theories of injury. You have
2 to have a consistent theory of injury. You can have different
3 causes of action, but you can't have directly contradictory
4 theories of injury.

5 They suffered an injury, as they've alleged throughout
6 their whole Complaint, because of the misrepresentation and
7 omissions at the point of sale, not because of the fact that
8 there was an undisclosed AECD. And that's what their RICO
9 claim is entirely based on.

10 So, Your Honor, I mean, again, we're not rearguing because
11 what we're relying upon is what Your Honor found to deal with
12 preemption. I think our preemption arguments are good
13 arguments. Your Honor rejected them. But Your Honor, in
14 rejecting those preemption arguments, made findings and
15 holdings and rulings that contradict what Your Honor is ruling
16 with respect to -- with respect to RICO proximate causation.

17 And this notion that the government only suffers an injury
18 when there is money that is taken from the government, cash, is
19 a preposterous notion. And as we all know, everybody in this
20 courtroom knows, that the government suffers an injury when its
21 laws are not followed, and clearly --

22 **THE COURT:** What's the best case for an
23 illustration -- of an illustration of a situation where the
24 government has not suffered any monetary damage but suffered
25 sort of a damage to its regulatory role, its integrity, its

1 enforcement ability, but no economic damage, and yet the court
2 has found that the beneficiaries of that regulatory scheme are
3 too removed and not within the zone of proximate cause?

4 **MR. GIUFFRA:** Well, in *Bridge*, clearly the government
5 did not suffer an injury, and, in fact, in the portion that
6 plaintiffs' counsel read, the Ninth Circuit, in distinguishing
7 the *Bridge* case, made the point -- said -- this is the Ninth
8 Circuit -- said the court distinguished *Anza* because in *Bridge*
9 the losing bidders were the only parties injured by plaintiffs'
10 misrepresentations. The county was not. It received the same
11 revenue regardless of which bidder prevailed.

12 But this notion that injury for purposes of RICO proximate
13 causation turns on whether the injury is a financial one is
14 completely unsupported by the law.

15 **THE COURT:** Yes. So I'm asking for a case where there
16 was no financial injury to a government regulatory agency which
17 was the victim of the RICO conduct in that sense and yet the
18 court found that the beneficiaries, whether they be consumers
19 or workers or immigrants, did not -- were not proximately --
20 were not within the zone of proximate cause. What is a good
21 example of that?

22 **MR. GIUFFRA:** Your Honor, I want to -- you know, I
23 don't want to make a statement to the Court.

24 I believe that the *Callahan* case, which was just cited
25 here before, may be on point, which is 182 F.3d at 237. That

1 dealt with the fact that -- as I understand that case, the
2 Third Circuit held that the plaintiffs' losses were derivative
3 of the liquor control board's regulatory mission and that was a
4 case where there were alleged misstatements made to the
5 regulatory control board about compliance with its rules
6 governing alcohol sales. And I think that case may well be on
7 point on that issue.

8 But I don't think that the notion of injury turns on
9 whether there was cash out the door because the Supreme Court
10 has repeatedly held in cases like *Vermont Agency of Natural*
11 *Resources*, 527 U.S. 765 at 771, cite year 2000, that the
12 government suffers an injury when its laws are violated in the
13 context of the Clean Air Act.

14 So there is clearly an injury that is suffered by the
15 government. And, in fact, the government suffers an injury, an
16 economic injury, in the context of alleged NOx because the
17 theory that the government is pursuing -- and we could look at
18 the Complaint of the government -- is that, you know, there is
19 excess NOx in the atmosphere. Health, you know, costs are
20 higher than the government has to pay for people. The
21 atmosphere is less clean so you have to spend more money trying
22 to clean it up.

23 The government actually does suffer an economic injury in
24 the context of this case. The problem, again, is what the
25 plaintiffs would like to do is get every conceivable cause of

1 action sustained by the Court without -- without having to meet
2 the requirements of those causes of action.

3 You've sustained a consumer fraud claim, you've sustained
4 a Magnuson-Moss warranty claim, but the RICO claim goes too
5 far. And they have not got a single case that they can cite
6 that's on point because, again, you know, when you look at a
7 case like *Rezner*, there is a fraud on the government. And the
8 court said no.

