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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

ARIANA KLINKOV, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

VOLKSWAGEN GROUP OF AMERICA,
INC.,

Defendant.

Civil Action No.

**CLASS ACTION COMPLAINT
AND DEMAND FOR JURY TRIAL**

Plaintiff Ariana Klinkov (“Ms. Klinkov” or “Plaintiff”), by her undersigned counsel, on behalf of herself and all others similarly situated, complaining of defendant Volkswagen Group of America, Inc. (“VW” or “Defendant”), alleges upon information and belief, as follows:

PRELIMINARY STATEMENT

1. This is a consumer class action against VW for violations of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, fraudulent omission, breach of express warranty, breach of implied warranty, unjust enrichment, and providing notice of violations of MASS. GEN. LAWS ch. 93A arising out of VW's use of "defeat devices" in certain diesel engine vehicles it manufactured, distributed, or sold to conceal the vehicles' true emissions levels. The vehicles allegedly containing defeat devices are Volkswagen diesel engine vehicles, which include 2009 through 2015 Jettas, 2012 through 2015 Beetles, 2010 through 2015 Golfs, and 2012 through 2015 Passats, and 2010 through 2015 Audi diesel engine A3s (the "Affected Vehicles").

2. On September 18, 2015, the U.S. Environmental Protection Agency ("EPA" or the "Agency") released that VW and its subsidiaries or affiliates "manufactured and installed defeat devices" in the Affected Vehicles. "Defeat devices" are software in the electronic control module ("ECM") of the vehicles at issue that sensed when the vehicle was being tested for compliance with EPA emission standards. The defeat device would sense the vehicle was being tested for EPA certification and would run software that produced compliant emission results. When the defeat device did not sense that the vehicle's emission were being tested, the vehicle performed on an alternate software designed for performance in real world driving conditions. The deliberate switch in software when not under testing conditions caused the vehicle's emissions to rise to 10 to 40 times above EPA compliant levels, in contrast to meeting such standards when the software used for emissions tests was being used.¹

3. Shortly after the EPA's revelation about the Affected Vehicles, VW admitted that it installed the defeat device software in approximately 11 million Affected Vehicles worldwide.

¹ A copy of the EPA's letter to VW can be found at <http://www3.epa.gov/otaq/cert/documents/vw-nov-cao-09-18-15.pdf>.

On or around September 21, 2015, VW's chief executive, Michael Horn, stated in regard to the growing scandal, "[o]ur company was dishonest, with the EPA and the California Air Resources board, and with all of you and in my German words, we have totally screwed up...."²

4. During the relevant time period, VW knew the Affected Vehicles contained the defeat device. Instead of disclosing this fact, VW engaged in a marketing campaign touting the Affected Vehicles desirable performance, fuel economy, and low emissions, and branding VW's "TDI" family of cars as "clean diesel" vehicles. VW has removed these advertisements from the internet since the truth about the Affected Vehicles was revealed to the public.

5. The end result of VW's misconduct is that the Affected Vehicles are unfit for their ordinary and intended use and cannot be operated in compliance with EPA emission standards. Plaintiff and the Class did not receive the benefit of their bargain as purchasers or lessees, received vehicles that were of a lesser standard, grade, and quality than represented, and did not receive vehicles that met ordinary and reasonable consumer expectations.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) because the aggregate amount in controversy exceeds \$5,000,000.00 and there is diversity between a plaintiff and a defendant.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) because VW is deemed a resident of this judicial district under 28 U.S.C. § 1391(c).

PARTIES

8. Plaintiff Ariana Klinkov resides in the State of Massachusetts. Ms. Klinkov owns a 2013 Jetta Sportwagen TDI, which she purchased in 2013 from Minuteman Volkswagen in

² See <http://www.cnbc.com/2015/09/21/volkswagen-us-ceo-screwed-up-on-eca-emissions-diesel-test-rigging.html>.

Bedford, Massachusetts. Ms. Klinkov's vehicle was manufactured, sold, distributed, advertised, marketed, and warranted by VW.

9. Ms. Klinkov purchased her VW primarily for her personal, family, and household use.

10. Ms. Klinkov was primarily motivated to purchase her VW because of VW's representation that the vehicle would provide good mileage and performance, and had low emissions.

