Exhibit A

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CIVIL DIVISION

STATE OF ALABAMA, Plaintiff,	)	
V.	) Case No.:	CV-2016-903390.00
VOLKSWAGEN AG, VOLKSWAGEN GROUP OF AMERICA INC, AUDI AG, AUDI OF AMERICA LLC ET AL, Defendants.	)	

ORDER

This matter comes before the Court on Defendants' motion to dismiss Plaintiff's complaint. The Court, having considered Defendants' motion, Plaintiff's opposition and the oral argument of the motion conducted by the Court on December 14, 2017, hereby enters the following:

Standard of Review

The standard by which the Court shall review Defendants' motion, as recently stated by the Court in ***Lloyd Noland Foundation, Inc. v. HealthSouth Corp.***, *979 So.2d 784 (Ala. 2007)* wherein the Court wrote:

> "We have set forth the standard of review that must be applied in reviewing a dismissal pursuant to *Rule 12(b)(6), Ala. R. Civ. P.*:
> 'On appeal, a dismissal is not entitled to a presumption of correctness. The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.' ***Nance v. Matthews***, *622 So.2d 297, 299 (Ala.1993)* (citations omitted).

> The trial court based its final order on . . . affirmative defenses. . . An affirmative defense is '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.' *Black's Law Dictionary* 451 (8th ed.2004). The party asserting the affirmative defense bears the burden of proving it. ***Stewart v. Brinley***, *902 So.2d 1 (Ala.2004).*
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> Generally, an affirmative defense is pleaded in a responsive pleading, such as an answer to a complaint. The reason affirmative defenses must be pleaded in a responsive pleading is to give the opposing party notice of the defense and a chance to develop evidence and offer arguments to controvert the defense. ***Blonder–Tongue Labs., Inc. v. University of Illinois***, *402 U.S. 313, 350, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).* 'Since the facts necessary to establish an affirmative defense generally must be shown by matters outside the complaint, the defense technically cannot be adjudicated on a motion under Rule 12[, Fed.R.Civ.P.]." 5 Charles Alan Wright and Arthur C. Miller, *Federal Practice and Procedure* § 1277 (3d ed.2004).
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> However, a party can obtain a dismissal under *Rule 12(b)(6), Ala. R. Civ. P.*, on the basis of an affirmative defense when ""the affirmative defense appears *clearly* on the face of the pleading."" ***Jones v. Alfa Mut. Ins. Co.***, *875 So.2d 1189, 1193 (Ala.2003)*(quoting ***Braggs v. Jim Skinner Ford, Inc.***, *396 So.2d 1055, 1058 (Ala.1981)*). In ***Jones v. Alfa***, *supra*, the face of the plaintiffs' complaint did not indicate that the statutory limitations period applicable to their bad-faith refusal-to-pay-insurance-benefits claim had expired before they sued; therefore, the insurer was not entitled to a dismissal pursuant to Rule 12(b)(6), Ala. R. Civ. P., on the affirmative defense of the statute of limitations." 979 So.2d at 791

In the case before the Court, Defendants do not argue that Plaintiff has not pled a cause of action against them. Rather, their motion to dismiss is based on their argument that, on the face of Plaintiff's complaint, it is clear that Plaintiff's State action is precluded under the preemptive provisions of Section 209(a) of the Clean Air Act, *42 U.S.C.A §7543(a).* Therefore, the Court's review will be of the specific allegations of Plaintiff's complaint in order to determine whether, as pled, the claims are so precluded.

Relevant Pleading History

Plaintiff, State of Alabama commenced this action on September 15, 2016, by filing its original complaint in this action.

On October 14, 2016, Defendants filed notice of removal of the action to the United States District Court for the Northern District of Alabama.

On May 31, 2017, this matter was remanded to this Court by the United States District Court for the Northern District of California by U.S. District Judge Charles R. Breyer. Judge Breyer noted that not just Alabama, but several other States Attorney General had filed claims in their respective State Courts, alleging that Defendants had violated their respective state laws by using a "defeat device" in certain models of their diesel engine automobiles. Defendant Volkswagen sought removal to federal court in each of the 12 states, including Alabama, under federal question jurisdiction, 28 USCA §1331. The Court remanded this matter, finding that Defendant's claims were insufficient to give rise to §1331 "arising under" jurisdiction, but amounted to no more than a preemption defense which does not give rise to federal subject-matter jurisdiction. Addressing specifically the Alabama case, Judge Breyer wrote the following:

> "Volkswagen is correct that a 'defeat device" is defined only in federal regulations. . . . But its focus on this term misconstrues the anti-tampering claims. A 'defeat device' is not an element under any of the States' anti-tampering statutes. The Alabama law, for example, provides only that:
>
> > No person shall cause, suffer, allow, or permit the removal, disconnection, and/or disabling of . . . [an] exhaust emission control system. . . which has been installed on a motor vehicle. ADEM Admin. Code R. 335-3-9-.06
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> Absent is a requirement that the 'removal, disconnection, and/or disabling' of an emission control system be performed by a 'defeat device'. Rather, the act triggering liability could, for example, be performed by someone using their hands to physically disconnect a vehicle's emission control system. (citation omitted) . . . Thus, even though the States' claims are based on factual allegations that Volkswagen used a defeat device in its vehicles, to prevail, the States do not need to prove that the defeat device qualifies as a 'defeat device' under the Clean Air Act. Instead, the States simply need to demonstrate that Volkswagen installed a device, whether or not a 'defeat device' under federal law, and that the device had the effect of removing, disconnecting, or disabling an emission control system. Volkswagen's 'defeat device' argument therefore fails under the first ***Grable***[1] prong, as it does not 'necessarily raise a stated federal issue.'

Under part (c) of Judge Breyer's remand order, the Court addressed whether the States' anti-tampering claims are permitted under the Clean Air Act. The Court wrote the following with regard to the scope of the Clean Air Act:

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[1] ***Grable & Sons Metal Prods, Inc. v. Darue Engineering & Manufacturing***, *545 U.S. 308 (2005)*

". . .Section 209 of the Clean Air Act prohibits states . . . from adopting or attempting to enforce 'any standard relating to the control of emissions from new motor vehicles.' (emphasis original) 42 U.S.C. §7543(a). . .Section 209 'was intended to have a broad preemptive effect' and to foreclose state-law claims 'relating to' emissions by new vehicles. ***In re Office of Attorney General of State of N.Y.***, *269 A.2d 1, 8-10 (N.Y App. Div. 2000)*. The Clean Air Act also specifies, however, that states are not denied '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)*. In other words, the federal government generally regulates 'new' motor vehicles, while states regulate 'in-use' motor vehicles. See, e.g. ***Sims v. Fla. Dept of Highway Safety & Motor Vehicles,*** *862 F.2d 1449, 1463 n. 8 (11th Cir. 1989)* ('[S]ection 7543(d) of the Clean Air Act further indicates Congress's intent to exclusively enforce federal emissions standards relating to new automobiles *before their initial sale* because *the statute specifically allows the state to regulate automobile use and operation subsequent to their initial sale.*')(emphasis added)

On August 1, 2017, Plaintiff filed its First Amended Complaint.

On September 25, 2017, Plaintiff filed its Motion to Compel written responses to its discovery requests.

On October 12, 2017, Plaintiff filed its Second Amended Complaint (SAC), to which Defendants' motions to dismiss are directed.

On October 26, 2017, the Defendants' motions to dismiss were filed and are now submitted to the Court.

