

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

IN RE CHRYSLER-DODGE-JEEP)
ECODIESEL MARKETING, SALES)
PRACTICES, AND PRODUCTS)
LIABILITY LITIGATION.)
)
)
)

NO. 17-md-02777 EMC

San Francisco, California
Wednesday, October 3, 2018

TRANSCRIPT OF PROCEEDINGS

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(ALL OTHER APPEARANCES AS INDICTED IN THE MINUTES.)

1 Wednesday - October 3, 2018

9:44 a.m.

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

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

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

9 **MS. CABRASER:** Good morning, Your Honor. Elizabeth
10 Cabraser, Lieff, Cabraser, Heimann & Bernstein, plaintiffs'
11 lead counsel and on behalf of the PSC. With me is my partner
12 David Stellings and a number of the members of our PSC.

13 **THE COURT:** All right. Good morning. Thank you.

14 **MS. RENDE:** Good morning, Your Honor. Leigh Rendé for
15 the United States, along with co-counsel Joseph Warren, Nigel
16 Cooney, Leslie Allen, as well as representatives of EPA.

17 **THE COURT:** All right. Thank you, Counsel.

18 **MS. FIORENTINI:** Good morning, Your Honor. Judith
19 Fiorentini with my colleague Jon Worm on behalf of the
20 California Attorney General's Office and the California Air
21 Resources Board.

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

23 **MR. GIUFFRA:** Good morning, Your Honor. Robert
24 Giuffra with Sullivan & Cromwell for Fiat Chrysler, and I'm
25 here with my partner Tom White.

1 **THE COURT:** All right. Thank you.

2 **MR. SLATER:** Good morning, Your Honor. Matthew Slater
3 of Cleary Gottlieb on behalf of Robert Bosch GmbH and Robert
4 Bosch LLC with my partner Carmine Boccuzzi.

5 **THE COURT:** All right. Good morning.

6 **MR. FEINBERG:** Good morning, Your Honor. Kenneth
7 Feinberg, settlement -- court-appointed settlement master,
8 prepared to give an update.

9 **THE COURT:** All right. And while you're standing, why
10 don't you go ahead and provide that update.

11 **MR. FEINBERG:** Your Honor, I'm pleased to report to
12 the Court that the negotiations, the settlement discussions
13 involving all of the parties, are ongoing but there does now
14 appear to be a date, aspirational as it may be, November 7th,
15 when we hope that all of the testing and all of the drafting of
16 the documents involving this MDL litigation and a possible
17 settlement will be completed subject to approval by their
18 principals, but that progress is ongoing.

19 There remains some important --

20 **THE COURT:** That's the settlement documents as between
21 the United States and FCA?

22 **MR. FEINBERG:** That is correct. That is correct.

23 **THE COURT:** Okay.

24 **MR. FEINBERG:** Between the United States and FCA.

25 Meanwhile, on a parallel track, I can also tell the Court

1 that the settlement documents involving FCA and the PSC, the
2 nonmonetary terms, those documents are also nearing completion,
3 not quite there but nearing completion. I'm optimistic that on
4 a parallel track by November 7th those documents will also be
5 completed.

6 The real hangup, of course, remains the monetary
7 considerations that will enter into any settlement. Those
8 discussions are ongoing between the government and FCA. I am
9 not part of those discussions, but I am part of the discussions
10 trying to get a monetary settlement between FCA and the PSC,
11 and those are -- there are some challenges there; but, again,
12 we've got another month now, consistent with the November 7
13 deadline, that hopefully we may be able to see some real
14 movement from both sides and we'll be able to meet that
15 deadline and get those monetary considerations finalized. I
16 don't know but we shall see.

17 Similarly, Bosch and the PSC and FCA, Bosch is also part
18 of those discussions; but, again, too early to say whether
19 we'll have those monetary terms resolved by the 7th or not, but
20 we're all working towards that goal. Everybody has been
21 extremely cooperative.

22 **THE COURT:** All right.

23 **MR. FEINBERG:** And they may add something, the
24 parties, additional gloss, on what I've just said as well.

25 **THE COURT:** All right. Well, let me first ask

1 Mr. Giuffra, then --

2 **MR. FEINBERG:** Thank you.

3 **THE COURT:** Thank you, Mr. Feinberg.

4 -- whether that accurately states the state of affairs.
5 I'm particularly interested in the target date. I understand
6 it's a target date but a hopeful date of completion of the
7 drafting of the documents with or without the monetary term,
8 but that and the testing assessment will be completed by
9 November 7th.

10 **MR. GIUFFRA:** Yes, Your Honor, we're quite confident
11 we can make that deadline of November 7th. We're clearly
12 speeding toward the finish line. FCA remains confident that we
13 have a fix.

14 We've completed on our end all of the testing and
15 submitted all the engineering reports that are specified under
16 what was the protocol we had as of September 1. We've
17 completed 10 months of testing. It's been done around the
18 clock, seven days a week.

19 And just to give the Court some specifics because this
20 obviously has taken some time, we've done 1,333 individual
21 tests on 10 vehicles under different driving conditions, and
22 this is far more testing than would be required for normal
23 emission certification with the government.

24 And I think it's important to keep in mind that unlike in
25 the *Volkswagen* case, which was handled next-door, in that case

1 the settlement was done and then there was still a lot more
2 testing and some of that testing went on literally for months,
3 I believe almost into December, almost a year actually for the
4 three leaders, in the approval process.

5 So in this case we will have a situation where the
6 testing, the documents, everything will be done so consumers
7 will be in, you know, the best possible position. There should
8 not be any uncertainty.

9 We have one issue that we are working on to provide a root
10 cause report to the government, and we endeavor to do that, you
11 know, within the next several weeks.

12 So, again, we're confident that --

13 **THE COURT:** Well in advance --

14 **MR. GIUFFRA:** Of the deadline, yes.

15 **THE COURT:** -- of the November 7th?

16 **MR. GIUFFRA:** So we're confident we have a fix. We
17 believe that it won't have an adverse effect on the consumer
18 driving experience. That's our position.

19 And, you know, we're very optimistic that we will get
20 government approval. It's obviously up to the government.
21 They make the decision, and we appreciate all the hard work of
22 the government folks. But, you know, we're working, you know,
23 round-the-clock.

24 **THE COURT:** And in terms of approval by management on
25 your side, you expect to have that fairly shortly after the

1 documents are completed?

2 **MR. GIUFFRA:** Yes. The only issues that we have
3 outstanding on our end would be if we pay money to the
4 government in connection with some sort of a resolution here.
5 Obviously that would have to be approved by more senior
6 management, but the CEO of the company is, you know, intimately
7 involved in what's going on so I don't think that's going to be
8 a problem.

9 **THE COURT:** So in terms of the nonmonetary relief
10 that's the subject of the documents, you expect no problems in
11 getting approval?

12 **MR. GIUFFRA:** There will not be any problem. You
13 know, again Mr. Chernoby, who is the very senior person at the
14 company, is involved day to day on this. He's literally
15 participating in the negotiations and he's the person who's
16 been tasked by management for, you know, bringing this to
17 conclusion.

18 **THE COURT:** All right. Thank you.

