

Litigators of the Week: One for the History Books

By Jenna Greene

October 28, 2016

It's a truism that litigation is a zero sum game—there's a winner and a loser.

But not this week. For the first time that we can remember, the Litigation Daily is naming opposing counsel as our co-litigators of the week, a historic honor that goes to Robert Giuffra Jr. of Sullivan & Cromwell and Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein.

Together, they led the effort to reach a \$14.7 billion settlement in the Volkswagen diesel emissions scandal, with Giuffra as national coordinating counsel for VW and Cabraser as lead counsel and chair of the 22-member plaintiffs' steering committee.



On Tuesday, U.S. District Judge Charles Breyer in San Francisco gave final approval to the deal, which came together at breakneck speed considering the magnitude of the case and the complexity of the settlement.

As Breyer put it at the final fairness hearing on Oct. 18, "What is most extraordinary about this proposal in many ways is that it reflects the fact that people from very different perspectives and from different interests can come together in a judicial or legal setting to try to resolve an issue. This is why we have a country of laws. This is why we have a procedure, a process."

The deal was a win for literally everyone who breathes. There are 475,000 cars on the road spewing nitrous oxide at up to 40 times the standard. Thanks to the settlement, VW will start buying affected vehicles



Elizabeth Cabraser, left, and Robert Giuffra, right.

Photos: ALM/Courtesy

back this fall, and not in, say, five years after a knock-down, drag-out fight. People who want to keep their cars will be able to get them fixed once regulators approve the modifications.

It was a win for the VW owners too. They'll get pre-scandal prices for their cars and an additional cash payment, or repairs plus cash. As of mid-October, more than 330,000 class members had registered for settlement benefits – with almost two years left to sign up. The number of class members who have opted out is less than one percent.

And it was a win for VW. The company admitted wrongdoing early on. As Giuffra noted, it was imperative that it put the episode behind it before its brand was "irreparably tarnished."

From submission of complaints to final approval, it took just 10 months to end the case. By comparison, the

duration of the average MDL that closed between Jan. 1 and June 15, 2016 was five and a half years, according to an analysis by Sullivan & Cromwell of data from the Judicial Panel on Multidistrict Litigation.

“My mantra from Day One was to get the most global settlement possible,” Giuffra said.

While he’s known as an accomplished courtroom litigator, he recognized that the way forward here was not to fight, but to strike a deal with the government, then the class action plaintiffs.

“Step one was to establish credibility with DOJ, EPA and the California Air Resources Board, as well as the FTC and state AGs,” he said. “Step two was to reach regulatory settlements to address the cars on the road and to remediate the environment. Step three was to leverage the regulatory settlements to resolve the class action.”

Still, that strategy doesn’t appear to have been obvious to VW at the outset, before Giuffra was tapped as lead counsel.

In early January, The New York Times reported on the “openly fractious relations between Volkswagen and American investigators,” citing complaints from New York’s attorney general Eric Schneiderman among others that “Our patience with Volkswagen is wearing thin.”

When Manfred Doess became head of VW’s legal department in January, he elevated Giuffra from handling the securities aspects of the case to full responsibility. The two had worked together before when Giuffra represented Porsche in obtaining the 2010 dismissal of federal securities claims seeking more than \$3 billion.

VW changed its tone as Doess, Giuffra and the VW legal team made the rounds to various regulators, hammering out deals. One goal: to make sure VW wouldn’t “double, triple, quadruple pay for the same conduct,” Giuffra said.

Sullivan & Cromwell partners Sharon Nelles, Steve Holley, David Rein, Michael Steinberg,

Diane McGimsey and Bill Monahan all worked on the case.

Meanwhile, Breyer selected Cabraser from dozens of applicants to chair the 22-member steering committee. Other members include David Boies, Michael Hausfeld, Paul Geller, Joseph Rice and Steve Berman.

None are what you would call meek, follower types. But Cabraser kept them united. “I was very pleased with the way we were able to work together,” she said, comparing the team effort to “a firehouse.”

Even as settlement talks were ongoing, she said, some committee members were preparing to litigate if the deal fell through. Breyer had promised an expedited trial—as early as fall 2016—if there was no settlement, and Cabraser made sure the plaintiffs could try the case if necessary.

“There was a sense of urgency, of pressure, that absolutely worked,” Cabraser said.

The class members weren’t shy about making their feelings known either. “The class was made up of people who were very engaged, very articulate,” she said. “A VW diesel is not an impulse buy.”