Allegations of Plaintiff's Second Amended Complaint

Plaintiff frames its complaint as a Chapter 28 claim arising under the Alabama Air Pollution Control Act of 1971 ("AAPCA") *Ala. Code §22-28-1 et seq. (1975).* Specifically, under Ala. Code §22-28-22(a), the statute provides:

"Any person who knowingly violates or fails or refuses to obey or comply with this chapter, or any rule or regulation adopted thereunder, or knowingly submits any false information under this chapter, or any rule or regulation thereunder, including knowingly making a false material statement, representation, or certification, or *knowingly rendering inaccurate a monitoring device or method,* upon conviction, shall be punished by a fine not to exceed ten thousand dollars ($10,000) for the violation and an additional penalty not to exceed ten thousand dollars ($10,000) for each day thereafter during which the violation continues and may also be sentenced to hard labor for the county for not more than one year." (emphasis added)

Rather than seek a criminal sanction, Plaintiff has alleged its claim for civil penalties under the provisions of *Ala. Code* §22-22A-5 (1) & (18)c (1975) which provides as follows:

> In addition to any other powers and functions which may be conferred upon it by law, the department is authorized beginning October 1, 1982 to:
> (1) . . . [A]dminister and enforce the provisions and execute the functions of Chapter 28 of this title . . .
> . . .
> (18)a. Issue an order assessing a civil penalty to any person who violates any provision of law identified in subdivision (1) of this section . . .
> . . .
> c. Any civil penalty assessed or recovered under paragraph a. or b. of this subdivision shall not exceed $25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the department under paragraph a. of this subdivision shall not exceed $250,000.00. Each day such violation continues shall constitute a separate violation for purposes of this subdivision.

Plaintiff has also alleged, as authority for its action, Regulation 335-3-9-.06 of Chapter 335-3-9, Alabama Administrative Code, entitled Control of Emissions from Motor Vehicles, which provides in relevant part as follows:

> "In addition to the other strictures contained in this Chapter, no person shall cause, suffer, allow, or permit the removal, disconnection, and/or disabling of a[n] . . . exhaust emission control system, or evaporative loss control system which has been installed on a motor vehicle; nor shall any person defeat the design purpose of any such motor vehicle pollution control device by installing therein or thereto any part or component which is not a comparable replacement part or component of the device. Provided that:
> . . .
> (b) Components and parts of emission control systems may be removed and replaced with like components and parts intended by the manufacturer for such replacement.
> . . ."

Under this statutory and regulatory backdrop, Plaintiff has made the following general allegations of fact. It alleges that starting in 2009, Defendants installed and maintained in its new motor vehicles certain software which was designed to alter emissions readings on certain diesel engines installed in Audi, Porsche, and Volkswagen motor vehicles, which software was known as "defeat devices".

Plaintiff alleges that in the 1990s, Defendants developed a diesel turbocharged direct injection engine ("TDI") for marketing in the U.S., including the State of Alabama. Plaintiff alleges that the said engines evolved over time, but that the emissions control system remained constant in that all engines were equipped with a diesel particulate filter ("DPF") and an exhaust gas recirculation system ("EGR"). The EGR reduced nitrous oxide emissions (NO_x) and the DPF reduced soot emissions.

Both systems, Plaintiff alleges, stressed the TDI engines and that Defendants chose to solve the engineering problems presented by installing defeat devices in the onboard computer software.[2] Plaintiff alleges that Defendants developed, over the years, several generations of such defeat devices which became more and more sophisticated in defeating the emissions control devices, except when the said vehicles were being tested.

For example, in 2006, Plaintiff alleges, Defendant Volkswagen developed the "Acoustic Function" defeat device software which could detect when the vehicle was in street use as opposed to being operated on a dynamometer ("dyno) or a stationary testing device. When on the testing device, the Acoustic Function defeat device would allow the emission control devices on the vehicle to operate so that the vehicle could pass its emissions standards; when the vehicle was in street use, the said defeat device would override the emissions equipment so as to relieve stress on the engine.[3]

Plaintiff also alleges that Defendants tampered with used as well as new vehicles. Plaintiff has alleged the following:

> "81. The State has reason to believe that Defendants tampered with used vehicles in Alabama on multiple occasions, including, but not limited to the two instances detailed below.
> 82. The first instance concerns the installation of the 'steering wheel recognition function' on *used vehicles* in Alabama. In or about 2012, used Subject Vehicles began to develop hardware failures. Volkswagen AG engineers determined that the failures were a result of Subject Vehicles starting in "dyno" testing mode, meaning that the emissions control system was turned on. Volkswagen AG and VWGOA employees decided to add a "steering wheel recognition function" to new and used Subject Vehicles to allow those vehicles to start in "street" mode, meaning that the vehicle now started with the emissions control system turned off. Volkswagen AG and/or VWGOA then ordered mechanics at Volkswagen-

[2] SAC ¶42
[3] SAC ¶55-56

branded dealerships in Alabama to install the new software function on used vehicles in Alabama."

Based on these and other allegations of fact, Plaintiff frames its complaint under two counts as follows:

Count I – Multiple violations of Admin Code Reg. 335-3-9-.06. Plaintiff characterized this claim as pertaining to new motor vehicles. The key allegation appears in ¶116, wherein Plaintiff alleges that "Defendants have admitted that they installed their defeat device software on vehicles that are licensed and registered in Alabama, both before the sale of the vehicles and after the sale of the vehicles, through software updates during maintenance."

Count II – Multiple violations of Admin Code Reg. 335-3-9-.06. Plaintiff characterized this claim as pertaining to used motor vehicles. The key allegation in this Count appears at ¶126, wherein Plaintiff alleges "Defendants and/or persons acting on behalf of Defendants caused or allowed the disconnection or disabling of the exhaust emissions control system installed on a motor vehicle each and every time Defendants or someone acting on Defendants' behalf, installed, updated, or otherwise maintained defeat software on a vehicle that was licensed or registered in Alabama."

Findings of Law

In their motion to dismiss, Defendants argue, not that Plaintiff has failed to state a claim, but that Sec. 209(a) of the Clean Air Act, *42 U.S.C.A. §7543(a)* provides for exclusive federal jurisdiction over the claim, as alleged by Plaintiff, precluding Plaintiff's state action. Specifically, Defendants point to the following language contained in Sec. 209(a):

> "No State. . . 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." (emphasis added)

Defendants argue that this provision precludes the State's civil action. Key to this argument is Defendant's assertion that the use of the phrase "relating to" indicates a legislative intent for a broad application of the provision, particularly of the term

"standard". Defendants argue that the State may not attempt to enforce any State standard for the control of emissions from "new motor vehicles"[4], therefore precluding the cause of action alleged under Count I of Plaintiff's complaint. Defendants argue that since the statute references "new motor vehicles", the preclusion applies to manufacturers only, since they are obviously the only source of new motor vehicles.

By extension, Defendants argue that since the allegations of Count II, applicable to used motor vehicles, relate back to refitting of originally manufactured components, that Count II is, likewise, precluded.

In opposition, Plaintiff argues that should the opinion in ***In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation***, *--- F.Supp.3d ----2017 WL 3816738, (N.D. CA 2017)* be adopted by this Court, then Defendants' motion would be well taken, but only as to Count I of the State's complaint. Plaintiff argues that Count II of its complaint, referencing the conduct of Defendants in refitting used motor vehicles so that they may allegedly continue and better evade emissions testing, may be pursued as a State action as expressly allowed under Section 209(d) of the Clean Air Act at 42 U.S.C.A §7543(d) which provides:

> "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." (emphasis added)

Plaintiff argues, in opposition, that a "registered or licensed motor vehicle" is by definition, not a "new motor vehicle" as that term is used in Sec. 7543(a), but is a used motor vehicle subject to State regulation.

