NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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OPINION LETTER

Re: *In re: Volkswagen "Clean Diesel" Litigation, CL-2016-9917*

Dear Counsel:

After announcement of an Environmental Protection Agency ("EPA") investigation into the emissions performance of several models of Volkswagen diesel automobiles, all Plaintiffs, owners of affected vehicles, brought cases against Defendant Volkswagen Group of America ("VWGA") and some additionally brought claims against certain dealerships. The cases raise, to varying degrees of similarity, claims of fraud, violations of the Virginia Consumer Protection Act ("VCPA"), violations of Virginia's Motor Vehicle Warranty Enforcement Act ("Lemon Law"), and other breaches of warranty. After initially seeking but failing to remove the cases to federal court, VWGA moved to have these cases consolidated for pre-trial proceedings under Va. Code Ann. § 8.01-267.4. On June 15, 2016 a three-judge panel ordered that the cases be coordinated before this Court.

The Parties filed numerous pre-trial motions including VWGA's request for a stay of all cases pending final approval of a class action settlement; Demurrers to all claims; Plaintiffs' Motions for Temporary Injunctions and Partial Summary Judgment in three cases; and other matters not addressed in this Letter Opinion. The Court held an initial status and scheduling hearing on July 14, 2016, resulting in "Pre-Trial Order #1" and established a hearing date for the Motion to Stay, all pending Demurrers, the two Motions seeking temporary injunctive relief, and the two Partial Summary Judgment motions. This Letter Opinion addresses all motions with the exception of the motions for summary judgment, which will be addressed under an independent Order.

The Court heard argument on August 11, 2016, and took the matters under advisement. The Court has since had the opportunity to consider the Parties' arguments on brief and in open Court and rules as set forth herein.

MOTION TO STAY

VWGA requests that these cases be stayed pending final approval of the federal class action settlement currently before the U.S. District Court for the Northern District of California. VWGA emphasizes the extent of the litigation and progress towards settlement in California, and notes that preliminary approval was granted on July 26.

A. VWGA's Arguments

VWGA argues a stay until final settlement approval would allow litigants to know their full options before proceeding in Court, and would streamline the litigation process by eliminating Plaintiffs who choose settlement, benefitting the Parties and judicial

economy. VWGA argues stays are "regularly" imposed on state cases in matters subject to multi-district settlement in service to judicial economy.[1]

B. Plaintiffs' Arguments

Collectively, Plaintiffs respond by first asserting they raise state law claims in Virginia as Virginia citizens against a Virginia citizen. Plaintiffs also refer to a pre-trial order in the federal case, which asserted it was not intended to prescribe how or whether parallel state court cases should proceed. *Id.* Plaintiffs assert Virginia law requires the cases move forward, and that delay would hinder their ability to make informed decisions, as staying the Virginia claims will "entice" Plaintiffs to take the "only option then on the table." Mr. Feinman, on behalf of his clients, further characterizes the settlement as a "scheme to defraud Virginians" because it does not explain the full recovery allowed under Virginia law and because VWGA, under his analysis, has falsely asserted that the affected vehicles are legal to drive on Virginia roads.

C. Analysis

The granting of a stay pending the outcome of an action in another court is in the sound discretion of the Court and is based on consideration of factors including the identity of the parties and issues in both actions; the time of filing; promotion of judicial efficiency; and possible prejudice to a party as a result of the stay.

Here, the Virginia Plaintiffs are subject to the proposed settlement and identity of the parties is not at issue. The timing between the Virginia cases and the federal case is not dispositive. That leaves questions of prejudice and judicial economy. Considering the latter first, these cases involve numerous parties and complicated claims, suggesting that judicial economy could be served by elimination of settling Plaintiffs.

Turning to prejudice, under the proposed settlement Plaintiffs could choose to have their car repaired or bought back by VWGA at market value, and would receive some amount of restitution. By comparison, Plaintiffs' Virginia claims could give rise to full replacement or refund (Va. Code Ann. §59.1-207.12 (2016)) and/or punitive damages for fraud or treble damages for willful violations of the VCPA (*see, e.g.*, Va. Code Ann. § 59.1-204(A) (2016)). The VCPA and Lemon Law also provide for attorneys' fees. As a

[1] VWGA cites *Van Zant v. Apple, Inc.*, 229 Cal. App. 4th 965, 971-72 (Cal. Ct. App. 2014); *Van Emden Mgmt. Corp. v. Marsh & McLennan Cos.*, 05-0066-A, 2005 Mass. Super. LEXIS 484, at *5-8 (Mass. Sept. 21, 2005); *Toledo v. Medical Eng'g Corp.*, No. 136, 2000 Pa. Dist. & Cnty. Dec. LEXIS 205, at *2 (Comm. Pleas Ct. Dec 29, 2000); *Ex parte State Mut. Ins. Co.*, 715 So.2d 207 (Ala. 1997).

result and as Plaintiffs note, staying this litigation would offer strategic advantages favoring VWGA while disserving Plaintiffs' full understanding of their possible remedies. Thus by increasing uncertainty about potential damages recoverable under Virginia law, a stay would work a prejudice to the Plaintiffs. Additionally, consolidation of these cases for pre-trial proceedings has already dramatically increased judicial economy.

Because the prejudice to Plaintiffs outweighs any remaining benefits to judicial economy, the Court denies the Motion to Stay.

DEMURRERS

Plaintiffs have filed Complaints raising similar, but not identical, claims. The complaints variously bring claims for Actual Fraud, Fraud by Concealment, Violations of the VCPA, Violations of Virginia's Lemon Law, and Breaches of Express and Implied Warranty. For its part, VWGA has filed Demurrers in nearly all cases raising two arguments with universal application to all Plaintiffs and all claims: preemption and that a stay is required under the primary jurisdiction doctrine. VWGA asserts additional arguments specific to the allegations of each Complaint, most notably challenging the sufficiency of Plaintiffs' fraud claims. For the reasons that follow, VWGA's Demurrers are sustained in part and overruled in part.

I. PREEMPTION

VWGA first asserts all Plaintiffs' claims are expressly or impliedly preempted under the Clean Air Act ("CAA"). The Court agrees, in part, with VWGA.

A. VWGA's Arguments

VWGA argues that federal emissions standards and the surrounding body of legislative history, case law, and statutes compel the conclusion that the CAA represents a "comprehensive regulatory scheme" preempting all claims in Virginia courts. The gist of VWGA's position is that the CAA entirely preempts state suits, that the actions here "seek to end-run the EPA's exclusive authority," and that the claims are expressly or impliedly preempted or, alternatively, subject to a stay under the primary jurisdiction doctrine.[2] By way of example, VWGA cites from the CAA and federal regulations setting procedures for manufacturers to meet emissions standards; establishing specific consumer rights including a prescribed warranty; granting EPA exclusive authority and discretion to

[2]In support, VWGA cites *Jackson v. General Motors Corp.*, 770 F. Supp. 2d 570, 573 (S.D.N.Y. 2011), *In re Detroit Diesel Corp. v. Office of Attorney Gen.*, 709 N.Y.S. 2d 1, 8 (N.Y. 1st Div. App. 2000)).

determine and enforce emissions standards; and requiring claims be brought in federal court.

Having set forth this statutory review, VGWA argues all of the state law claims here are expressly preempted under the CAA. Arguing the claims here effectively use Virginia law to enforce the federal standards, VWGA concludes the claims are expressly pre-empted. VWGA further argues the claims are impliedly preempted because federal law "occupies the field" of new car emissions such that Plaintiffs' claims would "stand as an obstacle" to Congressional objectives under the CAA.

B. Plaintiffs' Arguments

The Plaintiffs represented by Mr. Feinman counter there is no preemption arguing "air pollution at its source is the primary responsibility of States and local governments." Pls.' Mem., 2 (quoting 42 U.S.C. § 7401(a)(3)). Plaintiffs review the general scheme under Title I of the CAA, where states establish air quality control regions within which to apply federal standards and implement State Implementation Plans ("SIPs") to adhere to those standards. Plaintiffs further assert their claims are not preempted because they seek to recover damages arising out of their ownership and operation of their used, rather than new, vehicle, and the mere presence of a federal emissions regulation standard as an element of their state cause of action is not a basis for preemption.

