

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

IN RE: VOLKSWAGEN “CLEAN”	§	
	§	MDL DOCKET NO. 2672
DIESEL LIABILITY LITIGATION	§	

**BRIEF IN SUPPORT OF PLAINTIFF HOLLY HARRIS’S MOTION FOR TRANSFER
OF ACTIONS TO THE SOUTHERN DISTRICT OF TEXAS PURSUANT TO 28 U.S.C. §
1407**

Pursuant to 28 USC § 1407 and Rule 7.2(a) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Plaintiff, Holly Harris, respectfully submits this brief in support of her motion requesting that all currently-filed cases identified in the Schedule of Actions (“Actions”), as well as any cases subsequently filed involving similar facts or claims (“tag along cases”) (collectively, “Related Actions”), be transferred to the United States District Court for the Southern District of Texas for centralized and coordinated pretrial proceedings.

Presently, there are more than fifty actions pending in at least twenty different judicial districts in the United States alleging similar wrongful conduct on the part of Defendant, Volkswagen Group of America, Inc., and its affiliates Volkswagen AG and Audi AG. As discussed below, these actions all involve Volkswagen and Audi vehicles advertised, marketed, and sold throughout the United States. It is likely that a significant number of similar actions will be filed in jurisdictions across the country. Transfer for consolidation and coordination is proper because each of the Actions and tag along cases arise out of the same or similar nucleus of operative facts, arise out of the same or similar alleged wrongful conduct, will involve the resolution of the same or similar questions of fact and law, and discovery will be substantially similar and will involve the same documents and witnesses.

I. BACKGROUND

To protect United States citizens and residents, the United States Environmental Protection Agency (“EPA”) promulgates laws and regulations governing the emissions of pollution. Automakers must comply with these laws and regulations. Since at least 2009, Defendant Volkswagen Group of America, Inc., Volkswagen AG, and Audi AG (collectively “Volkswagen”) attempted to evade these laws and regulations by advertising, marketing, and selling vehicles with “defeat devices.” Volkswagen installed these “defeat devices” into many of their 2009-2015 diesel models. Volkswagen claimed that these “Subject Vehicles”¹ were “Clean Diesel.”

However, on September 18, 2015, the EPA completed part of its investigation of Volkswagen’s misfeasance. In its “Notice of Violation” (“NOV”), the EPA declared that Volkswagen’s “defeat devices” “bypass, defeat, or render inoperable elements of the vehicles’ emission control system that exist to comply with [Clean Air Act] emission standards.” The EPA further found that these vehicles do not satisfy the applications for the certificates of conformity that all vehicle manufacturers must obtain for each vehicle they intend to sell in the United States.

The EPA described Volkswagen’s “defeat device” as a “switch” that senses when the vehicle’s emissions are being tested. If the vehicle’s emissions are being tested, its electronic control module will output results that comply with EPA emissions standards. When the vehicle is not being tested, however, the switch is deactivated, allowing the electronic control module to

¹ The EPA identified the following vehicles as having the “defeat devices” (the “Subject Vehicles”): 2009-2015 VW Jetta; 2009-2015 VW Beetle; 2009-2015 VW Golf; 2013-2015 VW Passat; and 2009-2015 Audi A3.

reduce the effectiveness of the system that controls emissions, effectively increasing emissions of the pollutant nitrogen oxide (“NO_x”) by a factor of 10 to 40.

NO_x pollution contributes to nitrogen dioxide, ground-level ozone, and fine particulate matter. Exposure to these pollutants has been linked with serious health dangers, including asthma attacks and other respiratory illnesses serious enough to force people to seek hospital treatment. Ozone and particulate matter exposure have been associated with premature death due to respiratory or cardiovascular-related effects. Children, the elderly, and people with preexisting respiratory illnesses are at an acute risk of health complications from these pollutants.

In an extremely effective effort to boost sales of its line of diesel vehicles, Volkswagen implemented aggressive national marketing campaigns to raise consumer awareness of what it purported to be its “TDI Clean Diesel Technology.” Beginning with the 2009 model year, Volkswagen marketed the Subject Vehicles across the United States and around the world, selling approximately 11 million worldwide. In the United States, Volkswagen claimed the Subject Vehicles were clean, powerful, and EPA-certified.

Volkswagen charged a substantial premium for the Subject Vehicles. For example, for the 2015 Volkswagen Jetta, the base S model has a starting MSRP of \$18,780. The base TDI S “Clean Diesel,” however, has a starting MSRP of \$21,640, a price premium of \$2,860. The “Clean Diesel” premium for the highest trim Jetta model is substantially higher: The highest level gas Jetta SE has a starting MSRP of \$20,095, while the “Clean Diesel” TDI SEL MSRP is \$26,410, a staggering \$6,315 premium.

