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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

This Document Relates to:

ACTIONS SET FOR FEBRUARY 18, 2020 TRIAL

MDL No. 2672 CRB (JSC)

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISQUALIFY PLAINTIFFS' EXPERT LOUIS J. FREEH AND EXCLUDE HIS PROPOSED TESTIMONY AT TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

The Honorable Charles R. Breyer

Hearing Date: February 6, 2020

Hearing Time: 2:00 p.m.

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on February 6, 2020 at 2:00 p.m., Defendants Volkswagen AG and Volkswagen Group of America, Inc. (together, "Defendants") will and hereby do move this Court to disqualify one of Plaintiffs' designated experts, Louis J. Freeh, a former federal judge and the former Director of the FBI, and to exclude his proposed testimony at trial. This Motion is made pursuant to the Court's inherent authority to disqualify experts, Federal Rules of Evidence 402, 403, 702, and 703, and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Robert J. Giuffra, Jr. and William B. Monahan, all pleadings and papers filed herein, oral argument of counsel, and any matter which may be submitted at the hearing.

Dated: January 13, 2020

/s/ Robert J. Giuffra, Jr.

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SUMMARY OF ARGUMENT

This is an opt-out case about the claimed economic damages of ten purchasers and lessees of seven Volkswagen and Audi TDI vehicles manufactured by Volkswagen AG ("Volkswagen" or the "Company") and marketed by Volkswagen Group of America, Inc. ("VW America"; together with Volkswagen, "Defendants"). To try to inflame and confuse the jury in the punitive damages phase of trial (should the case proceed to that stage), Plaintiffs propose to have Louis J. Freeh, a former federal judge and former Director of the FBI, give his opinion as a purported expert. This comes four years after Volkswagen rejected Mr. Freeh's demand for $15 million in guaranteed fees, *plus* 10% of any "savings" he could net Volkswagen, to represent the Company in its U.S. diesel-related investigations and litigations, and three years after he tried (but failed) to become Volkswagen's Monitor.

Mr. Freeh now intends to testify as an expert *against* Volkswagen (for a flat fee of $50,000, plus $1,850 per hour for his testimony) in the *same* diesel emissions litigation for which he was nearly hired to help oversee. Despite previously receiving privileged and confidential information from Volkswagen's senior-most executives and counsel, Mr. Freeh seeks to betray those confidences by opining on topics directly related to the sensitive documents and other privileged information he received. As explained below, Mr. Freeh's conflict of interest and receipt of confidential information disqualify him from serving as an expert adverse to Defendants.

Moreover, on the merits, the entirety of Mr. Freeh's opinion is improper and should be excluded. Plaintiffs would have Mr. Freeh opine that Department of Justice ("DOJ") prosecutors and Judge Sean F. Cox in the Eastern District of Michigan erred and misused their discretion in determining the appropriate criminal punishment for Volkswagen, and that they under-punished Volkswagen by recommending and imposing a $2.8 billion fine—a record penalty for an automobile company, and one of the largest criminal fines in U.S. history. (*See generally* Ex. 1 ("Freeh Report") to the Declaration of William B. Monahan.)[1] As the Court knows, that $2.8 billion criminal fine was imposed on top of the more than $20 billion the Company has paid

[1] "Ex. _" as used herein refers to the exhibits to the Declaration of William B. Monahan.

to both resolve civil claims by the DOJ, the EPA, CARB, the Federal Trade Commission, nearly 50 States, and class action plaintiffs, and to fully remediate all harm to the environment caused by its conduct. Nevertheless, Plaintiffs want to confuse the jury into awarding civil punitive damages under California law based on what Mr. Freeh believes the "proper" federal criminal "fine range . . . *should have been*[:] $34,174,676,748 to $68,345,353,496." (*Id.* at 5 (emphasis added).)

As demonstrated below, Mr. Freeh's opinion is not only irrelevant to punitive damages under governing California law, but would invade the exclusive role of the jury to determine the amount of punitive damages (if any) and attempt to use a former federal judge to mislead the jury into considering impermissible factors for assessing punitive damages. Mr. Freeh's opinion also touches on topics that are improper for expert testimony, such as speculating on the inner thoughts of Judge Cox and DOJ prosecutors and determining whether evidence establishes certain issues in dispute at trial. Lastly, Plaintiffs seek to use Mr. Freeh to defy this Court's prior ruling and parade before the jury the untested allegations made by Plaintiffs' counsel regarding Defendants' resales of TDI vehicles as "certified pre-owned," which this Court has already excluded as irrelevant to this opt-out case over seven TDI vehicles.

Pursuant to its inherent authority to disqualify experts, Federal Rules of Evidence 402, 403, 702, and 703, and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Court should disqualify Mr. Freeh and exclude him as a testifying expert.

1. Mr. Freeh Should Be Disqualified from Serving as an Expert Adverse to Volkswagen Because of His Prior Relationship with Volkswagen as Prospective Counsel in Its Diesel Matters. Under Ninth Circuit law, disqualification of an expert is "warranted" when, as here, (1) the expert had a prior confidential relationship with a now-adverse party, and (2) the expert received confidential information relevant to the litigation from that party. *Hewlett-Packard Co.* v. *EMC Corp.*, 330 F. Supp. 2d 1087, 1092-93 (N.D. Cal. 2004) (Fogel, J.). Where an expert is an attorney and received privileged information relevant to the instant litigation, disqualification is all but a given. *See, e.g.*, *N. Pacifica, LLC* v. *City of Pacifica*, 335 F. Supp. 2d 1045, 1049-50 (N.D. Cal. 2004) (Chen, J.) (disqualifying attorney-experts because they obtained confidential information relevant to current lawsuit during prior relationship with now-adverse

party); *see also Stencel* v. *Fairchild Corp.*, 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001) (even for non-attorney experts disqualification is appropriate where parties share "legal strategies, . . . the attorney's views on the relative strengths or merits of a claim or defense, . . . or anticipated defenses" with that expert).