Plaintiffs represented by Ms. Kelly also argue against preemption, asserting the CAA's express preemption language precludes states from imposing their own emissions standards, but does not preempt individual consumer claims brought under state law.[3] Plaintiffs further argue that cases relied upon by VWGA are inapposite insofar as they addressed direct state actions brought by attorneys general.

C. Analysis

The federal preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, but "starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc., et al.*, 505 U.S. 504, 516 (1992); *see also* U.S. CONST., ART. VI, cl. 2. In interpreting the meaning of an express preemption

[3] In support, Plaintiffs cite *North Carolina ex rel. Cooper v. Tennesee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) (addressing emissions controls at a power plant under Title I of the CAA); *Freeman v. Grain Processing Corp.*, 848 N W.2d 58 (Iowa 2014) (addressing preemption of nuisance claims under Title I of the CAA), *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgt. Dist.*, 541 U.S. 246 (2004) (addressing at Title II claim, and noting that while 42 U.S.C. § 7543(a) broadly preempts state action and claims, it does not do so "in toto.").

clause, courts apply plain meaning rules of interpretation to the precise language of the statute, and Congress' use of "relating to" language in a preemption clause is to be given a broad, but not unlimited, scope. *See Morales v. TWA*, 504 U.S. 374 (1992); *Cipollone*, 505 U.S. 523-24; *Engine Mfrs.*, 541 U.S. at 258-59. In an implied preemption challenge, state claims survive as long as they do not interfere with a "significant federal regulatory objective." *See Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323, 328 (2011).

In *Cipollone*, the U.S. Supreme Court found federal cigarette labeling requirements preempted state laws and state law claims insofar as state claims constituted a "requirement or prohibition" on the "advertising of promotion of cigarettes." *Cipollone*, 505 U.S. at 523-24, 525-26. Simultaneously, however, the Court recognized that any claims unrelated to advertising, including the "general obligation not to deceive" in a fraud claim, as well warranty claims resulting from private contractual obligations, could go forward. *Id.* at 528-29. In comparing the text of the 1965 and 1969 Cigarette Acts, the Court noted increased breadth in the latter, which added, "[n]o requirement or prohibition based on smoking and health shall be imposed under State law." *Id.* at 515 (quoting 15 U.S.C. § 1334(c) (2016)). The Court held that the reference to "state law" encompassed not only state legislative action, but state common law action as well because "the language of the Act plainly reaches beyond such enactments." *Id.* at 521-22. In recognizing the continued vitality of state law fraud claims, however, the Court noted, "the common law is not of a piece," and that

> [i]nstead we must fairly but -- in light of the strong presumption against pre-emption -- narrowly construe the precise language . . . . The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition . . . imposed under State law.'

Id. at 523-24. In reaching its conclusion that the warranty claims survived, the Court noted that contractual requirements in a warranty are imposed by the warrantor rather than the state, and the preemption language of the 1969 Act barred only requirements or prohibitions imposed by the state. *Id.* at 515, 525-26.

Similarly, and within the context of implied preemption, the U.S. Supreme Court's decision in *Williamson* addressed tort claims arising out of Mazda's decision to provide only lap belts, and not seatbelts with shoulder restraints, in the rear center seat during a time when federal regulation permitted manufacturers to use either. *Williamson*, 562 U.S. at 326-27. In an earlier case, where giving a manufacturer a choice between automatic seatbelts and airbags was a "significant federal regulatory objective," the Court had determined a similar tort claim was preempted. *Id.* at 328-30 (citing *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)). Unlike the significant objective of giving

manufacturers a choice in *Geier*, the *Williamson* Court noted the choice between lap-only and lap-and-shoulder belts in rear seats was not a significant goal under the regulations, but was rather a matter of practical choice, cost, and other considerations. As such, the Court found the state claim was not preempted even if permitting it would effectively constrain manufacturers, because it did not interfere with a significant federal regulatory objective. *Id.* at 333-36.

Turning to the CAA, it bears emphasizing the statute is divided into distinct titles, each of which focuses on different sources of air pollution. Title I addresses fixed sources of pollution such as factories and power plants. *See* 42 U.S.C. §§ 7401-7431 (2016)). Title I envisions state enforcement of federal standards, broadly empowering states with the authority to determine for themselves how to comply with federal fixed source emissions limits through SIPs. *See* 42 U.S.C. §7410. Title II, by contrast, addresses mobile sources of air pollution including motor vehicles, and is the only Title whose provisions are at issue in these suits. *See* 42 U.S.C. §§ 7521-7590. Significantly and as compared to Title I, Title II establishes federal, EPA enforcement of nationally set emissions standards. *See generally* 42 U.S.C. §§ 7521, 7523. As part of that effort to centralize emissions enforcement, Title II contains the express preemption clause at issue:

> 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 U.S.C. § 7543(a) (2016). The preemption clause is central to the federal regulatory framework imposed on vehicle emissions such that the Second Circuit has noted, "The cornerstone of Title II is Congress' continued express preemption of state regulation of automobile emissions." *Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dep't of Envt'l Conservation*, 17 F.3d 521, 526 (2d Cir. 1994).

On its face, § 7543(a) bars any direct state adoption of emissions standards, or enforcement of the same. Further, and in terms even more direct than the language used in *Cippollone,* the provision expressly bars a state's political subdivisions from "attempting to enforce any standard relating to" emissions control from new vehicles, thereby encompassing state legislative, executive, or judicial acts.

Congress' use of the "relating to" language carries particularly broad preemptive effect. Specifically, "relating to" language appears and has been interpreted in other federal enforcement schemes, including aviation. In *Morales*, the Court found states could not regulate airline advertising as a pretext to regulation of airlines after deregulation because the laws violated an express pre-emption in the 1978 Airline

Deregulation Act barring states from "enacting or enforcing any law, rule, regulation, provision, or other provision having force and effect of law relating to rates, routes or services of any air carrier . . . ." *Morales*, 504 U.S. at 383. The *Morales* Court held that state action "relates to" regulated conduct "if it has a connection with or reference to such [conduct]." *Id.* (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983) (addressing preemption language in ERISA).

Under *Cipollone* and *Morales*, this Court holds that the CAA expressly bars state statutory and common law claims if the legal duty that is the predicate of the action "relates to" enforcement of new motor vehicle emission standards.[4] Under *Geier* and *Williamson*, this Court further holds that claims are preempted if permitting them to go forward would interfere with the significant federal objective under the CAA of controlling emissions standards from new motor vehicles through EPA enforcement.

With the foregoing analysis in mind, the Court addresses Plaintiffs' claims.

On their face, Plaintiffs' fraud and VCPA claims do not rely on emissions violations or enforcement to make out their claims. Instead Plaintiffs' claims rely upon allegedly false promises of compliance, efficiency, and new technology; or concealment of the fact that compliance testing was being circumvented. Although Plaintiffs reference the EPA violation notice in support of their allegations of falsehood and concealment, their claims ultimately rest on and seek remediation of injuries arising from misrepresentations and concealment of material facts made to (or hidden from) the Plaintiffs about the compliance, efficiency, and technology of their vehicles. This is distinguished from the claims in *Jackson* and *Detroit Diesel*, which sought to recover for injuries from the alleged noncompliance itself, or alleged fraud based on statements or representations made to federal regulators by manufacturers in procuring emissions compliance certificates.

