IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

JONATHAN MANLOVE, Individually, and on behalf of others similarly situated,	)	
Plaintiff,	)	
	)	No. 1:18-cv-145
v.	)	
	)	Judge McDonough
VOLKSWAGEN AKTIENGESELLSCHAFT, VOLKSWAGEN GROUP OF AMERICA, INC., and VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC,	)	Magistrate Judge Steger
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC AND VOLKSWAGEN GROUP OF AMERICA, INC.'S MOTION TO COMPEL ARBITRATION AND DISMISS PLAINTIFF'S AMENDED COMPLAINT

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This is a class and collective action for injunctive relief against Volkswagen's "Pact for the Future," a self-professed policy and scheme to phase out employees over the age of fifty and thereby achieve a "younger, slimmer" workforce. Volkswagen's Pact is designed to push older workers into early retirement by any means necessary—demotions, transfers, or any other adverse treatment. The Age Discrimination in Employment Act ("ADEA") and Tennessee Human Rights Act ("THRA") both provide for injunctive relief against this policy and practice of discriminating against older workers. *See* 29 U.S.C. § 626(c)(1) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter"); Tenn. Code Ann. §§ 4-21-306; 4-21-311(b) (in a THRA action, "the court may issue any permanent or temporary injunction, temporary restraining order, or any other order"). However, absent court intervention, the class lacks an adequate and effective remedy to block Volkswagen's Pact and stop its discriminatory class-wide practices. Absent appropriate declaratory and injunctive relief, such individual arbitrations are likely to result in inconsistent determinations and sporadic, patchwork retrospective enforcement of the law.

Volkswagen openly acknowledged the value of judicial proceedings on injunctive relief by expressly carving out all such relief from the Arbitration Agreement it imposed on Plaintiff Manlove and other U.S. workers. But Volkswagen now essentially argues that it did not mean what it wrote when it unequivocally preserved the ability to seek such relief in court, and takes the position that pursuing injunctive relief in court is "good for me but not for thee." These arguments should not bear fruit. Volkswagen is saddled with its choices and is bound by the plain language of its own contract.

Defendants thus attempt to create a dispute where none exists. Volkswagen drafted a three-page Agreement to Arbitrate dictating the boundaries of the parties' obligations. *See* Exhibit A

attached hereto (the "Agreement"). In two separate provisions, Volkswagen included unambiguous language that **nothing** in the Agreement shall be interpreted or construed "to **restrict or prevent either party**" from seeking injunctive relief—including both temporary and permanent injunctions—in a court of competent jurisdiction. *See* Agreement §§ 2, 5 (emphasis added). Now that Plaintiff has elected to exercise his rights under the law and the terms of the Agreement, Volkswagen seeks a unilateral *post hoc* modification of the parties' contract. Volkswagen's attempt to curtail Plaintiff's and the class' rights through a judicial do-over is foreclosed by the full weight and authority of the law.

Volkswagen bases its Motion on what amount to generic gripes that it, as the drafter, did not strip away Plaintiff's constitutional and statutory right to pursue relief in court as thoroughly as it had hoped. Volkswagen now asks this Court to rewrite the Agreement to mean what it *wishes*, in hindsight, it had drafted. In essence, it maintains that the provisions of the Agreement requiring arbitration are clear and unambiguous, while those exempting injunctive relief and permitting the parties to pursue such relief in Court should be interpreted away. In support, Volkswagen relies on out-of-district opinions interpreting different language found in other arbitration agreements. Such opinions provide no assistance to Defendants, because the parties' Agreement must be construed in accordance with its terms. Arbitration is a strict matter of consent, and Volkswagen cannot ask the Court to bend over backwards to provide additional rights to Volkswagen and to require Plaintiff and the class to arbitrate matters—i.e. the propriety of injunctive relief—they have never agreed to arbitrate.

