

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

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STATE OF TENNESSEE, *ex rel.*
HERBERT H. SLATERY III, in his official
capacity as the Attorney General and Reporter
of Tennessee, and
ROBERT J. MARTINEAU, JR., in his official
capacity as the Commissioner of the Tennessee
Department of Environment and Conservation,

Plaintiffs,

v.

VOLKSWAGEN AKTIENGESELLSCHAFT
d/b/a VOLKSWAGEN AG and/or
VOLKSWAGEN GROUP; 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.

AF
Case No. 16-1044-I

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION
TO DISMISS FOR FAILURE TO STATE A CLAIM¹

INTRODUCTION

The Defendants moved for dismissal based upon Tenn. R. Civ. P. 12.02(6) for failure to state a claim. The Defendants contend that all of the Plaintiffs' claims are preempted by the federal Clean Air Act (CAA) and that Tennessee's rules and regulations do not apply to manufacturing conduct. The context of the case is that the Defendants designed and manufactured motor vehicles for sale in Tennessee for the years 2009 through 2016 which included emissions defeat devices in

¹ The Court's findings and conclusions from its oral ruling on March 5, 2018, are incorporated herein, and the transcript of the same is appended hereto.

certain of these new vehicles, rather than the emission control systems required by the CAA for new cars sold in this country. In 2014 and 2015, the Defendants recalled these same vehicles for a field fix purportedly to improve the performance of the vehicles, all the while in fact increasing the effectiveness of the defeat devices.

ISSUES PRESENTED

The issues subsumed in this motion for dismissal for the Court to decide are: (1) Are the Plaintiffs' state claims regarding tampering and inspection and maintenance (I&M) testing before the recall in 2014 and 2015 precluded under the preemptive provision of Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a); and (2) Are the Plaintiffs' state claims arising out of and after the recall and field fix of the vehicles also precluded under the same CAA provision?

STANDARD OF REVIEW

In *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011), the Supreme Court stated as follows:

A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss "admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." In considering a motion to dismiss, courts "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief."

Id. at 426 (citations omitted).

PRINCIPLES OF LAW

Section 209(a) of the CAA, 42 U.S.C. § 7543(a) reads as follows:

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 a new motor vehicle engine 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 as a condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Section 209(d) of the CAA, 42 U.S.C. § 7543(d), reads as follows:

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.

Tenn. Comp. R. & Regs. 1200-3-36-.03 titled "Motor Vehicle tampering prohibited" states as follows:

- (1) No person shall cause, suffer, allow, or permit tampering of a motor vehicle or motor vehicle engine that is in compliance with federal motor vehicle standards except where the purpose of modification or removal of the air pollution emission control device is to install another device which is equally effective in reducing emissions from the vehicle.
- (2) No person shall manufacture, sell, offer to sell, or install any part or component on a motor vehicle or motor vehicle engine where the purpose 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 that is in compliance with the federal motor vehicle standards.

Tenn. Code Ann. § 68-201-120 states that

It is unlawful for any person to remove 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 the Clean Air Act, compiled in 42 U.S.C. § 7401 *et seq.*, prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser.

Tenn. Code Ann. § 68-201-112(a) states, "[a]ny person who knowingly . . . [(3)] [f]alsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained or followed . . . commits a Class C misdemeanor with the fine not to exceed \$10,000 per day per violation."

The Court notes the following statements from *Engine Manufacturer's Association v. Environmental Protection Agency*, 88 F.3d 1075 (D.C. Cir. 1996):

...

The [Clean Air Act] makes “the States and federal government partners in the struggle against air pollution.” . . . [T]he states had the “primary responsibility” for improving air quality The CAA contemplated that the states would carry out their responsibility chiefly by regulating stationary sources, such as factories and power plants . . . [b]oth before and after the 1977 amendments[.]

Id. at 1078-79.

...

In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions has been principally a federal project. The regulatory difference is explained in part by the difficulty of subjecting motor vehicles, which readily move across state boundaries, to control by individual states. Congress had another reason for asserting federal control in this area: the possibility of 50 different state regulatory regimes “raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers.” Two years after authorizing federal emission regulations, therefore, Congress preempted the states from adopting their own emission standards.

Id. at 1079. (citations omitted).

...

Section 209(a) preempts state standards for motor vehicles.

See id. at 1085.

...

In Re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation, 264 F.Supp.3d 1040 (N.D. C.A. 2017) (“*Wyoming*”) is not an authoritative case but provides a persuasive explanation of how the state and federal government interact as regards control over air quality and the emissions from vehicles. In *Wyoming*, Judge Breyer granted Volkswagen’s motion to dismiss Wyoming’s Complaint and then went on to discuss why that was

the case and discussed specifically the preemption issue. The Court notes the following statements from *Wyoming*:

[W]hether the analysis is characterized as preemption or purely as the interpretation of a federal regulatory scheme, the Court’s task is the same: to examine the text of Section 209, to consider its context within the Clean Air Act, and to consider relevant precedents and authorities that speak to Congress’s purpose and intent.

Id. at 1048. (citations omitted).

...

[T]he Clean Air Act and amendments thereto have made “the States and the Federal Government partners in the struggle against air pollution” . . . [b]ut the regulation of motor-vehicle emissions has become “a principally federal project.”

Id. at 1049. (citations omitted).