Plaintiffs' lack of reliance on emissions standards is further revealed when one considers whether Plaintiffs even need to assert lack of compliance in raising their fraud and VCPA claims. Plaintiffs point to advertising materials and news releases promising

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[4] The *Jackson* and *Detroit Deisel Corp.* holdings regarding the preemptive scope of § 7543(a) are reflective of and compatible with this holding The *Jackson* Court found express preemption of state law tort claims by individuals after allegedly having ingested fumes from noncompliant engines because it is "clear that a state common law tort action that questions whether a defendant complied with standards promulgated under the CAA is an example of a state attempting to enforce the CAA, and is therefore subject to preemption" *Jackson*, 770 F. Supp. 2d at 575. Similarly, the *Detroit Diesel Corp.* Court found state common law claims for fraud raised by an attorney general against manufacturers' use of a "defeat device" similar to the ones here were expressly preempted because "[i]n pursuing the common-law claims, the Attorney General is not, as he suggests, attempting to enforce an existing State standard or pursue a simple common-law claim but, rather, is seeking to use this State's common law to penalize the manufacturers for producing engines which failed to comply with the Federal standards." *Detroit Diesel*, 709 N.Y.S. 2d at 9.

not only compliance with regulations, but also describing new technologies developed by VWGA and offering improved fuel economy. Plaintiffs also point to VWGA's public statement that it had been "dishonest" to consumers in such advertising. As such, and although emissions compliance or lack thereof may be further proof of deceit, it is the deceit about compliance, rather than the need to enforce compliance, that is the gravamen of Plaintiffs' claims.

Similarly, under *Williamson*, there has been no argument, nor can the Court find any basis to conclude, that a significant federal regulatory goal of the CAA is consumer protection from false advertising claims regarding emissions compliance, vehicle efficiency, or implementation of new emissions technology. As such, Plaintiffs' fraud and VCPA claims are not impliedly preempted because their claims do not interfere with any significant federal regulatory goal within the CAA.

Because Plaintiffs' fraud and VCPA claims are based on alleged misrepresentations that do not rely on or seek to enforce any emissions standards, and because they will not interfere with any significant CAA regulatory objective, VWGA's Demurrers to those claims on the basis of preemption are overruled.

Analysis of Plaintiffs' claims for Temporary Injunctive Relief, Virginia Lemon Law violations, breaches of warranty, and Public Nuisance yields a different outcome. As noted above, the broad "relating to" language of the CAA's preemption clause bars any state act that would "relate to" enforcement of any emissions standards. Here, the relief sought in each of the injunctive counts, Lemon law claims, warranty claims, and public nuisance claims directly relates to enforcement of emissions standards because the basis for the breach or nuisance is violation of the federal emissions standards.

In the injunctive claims, Plaintiffs seek a mandatory injunction requiring VWGA to provide either Plaintiffs or, in the public nuisance claim, every Virginia driver, with a no cost lease or rental of an emissions-compliant vehicle.

The "legal duty" that is the predicate of these claims is compliance with CAA emissions standards such that the "relation to" enforcement of emissions standards is direct. It is hard to imagine a stronger example of invoking a state claim to enforce a federal regulation. VWGA's Demurrers to the claims for injunctive relief are sustained with prejudice.

Similarly, the Virginia Lemon Law and breach of warranty claims cite Plaintiffs having to drive an "illegal" vehicle or one that fails to comply with emissions regulations as the source of their injury. Their relief sought is similar to the relief sought in *Jackson* and *Geier*, where such claims were deemed preempted. As a result, Plaintiffs' Lemon

Law and warranty claims impermissibly relate to the express preemption against enforcing vehicle emission standards, and are further impliedly preempted because permitting parties to bring a warranty claim on the basis of a violation of federal emissions law would directly interfere with a central object of federal emission regulation: enforcing manufacturer's compliance with emissions standards.

This conclusion is further reinforced by the exclusive federal jurisdiction provided within the CAA for the bringing of claims against manufacturers for noncompliance, and the existence of a separate warranty within Title II of the CAA itself. *See* 42 U.S.C. §§ 7523, 7541(a). The former blunts Plaintiffs' arguments that they are entitled to pursue relief in state court under the "citizens suit" provision, which provides only for federal adjudication following adherence to particular notice and filing provisions, and the latter undermines Plaintiffs' contention that the CAA applies only to new, unsold vehicles. VWGA's Demurrers to all Plaintiffs' warranty and Virginia Lemon Law claims are sustained with prejudice.

II. VWGA REQUESTED STAY UNDER PRIMARY JURISDICTION DOCTRINE

Related to its preemption argument is VWGA's assertion that Plaintiffs' claims should be stayed because they rely upon a matter of EPA enforcement and therefore fall within the EPA's primary jurisdiction. Mr. Feinman's Plaintiffs respond that the request should be denied to "prevent an ongoing fraud" resulting from unnecessary delays and false promises of the vehicles' continued legal status on Virginia roads. Ms. Kelly's Plaintiffs additionally argue the Virginia fraud, VCPA, and warranty claims cannot be adjudicated by the EPA, are not subject to any EPA determinations.

As a preliminary matter, this is not a fit question to be raised on Demurrer, which tests only the legal sufficiency of the claims stated in the pleading challenged. *Thompson v. Skate Am., Inc.*, 261 Va. 121, 128 (2001). However, and as discussed above, Plaintiffs claims that survive preemption do not rely on any EPA determination because they make out claims based on misrepresentations to Plaintiffs by VWGA. Additionally, for the reasons discussed above on the Motion to Stay, a stay of this litigation works an unwarranted prejudice to Plaintiffs' claims. As a result, VWGA's additional requests for a stay within its Demurrers are denied.

III. ACTUAL FRAUD AND FRAUD BY CONCEALMENT

Regarding the fraud claims, Plaintiffs plead two different variations of a cause of action for actual fraud. Some Plaintiffs have alleged a claim for actual fraud by misrepresentation while others have alleged claims of fraud by concealment. In Virginia, "[t]he elements of actual fraud are: (1) a false representation, (2) of a material fact, (3)

made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Winn v. Aleda Constr. Co.*, 227 Va. 304, 308 (1984). Notwithstanding the clear pleading requirements for actual fraud, the Supreme Court of Virginia has continuously held that "[c]oncealment of a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exists, is as much fraud as if existence of the fact were expressly denied." *Metrocall of Delaware v. Continental Cellular Corp.*, 246 Va. 365, 374 (1993) (citing *Clay v. Butler*, 132 Va. 464, 474 (1922)). As such, those claims that assert fraud by means of intentional concealment of a material fact of the transaction may be maintained even without asserting an affirmative false representation. *Id.* The misled party claiming fraud must, however, still demonstrate the reasonable reliance on the misrepresentation. *See id.*, citing *American Sur. Co. v. Hannah*, 143 Va. 291, 301 (1925).

Here, VWGA has filed a Demurrer to each of the fraud claims arguing that Plaintiffs failed to plead a misrepresentation of fact with the specificity and particularity required to survive Demurrer. Specifically, VWGA demurs to each complaint as having failed to identify any VWGA employee as having made the fraudulent claim. Put differently, VWGA's Demurrer seeks a single false statement by a single person within the company giving rise to fraud.

The first group of substantively similar complaints the Court will address includes *Claytor, et al. v. Volkswagen Group of America,* CL-2016-10654 and CL-2016-10763; *Fleshman, et al. v. Volkswagen Group of* America, CL-2016-9927 and CL-2016-9928; *Grose, et al. v. Volkswagen Group of America,* CL-2015-9929 and CL-2016-9930; *Davidson, et al. v. Volkswagen Group of America,* CL-2016-8642; *Lum, et al. v. Volkswagen Group of America,* CL-2016-8645; and *Bredemeier, et al. v. Volkswagen Group of America,* CL-2016-8647 [hereinafter "the *Claytor* complaints"]. These complaints claim actual fraud as well as fraud by concealment. The misrepresentations relied upon are general advertising statements and media interview statements made by VWGA. The complaints allege Volkswagen's continuous advertisement and marketing of its vehicles as "Clean Diesel." The complaints also allege an interview statement made by then Volkswagen CEO, Mark Barnes, published on October 9, 2009 regarding the low vehicle emissions and environmental benefits of Volkswagen's TDI engine and "Clean Diesel" technology. The complaints further cite statements made on VWGA's website regarding the benefits of the "Clean Diesel" technology. The complaints allege the statements were intended to make Plaintiffs believe the vehicles were environmentally superior and complied with emissions standards. Plaintiffs assert they relied on the advertising and statements, and were induced to purchase their vehicles as a result. As for damages, the Plaintiffs claim the contract prices of their vehicles, collateral costs, and finance charges they would not have paid but for being induced to purchase their vehicles.