Count I of Plaintiff's Second Amended Complaint

The Court shall address Defendants argument regarding Count I of Plaintiff's complaint pertaining to new motor vehicles. The issue here is whether Defendants' installation of a "defeat device" in the computer software of new motor vehicles, and

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[4] **42 U.S.C.A. § 7550 (3)** Except with respect to vehicles or engines imported or offered for importation, the term "new motor vehicle" means a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser; and the term "new motor vehicle engine" means an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser; and with respect to imported vehicles or engines, such terms mean a motor vehicle and engine, respectively, manufactured after the effective date of a regulation issued under section 7521 of this title which is applicable to such vehicle or engine (or which would be applicable to such vehicle or engine had it been manufactured for importation into the United States). (emphasis added)

Plaintiff's effort to enforce a civil penalty for such conduct, is an attempt by Plaintiff "to enforce any standard relating to the control of emissions from new motor vehicles".

As described in ***In re Volkswagen "Clean Diesel"***, *supra*, the Clean Air Act includes within its scope, regulation of auxiliary emission control devices (AECD)s. The Court wrote the following in this regard:

> "The Clean Air Act, as amended, vests EPA with significant authority to set and enforce motor-vehicle emission standards. *42 U.S.C. § 7521(a)*. Pursuant to that authority, EPA has set emission limits for, among other pollutants, NOx and diesel particulate matter. 40 C.F.R. § 86.1811–04. The Clean Air Act also requires EPA to administer a certification program to ensure that all vehicles introduced into United States commerce satisfy these and other emission standards. *42 U.S.C. § 7525(a)*. . .
>
> Among the information a manufacturer must include in an application for certification is a list of all auxiliary emission control devices (AECDs) installed in the vehicles. 40 C.F.R. § 86.1844–01(d)(11). AECDs sense factors such as engine and vehicle speed for purposes of activating and deactivating vehicle emission controls. ***Id.*** § 86.1803–01[5]. EPA regulations permit the use of AECDs during certain driving conditions, such as at high altitude if the use is justified to protect the vehicle, or during engine start-up. *See* ***id.*** §§ 86.1803–01; 86.1810–09(f)(2). But an application for certification must include "a justification for each AECD ... and [a] rationale for why it is not a defeat device." ***Id.*** § 86.1844–01(d)(11).
>
> A defeat device is an AECD "'that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use,'" subject to limited exceptions. 40 C.F.R. § 86.1803–01. EPA prohibits the installation of defeat devices in all new passenger vehicles, *see* ***id.*** §§ 86.1809–10[6], 86.1809–12,

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[5] "Defeat device means an auxiliary emission control device (AECD) that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless:
(1) Such conditions are substantially included in the Federal emission test procedure;
(2) The need for the AECD is justified in terms of protecting the vehicle against damage or accident;
. . ."

[6] §§ 86.1809–10 (d) The following provisions apply for vehicle designs designated by the Administrator to be investigated for possible defeat devices:
(1) The manufacturer must show to the satisfaction of the Administrator that the vehicle design does not incorporate strategies that unnecessarily reduce emission control effectiveness exhibited during the Federal Test Procedure or Supplemental Federal Test Procedure (FTP or SFTP) when the vehicle is operated under conditions that may reasonably be expected to be encountered in normal operation and use.
(2) The following information requirements apply:
(i) Upon request by the Administrator, the manufacturer must provide an explanation containing detailed information regarding test programs, engineering evaluations, design specifications, calibrations, on-

> and the Clean Air Act gives EPA authority to bring a civil action against any disobedient manufacturer, *42 U.S.C. §§ 7522(a)(3)(B); 7524(b).* The Clean Air Act also prohibits manufacturers from introducing into commerce any new motor vehicle that is not covered by a certificate of conformity, and similarly grants EPA authority to enforce that restriction. *42 U.S.C. §§ 7522(a)(1); 7524(b).* And even if a manufacturer obtains a certificate of conformity, the certificate is not deemed to cover vehicles that are not as described in the manufacturer's application for certification "in all material respects." 40 C.F.R. § 86.1848–10(c)(6)." *2017 WL 3816738 at *1*

Regarding the vehicles made the subject this action, the Court in ***In re Volkswagen "Clean Diesel"***, *supra,* made the following observation:

"Volkswagen installed its defeat device in nearly 600,000 "clean diesel" vehicles, model years 2009 through 2016. But the company did not disclose the defeat device in its applications for new-vehicle certification, or in meetings with EPA and CARB[7] staff during the certification process. Only by installing the defeat device in its vehicles was Volkswagen able to obtain EPA and CARB certificates of conformity. In fact, these vehicles release NOx at factors up to 40 times higher than EPA limits." *2017 WL 3816738 at *2*

The ruling in ***In re Volkswagen "Clean Diesel"***, *supra*, differs procedurally from the case before this Court on the basis that the State Plaintiff in that case, the State of Wyoming, had developed a State Implementation Plan (SIP) in 1972, which is allowed under the provisions of *42 U.S.C. §7410(a)(1),* that requires each State to develop a State Implementation Plan to enforce EPA's national ambient air quality standards (NAAQS). Once a SIP is adopted and implemented, it has the force and effect of federal law and can be enforced in federal Court. Since the State of Alabama does not have a SIP, and is seeking enforcement of similar civil penalties under State law, there is no federal question sufficient to invoke 'arising under' jurisdiction under §1331.

As cited in ***In re Volkswagen "Clean Diesel"***, *supra,* the two Wyoming provisions sought to be enforced in the State action were as follows:

> "Two provisions of the State's SIP are at issue in this case. The first is an "anti-tampering" rule, which provides that:

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board computer algorithms, and design strategies incorporated for operation both during and outside of the Federal emission test procedure.

[7] California Air Resources Board

> No person shall intentionally remove, alter or otherwise render ineffective or inoperative ... any ... air pollution control device or system which has been installed on a motor vehicle or stationary internal combustion engine as a requirement of any federal law or regulation. Rules Wyo. Dep't of Envtl. Quality, Air Quality, ch. 13, § 2(a). . . .

The second SIP provision at issue is an "anti-concealment" rule, providing that:

> No person shall cause or permit the installation or use of any device, contrivance or operational schedule which, without resulting in reduction of the total amount of air contaminant released to the atmosphere, shall dilute or conceal an emission from a source. Rules Wyo. Dep't of Envtl. Quality, Air Quality, ch. 1, § 4(a)" 2017 WL 3816738 at *4

Wyoming's anti-tampering rules are substantially the same as the anti-tampering provisions contained in *Ala. Code* §22-28-22(a)[8] and its implementing regulation, 335-3-9-.06[9].