As a result of its investigation, the EPA ordered Volkswagen to recall the Subject Vehicles and repair them so that they comply with EPA emissions requirements at all times during normal operation. However, the modifications necessary to make the Subject Vehicles

EPA and Clean Air Act compliant will substantially degrade the Subject Vehicles' horsepower, efficiency, and other performance characteristics upon which Subject Vehicle owners or lessees based their purchasing decisions. Thus, even if Volkswagen makes the Subject Vehicles EPA and Clean Air Act compliant, Plaintiff and Class members will still suffer actual harm and damages. Once repaired, their vehicles will no longer perform as advertised and as they did when they were acquired, causing a diminution in value.

As a result of Volkswagen's unfair, deceptive, and/or fraudulent business practices, and its failure to disclose that under normal operating conditions the Subject Vehicles emit up to 40 times the allowed NOx levels, owners and/or lessees of the Subject Vehicles have suffered losses in money and/or property.

Had Plaintiff and Class members been aware at the time they acquired their Subject Vehicles of the "defeat device" and its ability to allow the Subject Vehicles to emit up to 40 times the allowed levels of pollutants, Plaintiff and Class members would not have purchased or leased said vehicles, or would have paid substantially less than they did.

Furthermore, if and when Volkswagen makes the required alterations to bring the Subject Vehicles into EPA and Clean Air Act compliance, Plaintiff and Class members will be required to spend additional sums of money on fuel and will no longer enjoy the performance characteristics which existed in their Subject Vehicles when purchased. Additionally, the Subject Vehicles will necessarily be worth less in the marketplace because of their diminished performance and efficiency—the consequence of bringing the vehicles into regulatory compliance.

Because Volkswagen advertised, marketed, and sold the Subject Vehicles nationwide, there will likely be thousands of "defeat device" claims filed throughout the various United

States district courts.

II. THE PANEL SHOULD TRANSFER THE VOLKSWAGEN “CLEAN” DIESEL CASES FOR CONSOLIDATED PROCEEDINGS.

The Panel may transfer and consolidate cases for coordinated pretrial proceedings if (i) the cases involve common questions of fact, (ii) the transfers will further the convenience of parties and witnesses, and (iii) the transfers will promote the just and efficient conduct of the actions. 28 U.S.C. § 1407(a). Each of the Related Actions arises from allegations that Volkswagen advertised, marketed, and sold so-called “Clean Diesel” vehicles as environmentally-friendly and fuel efficient, among other characteristics. Volkswagen charged a premium for the Subject Vehicles, yet, as discussed above, the Subject Vehicles were not as-marketed or as-advertised. Although there may be slight variations among the Related Actions, all seek recovery of the economic losses consumers suffered as a result of Volkswagen’s actions described herein.

Accordingly, each Related Action will involve common, central factual questions, including but not limited to questions about Volkswagen’s decision-making process, its knowing and intentional surreptitious use of the “defeat device,” and the extent of the diminution in the value of the Subject Vehicles. Consolidated discovery and pretrial litigation concerning these issues will “eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save time and effort of the parties, the attorneys, the witnesses, and the courts.” *Manual for Complex Litigation* (Fourth) § 20.131 (2004); *see also In re General Motors Corp. Piston Slap Prods. Liab. Litig.*, 314 F. Supp. 2d 1386, 1388 (J.P.M.L. 2004) (transferring actions and stating that “[c]entralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to class certification matters), and conserve the resources of the parties, their counsel and the judiciary));

In re Amazon.com, Inc., MDL No. 2527, 2014 WL 1364747, at *1 (J.P.M.L. April 8, 2014) (same).

III. THE SOUTHERN DISTRICT OF TEXAS IS CONVENIENT FOR THE PARTIES AND WITNESSES AND WELL-EQUIPPED TO ENSURE THE JUST AND EFFICIENT ADJUDICATION OF THIS LITIGATION.

The Related Actions satisfy the requirements of consolidation and transfer pursuant to 28 U.S.C. § 1407. Numerous factors must be weighed in order to determine which court is the appropriate transferee forum to handle the coordinated pretrial proceedings. Factors often cited include the convenience of the parties, location of records and witnesses, experience of the jurists, where the most pending cases are filed, and case load of the proposed transferee forum. Other highly relevant factors this Panel considers include the experience of the transferee jurist, the willingness of the transferee jurist to accept transfer and whether the jurist's docket will allow her the time to efficiently manage the MDL.

