

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

<p>David Whitcomb, <i>on behalf himself and all others similarly situated,</i></p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>VOLKSWAGEN GROUP OF AMERICA, INC.,</p> <p>VOLKSWAGEN AG,</p> <p>AUDI AG, and</p> <p>AUDI OF AMERICA, INC.</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: right;">CLERK OF DISTRICT COURT ALEXANDRIA, VIRGINIA</p> <p>No. <u>1:15CV1315</u> <u>(LO/MSN)</u></p> <p><b><u>JURY TRIAL DEMANDED</u></b></p>
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**CLASS ACTION COMPLAINT**

Plaintiff David Whitcomb, on behalf of himself and all others similarly situated, based on personal knowledge as to himself, and upon information and belief as to all other matters, alleges as follows:

**I. NATURE OF CLAIMS**

1. Defendants Volkswagen AG, Volkswagen Group of America, Inc., Audi AG, and Audi of America, Inc. (collectively "Volkswagen" or "Defendants") have aggressively claimed since 2008 that their cars containing TDI Clean Diesel engines ("Clean Diesel cars") are environmentally friendly, "clean," EPA certified, powerful, and fuel efficient.

2. However, Defendants' oft repeated claims regarding their Clean Diesel cars were fraudulent. The Clean Diesel cars were anything but "clean." Rather, Defendants utilized a sophisticated software program to deceive purchasers, as well as the Environmental Protection Agency ("EPA") and state regulators, about the true nature of the emissions from these Clean Diesel cars.

3. Defendants installed a software program in all Clean Diesel cars that detected when the cars were undergoing emissions testing. When the software detected emissions testing, it turned on full emissions control during the test. However, when the Clean Diesel cars were not undergoing testing, these emissions controls were not activated. As a result, during normal operations, these allegedly "clean" cars engines emitted pollutants, such as nitrogen oxides (NOx), at up to 40 times the amounts allowed under the laws of the United States and various states.

4. On September 18, 2015, the EPA issued a Notice of Violation ("NOV") finding that this sophisticated software constituted a "defeat device" under the Clean Air Act ("CAA").<sup>1</sup> A "defeat device" is anything that reduces the effectiveness of the vehicle's emissions control system during normal vehicle operations. The EPA found that because of these "defeat devices," the Clean Diesel cars did not meet federal emissions standards or comply with the certificates of conformity that Defendants—like all vehicle manufacturers—were required to secure for each car that they intended to sell in the United States.

5. By installing these "defeat devices" and failing to disclose the true level of emissions from the Clean Diesel cars, Defendants purposefully violated the CAA and its

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<sup>1</sup> Letter from United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (September 18, 2015), *available at* <http://www3.epa.gov/otaq/cert/documents/vw-nov-cao-09-18-15.pdf>.

regulations, as well as state law, lied to and defrauded their customers, and engaged in deceptive trade practices and unfair competition.

6. As a result of Defendants' fraudulent, deceptive, and unfair conduct, owners and lessees of the Class Vehicles (defined below), such as Plaintiff and the Class, have suffered losses.

7. According to the NOV, absent Defendants' deception, Defendants' nonconforming vehicles could not have been approved by the EPA for introduction into United States commerce.<sup>2</sup>

8. Defendants charged a premium for these Clean Diesel cars compared to cars that contained gasoline engines.

9. Although the EPA has ordered Defendants to recall the Class Vehicles and repair them so that they comply with EPA emissions requirements, the necessary modifications will substantially degrade the Class Vehicles' performance. Accordingly, regardless of whatever repairs Defendants might implement, the Class Vehicles will not perform as advertised, causing harm to Plaintiff and the Class. For example, the Class Vehicles will depreciate in value, and Plaintiff and the Class will incur more expenses for gasoline because the Class Vehicles will no longer be as fuel efficient.

10. As a result, Plaintiff and the Class seek damages, injunctive relief, declaratory relief, and equitable relief for Defendants' misconduct, as alleged in this Complaint, including but not limited to, the return of the purchase price of their cars, return of the premium they paid for the Clean Diesel cars, compensation for the diminution in value of their cars, and

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<sup>2</sup> *Id.*

compensation for the additional expenses (such as additional fuel costs) they incur as a result of Defendants' yet-to-be made modifications to the Class Vehicles.

## **II. JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), because at least one Class member is of diverse citizenship from one Defendant, there are more than 100 Class members, and the aggregate amount in controversy exceeds \$5 million, exclusive of interest and costs.

12. This Court has personal jurisdiction over Defendant Volkswagen Group of America, Inc., because it conducts business in Virginia and has sufficient minimum contacts with Virginia.

13. This Court has personal jurisdiction over Defendant Audi AG because it conducts business in Virginia and has sufficient minimum contacts with Virginia.

14. This Court has personal jurisdiction over Defendant Audi of America, Inc. because it conducts business in Virginia and has sufficient minimum contacts with Virginia.

15. Volkswagen AG has purposefully availed itself of this forum by directing its agents and distributor – Volkswagen Group of America, Inc., Audi AG, and Audi of America, Inc. - to take action here, and accordingly this Court has specific jurisdiction over Volkswagen AG.

16. Volkswagen AG is the sole owner of Volkswagen Group of America, Inc. Volkswagen AG directs the actions of its agent, Volkswagen Group of America, Inc. in selling and leasing its cars in the United States, and in performing related activities such as marketing and advertising to effectuate those sales.

17. Defendants, including Volkswagen AG and Audi AG, and/or their agents designed the Clean Diesel engines and cars, as well as the "defeat device," for distribution in the

United States and in this judicial district. These same defendants and their agents developed and disseminated the (fraudulent) advertisements, warranties, and promotional materials related to the Clean Diesel cars throughout the United States, as well as in this judicial district.

18. Volkswagen AG closely controls and directs Volkswagen Group of America, Inc., and therefore any marketing statements made by Volkswagen Group of America, Inc., as well as other statements identified throughout this Complaint that were made by Volkswagen Group of America, Inc. were made at the behest and direction of Volkswagen AG.

19. Audi of America, Inc. is a subsidiary of Audi AG, which in turn is controlled by Volkswagen AG. Therefore, any marketing statements made by Audi of America, Inc., as well as other statements identified throughout this Complaint that were made by Audi of America, Inc. were made at the behest and direction of Audi AG and/or Volkswagen AG.

20. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred and/or emanated from this District, and because Defendants have caused harm to Class members residing in this District.

21. This case is properly assigned to the Alexandria Division because Defendants Volkswagen Group of America, Inc. and Audi of America, Inc. maintain their corporate headquarters in this district.

### **III. THE PARTIES**

22. Defendant Volkswagen Aktiengesellschaft (“Volkswagen AG”) is a German corporation with its principal place of business in Wolfsburg, Germany. Volkswagen AG is the parent company of Volkswagen Group of America, Inc.

23. Defendant Volkswagen Group of America, Inc. is a New Jersey corporation with its principal place of business in Herndon, Virginia.

24. Defendant Audi Aktiengesellschaft (“Audi AG”) is a German corporation with its principal place of business located at Ingolstadt, Germany; Volkswagen AG owns 99.55 percent of Audi AG’s shares.

25. Defendant Audi of America is a New Jersey corporation with its principal place of business in Herndon, Virginia.

26. Plaintiff David Whitcomb is a resident of Waynesboro, Virginia. He purchased a 2015 Volkswagen Passat TDI in or around June 2015.