19 For the government, Ms. Rendé, if you have any comments.

20 **MS. RENDÉ:** Yes. We're pleased to hear FCA say that
21 they don't anticipate a problem with the nonmonetary terms of
22 the CD as we are still in the process of negotiating it.

23 That said, just to be clear, the United States did
24 complete its testing of the vehicles and we've been evaluating
25 our test results, as well as reports provided by FCA.

1 California is in the process of testing so there is still work
2 that is going on right now.

3 As you know, California and the United States will be
4 conferring regarding the final results. All of that is to say
5 that the agencies will be in a position to say whether or not
6 the proposed fix is viable by the November 7th date. That's
7 what we anticipate. And our hope is that, you know, should
8 there be a viable fix, that any drafting of any potential
9 settlement could be completed by then --

10 **THE COURT:** All right.

11 **MS. RENDÉ:** -- subject to approvals.

12 **THE COURT:** And you have chains of approval. I think
13 obviously we may have discussed last time, but I understand
14 that management or those who have been involved have been kept
15 up with the discussions, at least fairly far up the chain.

16 **MS. RENDÉ:** That is correct. Management is aware of
17 the ongoing discussions and where we are in the case.

18 **THE COURT:** All right. Thank you. That's helpful.

19 Comments from the PSC at this point? There's a question
20 we've raised previously talked about which is, number one, the
21 PSC's access to the testing reports and data and, two, to the
22 proposed consent decree with the government.

23 **MS. CABRASER:** Good morning, Your Honor. Elizabeth
24 Cabraser for plaintiffs.

25 We will be discussing both of those matters with the

1 governmental representatives after this status conference, and
2 we're hopeful that we can work out a process that will enable
3 us to see as early as possible both the ongoing testing
4 results -- we understand those have not been completed or
5 completely analyzed -- and the documents. So that if we are
6 able to reach a consumer settlement, our documentation and our
7 provisions are complementary and consistent with the government
8 objectives.

9 Our goal is simply to compensate and protect the consumers
10 to get them everything they have already paid for in these
11 vehicles, to compensate them for any and all performance
12 deficits, to protect them on an ongoing basis with respect to
13 the vehicles through a robust warranty, which we're working on,
14 and to provide economic incentives for them to participate in
15 the repair program because that's the only way it's going to
16 work.

17 We are gratified that everyone remains optimistic that the
18 vehicles can be repaired to original emission standards; and if
19 that is the case, this would be a very straightforward
20 resolution.

21 But in order to get the vehicles appropriately repaired
22 and to make sure that they still have viability and value, the
23 consumer-facing aspects of this are important and we are
24 committed to working in parallel and in complement to the
25 governmental entities so we consider ourselves under the same

1 essential deadlines that you've heard this morning.

2 **THE COURT:** All right. And it's been my understanding
3 that there's no objection from any party of sharing on a
4 realtime basis testing results and reports with the PSC, and I
5 expect that will continue.

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

7 **THE COURT:** I also want to make sure that you have
8 enough access to the proposed terms of the consent decree so
9 that we don't end up having it approved and then having to go
10 back because then you've looked at it and then there's some
11 inconsistency or some issues that have to be resolved, that
12 that ought to be effectuated in some way.

13 **MS. CABRASER:** I'm hopeful, Your Honor, that we can
14 work with the other parties to make sure that that does not
15 happen. We'll work through the settlement master if we have
16 any obstacles on that. We're ultimately under the Court's
17 direction, but I think through creativity and the trust that
18 has grown among the parties, we can make that happen.

19 **THE COURT:** All right. Well, good.

20 So if there is a problem, I want the parties to convey
21 that to Mr. Feinberg with whom I will speak, and I will then
22 direct him to take whatever steps are necessary; but at this
23 point it does seem to me very important that the PSC have
24 access to the information in order to make sure there's
25 consistency here.

1 **MS. FIORENTINI:** Your Honor, Judith Fiorentini.

2 **THE COURT:** Yes.

3 **MS. FIORENTINI:** I just wanted to make a brief
4 clarification to something that Mr. Feinberg represented to the
5 Court earlier.

6 I just wanted to make clear that the California Air
7 Resources Board and the Attorney General's Office have been
8 participating in the settlement process as well and are parties
9 to the settlement documents, and we agree with the November 7th
10 deadline. But I just wanted to make sure that the Court was
11 aware that we are a party to that document and the process.

12 **THE COURT:** Right. Right. And in terms of the
13 testing, it was represented that you are still doing testing,
14 CARB is still doing testing?

15 **MS. FIORENTINI:** That is correct. We believe the
16 testing is on track to be completed in mid-October with CARB
17 working in consultation with EPA being able to make a final
18 determination absolutely prior to November 7th absent any
19 unforeseen event happening, but possibly at the end of October
20 of this year.

21 **THE COURT:** And in terms of the approval process,
22 what's your expectation? If the testing comes out as everybody
23 hopes and the documents are drafted, what is the timeline for
24 approval for actually getting the documents signed?

25 **MS. FIORENTINI:** It's a several-week process. The

1 approval process from our office goes all the way up to the
2 Attorney General.

3 **THE COURT:** So several weeks?

4 **MS. FIORENTINI:** Yes.

5 **THE COURT:** So by the end of the year? Is that
6 reasonable?

7 **MS. FIORENTINI:** We're hoping before Christmas,
8 Your Honor. We have been keeping our office apprised of the
9 process, and so we are hoping that that might be a faster
10 process.

11 **THE COURT:** All right. And, Ms. Rendé, I forgot to
12 ask you that question. Your expectations -- if all goes well
13 and the drafting is done on or before the 7th, is it a
14 reasonable prospect that approval can be obtained from Justice
15 and EPA by the Christmas holiday?

16 **MS. RENDÉ:** That is our hope, Your Honor.

17 **THE COURT:** Okay.

18 **MS. RENDÉ:** And I did want to clarify one thing you
19 mentioned. I believe you mentioned earlier that none of the
20 parties object to the sharing of testing data. I wanted to
21 clarify. I believe that was in reference to testing from FCA.

22 But if not, just to be clear --

23 **THE COURT:** Yes.

24 **MS. RENDÉ:** Okay. We are not in a position right now
25 to answer whether or not the United States objects to the

1 sharing of that data that the United States has from the
2 United States' testing. We need to speak with our client. We
3 need to speak with management.

4 That said, as we mentioned before, we do want to have open
5 lines of communication with the PSC and we want to coordinate
6 with them, so we will speak with the PSC after the hearing to
7 make sure we do that.

8 **THE COURT:** All right. Ms. Cabraser, any comments in
9 that regard?

10 **MS. CABRASER:** No, Your Honor.

11 **THE COURT:** Okay. All right. And I understand the
12 report from Mr. Feinberg about the status of the monetary
13 negotiations and I also understand that there have been
14 discussions, although not part of this case, with the state
15 Attorney Generals; is that right?

16 **MR. GIUFFRA:** Yes, Your Honor. The goal of Fiat
17 Chrysler is to have a global settlement with all of the
18 interested parties, from obviously the Department of Justice,
19 the EPA, and CARB, but also the PSC, as well as 50 states, and
20 we are in active discussions with 49 of the states. They're
21 part of a multistate group, and then California is separately
22 represented. And, you know, we'd like to reach an agreement
23 with everyone, and that's our goal.

