STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota, by its Attorney General, Lori Swanson, and the Minnesota Pollution Control Agency,

Plaintiff,

v.

Volkswagen Aktiengesellschaft d/b/a Volkswagen Group and/ or Volkwagen AG; Volkswagen Group of America, Inc.; Audi AG; Dr. Ing. h.c.F. Porsche AG d/b/a Porsche AG; and Porsche Cars North America, Inc.

Defendants.

AMENDED
ORDER FOR PARTIAL DISMISSAL

Court File No. 27-CV-16-17753

The above-entitled matter came duly on January 24, 2018, before the Honorable Judge Daniel H. Mabley, pursuant to Defendants' motion to dismiss.

Kathrine Kelly and Jason Pleggenkuhle, Attorneys at Law, appeared in person on behalf of the Plaintiff.

David Rein, Mary Bolkcom, and Mickey Green, Attorneys at Law, appeared in person on behalf of Defendants Volkswagen AG, Volkswagen Group of America, Inc., and Audi AG.

Rachel Paulose, Attorney at Law, appeared in person on behalf of Defendants Dr. Ing, Porsche AG, and Porsche Cars, North America, Inc.

Based upon all the files, records, arguments of counsel, and the Court being fully advised in the premises, the Court makes the following:

ORDER

1. Defendants' motion to dismiss Plaintiff's first technology claim (the claim related to the installation of defeat devices in new vehicles resulting in "continuing" violations after sale) is **GRANTED.**

2. Defendants' motion to dismiss Plaintiff's second technology claim (the claim related to the installation of "improved" defeat technology in "in use" vehicles during maintenance and allegedly caused by Volkswagen Group of America and by Volkswagen AG is **DENIED**.

3. The claims against Audi Ag; Dr. Ing. H.C. F. Porsche Ag D/B/A/ Porsche Ag; and Porsche Cars North America, Inc., are **DISMISSED** in their entirety.

4. Defendants' motion to dismiss the remaining "German Defendants" (Volkswagen Group of America and Volkswagen AG) for lack of jurisdiction is **DENIED.**

5. The attached memorandum is incorporated.

Date: March 9, 2018

BY THE COURT:

Daniel H. Mabley
Judge of District Court

MEMORANDUM

Background

The facts alleged in this case have already been summarized in related orders issued by District Courts in the Northern District of California (*In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability litigation*, 264 F.Supp.3d 1040 (N.D. Cal. 2017), hereinafter "*Wyoming v. VW*," and in the Jefferson County, Alabama Circuit Court (*Alabama v. Volkswagen AG, et. al,* No.CV-2016-903390.00 (Ala. Cir. Ct. Dec. 19, 2017). The court adopts and incorporates the factual summaries recited in those cases.

Suffice it to say that beginning in the mid-2000's, Defendants manufactured new diesel vehicles equipped with "defeat devices" designed to prevent the proper operation of the vehicles' pollution control system. These defeat devices were designed to activate a vehicle's air pollution control systems when it detected that it was being tested in a laboratory, but deactivate them when it was driven in normal driving conditions.

These defeat devices were designed and controlled by Volkswagen AG and its subsidiaries Audi AG and Porsche AG (collectively "German Defendants"). The German Defendants developed the defeat devices at issue for their United States market and oversaw the sales and marketing efforts in Minnesota of their United States subsidiaries, VWGoA, and Porsche Cars North America, Inc. Defendants sold more than 11,500 vehicles in Minnesota between 2008 and 2015 equipped with these defeat devices.

In addition, Volkswagen of America—at the direction of Volkswagen AG—installed new and distinct defeat devices in certain *used* vehicles when they were brought in for maintenance (i.e., after they had been sold, registered, put into use). These new defeat devices had the ability to detect the subject vehicles' steering wheel angle which in turn

deactivated the pollution control systems which had been originally installed in these vehicles.

The Plaintiff brings this actions alleging violations under two Minnesota anti-tampering provisions: Minn. Stat. § 325E.0951, subd. 2 (which provides that " 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") and Minn. Rules part 7023.0120 (which provides that "no person shall remove, alter, or otherwise render inoperative any air pollution control system").

The Defendants have filed this motion to dismiss arguing that the State's claims are preempted by the Federal Clean Air Act ("CAA") and that the Court does not have jurisdiction over the German Defendants. CAA 42 U.S.C. § 7401 *et seq.*

Discussion

The CAA was amended in 1970 in order to develop "a comprehensive national program that 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). In doing so, Congress gave the Environmental Protection Agency (EPA) considerable "authority to set and enforce new vehicle emission standards" while "taking away similar authority from the states". *Wyoming v. VW*, 364 F.Supp.3d at 1041–49 (*citing* 42 U.S.C. § 7521(a)).