In ***In re Volkswagen "Clean Diesel"***, *supra,* because of the different procedural posture of the case, due to the State's attempt to enforce civil penalties under its SIP, rather than under state law, the Court addressed Defendant's motion to dismiss on grounds of the preclusive effect of Section 209(a) of the Clean Air Act, rather than remand the action back to Wyoming state court. In addressing that defense, the Court discussed the manner in which federal legislation can be adopted so as to preempt the field of its operation. The Court wrote:

> For present purposes . . . whether Wyoming's SIP is federal law or some combination of state and federal law is not material. That is because the clause of the Clean Air Act at issue, Section 209(a), expressly provides that 'No State ... shall adopt or *attempt to enforce any* standard relating to the

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8 *Ala. Code* §22-28-22(a) ". . . "Any person who . . . submits any false information under this chapter, or any rule or regulation thereunder, including knowingly making a false material statement, representation, or certification, or knowingly rendering inaccurate a monitoring device or method . . ."

9 *Regulation 335-3-9-.06 of Chapter 335-3-9, Alabama Administrative Code,* "In addition to the other strictures contained in this Chapter, no person shall cause, suffer, allow, or permit the removal, disconnection, and/or disabling of a[n] . . . exhaust emission control system, or evaporative loss control system which has been installed on a motor vehicle; nor shall any person defeat the design purpose of any such motor vehicle pollution control device by installing therein or thereto any part or component which is not a comparable replacement part or component of the device. . ."

> control of emissions from new motor vehicles....' *42 U.S.C. § 7543(a)*(emphasis added). By prohibiting States from attempting to enforce any covered standard, Section 209(a) not only preempts certain state law, but also prohibits certain state action.
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> Accordingly, whether characterized as state or federal law, if Wyoming seeks to use its SIP to enforce a standard within the purview of Section 209(a), it is taking action that the Clean Air Act prohibits States to take.
>
> Further, whether 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. *See, e.g.*, ***Dolan v. U.S. Postal Service***, *546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006)*(interpreting federal law outside preemption context; "[i]nterpretation ... depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"); ***Medtronic, Inc. v. Lohr***, *518 U.S. 470, 485–86, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)* (interpreting federal law within preemption context; "the purpose of Congress is the ultimate touchstone," as discerned from "the language of the pre-emption statute and the statutory framework surrounding it," as well as the "structure and purpose of the statute as a whole") (internal quotation marks omitted).
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> And to the extent there is a difference between the preemption analysis and standard statutory interpretation, the preemption framework actually *benefits* Wyoming. *That is because of the presumption that "the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."* ***Medtronic***, *518 U.S. at 485, 116 S.Ct. 2240* (quoting ***Rice v. Santa Fe Elevator Corp.***, *331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)*); *see also* ***Pac. Merch. Shipping Ass'n v. Goldstene*** *("Pac. Merch. II"), 639 F.3d 1154, 1167 (9th Cir. 2011)* (applying the presumption against preemption in considering whether the Submerged Lands Act preempted state environmental laws, "[g]iven the historic presence of state law in the area of air pollution") (internal quotation marks omitted)." 2017 WL 3816738 at *6

Thus, whether a particular Act of Congress preempts State action is a matter of Congressional intent to be gleaned the language of the pre-emption statute, the statutory framework surrounding it, or the structure and purpose of the statute as a whole. Since the preemption claimed under the Clean Air Act is in the area of a State's sovereign right to exercise its police power, then there is a presumption against federal preemption.

Though environmental regulation has traditionally been a matter of state authority, passage of the Clean Air Act and its amendments have made environmental regulation a joint federal – state project, with the States primarily regulating emissions from stationary sources, and the federal government regulating emissions from motor vehicles. ***Engine Mfrs. Ass'n v. US E.P.A.***, *88 F.3d 1075, 1079, 319 U.S.App.D.C. 12 (D.C. Cir. 1996) ;* see also ***Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.***, *627 F.3d 730, 733 (9th Cir. 2010)* ("[T]he [Clean Air] Act gives the states the job of regulating stationary sources of pollution, but the EPA ... [is] responsible for regulating emissions from motor vehicles and other mobile sources."). 2017 WL 3816738 at *7

Regarding the preemptive effect of the CAA, the Court, in ***In re Volkswagen "Clean Diesel"***, *supra*, relied primarily on the authority of ***Engine Mfrs. Ass'n v. US E.P.A.***, *88 F.3d 1075, 319 U.S.App.D.C. 12 (D.C. Cir. 1996)* for its finding of complete preemption of the CAA in regulating emissions standards in new motor vehicles, wherein the Court wrote:

> "The CAA contemplated that the states would carry out their responsibility chiefly by regulating stationary sources, such as factories and power plants. Both before and after the 1977 amendments, *Pub.L. No. 95–95, 91 Stat. 685*, many of the statutory requirements for SIPs related to the regulation of stationary sources. . .
>
> In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions had been a principally federal project. *See generally* ***Motor Vehicle Manufacturers Ass'n v. New York State Dep't of Envtl. Conserv.***, *17 F.3d 521, 524–27 (2d Cir.1994) ("MVMA"); **Motor & Equip. Mfrs. Ass'n, Inc. v. EPA**, 627 F.2d 1095, 1101–03, 1108–11 (D.C.Cir.1979)* ("*MEMA*"), *cert. denied,* 446 U.S. 952, 100 S.Ct. 2917, 64 L.Ed.2d 808 (1980). 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." ***MEMA***, *627 F.2d at 1109.* Two years after authorizing federal emissions regulations, therefore, Congress preempted the states from adopting their own emissions standards. The Second Circuit has referred to this preemption as "the cornerstone" of Title II, the portion of the CAA that governs mobile pollution sources. ***MVMA***, *17 F.3d at 526.*

> In spite of Congress' determination to protect manufacturers from multiple emissions standards, *see* ***MEMA***, *627 F.2d at 1109* (citing S.Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) U.S.Code Cong. & Admin.News 1967, p. 1938), California was granted an exemption from the § 209(a) preemption." 88 F.3d 1075 at 1079

Therefore, and rather definitively, the Clean Air Act applies to and completely preempts State action or enforcement of emissions standards for new motor vehicles, as that term is expressly defined in the Clean Air Act. See, *42 U.S.C.A. § 7550 (3)*. The term "standard", however, is not expressly defined in the CAA, and under the statutory interpretive rule that where a claim of complete preemption is made in the area of a State's police power, the presumption is against total preemption. The Court turned to the authority of ***Engine Mfrs. Ass'n v. South Coast Air Quality Management District***, *541 U.S. 2461, 24 S.Ct. 1756, 158 L.Ed.2d 529 (2004)* to address the issue of whether regulation of use of auxiliary emission control devices (AECDs) or "defeat devices", even in new motor vehicles, constituted a "standard" for purposes of the preemptive effect of the CAA on new motor vehicles. The Court wrote that the issue in ***South Coast*** was whether the intent of Congress, in the use of the word "standard" referred only to the numerical amount of emissions to be allowed, or whether the intent was broader to include numerical limits and the equipment needed to insure that the numerical limit is achieved in while in operation. The Court wrote:

> "The District Court's determination that this express pre-emption provision did not invalidate the Fleet Rules hinged on its interpretation of the word "standard" to include only regulations that compel manufacturers to meet specified emission limits. This interpretation of "standard" in turn caused the court to draw a distinction between purchase restrictions (not pre-empted) and sale restrictions (pre-empted). Neither the manufacturer-specific interpretation of "standard" nor the resulting distinction between purchase and sale restrictions finds support in the text of § 209(a) or the structure of the CAA.
>
> "'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" ***Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.***, *469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985)*.
>
> Today, as in 1967 when § 209(a) became law, "standard" is defined as that which "is established by authority, custom, or general consent, as a model or example; criterion; test." Webster's Second New International Dictionary 2455 (1945). The criteria referred to in § 209(a) relate to the

> *emission characteristics of a vehicle or engine*. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, *must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions*. This interpretation is consistent with the use of "standard" throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply, *e.g., 42 U.S.C. § 7521(a)(3)(B)(ii)*, or emission-control technology with which they must be equipped, *e.g., § 7521(a)(6)*." 24 S.Ct. at 1761

Rather clearly, therefore "standard" as used in 209(a) refers not only to the numerical amount of emissions from the motor vehicle, which must be below a certain amount set in the CAA, but also to the equipping of the motor vehicle with certain types of pollution control devices or some other design feature related to the control of emissions from the motor vehicle. The operation of auxiliary emission control devices (AECDs), or "defeat device", installed by the manufacturer 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 1971 ("AAPCA") *Ala. Code §22-28-1 et seq. (1975).*

Defendant's Rule 12(b)(6) motion to dismiss on grounds that an affirmative defense, namely complete preclusion under the provisions of Section 209(a) of the CAA, *42 U.S.C.A. §7543(a)*, regarding Count I of Plaintiff's Second Amended Complaint is well taken.