The *Claytor* complaints also include an allegation of fraud arising from VWGA having concealed facts it was required to disclose. The complaints contain statements by Volkswagen CEO Michael Horn made on September 21, 2015, September 29, 2015, and October 8, 2015 acknowledging concealment of the existence of the "defeat device" software. In conjunction with Plaintiffs' reliance on the environmental claims made by VWGA, the *Claytor* Plaintiffs have sufficiently plead actual fraud by both misrepresentation and concealment. VWGA's Demurrers to the claims for fraud in Count V of the *Claytor* complaints are therefore overruled.

The next group of substantively identical complaints alleging fraud includes *Campbell v. Volkswagen Group of America*, CL-2015-13950 and CL-2015-14287; *Mayer v. Volkswagen Group of America*, CL-2016-0023; *Zelonis v. Volkswagen Group of America*, CL-2015-13746; *Nunes v. Volkswagen Group of America*, CL-2015-15612; and *Van Houten v. Volkswagen Group of America,* CL-2015-16396 [hereinafter "the *Campbell* complaints"]. These complaints assert causes of action for fraud by concealment. The *Campbell* Plaintiffs plead VWGA purposefully and intentionally concealed the existence of a "defeat device" and that the existence of the defeat device was a material fact in each transaction. The *Campbell* Plaintiffs also plead the existence and concealment of the "defeat device" was intended to mislead so that they were unable to discover the device using due diligence, and that they relied on the non-existence of such a device in making their purchase decisions. The *Campbell* complaints allege damages from purchase costs, taxes, maintenance, insurance, and financing. The *Campbell* complaints sufficiently plead fraud by concealment and VWGA's Demurrers to those claims are overruled.

Next, VWGA demurred to the fraud claim in *Varky, et al. v. Volkswagen Group of America*, CL-2016-5460, again arguing the Plaintiffs failed to plead fraud with the required specificity. The *Varky* complaint contains a single count for fraud that encompasses both fraud by concealment and fraud by misrepresentation. The complaint alleges statements made in a 2008 Volkswagen press release, the same statements alleged in the *Claytor* complaints. In addition, the *Varky* complaint alleges 2014 statements regarding fuel efficiency from Volkswagen technical manager, Douglas Skorupski. The complaint then alleges that Plaintiffs relied on the intentional misrepresentations of VWGA in deciding to purchase their vehicles and that they would not have purchased their vehicles if they knew about the defeat device.

In reference to the fraud by concealment claims, the *Varky* Complaint alleges statements made by Volkswagen AG CEO Dr. Martin Winterkorn and VWGA CEO Michael Horn acknowledging the intentional concealment of the "defeat device." Lastly, the *Varky* complaint alleges damages of diminished value of the vehicles, increased insurance premiums, and loss of enjoyment and use of their vehicles. Because the *Varky*

complaint sets forth sufficient facts and allegations to plead fraud by both misrepresentation and concealment, VWGA's Demurrer to fraud in Count II in the *Varky* Complaint is overruled.

Amato v. Volkswagen Group of America, et al., Royals v. Volkswagen Group of America, et al., and *Schwalm v. Volkswagen Group of America, et al.* [hereinafter "the *Amato* complaints"] are another group of substantively identical complaints that each include a claim for fraud in Count III. The *Amato* complaints allege fraud by misrepresentation rather than concealment. VWGA argues the *Amato* Plaintiffs fail to plead a specific statement made by VWGA, its employees, or its representatives with sufficient particularity or specificity. While containing several statements and facts indicating that the existence of a "defeat device" was concealed from Plaintiffs, the complaints fail to actually allege a false statement of fact attributable to VWGA, its employees, or representatives with the requisite level of particularity.

The complaint vaguely references statements on a Volkswagen supported website including some statements of opinion, but does not identify when the statements were made or observed. Additionally, because the allegations lack specificity for when the website statements were made and observed, it is unclear whether Plaintiffs reasonably relied on these particular statements at the time of purchase. "[W]here fraud is relied on, the [pleading] must show specifically in what the fraud consists, so that the defendant may have the opportunity of shaping his defense accordingly, and since [fraud] must be clearly proved it must be distinctly stated." *Mortarino v. Consultant Eng'g Servs.*, 251 Va. 289, 295 (1996) (citations omitted). The *Amato* Plaintiffs do not give VWGA adequate notice to shape its defense and rebut any specific fraudulent misrepresentation. As a result, VWGA's Demurrers to the claims for fraud in Count III of the *Amato* complaints are sustained with leave to amend.

Lastly, the complaint in *Via v. Volkswagen Group of America* claims fraud in Count I based on a theory of fraud by misrepresentation. VWGA demurs, arguing again that Mr. Via fails to claim fraud with the requisite level of particularity. It is well settled in Virginia that for torts involving a conflict of laws, Virginia applies the *lex loci delicti*, or place of the wrong, standard. *Jones v. R. S. Jones & Assocs.*, 246 Va. 3, 5 (1993). As a result, in this case, the substantive law of Tennessee law applies as the vehicle was purchased in Tennessee. Any possible reasonable reliance took place in Tennessee when the purchase was made. In Tennessee, "[a] claim of fraud requires proof that (1) the defendant made a representation of an existing or past fact; (2) the representation was false when it was made; (3) the representation involved a material fact; (4) the defendant made the representation with knowledge that it was false or did so recklessly; (5) the plaintiff reasonably relied on the representation; and (6) the plaintiff was damaged by relying on the representation." *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 338 (Tenn.

2010). Here, Mr. Via failed to plead a claim of fraud with the specificity required. Mr. Via does not plead that VWGA made a false representation of a past or existing fact. The only fact alleged is that the brochure advertised excellent gas mileage and "good clean diesel fun." Neither of these statements represents an existing or past fact. As a result VWGA's Demurrer to Count I for fraud in the *Via* complaint is sustained with leave to amend.

IV. VIRGINIA CONSUMER PROTECTION ACT

The VCPA prohibits a number of practices that are alleged by Plaintiffs in these cases. As with the fraud claims, each Plaintiff's VCPA claim will be addressed based on the allegations made in that particular complaint.

Both the *Claytor* complaints and the *Campbell* complaints allege the same violations of the VCPA. The complaints allege violations under Va. Code Ann. § 59.1-200(A)(2), (5), (6), (8), and (14). VWGA demurs asserting, as with fraud, failure to allege the misrepresentations in question with sufficient specificity.

Va. Code Ann. § 59.1-200(A)(2) prohibits "[m]isrepresenting the source, sponsorship, approval, or certification of goods or services," Va. Code Ann. § 59.1-200(A)(5) prohibits "[m]isrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits." Va. Code Ann. § 59.1-200(A)(6) prohibits "[m]isrepresenting that goods or services are of a particular standard, quality, grade, style, or model." Va. Code Ann. § 59.1-200(A)(8) prohibits, "Advertising goods or services with intent not to sell them as advertised, or with intent not to sell at the price or upon the terms advertised." Finally, § Va. Code Ann. 59.1-200(A)(14) prohibits, "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction."

The *Claytor* Plaintiffs plead Volkswagen CEO, Mark Barnes' October 2009 statement that the vehicles were "clean enough to be certified in all 50 states." The Plaintiffs also plead that "on its website to promote 'clean diesel' technology,[5] [VWGA] falsely claimed that its Clean Diesel engine reduced smog and met standards in all 50 states, claiming success on the basis of modern fuel chemistry and innovative engine technology. Plaintiffs also plead VWGA had affirmative knowledge that the "defeat device" was used to defeat the regular emissions testing regime. The *Claytor* Plaintiffs therefore adequately alleged a factual misrepresentation regarding the certification, characteristics, and standard of the vehicles that are the subject of this suit. Plaintiffs also adequately alleged that VWGA advertised the vehicles with the intent not to sell them

[5] *See* www.clearlybetterdiesel.org

as advertised. Because the *Claytor* complaints have adequately pled all of their VCPA claims, VWGA's Demurrers to the VCPA claims in Count IV of the complaints are overruled.