In late 2015 and early 2016, Mr. Freeh sought out a prominent role representing Volkswagen as special counsel for its U.S. diesel-related investigations and litigations. To that end, Mr. Freeh engaged in extensive privileged and confidential discussions with Volkswagen's senior-most executives and counsel about the same diesel matters underlying this lawsuit, including discussing key documents and legal strategy. Mr. Freeh's contemplated mandate would have included a role overseeing both *this case* and the *exact same* criminal matter that is the subject of his expert opinion. (*See* Ex. 2 ("Freeh Dep. Tr.") at 80:13-24, 83:9-24; Ex. 3 at 1-2.) Indeed, Mr. Freeh sent a draft engagement letter to Volkswagen reflecting a lead role overseeing nearly all of Defendants' U.S. legal matters related to diesel emissions and proposing to be paid, on top of a guaranteed $15 million, 10% of any amount he could "save" Volkswagen by helping it achieve a reduced criminal fine—the very fine he now claims is too low as a result of a supposed conspiracy by Volkswagen and its counsel to conceal evidence from the sentencing court and prosecutors. (Ex. 3 at 3-4.) Mr. Freeh's role as prospective counsel created a confidential and privileged relationship with Volkswagen and satisfies the first requirement for disqualification.[2]

Evidencing the scope and extent of his privileged and confidential relationship with Volkswagen, Mr. Freeh retained (and produced to Volkswagen in response to a subpoena in this action) over 550 pages of communications regarding the diesel emissions matters with Volkswagen's executives and outside counsel. (Monahan Decl. ¶ 16.) This production included emails from Volkswagen's counsel attaching sensitive documents and legal memoranda, as well as emails from Mr. Freeh marked "privileged and confidential" in which he gave his advice on various diesel-related topics, such as the implications of those documents and how to conduct Volkswagen's internal investigation. (*Id.*) Mr. Freeh now proposes to opine *against* the Company

[2] After being denied the special counsel position, Mr. Freeh later contacted Volkswagen's General Counsel and lead U.S. outside counsel to congratulate them on resolving the criminal matter and to seek the job of Monitor for Volkswagen. He was also passed over for that position.

in open court on topics relating to the *very same* documents and information he received in privileged communications from Volkswagen. (Freeh Report at 3; Freeh Dep. Tr. at 151:8-152:3, 254:3-10, 269:17-25; Declaration of Robert J. Giuffra, Jr. ¶ 6.) Mr. Freeh's receipt of confidential information relevant to this action from Volkswagen "warrants" his disqualification. *Hewlett-Packard*, 330 F. Supp. 2d at 1092-93; *see N. Pacifica*, 335 F. Supp. 2d at 1049-50.

2. Mr. Freeh's Proposed Testimony Should Be Excluded on the Merits. Beyond Mr. Freeh's disabling conflict here, the substance of his proffered testimony is inadmissible for three reasons:

First, Mr. Freeh would opine that Volkswagen's "actual criminal fine [] ($2.8 billion) is substantially less than the lowest possible fine" that should have been imposed, and then argue that Volkswagen was under-punished by Judge Cox and the DOJ because the Company "certainly enjoyed more favorable sentencing circumstances than the then existing facts entitled it to have." (Freeh Report at 6, 11, 17.) Mr. Freeh then proposes to add that, according to his "proper calculation under the Sentencing Guidelines," the "fine range . . . *should have been* $34,174,676,748 to $68,345,353,496." (*Id.* at 5 (emphasis added).) The true purpose of Mr. Freeh's opinion is clear: to imply to the jury that unless it forces Defendants to pay massive punitive damages to 10 opt-out plaintiffs, Defendants will not have been "properly punished."

Mr. Freeh's opinions about the federal Sentencing Guidelines would impermissibly invade the "exclusive function of the jury" under California law to "determin[e] whether [punitive] damages should be awarded, and, if so, the amount," *Ferraro* v. *Pac. Fin. Corp.*, 8 Cal. App. 3d 339, 351 (Cal. Ct. App. 1970), and inject irrelevant, improper, and unduly prejudicial evidence into any punitive damages phase of the upcoming trial. Fed. R. Evid. 402, 403, 702; *see Moore* v. *United States*, 2015 WL 12910712, at *2 n.1 (S.D. Cal. July 7, 2015) ("opinions [that] invade the province of the jury . . . are not helpful to the trier of fact"); *Voilas* v. *Gen. Motors Corp.*, 73 F. Supp. 2d 452, 464-66 (D.N.J. 1999) (excluding proposed expert testimony that suggests to the jury approaches to calculating punitive damages or a range of potential monetary punishment).

Second, Mr. Freeh "opines" that the reason why Judge Cox imposed, at the recommendation of the DOJ, a $2.8 billion fine (and not some higher amount) was because the

"criminal conduct supposedly sanctioned at the April 21, 2017 sentencing was not fully revealed to the Court" at the time of sentencing. (Freeh Report at 17.) Without any factual basis, Mr. Freeh claims that Judge Cox and DOJ prosecutors were "not aware of" and "did not apparently consider" the possible "involvement of upper management" at sentencing, because Volkswagen and its counsel supposedly conspired to "intentionally or negligently conceal[this information] from Judge Cox" and "not truthfully admit the full scope of [Volkswagen's] fraud in the plea agreement." (*Id.* at 3, 5, 17-18; Freeh Dep. Tr. at 187:7-188:5.)

Mr. Freeh concedes that he has never spoken with Judge Cox or the DOJ prosecutors about Volkswagen's sentencing or criminal plea, and that he is unaware of any non-public communications between Defendants, Judge Cox and the DOJ prosecutors. (*See* Freeh Dep. Tr. at 11:19-22, 348:7-349:16.) This entire topic of Mr. Freeh's testimony is thus not an opinion; it is rank speculation—an impermissible field for expert testimony. *See Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590, 597 (1993) (expert testimony cannot be based on "subjective belief or unsupported speculation"); *Stanley* v. *Novartis Pharm. Corp.*, 2014 WL 12573393, at *6 (C.D. Cal. May 6, 2014) (excluding "the opinions of [expert] witnesses on the intent, motives, or states of mind" of others because they "have no basis in any relevant body of knowledge or expertise"); Fed. R. Evid. 702. If Mr. Freeh were allowed to testify, his speculations would create a trial-within-a-trial about the entirely collateral issues of Judge Cox's and DOJ prosecutors' states of mind at Volkswagen's sentencing, with the relevant fact witnesses being the DOJ attorneys who prosecuted Volkswagen and the sitting federal judge who sentenced Volkswagen.