24 **THE COURT:** All right. Now, in terms of sharing
25 documents with them, I understand that they are not technically

1 parties to this litigation and there may be some impediments
2 policy-wise, at least from the Government's perspective.

3 I would just reiterate what I had said previously, that I
4 think it's important that at the earliest point possible that
5 the Attorney Generals, who are in discussions with FCA, have
6 access. Perhaps under policy, government policy, that can't be
7 done until there's some approval. If that's the case, you
8 know, perhaps that's the case, but I would urge the parties to
9 get the documents as soon as possible so that doesn't hang up
10 this process either.

11 **MR. GIUFFRA:** Your Honor, if I could just be heard on
12 this one point.

13 You know, we are probably going to, you know, increase our
14 discussions with the Attorney Generals in the next several
15 weeks, and the issue that they are most focused on is the
16 consumer-facing provisions in our agreements.

17 We've obviously had discussions with both the PSC and the
18 DOJ, EPA, and CARB, and those would be things like, for
19 example, what are the warranties.

20 It would be extremely helpful and would help facilitate
21 the discussions if we were able to at least share with the
22 Attorney Generals what we were prepared to do; and I think
23 that, you know, our willingness to, for example, give a
24 warranty is something that, to some extent, it's really our
25 information, it's our willingness to do something, but I know

1 that in those discussions that's something that's very
2 important to the state AGs because their interest is obviously
3 protecting consumers. And so to the extent we can share that
4 kind of information with the state AGs, it certainly would
5 facilitate our ability to bring resolution.

6 **THE COURT:** All right. Is there any impediment to
7 that?

8 **MR. GIUFFRA:** I would want to -- you know, obviously I
9 think we -- I think we have the ability on our own to just say,
10 well, we're going to provide this kind of a warranty, unless
11 the government has some objection to it, and I don't know
12 whether they do have one. Just out of an abundance of caution,
13 I wanted to just float that issue.

14 **THE COURT:** Okay. Let's see if the government has any
15 objection to FCA sharing information regarding substantive
16 consumer-facing issues that it intends to provide under the
17 settlement agreement.

18 **MS. RENDÉ:** Yes, we object. We're happy to discuss
19 offline with FCA about this, but at this point we object.

20 **MR. GIUFFRA:** I think, Your Honor, our ability to say
21 to another party that's litigating with us "We're prepared to
22 do the following three things as part of a settlement" is not
23 information that's confidential to the United States. It's our
24 information.

25 **MS. RENDÉ:** We're happy to speak with FCA about the

1 information that they can share. So at this point right now
2 being told about this, this is our reaction; but as I
3 mentioned, we're happy to speak with FCA.

4 **THE COURT:** Okay. Ms. Cabraser?

5 **MS. RENDÉ:** I'm sure we can come up with something.

6 **THE COURT:** Okay.

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

8 I'm sure this is going to be a topic of discussion after
9 the status conference with the governmental folks.

10 As far as the PSC is concerned in terms of the
11 consumer-facing, documentation, including the warranty
12 discussions with FCA, we don't have and we haven't had any
13 objection to having those shared, and we've expressed this
14 through the settlement master with the multistate group at the
15 appropriate time.

16 So it's not an impediment as far as we're concerned but,
17 again, this is a multidimensional situation here where
18 everything intersects at least on the edges, with respect to
19 the DOJ, the EPA, CARB, the California AG, the PSC, and the
20 multistate group. So for our part, we don't want to initiate
21 any information sharing that would be seen as
22 counterproductive.

23 That said, I'm hopeful that we can work through all this
24 so that all of the parties that are interested in an overall
25 resolution can have the access they need and would like to have

1 to the aspects of the documentation and negotiations that are
2 ongoing.

3 That's the best way for everyone to meet the November
4 pencils down.

5 **THE COURT:** All right. Well, you know, I'm not even
6 sure whether the government would have standing to object to,
7 for instance, the FCA telling the multistate AGs, "Here's what
8 we're willing to do," or the PSC indicating what are the terms
9 of its proposed settlement provided the two parties to that
10 don't object.

11 But, in any event, I'd like you to meet and confer and see
12 if you can work something out with the goal of getting
13 information in order to facilitate the global resolution of
14 this case, which I think everybody wants.

15 Again, if there's a problem in that regard, please convey
16 that and discuss that with Mr. Feinberg. Even though he's not
17 directly involved in the negotiations between FCA and the
18 multistate Attorney Generals, he should be informed of any
19 developments or problems in that regard. All right?

20 **MS. RENDÉ:** Yes, Your Honor.

21 **THE COURT:** All right. Thank you.

22 All right. So that brings us -- I'm pleased to hear that
23 progress is being made. I'm hopeful we can come to terms soon
24 along the timelines that you-all stated with respect to the
25 nonmonetary terms; and that with the ongoing discussions with

1 respect to the monetary aspects, I hope that the parties can
2 move forward and see if a resolution can be reached.

3 Obviously, as I've indicated, I am not intending to slow
4 down or stop this litigation unless there's a clear indication
5 that we're headed in that direction and it makes sense in order
6 to preserve resources.

7 What that also means is that as we go on, resources are --
8 tremendous resources are being put into this case. We've got
9 substantial motions, I've got a big motion under submission on
10 the motion to dismiss. There's major class certification
11 motions with which is affiliated numerous *Daubert* and other
12 matters, and then we have one of the things I want to discuss
13 is the discovery and some of the international discovery that
14 has to be undertaken. So there's a great deal of work that has
15 to be done; and, therefore, as in any large case, the sooner a
16 resolution can be reached, if there's going to be a resolution,
17 the better. But at this point there's not enough of an
18 indication to me to stop the presses so we're going forward.

19 So let me ask first about the status of discovery. It
20 appears that significant numbers of depositions have taken
21 place. All the represented plaintiffs, I think, have been
22 deposed, if I'm not mistaken; but there are issues about
23 witnesses outside of the United States, particularly in Italy,
24 and the possible need to invoke the international process in
25 that regard and the timing of that.

1 So can someone give me an update as to where they see
2 discovery taking us and what the time frame might be?

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

4 Look, we've made a lot of progress in terms of discovery,
5 but this is, you know, potentially a big case and we have spent
6 a lot of time working through, you know, document issues, for
7 example, and we recently got a list of revised, you know,
8 search terms and custodians from the PSC on documents.

9 But in terms of the depositions, my understanding is that
10 there have been roughly 42 total that have been noticed so far.
11 Of the 42, 30 are domestic; and of the 30 that are domestic, 12
12 have been completed and then 2 were withdrawn.

13 There are 12 Italian witnesses and FCA has encouraged the
14 Italian witnesses to participate in the case. Under Italian
15 labor law, we can't compel our employees to participate in
16 civil litigation in the United States, and those employees are
17 invoking their rights under Italian law to require that they be
18 deposed pursuant to the Hague process.

19 It's my understanding that the Department of Justice has
20 indicated that it may proceed through the Hague process.
21 That's a process that takes months. And I'm not certain as to
22 what steps -- I don't believe -- at least on our end we're not
23 aware of steps that the Department of Justice has taken to
24 start that process, but -- and there has not yet been,
25 obviously, any merits expert disclosures or expert, you know,

1 discovery, and that's going to take in a case like this at
2 least three to four months would be my guess.