Several large multi-district litigation proceedings have been centralized, and efficiently handled, in the Southern District of Texas. With respect to the Southern District of Texas, Corpus Christi Division, the Honorable Janis Graham Jack was appointed by the Panel to preside over *In re Merscorp Inc., Real Estate Settlement Procedures Act (RESPA) Litigation*, MDL No. 1810. Additionally, the following list provides a sampling of the case centralized in the Southern District of Texas generally:

- *In re Enron Corporation Securities, Derivative & ERISA Litigation*, MDL No. 1446 (Hon. Melinda Harmon);
- *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation*, MDL No. 2046 (Hon. Lee H. Rosenthal);
- *In re Motion Picture Licensing Antitrust Litigation*, MDL No. 366 (Hon. John V. Singleton, Jr.);
- *In re Refined Petroleum Products Antitrust Litigation*, MDL No. 1886 (Hon. Sim

Lake);

- *In re Service Corporation International Securities Litigation*, MDL No. 1609 (Hon. Lynn N. Hughes);
- *In re Silica Products Liability Litigation*, MDL No. 1553 (Hon. Janis Graham Jack);
- *In re Testmasters Trademark Litigation*, MDL No. 1646 (Hon. Vanessa D. Gilmore);
- *In re VistaPrint Corp. Marketing and Sales Practice Litigation*, MDL No. 1994 (Hon. Nancy F. Atlas);
- *In re Waste Management, Inc. Securities Litigation*, MDL No. 1422 (Hon. Melinda Harmon);
- *In re Wells Fargo Wage and Hour Employment Practices Litigation (No. III)*, MDL No. 2266 (Hon. Gray H. Miller); and
- *In re BP p.l.c. Securities Litigation*, MDL No. 2185 (Hon. Keith Ellison).

Plaintiff hereby respectfully submits that this Honorable Panel should transfer all Related Actions for pretrial consolidation and coordination to the Honorable Nelva Gonzales Ramos, Judge of the Southern District of Texas, Corpus Christi Division. The Southern District of Texas is centrally located and has substantial resources and experience in handling multi-district litigation. The clerks are experienced in handling MDL transfers and the large number of filings that occur in multi-district litigation proceedings.

The Southern District of Texas is the best-suited venue for the consolidation and coordination of the litigation. The Southern District of Texas has the resources, experience and available judicial resources to preside over the “Clean” Diesel Litigation. For example, two important measures of judicial efficiency—the average time from filing to disposition and the percentage of case pending for more than three years—are lower than the national average.

Judge Nelva Gonzales Ramos graduated from University of Texas Law School, with honors, in 1991. Judge Ramos was in private practice for the first six years of her career and

then began her judicial career as a municipal court judge in Corpus Christi, Texas in 1997. She later served as a District Judge for the 347th Judicial District for the State of Texas from 2001 to 2011. During these years, she was routinely recognized by the members of the Corpus Christi Bar Association as an outstanding Judge. She helped create the Nueces County District Domestic Violence Court and has been active in her community, serving on the Coastal Bend Council on Alcohol and Drug Abuse, the Board of Directors for the Corpus Christi Chapter of the March of Dimes, and as a mentor to students at a local middle school. At the time of her judicial appointment, it was noted that Judge Ramos had presided over 1,200 criminal, civil, and family law cases that went to verdict or judgment, and yet only eight of those cases (less than 1%) had been reversed. Judge Ramos was nominated for her current position on the federal bench on January 26, 2011, was confirmed on August 2, 2011, and was commissioned on August 4, 2011.

After weighing all of the factors that the Panel should consider, Plaintiff respectfully submits that the Southern District of Texas is the appropriate forum in which to consolidate the Volkswagen “Clean” Diesel Litigation.

IV. CONCLUSION

Accordingly, Plaintiff respectfully requests that the actions noted on the annexed Schedule of Actions be transferred to the Southern District of Texas for consolidation and coordinated proceedings.

Respectfully submitted this 27th day of September, 2015.

/s/ Robert C. Hilliard

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CERTIFICATE OF SERVICE

In compliance with Rule 4. l(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that, on September 27, 2015, a copy of **BRIEF IN SUPPORT OF PLAINTIFF HOLLY HARRIS’S MOTION FOR TRANSFER OF ACTIONS TO THE SOUTHERN DISTRICT OF TEXAS PURSUANT TO 28 U.S.C. § 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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