...

Section 209(a) does not just prohibit States from adopting emission standards that conflict with EPA standards; the provision instead bars States from “adopt[ing] or attempting to enforce any standard” within Section 209(a)’s reach. Thus, even if a State “does not establish new or conflicting emission standards,” its effort to enforce new vehicle emission standards, will be prohibited.

Id. at 1050. (citations omitted) (emphasis in original).

...

By allowing the 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 [National Ambient Air Quality Standards].

Id. at 1050-51.

...

Inspection and maintenance programs are example of “in-use” regulations.

Id. at 1051. (citing to 42 U.S.C. § 7541(h)(2)).

...

Anti-tampering and concealment laws can also be applied as “in-use” regulations, prohibiting the disabling of emission-control systems and the use of devices that conceal on-road emissions.

Id. (citation omitted).

The Court notes that the *Wyoming* court went on to discuss what would happen if the state required all vehicles within it, once driven off a new car lot, to be equipped with an emission control device that’s not required by EPA regulations. *See id.* at 1051. The *Wyoming* court stated:

The state may argue that this standard is not “relat[ed] to the control of emission from *new motor vehicles*,” but instead regulates “the use, operation or movement of registered or licensed motor vehicles[.]” 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.” Vehicle manufacturers would likely feel pressure to install the emission-control device required by the State in its new vehicles.

Id.

...

A State’s “in-use” regulations cannot “amount to a standard relating back to the original design of the engine by the original engine manufacturer.”

Id. at 1052. (citing EPA’s statements in 59 Fed. Reg. 31306-01, 31330 (June 17, 1994)).

...

[E]ven after a vehicle is introduced into commerce certain State regulation comes within Section 209(a)’s bounds.

Id. at 1053.

...

By barring State enforcement of new-vehicle emission standards, both before and after the initial sale of a vehicle, Section 209(a) keeps States from interfering with EPA investigations and enforcement actions based on fraud or deceit against the Agency during the new-vehicle certification process. If States were also permitted to police such deception, there could be a multiplicity of redundant investigations and enforcement actions, “rais[ing] the spectre of an anarchic patchwork of federal and state regulatory programs.”

Id.

...
[C]ourts and EPA have recognized that, consistent with Congress's purpose in enacting Section 209 permissible "in-use" regulations "cause only minimal interference with interstate commerce," and the "burden of compliance" with an in-use regulation is generally "on individual owners and not on manufacturers and distributors." . . . (State's "in-use" regulations cannot "amount to a standard relating back to the original design of the engine by the original engine manufacturer[.]")

Id. at 1056. (citing *Allway Taxi v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972) and 59 Fed. Reg. 31306-01, 31330 (June 17, 1994)).

...
Wyoming's tampering and concealment claims place the burden of compliance on Volkswagen as the manufacturer. To ensure accurate emissions' reporting and the full use of the vehicle emission controls, Volkswagen must uninstall the defeat-device software. And even then, modifications to the vehicles are needed for them to perform as represented.

Id.

...
Wyoming's regulations therefore amount to impermissible State "standard[s] relating back to the original design of the engine by the original engine manufacturer."

Id. at 1056-57.

...
Further, Wyoming's claims (and those of other States) threaten to interfere with interstate commerce, because they are predicated on conduct that occurred during the manufacture of hundreds of thousands of vehicles intended for distribution throughout the United States. This, of course, does not mean that Volkswagen cannot be held responsible for the consequences of its actions. As is readily apparent from this MDL, Volkswagen has indeed been held responsible. But because Volkswagen's conduct took place during manufacturing, Congress determined the EPA, not the 50 States, was best situated to regulate it.

Id. at 1057.

CONCLUSIONS OF LAW

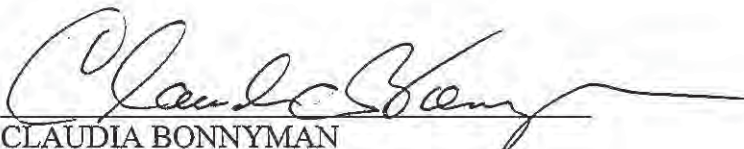
The Court holds that the Plaintiffs' state claims regarding tampering and I&M, before the recall, are precluded under the preemptive provision of Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), because this prohibition says that a state may not "adopt or attempt to enforce any standard," whether it's a federal standard or a state standard or whether it's a higher standard or a lower standard, "relating to the control of emissions from new motor vehicles." "Relating to" is extremely broad terminology because some of what the State is trying to do in the (FAC) ^{First Amended} relates ^(CB) ~~complaint~~ to or relates back to the installation of defeat devices in new vehicles during manufacturing. The Court finds that the Plaintiffs' claims that have to do with defeat devices, all of these claims that ^{arose} ~~took place~~ ^(CB) as a result of the continued use of the defeat devices through the years 2009 and 2016, must be dismissed because they are preempted by the CAA.

As to the Plaintiffs' claims arising out of and after the Defendants' recall and field fix of its vehicles, the Court holds that those claims are not preempted by Section 209(a) of the CAA. There is conceivably a set of facts which would allow the State of Tennessee to regulate the use of the vehicles in Tennessee during and after the recall and alteration of the Defendants' emission control defeat devices. Therefore, the Court does not dismiss any of the claims arising out of paragraphs 76 and 77² of the FAC. According to the FAC, the recall and alteration took place in 2014 and 2015. The Court is not at all comfortable finding that these claims are preempted because there simply is not enough information for the Court to take that position - dismissing a claim for failure to state a claim is a serious thing that prevents the State from expanding upon and explaining its claims.