The Court should decline Volkswagen's invitation to blue pencil the Agreement in its favor and should accordingly deny Defendants' Motion to compel arbitration and to dismiss this case.

I. PROCEDURAL HISTORY

On June 29, 2017, Plaintiff filed a Class and Collective Action Complaint against Defendants Volkswagen Aktiengelsellschaft ("VW AG"), Volkswagen Group of America, Inc. ("VWGoA"), and Volkswagen Group of America Chattanooga Operations, LLC ("VW Chattanooga"), (collectively "Volkswagen" or the "Company"). On September 18, 2018, Plaintiff filed an Amended Complaint, the current operative complaint. Dkt. 12 ("Compl."). Plaintiff pursues injunctive relief under the ADEA and THRA on behalf of himself and similarly-situated employees in the United States. *See* Compl. Counts I-II. Plaintiff and the class members do not seek a determination of damages or any monetary awards. *See id*.

Plaintiff alleges that Volkswagen has adopted and executed an ongoing policy and practice of age discrimination at the direction of parent company VW AG. *See* Compl. ¶ 5, 10, 66. In November 2016, VW AG launched a global policy, known as TRANSFORM 2025+, meant to transform the Company in the wake of the diesel-emission scandal. *See id*. ¶ 23. As part of this initiative, VW AG announced a so-called Pact for the Future under which older employees would be driven from the Company's management ranks either through an early retirement scheme or "natural fluctuations." *Id*. ¶¶ 24-25.[1] Of the 30,000 older employees to be purged under the Pact, about 7,000 would be in North and South America. *Id*. ¶ 25. Shortly after this announcement, Volkswagen reorganized VW Chattanooga's executive leadership team. Most notably, VW AG dispatched a new head of Human Resources from the parent company in Germany. *Id*. ¶ 27. It may readily be inferred that VW AG sought to place its stamp on its U.S. subsidiary and implement the Pact in the Chattanooga facility.

Within a few months, Plaintiff fell victim to Defendants' discriminatory policy and plan.

[1] Thus, the program's euphemistic label refers to the fact that lower and middle managers over the age of fifty were deemed part of the Company's past but not its "Future."

Volkswagen inexplicably demoted Mr. Manlove of its management ranks—from grade-9 Assistant Manager to grade-6 Supervisor—and transferred him out of the In-House Logistics Department. Another employee in Logistics over the age of fifty was similarly affected. *Id*. ¶ 49. Since then, Volkswagen has taken additional actions to target Mr. Manlove and induce him and his similarly-situated peers age fifty and older to leave the Company.

On October 30, 2018, Defendants moved to dismiss, or in the alternative stay, Plaintiff's Amended Complaint on the basis of the Agreement. *See* Dkts. 29-30. Volkswagen argues that Plaintiff is prevented from pursuing an action for injunctive relief in this Court because he agreed to submit his claims exclusively to an arbitrator. Dkt. 30. On November 8, 2018, this Court held an initial case management conference and heard preliminary statements about the issues in controversy in this matter, including the question of arbitration. *See* Dkt. 27. The parties' next case management conference is set for February 11, 2019. *See* Dkt. 36.

On December 6, 2018, Plaintiff moved for preliminary injunctive relief preventing the implementation of the Pact for the Future. Dkt. 37. In support, Plaintiff details the continued discrimination he has suffered since filing this action, and the irreparable harm that he and the class members face if Volkswagen is allowed to carry out its discriminatory policies during the pendency of this action. *See id*. Plaintiff seeks to restore and preserve the status quo while the class' allegations of systemic discrimination under the Pact are resolved on the merits.

Plaintiff now files this Opposition to Volkswagen's Motion. As set forth below, the Agreement contains unambiguous language expressly excluding claims for injunctive relief from mandatory arbitration. Consequently, Volkswagen's Motion should be denied.