#### IV. GENERAL FACTUAL ALLEGATIONS

##### A. Defendants Fraudulently Represented That Their Clean Diesel Cars Were Environmentally Friendly, Clean, Fuel Efficient, and Powerful

27. From the time the Clean Diesel cars were introduced in 2008, Defendants repeatedly bragged that these cars were environmentally friendly, EPA Certified, clean, fuel efficient, and powerful. Although diesel engines are often more fuel efficient than gasoline engines, they generally emit higher levels of pollutants.<sup>3</sup> Defendants claimed that their Clean Diesel cars solved this problem; Defendants claimed their Clean Diesel cars reduced emissions by up to 90 percent in these TDI engines through modifications to the engines and a unique exhaust treatment system. For example, an October 2008 press release stated:

The Jetta TDI is amongst the ten most fuel efficient vehicles on the US market. In the recently published “Fuel Economy Guide 2009” the EPA (Environmental Protection Agency) listed the Jetta TDI in the top ten low consumption and low emissions vehicles. In the current edition of the publication, the Jetta 2.0.1 Clean TDI, introduced to the market two months ago, is praised particularly for its excellent consumption figures; it has a fuel consumption of 5.7 litre per 100 kilometre. Moreover, the Jetta Clean TDI also fulfills stringent Californian emissions standards. This was achieved through modifications within the engine and by implementing an exhaust treatment system developed especially by Volkswagen and which reduces nitrogen oxide emissions (NOx) by up to 90

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<sup>3</sup> Andreas Cremer, *Volkswagen Boss Quits Over Diesel Scandal*, REUTERS, September 23, 2015, available at <http://www.reuters.com/article/2015/09/23/usa-volkswagen-idUSL1N11T18L20150923>.

percent. The central element of the exhaust treatment system is the NOx storage catalytic converter.<sup>4</sup>

28. Until Defendants' fraud was exposed, Defendants continued to falsely represent that Clean Diesel cars were clean and fuel efficient. For example, in 2009, Volkswagen stated "Volkswagen builds the cleanest, most efficient cars in the world, across the board."<sup>5</sup>

29. Also in 2009, Mark Barnes, then Volkswagen's Chief Operating Officer, stated that the TDI engine is "good for the environment because it puts out 25% less greenhouse gas emissions than what a gasoline engine would. And thanks to the uniqueness of the TDI motor, it cuts out the particulate emissions by 90% and the emissions of nitrous oxide are cut by 95%. So, a very very clean running engine. Clean enough to be certified in all 50 states. It's just like driving a high-powered gasoline engine so you are not giving up one bit of the driving experience that you'd expect from a regular gasoline engine."<sup>6</sup>

30. That same year, the Volkswagen Jetta TDI was named the "Green Car of the Year."<sup>7</sup> The next year, in 2010, the Audi A3 TDI was named as the "Green Car of the Year."<sup>8</sup> Similarly, in 2014, one of Defendants' websites stated that the "TDIs offered by Audi today are

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<sup>4</sup> Press Release, Volkswagen AG, *Volkswagen in Fuel Economy Guide 2009* (October 29, 2008) [http://www.volkswagenag.com/content/vwcorp/info\\_center/en/news/2008/10/vw\\_in\\_fuel\\_economy\\_guide.html](http://www.volkswagenag.com/content/vwcorp/info_center/en/news/2008/10/vw_in_fuel_economy_guide.html) (last visited October 4, 2015).

<sup>5</sup> Press Release, The Second BlueMotion Generation Puts Highly Innovative Efficiency Technology on the Road (June 3, 2009), *available at* [http://www.volkswagenag.com/content/vwcorp/info\\_center/en/themes/2009/06/bluemotion.html](http://www.volkswagenag.com/content/vwcorp/info_center/en/themes/2009/06/bluemotion.html) (last visited October 4, 2015).

<sup>6</sup> Gayathri Vaidyanathan, *Volkswagen Preps for a Diesel Revolution*, THE BUSINESS INSIDER Oct. 2009, *available at* <http://www.businessinsider.com/volkswagen-preps-for-a-diesel-revolution-2009-10>.

<sup>7</sup> John Voelcker, *Green Car of the Year: 2010 Audi A3 TDI*, GREEN CAR REPORTS, December 3, 2009, *available at* [http://www.greencarreports.com/news/1039566\\_green-car-of-the-year-2010-audi-a3-tdi](http://www.greencarreports.com/news/1039566_green-car-of-the-year-2010-audi-a3-tdi).

<sup>8</sup> *Id.*

highly efficient and clean, cultivated, comfortable, and powerful.”<sup>9</sup> Consistent with these misrepresentations, Volkswagen Group’s “Group Strategy 2018,” published in 2014, stated that its “Strategy 2018 focuses on positioning the Volkswagen Group as a global economic and environmental leader among automobile manufacturers. We have defined four goals that are intended to make Volkswagen the most successful, fascinating and sustainable automobile automaker in the world by 2018.”<sup>10</sup>

31. Defendants’ advertisement campaigns were replete with similar (mis)representations about its high performing Clean Diesel cars. One of the brochures for Volkswagen cars stated that its TDI Clean Diesel engines were “not that kind of diesel. These are not the kind of diesel engines that you find spewing sooty exhaust like an old 18-wheeler. Clean diesel vehicles meet the strictest EPA standards in the U.S. Plus, TDI technology helps reduce sooty emissions by up to 90%, giving you a fuel-efficient and eco-conscious vehicle.”<sup>11</sup>

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<sup>9</sup> Volkswagen AG, *Light My Fire* (August 25, 2014), *available at* [http://www.volkswagenag.com/content/vwcorp/info\\_center/en/themes/2014/08/Light\\_my\\_fire.html](http://www.volkswagenag.com/content/vwcorp/info_center/en/themes/2014/08/Light_my_fire.html) (last visited October 4, 2015).

<sup>10</sup> Volkswagen AG, *Group Strategy 2018*, *available at* [http://www.volkswagenag.com/content/vwcorp/content/en/the\\_group/strategy.html](http://www.volkswagenag.com/content/vwcorp/content/en/the_group/strategy.html) (last visited October 4, 2015).

<sup>11</sup> Volkswagen of America, Inc., *Volkswagen TDI Clean Diesel* (2012), *available at* <http://www.galpinvolkswagen.com/Media/Default/Page/brochures/pdf/tidi.pdf>



**A**

**Get from A to B. But don't forget to stop at points C, M, and Z. And of course Toledo.**

As you start your drive to work, you should still make your way to the work, drive to a long way. Volkswagen TDI Clean Diesel is the best of high mileage vehicles for the best way to get to the office without ever leaving your car. And with its smooth, quiet ride, you'll never miss a beat. And with its smooth, quiet ride, you'll never miss a beat. And with its smooth, quiet ride, you'll never miss a beat.

**Joyride further.**

TDI vehicles use clean diesel fuel and advanced engineering to achieve up to 48 miles per gallon with a range of up to 795 miles. That's up to 300% better fuel economy than comparable gas engines. You'll probably notice when you take up to 30% fewer trips to the pump. That's the difference between a car that's always there and a car that's not.

**Not that kind of diesel.**

These are not the kind of diesel engines that you'll find operating heavy machinery like an old 18-horsepower Chevrolet vehicle. These are the kind of diesel engines that you'll find operating heavy machinery like an old 18-horsepower Chevrolet vehicle. These are the kind of diesel engines that you'll find operating heavy machinery like an old 18-horsepower Chevrolet vehicle.

**High mileage doesn't mean low fun.**

Get better fuel economy, at least as good as the gas of driving. With a Volkswagen TDI vehicle, you'll get the performance, style, safety, and quality of a Volkswagen of German vehicle. It's just that you'll get more fun out of a high-mileage vehicle.

**Think Blue.**

Think beyond green. TDI represents the best of the Volkswagen. Think Blue. Think beyond green. TDI represents the best of the Volkswagen. Think Blue. Think beyond green. TDI represents the best of the Volkswagen. Think Blue.

**Volkswagen**  
TDI Clean Diesel

That's the Power of German Engineering. | Das Auto.

32. Other advertisements made similar misrepresentations about the benefits of the Volkswagen Clean Diesel cars.

**TDI Clean Diesel**

**A whole family of front-runners.**

Long range without sacrifice is the promise of TDI Clean Diesel. And Volkswagen has sold more diesel cars in the U.S. than every other brand combined. Premium kept.