² In the oral recording of the ruling, the Court mistakenly referred to ¶ 78 of the FAC instead of ¶ 77.

In summary, the Court is dismissing under Tenn. R. Civ. P. 12.02(6) the States' claims regarding tampering and I&M before the recall because the activities or the conduct that the Defendants were involved in related back to the original design and manufacture of the motor vehicles. But after 2014 and 2015, which the Court understands from the FAC were the years and the times when the recall went out for the Defendants' vehicles that are now owned by other people, the State is alleging that the Defendants in recalling and field fixing these vehicles violated state law, the anti-tampering and I&M claims, because these do not relate back to the original manufacturing and insertion of the devices into the new cars. Therefore, the Court is not dismissing under Tenn. R. Civ. P. 12.02(6) the States' claims arising out of and after Defendants' recall and field fix of the vehicles in 2014 and 2015.

It is so ORDERED.


CLAUDIA BONNYMAN
Chancellor

APPROVED FOR ENTRY:


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☐ emailed & mailed
3/24/18

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing proposed Order has been served upon the Defendants by electronic transmission and first class U.S. Mail, postage prepaid, on this 20th day of March 2018 at the following addresses:

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WILSON S. BUNTIN

IN THE CHANCERY COURT OF
 DAVIDSON COUNTY, TENNESSEE, PART I
 FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE, ex. rel.)
 HERBERT H. SLATERY, III, in his)
 official capacity as the Attorney)
 General and Reporter of Tennessee,)
 and)

ROBERT J. MARTINEAU, JR., in his)
 official capacity as the)
 Commissioner of the Tennessee)
 Department of Environment and)
 Conservation,)

Plaintiffs,)

vs.)

VOLKSWAGEN AKTIENGESELLSCHAFT)
 (d/b/a VOLKSWAGEN AG); AUDI AG;)
 VOLKSWAGEN GROUP OF AMERICA, INC.;)
 DR. ING. H.C. F. PORSCHE AG)
 (d/b/a PORSCHE AG); and PORSCHE)
 CARS NORTH AMERICA, INC.,)

Defendants.)

Case No.
 16-1044-I

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TRANSCRIPT OF RECORDED PROCEEDINGS

BENCH RULING

Before Chancellor Claudia C. Bonnyman

March 5, 2018

Reported by: Tammy K. Benefield, RPR, LCR
 Tennessee LCR No. 479
 Expires: 6/30/2018

P R O C E E D I N G S

(RECORDING BEGINS.)

THE COURT: This is Chancellor Bonnyman and this is a bench ruling in State of Tennessee versus Volkswagen defendants, Chancery Case No. 16-1044-I.

The parties are notified as to this oral ruling that there may be a silence in the ruling but if the parties will stay tuned, so to speak, the ruling should be picked up again in a few moments. The Court may have left the bench to get a copy of a case to read from or there may be some other reason but, as I said, if you just stay tuned, our experience has been that the recording will pick up.

The Court requests that the defendants prepare a transcript of this bench ruling and signify in an order that summarizes the decision that the transcript is incorporated by reference. That order and the transcript should then be provided to the plaintiffs for their review based on the local rules before or at the time of filing so that an opposing order can be presented if that is advisable.

And then moving on to the motion that the Court is resolving by this ruling, the defendants move for dismissal based upon Rule 12.02(6) for failure to

1 state a claim. The defendants contend that all the
2 plaintiffs' claims are preempted by the federal Clean
3 Air Act and that Tennessee's rules and regulations do
4 not apply to manufacturing conduct like the plaintiffs
5 challenge in their First Amended Verified Complaint.

6 The context of the case is that the
7 defendants designed and manufactured motor vehicles
8 for sale in Tennessee for the years 2009 through 2016.
9 The defendants included emission testing defeat
10 devices in their new vehicles rather than the emission
11 control systems required by the Clean Air Act for a
12 new car sold in this country.

13 In 2014 and 2015, the defendants recalled
14 the same vehicles for a field fix purportedly to
15 improve the performance of the vehicles all the while,
16 in fact, increasing the effectiveness of the defeat
17 devices.

18 In June 2016, the defendants executed a
19 partial settlement agreement with the state of
20 Tennessee resolving consumer protection claims related
21 to the marketing and sale of these vehicles in
22 Tennessee. The consent order of settlement preserved
23 the anti-tampering and the state's environmental
24 claims arising out of inspection and maintenance
25 testing.

1 The defendants have also litigated and
2 settled federal Clean Air Act claims against the
3 defendants with the Environmental Protection Agency.

4 The issues subsumed in this motion for
5 dismissal for the Court to decide are: One, are the
6 plaintiffs' state claims regarding tampering and the
7 inspection and maintenance testing before the recall
8 in 2014 and '15 precluded under the preemptive
9 provisions of Section 209(a) of the Clean Air Act at
10 42 U.S.C.A. Section 7543(a); and, two, are the
11 plaintiffs' state claims arising out of and after the
12 recall and field fix of its vehicles also precluded
13 under the same Clean Air Act provisions.

