

**BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

In re: VOLKSWAGEN “CLEAN”
DIESEL LIABILITY
LITIGATION

MDL No.

**BRIEF IN SUPPORT OF PLAINTIFF CHRISTOPHER J. D’ANGELO’S
MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407**

Pursuant to 28 U.S.C. § 1407 and Rule 7.2(a) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Plaintiff Christopher J. D’Angelo respectfully submits this memorandum of law in support of his motion for transfer of all currently filed federal cases in this litigation, and any subsequent “tag along” cases involving similar claims, to the United States District Court for the Central District of California.

Mr. D’Angelo recently purchased a Volkswagen (“VW”) “Clean Diesel” Passatt. To his dismay, he has learned that VW has been misleading consumers such as Plaintiff as far back as 2009 into purchasing certain allegedly “clean diesel” automobiles (“VW Clean Diesel Vehicles”) based on false and misleading representations that these vehicles are better for the environment and more fuel efficient than other VW models. The truth is these “clean” diesel vehicles are not “clean” or otherwise good for the environment. In fact, these “clean diesel”

automobiles produce nitrogen oxide at level increased by a factor of 10 to 40 times above the EPA compliant levels when being driven in normal use. VW has admitted that it intentionally installed electronic cheating devices into these automobiles to detect when they were being tested for emissions so that they would produce compliant emission results for the test. (Hereinafter, these will be referred to as the “defeat device.”) At all other times, including normal operation of the vehicles, however, these cars polluted the environment above federal and California-compliant levels.

On behalf of the class of owners of the affected vehicles nationwide and in California, Plaintiff’s action seeks damages, rescission and/or restitution from VW, including, but not limited to all the moneys paid toward the purchase of these vehicles, (or at least the diminution in value of the vehicles), and to avoid (through injunctive relief) the continuation of the sort of consumer deception that caused plaintiff to suffer the harm sought to be remedied here.

Plaintiff is already aware of numerous cases being filed on behalf of consumers similarly situated to Mr. D’Angelo, and fully expects hundreds of additional cases to be filed nationwide. Based on the numerous common questions of fact involved, the compelling need to establish uniform and consistent standards in conducting pretrial discovery and motion practice, and because the most logical and convenient location for these proceedings is the Central District of California¹,

¹ Not only are there already 6 pending cases in the Central District of California against VW, but given that California’s Air Resource Board has been working at the forefront with the EPA on these issues, and the Central District’s familiarity handling these types of cases (see *In re Hyundai & Kia Fuel Econ. Litig.*, 923 F. Supp. 2d 1364 (U.S. Jud. Pan. Mult. Lit. 2013), California has an integral interest in having this litigation managed here.

Mr. D'Angelo respectfully requests coordinated proceedings there before District Judge Fernando M. Olguin and Magistrate Judge Patrick J. Walsh.

I. BACKGROUND

This motion for transfer involves at least 20 actions pending in seven different jurisdictions across the United States asserting common factual allegations and involving overlapping claims and legal issues. Based on the extensive press coverage of VW's actions and the nationwide advertising that has come from plaintiff firms, Mr. D'Angelo expects many additional actions to be filed in the federal courts alleging similar claims.

A. Plaintiffs.

The various plaintiffs in this litigation have all filed civil actions arising from VW's misrepresentations concerning the true nature of its "clean" diesel automobiles. Plaintiffs are all owners or lessees of VW Clean Diesel Vehicles who purchased or leased a new or used vehicle in the United States or its territories and protectorates from an authorized VW dealership between 2009 and 2015 that contains software designed to hide the vehicle's true emission levels. Each of these pending federal cases presents a common core of facts, in that each (i) alleges that plaintiffs purchased or leased the VW Clean Diesel Vehicles based upon misrepresentations made by VW; (ii) asserts injury and damages arising from VW's wrongful conduct; and (iii) alleges the same or similar conduct by VW. Indeed, the factual allegations in plaintiffs' complaints are nearly identical in numerous critical respects.