9 And the only case that they can cite is *Bridge*, and in
10 *Bridge*, the government suffered no injury because it would have
11 been indifferent regardless of what happened because it was
12 getting the same money from the tax lien.

13 So our point, again, is the reason we're here, the reason
14 we are rearguing this particular motion and not everything --

15 **THE COURT:** So if the government had had a law,
16 regulation in *Bridge* that said there shall be no conspiracies
17 or fixing or anything else and therefore stated that purpose,
18 had an enforcement statement, would that have changed the
19 outcome?

20 **MR. GIUFFRA:** Well, first of all, it was not a law and
21 it was not a regulation; it was a rule governing this bidding
22 process, which I dare say is different than the federal Clean
23 Air Act, which has a comprehensive --

24 **THE COURT:** Well, but it had a regulatory interest in
25 it which was being compromised, the integrity of which was

1 being compromised by the practice challenged.

2 **MR. GIUFFRA:** But in that case, the only victim under
3 any conceivable term would have been the other bidders and that
4 rule was only put in place to protect --

5 **THE COURT:** The only economic victims, but one could
6 say that the government has an interest in the integrity of its
7 bidding process and that was compromised.

8 **MR. GIUFFRA:** Well, but I think what the other side is
9 now saying to Your Honor, if you want to adopt this theory, is
10 that well, when a car manufacturer emits excess emissions into
11 the atmosphere, the government doesn't suffer any economic
12 injury. I think that's not true. And, in fact, why is -- you
13 know, one of the remedies in the VW case was that VW had to pay
14 money to remediate the environment, okay, rather than the
15 government having to spend money to remediate the environment.

16 So this notion that there is no economic injury suffered
17 by the government from a violation of the Clean Air Act is
18 preposterous.

19 And so I think the problem here again is in order to get
20 past preemption, they said to the Court -- and Your Honor
21 agreed -- that the alleged injury flows not directly from the
22 violation of the Clean Air Act but from defendant's deceit.
23 Okay. We agree. That's Your Honor's holding. But that
24 holding completely undermines the notion that they -- that
25 the -- that they are the direct victim of the alleged scheme to

1 mislead the government about whether there were or were not
2 AECDs in the vehicles.

3 And, in fact, the way that Congress set up the Clean Air
4 Act was that the EPA, the victim of that fraud, has the ability
5 to vindicate its rights, and that's what they're doing in this
6 very court.

7 So all we're saying is they've got plenty of causes of
8 action that Your Honor has sustained. They just don't have a
9 RICO claim.

10 **THE COURT:** Let me ask Ms. Jensen to respond briefly
11 to the argument about inherently inconsistent positions.

12 **MS. JENSEN:** I'm sorry. What --

13 **THE COURT:** The inherently inconsistent positions that
14 you are taking and that the Court found with respect to the
15 preemption area and compared to the RICO --

16 **MS. JENSEN:** Yes, Your Honor.

17 Well, we think it's well-established that the plaintiffs
18 can put forward multiple theories for liability for different
19 claims. And, Your Honor, I'd be happy to get some cases for
20 you, but I think that's well-established.

21 I do think there's a couple of things that we should
22 clarify, and, number one, probably most importantly -- and I
23 tried to make this point a little bit earlier, but if the
24 defendants are right, that any time a law is violated, federal
25 law is violated, then the victims of that federal law

1 violation, if -- if the federal government could vindicate that
2 claim, then there would be no private attorneys general.

3 And, in fact, when you look at the structure of RICO, many
4 of the federal -- many of the predicate actions are violations
5 of federal law. So he would deprive the whole purpose of civil
6 RICO, which is to allow the victims to become private attorneys
7 general.

8 I would also note that the predicate acts here for the
9 RICO claims are mail and wire fraud, not the Clean Air Act, so
10 I just wanted to clarify that.