II. ARGUMENT

Volkswagen claims that its Agreement should be construed in favor of arbitration of the parties' dispute, but its argument rests on distortions of the Agreement and of applicable law. It is

axiomatic that arbitration is a matter of consent and that parties cannot be compelled to arbitrate any matters that they have not agreed to arbitrate. *See, e.g., Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Under basic Tennessee contract law, consistent with the Federal Arbitration Act ("FAA"), contracts must be enforced according to the plain meaning of their terms. *See, e.g., West v. Shelby Cty. Healthcare Corp*., 459 S.W.3d 33, 42 (Tenn. 2014) ("If the contractual language is clear and unambiguous, the literal meaning of the contract controls the dispute, and the language used in the contract is construed using its 'plain, ordinary, and popular sense.'") (citations omitted); *U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co*., 277 S.W.3d 381, 386 (Tenn. 2009) ("Absent fraud or mistake, the terms of a contract should be given their plain and ordinary meaning[.]").

In Tennessee, the law is clear:

> The courts **will not make a new contract for parties who have spoken for themselves, and will not relieve parties of their contractual obligations simply because these obligations later prove to be burdensome or unwise**. Thus, when called upon to interpret a contract, the courts will not favor either party. However, when a contract contains ambiguous or vague provisions, these provisions will be construed against the party responsible for drafting them.

Vargo v. Lincoln Brass Works, Inc., 115 S.W.3d 487, 492 (Tenn. Ct. App. 2003) (emphasis added, citations omitted).

Here, Volkswagen drafted an Arbitration Agreement that expressly and unambiguously exempts all proceedings for injunctive relief. *See* Agreement § 2. Not satisfied with this broad carve-out, Volkswagen went on to clarify that "injunctive relief" includes permanent injunctions. *Id.* § 5. This is the most that Plaintiff agreed to—an Agreement that preserved his ability to pursue injunctive relief in court. Accordingly, when Volkswagen adopted an official policy and plan of age discrimination to which he fell victim, Plaintiff opted to utilize this carve-out to seek injunctive relief to block the policy and address its effects. Nothing in the Agreement, and certainly nothing

in the law, prevents Plaintiff from bringing a representative action for injunctive relief to challenge a systemic pattern and practice of age discrimination.

A. The Plain Language of the Arbitration Agreement Allows Plaintiff to Seek Any Injunctive Relief in a Court of Competent Jurisdiction

The simplest and most direct way to resolve Volkswagen's Motion is to simply read and apply the straight-forward language of the Agreement. When "the language of the contract is clear and unambiguous, the literal meaning controls the outcome of the dispute." *Maggart v. Almany Realtors, Inc*., 259 S.W.3d 700, 704 (Tenn. 2008); s*ee also United States v. Donovan*, 348 F.3d 509, 512 (6th Cir. 2003) (where, as here, a contract is "clear and unambiguous" on its face, "[t]he intent of the parties is best determined by the plain language of the contract.").[2]

Volkswagen attempts to extricate itself from the plain language of the parties' Agreement—an agreement it drafted—despite unambiguous language exempting claims for injunctive relief from mandatory arbitration.[3] Defendants' effort to circumvent basic contract law amounts to little more than an invocation of the "policy favoring arbitration" (Dkt. 30 at 7) and hand-wringing over an alleged attempt to "undermine the very purpose of arbitration." (*Id*. at 5).

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[2] *See further Sturges v. Crowinshield*, 17 U.S. 122, 202-203 (1819) ("It would be dangero[us] in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation . . . [I]f . . . the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers . . . could not intend what they say, it must be one in which the absurdity and injustice of applying the provision . . . would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."); *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 421 (6th Cir. 2008) ("If a contract is clear and unambiguous . . . a court should not use extrinsic evidence to attempt to discern the intent of the parties, but rather should determine their intent from the plain language of the contract.'") (citations omitted).