11. VW is comprised of the following automobile brands: Volkswagen Passenger Cars, Audi, SEAT, ŠKODA, Bentley, Bugatti, Lamborghini, Porsche, Ducati, Volkswagen Commercial Vehicles, Scania and MAN.

12. VW is a New Jersey corporation with its headquarters in Herndon, Virginia. At all times relevant herein, VW was engaged in the business of designing, manufacturing, constructing, assembling, marketing, warranting, distributing, selling, leasing, and servicing automobiles, including the Affected Vehicles, and other motor vehicles and motor vehicle components throughout the United States.

FACTUAL ALLEGATIONS

13. As part of VW's campaign to overtake Toyota as the world's largest manufacturer, VW focused its growth strategy on presenting "clean" diesel as an alternative to hybrid-electric vehicles such as the Toyota Prius. VW represented that its diesel powered vehicles had low emissions and excellent fuel efficiency, but did not sacrifice performance.³ However, those representations have been proven false.

³ See <http://mobile.nytimes.com/2015/09/27/business/as-vw-pushed-to-be-no-1-ambitions-fueled-a-scandal.html?referer=& r=0>.

14. As recently revealed by the EPA, VW and its subsidiaries or affiliates “manufactured and installed defeat devices in certain model year 2009 through 2015 diesel light-duty vehicles equipped with 2.0 liter engines.” The defeat devices ensure that only during emissions testing are the Affected Vehicles’ complete emissions control systems fully functional. At all other times, the controls are not fully functional, resulting in Affected Vehicles operating on the road by emitting as much as 40 times the amount of pollution allowed by law.

15. VW is recalling approximately 480,000 vehicles in the United States in order to disable the defeat devices, and in order to make sure that Affected Vehicles have properly functioning emissions control systems. However, once the defeat devices are disabled, and the Affected Vehicles are operating within the proper emissions standards, the Affected Vehicles will not perform as well, and they will have less desirable fuel efficiency, again falling short of the representations VW made to consumers.

TOLLING OF THE STATUTE OF LIMITATIONS

16. Plaintiff and the other Class Members (defined below) were not reasonably able to discover the defeat devices until after purchasing or leasing the Affected Vehicles, despite their exercise of due diligence.

17. Despite their due diligence, Plaintiff and the other Class Members could not reasonably have been expected to learn or discover that they were deceived and that material information concerning the Affected Vehicles and the installation of the defeat device was concealed from them. Therefore, the discovery rule is applicable to the claims asserted by Plaintiff and the other Class Members.

18. Any applicable statute of limitation has also been tolled by Defendant’s knowledge, active concealment, and denial of the facts alleged herein. Defendant is further

estopped from relying on any statute of limitation because of its concealment of the illegal defeat device installed in the Affected Vehicles.

CLASS ACTION ALLEGATIONS

19. Plaintiff brings this lawsuit as a class action on behalf of herself and all other Class Members similarly situated as members of the proposed Class pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) and/or (b)(2). This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions.

20. The proposed nationwide class Plaintiff seeks to represent (the “Class”) is defined as follows:

All persons in the United States who purchased or leased an Affected Vehicle with the defeat device. Excluded from the Class are VW officers, directors, and employees (the “Nationwide Class”).

21. Plaintiff also brings this action on behalf of a statewide class of all persons who purchased or leased an Affected Vehicle in the State of Massachusetts:

All persons who purchased or leased an Affected Vehicle with the defeat device in the State of Massachusetts. Excluded from the Class are VW officers, directors, and employees (the “Massachusetts Subclass”).

22. Excluded from the Class are: (1) VW, any entity or division in which VW has a controlling interest, and its legal representatives, officers, directors, assignees, and successors; (2) the Judge to whom this case is assigned and the Judge’s staff; (3) governmental entities; and (4) those persons who have suffered personal injuries as a result of the facts alleged herein.

Plaintiff reserves the right to amend the Class definitions if discovery and further investigation reveal that the Class should be expanded, otherwise divided into subclasses, or modified in any other way.

Numerosity & Ascertainability

23. Although the exact number of Class Members is uncertain and can only be ascertained through appropriate discovery, the number is great enough such that joinder is impracticable. The disposition of the claims of these Class Members in a single action will provide substantial benefits to all parties and to the Court. Class Members are readily identifiable from information and records in VW's possession, custody, or control, as well as from records kept by the Department of Motor Vehicles.

