

**UNITED STATES JUDICIAL PANEL**  
**on**  
**MULTIDISTRICT LITIGATION**

**IN RE: VOLKSWAGEN “CLEAN DIESEL”  
MARKETING, SALES PRACTICES, AND  
PRODUCTS LIABILITY LITIGATION**

MDL No. 2672

**TRANSFER ORDER**

**Before the Panel:**\* Plaintiff in the Middle District of Louisiana action (*Faircloth*) listed on the attached Schedule A moves under Panel Rule 7.1 to vacate the Panel’s order conditionally transferring the action to MDL No. 2672. Defendant Volkswagen Group of America, Inc., opposes the motion.

After considering the argument of counsel, we find that this action involves common questions of fact with the actions transferred to MDL No. 2672, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Moreover, transfer is warranted for the reasons set out in our order directing centralization. In that order, we held that the Northern District of California was an appropriate Section 1407 forum for actions sharing factual questions regarding the role of VW and related entities in equipping certain 2.0 and 3.0 liter diesel engines with software allegedly designed to engage emissions controls only when the vehicles undergo official testing, while at other times the engines emit nitrous oxide well in excess of legal limits. *See In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, 148 F. Supp. 3d 1367 (J.P.M.L. 2015). This action involves allegations related to an affected Audi vehicle and clearly falls within the MDL’s ambit.

Plaintiff argues against transfer by asserting that there is no federal jurisdiction over his action and that *Faircloth* lacks facts common to the MDL because it focuses primarily on electrical failures in his Audi A8. These arguments are unconvincing. As we repeatedly have held, arguments concerning an alleged lack of federal subject matter jurisdiction are insufficient to warrant vacating a CTO.<sup>1</sup> Plaintiff does make some unique allegations of an electrical defect in his vehicle, but he also makes numerous allegations concerning the presence of a defeat device. As such, the presence of unique electrical system claims is not an impediment to transfer, given that common factual issues

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\* Judges Charles R. Breyer took no part in the decision of this matter.

<sup>1</sup> *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347-48 (J.P.M.L. 2001).

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exist.<sup>2</sup> Further, it appears that at least one other MDL case involves allegations of electrical system problems in addition to defeat device allegations. *See Tharp v. Volkswagen Group of America, Inc., et al.*, Case No. 16-02517 (S.D. Cal.) (subject vehicle experienced electrical issues and complaint included allegations of defeat device) (transferred to MDL No. 2672 on October 24, 2016).

We also deny plaintiff's request to separate and remand his electrical system claims from the defeat device claims. As an initial matter, plaintiff has intermingled the allegations of both defects in his claims. Plaintiff makes allegations about both alleged defects in, for instance, his redhibition claim. *See* Petition at p. 4 ("The electrical malfunctions for which Petitioner presented the vehicle for unsuccessfully repair on four occasions are caused by redhibitory defects... Further, the unlawful 'defeat device' installed by Volkswagen in the vehicle constitutes a redhibitory defect."). As defendants correctly note, Section 1407(a) authorizes the Panel only to separate and remand claims, cross-claims, counter-claims and third-party claims. It does not provide for the separation and remand of issues asserted within claims. *See, e.g., In re: Plumbing Fixture Cases*, 298 F. Supp. 484, 489-90 (J.P.M.L. 1968) ("This unequivocal and obviously deliberate withholding from the Panel of power to separate issues in a single civil action assigning one or more to the transferee court and one or more to the transferor court is a clear, precise and wise limitation on the powers of the Panel."); *see also In re: Resource Exploration, Inc., Sec. Litig.*, 483 F. Supp. 817, 822 (J.P.M.L. 1980) ("[T]he Panel is not empowered to carve out issues for separate treatment under Section 1407.").

IT IS THEREFORE ORDERED that this action is transferred to the Northern District of California and, with the consent of that court, assigned to the Honorable Charles R. Breyer for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION




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Sarah S. Vance  
Chair

Marjorie O. Rendell  
Ellen Segal Huvelle  
Catherine D. Perry

Lewis A. Kaplan  
R. David Proctor

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<sup>2</sup> *See, e.g., In re: Barclays Liquidity Cross & High Frequency Trading Litig.*, 67 F. Supp. 3d 1375, 1376 (J.P.M.L. 2014) ("Section 1407 does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization. The statute also does not require a complete identity of claims or parties.") (internal citations omitted).

**IN RE: VOLKSWAGEN “CLEAN DIESEL”  
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**SCHEDULE A**

Middle District of Louisiana

FAIRCLOTH v. VOLKSWAGEN GROUP OF AMERICA, INC., ET AL.,  
C.A. No. 3:16-738