KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 28, 2019

Via email Leopold.Matt@epa.gov
Matthew Z. Leopold
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U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* in Cause No. 18-15937, pending in the United States Court of Appeals for the Ninth Circuit

Dear Mr. Leopold,

Thank you for the opportunity to discuss the State of Texas's position on the issues raised in the request by the Ninth Circuit Court of Appeals for amici briefing on the issue of post-sale tampering. We appreciate the opportunity to express the State's concerns and address the issues raised by Judge Breyer's ruling in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 310 F.Supp.3d 1030 (N.D. Cal. 2018) (hereinafter "*Counties*"). The Court's decision in *Counties* and the appeal of that decision raise important issues that impact both state enforcement efforts and the careful federal/state balance prescribed by the Act.

The State provides the following materials in support of its position:

1) Attached as Appendix 1 is a summary of the State's responses to the questions raised by the Ninth Circuit panel in its August 22, 2019 order.

2) Attached as Appendix 2 is a written summary of *State of Texas v. Volkswagen et al.* that includes:

   - a description of Volkswagen's post-sale tampering conduct;
   - a summary of the State's litigation efforts to enforce its anti-tampering laws;
   - an analysis of preemption under the Clean Air Act;
   - a discussion of *Counties.*

3) Attached as Appendix 3 is Harris County's Response to Petition for Writ of Mandamus filed in the Third Court of Appeals, Austin that addresses Volkswagen's preemption claims.

4) Attached as Appendix 4 is the State of Texas's Response to Mandamus Petition, filed in the Third Court of Appeals, Austin, which contains attached evidentiary citations. The sections of the State's Response that address Volkswagen's preemption arguments are contained in Section II and begin at page 25. The Third Court of Appeals denied Volkswagen's mandamus petition on July 26, 2019.

The State appreciates the opportunity to provide its responses and supportive briefing addressing the Court's inquiry. We stand ready to address any questions you may have or provide additional information about this issue.

Sincerely,

/s/ *Patrick K. Sweeten*

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Appendix 1

QUESTIONS POSED BY THE NINTH CIRCUIT

In its August 22, 2019 order, the Ninth Circuit Court of Appeals invited the Office of the Solicitor General and the United States Environmental Protection Agency (EPA) to submit amicus curiae briefs in the above referenced action on the following issues:

1. **The effect on the preemption analysis, if any, of the exemption from preemption set forth in 42 U.S.C. § 7543(d), which preserves the ability of a state or its political subdivision to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.**

   Texas's response: The touchstone of a federal preemption analysis is Congressional purpose. *Wyeth v. Levine,* 555 U.S. 555,565 (2009). 42 U.S.C. § 7543 (Section 209) includes both an express preemption provision (7543(a)) and an exemption from that preemption (7543(d)). Thus, Congress's purpose is clear: the setting and enforcing of emissions standards for new motor vehicles is the sole purview of the federal government. States, however, are free to control, regulate, or restrict the use, operation, or movement of registered or licensed (i.e., "used" or "in-use") motor vehicles. In short, 42 U.S.C. § 7543 draws a clear textual distinction between pre- and post-sale regulation. In the instant context, the States are preempted from enforcing state laws that dictate what emissions control systems are installed on new motor vehicles that are sold in the United States. But once the vehicles are sold in the various states, the States are not preempted by federal law from enforcing laws that prohibit disabling or impairing emissions control systems on vehicles registered and in-use in that State. This fine balance is the very model of the cooperative federalism that permeates the entire federal Clean Air Act.

2. **The effect on the preemption analysis, if any, of 42 U.S.C. § 7524, which limits the amount of civil penalty for violations of the federal anti-tampering law, and which requires the EPA to consider certain factors when imposing such a penalty.**

   Texas's response: Like the federal anti-tampering law, the Texas anti-tampering law sets a range for civil penalties for violations; i.e., each law sets a maximum penalty per violation. As set forth in Appendix 2, Section IV, *infra,* actions at both a federal and state level for violations of environmental laws occur in other contexts, and multiple courts have held there is no claim preclusion in those instances. In this instance, at least 10 other states—all § 177 states-- have assessed civil penalties for the anti-tampering violations committed by Volkswagen in their state. The possibility of a civil penalty at the state level is not a basis to find preemption of state anti-tampering regulations.

3. Further Requests
   a. **Were the federal settlements intended to foreclose subsequent state or local civil penalties?**

Texas's response: No. As set forth in Appendix 2, Section V(4), *infra,* the federal settlements with Volkswagen, by their express terms do not settle, penalize, or release Texas's state law claims, or those of any other state. And in fact, at least 10 other states settled state law anti-tampering violations similar to those brought by Texas, for civil financial penalties, after the federal settlements were entered by the California federal district court. No one, including the Volkswagen defendants, argued that those civil financial penalties assessed by those states were precluded by the federal settlements.

   b. **What is the effect of the Ninth Circuit's ruling on whether state law anti-tampering regulations are preempted by the federal Clean Air Act on future settlements and federal enforcement of nationwide environmental regulations?**

Texas's response: The preemption issue before the Ninth Circuit is a narrow one: are state anti-tampering laws that prohibit tampering with the emissions control systems of used motor vehicles registered in their state preempted by 42 U.S.C. § 7543(a), and/or does 42 U.S.C. § 7543(d) expressly carve out from federal preemption a State's regulation of tampering with used motor vehicles registered in its state? The plain language of 42 U.S.C. §7543(d) carves out state law regulation of tampering on registered vehicles from preemption. Further, state regulation of in-use tampering does not interfere with federal enforcement or settlement of federal anti-tampering violations. Texas is not seeking to set anti-tampering laws on a national basis, or to enforce against conduct outside of Texas. Nor does it seek to enforce federal laws. But if the Ninth Circuit finds that state anti-tampering laws are preempted by section 7543(a), the application of such a holding could stymie the ability of states to address tampering conduct, vitiate anti-tampering laws in the vast majority of states, and fundamentally upset the historical balance between state and federal regulation of in-use vehicles.

   c. **Are these further requests relevant to the preemption analysis?**

Texas's response: These two concerns are not relevant to the pre-emption analysis. The text of the Clean Air Act lays out the cooperative federalism framework, drawing the line between what is preempted—setting and enforcing emissions standards for "new" vehicles—and what is not—regulating "used" vehicles. Moreover, it is not necessary for the court to reach these considerations because the enforcement of state anti-tampering regulations does not interfere with federal regulation and enforcement. State enforcement against tampering with emissions controls on used vehicles carried out within a state's borders does not stymie or pose an obstacle to federal setting and enforcement of nation-wide emissions standards for new vehicles.

Appendix 2

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Re: *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* in Cause No. 18-15937, pending in the United States Court of Appeals for the Ninth Circuit

Dear Mr. Leopold,

The State is providing the following summary in response to issues raised by the Ninth Circuit order. The sections that follow explain Volkswagen's post-sale tampering activities, set forth the States' anti-tampering claims against Volkswagen, and analyze the California Court's ruling in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 310 F.Supp.3d 1030 (N.D. Cal. 2018) (hereinafter "*Counties*"). We stand ready to address any questions or provide any additional information you may have about this issue.

I. BACKGROUND

A. Volkswagen's Original and Post-Sale Tampering Conduct

i. Original Tampering

Volkswagen's participation in the largest-ever emissions scandal involving an auto manufacturer has been well chronicled. Between 2009 and 2016, Volkswagen sold vehicles, which at the time of manufacture contained software that detected whether a vehicle was being emissions-tested on a dynamometer—a machine used for emissions testing—versus actually being driven on the road.[1] VWAG installed this software on over 500,000 diesel-powered vehicles sold throughout the United States. VWAG then sold the polluting diesels as "clean diesel" vehicles.

ii. Post-sale Tampering

But VWAG's tampering did not end there. In 2012, VWAG began receiving reports of alarming numbers of failed hardware parts in the emissions control systems of in-use "clean" diesel vehicles. If the emissions controls were turned off during normal driving by the factory-installed

[1] The software installed by Volkswagen during manufacturing was installed for the purpose of defeating the emissions testing required by the EPA prior to certifying the vehicles for sale in the United States. If Volkswagen did not demonstrate compliance with federal emissions standards, the EPA would not issue Certificates of Conformity, and the vehicles would not be available for sale in the United States. The tampering software at issue in Texas's enforcement case was installed by Volkswagen not for the purpose of cheating on federal emissions testing, but rather for the purpose of avoiding replacing or repairing emissions control systems while under warranty.

software, it was not immediately clear why the emissions controls were wearing out. VWAG's engineers suspected that these hardware failures were tied to the failure of the factory-installed software to reliably turn off emissions controls.[2] Emissions controls were operating, parts were wearing out under warranty, and Volkswagen was incurring the costs. Accordingly, VWAG decided to tamper with in-use vehicles by installing new software.

This new software started the vehicle with the emissions controls disabled and continued to operate the vehicle with disabled emissions controls unless the vehicle detected it was being tested for emissions. If the vehicle were never emissions-tested by being placed on a dynamometer, it would operate with the emissions controls disabled 100% of the time, thereby sparing emissions controls from wear and tear, and Volkswagen from mounting warranty costs. The new software parts worked together to ensure the vehicles would more effectively detect when the vehicle was actually being driven on the road versus being tested on a dynamometer, thus resulting in the impairment or disabling of the vehicles' emissions control devices more often. The end result would cause an increase in emissions.[3]

The new tampering software was developed by the engineers in Germany, but it was installed on vehicles in use throughout the United States, including Texas. Volkswagen provided the new software to dealerships that began installing the software on customers' vehicles in Texas whenever a customer brought their vehicle to the dealer for routine maintenance. The dealer was then reimbursed for installing the tampering software on the vehicles by Volkswagen.

The conduct that Texas alleges violates its anti-tampering regulations occurred entirely in Texas. And the tampering software parts were installed on Texas vehicles at Texas dealerships all before Volkswagen's original tampering activities had been revealed to the public. In fact, Texas vehicle owners were induced to bring their Volkswagen vehicles to the dealerships through false representations contained in letters sent to them at Volkswagen's direction. Volkswagen also misled the Texas dealerships about the purpose and effect of the tampering software and used Texas dealers to install the software in Texas. Volkswagen then paid the costs of installing the tampering software. And it did all this not for the purpose of cheating on federal emissions standards but to spare itself the costs of replacing parts that might fail while still under warranty. Volkswagen's tampering violations in Texas differ from those of a local mechanic who turns off the emissions controls to increase fuel economy at a customer's request in that Volkswagen

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[2] The engineers at VWAG theorized that the high failure rate of the diesel particulate filters ("DPFs) was due to the emissions control systems operating during normal driving. The DPFs were very expensive to replace under warranty and pursuant to their Importer Agreement "all maintenance work and/or repairs to be carried out shall be in accordance with VWAG's instructions, guidelines and/or procedures."

[3] Volkswagen of America Corporate Representative Stuart Johnson testified both software parts would increase the NOx emissions from the impacted vehicles:

Q. Okay. And the effect of these two different changes to the software would be to enhance the ability of the car to have the higher NOx emissions while it was on the road?

MR. MONAHAN: Objection.

THE WITNESS: I would say that's correct.

Johnson Dep. 119, Oct. 25, 2017.

defrauded both the owner of the vehicle and the dealer who installed the tampering and did so for its own benefit. But those facts should not spare Volkswagen from answering for its violations of Texas anti-tampering law. Nor should the fact that Volkswagen installed tampering software parts on a large number of vehicles, over 23,000 vehicles in Texas, spare it from answering for its violations of Texas law committed in Texas.

The tampering with these in-use vehicles occurred throughout the United States, including Texas, via a series of recall and service campaigns as well as "field fixes" performed when consumers brought their vehicles to Volkswagen dealerships for routine maintenance. This "post-sale tampering" is the subject of both the appeal in the Ninth Circuit and Texas's state court lawsuit filed in the 353rd Judicial District of Travis County, Texas.

B. The Texas Volkswagen Litigation

Texas filed environmental and consumer protection enforcement lawsuits in Travis County District Court on October 8, 2015, just three weeks after news of Volkswagen's tampering scheme was disclosed. Texas's case was neither filed in nor transferred to the federal MDL proceedings in the Northern District of California that resulted in the settlement of most consumer claims, and the environmental claims filed by DOJ on behalf of the EPA. Nor was Texas a party, or invitee, to the federal negotiations that resulted in the resolution of the majority of federal MDL claims that was announced on October 25, 2016.

In 2016, approximately forty-eight states in total, including Texas, settled their consumer claims with Volkswagen. Following those settlements, in 2017, Volkswagen AG plead guilty to three federal felony counts in the U.S. District Court Eastern District of Michigan. From the statement of facts in the guilty plea, the State of Texas first learned of Volkswagen's involvement in post-sale tampering activities. Following a stay of its proceeding in the state MDL, Texas amended its environmental enforcement petition to include Volkswagen's post-sale tampering activities.

In May 2017, ten Section 177 states including Connecticut, New York, and Massachusetts settled their environmental claims with Volkswagen. The settlement of the 177 states' claims included a release of post-sale tampering claims and payment to the combined 177 states of $157 million dollars.

In contrast, the non-177 states who filed environmental claims have faced significant challenges. Volkswagen asserted preemption defenses as a shield against each one of the non-177 state environmental enforcement actions. In Texas, Volkswagen filed a motion seeking summary judgment on the original and post-sale tampering claims. On February 21, 2018, the Travis County District Court granted Volkswagen's summary judgment motion as to original tampering and denied Volkswagen's motion as to Volkswagen's post-sale tampering conduct. Following that denial, the California Court issued its ruling in *Counties* on April 16, 2018. Volkswagen moved twice for reconsideration of the District Court's denial of their motion based on the California Court's ruling. Following denial of its reconsideration motions, Volkswagen sought mandamus relief in the Third District Court of Appeals. On July 26, 2019, Volkswagen's mandamus petition was denied. *In re Volkswagen Group of America, et al.*, No. 03-18-00508-CV, 2019 WL 3367548 (Tex. App.—Austin 2019, orig. proceeding).

During the course of its litigation, the State of Texas has undertaken significant discovery efforts to uncover facts related to its post-sale tampering claims. Volkswagen has sought seven stays of the proceedings, from multiple courts, yet the State's discovery efforts continue. Those efforts have included multiple depositions of Volkswagen executives involved in post-sale tampering efforts, including James Liang and Oliver Schmidt, both inmates in federal correctional facilities. The facts developed have revealed the depths and motivations behind Volkswagen's post-sale tampering activities, issues not fully explored in prior litigations and settlements.

II. The Counties' and Texas's Post-Sale Tampering Claims are not Preempted

A. The Legislative History and Text of the Clean Air Act Emphasizes the State's Role in Combatting Air Pollution.

The State of Texas's post-sale tampering claim is based on the Texas Clean Air Act ("TCAA") and TCEQ regulations that are part of a federal-state partnership provided under the federal Clean Air Act ("CAA") to combat air pollution. The CAA provides enforcement authority to both the federal and state governments. The Clean Air Act functions as a "comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The opening section of the CAA reflects Congress's intent to preserve the State's role in combatting air pollution:

> The Congress finds that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments. 42 U.S.C. § 7401(a)(3).

The text of the Clean Air Act establishes a dual enforcement regime that unambiguously preserves regulatory authority over the post-sale claims to the states. The Clean Air Act provides that "[e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. § 7407(a). Congress's intent to establish this co-enforcement regime was further expressed through its adoption of Section 209. 42 U.S.C. § 7543 (also known as § 209 of the Clean Air Act).

The legislative history of the Clean Air Act also makes clear that States and local governments were to partner in the role to clean up the air in the country: "The Senate remains convinced that the most effective enforcement of standards would take place on the State and local levels." Senate Consideration of the Report of the Conference Committee, 91st Cong., Publ. L. 91-604 (Dec. 18, 1970) *reprinted in* 93rd Cong. 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970,* 123, 127 (1974). While Congress removed the State's power to adopt or enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines," the States can still regulate "emissions from other than new cars[.]" S. Rep. No. 91-1196, National Air Quality Standards Act of 1970, *reprinted in A Legislative History of the Clean Air Act Amendments of 1970, supra,* 397, 513 (1974).

B. Section 209 Expressly Excludes Post-Sale Tampering Claims from Preemption in the Clean Air Act.

Not long after the Clean Air Act's passage, Congress became concerned that states were implementing conflicting standards for motor vehicle emissions that would put an inordinate burden on auto manufacturers producing new cars. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. N.Y. State Dep't of Envt'l Conserv.*, 17 F.3d 521, 524 (2d Cir. 1994). Accordingly, it enacted a preemption clause, Section 209, designed to prevent the manufacture of new cars from being subject to a multiplicity of state regulation. *Id.* The Clean Air Act's vehicle emissions preemption provision provides:

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment. 42 U.S.C. § 7543(a) (also known as § 209(a) of the Clean Air Act).

It then carves out an area for state regulation of vehicles:

> Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles. *Id.*§ 7543(d) (also known as § 209(d) of the Clean Air Act).

Section 209 draws a textual distinction between pre- and post-sale regulation. And while Section 209(a) of the CAA does expressly preempt states and their political subdivisions from enforcing emissions standards from *new* motor vehicles, Section 209(d) provides a savings clause allowing states and political subdivisions to regulate the "use" and "operation of used motor vehicles after sale."

Section 209 was enacted to preempt state regulation of new vehicles to avoid an "anarchic patchwork" of regulation in which manufacturers of new vehicles would have to meet varying emission standards for their new cars in different states thereby disrupting interstate commerce. *See Engine Mfrs. Ass'n, Inc. v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1979.) By its terms, the Clean Air Act creates a cooperative enforcement regime. By carving out post-sale control, regulation, or restrictions from the preemption clause in Section 209(d), Congress expressed its intent to allow the states to regulate vehicles post-sale. Nothing in the history of Section 209 indicates that Congress intended to restrict state authority to regulate vehicles once they are "in use" on state roads, so long as state regulation does not attempt to enforce EPA emission standards or introduce new emissions standards.

C. The Environmental Protection Agency has consistently recognized the existence and function of state anti-tampering rules.

For many years, the EPA has recognized and approved the existence and operation of state anti-tampering regulations. Many states have enacted anti-tampering rules concerning registered or licensed motor vehicles, which generally prohibit the removing, impairing or disabling of EPA-approved emission control equipment on vehicles.[4] The EPA has also noted that "many states" have anti-tampering rules and "use them successfully as enforcement tools." 63 Fed. Reg. 6651, 6652 (February 10, 1998). In EPA-issued circulars, the EPA has noted that "many states also impose fines" and that "[i]n addition to federal law, forty-five out of the fifty States also have statutes or regulations which prohibit tampering with the pollution control equipment on motor vehicles". Supp. MR.524: Supp. MR.516. U.S. EPA, Fact Sheet: Exhaust System Repair Guidelines 1 (Mar. 13, 1991), *available at* https://www.epa.gov/sites/production/files/documents/exhsysrepair.pdf. And the EPA has on many occasions approved submissions of anti-tampering rules as part of State Implementation Plans.[5] Anti-tampering enforcement actions fit squarely within the in-use exception since they involve the prohibition of tampering with EPA-approved emissions control systems of registered or licensed vehicles.

III. The *Counties* Decision Ignores the Underlying Text, Legislative History and Purpose of the Clean Air Act

In *Counties,* the California Court correctly rejected Volkswagen's primary argument, express preemption, and found that post-sale tampering claims are not expressly preempted by the Clean Air Act. *Counties*, 310 F. Supp. 3d at 1039. The Court found:

> "The Counties are not attempting to impose emissions measures that would require manufacturers to change the way they construct new vehicles. Rather, the Counties are attempting to prevent manufacturers from tampering with their vehicles after the vehicles

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[4] *See e.g.* 30 Tex. Admin. Code § 114.20; Minn. Stat. § 325E.0951 ("[a] person may not knowingly tamper with, adjust, alter, change, or disconnect any air pollution control system on a motor vehicle or on a motor vehicle engine."); Ala. Admin. Code r. 335-3-9-.06 ("[N]o person shall cause … [the] disabling of … [an] exhaust emission control system … which has been installed on a motor vehicle[.]"); 9 Va. Admin. Code § 5-91-190(A) ("[N]o owner or other person shall cause or permit the removal, disconnection, disabling or intentional alteration that reduces the effectiveness of an emissions control system or device that has been installed on a motor vehicle in accordance with federal laws and regulations.").

[5] *See* 70 Fed. Reg. 50199 (Aug. 26, 2005) (approving Tennessee anti-tampering regulation); 70 Fed. Reg. 21384 (Apr. 26, 2005)(approving Pennsylvania inspection and maintenance ("I&M") anti-tampering program); 63 Fed. Reg. 69589 (Dec. 17, 1998)(approving New Hampshire I&M anti-tampering testing); 61 Fed. Reg. 15715 (Apr. 9, 1996) (approving Illinois I&M antitampering inspection); 55 Fed. Reg. 36290 (Sept. 5, 1990) (approving Oklahoma's anti-tampering regulations for Tulsa County); 52 Fed. Reg. 4921 (Feb. 18, 1987) (approving Utah's I&M anti-tampering program for Utah County); 51 Fed. Reg. 34669 (Sept. 30, 1986) (approving Oklahoma's anti-tampering program for Oklahoma County); 50 Fed. Reg. 30960 (July 31, 1985) (approving Indiana antitempering regulation); 50 Fed. Reg. 5630 (Feb. 11, 1985) (approving Missouri's I&M anti-tampering inspection for St. Louis); 49 Fed. Reg. 31086 (Aug. 3, 1984) (approving Texas's anti-tampering regulations for Harris County); 37 Fed. Reg. 10842 (May 31, 1972) (approving anti-tampering regulations or I&M programs of various states, including Alabama and Wyoming).

> are sold to end users. Because the relation-back concept is not implicated here, it does not bring [these] claims within the preemptive scope of Section 209(a)" *Id.* at 1040.

But the Court's analysis did not end there. Instead, the California Court found that the Counties' claims conflicted with the overall scheme of the CAA and as a result were impliedly preempted. The basis, however, of the preemption of state law found by the California Court is less than clear.

There are two primary forms of "implied" preemption: field and conflict. In its discussion of the in-use tampering, the Court does not refer to or discuss the standard for field preemption. The type of "implied" preemption discussed by the Court is "conflict" preemption, sub-genus "obstacle." Implied conflict obstacle preemption has been described as follows:

> In its obstacle preemption cases, the [Supreme] Court has held that state law can interfere with federal goals by frustrating Congress's intent to adopt a uniform system of federal regulation, conflicting with Congress's goal of establishing a regulatory "ceiling" for certain products or activities, or by impeding the vindication of a federal right. However, the Court has also cautioned that obstacle preemption does not justify a "freewheeling judicial inquiry" into whether state laws are "in tension" with federal objectives, as such a standard would undermine the principle that "it is Congress rather than the courts that preempts state law." *Federal Preemption: A Legal Primer*, Jay B. Sykes and Nicole Vanatko, Congressional Research Service, July 23, 2019, 25-26, citing to *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring))

In *Counties*, the California Court engages in just the type of "freewheeling judicial inquiry into whether states' anti-tampering laws are in tension with federal objectives" disfavored by the US Supreme Court. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment). In its discussion of federal and state joint responsibility for enforcement of emissions standards in used vehicles, the Court discusses Congress' clear intent that States play a role in "assuring vehicles, once delivered to the ultimate and subsequent purchasers, continue to conform to the standards to which they were certified." *Counties* at 1042, citing to S. Re. 91-1196, at 31 (1970). The Court further discusses the federal anti-tampering laws and the state cohorts. *Counties* at 1042-3. The Court never finds, however, that the state anti-tampering laws frustrate Congress's intent to adopt a uniform system of federal regulation, conflict with Congress's goal of establishing a regulatory ceiling, or impede the vindication of a federal right. In fact, the Court finds that "[i]f, for example, a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clean Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders." *Counties* at 1042.[6]

And rather than finding that state laws pose an "obstacle" to federal law, as required by implied obstacle preemption, the Court instead created a special category of tampering conduct: that carried out by a manufacturer on a "model-wide" basis, finding that the EPA is in a "better

[6] Prior to the tampering engaged in by Volkswagen during the sham "recall" campaigns in 2014-2015, Volkswagen tampered with vehicles in Texas in exactly the fashion Judge Breyer describes, installing tampering software on customer's vehicles when the vehicle was brought into the dealership for routine maintenance.

position" to address it than the States. *Counties* at 1043-5. In short, for the Court, preemption was in part a question of scale. In other words, it is only if the tampering is "model wide" that EPA's superior nationwide enforcement power is triggered, and preemption is implicated. *See id.* at 1040. But the only difference contained in the California Court's hypothetical and the tampering acts alleged, is that Volkswagen repeated this tampering thousands of times. The number of tampering violations—and whether they involve some vehicles by model year rather than individually—is not rooted in the Clean Air Act and provides no principled basis for altering the underlying preemption analysis.

In its analysis of the interplay between state and federal regulation of in-use vehicle emissions and implied obstacle preemption on a model-wide basis, the California Court cited to no instance in which the state enforcement would pose an obstacle to federal regulation. It is only when the Court discusses penalties and the potential for a state to assess a penalty for a violation of its state anti-tampering law that it zeroes in on an actual obstacle. *Counties* at 1044-5. Here the Court expresses its atextual view that "[n]ot only is EPA *better positioned* than the Counties to regulate Volkswagen's post-sale software changes, but if the Counties were permitted to regulate this conduct, the size of the potential tampering penalties could significantly interfere with Congress' regulatory scheme." *Id.* (emphasis added).

The only other potential "conflict" the California Court identified was contained in the final footnote of the opinion. *Counties* at 1050, fn 7. There the Court discusses the software "fix" approved by the EPA after the settlement had been entered. In the context of the federal settlement the Court stated that because the federal settlement included a software fix that didn't actually bring the vehicles into compliance with federal emissions standards, the states could allege violations of the anti-tampering laws by the installation of the fix software that the Court approved. But the Court itself acknowledges exactly what conduct the states prohibit and regulate with their anti-tampering statutes: "These tampering laws generally 'prohibit the operation of motor vehicles when air pollution devices have been removed, altered, or rendered inoperative'." *Counties* at 1042, citing Arnold W. Reitze Jr., *Air Pollution Control Law: Compliance and Enforcement* § 10–5(d) (2001); *see also* 57 Fed. Reg. 24370–01 (June 9, 1992) (EPA's approval of Florida's anti-tampering program); 52 Fed. Reg. 4921–02 (Feb. 18, 1987) (EPA's approval of Utah's inspection and anti-tampering programs). The software fix approved by the California Court, while it may not have brought the vehicles into compliance with federal emissions standards, also did not include additional tampering devices that removed, altered, or rendered inoperative the emissions control systems on the vehicles, the conduct which is actionable under state anti-tampering law. There is no conflict, real or hypothetical, between the fix approved in the federal settlement and the states' anti-tampering laws. Texas's enforcement lawsuit addresses Volkswagen's post-sale tampering acts committed in Texas, well before the discovery of Volkswagen's extensive original or post-sale tampering activities or any fix later approved by the Court.

The implied preemption analysis in *Counties* is a freewheeling inquiry into the interplay between state and federal regulation of in-use vehicle emissions. The California Court found implied obstacle preemption, but identified no actual obstacle to federal emissions standards for new cars, or the enforcement thereof, posed by state law prohibitions of tampering with in-use vehicles. In *Counties*, the Court expresses its discomfort with some states seeking penalties for conduct---conduct already successfully penalized by California and 10 other 177 states-- but

cannot cite to a precedent to support such a disparate result. The *Counties* reasoning and decision should be rejected.

In short, the California Court's reading of the CAA in *Counties* hinges on an atextual assumption that Congress intended to reserve regulation of manufacturer conduct on a vehicle's "model-wide" basis. *Counties* at 1044-1047. It ignores the line drawn by the provisions of Section 209 and the text and legislative history of the CAA. In enacting Section 209, Congress explicitly indicated its awareness of the operation of state laws and state enforcement roles. In fact, the very point of section 209(d) is that there is room for state regulation of in-use vehicles. As the United States Supreme Court has said, "Because federal motor vehicle emissions-control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles." *Washington v. General Motors Corp.*, 406 U.S. 109, 15 n.4 (1972).

And the State of Texas's anti-tampering regulations do not impose any new emissions standards at all. The Supreme Court has defined standards as relating to:

> "the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution control device, or must have some other design feature related to the control of emissions. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (*EMA*).

There are no design characteristics mandated nor any numerical thresholds imposed by the State anti-tampering statutes. And neither do the State regulations require the design of a "third vehicle". Instead, the State regulations simply prohibit tampering with emissions control devices already installed in the vehicle prior to the original sale.

If Congress had intended to assert exclusive federal power to regulate "model-wide" post-sale tampering by automobile manufacturers, it would have done so explicitly. The "model wide" implied preemption discovered in *Counties* ignores the clear textual distinction in Section 209 and the legislative purpose of the CAA. It also upsets the careful state/federal balance created by Congress.

IV. Penalty and Claim Preclusion Considerations

The Ninth Circuit's order also invites the EPA and Solicitor General's position on statutory penalty limits and factors for the EPA to consider when imposing such a penalty, as codified by 42 U.S.C. §§ 7524(a) and (c)(2). Section 7524(a) limits the EPA from seeking more than $25,000 against a manufacturer for a violation of federal emissions control standards, and each vehicle in violation of emissions control standards shall be considered a separate violation. This penalty limit only applies to the EPA in federal civil enforcement and does not implicate states and the sovereign enforcement of their own laws and regulations. *See* 42 U.S.C. § 7524(b). Similarly, Section 7524(c)(2) requires the EPA to consider certain factors in imposing civil penalties—none of which include potential penalties assessed by the states in their own sovereign capacity.

This reading of the CAA is bolstered by the recognized occurrence of separate federal and

state actions for similar environmental violations. Parallel actions by the EPA and its respective state counterparts occur in other contexts and multiple courts have held such separate actions do not give rise to claim preclusion.[7] Additionally, the Environmental Mitigation Trust Agreement, as set forth in the First and Second Partial Consent Decrees entered into between the United States and Volkswagen, explicitly allows states to seek civil penalties. *See* VW MDL, Dkt. No. 2103-1 (Oct. 25, 2016) (2.0 Liter Vehicles), at Appx. D, pp. 12-13, ¶ 4.2.6 (stating that though beneficiary states must waive their right to seek injunctive relief, they may still seek "fines or penalties" under state environmental law).

The presence and legitimacy of parallel federal-state actions is well established. And concerns raised by Volkswagen about the extent of penalties that can be imposed by multiple jurisdictions speak more to the vast and egregious scope of the fraud committed by the world's largest car manufacturer than conflict preemption. Those expressed concerns are also premature, are not properly part of a preemption analysis and can be addressed by the courts governing those actions. Under the CAA and federal jurisprudence on parallel federal-state actions, Texas, as a separate sovereign, may enforce its own laws and seek civil penalties in absence of federal preemption. The State is solely pursuing violations of State law. In no way is the State seeking penalties for violations of the law that have been enforced by other parties in other litigation—the claims brought by Texas are based on Texas law, and have not been brought or settled by any other party. Nor will Defendants be subject to more than one civil penalty per violation in Texas. Neither Texas's nor the Counties' post-sale tampering claims against Volkswagen are preempted.

V. Texas's Experience Confirms That the CAA's Regime of Cooperative Federalism Works.

1. The Texas anti-tampering statue

The scope of the Texas anti-tampering statute ensures that Texas can regulate tampering without encumbering or inhibiting federal regulatory interests.

The State's enforcement case is rooted in Texas Water Code § 7.101, which establishes the scope of liability for violations of TCEQ rules. Section 7.101 provides "A person may not cause, suffer, allow, or permit a violation of a statute within the commission's jurisdiction or a rule adopted or an order or permit issued under such a statute." Texas's most recent petition pleads violations of two provisions: 30 Tex. Admin Code § 114.20(b) and 114.20(e).

30 Tex. Admin Code § 114.20(b)provides:

> No person may remove or make inoperable any system or device used to control emissions from a motor vehicle or motor vehicle engine or any part thereof, except where the purpose of removal of the system or device,

[7] *See e.g., Bates v. Dow Agrosciences* 544 US 431, 442 (2005); *United States v. Power Eng'g*, 303 F.3d 1232 (10th Cir. 2002) (EPA may pursue its own RCRA enforcement action regardless of the existence of an authorized state program and initiation of a state enforcement action*); United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002) (EPA may pursue criminal enforcement under RCRA where a state has an authorized program); *United States v. Murphy Oil,* 143 F. Supp. 2d 1054, 1087-92 (W.D. Wis. 2001) (prior state enforcement for same conduct did not bar federal CAA enforcement action); *United States v. LTV Steel Co.,* 118 F. Supp. 2d 827, 836-7 (N.D. Ohio 2000) (same).

> or part thereof, is to install another system or device, or part thereof, which is equally effective in reducing emissions from the vehicle.

30 Tex. Admin. Code § 114.20(e) provides:

> No person may sell, offer for sale, or *use* any system or device which circumvents or alters any system, device, engine, or any part thereof, installed by a vehicle manufacturer to comply with the Federal Motor Vehicle Control Program during actual in-use operation of a motor vehicle on Texas roadways.

These provisions must be read with reference to Water Code Section 7.101, which establishes the scope of liability for violations of TCEQ rules. Section 7.101 limits violations to acts "within the commission's jurisdiction" and prevents a "person" from "caus[ing}, suffer[ing], allow[ing] or permit[ting]" a violation of the anti-tampering statute. The "commission" is the TCEQ, the agency of the State whose charge is to implement the constitution and laws of the State of Texas relating to the conservation of natural resources and the protection of the environment. *See* Tex. Water Code Sec. 5.012. Pursuant to the Texas Administrative Code a "person" is defined by the Texas Administrative Code as "[a]n individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity." 30 Tex. Admin. Code § 3.2(25). And nothing in these provisions excepts an auto manufacturer who tampers with emissions systems from adherence to these provisions.

2. Texas's litigation involves only claims that occurred within the State and affected Texas consumers.

The State of Texas's environmental enforcement claims against Volkswagen focus exclusively on Volkswagen's unlawful tampering with emission systems on vehicles that were in use in Texas. Volkswagen implemented the emission disabling software at 60 dealerships in Texas, on over 23,000 vehicles in use in Texas, after falsely enticing Texas consumers to unwittingly avail themselves of the new tampering software addition. Texas is not seeking recovery for tampering that may have occurred in any other state. This position is consistent with TCEQ's interpretation and enforcement of its state anti-tampering laws since 1997.

Texas's anti-tampering laws, like its air-quality regulations, apply to conduct that takes place in Texas. The State has not alleged claims for similar tampering acts that may have taken place in other states—nor does it intend to add any such claims.

And like other state enforcement actions, constitutional due process constraints and limitations on personal jurisdiction, as well as choice of law considerations would govern and limit Texas's ability to enforce tampering violations for conduct that occurred outside of Texas. For example, before Texas could enforce its rules against an out-of-state mechanic, that mechanic would need additional contacts with the state beyond the unilateral action of a third party driving the car into the State. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In addition, where multiple states are involved, choice of law considerations may further govern the appropriateness of Texas enforcement.

Finally, the State has no interest in policing vehicle-emissions tampering that occurs in other states. Texas's concerns lie solely in its interest to protect the residents of the State and to continue to consistently interpret its laws to protect the environment and the public.

3. In a hypothetical scenario where EPA specifically required the emission system change, conflict preemption principles would be applied on a case-by-case basis.

The enforcement of Texas's anti-tampering laws will not in practice conflict with federal interests. Texas recognizes that it cannot impose duties or remedial measures that directly conflict with changes to emissions systems that the EPA specifically required that would make it "impossible for a private party to comply with both state and federal requirements." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990)); *see also Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 490 (2013).

Further, any question as to whether the state anti-tampering requirements make it impossible for a party to comply with both state and EPA requirements—would have to be analyzed under the particular facts and in view of EPA authority under 42 U.S.C. § 7541.But that scenario is plainly distinguishable from Texas's current enforcement case against Volkswagen. In the Volkswagen case, Volkswagen concealed the tampering software installed on in-use vehicles from everyone, including Texas vehicle owners, and state and federal regulators. Thus, no regulator, state or federal, knew about or approved of the tampering at the time it was carried out, much less required its installation. No such conflict preemption analysis is implicated here.

4. The State of Texas's claims are separate and distinct from those addressed by the Consent Decree.

The specific language in the federal Consent Decree provides further support for Texas's interpretation of its claims. The Third Partial Consent Decree entered in the Northern District of California on January 11, 2017, clearly defines the scope of the claims it resolved. Specifically, paragraph 90, provides:

> This Third Partial Consent Decree shall resolve and settle **the United States' Clean Air Act civil claims** related to: (1) any conduct described in the Complaint; (2) any conduct related to the emissions, or compliance with U.S. emissions standards, of the Subject Vehicles; and (3) any conduct related to the Subject Vehicles and disclosed by or on behalf of the Defendants to, or otherwise known to, the Department of Justice or EPA as of the date of this Agreement for the following relief: a. injunctive relief that is intended to enjoin, prevent, and deter future violations of the Act of the types alleged in the Complaint; and b. the assessment of civil penalties against Defendants. The Decree also contains a reservation of rights clause in paragraph 91, which provides that
>
> > The United States reserves, and this Third Partial Consent Decree is without prejudice to, all claims, rights, and remedies against Defendants with respect to all matters not expressly resolved in Paragraph 90.

Finally, in paragraph 96, the Decree states:

> This Consent Decree does not limit or affect the rights of Defendants or of the United States against any third parties, not party to this Consent Decree, **nor does it limit the rights of third parties, not party to this Consent Decree**, against Defendants, except as otherwise provided by law.

Texas was not a party to the Consent Decree or its underlying lawsuit, and its state-law tampering claims were not resolved under paragraph 90 of the Decree. In fact, its claims (along with the claims of the § 177 states, which later settled for $157 million dollars) were expressly reserved state-law claims under paragraph 96.

VI. Conclusion

From a plain reading of the Clean Air Act, including the preemption provisions in Section 209, states and their political subdivisions are not expressly preempted from regulating manufacturer post-sale tampering. The history and text of the Clean Air Act expressly reserve regulation of in-use and operation of post-sale vehicles for State regulation. Through these expressions, Congress intended for states to enforce against post-sale tampering of vehicles' emissions control devices, whether the violator is an individual mechanic tinkering with a single vehicle, or a large, international vehicle manufacturer implementing a "model-wide" tampering scheme. Furthermore, the CAA and federal jurisprudence clearly allow for parallel state enforcement proceedings.

Thank you again for your consideration of the State's position on this issue.

Best Regards,

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Appendix 3

ACCEPTED
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FOR THE THIRD DISTRICT OF TEXAS
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IN RE VOLKSWAGEN GROUP OF AMERICA, INC.,
VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC,
AUDI OF AMERICA, LLC, AND
PORSCHE CARS NORTH AMERICA, INC.,

Relators.

On Petition for Writ of Mandamus to the 353th District Court of Travis County, Texas
Trial Court Cause D-1-GN-16-000370; MDL 15-0844

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STATEMENT REGARDING ORAL ARGUMENT

Harris County does not believe that oral argument is necessary. However, should the Court conclude that oral argument would assist its decisional process, Harris County welcomes the opportunity to participate.

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INTRODUCTION

The State of Texas and Harris County (the "Governments") filed this action to hold Volkswagen accountable for thousands of violations of Texas law arising out of the now-infamous Volkswagen "clean diesel" scandal. In January 2017, Relator Volkswagen AG pled guilty to three federal crimes. *See* Supp. MR.48-49. The events underlying those guilty pleas occurred in two stages.

The first stage. Between 2009 and 2016, Volkswagen sold nearly 600,000 vehicles in the United States that were falsely branded as "clean diesel" vehicles. Supp. MR.115. These "showroom new" vehicles all contained "defeat devices" meant to detect at start-up whether the vehicles were being tested for compliance with emissions standards—and if not, to deactivate the emissions control systems. This daily deactivation of the emissions system, known as "Daily Tampering" in this litigation, is the most well-known and well-developed aspect of the scandal.

The second stage. Beginning in 2012, Volkswagen issued recalls to owners of in-use vehicles for the express purpose of changing the original defeat devices and replacing them with new technology that fundamentally changed the operation of the vehicles' emissions control systems and—perversely—increased emissions. This second stage of the scandal, known as "Recall Tampering" in this litigation, was initially overshadowed by the sheer audacity of the Daily Tampering scheme. But it has become the focus of the Governments' case in state court.

As of this filing, the Governments are the only litigants in the United States who are actively working to expose the depth and breadth of the Recall Tampering (most recently by deposing a Volkswagen executive in a federal prison who took the Fifth Amendment rather than answer questions about the Recall Tampering). This ambitious mandamus proceeding is an effort to stop that work in its tracks.

It is telling that, after months of arguing that the Recall Tampering claims are expressly preempted, Volkswagen has now retreated to its fallback argument: namely, that state anti-tampering regulations applicable to used vehicles "conflict" with the objectives of the Clean Air Act ("CAA"). Volkswagen has little choice, because even the federal MDL court agrees that Recall Tampering claims are ***not*** preempted expressly by the CAA. The implied preemption argument is no better. Even the federal MDL court, upon whose ruling Volkswagen places all its hopes, observed that if "a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clean Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders." *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 310 F. Supp. 3d 1030, 1043 (N.D. Cal. 2018). Volkswagen, of course, did not simply tamper "with a single in-use vehicle during vehicle maintenance." It tampered with thousands of in-use vehicles—one by one. Volkswagen essentially says it cannot be penalized because is "too big to tamper," but that is not a principled basis for preemption. Its petition should be denied.

BACKGROUND

The Clean Air Act and Cooperative Federalism

The CAA provides that "[e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C § 7407(a). Congress has declared that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3).

Not long after the passage of the CAA, however, Congress noticed that States were passing conflicting standards for emissions from new motor vehicles. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dept. of Envt'l Conserv.*, 17 F.3d 521, 524-25 (2d Cir. 1994). Finding that it would be unwise to tolerate state-by-state emission standards for new motor vehicles, Congress added an express preemption clause to the CAA. In its current form, it provides as follows:

> **(a) Prohibition**
>
> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a) (CAA § 209(a)).

Section 209(a) originally was enacted to address a very specific problem: Congress feared "the spectre of an anarchic patchwork of federal and state regulatory programs" for new car emissions—*i.e.*, the promulgation of different emissions standards for all 50 States. *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979). Because that scenario "threatened to create nightmares for the manufacturers," *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996), stifling the free flow of new vehicles across state borders and thereby harming interstate commerce, Congress ordered the EPA to promulgate uniform emission standards applicable to "showroom new" vehicles as well as a uniform process for obtaining federal certification.

Congress did not preempt the entire field of vehicle emissions regulation, which it could have done easily. Nor did it preempt state and local governments from regulating vehicle manufacturers, which it also could have done easily. Rather, it limited the scope of Section 209(a) preemption to "new motor vehicles." "Because federal motor vehicle emission control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles." *Washington v. General Motors Corp.*, 406 U.S. 109, 115 n.4 (1972).

To make this federal-state line explicit, Congress enacted a savings clause in Section 209(d) of the CAA that specifically preserves state authority to regulate the "use" and "operation" of used motor vehicles. The federal-state partnership is easy to discern when these two aspects of Section 209 are viewed side-by-side:

Preemption Clause 42 U.S.C. § 7543(a)	**Savings Clause** 42 U.S.C. § 7543(d)
No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.	Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

42 U.S.C. § 7543(a), (d) (CAA § 209(a), (d)).

As the Southern District of New York stated in an early seminal ruling, "both the history and text of the Act show that [Section 209] was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices ***for the manufacture and sale of new cars***." *Allway Taxi, Inc. v. City of New York,* 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 624 (2d Cir. 1972) (emphasis added).

Mindful of this history and this federal-state partnership, the EPA sets forth its understanding of the boundary: "the legality of particular regulatory controls that a state may impose . . . will depend upon the burden that such controls place on interstate commerce" and whether the state controls are "effectively regulations on the ***design*** of ***new*** engines rather than on the ***use*** of ***'in-use'*** engines." 59 Fed. Reg. 36969-01, 36973, 36974 (July 20, 1994) (emphasis added).

Volkswagen's Violations of Texas Anti-Tampering Laws

Volkswagen masterminded and implemented a scheme to tamper with the emissions control systems of vehicles owned and operated in Harris County, violating the anti-tampering provisions of Texas law. *See* MR.81 at ¶¶ 5.4, 5.5 (citing 30 Tex. Admin. Code § 114.20(b), (e)).

As explained above, Volkswagen violated these state laws in two ways. First, Volkswagen violated Texas anti-tampering regulations each and every day between 2009 and 2016, embedding a "defeat device" in its new vehicle designs that disabled the EPA-compliant engine and emission control system every day (unless the vehicle was undergoing testing). Second, Volkswagen violated those same anti-tampering regulations when it instituted a recall of its in-use vehicles, beginning in November 2014, for the deliberate purpose of substituting a new "defeat device" that tampered with the pre-existing emission control system.

The Daily Tampering is already well known, as it was widely publicized in the media and was the focus of the federal prosecutions and MDL proceedings. The Recall Tampering is only now coming into focus. At the time of this filing, the Governments are the only litigants in the United States who are still pursuing the evidence needed to expose the magnitude of the Recall Tampering.[1]

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[1] This Statement of Facts is based upon discovery obtained to date; the Governments are seeking more information and continued depositions to get to the bottom of the extent of the tampering. Thus far, Volkswagen has frustrated document discovery focused on this topic and its witnesses have invoked the Fifth Amendment. More depositions are currently being scheduled.

Daily Tampering. The core of the Daily Tampering claim appears in the guilty pleas of various Volkswagen officials and the company itself. In 2006, Volkswagen was working on a new diesel engine ("Generation 1" or "Gen 1"). This engine was "the cornerstone of a new project to sell passenger diesel vehicles in the United States . . . an important strategic goal of VW AG." Supp. MR.99-100.

But there was a problem: Volkswagen "could not design a diesel engine that would both meet the stricter U.S. NOx[2] emissions standards that would become effective in 2007" and create enough power to "attract sufficient customer demand in the U.S. market." Supp. MR.100. Eventually, Volkswagen designed an engine and emissions control system that could comply with standard U.S. emissions tests. Supp. MR.100. This system became known as "Dyno Mode," and it was the default mode in which VW's Gen 1 (and later Gen 2) vehicles started up each day. Supp. MR.99, 106; Supp. MR.336:1-10. But because Dyno Mode would not satisfy consumer expectations, Volkswagen also installed "defeat device software" to discern "whether the vehicle was undergoing standard U.S. emissions testing." Supp. MR.100. If testing was detected, the vehicle would remain in Dyno Mode. If not—as on every day of ordinary operation by consumers—the software would "disable some of the functioning of the vehicle's emission control systems" and switch the vehicle into "Road Mode." Supp. MR.401:5-10.

[2] NOx refers to nitrogen oxides, gases that contribute to air pollution.

Through this daily act of switching into Road Mode, "the effectiveness of the vehicle's emissions control systems was reduced substantially" and vehicles were able to "emit substantially higher [levels of] NOx, sometimes 35 times higher than U.S. Standards." Supp. MR.101. Generations 1 and 2 (model years 2009-14) thus began each day in Dyno Mode (and in compliance with emissions standards) until Volkswagen's software "disabled" their emissions control systems while the vehicles were in use.

Recall Tampering. The full magnitude of the Recall Tampering claim is still coming into focus; relatively little was known about this post-sale tampering until a corporate representative deposition in this case. The Governments recently sought more information during the deposition of a former Volkswagen employee who now resides in a federal minimum-security prison, but that effort was thwarted by his decision to invoke the Fifth Amendment (and the German equivalent)—***more than 200 times***. *See* Supp. MR.910; *see also* Supp. MR.878-913.

It is perhaps no coincidence that Volkswagen's mandamus petition and motion for a stay of discovery was filed immediately after that deposition. Because this Court denied the motion to stay, the Governments fully anticipate that more facts regarding the Recall Tampering will come to light as the case proceeds. Another deposition of an incarcerated Volkswagen employee is scheduled to occur on October 15, and it may reveal additional facts. Here is what we know now.

Beginning in 2012, Volkswagen's vehicles began to experience failures in their emissions equipment. Supp. MR.106. Volkswagen found these defects were caused by its vehicles remaining in Dyno Mode—that is, remaining in compliance with emissions standards—even under road conditions. *See* Supp. MR.336:2-5 ("some of them were staying in [dyno] mode, which was very hard on the hardware of the car parts"). To be precise, the failure to switch from Dyno Mode (compliant) to Road Mode (non-compliant) stressed the vehicles' exhaust systems, because the engines were never intended to be operated in Dyno Mode on the road. Supp. MR.106. The resulting damage caused warranty problems for Volkswagen, which was obligated to reimburse customers for the wear-and-tear caused by these hardware failures in its emissions control systems. Supp. MR.364:17-365:4.

To minimize warranty claims, Volkswagen began "three recall campaigns that started in November of 2014 and went through the spring of 2015." Supp. MR.240:12-14. It told owners "there is a campaign out on your vehicle . . . to update [the emissions system], and [Volkswagen] want[s] to perform it while we change your oil." Supp. MR.276:2-7. This program resembled recall campaigns undertaken by manufacturers on a regular basis—but with a significant exception. It was not designed to improve the vehicle's emissions system, but to undermine it. In these campaigns, Volkswagen engaged in an entirely new phase of tampering with in-use vehicles.

Having lured the customer into the Volkswagen dealership with promises of "improving" the emissions system, Volkswagen then instructed the dealer to install new tampering software. Supp. MR.308:16-309:15. Volkswagen both provided this new tampering software, Supp. MR.414:16-20, and paid the dealer to install it. Supp. MR.315:7-316:1. This software revision involved much more than changing a few lines of code—engine software is considered a part of the vehicle and comes with a unique part number. Supp. MR.337:11-20. The new defeat device software had a different part number from the original defeat device, Supp. MR.337:17-20, indicating that old software was replaced by new software—***one vehicle at a time***, as vehicles came in for maintenance at repair shops and dealerships across Texas.[3]

More important, the new software incorporated two functional changes into the emissions systems that violated state anti-tampering laws. First, it altered the start-up condition of Volkswagen's vehicles from Dyno Mode to Road Mode. Originally, each Volkswagen vehicle began the day in Dyno Mode (and thus in compliance with emissions standards) until it was deactivated by the defeat device. The new software caused vehicles to start "in the 'street mode' and, when the defeat device recognized that the vehicle was being tested for compliance with U.S. emissions standards, switch to the 'dyno mode.'" Supp. MR.107. In short, Volkswagen shifted the start-up condition from compliant to non-compliant.

[3] The Recall Tampering was accomplished through "software updates during maintenance," Supp. MR.108, both in response to recall notices and during routine maintenance visits.

Second, the new software added a "steering wheel angle recognition feature" that enabled a "vehicle to detect whether it was being tested . . . or being driven on the road." Supp. MR.107-08.

Taken together, these updates "reverse[d] the strategy such that the car[s] started in road mode" rather than the Dyno Mode that was the key feature of the original defeat device software. Supp. MR.335:21-22. Volkswagen confesses that "the effect of these two different changes to the software would be to enhance the ability of the car to have the higher NOx emissions while it was on the road." Supp. MR.338:12-18. In other words, the Recall Tampering ***increased*** emissions. Supp. MR.401:4-17, Supp. MR.402:11-15.

With respect to preemption, Volkswagen's corporate representative admitted under oath the most important details about the Recall Tampering. He admitted the inescapable fact that recall changes were "made to the car after it was certified" and thus "introduced to commerce." Supp. MR.264:16-24. He also admitted that "every single one" of the changes was "a change to the emission system software," Supp. MR.498:3-6, and "every single one of those changes was made after the cars were sold and they were out on the road." Supp. MR.498:7-9.

Under the federal-state partnership established by Section 209 of the CAA, which grants the federal government exclusive power over new motor vehicle standards and reserves the States' right to regulate vehicles once they are "in use," these admissions are decisive in the preemption analysis.

Litigation History

Federal claims. On September 3, 2015, after years of lying to regulators, Volkswagen finally admitted that it had embedded defeat device software in the vehicles that are the subject of this litigation—prompting the EPA to issue a "Notice of Violation" to Volkswagen. DOJ soon filed a complaint for violations of the CAA at the request of the EPA, and other cases were filed in federal courts across the country. The federal cases were all transferred to the Northern District of California for MDL proceedings. *See In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, and Products Liability Litig.*, No. 3:15-md-02672, Doc. 1609 (N.D. Cal. June 26, 2016).

The federal enforcement action was settled by three consent decrees, including a federal civil penalty of $1.45 billion. MR.368. But it is important to understand that Volkswagen's potential exposure to penalties was much greater. Between 2009 and 2016, Volkswagen sold nearly 600,000 vehicles that were falsely branded as "clean diesel" vehicles in the United States. MR.368. As such, the federal settlement amounts to less than $3,000 per vehicle—a mere fraction of the maximum penalty that could have been assessed ($37,500 per vehicle, per day). *See* 40 CFR § 19.4; 42 U.S.C. § 7524(a). Relators tout the $1.45 billion penalty as if it were sackcloth and ashes, but there is no evidence that they paid any part of it (as opposed to other Volkswagen entities, such as the German manufacturers)—and in any event, it was less than 10% of one day of their potential liability.

Wyoming. Volkswagen asserts that the Recall Tampering facts are familiar, suggesting that they were fully developed and adjudicated during the federal case. *See* Pet. at 14. But its treatment of these allegations during the *Wyoming* litigation in the federal MDL proceeding tells a very different story.

Most States chose to file state-law claims against Volkswagen in state court, and the federal MDL court remanded the state-law cases that Volkswagen removed to federal court. *See In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, and Products Liability Litig*, 2017 WL 2258757, at *13 (N.D. Cal. May 23, 2017). But the State of Wyoming elected to assert its state-law claims in the federal MDL. Wyoming did ***not*** allege a claim for Recall Tampering; its only claims involved the Daily Tampering. Volkswagen challenged that claim on the basis of preemption, and at the hearing, Volkswagen admitted that allegations of post-sale tampering would be actionable but implied that there was no basis for such a claim:

> 8 **MR. GIUFFRA:** The answer to that argument is, Your
> 9 Honor, if this were a situation where we tampered with the
> 10 vehicle, you know, if some auto shop tampered with it in an
> 11 emissions-control system in the state of Wyoming, they might
> 12 have something, because under Section 209(d) it says states
> 13 can, quote, *control, regulate, or restrict the use, operation,*
> 14 *or movement of registered and licensed vehicles.*
> 15 Well, these vehicles were not registered or licensed at
> 16 the time the defeat device was put in them.

> 6 And, in fact, when you look at 209(d), which actually does
> 7 give them the ability, if someone does tamper with the device
> 8 in the state after the car's been registered --

Supp. MR.213, 217.

Apparently seduced by Volkswagen's statements that the recall campaigns had reduced emissions—statements that have been shown to be false in this case—Wyoming not only failed to assert a Recall Tampering claim but affirmatively pled that the recalls had reduced emissions. Given the pleadings, the federal MDL court dismissed Wyoming's Daily Tampering claim on preemption grounds. *See In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, and Products Liability Litig.*, 264 F. Supp. 3d 1040 (N.D. Cal. 2017) ("*Wyoming*"). The court determined that, given Wyoming's allegation that the recalls had reduced emissions, the recalls were not actionable as a matter of state law—not as a matter of federal preemption. *Id.* at 1057 n.8. As late as Labor Day 2017, therefore, the Recall Tampering claim (and its implications for preemption) still had not been widely recognized.

State of Texas and Harris County Litigation. The State of Texas sued Relators in Travis County for violations of numerous Texas anti-tampering rules. Harris County, Fort Bend County, and several other counties filed their own suits. These actions were all transferred to a state-court MDL in Travis County.

In an earlier proceeding, this Court clarified that the counties had the right to file their own lawsuits, *In re Volkswagen Clean Diesel Litig.*, 03-16-00718-CV, 2017 WL 3224247, at *7 (Tex. App.—Austin July 28, 2017, no pet.), but ordered that all except the Harris County and Fort Bend County lawsuits must be abated. *In re Volkswagen Clean Diesel Litig.*, 03-17-00478-CV, 2017 WL 3221748, at *3 (Tex. App.—Austin July 28, 2017, orig. proceeding).

With the relationship of these state-law actions clarified, the State of Texas and Harris County (acting as the liaison for the TCAA Counties) joined forces and began to develop evidence revealing the full magnitude of the Recall Tampering (which they already had alleged ***before*** the *Wyoming* ruling, *see* Supp. MR.1214). In a deposition in October 2017, the Governments extracted a concession from Volkswagen's corporate representative that—contrary to Wyoming's allegations—the recalls had ***increased*** emissions. Supp. MR.401:4-17, Supp. MR.402:11-15. Recognizing the importance of this admission—as well as the importance of the Recall Tampering claim for purposes of preemption—the Governments amended their petitions to plead that claim in more detail. MR.39-40, 59, 62, 84. They then filed special exceptions against the preemption defense. Supp. MR.1047, 1072.

Volkswagen filed its own special exceptions and summary judgment motion, relying largely on the same arguments it had made in *Wyoming*. When confronted with the fact that its arguments depended on a premise that was factually incorrect (and that it had not corrected during the proceedings in *Wyoming*), MR.264, Volkswagen requested the chance to "supplement" its summary judgment motion and quietly tried to sanitize its arguments by withdrawing the false factual premise. *Compare* MR.145 (asserting that the recalls reduced emissions) *with* MR.191-223 (omitting this assertion). The Governments argued that neither claim is preempted, and in particular, the Recall Tampering claim involving conduct that occurred after the vehicles were already "in use" in Texas is not preempted. MR.236, 261.

On February 21, 2018, Judge Sulak declared that the Daily Tampering claim is preempted, but the Recall Tampering claim is not. Supp. MR.528. This ruling, the first of its kind, almost certainly influenced judges in other States who reached the same result in subsequent months. But the federal MDL court in California, apparently troubled by the financial burden that could theoretically be inflicted under various state laws, was reluctant to accept this conclusion.

Counties. On April 16, 2018, the California court confronted the issue of Recall Tampering in state-law cases filed by certain counties in Utah and Florida. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Products Liab. Litig.*, 310 F. Supp. 3d 1030 (N.D. Cal. 2018) ("*Counties*"). The California court rejected Volkswagen's contention that Recall Tampering claims are expressly preempted, reasoning that they "are not attempting to impose emission measures that would require manufacturers to change the way they construct new vehicles." *Id.* at 1040. The court also agreed that state anti-tampering rules do not necessarily conflict with the purposes of the Clean Air Act, even if they are applied to manufacturers:

> This is not to say that there is no conceivable scenario, consistent with the Clean Air Act, in which states and local governments could regulate a vehicle manufacturer's compliance with emission standards. ***If, for example, a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clean Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders.***

Id. at 1043 (emphasis added).

Yet the California court ignored the obvious implications of this principle, concluding that Volkswagen's model-wide Recall Tampering was so extensive that allowing state regulation would defeat the federal regulatory scheme. *Id.* at 1044. In other words, Volkswagen was simply "too big to tamper." The California court was unwilling to accept the consequences of allowing state-law liability.

Reconsideration. Volkswagen moved for reconsideration, citing *Counties*. MR.278. Following additional briefing and a hearing that included oral argument on the preemption issue, Judge Sulak denied reconsideration. Supp. MR.710-781. In doing so, he pledged to keep an open mind, to allow the facts to be developed, and to revisit the issue if it became appropriate—as is prudent for a judge presiding over an active MDL proceeding. Supp. MR.756-58, 779.

Meanwhile, this issue has divided the state courts. Tennessee and Minnesota allowed Recall Tampering claims. Supp. MR.1099, 1132.[4] Illinois and Missouri followed *Wyoming* and *Counties*, dismissing such claims. Supp. MR.1161, 1200. The only other state court to dismiss a Recall Tampering claim—Alabama—did so before the *Counties* ruling on the theory that the Recall Tampering "related back" to the original design. Supp. MR.1192. That reasoning was rejected by *Counties*, 310 F. Supp. 3d at 1040, and it is now discredited. For all practical purposes, therefore, the state courts are in equipoise on this issue.

[4] Those decisions were appealed and the cases were stayed pending appeal under procedures that differ from those in Texas.

Following all these events, Relators moved twice more for reconsideration. Supp. MR.783, 811. Again, Judge Sulak refused to revise his preemption ruling. In addition to reaffirming that ruling, Judge Sulak agreed with the Governments that it would be prudent to develop a full factual record on Recall Tampering—assuring that crucial evidence does not disappear while the appeals work their way through the various state and federal appellate courts. Supp. MR.873-74.

Current proceedings. The *Counties* decision is currently on appeal to the United States Court of Appeals for the Ninth Circuit. If the decision is overturned, as the Governments anticipate, any state court rulings that relied on it will be reduced to nothing more than the Cheshire Cat's vanishing grin—and in that event, the federal courts will have rejected all of Volkswagen's preemption arguments. Volkswagen's goal is to rush to judgment in state court before the federal appeal can run its course. Meanwhile, the Governments continue to develop their case.

On August 1, 2018, the Governments took the deposition of Oliver Schmidt, a high-ranking Volkswagen manager who currently resides in a federal facility. Schmidt exercised his Fifth Amendment rights and refused to answer questions about whether Volkswagen tampered with vehicles on state roads that it had not yet disclosed to the federal government. He refused to identify all of the tampering Volkswagen had engaged in affecting vehicles on Texas roads. Supp. MR.910.

That same day, VW chose to file its petition for mandamus and requested an emergency stay of discovery. This Court denied the motion for a stay.

SUMMARY OF ARGUMENT

Volkswagen already has settled state-law anti-tampering claims asserted by at least ten other States. Those States had adopted California's emission standards, which are exempt from ***express*** preemption by Section 209(a). 42 U.S.C. § 7507. But if Volkswagen were right about ***implied*** preemption, those state-law claims would have been equally invalid and Volkswagen would not have paid a penny. As in all litigation, follow the money: Volkswagen's settlements with those States are proof positive that it has no faith in its implied preemption argument.

For most of this litigation, the preemption battle has focused on the theory of express preemption. Volkswagen has insisted that state anti-tampering laws are "standard[s] relating to the control of emissions from new motor vehicles" and are subject to the express preemption clause of Section 209(a), not valid regulations of the "use" or "operation" of "registered or licensed motor vehicles" preserved by the savings clause of Section 209(d). There is a fierce debate over that distinction with respect to Daily Tampering claims, which involve the original defeat devices. But there is no room for serious debate with respect to Recall Tampering claims, which involve the installation of new defeat devices into in-use vehicles that were "registered and licensed" and were already in "use" and "operation" on state roads. Even *Counties* agreed that Recall Tampering claims are not expressly preempted. Therefore, the battleground has now shifted to the doctrine of implied preemption, an argument to which Volkswagen devoted just three paragraphs in the trial court.

Implied preemption arises only when a state law conflicts irreconcilably with the purposes and objectives of Congress. Out of respect for State sovereignty, any party asserting implied preemption must overcome a strong presumption that Congress did not intend to preempt State law; there must be "clear and manifest" evidence of Congress's preemptive intent. Volkswagen cannot meet that burden. The CAA envisions a federal-state partnership and expressly preserves state rights to regulate the use and operation of all motor vehicles following their initial sale. Congress intended to bar a 50-state "patchwork" of new motor vehicle standards from being imposed, and state anti-tampering rules do not offend that objective. Volkswagen's theory that Congress intended uniform federal regulation of all manufacturer conduct, regardless of its nature, finds no support in the text, history, or agency applications of the CAA. The Texas Supreme Court disdains this sort of "free wheeling" preemption theory, and it should be repudiated.

It is no answer for Volkswagen to tout the penalty it paid in the federal case (which represented less than 10% of the authorized CAA penalty for a single day, based on conduct that continued for eight years). The federal settlement vindicated the interests of federal law and the United States, but it did not involve the interests of the State of Texas and Harris County in enforcing Texas anti-tampering laws. Congress preserved the States' right to penalize conduct that violates state law, provided the state law does not attempt to enforce new motor vehicle standards. State anti-tampering rules do not cross that line. The petition should be denied.

ARGUMENT

Federal law is the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. Still, the States retain their own sovereign roles in our federal system. Therefore, the Supreme Court has emphasized that there is a presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Out of respect for state sovereignty, preemption analysis always starts with the premise that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

This presumption is strongest in fields that are traditionally the province of the States, such as pollution control and regulation of motor vehicle usage. Thus, "in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (internal punctuation omitted). "The presumption against preemption is heightened where federal law is said to bar state action in fields of traditional state regulation." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008) (internal quotation omitted). This presumption means that if there is any question about Congressional intent, conservative judicial principles teach that courts must err on the side of restraint and "accept the reading that disfavors pre-emption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

To be sure, identifying "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* at 76. But the presumption against preemption, and the clear-statement rule that accompanies it, are fundamental interpretive tools to assure that judges do not substitute their own will for the purposes of Congress. Thus, Volkswagen has the burden to show that immunizing vehicle manufacturers from state anti-tampering rules was the "clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565. Volkswagen cannot satisfy that heavy burden.

Volkswagen's petition hardly even addresses the strict test for preemption. In the trial court, Volkswagen relied primarily on express preemption arguments, insisting that state anti-tampering rules are standards affecting new motor vehicles. But even the California court rejected that argument because anti-tampering rules, as applied to in-use vehicles, "are not attempting to impose emissions measures that would require manufacturers to change the way they construct new vehicles." *Counties*, 310 F. Supp. 3d at 1040. Thus, Volkswagen now devotes 13 pages to its second-string argument that those state rules are barred by "conflict preemption"—an argument that received a mere ***three paragraphs*** of briefing in the trial court. *See* MR.212-13. Unable to mount a comprehensive argument for preemption, Volkswagen bases its petition on the flawed premise that Texas appellate courts must defer to a solitary federal trial court. Neither its preemption analysis nor its presumptuous demand for federal deference is legally correct.

I. The Governments' Recall Tampering Claim Is Not Preempted.

Texas anti-tampering rules that regulate post-sale modifications to vehicles that are in use on Texas roadways are neither expressly nor impliedly preempted. Regulating such conduct is within the historic police powers of the States and is protected from preemption by Section 209(d) of the CAA. Nothing about *Counties* alters that conclusion. Volkswagen's preemption argument is legally invalid.

A. State Anti-Tampering Laws are Not Implicitly Preempted.

It is unusual to begin a preemption analysis with the doctrine of implied, rather than express, preemption. Indeed, Volkswagen's motions in the trial court focused almost entirely on express preemption and treated implied preemption as merely an afterthought. *See* MR.212-13. But because even the California court recognizes that state anti-tampering laws are not expressly preempted by the CAA, Volkswagen has switched gears to focus on implied (or "conflict") preemption. That argument ignores the conventional requirements of preemption analysis and it is divorced from the text, history, and purposes of the CAA.

State anti-tampering laws for in-use vehicles do not conflict with the CAA. Volkswagen would not have paid millions of dollars to the ten States that adopted California standards if they did; those States are exempt from ***express*** preemption, *see* 42 U.S.C. § 7507, but nothing in the CAA suggests that they are exempt from ***implied*** preemption (and such a suggestion would make no sense). Accordingly, Volkswagen's voluntary payment of those States speaks volumes.

1. State anti-tampering rules for used vehicles are consistent with the purposes and objectives of the CAA.

Volkswagen's petition fails to engage in any meaningful analysis of the rules applicable to conflict preemption. Conflict preemption occurs if (a) it would be "impossible" to satisfy both federal and state law, or (b) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a particular federal law. *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (citing *Brown v. Hotel & Rest. Emp. & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984)); *see also BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 509 (Tex. 2008) (same).

Volkswagen notes that "the purpose of Congress is the ultimate touchstone" in preemption analysis, Pet. at 27, which is true. But as the Texas Supreme Court has explained, "when preemption is premised on the obstacle a state law erects to accomplishing a federal purpose, divining that intent can be more challenging." *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 482 (Tex. 2010). To do so, courts are bound to "examine the text of the relevant federal statute or regulation, the history of federal regulation in that subject area, and the agency's statements construing the regulation." *Id.* at 483 (citing *Geier v. American Honda Motor Co.*, 529 U.S. 861, 875-77 (2000)). "Courts must cautiously approach this interpretive task lest it become a 'free wheeling judicial inquiry into whether a state law is in tension with federal objectives,' which 'undercuts the principle that it is Congress rather than the courts that pre-empts state law.'" *Id.* (internal corrections omitted).

The text, history, and agency statements regarding Section 209 of the CAA all confirm Congress's intention that States be precluded from imposing their own emissions standards on "showroom new" motor vehicles prior to the initial sale, but remain free to regulate the use and operation of vehicles after the initial sale.

Text. As explained above, Congress addressed the question of preemption in Section 209(a) and limited its preemptive scope to "new motor vehicles." Thus, the text itself expressly preserves the States' long-established right to safeguard the health of their citizens through the regulation of emissions by vehicles "in use." *See, e.g.*, *Washington v. General Motors Corp.*, 406 U.S. 109, 115 n.4 (1972) ("Because federal motor vehicle emission control standards ***apply only to new motor vehicles***, States also retain broad residual power over used motor vehicles.") (emphasis added). To eliminate any doubt about its intent, Congress also enacted the savings clause in Section 209(d), which specifically preserves state authority to regulate the "use" and "operation" of used motor vehicles after the initial sale. Again, here is the text of the two provisions, placed side-by-side:

Preemption Clause 42 U.S.C. § 7543(a)	**Savings Clause** 42 U.S.C. § 7543(d)
No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.	Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

In short, the text unambiguously preserves a federal-state partnership and protects state authority to regulate the use and operation of motor vehicles.

Given the explicit recognition by Congress that States are free to regulate the "use" and "operation" of vehicles after the initial sale, Volkswagen's claim that state anti-tampering rules somehow conflict with the "full purposes and objectives" of the CAA is implausible. "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *Wyeth*, 555 U.S. at 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

Indeed, Congress embraced the co-existence of state and federal regulation not only in Section 209, but throughout the entire field of air pollution control. The CAA expressly declares that "[e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State," 42 U.S.C § 7407(a), and that "air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C § 7401(a)(3). Thus, while Congress reserved the regulation of new motor vehicle emissions standards for the exclusive control of the federal government, that assertion of federal power is an exception to the general rule of federal-state cooperation set forth in the CAA. Had Congress intended to assert exclusive federal power to regulate "model-wide" post-sale tampering by automobile manufacturers, it would have done so explicitly. Its "silence" is "powerful evidence" against preemption. *Wyeth*, 555 U.S. at 575.

History. The history of the CAA is well-known and frequently recounted. As the Supreme Court explained, the CAA is a "comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). For decades, it has been viewed as "a bold experiment in cooperative federalism." *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982); *see also Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001) ("an experiment in cooperative federalism"); *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (same); *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (same). As the Fifth Circuit has put it, the CAA is "a comprehensive program for controlling and improving the nation's air quality ***through state and federal regulation***." *BCCA Appeal Group v. EPA,* 355 F.3d 817, 821–22 (5th Cir. 2003) (emphasis added).

This federal-state partnership is not confined to stationary pollution sources, as Volkswagen implies, but also extends to mobile sources (like motor vehicles). As the Supreme Court noted shortly after the enactment of the CAA, the Act leaves "broad residual power" for States to regulate automobile use and operation:

> Because federal motor vehicle emission control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles. Moreover, citizens, States and local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights.

Washington, 406 U.S. at 115 n.4.

As explained above, the history of Section 209 is part of this larger story. Congress feared "an anarchic patchwork of federal and state regulatory programs" for new cars—*i.e.*, the promulgation of different emissions standards for new cars in every state. *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979). Recognizing that such disarray in new motor vehicle standards would harm interstate commerce and hinder a free flow of vehicles among States, Congress ordered the EPA to issue uniform emissions standards for new vehicles as well as a uniform process for obtaining federal certification. On the other hand, nothing in the history of Section 209 indicates that Congress intended to restrict state authority to regulate vehicles once they are "in use" on state roads.

As the Southern District of New York stated in an early, seminal ruling construing Section 209:

> [B]oth the history and text of the Act show that [§ 209] was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the ***manufacture and sale of new cars***.

Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 624 (2d Cir. 1972) (emphasis added). Of critical importance here, Congress "specifically refused to interfere with local regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers." *Id.* Congress simply was not concerned about state anti-tampering laws.

Agency statements. Mindful of both the statutory text and the history of "cooperative federalism" uniting state and federal governments in the struggle against air pollution, the EPA does ***not*** take the position that state laws prohibiting tampering with emissions control devices in used vehicles are preempted. Instead, the EPA acknowledges that "many states" have anti-tampering rules and "use them successfully as enforcement tools." 63 Fed. Reg. 6651, 6652 (February 10, 1998); *see also* Supp. MR.524 (EPA circular: "Many states also impose additional fines"); Supp. MR.516 (EPA circular: "In addition to federal law, forty-five out of the fifty States also have statutes or regulations which prohibit tampering with the pollution control equipment on motor vehicles."). Having held this position since the 1990s, the EPA plainly does not believe state anti-tampering rules conflict with the CAA. Nor has Congress ever seen fit to overrule the EPA's understanding of the CAA.

The EPA's conclusion follows from its expert, objective analysis of the "purposes and objectives" of Congress in Section 209. The EPA recognizes that Congress was concerned about the disruption of interstate commerce that would accompany an "anarchic patchwork" of state standards for new motor vehicles; therefore, "the legality of particular regulatory controls that a state may impose . . . will depend upon the burden that such controls place on interstate commerce" and whether the state rules are "effectively regulations on the ***design*** of ***new*** engines rather than on the ***use*** of ***'in-use'*** engines." 59 Fed. Reg. 36969-01, 36973, 36974 (July 20, 1994) (emphasis added).

In accord with that understanding, the EPA has expressed its position that the CAA "'reveals a clear Congressional intent to preclude states and localities from setting their own exhaust emission control standards ***only with respect to the manufacture and distribution of new automobiles***.'" 62 Fed. Reg. 6366-01, 6397 (February 11, 1997) (emphasis added).

Finally, acknowledging the presumption against preemption in the field of pollution control, the EPA believes that the preemption provisions of Section 209 "should be construed narrowly in order to protect states' rights, particularly in an area such as public health in which states traditionally exercise control." 59 Fed. Reg. 36969-01, 36973 (July 20, 1994).[5]

In sum, the EPA takes the position that the preemptive scope of the CAA turns on whether a state law burdens interstate commerce, and that such burdens occur only in state efforts to regulate new motor vehicles. If a manufacturer acts on a model-wide basis to tamper with its used vehicles once they are on the road, any so-called "burden" from the neutral enforcement of state anti-tampering rules falls only on the wrongdoing manufacturer—not on interstate commerce as such. The fact that Volkswagen's misconduct exceeds the automaker's ordinary role of designing and manufacturing new motor vehicles is not a federal concern.

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[5] This EPA rule was promulgated with reference to nonroad engines, *see* 42 U.S.C. § 7543(e)(1), rather than motor vehicles, *see* 42 U.S.C. § 7543(a), but "Congress intended the preemption provisions of section 209, as applied to nonroad engines, to be analogous to the preemption provisions as applied to motor vehicles." 59 Fed. Reg. 31,330 (June 17, 1994).

Conclusion. In sum, the appropriate benchmarks for discerning the "purposes and objectives" of Congress—text, history, and agency interpretations—all point in one direction: Congress deliberately crafted the CAA as a partnership between the federal and state governments, preserving a substantial role for States to regulate conduct involving the "use" or "operation" of used motor vehicles. With respect to motor vehicle emissions in particular, Congress sought to protect interstate commerce from a "patchwork" of emissions standards for new vehicles while preserving the States' historic right to regulate vehicles once they are in use. State anti-tampering laws do not create a "patchwork" of emissions standards or affect interstate commerce, so they do not conflict with the purposes of the CAA.

Texas anti-tampering rules are perfectly consistent with Congress's intent that States and the EPA play a dual role in regulating pollution from used vehicles. Those rules do not affect the design of new vehicles. Nor do they seek to regulate vehicles that have not yet been sold or force Volkswagen to change anything in its new vehicles before they are sold in Texas. They simply prohibit everyone—including Volkswagen—from engaging in post-sale conduct that tampers with the emissions control systems of used vehicles that are owned and operated in Texas. *See* 30 Tex. Admin. Code § 114.20(b), (e). Because state anti-tampering rules do not conflict with the purposes and objectives of the CAA, they are not subject to implied preemption.

2. The CAA authorizes state regulation of used vehicles and does not give the EPA exclusive power over manufacturers.

Unable to prevail under the "purposes and objectives" set forth in the text, history, and agency interpretations of the CAA, Volkswagen fashions a different "purpose and objective" out of whole cloth: "uniform nationwide regulation by the EPA of ***manufacturers' nationwide conduct*** in designing, building, ***and updating*** their vehicle models' emission control systems." Pet. at 27 (emphasis added). However, Volkswagen cites nothing in the text, history, or applications of the CAA to document this supposed Congressional "purpose"—especially not with regard to "updating" vehicles that are already in use. Volkswagen's petition invites just the sort of "'free wheeling judicial inquiry into whether a state law is in tension with federal objectives'" that the Texas Supreme Court has warned courts to resist. *MCI Sales*, 329 S.W.3d at 483.

The CAA distinguishes between regulation of "new" and "in-use" vehicles; it does not refer to federal control over "manufacturers" or "model-wide" conduct. Volkswagen is drawing a line that has no basis in the text or history of the CAA. Its claim that Congress intended to preclude all state laws that incidentally impact auto manufacturers flies in the face of the EPA's position that the litmus test for preemption is whether state rules are "effectively regulations on the design of new engines rather than on the use of 'in-use' engines." 59 Fed. Reg. 36969-01, 36974 (July 20, 1994). This test has nothing to do with status as a "manufacturer."

Volkswagen admits that state anti-tampering rules do not conflict with the purposes and objectives of the CAA as applied to consumers, dealers, mechanics, or auto shops, but insists that those same state rules cannot apply to manufacturers. In substance, Volkswagen asks this Court to invent an exception for manufacturers. *See* Pet. at 33-40. This exercise in judicial activism is the heart of the petition.

This theory confuses preemption of a specific area of regulation based on subject matter (emissions standards for new motor vehicles) with a wide-ranging grant of immunity based on the identity of a particular actor (auto manufacturers). Nothing in the text, history, or purpose of Section 209 supports the notion that manufacturers are immune from state in-use regulations. Congress easily could have provided that States cannot regulate manufacturers at all, but it did not do so. On the contrary, it declared that States may regulate the "use" and "operation" of "registered or licensed" motor vehicles—without any exception for manufacturers. 42 U.S.C. § 7543(d). As even the California court recognized, manufacturers are not exempt from state anti-tampering rules as a general proposition:

> This is not to say that there is no conceivable scenario, consistent with the Clean Air Act, in which states and local governments could regulate a vehicle manufacturer's compliance with emission standards. ***If, for example, a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clean Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders.***

Counties, 310 F. Supp. 3d at 1043 (emphasis added).

The California court was correct, but it was unwilling to follow this analysis to its logical (and inescapable) conclusion: If States can prohibit a manufacturer from tampering with the emissions control system of "a single in-use vehicle," *id.*, they can also prohibit manufacturers from doing the same to thousands of vehicles. The massive scale of Volkswagen's tampering does not alter the preemption test—especially since the actual tampering occurred one vehicle at a time across Texas. The presumption against preemption should be even stronger in such a case.

Put another way, the scale of Volkswagen's tampering has no bearing on whether States have the authority to enforce anti-tampering rules. Section 209(d) reserves such in-use regulations to state control, and exempting manufacturers from that reservation of state power would not serve any Congressional purpose. As noted, Congress took steps to avoid "an anarchic patchwork of federal and state regulatory programs." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1109. It intended to protect the free flow of interstate commerce—not auto manufacturers *per se*. State anti-tampering rules do not disrupt the pre-sale federal regulatory scheme, and manufacturers certainly have no protected interest in such tampering activity. Thus, there is neither a textual nor an historical basis for Volkswagen's assertion that Congress intended to immunize manufacturers from state anti-tampering rules. To be sure, most manufacturer activities involve pre-sale conduct that is subject to exclusive federal control, but if manufacturers elect to engage in post-sale conduct that violates state anti-tampering rules, the CAA does not protect them.

Volkswagen's choice to move beyond the design and sale of new vehicles and issue recall notices for the deliberate purpose of tampering with in-use vehicles distinguishes this case from one in which a state seeks to impose its own standards on new motor vehicle designs. Resisting this distinction, Volkswagen quotes—three times—a passage from *Allway Taxi* stating that valid in-use regulations are "directed primarily to intrastate activities and the burden of compliance would be on individual owners ***and not on manufacturers and distributors***." *Allway Taxi*, 340 F. Supp. at 1124; *see also* Pet. at 7, 34, 45 (quoting this text, emphasis added). But Volkswagen has completely missed the point. *Allway Taxi* was not suggesting that manufacturers and distributors are a "protected class" no matter what they do; it was simply stating that States may not—directly or indirectly—impose burdens on the pre-sale manufacture and distribution of new motor vehicles.

This understanding is clear from a full reading of *Allway Taxi*, which upheld a local ordinance requiring taxis to operate in a manner that reduced air pollution. The court explained that such an ordinance "is clearly compatible with the goal of the federal Clean Air Act," *id.* at 1124, and held the ordinance did not conflict with "a clear congressional intent to preclude states and localities from setting their own exhaust emission control standards ***only with respect to the manufacture and distribution of new automobiles***." *Id.* (emphasis added). In context, therefore, *Allway Taxi* teaches that States may regulate anyone—including manufacturers—provided the "burden of compliance" does not fall on "showroom new" vehicles.

In short, Volkswagen's theory that Congress did not expect state regulation to reach manufacturers under any circumstances depends on the premise that the conduct at issue in this litigation constituted "normal" manufacturer activities. Generally, a manufacturer loses control over a vehicle at the time of the initial sale, so most violations of state anti-tampering rules will be expected to involve only an owner's or mechanic's conduct; hence it is no surprise that most examples of such tampering violations involve localized incidents. But in this extraordinary case, Volkswagen regained control over its in-use vehicles during routine maintenance, then used that control to tamper with their emissions control systems—conduct that would admittedly violate state anti-tampering rules if committed by anyone else. The CAA does not give auto manufacturers a get-out-of-jail-free card if they cause post-sale tampering that would result in state-law liability for anyone else.

The real rationale behind Volkswagen's argument is found in its assertion—parroting the California court—that granting the EPA exclusive power to regulate post-sale tampering by manufacturers would be "sensible" and "logical" because the EPA "is best positioned to enforce emissions standards on a model-wide basis." Pet. at 40. That formulation is fundamentally flawed. Preemption does not turn on whether a rule would be "sensible" or "logical," but whether Congress intended it. Volkswagen is asking this Court to indulge in a "free wheeling judicial inquiry" that would "'undercut[] the principle that it is Congress rather than the courts that pre-empts state law.'" *MCI*, 329 S.W.3d at 483.

3. State-law remedies for tampering with used vehicles do not conflict with any comprehensive federal remedial scheme.

Stripped of all its artifice, the gist of Volkswagen's preemption argument—and the central rationale of the California court's ruling—is the scarecrow prospect that Volkswagen could be subject to ruinous additional penalties for its violations of state anti-tampering rules. *See* Pet. at 41-44. This rationale says nothing about conflict preemption and everything about the magnitude of the Recall Tampering. But the unprecedented scope of Volkswagen's tampering is not a principled basis for preemption. There are (at least) three fatal flaws in this argument.

First, the mere fact that Volkswagen is subject to a federal regulatory regime (and has been penalized for violating it) is ***not*** a basis to preempt state law:

> Ordinarily, the mere existence of a federal regulatory or enforcement scheme, even one as detailed as § 210, does not by itself imply pre-emption of state remedies. The Court has observed: "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for special features warranting pre-emption."

English v. Gen. Elec. Co., 496 U.S. 72, 87 (1990) (quoting *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)). This general rule applies with particular force to the CAA, as Section 209(d) specifically preserves the right of States to regulate the "use" and "operation" of "registered or licensed" vehicles. 42 U.S.C. § 7543(d). State laws that are expressly preserved by Congress cannot possibly be contrary to a comprehensive Congressional scheme.

Volkswagen's argument that the CAA is a comprehensive federal scheme relies on cases in which there was clear Congressional intent to supplant state law with an ***exclusive*** federal regime. *Arizona v. United States*, 567 U.S. 387 (2012)—at least the portion cited by Volkswagen—was a field preemption case in which federal regulation was "so pervasive . . . that Congress left no room for the States to supplement it." *Id.* at 399. Likewise, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), relied on "clear evidence that Congress intended that the [federal statute] be enforced exclusively by the Federal Government." *Id.* at 342.[6] Finally, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), recognized that Congress had chosen to "entrust administration of the labor policy for the Nation to a centralized administrative agency" (the NLRB), *id.* at 247, confining federal labor disputes to "a specific and specially constituted tribunal." *Id.* at 242-43 (citations omitted).[7] These cases illustrate that state laws are invalid on the basis that they are "duplicative" or "identical" to federal law if there is an ***exclusive*** federal regime. "When there [i]s no comprehensive federal program," however, "a State ha[s] authority to pass its own laws on the subject." *Arizona*, 567 U.S. at 403. That is precisely the case under the CAA.

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[6] *Buckman* also emphasized that its unique facts did not implicate "federalism concerns and the historic primacy of state regulation of matters of health and safety." *Buckman*, 531 U.S. at 348. By contrast, Section 209(d) of the CAA expressly safeguards "the historic power of 'states to adopt in-use regulations." *City of Dallas*, 720 F.3d at 538 n.6.

[7] The other two NLRB cases cited by Volkswagen are comparable. *See Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 287 (1971); *Wisc. Dep't of Industry, Labor and Hum. Rel. v. Gould, Inc.*, 475 U.S. 282 (1986).

As explained, the CAA is founded on the idea of "cooperative federalism." In particular, Section 209 reserves regulation of new motor vehicles to the EPA but "preserve[s] the field of regulation of old motor vehicles to state control *ab initio*." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1107 n.19. In the face of this scheme, Volkswagen has not provided any "clear and manifest" indication that Congress intended to fashion an ***exclusive*** federal remedial scheme for auto manufacturers. The best Volkswagen can do is to cite a series of post-sale duties that are imposed on manufacturers, but none asserts ***exclusive*** federal control over manufacturers.

Moreover, the CAA contains its own anti-tampering statute, which prohibits "any person" from tampering with federally-required features of a motor vehicle "prior to its sale" or "after such sale." 42 U.S.C. § 7522(a)(3)(A). The statute also prohibits "manufactur[ing]" or "install[ing]" defeat devices. *Id.* at § 7522(a)(3)(B). And it differentiates between manufacturers and others for purposes of the amount of the civil penalty. *See* 42 U.S.C. § 7524(a). But nothing in the statute suggests that the EPA has ***exclusive*** authority over tampering (by manufacturers or others). And as noted above, the EPA takes the opposite view. *See* pp. 29-30, *supra*. Thus, Volkswagen cannot credibly claim the CAA's anti-tampering scheme is ***exclusive***. "'The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.'" *Wyeth*, 555 U.S. at 575. This is such a case.

At bottom, Volkswagen's emphasis on the civil penalty it paid for violations of the federal scheme overlooks the constitutional principle of dual sovereignty. The Double Jeopardy Clause allows prosecutions by federal and state governments for the same factual conduct because "a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016). Volkswagen's suggestion that the mere prospect of multiple civil penalties for the same misconduct somehow violates the Supremacy Clause is simply a scarecrow, not a sound legal argument based on neutral principles of law.

Second, Volkswagen's handwringing over the size of its potential liability is premature and irrelevant to a preemption analysis. Determining the proper amount of a penalty under the state anti-tampering rules will be a matter for the fact-finder after a determination of liability, and Volkswagen will be free to argue that it already has been punished enough by the penalties paid to the federal government. *Cf. Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 54 (Tex. 1998) (prior awards of punitive damages may be offered by the defendant). Furthermore, if Volkswagen believes a state-law penalty is excessive or does not adequately reflect its prior payments, it will have a right to appeal that penalty as a violation of either state law or the Due Process Clause. This is not a conflict preemption issue, but a remedies issue that will be addressed when it is time to fashion a penalty. Thus, this Court should disregard Volkswagen's scare tactics.

In any event, there is little reason to believe that additional penalties would raise serious constitutional concerns. The Texas Supreme Court recently rejected the assertion that multiple daily penalties imposed on a defendant for violations of Texas environmental laws were excessive. *State v. Morello*, 547 S.W.3d 881, 889 (Tex. 2018). "While the fine imposed against [the defendant] is not insubstantial, the statute is clear that the amount accrues daily," *id.*, and after all, the defendant's "own delay in compliance resulted in the continued accrual of civil penalties." *Id.* In that situation, "the amount of the fine does not 'shock the sense of mankind.'" *Id.* (quoting *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980)). Here, Volkswagen deliberately pursued a multi-year scheme to cheat Texas and conceal the worst emissions scandal in history. It is safe to say that any state-law penalty for this misconduct will not "'shock the sense of mankind.'" *Id.*

Finally, the unstated premise of Volkswagen's argument—that somehow it would be unjust to penalize Volkswagen any more for its violations of state law—carries neither equitable nor legal force. Volkswagen paid only a small fraction of its potential penalty exposure under the CAA, *see* p. 12, *supra*, so it cannot be said that any additional penalties imposed by state courts (at least up to the total amount that could have been imposed under the CAA) would be inconsistent with the "purposes and objectives" of Congress. On the contrary, Congress indicated that any penalty within the range allowed by the CAA would accomplish its purposes. The magnitude of the potential penalty is not a valid basis for conflict preemption.

4. Deference to *Counties* is unwarranted.

Perhaps because it anticipates that its conflict preemption argument will not withstand independent scrutiny, Volkswagen hides behind *Counties* and contends that a ruling from a federal district court "is entitled to deference under Texas law." Pet. at 30. In effect, Volkswagen encourages this Court to outsource its solemn decision-making responsibilities on behalf of Texas citizens to a federal judge in San Francisco. But Texas courts "interpret federal law independently." *Kiefer v. Cont'l Airlines, Inc.*, 882 S.W.2d 496, 502 (Tex. App.—Houston [1st Dist.] 1994), *aff'd*, 920 S.W.2d 274 (Tex. 1996). Deference is not warranted.

Even the authorities cited by Volkswagen recognize that Texas courts must perform an independent legal analysis of federal law. *See* Pet. at 29-30 (citing *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 337 (Tex. App.—Dallas 2011, pet. denied) (Texas courts "interpret federal law independently"); *Summertree Venture III v. Fed. Savs. & Loan Ins. Corp.*, 742 S.W.2d 446, 450 (Tex. App.—Houston [14th Dist.] 1987, writ denied) ("We conclude that we are not bound by the [Fifth Circuit] decision nor by the district court decisions following it. We will look independently at the statutes, regulations, and legislative history to determine the issue."). Texas judges faced with an issue of federal law have a duty to decide it independently—and they are just as qualified as federal judges to do so. *See* Tex. Const. art. 16, § 1 (Texas judges take an oath to uphold the "laws of the United States and of this State").

This independence does not mean that Texas courts ignore federal decisions. As the Texas Supreme Court puts it, Texas courts "may" consult federal decisions "in determining the appropriate federal rule of decision"—but "they are *obligated* to follow only higher Texas courts and the United States Supreme Court." *Christus Health Gulf Coast v. Aetna, Inc.*, 237 S.W.3d 338, 343 n.8 (Tex. 2007). Therefore, while Texas courts "typically seek guidance from among the decisions of the lower federal courts," *First Nat'l*, 348 S.W.3d at 337, they should not defer to a decision that they find mistaken. And importantly, the Texas Supreme Court admonishes Texas courts not to focus "exclusively" on a single federal decision. *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993).

The true approach is illustrated by *Kiefer*, which also involved preemption (specifically, whether an airline passenger's personal injury claims were preempted by the Airline Deregulation Act). *Kiefer*, 882 S.W.2d at 497. The Fifth Circuit had held that the Act preempted state-law claims, and the defendant argued that "those decisions control the disposition of this case." *Id.* at 499.

The court of appeals "disagree[d]." *Id.* It examined decisions from several other federal circuits, district court decisions that read the Fifth Circuit's opinions "narrowly" to avoid preemption, and subsequent Fifth Circuit actions that raised doubts about the Fifth Circuit's reasoning. *Id.* at 500-02. The court reiterated that it was "free to interpret federal law independently" and it had a duty to follow the analysis it found "to be better-reasoned." *Id.* at 502.

That assertion of independence was prescient; by the time the issue reached the Texas Supreme Court, one of the Fifth Circuit decisions had been set aside. Even then, the Supreme Court disagreed with the Fifth Circuit's analysis: "In sum, while we agree with the result in *Hodges*, we would reach it another way." *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 284 (Tex. 1996). In short, *Kiefer* teaches that giving "respectful consideration" is not the same as deference.

In the present case, there is not yet a mature body of federal law to survey. There is only a single decision from the Northern District of California. Moreover, that decision is not time-tested. It is currently on appeal to the Ninth Circuit and thus subject to reversal. The consideration due to this solitary decision is limited. This is not a case in which federal doctrine "is sufficiently well-developed and coherent to inform" the decision, *Makram v. Exxon Corp.*, 796 S.W.2d 751, 753 (Tex. App.—Houston [14th Dist.] 1990, writ denied). And even in such a case, Texas courts' "reading of federal law could diverge." *Id.* at 754.

In sum, the California court's ruling is entitled to "respectful consideration," but nothing more. This Court has a duty to interpret the CAA "independently." Texas citizens are entitled to that independent determination, not a rubber-stamp of a California district court ruling (and a handful of state trial courts following it) that is flawed in its reasoning and ripe for reversal by the federal appellate courts. Volkswagen's appeal for "deference" should be denied.

B. State Anti-Tampering Laws Are Not Expressly Preempted.

Volkswagen's petition all but abandons the principal argument it advanced in the trial court and in courts across the country: that the CAA expressly preempts state anti-tampering laws. This retreat is understandable; even the California court squarely held that claims for Recall Tampering are ***not*** expressly preempted:

> [Volkswagen's] conduct affected vehicles that had already been sold to consumers and were in use within the Counties, not "new motor vehicles." ***The Counties' attempts to regulate Defendants' post-sale software changes are therefore not expressly preempted by Section 209(a).***

Counties, 310 F. Supp. 3d at 1039 (emphasis added). That ruling was correct.

1. State anti-tampering laws are not expressly preempted by Section 209 because they involve the use and operation of "registered or licensed" vehicles, not "new" vehicles.

The California court's decision—and Volkswagen's near abandonment of its express preemption argument with respect to Recall Tampering claims—is not surprising in light of the plain language of Section 209's express preemption clause (Section 209(a)) and savings clause (Section 209(d)).

As noted, Section 209(a) provides that state and local governments may not "adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a). In turn, Section 209(d) affirms that States may regulate "the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d). State regulation of post-sale tampering is not subject to the former section and is saved by the latter.

In all cases involving an express preemption clause, the federal statute itself "does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria*, 555 U.S. at 76. Courts must "'identify the domain expressly pre-empted,'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996), giving the "precise language" of the federal statute a "fair but narrow reading." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992). The need for judicial restraint is especially acute when Congress enacts both an express preemption clause and a savings clause, because both provisions must be given effect.

With respect to the Recall Tampering claim in this case, anti-tampering rules do not fall within the express preemption clause (Section 209(a)) and are preserved by the savings clause (Section 209(d)) for two reasons: (1) they do not involve "new motor vehicles," but tampering with "registered or licensed motor vehicles"; and (2) they are not "standard[s] relating to the control of emissions." To establish an abuse of discretion with respect to express preemption, Volkswagen is required to overcome both legal obstacles.

First, state anti-tampering rules applied to Volkswagen's Recall Tampering do not involve "new motor vehicles." The CAA defines "new motor vehicle" as a "motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser" (*i.e.*, "showroom new"). 42 U.S.C. § 7550(3). In this case, Volkswagen's Recall Tampering did not touch any "new motor vehicles."

As explained above, the courts have recognized that Section 209 balances the exclusive power of the federal government to regulate "new motor vehicles" against the traditional power of the States to regulate "use" or "operation" of "registered or licensed motor vehicles." *See, e.g.*, *Washington*, 406 U.S. at 115 n.4 ("Because federal motor vehicle emission control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles"); *Allway Taxi*, 340 F. Supp. at 1124 (Congress "specifically refused to interfere with local regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers"). It is now settled law that Section 209(d) safeguards "the historic power of 'states to adopt in-use regulations," *Ass'n of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534, 538 n.6 (5th Cir. 2013), which "preserves the field of regulation of old motor vehicles to state control *ab initio*." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1107 n.19.

Volkswagen acknowledged this federal-state balance in the *Wyoming* case:

> 15 In addition, they have a provision that deals with
> 16 altering and rendering inefficient or inoperable a pollution
> 17 control device in a vehicle. And that makes sense, because
> 18 historically the way that the division of authority has been
> 19 set up under the Clean Air Act, both in terms of its language
> 20 in 209(a) and in 209(d), is that the states are entitled to
> 21 regulate cars once they are in use, once they have been
> 22 registered or are operating in the states, and preventing
> 23 people from actually going to an auto shop, and having the
> 24 emissions controls system be disrupted.

Supp. MR.192.

This statement was not a slip of the tongue. Volkswagen acknowledged that "[c]learly" States retain the authority to regulate "something like . . . taking the emissions-control device out of a car." Supp. MR.195-96. Given that authority, Volkswagen admitted that it could be held liable under state law for tampering with emissions control systems in used vehicles:

> 8 MR. GIUFFRA: The answer to that argument is, Your
> 9 Honor, if this were a situation where we tampered with the
> 10 vehicle, you know, if some auto shop tampered with it in an
> 11 emissions-control system in the state of Wyoming, they might
> 12 have something, because under Section 209(d) it says states
> 13 can, quote, *control, regulate, or restrict the use, operation,*
> 14 *or movement of registered and licensed vehicles.*
> 15 Well, these vehicles were not registered or licensed at
> 16 the time the defeat device was put in them.

> 6 And, in fact, when you look at 209(d), which actually does
> 7 give them the ability, if someone does tamper with the device
> 8 in the state after the car's been registered --

Supp. MR.213, 217.

Volkswagen presumably felt comfortable with that admission in *Wyoming*, which did not involve Recall Tampering. But it came back to bite Volkswagen in the *Counties* case, which did involve such a claim—and which the California court ruled was not expressly preempted. *Counties*, 310 F. Supp. 3d at 1040. Likewise, this case alleges that Volkswagen "installed additional defeat device software code on the Subject Vehicles during normal maintenance and repair," MR.107 at ¶ 6.8, "after the original sale of those Subject Vehicles to the original owners." *Id.* ¶ 6.9. Section 209 does not preempt state law in such a case.

2. State anti-tampering laws are not expressly preempted by Section 209 because anti-tampering rules are not "standards" related to the control of emissions.

Independently, anti-tampering rules are not "standards" relating to emissions and thus are not subject to Section 209(a). Section 209(a) preempts state rules that either create or attempt to enforce a "standard relating to the control of emissions." 42 U.S.C. § 7543(a). Anti-tampering rules are not "standards" within the scope of this section, and for this independent reason, they are not expressly preempted.

As the Fifth Circuit has explained, the Supreme Court has construed and "'explicitly narrowed the meaning of 'standard' in § 209(a)'s statutory context,'" rejecting broader dictionary definitions of the term and "'highlighting that it refers to a mandatory, pollution-related obligation.'" *City of Dallas*, 720 F.3d at 539. Specifically, the Supreme Court construed the term as a reference to objective, quantifiable emissions characteristics:

> The criteria referred to in § 209(a) relate to the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions. This interpretation is consistent with the use of "standard" throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply, e.g., 42 U.S.C. § 7521(a)(3)(B)(ii), or emission-control technology with which they must be equipped, e.g., § 7521(a)(6).

Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 253 (2004); *see also City of Dallas*, 720 F.3d at 539 (quoting *S. Coast*).

The Court emphasized that the only "standards" referenced in Section 209(a) are objective, quantifiable benchmarks applicable to new vehicles. *See S. Coast*, 541 U.S. at 253. These standards prescribe objective criteria:

(i) numerical emission levels, 42 U.S.C. § 7521(a)(3)(B)(ii);

(ii) evaporation emission capacities, *id.* § 7521(a)(6), (g)(1); and

(iii) percentages of a manufacturer's sales volume. *Id.*

For purposes of Section 209(a), a "standard" relating to the control of emissions is an objective, quantifiable "emission characteristic." Anti-tampering rules are not "standards" under this definition. They have nothing to do with Section 209(a).

As the Supreme Court explained, the "standards" contemplated by the CAA appear in Section 202 ("Emissions ***standards*** for new motor vehicles or new motor vehicle engines"), not Section 203 ("Prohibited Acts"). *S. Coast*, 541 U.S. at 253 (emphasis added). Section 202 creates "mandatory, pollution-related obligations" that dictate objectively-measurable emissions control features (*i.e.*, "standards"). *City of Dallas*, 720 F.3d at 539. Section 203 simply creates a prohibition against tampering with such features. Anti-tampering rules are important, but they are not "standards relating to the control of emissions." As such, generally applicable anti-tampering prohibitions are not preempted "standards" under Section 209(a). For this independent reason, the trial court correctly ruled that such state rules are not expressly preempted by the CAA.

3. Volkswagen's false assertion that its recall campaigns "reduced" emissions is not a basis for preemption.

Volkswagen argues that its Recall Tampering "reduce[d] NOx emissions." Pet. at 37. This assertion is belied by its own corporate representative's testimony, who admitted under oath that the changes implemented during the recall campaign ***increased*** emissions. *See* Supp. MR.401:4-17; Supp. MR.402:11-15. The recall "reverse[d] the strategy" of the initial defeat device software by starting the vehicle in Road Mode instead of Dyno Mode, changing its default condition at start-up from in-compliance to out-of-compliance and allowing the vehicle to operate more consistently in Road Mode (with increased emissions). Supp. MR.335:19-22.

These facts are sufficient to defeat Volkswagen's fact-bound arguments—and the Governments are seeking more documents and noticing more depositions to expose the full extent of the Recall Tampering. Thus far, Volkswagen has avoided document discovery and its witnesses have invoked the Fifth Amendment, but more depositions are scheduled on this topic. *See* p. 6 n.1, *supra*.

Regardless, this argument is immaterial to the issue of federal preemption. Post-sale tampering with emissions control systems plainly falls within the power of the state to regulate the "use" or "operation" of "registered or licensed" vehicles, for the reasons set forth above. Whether such tampering "improved" performance, and thus should not be penalized under state law, is an entirely different issue from whether state regulation of such post-sale conduct is preempted by federal law.

4. Volkswagen's Recall Tampering does not "relate back" to its new motor vehicle design for purposes of preemption.

Finally, Volkswagen advances the novel theory that its post-sale acts of tampering are not preempted because they "relate back" to the original installation of the first-generation defeat devices. This claim is false. The post-sale conduct that forms the basis of the Recall Tampering claim is factually and legally distinct from the conduct that forms the basis of the Daily Tampering claim.

Volkswagen's corporate representative admitted that the software at issue is "a part on the vehicle," and like all other equipment, it "has its own part number." Supp. MR.337:11-16. During the recall campaign, the original tampering software was removed and replaced with an entirely new "part" that did not exist before. *See* Supp. MR.337:17-20 ("Q: And so the part numbers were changed during this recall process for the software on the vehicles; correct? A: Yes."). Legal or not, removing and replacing part of the emissions control system in a used vehicle that is already "registered or licensed" is independent conduct subject to state law.

As even the California court recognized, prohibiting post-sale tampering is "not attempting to impose emission measures that would require manufacturers to change the way they construct new vehicles," *Counties*, 310 F. Supp. 3d at 1040, but only "attempting to prevent manufacturers from tampering with their vehicles after the vehicles are sold to end users." *Id.* Such state anti-tampering rules do ***not*** "relate back to the vehicle manufacturing process." *Id.*

II. Mandamus Relief Is Inappropriate.

Independently, the petition should be denied because mandamus relief will not lie from the denial of a summary judgment motion on an affirmative defense. If appellate courts make mandamus available anytime a litigant is dissatisfied with a trial court's ruling on a dispositive motion, there will be no limits on this once "extraordinary writ" (and the courts can expect such petitions to become routine). Volkswagen's arguments to justify mandamus relief under these circumstances are creative but unconvincing. The petition should be denied for this reason alone.

A. Mandamus Relief from a Denial of Summary Judgment Is Rare.

Even in the modern era of mandamus review, the Supreme Court holds that "mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008). This rule remains the law because "parties are not 'entitled' to summary judgment in the same way they are entitled to" other protected rights that can only be vindicated by mandamus relief. *Id.* In terms that resonate here, given the unusual public interest in this litigation, the Court has emphasized that litigating cases to their natural conclusion "may still be important both for justice and the appearance of doing justice." *Id.* For this reason, it is virtually unheard of for appellate courts to grant mandamus relief from a summary judgment denial. This case should not be an exception to that rule.

This Court is faithful to that tradition. In the years since the Supreme Court enlarged the availability of mandamus relief, this Court has granted relief in only a handful of proceedings challenging denials of summary judgment. Those cases have involved scenarios in which the plaintiff had no standing to be in court at all, *In re LoneStar Logo & Signs*, LLC, 3-18-00214-CV, 2018 WL 2437601, at *1-3 (Tex. App.—Austin May 31, 2018, orig. proceeding); or the trial court lacked any jurisdiction over the litigation. *In re Murphy & Beane, Inc.*, 03-16-00690-CV, 2017 WL 3897453, at *5–6 (Tex. App.—Austin Aug. 29, 2017, orig. proceeding). Unlike those cases, this is not a case in which "the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved." *LoneStar Logo & Signs*, 2018 WL 2437601, at *8 (citation omitted). Far from it; Volkswagen simply complains that the trial court denied summary judgment on a merits-based affirmative defense and then refused to certify its ruling for an appeal (an inherently discretionary ruling). This is not the stuff of mandamus.

B. This Is Not an Exceptional Case Warranting Mandamus Relief.

Notwithstanding these ordinary rules, Volkswagen argues that it lacks an adequate appellate remedy because it will endure "expense and delay." Pet. at 47. Generally, of course, "expense" and "delay" do not render an appeal inadequate. *See Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992). These considerations warrant mandamus relief only in "exceptional cases." *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004). Volkswagen has not made such a showing.

As in other recent unsuccessful cases, "Relators have not explained how the alleged burden and expense would 'greatly exceed the norm' or skew the procedural dynamics of the case." *In re Empower Texans*, No. 03-18-00220-CV, 2018 WL 1802515, at *3 (Tex. App.—Austin April 17, 2018, orig. proceeding). There is no question that this litigation involves matters of great public importance, but the actual "burden and expense" of litigating the case is nothing special. Certainly, Volkswagen has not made a record to satisfy this strict standard.

Volkswagen makes much of the previous mandamus in this case. Pet. at 48. But that proceeding concerned the doctrine of dominant jurisdiction, so no proof of an inadequate remedy was required. *In re Volkswagen Clean Diesel Litigation*, 2017 WL 3221748, at *1-2 (citing *In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d 320 (Tex. 2016)). Accordingly, the previous mandamus ruling is immaterial here.

Volkswagen also parrots the State's concerns in that earlier mandamus about "multiple trials and multiple appeals." Pet. at 48. Those concerns are inapposite. First, most of the cases have been abated until the State's case is finally resolved. *See In re Volkswagen Clean Diesel Litigation*, 2017 WL 3221748 at *1 (all cases aside from Harris County and Fort Bend County must be "abated until resolution of the State's enforcement suit."). Accordingly, the preemption issue can be raised in an ordinary appeal from a final judgment and resolved by the appellate courts before most of the local government cases can even proceed. The abatement order eliminates most of Volkswagen's parade of horribles.

Second, Harris County is prepared to waive its right to remand for trial in the originating court and is willing to try its case alongside the State in Travis County, allowing a single factfinder to weigh the evidence, a single trial judge to preside, and a single appeal to resolve any legal issues after final judgment. The provision for remand to the originating court for trial is not jurisdictional and can be waived. *See* Tex. R. Jud. Admin. 13.7(b) ("may"); *see also In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 351 (5th Cir. 2017) (right to remand in federal MDL can be waived); *Armstrong v. LaSalle Bank Nat'l Ass'n*, 552 F.3d 613, 616-17 (7th Cir. 2009) (same). Moreover, even if the right to remand were not waived by the Counties, the trial court would have discretion to decide when to remand each case for trial. The MDL court "may set a transferred case for trial at such a time and on such a date as will promote the convenience of the parties and witnesses and the just and efficient disposition of all related proceedings." Tex. R. Jud. Admin. 13.6(d). Thus, the MDL court has all the tools necessary to cure Volkswagen's concerns.

Given these circumstances, Volkswagen's comparison to the mass tort cases undercuts its argument. *See* Pet. at 47. Du Pont was facing over 8,000 plaintiffs. *In re E.I. du Pont de Nemours & Co.*, 92 S.W.3d 517, 524 (Tex. 2002). Likewise, CSR was facing "thousands" of plaintiffs. *CSR Ltd. v. Link*, 925 S.W.2d 591, 586 (Tex. 1996). Masonite was facing "hundreds of claims." *In re Masonite Corp.*, 997 S.W.2d 194, 195 (Tex. 1999). Volkswagen faces just three cases in one court, and probably just a single trial. This situation is nothing like a mass tort case.

Next, Volkswagen complains about the expense of discovery, but it fails to identify any specific concern or any extraordinary expense—because there is none. Pet. at 48. The Governments' response to Volkswagen's motion for stay explained that Volkswagen is ***not*** being subjected to abusive discovery. At its own request, discovery is being coordinated by an MDL court to eliminate unnecessary burdens. *See, e.g.*, *In re Farmers Ins. Co. Wind/Hail Storm Litig.*, 481 S.W.3d 422, 429 (Tex. M.D.L. Panel 2015) (recognizing the purposes of the MDL statute include "prevent[ing] multiple and conflicting discovery orders"). Volkswagen provides no reason to believe the MDL court will be unable to manage discovery efficiently. At bottom, Volkswagen is simply arguing that a company which publicly admitted a multi-year strategy to deceive the United States and the State of Texas—and even pled guilty to federal crimes as a result—should not bear the expense of discovery designed to reveal the full extent of its criminal cover-up. That cannot be the law.

Finally, Volkswagen points out that the Texas MDL procedure was modeled on the federal MDL procedure. Pet. at 50-51. Volkswagen reasons that because federal courts favor interlocutory appeal in the MDL context, Texas should as well. But the Texas Legislature has not expressly authorized interlocutory appeals from incidental pretrial rulings in MDL cases. *See* Tex. Gov't Code § 74.161, *et seq.* Texas appellate courts may not expand their jurisdiction beyond that conferred by the Legislature. *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). Nor should they stretch mandamus principles to reach that result.

CONCLUSION

The petition for writ of mandamus should be denied. Harris County and the TCAA County Plaintiffs request all other relief to which they are entitled.

Respectfully submitted,

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1. Pursuant to Tex. R. App. P. 9.4, the undersigned certifies this brief complies with the type-volume limitation because it contains 14,195 words.

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Dated: September 4, 2018.

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Appendix 4

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IN RE VOLKSWAGEN GROUP OF AMERICA, INC., VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC, AUDI OF AMERICA, LLC, AND PORSCHE CARS NORTH AMERICA, INC.

THE STATE OF TEXAS'S RESPONSE TO MANDAMUS PETITION

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Statement Regarding Oral Argument

The State does not believe that oral argument is necessary to resolve this proceeding, because it is an illegitimate attempt to obtain interlocutory appeal of an order denying summary judgment on an affirmative defense and because Volkswagen's preemption arguments are foreclosed by the plain text of the Clean Air Act. Nonetheless, if the Court chooses to hold argument, the State asks to participate.

To the Honorable Third Court of Appeals:

Volkswagen attempts to expand the scope of mandamus relief in derogation of the Legislature's enactment of section 51.014(d) of the Civil Practice and Remedies Code. This is not only because mandamus is directed to abuses of discretion rather than the resolution of core legal issues, such as the affirmative defense of implied preemption. It is also because section 51.014(d) and the permissive appeal rules give a specific, statutory mechanism for resolving exactly this type of question on interlocutory appeal. That the district-court has exercised plenary discretion not to certify this issue for permissive interlocutory appeal *also* bars mandamus, because otherwise the common-law cause of action would swallow up the statutory mechanism for permissive appeal on controlling issues of law.

