IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,	)	
Plaintiff,	)	**No. 16 CH 14507**
v.	)	**Hon. Kathleen M. Pantle**
VOLKSWAGEN AKTIENGESELLSCHAFT d/b/a VOLKSWAGEN GROUP and/or VOLKSWAGEN AG; AUDI AG; VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI OF AMERICA, LLC; DR. ING. H.C.F. PORSCHE AG; and PORSCHE CARS NORTH AMERICA INC.,	)	
Defendants.	)	

ORDER

Defendants, Volkswagen AG, Volkswagen Group of America, Inc., Audi AG, Porsche AG, and Porsche Cars North America, Inc. ("Volkswagen Defendants"), have moved to dismiss Plaintiff's, the People of the State of Illinois, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, Amended Complaint. The motion is brought pursuant to 735 ILCS 5/2-619.1.

Defendants' Combined Motion to Dismiss Plaintiff' Amended Complaint is granted.

Factual Allegations

Beginning with the 2009 model year through the 2016 model year, Defendants manufactured and installed undisclosed and unauthorized "defeat devices" in their "clean diesel" vehicles[1]. (Am. Compl. ¶¶ 20, 22, 32.) Defeat devices, as their names suggest, are used to defeat tests that measure a vehicle's compliance with emission standards. (*Id.* at ¶ 31.) Defendants' "clean diesel" cars were initially designed to take advantage of the fuel efficiency of diesel engines, while remedying the air pollution diesel engines produce by equipping the vehicles with

[1] A full list of the types of 2.0 and 3.0 Liter Diesel Models with the defeat devices can be found in the table in Paragraph 22 of the Amended complaint.

an exhaust recirculation device and a diesel particulate filter ("emission control system"). *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation ("Wyoming")*, 264 F.Supp.3d 1040, 1043 (N.D. Cal. Aug. 31, 2017). However, while the emission control system successfully reduced the air pollution, it also led to hardware failures because when operated regularly, particulate matter would clog and break the particulate filter. *Id.*

Instead of curing the design issues, Defendants employed a defeat device to deactivate their emission control system altogether, except when the cars were being tested for emissions compliance. (Am.Compl. ¶¶ 21-23, 30.) Specifically, Defendants installed software that could identify when a car was undergoing emissions testing and when it was being driven normally. (*Id.* at ¶¶ 21-23, 30.) When the software detected a car was being tested, it would leave the emission control system activated, temporarily reducing emission output. (*Id.* at ¶ 23.) However, when the software recognized the car was being driven normally, it would disengage the emission control system, allowing the cars to emit nitrogen oxide in excess of federal Environment Protection Agency ("EPA") and California Air Resources Board's ("CARB") levels. (*Id.* at ¶¶ 20, 32.)

Nitrogen oxides are damaging to human health and the environment. (*Id.* at ¶¶ 24, 25.) When combined with other elements in the air, ozone, fine nitrate, and sulfate particles are created that can cause and contribute to respiratory health problems, having a disproportionate impact on vulnerable members of society like children and the elderly. (*Id.*) Nitrogen oxides can cause eutrophication of and excess nutrient loading in water bodies and can reduce biodiversity, aquatic life, and vegetation. (*Id.* at ¶ 25.)

Further, Defendants falsified their applications for Certificates of Conformity from the EPA and Executive Orders from CARB. (*Id.* at ¶ 26.) To sell cars in the United States, manufacturers must apply for and receive these certifications that confirm compliance with emission laws. (*Id.*) The applications require the identification, description, and justification of all auxiliary emissions control devices ("AECDs"), such as temperature, speed engine, rotation, transmission gear, or manifold vacuum sensors, as well as, an explanation as to why each AECD is not a defeat device. (*Id.*) Defendants never disclosed the existence of their defeat devices to the regulators or to their consumers. (*Id.* at ¶ 27.)

In 2012, Defendants noticed hardware failures in their "clean diesel" vehicles and

determined the cars spent too much time with the emissions control systems activated, resulting in too much strain on the car. (*Id.* at p. 13 ¶ 43.) Thus, Defendants decided to improve the defeat device by adding a "steering wheel recognition function" that would enhance the defeat device's effectiveness in determining when the vehicle is being tested. (*Id.*) Additionally, Defendants modified the vehicles so that they would begin with the emissions control system turned off and only be turned on if the software detected the vehicle was undergoing testing. (*Id.*) The software was included in all new vehicles and all Volkswagen-branded dealerships, including those in Illinois, were required to install the new software function on used vehicles. (*Id.*)

Despite Defendants' efforts to hide their defeat devices, a 2014 university study revealed significant discrepancies in the level of nitrogen oxides emitted during on-road testing compared to testing done with traditional dynameters. *Wyoming,* 264 F.Supp.3d at 1044. CARB and EPA investigated and Volkswagen continued to conceal the defeat devices and lied about possible explanations for the discrepancies. *Id.* During this process, Defendants sent recall notices to consumers, including those in Illinois, requesting owners bring their used vehicles to a Volkswagen-branded dealership for the purpose of a "field fix" that would repair the emissions-related software. (Am.Compl. ¶¶ 13, 44.) However, Defendants installed a software update that not only did not reduce emissions, but actually improved the defeat device's precision in determining when the car was being driven normally so that the emission control systems would spend more time inactive. (*Id.* at ¶ 44.)

As it became clear the software update had not worked to reduce emissions in the "clean diesel" vehicles and with the EPA threatening not to certify Volkswagen's model-year 2016 vehicles for sale in the United States, Volkswagen finally admitted to its use of defeat devices in the fall of 2015. *Wyoming,* 264 F. Supp. 3d at 1044. Once Volkswagen's scheme became public, hundreds of lawsuits were filed against Volkswagen, including both civil and criminal actions by the United States Department of Justice to enforce the federal Clean Air Act ("CAA") (42 U.S.C. §7401). (Am.Compl. ¶¶ 30, 31.) The cases were consolidated before the United States District Court for the Northern District of California for multidistrict litigation. *Wyoming,* 264 F.Supp.3d at 1044

In the spring of 2017, Defendants pled guilty to three criminal felony counts and settled the civil charges through consent decrees. (Am.Compl. ¶¶ 30-31.) As part of the plea agreement and civil consent decrees, Defendants agreed to pay $4.3 billion in civil and criminal penalties, to

invest $2 billion in Zero Emission Vehicle technology, to recall affected vehicles, and to contribute to $2.925 billion to an emissions mitigation trust. *Wyoming,* 264 F.Supp.3d at 1044. The States are the beneficiaries of the mitigation trust and the funds are to fully mitigate the environmental damage. *Wyoming,* 264 F.Supp.3d at 1044. The settlement resulted in Illinois and its residents receiving $732 million in consumer relief, $109 million in environmental mitigation, and $51 million in dealer compensation. (Mot. Dismiss 2.) Additionally, Defendants settled claims with ten States that have adopted California's emission standards. (Am.Compl. ¶ 32.)

More than 19,000 of the vehicles containing defect devices were sold in Illinois. (*Id.* at ¶ 28.) In fact, there are 29 Volkswagen dealerships, 11 Audi dealerships, 8 Porsche dealerships, and one corporate location in Illinois. (*Id.* at ¶ 16.) Accordingly, the People of the State of Illinois filed its Complaint, and amended it on October 18, 2017, against Defendants, Volkswagen Aktiengesellschaft d/b/a Volkswagen Group and/or Volkswagen AG, AUDI AG, Volkswagen Group of America, Inc., AUDI of America, LLC, Dr. Ing. H.C.F. Porsche AG d/b/a Porsche AG and Porsche Cars North America, Inc., alleging the violation of the Illinois Environmental Protection Act ("IEPA") (415 ILCS 5/42). Count I alleges an unauthorized impairment of vehicle air pollution control systems in violation of Section 240.103 of Illinois Pollution Control Board's Mobile Source Regulations (35 Ill. Adm. Code 240.103) ("Section 240.103") each time one of the defeat devices operated in Illinois. (*Id.* at 12.) Count II alleges unauthorized impairment of vehicle air pollution control systems in violation of Section 240.103 each time Defendants or someone acting on its behalf updated, improved, optimized, or otherwise maintained defeat device software. (*Id.* at 14.) Both counts seek a finding that Defendants willfully and knowingly violated Section 240.103, $50,000 civil penalty per violation, a $10,000 civil penalty for each day of each violation, costs, and any other relief this Court deems just and appropriate. (*Id.* at 12-13, 15-16.) It is from this Amended Complaint that Defendants moved to dismiss pursuant to 735 ILCS 5/2-619.1.