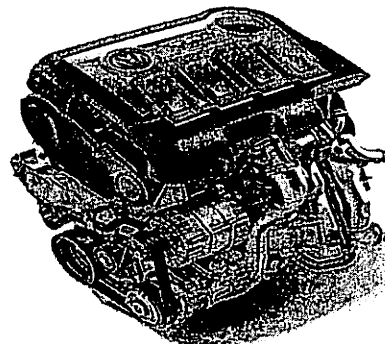
**VIEW INVENTORY**

## This ain't your daddy's diesel.

Stinky, smoky, and sluggish. Those old diesel realities no longer apply. Enter TDI Clean Diesel. Ultra-low-sulfur fuel, direct injection technology, and extreme efficiency. We've ushered in a new era of diesel.

- Engineered to burn low-sulfur diesel fuel
- "Common Rail" direct injection system

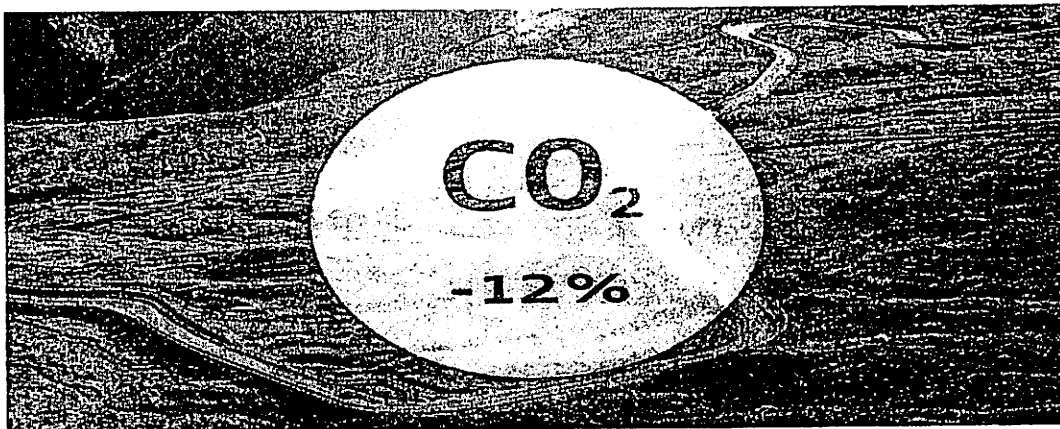
View key fuel efficiency info





33. Advertisements for Audi Clean Diesel cars included similar representations. One ad stated that Audi “pioneered TDI clean diesel engines to deliver more torque, lower fuel consumption, and reduce CO<sub>2</sub> emissions, compared to equivalent gasoline engines. The result of this revolutionary engineering delivers remarkable performance, while achieving increased fuel economy.”<sup>12</sup>

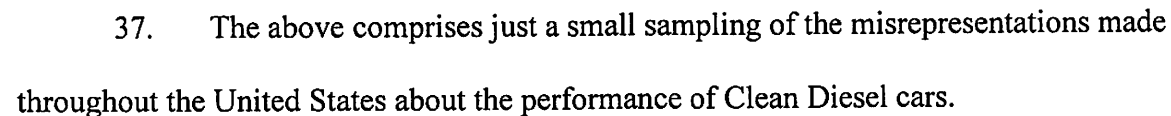
34. Other advertisements for Audi Clean Diesel cars included similar claims.



<sup>12</sup> Audi TDI Clean Diesel, available at <http://www.audiusa.com/technology/efficiency/tdi> (last visited October 4, 2015).

[illegible]

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38. The Clean Air Act (CAA) was enacted in 1970, and regulates air emissions from various sources, including vehicles. 42 U.S.C. § 7401, et seq. (1970). The CAA and regulations promulgated thereunder, including emissions standards for cars, exist to “protect human health and the environment by reducing emissions of nitrogen oxides (NOx) and other pollutants from

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mobile sources of air pollution.”<sup>15</sup> NOx plays a major role in the creation of ozone (smog) on hot summer days.<sup>16</sup> The EPA has found that “[b]reathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. Breathing ozone can also worsen bronchitis, emphysema, and asthma.”<sup>17</sup>

39. The CAA requires car manufacturers, such as Defendants, to certify that their vehicles sold in the United States meet emissions standards promulgated by the EPA. A vehicle cannot be sold in the United States unless the EPA certifies that the vehicle complies with its emissions standards (i.e. the vehicles must receive a “certificate of conformity”).<sup>18</sup>

40. Under the Clean Air Act, it is illegal for car manufacturers, such as Defendants, to install “defeat devices” in vehicles. “Defeat devices” are devices that reduce the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation.

41. On September 18, 2015, the EPA issued a NOV to Defendants Volkswagen AG, Volkswagen Group of America, and Audi AG, stating that Defendants had purposefully installed illegal “defeat devices” in their Clean Diesel cars.

42. According to the EPA, Defendants had “designed and installed a defeat device in these vehicles in the form of a sophisticated software algorithm that detected when a vehicle was undergoing emissions testing.”<sup>19</sup> When the software sensed that the car was being tested for

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<sup>15</sup> Letter from United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (September 18, 2015), *available at* <http://www3.epa.gov/otaq/cert/documents/vw-nov-caa-09-18-15.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

emission compliance, the software produced compliant emissions results. At all other times, the software ran a separate “road calibration,” which reduced the effectiveness of the emission control system.

43. The EPA found that, as a result, **“emissions of NO<sub>x</sub> increased by a factor of 10 to 40 times above the EPA compliant levels, depending on the type of drive cycle (e.g., city, highway).”**<sup>20</sup> The EPA further found that these Defendants had violated the CAA by falsely certifying that its Clean Diesel cars met applicable federal emissions standards.

44. If it had not been for a study conducted by West Virginia University’s Center for Alternative Fuels, Engines & Emissions, Defendants’ fraud may have gone undetected. In 2014, that Center published results of a study commissioned by the International Council on Clean Transportation, which found significantly higher in-use emissions from two diesel cars manufactured by Defendants. As a result of this study, the EPA and the California Air Resources Board (“CARB”) began investigating Defendants’ diesel engines. Initially, when confronted with this study, Defendants did not disclose the defeat devices. Instead, they repeatedly represented to the EPA and CARB that these higher in-use emissions were the result of “various technical issues and unexpected in-use conditions.”<sup>21</sup>

45. According to the NOV, it was not until CARB and the EPA would not approve certificates of conformity for Defendants’ 2016 model year vehicles that Defendants admitted to CARB and the EPA they had designed and installed these defeat devices. Defendants’ admissions were made public in news reports on or around September 18, 2015.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

46. Through its manipulation of the emissions testing process, Defendants perpetrated a huge fraud on the EPA and state regulators, as well as on their customers. Volkswagen AG's CEO, Prof. Dr. Martin Winterkorn, issued a public apology on September 20, 2015 stating he was "personally [and] deeply sorry that we have broken the trust of our customers and the public."<sup>22</sup> He resigned on September 23, 2015.<sup>23</sup>

47. The NOV identified defeat devices in at least the following makes and models of vehicles: ("Class Vehicles"): (i) 2009-2015 Volkswagen Jetta TDI; (ii) 2009-2014 Volkswagen Jetta SportWagen TDI; (iii) 2012-2015 Volkswagen Beetle TDI; (iv) 2012-2015 Volkswagen Beetle Convertible TDI; (v) 2010-2015 Volkswagen Golf TDI; (vi) 2015 Volkswagen Golf SportWagen TDI; (vii) 2012-2015 Volkswagen Passat TDI; and (viii) 2010-2015 Audi 3 TDI. Discovery may reveal that additional cars, makes, or models are properly considered as "Class Vehicles."

48. There are at least 482,000 cars in the United States sold by defendants with these "defeat" devices.<sup>24</sup>

49. These "Class Vehicles" share common harmful traits: (1) they are all equipped with "defeat devices," and (2) they have diesel engines that emit high levels of pollutants.

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<sup>22</sup> Press Release, Volkswagen AG, Statement of Prof. Dr. Martin Winterkorn, CEO of Volkswagen AG (September 20, 2015), *available at* [http://www.volkswagenag.com/content/vwcorp/info\\_center/en/news/2015/09/statement\\_ceo\\_of\\_volkswagen\\_ag.html](http://www.volkswagenag.com/content/vwcorp/info_center/en/news/2015/09/statement_ceo_of_volkswagen_ag.html) l.

