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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION**

IN RE: VOLKSWAGEN “CLEAN DIESEL”  
 MARKETING, SALES PRACTICES, AND  
 PRODUCTS LIABILITY LITIGATION

) MDL No. 2672 CRB (JSC)

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This Document Relates to:

) **DEFENDANTS’ RESPONSE TO  
 PLAINTIFFS’ MOTION TO DISQUALIFY**

ACTIONS SET FOR  
 FEBRUARY 24, 2020 TRIAL

) The Honorable Charles R. Breyer

\_\_\_\_\_

1           Plaintiffs’ motion seeking to disqualify the Court (Dkt. No. 7186), filed on the eve of trial  
 2 *after* the jury has been empaneled, is a frivolous tactic to try to delay the trial and to pressure the Court  
 3 into reconsidering its correct legal rulings on Plaintiffs’ legally and factually unsustainable claims. This  
 4 is not the first such motion Plaintiffs have made *in this action*. In November 2018, Plaintiffs moved to  
 5 disqualify Magistrate Judge Corley because of her “intimate involvement with the class action settlement  
 6 process” (*see* Dkt. No. 5513 at 1), which this Court denied (*see* Dkt. No. 5519).

7           As the Court knows, motions to disqualify judges face a high bar. The test is “whether a  
 8 reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might  
 9 reasonably be questioned.” *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000). Notably, “[a]  
 10 judge’s views on legal issues may not serve as the basis for motions to disqualify.” *United States v.*  
 11 *Conforte*, 624 F.2d 869, 882 (9th Cir. 1980); *see Liteky v. United States*, 510 U.S. 540, 555 (1994)  
 12 (“judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.”). Indeed,  
 13 “expressions of impatience, dissatisfaction, annoyance, and even anger” by a federal district court judge  
 14 “do not establish bias or partiality.” *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012).

15           Here, Plaintiffs’ motion to disqualify is baseless and unwarranted. Plaintiffs’ unhappiness  
 16 with the Court’s entirely correct legal rulings is no ground for disqualification. This Court can (and  
 17 should) promptly decide whether Plaintiffs’ disqualification motion is legally sufficient. It is black-letter  
 18 law that “the judge against whom an affidavit of bias is filed may pass on its legal sufficiency.” *United*  
 19 *States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978). The fact that this Court has presided over the  
 20 resolution of the class action settlement is no basis for recusal. Courts routinely preside over the resolution  
 21 of class actions and the subsequent trial of opt-out litigation, such as this. To cite just a few examples, the  
 22 same judges are presiding over opt-out litigation after approving class action settlements in the BP  
 23 Deepwater Horizon MDL, the Takata Airbag MDL and the Fiat Chrysler EcoDiesel Emissions MDL.  
 24 And Plaintiffs have known for years that the Court would preside over this trial, but elected to wait until  
 25 after the jury was empaneled to move for disqualification.

26           Defendants submit this Response to apprise the Court of two matters relevant to this  
 27 motion:  
 28

1           First, the Court should know that filing disqualification motions appears to be the *modus*  
 2 *operandi* of Plaintiffs’ counsel, Bryan Altman and the Knight Law Group. In just a few hours of research,  
 3 Defendants have already identified four motions filed by Mr. Altman and the Knight Law Group to  
 4 disqualify the presiding judge in their cases. The four cases are *King v. Hyundai Motor Am.* (see Ex. A  
 5 to Declaration of William B. Monahan (“Monahan Decl.”); *Simmons v. Howard*, 2010 WL 5138973 (Cal.  
 6 Super. Ct. Sept. 30, 2010); *Bell v. FCA US LLC*, 2018 WL 6719284 (Cal. Super. Ct. Sept. 4, 2018); and  
 7 *Moshari v. Mercedes-Benz USA, LLC* (see Monahan Decl. Ex. B)).

8           Indeed, seven months ago, Plaintiffs’ counsel tried the same tactic, seeking to disqualify—  
 9 during the middle of trial—Judge Michael Jones of the California Superior Court, as biased. (Monahan  
 10 Decl. Ex. A.) In a sworn response, Judge Jones made clear that the real offense at trial was that “[Bryan]  
 11 Altman blatantly ignored the Civil Pre-Trial Orders . . . and evidentiary rulings,” and repeatedly elicited  
 12 and discussed inadmissible evidence that “Mr. Altman knew he was not to discuss.” (*Id.* at 5, 10.) It is  
 13 noteworthy that Judge Andre Birotte of the United States District Court for the Central District of  
 14 California recently chastised Mr. Altman for improperly eliciting excluded evidence from an expert  
 15 witness, “clearly violating” a prior court order. (See Monahan Decl. Ex. C (Dec. 12, 2019 Trial Tr. at  
 16 587:13-593:5, *Quintero v. Ford Motor Co.*, No. CV 18-1912-AB (C.D. Cal.)).)

17           Second, the crux of Plaintiffs’ motion to disqualify is that this Court has determined that it  
 18 should decide whether Defendants’ prior correction offer was “appropriate” under the Consumers Legal  
 19 Remedies Act. This is plainly pre-textual. Plaintiffs took the exact opposite position last Thursday, urging  
 20 that the Court should not ask the jury to decide this “legal” question. (Monahan Decl. Ex. D (Feb. 13,  
 21 2020 Hr’g Tr.) at 70:9-10 ([PLAINTIFFS’ COUNSEL]: “I know the Court wants to get it right and talked  
 22 about an advisory jury. I, frankly, think this is a legal decision.”).)

23           At the February 13 hearing, Plaintiffs’ counsel had the following exchange with the Court:

24           [PLAINTIFFS’ COUNSEL]: [I]f the test of an appropriate correction is  
 25 whether it’s legally sufficient, notwithstanding that there may be factual  
 questions, *I think here it’s something that the Court should decide.*

26           THE COURT: Okay. So regardless of when it’s decided, it is your view  
 27 that it’s a court decision?

28           [PLAINTIFFS’ COUNSEL]: Yeah.

....

THE COURT: [I]t is your view that the Court decides it [whether a correction offer is appropriate] and not a jury?

[PLAINTIFFS' COUNSEL]: I think the Court here should, Your Honor.  
(Monahan Decl. Ex. D (Feb. 13, 2020 Hr'g Tr.) at 71:9-12, 72:22-73:4 (emphasis added)).

\* \* \*

The Court should promptly deny Plaintiffs' frivolous motion to disqualify the Court.

Dated: February 20, 2020

/s/ Robert J. Giuffra, Jr.

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**ATTESTATION (CIVIL LOCAL RULE 5-1(I)(3))**

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from the signatory.

Dated: February 20, 2020

SULLIVAN & CROMWELL LLP

/s/ William B. Monahan

William B. Monahan