11 A couple quick points. In *Bridge*, just to be clear, the
12 county's rules were violated, and there what was important was
13 that the county didn't lose any money. The only parties that
14 suffered financial losses were the plaintiffs, and so that is
15 why the court found even though the misrepresentations were not
16 made directly to the plaintiffs, that they were actionable
17 because ultimately they were the victims, and that's the case
18 here.

19 Finally --

20 **THE COURT:** Well, what about the comeback that the
21 government has suffered not only sort of compromise of its
22 regulatory enforcement powers and the integrity of its
23 regulation, but there are real costs in terms of cleanup costs
24 and things that would be incurred as a result of wire fraud and
25 the -- committed in getting these vehicles on the road under

1 the noses of the EPA. That there is going to be governmental
2 costs.

3 **MS. JENSEN:** Certainly, Your Honor. Well, I don't
4 have the United States' Complaint right in front of me. I
5 don't think that was the cause of action there for the DOJ.

6 And also certainly it's outside of the four corners of our
7 Complaint. So I haven't seen that as -- as something that is
8 in the record at this point, nor do I think it is -- again,
9 that's not -- it's not a derivative injury.

10 As Your Honor put it in the Motion to Dismiss order
11 previously, the whole purpose of the fraud was to sell the
12 cars. The COCs and the EOs were just a means to that end. And
13 so the direct victims are those that bought the cars because
14 the defendants fraudulently obtained the COCs and the EOs.

15 Finally, I'd like to just address the case that
16 Mr. Giuffra cited, which is the *Vermont Agency* case, and this
17 is something they cite in their Reply as well.

18 But in that case, number one, it wasn't a RICO case. It
19 was a qui tam action. And number two, it was -- this was also
20 about the United States losing money. So there the cause of
21 action was that EPA grants were fraudulently obtained; so, in
22 other words, it was a drain from the U.S. -- United States
23 government's dollars.

24 **THE COURT:** All right. Let's --

25 **MR. GIUFFRA:** Your Honor, just -- I apologize. I want

1 to just give you the cite. 182 F.3d 237. This is the *Callahan*
2 case, Third Circuit case from 1999.

3 **THE COURT:** What was the page cite?

4 **MR. GIUFFRA:** It's 182 F.3d 237, 1999. It's a
5 decision by Chief Judge Becker, who is highly respected. And
6 in that case, the Court held that RICO proximate causation was
7 not established, and it's a case where wholesale liquor
8 distributors were complaining because another distributor had
9 been cheating the -- cheating the Pennsylvania liquor
10 authorities.

11 So it's analogous to this case, and the court said, you
12 know, no RICO proximate causation.

13 **THE COURT:** Well, sounds like if what was happening
14 there was cheating the liquor authorities in order to get a
15 competitive advantage in the marketplace -- was that the nature
16 of the injury suffered by the plaintiffs?

17 **MR. GIUFFRA:** I think what they're saying there was
18 that the injury was not directly caused by the alleged
19 regulatory violation, and that's exactly what the facts are in
20 this case because what they claim the injury is in this case is
21 the misleading advertising, the omissions, etc., and I think
22 they have a serious problem here.

23 And I think Your Honor has to think long and hard about
24 how one can square what was argued -- what the findings are on
25 preemption with what went on with respect to trying to

1 establish RICO causation because if they sat here and said
2 well, this is a case about undisclosed AECDs, you would throw
3 the case out because it would be clearly preempted.

4 And so their injury theory has to be consistent across
5 these cases. And so I would urge the Court, as did
6 Judge Breyer in a similar circumstance, take a very hard look
7 at these cases because I strongly believe that the decision --
8 what they're trying to advocate here is inconsistent --

9 **THE COURT:** All right. We have got to move on to the
10 question about the fraudulent causes of action, and in
11 particular, what appears to be at issue here are the sort of
12 claims of partial misrepresentation as opposed to complete
13 omission, and one of those has to do with the EcoDiesel logo --
14 that's the plaintiffs' theory -- and what that implies, and
15 there seems to be some dispute as to what that implies, if
16 anything.

17 So what is the Court supposed to do with that at this
18 stage?

19 **MR. BUDNER:** Your Honor, Kevin Budner again, for the
20 plaintiffs.