<sup>23</sup> William Boston, Volkswagen CEO Resigns as Car Maker Races to Stem Emissions Scandal, THE WALL STREET JOURNAL, September 23, 2015, *available at* <http://www.wsj.com/articles/volkswagen-ceo-winterkorn-resigns-1443007423>.

<sup>24</sup> William Boston, Amy Harder, and Mike Spector, Volkswagen Halts U.S. Sales of Certain Diesel Cars, THE WALL STREET JOURNAL, September 20, 2015, *available at* <http://www.wsj.com/articles/volkswagen-ceo-apologizes-after-epa-accusations-1442754877>.

**C. Defendants' Misrepresentations Significantly Harmed Plaintiff and Class Members**

50. As a result of Defendants' misrepresentations, Plaintiff and the Class substantially overpaid for the Class Vehicles in the first place and face inevitable future costs. Moreover, Plaintiff and the Class never received the products they believed they purchased or leased.

51. Defendants charged a substantial premium for their Clean Diesel cars, as opposed to cars equipped with gasoline engines.<sup>25</sup> Plaintiff and the Class paid these premiums to gain the supposed benefits of these Clean Diesel cars, but these benefits were illusory.

52. For example, the below chart, based on Defendants' historical published price listings from archived web pages, illustrates the premiums charged for several Clean Diesel models in 2014 and 2015 as compared to the base gasoline models.<sup>26</sup>

<b>Model</b>	<b>TDI Clean Diesel</b>	<b>Base</b>	<b>TDI Clean Diesel Price Premium</b>
2014 VW Jetta Sportwagen	\$26,565	\$20,995	\$5,570
2015 Audi A3	\$34,125	\$31,825	\$2,300
2015 VW Beetle	\$25,330	\$20,695	\$4,635
2015 VW Beetle Convertible	\$29,675	\$25,595	\$4,080
2015 VW Golf	\$22,345	\$20,995	\$1,350
2015 VW Golf Sportwagen	\$24,595	\$21,395	\$3,200
2015 VW Jetta	\$21,640	\$17,325	\$4,315
2015 VW Passat	\$27,095	\$21,340	\$5,755

53. As a result, Plaintiff and the Class overpaid for their Class Vehicles by at least the amount of these premiums.

<sup>25</sup> Kyle Stock, Volkswagen's Other Ruse: Premium Pricing, BLOOMBERG BUSINESS, September 23, 2015, *available at* <http://www.bloomberg.com/news/articles/2015-09-23/volkswagen-s-other-diesel-ruse-premium-pricing>.

<sup>26</sup> Information is derived from archived versions of Volkswagen and Audi's websites, such as <https://web.archive.org/web/20150316205038/http://www.vw.com/models/jetta-sportwagen/> (last accessed on October 3, 2015); <https://web.archive.org/web/20150322233515/http://www.audiusa.com/models/compare> (last accessed on October 3, 2015); <https://web.archive.org/web/20150906033420/http://www.vw.com/models/beetle/> (last accessed on October 3, 2015).



54. Moreover, as a result of Defendants' fraudulent conduct, Plaintiff and the Class have suffered a substantial diminution in the re-sale value of their cars. The Class Vehicles are of diminished value because they do not comply with applicable federal and state emissions standards, cost more to operate, are less efficient when operated, cost more to repair, and have a diminished resale value.<sup>27</sup>

55. Defendants' representations about the benefits of the Clean Diesel cars, such as their claims that they were green, powerful, and fuel efficient, were deliberately intended to materially influence Plaintiff's and the Class's purchasing decisions.

56. In addition, the EPA has ordered Defendants to recall the Class Vehicles and refit them so that they comply with EPA emissions requirements during normal operation. As a result, the performance of the Class Vehicles will likely diminish. Among other things, they will likely not be as fuel efficient.

**D. Defendants Benefited from Their Misrepresentations**

57. Defendants extensively profited from their deceptive conduct. For example, in September 2013, Volkswagen sold over 40,000 units in the United States—just the third time Volkswagen had done so in 40 years. Volkswagen credited these Clean Diesel cars for this growth in sales.<sup>28</sup>

58. Moreover, as discussed above, Defendants charged Plaintiff and Class members a substantial premium for the Clean Diesel cars. Defendants would not have received these premiums had they disclosed that the Class Vehicles were equipped with defeat devices designed

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<sup>27</sup> William Boston, Amy Harder, and Mike Spector, Volkswagen Halts U.S. Sales of Certain Diesel Cars, THE WALL STREET JOURNAL, September 20, 2015, *available at* <http://www.wsj.com/articles/volkswagen-ceo-apologizes-after-epa-accusations-1442754877>.

<sup>28</sup> Volkswagen of America, Inc., Press Release, TDI Sales Boost Volkswagen to New Achievement in August (September 4, 2013), *available at* <http://media.vw.com/release/615/>.

to circumvent emissions testing, and the cars actually emitted high levels of pollutants during normal operations.

## **V. PLAINTIFF'S FACTS**

59. Plaintiff David Whitcomb purchased his 2015 Volkswagen Passat TDI in or around June 2015, before Defendants' misconduct was made public. He purchased the vehicle from Valley Volkswagen in Staunton, Virginia, and still owns the vehicle.

60. Although Mr. Whitcomb was unaware of it at the time of his purchase, his 2015 Volkswagen Passat TDI was equipped with a "defeat device" which allowed the vehicle to meet EPA emissions standards. He remained unaware of these facts until after the EPA issued its NOV to Defendants identifying the existence of the "defeat device."

61. Mr. Whitcomb purchased this vehicle with the reasonable belief that the vehicle complied with U.S. Emission standards, properly met all EPA certification requirements, and would retain those characteristics throughout its useful operating life. Defendants were responsible for making the representations and omissions that led to this reasonable belief.

62. As a result of Defendants' omissions and misrepresentations, Mr. Whitcomb has been damaged because he owns a vehicle that is diminished in value. Mr. Whitcomb's vehicle was worth less than the price he paid at the time of purchase because of the defeat device. Furthermore, after Defendants institute the retrofits mandated by the EPA, Plaintiff will incur increased expenses, such as the cost of additional fuel.

## **VI. TOLLING OF THE STATUTE OF LIMITATIONS**

### **A. Discovery Rule Tolling**

63. Until the EPA announced its Notice of Violation on September 18, 2015, Plaintiff and Class members had no way of knowing about Defendants' purposeful violation of the EPA's laws and regulations through the use of their "defeat device." Defendants' deception involved

sophisticated software manipulation, which was only uncovered by sophisticated investigations by the EPA and state regulators. For example, the Los Angeles *Times* reported on September 18, 2015, the substantial investigations by the California Air Resources Board (“CARB”) required to uncover Defendants’ deception. CARB tested on a special dynamometer in a laboratory, utilized open road testing with portable equipment, and used special testing devised by CARB to uncover Defendants’ scheme and how it evaded detection during emissions certifications tests.

Defendants were intent on hiding their behavior from regulators and consumers.

64. Before Defendants’ misconduct was disclosed by the EPA, Plaintiff and Class members could not have discovered through the exercise of reasonable diligence that Defendants were concealing the conduct complained of herein and misrepresenting Defendants’ true position with respect to the emissions qualities of their vehicles.

65. Plaintiff and other Class members did not discover, and did not know of facts that would have caused a reasonable person to suspect, that Defendants did not report information within their knowledge to federal and state authorities, their dealerships, or consumers; nor would a reasonable and diligent investigation have disclosed that Defendants had information in their possession about the existence of their sophisticated scheme and that they opted to conceal that information, which was discovered by Plaintiff only shortly before this action was filed. Nor in any event would such an investigation on the part of Plaintiff and other Class members have disclosed that Defendants valued profits over compliance with federal and state law, or the trust that the Plaintiff and other Class members had placed in Defendants’ representations, or that, necessarily, Defendants actively discouraged their personnel from raising or disclosing issues with regard to the true quality and quantity of the emissions, and the emissions software, of their vehicles, or of Defendants’ fraudulent scheme.