Moreover, she said, a car is “very personal. ... I understand the outrage of anyone against VW. People invest a lot of time and effort and care in selecting cars.” To learn that you were deceived by an automaker “is not a good feeling,” Cabraser said.

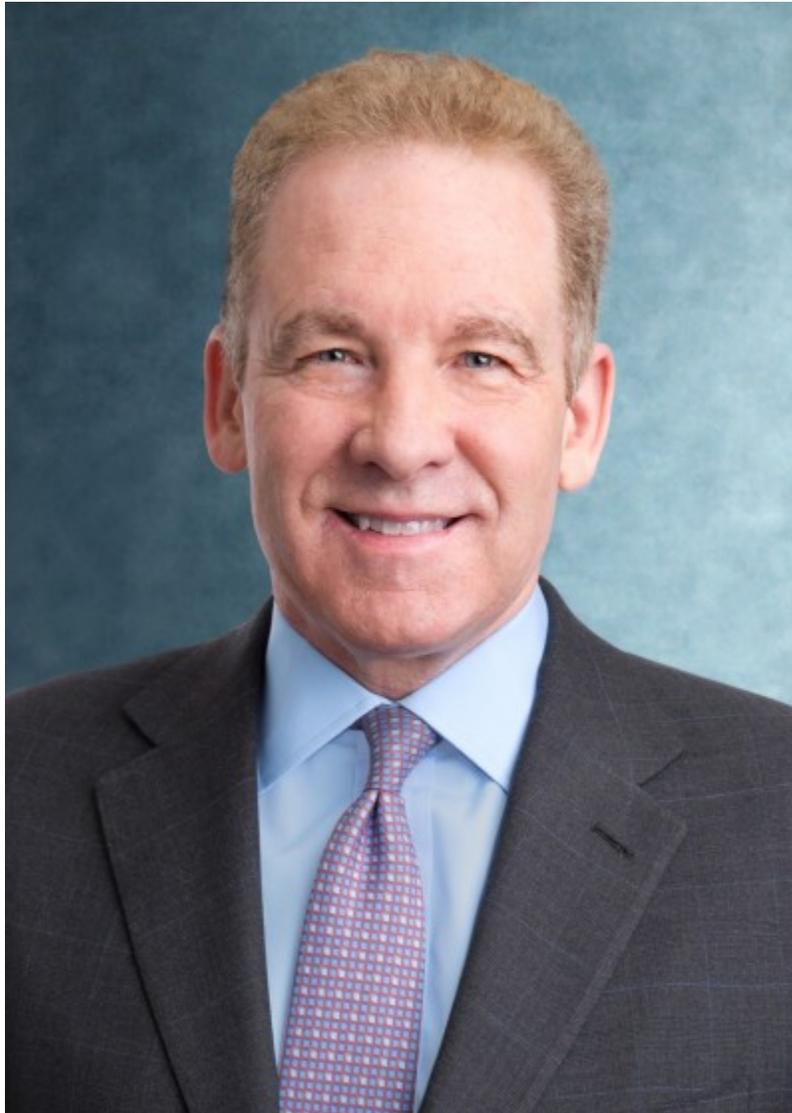
Breyer also appointed Robert Mueller, the former head of the FBI and now a partner at Wilmer Cutler Pickering Hale and Dorr, to serve as settlement master. Giuffra called it an unexpected but inspired choice. “He was critical to herding all the different parties,” he said. “Everyone knew he had the judge’s respect.”

Giuffra and Cabraser are unanimous in their respect for each other as well. In fact, it was they who suggested that they share the title of litigator of the week.

Cabraser summed it up. “Hard cases are easier when there are good lawyers on both sides.”

Sullivan & Cromwell's Robert Giuffra Jr.: From Rehnquist to VW

2 hours ago



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Robert Giuffra Jr.

Partner, Sullivan & Cromwell

Robert Giuffra Jr. has been a partner at Sullivan & Cromwell since 1997, and spent time in the White House and as a lawyer for U.S. Senate committees. He's currently representing Volkswagen in connection with its ongoing diesel emissions scandal.

Education

Bronxville High School, Bronxville, New York, graduated 1978

Giuffra's father was also an attorney, and had his own firm focused on insurance and admiralty law. Growing up, Giuffra said he can remember watching his father in court and falling in love with the profession.

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“I knew I was going to become a litigator,” the younger Giuffra said, noting that two out of his three siblings also followed in their father’s footsteps.