Typicality

24. The claims of the representative Plaintiff are typical of the claims of the Class in that the representative Plaintiff, like all Class Members, purchased or leased an Affected Vehicle designed, manufactured, and distributed by VW. The representative Plaintiff, like all Class Members, has been damaged by VW's misconduct in that she has incurred or will incur the damages associated with the defeat device. Furthermore, the factual bases of VW's misconduct are common to all Class Members and represent a common thread of misconduct resulting in injury to all Class Members.

Adequate Representation

25. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in prosecuting consumer class actions.

26. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the Class, and have the financial resources to do so. Neither Plaintiff nor his counsel have interests adverse to those of the Class.

Predominance of Common Issues

27. There are numerous questions of law and fact common to Plaintiff and Class Members that predominate over any question affecting only individual Class Members, the answer to which will advance resolution of the litigation as to all Class Members. These common legal and factual issues include:

- a. whether the Affected Vehicles suffer from the defeat device;
- b. whether the defeat device constitutes an unreasonable safety risk;
- c. whether VW knew or should have known about the defeat device and its adverse effects, and, if yes, how long VW has known of the defeat device and its adverse effects;
- d. whether the existence of the defeat device and its intended purpose constitutes a material fact reasonable consumers would have considered in deciding whether to purchase an Affected Vehicle;
- e. whether VW had a duty to disclose the defeat device and its intended purpose and consequences to Plaintiff and Class Members;
- f. whether VW omitted and failed to disclose material facts about the Affected Vehicles;
- g. whether VW's concealment of the defeat device software in the Affected Vehicles induced Plaintiffs and Class Members to act to their detriment by purchasing Affected Vehicles;
- h. whether Volkswagen violated state consumer protection statutes, including, *inter alia*, MASS. GEN. LAWS ch. 93A, and if so, what remedies are available by law;

- i. whether the Affected Vehicles were fit for their ordinary and intended use, in violation of the implied warranty of merchantability;
- j. whether Plaintiffs and Class Members are entitled to a declaratory judgment stating that the defeat device in the Affected Vehicles is not merchantable;
- k. whether Plaintiffs and Class Members are entitled to equitable relief, including, but not limited to, a preliminary and/or permanent injunction;
- l. whether VW should be declared responsible for notifying all Class Members of the defeat device and ensuring that all VW vehicles with the defeat device are recalled and repaired;
- m. what aggregate amounts of statutory penalties are sufficient to punish and deter Defendant and to vindicate statutory and public policy, and how such penalties should most equitably be distributed among Class members;
- n. whether VW was unjustly enriched by a benefit conferred on it by Plaintiffs and other Class Members such that it would be inequitable, unconscionable and unjust for VW to retain that benefit; and
- o. whether the Affected Vehicles can be made to comply with the EPA standards, and if so whether such modifications can be made to the Affected Vehicles without substantially degrading the Affected Vehicles' efficiency and/or performance.

Superiority

28. Plaintiff and Class Members have all suffered and will continue to suffer harm and damages as a result of VW's unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

29. Absent a class action, most Class Members would likely find the cost of litigating their claims prohibitively high and would therefore have no effective remedy at law. Because of the relatively small size of the individual Class Members' claims, it is likely that only a few Class Members could afford to seek legal redress for VW's misconduct. Absent a class action, Class Members will continue to incur damages, and VW's misconduct will continue without remedy.

30. Class treatment of common questions of law and fact would also be a superior method to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the courts and the litigants, and will promote consistency and efficiency of adjudication.

COUNT I

(Violation of Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, on behalf of the Nationwide Class)

31. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

32. Plaintiff brings this cause of action on behalf of herself and on behalf of the members of the Nationwide Class.

33. Plaintiff and the other Class Members are "consumers" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3).

34. Defendant is a "supplier" and "warrantor" within the meaning of 15 U.S.C. §§ 2301(4)-(5).

35. The Affected Vehicles are "consumer products" within the meaning of 15 U.S.C. § 2301(1).

36. Defendant's express warranty is a "written warranty" within the meaning of 15 U.S.C. § 2301(6).

37. Defendant breached the express warranty by:

- a. Extending Limited Warranty with the purchase or lease of the Affected Vehicles, thereby warranting to repair or replace any part defective in material or workmanship at no cost to the owner or lessee; and
- b. Selling and leasing Affected Vehicles with illegally installed defeat device software, requiring repair or replacement within the warranty period.