Based on information obtained from the EPA and California's Air Resource Board Plaintiffs now know the truth - not only are Plaintiffs' vehicle now polluting the environment beyond allowable state and federal limits, but the value of the vehicles has plummeted because of the stigma and uncertainty that now attaches to them. Indeed, Plaintiffs paid a premium for their vehicle specifically based on the misrepresentation that it was not only fuel efficient, but that it was "clean" for purposes of the environment. Plaintiff contend that they would not have paid this additional premium but for the misrepresentations of VW. Even if/when VW comes up with a way to retool its emission system in the VW Clean Diesel Vehicles, there is a substantial risk that the vehicles' fuel efficiency and performance will become compromised to Plaintiffs' detriment.

Plaintiffs in the at least 20 pending (as of September 21, 2015) federal actions are geographically diverse, residing in seven different states located across the country: California, Utah, New Jersey, Oregon, Illinois, Florida, and Alabama. In addition, plaintiffs are represented by a regionally diverse group of law firms

B. Defendant VW.

VW is a corporation organized under the laws of the New Jersey.

C. Status of the Actions.

Plaintiffs filed these pending federal cases in the following states (CA, UT, NJ, OR, IL, FL, and AL) all within days of discovering the true set of circumstances announced by the EPA and California's Air Resource Board on September 18, 2015. Each of the cases was filed no later than September 21, 2015. Given the infancy of these cases, none of the plaintiffs have been permitted to conduct discovery, or any other actions that would move the matters along

towards trial such that transfer would be unduly prejudicial or inefficient. That they are all at the same early procedural stage provides a good basis to coordinate them.

II. ARGUMENT

The VOLKSWAGEN “CLEAN” DIESEL LIABILITY LITIGATION actions currently pending in numerous different federal districts meet the requirements for transfer pursuant to 28 U.S.C. § 1407, and therefore, transfer of the above-referenced actions is warranted. Section 1407 authorizes the transfer of two or more civil actions, pending in different districts, for coordinated or consolidated pretrial proceedings, when (1) the “actions involv[e] one or more common questions of fact;” (2) transfer “will be for the convenience of parties and witnesses;” and (3) transfer “will promote the just and efficient conduct of such actions.”

“The multidistrict litigation statute, 28 U.S.C. § 1407, was enacted as a means of conserving judicial resources in situations where multiple cases involving common questions of fact were filed in different districts.” *Royster v. Food Lion (In re Food Lion)*, 73 F.3d 528, 53132 (4th Cir. 1996). Two critical goals of Section 1407 are to promote efficiency and consistency. *Illinois Municipal Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 852 (7th Cir. 2004). The statute “was [also] meant to ‘assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation’” and “[w]ithout it, ‘conflicting pretrial discovery demands for documents and witnesses’ might ‘disrupt the functions of the Federal courts.’” *In re Phenylpropanolamine Prod. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006) (quoting H.R. Rep. No. 1130, 90th Cong., 2d

Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899). The alternative to appropriate transfer is “multiplied delay, confusion, conflict, inordinate expense and inefficiency.” *Id.* (quoting *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 495 (J.P.M.L. 1968)).

These actions assert overlapping claims, based on multiple common factual allegations, and will involve common legal theories and themes as well. Consolidated pretrial treatment under Section 1407 will assist the parties and the courts in avoiding duplicative and conflicting rulings on the common issues in dispute. Granting this motion will also serve the convenience of the parties and witnesses and promote the just and efficient resolution of the litigation.

This Panel has frequently ordered the multidistrict transfer of multiple actions involving misrepresentations made by auto manufacturers concerning fuel efficiency related issues. See *In re Ford Fusion & C-Max Fuel Econ. Litig.*, 949 F. Supp. 2d 1368 (U.S. Jud. Pan. Mult. Lit. 2013); see also *In re Hyundai & Kia Fuel Econ. Litig.*, 923 F. Supp. 2d 1364 (U.S. Jud. Pan. Mult. Lit. 2013).

A. These Cases Involve Common Questions of Fact.

The first element of the Section 1407 transfer analysis is whether there are one or more common questions of fact. See 28 U.S.C. § 1407. The statute, however, does not require a “complete identity or even [a] majority” of common questions of fact to justify transfer. *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1381 (J.P.M.L. 2004).