Assuming *arguendo* that mandamus is available to consider the denial of a partial motion for summary judgment on an affirmative defense, the Court should nonetheless deny mandamus relief on preemption grounds. The district court not only acted within its discretion to hold as a matter of first impression that the post-sale tampering regulation is not preempted; the court was absolutely correct. Under Texas Supreme Court guidance interpreting the United States Supreme Court's preemption jurisprudence, the first step in preemption analysis is to look at the statutory text. While the Clean Air Act creates an exception to its general scheme of dual enforcement for vehicle emissions, 42 U.S.C. § 7543(a) (preempting state regulation related to "any new motor vehicle . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment"), it also carves back into the general scheme (and thus out of federal

preemption) any post-sale regulation of cars in use, *id.* § 7543(d) (exempting from the express preemption clause governing vehicle emissions any "registered or licensed motor vehicles"). The Clean Air Act expressly creates a cooperative enforcement regime. By carving post-sale emissions regulations out of the preemption clause, Congress expressed its manifest intent to allow the states to regulate vehicles post-sale. Because of the carve out, implied preemption can apply only if state regulation of post-sale vehicles interferes with the federal policy governing manufacture of new cars.

The Court should deny mandamus relief.

STATEMENT OF FACTS

Although mandamus should not involve the determination of facts, *see In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (distinguishing between application of law to settled facts and trial court's discretion to consider disputed fact evidence), the State disagrees with several of Volkswagen's factual statements, particularly those characterizing the content of the pleadings in this case and the real-world actions to which they apply. Moreover, Volkswagen has omitted the State's summary-judgment evidence. *See* M.R. Tab 17 (omitting exhibits). But the opposing party's summary-judgment evidence is an essential element to determining whether the district court abused its discretion. *E.g.*, *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985) (movant bears burden to show that there is "no genuine issue as to any material fact"). The State attaches those exhibits and verifies them as part of the mandamus record, in order to highlight the distinctions between the facts discussed by Judge Breyer in his two opinions and

the facts—along with supporting evidence—currently advanced by the State of Texas. *See* Appendix Tabs A-C.

1. The Volkswagen "Clean" Diesel Scandal

The triggering event for this litigation is undisputed. The Volkswagen defendants have publicly admitted that they installed software in the emissions-control system on certain diesel-powered vehicles to allow them to pass emissions testing even though they were actually non-compliant. The software functioned by altering the functioning of the emissions control systems during testing to yield artificially low emissions readings. Defendants concealed this information from regulators and the public.

2. Two Types of Tampering

To be clear, the State's lawsuit has addressed two distinct categories of tampering: "original tampering," in which the State brought claims based on the software installed in the emissions-control systems in Volkswagen "clean" diesel vehicles during the manufacturing process, see Appendix A Tab 4, Exh. 2-11 – 2-15; Tab 8, pp. 8-9, and "post-sale" tampering, which occurred when Volkswagen installed new software parts on vehicles when consumers brought those vehicles to dealerships in Texas, either for routine maintenance, or in response to a recall notice. *Id.*, Tab 4, Exh. 2-20; Tab 1, p. 8; Appendix C, pp. 6, 9-13.

a. "Original" Tampering

The State does not challenge the district court's grant of summary judgment to Volkswagen on the original tampering claims in this mandamus proceeding. However, it is necessary to flesh out the scope of those claims in order to see the distinction between the two categories of activity.

Volkswagen installed, at the time of manufacture, software that detected whether a vehicle was being emissions tested on a "dynamometer" (a machine for testing emissions) or being driven on the road. Appendix A, Tab 4, Exh. 2-11 – 2-15. This software impaired or disabled the emissions control systems when the vehicles were being driven by the owner/operator. *Id.* The equipment would always start in "test mode," *i.e.*, a non-polluting mode designed to give compliant readings on a dynamometer. *Id.*, Tab 7, 98:6-11. If the system detected that the vehicle was being driven rather than tested, the vehicle would switch from "test mode" to "street mode," and impair or disable the emissions control system. *Id.*, Tab 4, Exh. 2-12 – 2-13. As a result, in street mode allowed for better performance and mileage than the standards-compliant "test mode." Most importantly, the street mode caused expensive components of the emissions control systems to last longer, which meant that Volkswagen could pay less for replacing emissions hardware due to the high wear and tear caused by the full operation of emissions control systems in "test mode." *Id.*, Tab 7, 182;10-185:5.

b. Post-Sale Tampering

Volkswagen began receiving reports of high numbers of failed hardware parts in the emissions control systems of its "clean" diesel vehicles in 2012. *Id.*, Tab 4, 2-18;

Tab 5, 4-5. Its engineers suspected that these hardware failures were tied to the failure of the original software to work as Volkswagen intended. *Id.* Accordingly, Volkswagen decided to tamper with the vehicles *again* by installing new software on post-sale vehicles. *Id.*, Tab 4, Exh. 2-9 – 2-20; Tab 5, 5. The purpose of this software was to avoid costly repairs and replacement of the emissions control devices on the vehicles. *Id.*

This tampering occurred on cars that had already been sold and were being driven on Texas roads, sometimes for years. *Id.*, Tab. 4, 2-18 – 2-20. At a deposition on October 25, 2017, plaintiffs were first able to ask questions related to the installation of new software parts, post-sale. *Id.*, Tab 7.

To address the fact that its vehicles were wearing out faster because its system for detecting street-driving conditions was not disabling the emissions-control systems often enough, Volkswagen developed two new software parts to disable or impair the emissions control systems when the vehicles were being driven. *Id.*, Tab 4, 2-19 – 2-20; Tab 7, 87:15-88:13. These new parts were a feature that started the vehicle in "street mode" rather than "test mode" ("Start Function"), and a steering wheel angle recognition feature ("SWARF"). Working together, these two new tampering parts insured that the vehicles would start and stay in "street mode," unless the vehicle detected a test cycle (because the steering wheel was not moved within a certain period of time after the vehicle was started). *Id.*, Tab 4, 2-19-2-20; Tab 5, 4-5. The effect of the new software was that the emissions control systems would be disabled more often, resulting in less wear and tear on their components. *Id.*, Tab 7, 116:25-117:10.

In addition to including these parts in newly-manufactured vehicles, Volkswagen installed these new parts through recalls or maintenance on post-sale vehicles. *Id.*, Tab 4, 2-20. Volkswagen notified EPA of a "field fix" for the devices—a type of voluntary recall in which the EPA does not specifically authorize the work done,[1] and asserted that the fixes would "optimize" emissions. *Id.* The SWARF and Start Function fixes were not disclosed. *Id.*, Tab 7 282:23-283:1. In late 2014, Volkswagen submitted to EPA an application and received approval for a vehicle recall. *Id.*, Tabs 5, 7.

In January of 2017, Volkswagen AG pled guilty to federal criminal charges—at the time of the guilty plea, the State had already initiated suit, and this Court had stayed the Texas MDL proceeding on Volkswagen's motion. The guilty plea recited the fact that Volkswagen engaged in post-sale tampering with the emissions control systems of vehicles being driven on the roads in Texas. *Id.*, Tab 4, Exh. 2-18 – 2-20, Tab 5, 4-5. Moreover, it specified that through 2014 and 2015, Volkswagen continued to make various "fixes" that did not reveal "the underlying reason – the existence of software designed to detect, evade and defeat U.S. emissions tests." *Id.*, Tab 4, Exh. 2-22. When the stay was lifted in July 2017, the State commenced discovery of the post-sale tampering activities, in particular, the installation of the SWARF and Start Function.

[1] EPA, Field Fixes Related to Emissions Control-Related Components, MSAPC Advisory Circular No. 2B (Mar. 17, 1975), *available at* https://iaspub.epa.gov/otaqpub/display_file.jsp?docid=14316&flag=1

Volkswagen argues in its petition that this "fix" is addressed by the earlier decisions and that, therefore, any claims related to SWARF and Start Function were both addressed in the earlier proceedings, Pet. 31-32, and constitute the application of federal standards to the affected vehicles, Pet. 44.

That is where Volkswagen's treatment of the facts diverges from the State's record. The State's response to summary judgment asserted that the "fixes" installed during the field fixes and voluntary recall actions are factually distinct, because instead of "optimizing" the emissions control abilities of the vehicles and reducing pollution, Pet. 37, the SWARF and Start Function changes actually *increased pollution* by starting and keeping the car in pollution mode, more effectively than the original tampering, thereby impairing or disabling the emissions control systems whenever the vehicles were driven on the road by the owner/operator. MR.333-34 & n.9; *see* Appendix A, Tab 7, 272:22-274:6. Further, the changes upon which the State based its tampering allegations did not take place during the manufacturing process; but were installed during recalls and maintenance visits at Texas dealerships. *Id.*

2. The Field Fix and Recall

Volkswagen's most problematic statement of fact is that regulators were made aware that SWARF and the Start Function were being installed in maintenance actions and pursuant to the recall. Pet. 37 (arguing that claims are preempted because they were already dealt with by EPA's settlement). But the State's evidence shows that Volkswagen *did not* reveal the existence of SWARF and Start Functions in the

software to the EPA when it sought authorization for the field fix and recall. *See* Appendix A, Tab 7, 67:9-23 (Volkswagen told regulators that it was 1.) changing turbo charger, 2.) correcting the "PM model," which is used to judge how much soot loading is occurring with the particulate filter," and 3.) installing "software that would improve what's called the real world NOx emissions of the vehicle, to improve the way the vehicle performed on the street with regards to NOx emissions."). In sworn testimony, Volkswagen Group of America's corporate representative stated that the SWARF and Start Function changes were **not** disclosed to the EPA in Volkswagen Group of America's filings related to the field fix and the recall, and that Volkswagen Group of America did not know about SWARF and Start Function at the time. Appendix B, Tab 8, 69:12-15. The part numbers for the new software were supplied to the dealers, but Volkswagen Group of America did not know about the content or inclusion of the SWARF and Start Function tampering devices in the software. *Id.*, 122:2-9.

Volkswagen Group of America has admitted in written discovery that (1) the SWARF and Start Function updates were installed through software updates during maintenance; and (2) that Volkswagen employees falsely told regulators, customers, and others that the software fix was intended to improve the vehicles when, in fact, Volkswagen knew that the SWARF was designed to improve the "defeat device's precision in order to reduce the stress on the emissions control systems." Appendix A, Tab 4, Exh. 2-20; Tab 5, 5.

3. Federal Court Opinions.

Texas's lawsuit has proceeded parallel to suits by the federal EPA and other states. The EPA's suit was settled, and purported to cover all civil claims related to the scandal. Notably, a number of state claims were settled in the same proceeding on state law grounds,[2] notwithstanding that Volkswagen argues that the cases brought by Texas and other states that did not appear in the federal forum are preempted.

Volkswagen's arguments rest on opinions drafted in two separate proceedings. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1045 (N.D. Cal. 2017) ("*Wyoming*"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 310 F. Supp. 3d 1030, 1043, 1045 (N.D. Cal. 2018) ("*Counties*"). In the *Wyoming* proceeding, Wyoming did not allege that the changes failed to improve pollution, and Judge Breyer's opinion only, in a footnote, states that those updates "improved" emissions. *Wyoming*, at 1056 n.8. Indeed, the Wyoming decision expressly recites that "Volkswagen's conduct took place during manufacturing." *Id.* at 1055; *see also Counties*, 310 F. Supp. at 1039.

Unlike *Wyoming*, the *Counties* decision addresses allegations that SWARF and Start Function installed post-sale should be actionable. *Counties*, 310 F. Supp. 3d at 1034 (addressing claims by Hillsborough that "deviat[e] from Volkswagen's plea

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[2] *See* MDL No. 2672 CRB (JSC) *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, in the United States District Court Northern District of California, Joint Stipulation for Remand Pursuant to Settlement and [Proposed] Order, at Exhibit A, *available at* http://www.mass.gov/ago/docs/environmental/ecf-filed-remand-stipulation-with-executed-settlement-agreement.pdf

agreement). The opinion expressly recognizes that these claims fit within local regulations. *Id.* at 1040. *Counties* distinguished Volkswagen's reliance on *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y. 1972), holding that regulation of post-sale software changes does not implicate the standards for manufacturing new cars, *Counties*, 310 F. Supp. at 1040.

To hold that the post-sale tampering claims were preempted, Judge Breyer reasoned that they were impliedly preempted, because federal regulation addresses "entire classes of models of vehicles." *Id.* He relied on the fact that EPA implements in-use testing of vehicles to ensure that the original manufacturing standards hold up for the long term. *Id.* By contrast, he framed the history of state emissions testing as being focused on "individual vehicles." *See id.* at 1043. Preemption was, for Breyer, a question of scale:

> If, for example, a manufacturer were to tamper with a single in-use vehicle during vehicle maintenance, the Clean Air Act would not bar a state or local government from bringing a tampering claim against the manufacturer if the tampering occurred within its borders. In such a scenario, the manufacturer is not acting on a model-wide basis, and therefore the enforcement advantages that EPA has over the states and local governments are not implicated.

Id. It is only if the tampering is "model wide" that EPA's superior nationwide enforcement power is triggered, in turn triggering preemption. *Id.*

3. Volkswagen's Motion for Summary Judgment and Texas's Response.

This mandamus arises from the district court's denial of Volkswagen's motion for summary judgment on preemption and its various motions for reconsideration, based on *Wyoming* and *Counties*.

Volkswagen's motion argued that (1) Texas's amicus brief in the Wyoming case already resolved these claims, MR.204, and (2) Texas's "in use" argument that the daily operation of the vehicles on the roads of Texas constituted a separate and continuing violation of Texas's own laws, MR.214-15. With regard to the post-sale tampering, the motion for summary judgment argues that "Plaintiffs do not allege that the 'new software parts' were unrelated to the original defeat devices" and related back to the original manufacture. MR.216-17.[3]

The State's response controverted those statements factually, by pointing out that the post-sale SWARF and Start Function tampering had a negative impact on emissions and were not disclosed to regulators when the recalls were implemented. MR.241-244, 248-249 (citing Appendix B, Tab 8, 68:14-69:6; 119:12-18; 127:1 – 128:2; 272:22-274:6).

After the district court denied Volkswagen's motion, Volkswagen moved for rehearing on the ground that Judge Breyer's *Counties* decision had created a new theory of preemption. MR.279. The motion for reconsideration did not raise the

[3] Volkswagen also asserted that the claims did not adequately invoke the relevant state laws. MR.218-222. While a defendant would have to establish as a matter of law that each of these grounds for summary judgment were met, in the event that the Court determined the claims were not preempted, Volkswagen has framed this mandamus solely in terms of preemption. The State will not address issues outside the scope of Volkswagen's mandamus petition.

effect of the *Counties* decision as a new ground for summary judgment under Rule 166. *See* MR.278-287.

STANDARD OF REVIEW

Mandamus relief is available when a trial court clearly abuses its discretion and there is no adequate remedy by appeal. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 463-65 (Tex. 2008) (orig. proceeding); *Prudential*, 148 S.W.3d at 135-36. An error of law is a clear abuse of discretion for these purposes when the trial court failed to reach a result mandated by legal principles. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). And the adequacy of the appellate remedy is measured by a careful analysis of the costs and benefits of interlocutory review. *McAllen Med. Ctr.*, 275 S.W.3d at 464.

SUMMARY OF THE ARGUMENT

Mandamus is inappropriate because the Supreme Court has not opened mandamus wide to interlocutory appeals of summary judgments on substantive legal issues. And the Court cannot open the mandamus gates that wide, because a statutory remedy already exists for this procedural posture: section 51.014(d) of the Civil Practice and Remedies Code. Volkswagen is, in essence, attempting to review the district court's fully discretionary decision not to allow a permissive interlocutory appeal.

If there is jurisdiction, mandamus is still inappropriate. The State's enforcement action—which applies state regulations prohibiting tampering with factory-installed emission equipment in already sold cars to prevent them from reducing pollution—

is not preempted. The plain text of the Clean Air Act preserves state authority to regulate post-sale tampering with the operation of emissions control systems in vehicles to prevent the removal, impairing or disabling of emissions control systems. The EPA has officially recognized that the text of the statute preserves state authority over cars after sale, so long as the regulation does not interfere with national manufacturing standards for new, *i.e.*, as-yet unpurchased, cars. And Volkswagen, arguing before the California federal District Court, has freely admitted that the text and history of the Clean Air Act allow such regulations.

There is no real threat of interference with federal policy governing manufacturing standards. The State alleges—and its summary-judgment evidence supports the assertion—that Volkswagen's post-sale tampering with emissions control systems was not disclosed to or authorized by the federal Environmental Protection Agency. And the tampering subject of the State's lawsuit did not improve emissions; in fact, the State's evidence shows that the tampering increased emissions by impairing or fully disabling the emissions control systems any time the vehicles were driven on the roads in Texas. Volkswagen's application to the EPA to install new software did not ask for permission to install software that violated the Texas Clean Air Act—there is no evidence that the EPA has adopted a nationwide manufacturing standard that allows higher pollution levels. To the contrary, the evidence shows that Volkswagen did this to save the emission system from the additional wear and tear caused by normal, unimpaired, operation of the emissions control systems, because it did not want to pay the high cost of replacing expensive components of the emissions control systems under warranty.

To be clear, the State does not argue that post-sale regulation is incapable of being preempted by contrary federal manufacturing standards. But penalizing a mechanic's shop for making a car pollute more than federal standards has nothing to do with the uniformity of initial manufacturing standards. Volkswagen's only defense is that, because it is a manufacturer, the actions taken at its dealerships are legally distinct from actions that would be regulated by Texas law had they occurred at any other facility in Texas.

Volkswagen's argument boils down to the assertion that, although its tampering to make the cars pollute more Volkswagen would be subject to state regulation *but for the fact* that it is a manufacturer that ordered these modifications across the country. This is a deliberate misunderstanding of the precedent on which Volkswagen relies: nothing in the text of the Clean Air Act supports the proposition that a mom-and-pop mechanic would be liable under a state law for an act that cannot be regulated by the state if it is performed by the largest auto manufacturer in the world in multiple states. That argument is not sustainable on the Clean Air Act's text, nor is the adoption of "manufacturer immunity" consistent with the Clean Air Act's policy goals.

Volkswagen's petition makes clear what this case is really about: because Judge Breyer's case in California federal district court is at the middle of the spider web of claims, he ought to be able judge in his superior expertise. *See* Pet. at 31 (Judge Breyer is "uniquely positioned to understand the issues"); 23 (arguing that preemption derives from the fact that the outer limits of the State's requested penalties would potentially be as great as those negotiated by the EPA). This is nothing more than a

suggestion that state courts cannot second-guess the policy judgments of a federal district court judge, even when he uses his own policy intuitions about statutory penalties in place of statutory text. But the law is clear that Texas courts interpret federal statutes independent of the lower federal courts, and Texas courts do not make law from the bench. The Court should not allow Volkswagen to sweep the State's claims under the mat of the federal settlement, when they are based on different facts from the claims addressed in Judge Breyer's opinions and are based on laws governing post-sale regulation of motor vehicles, which are reserved to the States by the plain text of the Clean Air Act.

ARGUMENT

I. MANDAMUS IS NOT AVAILABLE TO REVIEW THE DENIAL OF A MOTION FOR PARTIAL SUMMARY JUDGMENT ON AN AFFIRMATIVE DEFENSE.

The Court's power to issue mandamus against a district court must be "agreeable to the principles of law regulating those writs." TEX. GOV'T CODE § 22.221(b). Before turning to the merits of Volkswagen's affirmative defense, therefore, it is necessary to determine whether its request for interlocutory appellate review is consistent with the legal principles governing mandamus relief. Because it is not—and because to expand the scope of mandamus to this type of question would frustrate the statutory mechanism for advancing this type of appeal, section 51.014(d) of the Civil Practice and Remedies Code—mandamus relief should be denied.

A. Mandamus Requires a Clear Abuse of Discretion with No Adequate Remedy By Appeal.

Mandamus will issue only to correct a clear abuse of discretion or violation of the duty imposed by law that cannot be remedied by appeal. *Walker*, 827 S.W.2d at 840. Only a "clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). This standard prevents mandamus from eliding into a form of discretionary interlocutory appeal. *See Prudential*, 148 S.W.3d at 137-38 (contrasting mandamus with statutory interlocutory appeals); *see also* TEX. R. APP. P. 28.3 (providing for permissive interlocutory appeal). Whether an appellate remedy is adequate turns on a "careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." *Prudential*, 148 S.W.3d at 136; *see also In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 298-99 (Tex. 2016) (orig. proceeding) (discussing *Prudential*'s broadening of the inadequate-remedy-by-appeal prong). The expense and difficulty of leaving a matter unresolved by the appellate courts is a factor in determining whether waiting for final appeal is an adequate appellate remedy. *Prudential*, 148 S.W.3d at 137.

But *Prudential* does not make every trial-court order reviewable, and the cases on which Volkswagen relies do not either. None of them addressed a substantive motion regarding the legal theory advanced; all of them have dealt with the categorical impropriety of proceeding with a matter despite a lack of jurisdiction over some person. This was true before *Prudential*. *See, e.g.*, *In re E.I. du Pont de Nemours*

& Co., 92 S.W.3d 517, 524 (Tex. 2002) (orig. proceeding) (forum non conveniens); *CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) (orig. proceeding) (denial of special appearance). The pre-*Prudential* cases on which Volkswagen relies all address the power of the court to consider the matter at all based on a matter extraneous to the ultimate legal questions in the case, *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271-72 (Tex. 1992) (orig. proceeding) (motion to compel arbitration); *In re Hibernia Nat'l Bank*, 21 S.W.3d 908, 910 (Tex. App.—Corpus Christi 2000, orig. proceeding) (legal capacity of bank to bring suit without registering as Texas corporation). None of the pre-*Prudential* case law suggests that mandamus will provide an interlocutory preview of the main substantive issues in the case.

The post-*Prudential* case Volkswagen cites is no different. *In re GlobalSanteFe Corp.*, 275 S.W.3d 477, 489-490 (Tex. 2008) (orig. proceeding) (applying Jones Act preemption to one claim in MDL proceeding).

While Volkswagen claims that mandamus is available for preemption claims as a blanket matter, Pet. 26, that is clearly not the case: each of the cases Volkswagen cites had to do with the amenability of a party to suit, and not the ultimate legal questions in the lawsuit. It would be a significant expansion of *Prudential* to apply its balancing of burdens to the actual substantive claims asserted against a defendant that undisputedly is an appropriate party to litigation in the district courts of Texas.

B. Mandamus's Common-Law Roots Prevent Its Use to Circumvent Section 51.014(d).

This mandamus squarely asks for an order requiring the granting of a motion for summary judgment. *See* Pet. xv. But neither this Court nor the Texas Supreme Court

has yet expanded *Prudential* to encompass an interlocutory appeal from a partial summary judgment on an affirmative defense. And allowing an interlocutory appeal by mandamus of a controlling legal issue involving the merits of the case is at odds with the Legislature's choice to provide a discretionary statutory appeal for such questions. TEX. CIV. PRAC. & REM. CODE § 51.014(d). It would significantly expand of the adequate-remedy-by-appeal prong of mandamus beyond the scope of this Court's, or the Supreme Court's, previous application of the *Prudential* standard.

1. A common-law remedy cannot displace section 51.014(d)'s grant of judicial discretion regarding permissive appeal of dispositive legal issues.

Courts lack power to create a common law form of interlocutory appeal under *Prudential* where, as here, there is specific statutory appellate remedy: permissive interlocutory appeal. TEX. CONST. art. II, § 1. Mandamus is a common-law writ that embodies some aspects of traditional equity practice *Callahan v. Giles*, 137 Tex. 571, 575-76, 155 S.W.2d 793, 795 (1941). Statutes setting out legal procedures routinely replace common-law procedural mechanisms. *E.g.*, *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 449 (Tex. 2012); *accord*, *e.g.*, *Bullock v. Amoco Prod. Co.*, 608 S.W.2d 899, 901 (Tex. 1980); *Union Cent. Life Ins. Co. v. Mann*, 138 Tex. 242, 249, 158 S.W.2d 477, 481 (1941). The Court's common-law powers do not extend to implicitly amending a statute by adding terms or concepts. *E.g.*, *Lee v. City of Houston*, 807 S.W.2d 290, 294-95 (Tex. 1991). Accordingly, if there is a statutory regime governing interlocutory appeal over summary judgments alleging controlling issues of law, Volkswagen cannot seek mandamus in this case.

The Legislature has specifically provided for interlocutory determination of controlling legal issues. TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f) (allowing permissive appeal on a "controlling question of law as to which there is a substantial ground for difference of opinion"); *see also* TEX. R. APP. P. 28.3. Because there is no limit on the district court's discretion to deny a permissive appeal, TEX. CIV. PRAC. & REM. CODE § 51.014(d) ("trial court in a civil action may, by written order, permit an appeal"), a district court's decision on permissive appeal is designed to be non-reviewable.

As a result, allowing a parallel mandamus to review the exact same substantive issue that could be resolved through permissive appeal would frustrate the Legislature's intent by supplanting a specific enactment of the Legislature governing interlocutory review. *See In re HMR Funding, LLC*, No. 14-18-00085-CV, 2018 WL 3635221, at *4 (Tex. App.—Houston [14th Dist.] July 31, 2018, orig. proceeding) ("We decline to second-guess that decision via mandamus, which would incentivize expense and delay as parties try different avenues of review."). Because section 51.014(d) specifically controls this type of appeal, in which a partial motion for summary judgment has resolved a controlling issue of law, it would be improper to expand mandamus review to allow equitable review of the same issue.

C. Even if Section 51.014(d) Did Not Exist, It Would Be Improper to Allow Mandamus from a Motion for Summary Judgment on an Affirmative Defense.

While *Prudential* opened the door to certain interlocutory appellate matters that would not traditionally have been subject to mandamus, *see* 148 S.W.3d at 137-38

(justifying expansion of mandamus on desire not to face legislative enlargement of mandatory interlocutory appeal), that expansion has been for specific categories of pretrial determination that impact the legitimacy of litigation, *e.g.*, *In re Xerox Corp.*, No. 16-0671, 2018 WL 3077704, at *2 (Tex. June 22, 2018) (orig. proceeding) (reviewing striking of motion to intervene to assert proportional liability); *J.B. Hunt*, 492 S.W.3d at 298-99 (reviewing plea in abatement); *McAllen Med. Ctr.*, 275 S.W.3d at 461 (reviewing adequacy of expert reports in medical malpractice suits); *Prudential*, 148 S.W.3d at 129-33 (reviewing contractual waiver of jury trial). The Supreme Court has never extended *Prudential* to a pretrial resolution of controlling legal issues, nor has it suggested that mandamus serves as a basis for interlocutory appeal of the denial of summary judgment on a controlling substantive issue of law.

Volkswagen would have a better argument for the propriety of mandamus if it could assert exclusive federal jurisdiction, because that would have challenged the ability of the trial court to consider the proceedings at all. *Cf. In re Essex Ins. Co.*, 450 S.W.3d 524, 525-26 (Tex. 2014) (per curiam) (orig. proceeding) (allowing mandamus of denial of rule 91a motion on rule that foreclosed suit entirely); *In re Lone Star Logo & Signs*, No. 03-18-0214-CV, 2018 WL 2437601, at *3 (Tex. App.—Austin 2018, orig. proceeding) (allowing mandamus of denial of summary judgment on standing grounds). But Volkswagen concedes that preemption is an affirmative defense in this context. MR.135-36. And Volkswagen embraces the California District Court's theory that the activities at issue in this case can be regulated by State law, but not if they are carried out by manufacturers. Pet. 39. That admission prevents preemption from being treated as a jurisdictional issue because, under

Volkswagen's own legal theory, it is only by learning about the facts that a court can determine whether the State's co-equal enforcement powers can be applied. A determination that hinges on facts about the party is not a jurisdictional determination.

D. Volkswagen's Petition Is Likewise Barred by Delay.

Mandamus should likewise be denied because Volkswagen has slept on its rights and should not now be able to obtain by stay the suspension of discovery when it has voluntarily engaged in discovery on a "weekly basis" since the April 11 order their mandamus petition now challenges. Delay in seeking mandamus relief and acquiescence in the asserted harm are both substantive bars to mandamus relief. *E.g.*, *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding) (four-month delay barred mandamus relief); *Callahan*, 137 Tex. at 574, 155 S.W.2d at 795 ("While mandamus is a common law writ and not an equitable remedy, its issuance is largely controlled by equitable principles. The writ will not be granted in aid of one who is guilty of laches." (citations omitted)). The State and county plaintiffs are harmed by Volkswagen's delay because they committed to a discovery schedule in light of Volkswagen's apparent acquiescence to continuing with discovery until the preemption issues can be resolved on appeal from final judgment.

Volkswagen has argued that its failure to timely seek mandamus review of the summary-judgment order stems from the trial court's amenability to motions for rehearing. *See* Reply in Support of Stay 7-8. But the relevant cases address a party's attempt to obtain a corrected order, not seriatim motions for rehearing of the denial of a motion for summary judgment. *E.g.*, *In re Oceanografia, S.A. de C.V.*, 494 S.W.3d

728, 731 (Tex. 2016) (orig. proceeding) (delay on *forum non conveniens* motion justified by strategic choice not to endanger appeal of denial of special appearance); *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding) (discussing series of time periods related to challenge to original order). Volkswagen's repeated motions for rehearing and attempts to obtain alternative rulings do not change the fact that the original order was entered four months before this petition was filed. It is arguable that, because the motions did not themselves comport with the requirements of Rule 166, they were incapable of preserving summary-judgment issues at all. *See Henkel v. Norman*, 441 S.W.3d 249, 251 n.1 (Tex. 2014) (per curiam) ("[W]e hold that a summary judgment cannot be affirmed on grounds not expressly set out in the motion or response." (quoting *Stiles v. Resolution Tr. Corp.*, 867 S.W.2d 24, 26 (Tex. 1993)). The motions for rehearing are neither part of the motion nor of the response. Volkswagen's repeated motions for rehearing caused the delay; they were not tied to moving forward a challenge to the initial denial of Volkswagen's motion for summary judgment.

E. Volkswagen's Arguments in Support of Expanding Mandamus Relief Fail.

Volkswagen's petition argues that, to obtain mandamus relief, it need only establish that (1) the district court erred in denying the motion for summary judgment, Pet. 25, and (2) an appeal of an MSJ denial is authorized by the "expense and delay" of trial-court proceedings, Pet. 46-48.

The abuse of discretion argument is plainly wrong to the extent it suggests that the district court should have deferred to the California federal district. The lead

case it relies upon is an Amarillo Court of Appeals decision that does not stand for the proposition Volkswagen asserts. *See* Pet. 22 & n.23 (citing *Alashmawi v. IBP, Inc.*, 65 S.W.3d 162, 169 (Tex. App.—Amarillo 2001, pet. denied)). And Volkswagen's argument is inconsistent with Texas practice because, rather than focusing on the text of the Clean Air Act, it relies on implication and general statements regarding "purpose." *E.g.*, Pet. 27. As explained below, that reasoning was designed to protect the sanctity of the MDL settlement in that court, rather than to vindicate a federal power asserted by Congress in plain statutory text consistent with the Supremacy Clause of the United States Constitution. *See infra*, Part III.

On adequate remedy by appeal, Volkswagen cites essentially the same factors that the State urged in support of its request for mandamus relief at an earlier stage in the case. *See* Pet. 23-24 (discussing threat of multiple merits proceedings and multiple final judgments). But those considerations are appropriate only if it is appropriate to consider mandamus relief in the first instance. Because the existence of section 51.014(d) forecloses the use of mandamus in this circumstance, *see supra*, Part I.B, there is no need to engage in adequate-remedy-by-appeal analysis.

The State does not contest that mandamus can function as a form of *ad hoc* interlocutory appeal of trial-court determinations that allow a judicial proceeding to go forward in a manner that undermines the legitimacy of the proceedings and unfairly taxes the litigants: the Supreme Court has said so in *Prudential*. But neither *Prudential* nor any subsequent Texas Supreme Court case has awarded mandamus relief against an order denying summary judgment, let alone an order denying

summary judgment on a claimed affirmative defense. *See supra*, Part I.C. Nor does Volkswagen cite any such case.

At any rate, Volkswagen is incorrect to suggest that the factors militating in favor of the State's earlier mandamus petition necessarily apply now. At that time, a failure to resolve the question of county participation in state-filed suits could have resulted in as many as 255 separate trial-court proceedings because the State sought to keep each county from maintaining its own separate lawsuit on the same cause of action. Volkswagen currently faces litigation in at most three counties,[4] which would yield only a few appellate proceedings.[5]

* * *

Volkswagen's petition makes no bones about treating this case as a collateral attack on the district court's discretionary decision to deny a permissive appeal. *See* Pet. 24. To extend mandamus relief to this case would be to stretch *Prudential* far beyond its analytical framework to conflict with a specific legislative enactment governing interlocutory appeal of this type of order. The Court should deny

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[4] Volkswagen puts the cart before the horse by arguing that Texas law would allow for subsequent trials in every county. *See* Pet. 49. In fact, under Texas's abatement rules, the plaintiffs in the abated claims would be able to raise only claims that were not fully litigated and settled by the State. *E.g.*, *In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d 320, 322 (Tex. 2016) (per curiam) (orig. proceeding). If the judgment in the State's case is properly drafted, there will be no further county lawsuits.

[5] While the legal disagreements between the First and Fourteenth Courts may be of special significance to whether a petition for review should be granted, Volkswagen's suggestion that the mere possibility that the coequal geographic reach of the First and Fourteenth Courts makes orders issued in the Houston area legally questionable cannot be maintained. Volkswagen would make Houston-area disputes categorically more amenable to mandamus relief. *See* Pet. 49 & n.33. The statutory structure of the Texas appellate system is not, as Volkswagen seems to suggest, inadequate.

mandamus on this basis alone, without respect to the merits of the preemption argument.

II. THE TEXAS CLAIMS SEEK TO ENFORCE NON-PREEMPTED REGULATIONS GOVERNING TAMPERING WITH PARTS OF IN-USE CARS.

Volkswagen's argument is anchored in Judge Breyer's *Wyoming* and *Counties* opinions. Indeed, Volkswagen goes so far as to suggest that any claims have already been addressed in the earlier proceedings because there was some discussion of "tampering" in the federal papers. Pet. 36-37.; *see also* Pet. 34 (discussing alleged overlap with *Counties* claims). The pleading history of this case establishes otherwise.

A. The State's original lawsuit focused on the tampering software that was installed in the cars when they were manufactured. *See* MR.54-57. Volkswagen had installed tampering devices that changed the way that its diesel motors ran when being tested; however, the original tampering did not always work as Volkswagen intended, and the cars often stayed in test mode causing damage to the emissions control systems in the cars. *Id.* Volkswagen admitted that the original tampering software in its vehicles, even though it did not always works as intended, undid the emissions controls in place during testing when a vehicle was on the road. MR.58. Claims related to the original tampering software installed during the manufacturing

process have been held preempted by the district court, Relator's Appendix Tab 2, and the State is not currently challenging that determination.

The State's live petition, however, separately advances claims arising from Volkswagen's post-sale activities regarding individual cars. MR.59, ¶ 5.18. Volkswagen conducted *additional* tampering in 2014-15. Under the guise of field fixes and voluntary recalls, it installed new two new tampering software devices on the vehicles. *See* Appendix A Tabs 4, Exh. 2-19 – 2-20; 7, 87:15-88:13.[6]

The State's allegation is that these devices caused the vehicles to start in high-emitting street mode (Start Function), and stay in high-emitting street mode unless a test cycle was detected because the steering wheel angle did not change within a certain period of time after the vehicle was started (SWARF), thereby insuring that the vehicles would reliably run in street mode during on-road driving by owner / operators. Certainly, Volkswagen did not disclose the two new tampering software parts to regulators before it added them to vehicles during routine maintenance, field fixes, or recall actions. Appendix A, Tab 7, 282:120-283:1. And when Volkswagen received EPA approval of a recall, it was without revealing to EPA that the software fixes would not result in lowered pollution. Appendix A, Tabs 5, 7. Although this

[6] Volkswagen has omitted the evidence attached to the State's response to the motion for summary judgment. The State tenders those attachments as a supplemental mandamus record.

recall was presented as a means to resolve, or at least ameliorate, pollution during on-road driving, it was actually used to install tampering software parts that increased polluting emissions by cars in use on Texas roads. Appendix A, Tab 5, 4-5.

B. The installation of these additional software parts—which were not present in the vehicles at the time of manufacture—violated several provisions of Texas law, including administrative rules providing that no person may "make inoperable any system or device used to control emissions from a motor vehicle," 30 TEX. ADMIN. CODE § 114.20(b), nor may a person "sell . . . in the State of Texas any motor vehicle unless . . . the motor vehicle shall be equipped with either the control systems or devices that were originally a part of the motor vehicle or motor vehicle engine or an alternate control system or device [and] the control systems . . . shall be in good operable condition," *id.* § 114.20(c). These rules specifically apply to "in use" regulation of vehicles. *See id.* § 114.20(e) ("No person may . . . offer for sale, or use . . . any system or device which circumvents or alters any system . . . installed by a vehicle manufacturer to comply with the Federal Motor Vehicle Control Program during actual in-use operation of the motor vehicle on Texas roadways."). The legal question in this case is whether claims under these rules governing tampering with the emissions control systems on vehicles by adding new and different parts that disable or impair those systems are saved from preemption by section 209(d).

And Volkswagen added new parts: Volkswagen's corporate representative described the software as "a part on the vehicle" with "its own part number. Appendix

B, Tab 8, 118:2-118:16. The corporate representative also testified that the part numbers changed when the new software was installed. Appendix B, Tab 8, 118:17-118:20.The removal and replacement of (ineffective) tampering software with a new, very effective tampering software that impairs or disables the emissions control systems on a vehicle during use is plainly covered by the relevant state statutes and rules, which govern auto mechanics working on vehicles in the State of Texas.

C. These claims do not overlap with those advanced by Wyoming, *see* Pet. 11-12, because the Wyoming claims addressed installation of software at the manufacturing stage, not the post-sale installation of new parts to disable emissions-control systems on licensed and registered vehicles in Texas. *See Wyoming*, at 1056 n.8 (Wyoming pleaded that the changes actually decreased pollution). Texas seeks penalties for the alterations to consumers' vehicles, post-sale, for use on the road, that rendered the emissions control systems inoperable in a new way. This tampering occurred in the services departments of Volkswagen dealerships. Appendix A, Tab 5, 9-11; Appendix B, Tab 8, 67:4-69:6 and 282:12-283:1. The State alleges this new software was a new part added to the vehicles. And that new part made the cars more polluting, by putting them into high-pollution mode the moment they were started, and keeping them in high-pollution mode as long as they were being driven on the road. *See* Counties Supp. MR.107 (explaining that the effect of the change was to put cars out of compliance with emissions standards from the time they were started, rather than having them switch out of compliance to non-compliance in certain circumstances). Regulation that controls that type of tampering with a vehicle after its initial sale is entirely consistent with section 209(d).

D. Volkswagen repeatedly implies that the issues raised by the State are somehow barred by a *res judicata*-like theory, either because they were considered by Judge Breyer or because the SWARF and Start Function software was authorized by the EPA. *See* Pet. 28-29. But, as explained in detail above, the EPA was never told about SWARF and Start Function—Volkswagen obtained a recall authorization for three *different* fixes. *See* Appendix A, Tab 7, 67:9-23; 69:12-15. And *Counties* forecloses any suggestion that Texas's claims are foreclosed by *Wyoming* by expressly concluding that this category of claims is excluded from the scope of 209(a)'s express preemption because it involves post-sale tampering. *Counties*, 310 F. Supp. at 1038-1040.

E. The State's current claims are restricted to allegations that Volkswagen ordered its dealers, or its dealers' service departments, to install new tampering software that disabled or impaired the emissions control systems whenever the cars were being driven through a new mechanism. This distinction comes down to a question of fact—did the nature of the changes constitute a separate act of tampering with in-use cars, or did it constitute a modification designed to bring pollution in line with the federal standards? *See* Volkswagen MSJ MR.125 n.4 (asserting that the changes related to steering wheel angle and starting mode were improvements, not additional devices to impair or disable emissions control systems in a new way). The evidence attached to the State's response to Volkswagen's summary judgment motion raises a fact issue as to the nature of the acts. *See* MR.332 (setting out evidence controverting Volkswagen's framing of the facts); MR.345 (arguing that Volkswagen has failed to meet its burden to produce facts to support summary

judgment). If this were an appeal under the summary-judgment standard, the question would be whether the evidence attached to this brief (and omitted from Volkswagen's mandamus record) raises a fact issue on the nature of the tampering. If this were an appeal of a motion for summary judgment, the nature of the changes would be a fact issue. And that by itself would warrant denial of the motion. Plaintiffs should not be able to sidestep the summary-judgment standards by seeking mandamus.

III. STATE ENFORCEMENT OF CLEAN-AIR STANDARDS ON REPAIR FACILITIES THAT ALTER POLLUTION ABATEMENT EQUIPMENT AFTER A CAR HAS BEEN SOLD IS NOT PREEMPTED.

Volkswagen's preemption argument is barred by statutory text and by the logical implication of its own judicial admissions. The Clean Air Act creates a dual-enforcement regime that reserves regulatory authority to the states, and its preemption clause governing emissions standards expressly carves out post-sale regulations intended to control pollution. The text of the Clean Air Act thus unambiguously reserves regulatory authority over the post-sale claims to the states.

A. Volkswagen Misstates the Relevant Standards for Determining Preemption.

Volkswagen cites little of the relevant case law from this Court or the Texas Supreme Court governing preemption or the consideration of federal judgments. Instead, it suggests that the California federal district court's decision is somehow based on secret knowledge or superior reasoning, for example because no opinion issued with the summary-judgment ruling below. *E.g.*, Pet. 2-3 (comparing district court's order to California federal district court's long opinion on preemption). But,

of course, in the Texas system trial courts do not opine on legal conclusions unless they are properly requested to issue findings and conclusions, TEX. R. CIV. P. 296, and summary-judgment rulings do not properly trigger findings and conclusions, because there is no factual question to be decided, *e.g.*, *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441-42 (Tex. 1997). Review is *de novo* based on the content of the motions, not on the district court's reasoning. *E.g.*, *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Accordingly, it was proper for the trial court to issue a plain order denying summary judgment, as every other district court in the State would have done.

Volkswagen's petition is replete with additional misunderstandings of Texas substantive and procedural law. The Court cannot resolve the preemption issue without considering the analytical framework required by *Texas* precedent.

1. The Texas Supreme Court emphasizes textual analysis in analyzing federal preemption statutes.

Federal preemption analysis turns on legislative intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In all preemption cases, Texas applies a presumption against preemption. *Graber v. Fuqua*, 279 S.W.3d 608, 611 (Tex. 2009); *see Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001) (presumption greatest where states historically have authority to act and noting party urging preemption bears burden).

Preemption can be express or implied. *Dall. Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 669 (Tex. 2008). While the existence of a specific preemption clause is not a conclusive bar on implied preemption, it is

evidence of intent not to preempt other related regulations. *BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 505 n.5 (Tex. 2008). "To discover the federal purpose with which the state law is in conflict, we examine the text of the relevant federal statute or regulation, the history of the federal regulation in that subject area, and the agency's statements construing the regulation." *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 483 (Tex. 2010) (cautioning against "'free wheeling judicial inquiry'" (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part & concurring in judgment)).

Implied, or implicit, preemption occurs either when the scope of a statute "indicates that Congress intended federal law to occupy [a] field exclusively, or when state law actually conflicts with federal law." *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21, 23-24 (Tex. 2002); *cf. Hinton*, 329 S.W.3d at 485 n.4 (entertaining Justice Thomas's theory that there can be no non-textual preemption).

2. Texas law treats federal district court decisions as persuasive authority.

A key tenet of Volkswagen's argument is that, because other states have accepted the reasoning of the California federal district court, the court below abused its discretion in not doing so. *See* Pet. 29-30. But that is not how Texas courts treat federal district-court opinions.

It is well established that federal district-court decisions are not binding on Texas courts. *E.g.*, *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (apart from United States Supreme Court decisions, federal-court decisions are not precedential in state court); *Barstow v. State*, 742 S.W.2d 495,

501 n.2 (Tex. App.—Austin 1987, writ denied) (same). This is consistent with the proposition that federal district-court opinions cannot be precedential. *See Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 457 (7th Cir. 2005) (stating that "a district court decision does not have stare decisis effect"). There is, thus, no abuse of discretion in rejecting a federal district court's reasoning.

Volkswagen suggests that there is a special rule of construction governing preemption cases that requires deference to non-Supreme Court decisions of the federal courts. *See* Pet. 22 n.23 (citing *Alashmawi*), 29 (citing other cases). But *Alashmawi* treated federal *circuit* precedent as *persuasive*, 65 S.W.3d at 168 ("Because the question of preemption of Texas law is a question of ascertaining the intention of Congress and presents a question of federal law, we first consider cases from the Fifth Circuit."). And none of the other cases on which Volkswagen relies suggests that a Texas court should substitute a federal district court's decision for its own in the manner suggested by Volkswagen.

Indeed, Volkswagen omits the relevant language from many of these decisions. While federal courts are given "respectful consideration," the cases on which Volkswagen relies all affirm that Texas courts interpret federal statutes "independently." *E.g.*, *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 337 (Tex. App.—Dallas 2011, pet. denied) ("Texas state courts interpret federal law independently, though 'we typically seek guidance from among the decisions of the

lower federal courts'" (citations omitted)).[7] And even then, that respect is accorded to the circuit courts, not the district courts. *Id.* (citing *Hassan v. Greater Hous. Transp. Co.*, 237 S.W.3d 727, 731 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)).

The other cases on which Volkswagen relies are not only older than *Penrod* and inconsistent with *Alamshawi* and *Hassan*, but also all adopt the position that only United States Supreme Court decisions are directly binding on Texas courts. *Torch Operating Co. v. Bartell*, 865 S.W.2d 552, 557 (Tex. App.—Corpus Christi 1993, writ denied) ("We choose to follow the United States Fifth Circuit's interpretation . . . rather than the Louisiana courts."); *Summertree Venture III, v. FSLIC*, 742 S.W.2d 446, 449 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (mentioning statement in *Port Terminal R.R. Ass'n v. Ross*, 155 Tex. 447, 455-56, 289 S.W.2d 220, 226 (1956), that rights conferred by federal statute should be construed according to a federal court's construction of that statute). The *Summertree Venture* court expressly concluded that it was not bound by the Fifth Circuit's decision, 742 S.W.2d at 450 ("We conclude that we are not bound by the *Hudspeth* decision nor by the district court decisions following it. We will look independently at the statutes, regulations, and legislative history to determine the issue."). And *Ross* itself does not apply lower federal-court decisions, but instead states that Texas courts will not be

[7] *Olson v. Holmes*, 571 S.W.2d 211, 213 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.), which relators highlight in a footnote, Pet. at 29 n.25, is not necessarily to the contrary. Putting aside the doubt the "n.r.e." notation places on the opinion, see, *e.g.*, *Brown v. Poff*, 392 S.W.2d 113, 113 (Tex. 1965) (per curiam) (discussing that "no reversible error" determination indicates that there is error in the opinion), it also refers to an affirmatively created federal right, which is not at issue here.

bound except by the United States Supreme Court: "Until required to do so by a clear and positive declaration of the highest federal tribunal, our trial and appellate courts cannot and should not give effect to a jury finding of negligence when in its opinion the record is completely devoid of evidence in support of same." 155 Tex. at 455-56, 289 S.W.2d at 226.

In sum, none of the cases from which Volkswagen has plucked clauses discussing federal-court decisions involved a Texas appellate court deferring to a federal district-court decision. It does not matter that other states have chosen the deference route. Volkswagen's petition is based on a fundamental misreading of a Texas court's obligations regarding federal law.

3. Volkswagen's attempt to invoke deference to the EPA's view of 209(d) not only fails procedurally, but ignores the EPA's recognition that Texas's regulations are not preempted.

The issue whether Texas courts address federal statutes independently or acquiesce to the decisions of federal district courts is particularly significant when a party asks the Court to accept an administrative body's statement—not even contained in a formal administrative rule—asking that all courts adhere to a federal district court decision. Pet. 7, 45 (citing *Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972) (emphasis added), *aff'd*, 468 F.2d 624 (2d Cir. 1972), and Control of Air Pollution, 59 Fed. Reg. 31306-01, 31330 (June 17, 1994) ("EPA expects that the principles articulated in *Allway Taxi* will be applied by the courts to any State adoption of in-use controls.")).

This is completely at odds with Texas's practice of addressing questions of federal law independently, based on statutory text and decisions of the United States Supreme Court. *See supra*, Part III.A.2. It is also at odds with the United States Supreme Court's guidance regarding similar federal-agency guidance on preemption. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326-27 (2008) (concluding that even if an agency's view on scope of preemption is relevant, it is not entitled to full and automatic deference).

Volkswagen's argument is also in considerable tension with the administrative guidance on which it rests. The reference to *Allway Taxi* was made in the adoption of a federal interpretative rule. *See* 59 Fed. Reg. 31306-01 at 31330. The EPA's statement actually supports Texas, not Volkswagen: "The Act does not intend preemption of regulations, like the regulation of . . . modest retrofit requirements after an engine is no longer new." *Id.* As explained below, *see infra,* Part II, the State's allegations are based on modifications to emissions control devices on engines that are "no longer new." Given that the EPA recognizes that states may impose modestly more restrictive requirements on factory installed engines when they are no longer "new," its guidance contemplates that the States will have power to regulate emission device tampering on engines that are no longer new when that tampering either conceals or worsens the emission of pollution.[8] *Allway*'s reasoning

[8] The Court should treat this statement only as persuasive. Federal interpretative rules are not entitled to the type of deference Volkswagen suggests even under the federal *Chevron* standard. *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 643 (2013) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements . . . do not warrant *Chevron*-style deference").

might well be important to the district court's rejection of the State's original tampering claims—i.e., that the operation of vehicles post-sale on Texas roads constituted a daily violation of federal standards—because those claims tie the existence of a continuing violation to the original manufacturing standards. But *Allway* expressly disclaims any implication that regulation of post-sale tampering is preempted by section 209(a) and (d).

* * *

It is telling that instead of including block quotes from the relevant text of the Clean Air Act, as one would expect in a case under the Texas Supreme Court's plain-text analysis, Volkswagen instead argues that the Court should defer to Judge Breyer's discussion of the policy implications of the Clean Air Act. *E.g.*, Pet. 31 ("Judge Breyer is thus uniquely positioned to understand the issues at the heart of the question here."). But the point of plain-text analysis is that Texas courts do not abdicate their own power in favor of the supposed policy knowledge of well-situated experts. Rather, Texas courts interpret the law as it expressed on the face of legislative enactments. *See Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) ("[T]he citizens of Texas must be able to look with confidence to existing law as written . . . . The law to be just and effective must be accessible and certain.") (internal quotation marks omitted)). Volkswagen's attempt to force the district court and this Court to defer either to the California federal district court or to the EPA is not only wrong, but inconsistent with the United States Constitution's admonition that state courts are free to construe federal laws without deferring to

federal courts. *E.g.*, *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876). Volkswagen's mode of argument is thus completely contrary to Texas precedent.

B. Post-Sale Tampering Claims Are Expressly Excluded from Preemption by the Clean Air Act.

The Clean Air Act expressly provides that "[e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. § 7407(a). Indeed, pollution prevention is "the primary responsibility of States and local governments." *Id.* § 7401(a)(3); *see also State/Operating Contractors ABS Emissions, Inc. v. Operating Contractors/State*, 985 S.W.2d 646, 654-55 (Tex. App.—Austin 1999, pet. denied) ("Congress has not preempted state regulation of air pollution."). The Clean Air Act functions as a "comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

Not long after the Act's passage, Congress became concerned that states were implementing conflicting standards for motor vehicle emissions that would put an inordinate burden on auto manufacturers producing new cars. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. N.Y. State Dep't of Envt'l Conserv.*, 17 F.3d 521, 524 (2d Cir. 1994). Accordingly it enacted a preemption clause designed to prevent the manufacture of new cars from being subject to a cacophony of state regulation. *Id.*

The Clean Air Act's vehicle emissions preemption provision provides:

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall

> require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a) (also known as § 209(a) of the Clean Air Act).[9] It then carves out an area for state regulation of vehicles:

> Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

Id. § 7543(d) (also known as § 209(d) of the Clean Air Act).

1. Section 209 draws a textual distinction between pre and post-sale regulation.

The interaction between these two subsections is plain and unambiguous. State regulation of new vehicles, prior to "initial retail sale, titling (if any), or registration" is preempted by section 209(a). 42 U.S.C. § 7543(a). But when the vehicles are sold and registered, they cease being "new" as section 209(a) uses that term; they become "registered or licensed motor vehicles." *Id.* § 7543(d). In short, section 209(d) removes the preemptive effect of section 209 once an engine stops

[9] The Clean Air Act also specifies that if a vehicle part is registered with the federal government, it cannot be subject to separate state standards. 42 U.S.C. § 7543(c). That provision is not at issue here, because there is no allegation that SWARF and Start Function were registered with the federal government.

being "new," which occurs when it is subject to an "initial retail sale, titling (if any), or registration." This temporal line between "new" and "titled" automobiles is mirrored in section 209's provision addressing nonroad vehicles, which applies only to "new nonroad engines or nonroad vehicles." *Id.* § 7543(e)(1) (exempting "new nonroad engines or nonroad vehicles" from state regulations). And it has been expressly recognized by the United States Supreme Court. *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 114 (1972) ("Congress has largely pre-empted the field with regard to emissions from *new* motor vehicles." (emphasis added) (internal quotation marks omitted)). Once a car is no longer new, the states have regulatory authority over its maintenance and emissions, so long as that regulation does not amount to a de facto regulation of the original manufacturing requirements.

2. Volkswagen's express preemption argument fails.

Volkswagen argues that the statutory text of 209(a) expressly preempts the state's post-sale tampering claims such that they cannot be saved by section 209(d). Pet. at 44-46. Of course, Volkswagen cannot rely on Judge Breyer's opinion for this argument, because Judge Breyer correctly rejected Volkswagen's express preemption claim in *Counties*, *see* 310 F. Supp. at 1039-1040.

This argument depends on extending the *Allway Taxi* theory that section 209(a) preempts any activity related to manufacture or new vehicles that happens to occur in interstate commerce, and draws the line between preempted and non-preempted

regulation at the impact on the manufacturer, as opposed to individual drivers. *See* Pet. at 45. Because the post-sale alterations allowed the devices to function "more efficiently," Volkswagen posits that they are in essence an extension of the manufacturing process and any regulation of them somehow relates back to the original manufacturing, merely because the manufacturer performed the modification. *See* Pet. 46.

This reasoning defies logic, depends on a denial of the plaintiffs' allegations, and flies in the face of section 209(a)'s text. It is illogical because, if the tampering devices are changed post-sale, the change cannot relate back to the original act of manufacturing. A change is a change.

It denies the State's allegations and evidence (which is improper in resolving a motion for summary judgment), because the State's case is that the post-sale tampering was used "to circumvent the manufacturer installed emissions control equipment during actual in use operation" of the vehicles on Texas roads. MR.67, ¶¶ 10.3-.6. Volkswagen should not be able to shield itself from regulation of its repair shop activities, simply because it also made the cars.

And it is inconsistent with the text of section 209(d), which is directly addressed to the manufacture of new vehicles. By definition, post-sale installation of new tampering software is a different transaction from the initial manufacture.

3. Volkswagen has previously admitted that the line is between pre-sale and in-use cars, and that states can regulate post-sale modification of emissions control devices.

Lead counsel for Volkswagen affirmatively stated during the *Wyoming* proceedings that claims related to post-sale tampering with the emissions control systems are not preempted. *See* Counties' Supp. MR.213-17 ("Mr. GIUFFRA: "[I]f this were a situation where we tampered with the vehicle . . . in the state of Wyoming, they might have something, because under Section 209(d) it says states can, quote, control, regulate, or restrict the use, operation, or movement of registered and licensed vehicle."). It would be contrary to this judicial admission for Volkswagen to argue that post-sale tampering with emissions-control systems are entirely outside of state regulations. As lead counsel for Volkswagen put it then: "[H]istorically, the way that the division of authority has been set up under the Clean Air Act, both in terms of its language in 209(a) and 209(d), is that the states are entitled to regulate cars once they are in use, once they have been registered or are operating in the states, and preventing people from actually going to an auto shop, and having the emissions controls systems be disrupted." *Id.* 217.

By Volkswagen's own admission, then, there is at least some latitude for state regulation of post-sale tampering with emissions-control systems. It is just that, under Judge Breyer's view of interstate commerce, the nature of the action being regulated changes not with the particular action, but with the identity of the actor.

In this context, Volkswagen's gloss on federal administrative practice applying *Allway Taxi* stops being tone deaf and becomes perverse: if preemption depends on whom the regulatory burden falls, then it should fall on small and large mechanics

alike. Volkswagen's legal theory depends on treating the same act differently if performed by a multinational corporation rather than a local automotive shop. That truly is determining the scope of federal law based on who bears the regulatory burden: small shops are burdened, while multinational corporations that have freely admitted to breaking the law are not.

4. There is no reason to restrict the scope of 209(d).

Without citing the relevant Supreme Court precedent, Volkswagen relies on Judge Breyer's statement in *Counties* that the Supreme Court has "repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." Pet. at 24-25 (citing *Counties*, 310 F. Supp. 3d at 1046 (citing *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000)). But cases like *Geier* involve preemption of common law tort claims in the face of a uniform set of federal safety standards, *id.* at 874-75. *Geier* stands merely for the proposition that a savings clause may be overcome by ordinary preemption analysis, *id.* at 871. As this Court has explained, such analysis hinges on whether there "exists and actual conflict between federal policy and local regulatory decisions," which may require fact finding before preemption can be resolved. *Secured Envt'l Mgmt, Inc. v. Tex. Natural Res. Conservation Comm'n*, 97 S.W.3d 246, (Tex. App.—Austin 2002, pet. denied).

Volkswagen's argument is mushy: it wants to extend section 209(a)'s protection of manufacturing standards for new vehicles to all activities undertaken by a manufacturer. But the cars about which Texas complains were not newly manufactured, and the SWARF and Start Function did not further federal emission

standards. Because the State's response to the motion for summary judgment puts at issue whether SWARF and Start Function additions to already-sold vehicles was, as a matter of fact, consistent with federal policy, it is impossible to grant summary judgment on this ground.

C. There Is No Implied Preemption Because the Clean Air Act Contemplates State Enforcement and this Application of Texas's Regulations Does Not Impair Federal Manufacturing Standards.

Volkswagen argues that state regulation of post-sale tampering with emission-control systems is preempted based on whether the person violating the statute is engaged in interstate commerce. *See* Pet. 33 (asserting that neither the State's allegations nor the Texas regulations can be distinguished from the *Wyoming* decision). But the Texas allegations are different, because the Wyoming allegation asserted that the changes made the emissions-control systems "operate more effectively," *see* Pet. 32 (citing complaint), while Texas alleges that the tampering actually made the emissions control systems function even less well, *see supra*, Part II.

1. Judge Breyer's history and policy argument for implied preemption is wrong, and the Court is free to disregard it.

Plaintiffs' presentation of Judge Breyer's reasoning attempts to lash the interstate-commerce reasoning of *Allway* with statements in federal court opinions that states have authority over stationary sources of pollution, but that the EPA has responsibility for regulating emissions from motor vehicles and other mobile sources. Pet. 33 (quoting *Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Contr. Dist.*, 627 F.3d 730, 733 (9th Cir. 2010))). While that division may

describe the scope of the manufacturing standards, it is divorced from the actual text of section 209. *See supra*, Part III.B.1.

The stationary/mobile distinction is not only counter-textual, but contrary to precedent. The very point of section 209(d) is that there is room for state regulation of in-use vehicles. As the United States Supreme Court has said, "Because federal motor vehicle emissions-control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles." *Washington v. General Motors Corp.*, 406 U.S. 109, 15 n.4 (1972). The Clean Air Act "has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles—that are expressly intended to control emissions." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996).

Judge Breyer reasoned that allowing all 50 states to penalize manufacturer conduct that took place "on a model-wide basis in thousands of vehicles nationwide" conflicts with the division of authority set up in section 209. *See* Pet. 34; *Counties*, 310 F. Supp. 3d at 1040. Based on this atextual distinction between "local" activity and nationwide activity by a manufacturer, and on a supposed distinction between fixed and mobile pollution sources, Volkswagen argues that section 209(d) cannot be read to save these regulations from preemption because it would be contrary to the supposed policy distinction between fixed and mobile source pollution sources. Pet. 35.

But both arguments are based on the proposition that the line is drawn not by the text of section 209, but by the policy discussions of court decisions discussing

those provisions. As those discussions are not holdings of the United States Supreme Court, they are not a basis for ignoring section 209's sharp division between new and in-use vehicles. *See supra*, Part III.B.1. As explained above, Volkswagen misunderstands the EPA's embrace of the *Allway Taxi* theory: state regulation that amounts to the imposition of a new manufacturing standard is preempted, and state law that conflicts with EPA requirements is likewise preempted, but the regulation of alterations to post-sale, in-use vehicles is subject to dual enforcement by the State and federal governments. And there is no support at all for the proposition that states can never regulated post-sale automobile emissions because they are not fixed-point sources of pollution.

2. The State's regulations do not frustrate the federal manufacturing standards—and federal law does not make manufacturers immune from regulation when they operate service departments.

Much of Volkswagen's argument appears to argue for implied preemption because there is continued federal oversight over manufacturer-installed devices. *See* Pet. 36-37 (detailing continued EPA oversight over manufacturer-installed devices). But the State's allegation is that Volkswagen engaged in post-sale tampering to further impair or render inoperable the emissions-control systems in the in-use vehicles, post-sale; the EPA's regulation is tied to continued review of whether the original devices continue to function in compliance with the law. In a dual enforcement system, there is no reason that the federal and state regulations have to conflict. EPA continues to review factory-installed equipment to ensure that it meets the original requirements. *Id.* The States have regulatory authority over tampering

with the devices on in-use cars, as a corollary to EPA's authority to ensure continued functioning. 209(d).

Volkswagen's argument might have increased traction had the EPA ordered a specific software fix to improve the functioning of a factory-installed control device. But the State's allegation is that the post-sale addition of new software made the pollution situation worse by disabling the emissions-control systems in a new way.[10] Because the State alleges an action with regard to individual post sale cars, and not an action that reaches back to the maintenance of factory-installed equipment, the relevant state regulations are not preempted.

Put simply, Texas regulation is preempted only if it impairs the implementation of uniform federal manufacturing standards. If the additional parts added to the cars post-sale were not either installed at the time of manufacture or certified by the EPA as model-wide improvements to protect air quality, they can be regulated by the States. And, as explained above, Texas alleges that the post-sale changes—far from bringing the cars to actual standards—actually made things worse. *See supra*, Part II.

The States retain authority, Volkswagen argues, to regulate individual vehicles for compliance. Pet. 37-38. This would still allow the states to regulate vehicles

[10] Volkswagen implies that the SWARF and Start Function tampering were "discussed with the EPA and California regulators first as a "field fix" and later as a "voluntary recall" to install optimized software. Pet. 37. This simply ignores the State's allegation that the SWARF and Start Function functioned contrary to federal policy, because they worsened pollution. *See* MR.243-44 (citing Appendix B, Tab 8, 67:4-69:6; 282:12-283:1). The evidence establishes that the field fixes and recalls were used as channels from installing the new tampering software parts. Because the evidence attached to the State's response at the very least makes Volkswagen's factual assertion that its fixes were authorized by the EPA and California a question of disputed fact, it would not be appropriate to grant summary judgment on that ground.

where "a mechanic removes or alters a vehicle's emissions-control system during routine maintenance." *Id.* at 38. While Volkswagen avers that this system would continue "to bolster state inspection programs," that is exactly what the State avers that Volkswagen did. In short, Volkswagen's argument depends on stretching the *Allway Taxi* theory that states cannot use regulation of in use vehicles to frustrate federal manufacturing guidelines to the point that any action by a manufacturer is beyond the reach of state regulation.[11]

To distract from the fact that it argues for a form of "manufacturer immunity," Volkswagen suggests that it is the number of cars involved that makes the difference. Pet. 39. And there is the rub. Section 209 is carefully circumscribed to limit preemption to regulations regarding manufacturing of new cars—if it were intended to preempt all actions *by manufacturers*, it would have been written to do so. *See Wyeth v. Levine*, 555 U.S. 555, 575 (2009) ("silence" in a context where Congress is well aware that states will act is "powerful evidence" against preemption).

Nor is it clear that the legislative history of section 209 supports Volkswagen's argument. Merely because 209(d) was meant to lessen the burden on vehicle manufacturers *qua* manufacturers, does not mean that it was designed to allow them

[11] Judge Breyer's misuse of *Allway Taxi* appears to conflate dormant-commerce clause analysis and preemption, by limiting the scope of state regulation at "interstate commerce." When Congress expressly allows the States to act—as it has in the Clean Air Act—interference with interstate commerce is not a proper legal issue, because the actions are allowed by congress. *White v. Mass. Council of Contrs. Emp'rs, Inc.*, 460 U.S. 204, 213 (1983). Accordingly, the proper question should not be whether state regulation interferes with interstate commerce at all, but whether it interferes with the aspect of interstate commerce the statute seeks to regulate—in this case, *the manufacturing standards for new cars*. That concept is analytically distinct from the proposition that manufacturers can never be separately regulated by the states in their capacity as the operators of licensed and company owned service centers.

to avoid state regulation when they act as service centers. The textual difference is between new and in-use cars: a manufacturer is subject to federal regulation when designing and manufacturing, but once a car is sold the manufacturer's activities are not encompassed in section 209(a).

3. The mere possibility of a double penalty, or even a high penalty, is an insufficient basis for determining that a state regulation is preempted.

Volkswagen also argues that the imposition of a penalty concurrent with federal penalties results in preemption, generally. Pet. 41-42 (citing *San Diego Bldg. Trades Council Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959)). This is all the more true, per Volkswagen, when the federal agency is administering a complex regulatory scheme. *Id.* (citing, *e.g.*, *Arizona v. United States*, 567 U.S. 387, 287-88 (2012)). In essence, this is an argument that the amount of penalties can lead Texas statutory and administrative regulations to be preempted in the same way a common-law cause of action can be preempted by the creation of a federal statutory cause of action. *See* Pet. 42 (discussing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)).

There is nothing surprising about the imposition of cumulative fines or penalties in Clean Air Act enforcement; it is based on a system of cooperative federalism. This litigation provides a perfect example: Volkswagen settled separately with the States that participated in the federal lawsuit,[12] but now argues that the state-law claims of the states that did not participate in the federal settlement cannot proceed. That

[12] *See supra*, n. 2.

theory is at odds with the settlement on which it relies to assert that this issue has already been resolved. *See* Pet. 1-2.

Again, this argument requires a chain of assumptions that cannot be borne by statutory text. And they cannot be supported by legal doctrine. *Buckman* is a case about federal statutory preemption of a common-law cause of action, 531 U.S. at 346 (case addressed whether common law fraud claims could supplement federal provisions governing FDA registration of surgical devices). It concerns a purely federal statutory concern, to which the presumption against preemption does not apply. *Id.* at 347. *Buckman*'s discussion of common-law causes of action for matters not traditionally within state regulatory authority is simply irrelevant, because it does not involve a federal statutory enactment designed to promote state regulation and to encourage states to inspect vehicles and enforce their own regimes controlling emissions devices in in-use vehicles. *Garmon* and *Arizona* are likewise irrelevant. *Garmon* is limited to avoiding a situation in which "two law-making sources . . . govern," 359 U.S. at 247. Likewise, Arizona sought to protect the federal government's power to retain complete control over an area of exclusive federal concern, 567 U.S. at 402. But the entire point of the Clean Air Act is for two sources of government to impose laws, and the dividing line between them is the text of section 209.

None of the cases on which Volkswagen relies thus stands for the proposition that the amount and calculation methodology of any penalties or fines triggers preemption by itself. All of them address the need to protect exclusive federal control over an area of governance. This issue is resolved by the text of section 209, in which

Congress expressly stated the scope of preemption it intended to prevent application of inconsistent state statutes to the manufacture of new vehicles.

To be sure, the total amount of fines in each case might be constitutionally excessive in a particular judgment. U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13. But the Supreme Court has never suggested that the threat of maximum fines for many violations automatically renders government regulation unconstitutional. To the contrary, penalty and fee amounts are typically a benchmark for determining the constitutionality of punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996). Determining the proper amount of fines and other punishments is "peculiarly within the power and discretion of the Legislature, and courts have no right to control or restrain that discretion, except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind." *State v. Laredo Ice Co.*, 96 Tex. 461, 467, 73 S.W. 951, 953 (1903). Clearly, the total amount of penalties cannot resolve the question whether Congress intended to preempt state law on the front end.

The legal question in an unreasonable fines challenge would be whether (1) the fees address the same conduct and (2) the total amount shocks the conscience. The place to resolve that issue is in a constitutional challenge to a specific fine, not prospectively, based on hypothetical facts, in this preemption dispute.

PRAYER

The Court should deny the mandamus petition.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On September 4, 2018, this document was served electronically on C. Vernon Hartline, Jr., lead counsel for Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, and Audi of America, LLC, via hartline@flash.net and Russell S. Post, lead counsel for the county plaintiffs, via rpost@beckredden.com .

/s/ Kristofer S. Monson
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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this response contains 13,718 words, excluding the portions of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Kristofer S. Monson
Kristofer S. Monson
Counsel for Appellant

MANDAMUS CERTIFICATION

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this stay response and that every factual statement is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A) and consistent with Rule 52.7(a)(1), I certify that every document contained in the appendix is a true and correct copy and can serve as a supplemental mandamus record. The supplemental record is also sworn to in the accompanying record certification.

/s/ Kristofer S. Monson
Kristofer S. Monson
Counsel for Appellant

No. 03-18-00508-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

IN RE VOLKSWAGEN GROUP OF AMERICA, INC., VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC, AUDI OF AMERICA, LLC, AND PORSCHE CARS NORTH AMERICA, INC.

THE STATE OF TEXAS'S RESPONSE TO MANDAMUS PETITION

APPENDIX

TAB

1. Appendix A: Exhibits to the State of Texas's Response and Opposition to Volkswagen and Porsche Defendants' Motion for Summary Judgment: filed November 20, 2017 ..... A
2. Appendix B: Exhibits to the State of Texas's Response and Opposition to Volkswagen and Porsche Defendants' Re-Filed Motion for Summary Judgment and Special Exceptions: filed December 15, 2017 ..... B
3. Appendix C: Defendant Volkswagen Group of America, Inc.'s Fourth Amended Responses and Objections to State of Texas's and TCAA County Plaintiffs' Second Set of Requests for Admissions and Interrogatories: served August 17, 2018 C

TAB A

APPENDIX A

AFFIDAVIT OF THOMAS A. RAY

STATE OF TEXAS §
TRAVIS COUNTY §

Before me, the undersigned notary, on this day personally appeared Thomas A. Ray, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

1. "My name is Thomas A. Ray. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. "On November 16, 2017, I accessed the website located at https://www.justice.gov, the public website for the United States Department of Justice. Thereafter, I navigated to the page located at https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six, where I viewed and subsequently printed Volkswagen AG's Rule 11 Plea Agreement in *United States v. Volkswagen AG*, No. 16-CR-20394, Eastern District of Michigan, attached hereto as Exhibit 4. That attachment is a true and accurate copy of the document I viewed and printed.

3. "On November 16, 2017, I accessed the website located at https://www.epa.gov, the public website for the United States Environmental Protection Agency. Thereafter, I navigated to the page located at https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-caa-09-18-15.pdf, where I viewed and subsequently printed a September 18, 2015 letter from Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, U.S. EPA, to various Volkswagen entities, subject "Notice of Violation," attached hereto as Exhibit 2. That attachment is a true and accurate copy of the document I viewed and printed.

4. "On November 16, 2017, I accessed the website located at https://www.epa.gov, the public website for the United States Environmental Protection Agency. Thereafter, I navigated to the page located at https://www.epa.gov/sites/production/files/2015-11/documents/vw-nov-2015-11-02.pdf, where I viewed and subsequently printed a November 2, 2015 letter from Susan Shinkman, Director, Office of Civil Enforcement, U.S. EPA, to various Volkswagen entities, subject "Notice of Violation," attached hereto as Exhibit 3. That attachment is a true and accurate copy of the document I viewed and printed."

Thomas A. Ray

Sworn to and subscribed before me by Thomas A. Ray on the 20th day of November, 2017.

Melodie Kay Cartwright
Notary Public in and for
the State of Texas

MELODIE KAY CARTWRIGHT
Notary Public-State of Texas
Notary ID #129481194
Commission Exp. JUNE 26, 2021
Notary without Bond

TAB 1

CAUSE NO. D-1-GN-16-000370

IN RE VOLKSWAGEN CLEAN DIESEL LITIGATION: TCAA ENFORCEMENT CASES	§	IN THE DISTRICT COURT
THE STATE OF TEXAS,	§	
Plaintiff,	§	
AND	§	
TRAVIS COUNTY, TEXAS,	§	
Plaintiff Intervenor,	§	TRAVIS COUNTY, TEXAS
v.	§	
VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI OF AMERICA, LLC,	§	
Defendants.	§	
TRAVIS COUNTY, TEXAS (TRAVIS COUNTY CAUSE NUMBER D-1-GN-15-004513)	§	353rd JUDICIAL DISTRICT

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S THIRD AMENDED RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

COMES NOW, Defendant Volkswagen Group of America, Inc. ("VWGoA") and serves the following Third Amended Responses and Objections to Plaintiff's First Set of Interrogatories pursuant to Rule 197 of the Texas Rules of Civil Procedure.[1]

[1] Given Judge Sulak's ruling at the December 2, 2016 hearing, VWGoA is serving these Third Amended Responses and Objections, but is doing so without waiver of its argument, as outlined in its Motion to Enforce Automatic Stay on file with the Court of Appeals for the Third Judicial District, that the automatic stay of the above-captioned action is currently in effect. VWGoA reserves all of its arguments, including its arguments on appeal, with respect to the automatic stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by email in compliance with the Texas Rules of Civil Procedure on January 9th, 2017 on the following counsel of record.

Via E-mail Patrick.Sweeten@texasattorneygeneral.gov
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/s/ C. Vernon Hartline, Jr.
C. VERNON HARTLINE, JR.

PRELIMINARY STATEMENT

These responses to Plaintiff's Interrogatories ("Interrogatories") are made with specific regard to the laws of the State of Texas, the Texas Rules of Civil Procedure and the specific facts of this case and are not applicable to other cases, facts or circumstances, or the rules and laws of any other state or jurisdiction concerning discovery or theories of causes of action.

Counsel for VWGoA has drafted these responses based upon the current state of VWGoA's knowledge and/or information regarding the information Plaintiff has requested. VWGoA's discovery, investigation and analysis of this matter are continuing. VWGoA reserves the right to amend, supplement or withdraw these responses or any part thereof.

VWGoA is available to meet and confer with respect to these responses, should counsel for Plaintiff wish to do so.

OBJECTIONS APPLICABLE TO ALL INTERROGATORIES

1. VWGoA objects to the Interrogatories to the extent that they purport to require VWGoA to conduct anything beyond a reasonable search for information that is reasonably available.

2. VWGoA further objects to the defined terms "You," "Your," and "VW," and to any Definition, Instruction or Interrogatory that incorporates those Definitions, on the ground that such Definitions and any such Definition, Instruction, or Interrogatory seek information that is in the possession, custody, or control of persons or entities other than VWGoA, fail to distinguish between distinct corporate entities, and purport to require VWGoA to discern or inquire about relationships between or among entities that are not affiliated with VWGoA. VWGoA will construe these terms to mean VWGoA.

3. VWGoA further objects to the defined term "Affected Vehicles" and to any Definition, Instruction or Interrogatory that incorporates it. The term erroneously references vehicles that do not exist, do not have TDI engines, or were not sold or leased in the United States. Affected Vehicles should be defined as, and a correct list of Affected Vehicles should only include, the below vehicles:

- 2.0L vehicles: VW Jetta (2009-2015); VW Jetta Sportwagen (2009-2014); VW Beetle (2013-2015); VW Beetle Convertible (2013-2015); Audi A3 (2010-2013 and 2015); VW Golf (2010-2015); VW Golf Sportwagen (2015); and VW Passat (2012-2015), and
- 3.0L vehicles: VW Touareg (2009-2016); Audi A6 quattro (2014-2016); Audi A7 quattro (2014-2016); Audi A8L (2014-2016); Audi Q5 (2014-2016); and Audi Q7 (2009-2015).

RESPONSES AND OBJECTIONS TO INTERROGATORIES

1. Please state the following information for each Affected Vehicle sold in the State of Texas by you or your agents or representatives:
The date of sale;
The VIN of the Affected Vehicle;
The name and address of the person who sold the Affected Vehicle; and,
The specific location where the Affected Vehicle was sold.

ANSWER: VWGoA has provided current good-faith estimates of available sales and lease data for Affected Vehicles. *See* VW-MDL2672-00959069 (2.0L) and VW-MDL2672-00959070 (3.0L). Those materials include, among other things, the date of sale, the VIN, and the identity of the dealer. VWGoA believes that the information set forth in those documents fully responds to Plaintiff's Interrogatory.

VWGoA objects to the undefined terms "agents" and "representatives" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms to mean VW- and Audi-brand franchise dealers. VWGoA further objects to the phrase "specific location where the Affected Vehicle was sold" on the grounds that it is vague, ambiguous and without a clear meaning. VWGoA is construing that phrase to mean the dealership at which the vehicle at issue was sold.

2. **Please state the following information for each Affected Vehicle offered for sale in the State of Texas by you or your agents or representatives:**
The date the Affected Vehicle was first offered for sale;
The VIN of the Affected Vehicle;
The name and address of the person who offered the Affected Vehicle for sale; and,
The specific location where the Affected Vehicle was offered for sale.

ANSWER: VWGoA has provided current good-faith estimates of available sales and lease data for Affected Vehicles. *See* VW-MDL2672-00959069 (2.0L) and VW-MDL2672-00959070 (3.0L). Those materials include, among other things, the date of sale, the VIN, and the identity of the dealer. VWGoA believes that the information set forth in those documents fully responds to Plaintiff's Interrogatory.

VWGoA objects to the undefined terms "agents" and "representatives" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms to mean VW- and Audi-brand franchise dealers. VWGoA further objects to the phrase "specific location where the Affected Vehicle was offered for sale" on the grounds that it is vague, ambiguous and without a clear meaning. VWGoA is construing that phrase to mean the dealership at which the vehicle at issue was sold. VWGoA further objects to the phrase "offered for sale" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean sold.

3. **Please state the following information for each Affected Vehicle leased in the State of Texas by you or your agents or representatives:**
The date of lease;
The VIN of the Affected Vehicle;
The name and address of the person who leased, as lessor, the Affected Vehicle; and,
The specific location where the Affected Vehicle was leased.

ANSWER: VWGoA has provided current good-faith estimates of available sales and lease data for Affected Vehicles. *See* VW-MDL2672-00959069 (2.0L) and VW-MDL2672-00959070 (3.0L). Those materials include, among other things, the lease date, the VIN, the identity of the dealer, and the identity of the lessor. VWGoA believes that the information set forth in those documents fully responds to Plaintiff's Interrogatory.

VWGoA objects to the undefined terms "agents" and "representatives" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms to mean VW- and Audi-brand franchise dealers. VWGoA further objects to the phrase "specific location where the Affected Vehicle was leased" on the grounds that it is vague, ambiguous and without a clear meaning. VWGoA is construing that phrase to mean the dealership at which the vehicle at issue was leased.

4. Please state the following information for each Affected Vehicle offered for lease in the State of Texas by you or your agents or representatives:
The date the Affected Vehicle was first offered for lease;
The VIN of the Affected Vehicle;
The name and address of the person who offered for lease, as lessor, the Affected Vehicle; and,
The specific location where the Affected Vehicle was offered for lease.

ANSWER: VWGoA has provided current good-faith estimates of available sales and lease data for Affected Vehicles. *See* VW-MDL2672-00959069 (2.0L) and VW-MDL2672-00959070 (3.0L). Those materials include, among other things, the lease date, the VIN, the identity of the dealer, and the identity of the lessor. VWGoA believes that the information set forth in those documents fully responds to Plaintiff's Interrogatory.

VWGoA objects to the undefined terms "agents" and "representatives" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms to mean VW- and Audi-brand franchise dealers. VWGoA further objects to the phrase "specific location where the Affected Vehicle was offered for lease" on the grounds that it is vague, ambiguous and without a clear meaning. VWGoA is construing that phrase to mean the dealership at which the vehicle at issue was leased. VWGoA further objects to the phrase "offered for lease" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean leased.

5. Please state the following information for each VW Representative that knew, on or before September 17, 2015, that the Affected Vehicles were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions. As used in this Interrogatory, VW Representative means (1) any officer, director, or board member of VW; (2) any officer, director, manager, supervisor, or engineer of any division or department of VW that was involved in, or responsible for, the design or modification of emission control equipment for the Affected Vehicles; (3) any officer, director, manager, supervisor, or engineer of any of the following VW divisions, departments, groups, or centers: Electronic Research Lab, Design Center California, Marketing and Strategy Division, Group Quality Division, Test Center California, Technical Center, Engineering and Environmental Office, and Research and Development; and (4) any officer, director, manager, supervisor, or engineer of any division, department, group, or center with responsibility for compliance with environmental laws regarding emission control equipment on Affected Vehicles.

A. The job title, name, and address (work location) of the VW Representative;
B. The date on which the VW Representative first became aware that any Affected Vehicles were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in

lowered emissions during emission testing procedures when compared to actual driving conditions; and,

C. From where or whom the VW Representative learned that any Affected Vehicles were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

ANSWER: VWGoA identifies James Liang, the Leader of Diesel Competence at VWGoA beginning in 2008, in response to this Interrogatory. Information concerning Mr. Liang's knowledge is set forth in his Rule 11 Plea Agreement, filed in the U.S. District Court for the Eastern District of Michigan on September 9, 2016. *See United States v. Liang*, No. 2:16-cr-20394-SFC-APP, ECF No. 19 at 5-7 (E.D. Mich. Sept. 9, 2016). VWGoA is not currently aware of the identities of other individuals who may be responsive to this Interrogatory, but notes that the subject matter of this Interrogatory is encompassed by the independent, ongoing investigation commissioned by the Supervisory Board of Volkswagen AG, being led by Jones Day. VWGoA understands that that investigation is expected to be completed in 1Q 2017. After the investigation has concluded and VWGoA has been provided with the information resulting from that investigation, VWGoA will be in a position to (and will) supplement its response to this Interrogatory, if supplementation is necessary. To the extent Plaintiff is requesting or suggesting that VWGoA should embark on a separate investigation in parallel with the Volkswagen AG Supervisory Board's independent investigation, such request goes well beyond any reasonable investigation. Requiring VWGoA to effectively redo Jones Day's investigation makes no sense and would not be reasonable.

VWGoA objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA further objects to the Interrogatory on the ground that it seeks the discovery of information that is in the possession, custody, or control of third parties, including VWAG. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

6. Please explain how the design or modification of the emission control equipment on the Affected Vehicles lowered emissions from the Affected Vehicles during vehicle emission testing when compared to actual driving conditions.

ANSWER: The design and general emissions control performance of Affected Vehicles in Test Groups 9VWXV02.035N, 9VWXV02.0U5N, AVWXV02.0U5N, BVWXV02.0U5N, CVWXV02.0U5N, DVWXV02.0U5N, and EVWXV02.0U5N are described in the section entitled "GEN1 Vehicles" below; the design and general emissions control performance of Affected Vehicles in Test Groups CVWXV02.0U4S, DVWXV02.0U4S, and EVWXV02.0U4S are described in the section entitled "GEN2 Vehicles" below; and the design and general emissions control performance of Affected Vehicles in Test Group FVGAV02.0VAL are described in the section entitled "GEN3 Vehicles" below. In 2014, a Field Fix for GEN1 and

GEN2 Vehicles that altered the calibrations of GEN1 and GEN2 Vehicles was issued. Where that Field Fix altered the functionality of the vehicles, such alterations are generally noted below.

GEN1 Vehicles

In diesel-engine-equipped light-duty motor vehicles, the combustion process creates a trade-off in engine-out emissions of NOx and particulate matter ("PM" or "soot") emissions. In such vehicles, including GEN1, GEN2 and GEN3 Vehicles, engine-out NOx emissions are typically controlled using various exhaust-gas recirculation ("EGR") strategies. As EGR increases, engine-out NOx decreases, while engine-out PM increases. Increases in fuel-rail pressure can sometimes be used to improve that trade-off, but such increases can negatively impact noise, vibration, and harshness ("NVH").

To reduce tailpipe PM, a diesel particulate filter ("DPF") is used in GEN1, GEN2 and GEN3 vehicles. Because the DPF has a finite capacity, the engine control unit ("ECU") periodically initiates a DPF regeneration operation, in which the combustion is modulated to increase the exhaust gas temperature and burn off the accumulated PM. Such a regeneration operation uses additional fuel and thus may be undesirable from a fuel-efficiency perspective. Moreover, excessive regenerations subject the DPF to heat stress, which may damage the DPF. In the GEN1 Vehicles (but not in the later GEN2 and GEN3 Vehicles, discussed below), the exhaust gas passes through a Lean NOx Trap (LNT, also referred to as a NOx Storage Catalyst, or a NOx absorber). The LNT acquires engine-out NOx in order to reduce tailpipe emissions of NOx. Because an LNT has a finite capacity to store NOx, it periodically undergoes a so-called DeNOx regeneration operation. In such regeneration, combustion uses a sub-stoichiometric air-fuel ratio. The absorbed NOx reacts with the exhaust gas produced by sub-stoichiometric combustion, and is reduced. Additionally, the LNT is gradually poisoned by oxides of sulfur (SOx). This necessitates a so-called DeSOx regeneration, which the ECU uses a sub-stoichiometric air-fuel ratio for combustion, and also modulates combustion to significantly raise exhaust gas temperature.

When the ECU in GEN1 Vehicles detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the GEN1 Vehicles trigger an increase in the EGR rate and (prior to the 2014 Field Fix) an increase in rail pressure for most engine operating conditions. Fuel-injection and other engine parameters are also varied to account for the altered rate of EGR and rail pressure, and to optimize NVH.

Prior to the 2014 Field Fix, when the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU in the GEN1 Vehicles modeled the soot loading on the DPF to be less than the true engine-out soot. Subsequent to the 2014 Field Fix, the ECU in the GEN1 Vehicles models the soot loading on the DPF according to the true engine-out soot, and instead places a distance-based limit on frequency of DPF regeneration.

When the ECU in the GEN1 Vehicles detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU prioritizes DeNOx regeneration of the LNT, meaning that such regeneration is more likely to occur, as long as engine conditions allow a regeneration. When the ECU detects or identifies through models the existence of certain vehicle operating

conditions that are consistent with the Highway Driving Cycle, the ECU also prioritizes DeSOx regeneration of the LNT and regeneration of the DPF, meaning that such regenerations are more likely to occur, as long as engine conditions allow a regeneration. When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU also expands the range of conditions in which a DeNOx or DeSOx regeneration of the LNT occurs, and lowers the modeled NOx-load threshold that must be undercut in order to disable DeNOx regeneration once said regeneration has begun.

The GEN1 Vehicles have a "soft heating" system, which heats the LNT catalyst by using delayed and increased post-injections of fuel. Such fuel is not fully combusted, leading in turn to an exothermic reaction on the oxidation catalyst, and thus heating slightly the exhaust temperature. In ordinary operation, "soft heating" is activated only when, in the previous driving cycle, the lambda sensor unit (LSU) was not activated as a result of dew protection (that is, when a quantity of condensed water has collected on the LSU). However, when the ECU detects or identifies through models the existence of certain vehicle operating conditions that are consistent with the FTP75 (but not the FTP Preconditioning Cycle), the ECU will trigger soft heating.

Overall, the effect of these modulations is to reduce tailpipe NOx emissions when the ECU in GEN1 Vehicles detects or identifies through models the existence of vehicle operating conditions that are typical of laboratory test conditions (*i.e.*, "dyno mode"), compared to tailpipe NOx emissions when vehicles are operated under other conditions, including on-road operation (*i.e.*, "road mode").

<u>GEN2 Vehicles</u>

Instead of LNT technology, GEN2 Vehicles (as well as the later GEN3 Vehicles) use a selective catalytic reduction (SCR) system to convert engine-out NOx into nitrogen, water, and carbon dioxide, thereby reducing tailpipe-out NOx. SCR technology uses diesel exhaust fluid (DEF, also known by the trade name "AdBlue"), which contains a solution of 32.5% urea in water, and which is injected into the exhaust system upstream of the SCR catalyst unit during vehicle operation. Inside the catalyst, the ammonia which was reacted out of the urea in DEF reacts with the engine-out NOx. DEF is contained in a tank onboard the vehicle and must periodically be replenished.

The ECU in vehicles that use SCR technology computes the amount of DEF that will be dosed into the SCR catalyst. For the GEN2 Vehicles, the basic mode of computation is referred to as "online mode," in which the ECU computes the dosing amount according to the instantaneous rate of modeled engine-out NOx. An alternate computation mode is referred to as "fill-level dosing." In "fill-level dosing" mode, the ECU takes advantage of the fact that the SCR unit itself may store some quantity of unreacted ammonia; in such a mode, the ECU therefore directs additional dosing of DEF so as to increase the current DEF fill level in the SCR unit.

When the ECU in GEN2 Vehicles detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU in the GEN2 Vehicles triggers increase in the EGR rate for most engine operating conditions. Fuel-injection and other engine parameters are also varied to account for the altered rate of EGR, and to optimize NVH.

Prior to the 2014 Field Fix, when the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU in the GEN2 Vehicles modeled the soot loading on the DPF to be less than the true engine-out soot. Subsequent to the 2014 Field Fix, the ECU in the GEN2 Vehicles models the soot loading on the DPF according to the true engine-out soot, and instead places a distance-based limit on frequency of DPF regeneration.

When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), GEN2 Vehicles use "fill-level dosing" mode. If during such conditions, LP-EGR is disabled (such as because of near-freezing ambient temperatures), and the exhaust tract is sufficiently cold, the ECU will modulate combustion to increase exhaust gas temperature. MY2013 and MY2014 GEN2 vehicles increase the DEF dosing rate if poor-quality DEF is detected (that is, DEF that is diluted or otherwise adulterated such that its ability to convert NOx is decreased). When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the maximum dosing-quality adjustment is higher than that used when such vehicle operating conditions are not detected. When the ECU has not detected or identified through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "road mode"), GEN2 Vehicles use "online dosing" mode, and places a limit on the DEF dosing rate according to the amount of long-term DEF consumption.

Overall, the effect of these modulations is to reduce tailpipe NOx emissions when the ECU in GEN2 Vehicles detects or identifies through models the existence of vehicle operating conditions that are typical of laboratory test conditions (*i.e.*, "dyno mode"), compared to tailpipe NOx emissions when vehicles are operated under other conditions, including on-road operation (*i.e.*, "road mode").

GEN3 Vehicles

In GEN3 Vehicles, the SCR dosing system uses fill-level dosing mode at all times. When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the target fill level is increased.

The GEN3 Vehicles use a thermal management strategy to increase the heat of the SCR unit to a target temperature. When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU will only use thermal management early in the driving cycle (as measured by distance driven).

The ECU deactivates the SCR thermal management strategy when the SCR target temperature is reached. However, SCR thermal management is not reactivated as soon as the SCR temperature drops below the target temperature. Rather, the SCR temperature must drop below a lower temperature threshold, known as a hysteresis threshold. When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the hysteresis threshold is set to a lower temperature.

The GEN3 Vehicles do not modulate combustion parameters or EGR rate in response to testing conditions.

Overall, the effect of these modulations is to reduce tailpipe NOx emissions when the ECU in GEN3 Vehicles detects or identifies through models the existence of vehicle operating conditions that are typical of laboratory test conditions (*i.e.*, "dyno mode"), compared to tailpipe NOx emissions when vehicles are operated under other conditions, including on-road operation (*i.e.*, "road mode").

VWGoA objects to Interrogatory No. 6 to the extent that it seeks expert opinion testimony. VWGoA further objects to the undefined terms "emission control equipment," "vehicle emission testing," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA further objects to this Interrogatory to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

7. For each of the Affected Vehicles, please state by how much the amount of NOx emitted during vehicle emission testing varied from the amount of NOx emitted during actual driving conditions. Please respond for each model and year of Affected Vehicles (rather than for each individual Affected Vehicle). If you contend that the amount varied depending on differences in actual driving conditions, please explain the range and circumstances of the variation.

ANSWER: VWGoA does not have testing data to establish by how much the amount of NOx emitted during vehicle emission testing varied from the amount of NOx emitted during actual driving conditions. However, certain testing data and documents regarding emissions testing data may nonetheless address the topic of this interrogatory, including Portable Emission Measurement System ("PEMS") data and Dynamometer testing data referenced by Bates Nos. on the following chart:

TESTING DATE	PEMS DATA	DYNAMOMETER DATA
4/15/15	VW-MDL2672-10415710 VW-MDL2672-10415745	VW-MDL2672-10415796 VW-MDL2672-10415851
4/16/15	VW-MDL2672-10415712 VW-MDL2672-10415713 VW-MDL2672-10415714 VW-MDL2672-10415747 VW-MDL2672-10415748	VW-MDL2672-10415797 VW-MDL2672-10415798 VW-MDL2672-10415799 VW-MDL2672-10415852 VW-MDL2672-10415853 VW-MDL2672-10415854
4/17/15	VW-MDL2672-10415716 VW-MDL2672-10415717 VW-MDL2672-10415718 VW-MDL2672-10415750 VW-MDL2672-10415751	VW-MDL2672-10415800 VW-MDL2672-10415801 VW-MDL2672-10415802 VW-MDL2672-10415855 VW-MDL2672-10415856

	VW-MDL2672-10415752	VW-MDL2672-10415857
4/20/15	VW-MDL2672-10415720 VW-MDL2672-10415721 VW-MDL2672-10415722 VW-MDL2672-10415753 VW-MDL2672-10415754 VW-MDL2672-10415755	VW-MDL2672-10415803 VW-MDL2672-10415804 VW-MDL2672-10415805 VW-MDL2672-10415858 VW-MDL2672-10415859 VW-MDL2672-10415860
4/21/15	VW-MDL2672-10415726 VW-MDL2672-10415727 VW-MDL2672-10415758 VW-MDL2672-10415759 VW-MDL2672-10415728	VW-MDL2672-10415806 VW-MDL2672-10415807 VW-MDL2672-10415808 VW-MDL2672-10415861 VW-MDL2672-10415862 VW-MDL2672-10415863
1/23/16	VW-MDL2672-10415737 VW-MDL2672-10415764	VW-MDL2672-10415826 VW-MDL2672-10415876
1/27/16	VW-MDL2672-10415744 VW-MDL2672-10415770	VW-MDL2672-10415829 VW-MDL2672-10415879

VWGoA objects to Interrogatory No. 7 to the extent that it seeks expert opinion testimony. VWGoA further objects to this Interrogatory to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA further objects to the undefined terms "vehicle emission testing" and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

8. Were the Affected Vehicles equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions?

ANSWER: VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA understands, however, that software in the Affected Vehicles enables the vehicles' emission control modules to detect when the vehicles are being driven on the road, rather than being tested, and that this software renders certain emission control systems in the vehicles inoperative when the emission control module detects the vehicles are not undergoing testing procedures, resulting in excess emissions when the vehicles are driven on the road.

VWGoA objects to Interrogatory No. 8 to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA further objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and

without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

9. Please explain why emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions was installed in the Affected Vehicles?

ANSWER: VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. The subject matter of this Interrogatory is encompassed by the independent, ongoing investigation commissioned by the Supervisory Board of Volkswagen AG, being led by Jones Day. VWGoA understands that that investigation is expected to be completed in 1Q 2017. During the pendency of this investigation, VWGoA does not possess any information responsive to this Interrogatory. After the investigation has concluded and VWGoA has been provided with the information resulting from that investigation, VWGoA will be in a position to (and will) amend its response to this Interrogatory. To the extent Plaintiff is requesting or suggesting that VWGoA should embark on a separate investigation in parallel with the Volkswagen AG Supervisory Board's independent investigation, such request goes well beyond any reasonable investigation. Requiring VWGoA to effectively redo Jones Day's investigation makes no sense and would not be reasonable.

VWGoA objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA further objects to the Interrogatory on the ground that it seeks the discovery of information that is in the possession, custody, or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

10. Please provide the following information for each person known to you to have been terminated or disciplined (or who resigned or retired in lieu of termination or discipline) as a result of the design or use in Affected Vehicles of emission control equipment that had been designed or altered so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

A. The name, job title, and former employer of the person.

B. Describe the person's involvement in the design or use in Affected Vehicles of emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

ANSWER: James Liang, the Leader of Diesel Competence at VWGoA beginning in 2008, was suspended from VWGoA in September 2016. The underlying conduct for which Mr. Liang was suspended is described in his Rule 11 Plea Agreement, filed in the U.S. District Court for the Eastern District of Michigan on September 9, 2016. *See United States v. Liang*, No. 2:16-cr-20394-SFC-APP, ECF No. 19 at 5-7 (E.D. Mich. Sept. 9, 2016).

VWGoA objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

11. Please state the amount of gross profit you made from the sale, or offering for sale, and lease, or offering for lease, in the State of Texas of any Affected Vehicle with a 2.0 liter TDI engine. In your response, please state the gross profit according to Generally Accepted Accounting Principles developed and established by the Financial Accounting Foundation's standard-setting Boards, the Financial Accounting Standards Board and the Governmental Accounting Standards Board, or an alternative generally accepted accounting methodology recognized by the international financial community for the public reporting of financial information.

ANSWER: VWGoA states that, upon reasonable inquiry, this information is not reasonably available to VWGoA.

VWGoA objects to Interrogatory No. 11 on the grounds that it is overly broad and unduly burdensome. VWGoA further objects to this Interrogatory as vague, ambiguous, and without a clear meaning insofar as it calls for VWGoA to determine what accounting methodologies are "recognized by the international financial community."

12. Please state the amount of gross profit you made from the sale, or offering for sale, and lease, or offering for lease, in the State of Texas of any Affected Vehicle with a 3.0 liter TDI engine. In your response, please state the gross profit according to Generally Accepted Accounting Principles developed and established by the Financial Accounting Foundation's standard-setting Boards, the Financial Accounting Standards Board and the Governmental Accounting Standards Board, or an alternative generally accepted accounting methodology recognized by the international financial community for the public reporting of financial information.

ANSWER: VWGoA states that, upon reasonable inquiry, this information is not reasonably available to VWGoA.

VWGoA objects to Interrogatory No. 12 on the grounds that it is overly broad and unduly burdensome. VWGoA further objects to this Interrogatory as vague, ambiguous, and without a

clear meaning insofar as it calls for VWGoA to determine what accounting methodologies are "recognized by the international financial community."

13. In accordance with Rule 197.1, please state the legal theories and describe in general the factual bases for your defense that Plaintiff's claims should be dismissed because they are preempted and barred by the Federal Clean Air Act.

ANSWER: 42 U.S.C. § 7543(a) (Clean Air Act § 209) provides that: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." The instant action, which involves allegations that certain diesel vehicles were designed and manufactured to include "defeat devices" that allegedly impacted the vehicles' NOx emissions, is an attempt by Plaintiff to enforce standards "relating to the control of emissions from new motor vehicles or new motor vehicle engines," and is therefore expressly preempted.

In addition, the action is impliedly preempted because Federal law occupies the field of regulating new motor vehicle emissions, and this action (and others like it) would stand as an obstacle to the fulfillment of Congress's objectives in enacting Title II of the Clean Air Act.

14. In accordance with Rule 197.1, please state the legal theories and describe in general the factual bases for your defense that Plaintiff's claims should be dismissed or abated by virtue of primary jurisdiction of the United States Environmental Protection Agency.

ANSWER: The doctrine of "primary jurisdiction" provides that when a case raises issues beyond a court's ordinary experience but within an agency's special competence, the court "may 'refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court.'" *Penny v. Southwestern Bell Tel. Co.*, 906 F.2d 183, 187 (5th Cir. 1990). Congress has assigned jurisdiction over the adoption and enforcement of emission standards applicable to new motor vehicles to the federal Environmental Protection Agency ("EPA"). That agency has not completed its work with regard to the alleged "defeat devices" in Volkswagen and Audi vehicles that are the subject of the instant action, and that work is beyond the ordinary experience of this Court. This matter should therefore be stayed, abated, or dismissed until the EPA has completed its work.

TAB 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 18 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Volkswagen AG
Audi AG
Volkswagen Group of America, Inc.
Thru:

David Geanacopoulos
Executive Vice President Public Affairs and General Counsel
Volkswagen Group of America, Inc.
2200 Ferdinand Porsche Drive
Herndon, VA 20171

Stuart Johnson
General Manager
Engineering and Environmental Office
Volkswagen Group of America, Inc.
3800 Hamlin Road
Auburn Hills, MI 48326

Re: Notice of Violation

Dear Mr. Geanacopoulos and Mr. Johnson:

The United States Environmental Protection Agency (EPA) has investigated and continues to investigate Volkswagen AG, Audi AG, and Volkswagen Group of America (collectively, VW) for compliance with the Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q, and its implementing regulations. As detailed in this Notice of Violation (NOV), the EPA has determined that VW manufactured and installed defeat devices in certain model year 2009 through 2015 diesel light-duty vehicles equipped with 2.0 liter engines. These defeat devices bypass, defeat, or render inoperative elements of the vehicles' emission control system that exist to comply with CAA emission standards. Therefore, VW violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Additionally, the EPA has determined that, due to the existence of the defeat

devices in these vehicles, these vehicles do not conform in all material respects to the vehicle specifications described in the applications for the certificates of conformity that purportedly cover them. Therefore, VW also violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing these vehicles, or for causing any of the foregoing acts.

Law Governing Alleged Violations

This NOV arises under Part A of Title II of the CAA, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. In creating the CAA, Congress found, in part, that "the increasing use of motor vehicles . . . has resulted in mounting dangers to the public health and welfare." CAA § 101(a)(2), 42 U.S.C. § 7401(a)(2). Congress' purpose in creating the CAA, in part, was "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," and "to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution." CAA § 101(b)(1)–(2), 42 U.S.C. § 7401(b)(1)–(2). The CAA and the regulations promulgated thereunder aim to protect human health and the environment by reducing emissions of nitrogen oxides (NOx) and other pollutants from mobile sources of air pollution. Nitrogen oxides are a family of highly reactive gases that play a major role in the atmospheric reactions with volatile organic compounds (VOCs) that produce ozone (smog) on hot summer days. Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. Breathing ozone can also worsen bronchitis, emphysema, and asthma. Children are at greatest risk of experiencing negative health impacts from exposure to ozone.

The EPA's allegations here concern light-duty motor vehicles for which 40 C.F.R. Part 86 sets emission standards and test procedures and section 203 of the CAA, 42 U.S.C. § 7522, sets compliance provisions. Light-duty vehicles must satisfy emission standards for certain air pollutants, including NOx. 40 C.F.R. § 86.1811-04. The EPA administers a certification program to ensure that every vehicle introduced into United States commerce satisfies applicable emission standards. Under this program, the EPA issues certificates of conformity (COCs), and thereby approves the introduction of vehicles into United States commerce.

To obtain a COC, a light-duty vehicle manufacturer must submit a COC application to the EPA for each test group of vehicles that it intends to enter into United States commerce. 40 C.F.R. § 86.1843-01. The COC application must include, among other things, a list of all auxiliary emission control devices (AECDs) installed on the vehicles. 40 C.F.R. § 86.1844-01(d)(11). An AECD is "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." 40 C.F.R. § 86.1803-01. The COC application must also include "a justification for each AECD, the parameters they sense and control, a detailed justification of each AECD that results in a reduction in effectiveness of the emission control system, and [a] rationale for why it is not a defeat device." 40 C.F.R. § 86.1844-01(d)(11).

A defeat device is an AECD "that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and

use, unless: (1) Such conditions are substantially included in the Federal emission test procedure; (2) The need for the AECD is justified in terms of protecting the vehicle against damage or accident; (3) The AECD does not go beyond the requirements of engine starting; or (4) The AECD applies only for emergency vehicles . . . ." 40 C.F.R. § 86.1803-01.

Motor vehicles equipped with defeat devices, such as those at issue here, cannot be certified. EPA, *Advisory Circular Number 24: Prohibition on use of Emission Control Defeat Device* (Dec. 11, 1972); *see also* 40 C.F.R. §§ 86-1809-01, 86-1809-10, 86-1809-12. Electronic control systems which may receive inputs from multiple sensors and control multiple actuators that affect the emission control system's performance are AECDs. EPA, *Advisory Circular Number 24-2: Prohibition of Emission Control Defeat Devices – Optional Objective Criteria* (Dec. 6, 1978). "Such elements of design could be control system logic (i.e., computer software), and/or calibrations, and/or hardware items." *Id.*

"Vehicles are covered by a certificate of conformity only if they are in all material respects as described in the manufacturer's application for certification . . . ." 40 C.F.R. § 86.1848-10(c)(6). Similarly, a COC issued by EPA, including those issued to VW, state expressly, "[t]his certificate covers only those new motor vehicles or vehicle engines which conform, in all material respects, to the design specifications" described in the application for that COC. *See also* 40 C.F.R. §§ 86.1844-01 (listing required content for COC applications), 86.1848-01(b) (authorizing the EPA to issue COCs on any terms that are necessary or appropriate to assure that new motor vehicles satisfy the requirements of the CAA and its regulations).

The CAA makes it a violation "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use." CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B); 40 C.F.R. § 86.1854-12(a)(3)(ii). Additionally, manufacturers are prohibited from selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing, any new motor vehicle unless that vehicle is covered by an EPA-issued COC. CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1); 40 C.F.R. § 86.1854-12(a)(1). It is also a violation to cause any of the foregoing acts. CAA § 203(a), 42 U.S.C. § 7522(a); 40 C.F.R. § 86-1854-12(a).

Alleged Violations

Each VW vehicle identified by the table below has AECDs that were not described in the application for the COC that purportedly covers the vehicle. Specifically, VW manufactured and installed software in the electronic control module (ECM) of these vehicles that sensed when the vehicle was being tested for compliance with EPA emission standards. For ease of reference, the EPA is calling this the "switch." The "switch" senses whether the vehicle is being tested or not based on various inputs including the position of the steering wheel, vehicle speed, the duration of the engine's operation, and barometric pressure. These inputs precisely track the parameters of the federal test procedure used for emission testing for EPA certification purposes. During EPA

emission testing, the vehicles' ECM ran software which produced compliant emission results under an ECM calibration that VW referred to as the "dyno calibration" (referring to the equipment used in emissions testing, called a dynamometer). At all other times during normal vehicle operation, the "switch" was activated and the vehicle ECM software ran a separate "road calibration" which reduced the effectiveness of the emission control system (specifically the selective catalytic reduction or the lean NOx trap). As a result, emissions of NOx increased by a factor of 10 to 40 times above the EPA compliant levels, depending on the type of drive cycle (e.g., city, highway).

The California Air Resources Board (CARB) and the EPA were alerted to emissions problems with these vehicles in May 2014 when the West Virginia University's (WVU) Center for Alternative Fuels, Engines & Emissions published results of a study commissioned by the International Council on Clean Transportation that found significantly higher in-use emissions from two light duty diesel vehicles (a 2012 Jetta and a 2013 Passat). Over the course of the year following the publication of the WVU study, VW continued to assert to CARB and the EPA that the increased emissions from these vehicles could be attributed to various technical issues and unexpected in-use conditions. VW issued a voluntary recall in December 2014 to address the issue. CARB, in coordination with the EPA, conducted follow up testing of these vehicles both in the laboratory and during normal road operation to confirm the efficacy of the recall. When the testing showed only a limited benefit to the recall, CARB broadened the testing to pinpoint the exact technical nature of the vehicles' poor performance, and to investigate why the vehicles' onboard diagnostic system was not detecting the increased emissions. None of the potential technical issues suggested by VW explained the higher test results consistently confirmed during CARB's testing. It became clear that CARB and the EPA would not approve certificates of conformity for VW's 2016 model year diesel vehicles until VW could adequately explain the anomalous emissions and ensure the agencies that the 2016 model year vehicles would not have similar issues. Only then did VW admit it had designed and installed a defeat device in these vehicles in the form of a sophisticated software algorithm that detected when a vehicle was undergoing emissions testing.

VW knew or should have known that its "road calibration" and "switch" together bypass, defeat, or render inoperative elements of the vehicle design related to compliance with the CAA emission standards. This is apparent given the design of these defeat devices. As described above, the software was designed to track the parameters of the federal test procedure and cause emission control systems to underperform when the software determined that the vehicle was not undergoing the federal test procedure.

VW's "road calibration" and "switch" are AECDs[1] that were neither described nor justified in the applicable COC applications, and are illegal defeat devices. Therefore each vehicle identified by the table below does not conform in a material respect to the vehicle specifications described in the COC application. As such, VW violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), each time it sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported (or caused any of the foregoing with respect to) one of the hundreds of thousands of new motor vehicles within these test groups. Additionally, VW

[1] There may be numerous engine maps associated with VW's "road calibration" that are AECDs, and that may also be defeat devices. For ease of description, the EPA is referring to these maps collectively as the "road calibration."

violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), each time it manufactured and installed into these vehicles an ECM equipped with the "switch" and "road calibration."

The vehicles are identified by the table below. All vehicles are equipped with 2.0 liter diesel engines.

Model Year	EPA Test Group	Make and Model(s)
2009	9VWXV02.035N	VW Jetta, VW Jetta Sportwagen
2009	9VWXV02.0U5N	VW Jetta, VW Jetta Sportwagen
2010	AVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2011	BVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012	CVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012	CVWXV02.0U4S	VW Passat
2013	DVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2013	DVWXV02.0U4S	VW Passat
2014	EVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2014	EVWXV02.0U4S	VW Passat
2015	FVGAV02.0VAL	VW Beetle, VW Beetle Convertible, VW Golf, VW Golf Sportwagen, VW Jetta, VW Passat, Audi A3

Enforcement

The EPA's investigation into this matter is continuing. The above table represents specific violations that the EPA believes, at this point, are sufficiently supported by evidence to warrant the allegations in this NOV. The EPA may find additional violations as the investigation continues.

The EPA is authorized to refer this matter to the United States Department of Justice for initiation of appropriate enforcement action. Among other things, persons who violate section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), are subject to a civil penalty of up to $3,750 for each violation that occurred on or after January 13, 2009;[1] CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. In addition, any manufacturer who, on or after January 13, 2009, sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused any of the foregoing acts with respect to any new motor vehicle that was not covered by an EPA-issued COC is subject, among other things, to a civil penalty of up to $37,500 for each violation.[2] CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. The EPA may seek, and district courts may order, equitable remedies to further address these alleged violations. CAA § 204(a), 42 U.S.C. § 7523(a).

[1] $2,750 for violations occurring prior to January 13, 2009.
[2] $32,500 for violations occurring prior to January 13, 2009.

The EPA is available to discuss this matter with you. Please contact Meetu Kaul, the EPA attorney assigned to this matter, to discuss this NOV. Ms. Kaul can be reached as follows:

Meetu Kaul
U.S. EPA, Air Enforcement Division
1200 Pennsylvania Avenue, NW
William Jefferson Clinton Federal Building
Washington, DC 20460
(202) 564-5472
kaul.meetu@epa.gov

Sincerely,

Phillip A. Brooks
Director
Air Enforcement Division
Office of Civil Enforcement

Copy:
Todd Sax, California Air Resources Board
Walter Benjamin Fisherow, United States Department of Justice
Stuart Drake, Kirkland & Ellis LLP

TAB 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV - 2 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Volkswagen AG
Audi AG
Porsche AG
Volkswagen Group of America, Inc.
Porsche Cars North America, Inc.
Thru:

David Geanacopoulos
Executive Vice President Public Affairs and
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Joseph Folz
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Auburn Hills, MI 48326

Walter J. Lewis
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Porsche Cars North America, Inc.
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Atlanta, GA 30328

Re: Notice of Violation

Dear Mr. Geanacopoulos, Mr. Johnson, Mr. Folz, and Mr. Lewis:

The United States Environmental Protection Agency (EPA) has investigated and continues to investigate Volkswagen AG, Audi AG, Porsche AG, Volkswagen Group of America, Inc., and Porsche Cars North America, Inc., (collectively, VW) for compliance with the Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q, and its implementing regulations. As detailed in this Notice of Violation (NOV), the EPA has determined that VW manufactured and installed defeat devices

in certain model year 2014 – 2016 diesel light-duty vehicles equipped with 3.0 liter engines. These defeat devices bypass, defeat, or render inoperative elements of the vehicles' emission control system that exist to comply with CAA emission standards. Therefore, VW violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Additionally, the EPA has determined that, due to the existence of the defeat devices in these vehicles, these vehicles do not conform in all material respects to the vehicle specifications described in the applications for the certificates of conformity that purportedly cover them. Therefore, VW also violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing these vehicles, or for causing any of the foregoing acts.