**B. Fraudulent Concealment Tolling**

66. All applicable statutes of limitations have been tolled by the operation of the discovery rule with respect to claims as to the Class Vehicles.

67. All applicable statutes of limitations have been tolled by Defendants' knowing and active fraudulent concealment and denial of the facts alleged herein throughout the time period relevant to this action.

68. Instead of disclosing their deceptive scheme, that the quality and quantity of emissions from the Class Vehicles were far worse than represented, or their disregard of federal and state law, Defendants instead falsely represented that the Clean Diesel vehicles complied with federal and state emissions standards, and that Defendants were reputable manufacturers whose representations could be trusted.

**C. Estoppel**

69. Defendants were under a continuous duty to disclose to Plaintiff and the other Class members the true character, quality, and nature of emissions from the vehicles at issue, and of those vehicles' emissions systems, and of the compliance of those systems with applicable federal and state law.

70. Defendants knowingly, affirmatively, and actively concealed the true nature, quality, and character of the emissions systems, and the emissions, of the vehicles at issue.

71. Defendants were also under a continuous duty to disclose to Plaintiff and the other Class members that they had engaged in the scheme complained of herein to evade federal and state emissions and clean air standards, and that they systematically devalued compliance with, and deliberately flouted, federal and state law regulating vehicle emissions and clean air.

72. Based on the foregoing, Defendants are estopped from relying on any statutes of limitations in defense of this action.

## **VII. CLASS ACTION ALLEGATIONS**

73. The Classes' claims all derive directly from a common course of conduct by Defendants. This case is about Defendants' responsibility for their knowledge and deception, their conduct, and their products. Defendants engaged in uniform and standardized conduct toward the Classes. They did not differentiate, in degree of care or candor, in their actions or inactions, or in the content of their statements or omissions, among individual Class members. The objective facts on these subjects are the same for all Class members. Within each Claim for Relief asserted by the respective Classes, the same legal standards govern. Accordingly, Plaintiff brings this lawsuit as a class action on his own behalf and on behalf of all other persons similarly situated as members of the proposed Classes pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) and/or (b)(2) and/or (c)(4). This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions.

### **A. Nationwide Consumer Class**

74. Plaintiff brings this action and seeks to certify and maintain it as a class action under Rules 23(a); (b)(2); and/or (b)(3); and/or (c)(4) of the Federal Rules of Civil Procedure on behalf of themselves and a Nationwide Consumer Class defined as follows:

All persons in the United States who, prior to the date on which Defendants' fraud was revealed, entered into a lease or bought a Class Vehicle, and who (i) still own or lease the Class Vehicle, or (ii) sold the Class Vehicle after the date on which Defendants' fraud was revealed or (iii) owned a Class Vehicle which was, following an accident, declared a total loss after the date on which Defendants' fraud was revealed.

### **B. Virginia Consumer Class**

75. Plaintiff alleges class action claims on behalf of a class of consumers in Virginia ("Virginia Class"). This class is defined as follows:

All persons who, prior to the date on which Defendants' fraud was revealed, entered into a lease or bought a Class Vehicle in Virginia, and who (i) still own or

lease the Class Vehicle, or (ii) sold the Class Vehicle after the date on which Defendants' fraud was revealed or (iii) owned a Class Vehicle which was, following an accident, declared a total loss after the date on which Defendants' fraud was revealed..

**C. Definitions and Exclusions**

76. The Nationwide Consumer Class and the Virginia Class, and their members, are sometimes referred to herein as the "Class" or "Classes."

77. Excluded from each Class are Defendants and their employees, officers, directors, legal representatives, heirs, successors and wholly or partly owned subsidiaries or affiliates of Defendants; Class Counsel and their employees; and the judicial officers and their immediate family members and associated court staff assigned to this case.

**D. Numerosity and Ascertainability**

78. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(1). There are hundreds of thousands of Class Vehicles nationwide, and numerous Class Vehicles in Virginia. Individual joinder of all Class members is impracticable.

79. Each of the Classes is ascertainable because its members can be readily identified using registration records, sales records, production records, and other information kept by Defendants or third parties in the usual course of business and within their control. Plaintiff anticipates providing appropriate notice to each certified Class, in compliance with Fed. R. Civ. P. 23(c)(2)(A) and/or (B), to be approved by the Court after class certification, or pursuant to court order under Fed. R. Civ. P. 23(d).

**E. Commonality and Predominance of Common Issues**

80. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(2) and 23(b)(3) because questions of law and fact that have common answers that are the same for each of the

respective Classes predominate over questions affecting only individual Class members. These common issue (and answers) include, without limitation, the following:

1. Whether the Defendants engaged in the conduct alleged herein;
2. Whether the Class Vehicles have “defeat devices” installed in them;
3. Whether the Class Vehicles emitted high levels of pollutants when operated in normal conditions;
4. Whether Defendants knew or should have known about the “defeat devices”;
5. Whether Defendants knew or should have known that the Class Vehicles emitted unlawful levels of pollutants when operated in normal conditions;
6. Whether the Class Vehicles have defects in that they do not comply with federal emissions regulations;
7. Whether the Class Vehicles have suffered a diminution of value as a result of the Class Vehicles’ incorporation of the “defeat devices”;
8. Whether Defendants had a duty to disclose the existence of the “defeat devices”;
9. Whether Defendants had a duty to disclose that the Class Vehicles emitted unlawful levels of pollutants when operated in normal conditions;
10. Whether Defendants omitted and failed to disclose material facts about the Class Vehicles;
11. Whether Defendants’ conduct tolls any or all applicable limitations periods by acts of fraudulent concealment, application of the discovery rule, or equitable estoppel;

12. Whether Defendants misrepresented that the Class Vehicles were “clean” and environmentally friendly;
13. Whether Defendants’ unlawful, unfair, and/or deceptive practices harmed Plaintiff and the Classes;
14. Whether Defendants have been unjustly enriched by their conduct;
15. Whether Plaintiff and other Class members overpaid for the Class Vehicles;
16. Whether Plaintiff and other Class members are entitled to damages and other monetary relief and, if so, in what amount;
17. Whether Plaintiff and Class members are entitled to declaratory relief; and
18. Whether Plaintiff and the Classes are entitled to equitable relief, including but not limited to, a preliminary and/or permanent injunction.

**F. Typicality**

81. This action satisfies the requirements of Fed. R. Civ. P. 23(a)(3) because Plaintiff’s claims are typical of the claims of the Class members, and arise from the same course of conduct by Defendants. The relief Plaintiff seeks is typical of the relief sought for the absent Class members.

**G. Adequate Representation**

82. Plaintiff will fairly and adequately represent and protect the interests of the Classes. Plaintiff has retained counsel with substantial experience in prosecuting consumer class actions, including actions involving defective products.

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



**H. Superiority**

84. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(2) because Defendants have acted and refused to act on grounds generally applicable to each Class, thereby making appropriate final injunctive and/or corresponding declaratory relief with respect to each Class as a whole.

85. This action satisfies the requirements of Fed. R. Civ. P. 23(b)(3) because a class action is superior to other available methods for the fair and efficient adjudication of this controversy. The common questions of law and fact regarding Defendants' conduct and responsibility predominate over any questions affecting only individual Class members.

86. Because the damages suffered by each individual Class member may be relatively small, the expense and burden of individual litigation would make it very difficult or impossible for individual Class members to redress the wrongs done to each of them individually, such that most or all Class members would have no rational economic interest in individually controlling the prosecution of specific actions, and the burden imposed on the judicial system by individual litigation by even a small fraction of the Class would be enormous, making class adjudication the superior alternative under Fed. R. Civ. P. 23(b)(3)(A).

87. The conduct of this action as a class action presents far fewer management difficulties, far better conserves judicial resources and the parties' resources, and far more effectively protects the rights of each Class member than would piecemeal litigation. Compared to the expense, burdens, inconsistencies, economic infeasibility, and inefficiencies of individualized litigation, the challenges of managing this action as a class action are outweighed by the benefits to the legitimate interests of the parties, the Court, and the public, of class treatment in this Court, making class adjudication superior to other alternatives, under Fed. R. Civ. P. 23(b)(3)(D).