Legal Standard

Section 2-619.1 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619.1) states that motions with respect to pleadings under section 2-615 and motions for involuntary dismissal under section 2-619 may be filed together as a single motion in any combination. *Hastings Mut. Ins. Co. v. Ultimate Backyard,* LLC, 2012 IL App (1st) 101751, ¶13. A combined motion shall be in parts and each part shall be limited to and shall specify that it is made under sections 2-615

or 2-619. 735 ILCS 5/2-619.1. Each part shall also clearly show the points or grounds relied upon under the section on which it is based. *Id.*

A motion to dismiss brought pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615) attacks the legal sufficiency of the complaint, and presents the question of whether the complaint states a cause of action upon which relief could be granted. *Weiss v. Waterhouse Secs.*, 335 Ill. App. 3d 875, 882 (1st Dist. 2002). Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted. *Turner v. Mem'l Med. Ctr.*, 233 Ill. 2d 494, 499 (2009). A trial court may grant a section 2-615 motion to dismiss a complaint that does not contain sufficient allegations of fact to state a cause of action. *Kapotas v. Better Gov't Ass'n*, 2015 IL App (1st) 140534, ¶ 26. The critical inquiry is whether the allegations of the complaint, when construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). In reviewing the sufficiency of a complaint, the court must accept as true all well-pled facts and reasonable inferences that may be drawn from those facts. *Iseberg v. Gross*, 366 Ill. App. 3d 857, 860 (1st Dist. 2006).

The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). Specifically, section 2-619(a)(9) of the Code of Civil Procedure permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim" (735 ILCS 5/2-619(a)(9)). *Van Meter*, 207 Ill. 2d at 367. An affirmative matter in a section 2-619(a)(9) motion is something in the nature of a defense that completely negates the cause of action. *Alpha Sch. Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 744-45 (1st Dist. 2009). Consequently, the moving party admits the legal sufficiency of the complaint, but asserts an affirmative defense or some other matter to defeat the plaintiff's claim. *Alpha Sch. Bus Co*, 391 Ill. App. 3d at 744-45. When considering a section 2-619 motion, a court must accept as true all well-pleaded facts in the complaint, as well as any inferences that may reasonably be drawn in plaintiff's favor. *Doe v. Univ. of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, ¶ 35. Dismissal of a complaint under section 2-619 is appropriate only if the plaintiff can prove no set of facts that would support a cause of action. *Id.*

Relevant Law

Clean Air Act
42 U.S.C. § 7543 State standards

(a) Prohibition. No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part [42 USCS §§ 7521 et seq.]. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

...

(d) Control, regulation, or restrictions on registered or licensed motor vehicles. Nothing in this part [42 USCS §§ 7521 et seq.] 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.

Illinois Environmental Protection Act
205 ILCS 5/10(A)(d)

(d) Standards and conditions regarding the sale, offer, or use of any fuel, vehicle, or other article determined by the Board to constitute an air-pollution hazard;

Illinois Pollution Control Board Mobile Source Regulations
35 Ill. Adm. Code 201.102 Definitions

"Person": any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this State, any other State or political subdivision or agency thereof or any legal successor, representative, agent or agency of the foregoing.

35 Ill. Adm. Code 240.102 Definitions

All terms that appear in this Part have the definitions specified in this Section, the Vehicle Emissions Inspection Law of 2005 [625 ILCS 5/13C], and 35 Ill. Adm. Code 201 and 211. When conflicting definitions occur between this Section and 35 Ill. Adm. Code 201 or 211, the definitions of this Section apply in this Part.

35 Ill. Adm. Code 240.103 Prohibitions

Except as permitted or authorized by law, no person shall fail to maintain in good working order or remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of the air pollution control systems or mechanisms of a motor vehicle as required by rules or regulations of the Board and the United States Environmental Protection Agency to be maintained in or on the vehicle.

35 Ill. Adm. Code 240.105 Penalties

(a) Any violations of Section 240.103, 240.121, 240.122, or 240.123 of this Part shall be

subject to the penalties as set forth in Section 42 of the Act [415 ILCS 5/42].

Analysis

Defendants move to dismiss Plaintiff's Amended Complaint arguing the claims are preempted by the Clean Air Act (42 U.S.C. §7401) ("CAA"). (Mot. Dismiss 11.) "The preemption doctrine, rooted in the supremacy clause of the United States Constitution, requires courts to examine whether it was Congress' intent for federal law to preempt state law in any given case." *Dannewitz v. EquiCredit Corp. of Am.*, 362 Ill. App. 3d 82, 84 (1st Dist. 2005)(internal citations omitted.) "There are three ways in which federal laws and statutes can preempt state law: (1) when the language of the federal statute expressly preempts state law; (2) when the scope of the statute indicates Congress intended federal law to occupy the field exclusively; or (3) when state law is in actual conflict with federal law." *Dannewitz*, 362 Ill. App. 3d at 84.

The CAA is one of the most comprehensive pieces of legislation in our nation's history and, thus, requires some background before conducting a preemption analysis. *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation ("MVMA"), 17* F.3d 521, 524 (2d Cir. 1994). Enacted in 1970 to respond to the increase of air pollution created by industrialization and urbanization and its threat to public health and welfare, the CAA (42 U.S.C. § 7401) is a comprehensive federal law that regulates air emissions under the auspices of the United States Environmental Protection Agency (the "EPA"). *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013) citing to 42 U.S.C. § 7401(a)(2). While environmental regulation "traditionally has been a matter of state authority," *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000), the CAA made "the States and the Federal Government partners in the struggle against air pollution." *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 938 (9th Cir. 2011). While States maintain substantial discretion to set and enforce pollution standards, regulation of motor-vehicle emissions has become "a principally federal project." *Engine Mfrs. Ass'n v. EPA ("EMA")*, 88 F.3d 1075, 1079 (D.C. Cir. 1996).

In Title II of the CAA, Congress endeavored to resolve the problems caused by moveable sources or vehicle emissions by regulating emission standards for new motor vehicles or new motor vehicle engines. *MVMA,* 17 F.3d at 525-26. Generally, it directs the EPA to "prescribe... standards applicable to the emission of any air pollutant from any class or classes of new motor

vehicles or new motor vehicle engines, which ... cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). It is in alignment with this mandate that the CAA empowers the EPA with setting numerical emission levels for vehicles and engines (§ 7521(a)(3)(B)(ii)), setting emission-control technology requirements (§ 7521(a)(6)), governing the use of emission-control devices in those vehicles (§ 7521(a)(4)(A)), and running a certification and testing program to ensure that new vehicles meet these standards (7521(m)). It also empowers the EPA to enforce its standards by permitting it to refuse the certification of vehicles that do not meet its requirements (§ 7525), to bring civil enforcement actions against violators (§ 7523-24), or to require a recall of defective engines or vehicles (§ 7541).

The CAA prohibits the distribution, the sale, the introduction into commerce, or the importation into the United States of any new motor vehicle or new motor vehicle engine unless such vehicle or engine is covered by a certificate of conformity issued by the EPA under regulations prescribed by the CAA (§ 7522(a)(1)). It is only after testing of the engine and review of the information provided by the manufacturer will the EPA make a finding that an engine conforms to the applicable emissions standards and will issue a certificate of conformity (§ 7525(a)(2)). Further, and even after certification, manufacturers are required to file a defect information report with the EPA when a specific emission-related defect affects twenty five or more vehicles of the same model year. 40 C.F.R. § 85.1903. The report must include a description of each class of vehicles potentially affected, the number of vehicles known or estimated to have the defect, an evaluation of the emissions impact of the defect, and any available emissions data which relate to the defect. *Id.*

Thus, two years after authorizing federal emissions regulations, Congress preempted the States from adopting their own emissions standards in Section 209(a) of the CAA, which provides:

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

42 U.S. Code § 7543(a).

In fact, Section 209's preemption has come to be known as the "cornerstone" of Title II. *MVMA,* 17 F.3d at 526. As the D.C. Circuit notes, one reason States are restricted from regulating motor vehicle emission is due "in part by the difficulty of subjecting motor vehicles, which readily move across state boundaries, to control by individual states," but also because of the "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." *EMA*, 88 F.3d at 1079. Notably, Section 209(a) does not simply bar conflicting standards, but prohibits States from adopting or attempting to enforce "*any standard* relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a) (Emphasis added).

However, the CAA includes a savings clause, which reserves the right to the States to establish and enforce "in-use" vehicle restrictions. *Pac. Merch. Shipping Ass'n v. Goldstene ("PMSA I")*, 517 F.3d 1108, 1115 (9th Cir. 2008). Specifically, Section 209(d) provides that:

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

42 U.S.C. § 7543(d).

These "in-use" restrictions can include carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles. *PMSA I,* 517 F.3d at 1115. It can also include the inspection and maintenance programs where States may require vehicle testing after sale to the ultimate purchaser to identify vehicles emitting excessive pollutants. 42 U.S.C. § 7541 and § 7511.

The first count of Plaintiff's Complaint is based on the regular operation of the defeat devices in Illinois that were installed at manufacturing and the second count is based on the software updates done once the cars were in use throughout Illinois. As the allegations are based on two separate sets of conduct, each requires its own preemption analysis under the CAA.

