CITATION: Quenneville v. Volkswagen Group Canada, Inc., 2019 ONSC 4668
COURT FILE NO.: CV-15-537029CP
DATE: 2019/08/07

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
MATTHEW ROBERT QUENNEVILLE, LUCIANO TAURO, MICHAEL JOSEPH PARE, THERESE H. GADOURY, AMY FITZGERALD, RENEE JAMES, AL-NOOR WISSANJI, JACK MASTROMATTEI, JAY MACDONALD, JOSEPH SISSINONS CHIROPRACTIC P.C., ANDREW JAMES BOWDEN, and CHRISTINA LYN VICKERY Plaintiffs	*Reidar M. Mogerman,* for the Plaintiffs
– and –	
VOLKSWAGEN GROUP CANADA, INC., VOLKSWAGEN AKTIENGESELLSCHAFT, VOLKSWAGEN GROUP OF AMERICA, INC., AUDI CANADA, INC., AUDI AKTIENGESELLSCHAFT, AUDI OF AMERICA INC. and VW CREDIT CANADA, INC. Defendants	*Cheryl Woodin* and *Ilan Ishai*,for the Volkswagen/Audi Defendants
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: July 31, 2019

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In a class action under the *Class Proceedings Act, 1992,*[1] Matthew Robert Quenneville, Luciano Tauro, Michael Joseph Pare, Therese H. Gadoury, Amy Fitzgerald, Renee James, Al-

[1] S.O. 1992, c. 6.

Noor Wissanji, Jack Mastromattei, Jay MacDonald, Joseph Sissinons, Chiropractic P.C., Andrew James Bowden, and Christina Lyn Vickery sue Volkswagen Group Canada, Inc., Volkswagen Aktiengesellschaft, Volkswagen Group of America, Inc., Audi Canada, Inc., Audi Aktiengesellschaft, Audi of America Inc. and VW Credit Canada, Inc. (collectively "VW").

[2] On this motion, the Plaintiffs seek:

a. production of the data and analysis relating to VW's investigation of the lag/surge issues reported by Class Members with 3.0L Generation Two Vehicles ("Gen 2 Vehicles"); and

b. an extension of the Claims Period Deadline (August 31, 2019) until the issues relating to the lag/surge can be analyzed and resolved.

[3] For the reasons that follow, I dismiss the motion.

B. Facts

[4] In the Plaintiffs' class action, by Order dated April 19, 2018, I approved a settlement for the owners of 3.0L VW, Audi, and Porsche diesel vehicles.[2] The main settlement benefits available for Class Members with eligible Gen 2 Vehicles were threefold; *i.e.*, (a) an Emissions Compliant Repair ("ECR"); (b) an extended emissions warranty; and (c) a Repair Payment.

[5] The ECR was actually available as a part of the recall of the vehicles to make them compliant with emissions regulations. The extended warranty and the Repair Payment were added by the Settlement Agreement. In the case of Class Members who have owned their Gen 2 Vehicles since before November 2015, the Repair Payment ranges between $6,525 and $11,025.

[6] Section 4.2.10 of the Settlement Agreement also provided the possibility of a "Reduced Performance Payment". This provision addressed the situation that the ECR repair might cause the degradation of certain performance attributes; namely: (a) fuel economy; (b) peak horsepower; and (c) peak torque.

[7] Section 4.2.10 provides that if the ECR caused reduced fuel economy of greater than 3 miles per gallon or a decrease of greater than 5% in peak horsepower or peak torque, then VW must pay each Class Members a Reduced Performance Payment of $500. Section 4.2.10 states:

> 4.2.10 **Reduced Performance Payment**. VW and Porsche represent that the Emissions Compliant Repair shall not result in Reduced Performance. In the event that the Emissions Compliant Repair causes Reduced Performance of Generation Two Eligible Vehicles, VW shall make an additional payment of $500 for each affected Generation Two Eligible Vehicle. In the event that the Emissions Compliant Repair causes a substantial, material adverse degradation, above and beyond the specified Reduced Performance levels, Plaintiffs and affected Settlement Class Members reserve their right to seek, and VW and Porsche reserve their right to oppose, additional remedies through motions to the Courts.

[8] As it is central to the dispute now before the court, it should be noted that section 4.2.10 reserves the Class Members' right to seek additional remedies through motions to the Courts "if

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[2] *Quenneville v. Volkswagen Group Canada, Inc.*, 2018 ONSC 2516.

the ECR causes a substantial, material adverse degradation, above and beyond the specified Reduced Performance levels". The Plaintiffs and VW dispute the meaning of this provision.