88. Plaintiff is not aware of any obstacles likely to be encountered in the management of this action that would preclude its maintenance as a class action. Rule 23 provides the Court with authority and flexibility to maximize the efficiencies and benefits of the class mechanism and reduce management challenges. The Court may, on motion of Plaintiff or on its own determination, certify a nationwide class or Virginia class for claims sharing common legal questions; utilize the provisions of Rule 23(c)(4) to certify any particular claims, issues, or common questions of fact or law for class-wide adjudication; certify and adjudicate bellwether class claims; and utilize Rule 23(c)(5) to divide any Class into subclasses.

## **VIII. CLAIMS FOR RELIEF**

### **COUNT I FRAUD/FRAUDULENT CONCEALMENT**

89. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as if fully set forth herein.

90. Plaintiff brings this Count against Defendants on behalf of members of the Nationwide Consumer Class. In the event a nationwide class cannot be maintained on this claim, this claim is asserted by the Virginia Class.

91. Defendants intentionally concealed and suppressed material facts concerning the Clean Diesel cars. Defendants' conduct defrauded Plaintiff and the Class through intentional and affirmative misrepresentations, omissions, suppression, and concealments of material fact.

92. These misrepresentations and omissions include, but are not limited to, the fact that Defendants did not disclose that the Clean Diesel cars included "defeat devices" nor that these cars emitted unlawful levels of pollutants during normal operating conditions. Moreover, Defendants repeatedly advertised the Clean Diesel cars as environmentally safe, clean, efficient,

and powerful, even though these statements were not true. Defendants intended Plaintiff and the Class to rely on those representations.

93. Defendants knew or had reason to know that Plaintiff and the Class would reasonably rely on their misrepresentation and omissions.

94. Plaintiff and the Class reasonably relied upon Defendants' false representations and omissions. Plaintiff and the Class had no means of learning or knowing that Defendants' representations and omissions were false and misleading, in part because Defendants used sophisticated means of deceiving their customers.

95. Defendants took steps to ensure that their employees did not reveal the details of their scheme to regulators or consumers, including Plaintiff and other Class members. Defendants did so to boost the reputation of their vehicles and falsely assure purchasers and lessees of their vehicles, including previously owned vehicles, that Defendants are reputable manufacturers that comply with applicable law, including federal and state clean air laws and emissions regulations. Defendants' false representations were material to consumers, both because those representations concern the quality of the affected vehicles, including their compliance with applicable federal and state law and regulations, and also because the representations played a significant role in the value of the vehicles.

96. Defendants had a duty to disclose the concealed material facts, including but not limited to the existence of the defeat devices and the fact that the Clean Diesel cars in actuality emitted high levels of pollutants during normal operations because:

1. Knowledge of the actual emissions and performance of the vehicles was known and/or accessible only to and by Defendants;

2. Knowledge of the scheme and its details were known and/or accessible only to and by Defendants;
3. Defendants had exclusive knowledge as to implementation and maintenance of their scheme;
4. Defendants knew the facts were not known to or reasonably discoverable by Plaintiff nor the Class;
5. Defendants made general affirmative representations about the qualities of the Clean Diesel cars with respect to emission standards which were deceptive, misleading, and incomplete without the disclosure of additional facts.

97. Defendants had a duty to disclose information regarding their Clean Diesel cars, including the actual emissions of these vehicles, and the existence of the defeat devices.

98. These omitted and concealed facts were material because they directly impact the value of the Class Vehicles purchased or leased by Plaintiff and other Class members. Whether a manufacturer's products comply with federal and state environmental regulations, and whether that manufacturer tells the truth with respect to such compliance or non-compliance, are material concerns to a consumer, particularly with respect to the emissions certification testing that vehicles must pass.

99. Defendants actively concealed and/or suppressed these material facts, in whole or in part, to pad and protect their profits and to keep from regulators and the public that their Clean Diesel cars did not or could not comply with federal and state laws governing clean air and emissions. Defendants concealed these facts at the expense of Plaintiff and Class members.

100. On information and belief, Defendants still have not made full and adequate disclosures, and continue to defraud Plaintiff and Class members by concealing material information regarding the emission qualities of the Class Vehicles and their efforts to circumvent emissions standards.

101. Defendants knew and intended to mislead consumers, including Plaintiff and Class members, and intended Plaintiff and Class members to rely on their misrepresentations and omissions. Plaintiff and Class members were unaware of the omitted material facts referenced herein.

102. Because of the concealment and/or suppression of the facts, Plaintiff and other Class members have sustained damages in an amount to be proven at trial. Plaintiff and Class members have been damaged because, inter alia, they own vehicles that are diminished in value. They also bought or leased cars that could not have been offered for sale in the U.S. by Defendants and their agents, had Defendants been truthful about the fact that the cars did not meet U.S. emissions standards. Moreover, Plaintiff and Class members paid more for those cars. Furthermore, after Defendants institute the retrofits mandated by the EPA, Plaintiff and Class members will incur additional expenses, such as the cost of fuel.

103. Defendants' actions and misconduct, as alleged in this Complaint, were undertaken wantonly, maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of Plaintiff's and other Class members' rights and the representations that Defendants made to them, in order to enrich Defendants. Defendants' conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be determined according to proof.

**COUNT II**  
**VIOLATIONS OF THE VIRGINIA CONSUMER PROTECTION ACT**  
**(VA Code Ann. §§ 59.1-196, et seq.)**

104. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as if fully set forth herein.

105. Plaintiff brings this Count against Defendants on behalf of the Virginia Class.

106. The Virginia Consumer Protection Act prohibits “. . . (5) misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits; (6) misrepresenting that goods or services are of a particular standard, quality, grade, style, or model; . . . (8) advertising goods or services with intent not to sell them as advertised . . . ; [and] (14) using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction[.]” VA CODE ANN. § 59.1-200(A).

107. Defendants are each a “person” as defined by VA CODE ANN. § 59.1-198. The transactions between Plaintiff and the other Class members on one hand and Defendants on the other, leading to the purchase or lease of the Class Vehicles by Plaintiff and the other Class members, are “consumer transactions” as defined by VA CODE ANN. § 59.1-198, because the Class Vehicles were used primarily for personal, family or household purposes.

108. In the course of Defendants’ businesses, they willfully failed to disclose and actively concealed the “defeat device” and true level of emissions from the Class Vehicles, both of which are material facts. Defendants therefore engaged in acts and practices that violate VA CODE ANN. § 59.1-200(A), including but not limited to: representing that the Class Vehicles have characteristics, uses, benefits, and qualities which they do not have; representing that the Class Vehicles are of particular standards and quality when they are not; advertising the Class Vehicles with the intent not to sell them as advertised; and engaging in conduct likely to deceive.

109. Defendants' actions as set forth above occurred in the conduct of trade or commerce.

110. Defendants knew and intended to mislead consumers, including Plaintiff and Class members, and intended Plaintiff and Class members to rely on their misrepresentations. Plaintiff and Class members were unaware of the omitted material facts referenced herein.

111. Plaintiff and the Class reasonably relied on Defendants' concealment and misrepresentation of material facts to their detriment. Defendants' conduct as set forth above and otherwise proximately caused injuries to Plaintiff and the other Class members.

112. Defendants had reason to know that the Class would rely on Defendants' representations because the representations were made in the course of advertising the Class Vehicles for sale to the Class.

113. Defendants' concealment and representations became a part of the basis for the bargain when the Class purchased the Class vehicles.

114. Plaintiff and other Class members suffered measurable injuries as a result of Defendants' conduct. Plaintiff and other Class members overpaid for the affected vehicles and did not receive the benefit of the bargain. Additionally, the Class Vehicles suffered a diminution in value. Plaintiff and Class members also face future inevitable costs. These injuries are the direct and natural consequences of Defendants' misrepresentations, concealments, and omissions.

115. Defendants actively and willfully with an intent to deceive or otherwise mislead, concealed and/or suppressed the material facts regarding the defective and non-EPA compliant Clean Diesel cars, the defeat device, and other aspects of the Class Vehicles in whole or in part, with the intent to deceive and mislead Plaintiff and the other Class members and to induce

Plaintiff and the other Class members to purchase or lease a Class Vehicle at a premium price, which did not match the true value of the vehicle.