Here, there is no question that these cases share a common core of operative factual allegations. Plaintiffs all allege that VW misrepresented the true nature of the VW Clean Diesel Vehicles and hid the existence of the defeat device used to mislead regulatory agencies into believing that the VW Clean Diesel Vehicles were

environmentally compliant. Each of the plaintiffs alleges that they paid a premium for these vehicles based on the misrepresentation that they were **both (1) clean and (2) fuel efficient**. Because the factual assertions in each of the instant actions are nearly identical, and many important legal issues in dispute will also be nearly identical, transfer and coordination or consolidation of these actions is highly appropriate. *See In re "Factor VIII or IX Concentrate Blood Prods." Prod. Liab. Litig.*, 853 F. Supp. 454, 455 (J.P.M.L. 1993).

In addition, all these actions rely upon similar legal theories of recovery. These theories include: misrepresentation, concealment, unfair business practices, and breach of consumer protection provisions of state law. While not every cause of action is asserted in every one of the cases, and applicable state law will vary, the lawsuits all share related underlying legal theories of liability, which is VW's fraud. As the Panel has previously stated, "the presence of additional or differing legal theories is not significant when the actions still arise from a common factual core" *In re Oxycontin Antitrust Litig.*, 542 F. Supp. 2d 1359, 1360 (J.P.M.L. 2008).

Because numerous common issues of fact exist among these cases, the pending actions clearly satisfy the first element of the transfer analysis under Section 1407.

B. Transfer Will Serve the Convenience of the Parties and Prevent Duplicative Discovery.

The convenience of the parties and prevention of duplicative discovery also favor transfer. *See* 28 U.S.C. § 1407. At present all of the cases are in their infancy. Indeed, they were all "born" on more or less the same date. If these cases continue to proceed separately, there will be substantial duplicative

discovery because of the many overlapping issues of fact and law. Multiple cases could involve the repetitive depositions of the same VW company representatives, other current and former employees, and expert witnesses, as well as production of the same records, and responses to duplicative interrogatories and document requests in jurisdictions around the country. *See, e.g., In re: Pilot Flying J Fuel Rebate Contract Litigation (No. II)*, 11 F. Supp. 3d 1351, 1352 (J.P.M.L. 2014) (“Centralization will avoid repetitive depositions of Pilot’s officers and employees and duplicative document discovery regarding the alleged scheme”). Absent transfer, the federal court system will be forced to administer – and VW will be compelled to defend – these related actions across multiple venues, all proceeding on potentially different pretrial schedules and subject to different judicial decision-making and local procedural requirements. Moreover, each plaintiff will be required to monitor and possibly participate in each of the other similar actions to ensure that VW does not provide inconsistent or misleading information.

None of the pending cases have progressed to the point where significant efficiencies will be forfeited through transfer to an MDL proceeding. This Panel has routinely recognized that consolidating litigation in one court benefits *both* plaintiffs and defendants. For example, pretrial transfer would reduce discovery delays and costs for plaintiffs, and permit plaintiffs’ counsel to coordinate their efforts and share the pretrial workload. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F.Supp.2d 1377, 1379 (2001) (“And it is most logical to assume that prudent counsel will combine their forces and apportion their workload in order to streamline the efforts of the parties and witnesses, their counsel and the judiciary, thereby effectuating an overall savings of cost and a minimum of inconvenience to all concerned.”); *In re Baldwin-United Corp. Litigation*, 581 F. Supp. 739, 741

(J.P.M.L. 1984) (same). As for VW, national or “generic” expert depositions will be coordinated, document production will be centralized, and travel for its current and former employees will be minimized, since it will only have to appear in one location rather than multiple districts around the country.