14 And as for the principles of law that the
15 Court is applying in this case -- well, before I get
16 to that, let me talk about the First Amended Verified
17 Complaint because that's what we're looking at. And
18 the Court is going to read into the record into this
19 order the pertinent parts of the complaint that direct
20 the Court's decision under the motion.

21 The First Amended Verified Complaint
22 states, after describing action for civil penalties
23 against the defendants for violation of the Tennessee
24 Air Quality Act, the complaint goes on to state, "A
25 motor vehicle's emission control system is supposed to

1 mitigate the harmful air pollutants, including
2 nitrogen oxides, emitted by the vehicle's engine. For
3 over ten years, Volkswagen carried out a scheme to
4 render inoperative certain emission control systems in
5 over a dozen separate U.S.-market, Audi, Volkswagen
6 and Porsche models..."

7 And I'm reading, by the way in pertinent
8 part, paragraph 3. "It did so by installing and later
9 updating software, known as...'defeat device,' in the
10 engine control units of the Subject Vehicles that
11 recognizes when the vehicles are undergoing emissions
12 testing.

13 "When the defeat device software detects
14 that the vehicle is undergoing emissions testing, it
15 activates or increases the effectiveness of the
16 vehicle's emission control system installed to meet
17 federal emissions standards. During every-day,
18 real-world driving by its customers, however, the
19 defeat device software renders inoperative these
20 emission control systems in the Subject Vehicles."

21 Paragraph 4, "Additionally, the defeat
22 device software renders inaccurate the onboard
23 diagnostics systems in the Subject Vehicles...to allow
24 them to pass annual state inspection and maintenance
25 testing."

1 Paragraph 5, "From 2008 through 2015,
2 approximately 8,936 of the Subject Vehicles
3 containing" the "defeat device software were
4 registered and operated on Tennessee's roads."

5 Paragraph 6, "Volkswagen marketed the
6 Subject Vehicles to Tennesseans as new 'clean diesel'
7 vehicles..."

8 And moving on to other pertinent parts of
9 the complaint. Paragraph 29 under Regulatory
10 Background. "The Air Act prohibits any person from
11 knowingly failing to comply with any provision of the
12 Air Act, or 'any duly promulgated air pollution
13 control regulation.'" TCA Section 68-201-112(a)(1).

14 Paragraph 30, "The Air Act prohibits any
15 person from knowingly falsifying, tampering with, or
16 rendering inaccurate 'any monitoring device or method
17 required to be maintained or followed.'" That's from
18 TCA 68-201-112(a)(3).

19 Paragraph 31, "The Rules require annual
20 inspections of in-use light-duty motor vehicles
21 registered in counties designated by rule to have an
22 inspection and maintenance testing program."

23 Tennessee Comprehensive Rules and Regulations
24 1200-03-29-.03.

25 Paragraph 32, "In counties with an I&M

1 testing program," -- that is inspection and
2 maintenance testing program -- "of which there are
3 six, the Rules indicate that an inspected in-use
4 light-duty diesel vehicle must fail an emissions
5 inspection if it does not pass a visual check of the
6 Malfunction Indicator Light...and an electronic
7 examination of the Onboard Diagnostics system
8 computer." And this is from Tennessee Comprehensive
9 Rules and Regulations 1200-03-29-.05(4).

10 Paragraph 33, "It is unlawful for any
11 person to remove or render inoperative any device or
12 element of design installed on or in a motor vehicle
13 or motor vehicle engine in compliance with regulations
14 under the federal Clean Air Act, compiled in 42 U.S.C.
15 Section 7401 et seq, prior to its sale and delivery to
16 the ultimate purchaser, or for any person knowingly to
17 remove or render inoperative any such device or
18 element of design after such sale and delivery to the
19 ultimate purchaser." TCA 68-201-120.

20 Paragraph 34, "The Rules provide that 'no
21 person shall cause, suffer, allow, or permit tampering
22 of a motor vehicle or motor vehicle engine that is in
23 compliance with federal motor vehicle standards.'"
24 That's from Rules and Regulations 1200-3-36-.03(1).

25 35, "The Rules provide that 'no person

1 shall manufacture, sell, offer to sell, or install any
2 part or component on a motor vehicle or motor vehicle
3 engine where the purpose...is to bypass, defeat...
4 any element of design installed on or in a motor
5 vehicle...that is in compliance with federal motor
6 vehicle standards.'" This is Tennessee Rules and Regs
7 1200-3-36-.03(2).

8 Paragraph 7 -- paragraph 6 [sic] defines
9 tampering under state law. Paragraph 37 states the
10 penalties for a violation of Tennessee's Air Act and
11 its Rules.

12 And then moving on to other pertinent
13 paragraphs. Paragraph 46 refers to Volkswagen's
14 tampering under the state act. "Tennessee has
15 inspection and maintenance testing programs...that
16 require all registered motor vehicles to pass
17 annual...tests that evaluate, among other things, the
18 operation of the vehicles' emission control systems."

19 Paragraph 47, "In Tennessee...inspection
20 and maintenance testing does not directly measure the
21 vehicle's emissions, but relies instead on the
22 vehicle's onboard diagnostic system..."

23 48, "Federal law requires auto
24 manufacturers to equip their cars with OBDs" -- that
25 is onboard diagnostic systems -- "that electronically

1 report failures of emission control systems...to
2 inspectors..."

