

1 HAGENS BERMAN SOBOL SHAPIRO LLP
2 STEVE W. BERMAN (*pro hac vice to be filed*)
3 THOMAS E. LOESER (Bar No. 202724)
4 1918 Eighth Avenue, Suite 330
5 Seattle, WA 98101
6 Telephone: (206) 623-7292
7 Facsimile: (206) 623-0594
8 steve@hbsslaw.com
9 toml@hbsslaw.com

8 QUINN EMANUEL URQUHART & SULLIVAN, LLP
9 JOHN B. QUINN (Bar No. 090378)
10 SHON MORGAN (Bar No. 187736)
11 865 South Figueroa Street, 10th Floor
12 Los Angeles, California 90017-2543
13 Telephone: (213) 443 3000
14 Facsimile: (213) 443 3100
15 shonmorgan@quinnemanuel.com

14 [Additional counsel listed on signature page]

15 *Attorneys for Plaintiff and the Proposed Class*

16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA
18 SOUTHERN DIVISION

19 ALEX BARKALOFF, an individual, and
20 the Class of Persons similarly situated,

21 Plaintiffs,

22 v.

23 VOLKSWAGEN GROUP OF
24 AMERICA, INC., a New Jersey
25 Corporation,

26 Defendant.

No. 2:15-cv-07997

CLASS ACTION

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: November 9, 2015
Time: 8:30 AM
Courtroom: 9D

Date Action Filed: October 12, 2015

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STATUTES

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12 CAL. CIV. CODE § 1793.2 *passim*

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15 CAL. HEALTH & SAFETY CODE § 43205 2, 3

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2 PLEASE TAKE NOTICE that in accordance with Federal Rules of Civil
3 Procedure, Rule 65, on November 9, 2015, at 8:30 a.m., in Courtroom 9D of the
4 United States District Court for the Central District of California, Santa Ana Division,
5 the Honorable David O. Carter presiding, Plaintiff Alex Barkaloff and the named
6 putative class members set forth in Exhibit A to the complaint (collectively
7 “Plaintiffs”), will move for preliminary and permanent injunctive relief to enforce the
8 rights of themselves and persons similarly situated under California’s emission control
9 warranties. The motion is based on this Notice, the Memorandum below, the
10 Declarations of Thomas E. Loeser, Esq. and Plaintiff Alex Barkaloff, and all evidence
11 and oral argument at the hearing.

12 PLEASE TAKE FURTHER NOTICE that, at the hearing on injunctive relief, as
13 allowed by the Federal Rules of Civil Procedure, the Court may advance the trial on
14 the merits and consolidate it with the hearing, and may sever and consolidate other
15 matters at issue in the actions and related actions in order to expedite, economize, and
16 avoid unnecessary delay in reaching the substance of the matters. *See* FED. R. CIV. P.
17 65(a)(2) and 42(a)-(b).

18 **RELIEF REQUESTED**

19 By this motion, Plaintiffs respectfully request that the Court enter preliminary
20 and permanent injunctive relief requiring Volkswagen to immediately begin
21 specifically performing its duties under section 1793.2(d) of the California Civil Code,
22 including requiring Volkswagen to promptly facilitate the return of California
23 Vehicles, and provide restitution or replacements, upon request in accordance with
24 California emissions and warranty law.
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1 **I. MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. INTRODUCTION AND SUMMARY**

3 The Court should issue preliminary and permanent injunctions mandating that
4 Defendant Volkswagen Group of America, Inc. (“Volkswagen” or “VW”) comply
5 with its undisputed obligation to promptly allow consumers to return California
6 Vehicles that fail to conform to the express emission warranties that came *as a matter*
7 *of law* with each car sold in California. *See* CAL. HEALTH & SAFETY CODE § 43205.
8 Plaintiffs *will* prevail on the merits of their express warranty claims as soon as the
9 matter is heard because Volkswagen has admitted—*in sworn congressional*
10 *testimony*—all material facts constituting its breach of the warranties and inability to
11 conform the vehicles to California regulations as the warranties require. Volkswagen
12 cannot answer the complaint in this action in good faith without again admitting all
13 material facts.