Section 209(a) of the CAA, provides in part as follows, "**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 § 7543(a). However, Congress expressly preserved the states' enforcement authority for both stationary (physical buildings) and mobile sources (motor vehicles). At issue in this case is the authority to regulate motor vehicles given to states under Section 209(d) of the CAA which provides as follows:

> **Control, regulation, or restrictions on registered or licensed motor 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. § 7543(d).

The dispute here centers on whether Minnesota's claims are prohibited attempts to enforce new-vehicle emission standards, § 209(a); or permitted attempts to regulate the operation of registered vehicles within the State, § 209(d).

As summarized by Plaintiff in its opposition memoranda, the acts giving rise to the State's claims here are the "daily tampering that occurs while the vehicles are in use on Minnesota roads, not Defendants' installation of the tampering technology before sale, or circumvention of federal emissions tests while they were still new motor vehicles." Plaintiff's Memo.[1]

Thus Plaintiff theorizes that (1) the State may regulate the operation of defeat devices installed on new cars during manufacture because it results in "continuing" violations after sale ("the first tampering technology") and (2) the State may regulate the installation of "improved" defeat technology into "used" cars during maintenance because both the installation of the improved defeat technology and the resulting violations occur after the vehicles are placed "in use" ("the second tampering technology").

a. "No State . . . shall adopt or . . . enforce"

Plaintiff argues that Minnesota Rules part 7023.0120, one of the anti-tampering provisions it seeks to enforce, is part of its State Implementation Plan ("SIP") which became incorporated into federal law (i.e., "federalized") when approved by the EPA and that as a result preemption simply cannot apply.

[1] Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 19, hereinafter, Plaintiff's Memo.

The CAA directs the EPA to promulgate National Ambient Air Quality Standards (NAAQS) and requires states to adopt enforceable SIP's to achieve those standards. 42 U.S.C. § 7408-7410. But whether or not Minnesota's SIP's were "federalized", the question remains whether or not Minnesota is seeking to enforce a standard as prohibited in 209(a). As stated in *Wyoming v. VW*, which rejected a similar "federalization" argument,

> For present purposes, though, whether Wyoming's SIP is federal law or some combination of state and federal law is not material. That is because the clause of the Clean Air Act at issue, Section 209(a), expressly provides that "No State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles." By prohibiting States from attempting to enforce any covered standard, Section 209(a) not only preempts certain state law, but also prohibits certain state action. Accordingly, whether characterized as state or federal law, if Wyoming seeks to use its SIP to enforce a standard within the purview of section 209(a), it is taking action that the Clean Air Act prohibits States to take. *Wyoming v. VW,* 264 F.Supp.3d at 1048 (internal citations omitted).

Thus the approval process by the EPA with respect to Minnesota's SIPs does not change the preemption analysis at all.

b. Is Plaintiff trying to "enforce any standard relating to the control of emissions?"

Plaintiff's argues that it is not bound by Section 209(a) because it is not attempting to enforce "any standard relating to the control of emissions" or indeed any standard at all. Rather, Plaintiff characterizes its claims as merely an attempt to apply the State's anti-tampering rules – regardless of which, if any, standards may be affected. This argument was dismissed in *Wyoming v. VW*, wherein it was stated,

> As an initial matter, it is clear that a rule that prohibits a person from installing a defeat device in a vehicle prior to registration is a "standard relating to the control of emissions from new motor vehicles." This conclusion follows from the Supreme Court's *South Coast* decision and the text of Section 209(a). As noted above, the Court in *South Coast* defined a "standard" in part as a "criterion [or] test," and reasoned that an example of a "standard relating to the control of emissions" would be a requirement that a vehicle "must be equipped with a certain type of pollution-control device." Like a requirement that a vehicle contain a certain pollution-control device, a requirement that a vehicle not contain a defeat device is also a

> criterion or test, compliance with which can readily be determined. And EPA's rule prohibiting defeat devices also "relates to the control of emissions," because a defeat device by definition "reduces the effectiveness of a vehicle's emission control system." States accordingly may not adopt their own rules prohibiting defeat devices in new vehicles, nor may they attempt to enforce EPA's rule barring defeat devices in new vehicles. *Wyoming v. VW,* 264 F.Supp.3d at 1052 (citations omitted).

c. Do the Plaintiff's claims relate to "new motor vehicles...?"