21 **THE COURT:** Because under the partial
22 misrepresentation theory, it has to stand for something, which
23 then gives rise to a misrepresentation by a failure to complete
24 that representation.

25 **MR. BUDNER:** Absolutely, Your Honor. And I think

1 you're right to focus on that. When you noted some
2 deficiencies in our pleading the last time around, you gave the
3 plaintiffs a roadmap for how to fix the pleading. And there
4 were two things that Your Honor said we could do.

5 One, was show that there were fuel economy representations
6 made on the class vehicles themselves; and, two, we could be
7 more specific about the general kinds of marketing
8 representations that were made and show that a plaintiff was
9 exposed to them and relied on them. And all of that, of
10 course, assuming the facts bore it out and there was a
11 reasonable basis to make those allegations. And the facts
12 absolutely bore both of those separate paths to fixing the
13 pleading out and we pled both sufficiently.

14 But addressing that first one, which Your Honor I think is
15 focused on at the moment, which is the EcoDiesel badge, as it
16 turns out "EcoDiesel" means not just "environmentally
17 friendly," as Your Honor addressed in the last round of
18 briefing, but also "fuel efficient." And this is something
19 that we know not just from speculation or guesswork, but from
20 Fiat Chrysler's own internal research and the statements of
21 their own executives. And I would direct you to paragraphs 155
22 to 163, five pages where we show exactly what Fiat Chrysler
23 intended "EcoDiesel" to mean and what it did, in fact, mean,
24 and I would direct you to this quote from one of their
25 executives:

1 Quote, "Chrysler decided to combine the terms *eco*, *diesel*,
2 and *three liter* to refer to the engine because the engine is an
3 economical, fuel efficient, more environmentally-friendly
4 three-liter diesel engine."

5 This is among many sources and many representations from
6 which we can understand what "EcoDiesel" was supposed to mean,
7 and then of course we know that Chrysler was quite successful
8 in communicating that meaning because, in fact, every single
9 named plaintiff alleges that they purchased their vehicles in
10 part because of what they understood "EcoDiesel" to mean,
11 reduced emissions and fuel efficient.

12 So I guess circling back on this to answer your -- to give
13 you the short answer after the long answer, "EcoDiesel" means a
14 package of things, including "environmentally friendly" and
15 "fuel efficient."

16 Now, Your Honor, what is deceptive about that is that the
17 fuel efficiency of these vehicles could be achieved only by
18 cheating on emissions, and that's an allegation that was in the
19 First Amended Complaint and it's an allegation that finds even
20 more support in the Second Amended Complaint.

21 In fact, we have cited to a number of internal documents
22 that show that -- that show the defendants linking the AECDs in
23 question to the fuel economy of the vehicles and declaring, I
24 think, unequivocally that they couldn't achieve the vehicle's
25 fuel economy without these AECDs.

1 **THE COURT:** And what is the evidence of actual either
2 television commercials or widely-disseminated brochures that
3 emphasize fuel economy as well eco friendly?

4 **MR. BUDNER:** Absolutely. So to be clear, based on the
5 roadmap that Your Honor set forth in the last order, we believe
6 that the amended allegations about the EcoDiesel badge alone
7 fix this claim and that we have adequately pleaded it on that
8 basis alone.

9 But as Your Honor notes, we have also gone through the
10 wide array of marketing materials that the defendants
11 disseminated, and they did so through a variety of media:
12 Through the vehicle brochures, as Your Honor noted, which were
13 available at the dealerships, available online; through the Ram
14 and Jeep websites; through print and TV commercials; through
15 representations made by the salespeople.

16 And, Your Honor, on that point, although we don't have
17 transcripts of every interaction between the plaintiffs and the
18 salespeople, we have the next best thing which is we have the
19 training materials that Fiat Chrysler provided to their
20 representatives that told them exactly what key messages -- and
21 that's a quote -- what "key messages" they could use to sell
22 these class vehicles.

23 So that's a sampling of the kinds -- of the avenues
24 through which the defendants made the misleading
25 representations about fuel economy and performance.