Law Governing Alleged Violations

This NOV arises under Part A of Title II of the CAA, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. In creating the CAA, Congress found, in part, that "the increasing use of motor vehicles . . . has resulted in mounting dangers to the public health and welfare." CAA § 101(a)(2), 42 U.S.C. § 7401(a)(2). Congress' purpose in creating the CAA, in part, was "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," and "to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution." CAA § 101(b)(1)–(2), 42 U.S.C. § 7401(b)(1)–(2). The CAA and the regulations promulgated thereunder aim to protect human health and the environment by reducing emissions of nitrogen oxides (NOx) and other pollutants from mobile sources of air pollution. Nitrogen oxides are a family of highly reactive gases that play a major role in the atmospheric reactions with volatile organic compounds (VOCs) that produce ozone (smog) on hot summer days. Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. Breathing ozone can also worsen bronchitis, emphysema, and asthma. Children are at greatest risk of experiencing negative health impacts from exposure to ozone.

The EPA's allegations here concern light-duty motor vehicles for which 40 C.F.R. Part 86 sets emission standards and test procedures and section 203 of the CAA, 42 U.S.C. § 7522, sets compliance provisions. Light-duty vehicles must satisfy emission standards for certain air pollutants, including NOx. 40 C.F.R. § 86.1811-04. The EPA administers a certification program to ensure that every vehicle introduced into United States commerce satisfies applicable emission standards. Under this program, the EPA issues certificates of conformity (COCs), and thereby approves the introduction of vehicles into United States commerce.

To obtain a COC, a light-duty vehicle manufacturer must submit a COC application to the EPA for each test group of vehicles that it intends to enter into United States commerce. 40 C.F.R. § 86.1843-01. The COC application must include, among other things, a list of all auxiliary emission control devices (AECDs) installed on the vehicles. 40 C.F.R. § 86.1844-01(d)(11). An AECD is "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." 40 C.F.R. § 86.1803-01. The COC application must also include "a justification for each AECD,

the parameters they sense and control, a detailed justification of each AECD that results in a reduction in effectiveness of the emission control system, and [a] rationale for why it is not a defeat device." 40 C.F.R. § 86.1844-01(d)(11).

A defeat device is an AECD "that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless: (1) Such conditions are substantially included in the Federal emission test procedure; (2) The need for the AECD is justified in terms of protecting the vehicle against damage or accident; (3) The AECD does not go beyond the requirements of engine starting; or (4) The AECD applies only for emergency vehicles . . . ." 40 C.F.R. § 86.1803-01.

Motor vehicles equipped with defeat devices, such as those at issue here, cannot be certified. EPA, *Advisory Circular Number 24: Prohibition on use of Emission Control Defeat Device* (Dec. 11, 1972); *see also* 40 C.F.R. §§ 86-1809-01, 86-1809-10, 86-1809-12. Electronic control systems which may receive inputs from multiple sensors and control multiple actuators that affect the emission control system's performance are AECDs. EPA, *Advisory Circular Number 24-2: Prohibition of Emission Control Defeat Devices – Optional Objective Criteria* (Dec. 6, 1978). "Such elements of design could be control system logic (i.e., computer software), and/or calibrations, and/or hardware items." *Id.*

"Vehicles are covered by a certificate of conformity only if they are in all material respects as described in the manufacturer's application for certification . . . ." 40 C.F.R. § 86.1848-10(c)(6). Similarly, COCs issued by EPA, including those issued to VW, state expressly, "[t]his certificate covers only those new motor vehicles or vehicle engines which conform, in all material respects, to the design specifications" described in the application for that COC. *See also* 40 C.F.R. §§ 86.1844-01 (listing required content for COC applications), 86.1848-01(b) (authorizing the EPA to issue COCs on any terms that are necessary or appropriate to assure that new motor vehicles satisfy the requirements of the CAA and its regulations).

The CAA makes it a violation "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use." CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B); 40 C.F.R. § 86.1854-12(a)(3)(ii). Additionally, manufacturers are prohibited from selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing, any new motor vehicle unless that vehicle is covered by an EPA-issued COC. CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1); 40 C.F.R. § 86.1854-12(a)(1). It is also a violation to cause any of the foregoing acts. CAA § 203(a), 42 U.S.C. § 7522(a); 40 C.F.R. § 86-1854-12(a).

Alleged Violations

Each VW vehicle identified by the table below has AECDs that were not described in the application for the COC that purportedly covers the vehicle. Specifically, VW manufactured and installed software in the electronic control module (ECM) of each vehicle that causes the vehicle to perform differently when the vehicle is being tested for compliance with EPA emission standards than in normal operation and use.

When this software determines the vehicle has begun the FTP 75 Federal emission test procedure, it directs the vehicle to employ a low NOx temperature conditioning mode. A status bit in the software indicates that a "temperature conditioning" mode is active. In this low NOx temperature conditioning mode, the vehicle operates under a number of emission control parameters, including injection timing, exhaust gas recirculation rate, and common rail fuel pressure in such a way that the parameters yield low engine-out NOx emissions and high exhaust temperatures. The high exhaust temperatures heat the selective catalytic reduction system ("catalyst") and improve the catalyst's ability to reduce tailpipe NOx emissions. In this low NOx temperature conditioning mode, the combination of low engine-out NOx and improved catalyst performance results in tailpipe NOx emissions that are below the applicable emissions standard.

However, the software employs a "timer" that coincides with the low NOx temperature conditioning mode. At exactly one second after the completion of the initial phases of the FTP 75 Federal emissions test procedure (1,370 seconds, which is when the vehicle would normally be turned off), this software directs the vehicle to cease low NOx temperature conditioning mode. The "temperature conditioning" status bit switches to zero, and a second status bit indicates the activation of "transition to normal mode." In this "normal mode," the emission control system is immediately less effective. Compared to the low NOx temperature conditioning mode, the vehicle employs a different injection timing, exhaust gas recirculation rate, and common rail fuel pressure. This yields higher levels of NOx from the engine and reduced exhaust temperatures.

In addition, when the vehicle starts under conditions that the software determines *are not* the beginning of the FTP 75 Federal emission test procedure, the vehicle does not use the low NOx temperature conditioning mode at all. Instead, the emission control parameters are set consistent with the "normal mode."

In sum, as soon as the vehicle senses that it is not being tested, it uses "normal mode." In "normal mode," tailpipe emissions of NOx are up to 9 times the applicable NOx standard levels, depending on model type and type of drive cycle (e.g., city, highway).

This NOV is based on vehicle emission testing performed by the EPA's National Vehicle and Fuel Emissions Laboratory, California Air Resources Board's Hagen-Smit Laboratory, and Environment Canada's River Road Laboratory. This testing was performed since EPA's announcement on September 25, 2015, that it would perform additional testing "using driving cycles and conditions that may reasonably be expected to be encountered in normal operation

and use, for the purposes of investigating a potential defeat device." EPA, *EPA Conducted Confirmatory Testing* (Sept. 25, 2015).

VW knew or should have known that the software described above bypasses, defeats, or renders inoperative elements of the vehicle design related to compliance with the CAA emission standards. This is apparent given the design of these defeat devices. As described above, the software was designed to track federal test procedures and cause emission control systems to underperform when the software determined that the vehicle was not being tested.

VW's software described above includes one or more AECDs that were neither described nor justified in the applicable COC applications, and are illegal defeat devices. Therefore each vehicle identified by the table below does not conform in a material respect to the vehicle specifications described in the COC application. As such, VW violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), each time it sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported (or caused any of the foregoing with respect to) one of the new motor vehicles within these test groups. Additionally, VW violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), each time it manufactured and installed into these vehicles an ECM equipped with the software described above.

The vehicles are identified by the table below. All vehicles are equipped with 3.0 liter diesel engines.

Model Year	**EPA Test Group**	**Make and Model(s)**
2014	EADXT03.02UG	VW Touareg
2015	FPRXT03.0CDD	Porsche Cayenne
2016	GVGAJ03.0NU4	Audi A6 Quattro, A7 Quattro, A8, A8L, and Q5

Enforcement

The EPA's investigation into this matter is continuing. The above table represents specific violations that the EPA believes, at this point, are sufficiently supported by evidence to warrant the allegations in this NOV. The EPA may find additional violations as the investigation continues.

The EPA is authorized to refer this matter to the United States Department of Justice for initiation of appropriate enforcement action. Among other things, persons who violate section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), are subject to a civil penalty of up to $3,750 for each violation that occurred on or after January 13, 2009; CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. In addition, any manufacturer who, on or after January 13, 2009, sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused any of the foregoing acts with respect to any new motor vehicle that was not covered by an EPA-issued COC is subject, among other things, to a civil penalty of up to $37,500 for each violation. CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. The EPA may

seek, and district courts may order, equitable remedies to further address these alleged violations. CAA § 204(a), 42 U.S.C. § 7523(a).

The EPA is available to discuss this matter with you. Please contact Meetu Kaul, the EPA attorney assigned to this matter, to discuss this NOV. Ms. Kaul can be reached as follows:

Meetu Kaul
U.S. EPA, Air Enforcement Division
1200 Pennsylvania Avenue, NW
William Jefferson Clinton Federal Building
Washington, DC 20460
(202) 564-5472
kaul.meetu@epa.gov

Sincerely,

Susan Shinkman
Director
Office of Civil Enforcement

Copy:
Todd Sax, California Air Resources Board
Walter Benjamin Fisherow, United States Department of Justice
Stuart Drake, Kirkland & Ellis LLP

TAB 4

86

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

United States of America, Plaintiff, v. VOLKSWAGEN AG, Defendant.	No. 16-CR-20394 HONORABLE SEAN F. COX Offenses: (1) Conspiracy (2) Obstruction of Justice (3) Entry of Goods by False Statement Violations: (1) 18 U.S.C. § 371 (2) 18 U.S.C. § 1512(c) (3) 18 U.S.C. § 542 Statutory Maximum Period of Probation: Five years per count Statutory Minimum Period of Probation: None/Not Applicable Statutory Maximum Fine: 18 U.S.C. § 3571(d) (the greater of twice the gross gain or twice the gross loss) Statutory Minimum Fine: None/Not Applicable

FILED
MAR 10 2017
CLERK'S OFFICE
DETROIT

GOVERNMENT EXHIBIT
1

Rule 11 Plea Agreement

The United States of America, by and through the Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section and with the approval of the Deputy Attorney General (collectively hereafter, "the Offices"), and the Defendant, Volkswagen AG (the "Defendant"), by and through its undersigned attorneys, and through its authorized representative, pursuant to authority granted by the Defendant's Management Board, with the consent of the Supervisory Board, hereby submit and enter into this plea agreement (the "Agreement"), pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The terms and conditions of this Agreement are as follows:

1. **Guilty Plea**

A. **Waiver of Indictment and Venue**

Pursuant to Fed. R. Crim. P. 7, the Defendant agrees to knowingly waive its right to grand jury indictment and its right to challenge venue in the United States District Court for the Eastern District of Michigan, and to plead guilty to Counts One through Three of the Third Superseding Information.

B. **Counts of Conviction**

The Third Superseding Information charges three counts: (1) Count One - conspiracy in violation of 18 U.S.C. § 371, (2) Count Two - obstruction of justice in

violation of 18 U.S.C. § 1512(c), and (3) Count Three – introducing imported merchandise into the United States by mean of false statements in violation of 18 U.S.C. § 542. The Defendant further agrees to persist in that plea through sentencing and, as set forth below, to cooperate fully with the Offices in their investigation into the conduct described in this Agreement and other conduct related to the introduction into the United States of diesel vehicles with defeat devices as defined under U.S. law.

C. **Elements of Offenses**

The elements of Count One (conspiracy) are as follows:

(1) The elements for conspiracy to defraud the United States by obstructing the lawful function of the federal government are as follows:

(a) That two or more persons conspired, or agreed, to defraud the United States or one of its agencies or departments, in this case, the Environmental Protection Agency (EPA), by dishonest means;

(b) That the defendant knowingly and voluntarily joined the conspiracy; and

(c) That a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(2) The elements for conspiracy to violate the wire fraud statute and Clean Air Act are as follows:

(a) That two or more persons conspired, or agreed, to commit a crime, in this case, a violation of the wire fraud statute (18 U.S.C. § 1343) and the Clean Air Act (42 U.S.C. § 7413(c)(2)(A)) as described below;

(b) That the defendant knowingly and voluntarily joined the conspiracy; and

(c) That a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

Object of the Conspiracy – Wire Fraud – 18 U.S.C. § 1343:

(a) The defendant knowingly participated in, devised, or intended to devise a scheme to defraud in order to obtain money or property;

(b) The scheme included a material misrepresentation or concealment of a material fact;

(c) The defendant had the intent to defraud; and

(d) The defendant used (or caused another to use) wire, radio or television communications in interstate or foreign commerce in furtherance of the scheme.

Object of the Conspiracy – Clean Air Act – 42 U.S.C. § 7413(c)(2)(A)

(a) The defendant knowingly made (or caused to be made) a false material statement, representation, or certification, or omission of material information;

(b) The statement, representation or certification that was made (or omitted), or caused to be made or omitted, was in a notice, application, record, report, plan or other document required to be filed or maintained under the Clean Air Act; and

(c) The statement, representation, certification, or omission of information, was material.

The elements of Count Two (obstruction of justice) are as follows:

(1) That the defendant altered, destroyed, mutilated, or concealed a record, document or other object;

(2) That the defendant acted knowingly;

(3) That the defendant acted corruptly; and

(4) That the defendant acted with the intent to impair the record, document or object's integrity or availability for use in an official proceeding.

The elements of Count Three (entry of goods by false statement) are as follows:

(1) That merchandise was imported;

(2) That the defendant entered or introduced merchandise into the commerce of the United States;

(3) That the defendant did so by means of a false statement, which it knew was false; and

(4) That the false statement was material to the entry of the merchandise.

D. **Statutory Maximum Penalties**

The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 371 (Count One) is a fine of $500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B). The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 1512(c) (Count Two) is a fine of $500,000; five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B). The statutory maximum sentence that the Court can impose for a violation of Title 18,

United States Code, Section 542 (Count Three) is a fine of $500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B).

E. **Factual Basis for Guilty Plea**

The Defendant is pleading guilty because it is guilty of the charges contained in the Third Superseding Information. The Defendant admits, agrees, and stipulates that the factual allegations set forth in Exhibit 2 (the Statement of Facts) are true and correct, that it is responsible under the laws of the United States for the acts of its employees described in Exhibit 2, and that the facts set forth in Exhibit 2 accurately reflect the Defendant's criminal conduct and provide a factual basis for the guilty plea. The Defendant agrees that it will neither contest the admissibility of, nor contradict, the Statement of Facts contained in Exhibit 2 in any proceeding.

2. **Sentencing Guidelines**

A. **Standard of Proof**

The Court will find sentencing factors by a preponderance of the evidence.

B. **Guideline Range**

There are no disputes with respect to the sentencing guidelines that require resolution by the court. While the Defendant does not adopt, agree or accept the United States Sentencing Guidelines (U.S.S.G.) analysis contained herein, for

purposes of avoiding the need for a contested sentencing proceeding and achieving a just and fair result, and because the Defendant agrees that the overall fine proposed herein achieves such a result, the Defendant does not contest the factual or legal basis of the Office's U.S.S.G. analysis contained in this Paragraph for the purposes of this proceeding and stipulates that the proposed fine constitutes a reasonable sentence under the factors listed in Title 18, United States Code, Section 3553(a). Pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the Court must determine an advisory sentencing guideline range pursuant to the United States Sentencing Guidelines (U.S.S.G.). The Court will then determine a reasonable sentence within the statutory range after considering the advisory sentencing guideline range and the factors listed in Title 18, United States Code, Section 3553(a). The Defendant also understands that if the Court accepts this Agreement, the Court is bound by the sentencing provisions in Paragraph 3. The Offices submit that a faithful application of the U.S.S.G. to determine the applicable fine range yields the following analysis:

a. The 2016 U.S.S.G. are applicable to this matter.

b. Offense Level. Based upon U.S.S.G. § 2B1.1, the total offense level is 41, calculated as follows:

(a)(1)	Base Offense Level	7
(b)(1)(P)	Amount of Loss > $550 million	+30
(b)(2)(A)(i)	More Than 10 Victims	+2
(b)(10)(B)	Substantial Part of Scheme Committed from Outside the United States	+2

TOTAL		41

c. Base Fine. Based upon U.S.S.G. § 8C2.4(a), the base fine is $8,543,169,187 (the pecuniary loss from the offense caused by the Defendant)

d. Culpability Score. Based upon U.S.S.G. § 8C2.5, the culpability score is 11, calculated as follows:

(a)	Base Culpability Score	5
(b)(1)	the unit of the organization within which the offense was committed had 5,000 or more employees and an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense	+5
(e)	obstruction of justice	+3
(g)(3)	The organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct	- 2
TOTAL		11

Calculation of Fine Range:

Base Fine	$8,543,169,187[1]
Multipliers	2 (min)/4 (max)
Fine Range	$17,086,338,374 (min)/ $34,172,676,746 (max)

[1] The base fine amount consists of the loss amount as calculated under USSG § 2B1.1 and accompanying Application Notes, discounted to reflect a 50% reduction for the litigation risk that both parties would bear were there a contested sentencing proceeding. *See, e.g.*, *United States v. Giovenco*, 773 F.3d 866 (7th Cir. 2014); *United States v. Prosperi*, 686 F.3d 32 (1st Cir. 2012).

3. **Sentence**

Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the Defendant agree that the appropriate disposition of this case is as set forth in this Section and agree to recommend jointly that the Court at a hearing to be scheduled at an agreed upon time impose it.

A. **Relevant Considerations**

The Offices enter into this Agreement based on the individual facts and circumstances presented by this case and the Defendant. Among the factors considered were the following:

1. the Defendant did not voluntarily disclose to the Offices the conduct described in Exhibit 2 (the Statement of Facts);

2. the Defendant cooperated with the Offices' investigation by, among other things, (i) gathering substantial amounts of evidence and performing forensic data collections in multiple jurisdictions; (ii) producing documents, including translations, to the Offices in ways that did not implicate foreign data privacy laws; (iii) collecting, analyzing, organizing, and producing voluminous evidence and information; (iv) interviewing hundreds of witnesses in the United States and overseas; (v) providing non-privileged facts relating to individuals and companies involved in the criminal conduct; and (vi) facilitating and encouraging

cooperation and voluntary disclosure of information and documents by current and former company personnel;

3. the Defendant has already agreed to compensate members of the class in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-2672 (N.D. Cal.), which consists of victims of the underlying criminal conduct that is the subject of this Agreement, and to pay into a NOx remediation trust, in an aggregate amount of approximately $11 billion (based on net present value);

4. despite obstruction of justice committed by certain of the Defendant's employees, principally in the form of document destruction, the Defendant, including through its outside counsel, self-disclosed this conduct to the Offices, remediated the conduct by recovering large portions of the deleted documents through a variety of forensic means, and conducted a thorough investigation of the conduct, the findings of which it reported to the Offices;

5. the Defendant engaged in remedial measures, including creation of a management board position to supervise the Defendant's legal and compliance functions, reorganization of the whistleblower system, improvements to its risk assessment systems, specific reforms to its engine-related practices, including a program to audit these reforms, termination the employment of six individuals who participated in, or failed to supervise employees who participated in, the misconduct

described in the Statement of Facts, suspending an additional eight individuals who participated in the misconduct described in the Statement of Facts for varying periods, and disciplining an additional three employees who participated in the misconduct described in the Statement of Facts; however, the Defendant's remediation remains incomplete;

6. the Defendant has committed to continue to enhance its compliance program and internal controls;

7. the Defendant has agreed, as part of its continuing cooperation obligations, and to ensure that the Defendant and its wholly-owned subsidiary Volkswagen Group of America ("VW GOA") implements an effective compliance program, to the appointment of an independent monitor (the "Monitor") for a period of up to three years, who will have authority with respect to the Defendant and VW GOA;

8. the nature and seriousness of the offenses;

9. the Defendant has no prior criminal history;

10. the Defendant has agreed to continue to cooperate with the Offices in any ongoing investigation of the conduct of the Defendant and its officers, directors, employees, agents, business partners, and consultants relating to the violations to which the Defendant is pleading guilty; and

11. the Defendant has agreed to pay an additional $1,500,000,000 to the United States to resolve claims for civil penalties arising from the underlying conduct that is the subject of this Agreement;

12. accordingly, after considering (1) through (11) above, (a) the Defendant received an aggregate discount of approximately 20% off of the bottom of the otherwise applicable U.S. Sentencing Guidelines fine range, reflecting its cooperation in the investigation, and (b) after application of the foregoing discount, the Defendant in addition received a credit of $11 billion, representing the net present value of the Defendant's settlements with consumers and payments to the NOx remediation trust in settlement of civil litigation.

B. **Fine**

The Defendant shall pay to the United States a criminal fine of $2,800,000,000, payable in full within ten days of the entry of judgment following the sentencing hearing in this matter. The Defendant shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the penalty amount that the Defendant pays pursuant to this Agreement. The Defendant further agrees that it shall not claim, assert, or apply for, either directly or indirectly, any tax deduction, tax credit, or any other offset with regard to any U.S. federal, state, or local tax or taxable income for any fine or forfeiture paid pursuant to this Agreement.

C. **Probation**

The parties agree that a term of organizational probation for a period of three years should be imposed on the Defendant pursuant to 18 U.S.C. §§ 3551(c)(1) and 3561(c)(1). The parties further agree, pursuant to U.S.S.G. § 8D1.4, that the term of probation shall include as conditions the obligations set forth in Paragraphs 5 and 6 below as well as the payment of the fine set forth in this Paragraph, but shall not include the obligations set forth in Paragraph 7 below.

D. **Special Assessment**

The Defendant shall pay to the Clerk of the Court for the United States District Court for the Eastern District of Michigan within ten days of the time of sentencing the mandatory special assessment of $1,200 ($400 per count).

E. **Restitution**

No order of restitution is appropriate in this case pursuant to 18 U.S.C. § 3663A(c)(3), as the number of identifiable victims is so large as to make restitution impracticable and/or determining complex issues of fact related to the cause or amount of victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. Moreover, as noted in Paragraph 2(A) above, the Defendant has already agreed to compensate members of the class in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability*

Litigation, No. 3:15-md-2672 (N.D. Cal.), which consists of individuals who purchased affected vehicles described in Exhibit 2.

4. **Other Charges**

In exchange for the guilty plea of the Defendant and the complete fulfillment of all of its obligations under this Agreement, the Offices agree that they will not file additional criminal charges against the Defendant or any of its direct or indirect affiliates or subsidiaries related to: (1) any conduct described in the Third Superseding Information or Exhibit 2; (2) any conduct related to the emissions, or compliance with U.S. emissions standards, of the Subject Vehicles or the Porsche Vehicles as described and defined in the Third Superseding Information and Exhibit 2; and (3) any conduct disclosed by, or on behalf of, the Defendant or otherwise known to the Offices or the EPA as of the date of this Agreement. The Offices, however, may use any information related to the conduct described in the Statement of Facts against the Defendant: (a) in a prosecution for perjury or obstruction of justice apart from the charge in the Third Superseding Information and identified in the Statement of Facts; (b) in a prosecution for making a false statement; (c) in a prosecution or other proceeding relating to any crime of violence; or (d) in a prosecution or other proceeding relating to a violation of any provision of Title 26 of the United States Code. This Paragraph does not provide any protection against prosecution for any other conduct, including but not limited

to crimes committed in the future by the Defendant or by any of its affiliates, subsidiaries, officers, directors, employees, agents or consultants, whether or not disclosed by the Defendant pursuant to the terms of this Agreement. In addition, this Agreement does not provide any protection against prosecution of any joint ventures of which the Defendant is a part, or any individuals, regardless of their affiliation with the Defendant. The Defendant agrees that nothing in this Agreement is intended to release the Defendant from any and all of the Defendant's excise and income tax liabilities and reporting obligations for any and all income not properly reported and/or legally or illegally obtained or derived.

5. **The Defendant's Obligations**

A. Except as otherwise provided in Paragraph 6 below in connection with the Defendant's cooperation obligations, the Defendant's obligations under the Agreement shall last and be effective for a period beginning on the date on which the Third Superseding Information is filed and ending three years from the later of the date on which the Third Superseding Information is filed or the date on which the Monitor is retained by the Defendant, as described in Paragraph 15 below (the "Term"). The Defendant agrees, however, that, in the event the Offices determine, in their sole discretion, that the Defendant has failed specifically to perform or to fulfill each of the Defendant's obligations under this Agreement, an extension or extensions of the Term may be imposed by the Offices, in their sole discretion, for

up to a total additional time period of one year, without prejudice to the Offices' right to proceed as provided in Paragraph 9 below. Any extension of the Term extends all terms of this Agreement, including the terms of the Monitorship in Exhibit 3, for an equivalent period. Conversely, in the event the Offices find, in their sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the Monitorship in Exhibit 3, and that the other provisions of this Agreement have been satisfied, the Term may be terminated early, except for the Defendant's cooperation obligations described in Paragraph 6 below.

B. The Defendant agrees to abide by all terms and obligations of this Agreement as described herein, including, but not limited to, the following:

1. to plead guilty as set forth in this Agreement;

2. to abide by all sentencing stipulations contained in this Agreement;

3. to appear, through its duly appointed representatives, as ordered for all court appearances, and obey any other ongoing court order in this matter, consistent with all applicable U.S. and foreign laws, procedures, and regulations;

4. to commit no further crimes;

5. to be truthful at all times with the Court and the Offices;

6. to pay the applicable fine and special assessments;

7. to cooperate with and report to the Offices as provided in Paragraph 6; and

8. to continue to implement a compliance and ethics program designed to prevent and detect fraudulent conduct throughout its operations.

C. The Defendant agrees that any fine or restitution imposed by the Court will be due and payable in full within ten days of the entry of judgment following the sentencing hearing, and the Defendant will not attempt to avoid or delay payment. The Defendant further agrees to pay the Clerk of the Court for the United States District Court for the Eastern District of Michigan the mandatory special assessment of $400 per count within ten business days from the date of sentencing.

6. **The Defendant's Cooperation and Reporting Obligations**

A. The Defendant shall cooperate fully with the Offices in any and all matters relating to the conduct described in this Agreement and Exhibit 2, and other related conduct under investigation by the Offices during the Term, subject to applicable law and regulations, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the end of the Term. At the request of the Offices, the Defendant shall also cooperate fully with other domestic law enforcement and regulatory authorities and agencies in any investigation of the Defendant, its parent company or its affiliates, or any of its present or former officers, directors, employees, agents, and consultants, or any other

party, in any and all matters relating to the conduct described in this Agreement and Exhibit 2, and other conduct related to the Defendant's installation of defeat devices and false and fraudulent representations pertaining thereto. The Defendant agrees that its cooperation pursuant to this Paragraph shall include, but not be limited to, the following:

1. The Defendant shall truthfully disclose all factual information not protected by a valid claim of attorney-client privilege or attorney work product doctrine, or by applicable law and regulations, including applicable data protection laws, with respect to its activities, those of its parent company and affiliates, and those of its present and former directors, officers, employees, agents, and consultants, including any evidence or allegations and internal or external investigations, about which the Defendant has any knowledge or about which the Offices may inquire. This obligation of truthful disclosure includes, but is not limited to, the obligation of the Defendant to provide to the Offices, upon request, any document, record or other tangible evidence about which the Offices may inquire of the Defendant.

2. Upon request of the Offices, the Defendant shall designate knowledgeable employees, agents or attorneys to provide to the Offices the information and materials described in Paragraph 6(A)(1) above on behalf of the Defendant. It is further understood that the Defendant must at all times provide complete, truthful, and accurate information.

3. The Defendant shall use its best efforts to make available for interviews or testimony, as requested by the Offices, present or former officers, directors, employees, agents and consultants of the Defendant. This obligation includes, but is not limited to, sworn testimony before a federal grand jury or in federal trials, as well as interviews with domestic law enforcement and regulatory authorities. Cooperation under this Paragraph shall include identification of witnesses who, to the knowledge of the Defendant, may have material information regarding the matters under investigation.

4. With respect to any information, testimony, documents, records or other tangible evidence provided to the Offices pursuant to this Agreement, the Defendant consents to any and all disclosures, subject to applicable law and regulations, including applicable data protection laws, to other governmental authorities in the United States of such materials as the Offices, in their sole discretion, shall deem appropriate.

B. In addition to the obligations in Paragraph 6(A), during the Term, should the Defendant learn of any evidence or allegation of a violation of U.S. federal law by or on behalf of the Defendant and relating to emissions of its vehicles, false or misleading statements made to public authorities or regulators, fraud or misrepresentations in the sale or marketing of its products, or obstruction of any pending or contemplated U.S. federal, state or local investigation or proceeding, the

Defendant shall promptly report such evidence or allegation to the Offices. Thirty days prior to the end of the Term, the Defendant, by the Chief Executive Officer of the Defendant and the Chief Financial Officer of the Defendant, will certify to the Offices that the Defendant has met its disclosure obligations pursuant to this Paragraph. Each certification will be deemed a material statement and representation by the Defendant to the executive branch of the United States for purposes of 18 U.S.C. § 1001, and it will be deemed to have been made in the judicial district in which this Agreement is filed.

7. **Other Obligations**

A. The Defendant agrees to retain an independent compliance monitor in accordance with Exhibit 3 of this Agreement.

B. While the obligation set forth in this Paragraph is not a condition to the term of probation, any failure to comply with the obligation set forth in this Paragraph shall constitute a breach of this Agreement and be subject to the terms set forth in Paragraph 9 below.

8. **Waiver of Appellate and Other Rights Under United States Law**

A. The Defendant understands that by entering into this Agreement, the Defendant surrenders certain rights as provided in this Agreement. The Defendant understands that the rights of criminal defendants in the United States include the following:

1. the right to plead not guilty and to persist in that plea;

2. the right to a jury trial;

3. the right to be represented by counsel – and if necessary have the court appoint counsel – at trial and at every other stage of the proceedings;

4. the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; and

5. pursuant to Title 18, United States Code, Section 3742, the right to appeal the sentence imposed.

B. Nonetheless, the Defendant knowingly waives the right to appeal the conviction and any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742, or on any ground whatsoever except those specifically excluded in this Paragraph, in exchange for the concessions made by the United States in this plea agreement. This Agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(b). The Defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of

Information Act, Title 5, United States Code, Section 552, or the Privacy Act, Title 5, United States Code, Section 552a. The Defendant waives all defenses based on the statute of limitations and venue with respect to any federal prosecution related to the conduct described in Exhibit 2 or the Third Superseding Information, including any prosecution that is not time-barred on the date that this Agreement is signed in the event that: (a) the conviction is later vacated for any reason; (b) the Defendant violates this Agreement; or (c) the plea is later withdrawn, provided such prosecution is brought within one year of any such vacation of conviction, violation of agreement, or withdrawal of plea plus the remaining time period of the statute of limitations as of the date that this Agreement is signed. The Offices are free to take any position on appeal or any other post-judgment matter. The parties agree that any challenge to the Defendant's sentence that is not foreclosed by this Paragraph will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver. Nothing in the foregoing waiver of appellate rights shall preclude the Defendant from raising a claim of ineffective assistance of counsel in an appropriate forum.

C. Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 limit the admissibility of statements made in the course of plea proceedings or plea discussions in both civil and criminal proceedings, if the guilty plea is later withdrawn. The Defendant expressly warrants that it has discussed these rules with

its counsel and understands them. Solely to the extent set forth below, the Defendant voluntarily waives and gives up the rights enumerated in Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. Specifically, the Defendant understands and agrees that any statements that it makes in the course of its guilty plea or in connection with the Agreement, including the Statement of Facts set forth as Exhibit 2 to the Agreement, are admissible against it for any purpose in any U.S. federal criminal proceeding if, even though the Offices have fulfilled all of their obligations under this Agreement and the Court has imposed the agreed-upon sentence, the Defendant nevertheless withdraws its guilty plea.

9. **Breach of Agreement**

A. If the Defendant (a) commits any felony under U.S. federal law; (b) provides in connection with this Agreement deliberately false, incomplete, or misleading information; (c) fails to cooperate as set forth in Paragraph 6 of this Agreement; (d) fails to implement a compliance program as set forth in Paragraph 3(A)(7) of this Agreement; or (e) otherwise fails specifically to perform or to fulfill each of the Defendant's obligations under the Agreement, regardless of whether the Offices become aware of such a breach after the Term of the Agreement, the Defendant shall thereafter be subject to prosecution for any federal criminal violation of which the Offices have knowledge, including, but not limited to, the charges in the Third Superseding Information described in Paragraph 1, which may

be pursued by the Offices in the United States District Court for the Eastern District of Michigan or any other appropriate venue. Determination of whether the Defendant has breached the Agreement and whether to pursue prosecution of the Defendant shall be in the Offices' sole discretion. Any such prosecution may be premised on information provided by the Defendant. Any such prosecution relating to the conduct described in the attached Statement of Facts or relating to conduct known to the Offices prior to the date on which this Agreement was signed that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the Defendant, notwithstanding the expiration of the statute of limitations, between the signing of this Agreement and the expiration of the Term of the Agreement plus one year. Thus, by signing this Agreement, the Defendant agrees that the statute of limitations with respect to any such prosecution that is not time- barred on the date of the signing of this Agreement shall be tolled for the Term of the Agreement plus one year. The Defendant gives up all defenses based on the statute of limitations, any claim of pre-indictment delay, or any speedy trial claim with respect to any such prosecution or action, except to the extent that such defenses existed as of the date of the signing of this Agreement. In addition, the Defendant agrees that the statute of limitations as to any violation of federal law that occurs during the term of the cooperation obligations provided for in Paragraph 6 of the Agreement will be tolled from the date upon which the

violation occurs until the earlier of the date upon which the Offices are made aware of the violation or the duration of the term plus three years, and that this period shall be excluded from any calculation of time for purposes of the application of the statute of limitations.

B. In the event the Offices determine that the Defendant has breached this Agreement, the Offices agree to provide the Defendant with written notice of such breach prior to instituting any prosecution resulting from such breach. Within thirty (30) days of receipt of such notice, the Defendant shall have the opportunity to respond to the Offices in writing to explain the nature and circumstances of such breach, as well as the actions the Defendant has taken to address and remediate the situation, which explanation the Offices shall consider in determining whether to pursue prosecution of the Defendant.

C. In the event that the Offices determine that the Defendant has breached this Agreement: (a) all statements made by or on behalf of the Defendant to the Offices or to the Court, including the attached Statement of Facts, and any testimony given by the Defendant before a grand jury, a court, or any tribunal, or at any legislative hearings, whether prior or subsequent to this Agreement, and any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Offices against the Defendant; and (b) the Defendant shall not assert any claim under the United States Constitution,

Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule that any such statements or testimony made by or on behalf of the Defendant prior or subsequent to this Agreement, or any leads derived therefrom, should be suppressed or are otherwise inadmissible. The decision whether conduct or statements of any current director, officer or employee, or any person acting on behalf of, or at the direction of, the Defendant, will be imputed to the Defendant for the purpose of determining whether the Defendant has violated any provision of this Agreement shall be in the sole discretion of the Offices.

D. The Defendant acknowledges that the Offices have made no representations, assurances, or promises concerning what sentence may be imposed by the Court if the Defendant breaches this Agreement and this matter proceeds to judgment. The Defendant further acknowledges that any such sentence is solely within the discretion of the Court and that nothing in this Agreement binds or restricts the Court in the exercise of such discretion.

10. **Parties to Plea Agreement**

The Defendant understands and agrees that this Agreement is between the Offices and the Defendant. Nevertheless, the Offices will bring this Agreement and the nature and quality of the conduct, cooperation and remediation of the Defendant, its direct or indirect affiliates and subsidiaries to the attention of other prosecuting

authorities or other agencies, as well as debarment authorities, if requested by the Defendant.

The Defendant agrees that this Agreement will be executed by an authorized corporate representative. The Defendant further agrees that a resolution duly adopted by the Defendant's Management Board, with the consent of the Supervisory Board in the form attached to this Agreement as Exhibit 1, authorizes the Defendant to enter into this Agreement and take all necessary steps to effectuate this Agreement, and that the signatures on this Agreement by the Defendant and its counsel are authorized by the Defendant's Management Board, with the consent of the Supervisory Board, on behalf of the Defendant.

The Defendant agrees that it has the full legal right, power, and authority to enter into and perform all of its obligations under this Agreement.

11. **Change of Corporate Form**

Except as may otherwise be agreed by the parties in connection with a particular transaction, the Offices may require, in their sole discretion, that, in the event that, during the Term of the Agreement, the Defendant undertakes any change in corporate form, including if it sells, merges, or transfers business operations that are material to the Defendant's consolidated operations, or to the operations of any subsidiaries or affiliates involved in the conduct described in Exhibit 2 (the Statement of Facts), as they exist as of the date of this Agreement, whether such sale

is structured as a sale, asset sale, merger, transfer, or other change in corporate form, the Defendant shall include in any contract for sale, merger, transfer, or other change in corporate form a provision binding the purchaser, or any successor in interest thereto, to the obligations described in this Agreement. If the Offices so require, the purchaser or successor in interest must also agree in writing that the Offices' ability to declare a breach under this Agreement is applicable in full force to that entity, and the Defendant will agree that the failure to include these provisions in the transaction will make any such transaction null and void. The Defendant shall provide notice to the Offices at least thirty (30) days prior to undertaking any such sale, merger, transfer, or other change in corporate form. The Offices will inform the Defendant within such 30-day period if the Offices require the Defendant to take the steps referred to above. If the Offices notify the Defendant prior to such transaction (or series of transactions) that they have determined that the transaction(s) has the effect of circumventing or frustrating the enforcement purposes of this Agreement, as determined in the sole discretion of the Offices, the Defendant agrees that such transaction(s) will not be consummated. In addition, if at any time during the Term of the Agreement the Offices determine in their sole discretion that the Defendant has engaged in a transaction(s) that has the effect of circumventing or frustrating the enforcement purposes of this Agreement, they may deem it a breach of this Agreement pursuant to Paragraph 9 of this Agreement. Nothing herein shall restrict

the Defendant from indemnifying (or otherwise holding harmless) the purchaser or successor in interest for penalties or other costs arising from any conduct that may have occurred prior to the date of the transaction, so long as such indemnification does not have the effect of circumventing or frustrating the enforcement purposes of this Agreement, as determined by the Offices.

12. **Failure of Court to Accept Agreement**

This Agreement is presented to the Court pursuant to Fed. R. Crim. P. 11(c)(1)(C). The Defendant understands that, if the Court rejects this Agreement, the Court must: (a) inform the parties that the Court rejects the Agreement; (b) advise the Defendant's counsel that the Court is not required to follow the Agreement and afford the Defendant the opportunity to withdraw its plea; and (c) advise the Defendant that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the Defendant than the Agreement contemplated. The Defendant further understands that if the Court refuses to accept any provision of this Agreement, neither party shall be bound by the provisions of the Agreement.

13. **Presentence Report**

The Defendant and the Offices waive the preparation of a Pre-Sentence Investigation Report. The Defendant understands that the decision whether to proceed with the sentencing without a Pre-Sentence Investigation Report is exclusively that of the Court. In the event the Court directs the preparation of a Pre-

Sentence Investigation Report, the Offices will fully inform the preparer of the Pre-Sentence Investigation Report and the Court of the facts and law related to the Defendant's case. At the time of the plea hearing, the parties will suggest mutually agreeable and convenient dates for the sentencing.

14. **Public Statements by the Defendant**

A. The Defendant expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for the Defendant make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Defendant set forth above, contradicting the fact that the Defendant has pled guilty to the charges set forth in the Third Superseding Information, or contradicting the facts described in Exhibit 2. Any such contradictory statement shall, subject to cure rights of the Defendant described below, constitute a breach of this Agreement, and the Defendant thereafter shall be subject to prosecution as set forth in Paragraph 9 of this Agreement. The decision whether any such contradictory statement will be imputed to the Defendant for the purpose of determining whether it has breached this Agreement shall be at the sole discretion of the Offices. If the Offices determine that a public statement by any such person contradicts in whole or in part the fact that the Defendant pled guilty to the charges in the Third Superseding Information or a statement contained in Exhibit 2, the Offices shall so notify the Defendant, and

the Defendant may avoid a breach of this Agreement by publicly repudiating such statement(s) within five business days after notification. The Defendant shall be permitted to raise defenses, to take legal positions and to assert affirmative claims in other proceedings relating to the matters set forth in the Third Superseding Information and Exhibit 2 provided that such defenses and claims do not contradict, in whole or in part, the fact that the Defendant pled guilty to the charges in the Third Superseding Information or a statement in Exhibit 2. This Paragraph does not apply to any statement made by any present or former officer, director, employee, or agent of the Defendant in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of the Defendant.

B. The Defendant agrees that if it or any of its direct or indirect subsidiaries or affiliates issues a press release or holds any press conference in connection with this Agreement, the Defendant shall first consult the Offices to determine (a) whether the text of the release or proposed statements at the press conference are true and accurate with respect to matters between the Offices and the Defendant; and (b) whether the Offices have any objection to the release or statement.

15. **Independent Compliance Monitor**

A. Promptly after the Offices' selection pursuant to Paragraph 15(B) below, the Defendant agrees to retain the Monitor for the term specified in Paragraph 15(C). The Monitor's duties and authority, and the obligations of the Defendant with respect to the Monitor and the Offices, are set forth in Exhibit 3, which is incorporated by reference into this Agreement. The same Monitor shall serve as the Independent Auditor appointed pursuant to Paragraph 27(b) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 CRB (JSC) (N.D. Cal.). No later than the date of execution of this Agreement, and after consultation with the Offices, the Defendant will propose to the Offices a pool of three qualified candidates to serve as the Monitor. If the Offices determine, in their sole discretion, that any of the candidates are not, in fact, qualified to serve as the Monitor, or if the Offices, in their sole discretion, are not satisfied with the candidates proposed, the Offices reserve the right to seek additional nominations from the Defendant. The parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of this Agreement. The Monitor candidates or their team members shall have, at a minimum, the following qualifications:

1. demonstrated expertise with respect to federal anti-fraud and environmental laws, including experience counseling on these issues;

2. experience designing and/or reviewing corporate ethics and compliance programs, including anti-fraud policies, procedures and internal controls;

3. knowledge of automotive or similar industries;

4. the ability to access and deploy resources as necessary to discharge the Monitor's duties as described in the Agreement;

5. sufficient independence from the Defendant to ensure effective and impartial performance of the Monitor's duties as described in the Agreement; and

6. the qualifications set out in Paragraph 27(a) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 CRB (JSC) (N.D. Cal.).

B. The Offices retain the right, in their sole discretion, to choose the Monitor from among the candidates proposed by the Defendant, though the Defendant may express its preference(s) among the candidates. In the event the Offices reject all proposed Monitors, the Defendant shall propose an additional three candidates within twenty (20) business days after receiving notice of the rejection. This process shall continue until a Monitor acceptable to both parties is chosen. The Offices and the Defendant will use their best efforts to complete the selection process within sixty (60) calendar days of the execution of this Agreement. If, during the

term of the monitorship, the Monitor becomes unable to perform his or her obligations as set out herein and in Exhibit 3, or if the Offices in their sole discretion determine that the Monitor cannot fulfill such obligations to the satisfaction of the Offices, the Offices shall notify the Defendant of the release of the Monitor, and the Defendant shall within thirty (30) calendar days of such notice recommend a pool of three qualified Monitor candidates from which the Offices will choose a replacement.

C. The Monitor's term shall be three years from the date on which the Monitor is retained by the Defendant, subject to extension or early termination as described in Paragraph 5. The Monitor's powers, duties, and responsibilities, as well as additional circumstances that may support an extension of the Monitor's term, are set forth in Exhibit 3. The Defendant agrees that it will not employ or be affiliated with the Monitor or the Monitor's firm for a period of not less than two years from the date on which the Monitor's term expires. Nor will the Defendant discuss with the Monitor or the Monitor's firm the possibility of further employment or affiliation during the Monitor's term.

16. **Complete Agreement**

This document states the full extent of the Agreement between the parties. There are no other promises or agreements, express or implied. Any modification of this Agreement shall be valid only if set forth in writing in a supplemental or revised plea agreement signed by all parties.

AGREED:

FOR VOLKSWAGEN AG:

Date: January 11, 2017

By: _____
Manfred Doess
General Counsel of Volkswagen AG

Date: January 11, 2017

By: _____
Reid Weingarten
Jason Weinstein
Christopher Niewoehner
Steptoe & Johnson LLP
Outside counsel for Volkswagen AG

Date: 11 January 2017

By: _____
Aaron R. Marcu
Olivia A. Radin
Linda Martin
Freshfields Bruckhaus Deringer US LLP
Outside counsel for Volkswagen AG

Date: January 11, 2017

By: _____
Robert J. Giuffra, Jr.
Sharon L. Nelles
Brent J. McIntosh
Sullivan & Cromwell LLP
Outside counsel for Volkswagen AG

FOR THE DEPARTMENT OF JUSTICE:

ANDREW WEISSMANN
Chief, Fraud Section
Criminal Division

Date: 1/11/17

By: _____
Benjamin D. Singer
Chief, Securities and Financial Fraud Unit
Gary A. Winters
Alison Anderson
David Fuhr
Trial Attorneys

JOHN CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

Date: 1/11/17

By: _____
Jennifer L. Blackwell
Trial Attorney

BARBARA L. McQUADE
United States Attorney Eastern District of Michigan

Date: 1/11/17

By: _____
John K. Neal
Chief, White Collar Crime Unit

EXHIBIT 1

CERTIFICATE OF CORPORATE RESOLUTIONS

A copy of the executed Certificate of Corporate Resolutions is annexed hereto as "Exhibit 1."

COMPANY OFFICER'S CERTIFICATE

I have read the plea agreement between Volkswagen AG (the "Defendant") and the United States of America, by and through the Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section (the "Agreement") and carefully reviewed every part of it with outside counsel for the Defendant. I understand the terms of the Agreement and voluntarily agree, on behalf of the Defendant, to each of its terms. Before signing the Agreement, I consulted outside counsel for the Defendant. Counsel fully advised me of the rights of the Defendant, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into this Agreement.

I have carefully reviewed the terms of the Agreement with the Management Board and the Supervisory Board. I have advised and caused outside counsel for the Defendant to advise the Management Board and the Supervisory Board fully of the rights of the Defendant, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into the Agreement.

No promises or inducements have been made other than those contained in the Agreement. Furthermore, no one has threatened or forced me, or to my knowledge any person authorizing the Agreement on behalf of the Defendant, in any

way to enter into the Agreement. I am also satisfied with outside counsel's representation in this matter. I certify that I am the General Counsel for the Defendant and that I have been duly authorized by the Defendant to execute the Agreement on behalf of the Defendant.

Date: January 11, 2017

VOLKSWAGEN AG

By: _____
Manfred Doess
General Counsel

Exh. 1-3

CERTIFICATE OF COUNSEL

I am counsel for Volkswagen AG (the "Defendant") in the matter covered by the plea agreement between the Defendant and the United States of America, by and through the Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section (the "Agreement"). In connection with such representation, I have examined relevant documents and have discussed the terms of the Agreement with the Management Board and the Supervisory Board. Based on our review of the foregoing materials and discussions, I am of the opinion that the representative of the Defendant has been duly authorized to enter into the Agreement on behalf of the Defendant and that the Agreement has been duly and validly authorized, executed, and delivered on behalf of the Defendant and is a valid and binding obligation of the Defendant. Further, I have carefully reviewed the terms of the Agreement with the Management Board and the Supervisory Board and the officers of the Defendant. I have fully advised them of the rights of the Defendant, of possible defenses, of the Sentencing Guidelines' provisions and of the consequences of entering into the Agreement. To my knowledge, the decision of the Defendant to enter into the Agreement, based on the authorization of the Management Board, with the consent of the Supervisory Board, is an informed and voluntary one.

Date: January 11, 2017

By: _____
Reid Weingarten
Jason Weinstein
Christopher Niewoehner
Steptoe & Johnson LLP
Counsel to Volkswagen AG

Date: 11 January 2017

By: _____
Aaron R. Marcu
Olivia A. Radin
Linda Martin
Freshfields Bruckhaus Deringer US LLP
Counsel to Volkswagen AG

Date: January 11, 2017

By: _____
Robert J. Giuffra, Jr.
Sharon L. Nelles
Brent J. McIntosh
Sullivan & Cromwell LLP
Counsel for Volkswagen AG

Exh. 1-5

EXHIBIT 2

STATEMENT OF FACTS

The following Statement of Facts is incorporated by reference as part of the Plea Agreement (the "Agreement") between the United States Department of Justice (the "Department") and Volkswagen AG ("VW AG"). VW AG hereby agrees and stipulates that the following information is true and accurate. VW AG admits, accepts, and acknowledges that under U.S. law it is responsible for the acts of its employees set forth in this Statement of Facts, which acts VW AG acknowledges were within the scope of the employees' employment and, at least in part, for the benefit of VW AG. All references to legal terms and emissions standards, to the extent contained herein, should be understood to refer exclusively to applicable U.S. laws and regulations, and such legal terms contained in this Statement of Facts are not intended to apply to, or affect, VW AG's rights or obligations under the laws or regulations of any jurisdiction outside the United States. This Statement of Facts does not contain all of the facts known to the Department or VW AG; the Department's investigation into individuals is ongoing. The following facts took place during the time frame specified in the Third Superseding Information and establish beyond a reasonable doubt the charges set forth in the criminal Information attached to this Agreement:

Relevant Entities and Individuals

1. VW AG was a motor vehicle manufacturer based in Wolfsburg, Germany. Under U.S. law, VW AG acts through its employees, and conduct undertaken by VW AG, as described herein, reflects conduct undertaken by employees. Pursuant to applicable German stock corporation law, VW AG was led by a Management Board that was supervised by a Supervisory Board. Solely for purposes of this Statement of Facts, unless otherwise indicated, references in this Statement of Facts to "supervisors" are to senior employees below the level of the VW AG Management Board.

2. Audi AG ("Audi") was a motor vehicle manufacturer based in Ingolstadt, Germany and a subsidiary approximately 99.55% owned by VW AG. Under U.S. law, Audi AG acts through its employees, and conduct undertaken by Audi AG, as described herein, reflects conduct undertaken by employees.

3. Volkswagen Group of America, Inc. ("VW GOA") was a wholly-owned subsidiary of VW AG based in Herndon, Virginia. Under U.S. law, VW GOA acts through its employees, and conduct undertaken by VW GOA, as described herein, reflects conduct undertaken by employees.

4. VW AG, Audi AG, and VW GOA are collectively referred to herein as "VW."

5. "VW Brand" was an operational unit within VW AG that developed vehicles to be sold under the "Volkswagen" brand name.

6. Company A was an automotive engineering company based in Berlin, Germany, which specialized in software, electronics, and technology support for vehicle manufacturers. VW AG owned fifty percent of Company A's shares and was Company A's largest customer.

7. "Supervisor A," an individual whose identity is known to the United States and VW AG, was the supervisor in charge of Engine Development for all of VW AG from in or about October 2012 to in or about September 2015. From July 2013 to September 2015, Supervisor A also served as the supervisor in charge of Development for VW Brand, where he supervised a group of approximately 10,000 VW AG employees. From in or about October 2011, when he joined VW, until in or about July 2013, Supervisor A served as the supervisor in charge of the VW Brand Engine Development department.

8. "Supervisor B," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2005 to in or about April 2007.

9. "Supervisor C," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2007 to in or about March 2011.

10. "Supervisor D," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about October 2013 to the present.

11. "Supervisor E," an individual whose identity is known to the United States and VW AG, was a supervisor with responsibility for VW AG's Quality Management and Product Safety department who reported to the supervisor in charge of Quality Management from in or about 2007 to in or about October 2014.

12. "Supervisor F," an individual whose identity is known to the United States and VW AG, was a supervisor within the VW Brand Engine Development department from in or about 2003 until in or about December 2012.

13. "Attorney A," an individual whose identity is known to the United States and VW AG, was a German-qualified in-house attorney for VW AG who was the in-house attorney principally responsible for providing legal advice in connection with VW AG's response to U.S. emissions issues from in or about May 2015 to in or about September 2015.

U.S. NOx Emissions Standards

14. The purpose of the Clean Air Act and its implementing regulations was to protect human health and the environment by, among other things, reducing emissions of pollutants from new motor vehicles, including nitrogen oxides ("NOx").

15. The Clean Air Act required the U.S. Environmental Protection Agency ("EPA") to promulgate emissions standards for new motor vehicles. The EPA established standards and test procedures for light-duty motor vehicles sold in the United States, including emission standards for NOx.

16. The Clean Air Act prohibited manufacturers of new motor vehicles from selling, offering for sale, introducing or delivering for introduction into U.S. commerce, or importing (or causing the foregoing with respect to) any new motor vehicle unless the vehicle complied with U.S. emissions standards, including NOx emissions standards, and was issued an EPA certificate of conformity.

17. To obtain a certificate of conformity, a manufacturer was required to submit an application to the EPA for each model year and for each test group of vehicles that it intended to sell in the United States. The application was required to be in writing, to be signed by an authorized representative of the manufacturer, and to include, among other things, the results of testing done pursuant to the published Federal Test Procedures that measure NOx emissions, and a description

of the engine, emissions control system, and fuel system components, including a detailed description of each Auxiliary Emission Control Device ("AECD") to be installed on the vehicle.

18. An AECD was defined under U.S. law as "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." The manufacturer was also required to include a justification for each AECD. If the EPA, in reviewing the application for a certificate of conformity, determined that the AECD "reduced the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use," and that (1) it was not substantially included in the Federal Test Procedure, (2) the need for the AECD was not justified for protection of the vehicle against damage or accident, or (3) it went beyond the requirements of engine starting, the AECD was considered a "defeat device." Whenever the term "defeat device" is used in this Statement of Facts, it refers to a defeat device as defined by U.S. law.

19. The EPA would not certify motor vehicles equipped with defeat devices. Manufacturers could not sell motor vehicles in the United States without a certificate of conformity from the EPA.

20. The California Air Resources Board ("CARB") (together with the EPA, "U.S. regulators") issued its own certificates, called executive orders, for the sale of motor vehicles in the State of California. To obtain such a certificate, the manufacturer was required to satisfy the standards set forth by the State of California, which were equal to or more stringent than those of the EPA.

21. As part of the application for a certification process, manufacturers often worked in parallel with the EPA and CARB. To obtain a certificate of conformity from the EPA, manufacturers were required to demonstrate that the light-duty vehicles were equipped with an on-board diagnostic ("OBD") system capable of monitoring all emissions-related systems or components. Manufacturers could demonstrate compliance with California OBD standards in order to meet federal requirements. CARB reviewed applications from manufacturers, including VW, to determine whether their OBD systems were in compliance with California OBD standards, and CARB's conclusion would be included in the application the manufacturer submitted to the EPA.

22. In 1998, the United States established new federal emissions standards that would be implemented in separate steps, or Tiers. Tier II emissions standards, including for NOx emissions, were significantly stricter than Tier I. For light-duty vehicles, the regulations required manufacturers to begin to phase in compliance with the new, stricter Tier II NOx emissions standards in 2004 and required

manufacturers to fully comply with the stricter standards for model year 2007. These strict U.S. NOx emissions standards were applicable specifically to vehicles in the United States.

VW Diesel Vehicles Sold in the United States

23. In the United States, VW sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused the foregoing actions (collectively, "sold in the United States") the following vehicles containing 2.0 liter diesel engines ("2.0 Liter Subject Vehicles"):

a. Model Year ("MY") 2009-2015 VW Jetta;

b. MY 2009-2014 VW Jetta Sportwagen;

c. MY 2010-2015 VW Golf;

d. MY 2015 VW Golf Sportwagen;

e. MY 2010-2013, 2015 Audi A3;

f. MY 2013-2015 VW Beetle and VW Beetle Convertible; and

g. MY 2012-2015 VW Passat.

24. VW sold in the United States the following vehicles containing 3.0 liter diesel engines ("3.0 Liter Subject Vehicles"):

a. MY 2009-2016 VW Touareg;

b. MY 2009-2015 Audi Q7;

c. MY 2014-2016 Audi A6 Quattro;

d. MY 2014-2016 Audi A7 Quattro;

e. MY 2014-2016 Audi A8L; and

f. MY 2014-2016 Audi Q5.

25. VW GOA's Engineering and Environmental Office ("EEO") was located in Auburn Hills, Michigan, in the Eastern District of Michigan. Among other things, EEO prepared and submitted applications (the "Applications") for a certificate of conformity and an executive order (collectively, "Certificates") to the EPA and CARB to obtain authorization to sell each of the 2.0 Liter Subject Vehicles and 3.0 Liter Subject Vehicles in the United States (collectively, the "Subject Vehicles"). VW GOA's Test Center California performed testing related to the Subject Vehicles.

26. VW AG developed the engines for the 2.0 Liter Subject Vehicles. Audi AG developed the engines for the 3.0 Liter Subject Vehicles and the MY 2013-2016 Porsche Cayenne diesel vehicles sold in the United States (the "Porsche Vehicles").

27. The Applications to the EPA were accompanied by the following signed statement by a VW representative:

> The Volkswagen Group states that any element of design, system, or emission control device installed on or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief,

> cause the emission into the ambient air of pollutants in the operation of its motor vehicles or motor vehicle engines which cause or contribute to an unreasonable risk to public health or welfare except as specifically permitted by the standards prescribed under section 202 of the Clean Air Act. The Volkswagen Group further states that any element of design, system, or emission control device installed or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines, for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause or contribute to an unreasonable risk to public safety.
>
> . . .
>
> All vehicles have been tested in accordance with good engineering practice to ascertain that such test vehicles meet the requirement of this section for the useful life of the vehicle.

28. Based on the representations made by VW employees in the Applications for the Subject Vehicles, EPA and CARB issued Certificates for these vehicles, allowing the Subject Vehicles to be sold in the United States.

29. Upon importing the Subject Vehicles into the United States, VW disclosed to U.S. Customs and Border Protection ("CBP") that the vehicles were covered by valid Certificates by affixing an emissions label to the vehicles' engines. These labels stated that the vehicles conformed to EPA and CARB emissions regulations. VW affixed these labels to each of the Subject Vehicles that it imported into the United States.

30. VW represented to its U.S. customers, U.S. dealers, U.S. regulators and others in the United States that the Subject Vehicles met the new and stricter

U.S. emissions standards identified in paragraph 22 above. Further, VW designed a specific marketing campaign to market these vehicles to U.S. customers as "clean diesel" vehicles.

VW AG's Criminal Conduct

31. From approximately May 2006 to approximately November 2015, VW AG, through Supervisors A-F and other VW employees, agreed to deceive U.S. regulators and U.S. customers about whether the Subject Vehicles and the Porsche Vehicles complied with U.S. emissions standards. During their involvement with design, marketing and/or sale of the Subject Vehicles and the Porsche Vehicles in the United States, Supervisors A-F and other VW employees: (a) knew that the Subject Vehicles and the Porsche Vehicles did not meet U.S. emissions standards; (b) knew that VW was using software to cheat the U.S. testing process by making it appear as if the Subject Vehicles and the Porsche Vehicles met U.S. emissions standards when, in fact, they did not; and (c) attempted to and did conceal these facts from U.S. regulators and U.S. customers.

The 2.0 Liter Defeat Device in the United States

32. In at least in or about 2006, VW AG employees working under the supervision of Supervisors B, C, and F were designing the new EA 189 2.0 liter diesel engine (later known as the Generation 1 or "Gen 1") for use in the United States that would be the cornerstone of a new project to sell passenger diesel

vehicles in the United States. Selling diesel vehicles in the U.S. market was an important strategic goal of VW AG. This project became known within VW as the "US'07" project.

33. Supervisors B, C, and F, and others, however, realized that VW could not design a diesel engine that would both meet the stricter U.S. NOx emissions standards that would become effective in 2007 and attract sufficient customer demand in the U.S. market. Instead of bringing to market a diesel vehicle that could legitimately meet the new, more restrictive U.S. NOx emissions standards, VW AG employees acting at the direction of Supervisors B, C, and F and others, including Company A employees, designed, created, and implemented a software function to detect, evade and defeat U.S. emissions standards.

34. While employees acting at their direction designed and implemented the defeat device software, Supervisors B, C, and F, and others knew that U.S. regulators would measure VW's diesel vehicles' emissions through standard U.S. tests with specific, published drive cycles. VW AG employees acting at the direction of Supervisors B, C, and F, and others designed the VW defeat device to recognize whether the vehicle was undergoing standard U.S. emissions testing on a dynamometer (or "dyno") or whether the vehicle was being driven on the road under normal driving conditions. The defeat device accomplished this by recognizing the standard drive cycles used by U.S. regulators. If the vehicle's

software detected that it was being tested, the vehicle performed in one mode, which satisfied U.S. NOx emissions standards. If the defeat device detected that the vehicle was not being tested, it operated in a different mode, in which the effectiveness of the vehicle's emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NOx, sometimes 35 times higher than U.S. standards.

35. In designing the defeat device, VW engineers borrowed the original concept of the dual-mode, emissions cycle-beating software from Audi. On or about May 17, 2006, a VW engineer, in describing the Audi software, sent an email to employees in the VW Brand Engine Development department that described aspects of the software and cautioned against using it in its current form because it was "pure" cycle-beating, i.e., as a mechanism to detect, evade and defeat U.S. emissions cycles or tests. The VW AG engineer wrote (in German), "within the clearance structure of the pre-fuel injection the acoustic function is nearly always activated within our current US'07-data set. This function is pure [cycle-beating] and can like this absolutely not be used for US'07."

36. Throughout in or around 2006, Supervisor F authorized VW AG engineers to use the defeat device in the development of the US'07 project, despite concerns expressed by certain VW AG employees about the propriety of designing and activating the defeat device software. In or about the fall of 2006, lower level

VW AG engineers, with the support of their supervisors, raised objections to the propriety of the defeat device, and elevated the issue to Supervisor B. During a meeting that occurred in or about November 2006, VW AG employees briefed Supervisor B on the purpose and design of the defeat device. During the meeting, Supervisor B decided that VW should continue with production of the US'07 project with the defeat device, and instructed those in attendance, in sum and substance, not to get caught.

37. Throughout 2007, various technical problems arose with the US'07 project that led to internal discussions and disagreements among members of the VW AG team that was primarily responsible for ensuring vehicles met U.S. emissions standards. Those disagreements over the direction of the project were expressly articulated during a contentious meeting on or about October 5, 2007, over which Supervisor C presided. As a result of the meeting, Supervisor C authorized Supervisor F and his team to proceed with the US'07 project despite knowing that only the use of the defeat device software would enable VW diesel vehicles to pass U.S. emissions tests.

38. Starting with the first model year 2009 of VW's new engine for the 2.0 Liter Subject Vehicles through model year 2016, Supervisors A-D and F, and others, then caused the defeat device software to be installed in the 2.0 Liter Subject Vehicles marketed and sold in the United States.

The 3.0 Liter Defeat Device in the United States

39. Starting in or around 2006, Audi AG engineers designed a 3.0 liter diesel for the U.S. market. The 3.0 liter engine was more powerful than the 2.0 liter engine, and was included in larger and higher-end model vehicles. The 3.0 liter engine was ultimately placed in various Volkswagen, Audi and Porsche diesel vehicles sold in the United States for model years 2009 through 2016. In order to pass U.S. emissions tests, Audi engineers designed and installed software designed to detect, evade and defeat U.S. emissions standards, which constituted a defeat device under U.S. law.

40. Specifically, Audi AG engineers calibrated a defeat device for the 3.0 Liter Subject Vehicles and the Porsche Vehicles that varied injection levels of a solution consisting of urea and water ("AdBlue") into the exhaust gas system based on whether the vehicle was being tested or not, with less NOx reduction occurring during regular driving conditions. In this way, the vehicle consumed less AdBlue, and avoided a corresponding increase in the vehicle's AdBlue tank size, which would have decreased the vehicle's trunk size, and made the vehicle less marketable in the United States. In addition, the vehicle could drive further between service intervals, which was also perceived as important to the vehicle's marketability in the United States.

Certification of VW Diesel Vehicles in the United States

41. VW employees met with the EPA and CARB to seek the certifications required to sell the Subject Vehicles to U.S. customers. During these meetings, some of which Supervisor F attended personally, VW employees misrepresented, and caused to be misrepresented, to the EPA and CARB staff that the Subject Vehicles complied with U.S. NOx emissions standards, when they knew the vehicles did not. During these meetings, VW employees described, and caused to be described, VW's diesel technology and emissions control systems to the EPA and CARB staff in detail but omitted the fact that the engine could not meet U.S. emissions standards without using the defeat device software.

42. Also as part of the certification process for each new model year, Supervisors A-F and others certified, and/or caused to be certified, to the EPA and CARB that the Subject Vehicles met U.S. emissions standards and complied with standards prescribed by the Clean Air Act. Supervisors A-F, and others, knew that if they had told the truth and disclosed the existence of the defeat device, VW would not have obtained the requisite Certificates for the Subject Vehicles and could not have sold any of them in the United States.

Importation of VW Diesel Vehicles in the United States

43. In order to import the Subject Vehicles into the United States, VW was required to disclose to CBP whether the vehicles were covered by valid certificates for the United States. VW did so by affixing a label to the vehicles' engines. VW employees caused to be stated on the labels that the vehicles complied with applicable EPA and CARB emissions regulations and limitations, knowing that if they had disclosed that the Subject Vehicles did not meet U.S. emissions regulations and limitations, VW would not have been able to import the vehicles into the United States. Certain VW employees knew that the labels for the Porsche Vehicles stated that those vehicles complied with EPA and CARB emissions regulations and limitations, when in fact, the VW employees knew they did not.

Marketing of "Clean Diesel" Vehicles in the United States

44. Supervisors A and C and others marketed, and caused to be marketed, the Subject Vehicles to the U.S. public as "clean diesel" and environmentally-friendly, when they knew the Subject Vehicles were intentionally designed to detect, evade and defeat U.S. emissions standards.

45. For example, on or about November 18, 2007, Supervisor C sent an email to Supervisor F and others attaching three photos of himself with

California's then-Governor, which were taken during an event at which Supervisor C promoted the 2.0 Liter Subject Vehicles in the United States as "green diesel."

The Improvement of the 2.0 Liter Defeat Device in the United States

46. Following the launch of the Gen 1 2.0 Liter Subject Vehicles in the United States, Supervisors C and F, and others, worked on a second generation of the vehicle (the "Gen 2"), which also contained software designed to detect, evade and defeat U.S. emissions tests. The Gen 2 2.0 Liter Subject Vehicles were launched in the United States in or around 2011.

47. In or around 2012, hardware failures developed in certain of the 2.0 Liter Subject Vehicles that were being used by customers on the road in the United States. VW AG engineers hypothesized that vehicles equipped with the defeat device stayed in "dyno" mode (i.e., testing mode) even when driven on the road outside of test conditions. Since the 2.0 Liter Subject Vehicles were not designed to be driven for longer periods of time in "dyno" mode, VW AG engineers suspected that the increased stress on the exhaust system from being driven too long in "dyno" mode could be the root cause of the hardware failures.

48. In or around July 2012, engineers from the VW Brand Engine Development department met, in separate meetings, with Supervisors A and E to explain that they suspected that the root cause of the hardware failures in the 2.0 Liter Subject Vehicles was the increased stress on the exhaust system from being

driven too long in "dyno" mode as a result of the use of software designed to detect, evade and defeat U.S. emissions tests. To illustrate the software's function, the engineers used a document. Although they understood the purpose and significance of the software, Supervisors A and E each encouraged the further concealment of the software. Specifically, Supervisors A and E each instructed the engineers who presented the issue to them to destroy the document they had used to illustrate the operation of the defeat device software.

49. VW AG engineers, having informed the supervisor in charge of the VW AG Engine Development department and within the VW AG Quality Management and Product Safety department of the existence and purpose of the defeat device in the 2.0 Liter Subject Vehicles, then sought ways to improve its operation in existing 2.0 Liter Subject Vehicles to avoid the hardware failures. To solve the hardware failures, VW AG engineers decided to start the 2.0 Liter Subject Vehicles in the "street mode" and, when the defeat device recognized that the vehicle was being tested for compliance with U.S. emissions standards, switch to the "dyno mode." To increase the likelihood that the vehicle in fact realized that it was being tested on the dynamometer for compliance with U.S. emissions standards, the VW AG engineers activated a "steering wheel angle recognition" feature. The steering wheel angle recognition interacted with the software by

enabling the vehicle to detect whether it was being tested on a dynamometer (where the steering wheel is not turned), or being driven on the road.

50. Certain VW AG employees again expressed concern, specifically about the expansion of the defeat device through the steering wheel angle detection, and sought approval for the function from more senior supervisors within the VW AG Engine Development department. In particular, VW AG engineers asked Supervisor A for a decision on whether or not to use the proposed function in the 2.0 Liter Subject Vehicles. In or about April 2013, Supervisor A authorized activation of the software underlying the steering wheel angle recognition function. VW employees then installed the new software function in new 2.0 Liter Subject Vehicles being sold in the United States, and later installed it in existing 2.0 Liter Subject Vehicles through software updates during maintenance.

51. VW employees falsely told, and caused others to tell, U.S. regulators, U.S. customers and others in the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Subject Vehicles when, in fact, VW employees knew that the update also used the steering wheel angle of the vehicle as a basis to more easily detect when the vehicle was undergoing emissions tests, thereby improving the defeat device's precision in order to reduce the stress on the emissions control systems.

The Concealment of the Defeat Devices in the United States – 2.0 Liter

52. In or around March 2014, certain VW employees learned of the results of a study undertaken by West Virginia University's Center for Alternative Fuels, Engines and Emissions and commissioned by the International Council on Clean Transportation (the "ICCT study"). The ICCT study identified substantial discrepancies in the NOx emissions from certain 2.0 Liter Subject Vehicles when tested on the road compared to when these vehicles were undergoing EPA and CARB standard drive cycle tests on a dynamometer. The results of the study showed that two of the three vehicles tested on the road, both 2.0 Liter Subject Vehicles, emitted NOx at values of up to approximately 40 times the permissible limit applicable during testing in the United States.

53. Following the ICCT study, CARB, in coordination with the EPA, attempted to work with VW to determine the cause for the higher NOx emissions in the 2.0 Liter Subject Vehicles when being driven on the road as opposed to on the dynamometer undergoing standard emissions test cycles. To do this, CARB, in coordination with the EPA, repeatedly asked VW questions that became increasingly more specific and detailed, as well as conducted additional testing themselves.

54. In response to learning about the results of the ICCT study, engineers in the VW Brand Engine Development department formed an ad hoc task force to

formulate responses to questions that arose from the U.S. regulators. VW AG supervisors, including Supervisors A, D, and E, and others, determined not to disclose to U.S. regulators that the tested vehicle models operated with a defeat device. Instead, Supervisors A, D, and E, and others decided to pursue a strategy of concealing the defeat device in responding to questions from U.S. regulators, while appearing to cooperate.

55. Throughout 2014 and the first half of 2015, Supervisors A, D, and E, and others, continued to offer, and/or cause to be offered, software and hardware "fixes" and explanations to U.S. regulators for the 2.0 Liter Subject Vehicles' higher NOx measurements on the road without revealing the underlying reason – the existence of software designed to detect, evade and defeat U.S. emissions tests.

56. On or about April 28, 2014, members of the VW task force presented the findings of the ICCT study to Supervisor E, whose supervisory responsibility included addressing safety and quality problems in vehicles in production. Included in the presentation was an explanation of the potential financial consequences VW could face if the defeat device was discovered by U.S. regulators, including but not limited to applicable fines per vehicle, which were substantial.

57. On or about May 21, 2014, a VW AG employee sent an email to his supervisor, Supervisor D, and others, describing an "early round meeting" with

Supervisor A, at which emissions issues in North America for the Gen 2 2.0 Liter Subject Vehicles were discussed, and questions were raised about the risk of what could happen and the available options for VW. Supervisor D responded by email that he was in "direct touch" with the supervisor in charge of Quality Management at VW AG and instructed the VW AG employee to "please treat confidentially" the issue.

58. On or about October 1, 2014, VW AG employees presented to CARB regarding the ICCT study results and discrepancies identified in NOx emissions between dynamometer testing and road driving. In response to questions, the VW AG employees did not reveal that the existence of the defeat device was the explanation for the discrepancies in NOx emissions, and, in fact, gave CARB various false reasons for the discrepancies in NOx emissions including driving patterns and technical issues.

59. When U.S. regulators threatened not to certify VW model year 2016 vehicles for sale in the United States, VW AG supervisors requested a briefing on the situation in the United States. On or about July 27, 2015, VW AG employees presented to VW AG supervisors. Supervisors A and D were present, among others.

60. On or about August 5, 2015, in a meeting in Traverse City, Michigan, two VW employees met with a CARB official to discuss again the discrepancies in

emissions of the 2.0 Liter Subject Vehicles. The VW employees did not reveal the existence of the defeat device.

61. On or about August 18, 2015, Supervisors A and D, and others, approved a script to be followed by VW AG employees during an upcoming meeting with CARB in California on or about August 19, 2015. The script provided for continued concealment of the defeat device from CARB in the 2.0 Liter Subject Vehicles, with the goal of obtaining approval to sell the Gen 3 model year 2016 2.0 Liter Subject Vehicles in the United States.

62. On or about August 19, 2015, in a meeting with CARB in El Monte, California, a VW employee explained, for the first time to U.S. regulators and in direct contravention of instructions from supervisors at VW AG, that certain of the 2.0 Liter Subject Vehicles used different emissions treatment depending on whether the vehicles were on the dynamometer or the road, thereby signaling that VW had evaded U.S. emissions tests.

63. On or about September 3, 2015, in a meeting in El Monte, California with CARB and EPA, Supervisor D, while creating the false impression that he had been unaware of the defeat device previously, admitted that VW had installed a defeat device in the 2.0 Liter Subject Vehicles.

64. On or about September 18, 2015, the EPA issued a public Notice of Violation to VW stating that the EPA had determined that VW had violated the

Clean Air Act by manufacturing and installing defeat devices in the 2.0 Liter Subject Vehicles.

The Concealment of the Defeat Devices in the United States – 3.0 Liter

65. On or about January 27, 2015, CARB informed VW AG that CARB would not approve certification of the Model Year 2016 3.0 Liter Subject Vehicles until Audi AG confirmed that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as had been identified by the ICCT study and as were being addressed by VW with the 2.0 Liter Subject Vehicles.

66. On or about March 24, 2015, in response to CARB's questions, Audi AG employees made a presentation to CARB, during which Audi AG employees did not disclose that the Audi 2.0 and 3.0 Liter Subject Vehicles and the Porsche Vehicles in fact contained a defeat device, which caused emissions discrepancies in those vehicles. The Audi AG employees informed CARB that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as the 2.0 Liter Subject Vehicles when, in fact, the 3.0 Liter Subject Vehicles possessed at least one defeat device that interfered with the emissions systems to reduce NOx emissions on the dyno but not on the road. On or about March 25, 2015, CARB, based on the misstatements and omissions made by the Audi AG representatives, issued an executive order approving the sale of Model Year 2016 3.0 Liter Subject Vehicles.

67. On or about November 2, 2015, EPA issued a Notice of Violation to VW AG, Audi AG and Porsche AG, citing violations of the Clean Air Act related to EPA's discovery that the 3.0 Liter Subject Vehicles and the Porsche Vehicles contained a defeat device that resulted in excess NOx emissions when the vehicles were driven on the road.

68. On or about November 2, 2015, VW AG issued a statement that "no software has been installed in the 3-liter V6 diesel power units to alter emissions characteristics in a forbidden manner."

69. On or about November 19, 2015, Audi AG representatives met with EPA and admitted that the 3.0 Liter Subject Vehicles contained at least three undisclosed AECDs. Upon questioning from EPA, Audi AG representatives conceded that one of these three undisclosed AECDs met the criteria of a defeat device under U.S. law.

70. On or about May 16, 2016, Audi AG representatives met with CARB and admitted that there were additional elements within two of its undisclosed AECDs, which impacted the dosing strategy in the 3.0 Liter Subject Vehicles and the Porsche Vehicles.

71. On or about July 19, 2016, in a presentation to CARB, Audi AG representatives conceded that elements of two of its undisclosed AECDs met the definition of a defeat device.

72. Supervisors A-F and others caused defeat device software to be installed on all of the approximately 585,000 Subject Vehicles and the Porsche Vehicles sold in the United States from 2009 through 2015.

Obstruction of Justice

73. As VW employees prepared to admit to U.S. regulators that VW used a "defeat device" in the 2.0 Liter Subject Vehicles, counsel for VW GOA prepared a litigation hold notice to ensure that VW GOA preserved documents relevant to diesel emissions issues. At the same time, VW GOA was in contact with VW AG to discuss VW AG preserving documents relevant to diesel emissions issues. Attorney A made statements that several employees understood as suggesting the destruction of these materials. In anticipation of this hold taking effect at VW AG, certain VW AG employees destroyed documents and files related to U.S. emissions issues that they believed would be covered by the hold. Certain VW AG employees also requested that their counterparts at Company A destroy sensitive documents relating to U.S. emissions issues. Certain Audi AG employees also destroyed documents related to U.S. emissions issues. The VW AG and Audi AG employees who participated in this deletion activity did so to protect both VW and themselves from the legal consequences of their actions.

74. Between the August 19, 2015 and September 3, 2015 meetings with U.S. regulators, certain VW AG employees discussed issues with Attorney A and others.

75. On or about August 26, 2015, VW GOA's legal team sent the text of a litigation hold notice to Attorney A in VW AG's Wolfsburg office that would require recipients to preserve and retain records in their control. The subject of the e-mail was "Legal Hold Notice – Emissions Certification of MY2009-2016 2.0L TDI Volkswagen and Audi vehicles." The VW GOA legal team stated that VW GOA would be issuing the litigation hold notice to certain VW GOA employees the following day. On or about August 28, 2015, Attorney A received notice that VW GOA was issuing that litigation hold notice that day. Attorney A indicated to his staff on August 31 that the hold would be sent out at VW AG on September 1. Among those at VW AG being asked to retain and preserve documents were Supervisors A and D and a number of other VW AG employees.

76. On or about August 27, 2015, Attorney A met with several VW AG engineers to discuss the technology behind the defeat device. Attorney A indicated that a hold was imminent, and that these engineers should check their documents, which multiple participants understood to mean that they should delete documents prior to the hold being issued.

77. On or about August 31, 2015, a meeting was held to prepare for the September 3 presentation to CARB and EPA where VW's use of the defeat device in the United States was to be formally revealed. During the meeting, within hearing of several participants, Attorney A discussed the forthcoming hold and again told the engineers that the hold was imminent and recommended that they check what documents they had. This comment led multiple individuals, including supervisors in the VW Brand Engine Development department at VW AG, to delete documents related to U.S. emissions issues.

78. On or about September 1, 2015, the hold at VW AG was issued. On or about September 1, 2015, several employees in the VW Brand Engine Development department at VW AG discussed the fact that their counterparts at Company A would also possess documents related to U.S. emissions issues. At least two VW AG employees contacted Company A employees and asked them to delete documents relating to U.S. emissions issues.

79. On or about September 3, 2015, Supervisor A approached Supervisor D's assistant, and requested that Supervisor D's assistant search in Supervisor D's office for a hard drive on which documents were stored containing emails of VW AG supervisors, including Supervisor A. Supervisor D's assistant recovered the hard drive and gave it to Supervisor A. Supervisor A later asked his assistant to throw away the hard drive.

80. On or about September 15, 2015, a supervisor within the VW Brand Engine Development department convened a meeting with approximately 30-40 employees, during which Attorney A informed the VW AG employees present about the current situation regarding disclosure of the defeat device in the United States. During this meeting, a VW AG employee asked Attorney A what the employees should do with new documents that were created, because they could be harmful to VW AG. Attorney A indicated that new data should be kept on USB drives and only the final versions saved on VW AG's system, and then, only if "necessary."

81. Even employees who did not attend these meetings, or meet with Attorney A personally, became aware that there had been a recommendation from a VW AG attorney to delete documents related to U.S. emissions issues. Within VW AG and Audi AG, thousands of documents were deleted by approximately 40 VW AG and Audi AG employees.

82. After it began an internal investigation, VW AG was subsequently able to recover many of the deleted documents.

EXHIBIT 3

INDEPENDENT COMPLIANCE MONITOR

The duties and authority of the Independent Compliance Monitor (the "Monitor"), and the obligations of Volkswagen AG, on behalf of itself and its subsidiaries and affiliates other than Porsche AG and Porsche Cars North America (for purposes of this Exhibit 3, the "Defendant" or "Company"), with respect to the Monitor and the United States Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the United States Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section (collectively hereafter, "the Offices"), are as described below. For the avoidance of doubt, the Monitorship described herein does not extend to Porsche AG or Porsche Cars North America.

1. The Company will retain the Monitor for a period of three years (the "Term of the Monitorship"), unless the early termination provision of Paragraph 5(A) of the Plea Agreement (the "Agreement") is triggered.

Monitor's Mandate

2. The Monitor's responsibility is to assess, oversee, and monitor the Company's compliance with the terms of the Agreement, so as to specifically address and reduce the risk of any recurrence of the Company's misconduct, and to oversee the Company's obligations under Section V (Injunctive Relief for VW Defendants) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel"*

Marketing, Sales Practices, and Products Liability Litigation, MDL No. 2672 CRB (JSC) (N.D. Cal.). During the Term of the Monitorship, the Monitor will evaluate, in the manner set forth below, the Company's implementation and enforcement of its compliance and ethics program for the purpose of preventing future criminal fraud and environmental violations by the Company and its affiliates, including, but not limited to, violations related to the conduct giving rise to the Third Superseding Information filed in this matter, and will take such reasonable steps as, in his or her view, may be necessary to fulfill the foregoing mandate (the "Mandate"). This Mandate shall include an assessment of the Board of Management's and senior management's commitment to, and effective implementation of, the Company's corporate compliance and ethics program.

Company's Obligations

3. The Company shall cooperate fully with the Monitor, and the Monitor shall have the authority to take such reasonable steps as, in his or her view, may be necessary to be fully informed about the Company's ethics and compliance program in accordance with the principles set forth herein and applicable law, including applicable environmental, data protection, and labor laws and regulations. To that end, the Company shall: facilitate the Monitor's access to the Company's documents and resources; not limit such access, except as provided in Paragraphs 5-6; and provide guidance on applicable local law (such as relevant data protection and

labor laws). The Company shall provide the Monitor with access to all information, documents, records, facilities, and employees, as reasonably requested by the Monitor, that fall within the scope of the Mandate of the Monitor under the Agreement. The Company shall use its best efforts to provide the Monitor with access to the Company's former employees and its third- party vendors, agents, and consultants.

4. Any disclosure by the Company to the Monitor concerning fraudulent conduct shall not relieve the Company of any otherwise applicable obligation to truthfully disclose such matters to the Offices, pursuant to the Agreement.

Withholding Access

5. The parties agree that no attorney-client relationship shall be formed between the Company and the Monitor. In the event that the Company seeks to withhold from the Monitor access to information, documents, records, facilities, or current or former employees of the Company that may be subject to a claim of attorney-client privilege or to the attorney work-product doctrine, or where the Company reasonably believes production would otherwise be inconsistent with applicable law, the Company shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor consistent with applicable law.

6. If the matter cannot be resolved, at the request of the Monitor, the Company shall promptly provide written notice to the Monitor and the Offices. Such

notice shall include a general description of the nature of the information, documents, records, facilities or current or former employees that are being withheld, as well as the legal basis for withholding access. The Offices may then consider whether to make a further request for access to such information, documents, records, facilities, or employees.

Monitor's Coordination with the Company and Review Methodology

7. In carrying out the Mandate, to the extent appropriate under the circumstances, the Monitor should coordinate with Company personnel, including in-house counsel, compliance personnel, and internal auditors, on an ongoing basis. The Monitor may rely on the product of the Company's processes, such as the results of studies, reviews, sampling and testing methodologies, audits, and analyses conducted by or on behalf of the Company, as well as the Company's internal resources (e.g., legal, compliance, and internal audit), which can assist the Monitor in carrying out the Mandate through increased efficiency and Company- specific expertise, provided that the Monitor has confidence in the quality of those resources.

8. The Monitor's reviews should use a risk-based approach, and thus, the Monitor is not expected to conduct a comprehensive review of all business lines, all business activities, or all markets. In carrying out the Mandate, the Monitor should consider, for instance, risks presented by: (a) organizational structure; (b) training programs or lack thereof; (c) compensation structure; (d) internal auditing

processes; (e) internal investigation procedures; (f) reporting mechanisms; (g) corporate culture; and (h) employee incentives and disincentives.

9. In undertaking the reviews to carry out the Mandate, the Monitor shall formulate conclusions based on, among other things: (a) inspection of relevant documents, including the Company's current anti-fraud and environmental policies and procedures; (b) on-site observation of selected systems and procedures of the Company at sample sites; (c) meetings with, and interviews of, relevant current and, where appropriate, former directors, officers, employees, business partners, agents, and other persons at mutually convenient times and places; and (d) analyses, studies, and testing of the Company's compliance program.

Monitor's Written Work Plans

10. To carry out the Mandate, during the Term of the Monitorship, the Monitor shall conduct an initial review and prepare an initial report, followed by at least two follow-up reviews and reports as described in Paragraphs 16-19 below. With respect to the initial report, after consultation with the Company and the Offices, the Monitor shall prepare the first written work plan within sixty (60) calendar days of being retained, and the Company and the Offices shall provide comments within thirty (30) calendar days after receipt of the written work plan. With respect to each follow-up report, after consultation with the Company and the Offices, the Monitor shall prepare a written work plan at least thirty (30) calendar

days prior to commencing a review, and the Company and the Offices shall provide comments within twenty (20) calendar days after receipt of the written work plan. Any disputes between the Company and the Monitor with respect to any written work plan shall be decided by the Offices in their sole discretion.

11. All written work plans shall identify with reasonable specificity the activities the Monitor plans to undertake in execution of the Mandate, including a written request for documents. The Monitor's work plan for the initial review shall include such steps as are reasonably necessary to conduct an effective initial review in accordance with the Mandate, including by developing an understanding, to the extent the Monitor deems appropriate, of the facts and circumstances surrounding any violations that may have occurred before the date of the Agreement. In developing such understanding the Monitor is to rely to the extent possible on available information and documents provided by the Company. It is not intended that the Monitor will conduct his or her own inquiry into the historical events that gave rise to the Agreement.

Initial Review

12. The initial review shall commence no later than one hundred twenty (120) calendar days from the date of the engagement of the Monitor (unless otherwise agreed by the Company, the Monitor, and the Offices). The Monitor shall issue a written report within one hundred fifty (150) calendar days of commencing

the initial review, setting forth the Monitor's assessment and, if necessary, making recommendations reasonably designed to improve the effectiveness of the Company's program for ensuring compliance with anti-fraud and environmental laws. The Monitor should consult with the Company concerning his or her findings and recommendations on an ongoing basis and should consider the Company's comments and input to the extent the Monitor deems appropriate. The Monitor may also choose to share a draft of his or her reports with the Company prior to finalizing them. The Monitor's reports need not recite or describe comprehensively the Company's history or compliance policies, procedures and practices, but rather may focus on those areas with respect to which the Monitor wishes to make recommendations, if any, for improvement or which the Monitor otherwise concludes merit particular attention. The Monitor shall provide the report to the Management Board of the Company and contemporaneously transmit copies to the Deputy Chief – Securities and Financial Fraud Unit, Fraud Section, Criminal Division, U.S. Department of Justice, at 1400 New York Avenue N.W., Bond Building, Washington, D.C. 20005; Chief, White Collar Crime Unit, United States Attorney's Office, Eastern District of Michigan, 211 W. Fort Street, Suite 2001, Detroit, Michigan 48226; and Deputy Chief, Environmental Crimes Section, U.S. Department of Justice, 601 D Street N.W., Washington D.C. 20530. After consultation with the Company, the Monitor may extend the time period for issuance

of the initial report for a brief period of time with prior written approval of the Offices.

13. Within one hundred fifty (150) calendar days after receiving the Monitor's initial report, the Company shall adopt and implement all recommendations in the report, unless, within sixty (60) calendar days of receiving the report, the Company notifies in writing the Monitor and the Offices of any recommendations that the Company considers unduly burdensome, inconsistent with applicable law or regulation, impractical, excessively expensive, or otherwise inadvisable. With respect to any such recommendation, the Company need not adopt that recommendation within the one hundred fifty (150) calendar days of receiving the report but shall propose in writing to the Monitor and the Offices an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation on which the Company and the Monitor do not agree, such parties shall attempt in good faith to reach an agreement within forty-five (45) calendar days after the Company serves the written notice.

14. In the event the Company and the Monitor are unable to agree on an acceptable alternative proposal, the Company shall promptly consult with the Offices. The Offices may consider the Monitor's recommendation and the Company's reasons for not adopting the recommendation in determining whether the Company has fully complied with its obligations under the Agreement. Pending

such determination, the Company shall not be required to implement any contested recommendation(s).

15. With respect to any recommendation that the Monitor determines cannot reasonably be implemented within one hundred fifty (150) calendar days after receiving the report, the Monitor may extend the time period for implementation with prior written approval of the Offices.

Follow-Up Reviews

16. A follow-up review shall commence no later than one hundred and eighty (180) calendar days after the issuance of the initial report (unless otherwise agreed by the Company, the Monitor and the Offices). The Monitor shall issue a written follow-up report within one hundred twenty (120) calendar days of commencing the follow-up review, setting forth the Monitor's assessment and, if necessary, making recommendations in the same fashion as set forth in Paragraph 12 with respect to the initial review. After consultation with the Company, the Monitor may extend the time period for issuance of the follow-up report for a brief period of time with prior written approval of the Offices.

17. Within one hundred twenty (120) calendar days after receiving the Monitor's follow-up report, the Company shall adopt and implement all recommendations in the report, unless, within thirty (30) calendar days after receiving the report, the Company notifies in writing the Monitor and the Offices

concerning any recommendations that the Company considers unduly burdensome, inconsistent with applicable law or regulation, impractical, excessively expensive, or otherwise inadvisable. With respect to any such recommendation, the Company need not adopt that recommendation within the one hundred twenty (120) calendar days of receiving the report but shall propose in writing to the Monitor and the Offices an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the Company and the Monitor do not agree, such parties shall attempt in good faith to reach an agreement within thirty (30) calendar days after the Company serves the written notice.

18. In the event the Company and the Monitor are unable to agree on an acceptable alternative proposal, the Company shall promptly consult with the Offices. The Offices may consider the Monitor's recommendation and the Company's reasons for not adopting the recommendation in determining whether the Company has fully complied with its obligations under the Agreement. Pending such determination, the Company shall not be required to implement any contested recommendation(s). With respect to any recommendation that the Monitor determines cannot reasonably be implemented within one hundred twenty (120) calendar days after receiving the report, the Monitor may extend the time period for implementation with prior written approval of the Offices.

19. The Monitor shall undertake a second follow-up review not later than one hundred fifty (150) calendar days after the issuance of the first follow-up report. The Monitor shall issue a second follow-up report within one hundred and twenty (120) days of commencing the review, and recommendations shall follow the same procedures described in Paragraphs 16-18. No later than sixty (60) days before the end of the Term, the Monitor shall submit to the Offices a final written report ("Certification Report"), setting forth an overview of the Company's remediation efforts to date, including the implementation status of the Monitor's recommendations, and an assessment of the sustainability of the Company's remediation efforts. No later than thirty (30) days before the end of the Term, the Monitor shall certify whether the Company's compliance program, including its policies and procedures, is reasonably designed and implemented to prevent and detect violations of the anti-fraud and environmental laws.

Monitor's Discovery of Potential or Actual Misconduct

20. (a) Except as set forth below in sub-paragraphs (b), (c) and (d), should the Monitor discover during the course of his or her engagement that:

- any defeat device has been designed, installed, or implemented in any vehicle of any kind manufactured by the Company, and is in use after the date of this Agreement, whether such design, installation or implementation has been accomplished by the Company alone or in

concert with any other person or entity contracting with or working with the Company; or

- the Company has made any materially false statement to any governmental entity, department, agency, or component within the United States, in connection with the certification, sale, offer for sale, importation or introduction of any vehicle or vehicle type

(collectively, "Potential Misconduct"), the Monitor shall immediately report the Potential Misconduct to the Company's General Counsel, Chief Compliance Officer, and/or Audit Committee for further action, unless the Potential Misconduct was already so disclosed. The Monitor also may report Potential Misconduct to the Offices at any time, and shall report Potential Misconduct to the Offices when they request the information.

(b) In some instances, the Monitor should immediately report Potential Misconduct directly to the Offices and not to the Company. The presence of any of the following factors militates in favor of reporting Potential Misconduct directly to the Offices and not to the Company, namely, where the Potential Misconduct: (1) poses a risk to public health or safety or the environment; (2) involves senior management of the Company; (3) involves obstruction of justice; or (4) otherwise poses a substantial risk of harm.

(c) If the Monitor believes that any Potential Misconduct actually occurred or may constitute a criminal or regulatory violation of U.S. law ("Actual Misconduct"), the Monitor shall immediately report the Actual Misconduct to the Offices. When the Monitor discovers Actual Misconduct, the Monitor shall disclose the Actual Misconduct solely to the Offices, and, in such cases, disclosure of the Actual Misconduct to the General Counsel, Chief Compliance Officer, and/or the Audit Committee of the Company should occur as the Offices and the Monitor deem appropriate under the circumstances.

(d) The Monitor shall address in his or her reports the appropriateness of the Company's response to disclosed Potential Misconduct or Actual Misconduct, whether previously disclosed to the Offices or not. Further, if the Company or any entity or person working directly or indirectly for or on behalf of the Company withholds information necessary for the performance of the Monitor's responsibilities and the Monitor believes that such withholding is without just cause, the Monitor shall also immediately disclose that fact to the Offices and address the Company's failure to disclose the necessary information in his or her reports.

(e) Neither the Company nor anyone acting on its behalf shall take any action to retaliate against the Monitor for any such disclosures or for any other reason.

Meetings During Pendency of Monitorship

21. The Monitor shall meet with the Offices within thirty (30) calendar days after providing each report to the Offices to discuss the report, to be followed by a meeting between the Offices, the Monitor, and the Company.

22. At least annually, and more frequently if appropriate, representatives from the Company and the Offices will meet together to discuss the Monitorship and any suggestions, comments, or improvements the Company may wish to discuss with or propose to the Offices, including with respect to the scope or costs of the Monitorship.

Contemplated Confidentiality of Monitor's Reports

23. The reports will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports could discourage cooperation, or impede pending or potential government investigations and thus undermine the objectives of the Monitorship. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the Offices determine in their sole discretion that disclosure would be in furtherance of the Offices' discharge of their duties and responsibilities or is otherwise required by law.

TAB 5

CAUSE NO. D-1-GN-16-000370
(MDL 15-0884)

IN RE VOLKSWAGEN CLEAN DIESEL (TCAA ENFORCEMENT)	§	IN THE DISTRICT COURT
	§	
	§	
	§	TRAVIS COUNTY, TEXAS
TCAA COUNTY CASES	§	
	§	
	§	353rd JUDICIAL DISTRICT
	§	
	§	

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S RESPONSES AND OBJECTIONS TO STATE OF TEXAS'S AND TCAA COUNTY PLAINTIFFS' SECOND SET OF REQUESTS FOR ADMISSIONS AND INTERROGATORIES

COMES NOW, Defendant Volkswagen Group of America, Inc. ("VWGoA") and serves the following Responses and Objections (the "Response") to the State of Texas's and the TCAA County Plaintiffs' (collectively, the "Plaintiffs") Second Set of Requests for Admissions and Interrogatories (the "Requests"). VWGoA reserves its right to supplement this Response as further information may become known to it.

PRELIMINARY STATEMENT

This Response is made with specific regard to the laws of the State of Texas, the Texas Rules of Civil Procedure and the specific facts of this case, and is not applicable to other cases, facts or circumstances, or the rules and laws of any other state or jurisdiction. Counsel for VWGoA has drafted this Response based on the current state of VWGoA's knowledge and information regarding the information Plaintiffs have requested. VWGoA reserves the right to amend, supplement or withdraw this Response or any part thereof. VWGoA is available to meet and confer with respect to this Response, should counsel for Plaintiffs wish to do so. With respect to the Requests for Admissions, except as otherwise specifically set forth in any

particular response, VWGoA can neither admit nor deny the factual allegations set forth in any specific Request for the reasons set forth in the particular response and objection to each such Request.

OBJECTIONS APPLICABLE TO ALL REQUESTS

1. VWGoA objects to the Requests to the extent that they purport to impose burdens or obligations on VWGoA that are broader than, inconsistent with, not authorized by or otherwise impermissible under the Texas Rules of Civil Procedure.

2. This Response is solely in the name of and on behalf of VWGoA. VWGoA objects to the Requests to the extent that they purport to require VWGoA to produce information in the possession, custody or control of VWGoA's parents, affiliates or subsidiaries that have corporate identities separate and apart from those of VWGoA on the grounds that such information is not in VWGoA's possession, custody or control.

3. Irrespective of whether VWGoA provides information in response to any specific Request, VWGoA reserves the right (but does not assume the obligation) to: (i) revise, amend, correct, supplement, clarify or modify the content of this Response in accordance with the Texas Rules of Civil Procedure and court orders; (ii) provide additional responsive information in the future; (iii) object to further discovery in this Action, including discovery relating to the subject matter of information provided in this Response; (iv) use or rely upon any information and documents produced in this Action in any hearing, proceeding or trial; (v) use or rely upon subsequently discovered information or information omitted from this Response as a result of mistake, error, oversight or inadvertence in any hearing, proceeding or trial; and (vi) challenge the authenticity or admissibility of any information or documents in any hearing, proceeding or trial.

4. VWGoA objects to the Requests to the extent that they purport to require VWGoA to conduct anything beyond a reasonable search for information that is reasonably available and in the possession, custody or control of VWGoA.

5. VWGoA further objects to the defined terms "You," "Your" and "VW," and to any Definition, Instruction or Request that incorporates those Definitions, on the ground that such Definitions and any such Definition, Instruction or Request seek information that is in the possession, custody or control of persons or entities other than VWGoA and fail to distinguish between distinct corporate entities (including by failing to distinguish between VWGoA and Volkswagen AG ("VWAG")). VWGoA will construe the terms "You," "Your" and "VW" to mean VWGoA only.

6. VWGoA further objects to the defined term "Recalibration," and to any Definition, Instruction or Request that incorporates that Definition, on the ground that it is overly broad and contains vague and undefined terms, for reasons the parties have previously discussed. VWGoA will construe the term "Recalibration" as referring to those software actions listed in the October 7, 2017 letter from VWGoA's counsel to Plaintiffs' counsel.

7. VWGoA further objects to the defined term "Steering Wheel Angle Recognition," and to any Definition, Instruction or Request that incorporates that Definition, to the extent that it is defined by reference to a plea agreement entered into by a third party. Although VWGoA does not know with certainty, based on VWGoA's review of the Rule 11 Plea Agreement between the United States and non-party VWAG, VWGoA (a) understands that the "Steering Wheel Angle Recognition" feature refers to a portion of the software code included in at least one service action or field fix released in late 2014 and early 2015, and (b) believes that such portion of the software code is contained within one or more of the service actions or field

fixes provided in the list of "Recalibrations" set forth in the October 7, 2017 letter from VWGoA's counsel to Plaintiffs' counsel. VWGoA will therefore construe Requests concerning the Steering Wheel Angle Recognition feature to be coextensive with "Recalibration" for the purpose of these Responses and Objections.

SPECIFIC RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSIONS

1. Admit that the factual allegations set forth in paragraphs 46 through 51 of Exhibit 2 to the VW Plea Agreement are true and correct.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests. VWGoA further objects to this Request on the grounds that it combines six separate Requests for Admissions and asserts them as a single Request for Admission; VWGoA will construe this Request as containing six separate Requests for Admissions and is responding only on that basis. In responding to this request, VWGoA is construing the phrase "VW Plea Agreement" to refer to the Rule 11 Plea Agreement between the United States and non-party VWAG (referred to herein as the "VWAG Plea Agreement").

Subject to and without waiver of these Objections, VWGoA responds as follows:

- VWAG Statement of Facts Paragraph 46: Although VWGoA is not a signatory to the VWAG Plea Agreement or the accompanying Statement of Facts that references Supervisors C and F but without identifying those individuals, VWGoA believes (a) based on the description of Supervisor C in the VWAG Statement of Facts, VWGoA's review of the Second Superseding Indictment filed in the Eastern District of Michigan in *United States* v. *Dorenkamp et al.*, and VWGoA's review of the November 18, 2007 email referenced in Paragraph 45 of the VWAG Statement of Facts, that Supervisor C refers to Jens Hadler, a former employee of VWAG who worked at VWAG's facility in Wolfsburg, Germany; and (b) based on the description of Supervisor F in the VWAG Statement of Facts, as well as VWGoA's review of the Second Superseding Indictment filed in the Eastern District of Michigan in *United States* v. *Dorenkamp et al.*, that Supervisor F refers to Richard Dorenkamp, a former employee of VWAG who worked at VWAG's facility in Wolfsburg, Germany. On that basis, VWGoA confirms the truthfulness and correctness of the facts included in paragraph 46 of the VWAG Statement of Facts.

- VWAG Statement of Facts Paragraph 47: VWGoA confirms that in or around 2012, hardware failures developed in certain of the 2.0 Liter Affected Vehicles that were being used by customers on the road in the United States. VWGoA cannot independently confirm the truthfulness and correctness of the remaining facts included in paragraph 47 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the remaining facts included in paragraph 47 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 48: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 48 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the facts included in paragraph 48 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 49: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 49 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the facts included in paragraph 49 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 50: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 50 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the facts included in paragraph 50 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 51: VWGoA confirms that VWGoA told U.S. regulators, U.S. customers and others in the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Affected Vehicles. VWGoA cannot independently confirm the truthfulness and correctness of the remaining facts included in Paragraph 51 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the remaining facts included in Paragraph 51 of the VWAG Statement of Facts are true and correct.

2. Admit that the Steering Wheel Angle Recognition feature was installed on one or more Existing Affected Vehicles in Texas in or around 2014.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests, including its objection to, and understanding of, the defined term "Steering Wheel Angle Recognition."

Subject to and without waiver of these Objections, VWGoA admits that the Recalibrations listed in response to Interrogatory 1.a, *infra*, were installed on one or more Affected Vehicles in Texas. Based on its understanding that at least one of those Recalibrations included the software code associated with the Steering Wheel Angle Recognition feature, VWGoA admits Request for Admission No. 2.

3. Admit that VW provided information and/or guidance to Texas Dealers on how to implement Recalibrations.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests, including its objection to, and understanding of, the defined terms "Recalibrations" and "VW."

Subject to and without waiver of these objections, VWGoA admits Request for Admission No. 3.

4. Admit that the following factual allegations from the Liang Plea Agreement are true and correct: "LIANG knew that his co-conspirators falsely and fraudulently told U.S. customers and others that a software update in about 2014 was intended to improve the vehicles when, in fact, LIANG and his co-conspirators knew that part of the update was intended to improve the defeat device's precision in order to reduce the stress on the emissions control systems."

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests.

Subject to and without waiver of these Objections, VWGoA states that it is not a signatory to the Plea Agreement entered by James Liang and has not been charged with any criminal offense by the United States. Further, VWGoA does not know the truth or falsity of Mr. Liang's assertions regarding his own knowledge or who the "co-conspirators" referenced in Mr. Liang's Plea Agreement are (or the identity of their employer). Mr. Liang's employment with VWGoA was suspended as of September 9, 2016, the date of his Plea Agreement. VWGoA is nonetheless able to confirm that VWGoA told U.S. customers and others that a software update in or around 2014 was intended to improve the vehicles. With respect to the remaining

assertions, to VWGoA's knowledge Mr. Liang has not explained the basis for them, and VWGoA cannot otherwise admit or deny them.

5. **Admit that the following factual allegations from the Liang Plea Agreement are true and correct: "LIANG knew that his co-conspirators also falsely and fraudulently told U.S. customers, EPA, and CARB that a voluntary recall in or around early 2015 was intended to 'fix' the issues that were causing the discrepancy, when, in fact, LIANG and his co-conspirators knew that although the update lowered the NOx emissions in certain VW diesel vehicles on the road, the update did not remove the defeat device software that was the true reason for the discrepancy."**

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests.

Subject to and without waiver of these Objections, VWGoA states that it is not a signatory to the Plea Agreement entered by James Liang and has not been charged with any criminal offense by the United States. Further, VWGoA does not know the truth or falsity of Mr. Liang's assertions regarding his own knowledge or who the "co-conspirators" referenced in Mr. Liang's Plea Agreement are (or the identity of their employer). Mr. Liang's employment with VWGoA was suspended as of September 9, 2016, the date of his Plea Agreement. VWGoA is nonetheless able to confirm (a) that the EPA and CARB were told that a voluntary recall in or around early 2015 was intended to "fix" the issues that were causing the discrepancy, and (b) based on VWAG's disclosures to EPA and CARB, that the software update did not remove the Defeat Device software that was the true reason for the discrepancy. With respect to the remaining assertions, to VWGoA's knowledge Mr. Liang has not explained the basis for them, and VWGoA cannot otherwise admit or deny them.

SPECIFIC RESPONSES AND OBJECTIONS TO INTERROGATORIES

1. **Please provide the following information concerning the planning for and/or implementation of any Recall or Service Campaign for any Recalibration any portion of which occurred during 2013-2015:**

   a. **the date on which each Recall or Service Campaign commenced and ended;**

b. the number of vehicles in Texas that participated in each Recall or Service Campaign;
c. the model, year and engine type of the vehicles included in each Recall or Service Campaign;
d. the number and location of Texas Dealers that participated in each Recall or Service Campaign;
e. a description of each Recall or Service Campaign, including specifically, 1) how many vehicle owners in Texas were notified of the Recall or Service Campaign, 2) the type of Recalibration made in the Recall or Service Campaign, 3) the reasons for the Recall or Service Campaign, and 4) how the Recalibration impacted the emission control system and performance of the vehicle.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests, including its objections to, and understanding of, the defined term "Recalibration." VWGoA further objects to this Interrogatory on the grounds that it combines eight separate interrogatories and asserts them as a single interrogatory; VWGoA will construe Interrogatory No. 1 as containing eight separate interrogatories and is responding only on that basis. VWGoA further objects to this Interrogatory to the extent that it seeks information that VWGoA does not maintain in the ordinary course of its business and is therefore unduly burdensome. VWGoA will construe the terms "Recall" and "Service Campaign" to mean only those Recalls and Service Campaigns related to "Recalibrations," as defined above. VWGoA further objects to the request in Interrogatory 1.a for the date on which each Recall or Service Campaign "ended" as vague and ambiguous. VWGoA will construe "ended" to mean, according to VWGoA's reasonably available records, the last date on which an Affected Vehicle in Texas received the particular Recalibration (the "Campaign End Date"). VWGoA further objects to the request in Interrogatory 1.e(2) for "the type of Recalibration made in the Recall or Service Campaign" as vague and ambiguous. VWGoA will construe Interrogatory 1.e(2) as requesting a short description of the Recall or Service Campaign based on VWGoA's records kept in the ordinary course of its business.

Subject to and without waiving its objections, in response to Interrogatory 1.a and Interrogatory 1.c, VWGoA states the following:

Campaign Code Designations	*Model, Model Year, Engine Type*	*Campaign Release Date*	*Campaign End Date*
FF_AV2.0U5N_10_14* FF_BV2.0U5N_09_14* FF_CV2.0U5N_08_14* FF_DV2.0U5N_05_14* FF_EV2.0U5N_02_14* 23O6 23N4	2012-14 Passat, 2010-14 Beetle, Jetta, Golf, Jetta SportWagen, Golf Wagen, Audi A3 with 2.0L TDI engines (EA 189)	December 16, 2014; April 7, 2015	October 31, 2016; October 18, 2016
FF_CV2.0U4S_05_14* FF_DV2.0U4S_05_14* FF_EV2.0U4S_02_14* 23N5 FF_CV2.0U4S_05_14 (R01)*	2015 Passat, Jetta, Beetle, Golf, Golf Sportwagen with 2.0L TDI engines (EA 288)	November 26, 2014; December 16, 2014; Revised April 17, 2015	October 18, 2016

In response to Interrogatory 1.b, VWGoA states that, according to its records, 15,115 Affected Vehicles in Texas had the 23O6 Service Action performed, 486 Affected Vehicles in Texas had the 23N4 Service Action performed, and 7,715 Affected Vehicles in Texas had the 23N5 Service Action performed. VWGoA states that although it keeps records of which vehicles received Service Action software updates, it is unable to reliably provide an accurate count of the number of vehicles that received the field fix software updates indicated with an asterisk above due to the method by which records are kept regarding software versions that are initially introduced as field fixes and which, as here, later form the basis of a recall service campaign.

In response to Interrogatory 1.d, VWGoA states that the following 60 dealers in Texas applied the updated software from one or more of the Service Actions to one or more of the Affected Vehicles:

Ancira Volkswagen 6125 Bandera Road San Antonio, TX 78238	Ancira Volkswagen of Laredo 2701 Bob Bullock Loop Laredo, TX 78045	Archer Volkswagen 10400 Southwest Freeway Houston, TX 77074

Autobahn Volkswagen 3000 White Settlement Road Fort Worth, TX 76107	Automax Volkswagen 3301 East Central Texas Expressway Killeen, TX 76543	Autonation Volkswagen Park Cities 5555 Lemmon Ave Dallas, TX 75209
Autonation Volkswagen Richardson 300 North Central Expressway Richardson, TX 75080	Bobby Beck's Lewisville Volkswagen 893 South Stemmons Freeway Lewisville, TX 75067	Bobby Beck's McKinney Volkswagen 3600 South Central Expressway McKinney, TX 75070
Brazos Valley Volkswagen 3100 Briarcrest Dr Bryan, TX 77802	Clay Cooley Volkswagen of Park Cities 5555 Lemmon Avenue Dallas, TX 75209	Clay Cooley Volkswagen of Richardson 300 North Central Expressway Richardson, TX 75080
Crown Motor Company Volkswagen 4716 Troup Highway Tyler, TX 75703	Dallas-Fort Worth Auto Auction 12101 Trinity Boulevard Euless, TX 76040	DeMontrond Automotive Group, Inc. 14101 North Freeway Houston, TX 77090
Garlyn Shelton Imports 5700 SW H. K. Dodgen Loop Temple, TX 76504	Garlyn Shelton Volkswagen 5508 S General Bruce Dr Temple, TX 76502	Gene Messer Volkswagen 7007 University Ave Lubbock, TX 79413
Gorman McCracken Volkswagen 800 E State Highway 31 Longview, TX 75601	Hendrick Volkswagen Frisco 5010 State Hwy 121 Frisco, TX 75034	Herb Easley Motors Inc. 1125 Central E Freeway Wichita Falls, TX 76306
Hewlett Volkswagen 7951 Hewlett Loop Road Georgetown, TX 78626	Hoy Volkswagen of El Paso 1122 Airway Boulevard El Paso, TX 79925	Maund Automotive Group 6900 Burnet Road Austin, TX 78757
Metro Volkswagen 2035 W Airport Freeway Irving, TX 75062	Momentum Volkswagen 2405 Richmond Ave Houston, TX 77098	Momentum Volkswagen of Jersey Village 19550 Northwest Freeway Houston , TX 77065
Momentum Volkswagen of Clear Lake 15100 Gulf Freeway Houston, TX 77034	North Park Volkswagen 21315 Interstate Highway 10 San Antonio, TX 78257	Onion Creek Volkswagen 10812 South IH 35 Austin, TX 78748

Orr Volkswagen of Texarkana 4545 North Stateline Avenue Texarkana, TX 75503	Patterson Volkswagen of Tyler 3800 Chandler Highway Tyler, TX 75702	Payne Mission 2003 E Expressway 83 Mission, TX 78572
Payne Volkswagen 4017 North Expressway Brownsville, TX 78520	Randy Hiley Volkswagen of Arlington 1461 East Interstate 20 Arlington, TX 76018	Rudolph Volkswagen of El Paso 5505 S Desert Blvd El Paso, TX 79932
Rusty Wallis Volkswagen 12635 LBJ Freeway Garland, TX 75041	Sewell Volkswagen of Midland-Odessa 5021 West Loop 250 North Midland, TX 79703	SouthWest Volkswagen of Weatherford 2951 Fort Worth Highway Weatherford, TX 76087
Street Volkswagen of Amarillo 8707 Pilgrim Drive Amarillo, TX 79119	Volkswagen of Abilene 1350 South Clack Street Abilene, TX 79605	Volkswagen of Alamo Heights 1402 Northeast Loop 410 San Antonio, TX 78209
Volkswagen of Beaumont 1515 Interstate 10 South Beaumont, TX 77701	Volkswagen of Corpus Christi 6902 S Padre Island Dr Corpus Christi, TX 78412	Volkswagen of Midland-Odessa 5021 Loop 250 Frontage Rd Midland, TX 79707
Volkswagen of the Woodlands 16785 Interstate 45 S The Woodlands, TX 77385	West Houston Volkswagen 17113 Katy Freeway Houston, TX 77094	Audi Central Houston 2120 Southwest Freeway Houston, TX 77098
Audi Dallas 5033 Lemmon Avenue Dallas, TX 75209	Audi El Paso 1444 Airway Boulevard El Paso, TX 79925	Audi Fort Worth 116 University Drive Fort Worth, TX 76107
Audi Grapevine 1260 East State Highway 114 Grapevine, TX76051	Audi North Austin 12971 Pond Springs Road Austin, TX 78729	Audi North Houston 17815 North Freeway Houston, TX 77090
Audi Plano 5930 West Plano Parkway Plano, TX 75093	Audi San Juan 1001 East Expressway 83 San Juan, TX 78589	Audi South Austin 4738 IH-35 South Austin, TX 78745
Audi West Houston 15865 Katy Freeway Houston, TX 77094	Cavendar Audi 15447 IH-10 W San Antonio, TX 78249	VCI Manheim Dallas Fort Worth Auction 12101 Trinity Boulevard Euless, TX 76040

In response to Interrogatory 1.e(1), VWGoA states that 20,178 owners and lessees of Affected Vehicles in Texas were notified of the availability of the 23O6 Service Action, 727 owners or lessees of Affected Vehicles in Texas were notified of the availability of the 23N4 Service Action, and 7,993 owners or lessees of Affected Vehicles in Texas were notified of the availability of the 23N5 Service Action. Based on its records, VWGoA does not believe that any owners or lessees of Affected Vehicles in Texas were notified of the remaining field fixes.