[9] Section 4.2.10 refers to "Reduced Performance," and section 2.94 of the Settlement Agreement defines Reduced Performance to mean "any of the following changes to the performance of a Generation Two vehicle that has received the ECR: (a) a reduction in calculated fuel economy using the U.S. EPA formula of more than three (3) miles per gallon; (b) a decrease of greater than five percent (5%) in peak horsepower; or (c) a decrease of greater than five percent (5%) in peak torque," which parameters were "measured by VW pursuant to industry standards in connection with the submission of the Emissions Compliant Repair to the U.S. EPA".

[10] Section 4.2.7.2 of the Settlement Agreement requires VW to disclose, among other things, any reasonably predictable changes to reliability, performance, drivability or any other attributes that are important to drivers resulting from the ECR. Section 4.2.7.2 provides:

> 4.2.7.2 For each Emissions Compliant Repair for a particular Generation Two Eligible Vehicle, but no later than seven (7) business days after the Pre-Approval Notice Date, VW and/or Porsche shall provide a Class Update with clear and accurate written disclosure based on the best available information regarding the impacts of the Emissions Compliant Repair on applicable Generation Two Vehicles. The ECR Disclosure will describe in plain language: ... (e) any and all reasonably predictable changes resulting from the Emissions Compliant Repair for a particular Generation Two Eligible Vehicle, including but not limited to changes to reliability, durability, fuel economy, noise vibrations, vehicle performance, drivability, and any other vehicle attributes that may reasonably be important to vehicle customers ....

[11] To enjoy the benefits of the Settlement Agreement, Class Members must submit their claims forms by May 31, 2019 and then they must confirm their choice of benefits, accept the offer, and have the ECR installed by an Authorized Dealer by August 31, 2019, with the Repair Payments paid after installation.

[12] As noted above, the ECR was part of a product recall. After review and testing, two U.S. regulators, whose standards aligned with those in Canada approved the ECR for the recalled Gen 2 Vehicles. The U.S. regulators were the Environmental Protection Agency (the "EPA") and the California Air Resources Board. The recalls occurred in Canada by February 2018.

[13] There are approximately 15,000 Gen 2 Vehicles eligible for settlement benefits. Approximately 13,000 Gen 2 vehicles have received the ECR to date, of which 5,000 had received their ECR before the Settlement Approval hearing.

[14] Focusing on the facts that participated the motion now before the court, after the installation of the ECR some Class Members with Gen 2 Vehicles who have had the ECR installed reported unexpected lags and surges in the acceleration of their vehicles. These Class Members believed that the lag/surge affected the performance, reliability, and the safety, of their vehicles. Some of these Class Members believed that that the lag/surge was dangerous when turning left or attempting to merge into traffic, and that accidents have only been narrowly averted.

[15] The concerns and complaints of these Class Members came to the attention of Class Counsel. In August 2018, after Class Counsel forwarded a safety complaint to VW, VW indicated that it would undertake an investigation.

[16] VW inquired about about the number of complaints and it asked for details. Following this request, in September 2018, Class Counsel posted a notice on Facebook to a group on Facebook -

i.e., the "Canadian VWAG 3L TDI & Bosch Settlement Forum" (the "Facebook Group"). The notice indicated that Class Counsel had been contacted by a few members respecting lag-issues and safety concerns. Class Counsel invited others with these concerns to come forward.

[17] Pausing here in the description of the factual background, there is a dispute between the parties about how many Class Members complained and about whether the complaints were orchestrated. Some of the complainants did not own eligible Gen 2 Vehicles and some of the complaints were not about lags and surges. In any event, there are at least 100 complainants that were concerned about the lag/surge issue and undoubtedly there are some additional silent complainants. But, also, in any event, nothing much turns on the number of complainants. For the purposes of this motion, I except that there is a group of Class Members who have genuine concerns about the lag/surge issue.

[18] Returning to the narrative, Class Counsel advised VW about complaints about three Gen 2 models; namely: VW Touareg, Audi Q7, and Audi Q5.

[19] VW investigated these complaints. VW indicated to Class Counsel that it was reviewing customer complaints, conducting further testing of post-ECR vehicles, and collecting feedback and analysis from VW and Audi engineers/technicians in various countries. Through its counsel, VW advised Class Counsel that it took safety complaints seriously and that Class Counsel would be advised once VW had completed its review of the lag/surge issue.