Count I

Count I alleges Defendants violated Section 240.103 of Illinois Pollution Control Board's Mobile Source Regulations ("Section 240.103") "each time one of those defeat devices operated

in Illinois by detecting that a registered or licensed Unlawful Vehicle was not undergoing emissions testing procedures." (Am. Compl. p. 12 ¶ 42.) Defendants contend that even though Plaintiff alleges it is regulating intrastate use of the defeat devices, Plaintiff, in reality, is attempting to enforce a "standard relating" to new-vehicle emissions because the action arises from Defendants' installation of defeat devices at the time of manufacturing and, therefore, are expressly preempted by Section 209(a) of the CAA. (Mot. Dismiss 11.) Thus, the issue is whether Plaintiff's claim under Section 240.103 is a prohibited attempt to enforce new vehicle emission standards where the defeat devices were installed in thousands of vehicles before they were registered to Illinois, but were regularly used within the State for years long after the cars were considered new.

The United States District Court for the Northern District of California reviewed a similar claim in the State of Wyoming's suit against Defendants and concluded that Wyoming's claims based on in-State operation of the defeat devices were expressly preempted by Section 209(a) of the CAA. *Wyoming,* 264 F.Supp.3d 1040. Like Plaintiff, Wyoming alleged that of the nearly 600,000 "clean diesel" vehicles Volkswagen sold in the United States, approximately 1,196 were registered in Wyoming and that each day one of those vehicles operated in the State, Defendants violated two provisions in Wyoming's State Implementation Plan ("SIP"). *Id.* at 1044-45. In fact, Plaintiff along with a number of other States filed an *amicus* brief in support of Wyoming's opposition to Defendants' Motion to Dismiss. *Id.* at 1046.

In contrast to Plaintiff's claim, Wyoming's claim was based on the violation of a SIP, not a state law. The CAA requires each State to develop a SIP to implement, maintain and enforce EPA standards and once approved by the EPA the SIP becomes federal law. *Id.* at 1045 citing to 42 U.S.C. § 7140(a)(1), 42 U.S.C § 7140(k)(3), and *Cal. Dump Truck Owners Ass'n v. Nichols,* 784 F.3d 500, 503 (9th Cir. 2015). The CAA contemplates that each SIP will be based primarily on State regulation of stationary sources, such as factories or power plants, but States also may regulate the operation of motor vehicles within their borders, but are subject to limitations *Id.* at 1045. Wyoming contended Defendants violated its "anti-tampering" SIP that prohibits the rendering of air pollution control devices inoperative and its "anti-concealment" SIP that prohibits the installation of a device that conceals a vehicle's emissions. *Id.* at 1045 citing to *Rules Wyo. Dep't of Evntl. Quality, Air Quality,* ch. 13 2(a) and ch. 1, 4(a).

Defendants filed a motion to dismiss Wyoming's complaint arguing the claims were

preempted by Section 209(a) of the CAA. *Id.* at 1046. The district court sought to determine "whether Wyoming'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)." *Id.* After an extensive analysis, the district court concluded that Wyoming's tampering claims were expressly preempted by the CAA because Wyoming alleged only conduct that took place during vehicle manufacturing, which is expressly prohibited under Section 209(a). *Id.* at 1057.

The district court reasoned that the CAA allows local laws to apply to tampering done to cars within States, such as when a mechanic disables a vehicle's catalytic converter in the repair shop because the mechanic's tampering is also entirely intrastate conduct that would only minimally interfere with interstate commerce. *Id* at 1052 citing to *Allway Taxi, Inc. v. City of New York,* 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972). However, the district court noted that the present situation differs because the defeat device was installed in thousands of vehicles during manufacturing before being introduced into interstate commerce. *Id.*

Looking at the language of Section 209(a), the district court observed that Section 209(a) addresses *what* States are allowed to prohibit, not *when* they are allowed to prohibit, which serves Congress's purpose of vesting authority in the EPA to regulate new vehicles' emissions. *Id.* at 1053. Thus, Section 209(a) "keeps States from interfering with EPA investigations and enforcement actions based on fraud or deceit against the [EPA] during the new-vehicle certification process." *Id.* The district court explained that if States were also allowed to "police such deception" there would be redundant investigations and enforcement actions leading to a "spectre of an anarchic patchwork of federal and state regulatory programs and threating to create nightmares for manufacturers." *Id.* citing to *EMA*, 88 F.3d at 1079 (internal quotation omitted.).

The district court also noted that to hold otherwise would discourage companies from acknowledging and remedying their bad behavior. *Id.* at 1055. The EPA has already investigated Defendants and negotiated civil consent decrees and a guilty plea, in which billions of dollars have been given to the States to mitigate the damage. *Id.* If States were able to pursue Defendants for the same conduct "they will be effectively penaliz[ing] [Defendants] for producing engines which failed to comply with Federal standards" and "for conceal[ing] or misrepresent[ing] [those] violations." *Id.* citing to *In re Office of Attorney General of State of*

New York, 269 A.D.2d at 11-12 (N.Y. App. Div. 2000) (Internal quotations omitted.).

Further, the court in *Wyoming* explored what would happen if Section 209(a) preemption expired the moment a car is driven off the dealership lot by presenting a hypothetical, in which States were allowed to require all vehicles in the State to be equipped with an emission-control device the moment a car is driven off the new-car lot. *Id.* at 1051. A State could argue the standard is not related to the control of emissions of *new* motor vehicles, but is controlling the use of the car in its State because the title has been transferred and the car is out in circulation. *Id.* However, the district court reasoned that if this were the case, vehicle manufacturers would likely feel pressure to install the emission-control devices in all its vehicles at the time of manufacturing so that when driven off the lot, the car would be in compliance. *Id.* And if all 50 States were permitted to make these "shortly-off-the-lot" emission standards, manufacturers could be facing the nightmare *EMA* warned against: "an anarchic patchwork of federal and 50 state regulatory programs". *Id.* referencing *EMA,* 88 F.3d at 1079. The hypothetical reveals that the timing of the regulation is not the only factor to consider when determining if a regulation will relate to the control of emissions in new vehicles and that courts should also consider the result of the regulation or its impact on the manufacturer.

Though an issue was raised as to whether Wyoming's SIP constituted a "federal law", the district court rejected Wyoming's "federalization" argument with regard to its SIP, finding that whether Wyoming's SIP is federal law or some combination of state and federal law was not material. *Id.* at 1047-48. If Wyoming sought to use its SIP to enforce a standard within the purview of Section 209(a), it cannot do so because it is taking action that the CAA prohibits States to take, *i.e.* enforce any standard relating to the control of emissions form new motor vehicles. *Id.*

The *Wyoming* district court also relied on *Allway Taxi, Inc. v. City of New York,* 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972), which addressed the tension in deciphering the "dividing line" between Section 209(a) and 209(d). *Id.* at 1051. The district court in *Allway Taxi* noted that if "a state or locality is free to impose its own emission control standards the moment after a new car is bought and registered", it would result in "an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce." *Allway Taxi,* 340 F. Supp. at 1124. Instead the *Allway* court outlined other regulations that are appropriately intrastate such as emission control standards upon the resale or reregistration of the

automobile or standards for the licensing of vehicles for commercial use within that locality. *Id.* These regulations are appropriately intrastate because they result in "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." *Id.* Further as a policy matter, the *Allway Taxi* court noted that "both the history and text of the Act show that [Section 209(a)] was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars." *Id.* Thus, the court in *Allway Taxi* interprets Section 209(a) as a sort of shield that prevents obstruction to interstate commerce and looks to see, as a practical matter, on whom the burden of the regulation would fall, intrastate persons or manufacturers. *Id.*

Moreover, the EPA has endorsed the principles articulated in *Allway Taxi* in its Preemption of State Regulation for Nonroad Engine and Vehicle Standards:

> EPA expects that the principles articulated in *Allway Taxi* will be applied by the courts to any State adoption of in-use controls. For example, manufacturers have voiced a concern that California would attempt to impose in-use emission control measures that would apply immediately after a new vehicle or engine were purchased. As the *Allway Taxi* court said, such standards applied to almost-new vehicles would be an attempt to circumvent section 209 preemption and would obstruct interstate commerce.

59 Fed. Reg. 36,969, 36,973-74 (July 20, 1994).

Thus, it is clear that a regulation or standard that is applied after the sale of a vehicle could still have an impact on manufacturing, burdening interstate commerce in direct violation of CAA principles and purpose.

Additionally, other courts throughout the country have rejected States' suits against Defendants based on their use or regular operation of the defeat devices, finding the claims preempted by Section 209(a). For example the State of Alabama also sued Defendants for violating the Alabama Air Pollution Control Act of 1971 (Ala. Code § 22-28-1) when the Defendants installed the defeat devices at manufacturing, when the cars operated with the defeat devices, and every time Defendants installed or updated the defeat software. *State of Alabama v. Volkswagen AG, et al.,* 2017 WL 6551054, * 5 (Ala. Cir. Ct. Dec. 19, 2017). Like here, these

claims were brought pursuant to a State statue and Defendants moved to dismiss the entire complaint arguing preemption under Section 209(a). *Id.* The Alabama court fully granted Defendants' motion to dismiss "on the grounds that the affirmative defense of complete federal preclusion" *Id.* at * 21.