3 So we still have some depositions to do. We have this
4 Italian issue, which is an important one. And, again, I
5 believe the Hague process could easily take three months, four
6 months to work through.

7 **THE COURT:** I'm going to ask the United States to
8 comment in a moment, but let me make sure I understand that
9 only the United States is seeking to take the depositions of
10 these 12 witnesses in Italy or is it also the PSC?

11 **MS. RENDÉ:** It's the United States in conjunction with
12 the PSC. We've been taking depositions concurrently.

13 **THE COURT:** Okay. So the PSC is involved as much?

14 **MS. CABRASER:** That's right, Your Honor.

15 **MS. RENDÉ:** That's correct.

16 **MS. CABRASER:** We have been coordinating our discovery
17 efforts with the United States and it's basically consolidated
18 discovery.

19 **THE COURT:** All right. So what's your perspective
20 about the Italian witnesses and timing?

21 **MS. RENDÉ:** Sure. And I believe we just added one
22 more to the number of witnesses located in Italy as I was not
23 aware that one person currently lives there.

24 That said, we are speaking with private counsel for these
25 witnesses. I just had a conversation yesterday, and it appears

1 that a few of the witnesses are willing to be deposed so we're
2 trying to work through this process.

3 That said, we are also going through the process of
4 putting together the package to try to compel testimony through
5 the Hague Convention. It is a lengthy process and we're
6 working on it so the more we can work out with counsel, the
7 better.

8 **THE COURT:** If you have to resort to Hague Convention,
9 what's your forecast as to timing these days?

10 **MS. RENDÉ:** Three months is -- three months is a fair
11 assessment. It might be a little bit longer than that.

12 **THE COURT:** And I understand there's an issue about if
13 it goes to trial, whether the United States case against FCA
14 will stay in this court absent consent from the defendants, or
15 from the parties for that matter. But putting that aside for
16 the moment, what's your forecast for when discovery can be
17 completed in this case?

18 **MS. RENDÉ:** With the exception of the witnesses
19 located in Italy, we believe that we could complete fact
20 discovery by the end of this year. And then along -- go ahead.

21 **THE COURT:** Yeah. So within the next two, three
22 months then?

23 **MS. RENDÉ:** That's correct. We think that that is
24 feasible.

25 **THE COURT:** Okay. And --

1 **MS. RENDÉ:** With the exception of the Italian
2 witnesses.

3 **THE COURT:** And I take it they are fairly important to
4 the case?

5 **MS. RENDÉ:** Yes. They are the people who did the
6 calibrations.

7 **THE COURT:** And if that takes three, four, five or
8 more months, that could put us into early 2019,
9 February-March 2019?

10 **MS. RENDÉ:** That's correct. And this is why, again,
11 we're trying to work with private counsel for these witnesses.

12 **THE COURT:** Okay. All right. Let me see if the PSC
13 has a different perspective.

14 **MS. CABRASER:** Your Honor, the PSC basically concurs
15 with the United States' view on this in terms of the ability to
16 get all but the Italian witnesses fact discovery completed, and
17 we're hopeful that that process with the Italian witnesses can
18 be expedited as Ms. Rendé reported in.

19 A caveat is with respect to Bosch. We had some discovery
20 disagreements with Bosch. My understanding is that thanks to
21 the magistrate judge in this case and the good faith of the
22 parties, those disagreements have been resolved.

23 Mr. Stellings can speak to that in greater detail, but
24 that means that we will be playing catch-up with respect to the
25 Bosch discovery in this case. We're willing -- we're willing

1 to do it, but it's a question of being able to review the
2 information and then scheduling necessary depositions.

3 **THE COURT:** So what -- taking the catch-up into
4 account, what's your forecast as to when discovery can be
5 completed?

6 **MS. CABRASER:** I remain optimistic that we can get the
7 essential discovery done by the end of this year or close to
8 the end of this year. We may or may not be coming back to the
9 Court with a modification of that. We would be doing that in
10 conjunction with the United States.

11 We don't want to see the litigation go off onto a myriad
12 of discovery tracks, so we're all trying as hard as we can to
13 be efficient and to conduct the essential fact discovery so
14 that we can hold our proposed trial date frame. I don't think
15 we're ready to recommend that that be moved at this time.
16 We're still hopeful that we can get our discovery done.

17 **THE COURT:** All right. Mr. Giuffra?

18 **MR. GIUFFRA:** You know, again, Your Honor, I think we
19 have, you know, a fair bit of work to do. Realistically, I
20 think that we're probably talking about no earlier than, you
21 know, April-May of next year when you get all this discovery
22 done, at least on the fact side.

23 Then you're looking at expert discovery. I think the
24 expert discovery, realistically in a case like this, is
25 probably, you know, three months. And so then -- and then

1 you'd have summary judgment motions. So I do think, you know,
2 there's a fair bit of work to still do.

3 And I know the question Your Honor is about to ask me,
4 which is setting a trial date. You know, again, I think that,
5 you know, we want to get a comprehensive, you know, resolution
6 with everyone.

7 There's obviously a risk we don't come to terms with the
8 government on the penalty amount. I'm hopeful that we will.
9 That would be a subject for a trial, and at this point, you
10 know, we're not consenting to have the trial here; but I'm
11 hopeful that we'll be able to work it out with the government.

12 Similarly, with the PSC, I'm hopeful we can work it out
13 with the PSC. And, you know, so this will become something
14 that doesn't, you know, need to be -- to be -- come to
15 fruition.

16 I'm a bit concerned about, you know, setting trial dates
17 and then distracting people from the settlement. Now,
18 obviously there's a lot of lawyers working on this case, but I
19 think realistically now that Your Honor has been told that
20 we'll have, you know, some sort of -- the white smoke will come
21 up from the government hopefully, you know, by sometime in
22 early November and, you know, we're talking about maybe even
23 submitting settlement papers by the end of the year, and
24 there's a process then for approval, that you have an ample
25 opportunity to set a trial date, you know, a little further

1 down the road rather than, you know, arbitrarily setting one
2 now and having it, you know, be moved, and it will just become
3 a distraction almost I think.

4 And we're all working hard. I mean, we're working on
5 class cert now. We're working on the depositions. So I don't
6 see that as a needed thing to do at this point.

7 **THE COURT:** Well, how would -- if you're working on
8 all that in preparation for trial and you're still foraging
9 ahead with depositions and possibly working out a completion of
10 depositions in Italy, I'm not sure what the distraction would
11 be.

12 I mean, doing a class cert motion is a distraction, so to
13 speak, doing all the *Daubert* motions is a distraction, but
14 we're foraging ahead. So I'm not sure what the downside is in
15 letting the parties know that this is all leading to a place
16 and a time.

17 **MR. GIUFFRA:** Well, I think the issue I would have,
18 Your Honor, is that, first of all, we don't even know the
19 contours of the case yet. We don't know what claims are in the
20 case. We don't know how big a trial we're going to have. You
21 know, I don't know if the other sides have a view, but if it's
22 a trial about, say, penalty and that happens in Detroit, maybe
23 that is a long trial of two or three, you know, weeks, maybe
24 into a month. I don't know. A trial with the PSC, I have no
25 idea what the length of that would be.

