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VW Asks 9th Circ. For Say Over Jones Day Docs In FOIA Suit

By **Linda Chiem**


Law360 (June 7, 2021, 7:50 PM EDT) -- Volkswagen has told the Ninth Circuit that it should have a say on whether the U.S. Department of Justice releases confidential documents in response to a Freedom of Information Act lawsuit, saying Jones Day's findings on Volkswagen's internal investigation into the 2015 emissions-cheating scandal are protected.

Volkswagen AG insisted in a Friday reply brief that it should be allowed to intervene in Loyola Marymount University professor Lawrence Kalbers' FOIA lawsuit seeking to get the Justice Department to publicly release Jones Day's findings — which have been kept under wraps — on how the "clean diesel" emissions-cheating scandal **took shape**, as well as reports from Volkswagen's **independent compliance monitor**.

U.S. District Judge Fernando M. Olguin in October denied Volkswagen's bid to intervene in the FOIA dispute as untimely and ordered the DOJ to search for and produce all "factual evidence" that the firm gave to the DOJ in connection with the government's criminal case against the company.

Judge Olguin held that Volkswagen missed the window to get in on Kalbers' October 2018 lawsuit, flatly rejecting claims from Volkswagen's attorneys at Sullivan & Cromwell LLP that the company only received "formal" notice of this lawsuit via a Sept. 4, 2019, letter the DOJ sent Volkswagen.

That argument was a "red herring that not only strains credulity, but is disingenuous as well," Judge Olguin said, flagging what he called troubling omissions and an apparent lack of candor by Volkswagen's counsel in light of emails that the DOJ sent on Aug. 22, 2018, and Oct. 17, 2018, notifying Volkswagen of Kalbers' FOIA request and his lawsuit.

Volkswagen said in Friday's reply brief that the judge unfairly criticized its attorneys, explaining that the "date on which VW learned of the lawsuit was not the relevant date for determining timeliness" under the Ninth Circuit's 2016 decision in [Smith v. L.A. Unified School District](#) .

"Beyond being wholly unsupported by relevant case law, the district court's ruling creates a troubling precedent that would compel submitters of confidential information to federal agencies, like VW, to intervene the moment they learn about any FOIA lawsuit, regardless of the government's position as to the scope of the request, what records may exist within that scope or what position the government may take with respect to those records," Volkswagen argued. This would only serve to "squander scarce judicial resources and increase litigation costs" further, it said.

The automaker maintains that it wasn't until the September 2019 letter, in which the DOJ said it was considering disclosing portions of a report from VW's independent compliance monitor, that sounded the alarm for Volkswagen to intervene to protect the release of any confidential "commercial or financial information" as part of the FOIA action.

"As a submitter of confidential commercial information to the government, VW had ample reason to believe its confidentiality interests would be protected under the plain text of FOIA and DOJ's implementing regulations unless and until DOJ notified it otherwise," Volkswagen argued.

Ultimately, Judge Olguin's order was "contrary to the legal standard adopted by numerous federal

courts across the country that have allowed an entity whose documents are being sought in a FOIA request to intervene at all stages of a case, including after summary judgment," Volkswagen said in its reply brief.

Kalbers, an associate dean of faculty and academic initiatives at Loyola Marymount's College of Business Administration who has been researching Volkswagen's "clean diesel" emissions cheating scandal, sued in October 2018 after the DOJ's Environment and Natural Resources Division denied his initial FOIA request because the documents he requested fell under an exemption in FOIA. That exemption shields the release of any documents "compiled for law enforcement purposes."

According to Volkswagen, Judge Olguin further complicated things and "effectively sent the parties back to square one" when he determined that the DOJ unduly narrowed Kalbers' FOIA request and ordered it to go back and dig up more documents it received from Jones Day. Volkswagen says that could potentially include more than 6 million documents that Volkswagen produced in response to a grand jury subpoena that are typically protected.

Kalbers countered in court documents that the judge fairly assessed Volkswagen's motion, which Kalbers described as yet another delay tactic, to block the release of documents that he has already been waiting 16 months for.

"The district court, scrupulous in its review of all of the evidence, was not fooled or amused," Kalbers said in a May 14 answering brief. "Indeed, the court analogized Volkswagen's attempted deception of the court with its deception of its regulators in the course of the diesel emissions fraud."

"Despite the district court's finding of chicanery, Volkswagen still pegs its argument primarily to the faux notice letter," Kalbers added in reference to the September 2019 letter. "Adamance notwithstanding, the district court was correct in holding that Volkswagen had no reasonable expectation at any time that the Department of Justice would represent its interests in this FOIA case."

"It is not at all a foregone conclusion, as Volkswagen assumes, that the target of a criminal investigation that produces records to the Justice Department and pleads guilty to three felonies maintains a legally protectable interest in those records for purposes of intervention in a FOIA case," Kalbers continued.

Volkswagen **hired Jones Day** to conduct an internal investigation shortly after the U.S. Environmental Protection Agency and the California Air Resources Board issued the September 2015 **notices of violation** blasting Volkswagen for rigging thousands of "clean diesel" vehicles with special software, or defeat devices, to fool regulators' tests and emit pollutants beyond federal limits.

Volkswagen has since paid more than \$25 billion in fines, penalties and settlements in the U.S. over the emissions scandal. That includes an overall **\$14.7 billion deal** in 2016 with federal and state regulators, including the DOJ and the EPA. The bulk of that deal — \$10 billion — went toward compensating Volkswagen customers for claims tied to the 2.0-liter TDI "clean diesel" vehicles. Volkswagen in 2017 cut an approximately **\$1.2 billion deal** to settle civil claims tied to its 3.0-liter TDI vehicles.

Kalbers said the factual evidence that Jones Day presented to the DOJ in connection with its **criminal investigation** apparently was deemed valuable to the government. In the plea agreement, the DOJ expressly acknowledged the extensive evidence provided to it, deeming the company's "cooperation" worthy of a discount of approximately \$3.4 billion off its criminal sentence — or 20% off the bottom of the U.S. Sentencing Guidelines fine range — which led to a much-reduced criminal fine of **\$2.8 billion**, according to Kalbers' answering brief.

"Because the government's cases never went to trial, little evidence of Volkswagen's fraud has reached the public domain," Kalbers said. "The still-secret Justice Department records remain of considerable interest both to researchers and the general public, including in Southern California which bore the greatest impact of Volkswagen's crimes."

Counsel and representatives for the parties referred Law360 to their respective court briefs and had no additional comment on Monday.

Kalbers is represented by Daniel Jacobs and Robert A. Rabbat of Enenstein Pham & Glass LLP.

Volkswagen is represented by Robert J. Giuffra Jr., Laura Kabler Oswell, Sharon L. Nelles, Suhana S. Han and Andrew J. Finn of Sullivan & Cromwell LLP.

The case is Kalbers v. U.S. Department of Justice, case number 20-56316, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Adam LoBelia.

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