[3] To the extent Volkswagen argues that there is some ambiguity, the language of the Agreement should be construed against Volkswagen as the drafter. *See Vargo,* 115 S.W.3d at 492; *Ford v. Syneron, Inc.*, No. 2:08-CV-272, 2009 WL 10674885, at *4 (E.D. Tenn. Feb. 19, 2009) ("Several federal appellate cases . . . hold that when a term is ambiguous or vague, it is construed against the drafter."). A sophisticated entity such as Volkswagen should not be rewarded for drafting ambiguous terms and then exploiting that ambiguity to the detriment of employees. This is particularly the case where Volkswagen seeks merely to shield facially-unlawful policies from traditional injunctive remedies and thereby perpetuate those policies.

Despite Volkswagen's arguments, "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" over the propriety of seeking injunctive relief in court. *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). Indeed, Volkswagen included specific instructions on how the Agreement must be interpreted. In two separate locations, the Agreement forbids any interpretation that would require the arbitration of claims for injunctive relief. *See* Agreement, §§ 2, 5. Not only is the Agreement "not susceptible" to Defendants' proposed interpretation, the Agreement *requires* just the opposite.

Notwithstanding any policy in favor of arbitration, nothing in the law "require[s] parties to arbitrate when they have not agreed to do so, **nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement**. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478 (emphasis added, citations omitted). As the Sixth Circuit has made clear, "the federal presumption in favor of arbitration **cannot be used as a means of rewriting the arbitration clause to encompass a dispute that the parties did not intend for arbitration** and that the contract does not anticipate." *Smith v. Altisource Sols.*, 726 F. App'x 384, 390 (6th Cir. 2018) (emphasis added). Defendants' Motion necessarily fails because "the contract language they rely on does not demonstrate the parties' intent to submit the dispute in question to arbitration." *Id.* (citation omitted).

Volkswagen acknowledges that "an express provision excluding a specific dispute . . . will remove the dispute from consideration by the arbitrators." Dkt. 30 at 10 (quoting *Watson Wyatt & Co. v. SBC Holdings, Inc.*, 513 F.3d 646, 650 (6th Cir. 2008)). Yet, Defendants brush aside the express provision present in its own Agreement. Volkswagen dismisses the carve-out for

injunctive relief as an "escape hatch from arbitration" meant to "render the Arbitration Agreement toothless." *Id.* at 4-5. This contention is misplaced. Most controversies—in particular, claims for damages—would remain for arbitration. But such a carve-out does create an exemption for specific matters, in this case, proceedings for injunctive relief. Volkswagen built this "escape hatch"—using specific language much stronger than provisions found in other agreements—presumably to protect in no uncertain terms its own right to seek injunctive relief in court. It cannot turn around and cry foul now that it has chosen to pursue discriminatory policies calling for injunctive remedies.

"Absent some ambiguity in the agreement," which Volkswagen does not and cannot establish, "it is the language of the contract that defines the scope of disputes subject to arbitration." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Here there is no ambiguity. There is no reason to "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract" simply because Volkswagen would prefer that Plaintiff be denied access to court. *Id.* at 294. As discussed below, the law is as plain as the Agreement's language, and it requires that Volkswagen's Motion be denied.

1. Section 2 of the Agreement Forbids Any Interpretation That Would Restrict the Parties from Pursuing Injunctive Relief in Court

At the outset of the Agreement, Volkswagen defined the scope of the parties' arbitrable disputes in Section 2, "Submission to Arbitration." The section consists of two sentences, both of which are plain on their face. The first broadly defines the disputes to be arbitrated as those related to an employee's employment with Volkswagen. The second operates as an immediate and specific qualification of this mandate,[4] and clarifies that the parties do not have to arbitrate claims for injunctive relief:

[4] Where the provision "containing an agreement to arbitrate is followed by some plain language imposing

> 2) Submission to Arbitration. Any and all disputes which involve or relate in any way to Employee's employment (or termination of employment) with VWGoA, whether initiated by Employee or by VWGoA, shall be submitted to and resolved by final and binding arbitration. **However, nothing in this Agreement shall be construed to restrict or prevent either party from pursuing injunctive relief in a court of competent jurisdiction**.