Count II of Plaintiff's Second Amended Complaint

Plaintiff has characterized Count II of its complaint as applicable to "in-use" motor vehicles, that is, vehicles which are not new motor vehicles and for which it claims the right to regulate is not preempted by the express language of the CAA at *42 U.S.C.A. §7543(d).*

Defendants argue for dismissal of Count II under a theory that, as pled, the allegations of wrongdoing "relate back" to the time of manufacture and to the original manufacturers and are therefore captured under the preemptive language of Section 209(a) of the Act.

The Court in ***In re Volkswagen "Clean Diesel"***, *supra*, which appears to be the touchstone opinion governing this case, does not perform this type of analysis. Rather, the Court, while conceding that regulation of "in-use" vehicles falls to the States, such a finding is not absolute nor does it hold in all cases. Instead, there is a dichotomy between intrastate and interstate actions which exists along a temporal spectrum commencing from the date of initial sale of a new vehicle to a time more remote from the date of initial sale. Along the temporal spectrum, the closer the State's attempt at enforcement of a regulation to the date of initial sale, the more likely that the attempt is to be barred under the provisions of Section 209(a) as the attempt is more likely to be made against the manufacturer and the effort is a burden to interstate commerce. However, the more remote in time that conduct is undertaken that would affect the emissions of a motor vehicle, then such effort is more likely an intrastate matter, not likely aimed at the manufacturer and therefore, under the provisions of 209(d) susceptible to State regulation and enforcement.

The real issue is to determine the dividing line, the point at which an "in-use" motor vehicle may become subject to State regulation because the effect on interstate commerce has lessened to the point that States may so regulate.

The Court in ***In re Volkswagen "Clean Diesel"***, *supra,* wrote the following:

> "The Clean Air Act does include a savings clause, which permits States to establish and enforce "in-use" vehicle restrictions. ***Pac. Merch. Shipping Ass'n v. Goldstene ("Pac. Merch. 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).*
>
> By allowing States to regulate 'registered or licensed motor vehicles,' as opposed to new motor vehicles, Section 209(d) preserves States' inherent authority to police conduct within their borders, and also enables them to develop additional tools to meet the EPA-established NAAQS. Inspection and maintenance programs are an example of "in use" regulations. *See 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. *See Arnold W. Reitze Jr., Air Pollution Control Law: Compliance and Enforcement § 10–5(d) (2001)*

("[M]any states prohibit the operation of motor vehicles when air pollution devices have been removed, altered, or rendered inoperative.").

In some circumstances, the dividing line between Section 209(a) and 209(d) can be more difficult to decipher. Imagine, for example, that a State requires all vehicles within it, once driven off the new-car lot, to be equipped with an emission-control device that is not required by EPA regulations. The State may argue that this standard is not "relat[ed] to the control of emissions from *new motor vehicles*," *42 U.S.C. § 7543(a)* (emphasis added), but instead regulates "the use, operation or movement of registered or licensed motor vehicles," ***id.*** *§ 7543(d)*. 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." ***EMA***, *88 F.3d at 1079* (citation omitted). Vehicle manufacturers would likely feel pressure to install the emission-control device required by the State in its new vehicles. And if other States also established shortly-off-the-lot emission-control requirements, manufacturers could face the "possibility of 50 different state regulatory regimes," which Congress sought to avoid. ***Id.***" 2017 WL 3816738 at *9

To "decipher" the dividing line between 209(a) complete federal preemption and 209(d) allowance of state regulation and enforcement, the Court turned to the ruling in ***Allway Taxi, Inc. v. City of New York***, *340 F.Supp. 1120, 1124 (S.D.N.Y. 1972),aff'd, 468 F.2d 624 (2d Cir. 1972),* which remains as sound authority on the issue. The Court wrote essentially that as long as the State enforcement is not too much of a burden on interstate commerce, then such State regulation and enforcement will not be preempted under the provisions of Section 209(a) of the CAA. The Court wrote:

". . .[T]he history and text of the [Clean Air] Act show that the second preemption section 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.

Thus, the second preemption section restricts states and localities from setting their own standards for new motor vehicles, which are defined as motor vehicles 'the equitable or legal title to which ... [have] never been transferred to an ultimate purchaser.' The statutory definition reveals a clear congressional intent to preclude states and localities from setting their own exhaust emission control standards only with respect to the manufacture and distribution of new automobiles. That narrow purpose is further suggested by the remainder of the section, which prohibits states and localities from setting standards governing emission control devices before the initial sale or

> registration of an automobile. Finally, congress specifically refused to interfere with local regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers.
>
> We do not say that a state or locality is free to impose its own emission control standards the moment after a new car is bought and registered. That would be an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce. The preemption sections, however, *do not preclude a state or locality from imposing its own exhaust emission control standards upon the resale or reregistration of the automobile. Nor do they preclude a locality from setting its own standards for the licensing of vehicles for commercial use within that locality*. Such regulations would cause only minimal interference with interstate commerce, since they would be *directed primarily to intrastate activities and the burden of compliance would be on individual owners and not on manufacturers and distributors*."(emphasis added) 340 F.Supp. at 1124

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. Examples of fields in which the State may act are in the relicensing and reregistration of a motor vehicle or in the regulation of commercial vehicles, though the Court did not limit such circumstances only to those cited in the opinion.

The Court in ***In re Volkswagen "Clean Diesel"***, *supra, also* wrote the following:

> "In ***Engine Manufacturers [v. US E.P.A.***, *88 F.3d 1075, 319 U.S.App.D.C. 12 (D.C. Cir. 1996)*] the D.C. Circuit cited favorably to ***Allway***, noting that the "***Allway Taxi*** interpretation, *postponing state regulation* so that the burden of compliance will not fall on the manufacturer, has prevented the definition of 'new motor vehicle' from 'nullifying' the motor vehicle preemption regime." ***EMA***, *88 F.3d at 1086*. EPA has also embraced ***Allway Taxi***, explaining that 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." EPA, Control of Air Pollution; Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression–Ignition Engines At or Above 37 Kilowatts, 59 Fed. Reg. 31306–01, 31330 (June 17, 1994) ("EPA expects that the principles articulated in ***Allway Taxi*** will be applied by the courts to any State adoption of in-use controls.")." 2017 WL 3816738 at *10