In regards to Alabama's claim based on the in-State use or operation of the defeat devices, the court held the "operation of auxiliary emission control devices (AECDs), or 'defeat device', installed by the manufacture of new cars is therefore within the scope of Section 209(a) of the CAA and subject to complete preemption, thus precluding a State action to enforce civil remedies under the Alabama Air Pollution Control Act of 1972". *Id.* at * 11. After discussing the decision of *Wyoming* at length, the Alabama court noted that the "determining factor for delineating whether the federal preemption of Section 209(a) of the Clean Air Act applies to in-use motor vehicles, is a determination of whether State regulation and enforcement would fall on individual owners or on original manufacturers, and thus would pose a burden on interstate commerce." *Id.* at *13. Further, the Alabama court also relied on *Allway Taxi* because it provides "certain parameters" for delineating the point of departure between the total preemption of Section 209(a) and the area in which the States may regulate and enforce emissions standards under Section 209(d) of the CAA. *Id.* at * 16. The Alabama court concluded "that State regulation of in-use motor vehicles must not burden interstate commerce and manufacturers creating the possibility of 50 different state regulatory regimes and the [spectre] of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers." *Id.* The Alabama court focused less on the time or moment when the regulation takes effect and instead relied on the result of the burden, *i.e.*, who, as a practical matter would be burdened by the regulation.

A Tennessee chancery court also dismissed the State of Tennessee's anti-tampering claim against Defendants based on the use of defeat devices in the State. *State of Tennessee v. Volkswagen Aktiengesellschaft,* Case no. 16-1044-I, * 8 (Tenn. Ch. Summ. Order Mar. 21, 2018). Similarly, the Attorney General of Tennessee alleged two violations of the Tennessee Air Quality Act (Tenn. Code Ann. § 68-201-120), the first based on the continued use of the defeat device and the second based on the "field fix." *Id.* at * 2. The Tennessee chancery court found that all claims that "arose as a result of the continued use of the defeat devices" must be dismissed because they are preempted by Section 209(a) of CAA. *Id.* *8. After extensively

quoting the discussion in *Wyoming,* the Tennessee chancery court noted that the "relating to" language of Section 209(a) is "extremely broad" and prevents any standard "whether it's a higher standard or a lower standard". *Id.* Thus, the court reasoned that since "some of what the State is trying to do in the [complaint] relates to or relates back to the installation of defeat devices in new vehicles during manufacturing", it is preempted by Section 209(a). *Id.*

A trial court in Minnesota also dismissed the claim filed by the Minnesota Attorney General against Defendants that related to the installation of defeat devices in new vehicles resulting in continuing violations after sale. *Minnesota v. Volkswagen Aktiengesellschaft,* Ct. File No. 27-CV-16-17753, ¶ 1 (Minn. Dist. Mar. 9, 2018). Again, after discussing the holding of *Wyoming,* the Minnesota court noted 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." *Id.* at * 8. Instead, the court noted it must consider other factors to determine whether a regulation relates to a new motor vehicle or the "in use" of a motor vehicle: (1) the regulation should not raise the "possibility of multiple state enforcement schemes which would necessarily burden interstate commerce" (*Id.* citing *Wyoming,* 264 F.Supp.3d at 1051); (2) the regulations "should generally burden owners, not manufacturers" (*Id.* at *9 citing *Allway Taxi,* 340 F. Supp. at 1124); (3) the regulations cannot "amount to a standard relating back to the original design of the engine by the original engine manufacture" (*Id.* quoting 59 Fed. Reg. 31306-01 (Jun. 17, 1994)); (4) the regulation should not pressure manufacturers to modify a motor vehicle's original features and design (*Id.* citing *Wyoming,* 264 F.Supp.3d at 1051); and (5) the regulation should relate primarily to intrastate activity and "thus have an insignificant burden on interstate commerce" (*Id.* at * 9-10 citing *Allway Taxi,* 340 F. Supp. at 1124.). After applying the factors to the allegations, the Minnesota court held that Section 209(a) precludes the claims based on the operation of the defeat devices. *Id.* at * 10.

Lastly, a trial court in Texas also granted Defendants' Motion for Summary Judgment with regard to the State of Texas's "original" claims finding the claims were preempted under Section 209(a). *State of Texas v. Volkswagen Group of America, Inc., et al,* File No. D-1-GN-16-000370, ¶¶ 1-3 (Tex. Dist. Apr. 11, 2018). However, an explanation of it reasoning was not given in the written two-page Order. (*Id.*)

With these principles in mind and following the holding of the federal district court in *Wyoming* and the State courts in Alabama, Tennessee Minnesota, and Texas, the Court grants

Defendants' Motion to Dismiss Count I of the Amended Complaint.

The CAA's express preemption provision is specific and unambiguous. The plain language of Section 209(a) prohibits States from enforcing "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines". 42 U.S. Code § 7543. Section 240.103, the anti-tampering law under which Plaintiff brings Count I, prohibits defeat devices:

> Except as permitted or authorized by law, no person shall fail to maintain in good working order or remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of the air pollution control systems or mechanisms of a motor vehicle as required by rules or regulations of the Board and the United States Environmental Protection Agency to be maintained in or on the vehicle

35 Ill. Adm. Code 240.103.

As an initial matter, Section 240.103 is a standard that relates to the control of vehicle emission. It is clear to this Court, as it was to the court in *Wyoming*, that a rule that prohibits the installation of a defeat device in a vehicle is a "standard relating to the control of emissions". 42 U.S.C. § 7543(a); *see Wyoming,* 564 F.Supp.3d at 1052. Principally, it is apparent that defeat devices "relate to" the control of emissions because, by definition, a defeat device "reduces the effectiveness of [a vehicle's] emission control system." 40 C.F.R. § 86.1803-01. Further, this interpretation is consistent with the use of "standard" throughout Title II of the CAA and the Supreme Court's interpretations of Section 209(a) in *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004). While the CAA does not define "standard", the Supreme Court turned to the dictionary when interpreting Section 209(a), noting that a "standard" is "established by authority, custom, or general consent, as a model or example; criterion; test." *S. Coast Air Quality*, 541 U.S. at 253 (internal citations omitted.). The Supreme Court reasoned that the "criteria referred to in § 209(a) relate to the emission characteristics of a vehicle or engine" and, therefore, "standards" could restrict a vehicle's emissions to a "certain amount of a given pollutant", could require a vehicle to "be equipped with a certain type of pollution-control device," or could mandate "some other design feature related to the control of emissions." *Id.* Just as a requirement that a vehicle be equipped with certain pollution-control device is a "standard" under Section 209(a), it follows that a requirement that prohibits a vehicle from being equipped with a device that impedes pollution-control equipment is also a "standard" under

Section 209(a). Thus, Section 240.103 is a standard that relates to the control of vehicle emission.

Accordingly, what remains is a determination as to whether the claims relate to the control of emissions in "*new* motor vehicles or *new* motor vehicle engines". 42 U.S. Code § 7543. (Emphasis added). More specifically, since Count I alleges a violation each time the defeat device was used in Illinois, the issue is whether the action seeks to enforce prohibited new-vehicle emission standards under Section 209(a) or to enforce "in-use" regulations permitted under Section 209(d).

As discussed above, the CAA empowers the federal government by way of the EPA to regulate new vehicles and reserves to the States, in Section 209(d), the ability to govern the operation of vehicles within its borders. *PMSA I,* 517 F.3d at 1115; *Bell*, 734 F.3d at 190; *Exxon Mobil Corp.,* 217 F.3d at 1255; *Jensen Family Farms, Inc.,* 644 F.3d at 938. The district court in *Wyoming* provided an illustrative example of a permissible "in-use" regulation where a State prohibits tampering with pollution control devices and brings an enforcement action against a mechanic who disables a vehicle's catalytic converter in the repair shop in order to circumvent emissions regulations. 264 F.Supp.3d at 1052. The example highlights several intentions of Section 209(d) and the CAA generally. First, the tampering and concealment clearly occurs after the vehicle is registered and in use. The mechanic is an individual and enforcement would not result in burdening a manufacture. Further, the mechanic's tampering was wholly done in State, making the conduct entirely intrastate. Thus, regulating and enforcing her conduct would cause only minimal interference with interstate commerce, if any. This illustrates the intended partnership between the States and the Federal Government that the CAA created to combat air pollution. *Jensen Family Farms, Inc.,* 644 F.3d at 938. The EPA presumably worked with the car's manufacturers to certify the car before it was sold to the owner and the State monitored the conduct of individuals within its borders to make certain the car remained in compliance.