While Mr. D’Angelo anticipates there will be hundreds of additional case filings, even the current level of litigation would benefit from transfer and coordinated proceedings, given the allegations of these complaints. *See In re First Nat’l Collection Bureau, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 11 F. Supp. 3d 1353, 1354 (J.P.M.L. Apr. 8, 2014) (“Although there are relatively few parties and actions at present, efficiencies can be gained from having these actions proceed in a single district,” such as “eliminat[ing] duplicative discovery; prevent[ing] inconsistent pretrial rulings . . . and conserv[ing] the resources of the parties, their counsel and the judiciary.”); *In re Hyundai & Kia Fuel Econ. Litig.*, 923 F. Supp. 2d 1364 (U.S. Jud. Pan. Mult. Lit. 2013) (creating multidistrict litigation for less than 15 pending actions involving, similar to the present actions, claims of false and misleading marketing of fuel efficient and better for the environment automobiles); *In re: Zurn Pex Plumbing Products Liability Litigation*, 572 F.Supp.2d 1380, 1381 (J.P.M.L. 2008) (granting transfer and consolidation of three cases and six potential tag-alongs because of the “overlapping and, often, nearly identical factual allegations that will likely require duplicative discovery and motion practice.

Centralizing these actions under Section 1407 will ensure streamlined resolution of this litigation to the overall benefit of the parties and the judiciary.”); *In re Amoxicillin Patent & Antitrust Litig.*, 449 F. Supp. 601, 603 (J.P.M.L. 1978) (granting transfer and consolidation of three cases “[b]ecause of the presence of complex factual questions and the strong likelihood that discovery concerning these

questions will be both complicated and time-consuming, we rule that transfer under Section 1407 is appropriate at the present time even though only three actions are presently involved.”).

In sum, transfer of these actions would serve the convenience of the parties and eliminate duplicative discovery, saving the parties—and the courts—significant time, effort, and money.

C. Transfer Will Promote the Just and Efficient Conduct of These Actions.

The Panel recognizes multiple factors as informing whether the just and efficient conduct of a litigation will be advanced by transfer, including: (i) avoidance of conflicting rulings in various cases; (ii) prevention of duplication of discovery on common issues; (iii) avoidance of conflicting and duplicative pretrial conferences; (iv) advancing judicial economy; and (v) reducing the burden on the parties by allowing division of workload among several attorneys. *See, e.g., In re: Endangered Species Act Section 4 Deadline Litig.*, 716 F.Supp.2d 1369, 1369 (J.P.M.L. 2010); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*, 424 F. Supp. 504, 506 (J.P.M.L. 1976).

All of these factors will be advanced by transfer here. As far as Mr. D’Angelo is aware at present, there are already numerous cases filed across the country against VW and there will be certainly many more filed in the coming days and weeks. At least twenty different plaintiffs’ firms from around the country already represent plaintiffs in these cases. Under this *status quo*, at least nine different federal district courts will be ruling on the many common factual and legal issues presented in these cases. The presence of numerous counsel, plaintiffs,

and courts currently involved in this litigation in almost every region of the country creates a clear risk of conflicting rulings, with the potential to generate significant confusion and conflict among the parties, as well as inconsistent obligations on the defendant.

The prospect of inconsistent rulings also encourages forum and judge shopping (including, for example, manipulation of non-congruent discovery limits, approaches to electronically stored information, and protective order issues). By contrast, a single MDL judge coordinating pretrial discovery and ruling on pretrial motions in all of these federal cases at once will help reduce witness inconvenience, the cumulative burden on the courts, and the litigation's overall expense, as well as minimizing this potential for conflicting rulings. *In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 2014 WL 7004048, at *1 (“Issues concerning the development, manufacture, regulatory approval, labeling, and marketing of Xarelto thus are common to all actions. Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary.”); *In re Tylenol Mktg., Sales Pracs. and Prods. Liab. Litig.*, 936 F.Supp.2d at 1379 (“Centralization will . . . prevent inconsistent pretrial rulings (on *Daubert* issues and other matters) . . .”).

Transfer also will reduce the burden on the parties by allowing more efficient and centralized divisions of workload among the numerous attorneys already involved in this litigation, as well as those who join later. Plaintiffs themselves will reap efficiencies from being able to divide up the management and conduct of the litigation as part of a unified MDL process through a plaintiffs' steering committee or similar mechanism, instead of each plaintiffs' firm separately litigating its own cases on distinct and parallel tracks. *In re Phenylpropanolamine (PPA) Prods.*

Liab. Litig., 173 F.Supp.2d at 1379; *In re Tylenol Mktg., Sales Pracs. and Prods. Liab. Litig.*, 936 F.Supp.2d at 1379 (“Centralization will . . . conserve the resources of the parties, their counsel, and the judiciary.”).