3 Paragraph 49, "Properly-functioning OBDS
4 would have reported the failure of the...Vehicles to
5 run their emission control systems properly and would
6 have alerted...inspectors..." of the failure.

7 Paragraph 50, "To allow the... Vehicles
8 to pass Tennessee's inspection and maintenance
9 testing, Volkswagen...implemented a further cheat: It
10 programmed the OBDS in the...Vehicles to falsely
11 report...that the automobiles' emission control
12 systems were working properly..."

13 "This deception subverted Tennessee's
14 inspection and maintenance program" -- this is from
15 paragraph 51 -- "and caused a substantial waste of
16 time and resources..." and damages to the state.

17 Paragraph 54, "In early-to-mid
18 2000s...Volkswagen explored equipping its Generation 1
19 diesel engines with a urea-spraying air pollution
20 emission control system..."

21 Paragraph 55, "In 2006, the engineers and
22 managers...abandoned the urea-spraying air pollution
23 emission control system and...used a...system that
24 used catalytic converter technology..." But "...it
25 became apparent to Volkswagen's engineers that it

1 produced too much soot."

2 Paragraph 56, "In late 2006, facing
3 these...engineering" problems "...Volkswagen's
4 engineers...adapted Audi's acoustic function to
5 overcome these issues."

6 Then moving on to paragraph 76. "In
7 2015, despite issuing two software recalls for its
8 Generations 1 and Generation 2 vehicles to purportedly
9 address the concerns raised by" a report, "Volkswagen
10 used these recalls instead as an opportunity to refine
11 the software in these vehicles to make it more
12 efficient at rendering certain emission control
13 systems inoperative in normal driving conditions,
14 resulting in...emissions that continued to exceed" the
15 "emission standards."

16 Paragraph 77, "The conduct...in
17 paragraph 76 is commonly referred to as the 'Field
18 Fix.' In 2014 and '15, Volkswagen falsely told
19 regulators and consumers that it was updating software
20 to improve the performance of the vehicles subject to
21 the recall, (which included existing, in-use vehicles
22 sold years before) when in fact, Volkswagen's
23 recall/maintenance was a rouse to improve the defeat
24 device software."

25 Paragraph 78, "A primary reason that

1 Volkswagen continued its deception after the 2014 ICCT
2 report was to secure government authorization to sell
3 Model Year 2015 and 2016" vehicles.

4 And that completes the reading of the
5 most pertinent provisions of the complaint, that is
6 the amended complaint, and I'm going to continue with
7 the allegations the defendants made as to its claims
8 and violations of law starting with paragraph 93.
9 This is also in the amended complaint.

10 "Each of the defendants knowingly
11 violated Tennessee's anti-tampering and I&M laws with
12 respect to each of the...Vehicles registered in
13 Tennessee."

14 Paragraph 94, "Until September 2015, each
15 defendant concealed and failed to disclose to the
16 state of Tennessee and the public that it had
17 installed defeat device software that continuously
18 tampers with the Subject Vehicles' emission control
19 systems while being driven by customers in the U.S.,
20 including those in Tennessee."

21 Paragraph 97, "By installing and using
22 defeat device software and/or performing updates to
23 such software with the intent of causing
24 the...systems...to become and/or remain inoperative
25 during normal driving conditions, the defendants

1 violated TCA 68-201-120, with respect to each of
2 the...Vehicles."

3 Paragraph 98, "By installing and using
4 defeat device software on each of the Subject
5 Vehicles, which falsifies, tampers with, or renders
6 inaccurate the OBD's ability to produce an accurate
7 assessment of the...Vehicle's true emissions
8 performance during the state I&M testing, the
9 defendants violated TCA 68-201-112(a)(3)..."

10 Paragraph 99, "By installing and using
11 defeat device software and/or performing updates to
12 such software on each of the Subject Vehicles to
13 cause, suffer, allow, or permit the emissions control
14 systems...to become and/or remain inoperative during
15 normal driving conditions, the defendants violated
16 TCA 68-201-112(a)(1) and...Rules and Regulations
17 1200-03-36-.03(1) with respect to each of
18 the...Vehicles."

19 And then last, "By installing and using
20 defeat device software and/or performing updates on
21 such software on each of the Subject Vehicles to cause
22 devices...otherwise in compliance with the federal
23 motor vehicle standards to be bypassed, defeated, or
24 rendered inoperative, or by providing the...Vehicles
25 to dealers for sale or lease to customers, the

1 defendants violated TCA 68-201-112(a)(1) and Tennessee
2 Comprehensive Rules and Regulations 1200-03-36-.03(2)
3 with respect to each of the Subject Vehicles."

4 And that does complete the Court's
5 reading of the most pertinent parts of the complaint.

6 And as for principles of law in this
7 case, in Webb versus Nashville Area Habitat for
8 Humanity at 346 S.W.3d 422 decided by the Supreme
9 Court in July 2011, in this case the Supreme Court was
10 describing Tennessee standards to be applied in a
11 motion to dismiss a pleading.

12 "A Rule 12.02(6) motion challenges only
13 the legal sufficiency of the complaint, not the
14 strength of the plaintiff's proof or evidence."

15 "The resolution of a 12.02(6) motion to
16 dismiss is determined by an examination of the
17 pleadings alone."