The *Campbell* complaints also contain allegations of VWGA's false advertising of the vehicles and allegations of fraud by concealment in connection with each of the Plaintiffs' transactions. The complaints do not contain discrete misrepresentations made prior to the transactions to be proved at trial as would be the normal course, but instead allege VWGA's express acknowledgement of misrepresentations intentionally made regarding the "defeat device" and its purpose. While a claim of actual fraud by misrepresentation requires an express allegation of reliance upon the misrepresentation, the VCPA allows for an individual action by "[a]ny person *who suffers loss as the result of a violation.*" *See* Va. Code Ann. § 59.1-204 (emphasis added). The *Campbell* complaints allege that the Plaintiffs would have never bought the vehicle if they knew about the "defeat device" and that they suffered the loss of the purchase price, taxes, maintenance, insurance, loan payments, and other expenses. The *Campbell* complaints contain sufficient allegations to withstand a Demurrer to each of the VCPA claims. VWGA's Demurrers to the VCPA claims in Count I of the *Campbell* complaints are therefore overruled.

The *Varky* complaint alleges VWGA violated the VCPA by its intentional and fraudulent installation of the defeat device, misrepresentations and false certifications that the vehicles complied with EPA requirements, and falsely advertising and marketing the vehicles as "green" or "clean." VWGA's Demurrer to the VCPA claims in the *Varky* complaint argues both preemption, which has been previously addressed, and that Plaintiffs failed to plead their claims with the requisite particularity.

"Although Virginia is a notice pleading jurisdiction, a complaint must still "contain sufficient allegations of material facts to inform a defendant of the nature and character of the claim" being asserted by the plaintiff." *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 407 (2012) (internal citations omitted). Here, the complaints make several factual allegations but fail to specifically identify which of the prohibited acts they are alleging under Va. Code Ann. § 59.1-200. The complaints neither allege the specific statutory violation nor do they adopt the precise corresponding language. Consequently, they do not inform VWGA of the nature of the statutory claims being asserted. VWGA is left to guess at which facts constitute a violation and which specific violations are being asserted. VWGA's Demurrer to Count I for VCPA claims in the *Varky* complaint is therefore sustained with leave to amend.

The *Amato* complaints each contain a claim for violations under the VCPA in Count II. The violations asserted are for "[m]isrepresenting that goods or services have certain

quantities, characteristics, ingredients, uses, or benefits," Va. Code Ann. § 59.1-200(A)(5), "[m]isrepresenting that goods or services are of a particular standard, quality, grade, style, or model," Va. Code Ann. § 59.1-200(A)(6), and "[a]dvertising goods or services with intent not to sell them as advertised, or with intent not to sell at the price or upon the terms advertised." Va. Code Ann. § 59.1-200(A)(8). *Schwalm v. Volkswagen Group of America, et al.* likewise includes the aforementioned claims under the VCPA, but also includes, "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction." Va. Code Ann. § 59.1-200(A)(14).

VWGA demurs to the VCPA claims in the *Amato* complaints again on the grounds that Plaintiffs failed to plead their VCPA claims with specificity. The Plaintiffs in these cases plead allegations regarding specific advertisements that held the vehicles out as having low enough emissions to meet the standards of all 50 states. The Plaintiffs also plead VWGA's knowledge that these advertisements were not true given the "defeat device." The Plaintiffs sufficiently plead enough factual allegations to support their claims under the VCPA, so VWGA's Demurrers to the VCPA claims in Count II of the *Amato* complaints are overruled.

The *Via* complaint alleges VCPA violations in Count IV. The violations alleged are "[m]isrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits," Va. Code Ann. § 59.1-200(A)(5), "[a]dvertising goods or services with intent not to sell them as advertised, or with intent not to sell at the price or upon the terms advertised," Va. Code Ann. § 59.1-200(A)(8), and "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction." Va. Code Ann. § 59.1-200(A)(14).

Here VWGA demurs on two grounds. First, VWGA argues Mr. Via failed to plead how the VCPA applies to a Tennessee transaction. Second, VWGA demurs to the VCPA claims on the grounds that Mr. Via failed to plead what misrepresentation he relied on with the required amount of particularity.

Unlike a tort claim such as fraud, nothing in the VCPA requires that violation by a Virginia company involve a transaction taking place in the Commonwealth. Instead, there are clearly delineated prohibited practices applicable to all non-excluded consumer transactions and "[a]ny person who suffers loss as the result" may bring a claim. *See* Va. Code Ann. §§ 59.1-200, 204. Mr. Via's transaction was not one excluded by the provisions of the VCPA. *See* Va. Code Ann. § 59.1-199. Both "consumer transaction," and "person" are defined terms within the VCPA and neither term imparts any geographic limitation for the transaction. *See* Va. Code Ann. § 59.1-198. As such, VWGA's Demurrer on this ground is overruled.

As for the Demurrer for lack of particularity, even though there is no specific factual statement alleged, Mr. Via pleads facts that if taken as true establish that VWGA made a misrepresentation of the quality and characteristics of their vehicles in connection with his purchase. The *Via* Complaint alleges that VWGA marketed its vehicles as clean diesel and meeting all EPA standards, that VWGA installed a defeat device to mislead regulators, and that VWGA lied about emissions from the vehicle as it marketed it to the public. Mr. Via has alleged facts sufficient to withstand Demurrer in his claim for VCPA violations. VWGA's Demurrer to Count IV of the *Via* complaint is overruled.

MOTIONS FOR TEMPORARY INJUNCTION

On behalf of his clients and "all Virginia citizens similarly situated," Mr. Feinman has brought two Motions for Temporary Injunction. The first seeks to mandate loaner vehicles for his clients and all Virginia owners of allegedly affected VWGA vehicles. The second asks this Court to find that it has *in rem* jurisdiction over the vehicles such that it may limit VWGA to proceeding only in this Court as to Virginia's citizens. Each claim will be addressed in turn.

I. Emergency Motion to Have Previously Filed "Count II – Motion for Temporary Injunction" to be Deemed Filed and to be Heard at the Hearing on August 11, 2016

In their Second Amended Complaint, the *Claytor* Plaintiffs present the following:

> **Count II – Motion for Temporary Injunction**
>
> The plaintiffs move the Court for a temporary injunction compelling the defendant to immediately provide the plaintiffs with substitute or alternative transportation consisting of a loaner or rental vehicle at no expense . . . . This temporary remedy is [ ] necessary to prevent the plaintiffs' unwilling participation in the public nuisance of approximately 10,000 to 11,000 similar vehicles [with the defeat devices installed]. The temporary injunction . . . should continue . . . until the parties consummate the relief of rescission . . . .

2nd Am. Compl., ¶ 46. Elsewhere in their Complaints, under their public nuisance claim, Plaintiffs ask for injunctive relief for all Virginia citizens in the form of barring VWGA from proceeding in any other courts. *Id.* at ¶ 58-63. At some point both requests seem to have merged, as the Parties' briefs and arguments addressed loaner cars to named Plaintiffs and all Virginia citizens. *See, e.g.*, Def.'s Mem. Opposing Temporary Injunction, 1.

In any event and as discussed previously herein, the requested relief is expressly preempted under the CAA, so the Motion must be denied with prejudice. The Motion must be denied also because Plaintiffs have failed to show they are entitled to injunctive relief and because, to the degree the request is made on behalf of all Virginians owning potentially affected VWGA vehicles, the request cannot be entertained as Virginia does not permit class action suits. Because both the availability of temporary injunctive relief and the pursuit of claims on behalf of nonparties could be raised again on relief that is not preempted, the Court is compelled to address both the sufficiency of Plaintiffs' assertion of entitlement to injunctive relief, and their assertion of the right to sue on behalf of all affected Virginia VWGA vehicle owners.