Furthermore, the circumstantial evidence that Mr. Freeh invokes to "support" his speculation is, in fact, directly controverted by the factual record—underscoring just how improper his proposed opinions are. Mr. Freeh first asserts that Judge Cox was unaware of the possible role Volkswagen management played in the diesel fraud, but fails to account for Judge Cox's statement at sentencing *recognizing* that "[t]his is a case of deliberate, massive fraud *perpetrated by VW management*." (Ex. 4 at 26:16-17 (emphasis added); *see* Freeh Report at 12.) Mr. Freeh next contends that a single email was supposedly "uncovered" in civil discovery after sentencing "reveal[ing]" facts of which Judge Cox and the DOJ prosecutors were supposedly unaware. (Freeh

Report at 12.) This, too, is plain wrong: a criminal complaint the DOJ filed in the Eastern District of Michigan nearly four months *before* Volkswagen's sentencing described in detail that very email. (*See* Freeh Report at 12-13; Ex. 5 ¶ 37.) As is the case with Mr. Freeh's proposed opinion, "[e]xpert testimony should not be admitted when it is speculative, it is not supported by sufficient facts, or the facts of the case contradict or otherwise render the opinion unreasonable." *Estate of Gonzales* v. *Hickman*, 2007 WL 3237727, at *3 n.34 (C.D. Cal. May 30, 2007) (quoting *United States* v. *Rushing*, 388 F.3d 1153, 1156 (8th Cir. 2004)).

Similarly, in claiming that Volkswagen somehow obstructed the DOJ's investigation, Mr. Freeh ignores that the DOJ credited Volkswagen's substantial cooperation efforts in its plea agreement, noting that the Company "produc[ed] voluminous evidence and information; [] interview[ed] hundreds of witnesses in the United States and overseas; [and] provid[ed] non-privileged facts relating to individuals and companies involved in the criminal conduct." (Ex. 6 ¶ 3.A.2.) And, of course, neither the DOJ nor Judge Cox has made any statements or taken any actions in the nearly three years since Volkswagen's sentencing suggesting that the Company concealed facts or evidence during the investigation or sentencing process.

Third, Mr. Freeh's opinion that Defendants "continue[] to engage in wrongdoing" by reselling TDI vehicles that they repurchased under this Court's previously approved orders as "certified pre-owned vehicle[s]" (Freeh Report at 7, 13-17) simply parrots Plaintiffs' counsel's allegations in another lawsuit. Even worse, this testimony is nothing more than an attempt to skirt this Court's December 10, 2019 ruling excluding this exact evidence because "there is not a 'sufficient nexus' between that conduct and the conduct that injured Plaintiffs such that the labeling conduct would be relevant in determining punitive damages." (Dkt. No. 6973 at 2.)

FACTUAL BACKGROUND

A. Mr. Freeh's Prior Relationship With Volkswagen as Prospective Counsel

As part of its search for counsel in late 2015 and early 2016, Volkswagen discussed with Mr. Freeh his retention as a senior lawyer representing the Company in its U.S. diesel emissions investigations and litigations. (*See* Freeh Dep. Tr. at 14:16-15:7, 79:13-81:6, 83:9-24, 85:24-86:9, 225:15-25, 234:10-24.) Volkswagen actively sought—and received—Mr. Freeh's

legal advice on the ongoing government investigations into diesel emissions matters, including the then-pending DOJ criminal investigation and related civil litigations. (Giuffra Decl. ¶¶ 3-7.) Among other things, Mr. Freeh (a) made a 90-minute presentation to members of Volkswagen's Supervisory Board at the Company's headquarters in Germany (Freeh Dep. Tr. at 78:17-79:1, 86:10-17), (b) met face-to-face with the Chairman of the Company (*id.* at 231:10-232:13), (c) communicated with Volkswagen's new CEO (Monahan Decl. ¶ 16), (d) emailed on a near-daily basis with Christine Hohmann-Dennhardt, the Company's new Management Board member in charge of legal matters (*id.* ¶ 16), and (e) spoke regularly and met with the Company's General Counsel, Manfred Doess, and lead U.S. outside counsel, Robert J. Giuffra, Jr. (Giuffra Decl. ¶¶ 3-7; Freeh Dep. Tr. at 249:1-12.)

Pursuant to the privileged relationship Volkswagen enjoyed with Mr. Freeh as prospective counsel, the Company's General Counsel and lead U.S. outside counsel discussed sensitive topics with Mr. Freeh and solicited his legal advice about strategy and evidence related to the diesel litigations and investigations. These privileged communications included:[3]

1. disclosing to Mr. Freeh an important legal memorandum prepared by outside counsel concerning the diesel investigations and seeking Mr. Freeh's advice on the same (Freeh Dep. Tr. at 253:3-11, 255:15-19, 257:8-258:5; Giuffra Decl. ¶ 7);
2. sharing with Mr. Freeh important documents identified during the internal investigation and asking Mr. Freeh for his opinion on the implications of those documents on pending litigation in the United States, which he gave (Freeh Dep. Tr. at 151:8-152:3, 254:3-10, 269:17-25; Giuffra Decl. ¶ 6);
3. soliciting advice from Mr. Freeh about the ongoing internal investigation, supervised by the Volkswagen Supervisory Board, including who should be

[3] Volkswagen is expressly not waiving privilege over any discussions with Mr. Freeh, nor does it need to disclose the actual substance of the confidential information shared with Mr. Freeh to meet the standard necessary to disqualify Mr. Freeh. *See, e.g.*, *Trone* v. *Smith*, 621 F.2d 994, 999 (9th Cir. 1980) ("The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule is intended to protect.").

interviewed and additional document retention measures (Giuffra Decl. ¶¶ 3-4; Monahan Decl. ¶ 16); and

4. obtaining Mr. Freeh's views on strategy for approaching and resolving U.S. investigations and litigations, including the DOJ criminal investigation (Giuffra Decl. ¶¶ 3-4).

Volkswagen's discussions with Mr. Freeh were so advanced that, in January 2016, Mr. Freeh submitted a six-page engagement letter addressed to the Chairman of its Supervisory Board, CEO and Board Member in charge of Legal and Compliance. (Ex. 3.) Mr. Freeh sought a guaranteed $15 million, plus 10% "of the savings the company and its subsidiaries yield and/or the costs saved by settlements, including attorney's fees, fines, court judgments, and arbitration awards in the context with the special matters and due to the work of [Mr. Freeh]." (*Id.* at 3-4.) In his engagement letter, Mr. Freeh also proposed that the scope of his engagement include "direct[] responsib[ility] for the handling and supervision of" diesel litigation matters, including "civil law suits [] pending against the [C]ompany," as well as "enforcement measures, and official measures that have been or will be initiated in various jurisdictions in the United States." (*Id.* at 1-2.) Mr. Freeh proposed to "directly interact with the various US-American regulatory, criminal, and governmental authorities" regarding the "ongoing and future investigations and examinations," and "also directly manage and supervise the various external attorneys and consultants" retained by the Company. (*Id.*) This proposed mandate covered both the instant consumer litigation and the DOJ criminal investigation. (Freeh Dep. Tr. at 80:13-24, 83:9-24.)[4]

Volkswagen ultimately determined not to hire Mr. Freeh—a decision made easier by his exorbitant guaranteed and contingent fee demands. (Ex. 3 at 3-4.)[5] Nevertheless, Mr. Freeh correctly acknowledged in later press interviews the nature of his relationship with Volkswagen:

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[4] During this period, Mr. Freeh also contacted the DOJ attorneys who played key roles in the Volkswagen investigation—Deputy Attorney General Sally Yates and Assistant Attorney General John Cruden—to advise them that he might be retained by Volkswagen to represent it before the DOJ. (Ex. 7; Freeh Dep. Tr. at 228:4-229:22.) Evidencing Volkswagen's advanced discussions with Mr. Freeh, press in both the United States and Germany reported that the Company was close to hiring him in connection with the diesel litigation. (*See, e.g.*, Exs. 8, 9.)