Agreement, § 2 (emphasis added). Despite the clear application of this carve-out to "either party," Volkswagen now seeks to "restrict or prevent" Plaintiff from pursuing injunctive relief in court. *See id.*

Volkswagen initially seeks to hide the obvious significance of this language by making the incredulous claim that "[p]laintiff does not rely on this paragraph to support his right to bring this lawsuit." Dkt. 30 at 11 n.5. Of course, the language of the Agreement governs regardless of whether Plaintiff invoked it in his Complaint. But he does just that, ***citing directly to the language of Section 2***. *See* Compl. ¶ 68. Section 2 is fatal to Volkswagen's Motion because it absolutely allows Plaintiff to pursue his claims for injunctive relief in court.

Volkswagen next advances an implausible interpretation of Section 2 that would run counter to its plain terms by imposing an outright bar on injunctive relief in all but the narrowest of circumstances. Defendants attempt to construe Section 2 as solely permitting a court to enforce an arbitration award, Dkt. 30 at 11 n.5, something it already has full authority to do. *See* Agreement, § 18. Nothing in the language of the Agreement supports, or even suggests, this significant limitation. In fact, this reading would undo contractual language that forbids any interpretation that would in any way restrict or prevent "either party from pursuing injunctive relief in a court of competent jurisdiction." Agreement § 2. Moreover, it is belied by Section 5, which

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a textual limitation," as is the case here, a "cardinal rule[] of textual interpretation" dictates "that the specific governs the general, or *generalia specialibus non derogant*." *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 797–98 (9th Cir. 2017). Thus, Volkswagen's specific textual limitation exempting injunctive relief from arbitration governs the broader first sentence.

expansively defines appropriate relief to include—without limitation—temporary injunctions, permanent injunctions, and restraining orders. *Id.* § 5. Defendants' reading defies both logic and the basic tenets of contract construction.

Notably, Volkswagen drafted a separate and distinct provision authorizing the parties to "judicially enforce" awards issued in arbitration. Section 18 of the Agreement states: "The decision and award of the arbitrator may also be judicially enforced pursuant to applicable law." Under Volkswagen's proposed interpretation, Section 18 is rendered entirely superfluous, contrary to centuries-old canons of interpretation. *See, e.g.*, *United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used."); *Maggart*, 259 S.W.3d at 704 ("The interpretation should be one that gives reasonable meaning to all of the provisions of the agreement, **without rendering portions of it neutralized or without effect**.") (emphasis added).

In the final analysis, Volkswagen's argument simply makes no sense. Section 2 defines the types of disputes that will be (and will not be) subject to arbitration. In this context, Volkswagen included a broad carve-out for any proceedings for injunctive relief. Volkswagen's contention that the carve-out is *actually* a heavily-veiled and utterly redundant reference to the parties' ability to judicially enforce certain arbitration awards does not hold water. Stripping away false outrage about Volkswagen's supposed entitlement to force its employees into individual arbitration, Volkswagen's Motion amounts to a case of sour grapes. The Court must adopt a rational and sensible interpretation of the plain text of the Agreement. Volkswagen cannot escape the words that it alone drafted; the Agreement authorizes Plaintiff to pursue his claims for injunctive relief in a court of competent jurisdiction.