1 So to set a trial date without even knowing what the
2 length of trial would be seems to me to be premature. Plus, we
3 don't even know what the impact of the fix would be. If we get
4 the fix and the fix is approved, the fix would obviously have
5 an effect on the scale of a trial and what the length of the
6 trial would be.

7 And, you know, in this case we talked earlier about, you
8 know, sometime in, you know, next year. I certainly would be
9 recommending doing it after the summer because, first of all,
10 it's never going to happen. If you set it for June, it's going
11 to be a one- or two-month trial, I don't see it, you know,
12 something you'd want to be doing at that period of time.

13 But, in any event, I think it's likely that until you know
14 what the scope of the trial is, it's kind of hard to set and
15 block out in your calendar, you know, is it a two-week trial, a
16 three-week trial, or a two-month trial, and I don't know what
17 the length of the trial would be at this point. I don't know
18 what the issues would be. We may stipulate to certain issues.

19 You know, one issue that could come up in a trial is,
20 well, were there undisclosed AECDs in the vehicles. I don't
21 know what our position would be on that. That may be
22 determined on the government's settlement. We have a
23 settlement with the government but we don't have one with the
24 PSC. The trial might look one way based on things we say in
25 our government settlement papers.

1 So I just think that getting the benefit of a little bit
2 more factual legal development in this case would allow the
3 Court to set a realistic trial date with a realistic length of
4 the trial, and to do so now we would literally be shooting in
5 the dark.

6 And I dare say I doubt the other side can realistically
7 say, "Your Honor, we think it's a three-week trial, a four-week
8 trial. These are the issues." We don't know what the issues
9 will be in the case, and we'll have a much better handle in
10 three or four months.

11 **THE COURT:** Well, we could always assume the worst
12 case scenario and assume a whatever the length is trial might
13 be and work backwards from there. I mean, you know, that's not
14 uncommonly the case, that we set trials well in advance. I
15 often set them at the first CMC early in the case before we've
16 even heard necessarily motions to dismiss, motions for summary
17 judgment. So you never know -- at least it's not my practice
18 to wait to set trial until a summary judgment motion has been
19 decided. I mean, we've got to get a timeline going and there
20 are adjustments along the way.

21 **MR. GIUFFRA:** I mean, realistically, you know, even if
22 Your Honor set a trial date, it probably would get moved,
23 but -- because trial dates typically, in my experience, often
24 get moved. Maybe not in this court.

25 **THE COURT:** There's certain -- yeah.

1 **MR. GIUFFRA:** Some judges --

2 **THE COURT:** Some of my colleagues, you might not even
3 be able to get those words out of your mouth.

4 **MR. GIUFFRA:** You never know.

5 But our only point would be, Your Honor, realistically the
6 parties are really working hard to try to settle the case. I
7 can represent to you that Fiat Chrysler would like to settle
8 the case with everyone.

9 There are a lot of uncertainties as to what the scope of
10 the trial will be. What effect does the fix have? Does the
11 fix, you know -- what effect does that have on the damages? Do
12 we settle with the government? What does our government
13 settlement have on a PSC case? Is the case just with the PSC?
14 What are the issues of the trial? We don't know yet.

15 And I think you'll have a much better handle on it after
16 you rule on the motion to dismiss, after you rule on class
17 certification. And if we settle with -- you know, obviously
18 with the government and with the PSC, it all may become moot.

19 So there's just a lot of moving parts and, you know, I
20 dare say that you'll know a lot more by, you know, say the day
21 of the class certification hearing in November so you could put
22 it off till then, and then at that point you'll have a sense as
23 to how you're going to rule on class certification. You'll
24 rule on the motion to dismiss. We'll know where we are on the
25 settlements. And then you can set the date, you know, then and

1 I don't think it would be much different than it would be now.

2 I'm just concerned about setting a date and having to sort
3 of plan on a theoretical trial that, you know, may not even
4 happen and then not knowing how long it would even be.

5 **THE COURT:** All right. Ms. Cabraser, what's your
6 thought about deferring a setting of a date until November 20th
7 when we hear the motion for class cert at which point we'll
8 have -- presumably I will have ruled on the motion to dismiss
9 that's pending, I will have a good idea where we're going on
10 class cert, et cetera, et cetera?

11 **MS. CABRASER:** Well, Your Honor, you know, the points
12 Mr. Giuffra made are true in any case where the Court is
13 setting a trial date. You never know everything you'd like to
14 know until the final rulings on the *motions in limine*, and
15 things can always change.

16 But having a trial date gives us a point to shoot for. It
17 enables us to focus our efforts. The trial is a trial of the
18 facts and the jury will be deciding the facts, and the basic
19 facts we don't see changing between now and then.

20 The scope of the case could change. The claims might
21 change. That means the content of the jury instructions could
22 change, but those things are typically not addressed until the
23 final pretrial conference or thereafter.

24 But, meanwhile, we are discovering the facts as pertinent
25 to the allegations in the complaints, both the governmental

1 complaints and the class complaints, and we don't see those
2 changing.

3 So that's a long-winded way of saying we defer to the
4 Court to set a trial date today or at an appropriate time.
5 We're happy with having a trial date set today. It gives us
6 something to shoot for and it helps us focus all of our
7 efforts.

8 **THE COURT:** What's your estimate of once fact
9 discovery closes how long will be needed to complete expert
10 discovery?

11 **MS. CABRASER:** That would take two months.

12 **THE COURT:** All right. So end of February to
13 complete --

14 **MS. CABRASER:** End of February.

15 **THE COURT:** -- if all things go well?

16 **MS. CABRASER:** That's assuming, you know, that we
17 continue as intensively as we've been, which I think everyone
18 has the expectation of doing.

19 Look, we're not -- I don't think anyone is operating on a
20 leisurely schedule. That just isn't done anymore in complex
21 litigation and it's all to the good. So we are all used to
22 operating under demanding schedules. In fact, that seems to be
23 the best way to get things done when we're all out of our
24 comfort zones and operating intensively. It has a way of
25 refining the issues and narrowing the issues, and that assures

1 that we're going to be discovering what's most important,
2 disagreeing about the important things, and reaching agreements
3 wherever we can.

4 **THE COURT:** All right.

5 **MR. GIUFFRA:** Your Honor, can I just be heard for one
6 second? I have something that's going to affect probably us
7 the most.

8 **THE COURT:** Yes.

9 **MR. GIUFFRA:** If we have this issue with the Italian
10 discovery, which I gather is a two- or three-month process, now
11 maybe that starts, I just think realistically, you know, you're
12 not going to get your expert discovery done until, you know,
13 May or June at the earliest. I mean, unless someone wants to
14 challenge that, I don't -- I just think realistically that's
15 what you're talking about. Then you have summary judgment
16 motions. The loser on the class cert is going to have a 23(f)
17 petition.

18 So realistically I think you're not talking about a trial
19 until sometime in the fall of 2019. And so my only -- my big
20 concern would be I wouldn't want to set one, say, for June,
21 which I think is completely unrealistic.

22 And so I'm just thinking when you think about all the
23 things that have to happen. Plus we could well be in a
24 situation where we're doing a settlement with, say, the
25 government entities as well as the state AGs and then maybe

1 have litigation still going on with the PSC. I don't know.
2 Hopefully I have settlements with everyone.