Other acceptable 209(d) regulations include: inspection and maintenance programs which may require emissions testing after sale (42 U.S.C. § 7541 and § 7511); transportation planning regulations, such as carpool lanes (*PMSA I,* 517 F.3d at 1115); restrictions on passenger car use in downtown areas (*Id.*); programs to control the extended idling of motor vehicles (*Id.*); and anti-tampering and concealment laws prohibiting the disabling of emission-control systems and the use of devices that conceal on-road emissions (*Wyoming,* 264 F.Supp.3d at 1052). Again,

these State regulations serve the CAA's intention to establish a federal and State partnership in the "struggle against air pollution" with federal government monitoring interstate pollution issues and the States' monitoring and reducing emission intrastate. *Jensen Family Farms, Inc.*, 644 F.3d at 938.

Typically, a simple way to determine the difference between standards that relate to new vehicle emissions and those that relate to "in-use" vehicle emissions is to look at the timing of the regulation. In fact, the CAA defines "new motor vehicle" as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3). Thus, the farther away in time the regulation is from the transfer, the more likely it is to be an "in-use" regulation permitted by Section 209(d). And inversely, the closer the regulation is to the sale of the car, the closer the more likely it is preempted by Section 209(a).

Plaintiff argues that its claim is beyond the reach of Section 209(a) preemption. Plaintiff claims that it is not seeking to enforce Section 240.103 against conduct that occurred prior to the transfer to the ultimate purchaser. In fact, some of the "clean diesel" vehicles had been on the road for years and the daily operation of the defeat device is therefore, in many instances, years away from the point of sale. Thus, Plaintiff argues that its enforcement action does not relate to the control of emissions for *new* motor vehicles, but seeks to "apply *Illinois* prohibition on *post-sale tampering* with federally approved emissions-control systems used in vehicles." (Resp. p. 11) (Emphasis in original).

However, as the Minnesota trial court persuasively held when reviewing the claims brought by its attorney general, 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*." *Minnesota,* Ct. File No. 27-CV-16-17753 at * 8. (Emphasis added.) As explored in *Allway Taxi's* hypothetical regarding just-off-the-lot regulations, a standard that takes effect after the title has been transferred to an ultimate purchaser can still have an impact on a manufacturer and that permitting these regulations simply because they come after the transfer of title "would be an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce." 340 F. Supp. at 1124. Accordingly, the Court looks to additional factors to make the determination as to whether Plaintiff's enforcement of Section 240.103 against Defendants, as a practical matter, relates to controlling emissions of new motor vehicles.

The first issue is whether Plaintiff's enforcement of Section 240.103 is directed primarily to intrastate activities. *Allway Taxi,* 340 F. Supp. at 1124. While the Complaint alleges it is targeting only the daily operation of the defeat device, not the installation at the manufacturing, these allegations are a circumvention of the purpose of the CAA as Defendants' activities did, in fact, occur at manufacturing. As the court in *Wyoming* explained, the operation of defeat devices "cannot be so easily separated from its installation." 264 F.Supp.3d. at 1056. Defeat devices reduce the effectiveness of emission control systems during "normal vehicle operation and use." *Id.* quoting 40 C.F.R. § 86.1803-01. Simply stated: that is how a defeat device functions. *Id.* If this Court were to adopt Plaintiff's interpretation of Section 209(a), "then, every defeat device installed in a new vehicle that is later registered in the State will violate its tampering and concealment rules, without any additional action by the manufacturer who installed the device." *Id.* Thus, even if Plaintiff claims to be regulating the use of defeat devices within its boundaries, it is also effectively regulating their installation at manufacturing. Further, the defeat devices were installed in hundreds of thousands of vehicles intended for distribution throughout the United States. These facts show that the installation of the defeat devices cannot be characterized as primarily intrastate. Lastly, Plaintiff alleges Defendants falsified their applications for Certificates of Conformity from the EPA and Executive Orders from CARB when they failed to disclose the defeat devices. (Am.Compl. at ¶¶ 26, 27.) This conduct was clearly not taken wholly, if at all, within Illinois. Accordingly, the alleged conduct is clearly not confined to the borders of Illinois and its enforcement of Section 240.103 is not directed primarily to intrastate activities. *Allway Taxi,* 340 F. Supp. at 1124.

The second issue concerns who is burdened by the regulation: an intrastate individual or an interstate manufacture. *Allway Taxi,* 340 F. Supp. at 1124. It is clear the burden falls on the manufacturer because the alleged bad conduct relates back to the original design of the vehicle. 59 Fed. Reg. 31306-01 (Jun. 17, 1994). Put another way, the issue is whether remedying the conduct requires specific design changes. *In re Caterpillar, Inc.*, 2015 U.S. Dist. LEXIS 98784, FN 16 (D.N.J., Jul. 29, 2015). In *Caterpillar*, the plaintiffs' claims did not seek a specific design change related to emissions compliance so it was not expressly preempted by the CAA. *Id.* However, the court in *Caterpillar* noted that if presented with evidence that the plaintiffs' claims would require an EPA-approved redesign of the emissions control system, it would reach a different result. *Id.* Unlike *Caterpillar,* however, sustaining Plaintiff's claims would have the

effect of requiring an EPA-approved redesign of the Defendant's emissions control system in order for Defendants to remedy their conduct. First, Defendants would have to stop installing the defeat device software that turns off the emission control system so that the vehicles' emissions would remain within EPA and CARB standards. Second, Defendants would have to cure the hardware failures that result when the emission control system is operated regularly. (Am. Compl. ¶¶ 21-23, 30.) Accordingly, the alleged bad conduct relates back to the original design of the vehicle, and therefore the enforcement action burdens the manufacturer, not an individual.

The third issue is whether enforcing Section 240.103 in this manner would result in minimal interference with interstate commerce. *Allway Taxi,* 340 F. Supp. at 1124. As determined, the tampering effectively occurred when the Defendants installed the defeat devices at manufacturing and the burden of remedying the bad conduct would also fall on the manufacturers. Accordingly, if Plaintiff is allowed to enforce Section 240.103 against manufacturers, other State and local governments would attempt to regulate Defendants similarly, which would result in "an anarchic patchwork of federal and 50 state regulatory programs", a clear nightmare for manufacturers. *Engine Mfr. Ass'n*, 88 F.3d at 1079. Permitting this claim to move forward would be "an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce." *Allway Taxi,* 340 F. Supp. at 1124. Accordingly, enforcing Section 240.103 in this manner would not result in minimal interference with interstate commerce.

The fourth issue is whether permitting the count to continue would undermine the EPA's maintenance of the integrity of the certification process and its enforcement of its emission standards. *Wyoming,* 264 F.Supp.3d at 1053. Section 209(a) "keeps States from interfering with EPA investigations and enforcement actions based on fraud or deceit against the [EPA] during the new-vehicle certification process." *Id.* As the district court in *Wyoming* explained, "if States were also permitted to police such deception, there could be a multiplicity of redundant investigations and enforcement actions," which would again raise "the spectre of an anarchic patchwork of federal and state regulatory programs" and threaten to create "nightmares for the manufacturers." *Id.* quoting *EMA*, 88 F.3d at 1079 (internal quotation marks omitted).

The last issue is whether the action undermines the partnership the CAA created between the States and the Federal Government "in the struggle against air pollution." *Jensen Family*

Farms, Inc., 644 F.3d at 938. As the *Allway Taxi* court noted "both the history and text of the Act show that [Section 209(a)] was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars." *Id.* Just as the CAA does not want to undercut the State's effort to combat pollution, but create an effective system for regulating pollution, the States should not seek to "hamstring" the federal government's efforts to enforce their own regulations. If manufacturing companies knew States could sue them based on admissions they made while settling civil and criminal actions with the federal government, they would be unlikely to make any admission with the federal government. This would certainly reduce the efficacy of the federal prosecution. Moreover, the case at hand is a prime example of success of the CAA's constructed partnership. The federal government sued manufacturers and was able to obtain billions of dollars for States and consumers, to which the State of Illinois was a direct beneficiary. Allowing Plaintiff to proceed with this claim would disrupt the partnership the CAA intentionally set out to create.

Therefore, after reviewing all of the factors, the Court concludes that Plaintiff's Count I relates to "new" vehicles under Section 209(a) and is accordingly preempted. While the regulation is not being enforced prior to the transfer of titles to the ultimate purchasers, all the other factors indicate Plaintiff is attempting to enforce a standard relating to the control of emissions from new motor vehicles. The action is not directed primarily to intrastate activities where the bad conduct occurred at the manufacturing level. By attempting to regulate the use of defeat devices, Plaintiff in practice is attempting to regulate their installation. Further, manufacturers, not individuals, are burdened by the regulation as the alleged bad conduct relates back to the original design of the vehicle. Enforcing Section 240.103 in this manner would not result in minimal interference with interstate commerce and could raise "the spectre of an anarchic patchwork of federal and state regulatory programs" and threaten to create "nightmares for the manufacturers." *EMA*, 88 F.3d at 1079. Permitting Count I to continue would undermine the EPA's maintenance of its certification process and its emission standards and would undermine the partnership the CAA created between the States and the Federal Government in the struggle against air pollution. In short, Count I is a clear circumvention of the purpose of the CAA.