In response to Interrogatory 1.e(2), VWGoA states that according to its records, and based on information provided at the time by VWAG, VWGoA described the Recalibrations to federal and California regulators as follows:

Campaign Code Designations	*Description of Software Update*
FF_AV2.0U5N_10_14 FF_BV2.0U5N_09_14 FF_CV2.0U5N_08_14 FF_DV2.0U5N_05_14 FF_EV2.0U5N_02_14 23O6 23N4	**Event:** 1. The previously implemented PM loading model (Ref. FF CV2.0U5N_07 14) may cause the malfunctions P0401 and P2463. 2. The current NOx storage catalyst (NSC) strategy may not be sufficient under dynamic and transient engine speed and load conditions and might cause high on-road NOx emissions. **Analysis:** 1. Improvements have been made with regard to the PM filter loading/ regeneration model. The updated software incorporates the latest engineering experiences to enhance the accuracy of the PM filter model. The implemented changes do not have a negative impact on the Kl-factor determination or influence the on-road performance of the vehicle. 2. Improvements have been made with regard to NSC strategy. The updated software incorporates the latest engineering experiences to enhance the efficiency of the NSC system. On road NOx emissions will be decreased by: • DeNOx frequency increased, decreased NOx loading will mitigate the impact of incomplete DeNOx operation. • Lower loading level of NOx storage catalyst leads to lower desorption rate during rich engine operation. • DeNOx strategy allowed on higher temperature levels. Thermal

	desorption will be avoided. **Activities:** Improved ECM software has been developed and will be available for service. It includes no summary table changes.
FF_CV2.0U4S_05_14 FF_DV2.0U4S_05_14 FF_EV2.0U4S_02_14 23N5 FF_CV2.0U4S_05_14 (R01)	**Event:** 1. Customers may notice noise coming from the turbocharger with MIL on and P0299 (turbocharger under boost fault) stored in the fault memory. 2. The previously implemented PM loading model may cause the malfunctions P0401 and P2463. 3. The current urea dosing strategy may not be sufficient under dynamic and transient engine speed and load conditions and might cause high on-road NOx emissions. **Analysis:** 1. The turbo charger bearing might experience high friction due to insufficient lubrication after engine cold start caused by high oil viscosity and low oil supply at cold ambient conditions. The boost pressure is limited for the engine warm-up phase. This ensures a reduction of forces on the bearing until lubrication of the turbocharger bearing is sufficient. 2. Improvements have been made with regard to the PM filter loading/regeneration model. The updated software incorporates the latest engineering experiences to enhance the accuracy of the PM filter model. The implemented changes do not have a negative impact on the Kl-factor determination or influence the on-road performance of the vehicle. 3. Improvements have been made ensuring a higher Ammonia filling level of the SCR catalyst. This ensures that the SCR catalyst is more robust against NOx peaks caused by dynamic and transient speed/load changes. The new software incorporates the latest engineering experiences to enhance the efficiency of the SCR system. The change in the after-treatment strategy has no negative impact on the fuel consumption and urea refill intervals for the majority of customers. **Activities:** Improved ECM software has been developed and will be available for service. It includes no summary table changes.

In response to Interrogatory 1.e(3), VWGoA states that it did not design either the engines at issue or the software that was installed as part of the above-referenced Service Actions and did not know the full purpose of this software at the time it initiated these Service Actions. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that one of the reasons the Service Actions were performed was to address certain hardware failures in the 2.0 Liter Affected Vehicles, as described more fully in paragraphs 47 to 51 of the VWAG Statement of Facts. VWGoA further responds to Interrogatory 1.e(3) by referring Plaintiffs to VWGoA's answer to Interrogatory 1.e(2), *supra*, which lists the reasons VWGoA provided to its federal and California regulators for the Service Actions and which VWGoA understood at the time to be the reasons for the Service Actions.

In response to Interrogatory 1.e (4), VWGoA objects to this interrogatory as vague and ambiguous. It is unclear what Plaintiff is requesting. VWGoA is willing to meet and confer to discuss this Interrogatory further.

2. Please provide the following information concerning the Steering Wheel Angle Recognition feature:

a. the reason(s) for installing the Steering Wheel Angle Recognition feature;
b. a description of how the Steering Wheel Angle Recognition feature altered the emissions control systems of Affected Vehicles;
c. the number of Existing Affected Vehicles in Texas on which You installed or caused to be installed the Steering Wheel Angle Recognition feature;
d. the number and location of Texas Dealers that participated in the installation of the Steering Wheel Angle Recognition feature on Existing Affected Vehicles.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests, including its objection to, and understanding of, the defined term "Steering Wheel Angle Recognition." VWGoA further objects to the phrase "altered the emissions control systems" in Interrogatory 2.b as vague and ambiguous. VWGoA further objects to this Interrogatory on the grounds that it combines four separate interrogatories and asserts them as a single interrogatory;

VWGoA will construe Interrogatory No. 2 as containing four separate interrogatories and is responding only on that basis.

Subject to and without waiver of these Objections, in response to Interrogatory 2.a, VWGoA states that it did not design either the engines at issue or the software referred to as the Steering Wheel Angle Recognition feature and did not know about the Steering Wheel Angle Recognition feature or its purpose at the time it was installed in any Affected Vehicles. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the Steering Wheel Angle Recognition feature was installed to address certain hardware failures in the 2.0 liter Affected Vehicles, as described more fully in paragraphs 47 to 51 of the VWAG Statement of Facts.

In response to Interrogatory 2.b, VWGoA states that it did not design either the engines at issue or the Steering Wheel Angle Recognition feature, and did not know about the Steering Wheel Angle Recognition Feature (or its purpose) at the time it was installed in any Affected Vehicles. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands, but cannot independently confirm, that the Steering Wheel Angle Recognition feature enabled the vehicle to better detect whether it was being tested on a dynamometer or being driven on the road.

In response to Interrogatory 2.c and Interrogatory 2.d, VWGoA refers Plaintiffs to its objection to the definition of "Steering Wheel Angle Recognition" in paragraph 4, *supra*, and further states that it believes, but is not certain, that at least one of the Recalibrations included the software code associated with the Steering Wheel Angle Recognition feature. VWGoA is not aware of the precise number of Affected Vehicles in Texas that received a Service Action that included the Steering Wheel Angle Recognition feature, or which dealers in Texas performed a

Service Action that included the Steering Wheel Angle Recognition feature. Without admitting that each of the Recalibrations listed in response to Interrogatory 1.a contained the Steering Wheel Angle Recognition feature, VWGoA states that 15,115 Affected Vehicles in Texas had the 23O6 Service Action performed, 486 Affected Vehicles in Texas had the 23N4 Service Action performed, and 7,715 Affected Vehicles in Texas had the 23N5 Service Action performed. VWGoA also respectfully refers Plaintiffs to VWGoA's response to Interrogatory 1.d, which lists those Texas dealers that performed a Recalibration.

3. Please provide the following information concerning James Robert Liang's employment at Volkswagen Group of America, Inc.:

a. The start and end dates and reason(s) for termination of Mr. Liang's employment at Volkswagen Group of America, Inc.;
b. The position or positions held by Mr. Liang during his employment at Volkswagen Group of America, Inc.;
c. All individuals who managed, supervised or oversaw Mr. Liang's work during his employment at Volkswagen Group of America, Inc.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests. VWGoA further objects to this Interrogatory on the grounds that it combines three separate interrogatories and asserts them as a single interrogatory; VWGoA will construe Interrogatory No. 3 as containing three separate interrogatories and is responding only on that basis.

Subject to and without waiving the foregoing objections, in response to Interrogatory 3.a, VWGoA states that Mr. Liang was employed by VWAG from 1983 until May 2008, and worked there as a Development Engineer. In May of 2008, Mr. Liang began working at VWGoA as a Foreign Service Employee. Mr. Liang's employment with VWGoA was suspended on September 9, 2016, the date of his plea agreement.

In response to Interrogatory 3.b, VWGoA states that Mr. Liang held the position of Leader of Diesel Competence at VWGoA.

In response to Interrogatory 3.c, and pursuant to Texas Rule of Civil Procedure 197.2(c), VWGoA refers Plaintiffs to the organizational charts that have been produced in this action at VW-MDL2672-01682476, VW-MDL2672-02604254, VW-MDL2672-09437387, and VW-MDL2672-12868461. VWGoA understands based on its investigation since the NOVs and substantial deposition testimony that the individuals who actually supervised and oversaw Mr. Liang's work on a day-to-day basis were employed by VWAG, not VWGoA.

Respectfully submitted,
/s/ C. Vernon Hartline, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by email in compliance with the Texas Rules of Civil Procedure on October 9th, 2017 on the following counsel of record.

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C. VERNON HARTLINE, JR.

TAB 6

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - x

IN RE: VOLKSWAGEN "CLEAN :

DIESEL" LITIGATION :

SHELBY ZELONIS, :

Plaintiff, : COORDINATED CASE NO.

v. : CL-2016-9917

VOLKSWAGEN GROUP, : CA No. CL-2015-13746

OF AMERICA, INC., :

Defendant. :

- - - - - - - - - - - - - - x

Videotaped Deposition of STUART JOHNSON

McLean, Virginia

Tuesday, August 8, 2017

9:09 a.m.

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Job No.: 336239

Pages 1 through 407

Reported by: Cassandra E. Ellis, RPR

1 this point?
2 A No, I would say, not. It
3 wasn't an issue, it wasn't an emergency
4 in -- at this point in time, regarding
5 room in the port. I would say that our
6 sales people, such as Mr. Horn, were, you
7 know, very interested and -- and wanted
8 us to get an approval for 2016. Not so
9 much that the ports were filled, just
10 that he wanted to sell cars.
11 Q Did you feel like you were
12 facing pressure from upper management to
13 solve this issue?
14 A Yes. I would say that's a fair
15 statement.
16 Q And would you agree with me
17 that part of the reason that the
18 additional admission about the vehicle
19 speed versus time logic, that was made on
20 August 19th, that one of the primary
21 reasons for that admission was to attempt
22 to get CARB to go ahead and certify the

1 2016 model year?
2 A I would say, yes. That's the
3 first time we actually at the August 19th
4 meeting, where we had some of CARBs
5 technical staff in the room that we
6 actually got some questions.
7 So that's when there -- the
8 question was raised, well, you're telling
9 us what you're doing, but you're not
10 telling us how you're doing it.
11 Q And at that point in time, you
12 all went ahead and told them how you were
13 doing it?
14 A Yes.
15 Q And the reason was to try to
16 get the 2016 certified; right?
17 MR. STEINBERG: Objection,
18 misstates his testimony,
19 argumentative.
20 A That was part of the reason,
21 yes.
22 Q Because that was in the

1 company's financial best interests;
2 right?
3 A Correct.
4 (Exhibit No. 24 was marked
5 for identification.)
6 BY MR. MELKERSEN:
7 Q I've handed you what's been
8 marked as Exhibit 24 to your deposition.
9 A Yep.
10 Q Do you recognize this document?
11 A Yes, I do.
12 Q What is this?
13 A This is an e-mail exchange
14 between Oliver Schmidt and me regarding
15 status of the ARB decision on 2016, and
16 then some personal interaction, as well.
17 Q If you could look down at the
18 e-mail dated August 21st, 2015, written
19 from you to Oliver Schmidt at 6:15 p.m.,
20 can you read that, please?
21 A Where is it?
22 Q At the bottom of the front

1 page?
2 A At bottom of the front page?
3 Q "We shook hands and" --
4 A Oh, okay. Right here. So,
5 yeah, I had -- I had mentioned to --
6 yeah, obviously after -- since this or
7 before this, I -- I talked to Alberto
8 Ayala. So after the August 19th meeting,
9 I -- I was attending this Asilomar
10 Conference in Monterey.
11 So we split up, you know,
12 the -- the Germans flew back to Germany
13 and I went back up to Monterey.
14 The next morning, I -- or next
15 afternoon, it was afternoon before I got
16 ahold of Annette. I called Annette
17 Hebert, I asked her if she had talked to
18 her staff.
19 She said, no, she hadn't yet.
20 So they -- she had no news of what
21 happened the day before.
22 So I told her that

TAB 7

CAUSE NO. D-1-GN-16-000370

IN RE:	
VOLKSWAGEN CLEAN	IN THE DISTRICT COURT
DIESEL LITIGATION:	TRAVIS COUNTY, TEXAS
TCAA ENFORCEMENT	353RD JUDICIAL DISTRICT
CASES	
ALL ACTIONS	

Video Deposition of STUART JOHNSON,

Corporate Representative for Volkswagen Group of America, Inc.

Taken at 3001 West Big Beaver Road, Suite 600

Troy, Michigan

Commencing at 9:07 a.m.

Wednesday, October 4, 2017

Before Denise M. Kizy, RPR, CRR, CSR-2466

1 **Q. Germany doesn't sign those documents;**
2 **right?**
3 A. That's correct, they don't.
4 **Q. Volkswagen Group of America signs**
5 **those documents?**
6 A. That is correct.
7 **Q. And it is Volkswagen Group of America**
8 **who is making the representations to the**
9 **governmental agencies that are contained in**
10 **those documents; correct?**
11 MR. MONAHAN: Objection; asked and
12 answered.
13 THE WITNESS: Excuse me?
14 MR. MONAHAN: I said objection; asked
15 and answered.
16 THE WITNESS: Yes, that's correct.
17 We submit the documents.
18 **BY MS. BECKMAN:**
19 **Q. And it's also Volkswagen Group of**
20 **America who is responsible for implementing the**
21 **field fixes in the field --**
22 MR. MONAHAN: Objection.
23 **Q. -- the authorized dealers?**
24 MR. MONAHAN: Can I have that back?
25 THE WITNESS: If it's a software

1 update, the software comes from VWAG Germany.
2 **BY MS. BECKMAN:**
3 **Q. And -- go ahead.**
4 A. And it's implemented by the service
5 department at Volkswagen Group of America.
6 **Q. And we're going to be looking at some**
7 **documents that relate to field fixes, including**
8 **communications with dealers about alterations to**
9 **the vehicles, but is it Volkswagen Group of**
10 **America who communicates to the dealers in**
11 **America what the field fixes involve and what**
12 **they need to do?**
13 A. Yes.
14 **Q. And if it is necessary to notify the**
15 **customers as part of the field fix or a service**
16 **campaign or a recall, is it also Volkswagen**
17 **Group of America who notifies the customers?**
18 A. Yes, that's correct.
19 **Q. What is an AECD?**
20 A. It's an auxiliary emission control
21 device.
22 **Q. And in your industry, how do you**
23 **refer to those? As AECDs?**
24 A. Yes.
25 **Q. So if I say AECD, we'll understand it**

1 **Q. In what way?**
2 A. The recall campaigns that were
3 implemented in late 2014 and early 2015 had
4 software in the -- the software package that was
5 making the corrections listed in these campaign
6 reports also added a steering wheel angle
7 function to the defeat device.
8 **Q. And the steering wheel angle function**
9 **was designed to do what, as you understand it?**
10 A. As I understand it today, the
11 steering wheel angle function was implemented to
12 make sure the vehicle when operated on the road
13 would stay in what was called the road
14 calibration.
15 **Q. And it would do that by recognizing**
16 **that the steering wheel was actually turning**
17 **while the wheels were turning?**
18 A. Yes, the assumption being that if the
19 steering wheel is being turned, the vehicle is
20 actually being driven on the street.
21 **Q. And the steering wheel recognition**
22 **feature was added as part of which field fix for**
23 **the 2012 Passat?**
24 A. It was added as part of the recall
25 campaign, the four-digit number, which I can't

1 **document that goes with recall campaign for the**
2 **2012 Passat; right?**
3 A. Right.
4 **Q. And when we look at the event, what**
5 **was Volkswagen of America telling the EPA and**
6 **CARB with regard to the problem that was**
7 **necessitating the software change?**
8 A. In the case of this vehicle, which
9 was a Passat, we were telling the agencies that
10 we were going to fix three problems.
11 One, we were going to make software
12 changes to protect the turbo charger, because we
13 were experiencing turbo charger failures; two,
14 we were going to make corrections to what we
15 call the PM model, which is a model used by the
16 control system to judge how much soot loading is
17 occurring with the particulate filter, because
18 we were experiencing particulate filter
19 failures; and, three, we were going to implement
20 software that would improve what's called the
21 real world NOx emissions of the vehicle, to
22 improve the way the vehicle performed on the
23 street with regards to NOx emissions.
24 **Q. And, specifically, you were going to**
25 **change the dosing strategy?**

1 A. Correct.
2 **Q. So that there would be more dosing of**
3 **urea that would neutralize the NOx?**
4 A. At least as it was presented to the
5 agencies in the fall of 2014, our VWAG
6 colleagues stated that they were going to change
7 the temperature range when dosing occurred and
8 that they were going to dose in smaller levels,
9 but more often to ensure that the catalyst had
10 the proper amount of DEF fluid in the catalyst.
11 They were acknowledging that there would be some
12 increase in the amount of dosing, but not a
13 significant amount.
14 **Q. Which one of these proposed problems**
15 **that comes with a proposed change included the**
16 **steering wheel recognition software?**
17 MR. MONAHAN: Foundation.
18 THE WITNESS: I think the steering
19 wheel angle function was added in addition to
20 these three.
21 **BY MS. BECKMAN:**
22 **Q. So you don't think that the code was**
23 **tacked onto these three changes, you think it**
24 **was something that just kind of snuck in there?**
25 A. It was in the same -- it was in the

software code, but I think it's an additional change on top of these three.

Q. And it is an additional change, obviously, that was not disclosed to any governmental agency?

A. That is correct.

Q. Was a version of that software flashed to any vehicles prior to these recall campaigns?

A. Our understanding, Volkswagen Group of America's understanding now, you know, given the documentation we've been exposed to after the fact, it indicates that the steering wheel angle was flashed into production vehicles at the start of the 2014 model year.

VIDEO TECHNICIAN: We need to go off the record at 10:28:24.

(Recess taken at 10:28 a.m.)

(Back on the record at 10:29 a.m.)

VIDEO TECHNICIAN: Okay. We are now back on the record. The time is 10:29:30 a.m.

BY MS. BECKMAN:

Q. Before we had that whatever this is called, a microphone, a microphone malfunction, we were talking about the flashing of the

1 Volkswagen of America does not have that
2 capability.
3 **Q. Volkswagen of America, no one in**
4 **Volkswagen of America has that capability?**
5 A. I would make an exception for Mr.
6 James Liang, but other than that, I don't
7 believe Volkswagen of America has any other
8 personnel that had that capability.
9 **Q. And so Volkswagen of America has not**
10 **gone back to see if any of the prior software**
11 **flashes before November of 2014 also**
12 **incorporated the steering wheel recognition**
13 **feature?**
14 A. That is correct.
15 **Q. Mr. Liang was a Volkswagen of America**
16 **employee, was he not, during a certain period of**
17 **time?**
18 A. He -- yes. He originally came as a
19 field service engineer.
20 **Q. In what year, please?**
21 A. 2008.
22 **Q. And did he work as a Volkswagen of**
23 **America employee from 2008 through 2015?**
24 A. Yes, he did.
25 **Q. Did he develop new software for these**

1 **vehicles here in the United States at a**
2 **Volkswagen of America facility?**
3 A. I believe he for the most part
4 reported still directly to his Volkswagen AG
5 colleagues and worked with them to develop
6 software.
7 **Q. Object to responsiveness.**
8 **Did he, he, Mr. Liang, work here in**
9 **the United States at Volkswagen Group of America**
10 **facilities, and as a Volkswagen Group of America**
11 **employee, to develop software to make changes to**
12 **these vehicle emission systems?**
13 A. I would say yes.
14 **Q. And Mr. Liang would have had the**
15 **ability between 2008 and 2015 to dig deep into**
16 **the software and recognize anything that was**
17 **going to change the emissions control system or**
18 **change the way it was monitored?**
19 MR. MONAHAN: Objection.
20 THE WITNESS: I would say Volkswagen
21 of America believes Mr. Liang has that
22 capability.
23 **BY MS. BECKMAN:**
24 **Q. Did anyone ever to your knowledge at**
25 **Volkswagen Group of America ask Mr. Liang to dig**

Do you remember that?

A. No, I don't recall that.

Q. Okay. Was there a change made to these vehicles after they were sold in the United States -- well, backtrack.

When the defeat device software was first added to the vehicles, and I'm talking about the software that recognized whether the vehicle was in test mode versus road mode, did the vehicles originally start in test mode?

A. Yes.

Q. Was that changed at some point in time so the vehicle started in road mode?

A. Yes.

Q. When was that change made?

MR. MONAHAN: For which cars?

MS. BECKMAN: Well, all of them.

BY MS. BECKMAN:

Q. So we can start with whichever model year and whichever vehicle you'd like to.

A. And I don't recollect that, but I may have to -- I have some documents I could maybe refer to.

Q. Go ahead.

A. Okay. Maybe I'll do that.

1 MR. MONAHAN: I think to help on this
2 one, it might be useful if the court reporter
3 read back the question and answer that we just
4 talked about.
5 MS. BECKMAN: Why don't you wait and
6 do that when you have the chance to question
7 him, because I'd rather not go back and do that.
8 **BY MS. BECKMAN:**
9 **Q. Is there another clarification?**
10 A. There's another clarification.
11 Just to make sure, you had asked if
12 there were any software updates that changed the
13 strategy of the car starting in test mode or
14 road mode.
15 **Q. Correct. I did.**
16 A. And I thought you were asking if
17 there were any software updates prior to the
18 fall of 2014 or spring of 2015 updates.
19 So in that case the answer is no, but
20 the November 2014 and the spring of 2015 recalls
21 did, in fact, reverse the strategy such that the
22 car started in road mode.
23 **Q. Okay. So let's talk about that for a**
24 **few minutes.**
25 **As I understand the issue, the cars**

1 **were originally programmed to start up in test**
2 **mode, and some of them were staying in test**
3 **mode, which was very hard on the hardware of the**
4 **car parts; right?**
5 A. That is correct.
6 **Q. And so part of this change to the**
7 **software that was made in late 2014 and earlier**
8 **2015, was to tell the cars to start in road mode**
9 **rather than test mode; correct?**
10 A. Correct.
11 **Q. And that was a different change, an**
12 **independent change, from telling the cars to**
13 **recognize the steering wheel angle, to know**
14 **whether to be in test mode or road mode; right?**
15 MR. MONAHAN: Objection.
16 THE WITNESS: I'm not sure I would
17 say it was a different change or an independent
18 change, but it was implemented at the same time.
19 **BY MS. BECKMAN:**
20 **Q. I understand those two things were**
21 **implemented at the same time --**
22 A. Yes.
23 **Q. -- but they actually do two different**
24 **things; right? One is telling the vehicle what**
25 **mode to start in?**

1 Q. This appears to be a form of a letter
2 that would go out to customers who own 2012
3 through 2014 model year Volkswagen Passats with
4 2-liter TI; is that right?
5 A. Yes.
6 Q. So this is the customer letter that
7 would have gone out to customers in Texas?
8 A. Correct.
9 Q. If you look down at the -- and,
10 again, this is a letter drafted by Volkswagen
11 Group of America; right?
12 A. That is correct.
13 Q. If you look down to "What is the
14 issue, and what will we do?" you're telling the
15 customer what you think the issue is and what
16 this fix is going to do; correct?
17 A. Yes.
18 Q. It states in paragraph two:
19 "In addition, the vehicle engine's
20 management software has been improved to
21 assure your vehicle's tailpipe emissions are
22 optimized and operating efficiently, well
23 beyond given governmental standard."
24 That wasn't true; was it? That
25 statement wasn't true?

1 A. Knowing the information we know now,
2 it is not true.
3 **Q. Isn't it Volkswagen Group of**
4 **America's position that that statement was never**
5 **going to be true?**
6 A. No.
7 **Q. There was never a way to make those**
8 **vehicles compliant as designed?**
9 A. No. We felt like the fix would
10 improve the emissions, such that the agencies
11 would be satisfied.
12 **Q. Well, that's not what you're**
13 **representing to the customers, though.**
14 **You're saying that these fixes you**
15 **were doing as part of the recall would make**
16 **these cars operate well beyond given**
17 **governmental standards, which to me means that**
18 **we're going to meet and beat government**
19 **standards; right?**
20 A. Yes, yes.
21 **Q. And those vehicles didn't do that as**
22 **part of this fix?**
23 A. I would dispute that. I think they
24 did --
25 **Q. Okay.**

1 **Q. Okay. So what we're going to do**
2 **today is walk through it. I can give you a**
3 **couple minutes if you want to glance through and**
4 **just kind of familiarize yourself with contents,**
5 **and then look up and give me a wink when you're**
6 **done doing that.**
7 MR. MONAHAN: I'm going to lodge a
8 scope objection on this document.
9 THE WITNESS: Okay.
10 **BY MS. DINUNZIO:**
11 **Q. Okay. I'm going to represent to you**
12 **that this is an Importer Agreement between**
13 **Volkswagen Aktiengesellschaft and Volkswagen of**
14 **America, Inc., as it was produced in this Clean**
15 **Diesel Litigation.**
16 **If you would walk through me with the**
17 **document to page four, please, of the document.**
18 A. Okay.
19 **Q. And do you see on page four where**
20 **Volkswagen AG is identified as a manufacturer of**
21 **high quality products?**
22 A. Yes.
23 **Q. Okay. And on that same page, do you**
24 **see where Volkswagen Group of America is**
25 **identified as the importer, distributor and**

1 **marketer of Volkswagen vehicles and other**
2 **Volkswagen products in the U.S.?**
3 A. Yes, I do see that.
4 **Q. Thank you.**
5 **And page four further states that**
6 **Volkswagen AG and Volkswagen Group of America**
7 **desire to continue their contractual**
8 **relationship based upon mutual understanding,**
9 **cooperation, trust, and confidence; correct?**
10 A. Yes, that is correct.
11 **Q. Let's turn to page seven of the**
12 **document. The numbers are on the top.**
13 A. Yes.
14 **Q. Okay. And on page seven, do you see**
15 **Article 6, Advice and Assistance?**
16 A. Yes.
17 **Q. And do you see subpart A of that**
18 **article?**
19 A. I do.
20 **Q. And that states that Volkswagen AG**
21 **may supply Volkswagen Group of America with,**
22 **among other materials, service and parts**
23 **documentation, literature and organizational**
24 **materials; correct?**
25 A. Correct.

1 A. That's correct.
2 MS. DINUNZIO: Page 43, which, Bill,
3 will be Bates 151.
4 **BY MS. DINUNZIO:**
5 **Q. So these amendments, amongst others,**
6 **were executed by Volkswagen AG and Volkswagen**
7 **Group of America on August 1st of 2011; correct?**
8 A. Correct. That's what the document
9 says.
10 MR. MONAHAN: Scope objection.
11 **BY MS. DINUNZIO:**
12 **Q. Okay. Was that fun, because we're**
13 **done with it?**
14 A. Okay.
15 **Q. A verbal affirmation of the funness**
16 **of that all would be appreciated.**
17 **Okay. Just a couple questions on**
18 **James Liang.**
19 A. Mm-hmm.
20 **Q. I believe the testimony was that he**
21 **worked for Volkswagen Group of America from 2008**
22 **through September of 2016; is that correct?**
23 A. That's correct.
24 **Q. Okay. What is James Liang's current**
25 **status with Volkswagen Group of America?**

A. His current status is that he is still employed, but suspended.

Q. Is he receiving a salary?

MR. MONAHAN: Outside the scope.

THE WITNESS: That I do not know.

BY MS. DINUNZIO:

Q. So he has not been terminated?

A. That is correct, he has not been terminated.

Q. Why not?

MR. MONAHAN: Outside the scope.

THE WITNESS: My understanding is that Volkswagen Group of America did not terminate Mr. Liang as a measure to cooperate with the Department of Justice.

BY MS. DINUNZIO:

Q. Can you tell me -- I don't know what that means. What does that mean?

MR. MONAHAN: Outside the scope.

THE WITNESS: It means that if he was terminated he may have immediately been deported, and he would have left the country, and the fact that he is suspended was a cooperative effort with the Department of Justice to have James remain in the country.

1 **BY MS. DINUNZIO:**
2 **Q. Okay. And he is -- he has**
3 **currently -- his status is that he has pled**
4 **guilty to the crimes -- some of the crimes with**
5 **which he was charged; is that correct?**
6 A. That is correct.
7 **Q. Okay. And so he already had a**
8 **sentencing hearing; is that correct?**
9 A. That is correct.
10 **Q. Okay. And did anybody express that**
11 **if he wasn't immediately taken into custody, he**
12 **may leave the country at those hearings, if**
13 **you're aware?**
14 MR. MONAHAN: Objection; scope.
15 THE WITNESS: That I am not aware of.
16 **BY MS. DINUNZIO:**
17 **Q. But he is still here in the United**
18 **States?**
19 A. He is, yes.
20 **Q. And do you know whether Volkswagen**
21 **Group of America is in any way covering the**
22 **legal costs related to James Liang's legal**
23 **troubles related to the VW Clean Diesel legal**
24 **action?**
25 MR. MONAHAN: Outside the scope.

1 THE WITNESS: And that I do not know.
2 **BY MS. DINUNZIO:**
3 **Q. Who would know that at Volkswagen**
4 **Group of America?**
5 A. I would -- I would suggest that the
6 legal office of Volkswagen Group of America
7 would know, and I would suggest that Mr. David
8 Detweiler, who is chief counsel, would be able
9 to answer that question.
10 **Q. Thank you.**
11 **And so James Liang's job title --**
12 **because he's still employed; correct?**
13 A. Yes, he is still an employee.
14 MR. MONAHAN: Asked and answered.
15 **BY MS. DINUNZIO:**
16 **Q. Okay. So does he --**
17 MR. MONAHAN: Asked and answered.
18 MS. DINUNZIO: Sorry about that.
19 **BY MS. DINUNZIO:**
20 **Q. So does he still have the same title**
21 **that he did?**
22 MR. MONAHAN: Outside the scope.
23 THE WITNESS: I believe, yes, he does
24 have the same title.
25 **BY MS. DINUNZIO:**

1 **Q. And that title is?**
2 A. I'm not positive, but I believe he's
3 called a specialist, salary grade 9.
4 **Q. Okay. So his job title was**
5 **specialist, salary grade 9, as far as you're**
6 **aware?**
7 A. As far as I'm aware.
8 MR. MONAHAN: Outside the scope.
9 THE WITNESS: Yes.
10 **BY MS. DINUNZIO:**
11 **Q. And are you aware that -- did you --**
12 **I'm sorry, I missed this part.**
13 **Did you have an opportunity to read**
14 **through the responses of Volkswagen Group of**
15 **America to the interrogatories that were**
16 **propounded and discussed here today at this**
17 **deposition?**
18 A. Yes, I did.
19 **Q. Okay. And are you aware that**
20 **Volkswagen Group of America responded to the**
21 **discovery by indicating that James Liang's job**
22 **title was leader of diesel competence?**
23 A. Okay. I'm sorry. Then that -- that
24 is correct.
25 **Q. That rings some bells?**

1 A. Yes.

2 **Q. Do you know what does the leader of**

3 **diesel competence do?**

4 A. Well, James Liang joined Volkswagen

5 of America in 2008. As described to the company

6 when he joined, he was here to help with the

7 launch of the TDI products.

8 He was very -- he was characterized

9 as being involved in the software development of

10 those vehicles, and, therefore, had a very deep

11 knowledge of the vehicles, and that he was here

12 to make sure the launch of the vehicles went

13 smoothly, and that he was here to help with

14 field problems, if any field problems came up

15 with those cars, and it was the understanding of

16 Volkswagen of America that that was a temporary

17 assignment, that he would be here on a --

18 generally he's an FSE, field service engineer we

19 call them, where he came over under a three-year

20 contract, but he ultimately stayed all the way

21 through 2015, 2016.

22 **Q. Do you know why he stayed longer than**

23 **his three-year contract?**

24 MR. MONAHAN: Scope.

25 THE WITNESS: I do not know exactly

1 why, but the company's understanding is that he
2 was going to just continue to assist with field
3 problems with the 2-liter TDI vehicles.
4 **BY MS. DINUNZIO:**
5 **Q. Tell me about all the actions of**
6 **which Volkswagen Group of America is aware that**
7 **James Liang would have taken with the**
8 **development of the software update that was the**
9 **recall 2306.**
10 A. So Volkswagen of America has had
11 access to e-mails, and with Mr. Liang
12 interacting with VWAG colleagues, it appears
13 that Mr. Liang was involved in the testing of
14 the software, and involved in implementing the
15 software, you know, approving a final level of
16 software that would be used in the recall
17 campaign.
18 **Q. Can you give me a little bit more**
19 **detail? You say it appears that he was**
20 **involved.**
21 A. Yes. So we have -- the company has
22 seen the e-mail strings where there's discussion
23 about DPF failures. There's discussion about PM
24 loading. There's discussion about the acoustic
25 function. There's discussions about

1 implementing the steering wheel fix or
2 improvement or enhancement.
3 **Q. And do you know whether those e-mails**
4 **have been produced in this litigation?**
5 A. I do not know.
6 **Q. Who would know?**
7 MS. DINUNZIO: You would, Bill? Oh,
8 how great. Okay. Good.
9 **BY MS. DINUNZIO:**
10 **Q. Let's see. Did James Liang play any**
11 **role in the development of the information that**
12 **was provided to the regulatory agencies**
13 **regarding the recall action 23O6?**
14 MR. MONAHAN: Objection; vague.
15 THE WITNESS: I do not believe -- the
16 company does not believe that he was involved in
17 those discussions.
18 **BY MS. DINUNZIO:**
19 **Q. I'm going to ask the same question**
20 **about James Liang. Tell me about all the**
21 **actions of which Volkswagen Group of America is**
22 **aware that James Liang would have taken in the**
23 **development of recall action 23N4.**
24 A. That's the recall action as spelled
25 out in the Exhibit 1, if I'm not mistaken.

1 I believe he would have had the same
2 role. He would have been interacting with VWAG
3 colleagues in diesel development, he would have
4 been testing the proposed software, and he would
5 have been involved in the same discussions about
6 the test recognition strategy, the steering
7 wheel angle and so on.
8 **Q. Are you aware of any other OEM that**
9 **has been caught using a steering angle --**
10 **steering wheel angle recognition feature as a**
11 **defeat device in one of their vehicles?**
12 MR. MONAHAN: Scope.
13 THE WITNESS: No, I'm not aware of
14 that.
15 **BY MS. DINUNZIO:**
16 **Q. Okay. Same question for James Liang**
17 **with regard to 23N5. Tell me all of the actions**
18 **that James Liang would have taken that**
19 **Volkswagen Group of America is aware of in the**
20 **development of that recall action.**
21 A. I would say it's essentially the same
22 answer; that he would have been involved in
23 testing the software, coming to a final
24 calibration that would be used in the soft -- in
25 the campaign, and, once again, he was involved

in the development and the implementation of the steering wheel angle.

Q. When you say testing the recall, what kind of testing is typically done of a recall that involves a software update of this nature?

A. Well, in the case of those software campaigns in late 2014 and early 2015, the software would have been tested on a dynamometer on the certification tests, but the software was also tested with a PEMS device over the road.

Q. And who has those test results?

A. Those test results to my knowledge are part of -- are with VWAG.

Q. Have those test results been provided to the regulatory agencies, EPA and CARB?

A. The results were presented to them in a presentation in October of 2014. I don't think they were presented any detailed results, just the conclusions.

Q. And did they get a document or did they get a presentation that they could review and --

A. They got a PowerPoint presentation with conclusions.

Q. And so the PowerPoint, was that

1 **the amount of the time that the vehicle would**
2 **operate in the road mode?**
3 A. I would say yes.
4 **Q. Okay. And the effect of the road**
5 **mode would be to reduce or disable some of the**
6 **functioning of the vehicle's emission control**
7 **systems?**
8 MR. MONAHAN: Objection; compound.
9 Object to disable.
10 THE WITNESS: Essentially, yes. You
11 know, there were two softwares. So road
12 software in simplistic terms is low PM, high
13 NOx. Test software is low NOx, high PM.
14 And the desire on the part of our
15 diesel development colleagues in VWAG was to
16 have this low PM software on the road to ensure
17 the durability of the diesel particulate filter.
18 **BY MS. DINUNZIO:**
19 **Q. Why was the diesel particulate filter**
20 **so important?**
21 A. Well, you needed it to pass the
22 particulate standards. There is a standard, and
23 at the time it was 10 milligrams per mile.
24 It was essential to meet those
25 standards, and what's come out from all this

1 discussion is that the engineers were not able
2 to come up with a single calibration that
3 balanced the NOx and the PM emissions, such that
4 the PM filter could live over the life of the
5 vehicle. It just couldn't do it. There was
6 just too much, too much PM loading, if the NOx
7 emissions were kept lower.
8 It's kind of a tradeoff between those
9 two. You can have one or the other for
10 engine-out emissions, but not both.
11 **Q. And the effect of the dialing back of**
12 **the emissions control systems, though, the**
13 **effect on the tailpipe-out NOx emissions would**
14 **be that they would increase?**
15 A. On the road, yes.
16 **Q. Okay. So you had talked earlier**
17 **about overloading the PM filter could cause**
18 **during regen events too high of a temperature**
19 **that would cause that filter to crack; is that**
20 **correct?**
21 A. Yes.
22 **Q. Okay. I am so impressed with myself**
23 **for remembering that. Are you likewise?**
24 **So the filter cracks, so what? You**
25 **replace it; right? What's the big deal?**

A. Well, right. That could be an outcome. So the filter would crack, the OBD system would recognize that with the pressure sensors that there's something wrong with the filter, and the light would come on, and then you would replace the filter.

Q. Okay.

A. But you don't -- it's an expensive part, and if they're breaking a lot, obviously, you don't want to keep doing that.

Q. How expensive are they, do you know?

A. No, I don't know, but it's -- I would -- I would estimate at least over a thousand dollars.

Q. What?

A. Yeah.

Q. What are they made of, gold?

A. It's a ceramic substrate canned in a stainless steel container. Every other -- it's a -- it's got a square substrate and every other square is plugged, so the exhaust gas goes in one side, has to travel through the wall of the ceramic, and then out the opposite holes at the other end.

Q. Did you say over a thousand dollars?

1 A. Yes.
2 **Q. Okay. And so would that be a part**
3 **that would be typically covered for some period**
4 **of time by a warranty?**
5 A. Yes.
6 **Q. Okay. I know what I'm asking for for**
7 **Christmas now, diesel particulate filters.**
8 **Okay. Let's see. When did**
9 **Volkswagen Group of America first suspect, if it**
10 **did, that the recall campaigns it had instituted**
11 **to address the excess on-road NOx emissions in**
12 **2014 and 2015, didn't fully address those excess**
13 **on-road NOx emissions?**
14 A. I would say that that was -- started
15 with the July 8th meeting, and then there were
16 several conversations that happened with the
17 agencies through August.
18 Then August 19th, we had an in-person
19 meeting with CARB again where we presented
20 additional information, and at that time there
21 was a -- I would say a more official admission
22 of a defeat device on the vehicle.
23 **Q. Okay. We've been talking about**
24 **hiring someone at Volkswagen Group of America**
25 **who would be able to interrogate --**

1 Ms. Reporter.
2 **BY MR. MONAHAN:**
3 **Q. Mr. Johnson, anything you'd like to**
4 **clarify about that answer.**
5 A. So, yes. In my answer I talk about
6 the steering wheel angle and the switching of
7 the start mode from road -- or from dyno to road
8 as implementing a defeat device, and I would
9 characterize it as enhancements that were added
10 to the existing defeat device.
11 **Q. When you were referring to an**
12 **existing defeat device, are you referring to**
13 **defeat device that was included in the cars at**
14 **production?**
15 A. Yes.
16 **Q. Okay. No further questions.**
17 **RE-EXAMINATION**
18 **BY MS. BECKMAN:**
19 **Q. I have a few follow-up questions for**
20 **you.**
21 A. Sure.
22 **Q. You were talking just now along the**
23 **same lines of adding the steering wheel**
24 **recognition feature.**
25 A. Mm-hmm.

1 **Q. And what we were calling the**
2 **start/stop, where you switched the car from**
3 **starting in test mode to starting in road mode;**
4 **right?**
5 A. Yes.
6 **Q. These were both added as part of the**
7 **recall software in late 2014, earlier 2015?**
8 A. That is correct.
9 **Q. The steering wheel recognition**
10 **feature device did not lower emissions; did it?**
11 **It had nothing to do with lowering emissions?**
12 A. That is correct.
13 **Q. In fact, it was designed to do the**
14 **opposite; it was designed to help the car stay**
15 **in road mode?**
16 MR. MONAHAN: Objection; compound.
17 THE WITNESS: Yes, that is correct.
18 **BY MS. BECKMAN:**
19 **Q. Same thing with the start/stop**
20 **device, it had nothing to do with lowering**
21 **emissions?**
22 A. That is correct.
23 **Q. It instead would help the car to**
24 **operate more frequently in road mode than in**
25 **test mode?**

1 A. That is correct.
2 **Q. And after all of that software was**
3 **added, the car still did not perform as well on**
4 **the road as they did in test mode as far as**
5 **emissions; did they?**
6 A. That's correct.
7 **Q. And according to the EPA, they still**
8 **did not meet regulations as far as emissions?**
9 A. They did not meet the regulations --
10 they did not meet the standards that are
11 published for the FTP cycle.
12 **Q. Which are the regulations that the**
13 **EPA uses and what they're trying to test for;**
14 **right?**
15 A. Only when they run the car on an FTP.
16 **Q. But, again, and we had this**
17 **discussion, that's their way of trying to**
18 **simulate how a vehicle is going to emit on the**
19 **road?**
20 MR. MONAHAN: Asked and answered.
21 THE WITNESS: Yes.
22 **BY MS. BECKMAN:**
23 **Q. I had asked you earlier about a**
24 **portion of your deposition that you gave in**
25 **August. I'm now going to hand it to you,**

1 **Volkswagen Group of America did, in fact,**
2 **disclose the steering wheel angle function to**
3 **EPA in the summer of 2015; is that correct?**
4 MR. MONAHAN: Misstates testimony.
5 THE WITNESS: No. The steering angle
6 function was revealed to the agencies in a
7 meeting on September 3rd, 2015.
8 **BY MS. DINUNZIO:**
9 **Q. Okay. And the start function, when**
10 **was that first disclosed?**
11 A. The same time.
12 **Q. And this is despite the fact that in**
13 **the original documents that were submitted to**
14 **the EPA for approval of the recall, it was not**
15 **disclosed that the steering wheel angle**
16 **recognition feature was part of the software**
17 **update; is that correct?**
18 A. That's correct.
19 **Q. And same question for the start**
20 **function: Also not disclosed in those original**
21 **documents to the EPA?**
22 MR. MONAHAN: Objection to the extent
23 that Ms. DiNunzio's questions assume knowledge
24 at the time.
25 You could answer.

1 THE WITNESS: Yes, that's correct.
2 **BY MS. DINUNZIO:**
3 **Q. Okay. So the fixes that we've been**
4 **talking about earlier today that were approved**
5 **by the EPA for these vehicles --**
6 A. Yes.
7 **Q. -- do they include the original**
8 **defeat device, which I believe was a vehicle**
9 **speed integration over time defeat device, do**
10 **they include that defeat device, the fixes?**
11 MR. MONAHAN: Objection; vague.
12 THE WITNESS: Yes, they do.
13 **BY MS. DINUNZIO:**
14 **Q. Okay. So the vehicle speed**
15 **integration over time is part of the fix that**
16 **the EPA has approved for the TDI vehicles?**
17 MR. MONAHAN: Vague.
18 THE WITNESS: It was in the original
19 software when the vehicle was manufactured new,
20 and it was not removed when the recall software
21 was implemented in November of 2014 or in April
22 of 2015.
23 **BY MS. DINUNZIO:**
24 **Q. Okay. I'm sorry. I'm unclear on my**
25 **question.**

1 **I'm asking about the fixes that we**
2 **were talking about that were approved this year**
3 **post-settlement.**
4 A. Oh, I'm sorry. I thought you were
5 still --
6 **Q. No, no, my fault.**
7 A. No, no. Yeah.
8 **Q. So let me ask the question again.**
9 **The fixes that were approved by the**
10 **EPA, post-settlement with the government, for**
11 **the TDI vehicles that are out there on the road**
12 **today, do those vehicles -- do those fixes for**
13 **those vehicles, do they include the defeat**
14 **device which is the original defeat device, the**
15 **vehicle speed integration over time?**
16 A. No. That's been completely
17 eliminated and written out of the software code.
18 MR. MONAHAN: Object to the term
19 "original defeat device."
20 **BY MS. DINUNZIO:**
21 **Q. Okay. And do the fixes approved by**
22 **the EPA for these TDI vehicles, post-settlement,**
23 **include the steering wheel angle recognition**
24 **feature --**
25 A. No.

1 **Q. -- defeat device?**
2 A. No, it does not.
3 **Q. They do not?**
4 MR. MONAHAN: Objection. Objection
5 to that little thing she added at the end there.
6 THE WITNESS: No, it does not.
7 **BY MS. DINUNZIO:**
8 **Q. Okay. And do the fixes approved by**
9 **the EPA for these TDI vehicles, post-settlement,**
10 **include the start function defeat device --**
11 MR. MONAHAN: Objection.
12 **BY MS. DINUNZIO:**
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TAB 8

CAUSE NO. D-1-GN-16-000370

IN RE VOLKSWAGEN CLEAN DIESEL LITIGATION: TCAA ENFORCEMENT CASES	§	IN THE DISTRICT COURT
THE STATE OF TEXAS,	§	
Plaintiff,	§	
AND	§	
TRAVIS COUNTY, TEXAS,	§	
Plaintiff Intervenor,	§	TRAVIS COUNTY, TEXAS
v.	§	
VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI OF AMERICA, LLC,	§	
Defendants.	§	
TRAVIS COUNTY, TEXAS (TRAVIS COUNTY CAUSE NUMBER D-1-GN-15-004513)	§	353rd JUDICIAL DISTRICT

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S THIRD AMENDED RESPONSES AND OBJECTIONS TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

COMES NOW, Defendant Volkswagen Group of America, Inc. ("VWGoA") and serves the following Third Amended Responses and Objections to Plaintiff's Requests for Admissions pursuant to Rule 198 of the Texas Rules of Civil Procedure.[1]

[1] Given Judge Sulak's ruling at the December 2, 2016 hearing, VWGoA is serving these Third Amended Responses and Objections, but is doing so without waiver of its argument, as outlined in its Motion to Enforce Automatic Stay on file with the Court of Appeals for the Third Judicial District, that the automatic stay of the above-captioned action is currently in effect. VWGoA reserves all of its arguments, including its arguments on appeal, with respect to the automatic stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by email in compliance with the Texas Rules of Civil Procedure on January 9th, 2017 on the following counsel of record.

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PRELIMINARY STATEMENT

These responses to Plaintiff's Requests for Admission ("Requests") are made with specific regard to the laws of the State of Texas, the Texas Rules of Civil Procedure and the specific facts of this case and are not applicable to other cases, facts or circumstances, or the rules and laws of any other state or jurisdiction concerning discovery or theories of causes of action.

Counsel for VWGoA has drafted these responses based upon the current state of VWGoA's knowledge and/or information regarding the information Plaintiff has requested. VWGoA's discovery, investigation and analysis of this matter are continuing. VWGoA reserves the right to amend, supplement or withdraw these responses or any part thereof.

VWGoA is available to meet and confer with respect to these responses, should counsel for Plaintiff wish to do so.

OBJECTIONS APPLICABLE TO ALL REQUESTS

1. VWGoA objects to the Requests to the extent that they purport to require VWGoA to conduct anything beyond a reasonable search for information that is reasonably available.

2. VWGoA further objects to the defined terms "You," "Your," and "VW," and to any Definition, Instruction or Request that incorporates those Definitions, on the ground that such Definitions and any such Definition, Instruction, or Request seek information that is in the possession, custody, or control of persons or entities other than VWGoA, fail to distinguish between distinct corporate entities, and purport to require VWGoA to discern or inquire about relationships between or among entities that are not affiliated with VWGoA. VWGoA will construe these terms to mean VWGoA.

3. VWGoA further objects to the defined term "Affected Vehicles" and to any Definition, Instruction or Request that incorporates it. The term erroneously references vehicles that do not exist, do not have TDI engines, or were not sold or leased in the United States. Affected Vehicles should be defined as, and a correct list of Affected Vehicles should only include, the below vehicles:

- 2.0L vehicles: VW Jetta (2009-2015); VW Jetta Sportwagen (2009-2014); VW Beetle (2013-2015); VW Beetle Convertible (2013-2015); Audi A3 (2010-2013 and 2015); VW Golf (2010-2015); VW Golf Sportwagen (2015); and VW Passat (2012-2015), and
- 3.0L vehicles: VW Touareg (2009-2016); Audi A6 quattro (2014-2016); Audi A7 quattro (2014-2016); Audi A8L (2014-2016); Audi Q5 (2014-2016); and Audi Q7 (2009-2015).

RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSIONS

1. You equipped the Affected Vehicles with 2.0 Liter TDI engines with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

RESPONSE: VWGoA denies this Request.

VWGoA objects to the undefined phrases "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

2. Your equipping the Affected Vehicles with 2.0 Liter TDI engines with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions was an intentional decision made by you.

RESPONSE: VWGoA denies this Request, and refers Plaintiff to VWGoA's denial of Request for Admission No. 1.

VWGoA objects to the undefined phrases "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

3. You equipped the Affected Vehicles with 3.0 Liter TDI engines with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

RESPONSE: VWGoA denies this Request.

VWGoA objects to the undefined phrases "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

4. Your equipping the Affected Vehicles with 3.0 Liter TDI engines with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions was an intentional decision made by you.

RESPONSE: VWGoA denies this Request, and refers Plaintiff to VWGoA's denial of Request for Admission No. 3.

VWGoA objects to the undefined phrases "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

5. The Affected Vehicles with 2.0 Liter TDI engines were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

RESPONSE: VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA understands and thereby admits, however, that software in the Affected Vehicles with 2.0 Liter TDI engines enables the vehicles' emission control modules to detect when the vehicles are being driven on the road, rather than being tested, and that this software renders certain emission control systems in the vehicles inoperative when the emission control module detects the vehicles are not undergoing testing procedures, resulting in excess emissions when the vehicles are driven on the road.

VWGoA objects to Request for Admission No. 5 to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA further objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

6. The Affected Vehicles with 3.0 Liter TDI engines were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

RESPONSE: VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA understands and thereby admits, however, that software in the Affected Vehicles with 3.0 Liter TDI engines enables the vehicles' emission control modules to detect when the vehicles are being driven on the road, rather than being tested, and that this software renders certain emission control systems in the vehicles inoperative when the emission control module detects the vehicles are not undergoing testing procedures, resulting in excess emissions when the vehicles are driven on the road.

VWGoA objects to Request for Admission No. 6 to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA further objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

7. You sold in the State of Texas Affected Vehicles with 2.0 Liter TDI engines.

RESPONSE: VWGoA admits this Request insofar as it sold new Affected Vehicles solely to authorized VW and Audi dealerships in the State of Texas.

8. You sold in the State of Texas Affected Vehicles with 3.0 Liter TDI engines.

RESPONSE: VWGoA admits this Request insofar as it sold new Affected Vehicles solely to authorized VW and Audi dealerships in the State of Texas.

9. You offered for sale in the State of Texas Affected Vehicles with 2.0 Liter TDI engines.

RESPONSE: VWGoA admits this Request insofar as it sold new Affected Vehicles solely to authorized VW and Audi dealerships in the State of Texas.

VWGoA objects to the phrase "offered for sale" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean sold.

10. You offered for sale in the State of Texas Affected Vehicles with 3.0 Liter TDI engines.

RESPONSE: VWGoA admits this Request insofar as it sold new Affected Vehicles solely to authorized VW and Audi dealerships in the State of Texas.

VWGoA objects to the phrase "offered for sale" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean sold.

11. You leased in the State of Texas Affected Vehicles with 2.0 Liter TDI engines.

RESPONSE: VWGoA denies this Request.

12. You leased in the State of Texas Affected Vehicles with 3.0 Liter TDI engines.

RESPONSE: VWGoA denies this Request.

13. You offered for lease in the State of Texas Affected Vehicles with 2.0 Liter TDI engines.

RESPONSE: VWGoA denies this Request.

VWGoA objects to the phrase "offered for lease" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean leased.

14. You offered for lease in the State of Texas Affected Vehicles with 3.0 Liter TDI engines.

RESPONSE: VWGoA denies this Request.

VWGoA objects to the phrase "offered for lease" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean leased.

15. As of June 3, 2016 you have not disabled or removed emission control equipment from the Affected Vehicles with 2.0 Liter TDI engines that was designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions when operated on Texas streets, roads, and/or highways.

RESPONSE: VWGoA admits that, as of June 3, 2016, VWGoA had not disabled or removed the referenced emission control equipment from 2.0 Liter Affected Vehicles in the possession of Texas consumers.

VWGoA objects to the undefined terms "disabled," "removed," "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

16. As of June 3, 2016, you have not disabled or removed emission control equipment from the Affected Vehicles with 3.0 Liter TDI engines that was designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions when operated on Texas streets, roads, and/or highways.

RESPONSE: VWGoA admits that, as of June 3, 2016, VWGoA had not disabled or removed the referenced emission control equipment from 3.0 Liter Affected Vehicles in the possession of Texas consumers.

VWGoA objects to the undefined terms "disabled," "removed," "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

TAB 9

new
1-1-95

IMPORTER AGREEMENT

between

VOLKSWAGEN AKTIENGESELLSCHAFT

- hereinafter referred to as "VWAG" -

and

VOLKSWAGEN OF AMERICA, INC.

- hereinafter referred to as "VWOA"

A. GENERAL PRINCIPLES

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Article 3	VWoA's Legal Status
Article 4	Area of Primary Responsibility

B. DUTIES AND SERVICES OF VWAG

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C. DUTIES AND SERVICES OF VWoA

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Article 22	Term of Agreement
Article 23	Ordinary Termination
Article 24	Short Notice of Termination
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E. GENERAL PROVISIONS

Article 27	Form, Relationship with Previous Agreements, Authority to Sign on Behalf of VWAG
Article 28	Transferability
Article 29	Partial Invalidity
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Attachments:

Appendix 1	Contractual Products
Appendix 2	Affiliated Companies of VWAG
Appendix 3	VWAG's Terms of Sale and Delivery of Importers
Appendix 4	Trade Marks
Appendix 5	Principles for the Determination of Transfer Prices
Appendix 6	Consumer Product Warranties
Appendix 7	Recall Actions

WHEREAS VOLKSWAGEN AG, a corporation organized under the laws of Germany and maintaining offices at Wolfsburg, Germany ("VWAG") is engaged in the manufacture of high quality products designed to satisfay the requirements of a wide range of purchasers throughout the world, including the United States of America.

WHEREAS VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation with offices at 3800 Hamlin Road, Auburn Hills, Michigan 48326 ("VWoA") has served for many years as the importer, distributor and marketer of Volkswagen vehicles and other Volkswagen products in the Continental United States and Hawaii;

WHEREAS VWAG offers to continue supplying VWoA with Volkswagen vehicles and other Volkswagen products;

WHEREAS VWoA desires to purchase such vehicles and other Volkswagen products from VWAG; and

WHEREAS VWAG AND VWOA desire to continue their contractual relationship based upon mutual understanding, cooperation, trust and confidence;

NOW THEREFORE, VWAG AND VWOA have entered into the following

IMPORTER AGREEMENT

A. GENERAL PRINCIPLES

Article 1
Subject of the Agreement

VWAG appoints VWoA as an importer of Volkswagen vehicles and other Volkswagen products, all as described in Appendix 1, for the area of primary responsibility defined in Article 4. VWoA agrees to accept such appointment and to assume responsibility for the importation, distribution, marketing and sale of such products through retail enterprises. In particular, VWoA shall perform all the duties assumed by it under this Agreement, shall exhaust fully all market opportunities for such products within such area of responsibility and shall promote in all respects the image and good reputation of any products and services covered by this Agreement, as well as the good reputation of VWAG, any affiliated companies of VWAG and any Volkswagen retail enterprises.

Article 2
Definitions

a) "Contractual Products" as used in this Agreement means all those products listed in Appendix 1, as modified from time to time pursuant to Article 5 (d).

b) "Volkswagen Distribution Organization" as used in this Agreement means the importers and distributors throughout the world authorized by VWAG to sell and/or service Contractual Products, together with the enterprises at the wholesale and retail levels duly authorized by them.

c) "Contractual Enterprises" as used in this Agreement means all enterprises within VWoA's Area of Primary Responsibility as defined in subparagraph d) which are authorized pursuant to written agreements to distribute, sell and/or service Contractual Products.

d) "Area of Primary Responsibility" as used in this Agreement means the area specified in Article 4 (a), as modified by VWAG pursuant to Article 4 (b).

Article 3
VWoA's Legal Status

VWoA shall carry on all business pursuant to this Agreement as an independent entrepreneur on its own behalf and for its own account. VWoA is not an agent or representative of VWAG and shall not act or purport to act for the account of or on behalf of VWAG.

Article 4
Area of Primary Responsibility

a) VWoA assumes primary responsibility for the continental United States and Hawaii, which shall be referred to hereafter as the "Area of Primary Responsibility".

b) VWoA shall neither advertise nor employ the service of agents nor in any other manner solicit for business outside the Primary Territory of Responsibility.

c) In the interest of a well planned and effective sales organisation, VWoA shall sell the Contractual Program only to members of the Contractual Enterprises.

B. DUTIES AND SERVICES OF VWAG

Article 5
Supplies

a) Subject to the availability of Contractual Products and constraints relating to deliveries by suppliers of VWAG, VWAG shall supply to VWoA Contractual Products as provided in this Article 5. VWAG may arrange to have Contractual Products supplied to VWoA pursuant to this Agreement by any of VWAG's affiliated companies identified in Appendix 2, as amended by the Parties from time to time.

b) Contractual Products shall be supplied in accordance with technical specifications previously agreed upon by VWAG and VWoA and in accordance with "VWAG's Terms of Sales and Delivery for Importers" set forth in Appendix 3 as amended by VWAG from time to time.

In case VWAG has caused one of its Affiliated Companies to supply Contractual Products to VWoA, the terms of sale and delivery of such affiliated company shall be applicable.

c) VWoA shall not modify Contractual Products delivered to it without the prior written approval of VWAG. However, to the extent that VWAG deems modification of Contractual Products necessary or desirable because of technical considerations, VWAG may at any time prior to shipment modify the Contractual Products to be delivered to VWoA, or may require VWoA to modify the Contractual Products at VWAG's expense.

d) VWAG and VWoA may agree from time to time to modify the technical specifications of Contractual Products, whereupon Appendix 1 will be deemed amended accordingly.

Article 6
Advice and Assistance

a) VWAG shall, to the extent it deems appropriate, advise and assist VWoA. In particular, if VWAG considers it appropriate, VWAG may supply VWoA with the following materials free of charge as far as possible:

- plans, concepts and programs for the sale of Contractual Products and for the management of its service and parts business;
- sales promotion concepts and materials for Contractual Products;
- training material for the initial and further training of personnel of VWoA and any Contractual Enterprises;
- systems and programs for the planning of VWoA's business activities under this Agreement and for the information and advice of Contractual Enterprises;
- standardized electronic data programs for business administration; and
- service and parts documentation, literature and organizational materials.

VWoA shall employ the above materials and shall use such materials in order to exploit all market opportunities in such manner and to such extent as agreed with VWAG. In the event that there will be a charge for any materials supplied pursuant to this Article 6 (a), VWAG shall obtain VWoA's prior agreement to such charge.

b) In addition, VWAG shall to the extent it deems appropriate:

- commission market surveys in conjunction with VWoA and bear a share of the costs thereof;

- make available to VWoA the experience gained by VWAG in the construction of importer, distributor and dealer facilities;

- assist VWoA by making available field service and special personnel;

- assist VWoA in procuring special tools and workshop equipment.

c) VWAG may cause any of its affiliated companies or any other Party to perform any or all of the duties described in subparagraphs a) and b) above.

d) VWAG shall, to the extent it deems necessary, issue summaries of experience it has gained in sales and after sales service of Contractual Products in areas outside the Area of Primary Responsibility and communicate such summaries to VWoA.

e) VWAG will under no circumstances be obligated to perform any acts in the Area of Primary Responsibility or send any personnel into the Area of Primary Responsibility in carrying out its obligations under this Agreement.

Article 7
Identifications and Trademarks

It is in the mutual interest of VWAG and the Volkswagen Distribution Organization to identify their activities and the services in a uniform manner on a worldwide basis.

a) VWoA shall accordingly be entitled and obligated to make use of the trademarks and service marks set forth in Appendix 4, as amended by VWAG from time to time, exclusively in connection with its activities pursuant to this Agreement and shall display the said marks prominently on its premises and on its stationery and business forms. In order to preserve the integrity of the said marks and maintain uniform and consistent product identification; VWoA shall employ the said marks only in the form and for the purposes

prescribed by VWAG. VWAG will make specimens of the said marks available to VWo'A.

b) VWAG consents to the use by VWoA of the word "Volkswagen" as part of its corporate name "Volkswagen of America, Inc". This authorization is non-exclusive and non-transferable and is not intended to extend to any other business or corporate name which VWoA may wish to adopt in the future. In addition, this authorization shall automatically terminate forthwith in the event of any permanent or temporary inability of VWAG to exercise freely the rights resulting from its ownership by VWAG of less than fifty-one (51 %) percent of the capital stock of VWoA. Except as expressly provided in this paragraph, VWoA shall not use and shall not permit any Contractual Enterprise to use, as part of its corporate or business name, any of the trademarks or service marks set forth in Appendix 4, as amended by VWAG from time to time, unless it shall have obtained prior written approval from VWAG.

c) VWoA shall take, at its own expense, but in the name of VWAG, all measures, including the institution and prosecution of lawsuits, which may be reasonably required to prevent unauthorized use within the Area of Primary Responsibility of the trademarks and service marks set forth in Appendix 4, as amended by VWAG from time to time. VWoA shall keep the legal department of VWAG informed of all of VWoA's activities under this paragraph, shall furnish the legal department of VWAG with reports of such activities as requested by VWAG and shall comply with all reasonable instructions given to it by VWAG with respect thereto.

d) VWAG shall be responsible for, and shall pay all fees required to be paid in connection with the registration or continued registration in the United States of the trademarks and service marks set forth in Appendix 4, as amended by VWAG from time to time, and shall, at its own expense, take all measures, including the prosecution of lawsuits, which may be reasonably required to prevent the registration in the Area of Primary Responsibility of any trademark or service mark set forth in Appendix 4, as amended by VWAG from time to time.

e) VWoA shall give due consideration to causing its premises and those of the Contractual Enterprises, to the extent possible, to conform to the identification program issued by VWAG from time to time.

f) Except as otherwise agreed between the contracting Parties in writing, VWoA, in order to maintain uniform and consistent product identification, shall sell and service Contractual Products under the designations specified by VWAG and shall cause the Contractual Enterprises to do the same.

g) VWoA shall cause its Contractual Enterprises to comply with its requirements relating to used car sales if such sales are carried out under any trademarks of VWAG licensed to such Contractual Enterprise.

Article 8
Warranty

VWAG MAKES NO WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, AS TO CONTRACTUAL PRODUCTS TO BE SUPPLIED BY VWAG TO VWOA, INCLUDING, BUT NOT BY WAY OF LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF SUCH CONTRACTUAL PRODUCTS, AND, EXCEPT AS EXPRESSLY PROVIDED IN ARTICLE 20 OF THIS AGREEMENT TO THE CONTRARY, VWAG SHALL BE UNDER NO LIABILITY WHATSOEVER, WHETHER FOR DIRECT, INDIRECT OR CONSEQUENTIAL DAMAGES WHERESOEVER OCCURRING AND HOWSOEVER CAUSED, OR IN ANY OTHER WAY IN CONNECTION WITH SUCH CONDITION. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT TO THE CONTRARY, ALL WARRANTIES OR LIABILITIES OF VWAG WITH RESPECT TO THE CONDITION OF CONTRACTUAL PRODUCTS TO BE SUPPLIED TO VWOA, WHETHER BY EXPRESS CONTRACT, IMPLICATION OR OPERATION OF LAW, ARE EXCLUDED.

C. DUTIES AND SERVICES OF VWOA

Article 9
Equipment and Organization of VWoA's Enterprise

a) Performance by VWoA of its obligations pursuant to this Agreement requires VWoA to meet adequate standards regarding financing, assets and personnel. The effectiveness of VWoA's enterprise and of the Contractual Enterprises depends largely on meeting such standards. These standards include, but are not limited to the following requirements:

aa) VWoA shall take steps necessary to maintain financial liquidity adequate for the conduct of its business and the maintenance of an appropriate balance sheet.

bb) VWoA shall maintain adequate facilities and equipment for all its activities pursuant to this Agreement, to such an extent as agreed upon with VWAG. In particular, VWoA shall have for this purpose sufficient storage area for new vehicles, spare parts warehousing facilities, appropriate workshop and service training facilities and related equipment and shall make available to the Contractual Enterprises a technically up-to-date data processing and communications system.

b) VWoA shall determine any of the requirements it deems necessary for the proper performance of its business activities in conjunction with VWAG, and for this purpose VWoA shall give due consideration to the summaries made available pursuant to Article 6 (d) of this Agreement.

c) VWoA shall employ suitably qualified personnel in sufficient numbers for the proper execution of its duties and obligations under this Agreement.

d) VWoA shall organize its enterprise in such a way that all its internal and external business activities can be performed effectively and in accordance with the demands of the market.

Article 10
Development and Support of Contractual Enterprises (Dealer Network)

a) The Parties agree that the successful sale of Contractual Products requires an effective Volkswagen Distribution Organization. VWoA therefore, based on a sales network planning schedule to be developed by it after consultation with VWAG, shall form and maintain within the Area of Primary Responsibility a sales network exemplary in the field of sales, service and parts supply.

b) VWoA shall conclude agreements with the Contractual Enterprises based upon uniform terms and conditions prepared by it from time to time after due consultation with VWAG.

c) VWoA shall assist and advise the Contractual Enterprises, particularly as provided in Article 15 and 18 of this Agreement. In doing so, VWoA shall make use of the services rendered by VWAG and described in Article 6 to such extent as VWoA deems appropriate.

Article 11
Purchase of Contractual Products

a) The Parties recognize that sales and supply planning is necessary for VWoA to exploit market opportunities as well as for VWAG to plan and effectively utilize its production capacity. Accordingly, VWoA and VWAG shall negotiate and agree upon VWoA's annual sales objectives and delivery schedules for Contractual Products.

b) VWoA's annual sales objectives established pursuant to paragraph (a) above, shall be determined not later than June 30th preceding the year to which the objectives apply, shall be in writing and specify the volume and delivery schedule of Contractual Products broken down by type, model and standard as well as optional equipment.

c) On the basis of and consistent with VWoA's annual sales objectives established pursuant to paragraph a) above, VWoA shall place firm orders with VWAG once a month, or more frequently, if the Parties so desire, which shall specify volume broken down by type, model, standard as well as optional equipment, and expected delivery dates.

d) In the event VWoA is not able to place firm orders for Contractual Products in a manner which is consistent with VWoA's annual sales objectives referred to in paragraph (a) above, VWoA shall promptly notify VWAG in writing of its inability to do so and, in consultation with VWAG, establish revised annual sales objectives which are achievable in view of the competitive conditions prevailing in the Area of Primary Responsibility.

e) VWAG agrees to deliver to VWoA Contractual Products pursuant to VWoA's

firm purchase orders which are consistent with VWoA's annual sales objectives or any revised annual sales objectives, and in accordance with the Terms of Sale and Delivery set forth in Appendix 3 as amended from time to time.

f) In the event that VWAG is not able to deliver to VWoA Contractual Products in accordance with VWoA's firm orders pursuant to subparagraph c) above, VWAG shall promptly notify VWoA in writing of its inability to do so and VWoA, in consultation with VWAG, shall establish revised annual sales objectives for the Area of Primary Responsibilty.

Article 12
Sale of Contractual Products

a) VWoA shall arrange for the delivery and distribution of Contractual Products within its Area of Primary Responsibility. In order to achieve its annual sales objectives, VWoA shall establish with the Contractual Enterprises the sales objectives to be achieved by each Contractual Enterprise.

b) VWoA shall, without prior written approval of VWAG, neither directly nor indirectly sell, market, or purport to be the selling agent, for new or unused motor vehicles which compete with Contractual Products and/or conclude distribution and/or service agreements for any goods which compete in the Area of Primary Responsibility with Contractual Products manufactured by VWAG or any company affiliated with VWAG.

c) Also, without VWAG's prior written approval, VWoA will not enter into any agreements or arrangements to promote the sale of goods or services from its business premises unless such activites do not affect in any regard VWAG's business interests.

Article 13
Purchase Price, Terms of Sale and Delivery, Terms of Payment

a) VWoA and VWAG shall negotiate and agree upon prices for the delivery of Contractual Products which are established in advance of the date of shipment to the United States and are calculated using a VWoA resale price based distributor margin formula to be agreed upon by the Parties in accordance with Appendix 5.

b) The price of any Contractual Product may not be modified except by a written agreement executed by both Parties.

c) VWAG shall sell the Contractual Products to VWoA at prices established in accordance with paragraphs a) and b) above and applicable on the day of shipment and in accordance with VWAG's Terms of Sale and Delivery for Importers set forth in Appendix 3, except that Sections III and IV of such Terms of Sale and Delivery for Importers are expressly excluded.

d) The Parties shall from time to time agree upon the terms of payment by VWoA to VWAG for the supply of Contractual Products and the rendering of services as specified in Article 6 of this Agreement.

Article 14
Inventory and Assortment

a) In order to enable VWoA to exploit market opportunities in the Area of Primary Responsibility, VWoA and its Contractual Enterprises shall at all times maintain inventory of Contractual Products in quantities sufficient to meet its sales objectives. VWoA shall maintain inventory sufficient to compensate for fluctuations in sales and deliveries. The assortment in inventory should correspond to the turnover of the respective Contractual Products.

b) VWoA shall maintain the inventory using equipment and devices necessary to keep the Contractual Products in merchantable condition.

Article 15
Marketing, Sales Promotion and Public Relations

a) VWoA shall establish and employ in the Area of Primary Responsibility marketing and public relations objectives and strategies which promote the reputation and image of VWAG and Contractual Products within guidelines established by VWAG. In developing such objectives and strategies, VWoA shall see to it that its activities are not inconsistent with any marketing and public relations plans, concepts and programs which VWAG has made available to VWoA from time to time.

b) In addition to the plans, concepts and programs made available by VWAG, VWoA shall develop and use additional marketing and advertising methods and activities in accordance with the guidelines of VWAG and in accordance with the development of VWoA's sales. VWoA shall make available to VWAG, samples of such advertising including the corresponding materials for reproduction and copying. VWoA shall ensure that VWAG is entitled to use such advertising by entering into copyright agreements to that effect.

c) VWoA shall provide for a marketing and advertising budget and shall expend not less than a percentage agreed upon with VWAG of the price of the vehicles listed in the sales objectives for marketing and advertising activities.

d) In advance of each calendar year or upon request of VWAG, VWoA shall report to VWAG concerning its public relations plans including shows and exhibitions proposed for the following calendar year, including its objectives, a description of activities and expenditures budgeted for the year to finance these activities.

e) VWoA shall reasonably consider to cooperate in any marketing and advertising campaign or activities designed by VWAG to be carried out by VWoA in the Area of Primary Responsibility. The extent and nature of such cooperation as well as the financial participation will be agreed in advance with VWAG.

f) VWoA shall assist its Contractual Enterprises to cooperate among each other on a regional basis in conducting marketing and advertising campaigns and shall participate actively in developing such campaigns.

g) In order to promote and improve the sales of the Contractual Products, VWoA shall cause its Contractual Enterprises to engage in business activities in respect of used cars including lease cars. VWoA shall provide assistance by way of organizational and promotional activities to its Contractual Enterprises.

For this purpose VWoA shall cause its Contractual Enterprises, among other things, to

- maintain stocks of used cars in sufficient quantities;
- perform repairs and maintenance services used cars;
- endeavour to take competing used cars in trade.

Article 16
After Sales Service

a) VWoA shall establish, develop and maintain a competent, effective and customer oriented after sales service to be provided through its Contractual Enterprises for Contractual Products. In providing such services, VWoA shall make every efforts to build and maintain good relationships between Contractual Enterprises and users of Contractual Products.

b) VWoA and/or its Contractual Enterprises shall, in accordance with VWAG's instructions, guidelines and/or procedures

- take delivery of, store as well as perform predelivery inspection and service of each vehicle prior to sales and delivery thereof; to the consumer;

- warranty repairs and/or service and repair Contractual Products as set forth in Appendix 6 regardless of where purchased;

c) VWoA shall cause its Contractual Enterprises to perform campaign inspections and/or corrections for users of Contractual Products including recall campaigns. VWAG may require campaign inspections and/or corrections whenever it deems such inspections and/or corrections to be necessary and may direct such campaigns to be carried out as referred to in Article 5 (c). Upon notice of a recall or service campaign affecting a particular

Contractual Product, VWoA shall cause its Contractual Enterprises to perform such campaigns, inspections and/or corrections on all affected Contractual Products whenever or wherever made available to them.

d) The aforementioned services are provided for the benefit of users of Contractual Products. Accordingly, VWoA shall not impose any charge on such users for parts, materials or labour for which VWoA will be reimbursed by VWAG.

e) All maintenance work and/or repairs carried out shall be in accordance with VWAG's instructions, guidelines and/or procedures.

f) VWoA shall provide for use in its service operations and service system such workshop equipment, special tools and measuring and test devices according to VWAG's guidelines as are necessary to meet the service obligations hereunder.

g) VWoA shall employ and designate qualified personnel which shall be responsible for promptly and courteously resolving consumer complaints on behalf of VWoA.

Article 17
Personnel and Training of Contractual Enterprises

a) VWoA shall cause its Contractual Enterprises to employ a sufficient number of qualified personnel, in particular sales and aftersales personnel.

b) For the purpose of the initial and follow-up training of personnel, VWoA shall in agreement with VWAG, hold training courses and seminars on all relevant technical and commercial subjects and, to this extent, shall make available instructors, training methods, equipment and facilities. In addition, VWoA shall make available in-dealership training and self-study programs to Contractual Enterprises. VWAG shall, if VWoA so requests, render technical assistance or provide advice with respect to training methods and materials based on experience gained by it in areas outside the Area of Primary Responsibility.

Article 18
Advice and Assistance to Contractual Enterprises, Business Management

a) VWoA shall provide expert advice to Contractual Enterprises by having available a sufficient number of field service and specialist personnel.

b) To the extent VWoA deems it appropriate, VWoA shall employ the VWAG Business Management System, shall introduce such System to the Contractual Enterprises and shall have experts advise Contractual Enterprises on business management matters. VWoA shall also ensure that VWoA's standardized data processing and communications programs are compatible with VWAG's standardized data processing and communications programs as well as those programs as utilized by the Contractual Enterprises so as to ensure effective administration including but not limited to order processing and adequate inventory control by the Contractual Enterprises.

Article 19
Warranty, Warranty Administration, Recall and Auditing

a) Contractual Products sold by VWoA shall be warranted by VWoA to the ultimate consumer in accordance with terms and conditions of warranty approved by VWAG (Appendix 6). VWoA agrees that all its sales of Contractual Products shall be made in such a manner that the customer acquires all rights in accordance with VWoA's warranties, to the exclusion of any other, further or different warranties.

b) VWAG shall reimburse to VWoA the warranty costs it has expended pursuant to paragraph a) above, including recall costs (Appendix 7) and service action costs. Recall and service actions will always be initiated by the service department of VWAG.

Reimbursement shall apply to

- US dealer's labor cost
- material cost calculated on cost price level VWoA (VWAG price list C plus landed cost VWoA) and additionally dealers' handling charge to the extent to be agreed between the Parties from time to time. Any increase of the

handling charge to be reimbursed shall be subject to prior approval by VWAG.

c) The execution of warranty shall be in accordance with the guidelines issued by VWAG from time to time.

d) VWoA shall be responsible for reducing the warranty costs by means of its own warranty cost reduction programs. VWAG shall continuously be kept informed by VWoA about the annual objectives and their achievement.

e) VWoA shall provide VWAG with information pertaining to warranty matters to the extent and in the manner determined by VWAG. VWoA shall upon request of VWAG make warranty parts available to VWAG for investigation.

VWoA shall maintain a modern computer communications and processing system for the acceptance and disposition of warranty claims received from its retailers consistent with the guidelines pursuant to subparagraph c) which is compatible with VWAG's system to enable VWAG to track warranty cost projections. VWoA shall make use of VWAG's part identifier, damage and vendor codes, primary cause designation and any other available codes necessary to communicate with VWAG. The system shall have the capability of editing retailer warranty claims and permit prompt payment to VWoA's retailers of justified claims.

f) Once a month on a date to be determined by VWAG, VWoA shall submit to VWAG its invoices for warranty costs incurred by it, including, but not limited to, all costs for recall actions and service actions. The invoices shall include a summary description of each claim including an accounting of the amounts disbursed by VWoA to its retailers for parts, labor and other items.

VWoA invoices shall be paid by VWAG within 30 days of the date of the invoice. In the event VWAG disputes the accuracy or appropriateness of a warranty claim, VWAG shall pay the invoice including the disputed claim when due and shall be reimbursed by VWoA promptly if the dispute is resolved in favor of VWAG.

g) VWAG shall have the right at any time to audit VWoA's implementation and administration of its warranties as previously approved by VWAG. In the event VWAG's audit identifies practices, procedures or individual instances

which have caused VWoA to make payments to dealers outside the scope of VWoA's warranty obligations towards its retail customers or payments beyond reasonable and necessary assistance, VWAG, in its discretion, may require VWoA to credit VWAG the amount of such payments.

h) In case VWAG has caused Contractual Products to be supplied by Affiliated Companies of VWAG for their own account, the terms of warranty of such companies shall replace the Warranty Conditions contained in Appendix 6.

Article 20
Extended Warranty, Marketing Costs

VWoA shall be responsible for certain other product related costs, including the following costs:

1. Cost of repair or replacement of wear and tear items which fail due to normal wear and tear within 12 months or 12,000 miles, whichever occurs first;

2. Costs of towing to the nearest dealer of a vehicle covered by VWoA's consumer product warranties;

3. Costs of a loaner or courtesy vehicle provided to the owner of a motor vehicle which is repaired pursuant to VWoA's consumer products warranties, and due to the time consuming nature of the repair cannot be completed on a timely basis;

4. Costs of improving the performance of a motor vehicle which the owner perceives as unsatisfactory;

5. Costs of arbitration awards rendered pursuant to VWoA's Autoline Arbitration Program or any state arbitration system pursuant to any "lemon" law ordering VWoA to repair a vehicle, refund repair and related costs, including lease payments, or repurchase the motor vehicle;

6. Costs of repair, reimbursement of repair costs or repurchase of a motor vehicle to prevent litigation;

7. Costs of judgments and settlements of Small Claims Court proceedings alleging defects or unsatisfactory performance of the motor vehicle;

8. Costs of trade assistance expended by VWoA to assist a vehicle owner to exchange an unsatisfactory motor vehicle with a new or satisfactory used vehicle.

Article 21
Reports

a) VWoA shall submit to VWAG on a regular basis information as reasonably requested by VWAG concerning, but not limited to, business data, such as, but not limited to, warranty and warranty related matters as well as recall, requirements for the homologation of Contractual Products in the Area of Primary Responsibility, any enactments or changes of any relevant laws and regulations including taxes and customs as well as any other matters which may affect any aspect covered by this Agreement. VWoA shall inform VWAG, in particular, of any modification (approved or proposed) in the laws governing its Area of Primary Responsibility which may affect the manufacturing of vehicles and the regulations governing the use thereof including safety requirements for the Contractual Products.

b) VWoA shall inform VWAG in particular through its regular reports on the development of the market generally and of its own and its contractual business activities within the Area of Primary Responsibility. VWoA shall furnish VWAG with all reasonably requested information relating to any substantial changes concerning any of its Contractual Enterprises in the Area of Primary Responsibility. VWoA shall particularily provide VWAG with a list of its Contractual Enterprises in the Area of Primary Responsibility. VWoA shall deliver such reports in a form and within a time determined by VWAG.

D. TERM AND TERMINATION OF AGREEMENT

Article 22
Term of Agreement

This Agreement shall enter into effect on January 1, 1995 except that the costs indentified in Article 20 of this Agreement shall continue to be reimbursed to VWoA with respect to all 1995 and earlier model year Contractual Products. This Agreement shall terminate on December 31, 1996 and it shall thereafter automatically be renewed for two year periods.

Article 23
Ordinary Termination

This Agreement may be terminated by either Party as of the end of December 31, 1996 or at any subsequent two year period by giving one year's prior written notice to the other Party.

Article 24
Short Notice of Termination

Either Party shall be entitled to terminate this Agreement at any time by giving six (6) months prior written notice in the event of a material breach by the other Party of obligations arising from this Agreement.

Article 25
Termination with Immediate Effect

Either Party to this Agreement may terminate this Agreement, effective upon giving notice of such termination, if the other Party:

- fails to obtain or is deprived of any official approval which may be necessary for the performance of the business activities governed by this Agreement; or

- suffers significant losses or severe damage to its business reputation or financial status (for example, the commencement of bankruptcy or insolvency proceedings, levy or execution upon the assets of said Party or of persons holding a participation therein on account of insolvency, protested checks or bills on account of insolvency); or

- is involved in staff, structural or financial difficulties in its enterprise which cannot be resolved within a reasonable period, where such difficulties endanger the fulfillment of material provisions of this Agreement.

Article 26
Procedures upon Termination of Agreement

Upon effectiveness of termination of this Agreement:

a) VWoA shall without delay.

- cease to make use of any trademarks and service marks ever licensed to VWoA by VWAG in any form whatsoever;

- on request of VWAG, assign, for reasonable compensation, orders not yet executed, to VWAG or to a third Party designated by VWAG, and, on request of VWAG, make available to VWAG or a third Party designated by VWAG all brand-new, unsold Contractual Products which are in perfect condition. The repurchase price of brand-new vehicles shall be VWoA's landed cost price therefor, but not more than VWoA's landed cost price for similar vehicles on the day of repurchase. For all other Contractual Products ten (10 %) percent administration costs shall be deducted from the repurchase price, which shall be calculated in the same manner; and

- surrender all documents and materials made available to it, in particular all special items of equipment and special tools, technical literature and advertising materials, including signs and the like; to the extent that such materials were invoiced when supplied, they will be paid for by VWAG on return at the current trade value less a reasonable deduction.

b) VWAG shall be entitled to cancel in whole or in part orders of VWoA not yet executed. VWoA shall not be entitled to any compensation whatsoever arising therefrom.

c) Except as provided in this Article 26, VWoA shall not be entitled to any claims whatsoever by reason of termination of this Agreement in accordance with Article 23, 24, or 25 except as provided in this Article 26.

E. GENERAL PROVISIONS

Article 27
Form, Relationship with Previous Agreements, Authority to Sign on Behalf of VWAG

a) All amendments or additions to this Agreement and all notices of termination shall be made or given in writing. Any oral agreements are null and void. Any amendment or addition other than an amendment or addition to any Appendix to this Agreement shall be identified in its title as "Addendum No. _", be dated and be executed on behalf of both Parties in accordance with procedures set forth in this Article 27.

b) The following Appendices as amended by VWAG or the Parties respectively from time to time, are attached to this Agreement and form an integral part hereof:

Appendix 1:	Contractual Products
Appendix 2:	Affiliated Companies of VWAG
Appendix 3:	VWAG's Terms of Sale and Delivery for Importers
Appendix 4:	Trade Marks
Appendix 5:	Principles for the Determination of Transfer Prices
Appendix 6:	Consumer Product Warranties
Appendix 7:	Recall Actions

c) Where special formalities must be completed before this Agreement can become valid, VWoA agrees to take the necessary steps at its own expense without delay.

d) Upon the execution of this Agreement by both Parties, any previous agreements between the Parties concerning the business relationship dealt with in this Agreement shall become null and avoid.

Article 28
Transferability

VWoA's rights and duties under this Agreement cannot and shall not be transferred or assigned without the prior written approval of VWAG.

Article 29
Partial Invalidity

In the event any portion of this Agreement is or becomes invalid or unenforceable for any reason, the remaining portion shall continue in force unaffected. In the event that such portion of this Agreement is or becomes invalid or unenforceable in any part of the Area of Primary Responsibility, the validity of such portion in the remaining parts of the said Area shall not be affected thereby.

Article 30
Failure to Exercise Rights

Failure of either Party to this Agreement to exercise any of the rights to which it is entitled under this Agreement shall not be regarded as a waiver of such right and shall not prevent the Party from exercising such right at a later date.

Article 31
Liability

Each Party to this Agreement shall itself bear the commercial risk accruing to it from this Agreement and from its execution. VWAG, in particular, accepts no responsibility for expenses incurred by VWoA in the execution of this Agreement or for undertakings entered into by VWoA hereunder. No provisions of this Agreement shall be interpreted in such a way as to create rights to third Parties against VWAG.

Article 32

Place of Performance, Jurisdiction and Applicable Law

a) The place of the registered offices of VWAG shall be the place of performance for all obligations resulting from this Agreement for either Party.

b) At the option of VWAG, the locally competent court having jurisdiction for the place of the registered offices of VWAG or the competent court for the place of the registered offices of VWoA shall have jurisdiction when VWoA is the defendant in the proceedings. The Parties hereby expressly agree that the court having jurisdiction for the place of the registered offices of VWAG shall have jurisdiction for all litigations when VWAG is the defendant in the proceedings. Notwithstanding the terms of any other agreement between the Parties to the contrary, this Agreement regarding jurisdiction shall also apply to all claims, whether or not based on this Agreement, which may arise in connection with VWoA's activities.

c) The laws of the Federal Republic of Germany shall govern this Agreement, its construction, validity, interpretation and performance, as well as all business relations between the Parties dealt with in this Agreement. The application of "The United Nation's Convention on Contracts for the International Sale of Goods" dated 11.04.1980 is hereby excluded.

Wolfsburg,	Auburn Hills,
VOLKSWAGEN AKTIENGESELLSCHAFT	VOLKSWAGEN OF AMERICA, INC.
By:	
By:	

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Appendix 1 Contractual Products

I. Brand-new Automobiles

1. Vehicles bearing the Volkswagen name in accordance with the tables of types agreed and applicable to the model year in question together with such variations as are approved by VWAG and VWoA.

2. Vehicles from the applicable product range of VWAG for diplomats, tourists and other special customers for use in other countries.

3. Vehicles of subsidiary companies and/or licensees of VWAG in accordance with the agreements made in each case with VWAG.

4. The following products for which the Importer within the terms of the Importer Agreement undertakes the provision of after-sales service and of genuine Volkwagen parts shall also be Contractual Products:

   - those vehicles not covered by the aforementioned tables of types, approved variations, product offers and agreements, and industrial engines

   - and vehicle types no longer produced by VWAG and its subsidiaries

   which are in circulation in the Importer's territory.

II. Aftermarket Service Parts

Genuine Volkswagen parts.

III. Exchange Parts

Genuine Volkswagen exchange parts.

IV. Other Contractual

1. Volkswagen industrial engines in accordance with the separate agreements concluded with VWAG.

2. Votex accessories in accordance with the agreements concluded with Votex Warenhandelsgesellschaft mbH.

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Appendix 2 Affiliated Companies of VWAG

Audi AG, Ingolstadt, Germany

Volkswagen de Mexico S.A. de C.V., Puebla, Mexico

Votex AG, Dreieich, Germany

Volkswagen Canada Inc., Scarborough, Ontario, Canada

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Appendix 3 VWAG's Terms of Sale and Delivery for Importers

I. General Remarks

1. These Terms apply to Contractual Products sold by VWAG to VWoA under the Importer Agreement.

2. The place of the registered offices of VWAG shall be the place of performance for all obligations by either party under these Terms.

3. The laws of the Federal Republic of Germany shall apply to these Terms, their interpretation and their performance. The German version of these Terms shall be the sole authoritative version if questions of interpretation arise.

   The application of "The United Nation's Convention on Contracts for the International Sale of Goods" dated 11.04.80 is hereby excluded.

4. The German court having jurisdiction for the place of the registered offices of VWAG shall have exclusive jurisdiction for all disputes arising from the business relationship governed by these Terms. However, VWAG reserves the right to apply to the court which has jurisdiction for the place of the VWoA's registered offices.

II. Orders

1. VWoA shall submit its orders in writing or in the form of EDP cards for tapes or tele-processing and shall in all cases use the order forms or recording media specified by VWAG.

2. Orders placed by VWoA shall be binding on it unless rejected by VWAG within 4 weeks. VWoA shall not be entitled to any claims whatsoever as a result of its orders having been rejected.

III. Prices

VWAG sells Contractual Products to VWoA at the prices valid on the day of dispatch. VWAG reserves the right to modify prices at any time. If prices are changed between the time of ordering and the day of dispatch VWoA shall pay the price valid on the day of dispatch.

IV. Terms of Payment

1. Unless otherwise agreed, all payments are to be made in US-Dollars (USD) in accordance with the invoice.

2. In principle VWAG delivers Contractual Products only against prepayment. Release for dispatch takes place only following the receipt of the payment or following the opening of an irrevocable letter of credit confirmed by a first class German or international bank and containing a part-shipment clause, provided that the remaining terms of the letter of credit can be fulfilled by VWAG. Payment by cheque or any other mode of payment other than by cash shall not constitute payment until VWAG is entitled to make unrestricted use of the entire amount in US-Dollars (USD)

on one of its accounts in the Federal Republic of Germany. The amount invoiced shall be payable 90 days after the date of issuance of the invoice.

3. The Contractual Products supplied remain the property of VWAG until it is able to make unrestricted use of the entire amount invoiced. VWoA is obliged at its own expense to take all measures necessary in accordance with the laws applicable in the Area of Primary of Responsibility to ensure that the right of ownership of VWAG is not adversely affected.

4. VWoA shall bear all costs incurred with its payments. If VWoA fails to pay any amount on the due date in case payment after dispatch has been agreed, it shall pay on demand overdue interest from the due date to the date of actual payment at a rate of 1 % over 90 days' libor as published on Telerate page 3750.

V. Deliveries

1. The Contractual Products ordered by VWoA will be delivered by VWAG subject to their availability and deliveries of VWAG's suppliers. VWoA shall accept partial deliveries.

2. VWoA shall not have any claim against VWAG for failure to deliver or for delayed delivery if such failure or delay is due to circumstances beyond the control of VWAG, for example natural disaster, force majeure, official ruling, war, disturbance, interruption in transportation facilities, shipwreck, strike, lock-out, confiscation, blockade, fire, shortage of supplies from subcontractors etc. If delivery is delayed because of such circumstances for more than 6 months, VWAG as well as VWoA may rescind the relative purchase orders.

3. If the delivery deadline is exceeded by more than 3 months for reasons other than of that kind listed in (2) above, VWoA may give notice of rescission of the purchase order concerned stating a reasonable period of grace in which delivery must take place. Any further claims by VWoA shall be excluded.

4. VWoA shall not be entitled to any claim against VWAG with respect to premature delivery of Contractual Products.

5. The appropriate version of the "Terms of Sale and Delivery for Volkswagen Industrial Engines" (including warranty terms) as printed on the reverse side of the order confirmation form applies to deliveries of Volkswagen industrial engines.

VI. Delivery Terms

1. Deliveries on the basis of the terms "EXW", "FOB", "FCA", "CFR", take place in accordance with Incoterms 1990 with the following modifications:

   (a) Unless otherwise agreed, VWoA shall at its own expense and within the framework of the VWAG General Transportation Insurance Policy obtain insurance cover from the place of readiness at the manufacturer's works to the destination, including all risks in transit and associated storage, together with war risk, in so far as insurable, provided always that VWoA is able to do so by law.

   (b) Unless otherwise agreed VWAG reserves the right to conclude the shipment and carriage contracts to the destination or cause same to be concluded and to choose the transportation agencies, transportation means and routes. However.

the costs of shipment and carriage are to borne by the party liable thereto under the Incoterms 1990 conditions and said party shall also bear the risk of changes in shipment and carriage rates charged.

(c) Unless otherwise agreed the costs incurred in providing export packing (for instance when shipping overseas) are to be borne by VWoA.

2. If delivery is on a "CIF" basis VWAG will supply in accordance with Incoterms 1990 provided, however, that the provisions of para 1 (c) apply.

3. Deliveries on the basis of the term "DAF" shall take place in accordance with Incoterms 1990 with the exceptions listed under para 1 (a) - (c). In addition the following exceptions apply:

   (a) All costs prepaid by the carrier in connection with customs processing at frontiers shall be borne by VWoA.

   (b) If deviation becomes necessary from the scheduled carriage route VWoA shall bear all differences in cost.

4. In the case of parts returned by VWoA within the framework of the exchange parts program VWAG shall bear the costs of customs duties and clearance as well as of carriage within the Federal Republic of Germany.

VII. Taking Delivery

1. VWoA shall take delivery of the ordered Contractual Products at the agreed place and at the date indicated to it. If VWoA fails to take delivery within the reasonable final period of grace allowed and made known to it by VWAG, VWAG shall be entitled to rescind the purchase contract and to claim the ascertainable losses incurred, but not less than plus five percent of the purchase price together, with the costs of return or redirection of the Contractual Products in compensation.

2. All complaints concerning incomplete or incorrect delivery of Contractual Products shall be submitted to VWAG in writing within 14 days following receipt of the delivery, accompanied by all relevant documents. If VWoA fails to do so, it shall not be entitled to any claims whatsoever. VWAG shall be responsible to VWoA for defective Contractual Products in accordance with the Terms of Warranty which VWoA is required to extend to its retail customers.

3. All details quoted by VWAG regarding performance, weight, fuel consumption, running costs, speed or the characteristic of Contractual Products shall be regarded as approximately only.

VIII. Miscellaneous

1. Without the prior written approval of VWAG, VWoA shall not assign any claims against VWAG wholly or in part to a third party and shall not grant to third parties any entitlements in respect of such claims.

2. All additions or modifications of these Terms of Sale and Delivery shall only be valid if made in writing.

3. If individual provisions of these Terms prove invalid or incapable of execution, the remaining provisions shall be unaffected.

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Appendix 4 Trade Marks

Trade marks according to Article 7 are:

1. Registered signs valid for all identification programmes of VWAG.

2. Registered Volkswagen signs. To be used only in accordance with the guidelines of the various identification programmes.

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Appendix 5 Principles for the Determination of Transfer Prices

The transfer prices to be charged to VWoA by VWAG for Contractual Products supplied by VWAG shall be agreed between the Parties by applying the following principles:

1. The basis for determining the transfer prices of the Contractual Products shall be the maximum suggested retail prices realistically achievable under expected market conditions as determined in accordance with Section 2 below as agreed between the Parties. Accordingly, the transfer price, which shall be the FOB-price, is to be computed by deducting from the retail price certain items, including, but not limited to, the following:

   - Suggested dealer margin calculated as a percentage of the suggested retail price,
   - VWoA's margin according to Section 2 below,
   - Customs duties and import fees,
   - Variable costs, including, but not limited to, freight, insurance, handling, port installation etc.

2. VWoA's annual budget based on a mutually agreed upon 12-months'-projected sales volume and respective maximum suggested retail prices for the Contractual Products reasonably expected to be sold in the market shall allow for an adequate margin to be determined in the following manner:

2.1 VWoA's margin is calculated as a percentage of the revenue per vehicle. This margin shall allow VWoA, under normal market conditions and sales and financial performance comparable to other independent distributors, to the extent ascertainable, to cover the following, mututally agreed upon budgeted expenditures including but not limited to:

   a) Normal marketing and sales expenditures for

      - administration,
      - advertising and other sales promotion measures,
      - aids for sales, build out programs,
      - incentive measures,
      - customer financing support, leasing support including, but not limited to residual value support,
      - deferred payments and floor planning
      - enhanced supplemental warranty coverage
      - product support and warranty related costs not reimbursed by VWAG.

   b) Normal warehousing and logistics.

2.2 An appropriate profit shall be achievable under normal market conditions.

3. Any other costs relating to marketing or warehousing which are not covered by VWoA's annual budget and caused by a single, unforeseen and/or extraordinary measure shall be borne by the Party having the predominant business interest in such measure or cost sharing or shall, if appropriate, be shared by the Parties; provided, however, that prior to any such measure the Parties shall agree on such measure or cost sharing.

4. VWoA's margin shall not include costs for warranty, customer satisfaction, repair of serial defects, recalls, product liability and service actions to the extent such costs are borne by VWAG.

5. When determining VWoA's margin the Parties shall give due regard to all significant market conditions such as, but not limited to

   - size of the market
   - intensity of competition
   - inventory levels and turnover sales
   - scope and terms of warranty provided
   - advertising requirements
   - special requirements of the brands
   - extension of credit and payment terms.

   Once a year either party may request a review of VWoA's margins. Any change to the margins may be made only by an agreement in writing signed by each party.

6. VWAG shall furnish to VWoA upon request accurate documentation as may be required by relevant US tax regulations.

7. VWoA, in consultation with VWAG, will exercise its best efforts to reduce its costs and maintain a sales organisation and administrative costs, at a level appropriate for its expected sales volumes.

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Appendix 6 Consumer Product Warranties

1. VWoA warrants to the owner that the Contractual Product is free from defects in material and workmanship in accordance with the following terms:

   - The new vehicle warranty becomes effective on the day of delivery or first service. It is valid for 2 years/24.000 miles whichever occurs first.

   - The power train warranty shall be for

     5 years/50.000 miles,
     10 years/100.000 miles (for model year 1994 and 1995 passenger cars) valid until December 31, 1994,

     whichever occurs first or until the original owner transfers ownership of the vehicle to someone other than an immediate family member.

   - the federal emissions warranty shall be for
     5 years/50.000 miles, whichever occurs first

   - the California emissions warranty shall be for
     7 years/70.000 miles, whichever occurs first

   - the warranty against corrosion perforation shall be for
     6 years.

   - For Volkswagen Industrial Engines the warranty expires after a period of 24 months or with the completion of 1.000 hours of operation, whichever occurs first.

   - For Genuine Spare Parts the warranty period is 12 months.

   - The above mentioned conditions shall be changed from time to time in accordance with new agreements between VWAG and VWoA.

2. Claims for the correction of defects under the warranties may only be lodged with authorized workshops entrusted with the service support of the purchased goods and must be lodged as soon as the defects are detected.

3. The warranty extends, subject to technical requirements, to replacement or repair of the defective parts. Replaced parts become the property of the supplier.

   The costs incurred during work under warranty for the removal and installation of parts shall not be charged to the customer unless these costs were incurred as a result of modifications made to the purchased goods.

   All further claims, particularly with regard to compensation of direct and indirect damage, are excluded (i.e. car hire charges, towing cost).

4. Warranty claims are not justified if the failure reported is caused by:

   - the purchased goods previously being repaired by a non-authorized workshop; or

   - parts being installed in the purchased goods whose use has not been approved by the manufacturer or where the purchased goods were modified in a manner not authorized by the manufacturer; or

   - the purchaser's failure to comply with the specifications relating to the maintenance and use of the purchased goods (service manual, service schedule etc.).

5. Normal wear and tear (for vehicles and genuine parts) is not covered by this warranty. The same applies to damage resulting from incorrect handling or excessive loads being applied (e.g. through involvement in motor sport).

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Appendix 7 Recall Actions

1. Recall actions shall be performed
   - to avoid reasonable and possible damage and/or personal injury related to products of VWAG already on the market, or
   - in compliance with legal requirements and/or agency instructions.

   Recall actions shall generally be performed upon mutual agreement between VWAG and VWoA.

   VWoA shall perform any action in accordance with the instructions and guidelines of VWAG.

2. VWoA shall start any recall action, initiated by VWAG, as soon as VWAG has provided the necessary information. VWoA shall provide VWAG with all technical data necessary for the record keeping of recall actions. VWoA shall inform VWAG immediately after a recall action is completed.

   Recall actions shall be performed by using genuine Volkswagen parts. Parts provided by other manufacturers shall only be used, if such parts have been approved by VWAG in advance.

   VWAG shall provide 100 % of such genuine parts needed for the performance of the recall action. If these parts are not delivered by VWAG they shall be ordered by VWoA in the usual manner.

   VWAG, shall to the extent it deems appropriate, assist VWoA by making field service and special personnel available to VWoA; the costs incurred thereby shall be borne by VWAG.

3. All costs directly resulting from any recall action and all costs associated with a recall action which are caused by VWoA's acting in accordance with VWAG directives, shall be borne by VWAG.

   The costs related to recall actions shall be processed exclusively by WIN (warranty system) in reference to the action code.

   The payment of additional costs, i. e. charges for air freight, will be determined by mutual agreement between VWoA and VWAG.

4. VWoA shall complete recall actions as soon as possible.

   VWoA shall be entitled to return any surplus genuine parts not needed for performing an action in accordance with mutually agreed conditions. Such return shall commence after completion of the recall action and shall be carried out at the latest within two months after completion.

a:\APP7.doc disk kl8

VOLKSWAGEN AG

VOLKSWAGEN AG · D-38436 Wolfsburg

Mr.
Gerhard P. Riechel
Associate General Counsel and Secretary
Volkswagen of America, Inc.
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VOLKSWAGEN
Aktiengesellschaft
Sitz: Wolfsburg
Amtsgericht Wolfsburg
HRB 1200

Re: Amendment to the Importer Agreement between VWAG and VWoA

Dear Mr. Riechel:

Pursuant to your Company's request we like to amend Appendix 4 of the Importer Agreement between Volkswagen Aktiengesellschaft (VWAG) and Volkswagen of America, Inc. (VWoA). Enclosed for your records please find an amended Appendix 4 to Article 7 of such Importer Agreement.

If you have any questions, do not hesitate to contact us.

Sincerely yours
Volkswagen AG

ppa
Deputy General Counsel

i.V.
Head of
Patents, Trademarks, Licensing

Attachment: Appendix 4 to Importer Agreement

2 AUG 01 13 33

g:K-DR-4\Ehinger\Brief\Letter on Appendix 4 to Importer Agreement

Appendix 4 Trade Marks

Trade marks according to Article 7 are:

1. Registered signs valid for all identification programmes of VWAG.

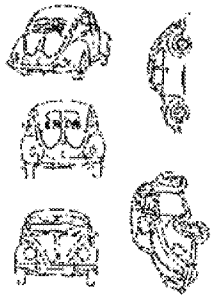
2. Registered Volkswagen signs. To be used only in accordance with the guidelines of the various identification programmes.

   VOLKSWAGEN

   VW

3. VWAG Registered trademarks to be included in the protection program include, but are not limited to:

   All trademarks noted in para.1 and para.2 above.
   All vehicle names including Beetle, New Beetle, Jetta, Golf, Passat, Cabrio and Eurovan.
   All design marks including the classic Beetle and New Beetle vehicle designs and the New Beetle icon:



July 17, 2001

Volkswagen AG

Deputy General Counsel

i.V.

Head of
Patents, Trademarks, Licensing

g:K-DR-4\Ehinger\Brief\Letter on Appendix 4 to Importer Agreement

AMENDMENT TO IMPORTER AGREEMENT

This Amendment (the "Amendment") to Importer Agreement is entered into by and between VOLKSWAGEN AG, a corporation organized under the laws of Germany ("VWAG") and VOLKSWAGEN GROUP OF AMERICA, INC. (formerly known as "Volkswagen of America, Inc."), a New Jersey corporation ("VWoA").

WHEREAS, VWAG and VWoA are parties to that certain Importer Agreement, effective January 1, 1995 as amended from time to time (the "Agreement"); and

WHEREAS, the parties desire to amend certain provisions of and Appendices to the Agreement.

NOW THEREFORE, VWAG and VWoA hereby amend the Agreement as follows:

1. References in the Agreement to "Volkswagen of America, Inc." are hereby replaced with "Volkswagen Group of America, Inc."

2. Article 4, paragraph (a), is hereby deleted in its entirety and replaced with the following:

"VWoA assumes primary responsibility for the United States of America, including Alaska, Hawaii and the territories of Guam and Puerto Rico, which shall be referred to herein as the "Area of Primary Responsibility"."

3. Appendix 2 is hereby amended and restated in the form attached hereto as Exhibit A to include Volkswagen Group of America Chattanooga Operations, LLC ("VWACO"), as an affiliated company of VWAG.

4. New motor vehicles, aftermarket service parts and exchange parts purchased by VWoA from VWACO shall be considered "Contractual Products" for purposes of the Agreement, including without limitation, Article 19 ("Warranty, Warranty Administration Recall and Auditing"); provided, however, that Articles 11 ("Purchase of Contractual Products") and 13 ("Purchase Price, Terms of Sale and Delivery, Terms of Payment") shall not apply to such vehicles or parts purchased by VWoA from VWACO, unless otherwise agreed by the parties in writing.

5. Article 19, paragraph (b), is hereby deleted in its entirety and replaced with the following:

"b) VWAG shall reimburse VWoA for the warranty costs incurred by VWoA pursuant to paragraph (a) above, including recall costs (Appendix 7) and service action costs. Recall and services actions must be coordinated with the service department of VWAG.

Reimbursement shall apply to:

- US dealer's labor cost;
- Cost of outside labor and outside materials (as may be agreed from time to time by VWAG); and
- Material cost equal to VWoA landed cost and dealer's handling charge (dealer net multiplied by 40% not to exceed MSRP).

Landing Cost and Handling factors will be calculated by February 28th using prior year data. Calculations will be reviewed by the parties and implemented by March 31" for the then current year."

6. Article 19, paragraph (f), is hereby deleted in its entirety and replaced with the following:

"f) (i) Except as described in subsection f(ii) below, claims for reimbursement of warranty costs shall be submitted to VWAG or other applicable Affiliated Company through the VWAG warranty system (currently, "SAGA2") , on a weekly basis when approved and paid by VWoA to the Contractual Enterprises. VWAG shall review all claims (through logical system edits or otherwise) and may summarize claim information as needed, and VWAG shall approve the claims for reimbursement to VWoA. VWoA shall only submit claims approved by it in accordance with the applicable reimbursement guidelines.

Except as described in subsection f (ii) below, once every two (2) weeks, VWAG (or the applicable Affiliated Companies) shall prepare a "Gutex" transmission of payment to VWoA. In the event VWAG disputes the accuracy or appropriateness of a warranty claim, VWAG shall pay the disputed claim when due and shall be reimbursed by VWoA promptly if the dispute is resolved in favor of VWAG

(ii) In the event the parties so agree, VWoA may submit invoices to an Affiliated Company for warranty costs incurred by it with respect to Contractual Products purchased by VWoA from the Affiliated Company, including, but not limited to, all costs for recall actions and service actions. The invoices shall include a summary description of each claim, including an accounting of the amounts disbursed by VWoA to its Contractual Enterprises for parts, labor and other Items.

Such invoices shall be paid by the Affiliated Company within 30 days of the date of the invoice, or as otherwise mutually agreed. In the event the Affiliated Company disputes the accuracy or appropriateness of a warranty claim, it shall pay the invoice, including the disputed claim, when due, and it shall be reimbursed by VWoA promptly if the dispute is resolved in favor of the Affiliated Company."

7. Article 20, paragraph (5), is hereby deleted in its entirety and replacing it with the following:

"Costs of arbitration awards rendered pursuant to VWoA's mediation/arbitration system (currently, the Better Business Bureau's Autoline Arbitration Program) or any state arbitration system pursuant to any "lemon" law ordering VWoA to repair a vehicle, refund repair and related costs, including lease payments, or repurchase the motor vehicle;"

8. Section 1 of Appendix 6 is hereby amended and restated in the form attached hereto as Exhibit B.

9. Appendix 7 is hereby amended as follows:

a) Section 3 of Appendix 7 is hereby deleted in its entirety and replaced with the following:

"3. All costs directly resulting from any recall action and all costs associated with a recall action which are caused by VWoA's acting in accordance with VWAG directions shall be borne by VWAG

Claims and payments for the costs related to such recall actions shall be processed exclusively through VWAG's warranty system (currently "SAGA2"), interfacing with the recall system, with reference to the appropriate action code.

The payment of additional costs (e.g., charges for air freight) shall be determined by mutual agreement between VWoA and VWAG."

b) Section 4 of Appendix 7 is hereby deleted in its entirety and replaced with the following:

"VWoA shall complete recall action as soon as reasonably possible. VWoA shall be entitled to return any genuine parts not needed for performing an action."

10. All provisions of the Agreement not expressly modified herein shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the undersigned parties have executed this Amendment, effective as of August 1, 2011.

VOLKSWAGEN AG	VOLKSWAGEN GROUP OF AMERICA, INC.
ppa. By:	By:
Name: HUBERT NIESWANDT	Name: DAVID GENNACOPOULOS
Title: CHIEF COUNSEL	Title: GENERAL COUNSEL
By:	By:
Name: Terence Johnsson	Name: Michael Lohscheller
Title: Executive Director Sales the Americas	Title: CFO

Exhibits: A: Appendix 2 to Importer Agreement

B: Section 1 of Appendix 6 to Importer Agreement

EXHIBIT A TO AMENDMENT TO IMPORTER AGREEMENT
July 1, 2011

Appendix 2: Affiliated Companies of VWAG

May 1, 2011

Audi AG, Ingolstadt Germany

Volkswagen de Mexico S.A. de C. V., Puebla, Mexico

Volkswagen do Brasil S.A. Sao Paulo, Brazil

Volkswagen Group of America Chattanooga Operations, LLC, Chattanooga TN

VWR, Wolfsburg, Germany

EXHIBIT B TO AMENDMENT TO IMPORTER AGREEMENT
July 1, 2011

Amended and Restated Section 1 of Appendix 6

1. VWoA shall provide warranty coverage to the purchaser or lessee of Contractual Products for repairs or replacement of parts due to defects In material and workmanship in accordance with the following terms for model years 2006 and forward:

- The warranty period begins on the date the vehicle is delivered to the original purchaser or lessee or the date such vehicle is first placed in service.