38. Defendant's breach of the express warranty deprived the Plaintiff and the other Class Members of the benefits of their bargains.

39. The amount in controversy of Plaintiff's individual claims meets or exceeds the sum or value of \$25. In addition, the amount in controversy meets or exceeds the sum or value of \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit.

40. Defendant has been afforded a reasonable opportunity to cure its breach of written warranty and/or Plaintiff and the other Class Members were not required to do so, because affording Defendant a reasonable opportunity to cure its breach of written warranty would have been futile. Defendant was also on notice of the illegally installed defeat device software from the complaints and service requests it received from various governmental entities and Class Members.

41. As a direct and proximate cause of Defendant's breach of written warranty, Plaintiff and the other Class Members sustained damages and other losses in an amount to be determined at trial. Defendant's conduct damaged Plaintiff and the other Class Members, who

are entitled to recover actual damages, consequential damages, specific performance, diminution in value, and costs, including statutory attorney fees and/or other relief as appropriate.

COUNT II

(Fraudulent Omission on behalf of the Nationwide Class)

42. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

43. Plaintiff brings this cause of action on behalf of herself and on behalf of the members of the Nationwide Class.

44. Defendant knew that the Affected Vehicles contained illegal defeat device software and thus were not suitable for their intended use.

45. Defendant concealed from and failed to disclose to Plaintiff and the Class the defective nature of the Affected Vehicles due to the defeat device software.

46. Defendant was under a duty to Plaintiff and the Class to disclose the defective nature of the Affected Vehicles due to the defeat device software because:

- a. Defendant was in a superior position to know the true state of facts about the defeat device software installed in the Affected Vehicles; and
- b. Defendant actively concealed the defective nature of the Affected Vehicles from Plaintiff and the Class.

47. The facts concealed or not disclosed by Defendant to Plaintiff and the other Class Members are material in that a reasonable person would have considered them to be important in deciding whether to purchase Defendant's Affected Vehicles or pay a lesser price for these vehicles. Had Plaintiff and the Class Members known the defective nature of the Affected

Vehicles due to the illegal defeat device software, they would not have purchased the Affected Vehicles or would have paid less for them.

48. Defendant concealed or failed to disclose the defeat device software and its true nature contained in the Affected Vehicles in order to induce Plaintiff and the Class Members to act thereon. Plaintiff and the other Class Members justifiably relied on the omission to their detriment. This detriment is evident from Plaintiff's and the Class Members' purchase or lease of Defendant's Affected Vehicles.

49. As a direct and proximate result of Defendant's misconduct, Plaintiff and the Class have suffered and will continue to suffer actual damages.

COUNT III

(Breach of Express Warranty on behalf of the Nationwide Class)

50. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

51. Plaintiff brings this cause of action on behalf of herself and on behalf of the members of the Nationwide Class. Defendant provided all purchasers and lessees of the Class Vehicles with the express warranty described herein, which became part of the basis of the bargain.

52. The defeat device software was manufactured and/or installed and/or distributed by Defendant in the Affected Vehicles and is covered by the express warranty.

53. Defendant breached the express warranty by:

- a. Extending a Limited Warranty with the purchase or lease of the Class Vehicles, thereby warranting to repair or replace any defect in material or workmanship at no cost to the owner or lessee; and

- b. Selling and leasing Class Vehicles with the illegal defeat device software installed, requiring repair or replacement within the warranty period.

54. As a direct and proximate cause of Defendant's breach, Plaintiff and the other Class Members have suffered damages and continue to suffer damages, including economic damages at the point of sale or lease, *i.e.*, the difference between the value of the vehicle as promised and the value of the vehicle as delivered. Additionally, Plaintiff and the other Class Members either have incurred or will incur economic damages related to the illegally installed defeat device software described herein.

COUNT IV

(Beach of Implied Warranty on behalf of the Nationwide Class)

55. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

56. Plaintiff brings this cause of action on behalf of herself and on behalf of the Nationwide Class.

57. Defendant was at all relevant times the manufacturer, distributor, warrantor, and/or seller of the Affected Vehicles. Defendant knew or had reason to know of the specific use for which the Affected Vehicles were purchased.