Count I of the Amended Complaint is dismissed with prejudice.

Count II

Count II alleges Defendants violated Section 240.103 of Illinois Pollution Control Board's Mobile Source Regulations ("Section 240.103") "each time Volkswagen Defendants or someone acting on their behalf updated, improved, optimized or otherwise maintained defeat device software on an Unlawful Vehicle that was licensed or registered in Illinois." (Am. Compl. p. 14, ¶ 45.) Defendants again argue that Plaintiff's claims based on software updates or "field fixes" are preempted by the CAA. (Mot. Dismiss 4.) Thus, the issue is whether Plaintiff's claim under Section 240.103 is a prohibited attempt to enforce new vehicle emission standards under Section 209(a) where the defeat devices were installed in thousands of vehicles before they were registered to Illinois, but were updated and improved within the State years after the cars were considered new.

The United States District Court for the Northern District of California reviewed tampering claims based on Defendant's "field fixes" or software updates in two counties', Hillsborough County, Florida and Salt Lake County, Utah (the "Counties"), suit against Defendants. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation ("Counties"),* 2018 WL 1796659 (N.D. Cal. Apr. 16, 2018). Like Plaintiff, the Counties alleged that Defendants modified "its defeat device to operate more effectively, and perhaps even added new defeat devices, through software updates during vehicle maintenance and post-sale recalls." *Id.* at * 1. Defendants moved to dismiss and the district court granted, holding the Counties' tampering claims were implicitly preempted by the CAA. *Id.* at * 13.

The district court distinguished the Counties' case from its holding in *Wyoming,* noting that the Counties' attempts to regulate the post-sale software changes are not expressly preempted by Section 209(a) because the changes were made to vehicles that had already been sold to consumers and were in use within the Counties, not "new motor vehicles". *Id.* at * 7. However, the district court noted the preemption analysis does not end there and that the court must consider whether "under the circumstances of [this] particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at * 8 quoting *Atay v. City of Maui,* 842 F.3d 688, 699 (9th Cir. 2016). Accordingly, it must identify how Congress intended for model-wide tampering by vehicle manufacturers to be regulated. *Id.*

Like Plaintiff does here, the Counties argued that when tampering occurs on new vehicles, Section 209(a) prohibits States and local governments from attempting to regulate the behavior; but when the tampering occurs to vehicles while they are in use, Section 209(d) allows States and local governments to regulate "regardless of the magnitude of the tampering offense or the identity of the offender, without interfering with the federal regulatory scheme." *Id.* However, the district court rejected the Counties' assessment, holding the CAA does not draw "such a clear line". *Id.* Instead, the district court extensively examined the CAA and its history and concluded that "it is evident from the statutory scheme and legislative history that Congress intended for EPA and the states and local governments to serve specific and separate functions in regulating emissions from in-use vehicles." *Id.* The district court noted that CAA has divided the duties when it comes to fighting pollution with the "EPA enforcing useful life vehicle emission standards primarily on a model-wide basis, and at the manufacturer level, and states and local governments enforcing the same standards on an individual vehicle basis at the end-user level." *Id.* at * 10.

Prior to the *Counties* ruling, other courts throughout the country had considered tampering claims based on Defendants' software updates or "field fixes" and reached different results. A trial court in Alabama dismissed the claims, while the courts in Minnesota, Tennessee, and Texas allowed them to proceed.

As discussed in the analysis of Count I above, the State of Alabama also sued Defendants for violating the Alabama Air Pollution Control Act of 1971 (Ala. Code § 22-28-1) every time Defendants installed or updated the defeat software. *Alabama,* 2017 WL 6551054, * 5. The Alabama court found the claims based on the software updates were completely precluded. *Id.* at * 21. The court noted that it was tasked with deciding whether "Plaintiffs have artfully pled themselves into a Section 209(d) claim, or whether the substance of the allegations actually falls under the complete preemptive provisions of Section 209(a)." *Id.* at * 20. To makes its decision, the court returned to the *Allway Taxi* "criteria" outlined in *Wyoming,* noting that a State regulation of in-use motor vehicles must [not] burden interstate commerce and manufacturers creating the possibility of 50 different: state regulatory regimes and the [spectre] of an anarchic patchwork of federal and state regulatory programs." *Id.* (Internal citations omitted.) (Internal quotations omitted.) The court noted that State regulations are not preempted by Section 209(a) of the CAA "if they 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 the individual owners and in-state users and not on manufacturers." *Id.* at * 21. Accordingly, the court focused on whom the burden would fall instead of the age of the car when the tampering occurred. *Id.* Even though the complaint alleged conduct done to "used motor vehicles", the Alabama court reasoned the action was pled against manufacturers, and not individual owners, and thus "that is where the burden of any remedy would fall." *Id.* Accordingly, the Alabama found the claims based on software updates were preempted and dismissed the complaint.

In contrast, the trial court in *Minnesota* did not dismiss the State of Minnesota's claim based on the Defendants' installation of "improved" defeat technology in used vehicles. *Minnesota,* Ct. File No. 27-CV-16-17753, p. 1 ¶ 2. After applying the factors it identified in *Wyoming,* 264 F.Supp.3d at 1051, *Allway Taxi,* 340 F. Supp. at 1124 and the federal regulations (59 Fed. Reg. 31306-01 (Jun. 17, 1994)), the court held that Section 209(a) does not preclude claims based on the "new technology". *Id.* at * 10. The court reasoned the technology was updated on vehicles that had already been transferred to an ultimate purchaser; it changed and improved how the devices operated so it could not "relate back" to the manufacturer's original design; and it took place entirely within Minnesota and thus the enforcement would have little effect on interstate commerce. *Id.* at * 10-11. While the Minnesota court acknowledged that the violations were committed by manufacturers, not individual owners, it ultimately concluded that 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." *Id.* Since the court analogized the situation to a local mechanic disabling a catalytic converter after market, which States are permitted to regulate under Section 209(a), the Minnesota court determined the claims related to the new and updated software are not preempted. *Id.*

Additionally, when the Tennessee chancery court reviewed the claims arising out of Defendants' recall and "field fixes", it decided that the claims were not precluded under the same CAA provisions. *Tennessee*, Case no. 16-1044-I, (Summ. Order p. 9, Mar. 21, 2018). The Tennessee court distinguished the "field fix" claims from the operation of defeat device claims by holding that the field fixes "do not relate back to the original manufacturing and insertion of the devices in the new cars." *Id.* at (Bench Ruling 27:1-8, Mar. 5, 2018). The court held it was "not at all comfortable" dismissing the claims because there was "simply" not enough

information and that "there is conceivably a set of facts which would allow the state of Tennessee to regulate the use of vehicles in Tennessee during and after the recall and alteration of the defendants' emission control, that is, defeat devices." *Id.* at 26-27. The court went onto explain that dismissing for failure to state a claim, "of course, is a serious thing" that would prevent the plaintiff from expanding upon and explaining its claim. *Id.* at 27:12-15. Thus, the field fix claims survived Defendants' motion to dismiss.

Lastly, a trial court in Texas also denied Defendants' Motion for Summary Judgment with regard to the State of Texas's "recall" tampering claims, finding the claim was not preempted under Section 209(a). *Texas,* File No. D-1-GN-16-000370, ¶ 4. The trial court, however, gave no reason for its ruling in the two-page Order that was entered on April 11, 2018. (*Id.*).

With these principles in mind and following the holding of the federal district court in *Counties* and the State court in Alabama, the Court grants Defendants' Motion to Dismiss Count II of the Amended Complaint.

The Court agrees with the persuasive analysis conducted in the *Counties* and *Minnesota* cases that a State's claim is not expressly preempted under Section 209(a) of the CAA. Initially, Defendants maintained that the updates were "predicated" on the their initial installation of the defeat devices and that updates or patches are "an intrinsic part of any kind of software" and therefore Count II is expressly preempted by Section 209(a) in the same manner that Count I is. (Mot. Dismiss 15.) In essence, Defendants argue that regulating the updates of software that was installed at manufacturing is the same as regulating the installation of the software at manufacturing. However, the alleged tampering—the software updates and installations—were done to vehicles that were already sold to the ultimate purchaser and that were in use throughout Illinois. As the court in *Minnesota* explained, since the tampering changed and improved how the devices operated, it could not "relate back" to the manufacturer's original design. Ct. File No. 27-CV-16-17753, p. 1 ¶ 2. at * 10-11; see also *Allway Taxi,* 340 F. Supp. at 1124. Further, Plaintiff is not attempting to pressure or require the manufacturers to change the design of the vehicles. *Wyoming,* 264 F.Supp.3d at 1051 Instead, Count II seeks to stop Defendants from tampering with vehicles that were in use within its borders. Thus, "field fixes" or software updates did not affect "new motor vehicles" and are therefore not expressly preempted by Section 209(a).