- The New Vehicle Limited Warranty shall be for
  - 4 years/50,000 miles, whichever occurs first (MY 2006 -2008).
  - 3 years/36,000 miles, whichever occurs first (MY 2009 and forward).

- The Powertrain Limited Warranty shall be for
  - 5 years/60,000 miles, whichever occurs first (MY 2006 and forward) .
  - 10 years/100,000 miles, whichever occurs first (MY 2011 Touareg only).

- Hybrid System Limited Warranty shall be for
  8 years/100,000 miles, whichever occurs first (apples for certain hybrid system parts on MY 2011 and forward hybrid vehicles).

- The Federal Emissions Warranty shall be for
  - 8 years/80,000 miles, whichever occurs first (applies to catalytic converter, E.C.M., onboard emissions diagnostic device).
  - 2 years/24,000 miles, whichever occurs first (certain emissions parts other than above items).

- The California Emissions Warranty shall be for
  - 3 years/50,000 miles, whichever occurs first (applies to any emission-related part).
  - 7 years70,000 miles, whichever occurs first (apples to specific control devices).
  - 15 years/100,000 miles, whichever occurs first (apples to any emission-related part on Partial-Zero Emissions Vehicles ("PZEV")).

- The Limited Warranty Against Corrosion Perforation shall be for
  12 years/unlimited miles

- For Genuine Spare Parts the warranty period shall be for
  1 Year/12,000 miles, whichever occurs first.

The above mentioned conditions shall be changed from time to time In accordance with new agreements between VWAG and VWoA.

TAB B

APPENDIX B

AFFIDAVIT OF THOMAS A. RAY

STATE OF TEXAS §
TRAVIS COUNTY §

Before me, the undersigned notary, on this day personally appeared Thomas A. Ray, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

1. "My name is Thomas A. Ray. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. "On November 16, 2017, I accessed the website located at https://www.justice.gov, the public website for the United States Department of Justice. Thereafter, I navigated to the page located at https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six, where I viewed and subsequently printed Volkswagen AG's Rule 11 Plea Agreement in *United States v. Volkswagen AG*, No. 16-CR-20394, Eastern District of Michigan, attached hereto as Exhibit 4. That attachment is a true and accurate copy of the document I viewed and printed.

3. "On November 16, 2017, I accessed the website located at https://www.epa.gov, the public website for the United States Environmental Protection Agency. Thereafter, I navigated to the page located at https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-caa-09-18-15.pdf, where I viewed and subsequently printed a September 18, 2015 letter from Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, U.S. EPA, to various Volkswagen entities, subject "Notice of Violation," attached hereto as Exhibit 2. That attachment is a true and accurate copy of the document I viewed and printed.

4. "On November 16, 2017, I accessed the website located at https://www.epa.gov, the public website for the United States Environmental Protection Agency. Thereafter, I navigated to the page located at https://www.epa.gov/sites/production/files/2015-11/documents/vw-nov-2015-11-02.pdf, where I viewed and subsequently printed a November 2, 2015 letter from Susan Shinkman, Director, Office of Civil Enforcement, U.S. EPA, to various Volkswagen entities, subject "Notice of Violation," attached hereto as Exhibit 3. That attachment is a true and accurate copy of the document I viewed and printed."

Thomas A. Ray

Sworn to and subscribed before me by Thomas A. Ray on the 20th day of November, 2017.

Melodie Kay Cartwright
Notary Public in and for
the State of Texas

MELODIE KAY CARTWRIGHT
Notary Public-State of Texas
Notary ID #129481194
Commission Exp. JUNE 26, 2021
Notary without Bond

TAB 1

11/20/2017 6:15 PM
Velva L. Price
District Clerk
Travis County
D-1-GN-16-000370
Sandra Henriquez

Master File No. D-1-GN-16-000370

IN RE VOLKSWAGEN CLEAN DIESEL LITIGATION: TCAA ENFORCEMENT CASE	§ § §	**IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 353RD JUDICIAL DISTRICT**

Transferred from:

Cause No. D-1-GN-15-004513

STATE OF TEXAS, Plaintiff,	§	IN THE DISTRICT COURT OF
and	§	
TRAVIS COUNTY, Plaintiff-Intervenor	§	TRAVIS COUNTY, TEXAS
v.	§	
VOLKSWAGEN GROUP OF AMERICA, INC., AUDI OF AMERICA, LLC, and PORSCHE CARS NORTH AMERICA, INC., Defendants.	§	200TH JUDICIAL DISTRICT

STATE OF TEXAS'S RESPONSE AND OPPOSITION TO VOLKSWAGEN AND PORSCHE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The State of Texas, through Texas Attorney General Ken Paxton, ("State") files its Response and Opposition to Volkswagen and Porsche Defendants' ("Defendants")[1] Motion for Summary filed pursuant to Tex. R. Civ. P. 166a(b). Defendants have not

[1] Defendants' Motion was filed by Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, and Audi of America, LLC (collectively "Volkswagen") and Porsche Cars North America, Inc.

met their burden to show that the State's action is preempted by the federal Clean Air Act nor can Defendants demonstrate that the regulatory provisions do not apply to Defendants' conduct; therefore, Defendants' Motion for Summary Judgment should be denied.

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INTRODUCTION AND SUMMARY OF ARGUMENT

For almost a decade, Defendants engaged in an unprecedented scheme of extraordinary scope and duration to install in thousands of diesel vehicles hidden software parts that disabled or impaired emissions controls when the vehicles were used on roadways by the ultimate owners and operators of the vehicles. Through recent discovery conducted in the Texas MDL proceeding, the State has learned that this unprecedented scheme also included the commission of other illegal acts within the State. Specifically, Defendants also engaged in aftermarket conduct involving the installation of new emissions-tampering parts on licensed and registered vehicles during recalls or maintenance actions at Texas dealerships.

Defendants now ask this Court dismiss all the State's claims related to this illegal conduct. The Court should deny Defendants' Motion for Summary Judgment for the following reasons:

- The State's Original Tampering claims are not expressly preempted because they are not an attempt to enforce a new-vehicle emission standard. They are an in-use regulation of vehicles expressly preserved under the Clean Air Act. The State seeks to penalize Defendants for causing, suffering, allowing, or permitting the emissions control systems on Affected Vehicles to be disabled each time the vehicles were in use on Texas roadways.

- The State's Recall Tampering claims involve separate and distinct conduct from the State's Original Tampering claims. These claims seek to penalize Defendants for tampering with EPA-approved emissions control systems by installing new parts on licensed and registered vehicles at Texas dealerships long after the manufacturing process was complete. These claims clearly fall outside the express preemption provision in the Clean Air Act and fall squarely within the in-use exception for state regulation of motor vehicles emissions.

- The State's claims are not impliedly preempted. Congress has already spoken in detail on the State's authority through Sections 209(a) and (d) of the Clean Air Act. It is therefore inappropriate to go beyond what Congress has expressly preempted and reserved for the States by inferring that Congress intended to provide immunity for vehicle manufacturers or by inferring a conflict with the Clean Air Act. Moreover, Defendants are importers of the Affected Vehicles, not manufacturers.

- Defendants' arguments regarding the applicability of the rules cited in the State's Petition improperly seek summary judgment based on the pleadings. Defendants also fail to meet their burden with admissible summary-judgment evidence. Even if the Court finds the applicability arguments proper, the State's anti-tampering rules apply to both the Original Tampering installed during the manufacturing of the Affected Vehicles, and to the subsequent Recall Tampering Defendants installed on vehicles operating in Texas.

SUMMARY JUDGMENT EVIDENCE

The State of Texas relies on the following evidence in support of this Response. True and correct copies of the referenced evidence are attached in an Appendix to this Response and are incorporated into this Response by reference as if fully set out herein:

Exhibit 1: Defendant Volkswagen Group of America, Inc.'s Third Amended Responses and Objections to Plaintiff's First Set of Interrogatories.

Exhibit 2: Letter from Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, U.S. EPA, to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (September 18, 2015).

Exhibit 3: Letter from Susan Shinkman, Director, Office of Civil Enforcement, U.S. EPA, to Volkswagen AG, Audi AG, Porsche AG, Volkswagen Group of America, Inc., and Porsche Cars North America, Inc. (November 2, 2015).

Exhibit 4: Rule 11 Plea Agreement, United States of America v. Volkswagen AG, E.D. Mich., No. 16-CR-20394.

Exhibit 5: Defendant Volkswagen Group of America, Inc.'s Responses and Objections to State of Texas's and TCAA County Plaintiffs' Second Set of Requests for Admissions and Interrogatories.

Exhibit 6: Deposition of Stuart Johnson, August 8, 2017.

Exhibit 7: Deposition of Stuart Johnson, Corporate Representative for Defendant Volkswagen Group of America, Inc., October 25, 2017.

Exhibit 8: Defendants' Third Amended Responses to the State's First Request for Admissions.

Exhibit 9: Importer Agreement between Volkswagen Aktiengesellschaft and Volkswagen of America, Inc.

Additionally, pursuant to Texas Rule of Civil Procedure 166a(d) the State gives notice of its intent to use discovery products not on file in support of its opposition and response to Defendants' Motion for Summary Judgment. Those discovery products include Exhibits 1, 5, 6, 7, 8 and 9.

BACKGROUND

I. The Volkswagen Tampering Scandal Generally.

On or about September 18, 2015, the public first learned that Volkswagen ("VW") installed hidden software parts on over 500,000 diesel-powered vehicles during the manufacturing process. This software disabled or impaired the emissions control systems of the vehicles when they were in-use by the ultimate owner/operator of the vehicle. Specifically, the hidden software recognized when the vehicles were undergoing emissions testing (commonly referred to as "test mode"), versus when they being driven (commonly referred to as "street mode"). While in "street mode," the software disabled

or impaired the emissions control systems when the cars were being driven. *See* Exhibit 8, pp. 8-9. The Affected Vehicles include numerous VW, Audi, and Porsche vehicles equipped with 2.0 and 3.0-liter diesel engines model years 2009-2015. *See* Exhibit 2, and Exhibit 3.

At some point during 2012, Defendants received reports of high numbers of failures of hardware parts in the emissions control systems in the Affected Vehicles, and those failures caught the attention of VW. Exhibit 4, p. 2-18, and Exhibit 5, pp. 4-5. VW engineers suspected that these hardware part failures were occurring in Affected Vehicles because the original hidden software parts installed during the manufacturing process were not working as Defendants intended. *Id.* Accordingly, VW decided to again tamper with the emissions control systems by installing new electronic parts on Affected Vehicles, including on post-sale Affected Vehicles, to further ensure that the emissions control systems were disabled or impaired when the vehicles were being driven. Exhibit 4, pp. 2-19 – 2-20, and Exhibit 5, p. 5. By installing these new parts to ensure the emissions control systems were disabled or impaired during normal driving conditions, VW sought to avoid costly repairs and replacement of emissions control systems hardware in those vehicles. *Id.*

For years, VW intentionally concealed information about its hidden software from both governmental regulators and the public. Exhibit 4, pp. 2-21 – 2-25. In late 2015, facing the threat of regulators' refusal to certify Defendants' model year 2016 vehicles for sale in the United States, VW for the first time admitted that it installed

hidden software parts during the manufacturing process to disable or impair the emissions control software on the Affected Vehicles when they were in use by the owner/operator during normal driving. Exhibit 6, p. 323: 11-21.

Later, through various criminal proceedings and guilty pleas resulting from those pleadings, it became apparent that VW's tampering with emissions control systems also occurred on vehicles that were already in use on Texas roadways, in most cases, years after they were manufactured and sold. Exhibit 4, pp. 2-18 – 2-20, and Exhibit 5, p. 5. On October 25, 2017, the State of Texas and the TCAA County Plaintiffs conducted one of the first depositions specifically related to VW's installation of new electronic parts intended to disable or impair emissions equipment on post-sale vehicles at Texas dealerships. *See* Exhibit 7. At that deposition, among other facts regarding this post-sale tampering, Plaintiffs learned that Volkswagen Group of America, Inc., employee James Liang was involved in the development of the tampering software parts that were installed by Defendants on thousands of vehicles in-use on Texas roads in 2014 and 2015. *Id.* at pp. 151:17-160:2.

II. The Two Categories of Tampering Explained.

The State alleges that VW engaged in two categories of tampering. The *first* category of tampering ("Original Tampering") occurred when VW installed hidden software parts in Affected Vehicles during the manufacturing process. Exhibit 4, pp. 2-12 – 2-14, and Exhibit 1, p. 8. The effect of this hidden software was to start the Affected Vehicle in low-NOx-emitting "test mode;" however, if the software detected

that the vehicle was not being tested on the dynamometer, but in fact was being driven on the road by the owner/operator, the software would disable or impair the normal operation of the emission controls system—switching the vehicle to high-NOx-emitting "street mode." *Id.* The *second* category of tampering ("Recall Tampering") occurred when Defendants installed new electronic parts on certain Affected Vehicles when consumers brought these vehicles into Defendants' Texas dealerships for routine maintenance, or in response to a recall notice from Defendants. Exhibit 4, p. 2-20, and Exhibit 1, p. 8. Given that Defendants had discovered, through high numbers of failure of certain emissions control hardware, that the Original Tampering part was not effective all the time, the new electronic parts were intended to further ensure that emissions control systems were disabled or impaired during normal driving conditions. Exhibit 4, pp. 2-18 – 2-20, and Exhibit 5, p. 14.

The sub-sections below include the specific facts related to each category of tampering.

A. Original Tampering.

VW installed hidden computer software in the Affected Vehicles that determined whether a vehicle was being tested for emissions on a dynamometer or being driven on the road. Exhibit 1, p. 8. This hidden software was intended to "turn-off" certain parts of the emission control systems when the vehicles were being driven by the owner/operator. *Id.* The Original Tampering part was a highly-sophisticated software component of the Electronic Control Module ("ECM"), or the "computer brain" of

the vehicle.[2] The vehicle would always be in "test mode" upon starting; i.e., the vehicle's emissions control systems would operate upon starting in such a manner that emissions would meet the emissions standards of the federal emissions test procedures carried out on a dynamometer. Exhibit 7, p. 98: 6-11. The Original Tampering part would monitor the vehicle for signs that the vehicle was not in fact being tested, but rather was being driven on the road by an owner/operator. If the part detected that the vehicle was being driven rather than being tested, the Original Tampering software would switch the vehicle from "test mode" to "street mode," and impede, impair or render inoperable the operations of the emissions control system. Exhibit 4, pp. 2-12 – 2-13. This disabling or impairing of the emissions control system meant that the exhaust emissions from the vehicles emitted tailpipe-out exhaust gas effectively untreated for NO_x, thereby allowing the vehicle to achieve better performance and mileage.[3] And importantly for Defendants, who bore responsibility for the durability of the hardware of the emissions control systems and the cost of replacing faulty hardware, "street mode" reduced or eliminated "wear and tear" on the hardware of the emissions control system. Exhibit 7, pp. 182:10-185:5.

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[2] *See* Moritz Contag Et Al., *How They Did It: An Analysis of Emission Defeat Devices in Modern Automobiles*, 2, (2017).

[3] *See* Moritz, *supra*, at 2.

B. Recall Tampering.

In or around 2012, VW received owner/operator complaints about hardware failures in Affected Vehicles. Exhibit 4, p. 2-18, and Exhibit 5, pp. 4-5. VW engineers suspected that the hardware failures in Affected Vehicles were due to the hidden software not adequately recognizing when the vehicles were being tested on a dynamometer versus when they being driven. *Id.* As a result, these Affected Vehicles operated in "test mode" when they were supposed to operate in "street mode" thereby causing failures of hardware components of the emissions control systems of those vehicles. *Id.*

To address this problem, VW developed two new software parts to disable or impair the emissions control systems when the vehicles were being driven. Exhibit 4, pp. 2-19 – 2-20 and Exhibit 7, pp. 87:15-88:13. These new parts were a steering wheel angle recognition feature ("SWARF") and a feature that started the vehicle in "street mode" rather than "test mode" ("Start Function"). Exhibit 4, pp. 2-19 – 2-20 and Exhibit 5, pp. 4-5. Start Function ensured that the vehicle was in "street mode" whenever turned on. SWARF ensured that the vehicle would stay in "street mode" as long as the steering wheel angle was moved, thereby signaling that the vehicle was being driven and not tested. *Id.*

These two software parts were Defendants' solution to the hardware failures in the emissions control systems. By ensuring that the vehicles started in "street mode" through Start Function, and would stay in "street mode" as long as the steering wheel

was moved by the driver, the problem of the failure of certain hardware components of the emissions control systems through "wear and tear" was solved. Exhibit 7, pp. 116:25-117:10. After all, the emissions control systems would now be impaired or disabled when the vehicle was driven by the owner/operator. Exhibit 7, p. 63:8-20.

These new parts were installed in new vehicles during manufacturing, beginning with model year 2014, but VW did not stop there. Exhibit 4, pp. 2-19 – 2-20 and Exhibit 5, pp. 4-5. VW also installed these new parts through recalls or maintenance actions on post-sale vehicles. Exhibit 4, p. 2-20. VW first notified regulators of a "field fix," which does not require regulator approval, for certain Affected Vehicles in 2014. *Id.* VW informed regulators that it would be "optimizing" emissions through installing software parts on in-use Affected Vehicles. *Id.* VW did not disclose the Start Function software part or the SWARF software part to the regulators. Exhibit 7, pp. 282:12-283:1. Then, in late 2014, VW submitted to EPA an application and received approval for a "recall" for certain Affected Vehicles. Exhibit 5, p. 7.

At the time, VW was engaged in an elaborate cover-up of the Original Tampering. Exhibit 4, pp. 2-21 – 2-22, and Exhibit 5, pp. 4-5. West Virginia University ("WVU") had conducted road-testing of certain diesel vehicles using a Portable Emissions Monitoring System, or "PEMS." During road testing of two Volkswagen vehicles, WVU detected NOx emissions that were far in excess of the NOx emissions of those vehicles during dynamometer testing. Exhibit 4, p. 2-21 and Exhibit 5, pp. 4-5. The test results were shared with regulators and the public. VW then commenced a

farce that lasted over a year, in which the regulators requested, and then demanded, that Volkswagen explain the reason for the gross discrepancies between NOx emissions when the vehicles were tested on the dynamometer versus the NOx emissions during normal driving. Exhibit 4, pp. 2-21 – 2-27. Volkswagen disputed the test results, demanded and conducted additional testing (which confirmed the WVU results in large part), prepared and presented numerous presentations to the regulators that posited various false reasons for the discrepancies. *Id.* The true reason for the discrepancies was only revealed when the regulators told VW it would not certify its 2016 model year vehicles for sale until VW admitted the truth. Exhibit 4, pp. 2-21 – 2-24 and Exhibit 5, pp. 4-5. As part of this extended cover-up, VW proposed a recall to the regulators, representing the recall would resolve, or at least largely ameliorate, the excess emissions. Exhibit 4, p. 2-19. In fact, VW used the recall – its proposed solution to the excess NOx emissions uncovered by WVU over a year prior – to install the new tampering parts on vehicles in hands of Texas owners, and in use on Texas roads, using the service departments of authorized VW and Audi dealerships throughout Texas. Exhibit 5, pp. 7-14.

Discovery of Defendants' post-sale tampering in Texas has only begun. VW AG plead guilty on January 11, 2017—the same day that this Texas MDL proceeding was stayed on Defendants' motion. The factual recitation of that guilty plea revealed that Defendants engaged in post-sale tampering with the emissions control systems of vehicles being driven on the roads in Texas. Exhibit 4, pp. 2-18 – 2-20 and Exhibit 5,

pp. 4-5. When the stay was lifted in this cause in late July of 2017, Plaintiffs commenced discovery of the tampering revealed by the factual recitation in the VW AG guilty plea, and took its first deposition on that tampering on October 25, 2017. However, Plaintiffs intend to conduct discovery of potential additional instances of post-sale tampering, as well as continue to conduct discovery on the number of times that Defendants engaged in tampering by causing, suffering, allowing or permitting the SWARF and Start Function software parts to be installed on licensed and registered vehicles in Texas.

III. Cooperative Federalism and General Preemption Standards.

The Texas Clean Air Act ("TCAA") and TCEQ regulations cited in this suit are part of a federal-state partnership provided under the federal Clean Air Act ("CAA") to combat air pollution. The CAA provides enforcement authority to both the federal and state governments. Unlike many federal statutes that set out a field of exclusive federal regulation, the CAA "made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The opening section of the CAA shows that Congress intended for the states to maintain their primary role in combating air pollution:

> The Congress finds that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.

42 U.S.C. § 7401(a)(3).

The legislative history to the Clean Air Act also makes clear that States and local governments were to partner in the role to clean up the air in the country: "The Senate remains convinced that the most effective enforcement of standards would take place on the State and local levels." Senate Consideration of the Report of the Conference Committee, 91st Cong., Publ. L. 91-604 (Dec. 18, 1970) *reprinted in* 93rd Cong. 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970,* 123, 127 (1974). While Congress removed the State's power to adopt or enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines," the States can still regulate "emissions from other than new cars[.]" S. Rep. No. 91-1196, National Air Quality Standards Act of 1970, *reprinted in A Legislative History of the Clean Air Act Amendments of 1970, supra,* 397, 513 (1974).

Federal preemption analysis begins with the assumption that the historic police powers of the States were not to be superseded by federal law unless that was the clear and manifest purpose of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Because the States are independent sovereigns in our federal system, courts presume that Congress does not cavalierly pre-empt state-law causes of action. *Id.* Accordingly, preemption provisions addressing local police powers should be narrowly construed. *Id.*

Federal courts do not hesitate to find preemption when Congress has expressly stated its intent, but have a general hesitancy to infer a preemptive intent, especially as to state regulation of matters of health and safety. *Perry v. Mercedes Benz of N. Am., Inc.*,

957 F.2d 1257, 1261 (5th Cir. 1992). Federal regulation "should not be deemed preemptive of state regulatory power in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

ARGUMENT

I. Facial vs. As-Applied Preemption Analysis.

Defendants argue that, pursuant to the Supremacy Clause of the United States Constitution, the State's claims are preempted by federal law. *See* Volkswagen and Porsche Defendants' Motion for Summary Judgment, p. 15 ("Defendants' Motion"). A statute may be challenged as unconstitutional on its face or as-applied. *Combs v. STP Nuclear Operating Co.*, 239 S.W.3d 264, 269-70 fn8 (Tex. App.—Austin 2007, pet. denied). A challenge to a statute on its face claims that a "statute is unconstitutional in all of its applications." *Id.* In contrast, a challenge to a statute as-applied asserts that a statute is unconstitutional "because of the manner in which it was applied in a particular case." *Id.* "[A]s-applied challenges are fact specific and must be brought on a case-by-case basis." *Id.*.[4]

[4] In the federal preemption context, courts have distinguished between as-applied and facial challenges. For example, in *Am. Petroleum Inst. v. Cooper*, 681 F. Supp. 2d 635, 656 (E.D.N.C. 2010), *aff'd in part, vacated in part,* 718 F.3d 347 (4th Cir. 2013), the District Court analyzed facial preemption challenges under both the CAA and the Petroleum Marketing Practices Act. The District Court later granted summary judgment on an as-applied basis. *Am. Petroleum Inst. v. Cooper*, 835 F. Supp. 2d 63, 89 (E.D.N.C. 2011), *aff'd in part, vacated in part,* 718 F.3d 347 (4th Cir. 2013).

A. The challenged regulations are facially valid.

Defendants have not shown (or argued) that the challenged regulations are unconstitutional or preempted in *all* their applications. Instead, Defendants appear to argue that their specific circumstances render the State's claims preempted. Defendants have not met their burden of showing that the challenged regulations are *facially* unconstitutional or preempted.

As set forth in the State's Special Exceptions, the challenged regulations are facially valid as a matter of law. The challenged regulations are within the residual authority for states to fight air pollution in the use and operation of vehicles on Texas roadways by preventing tampering with EPA-approved emission control systems on vehicles. They do not impose requirements on the sale of new vehicles or impose new-vehicle emission standards. Moreover, the EPA itself concluded that state anti-tampering rules are consistent with the CAA. *See* 63 Fed. Reg. 6651, 6652 (Feb. 10, 1998) ("Even though there is a federal law which provides for EPA enforcement, many states do have such rules and use them successfully as enforcement tools for resolutions of consumer complaints involving tampered vehicles, deterrence of tampering, deterrence of selling tampered vehicles, and enforcement of tampering violations)..[5]

[5] The Texas anti-tampering regulations in this suit were submitted to the EPA as part of the Texas SIP in 1997 and 1998. In both instances, the EPA disapproved the SIP for deficiencies not related to this suit. However, in disapproving the regulations that now appear under Section 114.20, the EPA found the State's anti-tampering rules both common and valid under the CAA and made the comment cited above.

B. The challenged regulations are valid as applied to Defendants' specific circumstances.

The challenged regulations are also valid as applied to Defendants' specific circumstances. The State makes claims about two separate types of tampering 1) Original Tampering and 2) Recall Tampering. *See* State of Texas's Second Amended Petition and Application for Injunctive Relief ("State's Petition"), pp. 24-29. Accordingly, Defendants must demonstrate how the specific facts of both Original Tampering and Recall Tampering cause each of the State's claims to be preempted by the CAA.

An as-applied preemption challenge is not an all-or-nothing inquiry. Even if some circumstances fall within preempted areas, other circumstances may fall outside of these preempted areas. In Section II below ("Express Preemption under the CAA"), the State addresses why the specific circumstances and acts surrounding 1.) Original Tampering and, separately, 2.) Recall Tampering are not expressly preempted by the CAA.

II. Express Preemption under the CAA.

Defendants argue that the State's claims are expressly preempted under Section 209 of the CAA codified at 42 U.S.C. § 7543. There are two relevant provisions in Section 209 concerning state regulation of motor vehicles.

The first provision is in Section 209(a), it provides an express prohibition for the following:

1. State laws adopting any *standard* relating to the control of emissions from *new* motor vehicles;

2. State laws to enforce any standard relating to the control of emissions from *new* motor vehicles; and,

3. State laws requiring certification, inspection, or any other approval relating to the control of emissions from any *new* motor vehicle as a condition precedent to the initial sale, titling, and/or registration.

42 U.S.C. § 7543(a) (CAA § 209(a)).

The second provision is in Section 209(d); it provides a savings clause for certain types of state regulation. It states that "[n]othing in this part shall preclude or deny" state regulation of the use, operation or movement of "*registered or licensed motor vehicles.*" 42 U.S.C. § 7543(d) (CAA § 209(d)) (emphasis added).

To meet their burden of proving "Express Preemption" under the CAA, Defendants must show that 1.) the State's claims fall within the express prohibition in Section 209(a), and 2.) that the State's claims are not preserved by the savings clause for state regulation of the use, operation or movement of registered or licensed vehicles under Section 209(d)..[6]

A. The express prohibition in Section 209(a) of the CAA applies only to *new* motor vehicles.

The express prohibition in Section 209(a) prohibits states from enforcing any "standard relating to the control of emissions from *new motor vehicles or new motor vehicle*

[6] *FDIC v. Lenk*, 361 S.W.3d 602, 609 (Tex. 2012) ("'When a defendant moves for summary judgment based on an affirmative defense, ... the defendant, as movant, bears the burden of proving each essential element of that defense.'" (quoting *Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (per curiam)).

engines subject to [Title II]." 42 U.S.C. § 7543(a) (emphasis added). A new vehicle is "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." *Id.* § 7550(3). As the Supreme Court stated in *Washington v. General Motors Corporation*, "federal motor vehicle emission control standards apply only to new motor vehicles," and states, therefore, "retain broad residual power over used motor vehicles." 406 U.S. 109, 115 n.4 (1972).

B. "Standards relating to the control of emissions" are *numerical* emission limits or *mandated* emission control technologies.

As interpreted by the Supreme Court, "standards" relating to the control of emissions under Section 209(a)

> … relate to the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions.

Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 253 (2004) (*EMA*). The Court further explained how standards are used consistently throughout Title II of the CAA "to denote requirements such as numerical emission levels with which vehicles or engines must comply" or "emission-control technology with which they must be equipped." *Id.* Regulation of standards for the control of emissions for new vehicles is reserved for the EPA because EPA dictates how a vehicle is to be engineered for the U.S. market.

When state or local regulations do not mandate a specific pollution limit or control technology, such regulations are not standards. In *Ass'n of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534, 539-40 (5th Cir. 2013), a city ordinance giving preference to taxicabs fueled by compressed natural gas was not a standard under Section 209(a) because it only provided incentives and did not mandate specific emission control technology. In finding the city ordinance not preempted, the District Court discussed the concept of an emission standard under Section 209:

> As is readily apparent from the Supreme Court's discussion of the enforcement of "standards" in *Engine Mfrs.,* Congress used those terms throughout Title II to refer to enforceable requirements to manufacture vehicles with particular kinds of emission controls or particular emissions levels or, alternatively, enforceable requirements to purchase vehicles with particular kinds of emission controls or particular emissions levels. Plaintiff asserted in its Response that "nothing in the words of § 209(a) supports such a narrow construction of this decidedly broad statute." *However, where a regulation "neither dictates permissible pollutant levels nor mandates emission control technology," it is not a "standard" under Section 209 of the Clean Air Act.*

Ass'n of Taxicab Operators, USA v. City of Dallas, 866 F. Supp. 2d 595, 600 (N.D. Tex. 2012), *aff'd*, 720 F.3d 534 (5th Cir. 2013) (emphasis added). Other federal courts have applied Section 209 standards to regulations requiring specific emission characteristics. *Compare Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 938–40 (9th Cir. 2011) (finding California rules related to registration and fees for diesel engines used in agriculture were not preempted by Section 209(e)); *with Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108, 1114 (9th Cir. 2008) (finding California

prohibitions on specified emissions from diesel engines used by ships in California coastal waters were a preempted "standard" under Section 209(e)).

C. The CAA expressly preserves state regulation designed to prevent pollution from registered or licensed motor vehicles.

Section 209(d) of the CAA expressly preserves state regulation over the use or operation of registered or licensed motor vehicles. In fact, many states have enacted anti-tampering rules concerning registered or licensed motor vehicles, which generally prohibit the removing, impairing or disabling of EPA-approved emission control equipment on vehicles.[7] In commenting on Texas's anti-tampering rules submitted to the EPA as part of Texas's State Implementation Plan (SIP) in 1997 and 1998, the EPA has even recognized:

> Even though there is federal law which provides for EPA enforcement, *many states do have such rules and use them successfully as enforcement tools* for resolutions of consumer complaints involving tampered vehicles, deterrence of tampering, deterrence of selling tampered vehicles, and enforcement of tampering violations.

63 Fed. Reg. 6651, 6652 (Feb. 10, 1998) (emphasis added). Anti-tampering enforcement actions fit squarely within the in-use exception since they involve the prohibition of

[7] *See e.g.* 30 Tex. Admin. Code § 114.20; Minn. Stat. § 325E.0951 ("[a] person may not knowingly tamper with, adjust, alter, change, or disconnect any air pollution control system on a motor vehicle or on a motor vehicle engine."); Ala. Admin. Code r. 335-3-9-.06 ("[N]o person shall cause … [the] disabling of … [an] exhaust emission control system … which has been installed on a motor vehicle[.]"); 9 Va. Admin. Code § 5-91-190(A) ("[N]o owner or other person shall cause or permit the removal, disconnection, disabling or intentional alteration that reduces the effectiveness of an emissions control system or device that has been installed on a motor vehicle in accordance with federal laws and regulations.").

tampering with EPA-approved emission control systems of registered or licensed vehicles.

The CAA "has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles—that are *expressly intended to control emissions.*" *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996)(emphasis added); *see also Ass'n of Taxicab Operators, USA v. City of Dallas*, 760 F.Supp. 2d 693, 697 (N.D. Tex. 2010). ("Section 209(d) preserves state and local authority over use and operations of vehicles.")

D. The State's claims for Original Tampering are not expressly preempted.

The State's Original Tampering claims specifically center on Defendants' installation of hidden software parts during manufacturing that disabled or impaired the emissions control systems of the vehicles once they were in-use and operated by consumers on Texas roads. *See* State's Petition, pp. 24-29. The State's Original Tampering claims seek penalties only for licensed and registered motor vehicles while operated or used in Texas. *Id.* These claims do not mandate a specific pollution limit or control technology for new vehicles.

Defendants rely heavily on the federal trial court decision from Judge Breyer in the Northern District of California, which found the State of Wyoming's claims centered on Original Tampering expressly preempted as an attempt to enforce the federal prohibition on defeat devices. *See In re: VW "Clean Diesel" Marketing, Sales*

Practices, and Products Liability Litigation, 2017 WL 3816738 (N.D. Cal. Aug. 31, 2017) (*Wyoming*). But Judge Breyer's decision is flawed in three respects: first, Judge Breyer's decision failed to recognize the difference between installing a "defeat device," and the separate, numerous events of disabling or impairing emissions control systems that occurred on state roads as the result of such software. Second, the State's anti-tampering regulations are neither new-vehicle emission standards nor attempts to enforce new-vehicle emissions standards preempted under Section 209(a). Third, Judge Breyer failed to apply the express preemption in Section 209(a) to Recall Tampering (as discussed below in Subsection E).

i. The State's Original Tampering claims are a valid in-use regulation distinct from the federal prohibition against defeat devices.

While states cannot impose or enforce a new-vehicle emission standard, they do retain broad authority over the "use, operation or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d). In this case, the State is applying its regulations to vehicles that have been sold and are subject to continual acts of emissions tampering while in operation, which is a valid exercise of the State's interest in combatting pollution on State roads under Section 209(d). *See Engine Mfrs. Ass'n*, 88 F.3d at 1094.

Judge Breyer's decision with respect to Original Tampering erroneously collapsed into one event, Defendants' installation of a defeat device and the subsequent acts of tampering Defendants knowingly caused for years while the Affected Vehicles were in use. The fact that the tampering software parts were originally installed at the

point of manufacture is not relevant to the inquiry. The question is when the act of tampering took place. As noted above, the act of tampering (i.e. disabling or impairing emissions control systems) took place when the cars were in use. Indeed, the State seeks claims only for tampering on licensed and registered vehicles that occurred in the State. *See* State's Petition, pp. 24-29. These claims are not, as Judge Breyer found in *Wyoming*, a redundant attempt to enforce the federal prohibition on defeat devices. *See Wyoming* at *10-11.

A "defeat device" is type of auxiliary emission control device ("AECD"), which generally means a software programmed in a vehicle's computer for activating, delaying, or deactivating the emissions control system on a vehicle. 40 C.F.R. § 86.1803-01. EPA regulations permit the use of AECDs during certain driving conditions, such as at high altitude if the use is justified to protect the vehicle. *See id.* §§ 86.1803-01; 86.1810-09(f)(2). Such systems are classified a "defeat device" if they reduce effectiveness of the emission control system under normal vehicle operation and use without sufficient rationale. *Id.* EPA regulates the use of AECDs as part of the new-vehicle certification process. An application for certification must include a justification for each AECD and a rationale for why it is not a defeat device. *Id.* § 86.1844-01(d)(11). A manufacturer seeking vehicle certification must include in an application for certification a list of all AECDs installed in the vehicles. 40 C.F.R. § 86.1844-01(d)(11). EPA prohibits the installation of defeat devices in all new passenger vehicles. *see id.* §§ 86.1809-10, 86.1809-12.

In *Wyoming*, Judge Breyer erroneously equated a state regulating emission control tampering with the federal prohibition on defeat devices as part of the vehicle certification process. While it is true that the hidden software parts that tampered with the Affected Vehicles' emissions equipment were originally installed during the manufacturing process, the Act contains a clear line of demarcation between the installation of such parts and emissions tampering. When the Affected Vehicles were originally shipped to Texas with the emissions-tampering software, the State did not have a claim under 30 Tex. Admin. Code § 114.20 because no actual "in-use" tampering had yet occurred. In contrast, the federal prohibition on defeat devices does not depend on actual operation of the vehicle. *See* 40 C.F.R. § 86.1809-12. Defendants had already violated the federal prohibition before their vehicles ever emitted any pollutants. But once Affected Vehicles were sold and registered to the end users and their emissions equipment began to be impaired while driving, the State's "in-use" authority under the savings clause in Section 209(d) began.

The critical fact in the State's claim is that the original hidden software functioned such that the act of tampering occurred each time the cars were driven on Texas roads. Exhibit 8, pp. 8-9. This is not a case of vehicles being sold in Texas with a defective piece of emissions equipment that was installed at the point of manufacture. Rather, the hidden software part worked by starting the Affected Vehicles in "test mode" and switching to "street mode" once the software recognized that the vehicle was being driven. Exhibit 4, pp. 2-12 – 2-13. While the hidden software part was present on the

Affected Vehicles when they came off the assembly line, the act of tampering (i.e. switching off emissions controls) occurred for years each time the vehicle was driven on Texas roads. It is true, as Judge Breyer observed, that the installation of the tampering software parts cannot be entirely separated from its use, but they are two separate actions. Texas does not seek to hold Defendants accountable for initial installation of a defeat device, but for allowing the continual disabling of emissions controls while the Affected Vehicles were in use in Texas, which contributed to increased NOx emissions in the State of Texas.

ii. The State's Original Tampering claims do not seek to enforce a new-vehicle emission standard.

Moreover, Judge Breyer incorrectly characterized Wyoming's suit as an effort to enforce a federal new-vehicle emission standard. In this suit, the Texas anti-tampering regulations are not an attempt to enforce new-vehicle emissions "standards." In applying the term "standard" to the Wyoming anti-tampering regulations, Judge Breyer cited *EMA*, focusing on the language of "criterion [or] test." *Wyoming* at *10. But he did not apply the more specific language of *EMA*, which limits the term to numerical limitations on specified pollutants, requirements for certain types of pollution-control devices, and other specific design features related to the control of emissions. *EMA,* 541 U.S. at 253.

A generic prohibition on disabling emissions equipment is not the same as a requirement or enforcing a requirement for a specific technology, numerical emissions

limit, or design feature. 30 Tex. Admin. Code Section 114.20 subsection (b) prohibits removing or making inoperable "any system or device used to control emissions from a motor vehicle or motor vehicle engine or any part thereof" except when replacing with an equally effective system. Subsection (c) prohibits selling or leasing a motor vehicle in the State unless "equipped with either the control systems or devices that were originally a part of the motor vehicle" and such systems are in "good operable condition." Subsection (e) prohibits the sale or use of any system that circumvents a vehicle emission system designed to comply with the Federal Motor Vehicle Control Program. None of these regulations attempt to enforce or mandate any specific emission limits or control technologies that vehicle manufacturers must include to sell vehicles in Texas. They only prohibit tampering with emissions control systems approved by EPA. Applied in this suit, they do not introduce an "anarchic patchwork of federal and state regulatory programs." *Engine Mfrs. Ass'n*, 88 F.3d at 1079.

iii. Cases cited by Defendants do not support preemption of the State's claims.

In *Allway Taxi, Inc. v. City of New York*, 340 F.Supp. 1120, 1124 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 624 (2nd Cir. 1972), a New York City ordinance required used taxi cabs to be equipped with emission control devices specified by a city taxi and limousine commission. While acknowledging that the locality could not impose its own emission standards the moment after a new car is bought and registered, the court held that Section 209 did not preempt emissions controls upon the resale or re-registration of

the automobile. *Id.* at 1124. The court's test for distinguishing the valid in-use restriction, which included pollution regulations, from a new-vehicle regulation was its minimal effect on interstate commerce. *Id.* The State's Original and Recall Tampering claims are consistent with *Allway* because they do not impose a burden on the manufacturers' design or sale of federally approved vehicles.

Defendants' reliance on *In re Office of Attorney General of State of New York*, 269 A.D.2d 1 (N.Y. App. Div. 2000) (*OAG*) is also misplaced. In *OAG*, the New York Attorney General issued subpoenas to several manufacturers of heavy-duty diesel engines as part of a fraud investigation concerning defeat devices. Without identifying the state statute that was preempted, the New York appellate court held that the subpoenas were properly quashed based on Section 209. *Id.* at 13. *OAG* differs from the State's suit because New York's investigation was based on fraudulent conduct. The subpoenas concerned "repeated fraudulent or illegal acts or persistent fraud" in connection with the EPA's certification of the diesel engines. *Id.* at 4. Although New York cited the "in use" saving clause, the gravity of its claims was clearly in the nature of fraud. The fraud was not on the State of New York, but on the EPA. Such fraud-on-the-EPA claims do not represent a distinct sovereign interest in maintaining vehicles with proper emissions equipment while in use on state roads, which Section 209(d) expressly preserves.

Sims v. State of Fla. Dep't of Highway Safety and Motor Vehicles, 862 F.2d 1449 (11th Cir. 1989) is irrelevant to the instant case because it concerns state regulation of new

vehicles before they were placed on state roadways. In *Sims*, a Florida statute prohibited the registration of imported "gray market" vehicles unless certified to be compliant with CAA and federal Motor Vehicle Safety Act. The court found the statute pre-empted because enforcement of the CAA "before [the] first sale [of new motor vehicles] is the sole and exclusive prerogative of the federal government." *Id.* at 1455. The holding in *Sims* does not apply to the State's claim for tampering to a vehicle emission system that occurs *after* the vehicles have been sold, titled, and registered, and in operation on Texas roads. It also doesn't apply because the State regulations at issue do not attach conditions on the initial sale of vehicles, but are focused on its operation on state roadways.

In *Jackson v. General Motors Corp.*, 770 F. Supp. 2d 570 (S.D.N.Y. 2011), the court found common law claims based on failure to comply with emission standards in the CAA pre-empted under Section 209(a). *Jackson* has no application in this case because it concerned a common-law tort action, not state regulatory authority expressly preserved and addressed by Section 209(d).

E. The State's claims related to Recall Tampering are not expressly preempted.

Defendants avoid discussion of the operative facts surrounding Recall Tampering. By doing so, Defendants fail to meet their burden for showing that the State's claims centered on Recall Tampering are preempted because, in an as-applied

challenge, the court must consider and weigh the law as applied to each specific set of circumstances. *See Combs*, 239 S.W.3d at 269-70 fn 8.

Defendants mischaracterize the State's "additional tampering" claims, characterizing them as claims that Defendants only installed "updates," which helped, but did not fix, emissions problems in post-sale diesel vehicles. *See* Defendants' Motion, pp. 24-25. But the State alleges, and has uncovered through recent discovery, conduct concerning licensed and registered vehicles that goes far beyond Defendants' Original Tampering.

This Court should consider the following operative facts about the State's claims related to Recall Tampering:

1. Recall Tampering involved separate and distinct acts by Defendants after the manufacturing process, and in many cases, years after the vehicles were sold to consumers in Texas. *See* Exhibit 4, pp. 2-18 – 2-20.

2. Recall Tampering involved the installation of *new* parts to ensure that emissions control systems were disabled or impaired when the vehicles were being driven by consumers in Texas. *Id.*

3. Recall Tampering occurred when licensed and registered vehicles were brought into the "shop" (i.e. Texas dealerships) for maintenance or other recalls. *See* Exhibit 5, pp. 7-14

4. Defendants provided instructions to Texas dealerships on how to install these new parts, which tampered with the emission control systems on used vehicles. *Id.* at p. 6.

5. The parts installed when the vehicles were "in the shop" for recalls or maintenance were not disclosed to the owner/operator, dealerships performing the service, or regulators. *Id.* at p. 7 and Exhibit 7, pp. 67:4-69:6; 127:1-128:2.

i. The State's claims related to Recall Tampering are not standards relating to the control of emissions from new vehicles.

The State's Recall Tampering claims are not 1.) standards relating to the control of emissions 2.) from *new* motor vehicles. *See* 42 U.S.C. § 7543(a) (CAA § 209(a)). The State's Recall Tampering claims do not mandate specific emission control technology for new vehicles. *See EMA* at 253. They seek to penalize Defendants for tampering with EPA-approved emission control systems by installing *new* parts, which were not disclosed, on licensed and registered vehicles *after* the manufacturing process was complete.

Indeed, because the State's Recall Tampering claims concern separate and distinct tampering acts affecting the use and operation of "licensed and registered" vehicles after the manufacturing process was complete, they also fall within the Section 209(d) savings clause. *See* 42 U.S.C. § 7543(d) (CAA § 209(d)). The State's Recall Tampering claims closely align with the "typical" application of state anti-tampering rules in that they seek to penalize for tampering with emission control systems of licensed and registered vehicles in Texas shops..[8]

[8] For example, Defendants cite to a TCEQ case involving 30 Tex. Admin. Code § 114.20(b) where an auto repair shop removed a catalytic converter from a used vehicle, disabled it, and then re-installed it on the same vehicle. *See In re Cornett d/b/a Cen-Tex Muffler Shop,* 2013 WL 1281355, at *2 (TCEQ Mar. 18, 2013). For claims related to Recall Tampering, the State alleges that Defendants caused, suffered, allowed, or permitted Texas dealerships to install a new electronic part on licensed and registered vehicles specifically designed to disable the vehicle's emission control systems.

ii. Recall Tampering included unprecedented illegal conduct, and specific facts not considered in *Wyoming* or any other decision.

Even if this Court were to agree the *Wyoming* decision applies to the State's Original Tampering claims (it does not), Recall Tampering falls far outside conduct applied or considered in that decision. Defendants imply that Judge Breyer considered the specific facts related to Recall Tampering in the *Wyoming* decision. *See* Defendants' Motion, p. 25. But Wyoming did not plead or brief the above operative facts about Recall Tampering. *See* Wyoming Complaint at ¶¶ 151-52, 164-71, *Wyoming*, 2017 WL 3816738 (N.D. Cal. Nov. 1, 2016). Moreover, in his decision, Judge Breyer only generally referenced -- in a footnote -- issues surrounding VW recalls and software updates and noted that those updates "improved" but did not fix emissions issues in vehicles. *Wyoming*, at *14 n. 8.[9] The State's claims related to Recall Tampering, however, do not center on whether software updates or recalls on licensed and registered vehicles improved, but did not fix, vehicle emissions. The State's Recall Tampering claims center on the installation of *new* parts to disable EPA-approved emission control systems on licensed and registered vehicles in Texas.

[9] Judge Breyer was incorrect. In fact, VWGoA testified on October 25, 2017 that the two tampering devices, SWARF and Start Function, which were snuck onto vehicles as part of the 2014-2015 so-called "NOx-emission-improving" recall campaigns, were added to the vehicles to cause the vehicles to start and stay in higher NOx-emitting "road mode," and would not lower NOx emissions. Exhibit 7, pp. 272:22-274:6. Notably, neither SWARF or Start Function are part of the post-settlement "fix" of the Affected Vehicles. *Id.* at 284:21-285:11.

Defendants undoubtedly avoid any discussion of specifics related to Recall Tampering because state enforcement of Defendants' Recall Tampering can be *supported* by Judge Breyer's decision.

First, Judge Breyer states "because Volkswagen's conduct took place during manufacturing, Congress determined that the EPA, not the 50 states, was best situated to regulate it." *Wyoming* at *14. Defendants' Recall Tampering, however, did *not* take place during manufacturing. *See* Exhibit. 4, pp. 2-18 – 2-20. In fact, Defendants' Recall Tampering occurred, in many cases, years after manufacturing was complete, when Defendants developed, tested, and caused the installation of *new* parts on the emissions control systems of licensed and registered vehicles when those vehicles were brought into Texas shops for recalls or maintenance..[10]

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[10] *See* Exhibit 7:
Q: Okay. Just a couple of questions on James Liang.
A: Mm-hmm.
Q: I believe the testimony was that he worked for Volkswagen Group of America from 2008 through September of 2016; is that correct?
A: That's correct.
Q: Okay, What is James Liang's current status with Volkswagen Group of America?
A: His current status is that he is still employed, but suspended. 151:17-152:2.

Q: Do you know what does the leader of diesel competence do?
A: Well, James Liang joined Volkswagen of America in 2008. As described to the company when he joined, he was here to help with the launch of the TDI products. He was very – he was characterized as being involved in the software development of those vehicles, and, therefore, had a very deep knowledge of the vehicles, and that he was here to make sure the launch of the vehicles went smoothly, and that he was here to help with field problems, if any field problems came up with those cars… 156: 2-15.

Q: Tell me about all the actions of which Volkswagen Group of America is aware that James Liang would have taken with the development of the software update that was the recall 23O6.
A: So Volkswagen of America has had access to e-mails, and with Mr. Liang interacting with VWAG colleagues, it appears the Mr. Liang was involved in the testing of the software, and involved in

Second, Judge Breyer also recognizes that "[i]t is undisputed that Wyoming may use its SIP to regulate vehicle tampering and emissions' concealment that occurs within its borders, such as when a car is in the shop for repair in the State and a mechanic physically disconnects the catalytic converter." *Wyoming* at *5. Accordingly, Judge Breyer distinguished Wyoming's claims centered on tampering during the original manufacturing process from situations where separate tampering occurs "when a car is in the shop for repair in the State." *Id.*

Tampering, of course, can include much more than just the physical disconnection of a catalytic converter in Judge Breyer's hypothetical. Tampering has

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implementing the software, you, approving a final level of software that would be used in the recall campaign.
Q: Can you give me a little bit more detail? You say it appears he was involved.
A: Yes. So we have – the company has seen the e-mail strings where there's discussion about DPF failures. There's discussion about PM loading. There's discussion about acoustic function. There's discussions about implementing the steering wheel fix or improvement or enhancement. 157:5-158-2

Q: Tell me about all the actions of which Volkswagen Group of America is aware that James Liang would have taken in the development of recall action 23N4.
A: That's the recall action as spelled out in the Exhibit 1, if I'm not mistaken. I believe he would have had the same role. He would have been interacting with VWAG colleagues in diesel development, he would have been testing the proposed software, and he would have been involved in the same discussions about the test recognition strategy, the steering wheel angle and so on. 158: 20-159:7

Q: Okay. Same question for James Liang with regard to 23N5. Tell me all the actions that James Liang would have taken that Volkswagen Group of America is aware of in the development of that recall action.
A: I would say it's essentially the same answer; that he would have been involved in testing the software, coming to the final calibration that would be used in the soft – in the campaign, and, once again, he was involved in the development and implementation of the steering wheel angle. 159:16-160:2.

become more sophisticated, and can involve anything from aftermarket computer chips to hacking a vehicle's on-board computer to disable an emissions control system in order to improve vehicle performance..[11] And this type of aftermarket electronic tampering is exactly what the State alleges that Defendants did through their Recall Tampering.

iii. The State's Recall Tampering claims do not "relate back" to the original design of the engine.

In *Wyoming,* Judge Breyer stated that Wyoming's claims centered on Original Tampering impermissibly related back to the original design of the engine by the original manufacturer. *Wyoming* at *14. The State's Recall Tampering claims do *not* relate back to the original design of the engine. Instead, the State's Recall Tampering claims allege that Defendants installed *new* software parts on licensed and registered vehicles when those vehicles were in use on Texas roadways, and brought into Texas shops by their owners for recalls or maintenance..[12]

Any "relating back" standard must remain narrow enough that it does not prohibit all state enforcement against those who tamper with licensed and registered

[11] *See* Jonathan Fahey, *How to Hack Your Car*, Forbes, July 2002, *available at* https://www.forbes.com/forbes/2002/0708/148.html#3dfa955c6b49; *see also* Boost Diesel Repair, LLC, Docket No. AED-17-8327 (U.S. E.P.A Aug. 22, 2017) *available at*: https://www.epa.gov/sites/production/files/2017-09/documents/boostdieselrepair17.pdf.

[12] To the extent Defendants claim that they did not install a new part on licensed and registered vehicles, this is a fact issue for the jury to decide.

vehicles..[13] After all, whenever a person, company, or mechanic tampers with an EPA-approved emissions control system, they are, in effect, tampering with the "original design of the engine." And, as noted above, the EPA found that state anti-tampering rules are common and important state enforcement tools for resolutions of consumer complaints involving tampered vehicles, deterrence of tampering, deterrence of selling tampered vehicles, and enforcement of tampering violations. *See* 63 Fed. Reg. 6651, 6652 (Feb. 10, 1998). Further, as Judge Breyer noted in *Wyoming*, it is undisputed that a state may "regulate vehicle tampering and emissions concealment that occurs within its borders, such as when a car is in the shop for repair in the State and a mechanic physically disconnects the catalytic converter." *Wyoming* at *5.

III. Implied Preemption.

Defendants also ask this Court to infer that Congress intended to provide immunity for manufacturers from state law action (Defendants' Motion, p. 20) and prohibit state law claims because they conflict with the CAA (Defendants' Motion, p. 21-22).

Congress, however, has already spoken on the specific areas concerning motor vehicles that are preempted from state regulation, and has also provided an express

[13] For example, one overly broad interpretation for "relating back" would be that because Defendants already tampered once (through hidden software parts installed during manufacturing), they are now immune from state enforcement of any new and separate tampering acts on licensed and registered vehicles.

exception from preemption for state regulation of licensed and registered vehicles. Accordingly,

> [w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a *reliable indicium of congressional intent with respect to state authority*, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992). (citations omitted) (emphasis added). Moreover, as the U.S. Supreme Court has stated, an express preemption provision supports a reasonable inference that Congress did not intend to preempt other matters. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

Here, because Congress has already spoken in detail on preemption through Sections 209(a) and (d) of the CAA, it is inappropriate to infer a special congressional intent to preempt state regulation of vehicle manufacturers or simply infer a conflict with the CAA.

A. The CAA does not provide vehicle manufacturers with special immunity from state regulation.

Defendants argue that this Court should infer that Congress intended to preempt state regulation of vehicle manufacturers. *See* Defendants' Motion, p. 20. ("The scope of the CAA and EPA regulation of new vehicle emissions leaves no room for state regulation of manufacturers"). But as noted above, Congress already provided a "reliable indicium of congressional intent with respect to state authority" in the CAA

through Section 209(a) and 209(d). *See Cipollone*, 505 U.S. at 517. Neither of these sections in the CAA provide for immunity from state regulation for vehicle manufacturers.

Certainly, if Congress intended to prohibit state regulation of vehicle manufacturers it could have easily written "states shall not enforce any standards against the manufacturer of a vehicle." It did not. Instead, it prohibited state regulation of standards relating to the emissions controls for "new motor vehicles or motor vehicle engine parts." 42 U.S.C. § 7543(a) (CAA § 209(a)). Congress sought to preempt state regulation of new vehicles to avoid an "anarchic patchwork" of regulation in which manufacturers would have to meet varying emission standards for their new cars in different states thereby disrupting interstate commerce. *See Engine Mfrs. Ass'n,* 88 F.3d at 1079. Congress, however, did *not* seek to protect vehicle manufacturers from state regulation of their later bad conduct in the form of emission control tampering once the vehicles were in use by their owners.

Undoubtedly, vehicle manufacturers do not have special immunity from state regulation under the CAA, and Section 209(a) does not provide absolute immunity for vehicle manufacturers. Vehicle manufacturers are also capable of taking illegal actions which fall within the State's authority to regulate in-use conduct on licensed and registered vehicles under Section 209(d). Whether a manufacturer physically sends mechanics out to car dealerships in Texas to tamper with registered or licensed vehicles or whether it instructs dealers to tamper with licensed and registered vehicles by

installing new electronic parts on registered or licensed vehicles (as in this case), it is not excused from state liability solely by virtue of its manufacturer status.

Finally, Defendants argue for vehicle manufacturer immunity even though they are not the vehicle manufacturers. VW of America is a wholly-owned subsidiary of Volkswagen Aktiengesellschaft ("Volkswagen AG"), the German manufacturer, and advertises, markets, distributes, sells, and/or finances motor vehicles throughout the State of Texas. Pursuant to an Importer Agreement between Volkswagen of America and Volkswagen AG, Volkswagen of America is defined as the importer, distributor and marketer of Volkswagen vehicles and other Volkswagen products in the U.S. Exhibit7, pp. 141:23-142:3; Exhibit 9, p. 4. Volkswagen of America also serves as a liaison between Volkswagen AG and the VW dealers in America that installed new software parts during Recall Tampering. Exhibit 7, pp. 26:19-27:18. The State's lawsuit alleges that pursuant to Tex. Water Code Section 7.101 Defendants, as importers, "caused, suffered, allowed or permitted" violations of Texas's anti-tampering rules. Accordingly, even if there was some type of blanket immunity for vehicle manufacturers (there is not), it would not apply to Defendants.

B. The State's claims do not conflict with the CAA.

As the Fifth Circuit has stated, conflict preemption may occur in two ways: 1.) a provision of state law may be incompatible with a federal statute such that compliance with both is a physical impossibility, or 2.) even if compliance with both is not

impossible, application of the state law would disturb, interfere with, or seriously compromise the purposes of the federal statutory scheme. *City of Morgan City v. S. Louisiana Elec. Co-op. Ass'n*, 31 F.3d 319, 322 (5th Cir. 1994). In addition, courts should not seek out conflicts between federal and state law where none clearly exist. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978).

The State's anti-tampering claims do not conflict with the CAA or make compliance with both the State's anti-tampering claims and the CAA a physical impossibility. The State's anti-tampering claims also do not disturb, interfere with or seriously compromise the purposes of the federal CAA. In fact, as previously noted, in commenting on the Texas's SIP, the EPA expressly recognized that, even though there are similar federal anti-tampering statutes (which are located within the CAA), state anti-tampering rules are a common and successful enforcement tool for states. *See* 63 Fed. Reg. 6651, 6652 (Feb. 10, 1998). Additionally, in enacting Sections 209(a) and (d), Congress has already specifically spoken on the areas of state regulation of motor vehicles that are preempted.

Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001) is not applicable to this case. *Buckman* involved preemption analysis for state law fraud claims based the defendant's fraud on the FDA. The Court found that state law fraud-on-the-FDA claims conflicted with the FDA's responsibility to police fraud consistently. *Id.* at 342. Unlike *Buckman*, the State's claims are not fraud on the EPA claims. For the State's Recall Tampering claims, the State seeks to penalize the installation of *new* software

parts during recalls or maintenance actions which disabled or impaired the emission control systems of licensed and registered vehicles. *See* State's Petition, pp. 24-29. For the State's Original Tampering claims, the State seeks to penalize Defendants for causing, suffering, allowing, or permitting the Affected Vehicles to operate with disabled or impaired emissions controls systems once the vehicles were in use on Texas roadways. *See id.*

In addition, neither *Buckman* nor the other cases Defendants cite considered conflict preemption in the context of a savings clause that expressly preserves state regulatory authority. In *Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986), a Wisconsin statute barring certain repeat offenders of the National Labor Relations Act from doing business with the state. The federal law in that case was an "integrated scheme of regulation." *Id.* at 287. Wisconsin did not invoke an express savings clause, but sought to avoid preemption by arguing the statute was a valid exercise of the state's spending power, rather than its regulatory power. *Id.* The Court, however, found that, in effect, the statute provided a "supplemental sanction" for violations of the federal law, and was preempted. *Id.* at 288. In contrast, the CAA does expressly preserve the authority for Texas to regulate and impose sanctions for the use and operation of vehicles, so long as they don't amount to new-vehicle emission standards.

In *Arizona v. U.S.*, 567 U.S. 387 (2012), Arizona enacted a statute related to the enforcement of immigration law, including a criminal offense for the willful failure to

complete or carry an alien registration document in federal immigration law. The Court found that federal immigration law "provide[s] a full set of standards governing alien registration, including punishment for noncompliance," which was designed as a "harmonious whole." *Id.* 401 (*citing Hines v. Davidowitz*, 312 U.S. 52, 72 (1941)). Arizona did not rely upon a savings clause that reserved a defined area of state regulation in the field of immigration, but instead argued that the state statute had the "same aim" as the federal law and adopted its "substantive standards." *Id.* 402. Without residual state authority to regulate immigration, the Court found that the criminal provision and other sections of statute conflicted with the comprehensive federal scheme. *Id.*

Finally, Defendants aver they have already been subject to enough penalties. First, the State notes that although Volkswagen AG has paid penalties as part of a federal settlement, Defendants have not shown (and the State is not aware of) any penalties paid by Defendants as part of that settlement. In addition, with respect to Recall Tampering, Defendants have not contended nor shown that penalties paid by Volkswagen AG covered all conduct recently uncovered by the State relating to Recall Tampering. Nevertheless, Defendants' general assertion that they have been subject to enough penalties is not relevant for preemption purposes. It is up to a Texas jury to decide, within the statutory range, the amount of penalties Defendants should incur for their 1.) Recall Tampering and 2.) Original Tampering in the State of Texas. *See* Tex. Water Code § 7.102.

IV. Applicability of the State's Anti-Tampering Claims.

Defendants also seek traditional summary judgment, arguing that the anti-tampering provisions of the Motor Vehicle Pollution Regulations cited in the State's petition do not apply to their conduct..[14] Defendants attached no evidence in support of their motion. Instead, they generally assert that "all factual statements herein are based on the allegations of Plaintiffs' petitions or official federal government documents available on reliable government or other Internet sites." Defendants' Motion, p. 6 note 5. To be entitled to summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action. *Sci. Spectrum v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Defendants' vague reference to "factual statements" made in "official government documents" does not qualify as summary-judgment evidence. Thus, they have not met their burden of proof under Rule 166a(b). Moreover, Defendants cite only to the Plaintiffs' petitions, attacking the legal adequacy of the causes of action. As Harris County argues, summary judgment is improper based on the adequacy of plaintiff's petition. *Sacks v. Zimmerman*, 401 S.W.3d 336, 339 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

Even if the Court determines that Defendants' applicability arguments are proper for summary judgment, Defendants' arguments here rely on the same flawed reasoning

[14] Although their Motion for Summary Judgment does not specify whether it is a traditional or no-evidence motion, Defendants' cite Rule 166a(b) as the basis of their motion.

about immunity for manufacturers.[15] and ignore the facts specific to Recall Tampering. Defendants also ignore Texas Water Code § 7.101, which establishes the scope of liability for violations of TCEQ rules. The State specifically addresses Defendants' arguments with respect to each anti-tampering provision below.

A. Subsection (b)

30 Tex. Admin Code § 114.20(b) provides:

> No person may remove or make inoperable any system or device used to control emissions from a motor vehicle or motor vehicle engine or any part thereof, except where the purpose of removal of the system or device, or part thereof, is to install another system or device, or part thereof, which is equally effective in reducing emissions from the vehicle.

Defendants argue that this provision should not apply against a vehicle manufacturer. *See* Defendants' Motion, p. 31. Nothing in this provision grants auto manufacturers (or importers) immunity from regulation. In fact, the provision expressly applies to any "person," defined by the Texas Administrative Code as "[a]n individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity." 30 Tex. Admin. Code § 3.2(25). Additionally, Tex. Water Code § 7.101 penalizes any "person" who "cause[s], suffer[s], allow[s], or permit[s]" a violation of a TCEQ rule including 30 Tex. Admin. Code § 114.20(b).

[15] The State, again, notes that Defendants are not auto manufacturers. Instead, the State alleges that, as importers, Defendants caused, suffered, allowed or permitted violations of state anti-tampering rules. *See* Tex. Water Code § 7.101.

Defendants argue that the term "inoperable" does not encompass their conduct. *See* Defendants' Motion, pp. 30-31. If something is inoperable it means it is incapable of being operable or is not functioning. The State alleges that Defendants made the emissions control systems incapable of being operated through two forms of tampering:

1. Recall Tampering: Defendants caused, suffered, allowed or permitted the making inoperable of emissions control systems on licensed and registered vehicles in Texas once they were in-use by their owners through the installation of a new tampering part on the vehicles while they were in Texas shops for recall or maintenance.

2. Original Tampering: Defendants caused, suffered, allowed or permitted the making inoperable of emissions control systems on licensed and registered vehicles in Texas through the installation of hidden tampering software parts during the manufacturing process.

Finally, Defendants argue that this provision does not apply because some of their additional tampering included software recalls that they declare, without any factual support, "brought emissions down relative to the original software." Defendants' Motion, p. 31. Defendants next declare, again without any factual support or evidence, that they meet the exception to the rule which states "except where the purpose. . . is to install another system or device. . . which is equally effective in reducing emissions from the vehicle." 30 Tex. Admin. Code § 114.20(b). Defendants' argument on this point presents a fact issue: the State contends, and has attached supporting evidence to this response, that Defendants' "purpose" through its Recall Tampering was to improve the tampering technology, not to install another device equally effective at reducing emissions.

B. Subsection (c)

30 Tex. Admin. Code § 114.20(c) provides:

> No person may sell, offer for sale, lease, or offer to lease in the State of Texas any motor vehicle unless all of the following conditions are met: (1) [t]he motor vehicle shall be equipped with either the control systems or devices that were originally a part of the motor vehicle or motor vehicle engine or an alternate control system or device as designated in subsection (b) of this section [and] (2) [t]he control systems or devices required in paragraph (1) of this subsection shall be in good operable condition.

This provision prohibits selling or leasing vehicles without emissions control systems in good operable condition. Defendants propose a strained reading of subparagraph (1) of the rule, suggesting that it is aimed at "sellers of used vehicles that the sellers have modified from the way those vehicles were manufactured." Defendants' Motion, p. 31. Section 114.20(c) does not require modification, but only that the vehicles sold in Texas include the emissions control equipment originally part of the vehicle, and that such equipment is in "good operable condition." There is no requirement that the seller themselves modify the equipment. Further, Tex. Water Code § 7.101 penalizes any person who "cause[s], suffer[s], allow[s] or permit[s]" violations of TCEQ rules including 30 Tex. Admin. Code § 114.20(c).

Subsection (c) applies to Defendants' conduct. Defendants caused, suffered, allowed, or permitted the Affected Vehicles to be sold and/or leased in Texas with emissions equipment that would be rendered inoperable while the vehicles were in "street mode."

The notice provision in subsection (c) does not mean that the substantive requirements above it apply only to used-car dealers. It simply adds a notice requirement where the TCEQ believed this type of violation most likely to occur. Defendants object to "the State's unprecedented effort" to apply Section 114.20 to "auto manufacturers." Defendants' Motion, p. 32. The State's effort is unprecedented only because the VW "Clean Diesel" scandal was an unprecedented violation of both state and federal law. The State has never before been faced with such a massive scheme to disable emissions equipment in vehicles placed on Texas roads.

C. Subsection (e)

Finally, 30 Tex. Admin. Code § 114.20(e) provides:

> No person may sell, offer for sale, or *use* any system or device which circumvents or alters any system, device, engine, or any part thereof, installed by a vehicle manufacturer to comply with the Federal Motor Vehicle Control Program during actual in-use operation of a motor vehicle on Texas roadways.

(emphasis added). Subsection (e) also applies to Defendants' conduct. The rule is not limited to selling devices that alter emissions equipment. It also prohibits the "use" of such devices. And, as noted above, Tex. Water Code § 7.101 penalizes any person who "cause[s], suffer[s], allow[s], or permit[s]" a violation of a TCEQ rule including 30 Tex. Admin. Code § 114.20(e).

For claims related to Original Tampering, the State alleges that Defendants caused, suffered, allowed or permitted the use of hidden software parts that altered and disabled EPA-approved emissions control systems. Those systems were "installed by a

vehicle manufacturer to comply with the Federal Motor Vehicle Control Program." Defendants used the original tampering software to circumvent and alter these systems "during actual in-use operation of a motor vehicle on Texas roadways."

For claims related to Recall Tampering, the State alleges that Defendants caused, suffered, allowed or permitted the use of new electronic parts installed on licensed and registered vehicles to disable EPA-approved emissions control systems. Those systems were "installed by a vehicle manufacturer to comply with the Federal Motor Vehicle Control Program." Defendants used the new parts to circumvent and alter these systems on vehicles "during actual in-use operation of a motor vehicle on Texas roadways."

Thus, the rule applies to the State's claims related both to Original Tampering and Recall Tampering. Again, the notice requirement applies to aftermarket businesses such as repair shops because, historically, such modifications typically occurred there. It does not impose a limitation on the applicability of the rule.

CONCLUSION AND PRAYER

Defendants have not met their burden for summary judgment. The State's claims related to both Original Tampering and Recall Tampering are not expressly preempted by the CAA and are expressly preserved under Section 209(d) of the CAA. The State's claims related to both Original Tampering and Recall Tampering are also not impliedly preempted. Additionally, in challenging whether the State's claims apply to their conduct, Defendants have not met their summary judgment burden because they have

not conclusively negated an element of the State's claims. Moreover, the State's claims are valid as applied to the challenged conduct. For the foregoing reasons, the State requests that this Court deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

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LIAISON COUNSEL FOR THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2017, a true and correct copy of the foregoing *State of Texas's Response and Opposition to Volkswagen and Porsche Defendants' Motion for Summary Judgment* was electronically filed and e-served on all known counsel in this case.

/s/ Patrick K. Sweeten
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Senior Counsel for Civil Litigation

TAB 2

CAUSE NO. D-1-GN-16-000370

IN RE VOLKSWAGEN CLEAN DIESEL LITIGATION: TCAA ENFORCEMENT CASES	§	IN THE DISTRICT COURT
THE STATE OF TEXAS,	§	
Plaintiff,	§	
AND	§	
TRAVIS COUNTY, TEXAS,	§	
Plaintiff Intervenor,	§	TRAVIS COUNTY, TEXAS
v.	§	
VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI OF AMERICA, LLC,	§	
Defendants.	§	
TRAVIS COUNTY, TEXAS (TRAVIS COUNTY CAUSE NUMBER D-1-GN-15-004513)	§	353rd JUDICIAL DISTRICT

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S THIRD AMENDED RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

COMES NOW, Defendant Volkswagen Group of America, Inc. ("VWGoA") and serves the following Third Amended Responses and Objections to Plaintiff's First Set of Interrogatories pursuant to Rule 197 of the Texas Rules of Civil Procedure.[1]

[1] Given Judge Sulak's ruling at the December 2, 2016 hearing, VWGoA is serving these Third Amended Responses and Objections, but is doing so without waiver of its argument, as outlined in its Motion to Enforce Automatic Stay on file with the Court of Appeals for the Third Judicial District, that the automatic stay of the above-captioned action is currently in effect. VWGoA reserves all of its arguments, including its arguments on appeal, with respect to the automatic stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by email in compliance with the Texas Rules of Civil Procedure on January 9th, 2017 on the following counsel of record.

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PRELIMINARY STATEMENT

These responses to Plaintiff's Interrogatories ("Interrogatories") are made with specific regard to the laws of the State of Texas, the Texas Rules of Civil Procedure and the specific facts of this case and are not applicable to other cases, facts or circumstances, or the rules and laws of any other state or jurisdiction concerning discovery or theories of causes of action.

Counsel for VWGoA has drafted these responses based upon the current state of VWGoA's knowledge and/or information regarding the information Plaintiff has requested. VWGoA's discovery, investigation and analysis of this matter are continuing. VWGoA reserves the right to amend, supplement or withdraw these responses or any part thereof.

VWGoA is available to meet and confer with respect to these responses, should counsel for Plaintiff wish to do so.

OBJECTIONS APPLICABLE TO ALL INTERROGATORIES

1. VWGoA objects to the Interrogatories to the extent that they purport to require VWGoA to conduct anything beyond a reasonable search for information that is reasonably available.

2. VWGoA further objects to the defined terms "You," "Your," and "VW," and to any Definition, Instruction or Interrogatory that incorporates those Definitions, on the ground that such Definitions and any such Definition, Instruction, or Interrogatory seek information that is in the possession, custody, or control of persons or entities other than VWGoA, fail to distinguish between distinct corporate entities, and purport to require VWGoA to discern or inquire about relationships between or among entities that are not affiliated with VWGoA. VWGoA will construe these terms to mean VWGoA.

3. VWGoA further objects to the defined term "Affected Vehicles" and to any Definition, Instruction or Interrogatory that incorporates it. The term erroneously references vehicles that do not exist, do not have TDI engines, or were not sold or leased in the United States. Affected Vehicles should be defined as, and a correct list of Affected Vehicles should only include, the below vehicles:

- 2.0L vehicles: VW Jetta (2009-2015); VW Jetta Sportwagen (2009-2014); VW Beetle (2013-2015); VW Beetle Convertible (2013-2015); Audi A3 (2010-2013 and 2015); VW Golf (2010-2015); VW Golf Sportwagen (2015); and VW Passat (2012-2015), and
- 3.0L vehicles: VW Touareg (2009-2016); Audi A6 quattro (2014-2016); Audi A7 quattro (2014-2016); Audi A8L (2014-2016); Audi Q5 (2014-2016); and Audi Q7 (2009-2015).

RESPONSES AND OBJECTIONS TO INTERROGATORIES

1. Please state the following information for each Affected Vehicle sold in the State of Texas by you or your agents or representatives:
The date of sale;
The VIN of the Affected Vehicle;
The name and address of the person who sold the Affected Vehicle; and,
The specific location where the Affected Vehicle was sold.

ANSWER: VWGoA has provided current good-faith estimates of available sales and lease data for Affected Vehicles. *See* VW-MDL2672-00959069 (2.0L) and VW-MDL2672-00959070 (3.0L). Those materials include, among other things, the date of sale, the VIN, and the identity of the dealer. VWGoA believes that the information set forth in those documents fully responds to Plaintiff's Interrogatory.

VWGoA objects to the undefined terms "agents" and "representatives" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms to mean VW- and Audi-brand franchise dealers. VWGoA further objects to the phrase "specific location where the Affected Vehicle was sold" on the grounds that it is vague, ambiguous and without a clear meaning. VWGoA is construing that phrase to mean the dealership at which the vehicle at issue was sold.

2. **Please state the following information for each Affected Vehicle offered for sale in the State of Texas by you or your agents or representatives:**
The date the Affected Vehicle was first offered for sale;
The VIN of the Affected Vehicle;
The name and address of the person who offered the Affected Vehicle for sale; and,
The specific location where the Affected Vehicle was offered for sale.

ANSWER: VWGoA has provided current good-faith estimates of available sales and lease data for Affected Vehicles. *See* VW-MDL2672-00959069 (2.0L) and VW-MDL2672-00959070 (3.0L). Those materials include, among other things, the date of sale, the VIN, and the identity of the dealer. VWGoA believes that the information set forth in those documents fully responds to Plaintiff's Interrogatory.

VWGoA objects to the undefined terms "agents" and "representatives" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms to mean VW- and Audi-brand franchise dealers. VWGoA further objects to the phrase "specific location where the Affected Vehicle was offered for sale" on the grounds that it is vague, ambiguous and without a clear meaning. VWGoA is construing that phrase to mean the dealership at which the vehicle at issue was sold. VWGoA further objects to the phrase "offered for sale" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean sold.

3. **Please state the following information for each Affected Vehicle leased in the State of Texas by you or your agents or representatives:**
The date of lease;
The VIN of the Affected Vehicle;
The name and address of the person who leased, as lessor, the Affected Vehicle; and,
The specific location where the Affected Vehicle was leased.

ANSWER: VWGoA has provided current good-faith estimates of available sales and lease data for Affected Vehicles. *See* VW-MDL2672-00959069 (2.0L) and VW-MDL2672-00959070 (3.0L). Those materials include, among other things, the lease date, the VIN, the identity of the dealer, and the identity of the lessor. VWGoA believes that the information set forth in those documents fully responds to Plaintiff's Interrogatory.

VWGoA objects to the undefined terms "agents" and "representatives" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms to mean VW- and Audi-brand franchise dealers. VWGoA further objects to the phrase "specific location where the Affected Vehicle was leased" on the grounds that it is vague, ambiguous and without a clear meaning. VWGoA is construing that phrase to mean the dealership at which the vehicle at issue was leased.

4. Please state the following information for each Affected Vehicle offered for lease in the State of Texas by you or your agents or representatives:
The date the Affected Vehicle was first offered for lease;
The VIN of the Affected Vehicle;
The name and address of the person who offered for lease, as lessor, the Affected Vehicle; and,
The specific location where the Affected Vehicle was offered for lease.

ANSWER: VWGoA has provided current good-faith estimates of available sales and lease data for Affected Vehicles. *See* VW-MDL2672-00959069 (2.0L) and VW-MDL2672-00959070 (3.0L). Those materials include, among other things, the lease date, the VIN, the identity of the dealer, and the identity of the lessor. VWGoA believes that the information set forth in those documents fully responds to Plaintiff's Interrogatory.

VWGoA objects to the undefined terms "agents" and "representatives" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms to mean VW- and Audi-brand franchise dealers. VWGoA further objects to the phrase "specific location where the Affected Vehicle was offered for lease" on the grounds that it is vague, ambiguous and without a clear meaning. VWGoA is construing that phrase to mean the dealership at which the vehicle at issue was leased. VWGoA further objects to the phrase "offered for lease" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean leased.

5. Please state the following information for each VW Representative that knew, on or before September 17, 2015, that the Affected Vehicles were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions. As used in this Interrogatory, VW Representative means (1) any officer, director, or board member of VW; (2) any officer, director, manager, supervisor, or engineer of any division or department of VW that was involved in, or responsible for, the design or modification of emission control equipment for the Affected Vehicles; (3) any officer, director, manager, supervisor, or engineer of any of the following VW divisions, departments, groups, or centers: Electronic Research Lab, Design Center California, Marketing and Strategy Division, Group Quality Division, Test Center California, Technical Center, Engineering and Environmental Office, and Research and Development; and (4) any officer, director, manager, supervisor, or engineer of any division, department, group, or center with responsibility for compliance with environmental laws regarding emission control equipment on Affected Vehicles.

A. The job title, name, and address (work location) of the VW Representative;
B. The date on which the VW Representative first became aware that any Affected Vehicles were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in

lowered emissions during emission testing procedures when compared to actual driving conditions; and,

C. From where or whom the VW Representative learned that any Affected Vehicles were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

ANSWER: VWGoA identifies James Liang, the Leader of Diesel Competence at VWGoA beginning in 2008, in response to this Interrogatory. Information concerning Mr. Liang's knowledge is set forth in his Rule 11 Plea Agreement, filed in the U.S. District Court for the Eastern District of Michigan on September 9, 2016. *See United States v. Liang*, No. 2:16-cr-20394-SFC-APP, ECF No. 19 at 5-7 (E.D. Mich. Sept. 9, 2016). VWGoA is not currently aware of the identities of other individuals who may be responsive to this Interrogatory, but notes that the subject matter of this Interrogatory is encompassed by the independent, ongoing investigation commissioned by the Supervisory Board of Volkswagen AG, being led by Jones Day. VWGoA understands that that investigation is expected to be completed in 1Q 2017. After the investigation has concluded and VWGoA has been provided with the information resulting from that investigation, VWGoA will be in a position to (and will) supplement its response to this Interrogatory, if supplementation is necessary. To the extent Plaintiff is requesting or suggesting that VWGoA should embark on a separate investigation in parallel with the Volkswagen AG Supervisory Board's independent investigation, such request goes well beyond any reasonable investigation. Requiring VWGoA to effectively redo Jones Day's investigation makes no sense and would not be reasonable.

VWGoA objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA further objects to the Interrogatory on the ground that it seeks the discovery of information that is in the possession, custody, or control of third parties, including VWAG. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

6. Please explain how the design or modification of the emission control equipment on the Affected Vehicles lowered emissions from the Affected Vehicles during vehicle emission testing when compared to actual driving conditions.

ANSWER: The design and general emissions control performance of Affected Vehicles in Test Groups 9VWXV02.035N, 9VWXV02.0U5N, AVWXV02.0U5N, BVWXV02.0U5N, CVWXV02.0U5N, DVWXV02.0U5N, and EVWXV02.0U5N are described in the section entitled "GEN1 Vehicles" below; the design and general emissions control performance of Affected Vehicles in Test Groups CVWXV02.0U4S, DVWXV02.0U4S, and EVWXV02.0U4S are described in the section entitled "GEN2 Vehicles" below; and the design and general emissions control performance of Affected Vehicles in Test Group FVGAV02.0VAL are described in the section entitled "GEN3 Vehicles" below. In 2014, a Field Fix for GEN1 and

GEN2 Vehicles that altered the calibrations of GEN1 and GEN2 Vehicles was issued. Where that Field Fix altered the functionality of the vehicles, such alterations are generally noted below.

GEN1 Vehicles

In diesel-engine-equipped light-duty motor vehicles, the combustion process creates a trade-off in engine-out emissions of NOx and particulate matter ("PM" or "soot") emissions. In such vehicles, including GEN1, GEN2 and GEN3 Vehicles, engine-out NOx emissions are typically controlled using various exhaust-gas recirculation ("EGR") strategies. As EGR increases, engine-out NOx decreases, while engine-out PM increases. Increases in fuel-rail pressure can sometimes be used to improve that trade-off, but such increases can negatively impact noise, vibration, and harshness ("NVH").

To reduce tailpipe PM, a diesel particulate filter ("DPF") is used in GEN1, GEN2 and GEN3 vehicles. Because the DPF has a finite capacity, the engine control unit ("ECU") periodically initiates a DPF regeneration operation, in which the combustion is modulated to increase the exhaust gas temperature and burn off the accumulated PM. Such a regeneration operation uses additional fuel and thus may be undesirable from a fuel-efficiency perspective. Moreover, excessive regenerations subject the DPF to heat stress, which may damage the DPF. In the GEN1 Vehicles (but not in the later GEN2 and GEN3 Vehicles, discussed below), the exhaust gas passes through a Lean NOx Trap (LNT, also referred to as a NOx Storage Catalyst, or a NOx absorber). The LNT acquires engine-out NOx in order to reduce tailpipe emissions of NOx. Because an LNT has a finite capacity to store NOx, it periodically undergoes a so-called DeNOx regeneration operation. In such regeneration, combustion uses a sub-stoichiometric air-fuel ratio. The absorbed NOx reacts with the exhaust gas produced by sub-stoichiometric combustion, and is reduced. Additionally, the LNT is gradually poisoned by oxides of sulfur (SOx). This necessitates a so-called DeSOx regeneration, which the ECU uses a sub-stoichiometric air-fuel ratio for combustion, and also modulates combustion to significantly raise exhaust gas temperature.

When the ECU in GEN1 Vehicles detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the GEN1 Vehicles trigger an increase in the EGR rate and (prior to the 2014 Field Fix) an increase in rail pressure for most engine operating conditions. Fuel-injection and other engine parameters are also varied to account for the altered rate of EGR and rail pressure, and to optimize NVH.

Prior to the 2014 Field Fix, when the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU in the GEN1 Vehicles modeled the soot loading on the DPF to be less than the true engine-out soot. Subsequent to the 2014 Field Fix, the ECU in the GEN1 Vehicles models the soot loading on the DPF according to the true engine-out soot, and instead places a distance-based limit on frequency of DPF regeneration.

When the ECU in the GEN1 Vehicles detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU prioritizes DeNOx regeneration of the LNT, meaning that such regeneration is more likely to occur, as long as engine conditions allow a regeneration. When the ECU detects or identifies through models the existence of certain vehicle operating

conditions that are consistent with the Highway Driving Cycle, the ECU also prioritizes DeSOx regeneration of the LNT and regeneration of the DPF, meaning that such regenerations are more likely to occur, as long as engine conditions allow a regeneration. When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU also expands the range of conditions in which a DeNOx or DeSOx regeneration of the LNT occurs, and lowers the modeled NOx-load threshold that must be undercut in order to disable DeNOx regeneration once said regeneration has begun.

The GEN1 Vehicles have a "soft heating" system, which heats the LNT catalyst by using delayed and increased post-injections of fuel. Such fuel is not fully combusted, leading in turn to an exothermic reaction on the oxidation catalyst, and thus heating slightly the exhaust temperature. In ordinary operation, "soft heating" is activated only when, in the previous driving cycle, the lambda sensor unit (LSU) was not activated as a result of dew protection (that is, when a quantity of condensed water has collected on the LSU). However, when the ECU detects or identifies through models the existence of certain vehicle operating conditions that are consistent with the FTP75 (but not the FTP Preconditioning Cycle), the ECU will trigger soft heating.

Overall, the effect of these modulations is to reduce tailpipe NOx emissions when the ECU in GEN1 Vehicles detects or identifies through models the existence of vehicle operating conditions that are typical of laboratory test conditions (*i.e.*, "dyno mode"), compared to tailpipe NOx emissions when vehicles are operated under other conditions, including on-road operation (*i.e.*, "road mode").

GEN2 Vehicles

Instead of LNT technology, GEN2 Vehicles (as well as the later GEN3 Vehicles) use a selective catalytic reduction (SCR) system to convert engine-out NOx into nitrogen, water, and carbon dioxide, thereby reducing tailpipe-out NOx. SCR technology uses diesel exhaust fluid (DEF, also known by the trade name "AdBlue"), which contains a solution of 32.5% urea in water, and which is injected into the exhaust system upstream of the SCR catalyst unit during vehicle operation. Inside the catalyst, the ammonia which was reacted out of the urea in DEF reacts with the engine-out NOx. DEF is contained in a tank onboard the vehicle and must periodically be replenished.

The ECU in vehicles that use SCR technology computes the amount of DEF that will be dosed into the SCR catalyst. For the GEN2 Vehicles, the basic mode of computation is referred to as "online mode," in which the ECU computes the dosing amount according to the instantaneous rate of modeled engine-out NOx. An alternate computation mode is referred to as "fill-level dosing." In "fill-level dosing" mode, the ECU takes advantage of the fact that the SCR unit itself may store some quantity of unreacted ammonia; in such a mode, the ECU therefore directs additional dosing of DEF so as to increase the current DEF fill level in the SCR unit.

When the ECU in GEN2 Vehicles detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU in the GEN2 Vehicles triggers increase in the EGR rate for most engine operating conditions. Fuel-injection and other engine parameters are also varied to account for the altered rate of EGR, and to optimize NVH.

Prior to the 2014 Field Fix, when the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU in the GEN2 Vehicles modeled the soot loading on the DPF to be less than the true engine-out soot. Subsequent to the 2014 Field Fix, the ECU in the GEN2 Vehicles models the soot loading on the DPF according to the true engine-out soot, and instead places a distance-based limit on frequency of DPF regeneration.

When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), GEN2 Vehicles use "fill-level dosing" mode. If during such conditions, LP-EGR is disabled (such as because of near-freezing ambient temperatures), and the exhaust tract is sufficiently cold, the ECU will modulate combustion to increase exhaust gas temperature. MY2013 and MY2014 GEN2 vehicles increase the DEF dosing rate if poor-quality DEF is detected (that is, DEF that is diluted or otherwise adulterated such that its ability to convert NOx is decreased). When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the maximum dosing-quality adjustment is higher than that used when such vehicle operating conditions are not detected. When the ECU has not detected or identified through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "road mode"), GEN2 Vehicles use "online dosing" mode, and places a limit on the DEF dosing rate according to the amount of long-term DEF consumption.

Overall, the effect of these modulations is to reduce tailpipe NOx emissions when the ECU in GEN2 Vehicles detects or identifies through models the existence of vehicle operating conditions that are typical of laboratory test conditions (*i.e.*, "dyno mode"), compared to tailpipe NOx emissions when vehicles are operated under other conditions, including on-road operation (*i.e.*, "road mode").

GEN3 Vehicles

In GEN3 Vehicles, the SCR dosing system uses fill-level dosing mode at all times. When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the target fill level is increased.

The GEN3 Vehicles use a thermal management strategy to increase the heat of the SCR unit to a target temperature. When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the ECU will only use thermal management early in the driving cycle (as measured by distance driven).

The ECU deactivates the SCR thermal management strategy when the SCR target temperature is reached. However, SCR thermal management is not reactivated as soon as the SCR temperature drops below the target temperature. Rather, the SCR temperature must drop below a lower temperature threshold, known as a hysteresis threshold. When the ECU detects or identifies through models the existence of certain vehicle operating conditions typical of operation under laboratory test conditions (*i.e.*, "dyno mode"), the hysteresis threshold is set to a lower temperature.

The GEN3 Vehicles do not modulate combustion parameters or EGR rate in response to testing conditions.

Overall, the effect of these modulations is to reduce tailpipe NOx emissions when the ECU in GEN3 Vehicles detects or identifies through models the existence of vehicle operating conditions that are typical of laboratory test conditions (*i.e.*, "dyno mode"), compared to tailpipe NOx emissions when vehicles are operated under other conditions, including on-road operation (*i.e.*, "road mode").

VWGoA objects to Interrogatory No. 6 to the extent that it seeks expert opinion testimony. VWGoA further objects to the undefined terms "emission control equipment," "vehicle emission testing," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA further objects to this Interrogatory to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

7. For each of the Affected Vehicles, please state by how much the amount of NOx emitted during vehicle emission testing varied from the amount of NOx emitted during actual driving conditions. Please respond for each model and year of Affected Vehicles (rather than for each individual Affected Vehicle). If you contend that the amount varied depending on differences in actual driving conditions, please explain the range and circumstances of the variation.

ANSWER: VWGoA does not have testing data to establish by how much the amount of NOx emitted during vehicle emission testing varied from the amount of NOx emitted during actual driving conditions. However, certain testing data and documents regarding emissions testing data may nonetheless address the topic of this interrogatory, including Portable Emission Measurement System ("PEMS") data and Dynamometer testing data referenced by Bates Nos. on the following chart:

TESTING DATE	PEMS DATA	DYNAMOMETER DATA
4/15/15	VW-MDL2672-10415710 VW-MDL2672-10415745	VW-MDL2672-10415796 VW-MDL2672-10415851
4/16/15	VW-MDL2672-10415712 VW-MDL2672-10415713 VW-MDL2672-10415714 VW-MDL2672-10415747 VW-MDL2672-10415748	VW-MDL2672-10415797 VW-MDL2672-10415798 VW-MDL2672-10415799 VW-MDL2672-10415852 VW-MDL2672-10415853 VW-MDL2672-10415854
4/17/15	VW-MDL2672-10415716 VW-MDL2672-10415717 VW-MDL2672-10415718 VW-MDL2672-10415750 VW-MDL2672-10415751	VW-MDL2672-10415800 VW-MDL2672-10415801 VW-MDL2672-10415802 VW-MDL2672-10415855 VW-MDL2672-10415856

	VW-MDL2672-10415752	VW-MDL2672-10415857
4/20/15	VW-MDL2672-10415720 VW-MDL2672-10415721 VW-MDL2672-10415722 VW-MDL2672-10415753 VW-MDL2672-10415754 VW-MDL2672-10415755	VW-MDL2672-10415803 VW-MDL2672-10415804 VW-MDL2672-10415805 VW-MDL2672-10415858 VW-MDL2672-10415859 VW-MDL2672-10415860
4/21/15	VW-MDL2672-10415726 VW-MDL2672-10415727 VW-MDL2672-10415758 VW-MDL2672-10415759 VW-MDL2672-10415728	VW-MDL2672-10415806 VW-MDL2672-10415807 VW-MDL2672-10415808 VW-MDL2672-10415861 VW-MDL2672-10415862 VW-MDL2672-10415863
1/23/16	VW-MDL2672-10415737 VW-MDL2672-10415764	VW-MDL2672-10415826 VW-MDL2672-10415876
1/27/16	VW-MDL2672-10415744 VW-MDL2672-10415770	VW-MDL2672-10415829 VW-MDL2672-10415879

VWGoA objects to Interrogatory No. 7 to the extent that it seeks expert opinion testimony. VWGoA further objects to this Interrogatory to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA further objects to the undefined terms "vehicle emission testing" and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

8. Were the Affected Vehicles equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions?

ANSWER: VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA understands, however, that software in the Affected Vehicles enables the vehicles' emission control modules to detect when the vehicles are being driven on the road, rather than being tested, and that this software renders certain emission control systems in the vehicles inoperative when the emission control module detects the vehicles are not undergoing testing procedures, resulting in excess emissions when the vehicles are driven on the road.

VWGoA objects to Interrogatory No. 8 to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA further objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and

without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

9. Please explain why emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions was installed in the Affected Vehicles?

ANSWER: VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. The subject matter of this Interrogatory is encompassed by the independent, ongoing investigation commissioned by the Supervisory Board of Volkswagen AG, being led by Jones Day. VWGoA understands that that investigation is expected to be completed in 1Q 2017. During the pendency of this investigation, VWGoA does not possess any information responsive to this Interrogatory. After the investigation has concluded and VWGoA has been provided with the information resulting from that investigation, VWGoA will be in a position to (and will) amend its response to this Interrogatory. To the extent Plaintiff is requesting or suggesting that VWGoA should embark on a separate investigation in parallel with the Volkswagen AG Supervisory Board's independent investigation, such request goes well beyond any reasonable investigation. Requiring VWGoA to effectively redo Jones Day's investigation makes no sense and would not be reasonable.

VWGoA objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA further objects to the Interrogatory on the ground that it seeks the discovery of information that is in the possession, custody, or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

10. Please provide the following information for each person known to you to have been terminated or disciplined (or who resigned or retired in lieu of termination or discipline) as a result of the design or use in Affected Vehicles of emission control equipment that had been designed or altered so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

A. The name, job title, and former employer of the person.

B. Describe the person's involvement in the design or use in Affected Vehicles of emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

ANSWER: James Liang, the Leader of Diesel Competence at VWGoA beginning in 2008, was suspended from VWGoA in September 2016. The underlying conduct for which Mr. Liang was suspended is described in his Rule 11 Plea Agreement, filed in the U.S. District Court for the Eastern District of Michigan on September 9, 2016. *See United States v. Liang*, No. 2:16-cr-20394-SFC-APP, ECF No. 19 at 5-7 (E.D. Mich. Sept. 9, 2016).

VWGoA objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

11. Please state the amount of gross profit you made from the sale, or offering for sale, and lease, or offering for lease, in the State of Texas of any Affected Vehicle with a 2.0 liter TDI engine. In your response, please state the gross profit according to Generally Accepted Accounting Principles developed and established by the Financial Accounting Foundation's standard-setting Boards, the Financial Accounting Standards Board and the Governmental Accounting Standards Board, or an alternative generally accepted accounting methodology recognized by the international financial community for the public reporting of financial information.

ANSWER: VWGoA states that, upon reasonable inquiry, this information is not reasonably available to VWGoA.

VWGoA objects to Interrogatory No. 11 on the grounds that it is overly broad and unduly burdensome. VWGoA further objects to this Interrogatory as vague, ambiguous, and without a clear meaning insofar as it calls for VWGoA to determine what accounting methodologies are "recognized by the international financial community."

12. Please state the amount of gross profit you made from the sale, or offering for sale, and lease, or offering for lease, in the State of Texas of any Affected Vehicle with a 3.0 liter TDI engine. In your response, please state the gross profit according to Generally Accepted Accounting Principles developed and established by the Financial Accounting Foundation's standard-setting Boards, the Financial Accounting Standards Board and the Governmental Accounting Standards Board, or an alternative generally accepted accounting methodology recognized by the international financial community for the public reporting of financial information.

ANSWER: VWGoA states that, upon reasonable inquiry, this information is not reasonably available to VWGoA.

VWGoA objects to Interrogatory No. 12 on the grounds that it is overly broad and unduly burdensome. VWGoA further objects to this Interrogatory as vague, ambiguous, and without a

clear meaning insofar as it calls for VWGoA to determine what accounting methodologies are "recognized by the international financial community."

13. In accordance with Rule 197.1, please state the legal theories and describe in general the factual bases for your defense that Plaintiff's claims should be dismissed because they are preempted and barred by the Federal Clean Air Act.

ANSWER: 42 U.S.C. § 7543(a) (Clean Air Act § 209) provides that: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." The instant action, which involves allegations that certain diesel vehicles were designed and manufactured to include "defeat devices" that allegedly impacted the vehicles' NOx emissions, is an attempt by Plaintiff to enforce standards "relating to the control of emissions from new motor vehicles or new motor vehicle engines," and is therefore expressly preempted.

In addition, the action is impliedly preempted because Federal law occupies the field of regulating new motor vehicle emissions, and this action (and others like it) would stand as an obstacle to the fulfillment of Congress's objectives in enacting Title II of the Clean Air Act.

14. In accordance with Rule 197.1, please state the legal theories and describe in general the factual bases for your defense that Plaintiff's claims should be dismissed or abated by virtue of primary jurisdiction of the United States Environmental Protection Agency.

ANSWER: The doctrine of "primary jurisdiction" provides that when a case raises issues beyond a court's ordinary experience but within an agency's special competence, the court "may 'refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court.'" *Penny v. Southwestern Bell Tel. Co.*, 906 F.2d 183, 187 (5th Cir. 1990). Congress has assigned jurisdiction over the adoption and enforcement of emission standards applicable to new motor vehicles to the federal Environmental Protection Agency ("EPA"). That agency has not completed its work with regard to the alleged "defeat devices" in Volkswagen and Audi vehicles that are the subject of the instant action, and that work is beyond the ordinary experience of this Court. This matter should therefore be stayed, abated, or dismissed until the EPA has completed its work.

TAB 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 18 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Volkswagen AG
Audi AG
Volkswagen Group of America, Inc.
Thru:

David Geanacopoulos
Executive Vice President Public Affairs and General Counsel
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2200 Ferdinand Porsche Drive
Herndon, VA 20171

Stuart Johnson
General Manager
Engineering and Environmental Office
Volkswagen Group of America, Inc.
3800 Hamlin Road
Auburn Hills, MI 48326

Re: Notice of Violation

Dear Mr. Geanacopoulos and Mr. Johnson:

The United States Environmental Protection Agency (EPA) has investigated and continues to investigate Volkswagen AG, Audi AG, and Volkswagen Group of America (collectively, VW) for compliance with the Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q, and its implementing regulations. As detailed in this Notice of Violation (NOV), the EPA has determined that VW manufactured and installed defeat devices in certain model year 2009 through 2015 diesel light-duty vehicles equipped with 2.0 liter engines. These defeat devices bypass, defeat, or render inoperative elements of the vehicles' emission control system that exist to comply with CAA emission standards. Therefore, VW violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Additionally, the EPA has determined that, due to the existence of the defeat

devices in these vehicles, these vehicles do not conform in all material respects to the vehicle specifications described in the applications for the certificates of conformity that purportedly cover them. Therefore, VW also violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing these vehicles, or for causing any of the foregoing acts.

Law Governing Alleged Violations

This NOV arises under Part A of Title II of the CAA, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. In creating the CAA, Congress found, in part, that "the increasing use of motor vehicles . . . has resulted in mounting dangers to the public health and welfare." CAA § 101(a)(2), 42 U.S.C. § 7401(a)(2). Congress' purpose in creating the CAA, in part, was "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," and "to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution." CAA § 101(b)(1)–(2), 42 U.S.C. § 7401(b)(1)–(2). The CAA and the regulations promulgated thereunder aim to protect human health and the environment by reducing emissions of nitrogen oxides (NOx) and other pollutants from mobile sources of air pollution. Nitrogen oxides are a family of highly reactive gases that play a major role in the atmospheric reactions with volatile organic compounds (VOCs) that produce ozone (smog) on hot summer days. Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. Breathing ozone can also worsen bronchitis, emphysema, and asthma. Children are at greatest risk of experiencing negative health impacts from exposure to ozone.

The EPA's allegations here concern light-duty motor vehicles for which 40 C.F.R. Part 86 sets emission standards and test procedures and section 203 of the CAA, 42 U.S.C. § 7522, sets compliance provisions. Light-duty vehicles must satisfy emission standards for certain air pollutants, including NOx. 40 C.F.R. § 86.1811-04. The EPA administers a certification program to ensure that every vehicle introduced into United States commerce satisfies applicable emission standards. Under this program, the EPA issues certificates of conformity (COCs), and thereby approves the introduction of vehicles into United States commerce.

To obtain a COC, a light-duty vehicle manufacturer must submit a COC application to the EPA for each test group of vehicles that it intends to enter into United States commerce. 40 C.F.R. § 86.1843-01. The COC application must include, among other things, a list of all auxiliary emission control devices (AECDs) installed on the vehicles. 40 C.F.R. § 86.1844-01(d)(11). An AECD is "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." 40 C.F.R. § 86.1803-01. The COC application must also include "a justification for each AECD, the parameters they sense and control, a detailed justification of each AECD that results in a reduction in effectiveness of the emission control system, and [a] rationale for why it is not a defeat device." 40 C.F.R. § 86.1844-01(d)(11).

A defeat device is an AECD "that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and

use, unless: (1) Such conditions are substantially included in the Federal emission test procedure; (2) The need for the AECD is justified in terms of protecting the vehicle against damage or accident; (3) The AECD does not go beyond the requirements of engine starting; or (4) The AECD applies only for emergency vehicles . . . ." 40 C.F.R. § 86.1803-01.

Motor vehicles equipped with defeat devices, such as those at issue here, cannot be certified. EPA, *Advisory Circular Number 24: Prohibition on use of Emission Control Defeat Device* (Dec. 11, 1972); *see also* 40 C.F.R. §§ 86-1809-01, 86-1809-10, 86-1809-12. Electronic control systems which may receive inputs from multiple sensors and control multiple actuators that affect the emission control system's performance are AECDs. EPA, *Advisory Circular Number 24-2: Prohibition of Emission Control Defeat Devices – Optional Objective Criteria* (Dec. 6, 1978). "Such elements of design could be control system logic (i.e., computer software), and/or calibrations, and/or hardware items." *Id.*

"Vehicles are covered by a certificate of conformity only if they are in all material respects as described in the manufacturer's application for certification . . . ." 40 C.F.R. § 86.1848-10(c)(6). Similarly, a COC issued by EPA, including those issued to VW, state expressly, "[t]his certificate covers only those new motor vehicles or vehicle engines which conform, in all material respects, to the design specifications" described in the application for that COC. *See also* 40 C.F.R. §§ 86.1844-01 (listing required content for COC applications), 86.1848-01(b) (authorizing the EPA to issue COCs on any terms that are necessary or appropriate to assure that new motor vehicles satisfy the requirements of the CAA and its regulations).

The CAA makes it a violation "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use." CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B); 40 C.F.R. § 86.1854-12(a)(3)(ii). Additionally, manufacturers are prohibited from selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing, any new motor vehicle unless that vehicle is covered by an EPA-issued COC. CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1); 40 C.F.R. § 86.1854-12(a)(1). It is also a violation to cause any of the foregoing acts. CAA § 203(a), 42 U.S.C. § 7522(a); 40 C.F.R. § 86-1854-12(a).

Alleged Violations

Each VW vehicle identified by the table below has AECDs that were not described in the application for the COC that purportedly covers the vehicle. Specifically, VW manufactured and installed software in the electronic control module (ECM) of these vehicles that sensed when the vehicle was being tested for compliance with EPA emission standards. For ease of reference, the EPA is calling this the "switch." The "switch" senses whether the vehicle is being tested or not based on various inputs including the position of the steering wheel, vehicle speed, the duration of the engine's operation, and barometric pressure. These inputs precisely track the parameters of the federal test procedure used for emission testing for EPA certification purposes. During EPA

emission testing, the vehicles' ECM ran software which produced compliant emission results under an ECM calibration that VW referred to as the "dyno calibration" (referring to the equipment used in emissions testing, called a dynamometer). At all other times during normal vehicle operation, the "switch" was activated and the vehicle ECM software ran a separate "road calibration" which reduced the effectiveness of the emission control system (specifically the selective catalytic reduction or the lean NOx trap). As a result, emissions of NOx increased by a factor of 10 to 40 times above the EPA compliant levels, depending on the type of drive cycle (e.g., city, highway).

The California Air Resources Board (CARB) and the EPA were alerted to emissions problems with these vehicles in May 2014 when the West Virginia University's (WVU) Center for Alternative Fuels, Engines & Emissions published results of a study commissioned by the International Council on Clean Transportation that found significantly higher in-use emissions from two light duty diesel vehicles (a 2012 Jetta and a 2013 Passat). Over the course of the year following the publication of the WVU study, VW continued to assert to CARB and the EPA that the increased emissions from these vehicles could be attributed to various technical issues and unexpected in-use conditions. VW issued a voluntary recall in December 2014 to address the issue. CARB, in coordination with the EPA, conducted follow up testing of these vehicles both in the laboratory and during normal road operation to confirm the efficacy of the recall. When the testing showed only a limited benefit to the recall, CARB broadened the testing to pinpoint the exact technical nature of the vehicles' poor performance, and to investigate why the vehicles' onboard diagnostic system was not detecting the increased emissions. None of the potential technical issues suggested by VW explained the higher test results consistently confirmed during CARB's testing. It became clear that CARB and the EPA would not approve certificates of conformity for VW's 2016 model year diesel vehicles until VW could adequately explain the anomalous emissions and ensure the agencies that the 2016 model year vehicles would not have similar issues. Only then did VW admit it had designed and installed a defeat device in these vehicles in the form of a sophisticated software algorithm that detected when a vehicle was undergoing emissions testing.

VW knew or should have known that its "road calibration" and "switch" together bypass, defeat, or render inoperative elements of the vehicle design related to compliance with the CAA emission standards. This is apparent given the design of these defeat devices. As described above, the software was designed to track the parameters of the federal test procedure and cause emission control systems to underperform when the software determined that the vehicle was not undergoing the federal test procedure.

VW's "road calibration" and "switch" are AECDs[1] that were neither described nor justified in the applicable COC applications, and are illegal defeat devices. Therefore each vehicle identified by the table below does not conform in a material respect to the vehicle specifications described in the COC application. As such, VW violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), each time it sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported (or caused any of the foregoing with respect to) one of the hundreds of thousands of new motor vehicles within these test groups. Additionally, VW

[1] There may be numerous engine maps associated with VW's "road calibration" that are AECDs, and that may also be defeat devices. For ease of description, the EPA is referring to these maps collectively as the "road calibration."

violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), each time it manufactured and installed into these vehicles an ECM equipped with the "switch" and "road calibration."

The vehicles are identified by the table below. All vehicles are equipped with 2.0 liter diesel engines.

Model Year	EPA Test Group	Make and Model(s)
2009	9VWXV02.035N	VW Jetta, VW Jetta Sportwagen
2009	9VWXV02.0U5N	VW Jetta, VW Jetta Sportwagen
2010	AVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2011	BVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012	CVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012	CVWXV02.0U4S	VW Passat
2013	DVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2013	DVWXV02.0U4S	VW Passat
2014	EVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2014	EVWXV02.0U4S	VW Passat
2015	FVGAV02.0VAL	VW Beetle, VW Beetle Convertible, VW Golf, VW Golf Sportwagen, VW Jetta, VW Passat, Audi A3

Enforcement

The EPA's investigation into this matter is continuing. The above table represents specific violations that the EPA believes, at this point, are sufficiently supported by evidence to warrant the allegations in this NOV. The EPA may find additional violations as the investigation continues.

The EPA is authorized to refer this matter to the United States Department of Justice for initiation of appropriate enforcement action. Among other things, persons who violate section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), are subject to a civil penalty of up to $3,750 for each violation that occurred on or after January 13, 2009;[1] CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. In addition, any manufacturer who, on or after January 13, 2009, sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused any of the foregoing acts with respect to any new motor vehicle that was not covered by an EPA-issued COC is subject, among other things, to a civil penalty of up to $37,500 for each violation.[2] CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. The EPA may seek, and district courts may order, equitable remedies to further address these alleged violations. CAA § 204(a), 42 U.S.C. § 7523(a).

[1] $2,750 for violations occurring prior to January 13, 2009.
[2] $32,500 for violations occurring prior to January 13, 2009.

The EPA is available to discuss this matter with you. Please contact Meetu Kaul, the EPA attorney assigned to this matter, to discuss this NOV. Ms. Kaul can be reached as follows:

Meetu Kaul
U.S. EPA, Air Enforcement Division
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William Jefferson Clinton Federal Building
Washington, DC 20460
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kaul.meetu@epa.gov

Sincerely,

Phillip A. Brooks
Director
Air Enforcement Division
Office of Civil Enforcement

Copy:
Todd Sax, California Air Resources Board
Walter Benjamin Fisherow, United States Department of Justice
Stuart Drake, Kirkland & Ellis LLP

TAB 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV - 2 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Volkswagen AG
Audi AG
Porsche AG
Volkswagen Group of America, Inc.
Porsche Cars North America, Inc.
Thru:

David Geanacopoulos
Executive Vice President Public Affairs and
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Herndon, VA 20171

Joseph Folz
Vice President, General Counsel and
Secretary
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Stuart Johnson
General Manager
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Walter J. Lewis
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Porsche Cars North America, Inc.
980 Hammond Drive, Suite 1000
Atlanta, GA 30328

Re: Notice of Violation

Dear Mr. Geanacopoulos, Mr. Johnson, Mr. Folz, and Mr. Lewis:

The United States Environmental Protection Agency (EPA) has investigated and continues to investigate Volkswagen AG, Audi AG, Porsche AG, Volkswagen Group of America, Inc., and Porsche Cars North America, Inc., (collectively, VW) for compliance with the Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q, and its implementing regulations. As detailed in this Notice of Violation (NOV), the EPA has determined that VW manufactured and installed defeat devices

in certain model year 2014 – 2016 diesel light-duty vehicles equipped with 3.0 liter engines. These defeat devices bypass, defeat, or render inoperative elements of the vehicles' emission control system that exist to comply with CAA emission standards. Therefore, VW violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Additionally, the EPA has determined that, due to the existence of the defeat devices in these vehicles, these vehicles do not conform in all material respects to the vehicle specifications described in the applications for the certificates of conformity that purportedly cover them. Therefore, VW also violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing these vehicles, or for causing any of the foregoing acts.

Law Governing Alleged Violations

This NOV arises under Part A of Title II of the CAA, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. In creating the CAA, Congress found, in part, that "the increasing use of motor vehicles . . . has resulted in mounting dangers to the public health and welfare." CAA § 101(a)(2), 42 U.S.C. § 7401(a)(2). Congress' purpose in creating the CAA, in part, was "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," and "to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution." CAA § 101(b)(1)–(2), 42 U.S.C. § 7401(b)(1)–(2). The CAA and the regulations promulgated thereunder aim to protect human health and the environment by reducing emissions of nitrogen oxides (NOx) and other pollutants from mobile sources of air pollution. Nitrogen oxides are a family of highly reactive gases that play a major role in the atmospheric reactions with volatile organic compounds (VOCs) that produce ozone (smog) on hot summer days. Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. Breathing ozone can also worsen bronchitis, emphysema, and asthma. Children are at greatest risk of experiencing negative health impacts from exposure to ozone.

The EPA's allegations here concern light-duty motor vehicles for which 40 C.F.R. Part 86 sets emission standards and test procedures and section 203 of the CAA, 42 U.S.C. § 7522, sets compliance provisions. Light-duty vehicles must satisfy emission standards for certain air pollutants, including NOx. 40 C.F.R. § 86.1811-04. The EPA administers a certification program to ensure that every vehicle introduced into United States commerce satisfies applicable emission standards. Under this program, the EPA issues certificates of conformity (COCs), and thereby approves the introduction of vehicles into United States commerce.

To obtain a COC, a light-duty vehicle manufacturer must submit a COC application to the EPA for each test group of vehicles that it intends to enter into United States commerce. 40 C.F.R. § 86.1843-01. The COC application must include, among other things, a list of all auxiliary emission control devices (AECDs) installed on the vehicles. 40 C.F.R. § 86.1844-01(d)(11). An AECD is "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." 40 C.F.R. § 86.1803-01. The COC application must also include "a justification for each AECD,

the parameters they sense and control, a detailed justification of each AECD that results in a reduction in effectiveness of the emission control system, and [a] rationale for why it is not a defeat device." 40 C.F.R. § 86.1844-01(d)(11).

A defeat device is an AECD "that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless: (1) Such conditions are substantially included in the Federal emission test procedure; (2) The need for the AECD is justified in terms of protecting the vehicle against damage or accident; (3) The AECD does not go beyond the requirements of engine starting; or (4) The AECD applies only for emergency vehicles . . . ." 40 C.F.R. § 86.1803-01.

Motor vehicles equipped with defeat devices, such as those at issue here, cannot be certified. EPA, *Advisory Circular Number 24: Prohibition on use of Emission Control Defeat Device* (Dec. 11, 1972); *see also* 40 C.F.R. §§ 86-1809-01, 86-1809-10, 86-1809-12. Electronic control systems which may receive inputs from multiple sensors and control multiple actuators that affect the emission control system's performance are AECDs. EPA, *Advisory Circular Number 24-2: Prohibition of Emission Control Defeat Devices – Optional Objective Criteria* (Dec. 6, 1978). "Such elements of design could be control system logic (i.e., computer software), and/or calibrations, and/or hardware items." *Id.*

"Vehicles are covered by a certificate of conformity only if they are in all material respects as described in the manufacturer's application for certification . . . ." 40 C.F.R. § 86.1848-10(c)(6). Similarly, COCs issued by EPA, including those issued to VW, state expressly, "[t]his certificate covers only those new motor vehicles or vehicle engines which conform, in all material respects, to the design specifications" described in the application for that COC. *See also* 40 C.F.R. §§ 86.1844-01 (listing required content for COC applications), 86.1848-01(b) (authorizing the EPA to issue COCs on any terms that are necessary or appropriate to assure that new motor vehicles satisfy the requirements of the CAA and its regulations).