[20] Transport Canada was also advised about the complaints, but it did not contact VW nor initiate a recall about the lag/surge issue.

[21] In May 2019, Class Counsel posted again on the Facebook Group page that, while "[y]ou don't have to decide on what benefits to take-up until [the Settlement program deadline of] August 31, 2019 (*i.e.*, install the ECR if you haven't already)," submitting a claim form in the Settlement program would not impact "[w]hether or not additional benefits become available (on account of the results of the investigation into safety/performance issues)".

[22] On May 23, 2019, after VW advised Class Counsel that it was still investigating the lag/surge issue, Class Counsel noted the approaching Claims Period Deadline of August 31, 2019). Class Counsel proposed to VW that a case management conference be scheduled to discuss how to proceed to get access to VW's data and to take next steps.

[23] No case management conference, however, was scheduled, and on May 30, 2019, VW advised that its review was complete for the Audi Q7 and that there was no safety issue associated with the ECR. VW reported as follows:

> Some of your clients who own the Audi Q7 complained of a post-repair issue described as a pause before increased acceleration. We understand that the issue might be noticeable to some drivers. Customer Safety is Volkswagen's number one priority. Volkswagen Group has reviewed the matter as to the Audi Q7 and found no safety impact. The method of repair has also been tested and approved by EPA/CARB and is part of the settlement because it met and received their approval.

[24] Class Counsel immediately took the position that VW's disclosure did not suffice. Class Counsel requested disclosure of the underlying data from the investigations. It submitted that this information was required for the Class Members to consider their rights under the Settlement Agreement.

[25] Independent of the lag/surge matter, VW reported on the matter of the performance attributes of (a) fuel economy; (b) peak horsepower; and (c) peak torque. VWs reports or updates indicated that there was no Reduced Performance.

[26] Thus, it was VW's position that the $500 provided for under the Settlement Agreement was not triggered. The reports did refer to some effects on vehicles (*e.g.* engine sounds) caused by the ECR, but there was no reference to lag/surge issues. The report update/notice rather indicated that:

> Drivers may notice some differences in vehicle operation characteristics after the repair, but other than as described in this booklet, drivers should not notice any adverse changes in fuel consumption, or vehicle reliability, durability, performance, drivability or other driving characteristics.

[27] With respect to the lag/surge issue, on June 10, 2019, VW made a report for the VW Touareg. The report was identical to the report for the Audi Q7; *i.e.*, that there were no safety issues associated with the ECR.

[28] Class Counsel again demanded the underlying data about the lag/surge issue. VW refused to provide the data.

[29] By June 2019, VW had advised Class Counsel that for the Touareg and Q7, the ECR had had no effect on safety. This assessment was based on product testing, the review that had been done by Transport Canada and National Highway Traffic Safety Administration of the ECR. VW indicated that the review of the lag issues on the Audi Q5 was ongoing and that VW would advise when it was completed.

[30] Class Counsel was not satisfied by VW's response. Class Counsel submitted that the Class Members had legitimate concerns about degradation and safety issues beyond the Reduced Performance metrics. Class Counsel submitted that the Settlement Agreement required VW to disclose it analysis and the underlying data to ensure the integrity of the implementation of the Settlement and so that the Class Members can make an informed decision about taking up the benefits of the settlement. Class Counsel submitted that given that section 4.2.7.2 requires VW to provide accurate disclosure of its "best information" about the effects of the ECR on the drivability, reliability and performance of the vehicles, VW should in good faith update that disclosure and provide the details and underlying data for its conclusion that there was no safety issue. Class Counsel submits that simply asserting that VW believes that there is no safety impact is not full disclosure of the potential effects or changes from the ECR.

[31] VW disagrees and submits that it has complied with its obligations under the Settlement Agreement and that it is not obliged to provide any additional information. VW has not turned over, and disputes a requirement to turn over, its non-Settlement data to Class Counsel. VW submits that Class Counsel's requests are outside the Settlement Agreement and there is no jurisdiction to alter its terms.

C. Discussion and Analysis

[32] I agree with VW's interpretation of the Settlement Agreement and I disagree with Class Counsel's arguments which conflate several provisions of the agreement.

[33] In particular, I disagree with Class Counsel's argument that the Class Members need or are

entitled to additional information about the lag/surge issue in order to make informed decisions about their rights under the Settlement Agreement.