A. Entitlement to a Temporary Injunction

Plaintiffs assert two statutory grounds for the relief requested. First, Plaintiffs point to Va. Code Ann. § 46.2-1048 and its corresponding state regulation, which prohibit the operation and use of a motor vehicle in the Commonwealth that has had its emissions system "rendered inoperable." Second, Plaintiffs point to the Virginia Lemon Law, which states, "If the manufacturer, its agents or authorized dealers do not conform the motor vehicle to any applicable warranty by repairing or correcting any defect or condition . . . The consumer shall have the unconditional right . . . to drive the motor vehicle until he receives either the replacement vehicle or the refund." Va. Code Ann. § 59.1-207.13(A)(2) (2016). On this basis, Plaintiffs assert they cannot legally operate their cars and are being denied their unconditional right to drive the vehicle. Plaintiffs further assert they have suffered irreparable harm and are entitled to relief because Virginia law enjoins "any owner" found to be violating Virginia Air Pollution Board regulations. Pointing to their Lemon Law and fraud claims, their "unwilling participation" in committing a public nuisance, and threats to their right to travel, Plaintiffs conclude the balance of the equities favors an injunction.

VWGA responds that the provision of rental cars to all Virginia Volkswagen owners and lessees is not cognizable in Virginia as it is a class action claim. VWGA also argues Plaintiffs are not entitled to temporary injunctive relief because they cannot demonstrate likelihood of success on the merits because the claims are preempted and neither the EPA nor the Commonwealth have declared the vehicles unfit to drive. VWGA further argues Plaintiffs cannot show irreparable harm because they are not presently at risk of civil or criminal penalties for driving the vehicles, so any harms are merely speculative. Finally, VWGA complains Plaintiffs fail to show the insufficiency of legal remedies such that equitable relief is justified.

To obtain a preliminary injunction Plaintiffs must establish they are likely to succeed on the merits, likely to suffer irreparable harm in the absence of preliminary relief,

the balance of equities tips in their favor, and an injunction is in the public interest. *The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342, 346-47 (4th Cir. 2009). The party seeking relief must show that the alleged harm is imminent, and not merely speculative or potential. *Ridgwell v. Brasco Bay Corp.*, 254 Va. 458, 462-63 (1997).

First, and as discussed above, the CAA bars Virginia from attempting to enforce any standard relating to the control of emissions. 42 U.S.C. § 7543(a) (2016). Injunctive relief requiring VWGA to replace a vehicle on the basis of its failure to comply with federal emissions regulations "relates to" enforcement of vehicle emissions standards and so is preempted. As such, Plaintiffs cannot show likelihood of success on the merits and the Motion must be denied.

Second, and even if the claim was not preempted, Plaintiffs fail to allege any imminent, irreparable harm that is more than merely speculative. Neither the EPA nor Virginia has declared the vehicles to not be road worthy or otherwise illegal. Plaintiffs make no allegation or showing, other than pure speculation, that revocation is imminent. Additionally, even if the vehicles were removed from the road, there is no argument that legal remedies are insufficient. Since the burden to show irreparable harm rests solely on the party seeking an injunction, the Motion must be denied.

B. Plaintiffs may not bring this action on behalf of all like-situated Virginia owners of VWGA vehicles because the claim does not fall within the narrow class of cases contemplated under 19th Century precedent, and the claim is disallowed under *Casey v. Merck.*

The Feinman Plaintiffs additionally argue they are entitled to bring suit on behalf of parties unaware of this litigation, unnamed by this action, and without any due process recourse to defend their own interests in this action. As the Virginia Supreme Court has recently explained, "A putative class action is a representative action in which a representative plaintiff attempts to represent the interests of not only named Plaintiffs, but also those of unnamed class members." *Casey v. Merck & Co.*, 283 Va. 411, 418 (2012). However, "Virginia jurisprudence does not recognize class actions" such that "[u]nder Virginia law, a class representative who files a putative class action is not recognized as having standing to sue in a representative capacity on behalf of the unnamed members of the putative class." *Id.*

Plaintiffs rely on a brief and all but abandoned span of jurisprudence from 1883 to 1892 for their conclusion that despite this clear bar to standing, Plaintiffs in equity may still pursue actions in a representative capacity. *See, e.g.*, *Bull v. Read*, 54 Va. 78 (1855) (addressing the constitutionality of tax assessments); *Blanton v. Southern Fertilizing Co.*,

77 Va. 335 (1883) (addressing taxation by "tagging" of fertilizer); *Bosher v. Richmond El.L.Co.*, 89 Va. 455 (1892) (addressing a shareholder suit for fraud). However, no procedures for such a process exist in Virginia, no rules have been adopted that would permit this Court to determine who the purported "like situated" Virginians are or how to manage any awards they might be entitled to after judgment. Further, the limited circumstances in which such actions have been embraced are actions against government officials for allegedly improper taxation and, in *Bosher*, a shareholder action. However, even in *Bosher*, the Court held:

> Where the fraudulent acts complained of are different and unconnected, the joinder is not allowed, because they are distinct and separate, although similar, as where agents procure subscriptions by fraudulent representations at different times and under varying circumstances, although similar in their general scope, because the defense is different and the acts are different and distinct, and the proofs are necessarily different, each dependent upon its own circumstances.

Bosher, 89 Va. at 464. Thus, and even if the plain language of the Virginia Supreme Court's ruling in *Casey* did not foreclose the kinds of actions contemplated long ago in *Bull, Blanton*, and *Bosher*, Plaintiffs here rely on the kind of "fraudulent representations at different times and under varying circumstances" that do not support a representative claim under Virginia law. As such, Plaintiffs lack standing to bring claims in a representative capacity and on behalf of like-situated Virginians, and all such claims are struck.

Because the requested relief is preempted under the CAA, because Plaintiffs have failed to carry their burden of showing they are entitled to a Temporary Injunction, and because they are not permitted to pursue claims on behalf of like-situated Virginians, the Motion for Temporary Injunction is denied with prejudice.

II. Motion for Temporary Injunction limiting VWGA from proceeding in any Court other than Fairfax Circuit Court as to Virginia's Citizens

This Motion, also brought by the Feinman Plaintiffs, contains no argument, but simply states the relief requested. The Second Amended Complaint briefly claims this Court may enjoin VWGA under *Kline v. Burke Constr. Co.,* 260 Va. 226 (1922). In argument, Plaintiffs relied on *Kline* and argued this Court has exclusive jurisdiction over these cases because they are *in rem* proceedings, with the *res* being the vehicles at issue. Plaintiffs asserted variously that the cars and the alleged "defeat devices" should be seen as VWGA property over which only Virginia Courts have jurisdiction.

In response, VWGA asserted *Kline* is inapposite as this is not an *in rem* claim. VWGA further argued Plaintiffs lack standing to bring any claim for relief as to all Virginia citizens because class actions are not permitted in Virginia. Finally, VGWA asserts Plaintiffs have failed to show entitlement to injunctive relief because they make no claim of irreparable harm.

Plaintiffs' Motion must be denied because *Kline* does not permit this Court to take exclusive jurisdiction for an *in personam* action, and no other basis for exclusive jurisdiction exists under Virginia law. The *Kline* decision holds that one court's ability to preclude another court from taking on a parallel action is predicated on an *in rem* suit. *Kline*, 260 U.S. at 229. The Court further held the injunctive authority of one court over another specifically does not apply to *in personam* actions. *Id.* at 227-28, 229. The Court finds this to be an *in personam* action and cannot invoke exclusive jurisdiction.

Plaintiffs raise common law and statutory *in personam* claims directly against VWGA. Plaintiffs bring claims for fraud by VWGA, violation of the VCPA and Lemon Law by VWGA, and, although subject to Demurrer, breaches of warranty by VWGA. Such claims are *in personam* claims and do not serve as a basis for exclusive jurisdiction. *See Kline*, 260 U.S. at 229; *Haney v. Wilcheck*, 38 F. Supp. 345, 356 (W.D. Va. 1941) ("It is well settled that actions *in personam*, as for damages arising out of a tort . . . may be brought in both a state and a federal court, without either ousting the jurisdiction of the other"); 5A M.J. Courts § 54; *see also* Morris E. Cohn, *Jurisdiction in Actions in Rem and in Personam*, 14 St. Louis L. Rev. 170, 170-71 (1929) ("An action *in personam* is one the judgment of which . . . affects the interests of the parties. It is, as one court phrases it, against a person, founded on the defendant's liability . . . . An action *in rem* is one whose judgment is an official decree of the status of a thing as it concerns [all] persons.").