2. <u>The Agreement Expressly Permits Court Actions for Permanent Injunctive Relief</u>

Volkswagen next argues that Plaintiff cannot pursue permanent injunctive relief in court because Section 5 of the Agreement addresses "provisional" injunctive relief, while Plaintiff seeks "a final order on the merits." Dkt. 30 at 11. Again, this argument ignores the express language of the Agreement. Section 5 of the Agreement specifically defines the type of "provisional" injunctive relief the parties may seek in court as including <u>permanent injunctions</u>. This was Volkswagen's contractual choice. A permanent injunction is, by definition, not a temporary interim measure, and stems from a "final order on the merits." *See* BLACK'S LAW DICTIONARY p. 800 (8th ed. 2004) (defining "permanent injunction" as "An injunction granted after a final hearing on the merits.").[5] Volkswagen is unable to support a theory that its express provision for "permanent" injunctions somehow refers only to preliminary injunctions. *Cf. id*. (defining "preliminary injunction," in contrast to "permanent injunction," as "A temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.").[6]

In fact, Volkswagen concedes that there are instances when a court *should* issue permanent injunctions that are not "provisional" and operate as a final order on the merits. Tellingly, Volkswagen argues that this is allowed only when *Volkswagen* would like to pursue a "non-provisional" permanent injunction in court, i.e. "a permanent injunction to bar any attempted class arbitration" and "injunctions related to unfair competition and intellectual property." Dkt. 30 at 14 n.7.[7] Indeed, what Volkswagen really disputes is not whether the Agreement authorizes the Court

[5] *See also Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981) ("Where, by contrast [to a preliminary injunction], a federal district court has granted a permanent injunction, the parties will already have had their trial on the merits[.]").

[6] In any event, Plaintiff does seek a preliminary injunction here and should clearly be permitted to do so.

[7] Ironically, Volkswagen supports the argument that *Volkswagen* can go to court to get a final order on the merits for certain claims because "the Arbitration Agreement **carves out injunctions** related to unfair

to issue a final order on the merits, but whether it authorizes the Court to issue a final order on the merits *of a claim made by an employee*. Once again, Volkswagen is undone by its own language. The text of the Agreement does not address or in any way support this limited interpretation, nor does the law permit this sort of one-sided access to court.

Not only is Volkswagen's position unsupported by the plain language of the Arbitration Agreement, it is prevented by law. Volkswagen's argument would impermissibly rewrite the Agreement in such a way that it "has a judicial forum for practically all claims that it could have against [Plaintiff]" while "[a]t the same time, [Plaintiff] is required to arbitrate any claim that [he] might have against [Volkswagen]." *Taylor v. Butler*, 142 S.W.3d 277, 286 (Tenn. 2004). Attempts to provide a judicial forum to one party while restricting the other party exclusively to arbitration are invalid and unenforceable under the law. *See id.* at 285-86 (collecting cases). Put simply, "[c]ourts will not enforce adhesion contracts which are oppressive to the weaker party or which serve to limit the obligations and liability of the stronger party." *Id*. at 286 (citation omitted). Thus, Volkswagen's one-sided interpretation should be avoided because it leads to an unlawful result.

3. Courts Routinely Hold Defendants to the Terms of Express Carve-Outs Similar to Those Contained in Volkswagen's Arbitration Agreement

While Volkswagen cites several cases that it claims support its position, such cases are inapplicable as set forth below. In contrast, courts apply common-sense contract interpretation to enforce similar contractual carve-outs for injunctive relief. Thus, under like circumstances, courts have regularly allowed actions for permanent injunctive relief to proceed in a judicial forum.

For example, in *Med. Creative Techs. v. Dexterity Surgical, Inc.*, No. CIV.A. 03-3773, 2004 WL 350735 (E.D. Pa. Feb. 25, 2004) the parties' agreement contained a carve-out for

competition and intellectual property." *Id*. (emphasis added). Apparently, unambiguous express carve-outs **are** enforceable as-written, but only where they benefit Defendants.

injunctive relief stating "[n]othing in this Section will prevent a party from instituting any action seeking injunctive or other equitable relief . . . ." Defendant argued against allowing a claim for permanent injunctive relief to proceed in court, arguing that the suit would entail ruling on the merits. *Id*. at *3. The court was unpersuaded:

> Defendant has produced no authority to support the contention that the alternative dispute resolution provisions were intended to apply only to preliminary as opposed to permanent injunctive relief. The plain text of the License Agreement provision for Dispute Resolution expressly excepts "actions seeking injunctive or other equitable relief," and makes no distinction between preliminary and permanent injunctions.