18 "A defendant who files a motion to
19 dismiss 'admits the truth of all of the relevant and
20 material allegations contained in the complaint,
21 but... asserts that the allegations fail to establish
22 a cause of action.'"

23 "In considering a motion to dismiss,
24 courts must construe the complaint liberally,
25 presuming all factual allegations to be true and

1 giving the plaintiff the benefit of all reasonable
2 inferences."

3 "A trial court should grant a motion to
4 dismiss 'only when it appears that the plaintiff can
5 prove no set of facts in support of the claim that
6 would entitle the plaintiff to relief.'"

7 "The fact-weighting and merits-based
8 determination aspect of the" federal "standard is at
9 odds with the well-established principle in Tennessee
10 that a Rule 12.02(6) motion challenges only the legal
11 sufficiency of the complaint, not the strength of the
12 plaintiff's proof or evidence."

13 "It also conflicts with the strong
14 preference embodied in the Tennessee Rules of Civil
15 Procedure that cases stating a valid legal claim
16 brought by Tennessee citizens be decided on their
17 merits."

18 "The Tennessee Rules of Civil Procedure
19 are intended to 'insure that cases and controversies
20 be determined upon their merits and not upon legal
21 technicalities or procedural niceties.'"

22 And then from Leggett versus Duke Energy
23 Corporation at 308 S.W.3d 843 and in this case -- and
24 let me eliminate the reading, actually, of that
25 particular case.

1 Moving to the state standards at
2 42 U.S.C.A. Section 7543(a), "No state or any
3 political subdivision thereof shall adopt or attempt
4 to enforce any standard relating to the control of
5 emissions from new motor vehicles or new motor vehicle
6 engines subject to this part. No state shall require
7 certification, inspection, or any other approval
8 relating to the control of emissions from any new
9 motor vehicle or new motor vehicle engine as condition
10 precedent to the initial retail sale, titling (if
11 any), or registration of such motor vehicle, motor
12 vehicle engine, or equipment."

13 And then (d) of the same statute, same
14 statute and section. Control, regulation, or
15 restrictions on registered or licensed motor vehicles.
16 "Nothing in this part shall preclude or deny to any
17 state or political subdivision thereof the right
18 otherwise to control, regulate, or restrict the use,
19 operation, or movement of registered or licensed motor
20 vehicles."

21 And then from 42 U.S.C. (A) Section 7416,
22 Retention of state authority. "Except as otherwise
23 provided in Sections 1857c-10(c), (e), and (f) (as in
24 effect before August 7, 1977), 7543, 7545(c)(4), and
25 7573 of this title (preempting certain state

1 regulation of moving sources) nothing in this chapter
2 shall preclude or deny the right of any state or
3 political subdivision thereof to adopt or enforce (1)
4 any standard or limitation respecting emissions of air
5 pollutants or (2) any requirement respecting control
6 or abatement of air pollution..."

7 And then from 42 U.S.C. (A) Section 7550,
8 "As used in this part - (1) The term 'manufacturer' as
9 used in Sections 7521, 7522, 7525, 7541, and 7542 of
10 this title means any person engaged in the
11 manufacturing or assembling of new motor vehicles, new
12 motor vehicle engines, new nonroad vehicles or new
13 nonroad engines, or importing such vehicles or engines
14 for resale, or who acts for and is under the control
15 of any such person in connection with the distribution
16 of new motor vehicles, new motor vehicle engines, new
17 nonroad vehicles or new nonroad engines, but shall not
18 include any dealer with respect to new motor
19 vehicles..."

20 And then from TCA 68-201-101, "This part
21 shall be known and may be cited as the Tennessee Air
22 Quality Act."

23 And then from Rules and Regulation
24 1200-3-36-.03, Motor vehicle tampering prohibited.

25 "(1) No person shall cause, suffer,

1 allow, or permit tampering of a motor vehicle or motor
2 vehicle engine that is in compliance with federal
3 motor vehicle standards except where the purpose of
4 modification or removal of the air pollution emission
5 control device is to install another device which is
6 equally effective in reducing emissions from the
7 vehicle.

8 "(2) No person shall manufacture, sell,
9 offer to sell, or install any part or component on a
10 motor vehicle or motor vehicle engine where the
11 purpose of the part or component is to bypass, defeat,
12 or render inoperative any device or element of design
13 installed on or in a motor vehicle or motor vehicle
14 engine that is in compliance with the federal motor
15 vehicle standards."

16 And then from TCA 68-201-116, corrections
17 of violation civil penalties or damages. "(b) (1) In
18 addition to the criminal penalties...any person who
19 violates or fails to comply with any provision of this
20 part or any rule, regulation, ordinance, or standard
21 adopted pursuant to this part shall be subject to a
22 civil penalty of up to \$25,000 per day for each day of
23 violation."

24 And then TCA 68-201-120, "It is unlawful
25 for any person to remove or render inoperative any

1 device or element of design installed on or in a motor
2 vehicle or motor vehicle engine in compliance with
3 regulations under the...Clean Air Act" compiled in
4 "42 U.S.C. Section 7401 et seq., prior to its sale and
5 delivery to the ultimate purchaser, or for any person
6 knowingly to remove or render inoperative any such
7 device or element of design after such sale and
8 delivery to the ultimate purchaser."