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Giuffra attended two high schools, finishing at Bronxville High School in Westchester County where he was named the first chief judge of the Bronxville High School Student Court, a body that decided and handed down punishments to students.

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“It wasn’t exactly the easiest job, because if you’re telling somebody they were late 12 times and they’re getting detention, it didn’t exactly make you very popular.” Giuffra said.

Princeton University, Princeton, New Jersey, graduated 1983

Giuffra was a champion golfer in high school, winning the Westchester Junior Golf championship, and placing second in a Metropolitan PGA Junior Golf tournament on Long Island, which helped him gain admission to top colleges.

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“I was a decent student in high school, but I wasn’t an academic superstar or anything like that,” Giuffra said.

At Princeton, golf took a backseat to his studies and Giuffra graduated summa cum laude and Phi Beta Kappa.

Yale Law School, New Haven, Connecticut, graduated 1987



(<https://bol.bna.com/wp-content/uploads/2017/02/Giuffra-in-Yale-e1487974142535.png>)

At Yale Law School, Giuffra enrolled in an evidence and securities regulation course taught by Ralph Winter, a judge on the U.S. Court of Appeals for the Second Circuit. Years later, Winter hired him as a clerk.

Notable people in Giuffra's section include Steve Higginson, a judge on the U.S. Court of Appeals for the Fifth Circuit; Richard Painter, chief ethics lawyer under former President George W. Bush; and George Conway, a partner at Watchell, Lipton, Rosen & Katz and the husband of White House Counselor Kellyanne Conway.

Work experience

White House Office of Public Liaison, 1981-82

Giuffra, a Republican who had worked on Ronald Reagan's presidential campaign in college, took a position as a low-level staffer in the Reagan White House. His duties included planning presidential events, preparing briefing memos and drafting correspondence.



(<https://bol.bna.com/wp-content/uploads/2017/02/Giuffra-Reagan-e1487975757966.jpg>)

Clerk for Judge Ralph Winter, U.S. Court of Appeals, 2nd Circuit, 1987-88

During his clerkship with Judge Winter, Giuffra said he learned the importance of simplifying arguments and figuring out the winning argument, not getting lost in the weeds and not assuming judges know the minutiae of every case.

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“The most important question of any case is ‘Why should we win?’” Giuffra said. “Why should the judge rule for us and not the opponent?”



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Giuffra, right with Winter, center and his Yale classmate George Conway III, left.

Clerk for Chief Justice William Rehnquist of the U.S. Supreme Court, 1988-89

Giuffra said he was so nervous during the interview to become Rehnquist's clerk that when the judge asked him if he had any questions, he said, "No, I just admire you and want to be your clerk." Rehnquist showed Giuffra the door soon after, so he was surprised he landed the job.

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“He did not like people who had a lot of airs, if you know what I mean,” Giuffra said. “So it was the right answer. I didn’t know it at the time, but it was.”



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Sullivan & Cromwell LLP, associate, 1989-95

Giuffra devoted long hours to his work and handled a variety of different cases including banking, security and intellectual property.

He recalled the third deposition of his career: Giuffra was defending the Bank of New York against claims by Northeast Bancorp that it had breached a merger agreement. He was deposing then-Arnold & Porter Chairman John Hawke. A half-hour after Giuffra started the deposition, the Sullivan & Cromwell partner supervising him, John Warden, entered the room. Warden mainly worked on a crossword puzzle, Giuffra said, pausing a few times to provide notes. After two hours, Warden left because Giuffra was capably handling the deposition on his own.

About his early career lessons, he said he learned to always listen to the answers in court, give a non-scripted reply and cross-examine the logic of the witnesses' story.



“In those days, it was kind of like boot camp for litigators,” Giuffra said of his firm.



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Giuffra, left. Armand P. D'Amato, center, John Warden, right.

In the fall of 1994 — a year before Giuffra was due to make partner — Washington, D.C. called. Senator Alfonse D'Amato, then chairman of the U.S. Senate Committee on Banking, Housing and Urban Affairs, told the young attorney he wanted him to serve as the committee's chief counsel. Giuffra talked it over with his parents and H. Rodgin Cohen, now the firm's senior chairman, who all convinced him to take the job in Washington.