3 **THE COURT:** All right. Well, let's do this --

4 **MR. SLATER:** Your Honor?

5 **THE COURT:** Yes?

6 **MR. SLATER:** Matthew Slater for the Bosch defendants.

7 Your Honor, I agree with the statements that Mr. Giuffra
8 has made. Just one further comment with respect to the
9 consideration of setting a trial date at or in connection with
10 the class certification hearing.

11 One of the issues the Court will be considering at that
12 time is the question of superiority, and on occasion courts
13 have found that the use of bellwether trials can be helpful
14 either as an alternative to a class trial or as a means to
15 determine whether class certification is appropriate.

16 And obviously the scope and the effort required in
17 connection with individual trials is different than what is
18 required in a class context, and it might be a tool that the
19 Court would want to consider in connection with class
20 certification to decide.

21 **THE COURT:** To hold a bellwether trial on the merits
22 as a means of informing class certification?

23 **MR. SLATER:** It could inform class certification in
24 deciding whether, in fact, the issues are common and whether
25 the evidence goes in the same way and is decided the same way

1 in the different bellwether trials.

2 There are issues -- just -- there are a lot of issues in
3 which that may play out. We could explore that; but, as I
4 said, it's an issue that you could consider in connection with
5 the hearing that's scheduled on November 20th and then decide
6 what to do with trial scheduling from there.

7 I fully agree with --

8 **THE COURT:** So you're suggesting even deferring
9 resolving the motion for class certification, which is
10 scheduled to be heard next month?

11 **MR. SLATER:** I'm suggesting it's something that you
12 can take into account at that time and based on your decisions
13 with respect to class certification in which you can -- and I
14 think under the superiority prong do need to consider the
15 alternatives -- can consider scheduling comprehensively at that
16 point.

17 **THE COURT:** All right. Ms. Rendé?

18 **MR. SLATER:** The only other point I'd make,
19 Your Honor, is there is a complication of joining Bosch in a
20 trial with the FCA defendants. If they either reach a -- go to
21 trial with the government and are bound by decisions in a
22 government case or if they reached a resolution with the
23 government in which they make certain admissions, there is the
24 potential for quite significant prejudice for our clients, and
25 we would want to be able to consider that at an appropriate

1 time as to how the trial would be conducted.

2 **THE COURT:** Well, how might that play out?

3 **MR. SLATER:** It might play out by having separate
4 trials.

5 **THE COURT:** Why would that be less prejudicial than
6 one trial? It seems like you'd want to be in that trial to
7 avoid any *estoppel* effect or some binding effect or -- I
8 thought your whole point is that there might be some prejudice
9 to your client resulting from the adjudication and the
10 resolution of the claims as between FCA and the government.

11 **MR. SLATER:** Right.

12 **THE COURT:** And I would think you would want to be a
13 part of that. That's usually the solution. If you're afraid
14 of being --

15 **MR. SLATER:** Well, we're certainly not going to be a
16 part of a trial with the government. We're not a party to that
17 case.

18 **THE COURT:** Well, I mean, a lot depends on what
19 happens here, whether there's consent. I mean, if we have a
20 consolidated trial, for instance, if we end up being in one
21 forum, that's one thing; if we end up being in a different
22 forum, it could be something else. In that case, you may have
23 to make your pitch to the Eastern District of Michigan.

24 **MR. SLATER:** If the EPA case goes to the
25 Eastern District of Michigan, there's no issue to address

1 because Bosch is not a defendant in the case that's been
2 brought by the United States.

3 **THE COURT:** I thought your concern was there might be
4 some findings there that would then impair your --

5 **MR. SLATER:** The concern is if there is some *estoppel*
6 effect against the co-defendant, then what impact that would
7 have on how the case goes in against our client.

8 **THE COURT:** That might argue to have the PSC case, in
9 which you are a part of, tried first and tried more quickly so
10 you get your adjudication on the merits rather than through
11 some *estoppel* effect in the Eastern District of Michigan.

12 **MR. SLATER:** Based on what the Government's saying,
13 that might happen anyway, but --

14 **THE COURT:** Okay.

15 **MR. SLATER:** All right. Thank you, Your Honor.

16 **THE COURT:** All right. Thanks.

17 Ms. Rendé?

18 **MS. RENDÉ:** Your Honor, you were discussing the
19 schedule for expert discovery, and --

20 **THE COURT:** Yeah.

21 **MS. RENDÉ:** -- I know Ms. Cabraser and you mentioned
22 February regarding PSC. Mr. Giuffra mentioned May or June
23 regarding FCA.

24 As we've stated in the CMC statement, I think both this
25 time and the last CMC statement we filed, in our view

1 Phase I expert discovery schedule for the United States doesn't
2 need to be identical to the schedule for the class plaintiffs,
3 although having it similar would be helpful.

4 That said, as far as the United States is concerned, we
5 believe that it would be appropriate for expert discovery to be
6 completed by spring, perhaps April or May.

7 **THE COURT:** Is that keyed in part to the issue about
8 the Italian witnesses too, or is that --

9 **MS. RENDÉ:** Yes, in part.

10 And perhaps towards the latter part of spring, keeping
11 that in mind with the motion for summary judgment, you know,
12 sometime late summer perhaps.

13 **THE COURT:** All right. Let me get -- thank you -- any
14 further comments from Ms. Cabraser.

15 **MS. CABRASER:** I don't think so, Your Honor. I think
16 we would concur with the spring expert projection of Ms. Rendé.

17 We hadn't heard -- at least I don't recall having heard
18 from Bosch counsel before on the bellwether concept. Some
19 courts have done that.

20 **THE COURT:** Preclass certification?

21 **MS. CABRASER:** Prenationwide class certification in a
22 case where there are not federal statutory claims pending.

23 It's a bellwether class, not an individual bellwether
24 case. I mean, there's an entire panoply of techniques that are
25 available to MDL transferee judges to determine class

1 certification issues, to determine trial structure issues.
2 We're happy to engage in any further briefing or submissions on
3 any of that that the Court would deem helpful and instructive
4 as we go forward.

5 It's news to us today, and I don't know whether it would
6 be appropriate in our view in this case at all, but we would
7 defer to the Court if you'd want to hear more information on
8 that.

9 **THE COURT:** All right. Well, I mean, you're involved
10 now in the process of having briefed the class cert and I'm
11 going to go forward. If somebody has a different idea as to
12 how to go forward, I guess we can discuss that at the hearing,
13 but right now I don't see any reason to deviate from the
14 traditional process but it may turn out that in our discussions
15 in the argument that there may be issues that warrant further
16 examination.

17 What I'm going to do is this: I'm going to defer setting
18 a trial date. I will endeavor to set one as we know more at
19 the hearing on the motion for class certification in November.
20 However, I am going to indicate that my expectation is that
21 fact-based discovery will be completed with the exception if
22 there is a problem of having to invoke the Hague Convention
23 with respect to the Italian witnesses, that will be done by the
24 end of this year.

25 It is also my anticipation that expert discovery -- again

1 this may be subject to the Italian witness problem -- would be
2 completed within three to four months thereafter.