The CAA makes it a violation "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use." CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B); 40 C.F.R. § 86.1854-12(a)(3)(ii). Additionally, manufacturers are prohibited from selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing, any new motor vehicle unless that vehicle is covered by an EPA-issued COC. CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1); 40 C.F.R. § 86.1854-12(a)(1). It is also a violation to cause any of the foregoing acts. CAA § 203(a), 42 U.S.C. § 7522(a); 40 C.F.R. § 86-1854-12(a).

Alleged Violations

Each VW vehicle identified by the table below has AECDs that were not described in the application for the COC that purportedly covers the vehicle. Specifically, VW manufactured and installed software in the electronic control module (ECM) of each vehicle that causes the vehicle to perform differently when the vehicle is being tested for compliance with EPA emission standards than in normal operation and use.

When this software determines the vehicle has begun the FTP 75 Federal emission test procedure, it directs the vehicle to employ a low NOx temperature conditioning mode. A status bit in the software indicates that a "temperature conditioning" mode is active. In this low NOx temperature conditioning mode, the vehicle operates under a number of emission control parameters, including injection timing, exhaust gas recirculation rate, and common rail fuel pressure in such a way that the parameters yield low engine-out NOx emissions and high exhaust temperatures. The high exhaust temperatures heat the selective catalytic reduction system ("catalyst") and improve the catalyst's ability to reduce tailpipe NOx emissions. In this low NOx temperature conditioning mode, the combination of low engine-out NOx and improved catalyst performance results in tailpipe NOx emissions that are below the applicable emissions standard.

However, the software employs a "timer" that coincides with the low NOx temperature conditioning mode. At exactly one second after the completion of the initial phases of the FTP 75 Federal emissions test procedure (1,370 seconds, which is when the vehicle would normally be turned off), this software directs the vehicle to cease low NOx temperature conditioning mode. The "temperature conditioning" status bit switches to zero, and a second status bit indicates the activation of "transition to normal mode." In this "normal mode," the emission control system is immediately less effective. Compared to the low NOx temperature conditioning mode, the vehicle employs a different injection timing, exhaust gas recirculation rate, and common rail fuel pressure. This yields higher levels of NOx from the engine and reduced exhaust temperatures.

In addition, when the vehicle starts under conditions that the software determines *are not* the beginning of the FTP 75 Federal emission test procedure, the vehicle does not use the low NOx temperature conditioning mode at all. Instead, the emission control parameters are set consistent with the "normal mode."

In sum, as soon as the vehicle senses that it is not being tested, it uses "normal mode." In "normal mode," tailpipe emissions of NOx are up to 9 times the applicable NOx standard levels, depending on model type and type of drive cycle (e.g., city, highway).

This NOV is based on vehicle emission testing performed by the EPA's National Vehicle and Fuel Emissions Laboratory, California Air Resources Board's Hagen-Smit Laboratory, and Environment Canada's River Road Laboratory. This testing was performed since EPA's announcement on September 25, 2015, that it would perform additional testing "using driving cycles and conditions that may reasonably be expected to be encountered in normal operation

and use, for the purposes of investigating a potential defeat device." EPA, *EPA Conducted Confirmatory Testing* (Sept. 25, 2015).

VW knew or should have known that the software described above bypasses, defeats, or renders inoperative elements of the vehicle design related to compliance with the CAA emission standards. This is apparent given the design of these defeat devices. As described above, the software was designed to track federal test procedures and cause emission control systems to underperform when the software determined that the vehicle was not being tested.

VW's software described above includes one or more AECDs that were neither described nor justified in the applicable COC applications, and are illegal defeat devices. Therefore each vehicle identified by the table below does not conform in a material respect to the vehicle specifications described in the COC application. As such, VW violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), each time it sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported (or caused any of the foregoing with respect to) one of the new motor vehicles within these test groups. Additionally, VW violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), each time it manufactured and installed into these vehicles an ECM equipped with the software described above.

The vehicles are identified by the table below. All vehicles are equipped with 3.0 liter diesel engines.

Model Year	**EPA Test Group**	**Make and Model(s)**
2014	EADXT03.02UG	VW Touareg
2015	FPRXT03.0CDD	Porsche Cayenne
2016	GVGAJ03.0NU4	Audi A6 Quattro, A7 Quattro, A8, A8L, and Q5

Enforcement

The EPA's investigation into this matter is continuing. The above table represents specific violations that the EPA believes, at this point, are sufficiently supported by evidence to warrant the allegations in this NOV. The EPA may find additional violations as the investigation continues.

The EPA is authorized to refer this matter to the United States Department of Justice for initiation of appropriate enforcement action. Among other things, persons who violate section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), are subject to a civil penalty of up to $3,750 for each violation that occurred on or after January 13, 2009; CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. In addition, any manufacturer who, on or after January 13, 2009, sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused any of the foregoing acts with respect to any new motor vehicle that was not covered by an EPA-issued COC is subject, among other things, to a civil penalty of up to $37,500 for each violation. CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. The EPA may

seek, and district courts may order, equitable remedies to further address these alleged violations. CAA § 204(a), 42 U.S.C. § 7523(a).

The EPA is available to discuss this matter with you. Please contact Meetu Kaul, the EPA attorney assigned to this matter, to discuss this NOV. Ms. Kaul can be reached as follows:

Meetu Kaul
U.S. EPA, Air Enforcement Division
1200 Pennsylvania Avenue, NW
William Jefferson Clinton Federal Building
Washington, DC 20460
(202) 564-5472
kaul.meetu@epa.gov

Sincerely,

Susan Shinkman
Director
Office of Civil Enforcement

Copy:
Todd Sax, California Air Resources Board
Walter Benjamin Fisherow, United States Department of Justice
Stuart Drake, Kirkland & Ellis LLP

TAB 5

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

United States of America, Plaintiff, v. VOLKSWAGEN AG, Defendant.	No. 16-CR-20394 HONORABLE SEAN F. COX Offenses: (1) Conspiracy (2) Obstruction of Justice (3) Entry of Goods by False Statement Violations: (1) 18 U.S.C. § 371 (2) 18 U.S.C. § 1512(c) (3) 18 U.S.C. § 542 Statutory Maximum Period of Probation: Five years per count Statutory Minimum Period of Probation: None/Not Applicable Statutory Maximum Fine: 18 U.S.C. § 3571(d) (the greater of twice the gross gain or twice the gross loss) Statutory Minimum Fine: None/Not Applicable

FILED
MAR 10 2017
CLERK'S OFFICE
DETROIT

GOVERNMENT EXHIBIT
1

Rule 11 Plea Agreement

The United States of America, by and through the Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section and with the approval of the Deputy Attorney General (collectively hereafter, "the Offices"), and the Defendant, Volkswagen AG (the "Defendant"), by and through its undersigned attorneys, and through its authorized representative, pursuant to authority granted by the Defendant's Management Board, with the consent of the Supervisory Board, hereby submit and enter into this plea agreement (the "Agreement"), pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The terms and conditions of this Agreement are as follows:

1. **Guilty Plea**

A. **Waiver of Indictment and Venue**

Pursuant to Fed. R. Crim. P. 7, the Defendant agrees to knowingly waive its right to grand jury indictment and its right to challenge venue in the United States District Court for the Eastern District of Michigan, and to plead guilty to Counts One through Three of the Third Superseding Information.

B. **Counts of Conviction**

The Third Superseding Information charges three counts: (1) Count One - conspiracy in violation of 18 U.S.C. § 371, (2) Count Two - obstruction of justice in

violation of 18 U.S.C. § 1512(c), and (3) Count Three – introducing imported merchandise into the United States by mean of false statements in violation of 18 U.S.C. § 542. The Defendant further agrees to persist in that plea through sentencing and, as set forth below, to cooperate fully with the Offices in their investigation into the conduct described in this Agreement and other conduct related to the introduction into the United States of diesel vehicles with defeat devices as defined under U.S. law.

C. **Elements of Offenses**

The elements of Count One (conspiracy) are as follows:

(1) The elements for conspiracy to defraud the United States by obstructing the lawful function of the federal government are as follows:

(a) That two or more persons conspired, or agreed, to defraud the United States or one of its agencies or departments, in this case, the Environmental Protection Agency (EPA), by dishonest means;

(b) That the defendant knowingly and voluntarily joined the conspiracy; and

(c) That a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(2) The elements for conspiracy to violate the wire fraud statute and Clean Air Act are as follows:

(a) That two or more persons conspired, or agreed, to commit a crime, in this case, a violation of the wire fraud statute (18 U.S.C. § 1343) and the Clean Air Act (42 U.S.C. § 7413(c)(2)(A)) as described below;

(b) That the defendant knowingly and voluntarily joined the conspiracy; and

(c) That a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

Object of the Conspiracy – Wire Fraud – 18 U.S.C. § 1343:

(a) The defendant knowingly participated in, devised, or intended to devise a scheme to defraud in order to obtain money or property;

(b) The scheme included a material misrepresentation or concealment of a material fact;

(c) The defendant had the intent to defraud; and

(d) The defendant used (or caused another to use) wire, radio or television communications in interstate or foreign commerce in furtherance of the scheme.

Object of the Conspiracy – Clean Air Act – 42 U.S.C. § 7413(c)(2)(A)

(a) The defendant knowingly made (or caused to be made) a false material statement, representation, or certification, or omission of material information;

(b) The statement, representation or certification that was made (or omitted), or caused to be made or omitted, was in a notice, application, record, report, plan or other document required to be filed or maintained under the Clean Air Act; and

(c) The statement, representation, certification, or omission of information, was material.

The elements of Count Two (obstruction of justice) are as follows:

(1) That the defendant altered, destroyed, mutilated, or concealed a record, document or other object;

(2) That the defendant acted knowingly;

(3) That the defendant acted corruptly; and

(4) That the defendant acted with the intent to impair the record, document or object's integrity or availability for use in an official proceeding.

The elements of Count Three (entry of goods by false statement) are as follows:

(1) That merchandise was imported;

(2) That the defendant entered or introduced merchandise into the commerce of the United States;

(3) That the defendant did so by means of a false statement, which it knew was false; and

(4) That the false statement was material to the entry of the merchandise.

D. **Statutory Maximum Penalties**

The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 371 (Count One) is a fine of $500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B). The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 1512(c) (Count Two) is a fine of $500,000; five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B). The statutory maximum sentence that the Court can impose for a violation of Title 18,

United States Code, Section 542 (Count Three) is a fine of $500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B).

E. **Factual Basis for Guilty Plea**

The Defendant is pleading guilty because it is guilty of the charges contained in the Third Superseding Information. The Defendant admits, agrees, and stipulates that the factual allegations set forth in Exhibit 2 (the Statement of Facts) are true and correct, that it is responsible under the laws of the United States for the acts of its employees described in Exhibit 2, and that the facts set forth in Exhibit 2 accurately reflect the Defendant's criminal conduct and provide a factual basis for the guilty plea. The Defendant agrees that it will neither contest the admissibility of, nor contradict, the Statement of Facts contained in Exhibit 2 in any proceeding.

2. **Sentencing Guidelines**

A. **Standard of Proof**

The Court will find sentencing factors by a preponderance of the evidence.

B. **Guideline Range**

There are no disputes with respect to the sentencing guidelines that require resolution by the court. While the Defendant does not adopt, agree or accept the United States Sentencing Guidelines (U.S.S.G.) analysis contained herein, for

purposes of avoiding the need for a contested sentencing proceeding and achieving a just and fair result, and because the Defendant agrees that the overall fine proposed herein achieves such a result, the Defendant does not contest the factual or legal basis of the Office's U.S.S.G. analysis contained in this Paragraph for the purposes of this proceeding and stipulates that the proposed fine constitutes a reasonable sentence under the factors listed in Title 18, United States Code, Section 3553(a). Pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the Court must determine an advisory sentencing guideline range pursuant to the United States Sentencing Guidelines (U.S.S.G.). The Court will then determine a reasonable sentence within the statutory range after considering the advisory sentencing guideline range and the factors listed in Title 18, United States Code, Section 3553(a). The Defendant also understands that if the Court accepts this Agreement, the Court is bound by the sentencing provisions in Paragraph 3. The Offices submit that a faithful application of the U.S.S.G. to determine the applicable fine range yields the following analysis:

a. The 2016 U.S.S.G. are applicable to this matter.

b. Offense Level. Based upon U.S.S.G. § 2B1.1, the total offense level is 41, calculated as follows:

(a)(1)	Base Offense Level	7
(b)(1)(P)	Amount of Loss > $550 million	+30
(b)(2)(A)(i)	More Than 10 Victims	+2
(b)(10)(B)	Substantial Part of Scheme Committed from Outside the United States	+2

TOTAL		41

c. Base Fine. Based upon U.S.S.G. § 8C2.4(a), the base fine is $8,543,169,187 (the pecuniary loss from the offense caused by the Defendant)

d. Culpability Score. Based upon U.S.S.G. § 8C2.5, the culpability score is 11, calculated as follows:

(a)	Base Culpability Score	5
(b)(1)	the unit of the organization within which the offense was committed had 5,000 or more employees and an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense	+5
(e)	obstruction of justice	+3
(g)(3)	The organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct	- 2
TOTAL		11

Calculation of Fine Range:

Base Fine	$8,543,169,187[1]
Multipliers	2 (min)/4 (max)
Fine Range	$17,086,338,374 (min)/ $34,172,676,746 (max)

[1] The base fine amount consists of the loss amount as calculated under USSG § 2B1.1 and accompanying Application Notes, discounted to reflect a 50% reduction for the litigation risk that both parties would bear were there a contested sentencing proceeding. *See, e.g.*, *United States v. Giovenco*, 773 F.3d 866 (7th Cir. 2014); *United States v. Prosperi*, 686 F.3d 32 (1st Cir. 2012).

3. **Sentence**

Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the Defendant agree that the appropriate disposition of this case is as set forth in this Section and agree to recommend jointly that the Court at a hearing to be scheduled at an agreed upon time impose it.

A. **Relevant Considerations**

The Offices enter into this Agreement based on the individual facts and circumstances presented by this case and the Defendant. Among the factors considered were the following:

1. the Defendant did not voluntarily disclose to the Offices the conduct described in Exhibit 2 (the Statement of Facts);

2. the Defendant cooperated with the Offices' investigation by, among other things, (i) gathering substantial amounts of evidence and performing forensic data collections in multiple jurisdictions; (ii) producing documents, including translations, to the Offices in ways that did not implicate foreign data privacy laws; (iii) collecting, analyzing, organizing, and producing voluminous evidence and information; (iv) interviewing hundreds of witnesses in the United States and overseas; (v) providing non-privileged facts relating to individuals and companies involved in the criminal conduct; and (vi) facilitating and encouraging

cooperation and voluntary disclosure of information and documents by current and former company personnel;

3. the Defendant has already agreed to compensate members of the class in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-2672 (N.D. Cal.), which consists of victims of the underlying criminal conduct that is the subject of this Agreement, and to pay into a NOx remediation trust, in an aggregate amount of approximately $11 billion (based on net present value);

4. despite obstruction of justice committed by certain of the Defendant's employees, principally in the form of document destruction, the Defendant, including through its outside counsel, self-disclosed this conduct to the Offices, remediated the conduct by recovering large portions of the deleted documents through a variety of forensic means, and conducted a thorough investigation of the conduct, the findings of which it reported to the Offices;

5. the Defendant engaged in remedial measures, including creation of a management board position to supervise the Defendant's legal and compliance functions, reorganization of the whistleblower system, improvements to its risk assessment systems, specific reforms to its engine-related practices, including a program to audit these reforms, termination the employment of six individuals who participated in, or failed to supervise employees who participated in, the misconduct

described in the Statement of Facts, suspending an additional eight individuals who participated in the misconduct described in the Statement of Facts for varying periods, and disciplining an additional three employees who participated in the misconduct described in the Statement of Facts; however, the Defendant's remediation remains incomplete;

6. the Defendant has committed to continue to enhance its compliance program and internal controls;

7. the Defendant has agreed, as part of its continuing cooperation obligations, and to ensure that the Defendant and its wholly-owned subsidiary Volkswagen Group of America ("VW GOA") implements an effective compliance program, to the appointment of an independent monitor (the "Monitor") for a period of up to three years, who will have authority with respect to the Defendant and VW GOA;

8. the nature and seriousness of the offenses;

9. the Defendant has no prior criminal history;

10. the Defendant has agreed to continue to cooperate with the Offices in any ongoing investigation of the conduct of the Defendant and its officers, directors, employees, agents, business partners, and consultants relating to the violations to which the Defendant is pleading guilty; and

11. the Defendant has agreed to pay an additional $1,500,000,000 to the United States to resolve claims for civil penalties arising from the underlying conduct that is the subject of this Agreement;

12. accordingly, after considering (1) through (11) above, (a) the Defendant received an aggregate discount of approximately 20% off of the bottom of the otherwise applicable U.S. Sentencing Guidelines fine range, reflecting its cooperation in the investigation, and (b) after application of the foregoing discount, the Defendant in addition received a credit of $11 billion, representing the net present value of the Defendant's settlements with consumers and payments to the NOx remediation trust in settlement of civil litigation.

B. **Fine**

The Defendant shall pay to the United States a criminal fine of $2,800,000,000, payable in full within ten days of the entry of judgment following the sentencing hearing in this matter. The Defendant shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the penalty amount that the Defendant pays pursuant to this Agreement. The Defendant further agrees that it shall not claim, assert, or apply for, either directly or indirectly, any tax deduction, tax credit, or any other offset with regard to any U.S. federal, state, or local tax or taxable income for any fine or forfeiture paid pursuant to this Agreement.

C. **Probation**

The parties agree that a term of organizational probation for a period of three years should be imposed on the Defendant pursuant to 18 U.S.C. §§ 3551(c)(1) and 3561(c)(1). The parties further agree, pursuant to U.S.S.G. § 8D1.4, that the term of probation shall include as conditions the obligations set forth in Paragraphs 5 and 6 below as well as the payment of the fine set forth in this Paragraph, but shall not include the obligations set forth in Paragraph 7 below.

D. **Special Assessment**

The Defendant shall pay to the Clerk of the Court for the United States District Court for the Eastern District of Michigan within ten days of the time of sentencing the mandatory special assessment of $1,200 ($400 per count).

E. **Restitution**

No order of restitution is appropriate in this case pursuant to 18 U.S.C. § 3663A(c)(3), as the number of identifiable victims is so large as to make restitution impracticable and/or determining complex issues of fact related to the cause or amount of victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. Moreover, as noted in Paragraph 2(A) above, the Defendant has already agreed to compensate members of the class in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability*

Litigation, No. 3:15-md-2672 (N.D. Cal.), which consists of individuals who purchased affected vehicles described in Exhibit 2.

4. **Other Charges**

In exchange for the guilty plea of the Defendant and the complete fulfillment of all of its obligations under this Agreement, the Offices agree that they will not file additional criminal charges against the Defendant or any of its direct or indirect affiliates or subsidiaries related to: (1) any conduct described in the Third Superseding Information or Exhibit 2; (2) any conduct related to the emissions, or compliance with U.S. emissions standards, of the Subject Vehicles or the Porsche Vehicles as described and defined in the Third Superseding Information and Exhibit 2; and (3) any conduct disclosed by, or on behalf of, the Defendant or otherwise known to the Offices or the EPA as of the date of this Agreement. The Offices, however, may use any information related to the conduct described in the Statement of Facts against the Defendant: (a) in a prosecution for perjury or obstruction of justice apart from the charge in the Third Superseding Information and identified in the Statement of Facts; (b) in a prosecution for making a false statement; (c) in a prosecution or other proceeding relating to any crime of violence; or (d) in a prosecution or other proceeding relating to a violation of any provision of Title 26 of the United States Code. This Paragraph does not provide any protection against prosecution for any other conduct, including but not limited

to crimes committed in the future by the Defendant or by any of its affiliates, subsidiaries, officers, directors, employees, agents or consultants, whether or not disclosed by the Defendant pursuant to the terms of this Agreement. In addition, this Agreement does not provide any protection against prosecution of any joint ventures of which the Defendant is a part, or any individuals, regardless of their affiliation with the Defendant. The Defendant agrees that nothing in this Agreement is intended to release the Defendant from any and all of the Defendant's excise and income tax liabilities and reporting obligations for any and all income not properly reported and/or legally or illegally obtained or derived.

5. **The Defendant's Obligations**

A. Except as otherwise provided in Paragraph 6 below in connection with the Defendant's cooperation obligations, the Defendant's obligations under the Agreement shall last and be effective for a period beginning on the date on which the Third Superseding Information is filed and ending three years from the later of the date on which the Third Superseding Information is filed or the date on which the Monitor is retained by the Defendant, as described in Paragraph 15 below (the "Term"). The Defendant agrees, however, that, in the event the Offices determine, in their sole discretion, that the Defendant has failed specifically to perform or to fulfill each of the Defendant's obligations under this Agreement, an extension or extensions of the Term may be imposed by the Offices, in their sole discretion, for

up to a total additional time period of one year, without prejudice to the Offices' right to proceed as provided in Paragraph 9 below. Any extension of the Term extends all terms of this Agreement, including the terms of the Monitorship in Exhibit 3, for an equivalent period. Conversely, in the event the Offices find, in their sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the Monitorship in Exhibit 3, and that the other provisions of this Agreement have been satisfied, the Term may be terminated early, except for the Defendant's cooperation obligations described in Paragraph 6 below.

B. The Defendant agrees to abide by all terms and obligations of this Agreement as described herein, including, but not limited to, the following:

1. to plead guilty as set forth in this Agreement;

2. to abide by all sentencing stipulations contained in this Agreement;

3. to appear, through its duly appointed representatives, as ordered for all court appearances, and obey any other ongoing court order in this matter, consistent with all applicable U.S. and foreign laws, procedures, and regulations;

4. to commit no further crimes;

5. to be truthful at all times with the Court and the Offices;

6. to pay the applicable fine and special assessments;

7. to cooperate with and report to the Offices as provided in Paragraph 6; and

8. to continue to implement a compliance and ethics program designed to prevent and detect fraudulent conduct throughout its operations.

C. The Defendant agrees that any fine or restitution imposed by the Court will be due and payable in full within ten days of the entry of judgment following the sentencing hearing, and the Defendant will not attempt to avoid or delay payment. The Defendant further agrees to pay the Clerk of the Court for the United States District Court for the Eastern District of Michigan the mandatory special assessment of $400 per count within ten business days from the date of sentencing.

6. **The Defendant's Cooperation and Reporting Obligations**

A. The Defendant shall cooperate fully with the Offices in any and all matters relating to the conduct described in this Agreement and Exhibit 2, and other related conduct under investigation by the Offices during the Term, subject to applicable law and regulations, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the end of the Term. At the request of the Offices, the Defendant shall also cooperate fully with other domestic law enforcement and regulatory authorities and agencies in any investigation of the Defendant, its parent company or its affiliates, or any of its present or former officers, directors, employees, agents, and consultants, or any other

party, in any and all matters relating to the conduct described in this Agreement and Exhibit 2, and other conduct related to the Defendant's installation of defeat devices and false and fraudulent representations pertaining thereto. The Defendant agrees that its cooperation pursuant to this Paragraph shall include, but not be limited to, the following:

1. The Defendant shall truthfully disclose all factual information not protected by a valid claim of attorney-client privilege or attorney work product doctrine, or by applicable law and regulations, including applicable data protection laws, with respect to its activities, those of its parent company and affiliates, and those of its present and former directors, officers, employees, agents, and consultants, including any evidence or allegations and internal or external investigations, about which the Defendant has any knowledge or about which the Offices may inquire. This obligation of truthful disclosure includes, but is not limited to, the obligation of the Defendant to provide to the Offices, upon request, any document, record or other tangible evidence about which the Offices may inquire of the Defendant.

2. Upon request of the Offices, the Defendant shall designate knowledgeable employees, agents or attorneys to provide to the Offices the information and materials described in Paragraph 6(A)(1) above on behalf of the Defendant. It is further understood that the Defendant must at all times provide complete, truthful, and accurate information.

3. The Defendant shall use its best efforts to make available for interviews or testimony, as requested by the Offices, present or former officers, directors, employees, agents and consultants of the Defendant. This obligation includes, but is not limited to, sworn testimony before a federal grand jury or in federal trials, as well as interviews with domestic law enforcement and regulatory authorities. Cooperation under this Paragraph shall include identification of witnesses who, to the knowledge of the Defendant, may have material information regarding the matters under investigation.

4. With respect to any information, testimony, documents, records or other tangible evidence provided to the Offices pursuant to this Agreement, the Defendant consents to any and all disclosures, subject to applicable law and regulations, including applicable data protection laws, to other governmental authorities in the United States of such materials as the Offices, in their sole discretion, shall deem appropriate.

B. In addition to the obligations in Paragraph 6(A), during the Term, should the Defendant learn of any evidence or allegation of a violation of U.S. federal law by or on behalf of the Defendant and relating to emissions of its vehicles, false or misleading statements made to public authorities or regulators, fraud or misrepresentations in the sale or marketing of its products, or obstruction of any pending or contemplated U.S. federal, state or local investigation or proceeding, the

Defendant shall promptly report such evidence or allegation to the Offices. Thirty days prior to the end of the Term, the Defendant, by the Chief Executive Officer of the Defendant and the Chief Financial Officer of the Defendant, will certify to the Offices that the Defendant has met its disclosure obligations pursuant to this Paragraph. Each certification will be deemed a material statement and representation by the Defendant to the executive branch of the United States for purposes of 18 U.S.C. § 1001, and it will be deemed to have been made in the judicial district in which this Agreement is filed.

7. **Other Obligations**

A. The Defendant agrees to retain an independent compliance monitor in accordance with Exhibit 3 of this Agreement.

B. While the obligation set forth in this Paragraph is not a condition to the term of probation, any failure to comply with the obligation set forth in this Paragraph shall constitute a breach of this Agreement and be subject to the terms set forth in Paragraph 9 below.

8. **Waiver of Appellate and Other Rights Under United States Law**

A. The Defendant understands that by entering into this Agreement, the Defendant surrenders certain rights as provided in this Agreement. The Defendant understands that the rights of criminal defendants in the United States include the following:

1. the right to plead not guilty and to persist in that plea;

2. the right to a jury trial;

3. the right to be represented by counsel – and if necessary have the court appoint counsel – at trial and at every other stage of the proceedings;

4. the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; and

5. pursuant to Title 18, United States Code, Section 3742, the right to appeal the sentence imposed.

B. Nonetheless, the Defendant knowingly waives the right to appeal the conviction and any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742, or on any ground whatsoever except those specifically excluded in this Paragraph, in exchange for the concessions made by the United States in this plea agreement. This Agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(b). The Defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of

Information Act, Title 5, United States Code, Section 552, or the Privacy Act, Title 5, United States Code, Section 552a. The Defendant waives all defenses based on the statute of limitations and venue with respect to any federal prosecution related to the conduct described in Exhibit 2 or the Third Superseding Information, including any prosecution that is not time-barred on the date that this Agreement is signed in the event that: (a) the conviction is later vacated for any reason; (b) the Defendant violates this Agreement; or (c) the plea is later withdrawn, provided such prosecution is brought within one year of any such vacation of conviction, violation of agreement, or withdrawal of plea plus the remaining time period of the statute of limitations as of the date that this Agreement is signed. The Offices are free to take any position on appeal or any other post-judgment matter. The parties agree that any challenge to the Defendant's sentence that is not foreclosed by this Paragraph will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver. Nothing in the foregoing waiver of appellate rights shall preclude the Defendant from raising a claim of ineffective assistance of counsel in an appropriate forum.

C. Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 limit the admissibility of statements made in the course of plea proceedings or plea discussions in both civil and criminal proceedings, if the guilty plea is later withdrawn. The Defendant expressly warrants that it has discussed these rules with

its counsel and understands them. Solely to the extent set forth below, the Defendant voluntarily waives and gives up the rights enumerated in Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. Specifically, the Defendant understands and agrees that any statements that it makes in the course of its guilty plea or in connection with the Agreement, including the Statement of Facts set forth as Exhibit 2 to the Agreement, are admissible against it for any purpose in any U.S. federal criminal proceeding if, even though the Offices have fulfilled all of their obligations under this Agreement and the Court has imposed the agreed-upon sentence, the Defendant nevertheless withdraws its guilty plea.

9. **Breach of Agreement**

A. If the Defendant (a) commits any felony under U.S. federal law; (b) provides in connection with this Agreement deliberately false, incomplete, or misleading information; (c) fails to cooperate as set forth in Paragraph 6 of this Agreement; (d) fails to implement a compliance program as set forth in Paragraph 3(A)(7) of this Agreement; or (e) otherwise fails specifically to perform or to fulfill each of the Defendant's obligations under the Agreement, regardless of whether the Offices become aware of such a breach after the Term of the Agreement, the Defendant shall thereafter be subject to prosecution for any federal criminal violation of which the Offices have knowledge, including, but not limited to, the charges in the Third Superseding Information described in Paragraph 1, which may

be pursued by the Offices in the United States District Court for the Eastern District of Michigan or any other appropriate venue. Determination of whether the Defendant has breached the Agreement and whether to pursue prosecution of the Defendant shall be in the Offices' sole discretion. Any such prosecution may be premised on information provided by the Defendant. Any such prosecution relating to the conduct described in the attached Statement of Facts or relating to conduct known to the Offices prior to the date on which this Agreement was signed that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the Defendant, notwithstanding the expiration of the statute of limitations, between the signing of this Agreement and the expiration of the Term of the Agreement plus one year. Thus, by signing this Agreement, the Defendant agrees that the statute of limitations with respect to any such prosecution that is not time- barred on the date of the signing of this Agreement shall be tolled for the Term of the Agreement plus one year. The Defendant gives up all defenses based on the statute of limitations, any claim of pre-indictment delay, or any speedy trial claim with respect to any such prosecution or action, except to the extent that such defenses existed as of the date of the signing of this Agreement. In addition, the Defendant agrees that the statute of limitations as to any violation of federal law that occurs during the term of the cooperation obligations provided for in Paragraph 6 of the Agreement will be tolled from the date upon which the

violation occurs until the earlier of the date upon which the Offices are made aware of the violation or the duration of the term plus three years, and that this period shall be excluded from any calculation of time for purposes of the application of the statute of limitations.

B. In the event the Offices determine that the Defendant has breached this Agreement, the Offices agree to provide the Defendant with written notice of such breach prior to instituting any prosecution resulting from such breach. Within thirty (30) days of receipt of such notice, the Defendant shall have the opportunity to respond to the Offices in writing to explain the nature and circumstances of such breach, as well as the actions the Defendant has taken to address and remediate the situation, which explanation the Offices shall consider in determining whether to pursue prosecution of the Defendant.

C. In the event that the Offices determine that the Defendant has breached this Agreement: (a) all statements made by or on behalf of the Defendant to the Offices or to the Court, including the attached Statement of Facts, and any testimony given by the Defendant before a grand jury, a court, or any tribunal, or at any legislative hearings, whether prior or subsequent to this Agreement, and any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Offices against the Defendant; and (b) the Defendant shall not assert any claim under the United States Constitution,

Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule that any such statements or testimony made by or on behalf of the Defendant prior or subsequent to this Agreement, or any leads derived therefrom, should be suppressed or are otherwise inadmissible. The decision whether conduct or statements of any current director, officer or employee, or any person acting on behalf of, or at the direction of, the Defendant, will be imputed to the Defendant for the purpose of determining whether the Defendant has violated any provision of this Agreement shall be in the sole discretion of the Offices.

D. The Defendant acknowledges that the Offices have made no representations, assurances, or promises concerning what sentence may be imposed by the Court if the Defendant breaches this Agreement and this matter proceeds to judgment. The Defendant further acknowledges that any such sentence is solely within the discretion of the Court and that nothing in this Agreement binds or restricts the Court in the exercise of such discretion.

10. **Parties to Plea Agreement**

The Defendant understands and agrees that this Agreement is between the Offices and the Defendant. Nevertheless, the Offices will bring this Agreement and the nature and quality of the conduct, cooperation and remediation of the Defendant, its direct or indirect affiliates and subsidiaries to the attention of other prosecuting

authorities or other agencies, as well as debarment authorities, if requested by the Defendant.

The Defendant agrees that this Agreement will be executed by an authorized corporate representative. The Defendant further agrees that a resolution duly adopted by the Defendant's Management Board, with the consent of the Supervisory Board in the form attached to this Agreement as Exhibit 1, authorizes the Defendant to enter into this Agreement and take all necessary steps to effectuate this Agreement, and that the signatures on this Agreement by the Defendant and its counsel are authorized by the Defendant's Management Board, with the consent of the Supervisory Board, on behalf of the Defendant.

The Defendant agrees that it has the full legal right, power, and authority to enter into and perform all of its obligations under this Agreement.

11. **Change of Corporate Form**

Except as may otherwise be agreed by the parties in connection with a particular transaction, the Offices may require, in their sole discretion, that, in the event that, during the Term of the Agreement, the Defendant undertakes any change in corporate form, including if it sells, merges, or transfers business operations that are material to the Defendant's consolidated operations, or to the operations of any subsidiaries or affiliates involved in the conduct described in Exhibit 2 (the Statement of Facts), as they exist as of the date of this Agreement, whether such sale

is structured as a sale, asset sale, merger, transfer, or other change in corporate form, the Defendant shall include in any contract for sale, merger, transfer, or other change in corporate form a provision binding the purchaser, or any successor in interest thereto, to the obligations described in this Agreement. If the Offices so require, the purchaser or successor in interest must also agree in writing that the Offices' ability to declare a breach under this Agreement is applicable in full force to that entity, and the Defendant will agree that the failure to include these provisions in the transaction will make any such transaction null and void. The Defendant shall provide notice to the Offices at least thirty (30) days prior to undertaking any such sale, merger, transfer, or other change in corporate form. The Offices will inform the Defendant within such 30-day period if the Offices require the Defendant to take the steps referred to above. If the Offices notify the Defendant prior to such transaction (or series of transactions) that they have determined that the transaction(s) has the effect of circumventing or frustrating the enforcement purposes of this Agreement, as determined in the sole discretion of the Offices, the Defendant agrees that such transaction(s) will not be consummated. In addition, if at any time during the Term of the Agreement the Offices determine in their sole discretion that the Defendant has engaged in a transaction(s) that has the effect of circumventing or frustrating the enforcement purposes of this Agreement, they may deem it a breach of this Agreement pursuant to Paragraph 9 of this Agreement. Nothing herein shall restrict

the Defendant from indemnifying (or otherwise holding harmless) the purchaser or successor in interest for penalties or other costs arising from any conduct that may have occurred prior to the date of the transaction, so long as such indemnification does not have the effect of circumventing or frustrating the enforcement purposes of this Agreement, as determined by the Offices.

12. **Failure of Court to Accept Agreement**

This Agreement is presented to the Court pursuant to Fed. R. Crim. P. 11(c)(1)(C). The Defendant understands that, if the Court rejects this Agreement, the Court must: (a) inform the parties that the Court rejects the Agreement; (b) advise the Defendant's counsel that the Court is not required to follow the Agreement and afford the Defendant the opportunity to withdraw its plea; and (c) advise the Defendant that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the Defendant than the Agreement contemplated. The Defendant further understands that if the Court refuses to accept any provision of this Agreement, neither party shall be bound by the provisions of the Agreement.

13. **Presentence Report**

The Defendant and the Offices waive the preparation of a Pre-Sentence Investigation Report. The Defendant understands that the decision whether to proceed with the sentencing without a Pre-Sentence Investigation Report is exclusively that of the Court. In the event the Court directs the preparation of a Pre-

Sentence Investigation Report, the Offices will fully inform the preparer of the Pre-Sentence Investigation Report and the Court of the facts and law related to the Defendant's case. At the time of the plea hearing, the parties will suggest mutually agreeable and convenient dates for the sentencing.

14. **Public Statements by the Defendant**

A. The Defendant expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for the Defendant make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Defendant set forth above, contradicting the fact that the Defendant has pled guilty to the charges set forth in the Third Superseding Information, or contradicting the facts described in Exhibit 2. Any such contradictory statement shall, subject to cure rights of the Defendant described below, constitute a breach of this Agreement, and the Defendant thereafter shall be subject to prosecution as set forth in Paragraph 9 of this Agreement. The decision whether any such contradictory statement will be imputed to the Defendant for the purpose of determining whether it has breached this Agreement shall be at the sole discretion of the Offices. If the Offices determine that a public statement by any such person contradicts in whole or in part the fact that the Defendant pled guilty to the charges in the Third Superseding Information or a statement contained in Exhibit 2, the Offices shall so notify the Defendant, and

the Defendant may avoid a breach of this Agreement by publicly repudiating such statement(s) within five business days after notification. The Defendant shall be permitted to raise defenses, to take legal positions and to assert affirmative claims in other proceedings relating to the matters set forth in the Third Superseding Information and Exhibit 2 provided that such defenses and claims do not contradict, in whole or in part, the fact that the Defendant pled guilty to the charges in the Third Superseding Information or a statement in Exhibit 2. This Paragraph does not apply to any statement made by any present or former officer, director, employee, or agent of the Defendant in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of the Defendant.

B. The Defendant agrees that if it or any of its direct or indirect subsidiaries or affiliates issues a press release or holds any press conference in connection with this Agreement, the Defendant shall first consult the Offices to determine (a) whether the text of the release or proposed statements at the press conference are true and accurate with respect to matters between the Offices and the Defendant; and (b) whether the Offices have any objection to the release or statement.

15. **Independent Compliance Monitor**

A. Promptly after the Offices' selection pursuant to Paragraph 15(B) below, the Defendant agrees to retain the Monitor for the term specified in Paragraph 15(C). The Monitor's duties and authority, and the obligations of the Defendant with respect to the Monitor and the Offices, are set forth in Exhibit 3, which is incorporated by reference into this Agreement. The same Monitor shall serve as the Independent Auditor appointed pursuant to Paragraph 27(b) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 CRB (JSC) (N.D. Cal.). No later than the date of execution of this Agreement, and after consultation with the Offices, the Defendant will propose to the Offices a pool of three qualified candidates to serve as the Monitor. If the Offices determine, in their sole discretion, that any of the candidates are not, in fact, qualified to serve as the Monitor, or if the Offices, in their sole discretion, are not satisfied with the candidates proposed, the Offices reserve the right to seek additional nominations from the Defendant. The parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of this Agreement. The Monitor candidates or their team members shall have, at a minimum, the following qualifications:

1. demonstrated expertise with respect to federal anti-fraud and environmental laws, including experience counseling on these issues;

2. experience designing and/or reviewing corporate ethics and compliance programs, including anti-fraud policies, procedures and internal controls;

3. knowledge of automotive or similar industries;

4. the ability to access and deploy resources as necessary to discharge the Monitor's duties as described in the Agreement;

5. sufficient independence from the Defendant to ensure effective and impartial performance of the Monitor's duties as described in the Agreement; and

6. the qualifications set out in Paragraph 27(a) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 CRB (JSC) (N.D. Cal.).

B. The Offices retain the right, in their sole discretion, to choose the Monitor from among the candidates proposed by the Defendant, though the Defendant may express its preference(s) among the candidates. In the event the Offices reject all proposed Monitors, the Defendant shall propose an additional three candidates within twenty (20) business days after receiving notice of the rejection. This process shall continue until a Monitor acceptable to both parties is chosen. The Offices and the Defendant will use their best efforts to complete the selection process within sixty (60) calendar days of the execution of this Agreement. If, during the

term of the monitorship, the Monitor becomes unable to perform his or her obligations as set out herein and in Exhibit 3, or if the Offices in their sole discretion determine that the Monitor cannot fulfill such obligations to the satisfaction of the Offices, the Offices shall notify the Defendant of the release of the Monitor, and the Defendant shall within thirty (30) calendar days of such notice recommend a pool of three qualified Monitor candidates from which the Offices will choose a replacement.

C. The Monitor's term shall be three years from the date on which the Monitor is retained by the Defendant, subject to extension or early termination as described in Paragraph 5. The Monitor's powers, duties, and responsibilities, as well as additional circumstances that may support an extension of the Monitor's term, are set forth in Exhibit 3. The Defendant agrees that it will not employ or be affiliated with the Monitor or the Monitor's firm for a period of not less than two years from the date on which the Monitor's term expires. Nor will the Defendant discuss with the Monitor or the Monitor's firm the possibility of further employment or affiliation during the Monitor's term.

16. **Complete Agreement**

This document states the full extent of the Agreement between the parties. There are no other promises or agreements, express or implied. Any modification of this Agreement shall be valid only if set forth in writing in a supplemental or revised plea agreement signed by all parties.

AGREED:

FOR VOLKSWAGEN AG:

Date: January 11, 2017

By: _____
Manfred Doess
General Counsel of Volkswagen AG

Date: January 11, 2017

By: _____
Reid Weingarten
Jason Weinstein
Christopher Niewoehner
Steptoe & Johnson LLP
Outside counsel for Volkswagen AG

Date: 11 January 2017

By: _____
Aaron R. Marcu
Olivia A. Radin
Linda Martin
Freshfields Bruckhaus Deringer US LLP
Outside counsel for Volkswagen AG

Date: January 11, 2017

By: _____
Robert J. Giuffra, Jr.
Sharon L. Nelles
Brent J. McIntosh
Sullivan & Cromwell LLP
Outside counsel for Volkswagen AG

FOR THE DEPARTMENT OF JUSTICE:

ANDREW WEISSMANN
Chief, Fraud Section
Criminal Division

Date: 1/11/17

By: _____
Benjamin D. Singer
Chief, Securities and Financial Fraud Unit
Gary A. Winters
Alison Anderson
David Fuhr
Trial Attorneys

JOHN CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

Date: 1/11/17

By: _____
Jennifer L. Blackwell
Trial Attorney

BARBARA L. McQUADE
United States Attorney Eastern District of Michigan

Date: 1/11/17

By: _____
John K. Neal
Chief, White Collar Crime Unit

EXHIBIT 1

CERTIFICATE OF CORPORATE RESOLUTIONS

A copy of the executed Certificate of Corporate Resolutions is annexed hereto as "Exhibit 1."

COMPANY OFFICER'S CERTIFICATE

I have read the plea agreement between Volkswagen AG (the "Defendant") and the United States of America, by and through the Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section (the "Agreement") and carefully reviewed every part of it with outside counsel for the Defendant. I understand the terms of the Agreement and voluntarily agree, on behalf of the Defendant, to each of its terms. Before signing the Agreement, I consulted outside counsel for the Defendant. Counsel fully advised me of the rights of the Defendant, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into this Agreement.

I have carefully reviewed the terms of the Agreement with the Management Board and the Supervisory Board. I have advised and caused outside counsel for the Defendant to advise the Management Board and the Supervisory Board fully of the rights of the Defendant, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into the Agreement.

No promises or inducements have been made other than those contained in the Agreement. Furthermore, no one has threatened or forced me, or to my knowledge any person authorizing the Agreement on behalf of the Defendant, in any

way to enter into the Agreement. I am also satisfied with outside counsel's representation in this matter. I certify that I am the General Counsel for the Defendant and that I have been duly authorized by the Defendant to execute the Agreement on behalf of the Defendant.

Date: January 11, 2017

VOLKSWAGEN AG

By: _____
Manfred Doess
General Counsel

Exh. 1-3

CERTIFICATE OF COUNSEL

I am counsel for Volkswagen AG (the "Defendant") in the matter covered by the plea agreement between the Defendant and the United States of America, by and through the Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section (the "Agreement"). In connection with such representation, I have examined relevant documents and have discussed the terms of the Agreement with the Management Board and the Supervisory Board. Based on our review of the foregoing materials and discussions, I am of the opinion that the representative of the Defendant has been duly authorized to enter into the Agreement on behalf of the Defendant and that the Agreement has been duly and validly authorized, executed, and delivered on behalf of the Defendant and is a valid and binding obligation of the Defendant. Further, I have carefully reviewed the terms of the Agreement with the Management Board and the Supervisory Board and the officers of the Defendant. I have fully advised them of the rights of the Defendant, of possible defenses, of the Sentencing Guidelines' provisions and of the consequences of entering into the Agreement. To my knowledge, the decision of the Defendant to enter into the Agreement, based on the authorization of the Management Board, with the consent of the Supervisory Board, is an informed and voluntary one.

Date: January 11, 2017

By: _____
Reid Weingarten
Jason Weinstein
Christopher Niewoehner
Steptoe & Johnson LLP
Counsel to Volkswagen AG

Date: 11 January 2017

By: _____
Aaron R. Marcu
Olivia A. Radin
Linda Martin
Freshfields Bruckhaus Deringer US LLP
Counsel to Volkswagen AG

Date: January 11, 2017

By: _____
Robert J. Giuffra, Jr.
Sharon L. Nelles
Brent J. McIntosh
Sullivan & Cromwell LLP
Counsel for Volkswagen AG

Exh. 1-5

EXHIBIT 2

STATEMENT OF FACTS

The following Statement of Facts is incorporated by reference as part of the Plea Agreement (the "Agreement") between the United States Department of Justice (the "Department") and Volkswagen AG ("VW AG"). VW AG hereby agrees and stipulates that the following information is true and accurate. VW AG admits, accepts, and acknowledges that under U.S. law it is responsible for the acts of its employees set forth in this Statement of Facts, which acts VW AG acknowledges were within the scope of the employees' employment and, at least in part, for the benefit of VW AG. All references to legal terms and emissions standards, to the extent contained herein, should be understood to refer exclusively to applicable U.S. laws and regulations, and such legal terms contained in this Statement of Facts are not intended to apply to, or affect, VW AG's rights or obligations under the laws or regulations of any jurisdiction outside the United States. This Statement of Facts does not contain all of the facts known to the Department or VW AG; the Department's investigation into individuals is ongoing. The following facts took place during the time frame specified in the Third Superseding Information and establish beyond a reasonable doubt the charges set forth in the criminal Information attached to this Agreement:

Relevant Entities and Individuals

1. VW AG was a motor vehicle manufacturer based in Wolfsburg, Germany. Under U.S. law, VW AG acts through its employees, and conduct undertaken by VW AG, as described herein, reflects conduct undertaken by employees. Pursuant to applicable German stock corporation law, VW AG was led by a Management Board that was supervised by a Supervisory Board. Solely for purposes of this Statement of Facts, unless otherwise indicated, references in this Statement of Facts to "supervisors" are to senior employees below the level of the VW AG Management Board.

2. Audi AG ("Audi") was a motor vehicle manufacturer based in Ingolstadt, Germany and a subsidiary approximately 99.55% owned by VW AG. Under U.S. law, Audi AG acts through its employees, and conduct undertaken by Audi AG, as described herein, reflects conduct undertaken by employees.

3. Volkswagen Group of America, Inc. ("VW GOA") was a wholly-owned subsidiary of VW AG based in Herndon, Virginia. Under U.S. law, VW GOA acts through its employees, and conduct undertaken by VW GOA, as described herein, reflects conduct undertaken by employees.

4. VW AG, Audi AG, and VW GOA are collectively referred to herein as "VW."

5. "VW Brand" was an operational unit within VW AG that developed vehicles to be sold under the "Volkswagen" brand name.

6. Company A was an automotive engineering company based in Berlin, Germany, which specialized in software, electronics, and technology support for vehicle manufacturers. VW AG owned fifty percent of Company A's shares and was Company A's largest customer.

7. "Supervisor A," an individual whose identity is known to the United States and VW AG, was the supervisor in charge of Engine Development for all of VW AG from in or about October 2012 to in or about September 2015. From July 2013 to September 2015, Supervisor A also served as the supervisor in charge of Development for VW Brand, where he supervised a group of approximately 10,000 VW AG employees. From in or about October 2011, when he joined VW, until in or about July 2013, Supervisor A served as the supervisor in charge of the VW Brand Engine Development department.

8. "Supervisor B," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2005 to in or about April 2007.

9. "Supervisor C," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2007 to in or about March 2011.

10. "Supervisor D," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about October 2013 to the present.

11. "Supervisor E," an individual whose identity is known to the United States and VW AG, was a supervisor with responsibility for VW AG's Quality Management and Product Safety department who reported to the supervisor in charge of Quality Management from in or about 2007 to in or about October 2014.

12. "Supervisor F," an individual whose identity is known to the United States and VW AG, was a supervisor within the VW Brand Engine Development department from in or about 2003 until in or about December 2012.

13. "Attorney A," an individual whose identity is known to the United States and VW AG, was a German-qualified in-house attorney for VW AG who was the in-house attorney principally responsible for providing legal advice in connection with VW AG's response to U.S. emissions issues from in or about May 2015 to in or about September 2015.

U.S. NOx Emissions Standards

14. The purpose of the Clean Air Act and its implementing regulations was to protect human health and the environment by, among other things, reducing emissions of pollutants from new motor vehicles, including nitrogen oxides ("NOx").

15. The Clean Air Act required the U.S. Environmental Protection Agency ("EPA") to promulgate emissions standards for new motor vehicles. The EPA established standards and test procedures for light-duty motor vehicles sold in the United States, including emission standards for NOx.

16. The Clean Air Act prohibited manufacturers of new motor vehicles from selling, offering for sale, introducing or delivering for introduction into U.S. commerce, or importing (or causing the foregoing with respect to) any new motor vehicle unless the vehicle complied with U.S. emissions standards, including NOx emissions standards, and was issued an EPA certificate of conformity.

17. To obtain a certificate of conformity, a manufacturer was required to submit an application to the EPA for each model year and for each test group of vehicles that it intended to sell in the United States. The application was required to be in writing, to be signed by an authorized representative of the manufacturer, and to include, among other things, the results of testing done pursuant to the published Federal Test Procedures that measure NOx emissions, and a description

of the engine, emissions control system, and fuel system components, including a detailed description of each Auxiliary Emission Control Device ("AECD") to be installed on the vehicle.

18. An AECD was defined under U.S. law as "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." The manufacturer was also required to include a justification for each AECD. If the EPA, in reviewing the application for a certificate of conformity, determined that the AECD "reduced the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use," and that (1) it was not substantially included in the Federal Test Procedure, (2) the need for the AECD was not justified for protection of the vehicle against damage or accident, or (3) it went beyond the requirements of engine starting, the AECD was considered a "defeat device." Whenever the term "defeat device" is used in this Statement of Facts, it refers to a defeat device as defined by U.S. law.

19. The EPA would not certify motor vehicles equipped with defeat devices. Manufacturers could not sell motor vehicles in the United States without a certificate of conformity from the EPA.

20. The California Air Resources Board ("CARB") (together with the EPA, "U.S. regulators") issued its own certificates, called executive orders, for the sale of motor vehicles in the State of California. To obtain such a certificate, the manufacturer was required to satisfy the standards set forth by the State of California, which were equal to or more stringent than those of the EPA.

21. As part of the application for a certification process, manufacturers often worked in parallel with the EPA and CARB. To obtain a certificate of conformity from the EPA, manufacturers were required to demonstrate that the light-duty vehicles were equipped with an on-board diagnostic ("OBD") system capable of monitoring all emissions-related systems or components. Manufacturers could demonstrate compliance with California OBD standards in order to meet federal requirements. CARB reviewed applications from manufacturers, including VW, to determine whether their OBD systems were in compliance with California OBD standards, and CARB's conclusion would be included in the application the manufacturer submitted to the EPA.

22. In 1998, the United States established new federal emissions standards that would be implemented in separate steps, or Tiers. Tier II emissions standards, including for NOx emissions, were significantly stricter than Tier I. For light-duty vehicles, the regulations required manufacturers to begin to phase in compliance with the new, stricter Tier II NOx emissions standards in 2004 and required

manufacturers to fully comply with the stricter standards for model year 2007. These strict U.S. NOx emissions standards were applicable specifically to vehicles in the United States.

VW Diesel Vehicles Sold in the United States

23. In the United States, VW sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused the foregoing actions (collectively, "sold in the United States") the following vehicles containing 2.0 liter diesel engines ("2.0 Liter Subject Vehicles"):

a. Model Year ("MY") 2009-2015 VW Jetta;

b. MY 2009-2014 VW Jetta Sportwagen;

c. MY 2010-2015 VW Golf;

d. MY 2015 VW Golf Sportwagen;

e. MY 2010-2013, 2015 Audi A3;

f. MY 2013-2015 VW Beetle and VW Beetle Convertible; and

g. MY 2012-2015 VW Passat.

24. VW sold in the United States the following vehicles containing 3.0 liter diesel engines ("3.0 Liter Subject Vehicles"):

a. MY 2009-2016 VW Touareg;

b. MY 2009-2015 Audi Q7;

c. MY 2014-2016 Audi A6 Quattro;

d. MY 2014-2016 Audi A7 Quattro;

e. MY 2014-2016 Audi A8L; and

f. MY 2014-2016 Audi Q5.

25. VW GOA's Engineering and Environmental Office ("EEO") was located in Auburn Hills, Michigan, in the Eastern District of Michigan. Among other things, EEO prepared and submitted applications (the "Applications") for a certificate of conformity and an executive order (collectively, "Certificates") to the EPA and CARB to obtain authorization to sell each of the 2.0 Liter Subject Vehicles and 3.0 Liter Subject Vehicles in the United States (collectively, the "Subject Vehicles"). VW GOA's Test Center California performed testing related to the Subject Vehicles.

26. VW AG developed the engines for the 2.0 Liter Subject Vehicles. Audi AG developed the engines for the 3.0 Liter Subject Vehicles and the MY 2013-2016 Porsche Cayenne diesel vehicles sold in the United States (the "Porsche Vehicles").

27. The Applications to the EPA were accompanied by the following signed statement by a VW representative:

> The Volkswagen Group states that any element of design, system, or emission control device installed on or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief,

> cause the emission into the ambient air of pollutants in the operation of its motor vehicles or motor vehicle engines which cause or contribute to an unreasonable risk to public health or welfare except as specifically permitted by the standards prescribed under section 202 of the Clean Air Act. The Volkswagen Group further states that any element of design, system, or emission control device installed or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines, for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause or contribute to an unreasonable risk to public safety.
>
> . . .
>
> All vehicles have been tested in accordance with good engineering practice to ascertain that such test vehicles meet the requirement of this section for the useful life of the vehicle.

28. Based on the representations made by VW employees in the Applications for the Subject Vehicles, EPA and CARB issued Certificates for these vehicles, allowing the Subject Vehicles to be sold in the United States.

29. Upon importing the Subject Vehicles into the United States, VW disclosed to U.S. Customs and Border Protection ("CBP") that the vehicles were covered by valid Certificates by affixing an emissions label to the vehicles' engines. These labels stated that the vehicles conformed to EPA and CARB emissions regulations. VW affixed these labels to each of the Subject Vehicles that it imported into the United States.

30. VW represented to its U.S. customers, U.S. dealers, U.S. regulators and others in the United States that the Subject Vehicles met the new and stricter

U.S. emissions standards identified in paragraph 22 above. Further, VW designed a specific marketing campaign to market these vehicles to U.S. customers as "clean diesel" vehicles.

VW AG's Criminal Conduct

31. From approximately May 2006 to approximately November 2015, VW AG, through Supervisors A-F and other VW employees, agreed to deceive U.S. regulators and U.S. customers about whether the Subject Vehicles and the Porsche Vehicles complied with U.S. emissions standards. During their involvement with design, marketing and/or sale of the Subject Vehicles and the Porsche Vehicles in the United States, Supervisors A-F and other VW employees: (a) knew that the Subject Vehicles and the Porsche Vehicles did not meet U.S. emissions standards; (b) knew that VW was using software to cheat the U.S. testing process by making it appear as if the Subject Vehicles and the Porsche Vehicles met U.S. emissions standards when, in fact, they did not; and (c) attempted to and did conceal these facts from U.S. regulators and U.S. customers.

The 2.0 Liter Defeat Device in the United States

32. In at least in or about 2006, VW AG employees working under the supervision of Supervisors B, C, and F were designing the new EA 189 2.0 liter diesel engine (later known as the Generation 1 or "Gen 1") for use in the United States that would be the cornerstone of a new project to sell passenger diesel

vehicles in the United States. Selling diesel vehicles in the U.S. market was an important strategic goal of VW AG. This project became known within VW as the "US'07" project.

33. Supervisors B, C, and F, and others, however, realized that VW could not design a diesel engine that would both meet the stricter U.S. NOx emissions standards that would become effective in 2007 and attract sufficient customer demand in the U.S. market. Instead of bringing to market a diesel vehicle that could legitimately meet the new, more restrictive U.S. NOx emissions standards, VW AG employees acting at the direction of Supervisors B, C, and F and others, including Company A employees, designed, created, and implemented a software function to detect, evade and defeat U.S. emissions standards.

34. While employees acting at their direction designed and implemented the defeat device software, Supervisors B, C, and F, and others knew that U.S. regulators would measure VW's diesel vehicles' emissions through standard U.S. tests with specific, published drive cycles. VW AG employees acting at the direction of Supervisors B, C, and F, and others designed the VW defeat device to recognize whether the vehicle was undergoing standard U.S. emissions testing on a dynamometer (or "dyno") or whether the vehicle was being driven on the road under normal driving conditions. The defeat device accomplished this by recognizing the standard drive cycles used by U.S. regulators. If the vehicle's

software detected that it was being tested, the vehicle performed in one mode, which satisfied U.S. NOx emissions standards. If the defeat device detected that the vehicle was not being tested, it operated in a different mode, in which the effectiveness of the vehicle's emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NOx, sometimes 35 times higher than U.S. standards.

35. In designing the defeat device, VW engineers borrowed the original concept of the dual-mode, emissions cycle-beating software from Audi. On or about May 17, 2006, a VW engineer, in describing the Audi software, sent an email to employees in the VW Brand Engine Development department that described aspects of the software and cautioned against using it in its current form because it was "pure" cycle-beating, i.e., as a mechanism to detect, evade and defeat U.S. emissions cycles or tests. The VW AG engineer wrote (in German), "within the clearance structure of the pre-fuel injection the acoustic function is nearly always activated within our current US'07-data set. This function is pure [cycle-beating] and can like this absolutely not be used for US'07."

36. Throughout in or around 2006, Supervisor F authorized VW AG engineers to use the defeat device in the development of the US'07 project, despite concerns expressed by certain VW AG employees about the propriety of designing and activating the defeat device software. In or about the fall of 2006, lower level

VW AG engineers, with the support of their supervisors, raised objections to the propriety of the defeat device, and elevated the issue to Supervisor B. During a meeting that occurred in or about November 2006, VW AG employees briefed Supervisor B on the purpose and design of the defeat device. During the meeting, Supervisor B decided that VW should continue with production of the US'07 project with the defeat device, and instructed those in attendance, in sum and substance, not to get caught.

37. Throughout 2007, various technical problems arose with the US'07 project that led to internal discussions and disagreements among members of the VW AG team that was primarily responsible for ensuring vehicles met U.S. emissions standards. Those disagreements over the direction of the project were expressly articulated during a contentious meeting on or about October 5, 2007, over which Supervisor C presided. As a result of the meeting, Supervisor C authorized Supervisor F and his team to proceed with the US'07 project despite knowing that only the use of the defeat device software would enable VW diesel vehicles to pass U.S. emissions tests.

38. Starting with the first model year 2009 of VW's new engine for the 2.0 Liter Subject Vehicles through model year 2016, Supervisors A-D and F, and others, then caused the defeat device software to be installed in the 2.0 Liter Subject Vehicles marketed and sold in the United States.

The 3.0 Liter Defeat Device in the United States

39. Starting in or around 2006, Audi AG engineers designed a 3.0 liter diesel for the U.S. market. The 3.0 liter engine was more powerful than the 2.0 liter engine, and was included in larger and higher-end model vehicles. The 3.0 liter engine was ultimately placed in various Volkswagen, Audi and Porsche diesel vehicles sold in the United States for model years 2009 through 2016. In order to pass U.S. emissions tests, Audi engineers designed and installed software designed to detect, evade and defeat U.S. emissions standards, which constituted a defeat device under U.S. law.

40. Specifically, Audi AG engineers calibrated a defeat device for the 3.0 Liter Subject Vehicles and the Porsche Vehicles that varied injection levels of a solution consisting of urea and water ("AdBlue") into the exhaust gas system based on whether the vehicle was being tested or not, with less NOx reduction occurring during regular driving conditions. In this way, the vehicle consumed less AdBlue, and avoided a corresponding increase in the vehicle's AdBlue tank size, which would have decreased the vehicle's trunk size, and made the vehicle less marketable in the United States. In addition, the vehicle could drive further between service intervals, which was also perceived as important to the vehicle's marketability in the United States.

Certification of VW Diesel Vehicles in the United States

41. VW employees met with the EPA and CARB to seek the certifications required to sell the Subject Vehicles to U.S. customers. During these meetings, some of which Supervisor F attended personally, VW employees misrepresented, and caused to be misrepresented, to the EPA and CARB staff that the Subject Vehicles complied with U.S. NOx emissions standards, when they knew the vehicles did not. During these meetings, VW employees described, and caused to be described, VW's diesel technology and emissions control systems to the EPA and CARB staff in detail but omitted the fact that the engine could not meet U.S. emissions standards without using the defeat device software.

42. Also as part of the certification process for each new model year, Supervisors A-F and others certified, and/or caused to be certified, to the EPA and CARB that the Subject Vehicles met U.S. emissions standards and complied with standards prescribed by the Clean Air Act. Supervisors A-F, and others, knew that if they had told the truth and disclosed the existence of the defeat device, VW would not have obtained the requisite Certificates for the Subject Vehicles and could not have sold any of them in the United States.

Importation of VW Diesel Vehicles in the United States

43. In order to import the Subject Vehicles into the United States, VW was required to disclose to CBP whether the vehicles were covered by valid certificates for the United States. VW did so by affixing a label to the vehicles' engines. VW employees caused to be stated on the labels that the vehicles complied with applicable EPA and CARB emissions regulations and limitations, knowing that if they had disclosed that the Subject Vehicles did not meet U.S. emissions regulations and limitations, VW would not have been able to import the vehicles into the United States. Certain VW employees knew that the labels for the Porsche Vehicles stated that those vehicles complied with EPA and CARB emissions regulations and limitations, when in fact, the VW employees knew they did not.

Marketing of "Clean Diesel" Vehicles in the United States

44. Supervisors A and C and others marketed, and caused to be marketed, the Subject Vehicles to the U.S. public as "clean diesel" and environmentally-friendly, when they knew the Subject Vehicles were intentionally designed to detect, evade and defeat U.S. emissions standards.

45. For example, on or about November 18, 2007, Supervisor C sent an email to Supervisor F and others attaching three photos of himself with

California's then-Governor, which were taken during an event at which Supervisor C promoted the 2.0 Liter Subject Vehicles in the United States as "green diesel."

The Improvement of the 2.0 Liter Defeat Device in the United States

46. Following the launch of the Gen 1 2.0 Liter Subject Vehicles in the United States, Supervisors C and F, and others, worked on a second generation of the vehicle (the "Gen 2"), which also contained software designed to detect, evade and defeat U.S. emissions tests. The Gen 2 2.0 Liter Subject Vehicles were launched in the United States in or around 2011.

47. In or around 2012, hardware failures developed in certain of the 2.0 Liter Subject Vehicles that were being used by customers on the road in the United States. VW AG engineers hypothesized that vehicles equipped with the defeat device stayed in "dyno" mode (i.e., testing mode) even when driven on the road outside of test conditions. Since the 2.0 Liter Subject Vehicles were not designed to be driven for longer periods of time in "dyno" mode, VW AG engineers suspected that the increased stress on the exhaust system from being driven too long in "dyno" mode could be the root cause of the hardware failures.

48. In or around July 2012, engineers from the VW Brand Engine Development department met, in separate meetings, with Supervisors A and E to explain that they suspected that the root cause of the hardware failures in the 2.0 Liter Subject Vehicles was the increased stress on the exhaust system from being

driven too long in "dyno" mode as a result of the use of software designed to detect, evade and defeat U.S. emissions tests. To illustrate the software's function, the engineers used a document. Although they understood the purpose and significance of the software, Supervisors A and E each encouraged the further concealment of the software. Specifically, Supervisors A and E each instructed the engineers who presented the issue to them to destroy the document they had used to illustrate the operation of the defeat device software.

49. VW AG engineers, having informed the supervisor in charge of the VW AG Engine Development department and within the VW AG Quality Management and Product Safety department of the existence and purpose of the defeat device in the 2.0 Liter Subject Vehicles, then sought ways to improve its operation in existing 2.0 Liter Subject Vehicles to avoid the hardware failures. To solve the hardware failures, VW AG engineers decided to start the 2.0 Liter Subject Vehicles in the "street mode" and, when the defeat device recognized that the vehicle was being tested for compliance with U.S. emissions standards, switch to the "dyno mode." To increase the likelihood that the vehicle in fact realized that it was being tested on the dynamometer for compliance with U.S. emissions standards, the VW AG engineers activated a "steering wheel angle recognition" feature. The steering wheel angle recognition interacted with the software by

enabling the vehicle to detect whether it was being tested on a dynamometer (where the steering wheel is not turned), or being driven on the road.

50. Certain VW AG employees again expressed concern, specifically about the expansion of the defeat device through the steering wheel angle detection, and sought approval for the function from more senior supervisors within the VW AG Engine Development department. In particular, VW AG engineers asked Supervisor A for a decision on whether or not to use the proposed function in the 2.0 Liter Subject Vehicles. In or about April 2013, Supervisor A authorized activation of the software underlying the steering wheel angle recognition function. VW employees then installed the new software function in new 2.0 Liter Subject Vehicles being sold in the United States, and later installed it in existing 2.0 Liter Subject Vehicles through software updates during maintenance.

51. VW employees falsely told, and caused others to tell, U.S. regulators, U.S. customers and others in the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Subject Vehicles when, in fact, VW employees knew that the update also used the steering wheel angle of the vehicle as a basis to more easily detect when the vehicle was undergoing emissions tests, thereby improving the defeat device's precision in order to reduce the stress on the emissions control systems.

The Concealment of the Defeat Devices in the United States – 2.0 Liter

52. In or around March 2014, certain VW employees learned of the results of a study undertaken by West Virginia University's Center for Alternative Fuels, Engines and Emissions and commissioned by the International Council on Clean Transportation (the "ICCT study"). The ICCT study identified substantial discrepancies in the NOx emissions from certain 2.0 Liter Subject Vehicles when tested on the road compared to when these vehicles were undergoing EPA and CARB standard drive cycle tests on a dynamometer. The results of the study showed that two of the three vehicles tested on the road, both 2.0 Liter Subject Vehicles, emitted NOx at values of up to approximately 40 times the permissible limit applicable during testing in the United States.

53. Following the ICCT study, CARB, in coordination with the EPA, attempted to work with VW to determine the cause for the higher NOx emissions in the 2.0 Liter Subject Vehicles when being driven on the road as opposed to on the dynamometer undergoing standard emissions test cycles. To do this, CARB, in coordination with the EPA, repeatedly asked VW questions that became increasingly more specific and detailed, as well as conducted additional testing themselves.

54. In response to learning about the results of the ICCT study, engineers in the VW Brand Engine Development department formed an ad hoc task force to

formulate responses to questions that arose from the U.S. regulators. VW AG supervisors, including Supervisors A, D, and E, and others, determined not to disclose to U.S. regulators that the tested vehicle models operated with a defeat device. Instead, Supervisors A, D, and E, and others decided to pursue a strategy of concealing the defeat device in responding to questions from U.S. regulators, while appearing to cooperate.

55. Throughout 2014 and the first half of 2015, Supervisors A, D, and E, and others, continued to offer, and/or cause to be offered, software and hardware "fixes" and explanations to U.S. regulators for the 2.0 Liter Subject Vehicles' higher NOx measurements on the road without revealing the underlying reason – the existence of software designed to detect, evade and defeat U.S. emissions tests.

56. On or about April 28, 2014, members of the VW task force presented the findings of the ICCT study to Supervisor E, whose supervisory responsibility included addressing safety and quality problems in vehicles in production. Included in the presentation was an explanation of the potential financial consequences VW could face if the defeat device was discovered by U.S. regulators, including but not limited to applicable fines per vehicle, which were substantial.

57. On or about May 21, 2014, a VW AG employee sent an email to his supervisor, Supervisor D, and others, describing an "early round meeting" with

Supervisor A, at which emissions issues in North America for the Gen 2 2.0 Liter Subject Vehicles were discussed, and questions were raised about the risk of what could happen and the available options for VW. Supervisor D responded by email that he was in "direct touch" with the supervisor in charge of Quality Management at VW AG and instructed the VW AG employee to "please treat confidentially" the issue.

58. On or about October 1, 2014, VW AG employees presented to CARB regarding the ICCT study results and discrepancies identified in NOx emissions between dynamometer testing and road driving. In response to questions, the VW AG employees did not reveal that the existence of the defeat device was the explanation for the discrepancies in NOx emissions, and, in fact, gave CARB various false reasons for the discrepancies in NOx emissions including driving patterns and technical issues.

59. When U.S. regulators threatened not to certify VW model year 2016 vehicles for sale in the United States, VW AG supervisors requested a briefing on the situation in the United States. On or about July 27, 2015, VW AG employees presented to VW AG supervisors. Supervisors A and D were present, among others.

60. On or about August 5, 2015, in a meeting in Traverse City, Michigan, two VW employees met with a CARB official to discuss again the discrepancies in

emissions of the 2.0 Liter Subject Vehicles. The VW employees did not reveal the existence of the defeat device.

61. On or about August 18, 2015, Supervisors A and D, and others, approved a script to be followed by VW AG employees during an upcoming meeting with CARB in California on or about August 19, 2015. The script provided for continued concealment of the defeat device from CARB in the 2.0 Liter Subject Vehicles, with the goal of obtaining approval to sell the Gen 3 model year 2016 2.0 Liter Subject Vehicles in the United States.

62. On or about August 19, 2015, in a meeting with CARB in El Monte, California, a VW employee explained, for the first time to U.S. regulators and in direct contravention of instructions from supervisors at VW AG, that certain of the 2.0 Liter Subject Vehicles used different emissions treatment depending on whether the vehicles were on the dynamometer or the road, thereby signaling that VW had evaded U.S. emissions tests.

63. On or about September 3, 2015, in a meeting in El Monte, California with CARB and EPA, Supervisor D, while creating the false impression that he had been unaware of the defeat device previously, admitted that VW had installed a defeat device in the 2.0 Liter Subject Vehicles.

64. On or about September 18, 2015, the EPA issued a public Notice of Violation to VW stating that the EPA had determined that VW had violated the

Clean Air Act by manufacturing and installing defeat devices in the 2.0 Liter Subject Vehicles.

The Concealment of the Defeat Devices in the United States – 3.0 Liter

65. On or about January 27, 2015, CARB informed VW AG that CARB would not approve certification of the Model Year 2016 3.0 Liter Subject Vehicles until Audi AG confirmed that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as had been identified by the ICCT study and as were being addressed by VW with the 2.0 Liter Subject Vehicles.

66. On or about March 24, 2015, in response to CARB's questions, Audi AG employees made a presentation to CARB, during which Audi AG employees did not disclose that the Audi 2.0 and 3.0 Liter Subject Vehicles and the Porsche Vehicles in fact contained a defeat device, which caused emissions discrepancies in those vehicles. The Audi AG employees informed CARB that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as the 2.0 Liter Subject Vehicles when, in fact, the 3.0 Liter Subject Vehicles possessed at least one defeat device that interfered with the emissions systems to reduce NOx emissions on the dyno but not on the road. On or about March 25, 2015, CARB, based on the misstatements and omissions made by the Audi AG representatives, issued an executive order approving the sale of Model Year 2016 3.0 Liter Subject Vehicles.

67. On or about November 2, 2015, EPA issued a Notice of Violation to VW AG, Audi AG and Porsche AG, citing violations of the Clean Air Act related to EPA's discovery that the 3.0 Liter Subject Vehicles and the Porsche Vehicles contained a defeat device that resulted in excess NOx emissions when the vehicles were driven on the road.

68. On or about November 2, 2015, VW AG issued a statement that "no software has been installed in the 3-liter V6 diesel power units to alter emissions characteristics in a forbidden manner."

69. On or about November 19, 2015, Audi AG representatives met with EPA and admitted that the 3.0 Liter Subject Vehicles contained at least three undisclosed AECDs. Upon questioning from EPA, Audi AG representatives conceded that one of these three undisclosed AECDs met the criteria of a defeat device under U.S. law.

70. On or about May 16, 2016, Audi AG representatives met with CARB and admitted that there were additional elements within two of its undisclosed AECDs, which impacted the dosing strategy in the 3.0 Liter Subject Vehicles and the Porsche Vehicles.

71. On or about July 19, 2016, in a presentation to CARB, Audi AG representatives conceded that elements of two of its undisclosed AECDs met the definition of a defeat device.

72. Supervisors A-F and others caused defeat device software to be installed on all of the approximately 585,000 Subject Vehicles and the Porsche Vehicles sold in the United States from 2009 through 2015.

Obstruction of Justice

73. As VW employees prepared to admit to U.S. regulators that VW used a "defeat device" in the 2.0 Liter Subject Vehicles, counsel for VW GOA prepared a litigation hold notice to ensure that VW GOA preserved documents relevant to diesel emissions issues. At the same time, VW GOA was in contact with VW AG to discuss VW AG preserving documents relevant to diesel emissions issues. Attorney A made statements that several employees understood as suggesting the destruction of these materials. In anticipation of this hold taking effect at VW AG, certain VW AG employees destroyed documents and files related to U.S. emissions issues that they believed would be covered by the hold. Certain VW AG employees also requested that their counterparts at Company A destroy sensitive documents relating to U.S. emissions issues. Certain Audi AG employees also destroyed documents related to U.S. emissions issues. The VW AG and Audi AG employees who participated in this deletion activity did so to protect both VW and themselves from the legal consequences of their actions.

74. Between the August 19, 2015 and September 3, 2015 meetings with U.S. regulators, certain VW AG employees discussed issues with Attorney A and others.

75. On or about August 26, 2015, VW GOA's legal team sent the text of a litigation hold notice to Attorney A in VW AG's Wolfsburg office that would require recipients to preserve and retain records in their control. The subject of the e-mail was "Legal Hold Notice – Emissions Certification of MY2009-2016 2.0L TDI Volkswagen and Audi vehicles." The VW GOA legal team stated that VW GOA would be issuing the litigation hold notice to certain VW GOA employees the following day. On or about August 28, 2015, Attorney A received notice that VW GOA was issuing that litigation hold notice that day. Attorney A indicated to his staff on August 31 that the hold would be sent out at VW AG on September 1. Among those at VW AG being asked to retain and preserve documents were Supervisors A and D and a number of other VW AG employees.

76. On or about August 27, 2015, Attorney A met with several VW AG engineers to discuss the technology behind the defeat device. Attorney A indicated that a hold was imminent, and that these engineers should check their documents, which multiple participants understood to mean that they should delete documents prior to the hold being issued.

77. On or about August 31, 2015, a meeting was held to prepare for the September 3 presentation to CARB and EPA where VW's use of the defeat device in the United States was to be formally revealed. During the meeting, within hearing of several participants, Attorney A discussed the forthcoming hold and again told the engineers that the hold was imminent and recommended that they check what documents they had. This comment led multiple individuals, including supervisors in the VW Brand Engine Development department at VW AG, to delete documents related to U.S. emissions issues.

78. On or about September 1, 2015, the hold at VW AG was issued. On or about September 1, 2015, several employees in the VW Brand Engine Development department at VW AG discussed the fact that their counterparts at Company A would also possess documents related to U.S. emissions issues. At least two VW AG employees contacted Company A employees and asked them to delete documents relating to U.S. emissions issues.

79. On or about September 3, 2015, Supervisor A approached Supervisor D's assistant, and requested that Supervisor D's assistant search in Supervisor D's office for a hard drive on which documents were stored containing emails of VW AG supervisors, including Supervisor A. Supervisor D's assistant recovered the hard drive and gave it to Supervisor A. Supervisor A later asked his assistant to throw away the hard drive.

80. On or about September 15, 2015, a supervisor within the VW Brand Engine Development department convened a meeting with approximately 30-40 employees, during which Attorney A informed the VW AG employees present about the current situation regarding disclosure of the defeat device in the United States. During this meeting, a VW AG employee asked Attorney A what the employees should do with new documents that were created, because they could be harmful to VW AG. Attorney A indicated that new data should be kept on USB drives and only the final versions saved on VW AG's system, and then, only if "necessary."

81. Even employees who did not attend these meetings, or meet with Attorney A personally, became aware that there had been a recommendation from a VW AG attorney to delete documents related to U.S. emissions issues. Within VW AG and Audi AG, thousands of documents were deleted by approximately 40 VW AG and Audi AG employees.

82. After it began an internal investigation, VW AG was subsequently able to recover many of the deleted documents.

EXHIBIT 3

INDEPENDENT COMPLIANCE MONITOR

The duties and authority of the Independent Compliance Monitor (the "Monitor"), and the obligations of Volkswagen AG, on behalf of itself and its subsidiaries and affiliates other than Porsche AG and Porsche Cars North America (for purposes of this Exhibit 3, the "Defendant" or "Company"), with respect to the Monitor and the United States Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the United States Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section (collectively hereafter, "the Offices"), are as described below. For the avoidance of doubt, the Monitorship described herein does not extend to Porsche AG or Porsche Cars North America.

1. The Company will retain the Monitor for a period of three years (the "Term of the Monitorship"), unless the early termination provision of Paragraph 5(A) of the Plea Agreement (the "Agreement") is triggered.

Monitor's Mandate

2. The Monitor's responsibility is to assess, oversee, and monitor the Company's compliance with the terms of the Agreement, so as to specifically address and reduce the risk of any recurrence of the Company's misconduct, and to oversee the Company's obligations under Section V (Injunctive Relief for VW Defendants) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel"*

Marketing, Sales Practices, and Products Liability Litigation, MDL No. 2672 CRB (JSC) (N.D. Cal.). During the Term of the Monitorship, the Monitor will evaluate, in the manner set forth below, the Company's implementation and enforcement of its compliance and ethics program for the purpose of preventing future criminal fraud and environmental violations by the Company and its affiliates, including, but not limited to, violations related to the conduct giving rise to the Third Superseding Information filed in this matter, and will take such reasonable steps as, in his or her view, may be necessary to fulfill the foregoing mandate (the "Mandate"). This Mandate shall include an assessment of the Board of Management's and senior management's commitment to, and effective implementation of, the Company's corporate compliance and ethics program.

Company's Obligations

3. The Company shall cooperate fully with the Monitor, and the Monitor shall have the authority to take such reasonable steps as, in his or her view, may be necessary to be fully informed about the Company's ethics and compliance program in accordance with the principles set forth herein and applicable law, including applicable environmental, data protection, and labor laws and regulations. To that end, the Company shall: facilitate the Monitor's access to the Company's documents and resources; not limit such access, except as provided in Paragraphs 5-6; and provide guidance on applicable local law (such as relevant data protection and

labor laws). The Company shall provide the Monitor with access to all information, documents, records, facilities, and employees, as reasonably requested by the Monitor, that fall within the scope of the Mandate of the Monitor under the Agreement. The Company shall use its best efforts to provide the Monitor with access to the Company's former employees and its third- party vendors, agents, and consultants.

4. Any disclosure by the Company to the Monitor concerning fraudulent conduct shall not relieve the Company of any otherwise applicable obligation to truthfully disclose such matters to the Offices, pursuant to the Agreement.

Withholding Access

5. The parties agree that no attorney-client relationship shall be formed between the Company and the Monitor. In the event that the Company seeks to withhold from the Monitor access to information, documents, records, facilities, or current or former employees of the Company that may be subject to a claim of attorney-client privilege or to the attorney work-product doctrine, or where the Company reasonably believes production would otherwise be inconsistent with applicable law, the Company shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor consistent with applicable law.

6. If the matter cannot be resolved, at the request of the Monitor, the Company shall promptly provide written notice to the Monitor and the Offices. Such

notice shall include a general description of the nature of the information, documents, records, facilities or current or former employees that are being withheld, as well as the legal basis for withholding access. The Offices may then consider whether to make a further request for access to such information, documents, records, facilities, or employees.

Monitor's Coordination with the Company and Review Methodology

7. In carrying out the Mandate, to the extent appropriate under the circumstances, the Monitor should coordinate with Company personnel, including in-house counsel, compliance personnel, and internal auditors, on an ongoing basis. The Monitor may rely on the product of the Company's processes, such as the results of studies, reviews, sampling and testing methodologies, audits, and analyses conducted by or on behalf of the Company, as well as the Company's internal resources (e.g., legal, compliance, and internal audit), which can assist the Monitor in carrying out the Mandate through increased efficiency and Company- specific expertise, provided that the Monitor has confidence in the quality of those resources.

8. The Monitor's reviews should use a risk-based approach, and thus, the Monitor is not expected to conduct a comprehensive review of all business lines, all business activities, or all markets. In carrying out the Mandate, the Monitor should consider, for instance, risks presented by: (a) organizational structure; (b) training programs or lack thereof; (c) compensation structure; (d) internal auditing

processes; (e) internal investigation procedures; (f) reporting mechanisms; (g) corporate culture; and (h) employee incentives and disincentives.

9. In undertaking the reviews to carry out the Mandate, the Monitor shall formulate conclusions based on, among other things: (a) inspection of relevant documents, including the Company's current anti-fraud and environmental policies and procedures; (b) on-site observation of selected systems and procedures of the Company at sample sites; (c) meetings with, and interviews of, relevant current and, where appropriate, former directors, officers, employees, business partners, agents, and other persons at mutually convenient times and places; and (d) analyses, studies, and testing of the Company's compliance program.

Monitor's Written Work Plans

10. To carry out the Mandate, during the Term of the Monitorship, the Monitor shall conduct an initial review and prepare an initial report, followed by at least two follow-up reviews and reports as described in Paragraphs 16-19 below. With respect to the initial report, after consultation with the Company and the Offices, the Monitor shall prepare the first written work plan within sixty (60) calendar days of being retained, and the Company and the Offices shall provide comments within thirty (30) calendar days after receipt of the written work plan. With respect to each follow-up report, after consultation with the Company and the Offices, the Monitor shall prepare a written work plan at least thirty (30) calendar

days prior to commencing a review, and the Company and the Offices shall provide comments within twenty (20) calendar days after receipt of the written work plan. Any disputes between the Company and the Monitor with respect to any written work plan shall be decided by the Offices in their sole discretion.

11. All written work plans shall identify with reasonable specificity the activities the Monitor plans to undertake in execution of the Mandate, including a written request for documents. The Monitor's work plan for the initial review shall include such steps as are reasonably necessary to conduct an effective initial review in accordance with the Mandate, including by developing an understanding, to the extent the Monitor deems appropriate, of the facts and circumstances surrounding any violations that may have occurred before the date of the Agreement. In developing such understanding the Monitor is to rely to the extent possible on available information and documents provided by the Company. It is not intended that the Monitor will conduct his or her own inquiry into the historical events that gave rise to the Agreement.

Initial Review

12. The initial review shall commence no later than one hundred twenty (120) calendar days from the date of the engagement of the Monitor (unless otherwise agreed by the Company, the Monitor, and the Offices). The Monitor shall issue a written report within one hundred fifty (150) calendar days of commencing

the initial review, setting forth the Monitor's assessment and, if necessary, making recommendations reasonably designed to improve the effectiveness of the Company's program for ensuring compliance with anti-fraud and environmental laws. The Monitor should consult with the Company concerning his or her findings and recommendations on an ongoing basis and should consider the Company's comments and input to the extent the Monitor deems appropriate. The Monitor may also choose to share a draft of his or her reports with the Company prior to finalizing them. The Monitor's reports need not recite or describe comprehensively the Company's history or compliance policies, procedures and practices, but rather may focus on those areas with respect to which the Monitor wishes to make recommendations, if any, for improvement or which the Monitor otherwise concludes merit particular attention. The Monitor shall provide the report to the Management Board of the Company and contemporaneously transmit copies to the Deputy Chief – Securities and Financial Fraud Unit, Fraud Section, Criminal Division, U.S. Department of Justice, at 1400 New York Avenue N.W., Bond Building, Washington, D.C. 20005; Chief, White Collar Crime Unit, United States Attorney's Office, Eastern District of Michigan, 211 W. Fort Street, Suite 2001, Detroit, Michigan 48226; and Deputy Chief, Environmental Crimes Section, U.S. Department of Justice, 601 D Street N.W., Washington D.C. 20530. After consultation with the Company, the Monitor may extend the time period for issuance

of the initial report for a brief period of time with prior written approval of the Offices.

13. Within one hundred fifty (150) calendar days after receiving the Monitor's initial report, the Company shall adopt and implement all recommendations in the report, unless, within sixty (60) calendar days of receiving the report, the Company notifies in writing the Monitor and the Offices of any recommendations that the Company considers unduly burdensome, inconsistent with applicable law or regulation, impractical, excessively expensive, or otherwise inadvisable. With respect to any such recommendation, the Company need not adopt that recommendation within the one hundred fifty (150) calendar days of receiving the report but shall propose in writing to the Monitor and the Offices an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation on which the Company and the Monitor do not agree, such parties shall attempt in good faith to reach an agreement within forty-five (45) calendar days after the Company serves the written notice.

14. In the event the Company and the Monitor are unable to agree on an acceptable alternative proposal, the Company shall promptly consult with the Offices. The Offices may consider the Monitor's recommendation and the Company's reasons for not adopting the recommendation in determining whether the Company has fully complied with its obligations under the Agreement. Pending

such determination, the Company shall not be required to implement any contested recommendation(s).

15. With respect to any recommendation that the Monitor determines cannot reasonably be implemented within one hundred fifty (150) calendar days after receiving the report, the Monitor may extend the time period for implementation with prior written approval of the Offices.

Follow-Up Reviews

16. A follow-up review shall commence no later than one hundred and eighty (180) calendar days after the issuance of the initial report (unless otherwise agreed by the Company, the Monitor and the Offices). The Monitor shall issue a written follow-up report within one hundred twenty (120) calendar days of commencing the follow-up review, setting forth the Monitor's assessment and, if necessary, making recommendations in the same fashion as set forth in Paragraph 12 with respect to the initial review. After consultation with the Company, the Monitor may extend the time period for issuance of the follow-up report for a brief period of time with prior written approval of the Offices.

17. Within one hundred twenty (120) calendar days after receiving the Monitor's follow-up report, the Company shall adopt and implement all recommendations in the report, unless, within thirty (30) calendar days after receiving the report, the Company notifies in writing the Monitor and the Offices

concerning any recommendations that the Company considers unduly burdensome, inconsistent with applicable law or regulation, impractical, excessively expensive, or otherwise inadvisable. With respect to any such recommendation, the Company need not adopt that recommendation within the one hundred twenty (120) calendar days of receiving the report but shall propose in writing to the Monitor and the Offices an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the Company and the Monitor do not agree, such parties shall attempt in good faith to reach an agreement within thirty (30) calendar days after the Company serves the written notice.

18. In the event the Company and the Monitor are unable to agree on an acceptable alternative proposal, the Company shall promptly consult with the Offices. The Offices may consider the Monitor's recommendation and the Company's reasons for not adopting the recommendation in determining whether the Company has fully complied with its obligations under the Agreement. Pending such determination, the Company shall not be required to implement any contested recommendation(s). With respect to any recommendation that the Monitor determines cannot reasonably be implemented within one hundred twenty (120) calendar days after receiving the report, the Monitor may extend the time period for implementation with prior written approval of the Offices.

19. The Monitor shall undertake a second follow-up review not later than one hundred fifty (150) calendar days after the issuance of the first follow-up report. The Monitor shall issue a second follow-up report within one hundred and twenty (120) days of commencing the review, and recommendations shall follow the same procedures described in Paragraphs 16-18. No later than sixty (60) days before the end of the Term, the Monitor shall submit to the Offices a final written report ("Certification Report"), setting forth an overview of the Company's remediation efforts to date, including the implementation status of the Monitor's recommendations, and an assessment of the sustainability of the Company's remediation efforts. No later than thirty (30) days before the end of the Term, the Monitor shall certify whether the Company's compliance program, including its policies and procedures, is reasonably designed and implemented to prevent and detect violations of the anti-fraud and environmental laws.

Monitor's Discovery of Potential or Actual Misconduct

20. (a) Except as set forth below in sub-paragraphs (b), (c) and (d), should the Monitor discover during the course of his or her engagement that:

- any defeat device has been designed, installed, or implemented in any vehicle of any kind manufactured by the Company, and is in use after the date of this Agreement, whether such design, installation or implementation has been accomplished by the Company alone or in

concert with any other person or entity contracting with or working with the Company; or

- the Company has made any materially false statement to any governmental entity, department, agency, or component within the United States, in connection with the certification, sale, offer for sale, importation or introduction of any vehicle or vehicle type

(collectively, "Potential Misconduct"), the Monitor shall immediately report the Potential Misconduct to the Company's General Counsel, Chief Compliance Officer, and/or Audit Committee for further action, unless the Potential Misconduct was already so disclosed. The Monitor also may report Potential Misconduct to the Offices at any time, and shall report Potential Misconduct to the Offices when they request the information.

(b) In some instances, the Monitor should immediately report Potential Misconduct directly to the Offices and not to the Company. The presence of any of the following factors militates in favor of reporting Potential Misconduct directly to the Offices and not to the Company, namely, where the Potential Misconduct: (1) poses a risk to public health or safety or the environment; (2) involves senior management of the Company; (3) involves obstruction of justice; or (4) otherwise poses a substantial risk of harm.

(c) If the Monitor believes that any Potential Misconduct actually occurred or may constitute a criminal or regulatory violation of U.S. law ("Actual Misconduct"), the Monitor shall immediately report the Actual Misconduct to the Offices. When the Monitor discovers Actual Misconduct, the Monitor shall disclose the Actual Misconduct solely to the Offices, and, in such cases, disclosure of the Actual Misconduct to the General Counsel, Chief Compliance Officer, and/or the Audit Committee of the Company should occur as the Offices and the Monitor deem appropriate under the circumstances.

(d) The Monitor shall address in his or her reports the appropriateness of the Company's response to disclosed Potential Misconduct or Actual Misconduct, whether previously disclosed to the Offices or not. Further, if the Company or any entity or person working directly or indirectly for or on behalf of the Company withholds information necessary for the performance of the Monitor's responsibilities and the Monitor believes that such withholding is without just cause, the Monitor shall also immediately disclose that fact to the Offices and address the Company's failure to disclose the necessary information in his or her reports.

(e) Neither the Company nor anyone acting on its behalf shall take any action to retaliate against the Monitor for any such disclosures or for any other reason.

Meetings During Pendency of Monitorship

21. The Monitor shall meet with the Offices within thirty (30) calendar days after providing each report to the Offices to discuss the report, to be followed by a meeting between the Offices, the Monitor, and the Company.

22. At least annually, and more frequently if appropriate, representatives from the Company and the Offices will meet together to discuss the Monitorship and any suggestions, comments, or improvements the Company may wish to discuss with or propose to the Offices, including with respect to the scope or costs of the Monitorship.

Contemplated Confidentiality of Monitor's Reports

23. The reports will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports could discourage cooperation, or impede pending or potential government investigations and thus undermine the objectives of the Monitorship. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the Offices determine in their sole discretion that disclosure would be in furtherance of the Offices' discharge of their duties and responsibilities or is otherwise required by law.

TAB 6

CAUSE NO. D-1-GN-16-000370
(MDL 15-0884)

IN RE VOLKSWAGEN CLEAN DIESEL (TCAA ENFORCEMENT)	§	IN THE DISTRICT COURT
	§	
	§	
	§	TRAVIS COUNTY, TEXAS
TCAA COUNTY CASES	§	
	§	
	§	353rd JUDICIAL DISTRICT
	§	
	§	

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S RESPONSES AND OBJECTIONS TO STATE OF TEXAS'S AND TCAA COUNTY PLAINTIFFS' SECOND SET OF REQUESTS FOR ADMISSIONS AND INTERROGATORIES

COMES NOW, Defendant Volkswagen Group of America, Inc. ("VWGoA") and serves the following Responses and Objections (the "Response") to the State of Texas's and the TCAA County Plaintiffs' (collectively, the "Plaintiffs") Second Set of Requests for Admissions and Interrogatories (the "Requests"). VWGoA reserves its right to supplement this Response as further information may become known to it.

PRELIMINARY STATEMENT

This Response is made with specific regard to the laws of the State of Texas, the Texas Rules of Civil Procedure and the specific facts of this case, and is not applicable to other cases, facts or circumstances, or the rules and laws of any other state or jurisdiction. Counsel for VWGoA has drafted this Response based on the current state of VWGoA's knowledge and information regarding the information Plaintiffs have requested. VWGoA reserves the right to amend, supplement or withdraw this Response or any part thereof. VWGoA is available to meet and confer with respect to this Response, should counsel for Plaintiffs wish to do so. With respect to the Requests for Admissions, except as otherwise specifically set forth in any

particular response, VWGoA can neither admit nor deny the factual allegations set forth in any specific Request for the reasons set forth in the particular response and objection to each such Request.

OBJECTIONS APPLICABLE TO ALL REQUESTS

1. VWGoA objects to the Requests to the extent that they purport to impose burdens or obligations on VWGoA that are broader than, inconsistent with, not authorized by or otherwise impermissible under the Texas Rules of Civil Procedure.

2. This Response is solely in the name of and on behalf of VWGoA. VWGoA objects to the Requests to the extent that they purport to require VWGoA to produce information in the possession, custody or control of VWGoA's parents, affiliates or subsidiaries that have corporate identities separate and apart from those of VWGoA on the grounds that such information is not in VWGoA's possession, custody or control.

3. Irrespective of whether VWGoA provides information in response to any specific Request, VWGoA reserves the right (but does not assume the obligation) to: (i) revise, amend, correct, supplement, clarify or modify the content of this Response in accordance with the Texas Rules of Civil Procedure and court orders; (ii) provide additional responsive information in the future; (iii) object to further discovery in this Action, including discovery relating to the subject matter of information provided in this Response; (iv) use or rely upon any information and documents produced in this Action in any hearing, proceeding or trial; (v) use or rely upon subsequently discovered information or information omitted from this Response as a result of mistake, error, oversight or inadvertence in any hearing, proceeding or trial; and (vi) challenge the authenticity or admissibility of any information or documents in any hearing, proceeding or trial.

4. VWGoA objects to the Requests to the extent that they purport to require VWGoA to conduct anything beyond a reasonable search for information that is reasonably available and in the possession, custody or control of VWGoA.

5. VWGoA further objects to the defined terms "You," "Your" and "VW," and to any Definition, Instruction or Request that incorporates those Definitions, on the ground that such Definitions and any such Definition, Instruction or Request seek information that is in the possession, custody or control of persons or entities other than VWGoA and fail to distinguish between distinct corporate entities (including by failing to distinguish between VWGoA and Volkswagen AG ("VWAG")). VWGoA will construe the terms "You," "Your" and "VW" to mean VWGoA only.

6. VWGoA further objects to the defined term "Recalibration," and to any Definition, Instruction or Request that incorporates that Definition, on the ground that it is overly broad and contains vague and undefined terms, for reasons the parties have previously discussed. VWGoA will construe the term "Recalibration" as referring to those software actions listed in the October 7, 2017 letter from VWGoA's counsel to Plaintiffs' counsel.

7. VWGoA further objects to the defined term "Steering Wheel Angle Recognition," and to any Definition, Instruction or Request that incorporates that Definition, to the extent that it is defined by reference to a plea agreement entered into by a third party. Although VWGoA does not know with certainty, based on VWGoA's review of the Rule 11 Plea Agreement between the United States and non-party VWAG, VWGoA (a) understands that the "Steering Wheel Angle Recognition" feature refers to a portion of the software code included in at least one service action or field fix released in late 2014 and early 2015, and (b) believes that such portion of the software code is contained within one or more of the service actions or field

fixes provided in the list of "Recalibrations" set forth in the October 7, 2017 letter from VWGoA's counsel to Plaintiffs' counsel. VWGoA will therefore construe Requests concerning the Steering Wheel Angle Recognition feature to be coextensive with "Recalibration" for the purpose of these Responses and Objections.

SPECIFIC RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSIONS

1. Admit that the factual allegations set forth in paragraphs 46 through 51 of Exhibit 2 to the VW Plea Agreement are true and correct.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests. VWGoA further objects to this Request on the grounds that it combines six separate Requests for Admissions and asserts them as a single Request for Admission; VWGoA will construe this Request as containing six separate Requests for Admissions and is responding only on that basis. In responding to this request, VWGoA is construing the phrase "VW Plea Agreement" to refer to the Rule 11 Plea Agreement between the United States and non-party VWAG (referred to herein as the "VWAG Plea Agreement").

Subject to and without waiver of these Objections, VWGoA responds as follows:

- VWAG Statement of Facts Paragraph 46: Although VWGoA is not a signatory to the VWAG Plea Agreement or the accompanying Statement of Facts that references Supervisors C and F but without identifying those individuals, VWGoA believes (a) based on the description of Supervisor C in the VWAG Statement of Facts, VWGoA's review of the Second Superseding Indictment filed in the Eastern District of Michigan in *United States* v. *Dorenkamp et al.*, and VWGoA's review of the November 18, 2007 email referenced in Paragraph 45 of the VWAG Statement of Facts, that Supervisor C refers to Jens Hadler, a former employee of VWAG who worked at VWAG's facility in Wolfsburg, Germany; and (b) based on the description of Supervisor F in the VWAG Statement of Facts, as well as VWGoA's review of the Second Superseding Indictment filed in the Eastern District of Michigan in *United States* v. *Dorenkamp et al.*, that Supervisor F refers to Richard Dorenkamp, a former employee of VWAG who worked at VWAG's facility in Wolfsburg, Germany. On that basis, VWGoA confirms the truthfulness and correctness of the facts included in paragraph 46 of the VWAG Statement of Facts.

- VWAG Statement of Facts Paragraph 47: VWGoA confirms that in or around 2012, hardware failures developed in certain of the 2.0 Liter Affected Vehicles that were being used by customers on the road in the United States. VWGoA cannot independently confirm the truthfulness and correctness of the remaining facts included in paragraph 47 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the remaining facts included in paragraph 47 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 48: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 48 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the facts included in paragraph 48 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 49: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 49 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the facts included in paragraph 49 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 50: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 50 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the facts included in paragraph 50 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 51: VWGoA confirms that VWGoA told U.S. regulators, U.S. customers and others in the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Affected Vehicles. VWGoA cannot independently confirm the truthfulness and correctness of the remaining facts included in Paragraph 51 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the remaining facts included in Paragraph 51 of the VWAG Statement of Facts are true and correct.

2. Admit that the Steering Wheel Angle Recognition feature was installed on one or more Existing Affected Vehicles in Texas in or around 2014.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests, including its objection to, and understanding of, the defined term "Steering Wheel Angle Recognition."

Subject to and without waiver of these Objections, VWGoA admits that the Recalibrations listed in response to Interrogatory 1.a, *infra*, were installed on one or more Affected Vehicles in Texas. Based on its understanding that at least one of those Recalibrations included the software code associated with the Steering Wheel Angle Recognition feature, VWGoA admits Request for Admission No. 2.

3. Admit that VW provided information and/or guidance to Texas Dealers on how to implement Recalibrations.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests, including its objection to, and understanding of, the defined terms "Recalibrations" and "VW."

Subject to and without waiver of these objections, VWGoA admits Request for Admission No. 3.

4. Admit that the following factual allegations from the Liang Plea Agreement are true and correct: "LIANG knew that his co-conspirators falsely and fraudulently told U.S. customers and others that a software update in about 2014 was intended to improve the vehicles when, in fact, LIANG and his co-conspirators knew that part of the update was intended to improve the defeat device's precision in order to reduce the stress on the emissions control systems."

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests.

Subject to and without waiver of these Objections, VWGoA states that it is not a signatory to the Plea Agreement entered by James Liang and has not been charged with any criminal offense by the United States. Further, VWGoA does not know the truth or falsity of Mr. Liang's assertions regarding his own knowledge or who the "co-conspirators" referenced in Mr. Liang's Plea Agreement are (or the identity of their employer). Mr. Liang's employment with VWGoA was suspended as of September 9, 2016, the date of his Plea Agreement. VWGoA is nonetheless able to confirm that VWGoA told U.S. customers and others that a software update in or around 2014 was intended to improve the vehicles. With respect to the remaining

assertions, to VWGoA's knowledge Mr. Liang has not explained the basis for them, and VWGoA cannot otherwise admit or deny them.

5. **Admit that the following factual allegations from the Liang Plea Agreement are true and correct: "LIANG knew that his co-conspirators also falsely and fraudulently told U.S. customers, EPA, and CARB that a voluntary recall in or around early 2015 was intended to 'fix' the issues that were causing the discrepancy, when, in fact, LIANG and his co-conspirators knew that although the update lowered the NOx emissions in certain VW diesel vehicles on the road, the update did not remove the defeat device software that was the true reason for the discrepancy."**

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests.

Subject to and without waiver of these Objections, VWGoA states that it is not a signatory to the Plea Agreement entered by James Liang and has not been charged with any criminal offense by the United States. Further, VWGoA does not know the truth or falsity of Mr. Liang's assertions regarding his own knowledge or who the "co-conspirators" referenced in Mr. Liang's Plea Agreement are (or the identity of their employer). Mr. Liang's employment with VWGoA was suspended as of September 9, 2016, the date of his Plea Agreement. VWGoA is nonetheless able to confirm (a) that the EPA and CARB were told that a voluntary recall in or around early 2015 was intended to "fix" the issues that were causing the discrepancy, and (b) based on VWAG's disclosures to EPA and CARB, that the software update did not remove the Defeat Device software that was the true reason for the discrepancy. With respect to the remaining assertions, to VWGoA's knowledge Mr. Liang has not explained the basis for them, and VWGoA cannot otherwise admit or deny them.

SPECIFIC RESPONSES AND OBJECTIONS TO INTERROGATORIES

1. **Please provide the following information concerning the planning for and/or implementation of any Recall or Service Campaign for any Recalibration any portion of which occurred during 2013-2015:**

   a. **the date on which each Recall or Service Campaign commenced and ended;**

b. the number of vehicles in Texas that participated in each Recall or Service Campaign;
c. the model, year and engine type of the vehicles included in each Recall or Service Campaign;
d. the number and location of Texas Dealers that participated in each Recall or Service Campaign;
e. a description of each Recall or Service Campaign, including specifically, 1) how many vehicle owners in Texas were notified of the Recall or Service Campaign, 2) the type of Recalibration made in the Recall or Service Campaign, 3) the reasons for the Recall or Service Campaign, and 4) how the Recalibration impacted the emission control system and performance of the vehicle.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests, including its objections to, and understanding of, the defined term "Recalibration." VWGoA further objects to this Interrogatory on the grounds that it combines eight separate interrogatories and asserts them as a single interrogatory; VWGoA will construe Interrogatory No. 1 as containing eight separate interrogatories and is responding only on that basis. VWGoA further objects to this Interrogatory to the extent that it seeks information that VWGoA does not maintain in the ordinary course of its business and is therefore unduly burdensome. VWGoA will construe the terms "Recall" and "Service Campaign" to mean only those Recalls and Service Campaigns related to "Recalibrations," as defined above. VWGoA further objects to the request in Interrogatory 1.a for the date on which each Recall or Service Campaign "ended" as vague and ambiguous. VWGoA will construe "ended" to mean, according to VWGoA's reasonably available records, the last date on which an Affected Vehicle in Texas received the particular Recalibration (the "Campaign End Date"). VWGoA further objects to the request in Interrogatory 1.e(2) for "the type of Recalibration made in the Recall or Service Campaign" as vague and ambiguous. VWGoA will construe Interrogatory 1.e(2) as requesting a short description of the Recall or Service Campaign based on VWGoA's records kept in the ordinary course of its business.

Subject to and without waiving its objections, in response to Interrogatory 1.a and Interrogatory 1.c, VWGoA states the following:

Campaign Code Designations	*Model, Model Year, Engine Type*	*Campaign Release Date*	*Campaign End Date*
FF_AV2.0U5N_10_14* FF_BV2.0U5N_09_14* FF_CV2.0U5N_08_14* FF_DV2.0U5N_05_14* FF_EV2.0U5N_02_14* 23O6 23N4	2012-14 Passat, 2010-14 Beetle, Jetta, Golf, Jetta SportWagen, Golf Wagen, Audi A3 with 2.0L TDI engines (EA 189)	December 16, 2014; April 7, 2015	October 31, 2016; October 18, 2016
FF_CV2.0U4S_05_14* FF_DV2.0U4S_05_14* FF_EV2.0U4S_02_14* 23N5 FF_CV2.0U4S_05_14 (R01)*	2015 Passat, Jetta, Beetle, Golf, Golf Sportwagen with 2.0L TDI engines (EA 288)	November 26, 2014; December 16, 2014; Revised April 17, 2015	October 18, 2016

In response to Interrogatory 1.b, VWGoA states that, according to its records, 15,115 Affected Vehicles in Texas had the 23O6 Service Action performed, 486 Affected Vehicles in Texas had the 23N4 Service Action performed, and 7,715 Affected Vehicles in Texas had the 23N5 Service Action performed. VWGoA states that although it keeps records of which vehicles received Service Action software updates, it is unable to reliably provide an accurate count of the number of vehicles that received the field fix software updates indicated with an asterisk above due to the method by which records are kept regarding software versions that are initially introduced as field fixes and which, as here, later form the basis of a recall service campaign.

In response to Interrogatory 1.d, VWGoA states that the following 60 dealers in Texas applied the updated software from one or more of the Service Actions to one or more of the Affected Vehicles:

Ancira Volkswagen 6125 Bandera Road San Antonio, TX 78238	Ancira Volkswagen of Laredo 2701 Bob Bullock Loop Laredo, TX 78045	Archer Volkswagen 10400 Southwest Freeway Houston, TX 77074

Autobahn Volkswagen 3000 White Settlement Road Fort Worth, TX 76107	Automax Volkswagen 3301 East Central Texas Expressway Killeen, TX 76543	Autonation Volkswagen Park Cities 5555 Lemmon Ave Dallas, TX 75209
Autonation Volkswagen Richardson 300 North Central Expressway Richardson, TX 75080	Bobby Beck's Lewisville Volkswagen 893 South Stemmons Freeway Lewisville, TX 75067	Bobby Beck's McKinney Volkswagen 3600 South Central Expressway McKinney, TX 75070
Brazos Valley Volkswagen 3100 Briarcrest Dr Bryan, TX 77802	Clay Cooley Volkswagen of Park Cities 5555 Lemmon Avenue Dallas, TX 75209	Clay Cooley Volkswagen of Richardson 300 North Central Expressway Richardson, TX 75080
Crown Motor Company Volkswagen 4716 Troup Highway Tyler, TX 75703	Dallas-Fort Worth Auto Auction 12101 Trinity Boulevard Euless, TX 76040	DeMontrond Automotive Group, Inc. 14101 North Freeway Houston, TX 77090
Garlyn Shelton Imports 5700 SW H. K. Dodgen Loop Temple, TX 76504	Garlyn Shelton Volkswagen 5508 S General Bruce Dr Temple, TX 76502	Gene Messer Volkswagen 7007 University Ave Lubbock, TX 79413
Gorman McCracken Volkswagen 800 E State Highway 31 Longview, TX 75601	Hendrick Volkswagen Frisco 5010 State Hwy 121 Frisco, TX 75034	Herb Easley Motors Inc. 1125 Central E Freeway Wichita Falls, TX 76306
Hewlett Volkswagen 7951 Hewlett Loop Road Georgetown, TX 78626	Hoy Volkswagen of El Paso 1122 Airway Boulevard El Paso, TX 79925	Maund Automotive Group 6900 Burnet Road Austin, TX 78757
Metro Volkswagen 2035 W Airport Freeway Irving, TX 75062	Momentum Volkswagen 2405 Richmond Ave Houston, TX 77098	Momentum Volkswagen of Jersey Village 19550 Northwest Freeway Houston , TX 77065
Momentum Volkswagen of Clear Lake 15100 Gulf Freeway Houston, TX 77034	North Park Volkswagen 21315 Interstate Highway 10 San Antonio, TX 78257	Onion Creek Volkswagen 10812 South IH 35 Austin, TX 78748

Orr Volkswagen of Texarkana 4545 North Stateline Avenue Texarkana, TX 75503	Patterson Volkswagen of Tyler 3800 Chandler Highway Tyler, TX 75702	Payne Mission 2003 E Expressway 83 Mission, TX 78572
Payne Volkswagen 4017 North Expressway Brownsville, TX 78520	Randy Hiley Volkswagen of Arlington 1461 East Interstate 20 Arlington, TX 76018	Rudolph Volkswagen of El Paso 5505 S Desert Blvd El Paso, TX 79932
Rusty Wallis Volkswagen 12635 LBJ Freeway Garland, TX 75041	Sewell Volkswagen of Midland-Odessa 5021 West Loop 250 North Midland, TX 79703	SouthWest Volkswagen of Weatherford 2951 Fort Worth Highway Weatherford, TX 76087
Street Volkswagen of Amarillo 8707 Pilgrim Drive Amarillo, TX 79119	Volkswagen of Abilene 1350 South Clack Street Abilene, TX 79605	Volkswagen of Alamo Heights 1402 Northeast Loop 410 San Antonio, TX 78209
Volkswagen of Beaumont 1515 Interstate 10 South Beaumont, TX 77701	Volkswagen of Corpus Christi 6902 S Padre Island Dr Corpus Christi, TX 78412	Volkswagen of Midland-Odessa 5021 Loop 250 Frontage Rd Midland, TX 79707
Volkswagen of the Woodlands 16785 Interstate 45 S The Woodlands, TX 77385	West Houston Volkswagen 17113 Katy Freeway Houston, TX 77094	Audi Central Houston 2120 Southwest Freeway Houston, TX 77098
Audi Dallas 5033 Lemmon Avenue Dallas, TX 75209	Audi El Paso 1444 Airway Boulevard El Paso, TX 79925	Audi Fort Worth 116 University Drive Fort Worth, TX 76107
Audi Grapevine 1260 East State Highway 114 Grapevine, TX76051	Audi North Austin 12971 Pond Springs Road Austin, TX 78729	Audi North Houston 17815 North Freeway Houston, TX 77090
Audi Plano 5930 West Plano Parkway Plano, TX 75093	Audi San Juan 1001 East Expressway 83 San Juan, TX 78589	Audi South Austin 4738 IH-35 South Austin, TX 78745
Audi West Houston 15865 Katy Freeway Houston, TX 77094	Cavendar Audi 15447 IH-10 W San Antonio, TX 78249	VCI Manheim Dallas Fort Worth Auction 12101 Trinity Boulevard Euless, TX 76040

In response to Interrogatory 1.e(1), VWGoA states that 20,178 owners and lessees of Affected Vehicles in Texas were notified of the availability of the 23O6 Service Action, 727 owners or lessees of Affected Vehicles in Texas were notified of the availability of the 23N4 Service Action, and 7,993 owners or lessees of Affected Vehicles in Texas were notified of the availability of the 23N5 Service Action. Based on its records, VWGoA does not believe that any owners or lessees of Affected Vehicles in Texas were notified of the remaining field fixes.

In response to Interrogatory 1.e(2), VWGoA states that according to its records, and based on information provided at the time by VWAG, VWGoA described the Recalibrations to federal and California regulators as follows:

Campaign Code Designations	*Description of Software Update*
FF_AV2.0U5N_10_14 FF_BV2.0U5N_09_14 FF_CV2.0U5N_08_14 FF_DV2.0U5N_05_14 FF_EV2.0U5N_02_14 23O6 23N4	**Event:** 1. The previously implemented PM loading model (Ref. FF CV2.0U5N_07 14) may cause the malfunctions P0401 and P2463. 2. The current NOx storage catalyst (NSC) strategy may not be sufficient under dynamic and transient engine speed and load conditions and might cause high on-road NOx emissions. **Analysis:** 1. Improvements have been made with regard to the PM filter loading/ regeneration model. The updated software incorporates the latest engineering experiences to enhance the accuracy of the PM filter model. The implemented changes do not have a negative impact on the Kl-factor determination or influence the on-road performance of the vehicle. 2. Improvements have been made with regard to NSC strategy. The updated software incorporates the latest engineering experiences to enhance the efficiency of the NSC system. On road NOx emissions will be decreased by: • DeNOx frequency increased, decreased NOx loading will mitigate the impact of incomplete DeNOx operation. • Lower loading level of NOx storage catalyst leads to lower desorption rate during rich engine operation. • DeNOx strategy allowed on higher temperature levels. Thermal

	desorption will be avoided. **Activities:** Improved ECM software has been developed and will be available for service. It includes no summary table changes.
FF_CV2.0U4S_05_14 FF_DV2.0U4S_05_14 FF_EV2.0U4S_02_14 23N5 FF_CV2.0U4S_05_14 (R01)	**Event:** 1. Customers may notice noise coming from the turbocharger with MIL on and P0299 (turbocharger under boost fault) stored in the fault memory. 2. The previously implemented PM loading model may cause the malfunctions P0401 and P2463. 3. The current urea dosing strategy may not be sufficient under dynamic and transient engine speed and load conditions and might cause high on-road NOx emissions. **Analysis:** 1. The turbo charger bearing might experience high friction due to insufficient lubrication after engine cold start caused by high oil viscosity and low oil supply at cold ambient conditions. The boost pressure is limited for the engine warm-up phase. This ensures a reduction of forces on the bearing until lubrication of the turbocharger bearing is sufficient. 2. Improvements have been made with regard to the PM filter loading/regeneration model. The updated software incorporates the latest engineering experiences to enhance the accuracy of the PM filter model. The implemented changes do not have a negative impact on the Kl-factor determination or influence the on-road performance of the vehicle. 3. Improvements have been made ensuring a higher Ammonia filling level of the SCR catalyst. This ensures that the SCR catalyst is more robust against NOx peaks caused by dynamic and transient speed/load changes. The new software incorporates the latest engineering experiences to enhance the efficiency of the SCR system. The change in the after-treatment strategy has no negative impact on the fuel consumption and urea refill intervals for the majority of customers. **Activities:** Improved ECM software has been developed and will be available for service. It includes no summary table changes.