[5] If his Report is to be taken at face value, Mr. Freeh would have received over *$6 billion* in fees for the criminal matter *alone* based on "savings" he generated against the potential penalty.

"Last January, I had discussions with [Ms. Hohmann-Dennhardt] and [Volkswagen]. ***However, these were confidential communications. I cannot talk about it.***" (Ex. 10 at 3 (emphasis added).)

In late 2016, just before Volkswagen's guilty plea was formally announced, Mr. Freeh mounted a second attempt to secure a central role in the Volkswagen diesel emissions matters. Mr. Freeh contacted Volkswagen's General Counsel and lead U.S. outside counsel to separately congratulate them on the Company's impending settlement with the DOJ and to request that the Company "please keep [him] in mind for any future role, such as monitor"—a highly remunerative role. (Ex. 11; Giuffra Decl. ¶ 9; Freeh Dep. Tr. at 220:21-221:4 (noting that fees for serving as Volkswagen monitor could have been in the "tens of millions of dollars").) Volkswagen did not recommend Mr. Freeh for the role, and, as the Court knows, the DOJ selected former Deputy Attorney General Larry Thompson as Monitor.

So, after being twice passed over by Volkswagen for important and highly compensated positions, Mr. Freeh forged a new path: In 2019, Mr. Freeh entered into a "strategic alliance" with Plaintiffs' co-counsel, Glaser Weil, and now proposes to serve as an expert testifying *against* Volkswagen for a $50,000 flat fee for his 18-page report, plus $1,850 per hour for his time. (Freeh Report at 4; Ex. 12.)

B. Mr. Freeh's Proposed Expert Testimony

Mr. Freeh purports to opine on three topics to support his ultimate conclusion that "[d]espite the 2017 criminal sentence [of $2.8 billion], . . . the full measure of justice for Volkswagen's deliberate, massive fraud has not yet had its 'day in court.'" (Freeh Report at 18.)

First, Mr. Freeh asserts that Judge Cox's record-setting $2.8 billion penalty was "far below the minimum" punishment that should have been imposed on Volkswagen, because it was a product of Judge Cox's "incorrect sentencing calculations." (*Id.* at 5-6, 18.) Instead, under Mr. Freeh's supposedly "proper calculations [of] the Sentencing Guidelines," the "fine range . . . *should have been* $34,174,676,748 to $68,345,353,496." (*Id.* at 5 (emphasis added).)

Second, Mr. Freeh asserts that Volkswagen "certainly enjoyed more favorable sentencing circumstances than the then existing facts entitled it to have." (*Id.* at 17.) To reach this conclusion, Mr. Freeh speculates that: (a) after sentencing, Defendants' "senior management . . .

would later be shown to be participant in the conduct which was subject to the sentence imposed by the Court"; (b) the DOJ prosecutors and Judge Cox were "not aware" of this newly discovered evidence conclusively establishing Defendants' executives in criminal misconduct; and, therefore, (c) Volkswagen must have "intentionally or negligently concealed [this information] from Judge Cox" and "not admit[ted] the full scope of its fraud in [its] plea agreement." (*Id.* at 5-6, 11-13, 17-18.) The supposedly newly-discovered evidence that Mr. Freeh refers to as "establish[ing]" the criminal misconduct of Defendants' senior executives are (1) unproven allegations in an indictment, and (2) a single email among VW America executives that the record shows was, in fact, known to both DOJ prosecutors and Judge Cox at the time of sentencing. (*See id.* at 6, 11-13; *see* Ex. 5 ¶ 37.) And Mr. Freeh's support for his speculation that Judge Cox and DOJ prosecutors were "not aware" of the possibility of misconduct by Defendants' management is (1) Judge Cox's statement that "[t]his is a case of deliberate, massive fraud perpetrated by VW management," and (2) the existence of that same email (which he erroneously presumes was hidden from the DOJ prosecutors and the court). (Freeh Report at 6, 12, 17.)

Finally, Mr. Freeh opines that Defendants continue to engage in "willful post-sentencing corporate misconduct." (*Id.* at 13-18.) This opinion is based on the untested allegations in a complaint filed by Plaintiffs' counsel regarding Defendants' resale of repurchased TDIs as "certified pre-owned" vehicles without labeling the vehicles' titles as "branded"—a topic the Court has already excluded, finding no "'sufficient nexus' between that conduct and the conduct that injured Plaintiffs such that the labeling conduct would be relevant in determining punitive damages." (Dkt. No. 6973 at 2.)

ARGUMENT

I. MR. FREEH CANNOT TESTIFY AS AN EXPERT AGAINST DEFENDANTS BECAUSE HE OBTAINED PRIVILEGED AND CONFIDENTIAL INFORMATION FROM VOLKSWAGEN AS A PROSPECTIVE ATTORNEY.

To ensure the "integrity of the adversary process, protect privileges that otherwise may be breached, and promote public confidence in the legal system," courts have the "inherent power to disqualify expert witnesses." *Hewlett-Packard*, 330 F. Supp. 2d at 1092; *see Kane* v. *Chobani, Inc.*, 2013 WL 3991107, at *5 (N.D. Cal. Aug. 2, 2013) (Koh, J.). As relevant here,

disqualification is "warranted" where two elements are met: (1) "the adversary had a confidential relationship with the expert," and (2) the "adversary disclosed confidential information to the expert that is relevant to the current litigation." *Hewlett-Packard*, 330 F. Supp. 2d at 1092-93. And, while not necessary to meet the disqualification standard, courts also consider whether disqualification "would be fair to the affected party and would promote the integrity of the legal process." *Id*. at 1093. Under this test, it is clear that Mr. Freeh should be disqualified.

A. Mr. Freeh Had a Confidential Relationship With Volkswagen and Obtained Relevant and Sensitive Information from Volkswagen in His Capacity as Prospective Counsel.