Chief Counsel, Senate Committee on Banking, Housing and Urban Affairs, 1995-96

Giuffra said he was the principal drafter of the Private Securities Litigation Reform Act of 1995, a tort reform bill that put new curbs on securities class actions. The bill was one of only two that survived a veto from President Bill Clinton. Giuffra criticized the partisan atmosphere.



“I was trying to get the bill passed rather than engage in some ideological score settling,” Giuffra said.

Counsel, Senate Whitewater Committee, 1995-96

Giuffra acted as counsel to the Senate committee created to investigate then-President Clinton and his wife Hillary, along with several of their business partners over their involvement in the defunct-Whitewater Development Corporation. He called it a “giant food fight.”

While there, he met his future wife, Joyce Campbell, at a victory party for Republican Sen. Bob Dole. She was his press secretary and her boss had just clinched the party's nomination for president. The couple tied the knot in 1998, and Dole attended the wedding.



(<https://bol.bna.com/wp-content/uploads/2017/02/img058.jpg>)

Bob Giuffra and Joyce Campbell at their 1998 wedding with former Republican Senator Bob Dole.



“The best thing I got out of working in Washington was my wife,” Giuffra said.

Dole lost his bid for the presidency to Clinton, and in 1996, Giuffra left government and returned to New York to resume his career at Sullivan & Cromwell.



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Sullivan & Cromwell LLP, partner, 1997-present

Giuffra represents Volkswagen AG as its national coordinating counsel in its diesel-emissions scandal. It recently settled with the U.S. Environmental Protection Agency, the U.S. Justice Department and the California Air Resources Board to buy back diesel vehicles in the U.S., fix vehicles and pay \$225 million to clean up the environment. This was part of another sweeping agreement for Volkswagen to spend \$14.7 billion on settling customer lawsuits and charges that it scammed U.S. emissions tests. The case is ongoing and certain parts of it will go on for at least a year, he said.

Giuffra said it's one of the most complicated cases he's ever worked on. In settling, he said he wanted to resolve the matter as quickly as possible.



“Not too many people call me with the easy slam-dunk winners,” Giuffra said.



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Photo by Krisztian Bocsi (Bloomberg)

Sullivan & Cromwell LLP, member, management committee, 2006-present

Giuffra's advice for young attorneys is to explain things in a clear and understandable way for the judge and jurors — don't overcomplicate issues in court. He advises against specializing in one area of law.



“The law is a profession and there’s a cobbler aspect to it,” he said. “And if you don’t learn how to do it from the best, you’ll never be a great lawyer.”

UPDATED: An earlier version of this story mistakenly referred to Richard Painter as George Painter; and stated Giuffra attended three high schools, when he attended two. The description of the VW settlement has also been amended. We regret the errors.

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SELECT COVERAGE

Why VW was smart to fold in emissions cheating case

Reuters

By Alison Frankel

June 28, 2016

(Reuters) – A few years back, the German automaker Porsche hired Robert Giuffra of Sullivan & Cromwell to defend the company against fraud suits by hedge funds that alleged they lost more than \$3 billion shorting Volkswagen shares. The hedge funds accused Porsche of lying about its 2008 accumulation of VW shares and options, squeezing short-sellers when Porsche revealed that it controlled virtually all of VW's publicly sold stock. Porsche denied the claims and litigated the cases aggressively in both state and federal court – a strategy that looked very smart after appellate judges in both jurisdictions tossed the hedge funds' suits.

Porsche's tactics in the hedge fund litigation contrast sharply with its decision-making in the litigation over Volkswagen's emissions cheating scandal. (Porsche is VW's majority shareholder.) On Tuesday, as you know, VW announced a settlement worth about \$15 billion to resolve civil claims by U.S. government agencies; the attorneys general of 44 states; and owners and leasers of cars equipped with devices designed to defeat emissions tests. As much as \$10.03 billion is earmarked for 475,000 VW owners, who can choose to sell their defective cars back to VW for their pre-scandal resale value or have VW fix their cars to comply with state and federal emissions standards. (So far, VW hasn't come up with a fix acceptable to regulators; if the company can't repair the cars, consumers will have a second chance to sell their vehicles back to VW at the same resale price.) Either way, VW will also pay car owners and leasers who participate in the class action settlement between \$5,100 and \$10,000 in cash.

VW didn't put up much of a fight before capitulating in the class action. U.S. District Judge Charles Breyer of San Francisco took over the consolidated consumer litigation last December, about a month before the U.S. government brought its own civil suit against the company. By mid-April, Volkswagen had reached an agreement in principle to settle with the plaintiffs steering committee, headed by Elizabeth Cabraser of Lief Cabraser Heimann & Bernstein, and with government regulators. The deal announced Tuesday codifies the terms of the agreement disclosed in April.