The EPA Regulation cited by the Court in ***In re Volkswagen "Clean Diesel"***, *supra*, Control of Air Pollution; Determination of Significance for non-road Sources and Emission Standards for New Non-road Compression-Ignition Engines at or Above 37 Kilowatts, *59 FR 31306-01, 1994 WL 263931, June 17, 1994,* bears review as it further elucidates the point at which an in-use licensed and registered motor vehicle can become subject to State regulation and enforcement. The regulation states the following:

> "This final rule establishes for the purpose of these federal regulations, a definition of "new" as it applies to all domestically manufactured and imported 'new non-road engines', 'new non-road vehicles,' and 'new non-road equipment.' New non-road engines, vehicles, and equipment are defined as engines, vehicles, and equipment *the equitable or legal title to which has not been transferred to an ultimate purchaser*. The ultimate purchaser is defined as the first person who in good faith purchases such engine, vehicle, or equipment for purposes other than resale.
>
> For some engines, vehicles, or equipment, the passage of title in the United States may not formally occur or manufacturers may retain title and lease the engines or equipment. In these cases, a domestic or imported non-road engine, non-road vehicle, or nonroad equipment will retain its status as "new" until such engine or vehicle is "placed into service." An engine, vehicle, or equipment is considered "placed into service" when the engine, vehicle, or equipment is used for its functional purposes.
>
> EPA believes that the definition of new should include the "placed into service" addition to the motor vehicle definition of new found in section 216 of the Act because of the nature of the non-road market. Non-road engines, non-road vehicles and non-road equipment are often leased and maintained by the manufacturer well into the useful life of the non-road equipment. A piece of equipment, the title of which has passed to the ultimate purchaser, should not be treated differently than a piece of equipment which is being used but has not yet passed to an ultimate purchaser.
>
> The Agency believes that this definition of "new" comports with the language, intent and structure of the Clean Air Act and is a permissible construction of the statute. Contrary to the assertion of some commenters, EPA's definition of "new" is consistent with the dictionary definition of the word as "having existed or been made but a short time." Webster's Ninth New Collegiate Dictionary, 1990. Generally speaking, manufactured products are sold soon after they are made and are considered new until they are sold or used.
>
> The commenters' definition of new—anything manufactured after the Clean Air Act Amendments' enactment or an applicable regulation's promulgation—would mean, by contrast, that any engine manufactured after a certain date would be new forever. This is certainly not the plain meaning

of "new." Congress could have stated that the federal preemption applied to certain equipment manufactured after a certain date, but Congress did not do so. Elsewhere in title II, Congress specified that a provision only applied to products manufactured after a certain date (see, section 218 requiring a ban on engines manufactured after the 1992 model year that require leaded gasoline) or first introduced into commerce after a certain date (see, section 211(f) regarding prohibition on fuels that are not substantially similar to fuels used to certify vehicles as meeting emission standards). The lack of such a date here further supports that Congress intended "new" to mean newly manufactured and not yet sold.

The legislative record also shows Congressional intent that "new" should refer to newly manufactured products. In his colloquy with Senator Wilson explaining the final version of section 209(e), Senator Chafee notes that 'because the preemption is limited to new engine standards only, States can continue to require existing and in-use non-road engines to reduce emissions . . .' (Emphasis added) 136 Cong. Rec. S17237 (October 26, 1990).

This language is echoed by similar language from Senator Baucus in his report to the Senate on the conference bill. 136 Cong. Rec. S16976 (October 27, 1990). If Congress intended the definition of new non-road engines or equipment, and as a result the preemption, to apply to an engine for its entire life, then it would appear that there would be no distinction between new and in- use non-road engines, as an engine manufactured after a certain date would always be new. Yet the statements of Senator Chafee and Senator Baucus clearly contemplate such a distinction.

The Agency's definition of new is also consistent with the way the Act approaches motor vehicle emission control. As noted earlier, section 216 defines new in the context of motor vehicles as 'a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser.' The Act applies federal emissions standards to "new" vehicles. These federal standards are enforced through certification, assembly line, and recall testing. *States, on the other hand, have a role in motor vehicle emission control through inspection/maintenance programs and are not restricted from controlling used vehicles.* The section 209(a) prohibition of state regulation of motor vehicles addresses only "new" motor vehicles and engines and prohibits state regulation that occurs before sale, titling, or registration of the vehicle.

The Clean Air Act Amendments of 1990 take a parallel approach to non-road standards and enforcement. . . . Given that the preemption provisions for new motor vehicles and new non-road engines appear in the same section of the Clean Air Act, it is reasonable to believe that Congress did not intend for the word "new" to be defined differently within the same section without stating this intent explicitly.

There is not a compelling policy or factual justification for defining 'new' differently in the non-road and motor vehicle contexts. State regulation of non-road engines does not generally present any greater degree of disruption of the movement of products, engines or equipment between

states than does regulation of motor vehicles. The comments provide little if any justification, in terms of relevant distinctions between motor vehicles and non-road engines, to justify such a significant departure from EPA's established practice for regulating mobile sources.

The Agency's definition of new is also consistent with case law. In ***Allway Taxi, Inc. v. City of New York***, the court held that where the exercise of local police power serves the purpose of a federal act—the Clean Air Act in that case—the preemptive effect of the act should be narrowly construed. In keeping with that principle, *EPA believes that the definition of "new" should be construed narrowly in order to protect states' rights, particularly in an area such as public health in which states traditionally exercise control.* California's nonroad regulations will serve the purpose of the federal act by improving air quality.

In ***Allway Taxi***, the court discussed the federal preemption of new motor vehicles and interpreted the meaning of new motor vehicle as defined in Section 216 of the Act. The court noted that this definition 'reveals a clear congressional intent to preclude states and localities from setting their own exhaust emission control standards *only with respect to the manufacture and distribution of new automobiles.*' The court stated further that the narrow purpose in the definition is reinforced by prohibiting states and localities from setting emission standards before the initial sale or registration of an automobile. *Congress specifically declared that section 209 did not preempt states from regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers.*

EPA believes that the further a state requirement is removed in time from the manufacture and distribution of new engines, the less interstate commerce is likely to be burdened. Furthermore, the legality of particular regulatory controls that a state may impose on non-road vehicles or engines that are no longer new will *depend upon the burden that such controls place on interstate commerce.* In fact, the court in ***Allway Taxi*** stated that a state or locality is not free to impose its own emission control measures the moment after a new car is bought and registered. 'That would be an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce.' *The court further stated that federal preemption does not, however, preclude a state from imposing its own exhaust emission control standards upon the resale or reregistration of the automobile. Furthermore, states are not precluded from setting standards for licensing of vehicles for commercial use.* These types of regulations, which are more removed, 'would cause only minimal interference with interstate commerce, since they would be directed primarily to intrastate activities and the burden of compliance would be on individual owners and in-state users and not on manufacturers and distributors.' (emphasis added)

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. 31306–01, 31329-30

Allway Taxi, thus provides the Court with certain parameters delineating the point of departure between the total preemption of Section 209(a) of the Clean Air Act, and the area in which the States may regulate and enforce emissions standards under Section 209(d) of the CAA. The criteria is 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 specter of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers. To accomplish this federal purpose:

- The further a state requirement is removed in time from the manufacture and distribution of new engines, the less interstate commerce is likely to be burdened. So, the time from the date of manufacture and introduction of the motor vehicle into the stream of commerce is a factor;
- Upon resale and retitling of a motor vehicle after its initial sale, the State may regulate and enforce emission requirements; and,
- In the licensing of commercial vehicles, the States may regulate and enforce its own emissions standards.