Even assuming for argument purposes that Plaintiffs claim that the vehicles they bought and the components in them are still somehow property of VWGA, Plaintiffs do not bring this action against that property. As such the holding in *Kline* compels the conclusion this Court cannot take exclusive jurisdiction. The Motion is denied with prejudice.

PLEAS IN BAR & MOTIONS CRAVING OYER IN SCHWALM, AMATO, AND ROYALS CASES

In their Amended Complaints, Plaintiffs Jane Schwalm, Wendy Amato, and Rebecca Royals assert breach of contract claims against the dealers who sold them their VWGA vehicles. These Plaintiffs all allege breaches of the sales contracts occurring at the time of sale and delivery, and in each case that date occurred more than four years from the date their cases were filed.

The Defendant dealerships argue jointly the contract claims are time barred under the Virginia Commercial Code ("VCC"), which imposes a four-year statute of limitations on breach of contract claims, with accrual of the cause of action at the time of breach, "regardless of the aggrieved party's lack of knowledge of the breach." Va. Code Ann. § 8.2-725 (1), (2) (2016).

Plaintiffs take issue with the dealerships' reliance on the "lack of knowledge" language in the VCC, asserting it is not Plaintiffs' lack of knowledge, but Defendants' concealment that should toll the limitations period. Asserting they have raised allegations constituting "at least innocent or constructive fraudulent concealment" by the dealerships, Plaintiffs conclude their breach of contract claim was timely filed. Plaintiffs further argue that, to the degree the dealerships were not aware of the "defeat device" installed in the vehicles, they remain liable for breaches of contract under the law of agency and in light of the allegations of fraudulent concealment against their principal, VWGA.

In addition to the VCC's four-year limitations period, the VCC also provides that it "does not alter the law on tolling of the statute of limitations . . . ." Va. Code Ann. § 8.2-725 (4). Generally, equitable tolling "should be applied sparingly," but is "allowed . . . where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 119-20 (internal quotations omitted). Fraud is sufficient misconduct to trigger equitable tolling, but "[a] mere innocent mistake will not amount to fraud." *Virginia Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 366 (1906). Finally, while a principal can be bound by and liable for an agent's misconduct if that agent is acting within the scope of his agency, in the converse situation, where an agent is unaware of a principle's misconduct, the agent is not bound by or liable for the principal's misconduct. *See Jefferson Std. Life Ins. Co. v. Hedrick*, 181 Va. 824, 833-34 (1943); RST 2d of Agency, §§ 256-264.

Plaintiffs allege the dealerships breached their sales contracts, and at no time allege the dealership was, for purposes of the contract of sale, an agent of VWGA. Even if they had so alleged, Plaintiffs cite no cases to support their contention the dealerships are liable for VWGA's alleged fraud merely because they were its agents. The cases provided by Plaintiffs on brief either apply the well-established rule that principals may be bound by the wrongful conduct of their agents, or recite the general basis for pleading fraud. None support their conclusion. Similarly, there is no claim that the dealerships were negligent in failing to challenge VWGA's representations regarding the emissions compliance, fuel performance, or technological capabilities of their automobile. As such, and under the guidance that equitable tolling is to be "applied sparingly," the Court finds the statute of limitations was not equitably tolled.

As a result, and under the VCC, the Plaintiffs' breach of contract claims accrued at the time the vehicles were delivered, and the statute of limitations tolled four years later such that all Plaintiffs' breach of contract claims against the dealerships are time-barred. The dealerships' Pleas in Bar are therefore sustained. In light of this ruling, the Motions Craving Oyer are dismissed as moot.

DEMURRER TO WARRANTY CLAIMS IN VIA CASE

Mr. Via raises a breach of warranty claim under Tennessee law against VWGA, alleging breaches an implied warranty of merchantability, a warranty of fitness for a particular purpose, and an express warranty. As damages, Mr. Via claims damages "related to the knowledge [he] has been unintentionally violating the law and polluting the environment," as well as reduced value and "any fixes" resulting in reduced performance and gas mileage. VWGA demurs to this count, arguing Mr. Via fails to allege contractual privity between himself and VWGA, a requirement under Tennessee law. VWGA also asserts the express warranty claim is subject to Demurrer because Mr. Via fails to plead the terms of an express warranty between himself an VWGA. Mr. Via has not raised an opposition to this argument within VWGA's Demurrer.

Whether interpreted under Virginia's Demurrer standard or Tennessee's Motion to Dismiss, the analysis is the same and is bound by the four corners of the Complaint. *Compare Cox Cable Hampton Rds., Inc. v. City of Norfolk,* 242 Va. 394, 397 (1991) *with Ellithorpe v. Weismark*, 479 S.W.3d 818, 823-24 (Tenn. 2015). Under Tennessee law, privity of contract is an essential element of warranty claims where the only losses are economic losses, but by statute there is no requirement of privity for breach of warranty claims for claims of personal or property damage. Tenn. Code § 29-34-104 (2016); *Messer Greisheim Indus. v. Cryotech of Kingsport, Inc.*, 131 S.W.3d 457, 463 (Tenn. App. Ct. 2003). In raising a claim for an express warranty, a party must allege the existence of an express warranty and privity between the parties. *Collier v. Greenbrier Developers, LLC*, 358 S.W.3d 195, 204 (Tenn. App. Ct. 2009).

In *Messer Greisheim*, the Tennessee Supreme Court examined whether a distributor of carbon dioxide ("CO2") for beverages could sue a supplier of contaminated CO2 for economic losses and damage to its storage tanks when the contract at issue was between the supplier and a third party, a secondary supplier of CO2. *Messer Greisheim*, 131 S.W.3d at 460. The Court explained that Tennessee has adopted the economic loss rule's requirement of contractual privity between parties in order to recover economic losses, but noted statutory exceptions to privity in claims for personal or property injury under Tennessee law. *Id.* at 463. The Court then dismissed the distributor's claims of economic loss but permitted its property claims to go forward. *Id.* at 464-65.

Mr. Via has raised both express and implied warranty claims. Even drawing all inferences in Mr. Via's favor, the only contract pleaded is one between himself and a dealership, and he does not otherwise allege privity of contract between himself and VWGA. As a result, his claim based on diminution of resale value is barred by the economic loss rule. Similarly, his claim for reduced performance and gas mileage is a claim for lost value or economic losses arising out of the car's alleged failure to comply with its warranted performance and is barred. By contrast, Mr. Via's claims of damages arising out of his "unintentionally violating the law and polluting the environment" would be, to the extent proven, personal injuries subject to the privity exception of Tenn. Code § 29-34-104. Finally, and as to the express warranty claim, Mr. Via cannot bring that claim under Tennessee law in the absence of privity. As such, the Demurrer is sustained with leave to amend as to economic losses claimed within Mr. Via's implied and fitness warranty claims and to his express warranty claim in full. The Demurrer is, however, overruled as to any personal injuries claimed under Mr. Via's implied and fitness warranty claims.[6]

DEMURRER TO TRESPASS CLAIM IN VIA CASE

Mr. Via additionally raises a claim of trespass, alleging VWGA trespassed on his property by installing the defeat device. VWGA argues the claim is subject to Demurrer because Mr. Via fails to allege an interference with his ownership of the vehicle because the defeat device was installed prior to his ownership, rather than subsequent to his purchase. Again, Mr. Via has not lodged an opposition to this aspect of VWGA's Demurrer.

This claim is brought in a Virginia court, but Mr. Via alleges purchasing the car in Tennessee. Under Virginia's conflict of law rules, and under the rule of *lex loci delecti*, trespass to chattels are addressed by the law of the state where the trespass occurred. 4A M.J. Conflict of Laws § 35. Here, Mr. Via alleges a trespass that could only have occurred, if anywhere, in Tennessee, given that he is claiming an injury arising out of the installation of the "defeat device" that predates his ownership of the vehicle, and his property rights did not arise until his purchase in Tennessee. As such the Court will consider the claim under Tennessee law. Under Tennessee law, "A trespass to chattels occurs when one party intentionally uses or intermeddles with personal property in rightful possession of another without authorization." *Garner v. Coffee Cnty. Bank*, 2015 Tenn App. LEXIS 873, *17-18 (Tenn. App. Ct. Oct. 23, 2015).