In a conference call with reporters on Tuesday, Cabraser said the proposed settlement gives consumers just what their lead lawyers were hoping for. There will undoubtedly be VW owners who don't like the deal – Virginia plaintiffs lawyer James Feinman, for instance, told me he will object to the settlement and advise his 655 clients not to accept the offer because, in his view, Virginia law requires VW to pay back the full purchase price of the cars, not just the resale value – but for most owners and leasers the agreement will be a relatively fast and happy ending to the emissions scandal.

But what about for Volkswagen? The company's lead counsel in the emissions cheating case is Sullivan & Cromwell, the same firm that litigated so fiercely and successfully in the hedge fund fraud cases against VW's majority shareholder. Why did VW cave so quickly in the emissions case? And can a \$15 billion surrender be considered a good outcome for the company?

Giuffra told me in an email statement Tuesday that it can. "We didn't follow a multi-year, grind-it-out litigation strategy, which would have been counterproductive for Volkswagen," his statement said. "The company was committed to making things right for consumers and the environment as fast as we could."

Let's consider the almost uniquely bad facts VW faced. The company's emissions cheating software was detected by California and federal regulators last fall, leading to a rare corporate mea culpa in January. Though VW could have contested the scope of its liability to car owners – and continues to insist that its 3.0-liter engine vehicles are untainted – Judge Breyer has made it abundantly clear from the moment he assumed control of the case that VW was going to have to compensate car owners.

Before Judge Breyer was appointed, VW floated the idea of resolving car owners' claims outside of court, in a company-directed process designed by renowned victims' compensation expert Kenneth Feinberg. But after a panel of federal judges picked Judge Breyer, the judge said any settlement would have to go through him. And unlike many judges appointed to lead big, complicated cases like this one, Breyer refused to allow the litigation to bog down. He appointed former FBI director Robert Mueller, now a partner at Wilmer Cutler Pickering Hale and Dorr, to mediate settlement talks and informed VW in March that if it didn't come up with an agreement by the following month, he would hold a bench trial this summer to determine the company's liability.

Breyer mused in open court about the environmental damage from VW cars spewing noxious emissions, so the company had good reason to worry about the outcome of a bench trial in a case in which plaintiffs lawyers claimed damages of as much as \$30, \$40 or \$50 billion dollars – before punitive damages or trebling under the racketeering laws. VW's exposure just to state and federal regulators theoretically ran to almost \$100 billion.

Against numbers like that, the \$10 billion VW has set aside for the class action buyback program looks almost like a bargain – especially because the \$10 billion is a ceiling. If owners and leasers of affected cars do not claim all of the money in the fund, whatever is left goes back to Volkswagen, according to the settlement agreement.

VW is probably also hoping that its quick civil settlements with consumers and state and federal regulators will play well with the Justice Department as it contemplates criminal charges against the company. Typically, prosecutors look favorably upon defendants' efforts to compensate victims.

The company also avoided the not inconsiderable cost of litigation. It will still have to pay millions of dollars in fees to private lawyers for car owners who decide to accept VW's settlement offer. The plaintiffs steering committee did not disclose its fee request in Tuesday's filings, and whatever Judge Breyer eventually awards to plaintiffs lawyers will be in addition to the \$15 billion VW has already put up. But by settling so early in the case, the company can credibly argue that plaintiffs lawyers aren't entitled to high fees because they just didn't put in as many hours as these cases usually demand.

And finally, the settlement allows VW to begin repairing relationships with its customers, starting with the marketing of the deal itself. Instead of fighting with people who have bought its cars, the company can try to win back their trust and their business.

Plaintiffs lawyer Elizabeth Cabraser said during Tuesday's call with reporters that VW "really had no choice" but to negotiate in good faith with car owners and regulators because their combined leverage made an agreement "essential to survival" for Volkswagen. But lots of defendants facing similar pressure have insisted on testing the strength of their case through dismissal motions, discovery battles and opposition to class certification.

VW caved – which was the right move.

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For Sullivan & Cromwell and VW, a \$14.7B Settlement Counts as a Win

American Lawyer

Jenna Greene, The Litigation Daily

June 29, 2016

When the foreman of the jury says "Not guilty," that's a defense win. When the judge dismisses a case on summary judgment, that's a defense win. When your client agrees to a \$14.7 billion settlement?