Id. Here, Volkswagen knew that actions for injunctive relief were common in employment disputes. It has long been established that class- and collective-wide injunctive relief is an appropriate remedy for systemic discrimination. *See, e.g.*, *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976) ("Lawsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy."); 29 U.S.C. § 626(b) (authorizing courts to award broad injunctive relief to effectuate the purposes of the Act). Had Volkswagen intended to arbitrate such foreseeable claims for injunctive relief, it could have included a much narrower carve-out.

Similarly, in *PBS Coal, Inc. v. Hardhat Min., Inc.*, 632 A.2d 903, 905–906 (Pa. 1993), the parties included a broad arbitration provision with specific carve-outs. Defendant argued that because the underlying "threshold or preliminary questions" were arbitrable, plaintiff's claims were subject to arbitration notwithstanding the parties' express carve-outs. *Id.* at 906. However, the court reasoned that "[a]greements to arbitrate are to be strictly construed and should not be extended by implication." *Id*. at 905. It thus held that, "the specific terms of the arbitration clause [to carve out certain claims] predominate over the general intent of the parties to submit 'any dispute' to arbitration" and allowed the case to proceed in court. *Id*. at 906 (citing Restatement

(Second) of Contracts § 203(c)).[8] *See also, e.g., KWD River City Investments, L.P. v. Ross Dress For Less, Inc.,* 288 P.3d 929, 930–31 (Okla. 2012) (allowing claim to proceed in court on the merits where "[t]he relief by which each party can receive their respective benefit under the consent provision is purely equitable and disputes involving equitable remedies are excluded from arbitration by the express terms of the arbitration provision."); *Best Effort First Time, LLC v. Southside Oil, LLC,* No. CV GLR-17-825, 2018 WL 1583465, at *9-10 (D. Md. Mar. 30, 2018) (finding "'with positive assurance' that the parties here have not agreed to arbitrate claims for permanent injunctions" based on clear language of the agreement and allowing permanent injunction to proceed in court while monetary damages proceed to arbitration); *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 62 (2d Cir. 1996) ("The district court should have assessed the arbitrability of the claim under the entire arbitration section, including the exclusionary clause. Only then could [it] divine the intent of the parties as reflected by the general arbitration clause *and* the exception.") (citations omitted).

4. <u>Defendants' Citations Are Distinguishable and Unpersuasive</u>

Defendants cite several out-of-district cases in an attempt to support their argument that Plaintiff cannot seek a permanent injunction in court. *See* Dkt. 30 at 11-14. Each of these opinions interpret *entirely different* contractual language that is wholly inapplicable to the matter at hand.

For example, Defendants cite to three cases—*Tennessee Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1329 (M.D. Tenn. 1990), *Blankenship v. Superior Controls, Inc.*, No. 13-12386, 2014 WL 4857083, at *3 (E.D. Mich. Apr. 25, 2014), *report and recommendation adopted*, No. 13-

[8] Likewise, in *Trustees of Univ. of Pennsylvania v. Aetna Inc.*, No. 3023 EDA 2012, 2013 WL 11250743 (Pa. Super. Ct. Nov. 1, 2013), the parties' arbitration agreement contained a carve-out from arbitration for equitable and injunctive relief. Defendant, like Volkswagen, argued that plaintiff's plea for injunctive relief on the merits was "solely an attempt to remove the claims from the ambit of the arbitration provision" and moved to compel. *Id.* at *3. The court was unpersuaded and held that the trial court had properly exercised jurisdiction because "[t]he arbitration agreement expressly excludes claims for equitable relief." *Id.* at *4.