1 And the messaging throughout all of those media was pretty
2 darn consistent. These are fuel -- these are fuel efficient
3 vehicles. They are powerful vehicles, and in many cases
4 they're best-in-class fuel efficient.

5 And, Your Honor, I mean, I have -- I think it was in our
6 Opposition we listed the numbers of plaintiffs that were
7 exposed to each of these different kinds of -- different
8 avenues of representations, and I think it was 16 plaintiffs
9 who relied on the fuel economy and power representations and
10 the dealer brochures -- and if I can, a footnote on the
11 brochures. There is only six of them. There is one -- there
12 is a vehicle for -- excuse me -- a brochure for each class
13 vehicle for each model year. So we have '14, '15, '16 for the
14 Grand Cherokee and '14, '15, '16 for the Ram 1500.

15 Each one of those six brochures is quoted and/or excerpted
16 in the Complaint. We have highlighted the relevant partial
17 misleading representations in each one of those documents.

18 We have 24 plaintiffs who relied on fuel economy and power
19 representations in print and TV advertisements, examples of
20 which were detailed in the Complaint.

21 We have 38 plaintiffs who relied on fuel economy and power
22 representations on the Ram and Jeep websites. And, Your Honor,
23 on those websites, representations about fuel economy and
24 performance, in addition to environmental friendliness, were
25 inescapable, and we've provided some excerpts that we think

1 show that.

2 We have 46 plaintiffs -- again, this is out of 60, 46 out
3 of 60 -- who relied on fuel economy and power representations
4 made by salespeople at the point of sale. Again, consistent
5 with the very specific training materials that Chrysler
6 provided.

7 And I think to round it off, Your Honor, I would a take --
8 I would go back to my original point, which is every single
9 class plaintiff was exposed to and relied on the EcoDiesel name
10 and badge, which for the reasons I've already communicated,
11 expressed a package of messaging, including fuel efficiency and
12 performance.

13 So I hope that answers your question. There is certainly
14 more that I can say. I think that we have -- we've pled these
15 claims more than sufficiently.

16 The defendants' representations about -- about the amended
17 allegations I think can fairly be characterized as
18 cherry-picking. They tried to divorce the 21 pages of
19 explanation we have about the representations from the specific
20 plaintiff paragraphs. You can't do that. I mean, this is a
21 Complaint to be read in its entirety as a whole.

22 As they get down into the weeds with the specific
23 representations -- excuse me -- allegations of some of the
24 plaintiffs, I think they -- they pretty blatantly misrepresent
25 them, and I would direct Your Honor -- I would invite

1 Your Honor to look at page 18 of their Motion to Dismiss and
2 the five plaintiffs that have, quote, "irrelevant" amendments,
3 and take a close look at what those plaintiff paragraphs
4 actually say. I think you'll find -- and I have it in front of
5 me. I don't want to -- we've already been here a long time. I
6 don't want to spend more time here than you need me to, but if
7 you want me to, I can talk about the ways in which those
8 specific --

9 **THE COURT:** No. I don't need that. Thank you.

10 Mr. Giuffra.

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

12 Let me start with the basic proposition. Plaintiffs are
13 seeking in this case, I think -- I believe 51 separate class
14 actions. And there has to be a lead plaintiff who has stated a
15 claim for each one of those class actions. You know, we talked
16 about this on the first go-around, how they don't have someone
17 from every state.

18 Now, what Your Honor held correctly the last time was that
19 plaintiffs just had formulaic allegations without any specifics
20 with respect to the who, what, when, where, how of what the ads
21 were that people saw on issues dealing with fuel efficiency.

22 Now, for at least ten of the plaintiffs that they have
23 cited, they have no additional allegations whatsoever. So
24 those ten plaintiffs have not pled a fraudulent concealment
25 claim and they should be dismissed. Their claims should be

1 dismissed with prejudice.

2 Now, with respect to the other plaintiffs, they do plead
3 in a very generalized and formulaic way what these people
4 supposedly saw. So, for example, there is one plaintiff
5 Carillo. The allegation that was added to the Complaint is
6 that that plaintiff spoke with a sales representative at the
7 dealer about mileage, EcoDiesel and towing. That's it. There
8 is no specifics. It's not that someone at the dealership said
9 that the miles per gallon would be 25 and it turns out the
10 miles per gallon are only 20. There is no specifics that are
11 pled.