9 And then TCA 68-201-112(a), "Any person
10 who knowingly: (3) Falsifies, tampers with, or
11 renders inaccurate any monitoring device or method
12 required to be maintained or followed...commits a
13 Class C misdemeanor with the fine not to exceed
14 \$10,000 per day per violation."

15 And "In addition...to any criminal action
16 that may be prosecuted...the board and commissioner
17 have and are vested with jurisdiction...to determine
18 whether...rules or regulations...or any order of the
19 board has been violated, and whether or not such
20 violation constitutes a public nuisance."

21 And then from Engine Manufacturers
22 Association versus U.S. Environmental Protection
23 Agency decided July 12, 1996, a District of Columbia
24 Circuit decision reported at 88 F.3d 1075, as I said,
25 in 1996. "The Clean Air Act statutory scheme. The

1 Clean Air Act makes 'the states and the federal
2 government partners in the struggle against air
3 pollution.'" "...the states had the 'primary
4 responsibility' for improving air quality" in the
5 beginning. "The Clean Air Act contemplated that the
6 states would carry out their responsibility chiefly by
7 regulating stationary sources, such as factories and
8 power plants. Both before and after the 1977
9 amendments..."

10 "In contrast to federally encouraged
11 state control over stationary sources, regulation of
12 motor vehicle emissions had been a principally federal
13 project."

14 "The regulatory difference is explained
15 in part by the difficulty of subjecting motor
16 vehicles, which readily move across state boundaries,
17 to control by individual states.

18 "Congress had another reason for
19 asserting federal control in this area: The
20 possibility of 50 different state regulatory regimes
21 'raised the spectre of an anarchic patchwork of
22 federal and state regulatory programs, a prospect
23 which threatened to create nightmares for the
24 manufacturers.'"

25 "Two years after authorizing federal

1 emissions regulations, therefore, Congress preempted
2 the states from adopting their own emissions
3 standards."

4 The federal approach was that "...state
5 emissions controls must be sufficiently delayed from
6 the original sale that the burden of compliance would
7 not fall on the manufacturer."

8 This case goes on -- this court goes on
9 to state that section in pertinent part,
10 "Section 209(a) preempts state standards for motor
11 vehicles: 'No state or any political subdivision
12 thereof shall adopt or attempt to enforce any standard
13 relating to the control of emissions from new motor
14 vehicles or new motor vehicle engines subject to this
15 part.'"

16 And then from the Wyoming -- the case
17 that's called the Wyoming case. In re: Volkswagen
18 "Clean Diesel" Marketing, Sales Practices, and
19 Products Liability Litigation, and this is a district
20 court decision at 264 F.Supp.3d 1040 in the Northern
21 District of California in the District Court. And
22 this is not an authoritative case but a persuasive
23 explanation of how the state and federal government
24 interact as regards control over air quality and the
25 emissions from vehicles.

1 Judge Breyer dismissed or granted
2 Volkswagen's motion to dismiss Wyoming's complaint,
3 and then went on to discuss ~~why that was the case~~ ^{the dismissal} and
4 discusses specifically the preclusion issue.

5 "...whether the analysis is characterized as
6 preemption or purely as the interpretation of a
7 federal regulatory scheme, the Court's task is the
8 same: To examine the text of Section 209, to consider
9 its context within the Clean Air Act, and to consider
10 relevant precedents and authorities that speak to
11 Congress's purpose and intent."

12 "...the Clean Air Act and amendments
13 thereto have made 'the states and the federal
14 government partners in the struggle against air
15 pollution.'" "But the regulation of motor vehicle
16 emissions has become a principally federal project."

17 This court then goes on to state the
18 language of 209(a) of the Act. Section 209(a), says
19 this court, does not -- says Judge Breyer in the Clean
20 Diesel case, also called the Wyoming case,
21 "Section 209(a) does not just prohibit states from
22 adopting emission standards that conflict with EPA
23 standards; the provision instead bars states from
24 'adopting or attempting to enforce any standard'
25 within 209(a)'s reach."

1 "Thus, even if a state 'does not
2 establish new or conflicting emission standards,' its
3 efforts to enforce new vehicle emission standards,
4 including EPA's standards, will be prohibited."

5 "By allowing states to regulate
6 'registered or licensed motor vehicles,' as opposed to
7 new motor vehicles, Section 209(d) preserves states'
8 ~~inherit~~ ^{inherent} (B) authority to police conduct within their
9 borders, and also enables them to develop additional
10 tools to meet the EPA-established" standards.

11 "Inspection and maintenance programs are
12 an example of 'in use' regulations."

13 "Anti-tampering and concealment laws can
14 also be applied as 'in use' regulations, prohibiting
15 the disabling of emission control systems and the use
16 of devices that conceal on-road emissions."

17 This case goes on to discuss what would
18 happen if the state required all vehicles within it,
19 once driven off a new car lot, to be equipped with an
20 emission control device that's not required by EPA
21 regulations. "The state may argue that this standard
22 is not 'related to the control of emissions from new
23 motor vehicles'...but instead regulates 'the use,
24 operation, or movement of registered or licensed motor
25 vehicles.'"

1 "A state regulation of this sort,
2 however, could significantly reduce the Clean Air
3 Act's effectiveness in preventing the type of
4 'anarchic patchwork of federal and state regulatory
5 programs' that would 'threaten to create nightmares
6 for the manufacturers.'"