14 Plaintiffs and the California public are suffering irreparable harm and have no
15 adequate remedy at law because Volkswagen is failing to—and refusing to—accept
16 the return of these vehicles and make restitution in accordance with California express
17 warranty law. *See* CAL. CIV. CODE § 1793.2(d)(2). Plaintiffs are now either: (a) getting
18 no use out of their California Vehicles; or (b) driving California Vehicles that are
19 illegal to sell and operate in California and are spewing toxic emissions into
20 California’s air. This harm will magnify if Plaintiffs are made to wait for
21 Volkswagen’s timetable or the conclusion of complex national multi-district litigation
22 to exercise their express warranty rights to return their vehicles. Plaintiffs typically
23 rely on their vehicles in their daily lives and livelihoods; the affected vehicles are now
24 up to six years old, and the “useful life” of an automobile is only about 8-12 years.
25 Prompt preliminary and permanent injunctive relief on these undisputed warranty
26 claims is necessary because justice delayed is justice denied in this case.

1 **II. FACTS**

2 **A. Each California Vehicle Is Covered By Express California Emissions**
3 **Warranties As a Matter of Law**

4 Plaintiffs and the Class are California owners and lessees of Volkswagen and
5 Audi diesel vehicles that relied on an illegal software “defeat device” to conform with
6 the emissions control regulations adopted by California’s Air Resources Board (the
7 “California Vehicles”). Under California’s stringent automobile emissions control
8 laws, each vehicle purchased or leased in the state must as a matter of law come with
9 an express manufacturer’s warranty that the vehicle was “[d]esigned, built, and
10 equipped so as to conform with all applicable regulations adopted by the Air
11 Resources Board.” CAL. HEALTH & SAFETY CODE § 43205; 13 CAL. CODE REGS. §
12 2037 (the “California Emissions Warranties”). The California Emissions Warranties
13 also specifically warrant Class members against any performance failure of the
14 emissions control system for three years or 50,000 miles, whichever occurs first, and
15 against any defect in any emission-related part for seven years or 70,000 miles,
16 whichever occurs first. *See id.*

17 **B. It is undisputed that Volkswagen breached the express California**
18 **Emissions Warranties with respect to each California Vehicle**

19 It is not disputed that Volkswagen breached the California Emissions
20 Warranties with respect to each California Vehicle. Specifically, Volkswagen admits
21 that the California Vehicles are not designed, built, or equipped to conform with
22 California’s air quality regulations. For example the Frequently Asked Questions
23 (“FAQ”) section of Volkswagen’s informational website states:

24 Are the news reports of this “defeat device” true?

25 Government regulations limit the use of engine software that
26 reduces the effectiveness of a vehicle’s emissions control
27 systems. Those are the “defeat device” regulations, and ...
28

1 Volkswagen did not comply with those regulations. We take
2 full responsibility for our actions ...¹

3 On October 8, 2015, in sworn testimony to the United States Congress, the
4 President and Chief Executive Officer of Volkswagen, Michael Horn, responded to a
5 question from the panel chairman about whether the software was installed “for the
6 express purpose of beating tests.” Mr. Horn stated that to his knowledge, “[i]t was
7 installed for this purpose, yes.”² Mr. Horn was even more candid in a videotaped
8 statement he made on September 22, 2015 that:

9 ...the Environmental Protection Agency has issued a
10 statement and reality that Volkswagen Group manipulated
11 engine software on our TDI diesel cars and we violated
12 emissions standards ... Volkswagen has broken the trust of
13 our customers and the public here in America ... So lets be
clear about this, our company was dishonest, with the EPA
and California Air Resources Board.³

14 **C. It Is Undisputed That Volkswagen Cannot Conform California Vehicles to**
15 **the Express California Emissions Warranties and Is Refusing to Take Back**
16 **Vehicles in Conformance With California Express Warranty Law**

17 Under applicable California express warranty law, Volkswagen must
18 “promptly” offer to accept the return of non-conforming vehicles and to provide
19 replacement vehicles or restitution of the purchase price (among other remedies)
20 unless it can make them “conform to the applicable express warranties after a
21 reasonable number of attempts.” CAL. CIV. CODE § 1793.2(d)(2). It is not disputed
22 Volkswagen cannot make the California Vehicles conform to the express warranties
23 and is not offering or attempting to do so at this time. Specifically, Volkswagen admits
24 that it has no fix and is not accepting the return of California Vehicles at this time:

25 ¹ See Declaration of Thomas E. Loeser (“Loeser Decl.”), ¶ 4 (referencing
26 www.vwdieselinfo.com/faqs).

27 ² Loeser Decl., ¶ 5, as reported in live coverage by National Public Radio (NPR)
and Associated Press (AP).

28 ³ Loeser Decl., ¶ 7, www.youtube.com/watch?v=Q6z8uUJE-jE (emphasis added).

1 How soon will the remedy be available, and how am I going
2 to be compensated for this?

3 We cannot offer a firm date now because we need to work
4 on the remedy and review it with the government. We are
5 proceeding as quickly as possible.

6 ***

7 I want to turn in my vehicle – can I and how?

8 We are cooperating closely with the regulatory authorities to
9 develop a remedy as quickly as possible. We ask for your
10 patience as we work to get this done right.⁴

11 In his Congressional testimony on October 8, 2015, Mr. Horn stated that
12 Volkswagen intends to make affected vehicles compliant with emissions standards
13 through software fixes and the installation of auxiliary hardware that will take “1 to 2
14 years, minimum.” When questioned on remedies for consumers, he stated that
15 Volkswagen may pay customers for a loss in resale values because of the scandal. He
16 said that Volkswagen isn’t considering providing loaner cars because the U.S.
17 government says the vehicles are safe to drive.⁵

18 Plaintiff Alex Barkaloff exemplifies the current situation. He purchased a 2013
19 Volkswagen Beetle TDI from the Volkswagen of Santa Monica dealership. He
20 financed the purchase through Volkswagen Credit, a division of Volkswagen. When
21 he learned that his vehicle relied on an illegal software “defeat device” to conform
22 with the emissions control standards, he no longer wanted the vehicle and sought to
23 return it. He stopped driving the vehicle and wanted to stop making payments but was
24 concerned about the impact on his credit.⁶

25
26 ⁴ Loeser Decl., ¶ 8, www.vwdieselinform.com/faqs.

27 ⁵ Loeser Decl., ¶ 6, as reported in live coverage by NPR and AP.

28 ⁶ See Declaration of Alex Barkaloff (“Barkaloff Decl.”), ¶¶ 4-5.

1 success on the merits to be outweighed by strong equitable
2 considerations. *See id.* at 1134-35. Under the *Winter* factor
3 test, a party is entitled to a preliminary injunction if she
4 establishes that: (1) she is “likely to succeed on the merits”;
5 (2) the “balance of equities tips in [the party’s] favor”; (3)
6 she is “likely to suffer irreparable harm in the absence of
7 preliminary relief”; and (4) a preliminary injunction is in the
8 public interest. *Winter*, 555 U.S. at 20; *Save Our Sonoran,*
9 *Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005). Under
10 the sliding scale test, a party is entitled to a preliminary
11 injunction if she establishes: (1) “serious questions going to
12 the merits”; (2) “a balance of hardships that tips sharply
13 towards the [the party]”; (3) “a likelihood of irreparable
14 injury”; and (2) a preliminary injunction is in the public
15 interest. *Alliance for the Wild Rockies*, 632 F.3d 1127, 1135
16 (9th Cir. 2011) (noting that the last two factors are identical
17 to two of the factors in *Winter*). While the test “requires the
18 [party] to make a showing on all four prongs,” the showing
19 need not be equally strong. *See id.*

20 *Tavazo Corp. v. Tavazo Corp.*, 2013 U.S. Dist. LEXIS 42028, at *3-5 (C.D. Cal. Mar.
21 25, 2013).

22 **B. Plaintiffs Are Now Entitled To Return Their California Vehicles And**
23 **Receive Restitution Or Replacement Pursuant to California Express**
24 **Warranty Law**

25 Plaintiffs and the Class have the *immediate* right to return California Vehicles to
26 Volkswagen. California law imposes express duties “on the manufacturer of consumer
27 goods sold in this state and for which the manufacturer has made an express
28 warranty.” CAL. CIV. CODE § 1793.2. Among those duties, “[i]f the manufacturer or its
representative in this state is unable to service or repair a new motor vehicle ... to
conform to the applicable express warranties after a reasonable number of attempts,
the manufacturer shall either *promptly* replace the new motor vehicle or *promptly*
make restitution to the buyer” at the vehicle owner’s option. *See* CAL. CIV. CODE §
1793.2(d)(2) (emphasis added).

1 Plaintiffs and the Class are excused from the requirement to “deliver
2 nonconforming goods to the manufacturer’s service and repair facility within this
3 state” because Volkswagen is refusing to accept them, and delivery of the California
4 Vehicles “cannot reasonably be accomplished.” CAL. CIV. CODE § 1793.2(c). Plaintiffs
5 and the Class are excused from any requirement that they allow a “reasonable number
6 of attempts” to bring their cars into conformity with California emissions laws because
7 Volkswagen admits it would be futile since it has no ability to make the required
8 repairs at this time. *See In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936,
9 970-971 (N.D. Cal. 2014). Because Volkswagen admittedly cannot make the
10 California Vehicles “conform to the applicable express warranties after a reasonable
11 number of attempts,” Plaintiffs and the Class are now entitled to return their cars to
12 Volkswagen and receive restitution or replacement pursuant to California express
13 warranty law. *See* CAL. CIV. CODE § 1793.2(d).

14 **C. Plaintiffs Will Prevail On The Merits As Soon As The Matter Can Be**
15 **Heard**

16 Again, Plaintiffs *will* prevail on the merits of their express warranty claims as
17 soon as the matter is heard because Volkswagen has admitted all material facts
18 constituting its breach of the warranties and inability to conform the vehicles in sworn
19 congressional testimony. Indeed, Volkswagen cannot answer the complaint in this
20 action in good faith without again admitting all material facts.

21 **D. Plaintiffs Are Suffering Irreparable Harm and Have No Adequate Remedy**
22 **At Law**

23 Plaintiffs, the Class, and the California public at large are suffering irreparable
24 harm and have no adequate remedy at law because Class members are now either: (a)
25 getting no use out of their class vehicles; or (b) driving class vehicles that are illegal to
26 sell or operate in California because they spew toxic emissions into California’s air.
27 This harm will magnify if Plaintiffs are made to wait for the conclusion of complex
28 national litigation to exercise their express warranty rights to return their vehicles.

1 Plaintiffs rely on their vehicles for their livelihood and convenience. The class
2 vehicles are now up to six years old. The “useful life” of an automobile is only about
3 8-12 year total.

4 Plaintiffs are also suffering irreparable harm specific to their restitution rights
5 under California’s express warranty law. The statute provides that “[w]hen restitution
6 is made[,] ... the amount to be paid by the manufacturer to the buyer may be reduced
7 by the manufacturer by that amount determined by multiplying the actual price ... paid
8 or payable by the buyer ... by a fraction having as its denominator 120,000 and having
9 as its numerator the number of miles ... prior to the time the buyer first delivered the
10 vehicle ... for correction of the problem that gave rise to the nonconformity.” CAL.
11 CIV. CODE § 1793.2(d)(2)(C). Volkswagen’s conduct in refusing to accept delivery of
12 the California Vehicles results in the additional miles on each of them that reduces the
13 value of the statutory restitution to which Plaintiffs are entitled.

14 Volkswagen’s efforts to develop a “fix” are not grounds for delay because it
15 admits that any such fix will not even begin until 2016 and will require at least a year
16 to implement. Further, it is physically impossible to create a “fix” that resolves the
17 toxic emissions without compromising the performance and fuel efficiency of the
18 affected vehicles. In any event, under the California Emissions Warranties, Plaintiffs
19 and Class members are *now* entitled to return their California Vehicles. *See* CAL. CIV.
20 CODE § 1793.2. Plaintiffs and Class members will suffer irreparable harm if
21 Volkswagen is allowed to continue to thwart its warranty obligations under California
22 law.

23 **E. There Is No Good Cause To Delay**

24 There is no good cause to delay proceeding on this matter. The broader
25 complexity of the Volkswagen emissions matter is not good cause for delay because
26 these issues can and should be resolved through a hearing on preliminary and
27 permanent injunctive relief. “Before or after beginning the hearing on a motion for a
28

1 preliminary injunction, the court may advance the trial on the merits and consolidate it
2 with the hearing.” FED. R. CIV. P. 65(a)(2). Further, where, as here, the matters
3 “involve a common question of law or fact, the Court may: (1) join for hearing or trial
4 any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any
5 other orders to avoid unnecessary cost or delay.” FED. R. CIV. P. 42(a). Likewise, for
6 “convenience, to avoid prejudice, or to expedite and economize, the Court may order a
7 separate trial of one or more separate issues [or] claims.” FED. R. CIV. P. 42(b).

8 **F. The Court May Provisionally Certify the Class As Necessary to Implement**
9 **the Injunctive Relief**

10 The Court may provisionally certify the Class as necessary to implement the
11 injunctive relief. *See Meyer v. Portfolio Recovery Assocs., LLC*, 696 F.3d 943, 949
12 (9th Cir. 2012). Under Rule 23(b)(2), a “class action may be maintained if Rule 23(a)
13 is satisfied and if . . . the party opposing the class has acted or refused to act on
14 grounds that apply generally to the class, so that final injunctive relief or
15 corresponding declaratory relief is appropriate respecting the class as a whole.” FED.
16 R. CIV. P. 23(b)(2). Such class certifications do not require individualized notice or
17 opt-out opportunities for the class. *See* FED. R. CIV. P. 23(c)(2)(A). “The plain
18 language of FRCP 23(b)(2) does not restrict class certification to instances when final
19 injunctive relief issues; it only requires that final injunctive relief be appropriate.”
20 *Meyer*, 696 F.3d at 949.

21 The undisputed facts plainly satisfy the elements of Rule 23(a). There are
22 approximately 70,000 Volkswagen and Audi vehicles in California that are equipped
23 with the illegal defeat device, thus the Class is so numerous that joinder of all
24 members is impracticable. Loeser Decl., ¶ 9. Whether use of the defeat device violates
25 the California Emissions Warranties is the paramount question in this case and it is
26 undeniably common to each Class vehicle, thus there are questions of law or fact
27 common to the Class. Plaintiff Barkaloff owns a vehicle with the defeat device
28 installed, thus his claims are typical. He is an adequate class representative because his

1 interests are aligned with those of the Class and he has hired attorneys who are well
2 known experts in class action litigation. *See* Barkaloff Decl., ¶¶ 4-7; Loeser Decl., ¶¶
3 2-3.

4 Alternatively, the Court need not certify the Class to implement the requested
5 relief. “There is no general requirement that an injunction affect only the parties in the
6 suit.” *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987). “[A]n injunction is not
7 necessarily made over-broad by extending benefit or protection to persons other than
8 prevailing parties in the lawsuit -- even if it is not a class action -- *if such breadth is*
9 *necessary to give prevailing parties the relief to which they are entitled.*” *Id.* at 1170-
10 1171 (emphasis in original). At present, 339 putative Class members have retained
11 Plaintiff’s counsel and authorized this identical lawsuit to be filed on their behalf if
12 necessary to obtain the preliminary injunction requested in this motion. *See* Loeser
13 Decl., ¶ 10. They are appearing individually and requesting the Court order
14 Volkswagen to specifically perform on its express warranty obligations to them and
15 the California public at large. *See id.* It would be entirely appropriate for the Court to
16 order Volkswagen to do so with or without provisional class certification.

17 IV. CONCLUSION

18 The Court should issue preliminary and permanent injunctive relief requiring
19 Volkswagen to immediately begin specifically performing its duties under section
20 1793.2(d) of the California Civil Code. To be clear, Plaintiffs are not requesting an
21 injunctive order that requires Volkswagen to seize every California Vehicle. Rather,
22 Plaintiffs seek an injunctive order requiring Volkswagen to promptly facilitate the
23 return of California Vehicles, and provide restitution or replacements, upon request in
24 accordance with California emissions and warranty law.
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1 DATED: October 12, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

2 By /s/ Thomas E. Loeser

3 Steve W. Berman (*pro hac vice to be filed*)

4 Thomas E. Loeser (Bar No. 202724)

5 1918 8th Avenue, Suite 3300

6 Seattle, Washington 98101

7 Telephone: (206) 623-7292

8 Facsimile: (206) 623-0594

9 steve@hbsslaw.com

10 toml@hbsslaw.com

11 QUINN EMANUEL URQUHART &
12 SULLIVAN, LLP

13 JOHN B. QUINN (Bar No. 090378)

14 SHON MORGAN (Bar No. 187736)

15 865 South Figueroa Street, 10th Floor

16 Los Angeles, California 90017-2543

17 Telephone: (213) 443 3000

18 Facsimile: (213) 443 3100

19 shonmorgan@quinnemanuel.com

20 Lee Gordon (Bar No. 174168)

21 HAGENS BERMAN SOBOL SHAPIRO LLP

22 301 N. Lake Avenue, Suite 203

23 Pasadena, CA 91101

24 Telephone: (213) 330-7150

25 Facsimile: (213) 330-7152

26 lee@hbsslaw.com

27 Peter B. Fredman

28 LAW OFFICE OF PETER FREDMAN

125 University Ave., Suite 102

Berkeley, CA 94710

Telephone: (510) 868-2626

Facsimile: (510) 868-2627

peter@peterfredmanlaw.com

Attorneys for Plaintiff and the Proposed Class