Here, Mr. Via alleges acts that occurred prior to his possession of the vehicle. There is no allegation that VWGA interfered with his ownership rights once he took

[6] VWGA did not raise a preemption claim in its Demurrer to Mr. Via's Complaint.

possession, and nothing that could be inferred as an allegation of intermeddling or intentional use by VWGA of his vehicle during his ownership. As such, the Demurrer to Mr. Via's trespass claim is sustained with prejudice.

DEMURRER IN VIA CASE AS TO ATTORNEY'S FEES

Finally, and briefly, VWGA argues Mr. Via cannot seek attorney's fees because he originally filed his action *pro se*. This argument is dismissed as moot since Mr. Via has since obtained counsel.

CONCLUSION

These cases have been filed in Virginia courts under state law. The Plaintiffs have a right to pursue their state law claims irrespective of what claims are being litigated in federal courts. This Court finds that the claims relating to the enforcement of the Clean Air Act are preempted as Congress has deemed the EPA the sole authority for enforcing federal laws governing motor vehicle emissions. In the same vein, the EPA has no jurisdiction over and provides no recourse for Virginia Plaintiffs who have claims for common law fraud and violations of a Virginia statute by a Virginia defendant. As such, these causes of action shall continue. The chart below represents the Court's rulings on the matters addressed in oral argument at the August 11, 2016 hearing.

Case	Moving Party	Motion	Ruling
In Re. Volkswagen 'Clean Diesel' Litigation CL-2016-9917 (All Cases)	VWGA	Motion to Stay	Denied generally and under the primary jurisdiction doctrine
Claytor, et al. v. Volkswagen Group of Amenca CL-2016-10654	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims Overruled for Fraud and VCPA claims.
Claytor, et al. v Volkswagen Group of America CL-2016-10763	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims. Overruled for Fraud and VCPA claims

Fleshman, et al. v. Volkswagen Group of America CL-2016-9927	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims. Overruled for Fraud and VCPA claims.
Fleshman, et al v. Volkswagen Group of America CL-2016-9928	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims. Overruled for Fraud and VCPA claims.
Grose, et al. v. Volkswagen Group of Amenca CL-2015-9929	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims. Overruled for Fraud and VCPA claims
Grose, et al v. Volkswagen Group of America CL-2016-9930	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims Overruled for Fraud and VCPA claims
Davidson, *et al. v. Volkswagen Group of Amenca* CL-2016-8642	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims. Overruled for Fraud and VCPA claims
Lum, et al v Volkswagen Group of Amenca CL-2016-8645	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims Overruled for Fraud and VCPA claims

Bredemeier, et al. v Volkswagen Group of America CL-2016-8647	VWGA	Demurrer	Sustained with Prejudice as to Temporary Injunctive Relief, Virginia Lemon Law, Breach of Warranty, and Public Nuisance claims. Overruled as to Fraud and VCPA claims
Campbell v. Volkswagen Group of America CL-2015-13950	VWGA	Demurrer	Overruled as to all claims.
Campbell v. Volkswagen Group of America CL-2015-14287	VWGA	Demurrer	Overruled as to all claims
Mayer v. Volkswagen Group of America CL-2016-0023	VWGA	Demurrer	Overruled as to all claims.
Zelonis v. Volkswagen Group of America CL-2015-13746	VWGA	Demurrer	Overruled as to all claims.
Nunes v. Volkswagen Group of America CL-2015-15612	VWGA	Demurrer	Overruled as to all claims
Van Houten v. Volkswagen Group of America CL-2015-16396	VWGA	Demurrer	Overruled as to all claims
Varky, et al. v. Volkswagen Group of America, CL-2016-5460	VWGA	Demurrer	Overruled as to fraud claims Sustained with prejudice as to warranty claims Sustained with leave to amend as to VCPA claims
Amato v Volkswagen Group of America, et al	VWGA	Demurrer	Overruled as to VCPA claim Sustained with leave to amend as to fraud claim
Schwalm v Volkswagen Group of America, et al.	VWGA	Demurrer	Overruled as to VCPA claim. Sustained with leave to amend as to fraud claims.
Royals v. Volkswagen Group of America, et al	VWGA	Demurrer	Overruled as to VCPA claim. Sustained with leave to amend as to fraud claim.
Via v. Volkswagen Group of America	VWGA	Demurrer	Overruled as to VCPA claim

			Overruled as to any implied and fitness warranty claims for personal injuries Sustained with leave to amend as to fraud claim. Sustained with leave to amend as to warranty claims for economic loss. Sustained with prejudice as to trespass claim. Dismissed as Moot regarding attorney's fees.
Claytor, et al. v Volkswagen Group of America CL-2016-10654	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court)	Denied with prejudice.
Claytor, et al v. Volkswagen Group of America CL-2016-10763	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court)	Denied with prejudice.
Fleshman, et al. v. Volkswagen Group of America CL-2016-9927	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court)	Denied with prejudice.
Fleshman, et al v. Volkswagen Group of America CL-2016-9928	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court)	Denied with prejudice.
Grose, et al v Volkswagen Group of America CL-2015-9929	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court).	Denied with prejudice
Grose, et al v. Volkswagen Group of America CL-2016-9930	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court).	Denied with prejudice
Davidson, *et al. v. Volkswagen Group of America* CL-2016-8642	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court).	Denied with prejudice
Lum, et al. v. Volkswagen Group of America CL-2016-8645	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court).	Denied with prejudice

Bredemeier, et al. v. Volkswagen Group of America CL-2016-8647	Plaintiffs	Motions for Temporary Injunctions (loaner cars and limiting VWGA from proceeding in any other court besides Fairfax Circuit Court)	Denied with prejudice
Amato v. Volkswagen Group of America, et al	VWGA	Plea in Bar	Sustained with prejudice
Schwalm v. Volkswagen Group of America, et al.	VWGA	Plea in Bar	Sustained with prejudice
Royals v. Volkswagen Group of America, et al.	VWGA	Plea in Bar	Sustained with prejudice.
Amato v. Volkswagen Group of America, et al.	VWGA	Motion Craving Oyer	Dismissed as Moot
Schwalm v Volkswagen Group of America, et al.	VWGA	Motion Craving Oyer	Dismissed as Moot.
Royals v. Volkswagen Group of America, et al.	VWGA	Motion Craving Oyer	Dismissed as Moot
Claytor, et al. v Volkswagen Group of America CL-2016-10654	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3 20 as the parties are not yet at issue and no answers have been filed
Claytor, et al. v. Volkswagen Group of America CL-2016-10763	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3 20 as the parties are not yet at issue and no answers have been filed
Fleshman, et al v. Volkswagen Group of America CL-2016-9927	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3 20 as the parties are not yet at issue and no answers have been filed.
Fleshman, et al v Volkswagen Group of America CL-2016-9928	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3 20 as the parties are not yet at issue and no answers have been filed
Grose, et al. v Volkswagen Group of America CL-2015-9929	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3 20 as the parties are not yet at issue and no answers have been filed.
Grose, et al. v Volkswagen Group of America CL-2016-9930	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3:20 as the parties are not yet at issue and no answers have been filed.
Davidson, *et al. v. Volkswagen Group of America* CL-2016-8642	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3 20 as the parties are not yet at issue and no answers have been filed
Lum, et al v Volkswagen Group of America CL-2016-8645	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3 20 as the parties are not yet at issue and no answers have been filed.

Bredemeier, et al. v. Volkswagen Group of America CL-2016-8647	Plaintiffs	Motion for Summary Judgment	Stricken by the Court pursuant to Rule 3 20 as the parties are not yet at issue and no answers have been filed.

Counsel for VWGA is directed to prepare orders for circulation and presentation to the Court consistent with the Court's rulings.

Sincerely yours,

Bruce D. White