In response to Interrogatory 1.e(3), VWGoA states that it did not design either the engines at issue or the software that was installed as part of the above-referenced Service Actions and did not know the full purpose of this software at the time it initiated these Service Actions. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that one of the reasons the Service Actions were performed was to address certain hardware failures in the 2.0 Liter Affected Vehicles, as described more fully in paragraphs 47 to 51 of the VWAG Statement of Facts. VWGoA further responds to Interrogatory 1.e(3) by referring Plaintiffs to VWGoA's answer to Interrogatory 1.e(2), *supra*, which lists the reasons VWGoA provided to its federal and California regulators for the Service Actions and which VWGoA understood at the time to be the reasons for the Service Actions.

In response to Interrogatory 1.e (4), VWGoA objects to this interrogatory as vague and ambiguous. It is unclear what Plaintiff is requesting. VWGoA is willing to meet and confer to discuss this Interrogatory further.

2. Please provide the following information concerning the Steering Wheel Angle Recognition feature:

a. the reason(s) for installing the Steering Wheel Angle Recognition feature;
b. a description of how the Steering Wheel Angle Recognition feature altered the emissions control systems of Affected Vehicles;
c. the number of Existing Affected Vehicles in Texas on which You installed or caused to be installed the Steering Wheel Angle Recognition feature;
d. the number and location of Texas Dealers that participated in the installation of the Steering Wheel Angle Recognition feature on Existing Affected Vehicles.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests, including its objection to, and understanding of, the defined term "Steering Wheel Angle Recognition." VWGoA further objects to the phrase "altered the emissions control systems" in Interrogatory 2.b as vague and ambiguous. VWGoA further objects to this Interrogatory on the grounds that it combines four separate interrogatories and asserts them as a single interrogatory;

VWGoA will construe Interrogatory No. 2 as containing four separate interrogatories and is responding only on that basis.

Subject to and without waiver of these Objections, in response to Interrogatory 2.a, VWGoA states that it did not design either the engines at issue or the software referred to as the Steering Wheel Angle Recognition feature and did not know about the Steering Wheel Angle Recognition feature or its purpose at the time it was installed in any Affected Vehicles. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the Steering Wheel Angle Recognition feature was installed to address certain hardware failures in the 2.0 liter Affected Vehicles, as described more fully in paragraphs 47 to 51 of the VWAG Statement of Facts.

In response to Interrogatory 2.b, VWGoA states that it did not design either the engines at issue or the Steering Wheel Angle Recognition feature, and did not know about the Steering Wheel Angle Recognition Feature (or its purpose) at the time it was installed in any Affected Vehicles. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands, but cannot independently confirm, that the Steering Wheel Angle Recognition feature enabled the vehicle to better detect whether it was being tested on a dynamometer or being driven on the road.

In response to Interrogatory 2.c and Interrogatory 2.d, VWGoA refers Plaintiffs to its objection to the definition of "Steering Wheel Angle Recognition" in paragraph 4, *supra*, and further states that it believes, but is not certain, that at least one of the Recalibrations included the software code associated with the Steering Wheel Angle Recognition feature. VWGoA is not aware of the precise number of Affected Vehicles in Texas that received a Service Action that included the Steering Wheel Angle Recognition feature, or which dealers in Texas performed a

Service Action that included the Steering Wheel Angle Recognition feature. Without admitting that each of the Recalibrations listed in response to Interrogatory 1.a contained the Steering Wheel Angle Recognition feature, VWGoA states that 15,115 Affected Vehicles in Texas had the 23O6 Service Action performed, 486 Affected Vehicles in Texas had the 23N4 Service Action performed, and 7,715 Affected Vehicles in Texas had the 23N5 Service Action performed. VWGoA also respectfully refers Plaintiffs to VWGoA's response to Interrogatory 1.d, which lists those Texas dealers that performed a Recalibration.

3. Please provide the following information concerning James Robert Liang's employment at Volkswagen Group of America, Inc.:

a. The start and end dates and reason(s) for termination of Mr. Liang's employment at Volkswagen Group of America, Inc.;
b. The position or positions held by Mr. Liang during his employment at Volkswagen Group of America, Inc.;
c. All individuals who managed, supervised or oversaw Mr. Liang's work during his employment at Volkswagen Group of America, Inc.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests. VWGoA further objects to this Interrogatory on the grounds that it combines three separate interrogatories and asserts them as a single interrogatory; VWGoA will construe Interrogatory No. 3 as containing three separate interrogatories and is responding only on that basis.

Subject to and without waiving the foregoing objections, in response to Interrogatory 3.a, VWGoA states that Mr. Liang was employed by VWAG from 1983 until May 2008, and worked there as a Development Engineer. In May of 2008, Mr. Liang began working at VWGoA as a Foreign Service Employee. Mr. Liang's employment with VWGoA was suspended on September 9, 2016, the date of his plea agreement.

In response to Interrogatory 3.b, VWGoA states that Mr. Liang held the position of Leader of Diesel Competence at VWGoA.

In response to Interrogatory 3.c, and pursuant to Texas Rule of Civil Procedure 197.2(c), VWGoA refers Plaintiffs to the organizational charts that have been produced in this action at VW-MDL2672-01682476, VW-MDL2672-02604254, VW-MDL2672-09437387, and VW-MDL2672-12868461. VWGoA understands based on its investigation since the NOVs and substantial deposition testimony that the individuals who actually supervised and oversaw Mr. Liang's work on a day-to-day basis were employed by VWAG, not VWGoA.

Respectfully submitted,
/s/ C. Vernon Hartline, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by email in compliance with the Texas Rules of Civil Procedure on October 9th, 2017 on the following counsel of record.

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C. VERNON HARTLINE, JR.

TAB 7

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - x

IN RE: VOLKSWAGEN "CLEAN :

DIESEL" LITIGATION :

SHELBY ZELONIS, :

Plaintiff, : COORDINATED CASE NO.

v. : CL-2016-9917

VOLKSWAGEN GROUP, : CA No. CL-2015-13746

OF AMERICA, INC., :

Defendant. :

- - - - - - - - - - - - - - x

Videotaped Deposition of STUART JOHNSON

McLean, Virginia

Tuesday, August 8, 2017

9:09 a.m.

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866-624-6221

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Job No.: 336239

Pages 1 through 407

Reported by: Cassandra E. Ellis, RPR

1 this point?
2 A No, I would say, not. It
3 wasn't an issue, it wasn't an emergency
4 in -- at this point in time, regarding
5 room in the port. I would say that our
6 sales people, such as Mr. Horn, were, you
7 know, very interested and -- and wanted
8 us to get an approval for 2016. Not so
9 much that the ports were filled, just
10 that he wanted to sell cars.
11 Q Did you feel like you were
12 facing pressure from upper management to
13 solve this issue?
14 A Yes. I would say that's a fair
15 statement.
16 Q And would you agree with me
17 that part of the reason that the
18 additional admission about the vehicle
19 speed versus time logic, that was made on
20 August 19th, that one of the primary
21 reasons for that admission was to attempt
22 to get CARB to go ahead and certify the

1 2016 model year?
2 A I would say, yes. That's the
3 first time we actually at the August 19th
4 meeting, where we had some of CARBs
5 technical staff in the room that we
6 actually got some questions.
7 So that's when there -- the
8 question was raised, well, you're telling
9 us what you're doing, but you're not
10 telling us how you're doing it.
11 Q And at that point in time, you
12 all went ahead and told them how you were
13 doing it?
14 A Yes.
15 Q And the reason was to try to
16 get the 2016 certified; right?
17 MR. STEINBERG: Objection,
18 misstates his testimony,
19 argumentative.
20 A That was part of the reason,
21 yes.
22 Q Because that was in the

1 company's financial best interests;
2 right?
3 A Correct.
4 (Exhibit No. 24 was marked
5 for identification.)
6 BY MR. MELKERSEN:
7 Q I've handed you what's been
8 marked as Exhibit 24 to your deposition.
9 A Yep.
10 Q Do you recognize this document?
11 A Yes, I do.
12 Q What is this?
13 A This is an e-mail exchange
14 between Oliver Schmidt and me regarding
15 status of the ARB decision on 2016, and
16 then some personal interaction, as well.
17 Q If you could look down at the
18 e-mail dated August 21st, 2015, written
19 from you to Oliver Schmidt at 6:15 p.m.,
20 can you read that, please?
21 A Where is it?
22 Q At the bottom of the front

1 page?
2 A At bottom of the front page?
3 Q "We shook hands and" --
4 A Oh, okay. Right here. So,
5 yeah, I had -- I had mentioned to --
6 yeah, obviously after -- since this or
7 before this, I -- I talked to Alberto
8 Ayala. So after the August 19th meeting,
9 I -- I was attending this Asilomar
10 Conference in Monterey.
11 So we split up, you know,
12 the -- the Germans flew back to Germany
13 and I went back up to Monterey.
14 The next morning, I -- or next
15 afternoon, it was afternoon before I got
16 ahold of Annette. I called Annette
17 Hebert, I asked her if she had talked to
18 her staff.
19 She said, no, she hadn't yet.
20 So they -- she had no news of what
21 happened the day before.
22 So I told her that

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TAB 8

CAUSE NO. D-1-GN-16-000370

IN RE:	
VOLKSWAGEN CLEAN	IN THE DISTRICT COURT
DIESEL LITIGATION:	TRAVIS COUNTY, TEXAS
TCAA ENFORCEMENT	353RD JUDICIAL DISTRICT
CASES	
ALL ACTIONS	

Video Deposition of STUART JOHNSON,

Corporate Representative for Volkswagen Group of America, Inc.

Taken at 3001 West Big Beaver Road, Suite 600

Troy, Michigan

Commencing at 9:07 a.m.

Wednesday, October 4, 2017

Before Denise M. Kizy, RPR, CRR, CSR-2466

1 **Q. Germany doesn't sign those documents;**
2 **right?**
3 A. That's correct, they don't.
4 **Q. Volkswagen Group of America signs**
5 **those documents?**
6 A. That is correct.
7 **Q. And it is Volkswagen Group of America**
8 **who is making the representations to the**
9 **governmental agencies that are contained in**
10 **those documents; correct?**
11 MR. MONAHAN: Objection; asked and
12 answered.
13 THE WITNESS: Excuse me?
14 MR. MONAHAN: I said objection; asked
15 and answered.
16 THE WITNESS: Yes, that's correct.
17 We submit the documents.
18 **BY MS. BECKMAN:**
19 **Q. And it's also Volkswagen Group of**
20 **America who is responsible for implementing the**
21 **field fixes in the field --**
22 MR. MONAHAN: Objection.
23 **Q. -- the authorized dealers?**
24 MR. MONAHAN: Can I have that back?
25 THE WITNESS: If it's a software

1 update, the software comes from VWAG Germany.
2 **BY MS. BECKMAN:**
3 **Q. And -- go ahead.**
4 A. And it's implemented by the service
5 department at Volkswagen Group of America.
6 **Q. And we're going to be looking at some**
7 **documents that relate to field fixes, including**
8 **communications with dealers about alterations to**
9 **the vehicles, but is it Volkswagen Group of**
10 **America who communicates to the dealers in**
11 **America what the field fixes involve and what**
12 **they need to do?**
13 A. Yes.
14 **Q. And if it is necessary to notify the**
15 **customers as part of the field fix or a service**
16 **campaign or a recall, is it also Volkswagen**
17 **Group of America who notifies the customers?**
18 A. Yes, that's correct.
19 **Q. What is an AECD?**
20 A. It's an auxiliary emission control
21 device.
22 **Q. And in your industry, how do you**
23 **refer to those? As AECDs?**
24 A. Yes.
25 **Q. So if I say AECD, we'll understand it**

1 **Q. In what way?**
2 A. The recall campaigns that were
3 implemented in late 2014 and early 2015 had
4 software in the -- the software package that was
5 making the corrections listed in these campaign
6 reports also added a steering wheel angle
7 function to the defeat device.
8 **Q. And the steering wheel angle function**
9 **was designed to do what, as you understand it?**
10 A. As I understand it today, the
11 steering wheel angle function was implemented to
12 make sure the vehicle when operated on the road
13 would stay in what was called the road
14 calibration.
15 **Q. And it would do that by recognizing**
16 **that the steering wheel was actually turning**
17 **while the wheels were turning?**
18 A. Yes, the assumption being that if the
19 steering wheel is being turned, the vehicle is
20 actually being driven on the street.
21 **Q. And the steering wheel recognition**
22 **feature was added as part of which field fix for**
23 **the 2012 Passat?**
24 A. It was added as part of the recall
25 campaign, the four-digit number, which I can't

1 recall off the top of my head, but can look it
2 up if you'd like to --
3 MARKED FOR IDENTIFICATION:
4 EXHIBITS 8-10
5 10:21 a.m.
6 **Q. Yeah, I've put two different field**
7 **fix documents in front of you. One we haven't**
8 **looked at yet that's Exhibit 8, which involves a**
9 **field fix for the 2012 Passat --**
10 A. Yes.
11 **Q. -- but it's dated April 17, 2015, the**
12 **letter is, the cover letter, and then the other**
13 **one that we were looking at previously, which is**
14 **the cover letter stating November of 2014, and**
15 **so my question to you is looking at those two**
16 **exhibits, which field fix contained the steering**
17 **wheel recognition feature?**
18 MR. MONAHAN: Objection.
19 THE WITNESS: I'd like to refer to
20 some documents here just to make sure.
21 **BY MS. BECKMAN:**
22 **Q. Feel free to do that.**
23 **And you can look at any documents**
24 **that you want to in your binder, if you'd just**
25 **let me know what you're looking at.**

1 **document that goes with recall campaign for the**
2 **2012 Passat; right?**
3 A. Right.
4 **Q. And when we look at the event, what**
5 **was Volkswagen of America telling the EPA and**
6 **CARB with regard to the problem that was**
7 **necessitating the software change?**
8 A. In the case of this vehicle, which
9 was a Passat, we were telling the agencies that
10 we were going to fix three problems.
11 One, we were going to make software
12 changes to protect the turbo charger, because we
13 were experiencing turbo charger failures; two,
14 we were going to make corrections to what we
15 call the PM model, which is a model used by the
16 control system to judge how much soot loading is
17 occurring with the particulate filter, because
18 we were experiencing particulate filter
19 failures; and, three, we were going to implement
20 software that would improve what's called the
21 real world NOx emissions of the vehicle, to
22 improve the way the vehicle performed on the
23 street with regards to NOx emissions.
24 **Q. And, specifically, you were going to**
25 **change the dosing strategy?**

A. Correct.

Q. So that there would be more dosing of urea that would neutralize the NOx?

A. At least as it was presented to the agencies in the fall of 2014, our VWAG colleagues stated that they were going to change the temperature range when dosing occurred and that they were going to dose in smaller levels, but more often to ensure that the catalyst had the proper amount of DEF fluid in the catalyst. They were acknowledging that there would be some increase in the amount of dosing, but not a significant amount.

Q. Which one of these proposed problems that comes with a proposed change included the steering wheel recognition software?

MR. MONAHAN: Foundation.

THE WITNESS: I think the steering wheel angle function was added in addition to these three.

BY MS. BECKMAN:

Q. So you don't think that the code was tacked onto these three changes, you think it was something that just kind of snuck in there?

A. It was in the same -- it was in the

software code, but I think it's an additional change on top of these three.

Q. And it is an additional change, obviously, that was not disclosed to any governmental agency?

A. That is correct.

Q. Was a version of that software flashed to any vehicles prior to these recall campaigns?

A. Our understanding, Volkswagen Group of America's understanding now, you know, given the documentation we've been exposed to after the fact, it indicates that the steering wheel angle was flashed into production vehicles at the start of the 2014 model year.

VIDEO TECHNICIAN: We need to go off the record at 10:28:24.

(Recess taken at 10:28 a.m.)

(Back on the record at 10:29 a.m.)

VIDEO TECHNICIAN: Okay. We are now back on the record. The time is 10:29:30 a.m.

BY MS. BECKMAN:

Q. Before we had that whatever this is called, a microphone, a microphone malfunction, we were talking about the flashing of the

1 Volkswagen of America does not have that
2 capability.
3 **Q. Volkswagen of America, no one in**
4 **Volkswagen of America has that capability?**
5 A. I would make an exception for Mr.
6 James Liang, but other than that, I don't
7 believe Volkswagen of America has any other
8 personnel that had that capability.
9 **Q. And so Volkswagen of America has not**
10 **gone back to see if any of the prior software**
11 **flashes before November of 2014 also**
12 **incorporated the steering wheel recognition**
13 **feature?**
14 A. That is correct.
15 **Q. Mr. Liang was a Volkswagen of America**
16 **employee, was he not, during a certain period of**
17 **time?**
18 A. He -- yes. He originally came as a
19 field service engineer.
20 **Q. In what year, please?**
21 A. 2008.
22 **Q. And did he work as a Volkswagen of**
23 **America employee from 2008 through 2015?**
24 A. Yes, he did.
25 **Q. Did he develop new software for these**

1 **vehicles here in the United States at a**
2 **Volkswagen of America facility?**
3 A. I believe he for the most part
4 reported still directly to his Volkswagen AG
5 colleagues and worked with them to develop
6 software.
7 **Q. Object to responsiveness.**
8 **Did he, he, Mr. Liang, work here in**
9 **the United States at Volkswagen Group of America**
10 **facilities, and as a Volkswagen Group of America**
11 **employee, to develop software to make changes to**
12 **these vehicle emission systems?**
13 A. I would say yes.
14 **Q. And Mr. Liang would have had the**
15 **ability between 2008 and 2015 to dig deep into**
16 **the software and recognize anything that was**
17 **going to change the emissions control system or**
18 **change the way it was monitored?**
19 MR. MONAHAN: Objection.
20 THE WITNESS: I would say Volkswagen
21 of America believes Mr. Liang has that
22 capability.
23 **BY MS. BECKMAN:**
24 **Q. Did anyone ever to your knowledge at**
25 **Volkswagen Group of America ask Mr. Liang to dig**

1 the ability to know where the vehicles were
2 purchased and where vehicles are currently being
3 operated.
4 **BY MS. BECKMAN:**
5 **Q. Okay. Well, there's one step**
6 **missing, though.**
7 A. Okay.
8 **Q. The step is is that these vehicles**
9 **actually came in and had service as part of the**
10 **campaign; right?**
11 A. Right. Yes.
12 **Q. Okay. So there's the campaign where**
13 **Dear Customer letters were sent out?**
14 A. Yes.
15 **Q. At least for two of them?**
16 A. Yes.
17 **Q. And then there's the actual flashing**
18 **of the new software?**
19 A. Yes.
20 **Q. Right?**
21 **What I'm trying to figure out is how**
22 **does Volkswagen of America determine what**
23 **vehicles have had new flashware software -- new,**
24 **let me restate that.**
25 **Has Volkswagen Group of America**

Do you remember that?

A. No, I don't recall that.

Q. Okay. Was there a change made to these vehicles after they were sold in the United States -- well, backtrack.

When the defeat device software was first added to the vehicles, and I'm talking about the software that recognized whether the vehicle was in test mode versus road mode, did the vehicles originally start in test mode?

A. Yes.

Q. Was that changed at some point in time so the vehicle started in road mode?

A. Yes.

Q. When was that change made?

MR. MONAHAN: For which cars?

MS. BECKMAN: Well, all of them.

BY MS. BECKMAN:

Q. So we can start with whichever model year and whichever vehicle you'd like to.

A. And I don't recollect that, but I may have to -- I have some documents I could maybe refer to.

Q. Go ahead.

A. Okay. Maybe I'll do that.

1 MR. MONAHAN: I think to help on this
2 one, it might be useful if the court reporter
3 read back the question and answer that we just
4 talked about.
5 MS. BECKMAN: Why don't you wait and
6 do that when you have the chance to question
7 him, because I'd rather not go back and do that.
8 **BY MS. BECKMAN:**
9 **Q. Is there another clarification?**
10 A. There's another clarification.
11 Just to make sure, you had asked if
12 there were any software updates that changed the
13 strategy of the car starting in test mode or
14 road mode.
15 **Q. Correct. I did.**
16 A. And I thought you were asking if
17 there were any software updates prior to the
18 fall of 2014 or spring of 2015 updates.
19 So in that case the answer is no, but
20 the November 2014 and the spring of 2015 recalls
21 did, in fact, reverse the strategy such that the
22 car started in road mode.
23 **Q. Okay. So let's talk about that for a**
24 **few minutes.**
25 **As I understand the issue, the cars**

1 **were originally programmed to start up in test**
2 **mode, and some of them were staying in test**
3 **mode, which was very hard on the hardware of the**
4 **car parts; right?**
5 A. That is correct.
6 **Q. And so part of this change to the**
7 **software that was made in late 2014 and earlier**
8 **2015, was to tell the cars to start in road mode**
9 **rather than test mode; correct?**
10 A. Correct.
11 **Q. And that was a different change, an**
12 **independent change, from telling the cars to**
13 **recognize the steering wheel angle, to know**
14 **whether to be in test mode or road mode; right?**
15 MR. MONAHAN: Objection.
16 THE WITNESS: I'm not sure I would
17 say it was a different change or an independent
18 change, but it was implemented at the same time.
19 **BY MS. BECKMAN:**
20 **Q. I understand those two things were**
21 **implemented at the same time --**
22 A. Yes.
23 **Q. -- but they actually do two different**
24 **things; right? One is telling the vehicle what**
25 **mode to start in?**

A. Yes.

Q. The other is after the vehicle has started, telling it what to recognize with regard to how the steering wheel is being turned to know whether it's in test mode or road mode; right?

A. That is correct.

Q. And both of those would involve a change in software to the vehicle; correct?

A. That is also correct.

Q. And software is actually considered a part on the vehicle?

A. That is correct.

Q. It has its own part number; right?

A. A software level does have a unique part number.

Q. And so the part numbers were changed during this recall process for the software on the vehicles; correct?

A. Yes.

Q. And the change did two different things to help the car stay in road mode on the road and test mode while it was being tested?

A. Yes, the same part number.

Q. Okay. But if the vehicles are in

1 **road mode, the problem is is they are emitting**
2 **potentially many times the amount of NOx that**
3 **the government allows by law?**
4 MR. MONAHAN: Objection.
5 THE WITNESS: Not necessarily.
6 **BY MS. BECKMAN:**
7 **Q. Did the notices of violation indicate**
8 **that at least the government believed these**
9 **vehicles were emitting a higher than allowable**
10 **by law NOx emission while they were on the road?**
11 A. Yes.
12 **Q. Okay. And the effect of these two**
13 **different changes to the software would be to**
14 **enhance the ability of the car to have the**
15 **higher NOx emissions while it was on the road?**
16 MR. MONAHAN: Objection.
17 THE WITNESS: I would say that's
18 correct.
19 **BY MS. BECKMAN:**
20 **Q. We talked earlier about the change to**
21 **the discovery responses, and that the model year**
22 **2015 vehicles were removed?**
23 A. Yes.
24 **Q. And I was a little confused still.**
25 **Why were the 2015 vehicles removed**

A. Yes.

Q. When you change a part number, are you supposed to report that to the government?

A. Yes.

Q. Was the part number associated either with the steering wheel recognition feature, or the start-up in road mode rather than test mode, reported to any governmental agency?

MR. MONAHAN: Objection to the suggestion that it was two separate parts.

You can answer.

THE WITNESS: Yes, my answer would be yes, we did supply the part number to the agencies that had the updates listed in the recall plans, the three points, turbo charger for Passats, NOx improvement, PM model improvement, but to Volkswagen of America had no knowledge that the steering wheel angle strategy and the start strategy were also being implemented at that same time.

BY MS. BECKMAN:

Q. So, in other words, Volkswagen of America, your position is that you disclosed the right part number, you just didn't tell the government exactly what it did?

1 A. Yes. Based on our knowledge at that
2 time, we did not know that those additional
3 changes to the software were in there, that
4 implemented the steering wheel angle and
5 implemented the start strategy.
6 **Q. When is the first time that**
7 **Volkswagen of America disclosed that additional**
8 **software added to the vehicles to any**
9 **governmental agency?**
10 MR. MONAHAN: Foundation.
11 THE WITNESS: That would have been on
12 September 3rd of 2015.
13 MR. MONAHAN: Can I have that
14 question back, please?
15 (The following requested portion of
16 the record was read by the reporter at
17 12:40 p.m.:
18 QUESTION: When is the first time that
19 Volkswagen of America disclosed that
20 additional software added to the vehicles to
21 any governmental agency?)
22 MS. BECKMAN: No, that wasn't the
23 question, or if it was that's not what I meant
24 it to be.
25 **BY MS. BECKMAN:**

1 Q. This appears to be a form of a letter
2 that would go out to customers who own 2012
3 through 2014 model year Volkswagen Passats with
4 2-liter TI; is that right?
5 A. Yes.
6 Q. So this is the customer letter that
7 would have gone out to customers in Texas?
8 A. Correct.
9 Q. If you look down at the -- and,
10 again, this is a letter drafted by Volkswagen
11 Group of America; right?
12 A. That is correct.
13 Q. If you look down to "What is the
14 issue, and what will we do?" you're telling the
15 customer what you think the issue is and what
16 this fix is going to do; correct?
17 A. Yes.
18 Q. It states in paragraph two:
19 "In addition, the vehicle engine's
20 management software has been improved to
21 assure your vehicle's tailpipe emissions are
22 optimized and operating efficiently, well
23 beyond given governmental standard."
24 That wasn't true; was it? That
25 statement wasn't true?

1 A. Knowing the information we know now,
2 it is not true.
3 **Q. Isn't it Volkswagen Group of**
4 **America's position that that statement was never**
5 **going to be true?**
6 A. No.
7 **Q. There was never a way to make those**
8 **vehicles compliant as designed?**
9 A. No. We felt like the fix would
10 improve the emissions, such that the agencies
11 would be satisfied.
12 **Q. Well, that's not what you're**
13 **representing to the customers, though.**
14 **You're saying that these fixes you**
15 **were doing as part of the recall would make**
16 **these cars operate well beyond given**
17 **governmental standards, which to me means that**
18 **we're going to meet and beat government**
19 **standards; right?**
20 A. Yes, yes.
21 **Q. And those vehicles didn't do that as**
22 **part of this fix?**
23 A. I would dispute that. I think they
24 did --
25 **Q. Okay.**

1 **Q. And you're telling customers in 2014**
2 **and 2015, that you're going to put this new**
3 **software on these vehicles, and this new**
4 **software is going to meet or beat governmental**
5 **standards; right?**
6 A. That's right.
7 **Q. In on-road conditions?**
8 MR. MONAHAN: Objection.
9 THE WITNESS: No, that's not what we
10 said.
11 **BY MS. BECKMAN:**
12 **Q. Oh, you were still talking about the**
13 **test mode?**
14 A. I'm talking about both, that the
15 vehicle would work and exceed -- or, I mean, be
16 better than the emission standards when it's
17 tested, but we also were going to dramatically
18 lower the NOx emissions on the road, and there
19 are no standards on the books that says while
20 you drive the car on the street, it has to meet
21 the FTP numbers.
22 **Q. Okay. But the whole point of FTP**
23 **testing is to try to get some standard level of**
24 **emission out on the road; right?**
25 MR. MONAHAN: Vague.

1 **Q. Okay. So what we're going to do**
2 **today is walk through it. I can give you a**
3 **couple minutes if you want to glance through and**
4 **just kind of familiarize yourself with contents,**
5 **and then look up and give me a wink when you're**
6 **done doing that.**
7 MR. MONAHAN: I'm going to lodge a
8 scope objection on this document.
9 THE WITNESS: Okay.
10 **BY MS. DINUNZIO:**
11 **Q. Okay. I'm going to represent to you**
12 **that this is an Importer Agreement between**
13 **Volkswagen Aktiengesellschaft and Volkswagen of**
14 **America, Inc., as it was produced in this Clean**
15 **Diesel Litigation.**
16 **If you would walk through me with the**
17 **document to page four, please, of the document.**
18 A. Okay.
19 **Q. And do you see on page four where**
20 **Volkswagen AG is identified as a manufacturer of**
21 **high quality products?**
22 A. Yes.
23 **Q. Okay. And on that same page, do you**
24 **see where Volkswagen Group of America is**
25 **identified as the importer, distributor and**

1 **marketer of Volkswagen vehicles and other**
2 **Volkswagen products in the U.S.?**
3 A. Yes, I do see that.
4 **Q. Thank you.**
5 **And page four further states that**
6 **Volkswagen AG and Volkswagen Group of America**
7 **desire to continue their contractual**
8 **relationship based upon mutual understanding,**
9 **cooperation, trust, and confidence; correct?**
10 A. Yes, that is correct.
11 **Q. Let's turn to page seven of the**
12 **document. The numbers are on the top.**
13 A. Yes.
14 **Q. Okay. And on page seven, do you see**
15 **Article 6, Advice and Assistance?**
16 A. Yes.
17 **Q. And do you see subpart A of that**
18 **article?**
19 A. I do.
20 **Q. And that states that Volkswagen AG**
21 **may supply Volkswagen Group of America with,**
22 **among other materials, service and parts**
23 **documentation, literature and organizational**
24 **materials; correct?**
25 A. Correct.

1 A. That's correct.
2 MS. DINUNZIO: Page 43, which, Bill,
3 will be Bates 151.
4 **BY MS. DINUNZIO:**
5 **Q. So these amendments, amongst others,**
6 **were executed by Volkswagen AG and Volkswagen**
7 **Group of America on August 1st of 2011; correct?**
8 A. Correct. That's what the document
9 says.
10 MR. MONAHAN: Scope objection.
11 **BY MS. DINUNZIO:**
12 **Q. Okay. Was that fun, because we're**
13 **done with it?**
14 A. Okay.
15 **Q. A verbal affirmation of the funness**
16 **of that all would be appreciated.**
17 **Okay. Just a couple questions on**
18 **James Liang.**
19 A. Mm-hmm.
20 **Q. I believe the testimony was that he**
21 **worked for Volkswagen Group of America from 2008**
22 **through September of 2016; is that correct?**
23 A. That's correct.
24 **Q. Okay. What is James Liang's current**
25 **status with Volkswagen Group of America?**

A. His current status is that he is still employed, but suspended.

Q. Is he receiving a salary?

MR. MONAHAN: Outside the scope.

THE WITNESS: That I do not know.

BY MS. DINUNZIO:

Q. So he has not been terminated?

A. That is correct, he has not been terminated.

Q. Why not?

MR. MONAHAN: Outside the scope.

THE WITNESS: My understanding is that Volkswagen Group of America did not terminate Mr. Liang as a measure to cooperate with the Department of Justice.

BY MS. DINUNZIO:

Q. Can you tell me -- I don't know what that means. What does that mean?

MR. MONAHAN: Outside the scope.

THE WITNESS: It means that if he was terminated he may have immediately been deported, and he would have left the country, and the fact that he is suspended was a cooperative effort with the Department of Justice to have James remain in the country.

1 **BY MS. DINUNZIO:**
2 **Q. Okay. And he is -- he has**
3 **currently -- his status is that he has pled**
4 **guilty to the crimes -- some of the crimes with**
5 **which he was charged; is that correct?**
6 A. That is correct.
7 **Q. Okay. And so he already had a**
8 **sentencing hearing; is that correct?**
9 A. That is correct.
10 **Q. Okay. And did anybody express that**
11 **if he wasn't immediately taken into custody, he**
12 **may leave the country at those hearings, if**
13 **you're aware?**
14 MR. MONAHAN: Objection; scope.
15 THE WITNESS: That I am not aware of.
16 **BY MS. DINUNZIO:**
17 **Q. But he is still here in the United**
18 **States?**
19 A. He is, yes.
20 **Q. And do you know whether Volkswagen**
21 **Group of America is in any way covering the**
22 **legal costs related to James Liang's legal**
23 **troubles related to the VW Clean Diesel legal**
24 **action?**
25 MR. MONAHAN: Outside the scope.

1 THE WITNESS: And that I do not know.
2 **BY MS. DINUNZIO:**
3 **Q. Who would know that at Volkswagen**
4 **Group of America?**
5 A. I would -- I would suggest that the
6 legal office of Volkswagen Group of America
7 would know, and I would suggest that Mr. David
8 Detweiler, who is chief counsel, would be able
9 to answer that question.
10 **Q. Thank you.**
11 **And so James Liang's job title --**
12 **because he's still employed; correct?**
13 A. Yes, he is still an employee.
14 MR. MONAHAN: Asked and answered.
15 **BY MS. DINUNZIO:**
16 **Q. Okay. So does he --**
17 MR. MONAHAN: Asked and answered.
18 MS. DINUNZIO: Sorry about that.
19 **BY MS. DINUNZIO:**
20 **Q. So does he still have the same title**
21 **that he did?**
22 MR. MONAHAN: Outside the scope.
23 THE WITNESS: I believe, yes, he does
24 have the same title.
25 **BY MS. DINUNZIO:**

1 **Q. And that title is?**
2 A. I'm not positive, but I believe he's
3 called a specialist, salary grade 9.
4 **Q. Okay. So his job title was**
5 **specialist, salary grade 9, as far as you're**
6 **aware?**
7 A. As far as I'm aware.
8 MR. MONAHAN: Outside the scope.
9 THE WITNESS: Yes.
10 **BY MS. DINUNZIO:**
11 **Q. And are you aware that -- did you --**
12 **I'm sorry, I missed this part.**
13 **Did you have an opportunity to read**
14 **through the responses of Volkswagen Group of**
15 **America to the interrogatories that were**
16 **propounded and discussed here today at this**
17 **deposition?**
18 A. Yes, I did.
19 **Q. Okay. And are you aware that**
20 **Volkswagen Group of America responded to the**
21 **discovery by indicating that James Liang's job**
22 **title was leader of diesel competence?**
23 A. Okay. I'm sorry. Then that -- that
24 is correct.
25 **Q. That rings some bells?**

A. Yes.

Q. Do you know what does the leader of diesel competence do?

A. Well, James Liang joined Volkswagen of America in 2008. As described to the company when he joined, he was here to help with the launch of the TDI products.

He was very -- he was characterized as being involved in the software development of those vehicles, and, therefore, had a very deep knowledge of the vehicles, and that he was here to make sure the launch of the vehicles went smoothly, and that he was here to help with field problems, if any field problems came up with those cars, and it was the understanding of Volkswagen of America that that was a temporary assignment, that he would be here on a -- generally he's an FSE, field service engineer we call them, where he came over under a three-year contract, but he ultimately stayed all the way through 2015, 2016.

Q. Do you know why he stayed longer than his three-year contract?

MR. MONAHAN: Scope.

THE WITNESS: I do not know exactly

1 why, but the company's understanding is that he
2 was going to just continue to assist with field
3 problems with the 2-liter TDI vehicles.
4 **BY MS. DINUNZIO:**
5 **Q. Tell me about all the actions of**
6 **which Volkswagen Group of America is aware that**
7 **James Liang would have taken with the**
8 **development of the software update that was the**
9 **recall 2306.**
10 A. So Volkswagen of America has had
11 access to e-mails, and with Mr. Liang
12 interacting with VWAG colleagues, it appears
13 that Mr. Liang was involved in the testing of
14 the software, and involved in implementing the
15 software, you know, approving a final level of
16 software that would be used in the recall
17 campaign.
18 **Q. Can you give me a little bit more**
19 **detail? You say it appears that he was**
20 **involved.**
21 A. Yes. So we have -- the company has
22 seen the e-mail strings where there's discussion
23 about DPF failures. There's discussion about PM
24 loading. There's discussion about the acoustic
25 function. There's discussions about

1 implementing the steering wheel fix or
2 improvement or enhancement.
3 **Q. And do you know whether those e-mails**
4 **have been produced in this litigation?**
5 A. I do not know.
6 **Q. Who would know?**
7 MS. DINUNZIO: You would, Bill? Oh,
8 how great. Okay. Good.
9 **BY MS. DINUNZIO:**
10 **Q. Let's see. Did James Liang play any**
11 **role in the development of the information that**
12 **was provided to the regulatory agencies**
13 **regarding the recall action 23O6?**
14 MR. MONAHAN: Objection; vague.
15 THE WITNESS: I do not believe -- the
16 company does not believe that he was involved in
17 those discussions.
18 **BY MS. DINUNZIO:**
19 **Q. I'm going to ask the same question**
20 **about James Liang. Tell me about all the**
21 **actions of which Volkswagen Group of America is**
22 **aware that James Liang would have taken in the**
23 **development of recall action 23N4.**
24 A. That's the recall action as spelled
25 out in the Exhibit 1, if I'm not mistaken.

1 I believe he would have had the same
2 role. He would have been interacting with VWAG
3 colleagues in diesel development, he would have
4 been testing the proposed software, and he would
5 have been involved in the same discussions about
6 the test recognition strategy, the steering
7 wheel angle and so on.
8 **Q. Are you aware of any other OEM that**
9 **has been caught using a steering angle --**
10 **steering wheel angle recognition feature as a**
11 **defeat device in one of their vehicles?**
12 MR. MONAHAN: Scope.
13 THE WITNESS: No, I'm not aware of
14 that.
15 **BY MS. DINUNZIO:**
16 **Q. Okay. Same question for James Liang**
17 **with regard to 23N5. Tell me all of the actions**
18 **that James Liang would have taken that**
19 **Volkswagen Group of America is aware of in the**
20 **development of that recall action.**
21 A. I would say it's essentially the same
22 answer; that he would have been involved in
23 testing the software, coming to a final
24 calibration that would be used in the soft -- in
25 the campaign, and, once again, he was involved

in the development and the implementation of the steering wheel angle.

Q. When you say testing the recall, what kind of testing is typically done of a recall that involves a software update of this nature?

A. Well, in the case of those software campaigns in late 2014 and early 2015, the software would have been tested on a dynamometer on the certification tests, but the software was also tested with a PEMS device over the road.

Q. And who has those test results?

A. Those test results to my knowledge are part of -- are with VWAG.

Q. Have those test results been provided to the regulatory agencies, EPA and CARB?

A. The results were presented to them in a presentation in October of 2014. I don't think they were presented any detailed results, just the conclusions.

Q. And did they get a document or did they get a presentation that they could review and --

A. They got a PowerPoint presentation with conclusions.

Q. And so the PowerPoint, was that

1 MR. MONAHAN: Objection; vague.
2 THE WITNESS: No, I don't believe so.
3 **BY MS. DINUNZIO:**
4 **Q. Why not?**
5 A. I think we were just taking our VWAG
6 colleagues at their word that the software
7 updates were going to reduce NOx emissions, and
8 that there would not be any additional concern
9 about the reliability of the vehicle.
10 **Q. Okay. So is it the case that when a**
11 **software update is performed on vehicles in**
12 **general, Volkswagen Group of America would not**
13 **monitor the effects of that update?**
14 A. Not -- no, not in any additional
15 special manner. We would still be monitoring
16 the warranty claims just like we always do.
17 So if there was a recall on a given
18 vehicle, and after a recall is performed
19 suddenly there's a lot of additional failures of
20 a component, you know, we would see that.
21 **Q. And this is going to be a little bit**
22 **for my benefit, just to make sure I'm clear on**
23 **this part of the testimony, but the purpose of**
24 **increasing the ability of the vehicle to detect**
25 **road driving versus dyno testing was to increase**

1 **the amount of the time that the vehicle would**
2 **operate in the road mode?**
3 A. I would say yes.
4 **Q. Okay. And the effect of the road**
5 **mode would be to reduce or disable some of the**
6 **functioning of the vehicle's emission control**
7 **systems?**
8 MR. MONAHAN: Objection; compound.
9 Object to disable.
10 THE WITNESS: Essentially, yes. You
11 know, there were two softwares. So road
12 software in simplistic terms is low PM, high
13 NOx. Test software is low NOx, high PM.
14 And the desire on the part of our
15 diesel development colleagues in VWAG was to
16 have this low PM software on the road to ensure
17 the durability of the diesel particulate filter.
18 **BY MS. DINUNZIO:**
19 **Q. Why was the diesel particulate filter**
20 **so important?**
21 A. Well, you needed it to pass the
22 particulate standards. There is a standard, and
23 at the time it was 10 milligrams per mile.
24 It was essential to meet those
25 standards, and what's come out from all this

1 discussion is that the engineers were not able
2 to come up with a single calibration that
3 balanced the NOx and the PM emissions, such that
4 the PM filter could live over the life of the
5 vehicle. It just couldn't do it. There was
6 just too much, too much PM loading, if the NOx
7 emissions were kept lower.
8 It's kind of a tradeoff between those
9 two. You can have one or the other for
10 engine-out emissions, but not both.
11 **Q. And the effect of the dialing back of**
12 **the emissions control systems, though, the**
13 **effect on the tailpipe-out NOx emissions would**
14 **be that they would increase?**
15 A. On the road, yes.
16 **Q. Okay. So you had talked earlier**
17 **about overloading the PM filter could cause**
18 **during regen events too high of a temperature**
19 **that would cause that filter to crack; is that**
20 **correct?**
21 A. Yes.
22 **Q. Okay. I am so impressed with myself**
23 **for remembering that. Are you likewise?**
24 **So the filter cracks, so what? You**
25 **replace it; right? What's the big deal?**

1 A. Well, right. That could be an
2 outcome. So the filter would crack, the OBD
3 system would recognize that with the pressure
4 sensors that there's something wrong with the
5 filter, and the light would come on, and then
6 you would replace the filter.
7 **Q. Okay.**
8 A. But you don't -- it's an expensive
9 part, and if they're breaking a lot, obviously,
10 you don't want to keep doing that.
11 **Q. How expensive are they, do you know?**
12 A. No, I don't know, but it's -- I
13 would -- I would estimate at least over a
14 thousand dollars.
15 **Q. What?**
16 A. Yeah.
17 **Q. What are they made of, gold?**
18 A. It's a ceramic substrate canned in a
19 stainless steel container. Every other -- it's
20 a -- it's got a square substrate and every other
21 square is plugged, so the exhaust gas goes in
22 one side, has to travel through the wall of the
23 ceramic, and then out the opposite holes at the
24 other end.
25 **Q. Did you say over a thousand dollars?**

1 A. Yes.
2 **Q. Okay. And so would that be a part**
3 **that would be typically covered for some period**
4 **of time by a warranty?**
5 A. Yes.
6 **Q. Okay. I know what I'm asking for for**
7 **Christmas now, diesel particulate filters.**
8 **Okay. Let's see. When did**
9 **Volkswagen Group of America first suspect, if it**
10 **did, that the recall campaigns it had instituted**
11 **to address the excess on-road NOx emissions in**
12 **2014 and 2015, didn't fully address those excess**
13 **on-road NOx emissions?**
14 A. I would say that that was -- started
15 with the July 8th meeting, and then there were
16 several conversations that happened with the
17 agencies through August.
18 Then August 19th, we had an in-person
19 meeting with CARB again where we presented
20 additional information, and at that time there
21 was a -- I would say a more official admission
22 of a defeat device on the vehicle.
23 **Q. Okay. We've been talking about**
24 **hiring someone at Volkswagen Group of America**
25 **who would be able to interrogate --**

1 **Q. Okay. And so you would agree that**
2 **this is a customer that apparently had a**
3 **question about the 2306 software update?**
4 A. Yes.
5 **Q. Okay. And the Customer CARE person**
6 **is responding:**
7 **"This service action was an engine**
8 **management software update to assure your**
9 **vehicle's tailpipe emissions are**
10 **operating --" or, I'm sorry -- "optimized**
11 **and operating efficiently."**
12 **Correct?**
13 A. Correct.
14 **Q. Now does she give him any other**
15 **information about that particular recall?**
16 A. Well, it says that we're working --
17 "Volkswagen is working diligently with
18 appropriate parties towards a remedy for our
19 TDI emissions outputs."
20 And it says here that:
21 "Your vehicle should not have a
22 problem complying with California emissions
23 regulations."
24 **Q. And you would relate that to the**
25 **recall that was performed?**

A. I assume so, but I have not -- not having seen Mr. Mooney's letter, I don't know exactly what he's asking here.

Q. Okay. And so the information that a Customer CARE Advocate would provide to a customer about a recall software update, where would the Customer CARE department get that information so that they could provide the consumer with that?

A. I believe they would get that information from the service department.

Q. And so do you have -- do you find that the description of the recall action in this document to the consumer is an adequate description of the recall action that was 2306?

A. Yes, I would consider that an adequate response.

Q. Okay. And even though it doesn't include information on the parts of that software update that were, in fact, the steering wheel angle recognition feature and the start function?

A. Yes.

Q. And why is that?

A. Well, there's no date on this either,

1 Ms. Reporter.
2 **BY MR. MONAHAN:**
3 **Q. Mr. Johnson, anything you'd like to**
4 **clarify about that answer.**
5 A. So, yes. In my answer I talk about
6 the steering wheel angle and the switching of
7 the start mode from road -- or from dyno to road
8 as implementing a defeat device, and I would
9 characterize it as enhancements that were added
10 to the existing defeat device.
11 **Q. When you were referring to an**
12 **existing defeat device, are you referring to**
13 **defeat device that was included in the cars at**
14 **production?**
15 A. Yes.
16 **Q. Okay. No further questions.**
17 **RE-EXAMINATION**
18 **BY MS. BECKMAN:**
19 **Q. I have a few follow-up questions for**
20 **you.**
21 A. Sure.
22 **Q. You were talking just now along the**
23 **same lines of adding the steering wheel**
24 **recognition feature.**
25 A. Mm-hmm.

1 **Q. And what we were calling the**
2 **start/stop, where you switched the car from**
3 **starting in test mode to starting in road mode;**
4 **right?**
5 A. Yes.
6 **Q. These were both added as part of the**
7 **recall software in late 2014, earlier 2015?**
8 A. That is correct.
9 **Q. The steering wheel recognition**
10 **feature device did not lower emissions; did it?**
11 **It had nothing to do with lowering emissions?**
12 A. That is correct.
13 **Q. In fact, it was designed to do the**
14 **opposite; it was designed to help the car stay**
15 **in road mode?**
16 MR. MONAHAN: Objection; compound.
17 THE WITNESS: Yes, that is correct.
18 **BY MS. BECKMAN:**
19 **Q. Same thing with the start/stop**
20 **device, it had nothing to do with lowering**
21 **emissions?**
22 A. That is correct.
23 **Q. It instead would help the car to**
24 **operate more frequently in road mode than in**
25 **test mode?**

1 A. That is correct.
2 **Q. And after all of that software was**
3 **added, the car still did not perform as well on**
4 **the road as they did in test mode as far as**
5 **emissions; did they?**
6 A. That's correct.
7 **Q. And according to the EPA, they still**
8 **did not meet regulations as far as emissions?**
9 A. They did not meet the regulations --
10 they did not meet the standards that are
11 published for the FTP cycle.
12 **Q. Which are the regulations that the**
13 **EPA uses and what they're trying to test for;**
14 **right?**
15 A. Only when they run the car on an FTP.
16 **Q. But, again, and we had this**
17 **discussion, that's their way of trying to**
18 **simulate how a vehicle is going to emit on the**
19 **road?**
20 MR. MONAHAN: Asked and answered.
21 THE WITNESS: Yes.
22 **BY MS. BECKMAN:**
23 **Q. I had asked you earlier about a**
24 **portion of your deposition that you gave in**
25 **August. I'm now going to hand it to you,**

1 **Volkswagen Group of America did, in fact,**
2 **disclose the steering wheel angle function to**
3 **EPA in the summer of 2015; is that correct?**
4 MR. MONAHAN: Misstates testimony.
5 THE WITNESS: No. The steering angle
6 function was revealed to the agencies in a
7 meeting on September 3rd, 2015.
8 **BY MS. DINUNZIO:**
9 **Q. Okay. And the start function, when**
10 **was that first disclosed?**
11 A. The same time.
12 **Q. And this is despite the fact that in**
13 **the original documents that were submitted to**
14 **the EPA for approval of the recall, it was not**
15 **disclosed that the steering wheel angle**
16 **recognition feature was part of the software**
17 **update; is that correct?**
18 A. That's correct.
19 **Q. And same question for the start**
20 **function: Also not disclosed in those original**
21 **documents to the EPA?**
22 MR. MONAHAN: Objection to the extent
23 that Ms. DiNunzio's questions assume knowledge
24 at the time.
25 You could answer.

1 THE WITNESS: Yes, that's correct.
2 **BY MS. DINUNZIO:**
3 **Q. Okay. So the fixes that we've been**
4 **talking about earlier today that were approved**
5 **by the EPA for these vehicles --**
6 A. Yes.
7 **Q. -- do they include the original**
8 **defeat device, which I believe was a vehicle**
9 **speed integration over time defeat device, do**
10 **they include that defeat device, the fixes?**
11 MR. MONAHAN: Objection; vague.
12 THE WITNESS: Yes, they do.
13 **BY MS. DINUNZIO:**
14 **Q. Okay. So the vehicle speed**
15 **integration over time is part of the fix that**
16 **the EPA has approved for the TDI vehicles?**
17 MR. MONAHAN: Vague.
18 THE WITNESS: It was in the original
19 software when the vehicle was manufactured new,
20 and it was not removed when the recall software
21 was implemented in November of 2014 or in April
22 of 2015.
23 **BY MS. DINUNZIO:**
24 **Q. Okay. I'm sorry. I'm unclear on my**
25 **question.**

1 **I'm asking about the fixes that we**
2 **were talking about that were approved this year**
3 **post-settlement.**
4 A. Oh, I'm sorry. I thought you were
5 still --
6 **Q. No, no, my fault.**
7 A. No, no. Yeah.
8 **Q. So let me ask the question again.**
9 **The fixes that were approved by the**
10 **EPA, post-settlement with the government, for**
11 **the TDI vehicles that are out there on the road**
12 **today, do those vehicles -- do those fixes for**
13 **those vehicles, do they include the defeat**
14 **device which is the original defeat device, the**
15 **vehicle speed integration over time?**
16 A. No. That's been completely
17 eliminated and written out of the software code.
18 MR. MONAHAN: Object to the term
19 "original defeat device."
20 **BY MS. DINUNZIO:**
21 **Q. Okay. And do the fixes approved by**
22 **the EPA for these TDI vehicles, post-settlement,**
23 **include the steering wheel angle recognition**
24 **feature --**
25 A. No.

1 **Q. -- defeat device?**
2 A. No, it does not.
3 **Q. They do not?**
4 MR. MONAHAN: Objection. Objection
5 to that little thing she added at the end there.
6 THE WITNESS: No, it does not.
7 **BY MS. DINUNZIO:**
8 **Q. Okay. And do the fixes approved by**
9 **the EPA for these TDI vehicles, post-settlement,**
10 **include the start function defeat device --**
11 MR. MONAHAN: Objection.
12 **BY MS. DINUNZIO:**
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TAB 9

CAUSE NO. D-1-GN-16-000370

IN RE VOLKSWAGEN CLEAN DIESEL LITIGATION: TCAA ENFORCEMENT CASES	§	IN THE DISTRICT COURT
THE STATE OF TEXAS,	§	
Plaintiff,	§	
AND	§	
TRAVIS COUNTY, TEXAS,	§	
Plaintiff Intervenor,	§	TRAVIS COUNTY, TEXAS
v.	§	
VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI OF AMERICA, LLC,	§	
Defendants.	§	
TRAVIS COUNTY, TEXAS (TRAVIS COUNTY CAUSE NUMBER D-1-GN-15-004513)	§	353rd JUDICIAL DISTRICT

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S THIRD AMENDED RESPONSES AND OBJECTIONS TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

COMES NOW, Defendant Volkswagen Group of America, Inc. ("VWGoA") and serves the following Third Amended Responses and Objections to Plaintiff's Requests for Admissions pursuant to Rule 198 of the Texas Rules of Civil Procedure.[1]

[1] Given Judge Sulak's ruling at the December 2, 2016 hearing, VWGoA is serving these Third Amended Responses and Objections, but is doing so without waiver of its argument, as outlined in its Motion to Enforce Automatic Stay on file with the Court of Appeals for the Third Judicial District, that the automatic stay of the above-captioned action is currently in effect. VWGoA reserves all of its arguments, including its arguments on appeal, with respect to the automatic stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by email in compliance with the Texas Rules of Civil Procedure on January 9th, 2017 on the following counsel of record.

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PRELIMINARY STATEMENT

These responses to Plaintiff's Requests for Admission ("Requests") are made with specific regard to the laws of the State of Texas, the Texas Rules of Civil Procedure and the specific facts of this case and are not applicable to other cases, facts or circumstances, or the rules and laws of any other state or jurisdiction concerning discovery or theories of causes of action.

Counsel for VWGoA has drafted these responses based upon the current state of VWGoA's knowledge and/or information regarding the information Plaintiff has requested. VWGoA's discovery, investigation and analysis of this matter are continuing. VWGoA reserves the right to amend, supplement or withdraw these responses or any part thereof.

VWGoA is available to meet and confer with respect to these responses, should counsel for Plaintiff wish to do so.

OBJECTIONS APPLICABLE TO ALL REQUESTS

1. VWGoA objects to the Requests to the extent that they purport to require VWGoA to conduct anything beyond a reasonable search for information that is reasonably available.

2. VWGoA further objects to the defined terms "You," "Your," and "VW," and to any Definition, Instruction or Request that incorporates those Definitions, on the ground that such Definitions and any such Definition, Instruction, or Request seek information that is in the possession, custody, or control of persons or entities other than VWGoA, fail to distinguish between distinct corporate entities, and purport to require VWGoA to discern or inquire about relationships between or among entities that are not affiliated with VWGoA. VWGoA will construe these terms to mean VWGoA.

3. VWGoA further objects to the defined term "Affected Vehicles" and to any Definition, Instruction or Request that incorporates it. The term erroneously references vehicles that do not exist, do not have TDI engines, or were not sold or leased in the United States. Affected Vehicles should be defined as, and a correct list of Affected Vehicles should only include, the below vehicles:

- 2.0L vehicles: VW Jetta (2009-2015); VW Jetta Sportwagen (2009-2014); VW Beetle (2013-2015); VW Beetle Convertible (2013-2015); Audi A3 (2010-2013 and 2015); VW Golf (2010-2015); VW Golf Sportwagen (2015); and VW Passat (2012-2015), and
- 3.0L vehicles: VW Touareg (2009-2016); Audi A6 quattro (2014-2016); Audi A7 quattro (2014-2016); Audi A8L (2014-2016); Audi Q5 (2014-2016); and Audi Q7 (2009-2015).

RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSIONS

1. You equipped the Affected Vehicles with 2.0 Liter TDI engines with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

RESPONSE: VWGoA denies this Request.

VWGoA objects to the undefined phrases "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

2. Your equipping the Affected Vehicles with 2.0 Liter TDI engines with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions was an intentional decision made by you.

RESPONSE: VWGoA denies this Request, and refers Plaintiff to VWGoA's denial of Request for Admission No. 1.

VWGoA objects to the undefined phrases "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

3. You equipped the Affected Vehicles with 3.0 Liter TDI engines with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

RESPONSE: VWGoA denies this Request.

VWGoA objects to the undefined phrases "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

4. Your equipping the Affected Vehicles with 3.0 Liter TDI engines with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions was an intentional decision made by you.

RESPONSE: VWGoA denies this Request, and refers Plaintiff to VWGoA's denial of Request for Admission No. 3.

VWGoA objects to the undefined phrases "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

5. The Affected Vehicles with 2.0 Liter TDI engines were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

RESPONSE: VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA understands and thereby admits, however, that software in the Affected Vehicles with 2.0 Liter TDI engines enables the vehicles' emission control modules to detect when the vehicles are being driven on the road, rather than being tested, and that this software renders certain emission control systems in the vehicles inoperative when the emission control module detects the vehicles are not undergoing testing procedures, resulting in excess emissions when the vehicles are driven on the road.

VWGoA objects to Request for Admission No. 5 to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA further objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

6. The Affected Vehicles with 3.0 Liter TDI engines were equipped with emission control equipment that had been designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions.

RESPONSE: VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA understands and thereby admits, however, that software in the Affected Vehicles with 3.0 Liter TDI engines enables the vehicles' emission control modules to detect when the vehicles are being driven on the road, rather than being tested, and that this software renders certain emission control systems in the vehicles inoperative when the emission control module detects the vehicles are not undergoing testing procedures, resulting in excess emissions when the vehicles are driven on the road.

VWGoA objects to Request for Admission No. 6 to the extent it seeks information that is in the possession, custody or control of third parties, including VWAG. VWGoA did not manufacture any of the vehicles at issue or design the referenced emission control equipment. VWGoA further objects to the undefined terms "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

7. You sold in the State of Texas Affected Vehicles with 2.0 Liter TDI engines.

RESPONSE: VWGoA admits this Request insofar as it sold new Affected Vehicles solely to authorized VW and Audi dealerships in the State of Texas.

8. You sold in the State of Texas Affected Vehicles with 3.0 Liter TDI engines.

RESPONSE: VWGoA admits this Request insofar as it sold new Affected Vehicles solely to authorized VW and Audi dealerships in the State of Texas.

9. You offered for sale in the State of Texas Affected Vehicles with 2.0 Liter TDI engines.

RESPONSE: VWGoA admits this Request insofar as it sold new Affected Vehicles solely to authorized VW and Audi dealerships in the State of Texas.

VWGoA objects to the phrase "offered for sale" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean sold.

10. You offered for sale in the State of Texas Affected Vehicles with 3.0 Liter TDI engines.

RESPONSE: VWGoA admits this Request insofar as it sold new Affected Vehicles solely to authorized VW and Audi dealerships in the State of Texas.

VWGoA objects to the phrase "offered for sale" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean sold.

11. You leased in the State of Texas Affected Vehicles with 2.0 Liter TDI engines.

RESPONSE: VWGoA denies this Request.

12. You leased in the State of Texas Affected Vehicles with 3.0 Liter TDI engines.

RESPONSE: VWGoA denies this Request.

13. You offered for lease in the State of Texas Affected Vehicles with 2.0 Liter TDI engines.

RESPONSE: VWGoA denies this Request.

VWGoA objects to the phrase "offered for lease" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean leased.

14. You offered for lease in the State of Texas Affected Vehicles with 3.0 Liter TDI engines.

RESPONSE: VWGoA denies this Request.

VWGoA objects to the phrase "offered for lease" on the grounds that it calls for a legal conclusion and is otherwise vague and ambiguous. VWGoA is construing that phrase to mean leased.

15. As of June 3, 2016 you have not disabled or removed emission control equipment from the Affected Vehicles with 2.0 Liter TDI engines that was designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions when operated on Texas streets, roads, and/or highways.

RESPONSE: VWGoA admits that, as of June 3, 2016, VWGoA had not disabled or removed the referenced emission control equipment from 2.0 Liter Affected Vehicles in the possession of Texas consumers.

VWGoA objects to the undefined terms "disabled," "removed," "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

16. As of June 3, 2016, you have not disabled or removed emission control equipment from the Affected Vehicles with 3.0 Liter TDI engines that was designed or modified so that the emission control equipment resulted in lowered emissions during emission testing procedures when compared to actual driving conditions when operated on Texas streets, roads, and/or highways.

RESPONSE: VWGoA admits that, as of June 3, 2016, VWGoA had not disabled or removed the referenced emission control equipment from 3.0 Liter Affected Vehicles in the possession of Texas consumers.

VWGoA objects to the undefined terms "disabled," "removed," "emission control equipment," "emission testing procedures," and "actual driving conditions" on the grounds that they are vague, ambiguous, and without a clear meaning. VWGoA is construing those terms according to their ordinary and usual meaning. VWGoA also objects to the undefined term "emissions" on the grounds that it is vague, nonspecific and ambiguous. VWGoA is construing that term to mean NOx.

TAB 10

new
1-1-95

IMPORTER AGREEMENT

between

VOLKSWAGEN AKTIENGESELLSCHAFT

- hereinafter referred to as "VWAG" -

and

VOLKSWAGEN OF AMERICA, INC.

- hereinafter referred to as "VWOA"

A. GENERAL PRINCIPLES

Article 1	Subject of the Agreement
Article 2	Definitions
Article 3	VWoA's Legal Status
Article 4	Area of Primary Responsibility

B. DUTIES AND SERVICES OF VWAG

Article 5	Supplies
Article 6	Advice and Assistance
Article 7	Identifications and Trademarks
Article 8	Warranty

C. DUTIES AND SERVICES OF VWoA

Article 9	Equipment and Organization of VWoA's Enterprise
Article 10	Development and Support of Contractual Enterprises (Dealer Network)
Article 11	Purchase of Contractual Products
Article 12	Sale of Contractual Products
Article 13	Purchase Price, Terms of Sale and Delivery, Terms of Payment
Article 14	Inventory and Assortment
Article 15	Marketing, Sales Promotion and Public Relations
Article 16	After Sales Service
Article 17	Personnel and Training of Contractual Enterprises
Article 18	Advice and Assistance to Contractual Enterprises, Business Management
Article 19	Warranty, Warranty Administration and Auditing
Article 20	Extended Warranty, Marketing Costs
Article 21	Reports

D. TERM AND TERMINATION OF AGREEMENT

Article 22	Term of Agreement
Article 23	Ordinary Termination
Article 24	Short Notice of Termination
Article 25	Termination with Immediate Effect
Article 26	Procedures upon Termination of Agreement

E. GENERAL PROVISIONS

Article 27	Form, Relationship with Previous Agreements, Authority to Sign on Behalf of VWAG
Article 28	Transferability
Article 29	Partial Invalidity
Article 30	Failure to Exercise Rights
Article 31	Liability
Article 32	Place of Performance, Jurisdiction and Applicable Law

Attachments:

Appendix 1	Contractual Products
Appendix 2	Affiliated Companies of VWAG
Appendix 3	VWAG's Terms of Sale and Delivery of Importers
Appendix 4	Trade Marks
Appendix 5	Principles for the Determination of Transfer Prices
Appendix 6	Consumer Product Warranties
Appendix 7	Recall Actions

WHEREAS VOLKSWAGEN AG, a corporation organized under the laws of Germany and maintaining offices at Wolfsburg, Germany ("VWAG") is engaged in the manufacture of high quality products designed to satisfay the requirements of a wide range of purchasers throughout the world, including the United States of America.

WHEREAS VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation with offices at 3800 Hamlin Road, Auburn Hills, Michigan 48326 ("VWoA") has served for many years as the importer, distributor and marketer of Volkswagen vehicles and other Volkswagen products in the Continental United States and Hawaii;

WHEREAS VWAG offers to continue supplying VWoA with Volkswagen vehicles and other Volkswagen products;

WHEREAS VWoA desires to purchase such vehicles and other Volkswagen products from VWAG; and

WHEREAS VWAG AND VWOA desire to continue their contractual relationship based upon mutual understanding, cooperation, trust and confidence;

NOW THEREFORE, VWAG AND VWOA have entered into the following

IMPORTER AGREEMENT

A. GENERAL PRINCIPLES

Article 1
Subject of the Agreement

VWAG appoints VWoA as an importer of Volkswagen vehicles and other Volkswagen products, all as described in Appendix 1, for the area of primary responsibility defined in Article 4. VWoA agrees to accept such appointment and to assume responsibility for the importation, distribution, marketing and sale of such products through retail enterprises. In particular, VWoA shall perform all the duties assumed by it under this Agreement, shall exhaust fully all market opportunities for such products within such area of responsibility and shall promote in all respects the image and good reputation of any products and services covered by this Agreement, as well as the good reputation of VWAG, any affiliated companies of VWAG and any Volkswagen retail enterprises.

Article 2
Definitions

a) "Contractual Products" as used in this Agreement means all those products listed in Appendix 1, as modified from time to time pursuant to Article 5 (d).

b) "Volkswagen Distribution Organization" as used in this Agreement means the importers and distributors throughout the world authorized by VWAG to sell and/or service Contractual Products, together with the enterprises at the wholesale and retail levels duly authorized by them.

c) "Contractual Enterprises" as used in this Agreement means all enterprises within VWoA's Area of Primary Responsibility as defined in subparagraph d) which are authorized pursuant to written agreements to distribute, sell and/or service Contractual Products.

d) "Area of Primary Responsibility" as used in this Agreement means the area specified in Article 4 (a), as modified by VWAG pursuant to Article 4 (b).

Article 3
VWoA's Legal Status

VWoA shall carry on all business pursuant to this Agreement as an independent entrepreneur on its own behalf and for its own account. VWoA is not an agent or representative of VWAG and shall not act or purport to act for the account of or on behalf of VWAG.

Article 4
Area of Primary Responsibility

a) VWoA assumes primary responsibility for the continental United States and Hawaii, which shall be referred to hereafter as the "Area of Primary Responsibility".

b) VWoA shall neither advertise nor employ the service of agents nor in any other manner solicit for business outside the Primary Territory of Responsibility.

c) In the interest of a well planned and effective sales organisation, VWoA shall sell the Contractual Program only to members of the Contractual Enterprises.

B. DUTIES AND SERVICES OF VWAG

Article 5
Supplies

a) Subject to the availability of Contractual Products and constraints relating to deliveries by suppliers of VWAG, VWAG shall supply to VWoA Contractual Products as provided in this Article 5. VWAG may arrange to have Contractual Products supplied to VWoA pursuant to this Agreement by any of VWAG's affiliated companies identified in Appendix 2, as amended by the Parties from time to time.

b) Contractual Products shall be supplied in accordance with technical specifications previously agreed upon by VWAG and VWoA and in accordance with "VWAG's Terms of Sales and Delivery for Importers" set forth in Appendix 3 as amended by VWAG from time to time.

In case VWAG has caused one of its Affiliated Companies to supply Contractual Products to VWoA, the terms of sale and delivery of such affiliated company shall be applicable.

c) VWoA shall not modify Contractual Products delivered to it without the prior written approval of VWAG. However, to the extent that VWAG deems modification of Contractual Products necessary or desirable because of technical considerations, VWAG may at any time prior to shipment modify the Contractual Products to be delivered to VWoA, or may require VWoA to modify the Contractual Products at VWAG's expense.

d) VWAG and VWoA may agree from time to time to modify the technical specifications of Contractual Products, whereupon Appendix 1 will be deemed amended accordingly.

Article 6
Advice and Assistance

a) VWAG shall, to the extent it deems appropriate, advise and assist VWoA. In particular, if VWAG considers it appropriate, VWAG may supply VWoA with the following materials free of charge as far as possible:

- plans, concepts and programs for the sale of Contractual Products and for the management of its service and parts business;
- sales promotion concepts and materials for Contractual Products;
- training material for the initial and further training of personnel of VWoA and any Contractual Enterprises;
- systems and programs for the planning of VWoA's business activities under this Agreement and for the information and advice of Contractual Enterprises;
- standardized electronic data programs for business administration; and
- service and parts documentation, literature and organizational materials.

VWoA shall employ the above materials and shall use such materials in order to exploit all market opportunities in such manner and to such extent as agreed with VWAG. In the event that there will be a charge for any materials supplied pursuant to this Article 6 (a), VWAG shall obtain VWoA's prior agreement to such charge.

b) In addition, VWAG shall to the extent it deems appropriate:

- commission market surveys in conjunction with VWoA and bear a share of the costs thereof;

- make available to VWoA the experience gained by VWAG in the construction of importer, distributor and dealer facilities;

- assist VWoA by making available field service and special personnel;

- assist VWoA in procuring special tools and workshop equipment.

c) VWAG may cause any of its affiliated companies or any other Party to perform any or all of the duties described in subparagraphs a) and b) above.

d) VWAG shall, to the extent it deems necessary, issue summaries of experience it has gained in sales and after sales service of Contractual Products in areas outside the Area of Primary Responsibility and communicate such summaries to VWoA.

e) VWAG will under no circumstances be obligated to perform any acts in the Area of Primary Responsibility or send any personnel into the Area of Primary Responsibility in carrying out its obligations under this Agreement.

Article 7
Identifications and Trademarks

It is in the mutual interest of VWAG and the Volkswagen Distribution Organization to identify their activities and the services in a uniform manner on a worldwide basis.

a) VWoA shall accordingly be entitled and obligated to make use of the trademarks and service marks set forth in Appendix 4, as amended by VWAG from time to time, exclusively in connection with its activities pursuant to this Agreement and shall display the said marks prominently on its premises and on its stationery and business forms. In order to preserve the integrity of the said marks and maintain uniform and consistent product identification; VWoA shall employ the said marks only in the form and for the purposes

prescribed by VWAG. VWAG will make specimens of the said marks available to VWo'A.

b) VWAG consents to the use by VWoA of the word "Volkswagen" as part of its corporate name "Volkswagen of America, Inc". This authorization is non-exclusive and non-transferable and is not intended to extend to any other business or corporate name which VWoA may wish to adopt in the future. In addition, this authorization shall automatically terminate forthwith in the event of any permanent or temporary inability of VWAG to exercise freely the rights resulting from its ownership by VWAG of less than fifty-one (51 %) percent of the capital stock of VWoA. Except as expressly provided in this paragraph, VWoA shall not use and shall not permit any Contractual Enterprise to use, as part of its corporate or business name, any of the trademarks or service marks set forth in Appendix 4, as amended by VWAG from time to time, unless it shall have obtained prior written approval from VWAG.

c) VWoA shall take, at its own expense, but in the name of VWAG, all measures, including the institution and prosecution of lawsuits, which may be reasonably required to prevent unauthorized use within the Area of Primary Responsibility of the trademarks and service marks set forth in Appendix 4, as amended by VWAG from time to time. VWoA shall keep the legal department of VWAG informed of all of VWoA's activities under this paragraph, shall furnish the legal department of VWAG with reports of such activities as requested by VWAG and shall comply with all reasonable instructions given to it by VWAG with respect thereto.

d) VWAG shall be responsible for, and shall pay all fees required to be paid in connection with the registration or continued registration in the United States of the trademarks and service marks set forth in Appendix 4, as amended by VWAG from time to time, and shall, at its own expense, take all measures, including the prosecution of lawsuits, which may be reasonably required to prevent the registration in the Area of Primary Responsibility of any trademark or service mark set forth in Appendix 4, as amended by VWAG from time to time.

e) VWoA shall give due consideration to causing its premises and those of the Contractual Enterprises, to the extent possible, to conform to the identification program issued by VWAG from time to time.

f) Except as otherwise agreed between the contracting Parties in writing, VWoA, in order to maintain uniform and consistent product identification, shall sell and service Contractual Products under the designations specified by VWAG and shall cause the Contractual Enterprises to do the same.

g) VWoA shall cause its Contractual Enterprises to comply with its requirements relating to used car sales if such sales are carried out under any trademarks of VWAG licensed to such Contractual Enterprise.

Article 8
Warranty

VWAG MAKES NO WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, AS TO CONTRACTUAL PRODUCTS TO BE SUPPLIED BY VWAG TO VWOA, INCLUDING, BUT NOT BY WAY OF LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF SUCH CONTRACTUAL PRODUCTS, AND, EXCEPT AS EXPRESSLY PROVIDED IN ARTICLE 20 OF THIS AGREEMENT TO THE CONTRARY, VWAG SHALL BE UNDER NO LIABILITY WHATSOEVER, WHETHER FOR DIRECT, INDIRECT OR CONSEQUENTIAL DAMAGES WHERESOEVER OCCURRING AND HOWSOEVER CAUSED, OR IN ANY OTHER WAY IN CONNECTION WITH SUCH CONDITION. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT TO THE CONTRARY, ALL WARRANTIES OR LIABILITIES OF VWAG WITH RESPECT TO THE CONDITION OF CONTRACTUAL PRODUCTS TO BE SUPPLIED TO VWOA, WHETHER BY EXPRESS CONTRACT, IMPLICATION OR OPERATION OF LAW, ARE EXCLUDED.

C. DUTIES AND SERVICES OF VWOA

Article 9
Equipment and Organization of VWoA's Enterprise

a) Performance by VWoA of its obligations pursuant to this Agreement requires VWoA to meet adequate standards regarding financing, assets and personnel. The effectiveness of VWoA's enterprise and of the Contractual Enterprises depends largely on meeting such standards. These standards include, but are not limited to the following requirements:

aa) VWoA shall take steps necessary to maintain financial liquidity adequate for the conduct of its business and the maintenance of an appropriate balance sheet.

bb) VWoA shall maintain adequate facilities and equipment for all its activities pursuant to this Agreement, to such an extent as agreed upon with VWAG. In particular, VWoA shall have for this purpose sufficient storage area for new vehicles, spare parts warehousing facilities, appropriate workshop and service training facilities and related equipment and shall make available to the Contractual Enterprises a technically up-to-date data processing and communications system.

b) VWoA shall determine any of the requirements it deems necessary for the proper performance of its business activities in conjunction with VWAG, and for this purpose VWoA shall give due consideration to the summaries made available pursuant to Article 6 (d) of this Agreement.

c) VWoA shall employ suitably qualified personnel in sufficient numbers for the proper execution of its duties and obligations under this Agreement.

d) VWoA shall organize its enterprise in such a way that all its internal and external business activities can be performed effectively and in accordance with the demands of the market.

Article 10
Development and Support of Contractual Enterprises (Dealer Network)

a) The Parties agree that the successful sale of Contractual Products requires an effective Volkswagen Distribution Organization. VWoA therefore, based on a sales network planning schedule to be developed by it after consultation with VWAG, shall form and maintain within the Area of Primary Responsibility a sales network exemplary in the field of sales, service and parts supply.

b) VWoA shall conclude agreements with the Contractual Enterprises based upon uniform terms and conditions prepared by it from time to time after due consultation with VWAG.

c) VWoA shall assist and advise the Contractual Enterprises, particularly as provided in Article 15 and 18 of this Agreement. In doing so, VWoA shall make use of the services rendered by VWAG and described in Article 6 to such extent as VWoA deems appropriate.

Article 11
Purchase of Contractual Products

a) The Parties recognize that sales and supply planning is necessary for VWoA to exploit market opportunities as well as for VWAG to plan and effectively utilize its production capacity. Accordingly, VWoA and VWAG shall negotiate and agree upon VWoA's annual sales objectives and delivery schedules for Contractual Products.

b) VWoA's annual sales objectives established pursuant to paragraph (a) above, shall be determined not later than June 30th preceding the year to which the objectives apply, shall be in writing and specify the volume and delivery schedule of Contractual Products broken down by type, model and standard as well as optional equipment.

c) On the basis of and consistent with VWoA's annual sales objectives established pursuant to paragraph a) above, VWoA shall place firm orders with VWAG once a month, or more frequently, if the Parties so desire, which shall specify volume broken down by type, model, standard as well as optional equipment, and expected delivery dates.

d) In the event VWoA is not able to place firm orders for Contractual Products in a manner which is consistent with VWoA's annual sales objectives referred to in paragraph (a) above, VWoA shall promptly notify VWAG in writing of its inability to do so and, in consultation with VWAG, establish revised annual sales objectives which are achievable in view of the competitive conditions prevailing in the Area of Primary Responsibility.

e) VWAG agrees to deliver to VWoA Contractual Products pursuant to VWoA's

firm purchase orders which are consistent with VWoA's annual sales objectives or any revised annual sales objectives, and in accordance with the Terms of Sale and Delivery set forth in Appendix 3 as amended from time to time.

f) In the event that VWAG is not able to deliver to VWoA Contractual Products in accordance with VWoA's firm orders pursuant to subparagraph c) above, VWAG shall promptly notify VWoA in writing of its inability to do so and VWoA, in consultation with VWAG, shall establish revised annual sales objectives for the Area of Primary Responsibilty.

Article 12
Sale of Contractual Products

a) VWoA shall arrange for the delivery and distribution of Contractual Products within its Area of Primary Responsibility. In order to achieve its annual sales objectives, VWoA shall establish with the Contractual Enterprises the sales objectives to be achieved by each Contractual Enterprise.

b) VWoA shall, without prior written approval of VWAG, neither directly nor indirectly sell, market, or purport to be the selling agent, for new or unused motor vehicles which compete with Contractual Products and/or conclude distribution and/or service agreements for any goods which compete in the Area of Primary Responsibility with Contractual Products manufactured by VWAG or any company affiliated with VWAG.

c) Also, without VWAG's prior written approval, VWoA will not enter into any agreements or arrangements to promote the sale of goods or services from its business premises unless such activites do not affect in any regard VWAG's business interests.

Article 13
Purchase Price, Terms of Sale and Delivery, Terms of Payment

a) VWoA and VWAG shall negotiate and agree upon prices for the delivery of Contractual Products which are established in advance of the date of shipment to the United States and are calculated using a VWoA resale price based distributor margin formula to be agreed upon by the Parties in accordance with Appendix 5.

b) The price of any Contractual Product may not be modified except by a written agreement executed by both Parties.

c) VWAG shall sell the Contractual Products to VWoA at prices established in accordance with paragraphs a) and b) above and applicable on the day of shipment and in accordance with VWAG's Terms of Sale and Delivery for Importers set forth in Appendix 3, except that Sections III and IV of such Terms of Sale and Delivery for Importers are expressly excluded.

d) The Parties shall from time to time agree upon the terms of payment by VWoA to VWAG for the supply of Contractual Products and the rendering of services as specified in Article 6 of this Agreement.

Article 14
Inventory and Assortment

a) In order to enable VWoA to exploit market opportunities in the Area of Primary Responsibility, VWoA and its Contractual Enterprises shall at all times maintain inventory of Contractual Products in quantities sufficient to meet its sales objectives. VWoA shall maintain inventory sufficient to compensate for fluctuations in sales and deliveries. The assortment in inventory should correspond to the turnover of the respective Contractual Products.

b) VWoA shall maintain the inventory using equipment and devices necessary to keep the Contractual Products in merchantable condition.

Article 15
Marketing, Sales Promotion and Public Relations

a) VWoA shall establish and employ in the Area of Primary Responsibility marketing and public relations objectives and strategies which promote the reputation and image of VWAG and Contractual Products within guidelines established by VWAG. In developing such objectives and strategies, VWoA shall see to it that its activities are not inconsistent with any marketing and public relations plans, concepts and programs which VWAG has made available to VWoA from time to time.

b) In addition to the plans, concepts and programs made available by VWAG, VWoA shall develop and use additional marketing and advertising methods and activities in accordance with the guidelines of VWAG and in accordance with the development of VWoA's sales. VWoA shall make available to VWAG, samples of such advertising including the corresponding materials for reproduction and copying. VWoA shall ensure that VWAG is entitled to use such advertising by entering into copyright agreements to that effect.

c) VWoA shall provide for a marketing and advertising budget and shall expend not less than a percentage agreed upon with VWAG of the price of the vehicles listed in the sales objectives for marketing and advertising activities.

d) In advance of each calendar year or upon request of VWAG, VWoA shall report to VWAG concerning its public relations plans including shows and exhibitions proposed for the following calendar year, including its objectives, a description of activities and expenditures budgeted for the year to finance these activities.

e) VWoA shall reasonably consider to cooperate in any marketing and advertising campaign or activities designed by VWAG to be carried out by VWoA in the Area of Primary Responsibility. The extent and nature of such cooperation as well as the financial participation will be agreed in advance with VWAG.

f) VWoA shall assist its Contractual Enterprises to cooperate among each other on a regional basis in conducting marketing and advertising campaigns and shall participate actively in developing such campaigns.

g) In order to promote and improve the sales of the Contractual Products, VWoA shall cause its Contractual Enterprises to engage in business activities in respect of used cars including lease cars. VWoA shall provide assistance by way of organizational and promotional activities to its Contractual Enterprises.

For this purpose VWoA shall cause its Contractual Enterprises, among other things, to

- maintain stocks of used cars in sufficient quantities;
- perform repairs and maintenance services used cars;
- endeavour to take competing used cars in trade.

Article 16
After Sales Service

a) VWoA shall establish, develop and maintain a competent, effective and customer oriented after sales service to be provided through its Contractual Enterprises for Contractual Products. In providing such services, VWoA shall make every efforts to build and maintain good relationships between Contractual Enterprises and users of Contractual Products.

b) VWoA and/or its Contractual Enterprises shall, in accordance with VWAG's instructions, guidelines and/or procedures

- take delivery of, store as well as perform predelivery inspection and service of each vehicle prior to sales and delivery thereof; to the consumer;

- warranty repairs and/or service and repair Contractual Products as set forth in Appendix 6 regardless of where purchased;

c) VWoA shall cause its Contractual Enterprises to perform campaign inspections and/or corrections for users of Contractual Products including recall campaigns. VWAG may require campaign inspections and/or corrections whenever it deems such inspections and/or corrections to be necessary and may direct such campaigns to be carried out as referred to in Article 5 (c). Upon notice of a recall or service campaign affecting a particular

Contractual Product, VWoA shall cause its Contractual Enterprises to perform such campaigns, inspections and/or corrections on all affected Contractual Products whenever or wherever made available to them.

d) The aforementioned services are provided for the benefit of users of Contractual Products. Accordingly, VWoA shall not impose any charge on such users for parts, materials or labour for which VWoA will be reimbursed by VWAG.

e) All maintenance work and/or repairs carried out shall be in accordance with VWAG's instructions, guidelines and/or procedures.

f) VWoA shall provide for use in its service operations and service system such workshop equipment, special tools and measuring and test devices according to VWAG's guidelines as are necessary to meet the service obligations hereunder.

g) VWoA shall employ and designate qualified personnel which shall be responsible for promptly and courteously resolving consumer complaints on behalf of VWoA.

Article 17
Personnel and Training of Contractual Enterprises

a) VWoA shall cause its Contractual Enterprises to employ a sufficient number of qualified personnel, in particular sales and aftersales personnel.

b) For the purpose of the initial and follow-up training of personnel, VWoA shall in agreement with VWAG, hold training courses and seminars on all relevant technical and commercial subjects and, to this extent, shall make available instructors, training methods, equipment and facilities. In addition, VWoA shall make available in-dealership training and self-study programs to Contractual Enterprises. VWAG shall, if VWoA so requests, render technical assistance or provide advice with respect to training methods and materials based on experience gained by it in areas outside the Area of Primary Responsibility.

Article 18
Advice and Assistance to Contractual Enterprises, Business Management

a) VWoA shall provide expert advice to Contractual Enterprises by having available a sufficient number of field service and specialist personnel.

b) To the extent VWoA deems it appropriate, VWoA shall employ the VWAG Business Management System, shall introduce such System to the Contractual Enterprises and shall have experts advise Contractual Enterprises on business management matters. VWoA shall also ensure that VWoA's standardized data processing and communications programs are compatible with VWAG's standardized data processing and communications programs as well as those programs as utilized by the Contractual Enterprises so as to ensure effective administration including but not limited to order processing and adequate inventory control by the Contractual Enterprises.

Article 19
Warranty, Warranty Administration, Recall and Auditing

a) Contractual Products sold by VWoA shall be warranted by VWoA to the ultimate consumer in accordance with terms and conditions of warranty approved by VWAG (Appendix 6). VWoA agrees that all its sales of Contractual Products shall be made in such a manner that the customer acquires all rights in accordance with VWoA's warranties, to the exclusion of any other, further or different warranties.

b) VWAG shall reimburse to VWoA the warranty costs it has expended pursuant to paragraph a) above, including recall costs (Appendix 7) and service action costs. Recall and service actions will always be initiated by the service department of VWAG.

Reimbursement shall apply to

- US dealer's labor cost
- material cost calculated on cost price level VWoA (VWAG price list C plus landed cost VWoA) and additionally dealers' handling charge to the extent to be agreed between the Parties from time to time. Any increase of the

handling charge to be reimbursed shall be subject to prior approval by VWAG.

c) The execution of warranty shall be in accordance with the guidelines issued by VWAG from time to time.

d) VWoA shall be responsible for reducing the warranty costs by means of its own warranty cost reduction programs. VWAG shall continuously be kept informed by VWoA about the annual objectives and their achievement.

e) VWoA shall provide VWAG with information pertaining to warranty matters to the extent and in the manner determined by VWAG. VWoA shall upon request of VWAG make warranty parts available to VWAG for investigation.

VWoA shall maintain a modern computer communications and processing system for the acceptance and disposition of warranty claims received from its retailers consistent with the guidelines pursuant to subparagraph c) which is compatible with VWAG's system to enable VWAG to track warranty cost projections. VWoA shall make use of VWAG's part identifier, damage and vendor codes, primary cause designation and any other available codes necessary to communicate with VWAG. The system shall have the capability of editing retailer warranty claims and permit prompt payment to VWoA's retailers of justified claims.

f) Once a month on a date to be determined by VWAG, VWoA shall submit to VWAG its invoices for warranty costs incurred by it, including, but not limited to, all costs for recall actions and service actions. The invoices shall include a summary description of each claim including an accounting of the amounts disbursed by VWoA to its retailers for parts, labor and other items.

VWoA invoices shall be paid by VWAG within 30 days of the date of the invoice. In the event VWAG disputes the accuracy or appropriateness of a warranty claim, VWAG shall pay the invoice including the disputed claim when due and shall be reimbursed by VWoA promptly if the dispute is resolved in favor of VWAG.

g) VWAG shall have the right at any time to audit VWoA's implementation and administration of its warranties as previously approved by VWAG. In the event VWAG's audit identifies practices, procedures or individual instances

which have caused VWoA to make payments to dealers outside the scope of VWoA's warranty obligations towards its retail customers or payments beyond reasonable and necessary assistance, VWAG, in its discretion, may require VWoA to credit VWAG the amount of such payments.

h) In case VWAG has caused Contractual Products to be supplied by Affiliated Companies of VWAG for their own account, the terms of warranty of such companies shall replace the Warranty Conditions contained in Appendix 6.

Article 20
Extended Warranty, Marketing Costs

VWoA shall be responsible for certain other product related costs, including the following costs:

1. Cost of repair or replacement of wear and tear items which fail due to normal wear and tear within 12 months or 12,000 miles, whichever occurs first;

2. Costs of towing to the nearest dealer of a vehicle covered by VWoA's consumer product warranties;

3. Costs of a loaner or courtesy vehicle provided to the owner of a motor vehicle which is repaired pursuant to VWoA's consumer products warranties, and due to the time consuming nature of the repair cannot be completed on a timely basis;

4. Costs of improving the performance of a motor vehicle which the owner perceives as unsatisfactory;

5. Costs of arbitration awards rendered pursuant to VWoA's Autoline Arbitration Program or any state arbitration system pursuant to any "lemon" law ordering VWoA to repair a vehicle, refund repair and related costs, including lease payments, or repurchase the motor vehicle;

6. Costs of repair, reimbursement of repair costs or repurchase of a motor vehicle to prevent litigation;

7. Costs of judgments and settlements of Small Claims Court proceedings alleging defects or unsatisfactory performance of the motor vehicle;

8. Costs of trade assistance expended by VWoA to assist a vehicle owner to exchange an unsatisfactory motor vehicle with a new or satisfactory used vehicle.

Article 21
Reports

a) VWoA shall submit to VWAG on a regular basis information as reasonably requested by VWAG concerning, but not limited to, business data, such as, but not limited to, warranty and warranty related matters as well as recall, requirements for the homologation of Contractual Products in the Area of Primary Responsibility, any enactments or changes of any relevant laws and regulations including taxes and customs as well as any other matters which may affect any aspect covered by this Agreement. VWoA shall inform VWAG, in particular, of any modification (approved or proposed) in the laws governing its Area of Primary Responsibility which may affect the manufacturing of vehicles and the regulations governing the use thereof including safety requirements for the Contractual Products.

b) VWoA shall inform VWAG in particular through its regular reports on the development of the market generally and of its own and its contractual business activities within the Area of Primary Responsibility. VWoA shall furnish VWAG with all reasonably requested information relating to any substantial changes concerning any of its Contractual Enterprises in the Area of Primary Responsibility. VWoA shall particularily provide VWAG with a list of its Contractual Enterprises in the Area of Primary Responsibility. VWoA shall deliver such reports in a form and within a time determined by VWAG.

D. TERM AND TERMINATION OF AGREEMENT

Article 22
Term of Agreement

This Agreement shall enter into effect on January 1, 1995 except that the costs indentified in Article 20 of this Agreement shall continue to be reimbursed to VWoA with respect to all 1995 and earlier model year Contractual Products. This Agreement shall terminate on December 31, 1996 and it shall thereafter automatically be renewed for two year periods.

Article 23
Ordinary Termination

This Agreement may be terminated by either Party as of the end of December 31, 1996 or at any subsequent two year period by giving one year's prior written notice to the other Party.

Article 24
Short Notice of Termination

Either Party shall be entitled to terminate this Agreement at any time by giving six (6) months prior written notice in the event of a material breach by the other Party of obligations arising from this Agreement.

Article 25
Termination with Immediate Effect

Either Party to this Agreement may terminate this Agreement, effective upon giving notice of such termination, if the other Party:

- fails to obtain or is deprived of any official approval which may be necessary for the performance of the business activities governed by this Agreement; or

- suffers significant losses or severe damage to its business reputation or financial status (for example, the commencement of bankruptcy or insolvency proceedings, levy or execution upon the assets of said Party or of persons holding a participation therein on account of insolvency, protested checks or bills on account of insolvency); or

- is involved in staff, structural or financial difficulties in its enterprise which cannot be resolved within a reasonable period, where such difficulties endanger the fulfillment of material provisions of this Agreement.

Article 26
Procedures upon Termination of Agreement

Upon effectiveness of termination of this Agreement:

a) VWoA shall without delay.

- cease to make use of any trademarks and service marks ever licensed to VWoA by VWAG in any form whatsoever;

- on request of VWAG, assign, for reasonable compensation, orders not yet executed, to VWAG or to a third Party designated by VWAG, and, on request of VWAG, make available to VWAG or a third Party designated by VWAG all brand-new, unsold Contractual Products which are in perfect condition. The repurchase price of brand-new vehicles shall be VWoA's landed cost price therefor, but not more than VWoA's landed cost price for similar vehicles on the day of repurchase. For all other Contractual Products ten (10 %) percent administration costs shall be deducted from the repurchase price, which shall be calculated in the same manner; and

- surrender all documents and materials made available to it, in particular all special items of equipment and special tools, technical literature and advertising materials, including signs and the like; to the extent that such materials were invoiced when supplied, they will be paid for by VWAG on return at the current trade value less a reasonable deduction.

b) VWAG shall be entitled to cancel in whole or in part orders of VWoA not yet executed. VWoA shall not be entitled to any compensation whatsoever arising therefrom.

c) Except as provided in this Article 26, VWoA shall not be entitled to any claims whatsoever by reason of termination of this Agreement in accordance with Article 23, 24, or 25 except as provided in this Article 26.

E. GENERAL PROVISIONS

Article 27
Form, Relationship with Previous Agreements, Authority to Sign on Behalf of VWAG

a) All amendments or additions to this Agreement and all notices of termination shall be made or given in writing. Any oral agreements are null and void. Any amendment or addition other than an amendment or addition to any Appendix to this Agreement shall be identified in its title as "Addendum No. _", be dated and be executed on behalf of both Parties in accordance with procedures set forth in this Article 27.

b) The following Appendices as amended by VWAG or the Parties respectively from time to time, are attached to this Agreement and form an integral part hereof:

Appendix 1:	Contractual Products
Appendix 2:	Affiliated Companies of VWAG
Appendix 3:	VWAG's Terms of Sale and Delivery for Importers
Appendix 4:	Trade Marks
Appendix 5:	Principles for the Determination of Transfer Prices
Appendix 6:	Consumer Product Warranties
Appendix 7:	Recall Actions

c) Where special formalities must be completed before this Agreement can become valid, VWoA agrees to take the necessary steps at its own expense without delay.

d) Upon the execution of this Agreement by both Parties, any previous agreements between the Parties concerning the business relationship dealt with in this Agreement shall become null and avoid.

Article 28
Transferability

VWoA's rights and duties under this Agreement cannot and shall not be transferred or assigned without the prior written approval of VWAG.

Article 29
Partial Invalidity

In the event any portion of this Agreement is or becomes invalid or unenforceable for any reason, the remaining portion shall continue in force unaffected. In the event that such portion of this Agreement is or becomes invalid or unenforceable in any part of the Area of Primary Responsibility, the validity of such portion in the remaining parts of the said Area shall not be affected thereby.

Article 30
Failure to Exercise Rights

Failure of either Party to this Agreement to exercise any of the rights to which it is entitled under this Agreement shall not be regarded as a waiver of such right and shall not prevent the Party from exercising such right at a later date.

Article 31
Liability

Each Party to this Agreement shall itself bear the commercial risk accruing to it from this Agreement and from its execution. VWAG, in particular, accepts no responsibility for expenses incurred by VWoA in the execution of this Agreement or for undertakings entered into by VWoA hereunder. No provisions of this Agreement shall be interpreted in such a way as to create rights to third Parties against VWAG.

Article 32

Place of Performance, Jurisdiction and Applicable Law

a) The place of the registered offices of VWAG shall be the place of performance for all obligations resulting from this Agreement for either Party.

b) At the option of VWAG, the locally competent court having jurisdiction for the place of the registered offices of VWAG or the competent court for the place of the registered offices of VWoA shall have jurisdiction when VWoA is the defendant in the proceedings. The Parties hereby expressly agree that the court having jurisdiction for the place of the registered offices of VWAG shall have jurisdiction for all litigations when VWAG is the defendant in the proceedings. Notwithstanding the terms of any other agreement between the Parties to the contrary, this Agreement regarding jurisdiction shall also apply to all claims, whether or not based on this Agreement, which may arise in connection with VWoA's activities.

c) The laws of the Federal Republic of Germany shall govern this Agreement, its construction, validity, interpretation and performance, as well as all business relations between the Parties dealt with in this Agreement. The application of "The United Nation's Convention on Contracts for the International Sale of Goods" dated 11.04.1980 is hereby excluded.

Wolfsburg,	Auburn Hills,
VOLKSWAGEN AKTIENGESELLSCHAFT	VOLKSWAGEN OF AMERICA, INC.
By:	
By:	

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Appendix 1 Contractual Products

I. Brand-new Automobiles

1. Vehicles bearing the Volkswagen name in accordance with the tables of types agreed and applicable to the model year in question together with such variations as are approved by VWAG and VWoA.

2. Vehicles from the applicable product range of VWAG for diplomats, tourists and other special customers for use in other countries.

3. Vehicles of subsidiary companies and/or licensees of VWAG in accordance with the agreements made in each case with VWAG.

4. The following products for which the Importer within the terms of the Importer Agreement undertakes the provision of after-sales service and of genuine Volkwagen parts shall also be Contractual Products:

   - those vehicles not covered by the aforementioned tables of types, approved variations, product offers and agreements, and industrial engines

   - and vehicle types no longer produced by VWAG and its subsidiaries

   which are in circulation in the Importer's territory.

II. Aftermarket Service Parts

Genuine Volkswagen parts.

III. Exchange Parts

Genuine Volkswagen exchange parts.

IV. Other Contractual

1. Volkswagen industrial engines in accordance with the separate agreements concluded with VWAG.

2. Votex accessories in accordance with the agreements concluded with Votex Warenhandelsgesellschaft mbH.

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Appendix 2 Affiliated Companies of VWAG

Audi AG, Ingolstadt, Germany

Volkswagen de Mexico S.A. de C.V., Puebla, Mexico

Votex AG, Dreieich, Germany

Volkswagen Canada Inc., Scarborough, Ontario, Canada

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Appendix 3 VWAG's Terms of Sale and Delivery for Importers

I. General Remarks

1. These Terms apply to Contractual Products sold by VWAG to VWoA under the Importer Agreement.

2. The place of the registered offices of VWAG shall be the place of performance for all obligations by either party under these Terms.

3. The laws of the Federal Republic of Germany shall apply to these Terms, their interpretation and their performance. The German version of these Terms shall be the sole authoritative version if questions of interpretation arise.

   The application of "The United Nation's Convention on Contracts for the International Sale of Goods" dated 11.04.80 is hereby excluded.

4. The German court having jurisdiction for the place of the registered offices of VWAG shall have exclusive jurisdiction for all disputes arising from the business relationship governed by these Terms. However, VWAG reserves the right to apply to the court which has jurisdiction for the place of the VWoA's registered offices.

II. Orders

1. VWoA shall submit its orders in writing or in the form of EDP cards for tapes or tele-processing and shall in all cases use the order forms or recording media specified by VWAG.

2. Orders placed by VWoA shall be binding on it unless rejected by VWAG within 4 weeks. VWoA shall not be entitled to any claims whatsoever as a result of its orders having been rejected.

III. Prices

VWAG sells Contractual Products to VWoA at the prices valid on the day of dispatch. VWAG reserves the right to modify prices at any time. If prices are changed between the time of ordering and the day of dispatch VWoA shall pay the price valid on the day of dispatch.

IV. Terms of Payment

1. Unless otherwise agreed, all payments are to be made in US-Dollars (USD) in accordance with the invoice.

2. In principle VWAG delivers Contractual Products only against prepayment. Release for dispatch takes place only following the receipt of the payment or following the opening of an irrevocable letter of credit confirmed by a first class German or international bank and containing a part-shipment clause, provided that the remaining terms of the letter of credit can be fulfilled by VWAG. Payment by cheque or any other mode of payment other than by cash shall not constitute payment until VWAG is entitled to make unrestricted use of the entire amount in US-Dollars (USD)

on one of its accounts in the Federal Republic of Germany. The amount invoiced shall be payable 90 days after the date of issuance of the invoice.

3. The Contractual Products supplied remain the property of VWAG until it is able to make unrestricted use of the entire amount invoiced. VWoA is obliged at its own expense to take all measures necessary in accordance with the laws applicable in the Area of Primary of Responsibility to ensure that the right of ownership of VWAG is not adversely affected.

4. VWoA shall bear all costs incurred with its payments. If VWoA fails to pay any amount on the due date in case payment after dispatch has been agreed, it shall pay on demand overdue interest from the due date to the date of actual payment at a rate of 1 % over 90 days' libor as published on Telerate page 3750.

V. Deliveries

1. The Contractual Products ordered by VWoA will be delivered by VWAG subject to their availability and deliveries of VWAG's suppliers. VWoA shall accept partial deliveries.

2. VWoA shall not have any claim against VWAG for failure to deliver or for delayed delivery if such failure or delay is due to circumstances beyond the control of VWAG, for example natural disaster, force majeure, official ruling, war, disturbance, interruption in transportation facilities, shipwreck, strike, lock-out, confiscation, blockade, fire, shortage of supplies from subcontractors etc. If delivery is delayed because of such circumstances for more than 6 months, VWAG as well as VWoA may rescind the relative purchase orders.

3. If the delivery deadline is exceeded by more than 3 months for reasons other than of that kind listed in (2) above, VWoA may give notice of rescission of the purchase order concerned stating a reasonable period of grace in which delivery must take place. Any further claims by VWoA shall be excluded.

4. VWoA shall not be entitled to any claim against VWAG with respect to premature delivery of Contractual Products.

5. The appropriate version of the "Terms of Sale and Delivery for Volkswagen Industrial Engines" (including warranty terms) as printed on the reverse side of the order confirmation form applies to deliveries of Volkswagen industrial engines.

VI. Delivery Terms

1. Deliveries on the basis of the terms "EXW", "FOB", "FCA", "CFR", take place in accordance with Incoterms 1990 with the following modifications:

   (a) Unless otherwise agreed, VWoA shall at its own expense and within the framework of the VWAG General Transportation Insurance Policy obtain insurance cover from the place of readiness at the manufacturer's works to the destination, including all risks in transit and associated storage, together with war risk, in so far as insurable, provided always that VWoA is able to do so by law.

   (b) Unless otherwise agreed VWAG reserves the right to conclude the shipment and carriage contracts to the destination or cause same to be concluded and to choose the transportation agencies, transportation means and routes. However.

the costs of shipment and carriage are to borne by the party liable thereto under the Incoterms 1990 conditions and said party shall also bear the risk of changes in shipment and carriage rates charged.

(c) Unless otherwise agreed the costs incurred in providing export packing (for instance when shipping overseas) are to be borne by VWoA.

2. If delivery is on a "CIF" basis VWAG will supply in accordance with Incoterms 1990 provided, however, that the provisions of para 1 (c) apply.

3. Deliveries on the basis of the term "DAF" shall take place in accordance with Incoterms 1990 with the exceptions listed under para 1 (a) - (c). In addition the following exceptions apply:

   (a) All costs prepaid by the carrier in connection with customs processing at frontiers shall be borne by VWoA.

   (b) If deviation becomes necessary from the scheduled carriage route VWoA shall bear all differences in cost.

4. In the case of parts returned by VWoA within the framework of the exchange parts program VWAG shall bear the costs of customs duties and clearance as well as of carriage within the Federal Republic of Germany.

VII. Taking Delivery

1. VWoA shall take delivery of the ordered Contractual Products at the agreed place and at the date indicated to it. If VWoA fails to take delivery within the reasonable final period of grace allowed and made known to it by VWAG, VWAG shall be entitled to rescind the purchase contract and to claim the ascertainable losses incurred, but not less than plus five percent of the purchase price together, with the costs of return or redirection of the Contractual Products in compensation.

2. All complaints concerning incomplete or incorrect delivery of Contractual Products shall be submitted to VWAG in writing within 14 days following receipt of the delivery, accompanied by all relevant documents. If VWoA fails to do so, it shall not be entitled to any claims whatsoever. VWAG shall be responsible to VWoA for defective Contractual Products in accordance with the Terms of Warranty which VWoA is required to extend to its retail customers.

3. All details quoted by VWAG regarding performance, weight, fuel consumption, running costs, speed or the characteristic of Contractual Products shall be regarded as approximately only.

VIII. Miscellaneous

1. Without the prior written approval of VWAG, VWoA shall not assign any claims against VWAG wholly or in part to a third party and shall not grant to third parties any entitlements in respect of such claims.

2. All additions or modifications of these Terms of Sale and Delivery shall only be valid if made in writing.

3. If individual provisions of these Terms prove invalid or incapable of execution, the remaining provisions shall be unaffected.

PF

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Appendix 4 Trade Marks

Trade marks according to Article 7 are:

1. Registered signs valid for all identification programmes of VWAG.

2. Registered Volkswagen signs. To be used only in accordance with the guidelines of the various identification programmes.

VOLKSWAGEN

VW

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Status: 03/1994

Appendix 5 Principles for the Determination of Transfer Prices

The transfer prices to be charged to VWoA by VWAG for Contractual Products supplied by VWAG shall be agreed between the Parties by applying the following principles:

1. The basis for determining the transfer prices of the Contractual Products shall be the maximum suggested retail prices realistically achievable under expected market conditions as determined in accordance with Section 2 below as agreed between the Parties. Accordingly, the transfer price, which shall be the FOB-price, is to be computed by deducting from the retail price certain items, including, but not limited to, the following:

   - Suggested dealer margin calculated as a percentage of the suggested retail price,
   - VWoA's margin according to Section 2 below,
   - Customs duties and import fees,
   - Variable costs, including, but not limited to, freight, insurance, handling, port installation etc.

2. VWoA's annual budget based on a mutually agreed upon 12-months'-projected sales volume and respective maximum suggested retail prices for the Contractual Products reasonably expected to be sold in the market shall allow for an adequate margin to be determined in the following manner:

2.1 VWoA's margin is calculated as a percentage of the revenue per vehicle. This margin shall allow VWoA, under normal market conditions and sales and financial performance comparable to other independent distributors, to the extent ascertainable, to cover the following, mututally agreed upon budgeted expenditures including but not limited to:

   a) Normal marketing and sales expenditures for

      - administration,
      - advertising and other sales promotion measures,
      - aids for sales, build out programs,
      - incentive measures,
      - customer financing support, leasing support including, but not limited to residual value support,
      - deferred payments and floor planning
      - enhanced supplemental warranty coverage
      - product support and warranty related costs not reimbursed by VWAG.

   b) Normal warehousing and logistics.

2.2 An appropriate profit shall be achievable under normal market conditions.

3. Any other costs relating to marketing or warehousing which are not covered by VWoA's annual budget and caused by a single, unforeseen and/or extraordinary measure shall be borne by the Party having the predominant business interest in such measure or cost sharing or shall, if appropriate, be shared by the Parties; provided, however, that prior to any such measure the Parties shall agree on such measure or cost sharing.

4. VWoA's margin shall not include costs for warranty, customer satisfaction, repair of serial defects, recalls, product liability and service actions to the extent such costs are borne by VWAG.

5. When determining VWoA's margin the Parties shall give due regard to all significant market conditions such as, but not limited to

   - size of the market
   - intensity of competition
   - inventory levels and turnover sales
   - scope and terms of warranty provided
   - advertising requirements
   - special requirements of the brands
   - extension of credit and payment terms.

   Once a year either party may request a review of VWoA's margins. Any change to the margins may be made only by an agreement in writing signed by each party.

6. VWAG shall furnish to VWoA upon request accurate documentation as may be required by relevant US tax regulations.

7. VWoA, in consultation with VWAG, will exercise its best efforts to reduce its costs and maintain a sales organisation and administrative costs, at a level appropriate for its expected sales volumes.

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Appendix 6 Consumer Product Warranties

1. VWoA warrants to the owner that the Contractual Product is free from defects in material and workmanship in accordance with the following terms:

   - The new vehicle warranty becomes effective on the day of delivery or first service. It is valid for 2 years/24.000 miles whichever occurs first.

   - The power train warranty shall be for

     5 years/50.000 miles,
     10 years/100.000 miles (for model year 1994 and 1995 passenger cars) valid until December 31, 1994,

     whichever occurs first or until the original owner transfers ownership of the vehicle to someone other than an immediate family member.

   - the federal emissions warranty shall be for
     5 years/50.000 miles, whichever occurs first

   - the California emissions warranty shall be for
     7 years/70.000 miles, whichever occurs first

   - the warranty against corrosion perforation shall be for
     6 years.

   - For Volkswagen Industrial Engines the warranty expires after a period of 24 months or with the completion of 1.000 hours of operation, whichever occurs first.

   - For Genuine Spare Parts the warranty period is 12 months.

   - The above mentioned conditions shall be changed from time to time in accordance with new agreements between VWAG and VWoA.

2. Claims for the correction of defects under the warranties may only be lodged with authorized workshops entrusted with the service support of the purchased goods and must be lodged as soon as the defects are detected.

3. The warranty extends, subject to technical requirements, to replacement or repair of the defective parts. Replaced parts become the property of the supplier.

   The costs incurred during work under warranty for the removal and installation of parts shall not be charged to the customer unless these costs were incurred as a result of modifications made to the purchased goods.

   All further claims, particularly with regard to compensation of direct and indirect damage, are excluded (i.e. car hire charges, towing cost).

4. Warranty claims are not justified if the failure reported is caused by:

   - the purchased goods previously being repaired by a non-authorized workshop; or

   - parts being installed in the purchased goods whose use has not been approved by the manufacturer or where the purchased goods were modified in a manner not authorized by the manufacturer; or

   - the purchaser's failure to comply with the specifications relating to the maintenance and use of the purchased goods (service manual, service schedule etc.).

5. Normal wear and tear (for vehicles and genuine parts) is not covered by this warranty. The same applies to damage resulting from incorrect handling or excessive loads being applied (e.g. through involvement in motor sport).

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Appendix 7 Recall Actions

1. Recall actions shall be performed
   - to avoid reasonable and possible damage and/or personal injury related to products of VWAG already on the market, or
   - in compliance with legal requirements and/or agency instructions.

   Recall actions shall generally be performed upon mutual agreement between VWAG and VWoA.

   VWoA shall perform any action in accordance with the instructions and guidelines of VWAG.

2. VWoA shall start any recall action, initiated by VWAG, as soon as VWAG has provided the necessary information. VWoA shall provide VWAG with all technical data necessary for the record keeping of recall actions. VWoA shall inform VWAG immediately after a recall action is completed.

   Recall actions shall be performed by using genuine Volkswagen parts. Parts provided by other manufacturers shall only be used, if such parts have been approved by VWAG in advance.

   VWAG shall provide 100 % of such genuine parts needed for the performance of the recall action. If these parts are not delivered by VWAG they shall be ordered by VWoA in the usual manner.

   VWAG, shall to the extent it deems appropriate, assist VWoA by making field service and special personnel available to VWoA; the costs incurred thereby shall be borne by VWAG.

3. All costs directly resulting from any recall action and all costs associated with a recall action which are caused by VWoA's acting in accordance with VWAG directives, shall be borne by VWAG.

   The costs related to recall actions shall be processed exclusively by WIN (warranty system) in reference to the action code.

   The payment of additional costs, i. e. charges for air freight, will be determined by mutual agreement between VWoA and VWAG.

4. VWoA shall complete recall actions as soon as possible.

   VWoA shall be entitled to return any surplus genuine parts not needed for performing an action in accordance with mutually agreed conditions. Such return shall commence after completion of the recall action and shall be carried out at the latest within two months after completion.

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VOLKSWAGEN AG

VOLKSWAGEN AG · D-38436 Wolfsburg

Mr.
Gerhard P. Riechel
Associate General Counsel and Secretary
Volkswagen of America, Inc.
3800 Hamlin Road
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Dr. jur. Jens Neumann
Dr. Bernd Pischetsrieder
Dr.-Ing. E. h. Folker Weißgerber
Dr. rer. nat. Martin Winterkorn

VOLKSWAGEN
Aktiengesellschaft
Sitz: Wolfsburg
Amtsgericht Wolfsburg
HRB 1200

Re: Amendment to the Importer Agreement between VWAG and VWoA

Dear Mr. Riechel:

Pursuant to your Company's request we like to amend Appendix 4 of the Importer Agreement between Volkswagen Aktiengesellschaft (VWAG) and Volkswagen of America, Inc. (VWoA). Enclosed for your records please find an amended Appendix 4 to Article 7 of such Importer Agreement.

If you have any questions, do not hesitate to contact us.

Sincerely yours
Volkswagen AG

ppa
Deputy General Counsel

i.V.
Head of
Patents, Trademarks, Licensing

Attachment: Appendix 4 to Importer Agreement

2 AUG 01 13 33

g:K-DR-4\Ehinger\Brief\Letter on Appendix 4 to Importer Agreement

Appendix 4 Trade Marks

Trade marks according to Article 7 are:

1. Registered signs valid for all identification programmes of VWAG.

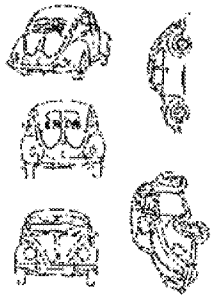
2. Registered Volkswagen signs. To be used only in accordance with the guidelines of the various identification programmes.

   VOLKSWAGEN

   VW

3. VWAG Registered trademarks to be included in the protection program include, but are not limited to:

   All trademarks noted in para.1 and para.2 above.
   All vehicle names including Beetle, New Beetle, Jetta, Golf, Passat, Cabrio and Eurovan.
   All design marks including the classic Beetle and New Beetle vehicle designs and the New Beetle icon:



July 17, 2001

Volkswagen AG

pp.

Deputy General Counsel

i.V.

Head of
Patents, Trademarks, Licensing

g:K-DR-4\Ehinger\Brief\Letter on Appendix 4 to Importer Agreement

AMENDMENT TO IMPORTER AGREEMENT

This Amendment (the "Amendment") to Importer Agreement is entered into by and between VOLKSWAGEN AG, a corporation organized under the laws of Germany ("VWAG") and VOLKSWAGEN GROUP OF AMERICA, INC. (formerly known as "Volkswagen of America, Inc."), a New Jersey corporation ("VWoA").

WHEREAS, VWAG and VWoA are parties to that certain Importer Agreement, effective January 1, 1995 as amended from time to time (the "Agreement"); and

WHEREAS, the parties desire to amend certain provisions of and Appendices to the Agreement.