The two elements warranting disqualification—a confidential relationship between the expert and the opposing party, and sharing of confidential information with that expert—are unquestionably met here.

All that is needed to establish that a confidential relationship existed is to determine whether "the litigant [would] reasonably . . . expect that any communications would be maintained in confidence." *Hewlett-Packard*, 330 F. Supp. 2d at 1093. Volkswagen had a privileged relationship with Mr. Freeh—who is a New York-licensed attorney (Ex. 13)—as prospective counsel and had every expectation that its communications with him would remain confidential. *See Sullivan* v. *Cangelosi*, 923 N.Y.S.2d 737, 739 (N.Y. App. Div. 2011) ("[E]ven in the absence of an attorney-client relationship . . . an attorney has a fiduciary obligation to preserve the confidential secrets of prospective clients."); N.Y. Rules of Prof. Conduct 1.18(a).

As to the second element—whether Volkswagen "disclosed confidential information to the expert that is relevant to the current litigation," *Kane*, 2013 WL 3991107, at *5—that threshold is also plainly met. Relevance is a low bar, *see Broadcom Corp.* v. *Emulex Corp.*, 2010 WL 11465478, at *3 (C.D. Cal. Apr. 5, 2010), and "confidential information" is "information of either particular significance or [that] which can be readily identified as either attorney work product or within the scope of the attorney-client privilege." *Hewlett-Packard*, 330 F. Supp. 2d at 1094 (internal quotation marks omitted). There is no requirement that the expert opine on the topic of the information he received (though Mr. Freeh intends to do just that); simply

obtaining relevant confidential information from an adverse party merits disqualification. *See Plumley* v. *Doug Mockett & Co.*, 2008 WL 5382269, at *2-3 (C.D. Cal. Dec. 22, 2008).

Mr. Freeh's possession of over 550 pages of communications with Volkswagen containing privileged and confidential information about the diesel emissions investigations and litigations, as well as his public confirmation that his relationship with Volkswagen featured "confidential communications [that] I cannot talk about" (Ex. 10 at 3), leave no doubt that Volkswagen shared confidential materials with Mr. Freeh related to the same diesel emissions issues underlying this case.[6] By any measure, Mr. Freeh should be disqualified from serving as an expert adverse to Defendants. *See Stencel*, 174 F. Supp. 2d at 1083 (disqualification warranted where "legal strategies, . . . the attorney's views on the relative strengths or merits of a claim or defense, . . . or anticipated defenses" were shared with now-adverse expert); *N. Pacifica*, 335 F. Supp. 2d at 1050 (for *attorney*-experts "it must be *presumed* [attorney-expert] had access to confidential information [and t]his warrants their disqualification") (emphasis added).

B. Disqualification Is the Only Remedy That Would Ensure the Integrity of the Adversary Process, and It Would Not Be Unfair to Plaintiffs.

Because the two elements above are met, Mr. Freeh's disqualification is "warranted." *Hewlett-Packard*, 330 F. Supp. 2d at 1092-95. And, while not necessary to meet the disqualification standard, the final considerations for the Court are whether Mr. Freeh's disqualification would promote the integrity of the legal process and would be fair to Plaintiffs. *Id.* at 1093. These, too, weigh heavily in favor of Mr. Freeh's disqualification.

First, disqualifying Mr. Freeh is the *only* remedy that would "protect the integrity of the adversary process, protect privileges that otherwise may be breached, and promote public confidence in the legal system." *Id.* at 1092. The circumstances here go far beyond what other courts have found to be disqualifying.[7] Here, the topics that Volkswagen discussed with Mr. Freeh

[6] *See, e.g.*, *Broadcom*, 2010 WL 11465478, at *3 (stating that it is not necessary "that [the expert] received direct information about [the adverse party's] current litigation strategy," but instead that "[t]he critical question [] is whether [the expert] received confidential information 'that is relevant' to the current [] litigation") (citation and quotation marks omitted).

[7] In *Plumley*, the court disqualified an attorney-expert even when the attorney never personally represented or had a relationship with the adversary and was only conflicted because a colleague had an attorney-client relationship with the party in a related matter. 2008 WL 5382269, at *2-3. And, in *North Pacifica*, the court disqualified an attorney-expert even after he had just

are not only privileged, but *squarely* implicated by his proposed testimony. For instance, one of Mr. Freeh's main conclusions—that there was executive-level wrongdoing that Volkswagen concealed from the court and the prosecutors—*is primarily based on a document that Volkswagen's counsel shared with Mr. Freeh to seek his legal advice on its implications*. (Freeh Dep. Tr. at 151:8-152:3, 254:3-10, 269:17-25; Giuffra Decl. ¶ 6.) As such, Mr. Freeh has put Defendants in a catch-22: to effectively cross-examine Mr. Freeh, Volkswagen would need to waive the very privilege at issue or risk the jury erroneously concluding that his unspoken knowledge suggests undisclosed wrongdoing.[8]

Second, while courts have also considered whether the party retaining the expert would be "unduly prejudiced by the disqualification," *Kane*, 2013 WL 3991107, at *7, any claimed unfairness resulting from Mr. Freeh's disqualification would lay entirely at Plaintiffs' feet because they knew about his prior relationship with Volkswagen. (*See* Freeh Dep. Tr. at 32:7-33:14.) Plaintiffs thus retained Mr. Freeh with full knowledge that he could be disqualified, and they should bear the consequences of that decision. Further, as discussed below, because Mr. Freeh's opinions are themselves inadmissible, his disqualification would cause no incremental unfairness.

II. THE COURT ALSO SHOULD EXCLUDE MR. FREEH BECAUSE HIS TESTIMONY IS IRRELEVANT, UNDULY PREJUDICIAL AND INADMISSIBLE.

A. Mr. Freeh's Testimony About the Federal Sentencing Guidelines Is Irrelevant, Unduly Prejudicial, and Invades the Exclusive Province of the Jury.

Mr. Freeh's opinions on the federal Sentencing Guidelines are irrelevant and impermissible expert testimony that is likely to mislead the jury and unduly prejudice Defendants.

First, under California law, it is the "*exclusive* function of the jury" to "determin[e] whether [punitive] damages should be awarded, and, if so, the amount." *Ferraro*, 8 Cal. App. 3d

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two conversations with the now-adverse party. *See* 335 F. Supp. 2d at 1047-50. The court reasoned that disqualification was necessary because, even though the contact was brief, there was "a substantial likelihood that [the expert] obtained confidential client information." *Id.* at 1050.