7 "Vehicle manufacturers would likely feel
8 pressure to install the emission control device
9 required by the state in its new vehicles."

10 "..."a state's 'in use' regulations cannot
11 'amount to a standard relating back to the original
12 design of the engine by the original engine
13 manufacturer.'"

14 "...even after a vehicle is introduced
15 into commerce, certain state regulation comes within
16 Section 209(a)'s bounds."

17 "By barring state enforcement of new
18 vehicle emission standards, both before and after the
19 initial sale of a vehicle, Section 209(a) keeps states
20 from interfering with EPA investigations and
21 enforcement actions based on fraud or deceit against
22 the agency during the new vehicle certification
23 process. If states were...permitted to police such
24 deception, there could be a multiplicity of redundant
25 investigations and enforcement actions, 'raising the

1 spectre of an anarchic patchwork of federal and state
2 regulatory programs..."

3 "...courts and EPA have recognized that,
4 consistent with Congress's purpose in enacting
5 Section 209, permissible 'in use' regulations 'cause
6 only minimal interference with interstate commerce,'
7 and the 'burden of compliance' with an in-use
8 regulation is generally 'on individual owners and not
9 on manufacturers and distributors.'"

10 Again, the "(...state's 'in use'
11 regulations cannot 'amount to a standard relating back
12 to the original design of the engine by the original
13 engine manufacturer.')

14 This court went on to find that
15 "...Wyoming's tampering and concealment claims place
16 the burden of compliance on Volkswagen as the
17 manufacturer. To ensure accurate emissions' reporting
18 and the full use of vehicle emission controls,
19 Volkswagen must uninstall the defeat device software.
20 And even then, modifications to the vehicles are
21 needed for them to perform as represented."

22 "Wyoming's regulations therefore amount
23 to impermissible state 'standards relating back to the
24 original design of the engine by the original engine
25 manufacturer.'"

1 "Further, Wyoming's claims (and those of
2 other states) threaten to interfere with interstate
3 commerce, because they are predicated on conduct that
4 occurred during the manufacture of hundreds of
5 thousands of vehicles intended for distribution
6 throughout the United States.

7 "This...does not mean that Volkswagen
8 cannot be held responsible for the consequences of its
9 actions. As is readily apparent from this" decision
10 "Volkswagen has indeed been held responsible. But
11 because Volkswagen's conduct took place during
12 manufacturing, Congress determined that EPA, not the
13 50 states, was best situated to regulate it."

14 And having read those principles of law,
15 the Court's understanding of those principles are
16 that, as for issue number one, are the plaintiffs'
17 state claims regarding tampering and the inspection
18 and maintenance testing before the recall in 2014 and
19 '15 precluded under the preemptive provisions of
20 Section 209(a) of the Clean Air Act at 42 U.S.C.A.
21 Section 7543(a). And the Court is now looking at that
22 provision so I can comment more clearly on it.

23 The plaintiffs' state claims regarding
24 inspection and maintenance before the recall are
25 precluded under preemptive provisions of

1 the use of the vehicles in Tennessee during and after
2 the recall and alteration of the defendants' emission
3 control, that is, defeat devices.

4 So the Court does not dismiss any of the
5 claims arising out of paragraphs 76 and 78 of the
6 First Amended Verified Complaint. And according to
7 the complaint, the recall and alteration took place in
8 2014 and 2015.

9 So the Court is not at all comfortable
10 finding that those claims are preempted because there
11 simply is not enough information for the Court to take
12 that position. Because dismissing a claim for failure
13 to state a claim, of course, is a serious ~~thing~~ ^{Event (P)} that
14 prevents the parties here at the state from expanding
15 upon and explaining its claims.

16 And so the Court is dismissing, under
17 Rule 12.02(6), the state claims regarding tampering,
18 inspection and maintenance before the recall because
19 the activities or the conduct that the defendants were
20 involved in related back to the original -- related
21 back to the original design and manufacture of the
22 motor vehicles.

23 But after 2014 and 2015, which the Court
24 understands from the complaint were the years and the
25 times when the recall went out for the defendants'

1 vehicles that are now owned by other people, and at
2 recall, as the Court understands the complaint, the
3 state is saying that the defendants, in recalling and
4 field fixing the vehicles, violated state law,
5 anti-tampering, and also the inspection and
6 maintenance testing environmental claims because these
7 do not relate back to the original manufacturing and
8 insertion of the devices in the new cars.

9 And so, as I said before, I'm asking the
10 defendants to prepare a summary order and incorporate
11 by reference the transcript of this oral ruling. And
12 so we are now adjourned.

13 (RECORDING ENDS.)
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REPORTER'S CERTIFICATE

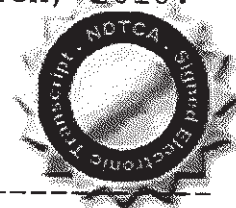
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I, Tammy K. Benefield, Notary Public and Certified Court Reporter, do hereby certify that I transcribed the RECORDED proceeding to the best of my skill and ability; and that said transcript is a true, accurate, and complete transcript to the best of my ability.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

SIGNED this 15th day of March, 2018.

Tammy K. Benefield



Tammy K. Benefield, RPR, CLR, LCR
Tennessee LCR No. 479
Expires: 6/30/2018
Notary commission expires: 8/2/2021