12 There is another plaintiff, Muckenfuss, who claims to have
13 conducted online research about fuel economy and torque and
14 then discussing overall efficiency with the sales rep and
15 seeing a brochure, but there is no specifics pled as to what
16 exactly was -- that plaintiff saw, didn't see, and so that's
17 wrong.

18 In addition, as I just mentioned, plaintiffs think -- seem
19 to suggest that they only need one plaintiff of all their
20 plaintiffs to plead particularized facts supporting a
21 fraudulent concealment claim and that's enough.

22 No, it's not. Each plaintiff who is a rep in each state
23 who is representing a particular state subclass having a
24 different fraudulent concealment theory needs to have pled with
25 particularity their fraudulent concealment case, and, in fact,

1 the case *Opperman*, which you cited in your decision, makes
2 clear that each plaintiff must plead that they saw the ads,
3 specifically the alleged false ads, in order to support a
4 fraudulent concealment theory, and you've got to say what the
5 problem is.

6 So what do they do? They come back ultimately to the
7 EcoDiesel badge which has been, you know -- first of all, they
8 ignore the fact that for 75 percent of the vehicles, the Rams,
9 it's a red EcoDiesel; for 25 percent, which is the Jeep Grand
10 Cherokees, it's green and has the leaf. It's my understanding
11 that some of their plaintiffs didn't even pay attention to the
12 badge before they bought the vehicles based on what we've
13 established in class cert discovery. That's for the next
14 Brief.

15 But Your Honor held the last time that this mere badge,
16 which doesn't connote anything -- it's like we are dealing with
17 vague concepts. It's not like "I promise that this vehicle
18 will have 25 miles per gallon fuel efficiency" and it turns out
19 it's 20. That's a false statement.

20 But what they have is this EcoDiesel badge, and, again,
21 it's only green for 25 percent of the vehicles, and they
22 basically -- what they've done in their amendment is
23 essentially taken every reference to the badge and added the
24 words "fuel efficiency" in broad generic terms, and that is
25 not, you know, pleading what this badge told each

1 particularized -- each plaintiff in any kind of particularized
2 way that, you know, somehow Fiat Chrysler promised that that
3 plaintiff would experience a certain level of miles per gallon
4 or performance and therefore it was misleading.

5 The fact that he is leading with the badge we think
6 confirms that this claim has not been sufficiently pled.

7 Thank you.

8 **THE COURT:** All right. What about that? I mean,
9 what's the best example of something that's specifically
10 inferable from the badge? Whether it's combined with something
11 that the -- is on an advertisement or something that a
12 salesperson may have said, what is it that ties this badge, eco
13 friendly, to something about fuel economy in particular?

14 **MR. BUDNER:** So just for clarification, where do we
15 see that EcoDiesel communicates full efficiency? Is that
16 Your Honor's question?

17 **THE COURT:** Yes.

18 **MR. BUDNER:** I would again direct Your Honor to
19 paragraphs 155 through 163, and I know you can't flip through
20 500 pages while you're up there on the bench. I want to make
21 sure those paragraphs are surfaced to the top for you.

22 But, you know, we go through the very research that
23 Chrysler conducted in trying to figure out what name to use for
24 these vehicles so that they could communicate the right
25 messages --

1 **THE COURT:** So that's on the planning side. What
2 about on the actual dissemination, the ads, the websites?

3 **MR. BUDNER:** Sure.

4 **THE COURT:** Maybe you can read to me real quick what
5 is an example of something that converts the EcoDiesel logo to
6 one that makes an applied representation about fuel efficiency.

7 **MR. BUDNER:** Yeah. So I think we understand that the
8 word "eco" means "economic" and "full efficient" from the
9 research.

10 We see the EcoDiesel badge on, as far as I'm aware,
11 virtually every single consumer-facing communication about
12 these vehicles.