[8] Even if some of the documents Volkswagen discussed with Mr. Freeh have since become public, Mr. Freeh should still be disqualified because he received privileged communications about Volkswagen's litigation strategies. *See Kane*, 2013 WL 3991107, at *7 ("[I]f Plaintiffs' Counsel were to continue to communicate with [its expert], [defendant] could be irreparably prejudiced through the direct or indirect disclosure of [its] confidential legal theories and anticipated defenses," as this would "undermine the very integrity of the adversary system.").

at 351 (emphasis added); *see Gagnon* v. *Cont'l Cas. Co.*, 211 Cal. App. 3d 1598, 1602 (Cal. Ct. App. 1989).[9] And, because expert "opinions [that] invade the province of the jury . . . are not helpful to the trier of fact," *Moore*, 2015 WL 12910712, at *2 n.1, they are inadmissible under Fed. R. Evid. 702. *See* Fed. R. Evid. 702(a) (expert opinion must "help the trier of fact to understand the evidence or to determine a fact in issue").

Here, while Mr. Freeh's proposed testimony does not explicitly dictate to the jury the amount of punitive damages it should award, it is clearly suggested by Mr. Freeh's opinion that the "proper" punishment under the Sentencing Guidelines "*should have been* $34,174,676,748 to $68,345,353,496." (Freeh Report at 5 (emphasis added).) This type of expert opinion, which suggests potential "approaches to ascertaining punitive damages" or a "range of reasonable value of punitive damages," invades the exclusive province of the jury and is inadmissible under Rule 702. *Voilas*, 73 F. Supp. 2d at 464-66; *see Lea* v. *Wyeth LLC*, 2011 WL 13193321, at *4 (E.D. Tex. Sept. 16, 2011) (excluding expert opinion that damages could be calculated akin to a "SEC fine" because it provided the jury with a range and "potential method[] of measuring punitive damages."). As the *Voilas* court reasoned:

> [T]here are no credentials that could qualify an individual as a punitive damages expert, primarily because the area of assessing punitive damages, implicative of various societal policies and lacking any basis in economics, rests strictly within the province of the jury and, thus, does not necessitate the aid of expert testimony.

73 F. Supp. 2d at 463-66 (excluding expert testimony under Rule 702 because there is "no reason as to why the trier of fact . . . will be unable to determine an appropriate punitive award on its own without the aid of, or clarification provided by, expert testimony"). Accordingly, courts across the country have followed *Voilas*'s reasoning and have routinely excluded under Rule 702 expert opinions, like Mr. Freeh's, that attempt to guide (explicitly or implicitly) the jury's assessment of the appropriateness and quantum of punitive damages.[10]

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[9] *See also Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 24-25 (1991) (Scalia, J., concurring) ("[I]t has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury . . . .").

[10] *See, e.g.*, *Salinas* v. *State Farm Fire & Cas. Co.*, 2012 WL 5187996, at *5 (S.D. Tex. Feb. 23, 2012) (excluding plaintiffs' expert who offered opinion using "methods and calculations [that were] merely a way to suggest a specific amount of punitive damages to the jury"); *Lopez* v. *Geico*

Second, should this case proceed to the punitive damages phase of trial, the question for the jury (and solely the jury) is whether Defendants should be further punished under *California law*, taking into account the amount of prior criminal and civil fines and penalties paid by Defendants for the same conduct underlying Plaintiffs' claims. *See Gagnon*, 211 Cal. App. 3d at 1602 (the jury may consider "punitive damages previously . . . imposed for the same conduct" in determining appropriateness and amount of punitive damages). What is *not* relevant to the jury's consideration of punitive damages, however, is the *criminal* penalty that *could* have been calculated under the *advisory federal* Sentencing Guidelines or whether *federal law* authorized additional criminal penalties. *See id.* ("The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, . . . the plaintiff's actual damages[,] . . . whether the defendant's conduct has or is likely to affect more than the plaintiff and whether punitive damages previously have been imposed for the same conduct."). Nor is Judge Cox's thought process at sentencing an appropriate consideration for the jury, as neither Mr. Freeh nor the jury serves as a *de facto* Court of Appeals reviewing Judge Cox's discretion to accept the plea agreement or impose a $2.8 billion fine.

To illustrate this point, if Plaintiffs' position were correct, then in any civil action seeking punitive damages involving conduct subject to prior criminal penalties, the judges, prosecutors, and defense counsel in those prior criminal proceedings would routinely be called as relevant fact witnesses. That is, in order to rebut Mr. Freeh's baseless speculation on what Judge Cox supposedly was or was not aware of at the time of sentencing and what DOJ prosecutors knew

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Ins. Co., 2013 WL 9720887, at *1-2 (D.N.M. Oct. 9, 2013) ("As the court explained in *Voilas*, punitive damages are entirely within the purview and ability of a jury to determine because they involve social, rather than economic concerns, and the assessment of those damages does not require any particular expertise."); *Baldonado* v. *Wyeth*, 2012 WL 1520331, at *3 (N.D. Ill. Apr. 30, 2012) ("[I]t is not proper for [an expert] to give an expert opinion on the amount of punitive damages the jury should award. The amount, if any, is for the jury to decide based on the facts of this case and the applicable punitive damages law. Such expert testimony would [in]vade the province of the jury."); *Burton* v. *Wyeth-Ayerst Labs. Div. of Am. Home Prods. Corp.*, 513 F. Supp. 2d 708, 717 (N.D. Tex. 2007) ("[T]o the extent that the [expert report] suggests to the jury that it should assess a punitive damage award (if any) in the range of $100 million to $2.5 billion the [expert report] is wholly prejudicial."); *Dering* v. *Serv. Experts Alliance LLC*, 2007 WL 4299968, at *9 (N.D. Ga. Dec. 6, 2007) ("[A]llowing an expert opinion on the amount of punitive damages is improper. The amount of punitive damages is to be determined by the enlightened conscience of an impartial jury.").

or did not know when entering a plea agreement, Defendants should be entitled to call these individuals as fact witnesses. (*See* Freeh Report at 17 ("[T]he full scope of Volkswagen's criminal conduct at the time of sentencing . . . was not known to Judge Cox."); Freeh Dep. Tr. at 187:7-188:5 ("My conclusion [is] that DOJ didn't know . . . that there was upper management involvement.").) But none of this is at all relevant to the jury's consideration of civil punitive damages. Nor should a defendant have to elicit discovery or testimony from the sentencing judge or prosecutors to establish the full scope of what they knew about the defendant's wrongdoing. This is all a matter of irrelevant fact, not relevant opinion, and should be excluded under Rule 402. Moreover, such a trial-within-a-trial on purely collateral issues about the circumstances of Volkswagen's criminal sentencing would be a waste of time and public resources and further warrants exclusion of Mr. Freeh's testimony. Fed. R. Evid. 403.