58. Defendant provided Plaintiff and the other Class Members with an implied warranty that the Affected Vehicles and any parts thereof were merchantable and fit for the ordinary purposes for which they were sold. However, the Affected Vehicles were not and are not fit for their ordinary purpose of providing reasonably reliable and safe transportation because, *inter alia*, the Affected Vehicles contained an illegal defeat device software that adversely impacted emissions.

59. Defendants impliedly warranted that the Affected Vehicles were of merchantable quality and fit for such use. This implied warranty included, among other things: (i) a warranty that the Affected Vehicles manufactured, supplied, distributed, and/or sold by Defendants were safe and reliable for providing transportation; and (ii) a warranty that the Affected Vehicles would be fit for their intended use while the Affected Vehicles were being operated.

60. Contrary to the applicable implied warranties, the Affected Vehicles at the time of sale and thereafter were not fit for their ordinary and intended purpose of providing Plaintiff and the other Class Members with reliable, durable, and safe transportation. Instead, the Class Vehicles are defective, including but not limited to the installation of an illegal defeat device software that adversely impacted emissions.

61. As a direct and proximate result of VW's false and misleading representations and warranties, Plaintiff and other Class members suffered significant injury when Volkswagen sold to them vehicles that, it is now clear, are worth far less than the price Plaintiff and other Class members paid for them.

COUNT V

(Unjust Enrichment on behalf of the Nationwide Class)

62. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

63. Plaintiff brings this cause of action on behalf of herself and on behalf of the Nationwide Class.

64. VW has received and retained a benefit from Plaintiff and the Class, resulting in inequity.

65. VW has benefitted from selling and leasing vehicles whose value was artificially inflated by VW's concealment of the Affected Vehicles' performance and emissions problems for far more than they were worth, at a profit. Plaintiff and members of the Class have overpaid for the Affected Vehicles.

66. VW has further benefitted by avoiding the costs of a recall and other lawsuits, and has benefitted from its statements about the success of VW diesel vehicles. Thus, all Class Members have conferred a benefit on VW, which it is inequitable for VW to retain.

67. Plaintiff was not aware of the true facts of the Affected Vehicles and did not benefit from VW's conduct.

68. VW knowingly accepted the benefits of its unjust conduct.

69. As a result of VW's conduct, the amount of its unjust enrichment should be disgorged, in an amount to be determined at trial.

MASS. GEN. LAWS CH. 93A NOTICE

70. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

71. Plaintiff provides this notice on behalf of herself and on behalf of the Massachusetts Subclass.

72. Plaintiff hereby provides VW with notice and demand that within thirty days, VW correct, repair, replace or otherwise rectify the unlawful, unfair, false and/or deceptive practices complained of herein. VW's failure to do so will result in Plaintiff amending this Complaint to seek, pursuant to MASS. GEN. LAWS ch. 93A, § 9, on behalf of herself and those similarly situated Massachusetts Subclass members, compensatory damages, treble damages, reasonable attorneys' fees, and such equitable relief as the Court deems just and proper.

WHEREFORE Plaintiffs pray for judgment as follows:

- A. Certification of the proposed class and subclass, including appointment of Plaintiff and her counsel to represent the class and subclass;
- B. An order awarding Plaintiff and the members of the class and subclass, statutory, punitive or any other form of damages;
- C. Injunctive relief including restitution, disgorgement or other equitable relief;
- D. An order requiring VW to adequately disclose and remedy the defeat device in the Affected Vehicles;
- E. An order awarding Plaintiff and the members of the class and subclass pre-judgment and post-judgment interest;
- F. An order awarding Plaintiff and the members of the class and subclass reasonable attorneys' fees and costs of suit, including expert witness fees; and
- G. Such other and further relief as may be appropriate.

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO P.C.
Attorneys for Plaintiff

By: /s/ James E. Cecchi

JAMES E. CECCHI

Dated: October 7, 2015

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JURY DEMAND

Plaintiff demands a trial by jury as to all issues so triable.

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OLSTEIN, BRODY & AGNELLO P.C.
Attorneys for Plaintiff

By: /s/ James E. Cecchi
JAMES E. CECCHI

Dated: October 7, 2015

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