116. Plaintiff and the other Class members seek treble damages pursuant to VA CODE ANN. § 59.1-204.

**COUNT III**  
**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**

117. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as if fully set forth herein.

118. Plaintiff brings this Count against Defendants on behalf of the Virginia Class.

119. UCC § 2-314, codified at VA CODE ANN. § 8.2-314(1), provides that, unless disclaimed, there is an implied warranty of merchantability with respect to goods purchased from a merchant. An implied warranty of merchantability attached to each of the Class Vehicles.

120. Among the warranties included in the implied warranty of merchantability is the warranty that the goods will pass without objection in the trade; that the goods are fit for the ordinary purposes for which such goods are used; and that the goods conform to the promise of affirmations of fact made on the container or label if any.

121. Defendants should have reasonably expected the Class, as ultimate users of the Class Vehicles, to use and be affected by the Class Vehicles. Members of the class were foreseeable users of the Class Vehicles and intended beneficiaries of Defendants' contracts to sell the vehicles. Defendants actively misled the Class by making affirmative misrepresentations regarding the Class Vehicles.

122. At the time of the sales, Defendants had knowledge that the affected vehicles would not comply with the aforementioned implied warranties.

123. Defendants breached their implied warranties.



124. For the reasons set forth above in the Complaint, the Class Vehicles would not pass without objection in the trade because the retail sale by Defendants of a vehicle that contains a defeat device is unlawful. Likewise, the Class Vehicles would not pass without objection in the trade because the retail sale by Defendants of a vehicle that does not comply with governing emissions standards is unlawful, as is the sale of a vehicle whose certificate of compliance was fraudulently obtained.

125. Also for the reasons set forth above, the Class Vehicles are not fit for the ordinary purpose for which vehicles are used because they do not comply with applicable federal and state emissions standards.

126. Furthermore, the Class Vehicles do not conform to the promise or affirmations of fact made on their labels because those labels misstated that they complied with applicable federal and state emissions standards, and the stated gas mileage for comparison purposes was not achieved via EPA-compliant testing procedures.

127. Defendants were provided notice of their breaches by their own and governmental inquiries and investigations, and by numerous complaints, among other sources of information. Defendants were aware of their own intentional conduct causing the breaches long before Plaintiffs and the Class and had ample notice and opportunity to correct them.

128. As a result of the foregoing breaches of warranty, Plaintiff and other Class members have been damaged. Plaintiff and other Class members purchased or leased vehicles that at the time of sale or lease, could not have been sold or leased in the United States because they did not meet U.S. emissions standards. In light of the defects in the Class Vehicles, Plaintiff and Class members overpaid for their vehicles. The Class Vehicles are of diminished value because they do not comply with applicable federal and state emissions standards, cost more to

operate, are less efficient when operated, cost more to repair, , and have a diminished resale value.

**COUNT IV**  
**BREACH OF EXPRESS WARRANTY**

129. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as if fully set forth herein.

130. Plaintiff brings this Count against Defendants on behalf of the Virginia Class.

131. UCC § 2-313, codified at VA CODE ANN. § 8.2-313(A)-(B), provides that an express warranty is created when an affirmation of fact or promise made by a seller relating to goods becomes part of the basis of the bargain for the goods, or when any description of goods becomes part of the basis of the bargain. By advertising the “green” and “clean” qualities of the Clean Diesel cars, Defendants expressly warranted to Plaintiff and other Class members that the affected vehicles, at a minimum, complied with all applicable laws and regulations relating to emissions standards. Moreover, Defendants expressly warranted to Plaintiff and to other Class members that their Clean Diesel engines were comparatively more “green” and “clean” than alternative vehicle choices.

132. Defendants also warranted specific, measurable performance characteristics of Class Vehicles through the use of an EPA fuel economy label, which misrepresented the “greenhouse gas” rating, miles per gallon, yearly fuel costs, and fuel savings over five years to consumers. These labels were intended to give consumers a means of comparing the Class Vehicles to alternative vehicles they might purchase. Defendants made these express representations part of the basis of the bargain for the Class Vehicles.

133. Such statements were intended by Defendants to be, and are, among the facts a reasonable consumer would consider to be material in the purchase of a vehicle.

134. Additionally, Defendants should have reasonably expected the Class, as ultimate users of the Class Vehicles, to use and be affected by the Class Vehicles. Defendants actively made affirmative misrepresentations regarding the Class Vehicles.=

135. Contrary to Defendants' representations, the Class Vehicles did not comply with applicable environmental regulations and emitted between 10 and 40 times the amount of pollutants allowed by those regulations.

136. Additionally, Defendants stated that the Class Vehicles achieved a certain "greenhouse gas" rating and fuel efficiency, measured in terms of miles per gallon, when tested in accordance with applicable EPA regulations. Those statements created an express warranty that, under normal operating conditions, the Class Vehicles would achieve the stated fuel efficiency and produce a certain amount of emissions for purposes of comparing the affected vehicles to alternative vehicles. These statements were typically contained on an EPA mileage sticker on the vehicle.

137. However, if the affected vehicles had been tested in accordance with EPA standards while also complying with pollution regulations, they would have achieved significantly lower fuel efficiency than was stated on the EPA mileage sticker on the vehicle.

138. Plaintiff and other class members did not have an opportunity to inform Defendants of the breach because Defendants deliberately withheld material information and actively misled the Class with regard to the performance, value, and other characteristics of the Class Vehicles. Defendants were provided notice of their breaches by their own and governmental inquiries and investigations, and by numerous complaints, among other sources of information. Defendants were aware of their own intentional conduct causing the breaches long before Plaintiffs and the Class and had ample notice and opportunity to correct them.

139. As a result of the foregoing breaches of express warranties, Plaintiff and other Class members have been damaged. Plaintiff and other Class members purchased or leased vehicles that at the time of sale or lease, could not have been sold or leased in the United States because they did not meet U.S. emissions standards. In light of the defects in the Class Vehicles, Plaintiff and Class members overpaid for their vehicles. The Class Vehicles are of diminished value because they do not comply with applicable federal and state emissions standards, cost more to operate, are less efficient when operated, cost more to repair, and have a diminished resale value.

**COUNT V**  
**VIOLATION OF THE MAGNUSON-MOSS**  
**WARRANTY ACT, 15 U.S.C. § 2301 ET SEQ.**

140. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as if fully set forth herein.

141. Plaintiff brings this Count against Defendants on behalf of members of the Nationwide Consumer Class.

142. This Court has jurisdiction to decide claims brought under 15 U.S.C. § 2301 by virtue of 28 U.S.C. § 1332(a)-(d).

143. The Class Vehicles are “consumer products” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

144. Plaintiff and Class members are “consumers” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3).

145. Defendants are “suppliers” and “warrantors” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(4)-(5).

146. 15 U.S.C. § 2310(d)(1) provides a cause of action for any consumer who is damaged by the failure of a warrantor to comply with an implied or written warranty.

147. Volkswagen provided Plaintiff and the other Class members with an implied warranty of merchantability in connection with the purchase or lease of their vehicles that is an “implied warranty” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(7). As a part of the implied warranty of merchantability, Volkswagen warranted that the Class Vehicles were fit for the ordinary purpose of passenger motor vehicles, would pass without objection in the trade as designed, manufactured, and marketed, and would comply with applicable federal and state emissions standards.

148. Volkswagen breached this implied warranty and is therefore liable to Plaintiff and the Class pursuant to 15 U.S.C. § 2310(d)(1) because, without limitation, the Class Vehicles share a common design defect in that they emit unlawful levels of pollutants and are equipped with defeat devices intended to evade detection of their poor emissions. The Defendants have admitted that the Class Vehicles are defective and anticipate recalling the Class Vehicles, but the recalls are woefully insufficient.