Third, in addition to being irrelevant and invading the province of the jury, Mr. Freeh's opinions on the Sentencing Guidelines will almost certainly confuse and mislead the jury about what it can consider when assessing punitive damages—and will severely prejudice Volkswagen. At base, this type of opinion should be excluded under Rule 403 because "such testimony carries the risk of swaying and misleading the jury into the erroneous belief that it is limited to [the offered] methods and ranges of damages outlined by [the expert]." *Voilas*, 73 F. Supp. 2d at 464-65; *see Lea*, 2011 WL 13193321, at *1, 4 (excluding expert opinion on punitive damages as "wholly prejudicial" because it suggests "a potential range of punitive damages").

These risks are all the more acute here because Plaintiffs want to use Mr. Freeh, a former *federal judge*, to deliver this opinion to the jury. As a former federal judge, Mr. Freeh's testimony is even more likely to sway the jury into (a) substituting his judgment for their own on the appropriate punishment, and (b) possibly disregarding this Court's instructions on what they may or may not consider in assessing punitive damages under California law (which does not include the federal Sentencing Guidelines or Judge Cox's thought process). This intolerable risk further justifies excluding Mr. Freeh's testimony under Fed. R. Evid. 403.[11]

[11] "[There is a] strong possibility . . . that expert testimony on punitive damages might confuse the issues to the extent that the jury is instructed, on the one hand, that it may assess any

B. Mr. Freeh's Speculation on the Scienter of Defendants' Executives and Knowledge of Judge Cox and DOJ Prosecutors Is Improper and Inadmissible.

Mr. Freeh's conclusion that Volkswagen "certainly enjoyed more favorable sentencing circumstances than the then existing facts entitled it to have" (Freeh Report at 18) rests on two "opinions" that are entirely inappropriate for expert testimony: (1) that the unproven allegations in an indictment and a single email in fact establish the knowledge, scienter, and criminal intent of Defendants' executives; and (2) that Judge Cox and DOJ prosecutors were unaware of the possibility that Defendants' management potentially played a role in the diesel emission fraud because Volkswagen did not admit the full scope of its fraud in the plea agreement and deliberately concealed this from the sentencing court and the prosecutors. (*See id.* at 5-6, 11-13, 17-18.) His opinion on these topics should also be excluded.

1. Mr. Freeh's Opinion That an Indictment and a Single Email Establish Criminal Wrongdoing by Defendants' Executives Is Improper.

To support his ultimate conclusion, Mr. Freeh first intends to establish that, after sentencing, previously unknown evidence came to light that established wrongdoing by Defendants' executives that was not covered in the plea agreement and not reflected by Judge Cox's $2.8 billion penalty. (*See id.* at 5.) Mr. Freeh's assumption relies on two sources: (1) the fifth superseding indictment in *United States* v. *Dorenkamp et al.*, No. 2:16-cr-20394 (E.D. Mich. Mar. 14, 2018), Dkt. No. 120, and (2) a single email between VW America employees. (*Id.* at 12-13.) But Mr. Freeh's entire opinion on these topics either is based on an improper foundation for expert testimony or is otherwise an improper subject of expert testimony. *See* Fed. R. Evid. 702, 703.

First, Mr. Freeh seeks to opine that the unproven allegations in an indictment filed after Volkswagen's sentencing in fact "demonstrate[] that the fraud . . . went to the very top of the corporation." (Freeh Report at 12.) But, as Mr. Freeh concedes, unsubstantiated allegations in an indictment "are not proven facts," and the "mere fact that [Volkswagen executives] ha[ve] been indicted . . . doesn't mean, as a matter of fact, that [they] knew about the diesel emissions issues."

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amount of punitive damages it deems proper and it is then provided, on the other hand, with expert testimony specifically outlining . . . methods of calculating damages as well as corresponding ranges of awards." *Voilas*, 73 F. Supp. 2d at 464-65 (excluding expert opinion under Rule 403).

(Freeh Dep. Tr. at 161:23-162:11.) Because an "indictment is not evidence against the accused and affords no inference of guilt or innocence," *United States* v. *Ramirez*, 710 F.2d 535, 545 (9th Cir. 1983), and because otherwise inadmissible evidence is itself admissible through expert testimony *only* "[i]f experts in the particular field"—here, the law—"*would reasonably rely on those kinds of facts or data in forming an opinion on the subject*," Fed. R. Evid. 703 (emphasis added), Mr. Freeh may not form an opinion on the basis of the allegations in this indictment.

Second, the only other evidence Mr. Freeh points to is a single email, which he opines "*establishe*[*s*] that the CEO and general counsel of VW America perpetuated the [diesel emissions] fraud," were aware of the scope and extent of Defendants' use of defeat devices, and "participated in the coverup" in criminally keeping this information from U.S. regulators. (Freeh Report at 6, 12-13 (emphasis added); *see* Freeh Dep. Tr. at 163:15-164:1, 164:2-8.)[12] But it is not Mr. Freeh's role at this trial to pass judgment on whether a document in fact establishes certain issues in dispute, including the scienter, knowledge, criminal intent, and in fact wrongdoing by Defendants' executives. That role, instead, is reserved *exclusively* for the jury; and Mr. Freeh should be barred from testifying as to his speculative conclusions on the impact of this document. *See Newkirk* v. *ConAgra Foods, Inc.*, 727 F. Supp. 2d 1006, 1026 (E.D. Wash. 2010), *aff'd*, 438 F. App'x 607 (9th Cir. 2011) ("Expert testimony is properly excluded where the witness is no more capable than the factfinder to draw a conclusion," including when a defendant "knew" of a particular fact); *Moore*, 2015 WL 12910712, at *2 n.1 ("opinions [that] invade the province of the jury" are not permissible expert testimony); *see also Stanley*, 2014 WL 12573393, at *6 (improper for expert to opine "on the intent, motives, or states of mind" of others). Mr. Freeh's opinion on this document should therefore be excluded. Fed. R. Evid. 702.[13]

[12] Notably, this email was sent to Mr. Freeh by Defendants' lead U.S. outside counsel in January 2016 for the express purpose of soliciting his privileged advice on the implications of the email. (Giuffra Decl. ¶ 6 (noting he also shared *his own views* on that same email with Mr. Freeh).)

[13] The fact that Mr. Freeh, as a former federal judge and Director of the FBI, would be accusing these individuals—who have never been indicted—in open court of criminal misconduct is irresponsible and immeasurably prejudicial, further justifying the exclusion of his testimony.