Because the burden is likely to fall on the user of the vehicle rather than on the manufacturer, the preemptive effect of Section 209(a) will not apply to bar the State action. There may be other instances beyond those cited herein and must be reviewed on a case by case basis.

In ***In re Volkswagen "Clean Diesel"***, *supra*, the State of Wyoming was attempting to enforce the provisions of its SIP with regard to registered motor vehicles, that is, with regard to vehicles already in use. The Court nevertheless held, applying the criteria set forth in ***Allway Taxi***, that the State was preempted from such regulation and enforcement. In so ruling, the Court wrote the following:

> "The dispute between Wyoming and Volkswagen centers on 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)*. . . . [W]hat about the situation here, where Volkswagen installed a defeat device in thousands of vehicles before they were introduced into interstate commerce?

. . .

Even though EPA's rule prohibiting defeat devices is a standard covered by Section 209(a), amicus curiae Harris County contends that Section 209(a) prohibits States only from enforcing that standard before the initial sale of EPA-approved vehicles. . . . Harris County contends that Section 209(a) does not bar Wyoming's claims because Volkswagen's "clean diesel" vehicles have been certified already, and in some cases have been on the roads in Wyoming for 7 years.

Harris County is correct that Section 209(a) keeps States from intruding into EPA's new-vehicle certification process and its pre-sale regulation of vehicles; but the provision's text and context, and Congress's purpose in enacting it show that even after a vehicle is introduced into commerce certain State regulation comes within Section 209(a)'s bounds.

Starting with the text of Section 209(a), the provision speaks most directly to *what* States are prohibited from regulating, not *when* they are prohibited from doing so. States are prohibited from attempting to enforce "any standard relating to the control of emissions from new motor vehicles." The provision does not state, however, that States are prohibited from attempting to enforce such standards only *before the sale* of new vehicles. The consequence of this distinction is most readily observable in the context of fraud-against-EPA type claims. If, after certification, it is discovered that a manufacturer tampered with vehicles during testing, and the manufacturer's vehicles accordingly did not comply with EPA's new-vehicle emission standards, the Clean Air Act vests EPA with authority to bring a civil action, and in some instances even a criminal action, against the manufacturer. *See 42 U.S.C. §§ 7413(c)(2); 7522(a); 7524(b).* But because Section 209(a) prohibits States from enforcing "standard[s] relating to the control of emissions from new motor vehicles," *both before and after* the vehicles enter into commerce, States cannot do the same.

Reading Section 209(a) in this way also furthers Congress's purpose in enacting the provision. 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, ... [and] threaten[ing] to create nightmares for the manufacturers." *EMA*, 88 F.3d at 1079 (internal quotation marks omitted).

. . .

The Supreme Court's decision in ***Buckman Co. v. Plaintiffs' Legal Committee***, *531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001)* also

supports reading Section 209(a) as prohibiting State claims predicated on deceit against EPA during new-vehicle certification. . . .

Although ***Buckman*** was an implied preemption case, the Court's analysis is instructive in interpreting the scope of Section 209(a). Like the FDA in the realm of medical devices, Congress has vested EPA with significant authority to regulate and enforce new-vehicle emission standards. If, despite this authority, States could bring actions against vehicle manufacturers based on deceit of EPA *during new-vehicle certification*, manufacturers would be forced to comply with EPA regulations "in the shadow of 50 State" regimes, which would "dramatically increase the burdens" manufactures would face in bringing new vehicles to market. *531 U.S. at 350, 121 S.Ct. 1012*. These additional burdens would hamper Congress's purpose in enacting Section 209(a), and counsel against a cabined reading of Section 209(a) that would only prohibit States from interfering with the initial sale of EPA-approved vehicles.

Having established (1) that EPA's rule prohibiting the installation of defeat devices in new vehicles is a standard that Section 209(a) bars States from enforcing; and (2) that Section 209(a) proscribes States from enforcing this standard even after the relevant vehicles are introduced into commerce, one more question remains: Is Wyoming attempting to enforce this standard through its tampering and concealment claims against Volkswagen?

The answer is yes. Although the relevant SIP provisions do not use the term "defeat device," their application here is ultimately predicated on Volkswagen installing such a device in its "clean diesel" vehicles during manufacturing. That is not only conduct EPA prohibits, but is also conduct that EPA has already investigated, and which culminated in civil consent decrees, a guilty plea, and billions of dollars in penalties and mitigation costs, some of which will compensate Wyoming and its residents, and together which will fully mitigate the environmental harm caused by Volkswagen's conduct. If Wyoming (and other States) are allowed to hold Volkswagen responsible for the same conduct, they will be effectively "penalize[ing] [Volkswagen] for producing engines which failed to comply with the Federal standards," and for "conceal[ing] or misrepresent[ing] [those] violations." *In re Office of Attorney General*, 269 A.D.2d at 11–12, 709 N.Y.S.2d 1.[5]

. . .

. . . Wyoming argues that it is not attempting to enforce EPA's standard prohibiting the installation of defeat devices in new vehicles, because its claims are based only on the *operation* of Volkswagen's defeat device within the State. Framed in this way, Wyoming contends that its claims are permitted under the Clean Air Act's savings clause, § 209(d).

The operation of Volkswagen's defeat device on the roads of Wyoming, however, cannot be so easily separated from its installation. For one thing, *all* defeat devices perform by reducing the effectiveness of emission control systems during "normal vehicle operation and use." 40 C.F.R. § 86.1803–01. That is how a defeat device works. Under Wyoming's reading, 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. Thus, even if Wyoming is regulating the *use* of defeat devices, it is also effectively regulating their installation.

Further, Wyoming's claims are materially distinguishable from "in use" vehicle regulations permitted under Section 209(d). As noted above, courts 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." **Allway Taxi**, 340 F.Supp. at 1124; see also* 59 Fed. Reg. 31306–01, 31330(explaining that 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"). For example, in the case of a mechanic who disconnects a vehicle's catalytic converter in the repair shop, the regulated conduct occurs within a single state and the burden of compliance is on the mechanic and the owner of the vehicle. . .

In contrast, 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 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. (*See* Compl. ¶ 104 (noting that if the vehicles' emission-control system operated fully, as currently configured, "particulate matter would ... clog and break the engine's diesel particulate filter").)

Wyoming's regulations therefore amount to impermissible State "standard[s] relating back to the original design of the engine by the original engine manufacturer." 59 Fed. Reg. at 31330. 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 that EPA, not the 50 States, was best situated to regulate it." 2017 WL 3816738 at *10-14

The Court has reviewed a copy of the complaint filed in *People of the State of Wyoming v. Volkswagen Group of America, Inc. et al, In the United States District Court for the Northern District of California, Civil No. 16-CV-271-J* ("the Wyoming Complaint") to compare its allegations with those alleged in the State of Alabama's complaint filed in this action. In the Wyoming Complaint, the State alleged that

Defendants had developed emission concealing technology to hide NO_x emissions from 2.0 and 3.0 diesel engines in its 2009-2015 model vehicles. The State sought enforcement of civil penalties under its State Implementation Plan (SIP).[10]

In its factual allegations, the Wyoming Complaint at ¶¶ 81-84 mirrors the Factual Allegations in the case before this Court, verbatim, at ¶¶ 35-37; ¶¶86-87 of the Wyoming complaint is the same as ¶¶38-39 for the Alabama Complaint; ¶91 Wyoming to ¶42 for Alabama; and ¶94 Wyoming for ¶43 Alabama. The recitation of the six generations of defeat devices in Subpart B of the Wyoming Complaint is the same as the said recitation contained in Subpart B of the Complaint before this Court; the allegation of scienter on the part of Defendants' executives in Subpart C of both complaints is the same, though not identical.