3 That would suggest -- I won't set a date now, but that
4 would suggest a trial date perhaps late summer but still summer
5 or very early fall given the amount of time between expert
6 close, dispositive motion, pretrial work.

7 And I would be looking at possibly compressing some of
8 those normal time frames to get this heard. My goal is to get
9 this heard before the end of the summer, but I'm not going to
10 set a date yet; but I will indicate that my expectation is that
11 fact discovery will be completed by the end of the year so that
12 should not slow down. And we'll set a date -- some firm dates
13 with respect to the trial and trial deadlines on November 20th
14 at the hearing.

15 Just a couple housekeeping matters with respect to the
16 objections that defendants have filed and motions to strike a
17 portion of Dr. Shankar's declaration.

18 I guess I have not already granted FCA's leave to file the
19 surreply brief. Have I not ruled on that?

20 **MR. GIUFFRA:** I believe you have not, Your Honor.

21 **THE COURT:** All right. Well, then I'm going to grant
22 you that, but I'm also going to grant -- I think the PSC would
23 like to file a response to that; is that right?

24 **MS. CABRASER:** That's right, Your Honor.

25 **THE COURT:** All right. So you'll have that filed,

1 your surrepley brief, and expert report.

2 **MR. GIUFFRA:** I think we can do it in two weeks,
3 Your Honor.

4 **THE COURT:** All right. That would be --

5 **MR. GIUFFRA:** That would be the 17th.

6 **THE COURT:** The 17th?

7 And can you file something within a week thereafter?

8 **MS. CABRASER:** Yes, Your Honor.

9 **MR. GIUFFRA:** That should be fine.

10 **THE COURT:** All right. So that will be -- that will
11 take care of that housekeeping matter.

12 Is there anything else we need to address this morning?

13 **MR. GIUFFRA:** Your Honor, I just would like to be
14 heard for just a few minutes on this whole question -- I keep
15 raising it and I'm a little bit, like, I'm trying to foresee
16 what I think is going to happen -- on the class certification
17 and the desire to have an evidentiary hearing.

18 I strongly urge the Court to try to do this over two days
19 rather than one, and let me see if I can explain why quickly.

20 There's 100-plus -- 150-plus pages of briefing. You have
21 more than 1,000 pages of expert reports. There are more than
22 1500 deposition pages that have been taken. They have three
23 experts; we have two.

24 In my experience, holding an evidentiary hearing in a
25 class certification has now become much more routine. It's

1 been recognized -- the Ninth Circuit in the *Countrywide* case
2 recognized that oftentimes you can't just look at the pleadings
3 and make a determination. Courts in this district have
4 routinely started to hold evidentiary hearings, and we cited
5 cases: *Perez*. There's an *Apple* case. *Seagate Technologies* is
6 another one.

7 I personally have been involved in the last, you know,
8 several years in two class certification evidentiary hearings,
9 including one in July of this year, and I think it's just a
10 very efficient way for the Court -- it helps the Court deal
11 with the massive amount of documents. You have the ability to
12 see the witnesses testify. You can ask them questions.

13 The way I would envision doing this, we'd set up a big
14 screen. Each side could project on the screen, you know, what
15 they think is important, and in this case it will be things
16 like the ads or what the statistics show. And I think it would
17 really assist the Court.

18 **THE COURT:** Well, you do demonstratives in a
19 nonevidentiary hearing. What value -- I mean, evidentiary
20 hearing often is necessary to resolve disputed questions of
21 fact that can't be done on the paper where one would have to
22 assess, for instance, credibility or some other -- or
23 somewhat --

24 **MR. GIUFFRA:** In my experience you will have to do
25 that in this case because there are disputes over facts. And,

1 again, the plaintiffs have the burden on class certification to
2 establish that the requirements have been met.

3 Now, Ms. Cabraser can, you know, get up and say, "Oh, this
4 is just a typical, you know, consumer case." It's not. Okay.
5 There are very complicated --

6 **THE COURT:** Can you think as you sit here right now or
7 stand here right now what is an example of a disputed issue of
8 fact that goes to the question of one of the elements of
9 Rule 23 that would benefit from an evidentiary hearing?

10 **MR. GIUFFRA:** Well, one of the big issues that you're
11 going to have to deal with here is: What was the nature of the
12 ad campaign. Was there a national ad campaign or not? In the
13 *Volkswagen* case there was clearly a national ad campaign and
14 there was no dispute about it. The ads were run on the
15 Super Bowl.

16 In this case, you know, that is a very hotly contested
17 issue. We don't believe there was ever an ad that was ever run
18 anywhere that was one that was focused on emissions issues at
19 all.

20 **THE COURT:** You'll have plenty of documents to show
21 that and you'll have a declaration.

22 **MR. GIUFFRA:** You'll also, though, Your Honor, have
23 issues about, you know, say, value; right? Our experts --

24 **THE COURT:** Well, you're not going to answer that?
25 Other than documents and declarations saying "Here's what we

1 did. No, here's what they didn't do," et cetera, et cetera,
2 et cetera, what's an example of a witness whose live testimony
3 would benefit and inform the Court's analysis?

4 **MR. GIUFFRA:** I think, Your Honor, that for each one
5 of these -- first of all, there would be *Daubert* motions
6 against each one. So now we're going to have argument on five
7 *Daubert* motions -- I think it's five. Is that the right
8 number? I believe it's five -- plus the class certification
9 arguments, plus Bosch will obviously want to get involved in
10 it, in the context of three hours. I just think that that is
11 going to be way too fast.

12 **THE COURT:** Well, the length, maybe that is one
13 question. I mean, we devote more than three hours, as I
14 sometimes do for instance in complex claims constructions in
15 patent cases, but I rarely take live evidence.

16 So I guess my question is: Setting up for a lengthy
17 hearing, specially setting it, et cetera, et cetera, is one
18 thing; having live witnesses, which is always fun, but I'm not
19 sure how that's helpful here.

20 **MR. GIUFFRA:** Well, I think the virtue is that when
21 you have the witnesses -- I've seen it myself. The witnesses
22 come on for, say, you have a direct examination of 40 minutes
23 or 30 minutes or something like that. Then you get the
24 cross-examination. What the witnesses will do is they will
25 highlight the key points for the Court. You can ask questions.

1 Then they're subject to cross-examination. Again, you get to
2 see the give and the take, and you can assess both their
3 credibility but also you can get the issues narrowly focused
4 and identified.

5 I'm not saying, Your Honor, we should have a three-day
6 hearing, a four-day hearing, or a five-day hearing. I'm saying
7 two days. You're probably going to have a day anyway --
8 okay? -- no matter what just to deal with all the *Daubert*
9 motions. And so our view is that by having the people actually
10 sit there and testify -- look, there will be disagreements
11 about, for example, how were the ads picked by Professor
12 Shankar; right? That will be an issue. And was his
13 methodology one that was effective. Then our expert will come
14 in and say why he did it wrong. So there's going to be a
15 dispute, for example, about that.

16 There will be disputes about how you go and calculate
17 damages here. There will be a dispute -- you know, one of the
18 big things in this case that makes it tricky for class
19 certification is that the evidence is that the value of these
20 vehicles has not gone down since the NOV's were announced. In
21 fact, on a depreciation basis, they've actually gone up more
22 than one would have expected given normal depreciation.