13 And you talked about in combination with other things. So
14 I would, you know -- I would point you to a -- for example,
15 some of the print advertisements because that's just an easy
16 visual that is in the Complaint.

17 But if you look at -- starting on page 101, we have three
18 print advertisements. Every one has either the EcoDiesel badge
19 or the EcoDiesel name in combination with their key marketing
20 messages like, for example, "Best in Class 30 Highway MPG and a
21 730-mile Driving Range" or "The World's Most Fuel Efficient
22 Full-Sized Pickup Truck, Ram 1500 EcoDiesel" or "Takes Fewer
23 Breaks," a slogan imposed over a gasoline can. "28 Best in
24 Class EcoDiesel Highway MPG." You see --

25 **THE COURT:** So it's the association of the high MPGs

1 with the EcoDiesel badge that is repeated in ads and --

2 **MR. BUDNER:** Pervasive and consistent, Your Honor. It
3 is absolutely central to their marketing efforts as associating
4 the worded "EcoDiesel" with full efficiency.

5 Similar -- I'm highlighting the visuals that we've
6 included in the Complaint --

7 **THE COURT:** What is your response to Mr. Giuffra's
8 point that there were ten named plaintiffs where there are no
9 new allegations? What about them?

10 **MR. BUDNER:** My short answer is he is wrong.

11 **THE COURT:** You mean factually wrong?

12 **MR. BUDNER:** Factually wrong that they don't include
13 any new allegations. I believe it's pages 16 through 18 of
14 their Opposition. They start with five plaintiffs who
15 admittedly made only small changes to their plaintiff
16 paragraphs. And then they go to the five plaintiffs that I was
17 referencing before who made, quote/unquote, "irrelevant
18 changes."

19 But, Your Honor, since they brought it up, I suppose we
20 should go there, and I really would invite you to compare what
21 they say about those plaintiffs and what those plaintiffs
22 actually allege.

23 Let's start with one of them, Plaintiff Brinkman, whose
24 plaintiff paragraph is found at page 39. In addition to the,
25 quote/unquote, "irrelevant amendments" that Plaintiff Brinkman

1 made to his plaintiff paragraph, he also says that he saw,
2 quote, "representation on" -- "representations on Ram's website
3 in which the class vehicles were represented to have good fuel
4 economy and towing power," and he alleges that he was, quote,
5 "given a brochure for the class vehicle at Watertown Ford
6 Chrysler that touted the EcoDiesel's fuel economy and towing
7 capabilities."

8 Now, I have some ellipses in those quotes because I was
9 focusing on fuel economy. They also made representations about
10 environmental friendliness.

11 Let's go to Plaintiff Carter, paragraph 44. He alleges
12 that he saw representations on Jeep's website in which the
13 class vehicles were represented as having "good fuel efficiency
14 and towing power," end quote. And that he saw, quote,
15 "representations in a Jeep brochure that touted the class
16 vehicle's EcoDiesel attributes, including its fuel efficiency
17 and performance," end quote.

18 Plaintiff Gunderson, paragraph 60, alleges that he relied
19 on the representations on the Ram website.

20 Plaintiff Melin, paragraph 74, allegations about viewing
21 TV commercials and receiving representations from a sales
22 representative.

23 Same for Plaintiff Bali's representations from a sales
24 rep, paragraph 39.

25 Those are five of the ten that Mr. Giuffra is saying said

1 nothing new about representations that they were exposed to.

2 The other five, as I mentioned, don't have as robust new
3 allegations, but they do allege that they relied on the meaning
4 of the word "EcoDiesel," which, as we've explained and looking
5 holistically at the amendments together, shows that they
6 were -- that the EcoDiesel badge communicated to them that the
7 vehicles would be fuel efficient and concealed from them that
8 the vehicles' fuel efficiency could be achieved only by
9 cheating on emissions.

10 **THE COURT:** All right. I will give you a last chance
11 to respond.