Under Subpart E(iii) of the Factual Allegations in the Wyoming Complaint, Wyoming alleges that in October 2014, Defendant proffered that it would cure a high emissions result with the California Air Resources Board (CARB) by conducting software recalls.[11] Wyoming also alleged that on November 26, 2014 and on December 12, 2014, in recall related submissions to the EPA and CARB, Defendant touted the Generation 2 software recall as a 'pro-active' 'upgrade'. Wyoming also alleges that Defendant sent notices to dealers and customers falsely describing the software updates as being issued to "assure the vehicle's tailpipe emissions are optimized and operating efficiently", stating that the software recall was "part of Volkswagen's ongoing commitment to our environment, and in cooperation with the United States Environmental Protection Agency."[12]

Subpart E of the Factual Allegations of Plaintiff's Second Amended Complaint is styled "Defendants tampered with used vehicles." Under this heading, many of the factual allegations are quite similar to those made in the Wyoming Complaint related to software recalls.

However, the exception is the allegation contained in ¶82 of Plaintiff's Second Amended Complaint, wherein the State of Alabama alleges:

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[10] Wyoming Complaint ¶¶ 2-3
[11] Wyoming Complaint ¶164
[12] Wyoming Complaint ¶167-68

"The first instance concerns the installation of the 'steering wheel recognition function' on used vehicles in Alabama. In or about 2012, used Subject Vehicles began to develop hardware failures. Volkswagen AG engineers determined that the failures were the result of Subject Vehicles starting in 'dyno' test mode, meaning that the emissions control system was turned on. Volkswagen AG and VWGOA employees decided to add a 'steering wheel recognition function' to new and used Subject Vehicles to allow these vehicles to start in 'street' mode, meaning that the vehicle now started with the emissions control system turned off. Volkswagen AG and/or VWGOA then ordered mechanics at Volkswagen-branded dealerships in Alabama to install the new software function on used vehicles in Alabama."

In the Wyoming Complaint, the State of Wyoming made the following claims:

Claim I – Concealing Emissions

Under this Claim, Wyoming alleges that as of November 1, 2015, there were 1,196 Subject Vehicles operating in the State of Wyoming and the violation alleged was that the Defendants had "installed software in the Subject Vehicles that conceals the vehicles' actual emissions of nitrogen oxides by activating air pollution control systems only when the vehicles are undergoing emissions testing and not during normal on-road operating."[13]

Claim II - Tampering

Under this Claim, Wyoming alleges that as of November 1, 2015, there were 1,196 Subject Vehicles operating in the State of Wyoming and the violation alleged was that the Defendants had "intentionally installed software in the Subject Vehicles that renders certain air pollution control devices and systems required under federal law, inoperable or ineffective during normal driving conditions."[14]

In the State of Alabama's Second Amended Complaint, Alabama states its claims in two counts as well, as follows:

Count I – Concealing emissions by disconnecting or disabling an exhaust emissions control system in violation of ADEM Admin. Code Regulation 335-3-9-.06 with respect to new motor vehicles.

Count II - Concealing emissions by disconnecting or disabling an exhaust emissions control system in violation of ADEM Admin. Code Regulation 335-3-9-.06 with respect to used motor vehicles. The operative allegation under Count II states:

[13] Wyoming Complaint ¶228
[14] Wyoming Complaint ¶235

"Defendants and/or persons acting on behalf of Defendants caused or allowed the disconnection or disabling of the exhaust emission control system installed on a motor vehicle each and every time Defendants or someone acting on Defendants' behalf installed, updated, or otherwise maintained defeat device software on a vehicle that was licensed or registered in Alabama. (emphasis added.)[15]

This language underlined as cited hereinabove from Plaintiff's Second Amended Complaint, is lifted from *42 U.S.C.A. ¶7543(d)* which provides:

"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."

The Court must consider whether Plaintiff's have artfully pled themselves into a Section 209(d) claim, or whether the substance of the allegations actually fall under the complete preemptive provisions of Section 209(a) of the Clean Air Act.

The substance of the allegation, contained in ¶82 of Plaintiff's Second Amended Complaint, is that the Defendants, as manufacturers of the Subject Vehicles[16], created a software update to be fitted on the said vehicles to more efficiently allow the auxiliary emission control devices (AECD) or, "defeat devices", to function so as to mask the subject vehicles' actual emissions during testing.

In much the same way, Plaintiff in the Wyoming Complaint sought to hold Defendants liable under Wyoming's SIP for issuing recalls to update the computer software to create the same result, namely, a better way for the defeat device to operate so as to mask the true exhaust emissions of the subject vehicle.

Looking to the ***Allway Taxi*** criteria, in order for a field of State regulation and enforcement to open under Section 209(d) of the CAA, 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 specter of an anarchic patchwork of federal and state regulatory programs". Plaintiff's Count II, though addressed to alterations made to used vehicles, nevertheless, does not allege that any "third party" performed the alterations. Rather the allegation is that the Defendant manufacturers produced the software update and therefore only they can be held liable

[15] Plaintiff's Second Amended Complaint ¶126
[16] Audi, Porsche and Volkswagen diesel engine vehicles starting with the 2009 model year. Plaintiff's Second Amended Complaint ¶2

since they are the only alleged manufacturer and supplier of the "steering wheel recognition function" software. Plaintiff seeks to hold Defendants liable for civil penalties under the doctrine of respondeat superior or agency since the modification was sent to authorized dealerships of Defendant manufacturers.

Though 59 Fed. Reg. 31306–01, 31329-30, cited hereinabove, states that federal preemption does not preclude a State from imposing its own exhaust emission control standards upon the resale or reregistration of in use motor vehicles, nor from setting standards for licensing of vehicles for commercial use, these types of 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 individual owners and in-state users and not on manufacturers and distributors.

While Plaintiff has not pled that the "used motor vehicles", which were made the subject of the installation of steering wheel recognition function software, were motor vehicles that had been resold or recertified, or that the said "used motor vehicles" were licensed for commercial use, State regulation and enforcement actions can be had only if to do so would not burden interstate commerce and the burden of enforcement would fall on individual owners of the said vehicles rather than on the manufacturer. However, in the case before the Court, the enforcement action is directed exclusively to the manufacturers and that is where the burden of any remedy would fall.

The Court therefore finds that the Court in ***In re Volkswagen "Clean Diesel"***, *supra*, has spoken to the issue of State regulation and enforcement of standards with regard to "in-use" motor vehicles in a way that forecloses Plaintiff's claim under Count II as well.

WHEREFORE, the foregoing matters and authority having been considered by the Court, the following is hereby **ORDERED**:

1. Defendant's motion to dismiss Plaintiff's Second Amended Complaint on grounds that the affirmative defense of complete federal preclusion of the State claims presented is hereby **GRANTED**.

2. Defendant's motion to stay said discovery filed on September 18, 2017 and Plaintiff's motion to compel discovery filed on September 25, 2017 are both rendered **MOOT** by the Court's order entered on this date.
3. Each party to bear their own costs.

DONE AND ORDERED ON THIS THE 18th DAY OF DECEMBER, 2017.

JOSEPH L. BOOHAKER
PRESIDING CIRCUIT JUDGE