[34] The explanation of my disagreement with Class Counsel's argument begins by noting and finding that remedies for the lag/surge issue are not available under - nor precluded by - the Settlement Agreement. In other words, the lag/surge issue is a safety issue and not a matter of a Reduced Performance level. Using the language of section 4.2.10, this safety issue is not a "degradation, above and beyond the specified Reduced Performance levels", and since the lag/surge issue is not within the qualifying language of section 4.2.10, it is also not a matter for which "Class Members reserve their right to seek ... additional remedies through motions to the Courts".

[35] As I would interpret section 4.2.10 in the context of the whole Settlement Agreement, its role is to deal with the circumstance that the ECR has so severely degraded the fuel economy, peak horsepower, or peak torque of the Gen 2 Vehicles that the $500 Reduced Performance Payment is inadequate compensation for the proprietary harm suffered by the Class Members.

[36] To use the language of section 4.2.10, in circumstance of a "above and beyond the specified Reduced Performance levels", the Settlement Agreement envisions that the court would have the jurisdiction to augment the monetary award, the Reduced Performance Payment, on a class wide basis.

[37] Safety problems and injuries to person or property caused by the ECR are outside the ambit of section 4.2.10. And a post-repair defect in the Gen 2 Vehicles caused by the ECR is also outside the ambit of the releases provided by the Settlement Agreement. Thus, it is the case that while finding remedies for the lag/surge issue is not within section 4.2.10, the Settlement Agreement does not preclude claims being brought about the lag/surge issue. The claims, however, would be new claims outside the Settlement Agreement.

[38] For similar reasons, the lag/surge issue does not come with the disclosure obligations of section 4.2.7.2 of the Settlement Agreement, which requires VW to provide accurate disclosure of its best information about the effects of the ECR on the drivability, reliability and performance of the vehicles". I interpret section of 4.2.7.2 as not prescribing - nor precluding - VW from disclosing safety concerns, which disclosure obligations are outside the ambit of the Settlement Agreement and within the ambit of tort law and statutory obligations.

[39] Several practical and legal realities follow from this interpretation of sections 4.2.10 and 4.2.7.2 of the Settlement Agreement.

[40] First, there is no obligation on VW to provide its analysis of the safety issue or for it to provide the underlying data that led it to report that there was no safety issue associated with the installation of the ECR, which it is worth repeating was also tested and approved by the government regulators in the U.S. and Canada. Moreover, VW has stringent regulatory obligations when it comes to safety. If VW determines that the ECR "affects or is likely to affect the safety of any person," then under the *Motor Vehicle Safety Act,*[3] VW is obligated to report it to Transport

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[3] S.C. 1993, c. 16.

Canada and to issue a recall to address the issue.[4] Any contravention of the *Act* is an indictable offence and liable to a fine up to $2 million.[5]

[41] Second, there is no need for the Class Members to have additional information in order to understand their rights under the Settlement Agreement and no need to extend the deadline for making claims under the Settlement Agreement. If the Class Members have rights with respect to the lag/surge issue, those rights are outside of - but not prejudiced by - section 4.2.10 of the Settlement Agreement.

[42] Third, since claims arising from a safety concern associated with the lag/surge issue are outside the ambit of the Settlement Agreement, the court in administering the settlement has no jurisdiction to order VW to produce its analysis or the underlying data. Such a direction would be much more than administrative, and such a direction would, in effect, be to amend the agreement reached by the parties, which is something the court cannot do.[6]

D. Conclusion

[43] For the above reasons, I dismiss the Plaintiffs' motion.

[44] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with VW's submissions within twenty days of the release of these Reasons for Decision followed by the Plaintiffs' submissions within a further twenty days.

[redacted]

Perell, J.

Released: August 07, 2019

[4] *Motor Vehicle Safety Act, S.C. 1993, c. 16*, s. 10(1).
[5] *Motor Vehicle Safety Act, S.C. 1993, c. 16*, s. 17(1)(b).
[6] *Fontaine v. Canada (Attorney General)*, 2018 ONSC 103.

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Plaintiffs

– and –

VOLKSWAGEN GROUP CANADA, INC., VOLKSWAGEN AKTIENGESELLSCHAFT, VOLKSWAGEN GROUP OF AMERICA, INC., AUDI CANADA, INC., AUDI AKTIENGESELLSCHAFT, AUDI OF AMERICA INC. and VW CREDIT CANADA, INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: August 7, 2019