NOW THEREFORE, VWAG and VWoA hereby amend the Agreement as follows:

1. References in the Agreement to "Volkswagen of America, Inc." are hereby replaced with "Volkswagen Group of America, Inc."

2. Article 4, paragraph (a), is hereby deleted in its entirety and replaced with the following:

"VWoA assumes primary responsibility for the United States of America, including Alaska, Hawaii and the territories of Guam and Puerto Rico, which shall be referred to herein as the "Area of Primary Responsibility"."

3. Appendix 2 is hereby amended and restated in the form attached hereto as Exhibit A to include Volkswagen Group of America Chattanooga Operations, LLC ("VWACO"), as an affiliated company of VWAG.

4. New motor vehicles, aftermarket service parts and exchange parts purchased by VWoA from VWACO shall be considered "Contractual Products" for purposes of the Agreement, including without limitation, Article 19 ("Warranty, Warranty Administration Recall and Auditing"); provided, however, that Articles 11 ("Purchase of Contractual Products") and 13 ("Purchase Price, Terms of Sale and Delivery, Terms of Payment") shall not apply to such vehicles or parts purchased by VWoA from VWACO, unless otherwise agreed by the parties in writing.

5. Article 19, paragraph (b), is hereby deleted in its entirety and replaced with the following:

"b) VWAG shall reimburse VWoA for the warranty costs incurred by VWoA pursuant to paragraph (a) above, including recall costs (Appendix 7) and service action costs. Recall and services actions must be coordinated with the service department of VWAG.

Reimbursement shall apply to:

- US dealer's labor cost;
- Cost of outside labor and outside materials (as may be agreed from time to time by VWAG); and
- Material cost equal to VWoA landed cost and dealer's handling charge (dealer net multiplied by 40% not to exceed MSRP).

Landing Cost and Handling factors will be calculated by February 28th using prior year data. Calculations will be reviewed by the parties and implemented by March 31" for the then current year."

6. Article 19, paragraph (f), is hereby deleted in its entirety and replaced with the following:

"f) (i) Except as described in subsection f(ii) below, claims for reimbursement of warranty costs shall be submitted to VWAG or other applicable Affiliated Company through the VWAG warranty system (currently, "SAGA2") , on a weekly basis when approved and paid by VWoA to the Contractual Enterprises. VWAG shall review all claims (through logical system edits or otherwise) and may summarize claim information as needed, and VWAG shall approve the claims for reimbursement to VWoA. VWoA shall only submit claims approved by it in accordance with the applicable reimbursement guidelines.

Except as described in subsection f (ii) below, once every two (2) weeks, VWAG (or the applicable Affiliated Companies) shall prepare a "Gutex" transmission of payment to VWoA. In the event VWAG disputes the accuracy or appropriateness of a warranty claim, VWAG shall pay the disputed claim when due and shall be reimbursed by VWoA promptly if the dispute is resolved in favor of VWAG

(ii) In the event the parties so agree, VWoA may submit invoices to an Affiliated Company for warranty costs incurred by it with respect to Contractual Products purchased by VWoA from the Affiliated Company, including, but not limited to, all costs for recall actions and service actions. The invoices shall include a summary description of each claim, including an accounting of the amounts disbursed by VWoA to its Contractual Enterprises for parts, labor and other Items.

Such invoices shall be paid by the Affiliated Company within 30 days of the date of the invoice, or as otherwise mutually agreed. In the event the Affiliated Company disputes the accuracy or appropriateness of a warranty claim, it shall pay the invoice, including the disputed claim, when due, and it shall be reimbursed by VWoA promptly if the dispute is resolved in favor of the Affiliated Company."

7. Article 20, paragraph (5), is hereby deleted in its entirety and replacing it with the following:

"Costs of arbitration awards rendered pursuant to VWoA's mediation/arbitration system (currently, the Better Business Bureau's Autoline Arbitration Program) or any state arbitration system pursuant to any "lemon" law ordering VWoA to repair a vehicle, refund repair and related costs, including lease payments, or repurchase the motor vehicle;"

8. Section 1 of Appendix 6 is hereby amended and restated in the form attached hereto as Exhibit B.

9. Appendix 7 is hereby amended as follows:

a) Section 3 of Appendix 7 is hereby deleted in its entirety and replaced with the following:

"3. All costs directly resulting from any recall action and all costs associated with a recall action which are caused by VWoA's acting in accordance with VWAG directions shall be borne by VWAG

Claims and payments for the costs related to such recall actions shall be processed exclusively through VWAG's warranty system (currently "SAGA2"), interfacing with the recall system, with reference to the appropriate action code.

The payment of additional costs (e.g., charges for air freight) shall be determined by mutual agreement between VWoA and VWAG."

b) Section 4 of Appendix 7 is hereby deleted in its entirety and replaced with the following:

"VWoA shall complete recall action as soon as reasonably possible. VWoA shall be entitled to return any genuine parts not needed for performing an action."

10. All provisions of the Agreement not expressly modified herein shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the undersigned parties have executed this Amendment, effective as of August 1, 2011.

VOLKSWAGEN AG	VOLKSWAGEN GROUP OF AMERICA, INC.
ppa. By:	By:
Name: HUBERT NIESWANDT	Name: DAVID GENNACOPOULOS
Title: CHIEF COUNSEL	Title: GENERAL COUNSEL
By:	By:
Name: Terence Johnsson	Name: Michael Lohscheller
Title: Executive Director Sales the Americas	Title: CFO

Exhibits: A: Appendix 2 to Importer Agreement

B: Section 1 of Appendix 6 to Importer Agreement

EXHIBIT A TO AMENDMENT TO IMPORTER AGREEMENT
July 1, 2011

Appendix 2: Affiliated Companies of VWAG

May 1, 2011

Audi AG, Ingolstadt Germany

Volkswagen de Mexico S.A. de C. V., Puebla, Mexico

Volkswagen do Brasil S.A. Sao Paulo, Brazil

Volkswagen Group of America Chattanooga Operations, LLC, Chattanooga TN

VWR, Wolfsburg, Germany

EXHIBIT B TO AMENDMENT TO IMPORTER AGREEMENT
July 1, 2011

Amended and Restated Section 1 of Appendix 6

1. VWoA shall provide warranty coverage to the purchaser or lessee of Contractual Products for repairs or replacement of parts due to defects In material and workmanship in accordance with the following terms for model years 2006 and forward:

- The warranty period begins on the date the vehicle is delivered to the original purchaser or lessee or the date such vehicle is first placed in service.

- The New Vehicle Limited Warranty shall be for
  - 4 years/50,000 miles, whichever occurs first (MY 2006 -2008).
  - 3 years/36,000 miles, whichever occurs first (MY 2009 and forward).

- The Powertrain Limited Warranty shall be for
  - 5 years/60,000 miles, whichever occurs first (MY 2006 and forward) .
  - 10 years/100,000 miles, whichever occurs first (MY 2011 Touareg only).

- Hybrid System Limited Warranty shall be for
  8 years/100,000 miles, whichever occurs first (apples for certain hybrid system parts on MY 2011 and forward hybrid vehicles).

- The Federal Emissions Warranty shall be for
  - 8 years/80,000 miles, whichever occurs first (applies to catalytic converter, E.C.M., onboard emissions diagnostic device).
  - 2 years/24,000 miles, whichever occurs first (certain emissions parts other than above items).

- The California Emissions Warranty shall be for
  - 3 years/50,000 miles, whichever occurs first (applies to any emission-related part).
  - 7 years70,000 miles, whichever occurs first (apples to specific control devices).
  - 15 years/100,000 miles, whichever occurs first (apples to any emission-related part on Partial-Zero Emissions Vehicles ("PZEV")).

- The Limited Warranty Against Corrosion Perforation shall be for
  12 years/unlimited miles

- For Genuine Spare Parts the warranty period shall be for
  1 Year/12,000 miles, whichever occurs first.

The above mentioned conditions shall be changed from time to time In accordance with new agreements between VWAG and VWoA.

TAB 11

Pages 1 - 35

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,	) NO. MD 15-02672 CRB

San Francisco, California
Tuesday, August 1, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff State of Wyoming:
State of Wyoming
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Water & Natural Resources Division
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(307) 777-3542 (fax)
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PETER MICHAEL
ELIZABETH MORRISSEAU

For Volkswagen Defendants:
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New York, NY 10004
(212) 558-4000
BY: ROBERT J. GIUFFRA, JR.
WILLIAM WAGENER

Reported By: Lydia Zinn, CSR No. 9223, FCRR, Official Reporter

1 **APPEARANCES**:

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4 Philadelphia, PA 19103
(215) 656-3377
5 (215) 606-3377 (fax)
BY: MATTHEW A. GOLDBERG
6

7

8 Multiple other counsel also present, both in person and via
telephone through CourtConnect, as reflected in the minutes
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1 **Tuesday - August 1, 2017** **9:02 a.m.**

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

3 **---000---**

4 **THE CLERK:** You may be seated. Calling Civil Action
5 C. 15-MD-2672, In Re: Volkswagen Clean Diesel Marketing, Sales
6 Practices, and Products Liability Litigation. Counsel, please
7 state your appearances for the record.

8 **MS. MORRISSEAU:** Elizabeth Morrisseau, for the State
9 of Wyoming. And with me at counsel table is Water and Natural
10 Resources Division, James Kaste. And Wyoming Attorney General
11 Pete Michael should be sneaking in momentarily.

12 **THE COURT:** Sneaking in? He doesn't have to sneak
13 in.

14 **MS. MORRISSEAU:** He don't do a good job of sneaking
15 he's six-foot-six.

16 **THE COURT:** I would expect that in Wyoming, exactly.
17 Is he coming, you said?

18 **MS. MORRISSEAU:** He is coming.

19 **THE COURT:** Would you like us to wait a few minutes?
20 When do you expect him?

21 **MS. MORRISSEAU:** Well, he's -- they're concluding a
22 business meeting at the Conference of Western Attorney
23 Generals. He should be here shortly.

24 **THE COURT:** Where is that?

25 **MS. MORRISSEAU:** It's, I think, a five-minute cab

1 ride away from here.
2 **THE COURT:** There's no such thing as a five-minute
3 cab ride in San Francisco. There used to be, but that's out of
4 the past.
5 Okay. Well, I'll tell you what. Let's wait. Let's wait.
6 Let's wait 10 minutes. All right? We'll resume at 9:15.
7 You're not in a hurry.
8 Is your family out here, Mr. Giuffra?
9 **MR. GIUFFRA:** Your Honor, I really love
10 San Francisco. And the thing that's so striking about it is I
11 got off the plane, and it's cool in San Francisco. It's really
12 hot in New York. And whenever I come here in the winter time
13 and it's cold in New York, it's nice in San Francisco. It's
14 just --
15 **THE COURT:** Don't tell anybody that.
16 **MR. GIUFFRA:** It's just incredible.
17 **THE COURT:** You've told too many people that already.
18 That's why we're having no such thing as a five-minute cab
19 ride.
20 We'll wait. If he comes in before 9:15, please let my
21 clerk know.
22 **MS. MORRISSEAU:** Thank you, Your Honor.
23 (Recess taken from 9:04 a.m. until 9:11 a.m.)
24 **THE CLERK:** You may be seated. Recalling Civil
25 Action C. 15-MD-2672, In Re: Volkswagen. Counsel, please

1 state your appearances.

2 **MS. MORRISSEAU:** Elizabeth Morrisseau, for the State

3 of Wyoming. And with me is Attorney General Pete Michael, and

4 also Water and Natural Resources Division Deputy, James Kaste.

5 **THE COURT:** Good morning. Welcome.

6 **MR. GIUFFRA:** Good morning, Your Honor.

7 Robert Giuffra, from Sullivan Cromwell, for the Volkswagen

8 defendants. And along with me is my colleague, Bill Wagener.

9 And I noticed the new artwork. It looks quite nice.

10 **THE COURT:** Yes, yes. You know, these are copies of

11 murals that are in Coit Tower in San Francisco, which were the

12 WPA murals.

13 And we had, in the '30s, of course, a lot of murals. A

14 lot of artwork was created under the -- under WPA given to the

15 government. It was actually paid for by the government. And

16 over the years, regrettably, some of them have deteriorated

17 over time; but we have been quite active -- at least this

18 Court -- in restoring murals. And we have a courthouse up in

19 McKinleyville that has these.

20 Now, they were controversial in the '30s. I guess they

21 probably still are controversial, because the themes of the

22 '30s were, you know, during the Depression were rather

23 pronounced; but art is worth preserving, and it is in the

24 public domain, and it ought to be celebrated in courthouses.

25 People come to courthouses not because they want to be

1 here, but because they are required by our process to be here.
2 And if you notice in the corridors, we have a lot of
3 photographs up which are of an historic nature, to try to give
4 people who come to the courtroom some feel that there is a
5 history in courts and the community. And it's important. It
6 does serve that function. And so thank you for pointing it
7 out.
8 I have shown this to my colleagues. And it's up to them
9 to pick. I don't know. My theory was that they'll think that
10 -- it's sort of the problem with federal judges -- a problem --
11 one of the problems with federal judges, is that if one judge
12 has something, the others want to know why they don't have it,
13 as well. So my guess is maybe we will see more art in the
14 various courtrooms.
15 **MR. GIUFFRA:** Your Honor, just one procedural
16 question. Is CourtCall on? I just wanted to check. Is it on?
17 **THE COURT:** Oh, okay. Is it on?
18 **THE CLERK:** Yes.
19 **THE COURT:** Well, that's good. That will -- that
20 should inform my judgment as to how much I talk. Anyway.
21 Yes, sir.
22 **MR. GOLDBERG:** And Matthew Goldberg, on behalf of
23 Porsche AG.
24 **THE COURT:** Good. Welcome.
25 **MR. GOLDBERG:** Thanks.

1 **THE COURT:** Let's get to the substance of what we're
2 talking about today, which is a motion to dismiss the State of
3 Wyoming's complaint in the MDL matter. And I think I should
4 turn to Volkswagen first, and see if they want to add comments
5 to what's already been filed. Go ahead, Mr. Giuffra.
6 **MR. GIUFFRA:** Thank you very much, Your Honor.
7 This case is unprecedented. It's an unprecedented
8 enforcement action by what's called a non-177 state. And I
9 think Your Honor is aware of the distinction between California
10 and the 177 states which follow California. And under the
11 Clean Air Act, Section 177, Congress authorized California,
12 which was a leader in environmental matters before even the EPA
13 really got up and running to regulate emissions, subject to
14 oversight by the federal government.
15 And Wyoming is not a 177 state. And in the more than 50
16 years since the Clean Air Act, there has never been a court
17 decision upholding the right of a non-177 state to bring an
18 environmental enforcement action, which is what this is.
19 We've settled with Wyoming with respect to -- and a number
20 of other states; probably more than 40 -- their consumer
21 claims. We've settled with the bulk of the 177 states. And
22 the question before the Court is whether Wyoming, a non-177
23 state, can bring an environmental enforcement action.
24 And if one looks back at the history of the Clean Air Act,
25 and also enforcement actions involving automobile

1 manufacturers, there has never been a situation where a Court
2 has ever upheld an enforcement action brought by a non-177
3 state in the context of a defeat device.
4 And, as we point out in Appendix A to our Reply Brief,
5 there have been many situations, going back to Ford in 1972,
6 and to the present; and probably the biggest one before
7 Volkswagen being the big diesel truck case in the late '80s
8 [sic] -- actually, late '90s. Excuse me.
9 Now there's a reason for that, and it's pretty clear.
10 Section 209(a) of the Clean Air Act has an express preëmption
11 provision, and the language could not be clearer, and we rest
12 on it. It says that a state cannot, quote, *Adopt or attempt* --
13 adopt or attempt -- *to enforce any standard relating to*
14 *emissions from new vehicles or new motor vehicle engines*. And
15 Congress put this provision in, because it was concerned about
16 having a patchwork of enforcement actions brought by states.
17 We also think, Your Honor, that these claims are impliedly
18 preëmpted, both because of conflict preëmption, and also
19 because the field here is occupied by the federal government,
20 and to a lesser degree by California and states following
21 California.
22 Now let me say a word about the Wyoming statute, because I
23 think that's important in just illustrating what's going on
24 here. There are two regulations that Wyoming claims are being
25 violated. And one is a broad -- and we would describe it as a

1 vague -- regulation that prohibits a device or contrivance that
2 would, quote, *dilute or conceal emissions broadly*. And that's
3 a provision that would apply to a smokestack as well as a car.
4 Wyoming does not follow the definition of "defeat device"
5 that's in the federal regulations. It doesn't follow the --
6 California does, and there's a reason for that: Because
7 not all -- what are called "Auxiliary Emissions Control
8 Devices", AECDs -- it sounds like a band -- actually are
9 impermissible, because some control devices which actually do
10 have a dilutive effect on emissions systems are permissible to
11 protect the engine life. We're not saying that's the issue in
12 the Volkswagen defeat device, but what I'm saying is that the
13 regulation, itself, is one that could apply broadly to
14 smokestacks and everything else.
15 In addition, they have a provision that deals with
16 altering and rendering inefficient or inoperable a pollution
17 control device in a vehicle. And that makes sense, because
18 historically the way that the division of authority has been
19 set up under the Clean Air Act, both in terms of its language
20 in 209(a) and in 209(d), is that the states are entitled to
21 regulate cars once they are in use, once they have been
22 registered or are operating in the states, and preventing
23 people from actually going to an auto shop, and having the
24 emissions controls system be disrupted.
25 But there is no precedent of a non-177 state being

1 involved in a matter relating to a design feature in a vehicle,
2 which is what this case is about.
3 And one other point, just to set the stage: In the
4 Complaint they talk about roughly 300 -- based on what we
5 understand, there's roughly 370 cars that were registered in
6 Wyoming -- Volkswagen cars, but in the Complaint they talk
7 about several thousand.
8 But just to give Your Honor a sense of the penalties we're
9 talking about -- and these are penalties, just by their terms,
10 that make sense only in the context of smokestacks and other
11 types of what are called "stationary pollution source devices."
12 And the way -- the way that -- another aspect of the Clean
13 Air Act is that mobile source devices, which is in Article II
14 [sic] of the Clean Air -- Title II of the Clean Air Act, are
15 regulated by the federal government; but stationary sources of
16 pollution, like a plant, are governed by the -- regulated by
17 the states.
18 But the penalties here that they're talking about are
19 $347,500 per day. So if you have one car in Wyoming for a
20 year, the amount of fine that they could seek for that car
21 against the manufacturer of the car would be close to
22 $1.4 billion. If you had a car that went to Yellowstone
23 National Park for five days, and it maybe was from California,
24 they could, you know, come to Volkswagen and say, *We want*
25 *$150,000, because it was in the state for roughly -- roughly*

1 *five days*. And that just gives you a sense.
2 Now, the question, again, going to the text of the
3 preëmption provision, which is 209(a), is: Is this a standard
4 relating to the control of emissions from a new vehicle? The
5 enforcement action that they're looking to bring, pursuant to
6 the two regulations that I referenced. And clearly it is.
7 The Supreme Court, in the *South Coast* case, has talked
8 about a standard being a design feature, an emissions control
9 technology, and clearly, whether Volkswagen had defeat devices
10 in its vehicles. And the Complaint by Wyoming concedes and
11 acknowledges that those -- those defeat devices were put into
12 the vehicles in Germany, pursuant -- in engineering in Germany.
13 It wasn't something that was done in the United States.
14 So clearly it's a standard. And standard picks up things
15 like a design feature. And then the statute talks about
16 "relating to"; "relating to" -- the Supreme Court, in cases
17 like *Morales*, has talked about that being construed broadly.
18 So if the language of the statute is that the state cannot
19 adopt or attempt to enforce any standard, and the standard
20 picks up an emissions-control technology, and relating to --
21 relating to emissions, it's a pretty open-and-shut case, we
22 think, in terms of just the clear language of the -- of the
23 statute.
24 And in fact, Your Honor, the one case that's definitely on
25 point on all fours is a case from the First Department in

1 New York called *The Office of Attorney General*, where, after
2 that diesel situation involving all of the diesel truck
3 manufacturers, the New York State Attorney General sought to do
4 something very similar to what Wyoming is seeking to do here,
5 which is to basically seek an additional penalty on top of the
6 penalty that was already meted out by the federal government.
7 And the Court there -- and that was a case involving far more
8 vehicles even than Volkswagen. And the Court would not allow
9 the State Attorney General -- they quashed the subpoena from
10 attempting to enforce a standard relating to emissions, even
11 though New York was only seeking to a penalty under the
12 New York standards.
13 So we think, Your Honor, that cases such as the *Office of*
14 *the Attorney General*, the *Jackson* case, the *Sims* case make it
15 quite clear that Section 209(a) clearly bars Wyoming's attempt
16 to enforce any standard, and that clearly would encompass this.
17 Now, the argument that the other side makes is, *Well, we*
18 *have authority under Section 209(d)*. And that's the provision
19 dealing with in-use regulatory authority. And again, Congress,
20 in dividing authority between the states and the federal
21 government, said, *Well, states could control* -- quote, *control,*
22 *regulate, or restrict the use, operation, or movement of*
23 *registered or licensed vehicles*.
24 Clearly, that's true. And that would be something like
25 limiting idling of cars, car-pool lanes, taking the

1 emissions-control device out of a car.

2 But there is no precedent, whatsoever, for a stay

3 attempting to --

4 **THE COURT:** So let me can ask you this, Mr. Giuffra.

5 A number of states, by stipulation -- I think by your

6 stipulation, but you can correct me if I'm wrong; but I think

7 it was by stipulation -- remand -- I remanded a number of

8 states back to the state. I don't know. How many were there?

9 **MR. GIUFFRA:** Probably about -- I think it was about

10 ten or eleven, was my best recollection.

11 **THE COURT:** So wouldn't the decision in this case on

12 this motion inform -- that is, have some impact on -- how those

13 cases proceed?

14 **MR. GIUFFRA:** Yes, we would think so, Your Honor.

15 And we would think that those state courts that are looking to

16 see, *Well, what should we do on remand?* would look to see,

17 *Well, what did Judge Breyer do interpreting* --

18 **THE COURT:** They may choose to go the other way. I

19 mean, they're going to do what they think is proper.

20 But this decision, I would think, would speak to that

21 issue, as well.

22 **MR. GIUFFRA:** I would think so, Your Honor, as well.

23 There are roughly approximately a little bit more than --

24 I think there are 36 non-177 states.

25 There's probably a little bit -- somewhere around 15 that

1 are still pursuing claims. A number of the non-177 states have
2 abandoned and have never even brought these kinds of claims
3 against Volkswagen.
4 **THE COURT:** Have any of the actions -- the remanded
5 actions -- been adjudicated in terms of this issue?
6 **MR. GIUFFRA:** No, Your Honor. And I think people are
7 actually waiting to see how Your Honor rules on this issue, and
8 that's why you got all of the amicus briefs. We literally have
9 counties in Texas that have brought actions under their county
10 environmental laws against Volkswagen.
11 And, you know, Your Honor, the point to keep in mind is I
12 gave you that number about one point -- you know, you run the
13 math on the Wyoming penalties. It would be higher than the EPA
14 penalty Volkswagen paid, which was $1.45 billion.
15 In terms of the remand cases, it was interesting. When
16 everyone -- when the state -- when the non-177 states were
17 trying to urge Your Honor to remand, and Your Honor granted the
18 remand because preëmption is a defense, they all insisted that
19 they were not applying the federal definition of a defeat
20 device; but obviously that creates the conflict once you get
21 back into the state court. And it also creates the conflict
22 here, because if Wyoming has a definition of a contrivance or
23 device that has an effect on emissions, which is a broad, vague
24 regulation that bears no resemblance to the federal or
25 California definitions of defeat device, then that plays right

1 into the question of -- of conflict preëmption, as well as,
2 again, we have express preëmption.
3 **THE COURT:** I'd like to hear from Wyoming.
4 **MR. GIUFFRA:** Thank you, Your Honor.
5 **THE COURT:** Thank you.
6 **MS. MORRISSEAU:** May it please the Court.
7 Your Honor, we started this morning out with some banter
8 about history. And history is certainly important, but that's
9 not all there is, because there's got to be a first time for
10 everything. Now, the fact that there has never been a non-177
11 state bringing a case like there before is not an indication of
12 what the statute allows; it's only an indication of what's
13 happened before.
14 Now, one of the things that Volkswagen's counsel was
15 talking about just now is this idea of the 209 preëmption,
16 basically saying that United States Congress decided that an
17 automobile manufacturer can get away with doing just about any
18 bad thing to a car, as long as they think about doing that bad
19 thing to a car before they sell it.
20 That's not right, for --
21 **THE COURT:** How do you get there?
22 I mean, I think now in the last two years this Court has
23 done a lot of things to Volkswagen, maybe by way of agreement;
24 but I don't think that anyone can come to the conclusion that
25 the litigation hasn't resulted in significant penalties to

1 Volkswagen. I think they're now up to somewhere in the
2 neighborhood of -- I would say 22- to $25 billion. I don't
3 think you can look at that and say, *Well, Congress said you can*
4 *get away with it*. As a matter of fact, I think Congress said
5 the opposite. They said, *You can't get away with it*.
6 And I also think Volkswagen has recognized that. And they
7 actually recognized it on what I call "Day One," but they
8 recognize --
9 Maybe it's Day Two.
10 Maybe Day One was the disclosure by, by the way -- by both
11 the federal government and by CARB -- by California --
12 disclosed the existence of these defeat devices.
13 And after that, which would be Day Two, Volkswagen has
14 ended up -- admitted it.
15 And on Day Three -- you know, I'm telescoping the
16 calendar -- they've ended up paying 22- to 25 billion.
17 It's not over. I mean, there are other aspects of it, but
18 I don't know that I would subscribe to --
19 I accept your first argument, which is there has to be a
20 first case for everything. And I understand that. If there
21 weren't, then the law wouldn't develop at all.
22 But I think it's somewhat informative to say that there
23 are -- you know, the statute's been around a long time. It's
24 been around for some period of time. And there haven't been
25 this type of enforcement actions.

1 So I think that that, at least to a Court, is a flag. I
2 think it's a yellow flag, not a red flag. It's a yellow flag.
3 It says, *Well, it's been around for a while, and any Court*
4 *should proceed with some caution*, because if the Court
5 decides -- accepts your argument, that would be a first time
6 that the Court has accepted that argument.
7 But I'm troubled by my own reading of the preëmption,
8 because it seems to me -- I was going to say "for a change." I
9 don't know if it's a change, or not. It seems to be very
10 clearly written. *No state* -- and that's Wyoming. We all
11 recognize that -- *shall adopt or attempt to enforce any*
12 *standard relating to the control of emissions from new motor*
13 *vehicles, or new motor vehicle engines*. I don't know how you
14 can say it any more clearer.
15 I don't think this is necessarily a case of implicit
16 preëmption. I think it's explicit. How is it not explicit?
17 What, in your judgment -- and this may be a little unfair to
18 ask you, but if Congress wanted to preëmpt -- did not want
19 Wyoming, California, or any other state to bring an action of
20 this type -- how would they have written it? How would you
21 have suggested, if you were the legislative -- if you were
22 counsel instead of to the great state of Wyoming, you were
23 counsel to the Congress of the United States, how would you do
24 it?
25 **MS. MORRISSEAU:** Your Honor, they would have to add

1 an additional sentence that would say, *States may not assert*
2 *anti-tampering claims against automobile manufacturers.*
3 And that's where I was going with my original point, is
4 that what Wyoming is alleging Volkswagen has done is that they
5 have tampered with motor vehicles. And so it's not a question
6 about how the cars were designed in the first place. Wyoming
7 has no issue with how the cars are designed.
8 The way Wyoming's law at issue works is whatever controls
9 are on the car have to remain operational. And so it's
10 important.
11 Volkswagen really did three things here that matter.
12 The first thing they did was they designed vehicles that
13 contained pollution-control devices to meet the EPA standards.
14 We got exhaust gas recirculation. You've got a particulate
15 filter. You've got a lean trap, or a selective catalytic
16 converter. The first thing they did: They designed cars with
17 functioning pollution-control devices.
18 Then they made a decision that if those pollution-control
19 devices worked the way that they were physically designed to
20 work, the cars weren't going to perform the Volkswagen way. So
21 then they installed a computer program that would alter the
22 parameters, and turn off and turn down those pollution-control
23 devices when the cars are operating.
24 It's kind of like having a lookout. You know, when you've
25 got -- when there's cops on the street, you're not having money

1 and drugs exchanging hands. When the cops drive by, nothing
2 happens when they're present.
3 And that's like a test cycle. When the test cycle is
4 running, everything works just fine.
5 And so -- but I guess the important thing, really, is that
6 after all of that, they initiated a software recall, as well.
7 And what that software recall did was essentially recalibrate
8 the way that the computer programs worked, so that they would
9 turn off the pollution-control devices less frequently.
10 **THE COURT:** But the lookout is a means by which they
11 can accomplish the criminal offense.
12 **MS. MORRISSEAU:** Absolutely, Your Honor.
13 **THE COURT:** All right. So why isn't the emissions
14 device -- the defeat device a means by which they can subvert
15 the emissions control the standard? That's the mechanistic
16 means by which they are successful. A lookout is successful,
17 or not; but his or her job is to say, *Hey, the cops are coming.*
18 *Don't do X. Don't do Y*, or *They're coming from the right, and*
19 *you should go to the left*. You know, that's a means to
20 accomplish.
21 The purpose that --
22 I'm getting down into sort of the weeds of how it's
23 working, because I'm trying to understand your argument. So
24 you said, *Well, they have to add a sentence which says there*
25 *should be no device -- no emissions device*. So let's say they

1 figure out something else; some other way to do it, to
2 subvert --
3 Let's say they designed a device -- an emissions-control
4 device that would work, like, every tenth day, or every -- work
5 on some sort of different system from the present system. Not
6 a device, but simply the whole thing worked that way. I don't
7 know. It seems to me that that's a means by which they could
8 accomplish their illicit purpose, but you have to go back
9 actually to the basic argument, which is: Did Congress intend
10 to permit states to enforce these standards, as applied to
11 manufacturers?
12 And I just don't see it that way. I don't understand how
13 it works that way.
14 **MS. MORRISSEAU:** Well, I think to go back to your
15 point about the means, the fact is that Volkswagen tampered
16 with the vehicles, which in and of itself is a violation, in
17 order to hide their noncompliance with the new owner vehicle
18 standards.
19 Now, there are two different violations; and they don't
20 change the fact of the other.
21 And the other point -- the other important thing, as well,
22 is that Wyoming does not need to prove that Volkswagen violated
23 EPA's standard to prove that they tampered with --
24 **THE COURT:** Let's take a car. We used to have these
25 things called real speed limits, like, *You can't go over 65.*

1 *You can't go over 55*, and so forth. Just say.
2 Okay. So Volkswagen designs a car that can go 70 or 80,
3 but knows that in California or in the United States, you
4 cannot drive a car over 65 miles. So it puts a governor --
5 what we call "governors" -- on motor devices, so it just
6 doesn't work over 65.
7 Is that the installation of a device that then defeats the
8 speed limits, so if an individual wanted to remove it -- they'd
9 have a faster car -- they could do so without Wyoming, for
10 example, enforcing this type of law?
11 **MS. MORRISSEAU:** That's a tricky one, because with
12 speeding the driver him or herself has to actually step down to
13 increase the gas to the engine to get the car up to a certain
14 speed. And so regardless of what is installed on the car, the
15 consumer is really the one with the power to make that
16 decision.
17 But with the tampering devices that Volkswagen put on
18 these cars, the consumer isn't the one who's altering the
19 parameters that are feeding into the triggering device.
20 **THE COURT:** Maybe you demonstrated the weakness in my
21 argument, but I'm just trying to follow through it.
22 Anyway, I have to wonder whether Congress really wanted to
23 have 50 states or even other subdivisions start to enforce
24 these regulations. I mean, you could say, *Well, we're not*
25 *enforcing the regulations. What we're doing is enforcing our*

1 *laws in connection with tampering of the vehicle*, but that's by
2 another name. I mean, that seems to be the way it's
3 characterized, rather than its purpose.
4 Its purpose here is to enforce the emissions-control
5 standard. If they were in compliance with the
6 emissions-control standard, you wouldn't have a case here.
7 Right?
8 **MS. MORRISSEAU:** Not necessarily. The tampering is
9 the problem. It's not the standard. And you can have a
10 situation where you can tamper with a vehicle, but you don't
11 violate the standard, and you've violated tampering.
12 For example, if they changed the parameters the trigger
13 when the particulate filter regenerates, then you might have a
14 situation where you've got increased engine wear and tear, and
15 you've got to be replacing engine parts more frequently. Well,
16 you don't necessarily go over the standard in terms of what's
17 the concentration of soot that's in your exhaust on any given
18 day.
19 And so that's -- I mean, that's really what this case
20 really comes down to, is it's a struggle between Congress
21 telling the states, *You don't get to design cars, but you do*
22 *get to control how they work on your roads.*
23 And this question about, *What is tampering? And does it*
24 *matter that Volkswagen came up with these ideas at the time*
25 *they were designing the vehicles? Does it matter that they did*

1 *this software recall, or not?* I mean, you can look at the
2 question of how important tampering is to states. If you look
3 at different cases that get into, really, Fourth Amendment
4 questions of, *How can you seize a vehicle to do your standard*
5 *vehicle inspection?* a lot of those cases discuss the importance
6 of tampering to states. And so that's really what you're
7 wrestling with.
8 And the other thing that I think is important in the
9 context of this case and some of the different cases out there
10 related to what is and isn't preëmpting is that tampering is
11 really a physical analogue to fraud. Fraud is saying something
12 is what it is not. And then tampering is going ahead and
13 making something what it is not.
14 **THE COURT:** So your fraud argument is that the fraud
15 is -- that there's a common law, you know, tort: Fraud. I
16 mean, you can sue on that. And is it that it's a state claim
17 in connection with fraud? Is that your -- like they held in
18 New Jersey?
19 **MS. MORRISSEAU:** Well, I'm drawing an analogy to
20 those fraud cases. So there's the New Jersey case, but then
21 even if you look at *Cipollone*, what they allowed -- what they
22 determined was not preëmpted was your general fraud claim. And
23 so --
24 **THE COURT:** I found the New Jersey case very
25 interesting, even though it's -- there are all of these caveats

1 about not citing it, and so forth; but I think that more
2 properly, the New Jersey case raises issues that I have some
3 concern about, and concern that I think will be addressed, I
4 assume, in the remand motions that are going to be forthcoming
5 in -- but that it's not this case. It's not this case, but I
6 mean, the breadth of the New Jersey case is staggering, in
7 terms of the issues of preëmption. And I think I'll probably
8 have to address that when I deal with the remand motions.
9 So I don't think it's -- I appreciate your citing it. I
10 know it's -- and I've found it informative, but I think it's
11 really informative of the and relevant to the state -- I mean,
12 to the remand motions which I'm going to hear in due course.
13 **MS. MORRISSEAU:** So I'd like to briefly talk about --
14 **THE COURT:** Sure.
15 **MS. MORRISSEAU:** Volkswagen's counsel talked about
16 how Wyoming's laws conflict with federal regulations about
17 automobile emission control devices, or AECDs.
18 Now, AECDs are essentially federally approved systems that
19 can turn off or turn down pollution-control devices for short
20 and discrete time periods. Now, Wyoming takes the use of these
21 federally approved AECDs into consideration when determining
22 what federally required pollution-control devices are at issue
23 on any given vehicle. So Wyoming could not enforce its
24 anti-tampering law against the proper use of an AECD, because
25 the proper use is part and parcel of the EPA's decision of what

1 pollution-control devices need to be on a particular car, and
2 how they ought to work.
3 And in any event, if there was a conflict between a valid
4 EPA regulation and a state law, that would trigger an
5 as-applied preëmption challenge; but that's a red herring here,
6 because there's no direct conflict between the federal rules on
7 AECDs and Wyoming's anti-tampering rules.
8 So I'll briefly go to the some of the cases that
9 Volkswagen asserted were silver bullets. So first, there's the
10 *Jackson* case. This case is not on point, because the essence
11 of the preëmptive claim was an attempt by private parties to
12 get damages from the violation of EPA's new motor vehicle
13 standards. It was just an attempt to directly enforce those
14 standards.
15 Then there's the *Sims* case. Now, that case was about
16 Florida's grey market car law, which forbids the registration
17 of imported vehicles, unless the EPA first issued a sort of
18 certificate of compliance, even if issuing such a certificate
19 was in conflict with EPA's own regulations on importing
20 vehicles. So that's not on point, as well.
21 And then there's the quashed New York Attorney General
22 subpoena. And, as you read in the New Jersey case, the
23 New Jersey Court didn't find that case to be particularly
24 appealing, for two reasons. One, the New York
25 Attorney General --

1 **THE COURT:** You're talking about now the New Jersey
2 case looking at the Attorney General?
3 **MS. MORRISSEAU:** The *Felix* case.
4 **THE COURT:** Right, yeah.
5 **MS. MORRISSEAU:** In the *Felix* case --
6 **THE COURT:** But the problem is, number one, I don't
7 necessarily find the *Felix* case persuasive of anything. And,
8 number two, I don't think I should look at it, because *Felix* --
9 they said that I shouldn't -- that is, the *Felix* Court said I
10 shouldn't, so I don't think I should look at that.
11 And the fact is that the *Felix* Court disapproves of the
12 Attorney Generals case in New York, well, that's -- I
13 understand that. I understand that. Some Courts think that
14 the other Court's wrong. That happens all of the time. Some
15 Courts think I'm wrong. Some Courts think, fortunately, that
16 I'm right, but I don't know. I mean, I'm not going to look at
17 the *Felix* case and think, *Oh, that's rather persuasive as to*
18 *the Attorney Generals case*.
19 **MS. MORRISSEAU:** Sure. So without looking at the
20 *Felix* case, if you looked at the quashed subpoena, itself, what
21 the subpoena was, was an attempt to get every single document
22 that the companies had provided to EPA as part of EPA's
23 enforcement. It was a direct attempt to enforce federal
24 emissions standards. And so that's why that one was quashed.
25 **THE COURT:** But is it the direct attempt, or the

1 indirect attempt? I mean, where do I draw the line between
2 direct and indirect?
3 I could understand drawing lines between explicit and
4 implicit preëmption. You have to do that.
5 But I don't know that there's a real line between a direct
6 attempt to enforce a standard, and an indirect. If I look at
7 the preëmption language, it doesn't distinguish between direct
8 and indirect. If you indirectly attempt to enforce a standard,
9 it's been preëmpted. Because you can do something by
10 indirection, doesn't -- it doesn't obviate the impact of a
11 preëmption argument, because there's always an indirect way to
12 do something. You can say, *I can't go in a straight line, so*
13 *I'm going to go in a crooked line, and it's going to have the*
14 *same impact.*
15 You look at impact. You look at purpose. You look at
16 intention. You look at all those things to try to figure out:
17 What are you doing?
18 And I don't think it's an answer to an argument to say,
19 *Well, by the way, we're doing it indirectly. It's okay.*
20 **MS. MORRISSEAU:** Sure. I mean, the distinction is
21 whether it's a new vehicle, or whether it's a used vehicle.
22 And so that's where the tampering really gets to.
23 And so in the *Allway Taxi* case -- that was one where a
24 New York City regulation that established both fuel standards
25 and emission-control standards was upheld. Now, there was some

1 conversation that -- I mean dicta, really, about when it is
2 that a car changes from being new to used, and when you can
3 go -- when you can regulate that used car; but that's all
4 dicta, because in that case the regulation, itself, was upheld.
5 And another case that really matters -- and the one that
6 Volkswagen hasn't addressed in its Reply -- is the *Counts*
7 *versus General Motors*. Now, that comes out of the
8 Eastern District of Michigan just a few months ago. And in
9 that case plaintiffs brought consumer-protection and fraud
10 allegations against General Motors related to a defeat device
11 installed in the Chevy Cruze that operated similar to the
12 computer programs at issue in this case. And in the *Counts*
13 Opinion, they referenced some of the different orders that have
14 come out in *Volkswagen* litigation, because they're so closely
15 interrelated.
16 And in that case, the plaintiffs -- they survived a motion
17 to dismiss because the Court determined that their claims
18 didn't directly -- they didn't directly rely on proving
19 noncompliance with the EPA standards, so the EPA standards were
20 irrelevant to the case before the Bar.
21 And that's analogous to Wyoming's case before you today.
22 Our case does not rise or fall on whether the standards were
23 violated. Our case rises and falls on whether the vehicles
24 were tampered with.
25 **THE COURT:** Okay. Let me hear the response to that

1 case. Thank you.

2 **MR. GIUFFRA:** Your Honor, I actually think Wyoming's

3 counsel just made our case for us, because she couldn't imagine

4 a clearer case of conflict preëmption than Wyoming wanting to

5 enforce its own emissions laws, notwithstanding Section 209(a).

6 And, in fact, Your Honor, if you look at the peripheral

7 relief in the Wyoming Complaint on paragraph B at page 49, they

8 say they'd like to have -- one of the things they seek is a

9 schedule to bring all of the subject vehicles into compliance

10 with Wyoming State air-quality laws, and the Wyoming State

11 Implementation Plan. And then they also seek, in the

12 alternative, an emissions mitigation plan to offset any excess

13 emissions that can't be directed. So --

14 **THE COURT:** Well, but okay. Let's get to Counsel's

15 point here that -- her last argument is, Look. We're not

16 enforcing --

17 The Complaint is one thing. Let's just put that aside for

18 the moment, though it is what we're here to discuss,

19 supposedly: Dismiss the Complaint. So what it says is

20 relevant.

21 But putting that aside for the moment, and treating her

22 argument seriously, it is, *Look. Whether they're in*

23 *compliance/not in compliance with the EPA standards, or the*

24 *SIP, I guess, so what? We're here about a tampering device.*

25 *This engine has been tampered with, and therefore the exhaust*

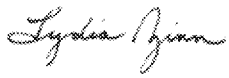
1 *system has been tampered with. Therefore, that's what the case*
2 *is about, and we're seeking damages as a result of the*
3 *tampering. Whether they were in compliance with the EPA*
4 *standard or not, who cares?*
5 I mean not "Who cares," but, *That's not our case. Our*
6 *case is: You tampered with the engine.*
7 Okay. What's the answer to that part?
8 **MR. GIUFFRA:** The answer to that argument is, Your
9 Honor, if this were a situation where we tampered with the
10 vehicle, you know, if some auto shop tampered with it in an
11 emissions-control system in the state of Wyoming, they might
12 have something, because under Section 209(d) it says states
13 can, quote, *control, regulate, or restrict the use, operation,*
14 *or movement of registered and licensed vehicles.*
15 Well, these vehicles were not registered or licensed at
16 the time the defeat device was put in them.
17 In fact, if you look at paragraphs 104 to 108 of the
18 Complaint, it talks about how the defeat devices were installed
19 in Germany, and they were an integral part --
20 **THE COURT:** So the argument in response to that, I
21 think, is what you said. It is, *Look. The way the car is*
22 *manufactured with its intricate interrelationship, workings,*
23 *and so forth -- that's what is the given. And it can't be*
24 *subject to a separate state-court lawsuit as it relates to*
25 *emissions because of the Clean Air Act preëmption.*

1 It is, *We look at the entire system. And the entire*
2 *system -- that is the emissions system, with all of its moving*
3 *parts, its defeat devices, its enabling devices, and so forth.*
4 *That's what the subject of federal regulation.*
5 After that, when the car is being used, oh, you take out
6 the titanium screws, and you put in the iron screws; or you do
7 this, or that, or disconnect something, and so forth.
8 For example, I suppose if they ran it into a VW dealer and
9 said, *By the way, would you mind just disconnecting this device*
10 *in my car?* You know. And the VW people did that.
11 I'm not suggesting they did; but of course, that could be
12 subject -- that's a change in the use of the vehicle after it
13 has gone through the process.
14 And there's no workable way to have a nationwide system of
15 enforcement if you are going to allow 50 states to take -- to
16 disassemble the system in some way, or point out one part or
17 another part of a wholly integrated system.
18 And that, I think, is -- at least, in my tentative
19 thinking -- how the argument goes. Now I have to think more
20 about it, and I have to consider counsel's views in that
21 regard; but that's the way I sort of look at it. The tampering
22 is not the manufacturer's.
23 **MR. GIUFFRA:** Yes. And there's a distinction between
24 that, Your Honor.
25 And the problem would be, just to give you an example, in

1 the settlement that we've reached that this Court entered, we
2 agreed that for the 2-liter cars, they could be on the road and
3 operated at a standard than was lower than the original
4 certified standard. What would happen if Wyoming said, *Well,*
5 *we really want you to comply with the originally certified*
6 *standard*. Could they bring an enforcement action to disrupt
7 the settlement as it applied in Wyoming? We'd all say, *Of*
8 *course not. That would make no sense*.
9 Let me make a couple of observations on the fraud claim.
10 People mix and match the environmental enforcement action,
11 which is what we're talking about here, with some sort of
12 consumer-fraud claim. As I indicated before, to the extent
13 there was any misrepresentation made to any Wyoming resident,
14 and there's a Wyoming statute that gives the Attorney General
15 the ability to go after a manufacturer or distributor of a car
16 who made a misrepresentation in their advertising, we settled
17 that claim with Wyoming, and we paid them money; I believe
18 $1,100 a car. And we have a release for that claim. So the
19 claim for misleading the consumers of Wyoming has been settled.
20 The only claim that we're here about now is whether they
21 can bring an environmental enforcement action. And the courts
22 all have said that you can't do it against the manufacturer,
23 because even if there was a defeat device at the car at the
24 time of manufacture, that's not a tampering with a vehicle
25 after it's been registered or licensed.

1 Now, a comment was made before about the 2014 software
2 recall. And that's at paragraph -- I would direct the Court to
3 paragraph 152. And paragraph 152 alleges that that software
4 recall had the effect of lowering the emissions on the cars.
5 It did not increase the emissions on the cars.
6 In any event -- in any event, courts, including the
7 *New York Attorney General* case, have all said that's something
8 that goes to the design of the car. It's -- we do say a
9 software-update-type situation that relates back to the
10 original design of the car. In the original design of this
11 car, it always had a defeat device in it. It was designed with
12 a defeat device in it.
13 The auto emissions -- to the extent that there was a
14 misrepresentation made to a government agency, it was made to
15 EPA and CARB, who were responsible for doing the testing.
16 Wyoming doesn't test cars.
17 And one other point that I think is an important one:
18 When you really step away from it, what Wyoming wants to do is
19 just get an additional penalty for Volkswagen's violations of
20 federal law. And the Supreme Court, in cases like the Arizona
21 case in the context of immigration, the *Buckman* case in the
22 context of the FDA, the *Gould* case in terms of the federal
23 labor-law standards, have all said that these sorts of state
24 copycat, pile-on type of enforcement actions conflict with
25 federal law, because federal law sets a set of rules; a

1 standard. Federal law, the penalty's $37,500 per car forever.
2 States -- Wyoming wants 37,500 per day.
3 And there really is no -- in allowing Wyoming to bring
4 this, and other non-177 states to bring these kinds of state
5 enforcement actions in the face of Section 209(a) --
6 And, in fact, when you look at 209(d), which actually does
7 give them the ability, if someone does tamper with the device
8 in the state after the car's been registered --
9 -- but it would make it impossible in the future for auto
10 manufacturers to actually enter into the kinds of global
11 settlements that Volkswagen did, because we were able to work
12 with the EPA and work with CARB, and have a penalty regime that
13 made some sense.
14 And, as Your Honor pointed out, it's hard to imagine a
15 situation where a manufacturer has been penalized as much as
16 Volkswagen has. I think you're correct. The number's between,
17 I think, $22 million and counting, in terms of how much has
18 been paid. And, you know, on the penalties side, alone, for
19 the federal side, there was $1.45 billion.
20 So we think that clearly Section 209(a) applies here. All
21 of the case law supports the application of 209 to -- (d) --
22 this claim, to be a preëmptive one. And we -- as I mentioned
23 before, we settled the consumer fraud claim with Wyoming.
24 So we urge Your Honor to dismiss this case; to dismiss it
25 with prejudice. And we're hopeful that Your Honor's decision

1 will be looked at by some of the other courts that have the
2 cases.
3 **THE COURT:** Well, that depends on my decision.
4 **MR. GIUFFRA:** If Your Honor agrees that
5 Section 209(a) applies --
6 **THE COURT:** If I agree with you, you're hopeful that
7 it will be looked at.
8 **MR. GIUFFRA:** That's true.
9 **THE COURT:** And if I disagree with you, you're less
10 hopeful.
11 **MR. GIUFFRA:** I'm less hopeful. Supreme Court before
12 I'm over. Thank you very much.
13 **THE COURT:** All right. Thank you. The matter's
14 submitted. Thank you.
15 (At 10:00 a.m. the proceedings were adjourned.)
16 I certify that the foregoing is a correct transcript from the
17 record of proceedings in the above-entitled matter.
18
19 
20 _____ August 1, 2017
Signature of Court Reporter/Transcriber Date
21 Lydia Zinn
22
23
24
25

TAB C

CAUSE NO. D-1-GN-16-000370
(MDL 15-0884)

IN RE VOLKSWAGEN CLEAN DIESEL (TCAA ENFORCEMENT)	§	IN THE DISTRICT COURT
	§	
	§	
	§	TRAVIS COUNTY, TEXAS
TCAA COUNTY CASES	§	
	§	
	§	353rd JUDICIAL DISTRICT
	§	
	§	

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S FOURTH AMENDED RESPONSES AND OBJECTIONS TO STATE OF TEXAS'S AND TCAA COUNTY PLAINTIFFS' SECOND SET OF REQUESTS FOR ADMISSIONS AND INTERROGATORIES

COMES NOW, Defendant Volkswagen Group of America, Inc. ("VWGoA") and serves the following Fourth Amended Responses and Objections (the "Response") to the State of Texas's and the TCAA County Plaintiffs' (collectively, the "Plaintiffs") Second Set of Requests for Admissions and Interrogatories (the "Requests"). VWGoA reserves its right to supplement this Response as further information may become known to it.

PRELIMINARY STATEMENT

This Response is made with specific regard to the laws of the State of Texas, the Texas Rules of Civil Procedure and the specific facts of this case, and is not applicable to other cases, facts or circumstances, or the rules and laws of any other state or jurisdiction. Counsel for VWGoA has drafted this Response based on the current state of VWGoA's knowledge and information regarding the information Plaintiffs have requested. VWGoA reserves the right to further amend, supplement or withdraw this Response or any part thereof. VWGoA is available to meet and confer with respect to this Response, should counsel for Plaintiffs wish to do so. With respect to the Requests for Admissions, except as otherwise specifically set forth in any

particular response, VWGoA can neither admit nor deny the factual allegations set forth in any specific Request for the reasons set forth in the particular response and objection to each such Request.

OBJECTIONS APPLICABLE TO ALL REQUESTS

1. This Response is solely in the name of and on behalf of VWGoA. VWGoA objects to the Requests to the extent that they purport to require VWGoA to produce information in the possession, custody or control of VWGoA's parents, affiliates or subsidiaries that have corporate identities separate and apart from those of VWGoA on the grounds that such information is not in VWGoA's possession, custody or control.

2. Irrespective of whether VWGoA provides information in response to any specific Request, VWGoA reserves the right (but does not assume the obligation) to: (i) revise, amend, correct, supplement, clarify or modify the content of this Response in accordance with the Texas Rules of Civil Procedure and court orders; (ii) provide additional responsive information in the future; (iii) object to further discovery in this Action, including discovery relating to the subject matter of information provided in this Response; (iv) use or rely upon any information and documents produced in this Action in any hearing, proceeding or trial; (v) use or rely upon subsequently discovered information or information omitted from this Response as a result of mistake, error, oversight or inadvertence in any hearing, proceeding or trial; and (vi) challenge the authenticity or admissibility of any information or documents in any hearing, proceeding or trial.

3. VWGoA objects to the defined term "Recalibration," and to any Definition, Instruction or Request that incorporates that Definition, on the ground that it is overly broad and contains vague and undefined terms and encompasses numerous service actions and/or field fixes

that have no plausible relevance to Plaintiff's remaining claims in this action. Consistent with the parties' meet-and-confer on July 19, 2018, VWGoA will construe the term "Recalibration" to refer only to those Recalibrations that: (i) contained the so-called Steering Wheel Angle Recognition and/or Start Function features; (ii) detected whether an Affected Vehicle was being tested on a dynamometer or being driven on the road; or (iii) impaired or disabled an Affected Vehicle's emissions control system.[1] VWGoA will apply this definition throughout its Response.

4. VWGoA objects to the defined time period in Definitions and Instructions Number 1 and any Definition, Instruction or Interrogatory that incorporates that time period on the grounds that it is overly broad, unduly burdensome and seeks irrelevant information to the extent that the time period begins on January 1, 2008 and continues through the present. The only remaining claims in this action are Plaintiff's Recall Tampering claims, which, according to Plaintiff's Third Amended Petition, relate to conduct dating back to, at the earliest, 2012 (State 3AP ¶ 5.16(E)). In addition, consistent with the parties' meet-and-confer on July 19, 2018, VWGoA has not applied a date restriction in its search for "Recalibrations" meeting any of the three criteria set forth above (in its third Objection Applicable to All Interrogatories). After a

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[1] Any Auxiliary Emissions Control Device ("AECD") arguably could be interpreted under the applicable EPA regulations to "impair" an emissions control system—including AECDs fully disclosed to regulators. The relevant regulations define an AECD as:

> [A]ny element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, *modulating, delaying, or deactivating the operation of* any part of the emission control system.

40 CFR § 86.1803-01 (emphasis added). We do not understand from our meet-and-confer discussions (or from Plaintiff's operative Petition) that Plaintiff is seeking information regarding AECDs fully disclosed to regulators. But if that is incorrect, the parties will need to meet and confer further with respect to this topic, as any such AECDs are irrelevant to this action.

reasonable investigation, however, VWGoA has identified no such "Recalibrations" (or documents concerning any such "Recalibrations") from prior to 2012. VWGoA therefore will construe the relevant time period for this Response as beginning on January 1, 2012.

5. VWGoA objects to the Requests to the extent that they purport to require VWGoA to conduct anything beyond a reasonable search for information that is reasonably available and in the possession, custody or control of VWGoA.

6. VWGoA further objects to the defined terms "You," "Your" and "VW," and to any Definition, Instruction or Request that incorporates those Definitions, on the ground that such Definitions and any such Definition, Instruction or Request seek information that is in the possession, custody or control of persons or entities other than VWGoA and fail to distinguish between distinct corporate entities (including by failing to distinguish between VWGoA and Volkswagen AG ("VWAG")). VWGoA will construe the terms "You," "Your" and "VW" to mean Volkswagen Group of America, Inc. only.

7. VWGoA further objects to the defined term "Steering Wheel Angle Recognition," and to any Definition, Instruction or Request that incorporates that Definition, to the extent that it is defined by reference to a plea agreement entered into by a third party. Based on VWGoA's review of the Rule 11 Plea Agreement between the United States and VWAG and its own reasonable investigation, VWGoA (a) understands that the "Steering Wheel Angle Recognition" feature refers to a portion of the software code included in the 23N5, 23O6 and 23N4 recall campaigns, and will construe Interrogatories concerning the Steering Wheel Angle Recognition feature (and the related Start Function feature) to refer to that software code (whether installed through those three recall campaigns or through other Recalibrations).

SPECIFIC RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSIONS

1. Admit that the factual allegations set forth in paragraphs 46 through 51 of Exhibit 2 to the VW Plea Agreement are true and correct.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests. VWGoA further objects to this Request on the grounds that it combines six separate Requests for Admissions and asserts them as a single Request for Admission; VWGoA will construe this Request as containing six separate Requests for Admissions and is responding only on that basis. In responding to this request, VWGoA is construing the phrase "VW Plea Agreement" to refer to the Rule 11 Plea Agreement between the United States and VWAG (referred to herein as the "VWAG Plea Agreement").

Subject to and without waiver of these Objections, VWGoA responds as follows:

- VWAG Statement of Facts Paragraph 46: Although VWGoA is not a signatory to the VWAG Plea Agreement or the accompanying Statement of Facts that references Supervisors C and F but without identifying those individuals, VWGoA believes (a) based on the description of Supervisor C in the VWAG Statement of Facts, VWGoA's review of the Second Superseding Indictment filed in the Eastern District of Michigan in *United States* v. *Dorenkamp et al.*, and VWGoA's review of the November 18, 2007 email referenced in Paragraph 45 of the VWAG Statement of Facts, that Supervisor C refers to Jens Hadler, a former employee of VWAG who worked at VWAG's facility in Wolfsburg, Germany; and (b) based on the description of Supervisor F in the VWAG Statement of Facts, as well as VWGoA's review of the Second Superseding Indictment filed in the Eastern District of Michigan in *United States* v. *Dorenkamp et al.*, that Supervisor F refers to Richard Dorenkamp, a former employee of VWAG who worked at VWAG's facility in Wolfsburg, Germany. On that basis, VWGoA admits the facts included in paragraph 46 of the VWAG Statement of Facts.

- VWAG Statement of Facts Paragraph 47: VWGoA admits that in or around 2012, hardware failures developed in certain of the 2.0 Liter Affected Vehicles that were being used by customers on the road in the United States. VWGoA cannot independently confirm the truthfulness and correctness of the remaining facts included in paragraph 47 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands and therefore admits that the remaining facts included in paragraph 47 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 48: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 48 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands and therefore admits that the facts included in paragraph 48 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 49: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 49 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands and therefore admits that the facts included in paragraph 49 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 50: VWGoA cannot independently confirm the truthfulness and correctness of the facts included in paragraph 50 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands and therefore admits that the facts included in paragraph 50 of the VWAG Statement of Facts are true and correct.

- VWAG Statement of Facts Paragraph 51: VWGoA admits that VWGoA told U.S. regulators, U.S. customers and others in the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Affected Vehicles. VWGoA cannot independently confirm the truthfulness and correctness of the remaining facts included in Paragraph 51 of the VWAG Statement of Facts. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands and therefore admits that the remaining facts included in Paragraph 51 of the VWAG Statement of Facts are true and correct.

2. Admit that the Steering Wheel Angle Recognition feature was installed on one or more Existing Affected Vehicles in Texas in or around 2014.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests.

Subject to and without waiver of these Objections, VWGoA admits that the Recalibrations listed in response to Interrogatory 1.a and 1.c, *infra*, were installed on one or more Affected Vehicles in Texas. Based on its understanding that these Recalibrations included the software code associated with the Steering Wheel Angle Recognition feature, VWGoA admits Request for Admission No. 2.

3. Admit that VW provided information and/or guidance to Texas Dealers on how to implement Recalibrations.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests.

Subject to and without waiver of these objections, VWGoA admits Request for Admission No. 3.

4. Admit that the following factual allegations from the Liang Plea Agreement are true and correct: "LIANG knew that his co-conspirators falsely and fraudulently told U.S. customers and others that a software update in about 2014 was intended to improve the vehicles when, in fact, LIANG and his co-conspirators knew that part of the update was intended to improve the defeat device's precision in order to reduce the stress on the emissions control systems."

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests.

Subject to and without waiver of these Objections, VWGoA states that it is not a signatory to the Plea Agreement entered by James Liang and has not been charged with any criminal offense by the United States. Further, VWGoA does not know the truth or falsity of Mr. Liang's assertions regarding his own knowledge or who the "co-conspirators" referenced in Mr. Liang's Plea Agreement are (or the identity of their employer). Mr. Liang's employment with VWGoA was suspended as of September 9, 2016, the date of his Plea Agreement. Following the imposition of Mr. Liang's criminal sentence (on August 25, 2017), and in anticipation of Mr. Liang reporting to prison in early October 2017, VWGoA terminated his employment on September 30, 2017. Mr. Liang has declined VWGoA's request to speak with him regarding the statements he has made in his Plea Agreement. VWGoA has made reasonable inquiry, but the information known or easily obtainable is insufficient to enable VWGoA to admit or deny this Request, *see* Tex. R. Civ. P. 198.2(b), except to the extent that VWGoA admits that VWGoA told U.S. customers and others that a software update in or around 2014 was intended to improve certain of the 2.0 Liter Affected Vehicles.

5. Admit that the following factual allegations from the Liang Plea Agreement are true and correct: "LIANG knew that his co-conspirators also falsely and fraudulently told U.S. customers, EPA, and CARB that a voluntary recall in or around early 2015 was intended to 'fix' the issues that were causing the discrepancy, when, in fact, LIANG and his co-conspirators knew that although the update lowered the NOx emissions in certain VW diesel vehicles on the road, the update did not remove the defeat device software that was the true reason for the discrepancy."

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests.

Subject to and without waiver of these Objections, VWGoA states that it is not a signatory to the Plea Agreement entered by James Liang and has not been charged with any criminal offense by the United States. Further, VWGoA does not know the truth or falsity of Mr. Liang's assertions regarding his own knowledge or who the "co-conspirators" referenced in Mr. Liang's Plea Agreement are (or the identity of their employer). Mr. Liang's employment with VWGoA was suspended as of September 9, 2016, the date of his Plea Agreement. Following the imposition of Mr. Liang's criminal sentence (on August 25, 2017), and in anticipation of Mr. Liang reporting to prison in early October 2017, VWGoA terminated his employment on September 30, 2017. Mr. Liang has declined VWGoA's request to speak with him regarding the statements he has made in his Plea Agreement. VWGoA has made reasonable inquiry, but the information known or easily obtainable is insufficient to enable VWGoA to admit or deny this Request, *see* Tex. R. Civ. P. 198.2(b), except to the extent that VWGoA admits (a) that the EPA and CARB were told that a voluntary recall in or around early 2015 was intended to "fix" the issues that were causing the NOx emission discrepancies identified in the West Virginia University study, and (b) based on VWAG's disclosures to EPA and CARB, that the software update did not remove the defeat device software that was the true reason for the discrepancy.

SPECIFIC RESPONSES AND OBJECTIONS TO INTERROGATORIES

1. Please provide the following information concerning the planning for and/or implementation of any Recall or Service Campaign for any Recalibration any portion of which occurred during 2013-2015:

a. the date on which each Recall or Service Campaign commenced and ended;
b. the number of vehicles in Texas that participated in each Recall or Service Campaign;
c. the model, year and engine type of the vehicles included in each Recall or Service Campaign;
d. the number and location of Texas Dealers that participated in each Recall or Service Campaign;
e. a description of each Recall or Service Campaign, including specifically, 1) how many vehicle owners in Texas were notified of the Recall or Service Campaign, 2) the type of Recalibration made in the Recall or Service Campaign, 3) the reasons for the Recall or Service Campaign, and 4) how the Recalibration impacted the emission control system and performance of the vehicle.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests. VWGoA further objects to this Interrogatory on the grounds that it combines eight separate interrogatories and asserts them as a single interrogatory; VWGoA will construe Interrogatory No. 1 as containing eight separate interrogatories and is responding only on that basis. VWGoA further objects to the request in Interrogatory 1.a for the date on which each Recall or Service Campaign "ended" as vague and ambiguous. VWGoA will construe "ended" to mean, according to VWGoA's reasonably available records, the last date on which an Affected Vehicle in Texas received the particular Recall or Service Campaign (the "Campaign End Date"). VWGoA further objects to the request in Interrogatory 1.e(2) for "the type of Recalibration made in the Recall or Service Campaign" as vague and ambiguous. VWGoA will construe Interrogatory 1.e(2) as requesting a short description of the Recall or Service Campaign based on VWGoA's records kept in the ordinary course of its business.

Subject to and without waiving its objections, in response to Interrogatory 1.a and Interrogatory 1.c, VWGoA states the following:

Campaign or Technical Service Bulletin Code Designations	*Model, Model Year, Engine Type*	*Campaign Release Date*	*Campaign End Date*
23O6 (VW-brand vehicles) 23N4 (Audi-brand vehicles)	2010-14 Beetle, Jetta, Golf, Jetta SportWagen, Golf Wagen, Audi A3 with 2.0L TDI engines (EA 188)	April 7, 2015	October 31, 2016 (23O6); October 18, 2016 (23N4)
TSB 2035464[2]	2009-14 Beetle, Jetta, Golf, Jetta SportWagen, Golf Wagen, Audi A3 with 2.0L TDI engines (EA 188)	No formal recall campaign; limited flashes at dealerships	No formal recall campaign; limited flashes at dealerships
23N5	2012-14 Passat with 2.0L TDI engines (EA 189)	December 15, 2014	October 18, 2016

In response to Interrogatory 1.b, VWGoA states that, according to its records, 15,115 Affected Vehicles in Texas had the 23O6 service action performed, 486 Affected Vehicles in Texas had the 23N4 service action performed, and 7,715 Affected Vehicles in Texas had the 23N5 service action performed.[3]

In response to Interrogatory 1.d, VWGoA states that the following 60 dealers in Texas applied the software from one or more of the Recalibrations to one or more of the Affected Vehicles:

[2] VWGoA understands that, prior to the formal 23O6 Recall Campaign for the VW-brand vehicles, the related Steering Wheel Angle Recognition and Start Function features were initially included as part of field fixes, rolled out on a model-wide basis, pursuant to a Technical Service Bulletin ("TSB"). Those field fixes were then superseded by the formal 23O6 Recall Campaign. The number of vehicles in Texas that received the software as part of the TSB (prior to the formal 23O6 Recall Campaign) was 27 vehicles.

[3] 24 of the 27 vehicles referenced in footnote 2 above also were taken to dealerships for installation of the software associated with the 23O6 Recall Campaign. Those 24 vehicles are *included* in the 15,115 listed in the text above, even though VWGoA understands that those vehicles had already received the related Steering Wheel Angle Recognition and Start Function features as part of the TSB that preceded the formal 23O6 Recall Campaign. VWGoA notes this fact in order to ensure against double-counting.

Ancira Volkswagen 6125 Bandera Road San Antonio, TX 78238	Ancira Volkswagen of Laredo 2701 Bob Bullock Loop Laredo, TX 78045	Archer Volkswagen 10400 Southwest Freeway Houston, TX 77074
Autobahn Volkswagen 3000 White Settlement Road Fort Worth, TX 76107	Automax Volkswagen 3301 East Central Texas Expressway Killeen, TX 76543	Autonation Volkswagen Park Cities 5555 Lemmon Ave Dallas, TX 75209
Autonation Volkswagen Richardson 300 North Central Expressway Richardson, TX 75080	Bobby Beck's Lewisville Volkswagen 893 South Stemmons Freeway Lewisville, TX 75067	Bobby Beck's McKinney Volkswagen 3600 South Central Expressway McKinney, TX 75070
Brazos Valley Volkswagen 3100 Briarcrest Dr Bryan, TX 77802	Clay Cooley Volkswagen of Park Cities 5555 Lemmon Avenue Dallas, TX 75209	Clay Cooley Volkswagen of Richardson 300 North Central Expressway Richardson, TX 75080
Crown Motor Company Volkswagen 4716 Troup Highway Tyler, TX 75703	Dallas-Fort Worth Auto Auction 12101 Trinity Boulevard Euless, TX 76040	DeMontrond Automotive Group, Inc. 14101 North Freeway Houston, TX 77090
Garlyn Shelton Imports 5700 SW H. K. Dodgen Loop Temple, TX 76504	Garlyn Shelton Volkswagen 5508 S General Bruce Dr Temple, TX 76502	Gene Messer Volkswagen 7007 University Ave Lubbock, TX 79413
Gorman McCracken Volkswagen 800 E State Highway 31 Longview, TX 75601	Hendrick Volkswagen Frisco 5010 State Hwy 121 Frisco, TX 75034	Herb Easley Motors Inc. 1125 Central E Freeway Wichita Falls, TX 76306
Hewlett Volkswagen 7951 Hewlett Loop Road Georgetown, TX 78626	Hoy Volkswagen of El Paso 1122 Airway Boulevard El Paso, TX 79925	Maund Automotive Group 6900 Burnet Road Austin, TX 78757
Metro Volkswagen 2035 W Airport Freeway Irving, TX 75062	Momentum Volkswagen 2405 Richmond Ave Houston, TX 77098	Momentum Volkswagen of Jersey Village 19550 Northwest Freeway Houston, TX 77065

Momentum Volkswagen of Clear Lake 15100 Gulf Freeway Houston, TX 77034	North Park Volkswagen 21315 Interstate Highway 10 San Antonio, TX 78257	Onion Creek Volkswagen 10812 South IH 35 Austin, TX 78748
Orr Volkswagen of Texarkana 4545 North Stateline Avenue Texarkana, TX 75503	Patterson Volkswagen of Tyler 3800 Chandler Highway Tyler, TX 75702	Payne Mission 2003 E Expressway 83 Mission, TX 78572
Payne Volkswagen 4017 North Expressway Brownsville, TX 78520	Randy Hiley Volkswagen of Arlington 1461 East Interstate 20 Arlington, TX 76018	Rudolph Volkswagen of El Paso 5505 S Desert Blvd El Paso, TX 79932
Rusty Wallis Volkswagen 12635 LBJ Freeway Garland, TX 75041	Sewell Volkswagen of Midland-Odessa 5021 West Loop 250 North Midland, TX 79703	SouthWest Volkswagen of Weatherford 2951 Fort Worth Highway Weatherford, TX 76087
Street Volkswagen of Amarillo 8707 Pilgrim Drive Amarillo, TX 79119	Volkswagen of Abilene 1350 South Clack Street Abilene, TX 79605	Volkswagen of Alamo Heights 1402 Northeast Loop 410 San Antonio, TX 78209
Volkswagen of Beaumont 1515 Interstate 10 South Beaumont, TX 77701	Volkswagen of Corpus Christi 6902 S Padre Island Dr Corpus Christi, TX 78412	Volkswagen of Midland-Odessa 5021 Loop 250 Frontage Rd Midland, TX 79707
Volkswagen of the Woodlands 16785 Interstate 45 S The Woodlands, TX 77385	West Houston Volkswagen 17113 Katy Freeway Houston, TX 77094	Audi Central Houston 2120 Southwest Freeway Houston, TX 77098
Audi Dallas 5033 Lemmon Avenue Dallas, TX 75209	Audi El Paso 1444 Airway Boulevard El Paso, TX 79925	Audi Fort Worth 116 University Drive Fort Worth, TX 76107
Audi Grapevine 1260 East State Highway 114 Grapevine, TX76051	Audi North Austin 12971 Pond Springs Road Austin, TX 78729	Audi North Houston 17815 North Freeway Houston, TX 77090

Audi Plano 5930 West Plano Parkway Plano, TX 75093	Audi San Juan 1001 East Expressway 83 San Juan, TX 78589	Audi South Austin 4738 IH-35 South Austin, TX 78745
Audi West Houston 15865 Katy Freeway Houston, TX 77094	Cavendar Audi 15447 IH-10 W San Antonio, TX 78249	VCI Manheim Dallas Fort Worth Auction 12101 Trinity Boulevard Euless, TX 76040

In response to Interrogatory 1.e(1), VWGoA states that 20,178 owners and lessees of Affected Vehicles in Texas were notified of the availability of the 23O6 recall campaign, 727 owners or lessees of Affected Vehicles in Texas were notified of the availability of the 23N4 recall campaign, and 7,993 owners or lessees of Affected Vehicles in Texas were notified of the availability of the 23N5 recall campaign.

In response to Interrogatory 1.e(2), VWGoA states that according to its records, and based on information provided at the time by VWAG, VWGoA described the Recalibrations to federal and California regulators, using Field Fix designations, as follows:

Campaign or Technical Service Bulletin Code Designations	*Description of Software Update*
23O6 23N4	**Event:** 1. The previously implemented PM loading model (Ref. FF CV2.0U5N_07 14) may cause the malfunctions P0401 and P2463. 2. The current NOx storage catalyst (NSC) strategy may not be sufficient under dynamic and transient engine speed and load conditions and might cause high on-road NOx emissions. **Analysis:** 1. Improvements have been made with regard to the PM filter loading/ regeneration model. The updated software incorporates the latest engineering experiences to enhance the accuracy of the PM filter model. The implemented changes do not have a negative impact on the Kl-factor determination or influence the on-road performance of the vehicle. 2. Improvements have been made with regard to NSC strategy. The

	updated software incorporates the latest engineering experiences to enhance the efficiency of the NSC system. On road NOx emissions will be decreased by: • DeNOx frequency increased, decreased NOx loading will mitigate the impact of incomplete DeNOx operation. • Lower loading level of NOx storage catalyst leads to lower desorption rate during rich engine operation. • DeNOx strategy allowed on higher temperature levels. Thermal desorption will be avoided. **Activities:** Improved ECM software has been developed and will be available for service. It includes no summary table changes.
TSB 2035464	**Event:** 1. Improvements being made in regards to the PM filter loading model. A not optimized PM loading model might cause malfunctions: P0401 and P2463. 2. Due to the occurrence of false fail monitoring events from the Zero Fuel Calibration Diagnostic it is necessary to improve the method of calibration. It might cause malfunctions P0263, P0266, P0269 and P0272. **Analysis:** 1. This software update incorporates latest engineering experiences to improve the accuracy of the PM filter loading model. 2. Currently engine temperature, air temperature and boost pressure are only used to disable the calibration function. With the improved calibration method, these parameters are also used to adjust the calibration result. As a result the variation of the calibration values and setting of false fails is much lower. **Activities:** Improved ECM software has been developed. It includes no summary table changes. The improved software is available for service.
23N5	**Event:** 1. Customers may notice noise coming from the turbocharger with MIL on and P0299 (turbocharger under boost fault) stored in the fault memory. 2. The previously implemented PM loading model may cause the malfunctions P0401 and P2463. 3. The current urea dosing strategy may not be sufficient under dynamic and transient engine speed and load conditions and might cause high on-road NOx emissions. **Analysis:**

	1. The turbo charger bearing might experience high friction due to insufficient lubrication after engine cold start caused by high oil viscosity and low oil supply at cold ambient conditions. The boost pressure is limited for the engine warm-up phase. This ensures a reduction of forces on the bearing until lubrication of the turbocharger bearing is sufficient. 2. Improvements have been made with regard to the PM filter loading/regeneration model. The updated software incorporates the latest engineering experiences to enhance the accuracy of the PM filter model. The implemented changes do not have a negative impact on the Kl-factor determination or influence the on-road performance of the vehicle. 3. Improvements have been made ensuring a higher Ammonia filling level of the SCR catalyst. This ensures that the SCR catalyst is more robust against NOx peaks caused by dynamic and transient speed/load changes. The new software incorporates the latest engineering experiences to enhance the efficiency of the SCR system. The change in the after-treatment strategy has no negative impact on the fuel consumption and urea refill intervals for the majority of customers. **Activities:** Improved ECM software has been developed and will be available for service. It includes no summary table changes.

With regard to the additional software changes or flashes identified in Plaintiffs' April 23, 2018 letter[4]—none of which to VWGoA's knowledge based on a reasonable investigation constituted "Recalibrations"—VWGoA states that according to its records, and based on

[4] Plaintiffs' April 23 letter omitted certain software updates that VWGoA disclosed in its September 23, 2017 list. Pursuant to Plaintiffs' request in the April 23 letter, VWGoA has included those additional updates in the chart below.

information provided at the time by VWAG, the basis, purpose, reason and effect of those software changes or flashes was as follows:[5]

Test Group(s)	*Field Fix Code(s) (or Recall Code(s))*[6]	*Description of Software Update*
9VWXV02.0U5N	RF_9V2.0U5N_01_09	A new ECM software level was developed to address starting behavior at very low temperatures (below 0°F). The new software was installed in production and available at customer service with a January 2009 rolling implementation date. This software change did not have an impact on emissions.
9VWXV02.0U5N AVWXV02.0U5N	FF_9V2.0U5N_03_09 FF_AV2.0U5N_01_09	The gearbox clutch temperature sensor had the potential to falsely detect a high oil temperature. Analysis showed that the wiring harness of the temperature sensor may have had connector wires that were insufficiently crimped during a limited production period. The gearbox was reprogrammed with updated software. The affected temperature sensor was deactivated and replaced by a modeled temperature. This software change did not have an impact on emissions.

[5] The majority of software changes or flashes described in Plaintiffs' April 23, 2018 letter were not associated with a formal emissions recall. Therefore, these software changes or flashes are referred to by their Field Fix codes, with the exception of the 23M1/23L2 recall campaign.

[6] Multiple field fix codes were often used to describe substantially identical software updates involving multiple test groups. To the extent feasible, VWGoA has consolidated the descriptions for such updates into single entries in the table below. Certain field fixes were updated with subsequent revisions (indicated as "revision 1" or "R_01"). These revisions sometimes contained substantive changes to the software, and other times merely reflected updated documentation, and have been grouped in the chart accordingly.

9ADXT03.03LD	FF_9A3.03LD_02_09	During internal vehicle testing and evaluation of MY10 vehicles, an improved OBD robustness and functionality was developed for MY09 vehicles. These improved calibrations were used to enhance functionality of MY09 software with respect to the following aspects: - Diesel Particulate Filter (Fault Code P2002) - OBD SCR System (Fault Code P2201) - OBD Engine Control Module (Fault Code P1388) - PVE(j)(2) Findings Correction Vehicles of test group 9ADXT03.03LD were equipped with the updated ECM calibrations in service. This software change did not have an impact on emissions.
9VWXV02.0U5N	FF_9V2.0U5N_02_09	A new ECM software level was developed to optimize OBD function. The new software was available at customer service with a July 2009 rolling implementation date. This software change did not have an impact on emissions.

AADXT03.03LD	RF_AA3.03LD_02_10	During internal vehicle testing and evaluation of MY10 vehicles, an improved OBD functionality was developed for MY10 vehicles. These improved calibrations were used to enhance functionality of MY10 software with respect to the following aspects: - P2201 (NOx Sensor upstream SCRC) - P229F (NOx Sensor downstream SCRC) - P026A (Charge Air Cooler) - P2002 (Diesel Particulate Filter - Enhanced Soot Loading Model) - P204A (Urea Pressure Sensor - only Audi Q7) Vehicles of test group AADXT03.03LD were equipped with the updated ECM calibrations in service. This software change did not have an impact on emissions.
AVWXV02.0U5N	RF_AV2.0U5N_02_10	Rough, noisy engine running occurred at cold engine start conditions (50 - 104 °F engine oil temperature). A new software calibration was developed to improve engine running and engine noise in these conditions. The new ECM software calibration was installed in production and made available for service with a February 2010 rolling implementation date. This software change did not have an impact on emissions.

AVWXV02.0U5N	RF_AV2.0U5N_03_10	O2-sensor diagnosis was too sensitive (leading to unnecessary service events for customers) and poisoning of O2-sensor was occurring, leading to fault codes stored in the ECM (DTCs P0136, P0139, P2271, P0138 and P320C). A new software calibration was developed to stabilize O2-sensor diagnosis to avoid unnecessary service actions. This calibration entailed early DPF regeneration after 60 miles and activation of O2-sensor heating during keep-alive-time. The new ECM software calibration was installed in production and made available for service with a February 2010 rolling implementation date. This software change did not have an impact on emissions.
AVWXV02.0U5N	RF_AV2.0U5N_04_10	O2-sensor diagnosis was too sensitive (leading to unnecessary service events for customers) and poisoning of O2-sensor was occurring, leading to fault codes stored in the ECM (DTCs P0136, P0139, P2271, P013B, and P320C). This calibration entailed early DPF regeneration after 60 miles and activation of O2-sensor heating during keep-alive-time. The new ECM software calibration was installed in production and made available for service with an April 2010 rolling implementation date. This software change did not have an impact on emissions.

9ADXT03.03LD AADXT03.03LD	FF_9A3.03LD_03_10 FF_AA3.03LD_03_10	During internal vehicle testing and evaluation of MY11 vehicles, an improved OBD robustness and functionality was developed for MY09 and MY10 vehicles. These improved calibrations were used to enhance functionality of MY09 and MY10 calibrations with respect to the following aspects: -P2458 (DPF incomplete regeneration) -P2084 (Plausibility check of Exhaust Gas Temp. Sensor EGT2 upstream DOC) -P2279 (Boost pressure hose leakage). Vehicles of test group 9ADXT03.03LD and AADXT03.03LD were equipped with the updated ECM calibrations in service. This software change did not have an impact on emissions.
AVWXV02.0U5N 9VWXV02.0U5N	FF_AV2.0U5N_05_10 FF_9V2.0U5N_04_10	A new software calibration was developed to avoid poisoning of O2-sensor and to avoid incorrect detection of MAF-sensor at low battery voltage to improve drivability. The new ECM software calibration was made available for service with an October 2010 rolling implementation date. This software change did not have an impact on emissions.
BADXT03.03UG	RF_BA3.03UG_01_11	A new ECM calibration with optimized logic for the fuel feed pump was developed to improve starting behavior in a cold environment. The new ECM calibration was phased into production in CW50/2010, replacing the previous release. This software change did not have an impact on emissions.
BADXT03.03UG CADXT03.03UG	FF_BA3.03UG_03_11 RF_CA3.03UG_02_11	Vehicles pulled away with a jerk and slightly increased engine speed, and gear changes were uncomfortable. Software for the TCM was improved to address these concerns. This software change did not have an impact on emissions.

BADXT03.03UG CADXT03.03UG	FF_BA3.03UG_04_11 RF_CA3.03UG_03_11	New gearbox software for the transmission control unit was developed with improved and modified diagnostic service, correction of shiftlock function and correction of CAN signal. This software change did not have an impact on emissions.
CADXT03.02UG BADXT03.02UG	RF_CA3.02UG_02_11[7] FF_BA3.02UG_02_11	Multiple DTCs could be stored in the ECM fault memory due to an under voltage condition in the AdBlue control module. Improved ECM software was developed to avoid the under voltage condition. This software change did not have an impact on emissions.
BVWXV02.0U5N CVWXV02.0U5N	FF_BV2.0U5N_05_12 RF_CV2.0U5N_01_12	New ECM and TCM calibrations were developed to correct hesitation behavior of diesel vehicles with L6 transmission. New ECM and TCM calibrations were made available with a November 2011 rolling implementation date. This software change did not have an impact on emissions.
CADXT03.02UG BADXT03.02UG	RF_CA3.02UG_03_12 RF_CA3.02UG_03_12 revision 1 FF_BA3.02UG_04_12	OBD parameter (PID) $1F "Time since engine start" was modified. Formerly PID $1F was triggered by the ignition switch. The trigger contained in the TCM software was changed to the signal "DC recognized." This software change did not have an impact on emissions.
CADXT03.02UG	RF_CA3.02UG_04_12	Software was developed to improve gear shifting quality. This software change did not have an impact on emissions.

[7] Due to minor inconsistencies between VWGoA's field fix logs and associated field fix documentation, some field fixes are listed here under slightly different codes than those listed in Plaintiff's April 23, 2018 letter. This field fix was referred to as RF_CA3.02UG_02_12 in that letter.

9ADXT03.03LD AADXT03.03LD BADXT03.03UG CADXT03.03UG	FF_9A3.03LD_05_12 FF_AA3.03LD_05_12 FF_BA3.03UG_05_12 RF_CA3.03UG_04_12	On Audi Q7 vehicles, the diagnostic thresholds of the urea metering pump were set too close to the startup of pump operation. As a result, an event could be registered in the ECU memory (P0204B) and the engine warning light could light up. During MY12 development, a revised ECU software with an improved urea metering pump logic was developed which was backward compatible to MY09, MY10 and MY11 vehicles. This new calibration was made available for MY09, MY10 and MY11 vehicles as well. This software change did not have an impact on emissions.
AVWXV02.0U5N BVWXV02.0U5N CVWXV02.0U5N	FF_AV2.0U5N_07_12 FF_BV2.0U5N_06_12 RF_CV2.0U5N_03_12	Customers complained that while braking and down-shifting in Tiptronic mode and while accelerating from a rolling stop, the transmission did not respond accordingly. Improved software for the TCM was developed to address these concerns. This software change did not have an impact on emissions.
DVWXV02.0U4S	RF_DV2.0U4S_01_12[8]	New software was developed to avoid fault code entry P2201/P1388 and P0606 for the NOx sensor due to a diagnostic strategy that was too sensitive. This new software was indroduced into production in August 2012 and made available for service in case of customer complaints. This software change did not have an impact on emissions.

[8] Referred to as RF_DV2.0U4S_01_13 in Plaintiffs' April 23, 2018 letter.

CADXT03.02UG BADXT03.02UG	RF_CA3.02UG_05_12 FF_BA3.02UG_03_12	On the Volkswagen Touareg, a MIL ON event with one or more of the following DTCs stored in the ECM memory could occur: P208E due to a stuck valve pin of the AdBlue dosing valve; P20EE due to insufficient robustness of the SCR Cat efficiency diagnosis; P150A due to implausible signal for the time frame ignition off; or P208C due to a too sensitive diagnostic strategy of the reductant pump during system checks. Improved ECM software was developed to address these concerns. This software change did not have an impact on emissions.
CVWXV02.0U4S	FF_CV2.0U4S_01_12	New software was developed to avoid fault code entry P2201 for the NOx sensor and/or P050E, P2080, P244C, P2478 for the exhaust gas temperature sensor due to a diagnostic strategy that was too sensitive. This new software was made available for service in case of customer complaints. This software change did not have an impact on emissions.
BADXT03.02UG	FF_BA3.02UG_05_12	Software was developed to improve gear shifting quality. This software change did not have an impact on emissions.
9ADXT03.03LD AADXT03.03LD	FF_9A3.03LD_06_12 RF_AA3.03LD_06_12	On Audi Q7 and VW Touareg vehicles, the following DTCs could be stored in the ECM memory: P208E: valve pin of AdBlue dosing valve stuck (MIL ON); and/or P20EE: SCR Cat efficiency too low (MIL ON); and/or P150A: Signal for time frame ignition off implausible. New ECM software with an improved SCR catalyst efficiency diagnosis and stoppage timer was developed to fix the above mentioned concerns. This software change did not have an impact on emissions.

CADXT03.03UG	RF_CA3.03UG_05_12	MIL ON and DTC P208E could be stored in the ECM memory due to a stuck valve pin of the AdBlue dosing valve (P208E), and/or MIL ON and P20EE stored in ECM memory could occur due to insufficient robustness of the SCR catalyst efficiency diagnosis. New ECM Software was developed to fix the above mentioned concerns. This software change did not have an impact on emissions.
CVWXV02.0U4S	FF_CV2.0U4S_01_12 (R01)	FF_CV2.0U4S_01_12 was updated to reflect a new set of software levels addressing the same issues covered in that previous field fix. This software change did not have an impact on emissions.
BADXT03.02UG BADXT03.03UG CADXT03.02UG	FF_BA3.02UG_06_12 FF_BA3.03UG_06_12 FF_CA3.02UG_06_12	On Volkswagen Touareg/Audi Q7 vehicles, shift operation of the automatic transmission could feel uncomfortable. Improved TCM software to correct transmission lag was developed and made available for service. This software change did not have an impact on emissions.
DVWXV02.0U5N	FF_DV2.0U5N_02_13 FF_DV2.0U5N_02_13_R01	Customer complaints were received of MIL ON conditions with DTC P00AF stored in ECM Fault Memory (Turbocharger / Supercharger Boost Control "A" Module Performance). Updated software was developed which included improved turbocharger diagnostics. This software change did not have an impact on emissions.
9ADXT03.03LD; AADXT03.03LD	FF_9A3.03LD_07_13 FF_AA3.03LD_07_13	On Audi Q7 and VW Touareg vehicles, the following DTCs could be stored in the ECM memory: P208E: valve pin of AdBlue dosing valve stuck (MIL ON); and/or P20EE: SCR Cat efficiency too low (MIL ON); and/or P150A: Signal for time frame ignition off implausible. New ECM Software with an improved SCR catalyst efficiency diagnosis and stoppage timer was developed to fix the above mentioned concerns. This software change did not have an impact on emissions.

BADXT03.02UG; CADXT03.02UG	FF_BA3.02UG_07_13 FF_CA3.02UG_07_13	On VW Touareg vehicles, the following DTCs could be stored in the ECM memory and a MIL ON condition could occur: P0263; P0266; P0269; P0272; P0275; P0278; deviation of injection quantity cylinder 1-6. Analysis showed that the application of zero fuel calibration ("ZFC") quantity control was incorrect, causing the OBD Monitor for the ZFC injection quantity to pass the threshold value erroneously. Improved ECM software addressing these concerns was developed and made available for service. This software change did not have an impact on emissions.
BADXT03.03UG; CADXT03.03UG	FF_BA3.03UG_07_13 FF_CA3.03UG_06_13	On Audi Q7 vehicles, the following DTCs could be stored in the ECM memory: P208E: valve pin of AdBlue dosing valve stuck (MIL ON); and/or P20EE: S CR Cat efficiency too low (MIL ON); and/or P150A: Signal for time frame ignition off implausible; and/or P0263; 0266; 0269; 0272; 0275; 0278: deviation of injection quantity cylinder 1-6. Improved ECM software with revised SCR catalyst efficiency diagnosis, stoppage timer and injection quantity analysis was developed to address these concerns and made available for service. This software change did not have an impact on emissions.
CVWXV02.0U5N	FF_CV2.0U5N_05_13	Fault code entry P240F for slow response exhaust gas recirculation could occur, and customer complaints about a hesitation issue were received. Analysis showed that an adjustment to the system reaction model was needed due to false failure events of the EGR slow response diagnosis in high altitude conditions. Improved ECM software was developed incorporating these changes, as well as improved TCM software to provide an improved hesitation characteristic. This software change did not have an impact on emissions.

CVWXV02.0U4S	FF_CV2.0U4S_03_13	Fault code entry P2201 for NOx sensor was observed. The NOx sensor monitor checks whether a high NOx peak upstream of the SCR catalyst will lead to a small increase downstream of the SCR catalyst due to a limited NOx conversion. With very long constant driving under highway conditions, the efficiency of the SCR catalyst could be much higher than expected. Therefore, a NOx peak that should normally pass the SCR system partially will completely be converted. Because the ECU only calculates with the desired SCR performance, the NOx sensor monitor expects an increase of the downstream NOx sensor reading and makes a false fail decision in this situation. In order to avoid this scenario, the enable criteria of this monitor was changed from "multiple" to "once-per-DCY" to prevent additional monitoring events in very long driving cycles that could result in the failure scenario. Improved ECM software incorporating this change was implemented in production and also made available for service. This software change did not have an impact on emissions.
CADXT03.03UG BADXT03.02UG BADXT03.03UG CADXT03.02UG	FF_CA3.03UG_07_13 FF_BA3.02UG_08_13 FF_BA3.03UG_08_13 FF_CA3.02UG_08_13	Customer complaints were received about rough idle and driveability concerns when driving in city traffic. For Audi Q7/VW Touareg vehicles, a new series master file was developed to improve customer satisfaction and driveability with low quality fuel. Improved ECM software incorporating these changes was developed and made available for service. This software change did not have an impact on emissions.

DADXT03.02UG DADXT03.03UG	RF_DA3.02UG_01_13[9] RF_DA3.03UG_02_13	On the Volkswagen Touareg, one or more of the following issues could occur: (1) unauthorized storage of various DTCs concerning particle Sensor. MIL ON; DTCs P24AF; P026A; P050E; (2) sporadic false MIL entries of charge air undercooling; (3) unauthorized storage of DTC P0299 concerning boost pressure; (4) jerky engine behavior and reduced driveability. MIL ON & P0403; (5) P20EE, P207F stored for lowered SCR Cat efficiency; (6) rough idle when using low quality fuel; (7) sporadic false MIL and DTC P229F set inadvertently. The company changed the calibration so the diagnosis is performed on UDC-like driving conditions, redesigned the charge air undercooling monitor, redesigned the target boost pressure model, improved EGR control, redesigned the SCR catalyst efficiency control, improved idle control logic and improved NOx-sensor self-diagnosis. Improved ECM software incorporating these changes was developed and made available for service. This software change did not have an mpact on emissions.
9ADXT03.03LD AADXT03.03LD BADXT03.03UG CADXT03.03UG	23L2/L7 23M1/W8	The company performed an Emissions Service Action with Customer Notification to upgrade ECM software levels and to replace the exhaust differential pressure sensor with an improved version for MY09-12 Volkswagen Touareg and Audi Q7 vehicles. This service action included several software levels to resolve DTCs in the ECM memory that were covered by earlier field fix codes. The recall was initiated with dealer and customer notifications on July 1, 2013. This recall did not have an impact on emissions.

[9] Referred to as RF_DV2.0U4S_01_12 in Plaintiffs' April 23, 2018 letter.

EADXJ03.04UG EADXJ03.04UG	RF_EA3.04UG_01_13 RF_EA3.04UG_02_13	On Audi A6, A7 and Q5 vehicles, some customers complained about hesitation while driving. Improved TCM software was developed to address noticeable hesitation under certain driving conditions and was made available for production and service. This software change did not have an impact on emissions.
DVWXV02.0U4S EVWXV02.0U4S	FF_DV2.0U4S_03_14 RF_EV2.0U4S_01_14	Dramatic low temperature conditions could lead to the occurrence of false fail monitoring events of the SCR catalyst and DEF dilution monitors. These monitors activate the SCR driving inducement and result in no restart possible after 200 miles. Analysis showed that under extreme ambient conditions (low temperature, combined with excessive snowfall and high wind conditions) the difference in estimated and actual SCR conversion efficiency was severe enough for a false failure detection. This condition could be caused by front end grill blockage by snow resulting in the temperature sensor receiving an incorrect ambient temperature reading. An enable criterion of "t _env <8.5 °C" was determined to be sufficient to prevent the false fail monitoring events. Improved ECM software was developed implementing this solution and was made available for service. This software change did not have an impact on emissions.
CVWXV02.0U4S; CVWXV02.0U5N; DVWXV02.0U4S; DVWXV02.0U5N	FF_CV2.0U4S_04_14 FF_CV2.0U5N_06_14 FF_DV2.0U4S_04_14 FF_DV2.0U5N_03_14	Customer complaints of hesitation issue were received. Analysis showed that TCM software needed updated programming. Updated TCM software was released that provided an improved hesitation characteristic. This software change did not have an impact on emissions.

BADXT03.03UG CADXT03.03UG DADXT03.03UG	FF_BA3.03UG_06_12_R01 FF_CA3.03UG_09_14 FF_DA3.03UG_01_12_R01	On Audi Q7 vehicles, shift operation of the automatic transmission could feel uncomfortable and/or customers could experience the message "Gearbox = malfunction: You can continue driving," with DTC P1893 and/or P1890 stored in the TCM memory. Analysis showed that the diagnostic threshold setting was too sensitive. Improved TCM software was developed and made available for service incorporating corrections to the diagnostic threshold and correcting transmission lag. This software change did not have an impact on emissions.
9ADXT03.03LD AADXT03.03LD	FF_9A3.03LD_08_14 FF_AA3.03LD_08_14	Some Audi Q7 / VW Touareg customers complained about rough idling and/or the DTCs P0263, P0266, P0269, P0272, P0275, P0278 present in the ECM memory. Analysis showed that the cylinder contribution/balance strategy was too weak. Improved ECM software to address the cylinder contribution/balance strategy was developed and made available for service. This software change did not have an impact on emissions.

EADXJ03.04UG	RF_EA3.04UG_04_ 14	MIL on and limp home mode activation could occur, with DTCs P2463: Diesel Particulate Filter - Soot Accumulation and/or P2002: Particulate Trap Bank 1 Efficiency Below Threshold. Analysis showed that in some rare cases a rearrangement of soot inside of the DPF could take place, leading to a disproportionately high DP signal. In those rare cases the regeneration of the DPF could be triggered by the DP signal, rather than by the usual simulation model. Improved ECM software with an improved calculation of soot load, increased length of regenerations triggered by the DP model, and decreased distance between two regeneration events (from 840 miles to 636 miles) was developed and made available for production and service. This software change was determined to cause a minimal impact on emissions, with the reduced distance between two regeneration events leading to increased upward adjustment factors.
FVGAV02.0VAL	RF_FV2.0VAL_01_14	Some customers were unable to start their vehicles after they had been parked for a long period of time, e.g. overnight. Analysis showed that drained batteries were causing the issue. If customers opened the door or switched the ignition back on within 10 seconds after the ignition has been switched off, the ECM would wake up the CAN bus continuously, leading ultimately to a discharged battery after approximately 9 hours when the vehicle was parked. Improved ECM software including corrections that inhibited the vehicle from waking up the CAN bus when parked, preventing the discharge of the battery, was implemented in production and made available for service. This software change did not have an impact on emissions.

FVGAV02.0VAL	RF FV2.0VAL_03_ 15	Customers could notice MIL on with DTC P2458 "Particulate matter trap, incomplete regenerations." In rare cases, customer could notice MIL on during long idle phases with DTC P2462 "calculated particulate matter trap loading exceeds maximum threshold" stored in the ECM. Analysis showed that P2458 was caused by incorrect data for the particulate matter trap regeneration time. The desired value of 12,600 seconds, as listed in the summary table, was wrongly coded with 9,600 seconds for these applications. Incorrect data at idle transient phases led to incorrect calculation of modeled soot loading, causing DTC P2462 due to a deviation between the modeled and actual soot mass of the PM loading. Updated software incorporating corrections to both of these issues was developed and made available for service. This software change did not have an impact on emissions.
EADXJ03.04UG FVGAJ03.0NU4	FF_EA3.04UG_07_15 FF_EA3.04UG_07_15_R 01 RF_FV3.0NU4_01_15 RF_FV3.0NU4_01_15 (Revision 01)	Reductant pressure too low (DTC P20E800) was stored in the engine control module (ECM). Improved ECM software with a more robust diagnostic strategy was developed and made available for production and service. This software change did not have an impact on emissions.
9VWXV02.0U5N	FF_9V2.0U5N_11_15	This software was never released into service.

FVGAT03.0NU2	RF_FA3.0NU2_01_15	Multiple issues were present with ECM software: (1) DPF regeneration may not have been performed adequately under hot and humid climatic conditions; (2) Glow plug cylinder 5 defect; (3) MIL On and P20FE stored in ECU fault memory; and (4) MIL On and P24D1 and/or P2201 stored in ECU fault memory. Improved software was developed modifying the soot loading model, improving the glow plug diagnostic, improving the robustness of the SCR heating diagnosis and altering the PM sensor diagnosis, and made available for production and service. This software change did not have an impact on emissions.
DVWXV2.0U4S	FF_DV2.0U4S_07_15	Application was updated to include TCM software levels for the earliest production stages. This software change did not have an impact on emissions.[10]
DADXT03.03UG EADXT03.03UG FVGAT03.0NU3	FF_DA3.03UG_06_16[11] FF_EA3.03UG_02_16 FF_FV3.0NU3_01_16	Under certain driving conditions the ECM would detect a too low reductant pressure condition because of an overly sensitive pressure diagnostic. Improved ECM software addressing this concern and an issue with inadvertantly triggered glow plugs was made available for service. This software change did not have an impact on emissions.

[10] VWGoA understands that this field fix documentation reflected a correction of prior information provided to the agencies regarding software levels previously implemented at the time of production, not a service action to install new software levels with respect to Existing Affected Vehicles.

[11] Referred to in Plaintiffs' April 23, 2018 letter as FF_DA3.03UG_06_15.

FVGAV02.0VAL	FF FV2.0VAL_04_16	Customers could notice a MIL on with one or both of DTCs P208D "Reductant Pump A Control Circuit High" and/or P205B "Reductant Tank Temperature Sensor Circuit" stored in the ECM during cold weather conditions. Analysis showed that the ECM calibration could lead to false failure detection for both of these codes. Improved software incorporating robustness enhancements and an extended initialization phase for the SCR tank temperature signal was developed and made available for service in case of customer complaint. This software change did not have an impact on emissions.

In response to Interrogatory 1.e(3), VWGoA states that it did not design either the engines at issue or the software that was installed as part of either the Recalibrations or the other software changes or flashes described in Plaintiffs April 23, 2018 letter. With regard to the Recalibrations (which are listed in response to Interrogatories 1.a and 1.c), VWGoA did not know the full purpose of this software at the time it initiated the Recalibrations. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands (a) that one of the reasons the Recalibrations were performed was to address certain hardware failures in certain of the 2.0 Liter Affected Vehicles, as described more fully in paragraphs 47 to 51 of the VWAG Statement of Facts, and (b) that the Recalibrations used the steering wheel angle of the vehicle as a basis to more easily detect when the vehicle was undergoing emissions tests, thereby improving the defeat device's precision in order to reduce the stress on the emissions control systems. VWGoA further responds to Interrogatory 1.e(3) by referring Plaintiffs to VWGoA's answer to Interrogatory 1.e(2), *supra*, which lists the reasons

VWGoA provided to its federal and California regulators for the Recalibrations and which VWGoA understood at the time to be the reasons for the Recalibrations.

In response to Interrogatory 1.e(4), VWGoA directs Plaintiffs to its response to Interrogatory 1.e(2).

2. Please provide the following information concerning the Steering Wheel Angle Recognition feature:

a. the reason(s) for installing the Steering Wheel Angle Recognition feature;
b. a description of how the Steering Wheel Angle Recognition feature altered the emissions control systems of Affected Vehicles;
c. the number of Existing Affected Vehicles in Texas on which You installed or caused to be installed the Steering Wheel Angle Recognition feature;
d. the number and location of Texas Dealers that participated in the installation of the Steering Wheel Angle Recognition feature on Existing Affected Vehicles.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests. VWGoA further objects to the phrase "altered the emissions control systems" in Interrogatory 2.b as vague and ambiguous. VWGoA further objects to this Interrogatory on the grounds that it combines four separate interrogatories and asserts them as a single interrogatory; VWGoA will construe Interrogatory No. 2 as containing four separate interrogatories and is responding only on that basis.

Subject to and without waiver of these Objections, in response to Interrogatory 2.a, VWGoA states that it did not design either the engines at issue or the software referred to as the Steering Wheel Angle Recognition feature and did not know about the Steering Wheel Angle Recognition feature or its purpose at the time it was installed in any Affected Vehicles. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the Steering Wheel Angle Recognition feature was installed

to address certain hardware failures in certain of the 2.0 liter Affected Vehicles, as described more fully in paragraphs 47 to 51 of the VWAG Statement of Facts.

In response to Interrogatory 2.b, VWGoA states that it did not design either the engines at issue or the Steering Wheel Angle Recognition feature, and did not know about the Steering Wheel Angle Recognition Feature or its purpose at the time it was installed in any Affected Vehicles. However, based on VWGoA's review of the VWAG Plea Agreement and the VWAG Statement of Facts, VWGoA understands that the Steering Wheel Angle Recognition feature, if installed on an Affected Vehicle and not already included in the vehicle at the time of manufacture, enabled the vehicle to better detect whether it was being tested on a dynamometer or being driven on the road.

In response to Interrogatory 2.c and Interrogatory 2.d, VWGoA refers Plaintiffs to its objection to the definition of "Steering Wheel Angle Recognition" in paragraph 4, *supra*, and further states that it understands that the Recalibrations (which are set forth in Interrogatory 1.a and 1.c) included the software code associated with the Steering Wheel Angle Recognition feature. VWGoA is not aware of the precise number of Affected Vehicles in Texas that received a Recalibration that included the Steering Wheel Angle Recognition feature, or which dealers in Texas performed a service action that included the Steering Wheel Angle Recognition feature. However, VWGoA states that, based on a reasonable investigation, 15,115 Affected Vehicles in Texas had the 23O6 recall campaign performed, 486 Affected Vehicles in Texas had the 23N4 recall campaign performed, and 7,715 Affected Vehicles in Texas had the 23N5 recall campaign performed.[12] However, VWGoA also understands that Model Year 2014 Affected Vehicles that

[12] As noted in footnote 3, 24 of the 27 vehicles referenced in footnote 2 above also were taken to dealerships for installation of the software associated with the 23O6 Recall Campaign. Those 24 vehicles are

received the Recalibrations already had the Steering Wheel Angle Recognition feature, which had been included in those vehicles at the time of manufacture. VWGoA also respectfully refers Plaintiffs to VWGoA's response to Interrogatory 1.d, which lists those Texas dealers that performed the Recalibrations to one or more of the Affected Vehicles in Texas.

3. Please provide the following information concerning James Robert Liang's employment at Volkswagen Group of America, Inc.:

a. The start and end dates and reason(s) for termination of Mr. Liang's employment at Volkswagen Group of America, Inc.;
b. The position or positions held by Mr. Liang during his employment at Volkswagen Group of America, Inc.;
c. All individuals who managed, supervised or oversaw Mr. Liang's work during his employment at Volkswagen Group of America, Inc.

RESPONSE: VWGoA hereby incorporates the Objections Applicable to All Requests. VWGoA further objects to this Interrogatory on the grounds that it combines three separate interrogatories and asserts them as a single interrogatory; VWGoA will construe Interrogatory No. 3 as containing three separate interrogatories and is responding only on that basis.

Subject to and without waiving the foregoing objections, in response to Interrogatory 3.a, VWGoA states that Mr. Liang was employed by VWAG from 1983 until May 2008, and worked there as a Development Engineer. In May of 2008, Mr. Liang began working at VWGoA as a Foreign Service Employee. Mr. Liang's employment with VWGoA was suspended on September 9, 2016, the date of his plea agreement. Following the imposition of Mr. Liang's criminal sentence (on August 25, 2017), and in anticipation of Mr. Liang reporting to prison in early October 2017, VWGoA terminated his employment on September 30, 2017.

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included in the 15,115 listed in the text above, even though VWGoA understands that those vehicles had already received the related Steering Wheel Angle Recognition and Start Function features as part of the TSB that preceded the formal 23O6 Recall Campaign. VWGoA notes this fact in order to ensure against double-counting.

In response to Interrogatory 3.b, VWGoA states that Mr. Liang held the position of Leader of Diesel Competence at VWGoA. In that position, no one at VWGoA reported to him. Mr. Liang was not a supervisor or manager at VWGoA.

In response to Interrogatory 3.c, and pursuant to Texas Rule of Civil Procedure 197.2(c), VWGoA refers Plaintiffs to the organizational charts that have been produced in this action at VW-MDL2672-01682476, VW-MDL2672-02604254, VW-MDL2672-09437387, and VW-MDL2672-12868461. VWGoA understands based on its investigation since the NOVs and substantial deposition testimony that the individuals who actually supervised and oversaw Mr. Liang's work on a day-to-day basis were employed by VWAG, not VWGoA. In particular, VWGoA understands that while Mr. Liang may have nominally been included on certain VWGoA organizational charts, he reported to VWAG's Heads of Diesel Engine Development in Germany, which varied over the period Mr. Liang was at VWGoA, but included Hartmut Stehr and Wolfgang Goerck (Heads of EADA/3 – Diesel Engine Development – Combustion Team) as well as Thorsten Duesterdiek and Richard Dorenkamp (Heads of EADA – Diesel Engine Development – Procedures and Exhaust After-treatment).

Respectfully submitted,
/s/ C. Vernon Hartline, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by email in compliance with the Texas Rules of Civil Procedure on August 17, 2018 on the following counsel of record.

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/s/ C. Vernon Hartline, Jr.

C. VERNON HARTLINE, JR.

VERIFICATION

STATE OF TEXAS §
§
§
TRAVIS COUNTY §

Before me, the undersigned notary, on this day personally appeared Patrick K. Sweeten, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

"My name is Patrick K. Sweeten. I am capable of making this verification. I have personal knowledge of the facts set forth in this verification which are true and correct.

1. I am Senior Counsel for Litigation for the Office of the Attorney General of Texas and I am lead counsel the State of Texas in Cause No. D-1-GN-16-000370; *In re Volkswagen Clean Diesel Litigation* (MDL15-0884) in the 353rd Judicial District Court of Travis County ("Clean Diesel Litigation"). As counsel for the State, I am knowledgeable about the filings related to this case and the matters set forth in this verification, which is made on my personal knowledge following review of the relevant case materials.

2. Attached as "Appendix A" to the State of Texas's Response to Mandamus Petition are true and correct copies of exhibits that were attached to the State of Texas's Response and Opposition to Volkswagen and Porsche Defendants' Motion for Summary Judgment that were electronically filed with the Travis County District Clerk's Office in the Clean Diesel Litigation on November 20, 2017. Exhibit A include the following documents:

- Tab 1: Defendant Volkswagen Group of America, Inc.'s Third Amended Responses and Objections to Plaintiff's First Set of Interrogatories.

- Tab 2: Letter from Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, U.S. EPA, to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (September 18, 2015).

- Tab 3: Letter from Susan Shinkman, Director, Office of Civil Enforcement, U.S. EPA, to Volkswagen AG, Audi AG, Porsche AG, Volkswagen Group of America, Inc., and Porsche Cars North America, Inc. (November 2, 2015).

- Tab 4: Rule 11 Plea Agreement, United States of America v. Volkswagen AG, E.D. Mich., No. 16-CR-20394.

- Tab 5: Defendant Volkswagen Group of America, Inc.'s Responses and Objections to State of Texas's and TCAA County Plaintiffs' Second Set of Requests for Admissions and Interrogatories.

- Tab 6: Deposition of Stuart Johnson, August 8, 2017.

- Tab 7: Deposition of Stuart Johnson, Corporate Representative for Defendant Volkswagen Group of America, Inc., October 25, 2017.

- Tab 8: Defendants' Third Amended Responses to the State's First Request for Admissions.

- Tab 9: Importer Agreement between Volkswagen Aktiengesellschaft and Volkswagen of America, Inc."

3. Attached as "Appendix B" to the State of Texas's Response to Mandamus Petition are true and correct copies of the State's exhibits that were attached to the State of Texas's Response and Opposition to Volkswagen and Porsche Defendants' Re-Filed Motion for Summary Judgment and Special Exceptions and were electronically filed with the Travis County District Clerk's Office

in the Clean Diesel Litigation on December 15, 2017. Exhibit B includes the following documents:

- Tab 1: State of Texas's Response and Opposition to Volkswagen and Porsche Defendants' Motion for Summary Judgment (filed Nov. 20, 2017).
- Tab 2: Defendant Volkswagen Group of America, Inc.'s Third Amended Responses and Objections to Plaintiff's First Set of Interrogatories.
- Tab 3: Letter from Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, U.S. EPA, to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (September 18, 2015).
- Tab 4: Letter from Susan Shinkman, Director, Office of Civil Enforcement, U.S. EPA, to Volkswagen AG, Audi AG, Porsche AG, Volkswagen Group of America, Inc., and Porsche Cars North America, Inc. (November 2, 2015).
- Tab 5: Rule 11 Plea Agreement, *United States of America v. Volkswagen AG*, E.D. Mich., No. 16-CR-20394.
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- Tab 8: Deposition of Stuart Johnson, Corporate Representative for Defendant Volkswagen Group of America, Inc., October 25, 2017.
- Tab 9: Defendants' Third Amended Responses to the State's First Request for Admissions.
- Tab 10: Importer Agreement between Volkswagen Aktiengesellschaft and Volkswagen of America, Inc.

- Tab 11: Transcript for Hearing for Hearing on Motion to Dismiss in Civil Action C. 15-MD-2672, *In Re: Volkswagen Clean Diesel Marketing, Sales Practices, and Products Liability Litigation.*"

4. Attached as "Appendix C" to the State of Texas's Response to Mandamus Petition is a true and correct copy of Defendant Volkswagen Group of America, Inc.'s Fourth Amended Responses and Objections to State of Texas's and TCAA County Plaintiffs' Second Set of Requests for Admissions and Interrogatories which was served on the State in the Clean Diesel Litigation via email transmittal on August 17, 2018."

Patrick K. Sweeten

Sworn to and subscribed before me by Patrick K. Sweeten on September 4, 2018.

ELIZABETH A. SAUNDERS
My Notary ID # 131158174
Expires June 5, 2021

Notary Public in and for
the State of Texas

My commission expires:

06/05/2021

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

Before me, the undersigned notary, on this day personally appeared Kristofer S. Monson, a person whose identity is known to me. After I administered an oath to him, upon his oath he said the following:

"My name is Kristofer S. Monson. I am over twenty-one (21) years of age, of sound mind, and am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct. I am an attorney with the Office of the Solicitor General, Office of the Texas Attorney General, representing the State of Texas. I am licensed to practice in the State of Texas, and prepared, with co-counsel, the mandamus record, attached as the Mandamus Record. All of the documents in the Mandamus Record are true and correct copies of the documents identified or true and correct copies of the documents filed in this action, as those documents exist in our files or were transferred to me by co-counsel."

Signed this 4th day of September, 2018

Kristofer S. Monson, Affiant

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this 4th day of September, 2018.

Hollis Lee Duncan

Notary Public in and for the State of Texas

My commission expires: 3/30/2019

HOLLIS LEE DUNCAN
Notary Public
STATE OF TEXAS
Commission Exp. MARCH 30, 2019

Notary without Bond