However, the preemption analysis does not end there. A federal law can also preempt state law "when the scope of the statute indicates Congress intended federal law to occupy the field exclusively" or "when state law is in actual conflict with federal law." *Dannewitz*, 362 Ill. App. 3d at 84. The CAA indicates Congress intended the federal government to occupy the regulation and enforcement of manufacturer emission-standards tampering exclusively and that to allow Plaintiff to enforce its anti-tampering law in this manner would be in actual conflict with federal law.

Plaintiff alleges and Defendants have admitted to tampering with their "clean diesel" vehicles, model years 2009 through 2016, throughout the country when Defendants updated, improved, optimized, or otherwise maintained the defeat device software. (Am.Compl. ¶¶ 20, 22, 32.) In Count II, Plaintiff seeks to enforce Section 240.103 against Defendants for the upgrades conducted on vehicles that were licensed or registered in Illinois. (*Id.* at p. 14 ¶ 45.) While the CAA in Section 209(d) allows the States to govern the operation of vehicles within its borders, Defendants' bad conduct exceeds the traditional scenario of the State's enforcement "in-use" regulations, such as mechanic who disables a vehicle's catalytic converter in the repair shop in order to circumvent emissions regulations. 264 F.Supp.3d at 1052. *PMSA I,* 517 F.3d at 1115; *Bell*, 734 F.3d at 190; *Exxon Mobil Corp.*, 217 F.3d at 1255; *Jensen Family Farms, Inc.*, 644 F.3d at 938. With respect to the trial court in *Minnesota,* the manufacturers were not acting as mechanics performing maintenance services long after the motor vehicles involved had been placed into commerce. Ct. File No. 27-CV-16-17753, * 10-11. Here, the manufacturers worked to improve a model-wide defeat device to intentionally conceal the fraud they had committed with their initial vehicle designs. The Defendants' tampering, while some of it occurred in Illinois, took place throughout the entire country and affected entire makes and models of vehicles for over a decade. This tampering cannot be analogized to a rouge intrastate mechanic. Thus, the issue is how Congress, through the CAA and its amendment, intended emissions tampering that is conducted on such a national and model-wide scale to be regulated.

The detailed review of the CAA's "statutory scheme and legislative history" provided by the district court in *Counties*, and its ultimate decision, are particularly instructive in resolving this issue because the preemptive reach of a federal statute is a question of federal law and the Illinois Supreme Court gives "considerable weight to the decisions of federal courts of appeals and federal district courts" that address the scope of preemption under federal law. *Sprietsma v.*

Mercury Marine, 197 Ill.2d 112, 120 (2001), *rev'd on other grounds,* 537 U.S. 51 (2002); *see also State Bank of Cherry v. CGB Enters'.,* 2013 IL 113836 ¶ 33. As an initial matter, the district court highlighted the CAA's general mandate: vehicles must meet EPA's emission standards during their "useful life", meaning the federal regulation of vehicle emissions does not stop after vehicles are sold or put in use. 2018 WL 1796659, * 8. citing to 42 U.S.C. § 7521(a)(1). The EPA's primary role after vehicles are put in use is to ensure that entire classes or models of vehicles remain in compliance with its emission standards and to work with manufacturers to accomplish this goal. *Id.* As an example, the district court pointed to the EPA's manufacturer in-use verification testing, in which vehicle manufacturers must produce and test a specific number of vehicles. *Id.* citing to 40 C.F.R. § 86.1845-04, § 86.1827-01. If the vehicles fail the in-use tests or if the EPA determines the vehicles do not conform to their emissions standards, the EPA can recall them. *Id.* citing to 42 U.S.C. § 7541(c)(1). The EPA can also inspect manufacturers' emissions testing records and observe activities at the manufacturing plants both before and after vehicles are sold to end users. *Id.* citing to 42 U.S.C. § 7542. Lastly, manufacturers are required to report emission related defects, including "software… which must function properly to ensure continued compliance with emission standards." *Id. citing to* 40 C.F.R. § 85.1902(b)(2). This grant of power to the EPA to continue investigating models of vehicles even after the certification process has been complete, suggests that Congress intended the federal regulation of emission standards to continue even after certification has been granted.

The district court noted that it is the States and local governments' duty to enforce standards by inspecting individual vehicles for compliance, pointing to the grant program created under the Air Quality Act of 1967 that awards money to support these programs. *Id.* at * 9 citing to 42 U.S.C § 7544. The State-based emissions programs "operate on an individual vehicle basis", which is made clear by two factors. One, States have the ability to withhold registration as a means of enforcement, which importantly has an impact on only individual owners of specific non-compliant vehicles. *Id.* Two, Section 207(h)(2) of the CAA states "Nothing in [Section 209(a)] shall be construed to prohibit a State from testing or requiring testing of, a motor vehicle after the date of sale of such vehicle to the ultimate purchaser…" with the exception that "no new motor vehicle manufacturer or dealer may be required to conduct testing under this paragraph." *Id. quoting* 42 U.S.C § 7541(h)(2). Thus, the district court concluded that through the exception Congress has "manifested its intent that state inspection programs should

not interfere with vehicle manufacturers." *Id.*

The district court also highlighted overlap between federal, state, and local enforcement authority of emissions standards. As an example, the district court pointed to a CAA amendment that expanded the reach of a federal tampering law—one that prohibits "any person" from removing or rending inoperative emission control devices either before or after the vehicles in which the devices are installed are sold to ultimate purchasers—from large business entities, like manufacturers and dealers, to include individual owners and operators of vehicles. *Id. citing to* 42. U.S.C § 7522(a)(3)(A); Clean Air Act Amendments of 1977, Pub. L. 95-95 § 2199(a); Pub. L. 101-549, § 228(b) 104 as codified in 42 U.S.C. § 7522(a)(3)(A)). Further the district court importantly recognized that there is not a CAA statute or amendment that directs the power the other way, i.e., one that allows local governments to regulate manufacturers. *Id.* This demonstrates Congress' intent that States' power to regulate emission standards on model-wide scale or at the manufacturing level has been intentionally limited.

Further, the court in *Counties* noted that the division of authority is "sensible" and further supports the notion that Congress intended there to be a division. First, the EPA is best positioned to enforce emission standards on a model-wide basis because model-wide emission problems will have an impact on vehicles in many states and because the EPA can rely on data it has collected during the certification process and its preexisting relationships with manufacturers. *Id.* Additionally, the EPA, as a certifying body, has more leverage to combat large international manufacturers. In fact, it was the EPA's threat to not certify Defendants' 2016 model year vehicles that led Defendants to admit their bad conduct. Further, the State and local governments are best positioned to enforce emission standards at the individual user level because they already oversee vehicle registration and drivers' licensing and can use state police power to aid enforcement. *Id.* Moreover, it would be impractical for the federal government, by way of the Department of Justice, to inspect and prosecute rouge mechanics throughout all 50 States.

Thus, since a manufacturer's actions affect vehicles model-wide, the CAA manifests Congress' intent that the EPA, not the states or local governments, will regulate that conduct. Congress intended a division of authority where the EPA enforces "useful life vehicle emission standards primarily on a model-wide basis, and at the manufacturer level" and where States and local governments enforce "the same standards on an individual vehicle basis at the end-user

level." *Counties*, 2018 WL 1796659, * 10.

With this Congressional intention in mind, the Court turns to the Plaintiff's allegations. Plaintiff alleges conduct that is "model-wide" in nature. Plaintiff alleged that in 2012, it was Defendants' engineers who noticed the hardware failures and created a "steering wheel recognition function" that would make the defeat device software more affective. (Am. Compl. p. 13 ¶ 43.) It was at the manufacturing level that this function was then added to all new vehicles, as well as, to in-us vehicles throughout Illinois that contained the defeat devices. (*Id.*) Further, Plaintiff alleges that in 2014 Defendants recalled its vehicles containing defeat devices throughout the country, including Illinois, under the guise of improvement to emissions software. (*Id.* p. 14 ¶ 44.) However, Plaintiff pleads, while block quoting Defendants' admission in their federal guilty plea, Defendants were in fact installing defeat device software that attempted to better conceal their bad conduct. (*Id.*)

Defendants' in-use software changes were conducted on a model-wide level or a scale that had an impact on entire classes or models of vehicles. This national and model-wide tampering is the type of conduct that Congress intended the EPA to regulate. Further, the EPA has done just that. (Am. Compl. pp. 13-14.) It began its investigation in 2014 and it was the EPA's threat to not certify Defendants' 2016 model vehicles that ultimately forced Defendants to finally admit their bad conduct. Next, the EPA brought civil actions and criminal charges based on both the initial installation of the defeat devices, as well as, their later upgrades and changes to the software, which resulted in billions of dollars paid to States and consumers to remedy the damage. Notably, Illinois and its residents have received $732 million in consumer relief, $109 million in environmental mitigation, and $51 million in dealer compensation. (Mot. Dismiss 2.) Congress' division of power is functioning as intended.