Plaintiff argues that Section 209(a) is inapplicable to this case because it is not attempting to adopt or enforce any standard relating to *new motor vehicles*. Rather Plaintiff relies upon the "in use" exception found in Section 209(d) and argues that it is not preempted because the operation of defeat devices "continues" after sale and because the installation of the new defeat technology during maintenance similarly occurred after sale. As Plaintiff explains, "[b]y the unambiguous language of section 7543(d), once Defendants' vehicles were sold to Minnesotans and registered in Minnesota, the State had full authority to regulate how they operate." Plaintiff's Memo at 9.

The definition of "new motor vehicle" under the CAA seems simple and straightforward, "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3). Conversely, "once title to a motor vehicle has been transferred to the ultimate purchaser . . . the vehicle is no longer new". Wyoming v. VW, 264 F.Supp.3d at 1052.

In Wyoming v. VW, the court discussed the reach of Section 209(d), stating,

> By allowing States to regulate "registered or licensed motor vehicles," as opposed to new motor vehicles, Section 209(d) preserves States' inherent authority to police conduct within their borders, and also enables them to develop additional tools to meet the EPA-established NAAQS. 264 F.Supp.3d at 1050-51.

The Wyoming Court provided several examples where state regulation after sale to the ultimate purchaser is permitted under Section 209(d), including:

- Inspection and maintenance programs which may require emissions testing after sale.

- Transportation planning regulations, such as carpool lanes.
- Restrictions on passenger car use in downtown areas.
- Programs to control the extended idling of motor vehicles.
- Anti-tampering and concealment laws prohibiting the disabling of emission-control systems and the use of devices that conceal on-road emissions.
- The disabling of a motor vehicle's catalytic converter by a mechanic in a repair shop. 264 F.Supp.3d 1040.

But the dividing line between Section 209(a) and 209(d) is not quite so clear. First of all, as Wyoming v. VW makes clear the dividing line is not necessarily the point of sale:

> [Section 209(a)] speaks most directly to what States are prohibited from regulating, not when they are prohibited from doing so. States are prohibited from attempting to enforce "any standard relating to the control of emissions from new motor vehicles." The provision does not state, however, that States are prohibited from attempting to enforce such standards only before the sale of new vehicles . . . Section 209(a) prohibits States from enforcing "standards relating to the control of emissions from new motor vehicles," both before and after the vehicles enter into commerce. 264 F.Supp.3d at 1053.

It thus appears that, while the timing of the state's regulation is a significant factor in locating the dividing line between Section 209(a) and 209(d), it is not necessarily dispositive. As a result, courts have taken into account several other factors in deciding whether or not state emissions regulations relate to new motor vehicles versus a motor vehicles "in use." Those factors significantly overlap and include the following:

- **Does the state regulation promote uniformity of regulation?** There is considerable authority that a state's "in use" regulations should not raise the possibility of multiple state enforcement schemes which would necessarily burden interstate commerce.

  > A State regulation of this sort, however, could significantly reduce the Clean Air Act's effectiveness in preventing the type of "anarchic patchwork of federal and state regulatory programs" that would "threaten to create nightmares for the manufacturers . . . and if other States also established shortly-off-the-lot emission-control requirements, manufacturers could face the "possibility of 50 different state regulatory regimes," which Congress sought to avoid. *Wyoming v. VW,* 264 F.Supp.3d at 1051.

- **Is the burden of compliance on the manufacturer?** The court in *Allway Taxi, Inc. v. City of*

New York, made it clear that "in use" regulations should generally burden owners, not manufacturers, stating,

> The court looked not only at the new versus "in use" dividing line, but also considered who would face the burden of complying with the relevant regulation. If the "burden of compliance would be on individual owners and not on manufacturers and distributors," the court reasoned that the regulation "would cause only minimal interference with interstate commerce," and would be a permissible "local regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers. 340 F.Supp. 1120, 1124 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

- **Does the state regulation "relate back" to the original design and manufacture?** As the court in *Allway Taxi* noted and as the EPA explained, in use regulations cannot "amount to a standard relating back to the original design of the engine by the original engine manufacturer." Control of Air Pollution, 59 Fed. Reg. 31306–01 (Jun. 17, 1994). Nor should a state's "in use" regulations pressure manufacturers to modify a motor vehicle's original features and design.

> [If a State required] all vehicles within it, once driven off the new-car lot, to be equipped with an emission-control device that is not required by EPA regulations . . . vehicle manufacturers would likely feel pressure to install the emission-control device required by the State in its new vehicles. *Wyoming v. VW,* 264 F.Supp.3d at 1051.

- **Is the regulation primarily confined to intrastate activity?** The rationale behind Section 209(d) is that the state regulation authorized thereunder will relate primarily to intrastate activity and thus have an insignificant burden on interstate commerce.