2. Mr. Freeh's Speculation About What Judge Cox and DOJ Prosecutors Knew at the Time of Sentencing Is Inadmissible.

Mr. Freeh intends to use his improper and inadmissible opinions above to conclude that because "senior management of VW AG would later be shown to be participant in the conduct which was subject to the sentence imposed by the Court," at the time of sentencing Judge Cox and DOJ prosecutors were "not aware" of the "role upper management played in the underlying fraud." (Freeh Report at 5-6, 17-18.) Mr. Freeh then presumes that Volkswagen and/or its counsel, including counsel in this case, "intentionally or negligently concealed" this evidence from Judge Cox, failed to "admit the full scope of its fraud in the plea agreement" with the DOJ, and that, therefore, Volkswagen "certainly enjoyed more favorable sentencing circumstances than the then existing facts entitled it to have," because the "sentencing Court did not account for th[is] criminal conduct." (*Id.* at 5-6, 11, 17-18.) Mr. Freeh points to only two sources to support this incredible conclusion: (1) a statement made by Judge Cox at sentencing, and (2) the existence of the email discussed above. (*Id.* at 11-13.)

First, as a threshold matter, the entirety of Mr. Freeh's proposed opinion on this topic is improper expert testimony because it seeks to divine the knowledge and awareness of other individuals based completely on circumstantial evidence. Mr. Freeh admits that he has never spoken to Judge Cox or the DOJ prosecutors about Volkswagen's criminal sentencing or plea agreement, and that he has no knowledge of any representations made to Judge Cox or DOJ prosecutors about Volkswagen's conduct outside the public record. (Freeh Dep. Tr. at 348:7-349:16, 128:12-129:2.) Mr. Freeh, thus, has no *actual* knowledge of what Judge Cox or the DOJ prosecutors knew or did not know.[14] His speculation on what other people might have been thinking is not a proper topic for expert testimony, and thus Mr. Freeh's opinion should be

[14] Despite openly speculating on issues he does not know about (like the knowledge of others) to reach the conclusion that Volkswagen acted wrongfully in reaching its criminal plea, Mr. Freeh's opinion disregards the facts that are actually in the public record. Most notably, Mr. Freeh ignores that the DOJ stated in the plea agreement that Volkswagen "cooperated with the [DOJ's] investigation by, among other things, . . . collecting, analyzing, organizing, and producing voluminous evidence and information; [] interviewing hundreds of witnesses in the United States and overseas; [] providing non-privileged facts relating to individuals and companies involved in the criminal conduct; and [] facilitating and encouraging cooperation and voluntary disclosure of information and documents by current and former company personnel." (Ex. 6 ¶ 3.A.2.) And, the fact that neither the DOJ nor Judge Cox has cried foul since the sentencing speaks volumes.

excluded under *Daubert* and Rule 702. *Daubert*, 509 U.S. at 590, 597 (holding under Rule 702 that expert testimony may not be based on "subjective belief or unsupported speculation"); *see, e.g.*, *Stanley*, 2014 WL 12573393, at *6 (excluding "the opinions of [expert] witnesses on the intent, motives, or states of mind of . . . others" because they "have no basis in any relevant body of knowledge or expertise") (citation omitted).

Second, Mr. Freeh incredibly concludes that Judge Cox was "not aware" of the possibility that the fraud extended to Volkswagen's management, yet the basis for Mr. Freeh's speculation is a statement by Judge Cox at sentencing *acknowledging* his awareness that "[t]his is a case of deliberate, massive fraud *perpetrated by VW management*." (Ex. 4 at 26:16-17 (emphasis added); Freeh Report at 12.) Mr. Freeh's opinion is thus contradicted by the source it purports to rely upon, meriting its exclusion.[15] *See Hickman*, 2007 WL 3237727, at *3 n.34 (citing *Greenwell* v. *Boatwright*, 184 F.3d 492, 497 (6th Cir. 1999) for the proposition that "[e]xpert testimony . . . is inadmissible when the facts upon which the expert bases his testimony contradict the evidence").

Third, on the basis of a single email, Mr. Freeh concludes that "[f]acts uncovered [in this civil multidistrict litigation following the criminal sentencing] have revealed that top executives of VW America appear to have been involved, which has not been accounted for by the plea agreement." (Freeh Report at 12-13.) This conclusion necessarily rests on the theory that DOJ prosecutors and Judge Cox were unaware of this email that has since been "uncovered." (*See id.*) This opinion, too, should be excluded because the record shows that at least four months *before* Volkswagen's April 2017 sentencing, this email was known to *both* DOJ prosecutors *and* the sentencing court, as the email was described in detail in a December 2016 criminal complaint filed by the DOJ in the Eastern District of Michigan. (Ex. 5 ¶ 37; *see Hickman*, 2007 WL 3237727, at *3 n.34 (citing *Rushing*, 388 F.3d at 1156 for the proposition that "[e]xpert testimony should not be admitted when it is speculative, it is not supported by sufficient facts, or the facts of the case contradict or otherwise render the opinion unreasonable").)

[15] Mr. Freeh's attempt to salvage his conclusion by recasting Judge Cox's declarative statement, given in the middle of announcing Volkswagen's sentence, as somehow being a question to which either DOJ prosecutors or counsel for Volkswagen were required to respond is unsupported by the record, and should similarly be rejected. (*See* Freeh Dep. Tr. at 158:12-159:19, 186:23-187:21, 333:5-335:10, 340:22-341:25.)

C. Mr. Freeh's Opinion that Defendants Continue to Engage in Wrongdoing is Based on Untested Allegations with No "Nexus" to Plaintiffs' Claims.

Finally, in an effort to circumvent this Court's prior Order, Plaintiffs' counsel want to use Mr. Freeh as the mouthpiece through which to parrot their untested allegations in a complaint filed by Plaintiffs' counsel in another case regarding Defendants' resales of TDIs, without first branding the vehicles' titles, as "certified pre-owned" vehicles. (Freeh Report at 18.) This Court correctly ruled just last month that Plaintiffs may not put before the jury irrelevant evidence on "certified pre-owned" vehicles, because "there is not a 'sufficient nexus' between that conduct and the conduct that injured Plaintiffs such that the labeling conduct would be relevant in determining punitive damages." (Dkt. No. 6973 at 2 (citing *Boeken* v. *Philip Morris, Inc.*, 127 Cal. App. 4th 1640, 1694 (Cal. Ct. App. 2005)).)

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court disqualify Mr. Freeh and preclude him from offering any testimony at trial.

Dated: January 13, 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: January 13, 2020

SULLIVAN & CROMWELL LLP

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