Just as the timing of the regulation in Count I was not determinative due to the impact the regulation had on interstate commerce, the timing of the regulation is not determinative here because manufacturing no longer concludes the moment the vehicle gets off the assembly line. As the district court in *Counties* explained, the evolving nature of vehicle manufacturing and with more technology and computerization of cars, manufacturing no longer abruptly ends when a car leaves the plant. *Id.* at * 11. As a result, entire models of vehicles can easily receive software updates across the country, long after cars have been manufactured, and thus the interstate nature of these abilities leaves states and local governments "ill equipped to regulate".

Id.

Additionally, just as the use of defeat devices cannot be so easily separated from the installation of defeat devices (*Wyoming,* 264 F.Supp.3d. at 1056), the updating of software to conceal the fraud committed at the certification process cannot be easily separated from the certification process. Congress is clear that it intends the EPA to manage its certification program (42 U.S.C. § 7521(m)), including its enforcement. Congress has empowered the EPA to refuse the certification of vehicles that do not meet its requirements 42 U.S.C (§ 7525), to bring civil enforcement actions against violators (42 U.S.C § 7523-24), or to require a recall of defective engines or vehicles (42 U.S.C § 7541). Allowing States and local government to also investigate and prosecute this fraud against the EPA would create an actual conflict with federal law. *Dannewitz*, 362 Ill. App. 3d at 84. Moreover, if local tampering claims are allowed to proceed, manufacturers could be subjected to up to 50 state and approximately 3,000 county regulatory actions based on uniform conduct that happened nationwide, creating further conflict with federal policy provided in the CAA. *Counties,* 2018 WL 1796659, * 12.

Plaintiff responds by attempting to undermine the reasoning in *Counties* by arguing the foundation of the district court's decision was based on the term "model-wide", which it failed to define. (Pl.'s Resp. Supp. 8, May 7, 2018.) Plaintiff claims the district court's "puzzling omission" leaves "a number of obvious follow-up questions". (*Id.* at 9.) Contrary to Plaintiff's argument, there is nothing confusing about distinguishing between individual tampering and "model-wide" tampering. Under the facts of this case, the term "model-wide" refers to Defendants' tampering done to its "clean diesel" vehicles from model years 2009 to 2016. (Am.Compl. ¶ 20.) One need only look at the table it provided in Paragraph 22 of the Amended Complaint which lists the types of 2.0 and 3.0 Liter Diesel Models Defendants equipped defeat devices and recalled for software updates in order to discern the models affected by the tampering devices. (*Id.* at ¶ 22.) Further, though Plaintiff raises a number of hypotheticals in order to create an ambiguity about the term "model-wide", a term is not ambiguous merely because parties may disagree about its meaning. *See e.g. Founders v. Munoz,* 237 Ill.2d 424, 433 (2010). Given that, under the well-pleaded facts of this case Defendants are accused of large-scale tampering on their own diesel vehicles in identifiable model years, it is ironic for Plaintiff to suggest that it cannot tell whether Defendants' tampering was done on an individual basis or a model-wide basis.

Additionally, Plaintiff argues that a question of fact would still remain to the precise scale of conduct alleged in Count II. (Pl.'s Resp. Supp. 9, May 7, 2018.) A precise scale, however, is not required, nor is it ambiguous that the tampering occurred by manufacturers on a model and national-wide scale. As Plaintiff pleads in its Amended Complaint, "[b]eginning in the 2009 model year and continuing through the 2016 model year, the Volkswagen Defendants manufactured and installed undisclosed unauthorized 'defeat devices' in diesel light-duty Volkswagen Audi, and Porsche vehicles equipped with 2.0-liter and 3.0-lieter engines" (Am. Compl. ¶ 20.) Further, Defendants have admitted to illegally updating the software, as Plaintiff directly quotes their guilty plea in Count II. (*Id.* at p. 14 ¶ 44.) There is no dispute as to the massive scale of Defendants' tampering.

Lastly, the language of Section 209(d) does not "give states and local governments *carte blanche* to regulate any conduct that affects emissions from vehicles that are in use." *Counties,* 2018 WL 1796659 * 12. Section 209(d) states: "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 of licensed motor vehicles." 42. U.S.C. § 7543(d). (Emphasis added). Congress' use of "otherwise" indicates "that state and local government regulation of in-use vehicles is subject to the limitations otherwise imposed by federal law", including "the division of authority between EPA and the states and local governments." *Id.* The holding in *Counties* states it best:

> Courts have repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law. Interpreting Section 209(d) in the manner suggested by the Counties would have just such a destabilizing effect. When the Clean Air Act is considered as a whole, it is clear that congress intended for EPA to regulate vehicle emission standards on a model-wide basis, while states and local governments would regulate compliance with theses standard sat the individual vehicle level. Section 209(d) does not modify that framework. The Counties' tampering claims, based on post-sale software changes to the affected vehicles by [Defendants], are an attempt to enforce vehicle emission standards on a model-wide basis. Because Congress intended for only EPA to regulate such conduct, the Court concludes that these claims stand as an obstacle to Congress' purpose and are preempted by the Clean Air Act.

Id. at * 13. (Internal quotations omitted.) (Internal citations omitted.)

Accordingly, this Court declines to give broad effect to Section 209(d) because it would upset

the careful regulatory scheme established by federal law in the CAA. Plaintiff's claims based on the software updates or "field fixes" stand as an obstacle to Congress' purpose and are preempted by the CAA.

Count II of the Amended Complaint is dismissed with prejudice.

Personal jurisdiction argument

In addition to Defendants preemption arguments, they contend that the claims against the German parents[2] should be dismissed pursuant to 735 ILCS 5/2-301 for lack of personal jurisdiction. As the Court has dismissed Plaintiff's entire Amended Complaint, however, it does not reach this issue.

Defendants' Motion to Dismiss Plaintiff's Amended Complaint is granted and this case is dismissed with prejudice.

This is a final Order disposing of all matters in this litigation.

DATE: June 5, 2018

ENTERED
JUDGE KATHLEEN M. PANTLE-1775
JUN 05 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge Kathleen M. Pantle

[2] Plaintiff pleads the following to establish jurisdiction over Defendants: Defendant Volkswagen Aktiengesellschaft d/b/a Volkswagen Group and/or Volkswagen AG ("Volkswagen AG") is a corporation organized under the laws of Germany that has its principal place of business in Wolfsburg, Germany. (Am.Compl. at ¶ 3.) Volkswagen AG is the parent corporation of Audi AG and Volkswagen Group of America, Inc. (Id. at ¶ 3.) Defendant Volkswagen Group of America, Inc. ("VWGOA") is a corporation organized under New Jersey law, is registered to do business in Illinois, and its principal place of business is in Virginia. (Id. at ¶ 4.) VWGOA is a wholly-owned subsidiary of Volkswagen AG. (Id. at ¶ 4.) VWGOA's Engineering and Environmental Office interacts with U.S. regulators and handles regulatory compliance and certification-related issues for Volkswagen AG and Audi AG. (Id. at ¶ 4.) Audi of America, LLC a/k/a Audi of America, In. ("Audi of America") is a wholly owned subsidiary of Audi AG and is an operating unit of and wholly owned by VWGOA, with its principal place of business in Virginia. (Id. at ¶ 5.) It is closely controlled and directed by Volkswagen AG and Audi AG. (Id. at ¶ 5.) The "VW Group" is an organizational and trade term referring to Volkswagen AG's automotive brands (including Volkswagen Passenger Cars and subsidiaries Audi and Porsche) and financial services business. (Id. at ¶ 6.) Volkswagen AG and the VW Group are managed by Volkswagen AG's Board of Management. (Id. at ¶ 6.) A Supervisory Board appoints, monitors, and advises the Board of Management and issues its rules. Each brand in the VW Group also has its own Brand Board of Management. The members of the Brand Boards of Management manage their respective brands, pursuant to targets and requirements laid down by the Volkswagen AG Board of Management. (Id. at ¶ 6.) Defendant Audi AG is a corporation organized under the laws of Germany that has its principal place of business in Ingolstadt, Germany, is a member of the VW Group, and is 99.55% owned of its stock is owned by Volkswagen AG. (Id. at ¶ 7.) Defendant Dr. Ing. H.c. F. Porsche d/b/a ("Porsche") is a corporation organized under the laws of Germany that has its principal place of business in Germany and it is a member of the VW Group and wholly owned subsidiary of Volkswagen AG. (Id. at ¶ 8.) Defendant Porsche Cars North America, Inc. ("Porsche NA") is a Delaware corporation that has its principal place of business in Georgia, registered to do business in Illinois, and is wholly owned subsidiary of Porsche, and is closely controlled and directed by Porsche. (Id. at ¶ 9.)