Accordingly, transfer to a single district court is appropriate for the just and efficient resolution of these cases.

D. The Proper Transferee Forum Is the Docket of Judge Fernando M. Olguin In the Central District of California

Mr. D’Angelo’s case has been assigned to Judge Fernando M. Olguin. Mr. D’Angelo believes that the panel should assign the litigation to him since the Central District of California best meets the objective of a forum that advances “the convenience of the parties and will promote the just and efficient conduct” of these actions. 28 U.S.C. § 1407. The Central District of California best meets these requirements because:

1. There are already at least six pending matters in the Central District of California. As such, a significant portion of the witnesses and documents relating to purchase, lease and marketing of VW are likely located in the District.

2. Given the potential importance of federal-state coordination and cooperation, the Central District of California is particularly well suited to handle the In RE: VOLKSWAGEN “CLEAN” DIESEL LIABILITY LITIGATION, the Central District of California is especially equipped to handle this matter given its experience handling multidistrict litigation involving the issues present in this action. See *In re Hyundai & Kia Fuel Econ. Litig.*, 923 F. Supp. 2d 1364 (U.S. Jud. Pan. Mult. Lit. 2013).

At its core, this litigation involves allegations similar to those at issue in the *In re Hyundai & Kia Fuel Econ. Litigation* action. Judge Fernando M. Olguin is an experienced judge who presides over numerous actions pending in this district, including Mr. D'Angelo's action. See *In re Pella Corp. Architect and Designer Series Window Mktg., Sales Pracs. and Prods. Liab. Litig.*, 996 F.Supp.2d 1380, 1383 (J.P.M.L. 2014) (transferring actions to same judge already presiding over similar litigation "involving defects in various different windows (albeit windows manufactured by a different entity)"); *In re Pradaxa (dabigatran etexilate) Prods. Liab. Litig.*, 883 F.Supp.2d 1355, 1356 (J.P.M.L. 2012) ("Judge Herndon, an experienced MDL judge, has deftly presided over *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices & Products Liability Litigation*, 655 F.Supp.2d 1343 (J.P.M.L.2009), another large pharmaceutical products liability litigation.").

3. The Central District of California is geographically accessible to counsel and parties involved in this litigation. As noted, the District is geographically central to numerous witnesses, and the California Air Resource Board ("CARB") has been instrumental in working with the EPA to uncover the fraudulent activities of VW. Having access to CARB's key witnesses (who are based out of El Monte California – which is located within the district) will be essential in this litigation. Additionally, given that the district hosts numerous airports (Los Angeles International Airport, Burbank Bob Hope Airport, as well as John Wayne Airport in Orange County) the parties and counsel will be able to litigate the case with relative ease here.

Also, to the extent that any additional witnesses and documents may be located outside California, the Central District of California is centrally located

and accessible such that locating multidistrict proceedings there will facilitate any needed discovery in these proximate locations. *See infra* II.D.1. Expert witnesses and counsel also would find Los Angeles a convenient location to reach for hearings and any possible bellwether trials.

III. CONCLUSION

Mr. D'Angelo respectfully requests that the Panel transfer the given the potential importance of federal-state coordination and cooperation, the In RE: VOLKSWAGEN "CLEAN" DIESEL LIABILITY LITIGATION to the Central District of California. The Central District is particularly well suited to handle the actions described herein, as well as any similar "tag along" cases subsequently filed.

Dated: September 22, 2015

Respectfully submitted,

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**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE: Volkswagen "Clean" Diesel
Liability Litigation

MDL No.

CERTIFICATE OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that, on September 22, 2015, a copy of **BRIEF IN SUPPORT OF PLAINTIFF CHRISTOPHER J. D'ANGELO'S MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. SECTION 1407** was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses on the Electronic Mail Notice List.

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