23 So what does the other side do? Well, they go off and do
24 some survey that also includes people who bought gas cars and
25 they try to get people to value what the benefit was of the --

1 **THE COURT:** And you've cross-examined or you will have
2 cross-examined those experts and made your point. I mean,
3 that's what we typically see.

4 **MR. GIUFFRA:** But the problem, Your Honor, is that you
5 read it on a cold transcript. Okay? First of all, Your Honor
6 is going to sit and read 1500 pages of transcripts? I don't
7 think so. I mean, that's a lot of transcripts to have to read;
8 whereas, if we can just have the person here, you can watch
9 them, you can -- we'll obviously hit the most important points.
10 It's going to be a lot more efficient, and I think it's a more
11 effective way of doing the presentation.

12 Now, if the other side wants to do a drive-by, you know,
13 class certification thing, that's fine, but then the problem
14 becomes we'll obviously -- the loser will appeal. Now,
15 obviously the Ninth Circuit can decide whether to take it or
16 not.

17 But I really believe that given the complicated issues
18 here of damages, whether there was an actual injury, whether it
19 was suffered by all class members in the same way, whether
20 people bought these cars for the same reasons. Some people
21 cared about, you know, miles per gallon. Some people, you
22 know, wanted big trucks. Some people wanted, you know, hauling
23 capacity. Some people never saw, including class members, any
24 ads or cared about the environment. So those are all different
25 issues and those are all going to whether common issues will

1 dominate here or not.

2 And so I just think that given you have five experts, all
3 of these documents, the Court will benefit and the
4 administration of justice will benefit and you'll get a better
5 decision if you get the benefit of doing it this way rather
6 than something which is done strictly on the papers.

7 At a minimum, having slides and being able to at least
8 call the Court's attention to the most important, you know,
9 evidence is useful. But, you know, what are we going to do?
10 Just play clips from depositions rather than having the people
11 here? I think it's a lot more effective and it can be done. I
12 mean, I personally have done it twice in the last two years and
13 it's very effective, including once with Ms. Cabraser's firm in
14 a case in New York.

15 **THE COURT:** All right.

16 **MR. GIUFFRA:** So it can be done very effectively, and
17 I think that the alternative is one where, you know, you'll
18 just have a big morass of papers and it will be hard to get to
19 the nub of the issues.

20 **THE COURT:** All right. Your comments?

21 **MS. CABRASER:** Your Honor, this is the seventh request
22 that the Court alter its procedure, and we would say this:

23 The papers are thorough, they're voluminous. The Court
24 will have a record. The Court will be able to review that
25 record. The Court will be able to determine what format of a

1 hearing would be most helpful to it. This Court is no stranger
2 to complex consumer cases, including complex auto consumer
3 cases, including complex consumer fraud cases.

4 With respect to what would be required or expected of this
5 hearing, the Ninth Circuit made itself very, very clear this
6 year in the *Sali versus Corona* case, 889 F.3d 623, that it has
7 never equated a District Court's rigorous analysis at the class
8 certification stage with conducting a minitrial.

9 And we believe what FCA is asking for is actually a
10 minitrial, which conflates the Rule 23 analysis to determine
11 whether or not the actual factual determination of common
12 questions of fact is best done in a class trial format with the
13 actual answers to those questions, which are the province of
14 the fact finder. The fact finder at trial, the jury at trial,
15 will have live witnesses, fact witnesses and expert witnesses.

16 There were 60 class representatives deposed for this case.
17 The Court has access to the full transcripts. The parties have
18 excerpted and analyzed and presented that, and the same will be
19 done with the experts.

20 So it's up to Your Honor, but our point is this should not
21 digress into a minitrial, which is what FCA is requesting.

22 And we've heard several pre-arguments of class
23 certification. We've heard pre-arguments of the case on the
24 merits. We've heard an opening trial statement. We've been
25 holding our fire on the class side to when and if that's

1 appropriate.

2 We think the proper focus and the most instructive focus
3 of a hearing on class certification is with respect to Rule 23
4 analysis: Are there significant questions of fact that have a
5 common answer such that a jury answer, a fact-finder answer, to
6 those questions in a class-wide trial binding on the class,
7 binding on any subclasses, binding on one or both of the
8 defendants is the superior mechanism among available
9 mechanisms? And that doesn't require a minitrial and it
10 doesn't require a show trial.

11 And so we leave it to Your Honor to determine what format
12 is most helpful to you. It isn't a matter of due process to
13 either party. It's not a requirement of the Ninth Circuit in
14 cases of this complexity and magnitude, and we don't believe
15 that it's been the practice of this court.

16 Thank you.

17 **THE COURT:** All right. Well, I will reserve judgment
18 on that question.

19 **MR. GIUFFRA:** Your Honor, just one little two, three
20 sentences.

21 I'm not asking for a minitrial with the class reps coming
22 up here and asking, "You know, you say you bought the car for
23 this reason; you say you bought it for that reason." What I'm
24 saying is we have five experts and all we're talking about is
25 having the experts testify live and be subject to

1 cross-examination as a way to facilitate Your Honor --

2 **THE COURT:** But you're not suggesting this in lieu of
3 the extensive written record and all the excerpts and stuff?

4 **MR. GIUFFRA:** Of course not.

5 **THE COURT:** So you want the Court to review both the
6 thousands of pages as well as take testimony?

7 **MR. GIUFFRA:** Your Honor, I'm trying to be practical,
8 and so what I'm saying is I think that --

9 **THE COURT:** Yeah, I'm trying to be practical too. So
10 you're trying to entice me to say, "Well, you don't have to
11 look at all this stuff"; but then are you suggesting you'd be
12 willing to withdraw the voluminous record and we do it on the
13 basis -- I'd consider that.

14 **MR. GIUFFRA:** I just think it will be -- I think it
15 will be faster for the Court if you have the people testify and
16 they highlight the most important parts of their testimony.

17 **THE COURT:** Well, I will make that determination and
18 the question is, frankly, not going to be whether it's faster,
19 unless there's a proposal to withdraw some of the record and
20 have testimony in lieu of that, and that might be attractive in
21 some ways; but if that's not the case, it's the duty of this
22 Court to review everything that's material and relevant, and so
23 I don't see a timesaving.

24 Where it is relevant is if there are credibility-type
25 questions, something that can be gleaned from an evidentiary

1 hearing and having live testimony subject to cross-examination
2 that otherwise would not be apparent from the papers, then that
3 is something worth considering.

4 I will say that we may end up reserving, you know, more
5 time and I will invite perhaps formal presentation. I normally
6 just fire off questions, but something like this if you've got
7 a PowerPoint, if you've got some demonstratives that you think
8 are useful, that certainly has been useful in prior hearings on
9 various matters and I will be open to that. And I'm not
10 foreclosing it, but I'm going to look at it and make a
11 determination whether it's going to be helpful or not. All
12 right?

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

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

15 **THE COURT:** All right. So we'll see you on the 20th;
16 is that right? The 20th.

17 **MS. CABRASER:** Yes.

18 **MR. GIUFFRA:** Yes.

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

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

21 (Proceedings adjourned at 10:50 a.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: Thursday, October 4, 2018



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