149. Defendants provided Plaintiff and the other Class members with an express written warranty in connection with the purchase or lease of their vehicles, as described further below, that is a “written warranty” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(6). Defendants made written affirmations of fact that the Class Vehicles would be free of defects that would prevent ordinary use. Defendants affixed labeling and other written affirmations making specific, performance-related representations related to the nature of the Class Vehicles, including the performance within specified emissions ranges. The EPA fuel economy label affixed to each Class Vehicle warranted the “greenhouse gas” rating, yearly fuel

cost, the fuel savings over a period of five years, and the miles-per-gallon the car achieved, all based on knowingly and intentionally misleading information.

150. Defendants breached their express warranties for the Class Vehicles by, among other things, selling or leasing to Class Members Class Vehicles that are not free of material defects; they emit high levels of pollutants and are equipped with defeat devices intended to evade detection of their unlawful emissions.

151. Any efforts to limit the express and implied warranties in a manner that would exclude coverage of the Class Vehicles is unconscionable, and any such effort to disclaim, or otherwise limit, liability for the Class Vehicles is null and void.

152. Any limitations on the express and implied warranties are procedurally unconscionable. Defendants purposefully misrepresented the Class Vehicles to consumers. Additionally, there was unequal bargaining power between Defendants, on the one hand, and Plaintiff and the other Class members, on the other.

153. Any limitations on the express and implied warranties are substantively unconscionable. Defendants knew that defeat devices were installed on the Class Vehicles and that they were misrepresenting the emissions, fuel performance, and value of the Class Vehicles. Defendants failed to disclose the defeat device to Plaintiff and the other Class members well after becoming aware of them. Given this intentionally fraudulent behavior, Defendants' enforcement of any durational limitations on those warranties, would be harsh and shock the conscience.

154. Plaintiff and each of the other Class members have had sufficient direct dealings with either Defendants or their agents (dealerships) to establish privity of contract.

155. Nonetheless, privity is not required here because Plaintiff and each of the other Class members are intended third-party beneficiaries of contracts between Defendants and their dealers and agents. Specifically, Plaintiff and each of the other Class members are intended third-party beneficiaries of the implied and written warranties. The dealers and agents were not intended to be the ultimate consumers of the Class Vehicles and have no rights under the warranty agreements provided for the Class Vehicles: the warranty agreements were designed for and intended to benefit consumers. Finally, privity is also not required because the Class Vehicles are unsafe and hazardous instrumentalities due to the toxic level of pollutants they produce with normal use.

156. Pursuant to 15 U.S.C. § 2310(e), Plaintiff is entitled to bring this class action and are not required to give Defendants notice and an opportunity to cure until such time as the Court determines the representative capacity of Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure.

157. Furthermore, affording Defendants an opportunity to cure their breach of warranties would be unnecessary and futile. At the time of sale or lease of each Class Vehicle, the Defendants knew, should have known, or were reckless in not knowing of its misrepresentations concerning the Class Vehicles' inability to perform as warranted, but nonetheless failed to rectify the situation and/or disclose the defective design. Under the circumstances, the remedies available under any informal settlement procedure would be inadequate, and any requirement that Plaintiff resort to an informal dispute resolution procedure and afford Defendants a reasonable opportunity to cure its breach of warranties is excused and thereby deemed satisfied.

158. The amount in controversy of Plaintiff's individual claims meets or exceeds the sum of \$25. The amount in controversy of this action exceeds the sum of \$50,000, exclusive of interest and costs, computed on the basis of all claims to be determined in this lawsuit. Plaintiff, individually and on behalf of the other Class members, seeks all damages permitted by law, including diminution in value of their vehicles, in an amount to be proven at trial. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiff and the other Class members are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have reasonably been incurred by Plaintiff and the other Class members in connection with the commencement and prosecution of this action.

159. Additionally, Plaintiff and each of the other Class members are entitled to equitable relief under 15 U.S.C. § 2310(d)(1).

**COUNT VI**  
**UNJUST ENRICHMENT**

160. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint, as if fully set forth herein.

161. Plaintiff brings this Count against Defendants on behalf of members of the Nationwide Consumer Class. In the alternative, this Claim is asserted on behalf of the Virginia Class.

162. As a result of their wrongful and fraudulent acts, concealments, and omissions pertaining to the design defect of their vehicles and the concealment of the defect, as set forth above, Defendants charged a higher price for their vehicles than the vehicles' true value. Defendants were also able to sell cars to customers that they would have otherwise been unable to sell.



163. Defendants enjoyed the benefit of increased financial gains, to the detriment of Plaintiff and other Class members, who paid a premium price that did not reflect the true value of the affected vehicles. It would be inequitable, unjust, and unconscionable for Volkswagen to retain those wrongfully obtained funds.

164. Plaintiff and Class members have no adequate remedy at law.

165. Plaintiff and other Class members therefore seek disgorgement of all profits, plus interest.

#### **IX. PRAYER FOR RELIEF**

166. Plaintiff, on behalf of himself and all others similarly situated, requests the Court to enter judgment against Defendants, as follows:

1. An order certifying the proposed Classes, designating Plaintiff as the named representatives of the Classes, designating the undersigned as Class Counsel, and making such further orders for the protection of Class members as the Court deems appropriate, under Fed. R. Civ. P. 23;
2. A declaration that the Clean Diesel cars have defective emissions systems;
3. A declaration that Defendants are financially responsible for notifying all Class members about the defective nature of the Class Vehicles;
4. An order enjoining Defendants to desist from further deceptive distribution, sales, and lease practices with respect to the Class Vehicles, and such other injunctive relief that the Court deems just and proper;
5. An award to Plaintiff and Class members of compensatory, exemplary, and punitive remedies and damages and statutory penalties, including interest, in an amount to be proven at trial;

6. An award to Plaintiff and Class members for the return of the purchase prices of the Class Vehicles, with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the same, for damages and for reasonable attorneys' fees;
7. An award to Plaintiff and Class members for the premium that they overpaid for the Class Vehicles as opposed to gasoline vehicles, with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the same, for damages and for reasonable attorneys' fees;
8. An award to Plaintiff and Class members for the additional expenses they incur for operating and maintaining their vehicles, such as fuel, after Defendants implement a retrofit of the emissions system;
9. A declaration that Defendants must disgorge, for the benefit of Plaintiff and Class members, all or part of the ill-gotten profits they received from the sale or lease of the Class Vehicles, or make full restitution to Plaintiff and Class members;
10. An award of attorneys' fees and costs, as allowed by law;
11. An award of prejudgment and post judgment interest, as provided by law;
12. Leave to amend the Complaint to conform to the evidence produced at trial; and
13. Such other relief as may be appropriate under the circumstances.

**X. DEMAND FOR JURY TRIAL**

167. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a jury trial as to all issues triable by a jury.

By: 

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## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

David Whitcomb

## DEFENDANTS

Volkswagen Group of America, Inc.; Volkswagen AG; Audi AG; and Audi of America, Inc.

(b) County of Residence of First Listed Plaintiff Waynesboro, VA  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Fairfax County, VA  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Boies, Schiller & Flexner LLP [See Attachment]  
5301 Wisconsin Ave., NW, Washington, DC 20015  
(202) 237-2727

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                                   | DEF                                   |   | PTF                        | DEF                                   |
|---|---------------------------------------|---------------------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1            | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2            | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input checked="" type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input checked="" type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
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## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from Another District (specify)  
☐ 6 Multidistrict Litigation

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
Class Action Fairness Act, 28 U.S.C. § 1332(d); Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq.

Brief description of cause:

Warranty breaches, deceptive practices, fraud, and other claims for misstating emissions of "Clean Diesel" cars

## VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$  
5,000,001.00

CHECK YES only if demanded in complaint:  
JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
10/08/2015

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**ATTACHMENT TO CIVIL COVER SHEET**

**I. (c) Plaintiff's Attorneys**

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BOIES, SCHILLER & FLEXNER LLP  
333 Main Street  
Armonk, NY 10504  
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Court Name: United States District Court  
Division: 1  
Receipt Number: 14683854578  
Cashier ID: rbroaden  
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Amt Tendered: \$400.00

Total Due: \$400.00  
Total Tendered: \$400.00  
Change Amt: \$0.00

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