12 **MR. GIUFFRA:** I'm sorry to -- our point -- I think
13 Your Honor had it absolutely correct, that citing internal Fiat
14 Chrysler marketing materials and analyses is obviously
15 irrelevant. What matters is what the plaintiffs actually
16 plead. And I would urge the Court to look through the
17 allegations because what they've done is they will, for
18 example, say -- if you look at Brinkman, who was just -- in
19 Brinkman they just say, "Decided to buy the class vehicle based
20 in part on FCA's representations that it was an EcoDiesel
21 vehicle," and they've added, "i.e., reduced emissions and fuel
22 efficient," the same "i.e., reduced emissions and fuel
23 efficient" that's added throughout the whole Complaint.

24 So it's not something specific where Mr. Brinkman claims,
25 you know, someone told him that they would achieve a certain

1 level of MPG and it's only 20 instead of 25. That's not the
2 kind of specific thing.

3 Similarly they cite -- to the extent they cite brochures
4 and websites, it's highly, highly generalized and doesn't
5 provide the kind of particularity that we believe can support
6 this kind of fraudulent concealment claim.

7 Thank you.

8 **THE COURT:** All right. I will take the matter under
9 submission.

10 **MR. SLATER:** Your Honor, may I be heard?

11 **THE COURT:** Briefly.

12 **MR. SLATER:** I just want to make clear that you've
13 already dealt with these issues as to Bosch. I have the
14 F.Supp.3d cite, 295 F.Supp.3d at 989. This is where you say,
15 "To the extent they are relying on EcoDiesel, Bosch had nothing
16 to do with that."

17 To the extent that they cite paragraphs 146 through 148 of
18 the Amended Complaint in respect to Bosch, you addressed that
19 point in your opinion as well, that Bosch -- that no plaintiff
20 said they saw anything that Bosch said on this subject matter.
21 We think that disposes of it, regardless of where you come out
22 on FCA.

23 If you can indulge me for one more minute, you asked a
24 question about -- in connection with proximate cause, whether
25 there is a case that deals with zone of interests in relation

1 to the proximate cause question.

2 I don't know that there is. I think it's quite
3 exceptional that a plaintiff comes along and says, "You
4 committed a fraud on a regulator that I, as a private party,
5 can bring a claim for RICO treble damages."

6 There are cases that say where there is a pervasive
7 regulatory scheme, the plaintiff may not come in and use RICO
8 as a supplementary means of trying to vindicate their
9 interests, whatever they may be.

10 And if it would be helpful to the Court to see those
11 cases -- they're not proximate cause cases --

12 **THE COURT:** That's a different issue. That is where
13 Congress has allegedly molded a scheme and wanted and
14 balanced -- typically balanced the interests --

15 **MR. SLATER:** But that, in a sense, is what you were
16 asking about. What is Congress trying to accomplish, and what
17 Congress is trying to accomplish --

18 **THE COURT:** But if they didn't do that here -- there
19 is no assertion here that there was this other kind of
20 preemption, that --

21 **MR. SLATER:** Well, there is. They couldn't bring a
22 claim directly under the Clean Air Act. No question, as
23 Mr. Giuffra said. There is no question.

24 **THE COURT:** That's usually not dispositive of the RICO
25 claim unless there is a very clear indication that Congress

1 wanted to preclude any kind of remedy or incorporation of a
2 remedy.

3 **MR. SLATER:** Again, for a claim of fraud on them,
4 that's a different issue. But they're not bringing a RICO
5 claim for fraud on them. They are bringing a RICO claim for
6 fraud-on-the-regulator, and there are these cases that say when
7 you're trying to bring a claim for fraud-on-the-regulator,
8 under RICO, you can't do it.

9 And if it would help, I will submit them to the Court. If
10 it won't, I won't take your time.

11 **THE COURT:** Well, I mean, if that's an argument that
12 you've already advanced, that's a different line of argument
13 than what we were talking about.

14 **MR. SLATER:** I just thought it was relevant to the
15 question you were asking, and if you would find it helpful, I
16 could supply it.

17 **THE COURT:** All right. I'm going to take the matter
18 under submission. Thank you.

19 (Proceedings adjourned at 2:25 p.m.)
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CERTIFICATE OF REPORTER

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

DATE: Friday, August 3, 2018

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter