

CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-000828-166

(Class Action)  
SUPERIOR COURT

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**S. GAGNON**

and

**J. BOUCHARD**

*Petitioners*

-vs.-

**AUDI CANADA INC.**

and

**AUDI AG**

and

**VOLKSWAGEN GROUP CANADA INC.**

and

**VOLKSWAGEN AG**

and

**PORSCHE CARS CANADA, LTD.**, legal person duly constituted, having its head office at 420-5925 RD Airport, City of Mississauga, Province of Ontario, L4V 1W1

and

**BENTLEY MOTORS CANADA, LTD.**, legal person duly constituted, having its head office at 2500-1000 rue De La Gauchetière West, City of Montreal, Province of Quebec, H3B 0A2

*Respondents*

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**THIRD AMENDED APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS ACTION & TO APPOINT THE PETITIONERS AS REPRESENTATIVES**  
(Art. 574 C.C.P. and following)

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TO THE HONOURABLE MADAM JUSTICE SUZANNE COURCHESNE OF THE SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONERS STATE AS FOLLOWS:

## **I. GENERAL PRESENTATION**

### **A) The Action**

1. Petitioners wish to institute a class action on behalf of the following group, of which they are members, namely:
  - all persons, entities or organizations resident in Quebec who purchased and/or leased one or more of the Subject Vehicles with gasoline engines, or any other group to be determined by the Court;
2. This case involves a scheme in which the Respondents installed software programs that operate primarily during testing, but not during on-road driving conditions, in gasoline-powered Audi, Bentley, Porsche, and Volkswagen vehicles sold or leased in Canada. The software programs reduce the vehicle's emission controls enabling the vehicle to produce lower CO<sub>2</sub> emissions and to exhibit higher fuel efficiency under testing conditions, but not during normal operation;
3. The "Subject Vehicles" means (...) the following Audi, Bentley, Porsche, and Volkswagen vehicles with a gasoline engine (...):
  - (i) ZF 8HP55 "AL 551" transmission<sup>1</sup>, including but not limited to, the Audi 3.0L A6, A8, Q5, and Q7 models,
  - (ii) DL 501-7Q "DL 501" transmission<sup>2</sup>, including but not limited to, the Audi 3.0L S4, S5, S6, S7 models; and
  - (iii) The vehicles listed in following table:

<b>Make</b>	<b>Model</b>	<b>Engine Capacity</b>	<b>Model Year</b>
Audi	A8L	4.0L	2015
Audi	A8L	6.3L	2013
Audi	A8L	6.3L	2014
Audi	A8L	6.3L	2015
Audi	A8L	6.3L	2016
Audi	RS7	4.0L	2014
Audi	RS7	4.0L	2015

<sup>1</sup> The AL 551 transmission belongs to the ZF 8HP family of eight-speed units Audi sourced from transmission supplier ZF Friedrichshafen.

<sup>2</sup> The DL 501 model Audi sourced from Volkswagen.



Audi	RS7	4.0L	2016
Audi	S8	4.0L	2013
Audi	S8	4.0L	2014
Audi	S8	4.0L	2015
Audi	S8	4.0L	2016
Bentley	Continental GT	4.0L	2013
Bentley	Continental GT	4.0L	2014
Bentley	Continental GT	4.0L	2015
Bentley	Continental GT	4.0L	2016
Bentley	Continental GT	4.0L	2017
Bentley	Continental GTC	4.0L	2013
Bentley	Continental GTC	4.0L	2014
Bentley	Continental GT Convertible	4.0L	2015
Bentley	Continental GT Convertible	4.0L	2016
Bentley	Continental GT Convertible	4.0L	2017
Bentley	Flying Spur	4.0L	2015
Bentley	Flying Spur	4.0L	2016
Bentley	Flying Spur	6.0L	2014
Bentley	Flying Spur	6.0L	2015
Bentley	Flying Spur	6.0L	2016
Porsche	Cayenne	3.6L	2013
Porsche	Cayenne	3.6L	2014
Porsche	Cayenne	3.6L	2016
Porsche	Cayenne GTS	3.6L	2016
Porsche	Cayenne GTS	4.8L	2013
Porsche	Cayenne GTS	4.8L	2014
Porsche	Cayenne S	3.6L	2015
Porsche	Cayenne S	3.6L	2016
Porsche	Cayenne S	4.8L	2013
Porsche	Cayenne S	4.8L	2014
Porsche	Cayenne Turbo	4.8L	2013
Porsche	Cayenne Turbo	4.8L	2014
Porsche	Cayenne Turbo S	4.8L	2014
Porsche	Cayenne Turbo S	4.8L	2016
Volkswagen	Tiguan 4MOTION	2.0L	2017
Volkswagen	Touareg	3.6L	2013
Volkswagen	Touareg	3.6L	2014

4. The software programs may also be equipped on higher performance versions of some of these models. The list of vehicles equipped with this transmission that also use the software program that operates it in the above-described manner may grow or change as the investigations proceed;
5. The Petitioners contend that the Respondents failed to disclose the existence of the software program and that the Subject Vehicles emitted carbon dioxide (CO<sub>2</sub>) at a



much higher level than stated and that they had substantially lower fuel efficiency than stated. In fact, the Respondents actively concealed the existence of the software program and the fact that its existence would diminish both the intrinsic and the resale value of the Subject Vehicles, as well as, increase the cost of gas for consumers;

## **B) The Respondents**

6. Respondent Audi Canada Inc. (“Audi Canada”) is a Canadian corporation with its head office in Ajax, Ontario. It is a wholly-owned subsidiary of Respondent Volkswagen Group Canada Inc., as appears from a copy of an extract from the *Registraire des entreprises*, produced herein as **Exhibit R-1**;
7. Respondent Audi AG is a German corporation with its head office in Bavaria, Germany. According to Audi AG, in 2015, it sold approximately 26,754 vehicles in Canada, as appears from a copy of Audi AG’s 2015 Annual Report, produced herein as **Exhibit R-2**;
8. Respondent Audi AG is the owner of the following Canadian trade-marks: (word) AUDI (TMA279462), (word) AUDI (TMA303809), (design) Audi design (TMA685348), (design) AUDI (TMA846211), as appears from a copy of said trade-marks from the CIPO database, produced herein as **Exhibit R-3**;
9. Respondent Volkswagen Group Canada Inc. (“Volkswagen Canada”) is a Canadian corporation with its head office in Ajax, Ontario. It is the parent company of Respondent Audi Canada, the whole as appears from a copy of an extract from the *Registraire des entreprises*, produced herein as **Exhibit R-4**;
10. Respondent Volkswagen AG is a German corporation with its head office in Wolfsburg, Germany. Volkswagen AG controls 99.55% of Audi AG;
- 10.1 Respondent Porsche Cars Canada, Ltd. (“Porsche Canada”) is a Canadian corporation with its head office in Mississauga, Ontario. Porsche Canada is the exclusive importer and distributor of Porsche vehicles, including the Cayenne in Canada, the whole as appears more fully from a copy of an extract from the *Registraire des entreprises* and from a copy of the Porsche Canada Press Release entitled “Porsche Cars Canada reports its March and first quarter of 2019 sales results” dated April 2, 2019, produced herein *en liasse* as **Exhibit R-19**;
- 10.2 The Porsche group of companies, including Porsche Canada, was wholly acquired by the Volkswagen group in 2012 when Volkswagen AG purchased the 50.1% remaining shares of Porsche, the whole as appears more fully from a copy of The Guardian article entitled “Volkswagen swallows Porsche” dated July 5, 2012, produced herein as **Exhibit R-20**;



- 10.3 Respondent Bentley Motors Canada, Ltd. (hereinafter “Bentley Canada”) is a Canadian corporation with its head office in Montreal, Quebec. Bentley Canada is the importer and distributor of Bentley motor vehicles in Canada, the whole as appears more fully from a copy of an extract from the *Registraire des entreprises*, produced herein as **Exhibit R-21**;
- 10.4 The Bentley group of companies, including Bentley Canada, was acquired by the Volkswagen group in July 1998, the whole as appears more fully from a copy of Volkswagen AG’s publication entitled “Facts and Figures Navigators 2012” dated 2012, produced herein as **Exhibit R-22**;
11. During the Class Period, the Respondents, either directly or through a parent company, subsidiary, agent or affiliate, designed, manufactured, exported, imported, marketed, advertised, distributed, leased and/or sold the Subject Vehicles throughout Canada, including within the province of Quebec;
12. Given the close ties between the Respondents and considering the preceding, they are all solidarily liable for the acts and omissions of the other;

### **C) The Situation**

13. The *On-Road Vehicle and Engine Emission Regulations* under the *Canadian Environmental Protection Act, 1999* (“CEPA”) makes it a violation for any person to sell, manufacture, or install any component in a motor vehicle that “is an auxiliary emission control device that reduces the effectiveness of the emission control system under conditions that may reasonably be expected to be encountered in normal vehicle operation and use”;

#### **(i) Diesel Vehicles – NO<sub>x</sub> Defeat Device**

14. It has been widely publicized that, for years, the Respondents engaged in an extensive scheme to misrepresent the emissions of their so-called “clean diesel” vehicles by equipping them with a defeat device;
15. The defeat device at issue in that litigation used an algorithm to detect when vehicles were being operated on dynamometers, such as is used in smog testing facilities and by federal regulators when determining compliance with emissions standards. When the diesel defeat device detected that the car was undergoing emissions testing, it would engage full emissions controls, which allowed the diesel vehicles to pass stringent standards for NO<sub>x</sub> emissions<sup>3</sup>. During on-road driving, however, these same cars emitted 10 to 40 times the legal limits for NO<sub>x</sub> because the emission controls were turned off;
16. On September 18, 2015, the “Volkswagen Emissions Scandal” erupted, when the United States Environmental Protection Agency (U.S. EPA) issued a notice of

<sup>3</sup> Nitrogen dioxide and nitric oxide are referred to together as oxides of nitrogen (NO<sub>x</sub>).



violation of the *Clean Air Act* to the Volkswagen Group after it was discovered that Volkswagen had intentionally programmed certain diesel engines to activate emissions controls only during laboratory emissions testing. The programming caused the vehicles' NO<sub>x</sub> output to meet environmental standards during regulatory testing, but emit up to 40 times more NO<sub>x</sub> in real-world driving. Volkswagen deployed this programming in about eleven million cars worldwide, during model years 2009 through 2015;

17. In September 2015 and again in November 2015, the Respondents admitted using defeat device software to activate emissions controls when diesel cars were being smog tested and deactivate those controls during normal, on-road driving. Volkswagen claimed that the diesel defeat device was an isolated incident, which it blamed on "rogue engineers", as appears from various journal articles, produced herein *en l'asse* as **Exhibit R-5**;
18. Despite these admissions, it was not an isolated incident, and the unlawful activity was not perpetrated by only a few "rogue engineers", but purposefully;

**(ii) Gasoline Subject Vehicles – CO<sub>2</sub> Software Program**

19. Moreover, this unlawful activity was not limited to their diesel vehicles. It has recently been discovered that the Respondents have been surreptitiously using a completely different software program on at least the Subject Vehicles;
20. Unbelievably, despite the Respondents' promises to be honest about their past mistakes in 2015, they apparently persisted in concealing and selling vehicles with a different software program in thousands of Audi, Bentley, Porsche, and Volkswagen-branded vehicles;
21. Unlike the emissions defeat devices in the diesel engine vehicles, which manipulate nitrous oxide (NO<sub>x</sub>) levels, the software programs in the gasoline engine vehicles manipulate another pollutant, carbon dioxide (CO<sub>2</sub>) levels;
22. In July 2016, it was uncovered (and widely reported) that the Respondents equipped many of its *gasoline* vehicles with an entirely different software program to falsify and misrepresent the emission of another noxious gas, carbon dioxide emissions, as well as fuel efficiency, as appears from various articles, produced herein *en l'asse* as **Exhibit R-6**;
- 22.1 Specifically, on November 5, 2016, the German newspaper *Bild am Sonntag* reported that the California Air Resources Board ("CARB") had discovered another defeat device, this time on several gasoline-powered Audi models equipped with a certain 8-speed automatic transmission (Exhibit R-6). Like the defeat devices used in the diesel vehicles, this device uses engine and transmission management software and the car's sensors to detect when the vehicle is undergoing emissions



testing, and then operates vehicle systems to reduce carbon dioxide emissions to legal levels only during test cycles;

22.2 According to the *Bild am Sonntag* report, the device works as follows: when the affected vehicles are turned on, they activate a “warm-up” mode. In that mode, the engine management computer instructs the automatic transmission to change gears at unusually low engine speeds (commonly measured in revolutions per minute or RPM), keeping engine speed low and thus burning less fuel and emitting lower amounts of carbon dioxide. However, this mode remains active only until the steering wheel is turned 15 degrees or more, at which point the engine management computer switches the transmission into normal mode, wherein the transmission shifts at normal, higher RPM, offering higher performance, lower fuel economy, and significantly greater carbon dioxide emissions;

22.3 Thus, during emissions testing, which typically takes place on a dynamometer, the car remains in “warm-up” mode indefinitely, because the steering wheel is not turned. Meanwhile, in normal driving conditions, any turn requires the steering wheel to be rotated more than 15 degrees, and the car switches to its normal shifting program;

22.4 *Bild am Sonntag* further reports that Audi documents confirm this scheme. In February 2013, during testing of Audi vehicles, Audi’s then-head of powertrain development, Axel Eiser, asked when the “cycle-optimized shift program” would be ready, and suggested that the emissions-cheating shift program be configured so that it “runs at 100% on the roller, but only .01% with the customer” (Exhibit R-6);

22.5 Following the *Bild am Sonntag* report, extensive technical vehicle testing was performed in the United States to detect discrepancies in emissions and fuel economy performance between lab and normal driving conditions. As the investigations have borne out, it was discovered that many transmissions that the Respondents used in their vehicles along with a software program that is primarily active in testing, but not in real world driving, thus impacting the emissions and fuel economy in each setting;

22.6 As a result of this software, the Subject Vehicles emit more CO<sub>2</sub> and achieve worse fuel economy on the road than what was disclosed to regulators and represented to consumers who purchased and/or leased them;

23. Instead of delivering on their promises of high performance coupled with low or compliant emissions, the Respondents devised a way to make it appear that their cars did what they said they would when, in fact, they did not. Simply put, the Respondents lied to consumers and regulators alike and continued to lie over many years;

23.1 The NO<sub>x</sub> defeat device in the diesel vehicles and the software programs in the Subject Vehicles (which are powered by gasoline) use different methods to alter



their emissions under testing conditions, but they share several key aspects. Most notably, they use at least one of the same triggers to identify testing conditions: the steering wheel. Emissions testing takes place on a dynamometer – essentially a treadmill for cars – and so unlike in real-world driving, the steering wheel is never turned or rotated. Thus, like the NO<sub>x</sub> defeat device in the diesel vehicles, turning the steering wheel after starting up the car disengages the test-defeating low-power mode and engages the normal, higher-polluting mode. The industry term for this is “cycle optimization”—that is, optimizing vehicle functionality to pass test cycles, while operating differently during normal driving. This form of cheating renders test results meaningless and advertising based on them false and misleading;

24. The Respondents were able to disguise this deception by programming its engines with the ability to engage different modes, one of which used significantly less fuel and emitted significantly less CO<sub>2</sub>, but also delivered significantly less power. The Respondents deceptively dubbed this the “warm-up” strategy, a mode that activates when the Subject Vehicles are started. As long as the “warm-up” function remains activated, the automatic transmission remains in a “switching program” that produces a low engine speed, consumes less fuel, and produces less CO<sub>2</sub>. However, this mode remains active only until the steering wheel is turned 15 degrees or more, at which point the engine management computer switches the transmission into normal mode, wherein the transmission shifts at normal, higher RPM, offering higher performance, lower fuel economy, and significantly greater carbon dioxide emissions;
25. The Respondents also figured out how to activate this low fuel/low emissions/low power mode during governmental tests. The Respondents’ engineers concluded that the only time the Subject Vehicles would run continuously with no steering wheel input would be when the vehicles were undergoing examination in a lab, on a test bed. The vehicles’ transmission control modules (“TCM”) therefore set “shift points” that allow the vehicles to detect those lab conditions and to produce compliant emission results under those conditions (known by Volkswagen as the “dyno calibration” mode)<sup>4</sup>. Under these static dynamometer lab conditions (a vehicle treadmill), the software program enables the Subject Vehicles to operate in this low power mode;
- 25.1 The (...) software is embedded in the TCM. The TCM’s primary function is to regulate shifting between gears (to establish shift logic) by reacting to signals from sensors monitoring coolant temperature, exhaust temperature, ignition timing, crankshaft and camshaft positioning, fuel mixture and air flow volumes. The TCM and engine control unit (“ECU”) work in tandem to execute the actual cheat

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<sup>4</sup> The defeat device software is imbedded in the TCM. The TCM’s primary function is to establish shift logic by reacting to signals from sensors monitoring coolant temperature, exhaust temperature, ignition timing, crankshaft and camshaft positioning, fuel mixture and air flow volumes. The TCM and engine control unit (“ECU”) work in tandem to execute the actual cheat function. The engineers imbedded the cheat software in the TCM unit, intentionally making its detection less probable





function. The engineers embedded the cheat software in the TCM unit, intentionally making its detection less probable;

- 25.2 The Subject Vehicles operate with the software either “active” or “inactive”. When the program is active, the transmission changes gears at lower engine speeds (measured in rotations per minute or “RPMs”) than when it is inactive. Shifting between gears at lower engine speeds (when the software is active) keeps the average engine speed low, thus burning less fuel and emitting less carbon dioxide. Conversely, when the software is inactive (i.e., in regular driving), the Subject Vehicles shift gears at higher RPMs, resulting in higher carbon dioxide emissions and reduced fuel economy;
- 25.3 In each Subject Vehicle, the software is calibrated to activate when it encounters certain “entry conditions” and de-activate under certain “exit conditions.” In the AL 551-8Q, for example, the software activates immediately after a key-start (when the vehicle’s ignition is turned on) and remains on until the steering wheel is turned 15 degrees or more (which does not occur during emissions testing). After a wheel turn, as occurs in real-world driving, the transmission switches to a “normal” mode (i.e., with the software off) in which it shifts at higher RPMs, uses more gas, and emits more carbon dioxide;
- 25.4 As with the AL 551-8Q, the software in each Subject Vehicle is active for at least some portion of standard emissions testing procedures and mostly inactive during on-road driving. This is so because the “exit conditions” that render the software inactive (like turning the steering wheel) are encountered in everyday driving conditions, but not during emissions testing;
- 25.5 While each of the Subject Vehicles and transmissions at issue in this case is programmed with the Software, the program calibrations vary across the different Subject Vehicle models (i.e., the software is activated and de-activated by somewhat different conditions in different Subject Vehicles). For example, in the AL 551-8Q, manufactured by non-party ZF AG, the “exit condition” – which renders the software inactive – is triggered by the angle of the steering wheel. The AL 951-8Q is also manufactured by ZF AG, and its software operates similarly. When ignition is turned on, the transmission will use the software unless and until a steering angle exit condition is met;
- 25.6 For Subject Vehicles with the AL 1000-8A transmission, different parameters trigger the active and inactive status for the software, but with a similar result. In these vehicles, the program is active after every key-start ignition, and then turns off when prompted by exit conditions including lateral and longitudinal acceleration, two parameters likely to be triggered during on-road driving, and not on a dynamometer test;
- 25.7 For Subject Vehicles with the AQ 450-6A transmission, the software is activated once the ignition is turned on and if the temperature of ATF is lower than a specific



value (again, this occurs in virtually all testing situations). The software deactivates when certain exit conditions, such as lateral acceleration, are met;

- 25.8 Regardless of the specific calibrations in each of the Subject Vehicles, the outcomes are the same: the software resulted in better fuel economy and lower emissions in the testing environment, and worse fuel economy and higher emissions on the road;
26. A vehicle's advertised fuel economy is determined by driving a vehicle over five standardized driving patterns (or drive cycles), all of which are performed in a laboratory on a dynamometer where the conditions for all tests can be controlled. These driving cycles include cold starts, hot starts, highway driving, aggressive and high-speed driving, driving with the air conditioner in use under conditions similar to a hot summer day and driving in cold temperatures. Data from the five drive cycles are combined and adjusted for "real world" conditions in a way to represent "City" driving and "Highway" driving. The "combined" fuel economy is the average of the City and Highway values with weights of 55% and 45% respectively;
27. During each of the drive cycles – all of which are performed in a lab, under the Subject Vehicles' low power/low emissions/low fuel consumption mode – the amount of each pollutant is measured. This includes un-combusted or partially combusted gasoline (hydrocarbons or HC), carbon monoxide (CO) and carbon dioxide (CO<sub>2</sub>). The amount of carbon produced is then converted to amount of gasoline which was required to produce the carbon in the exhaust. The amount of gasoline produced during the tests is divided into the distance driven on the test to produce the fuel economy;
28. Based on this equation, as the amount of CO<sub>2</sub> produced increases, the gasoline used increases and the fuel economy decreases. Therefore, if a Subject Vehicle produced less CO<sub>2</sub> during laboratory testing, but higher CO<sub>2</sub> when driven on road, then the vehicle would have better estimated fuel efficiency than the vehicle would actually achieve on road;
29. This software program is particularly reprehensible because it does not directly affect emissions controls, so it is very difficult to detect. Instead, when the device detects that the car is in a testing bay, it alters the shift points of the automatic transmission so that the vehicle operates in a low rev mode, by automatically shifting into the next higher gear sooner than it otherwise would under normal driving conditions. This modified shifting scheme reduces the engine's revolutions per minute (RPM), fuel consumption, and CO<sub>2</sub> emissions; by keeping the engine's RPM artificially low, it consumes less fuel and emits less carbon dioxide. When the vehicle is not in a testing bay, the software program deactivates and allows the vehicle to operate at a higher RPM such that the vehicle has more power and acceleration, but also consumes more fuel and emits more CO<sub>2</sub>,



30. Additional reports indicate that high-placed Audi executives knew exactly how the software program worked and instructed company employees to utilize it as much as possible to misrepresent the performance of the Subject Vehicles, to deceive regulators and to deceive the public. Volkswagen and Audi management discussed the CO<sub>2</sub> defeat-device software in detail, for example, during a “Summer Drive” event in South Africa in the second half of February 2013. According to the event minutes, Axel Eiser, then the head of Audi’s powertrain division (currently the head of powertrain development of the entire Volkswagen group), said: “the shifting program needs to be configured so that it runs at 100% on the treadmill but only 0.01% with the customer”, as appears from The Wall Street Journal article, produced herein as **Exhibit R-7**;

30.1 On November 14, 2016, Respondents Volkswagen AG and Audi AG confirmed that U.S. and European investigators were looking into irregularities related to CO<sub>2</sub> emissions levels in the Subject Vehicles. According to the Wall Street Journal:

“The transmission in question was widely used in Audi’s top sedans and sport-utility vehicles. Audi engineered the automatic transmissions to run at very low RPMs during treadmill tests to pass emissions tests, but then to run at full performance on the road, resulting in higher greenhouse gas emissions, according to a person familiar with the situation and an internal Audi document reviewed by The Wall Street Journal.”

The whole as appears more fully from a copy of The Wall Street Journal article entitled “VW, Audi Confirm Investigation Into Carbon Dioxide Levels in Some Audi Cars” dated November 14, 2016, produced herein as **Exhibit R-15**;

31. The Respondents misstated the CO<sub>2</sub> emissions as well as the gas consumption of the Subject Vehicles significantly. Their statements of the estimated fuel efficiency and number of grams of carbon dioxide emitted per kilometre driven by the vehicle were grossly exaggerated due to the use of the software program;

31.1 On August 30, 2019, the U.S. EPA issued a press release regarding its revision of the fuel economy estimates for a number of model year 2013-2017 Audi, Bentley, Porsche and Volkswagen vehicles to ensure that consumers are given accurate fuel economy values. The U.S. EPA also required the Volkswagen group to forfeit emissions credits under the greenhouse gas (GHG) emissions standards for light duty vehicles to account for under-reporting emissions, the whole as appears more fully from a copy of the press release entitled “EPA Requires Audi, Bentley, Porsche and Volkswagen to Correct Fuel Economy Labels for a Number of 2013-2017 Gasoline Powered Vehicles” dated August 30, 2019 and from a copy of an extract from the U.S. EPA website at [www.epa.gov](http://www.epa.gov), produced herein *en liasse* as **Exhibit R-23**;

31.2 The U.S. EPA issued the following statement (Exhibit R-23):



In the course of the investigation concerning defeat devices in Volkswagen's diesel vehicles, the EPA and the California Air Resources Board discovered that the company employed software to manage vehicle transmissions in gasoline vehicles. This software causes the transmission to shift gears during the EPA-prescribed emissions test in a manner that sometimes optimizes fuel economy and greenhouse gas (GHG) emissions during the test, but not under normal driving conditions. The company employed this software in roughly one million gasoline light-duty vehicles from model years 2013 through 2017 sold by Volkswagen in the United States under the brand names Volkswagen, Audi, Porsche, and Bentley.

Just as Volkswagen over-stated the fuel economy of these vehicles, the company under-stated greenhouse gas emissions by approximately 220,000 metric tons. To account for these discrepancies Volkswagen will forfeit approximately 220,000 GHG emission credits under EPA's light duty GHG emissions standard program. Volkswagen will also forfeit credits in the federal Corporate Average Fuel Economy program. The exact amount of credits will be subject to approval by EPA and the National Highway Traffic Safety Administration.

**(iii) Summative Remarks**

32. The Respondents were well aware that emissions and fuel consumption were significant factors for customers making vehicle purchase decisions – the misrepresentations regarding these two factors was designed to influence customers to purchase their Subject Vehicles based on false information;
33. Because of the Respondents' actions, the vehicles that they sold to the Petitioners and the Class are not what they had promised. During normal operation, the Subject Vehicles pollute the atmosphere with much higher levels of carbon dioxide than the artificially-manipulated test results disclose or than are permitted by federal and environmental protection laws. Meanwhile, when the engine and transmission are operated in a manner that actually limits pollution to legal levels, the Subject Vehicles cannot deliver the performance that the Respondents advertise;
34. As a result of the Respondents' surreptitious use of the software program to exaggerate the fuel economy of the Subject Vehicles and to downplay their CO<sub>2</sub> emissions, owners and lessees of the Subject Vehicles have suffered damages upon which they are entitled to claim;



## II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

### A. Petitioner Gagnon

35. On or about June 14, 2010, Petitioner Gagnon purchased a new 2011 Audi Q5 3.2 Premium Quattro with a gasoline engine (VIN WA1CKCFP1BA001453) from Québourg Auto at 7777 Boul. Henri Bourassa, in Charlesbourg, Quebec for a total cost of approximately \$53,739.79 including taxes, as appears from the paperwork dated June 14, 2010, produced herein as **Exhibit R-8**;
36. At the time, the Respondents represented that the vehicle had a fuel consumption of 11.5 litres per 100 kilometres in city driving and 9.0 litres per 100 kilometres on the highway, as appears from an extract from The Car Guide, produced herein as **Exhibit R-9**;
37. On or about August 1, 2013, Petitioner Gagnon purchased a new 2014 Audi Q5 3.0 Quattro with a gasoline engine (VIN WA1DGCFP1EA034138) from Audi Lauzon at 2400 Boul. Chomedey, in Laval, Quebec for a total cost of approximately \$50,753.00 plus taxes payable in monthly installments of \$655.71 including taxes, as appears from the Sales Agreement dated August 1, 2013, produced herein as **Exhibit R-10**;
38. At the time, the Respondents represented that the vehicle had a fuel consumption of 11.4 litres per 100 kilometres in city driving and 7.8 litres per 100 kilometres on the highway, as appears from an extract from The Car Guide, produced herein as **Exhibit R-11**;
39. Petitioner Gagnon noticed that his vehicles were consuming gasoline at a very significant rate; much higher than he would have expected given the Respondents' representations relating to the vehicles' fuel efficiency;
40. On or about July 7, 2016, Petitioner Gagnon purchased a new 2017 Audi Q5 3.0L with a gasoline engine (VIN WA1D7AFP6HA025279) from Audi Lauzon at 2400 Boul. Chomedey, in Laval, Quebec for a total cost of approximately \$50,955.20 plus taxes payable in monthly installments of \$615.98 including taxes, as appears from a copy of the Sales Contract dated July 7, 2016, produced herein as **Exhibit R-12**;
41. At the time, the Respondents represented that the vehicle had a fuel consumption of 13.2 litres per 100 kilometres in city driving and 9.2 litres per 100 kilometres on the highway, as appears from an extract from The Car Guide, produced herein as **Exhibit R-13**;
42. Petitioner Gagnon has become aware of several news stories about this software program that Audi had installed in his vehicles and also noticed that several class actions were filed in the United States due to this same issue, as appears from



copies of the U.S. Class Action Complaints, produced herein, *en liasse*, as **Exhibit R-14**;

42.1 The U.S. Class Actions (*inter alia*, Exhibit R-14), have since been centralized and transferred into the multidistrict litigation (MDL) litigation No. 2672, which is the In Re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation and a Consolidated Consumer Class Action Complaint was filed on October 12, 2017. On August 30, 2019, the complaint was amended, the whole as appears more fully from a copy of the Redacted Version of the Audi CO2 Consolidated Consumer Class Action Complaint dated October 12, 2017 and from a copy of the Amended Consolidated Consumer Class Action Complaint dated August 30, 2019, produced herein *en liasse* as **Exhibit R-16**;

42.1.1 On August 30, 2019, a settlement was reached in the U.S. litigation with a “Settlement Value” of no less than USD \$94,999,947 available to compensate class members, the whole as appears more fully from a copy of the Consumer Class Action Settlement Agreement and Release dated August 30, 2019, produced herein as **Exhibit R-24**;

42.2 In addition, on December 20, 2016, a Statement of Claim was filed in Ontario under Court File No.: CV-16-564517-00CP, which has since been amended, the whole as appears more fully from a copy of the Amended Statement of Claim in *Spiegel v. Audi Canada Inc. et al.*, Court File No. CV-16-564517-00CP, produced herein as **Exhibit R-17**;

#### B. Petitioner Bouchard

42.3 On December 21, 2015, Petitioner Bouchard bought a 2013 Volkswagen Touareg 3.6L that had 35,600 kms on it (VIN WVGDF9BPXDD007515) from Langlois Volkswagen at 6090 Boulevard Ste-Anne, in L’Ange-Gardien, Quebec for \$42,535.00 including taxes, the whole as appears more fully from a copy of Petitioner Bouchard’s sales contract dated December 21, 2015, produced herein as **Exhibit R-25**;

42.4 At the time, the Respondents had represented that the vehicle had a fuel consumption of 12.3 litres per 100 kilometres in city driving and 7.0 litres per 100 kilometres on the highway, as appears from an extract from The Car Guide, produced herein as **Exhibit R-26**;

42.5 Petitioner Bouchard noticed that his vehicle was consuming gasoline at a very significant rate during city driving; much higher than he would have expected given the Respondents’ representations relating to the vehicle’s fuel efficiency;

42.6 The U.S. EPA website (Exhibit R-23) indicates that the fuel efficiency of Petitioner Bouchard’s Subject Vehicle had been misstated by 1.6 kms (1 mile) for city driving, but had stayed constant for highway driving;



43. The Petitioners have suffered ascertainable loss as a result of the Respondents' omissions and/or misrepresentations associated with the software program, including, but not limited to, overpayment for the Subject Vehicles, past, present, and future excessive gasoline charges, reduced resale value, and trouble and inconvenience;
44. Had Petitioners known about the existence of the software program, they would not have purchased the Subject Vehicle(s);
45. Petitioners' damages are a direct and proximate result of the Respondents' conduct;
46. In consequence of the foregoing, the Petitioners are justified in claiming damages;

### **III. FACTS GIVING RISE TO INDIVIDUAL ACTIONS BY EACH MEMBER OF THE CLASS**

47. Every member of the Class has purchased and/or leased a Subject Vehicle and is justified in claiming at least one or more of the following as damages:
- a. Overpayment of the purchase price and/or lease payments of the Subject Vehicles,
  - b. Lower resale value of the Subject Vehicles,
  - c. Increased fuel expenditures,
  - d. Out-of-pocket loss,
  - e. Cost of future attempted repairs,
  - f. Loss of performance from future repairs;
  - g. Trouble and inconvenience, and
  - h. Punitive and/or exemplary damages;
48. However, even if the Respondents were to repair/deactivate the software program in the Subject Vehicles so that they comply with emissions requirements, the repair would not compensate the Class for the significant harm that the Respondents have caused because any repairs performed as part of the recall are likely to significantly diminish the performance of the Subject Vehicles;
49. All of these damages to the Class Members are a direct and proximate result of the Respondents' conduct;



#### **IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

A) The composition of the Class makes it difficult or impractical to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings

50. Petitioners are unaware of the specific number of persons who purchased and/or leased the Subject Vehicles; however, it is safe to estimate that it is in the thousands;

51. Class Members are numerous and are scattered across the province;

52. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if Class Members themselves could afford such individual litigation, the court system could not as it would be overloaded and, at the very least, it is not in the interests of judicial economy. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondents would increase delay and expense to all parties and to the court system;

52.1 This class action overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity;

53. Also, a multitude of actions instituted in different jurisdictions, both territorial and judicial districts, risks having contradictory judgments on issues of fact and law that are similar or related to all members of the Class;

54. These facts demonstrate that it would be impractical, if not impossible, to contact every member of the Class to obtain mandates and to join them in one action;

55. In these circumstances, a class action is the only appropriate procedure and the only viable means for all of the members of the Class to effectively pursue their respective rights and have access to justice;

B) The claims of the members of the Class raise identical, similar or related issues of law or fact

56. Individual issues, if any, pale by comparison to the numerous common issues that will advance the litigation significantly;

57. The damages sustained by the Class Members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;





58. The claims of the Class Members raise identical, similar or related issues of fact or law as outlined hereinbelow;

59. The interests of justice favour that this application be granted in accordance with its conclusions;

#### **V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

60. The action that the Petitioners wish to institute on behalf of the members of the Class is an action in damages, injunctive relief, and declaratory judgment;

61. The conclusions that the Petitioners wish to introduce by way of an application to institute proceedings appear hereinbelow;

A) Petitioners request that they be attributed the status of representatives of the Class

62. Petitioners are members of the Class;

63. Petitioners are ready and available to manage and direct the present action in the interest of the members of the Class that they wish to represent and are determined to lead the present file to a final resolution of the matter, the whole for the benefit of the Class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux actions collectives*, as the case may be, and to collaborate with their attorneys;

64. Petitioners have the capacity and interest to fairly and properly protect and represent the interest of the members of the Class;

65. Petitioners have given the mandate to their attorneys to obtain all relevant information with respect to the present action and intend to keep informed of all developments;

66. Petitioners, with the assistance of their attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the Class and to keep them informed;

66.1 Petitioners have given instructions to their attorneys to put information about this class action on its website and to collect the coordinates of those Class Members that wish to be kept informed and participate in any resolution of the present matter, the whole as will be shown at the authorization hearing;

67. Petitioners are in good faith and have instituted this action for the sole goal of having their rights, as well as the rights of other Class Members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;



68. Petitioners understand the nature of the action;
69. Petitioners' interests are not antagonistic to those of other members of the Class;
70. Petitioners are prepared to be examined out-of-court on their allegations (as may be authorized by the Court) and to be present for Court hearings, as may be required and necessary;
- 70.1 Petitioners have spent time researching this issue on the internet and meeting with their attorneys to prepare this file. In so doing, they are convinced that the problem is widespread;
71. Petitioners, with the assistance of their attorneys, have created a webpage at [www.clg.org](http://www.clg.org) wherein other Class Members can enter their coordinates to join the class action and be kept up to date on its development, the whole as appears more fully from a copy of a redacted chart of potential Class Members who have inputted their information through the CLG webpage, produced herein as **Exhibit R-18**;
- B) Petitioners suggest that this class action be exercised before the Superior Court of justice in the district of Montreal
72. A great number of the members of the Class reside in the judicial district of Montreal and in the appeal district of Montreal;
73. Petitioners' attorneys practice their profession in the judicial district of Montreal;
74. The present application is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present application;

**AUTHORIZE** the bringing of a class action in the form of an application to institute proceedings in damages, injunctive relief, and declaratory relief;

**APPOINT** the Petitioners as representatives of the persons included in the class herein described as:

- all persons, entities or organizations resident in Quebec who purchased and/or leased one or more of the Subject Vehicles with gasoline engines, or any other group to be determined by the Court;

**IDENTIFY** the principle issues of fact and law to be treated collectively as the following:

- a) Did the Respondents either install the software programs or have the software programs installed in the Subject Vehicles?



- b) Did the Respondents know or should they have known about the software program and, if so, for how long?
- c) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of the Subject Vehicles?
- d) Are the Petitioner and the Class Members entitled to a declaratory judgment stating that the Respondents committed misconduct in utilizing the software program to misstate the qualities of the Subject Vehicles?
- e) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- f) Should an injunctive remedy be order to force the Respondents to buy back the Subject Vehicles or otherwise, free of charge, remove the software program while ensuring that the Subject Vehicles conform to promised performance and fuel economy guarantees?
- g) Are the Respondents responsible for all related damages (including, but not limited to: the Overpayment of the purchase price and/or lease payments of the Subject Vehicles, the lower resale value of the Subject Vehicles, increased fuel expenditures, out-of-pocket loss, the cost of future attempted repairs, loss of performance from future repairs, and trouble and inconvenience) to Class Members as a result of their misconduct and in what amount?
- h) Are the Respondents responsible to pay punitive damages to Class Members and in what amount?

**IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioners and each of the members of the Class;

DECLARE the Defendants have committed unfair, false, misleading, and/or deceptive conduct with respect to their designing, marketing, advertising, leasing, selling and/or representing the Subject Vehicles as having certain levels of lower fuel economy and lower emissions than in reality;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct by designing, marketing, advertising, leasing, selling and/or representing the Subject Vehicles in a false manner;



ORDER the Defendants to recall and repair the Subject Vehicles free of charge, or otherwise, to buy back the Subject Vehicles at the original sale price or return any and all lease payments;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the Class;

CONDEMN the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the Class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the application to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the Class;

**DECLARE** that all members of the Class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;

**FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;

**ORDER** the publication of a notice to the members of the group in accordance with article 579 C.C.P. within sixty (60) days from the judgment to be rendered herein in The Montreal Gazette and La Presse;

**ORDER** that said notice be available on the Respondents' websites, Facebook pages, and Twitter accounts with a link stating "Notice to Audi Vehicle Owners/Lessees";



**ORDER** that said notice be sent by individual letters emailed and/or mailed to Class Members by using the Respondents' customer list;

**RENDER** any other order that this Honourable Court shall determine and that is in the interest of the members of the Class;

**THE WHOLE** with costs, including all publication and dissemination fees.

Montreal, January 20, 2020

Andrea Grass

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CONSUMER LAW GROUP INC.

Per: Me Andrea Grass

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