> We do not say that a state or locality is free to impose its own emission control standards the moment after a new car is bought and registered. That would be an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce. The preemption sections, however, do not preclude a state or locality from imposing its own exhaust emission control standards upon the resale or reregistration of the automobile. Nor do they preclude a locality from setting its own standards for the licensing of vehicles for commercial use within that locality. Such regulations would cause only minimal interference with interstate commerce, since they would be 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 1134.

d. Plaintiff's first tampering technology claim is preempted.

Applying these factors to the State's first tampering technology claim (alleging "continuing" violations") and following the previous rulings by the district courts in Wyoming, Alabama and Texas, the Court holds that Section 209(a) precludes these claims. The Court rejects the "continuing violation" theory put forward by Plaintiff. As the *Wyoming v. VW* court noted, "[t]he operation of Volkswagen's defeat device on the roads . . . cannot be so easily separated from its installation." 264 F.Supp.3d at 1056. Applying the factors mentioned above, it is clear that the State's claims have their "genesis" in the manufacturers' conduct and therefore the State is effectively [seeking] to use state law "to penalize the manufacturers for producing engines which failed to comply with the Federal standards promulgated pursuant to the CAA." *In re Office of Attorney General*, 269 A.D.2d 1, (N.Y. App. Div. 2000). "Thus, even though the vehicles at issue [have] already entered into commerce, the court reason[s] that Section 209(a) preempt[s] the State's action." *Wyoming v. VW*, 264 F.Supp.3d at 1054.

e. Plaintiff's second tampering technology claim is not preempted.

Also applying the above factors to the State's second tampering technology claims ("installation of improved defeat devices"), and following the previous ruling by the district court in Texas (*In re Volkswagen Clean Diesel Litigation*, Cause No. D-1-GN-16-000370, 353rd Judicial District, Travis County, Texas), the Court holds that Section 209(a) does not preclude these claims. The following allegations in the pleadings support this position:

- The alleged installation of the improvements to the defeat devices occurred after the title to the subject motor vehicles had been transferred to an ultimate purchaser.
- The alleged installation of this new technology both changed the manner in which the defeat devices operated and improved its performance, and thus does not "relate back" to the manufacturer's original design and installation.

- The alleged activity constituting the violations took place entirely within this state and thus would have little effect on interstate commerce. *See* Plaintiff's Complaint.
- The Court acknowledges that the alleged violations were committed by manufacturers rather than owners. But in installing this new and improved defeat technology, the Defendants were not acting as manufacturers but rather were actually acting as mechanics who intentionally performed maintenance services long after the motor vehicles involved had been placed into commerce. And since the technology installed was both new and improved, these installations cannot be said as a matter of law to "relate back" to the original manufactured product. The Court analogizes this situation to a local mechanic disabling a catalytic converter after market. There is little dispute that states are able to regulate such activity under Section 209(d) after the motor vehicle has been placed "in use". *See Wyoming v. VW* 264 F.Supp.3d 1040; *Allway Taxi*, 340 F.Supp. 1120.

f. The application of Minnesota's anti-tampering rules is not limited to "compliant" pollution control systems.

The Court rejects Defendants' argument that state authority under Section 209(d) extends only to regulating post-sale installation of tampering technology if the vehicles were CAA-compliant when originally sold.

As stated by Plaintiff, Minnesota's anti-tampering laws do not define an air pollution control system as being a device or element of design which *actually* complies with federal pollutant emission restrictions, but rather one whose elements were installed "in order to" comply with those restrictions. Minn. Stat. § 325E.0951, subd.1(c). The only possible purpose in installing this improved technology was to allow these vehicles to pass an emissions test i.e., comply with emissions standards.

g. The Court has personal jurisdiction over Volkswagen AG.

> Where a forum resident seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [due process] is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985)

Jurisdiction over foreign manufacturers is appropriate when they direct their products to a forum state or with the expectation that they will be purchased by consumers in the

forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The State's allegations that the Volkswagen AG (1) designed its vehicles to be driven in Minnesota, (2) acted with their U.S. affiliates to obtain permission to sell vehicles in Minnesota; (3) oversaw the sales and marketing efforts in Minnesota of their U.S. affiliates, (5) instructed their U.S. affiliate VWGoA to install new tampering technology in already sold vehicles registered in Minnesota, and (6) transacted business through at least 10 Volkswagen-specific dealerships located in Minnesota are sufficient to establish that Volkswagen AG directed its activities at Minnesota and purposefully availed itself of the privileges of conducting business within Minnesota. Thus jurisdiction over Volkswagen AG is proper.

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