For Sullivan & Cromwell and Volkswagen AG, yes, that's a defense win too.

Not in the conventional sense, of course. There was no clever argument that was going to get VW off the hook--especially not after company leaders admitted in September that 11 million diesel cars worldwide were fitted with "defeat devices" to cheat emissions tests.

Instead, for the defense this case was all about playing the hand it was dealt. The Sullivan team led by partner Robert Giuffra Jr., Volkswagen's coordinating counsel in the United States, did so skillfully.

Giuffra and his client had two basic options: go into hyper-litigation mode, then eventually settle for a fortune, as BP did in the Deepwater Horizon suits, or get it over with--settle as many pieces as possible as quickly as possible.

“I’m generally a fighter. I’ve tried multi-billion-dollar cases,” Giuffra said in an interview. “But fighting for the sake of fighting is a dumb strategy....I’m a big believer in looking at every case. Sometimes you make peace.”

Moreover, VW is a consumer-facing company. If as part of its litigation strategy, VW dug in and refused to take any responsibility for its conduct, there was a real risk of destroying the brand, not to mention piling up treble and/or punitive damages.

“We wanted to put this behind the company...to control the risk and exposure,” Giuffra said. “My mantra was a global U.S. settlement.”

The result: A deal that is without parallel in speed and scope, coming less than six months after the Justice Department sued on behalf of the Environmental Protection Agency and about four months after the consolidated class action suit was filed in San Francisco federal court.

By comparison, the average duration of other MDLs that have closed in 2016 was five and a half years, according to research by Sullivan & Cromwell.

It’s worth noting that while the settlement price-tag has been widely reported as \$14.7 billion, it almost certainly won’t really be that much, even after legal fees for the plaintiffs lawyers are eventually added. For one thing, much of the outlay should be tax-deductible as a business expense.

Also, the total is based on an assumption that every consumer will ask VW to buy back his or her car. In reality, that’s unlikely. (Though if VW doesn’t buy back or fix 85 percent of the polluting engines, it will have to pay more into an environmental fund.)

In addition, \$2 billion of the fine is actually an investment in initiatives to promote the use of zero emissions vehicles in the U.S. In theory, VW at some point could make money off that.

Still, some significant aspects of the litigation remain unresolved, including potential criminal charges. But here, VW’s position is strengthened by being able to go the Justice Department and point to the settlement, which gets the cars off the road, pays back consumers and includes a \$2.7 billion payment to an environmental remediation fund. Which all makes the company look less like a bad guy and more like a remorseful cooperator.

In moving into the role of lead VW lawyer, it no doubt helped that Giuffra had already proven himself to VW’s general counsel, Manfred Doess.

Doess became head of VW’s legal department on Jan. 1. Before that, he was the top lawyer for Porsche Automobil Holding SEC.

Giuffra represented Porsche in obtaining the 2010 dismissal of federal securities claims seeking more than \$3 billion arising out of Porsche's takeover bid for Volkswagen. In 2014, the U.S. Court of Appeals for the Second Circuit affirmed the decision.

With Doess at the helm as the new GC, Giuffra, who had been handling the securities litigation portion of the VW suits, stepped up as lead coordinating counsel. Partner Sharon Nelles also played a key role in the settlement.

New York-based Herzfeld & Rubin was co-liaison counsel.

The 22-member plaintiffs "dream team" steering committee is led by Elizabeth Cabraser of Lief, Cabraser, Heimann & Bernstein.

Robert Mueller, the former head of the FBI and now a partner at Wilmer Cutler Pickering Hale and Dorr, serves as settlement master.

It's been a brutal few months for all the lawyers.

U.S. District Judge Charles Breyer in San Francisco, who is overseeing the class action, praised all sides for their "extraordinary effort and hours, seven days a week, 14-hour-plus days."

In a light-hearted exchange during a March 24 status conference, Giuffra told Breyer, "My 8-year-old son doesn't like the case very much because he says 'Daddy is never home.'"

According to a court transcript, Breyer replied, "In a month's time, we will reintroduce you to your family. They can all come to San Francisco for an environmentally correct holiday, right, and we'll--"

Giuffra interjected, "He is actually in San Francisco. We are hoping to go to Alcatraz this afternoon."

Breyer's response: "Please don't arrange to stay any longer than necessary because then we're going to have to use Director Mueller's contacts to get you out."

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