12386, 2014 WL 4856524 (E.D. Mich. Sept. 30, 2014), and *Compuserve, Inc. v. Vigny Int'l Fin. Ltd.*, 760 F. Supp. 1273, 1276–77 (S.D. Ohio 1990)—to support the argument that claims for permanent injunctions must always be left to the arbitrator. In reality, nothing in these cases stands for such a drastic bright-line rule.

In *Tennessee Imports*, the court considered only whether a court ever had the power to issue a preliminary and/or permanent injunction in the absence of a carve-out for injunctive relief. *See* 745 F. Supp. at 1318 (pointing to mandatory arbitration provision containing no carve-out for injunctive relief). The contract here contains precisely such a carve-out.

In *Blankenship*, the court considered whether a carve-out allowing an employer to "obtain an injunction or restraining order to enjoin or restrain Employee from the breach or threatened breach" of a non-compete agreement allowed the employer to bring all claims related to a breach of the non-compete in court, including a counterclaim for monetary damages. 2014 WL 4857083, at *2-3. Unsurprisingly, the court found that it did not, and ruled that the contractual provision for restraining breaches referred to preliminary injunctive relief. *Id.* Here, the Agreement contains critical additional language foreclosing any interpretation which would restrict the parties' ability to obtain injunctive relief in court and expressly providing for permanent injunctive relief.[9]

Similarly, the carve-out at issue in *Compuserve* limited permissible injunctive relief to "restraining orders and/or preliminary injunctions against threatened conduct that will cause loss or damage." 760 F. Supp. at 1276-77 (citation omitted). By contrast, the Agreement here contains

[9] Volkswagen's agreement is more akin to that in *Bd. of Trustees of Metrohealth System v. Eramed, LLC*, No. 1:09 CV 2645, 2010 WL 3239011 (N.D. Ohio Aug. 16, 2010), cited in *Blankenship*, which exempted actions for temporary or permanent injunctive relief. *Id.* at *4. The court fully recognized this provision as enforceable but held that the contract action at issue there was not one for injunctive relief. *Id.*

no such limiting language, and in fact expressly reserves Plaintiff's right to seek permanent injunctions in court.

Likewise, Volkswagen cites another three out-of-district cases which purportedly "reject[] similar efforts to sidestep arbitration." Dkt. 30 at 13-14. Even if these cases were binding on the court, the language at issue renders their reasoning wholly inapposite. In each of these cases, the contractual provisions for injunctive relief contain none of the strong, unequivocal language present in Volkswagen's Agreement. While the agreements generally preserve the right to seek an injunction, they do not propound additional language—comparable to VW's Agreement—qualifying that claims for injunctive relief are exempted from the scope of disputes to be submitted to arbitration.

For example, in *PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10 (1st Cir. 2010), the arbitration agreement contained no carve-out for the right to seek injunctive relief *in court*, and is thus entirely irrelevant to the issue presented here. There, the plaintiff argued that a provision in an arbitration agreement generally preserving the parties' "right to seek injunctive relief" somehow rendered arbitration "an optional mechanism for dispute resolution." *Id*. at 16. Instead, the court reasoned that general preservation of the right to seek injunctive relief as a remedy simply "furnishe[d] the arbitrator with broad legal and equitable powers should either party seek special kinds of relief," including injunctive relief. *Id*. Neither the holding nor the underlying reasoning has any bearing on Volkswagen's express language allowing the parties to seek preliminary and permanent injunctive relief *in a court of competent jurisdiction*.

Remy Amerique, Inc. v. Touzet Distribution, S.A.R.L., 816 F. Supp. 213 (S.D.N.Y. 1993), on which Volkswagen heavily relies, similarly is of no assistance to Defendants. The agreement there contained none of the strong language Volkswagen chose to include in its Agreement. Of

particular importance to the *Remy* court, the provision defining the scope of the disputes to be submitted to arbitration (parallel to Section 2 of the Agreement here) contained no limitation on the broad scope of issues to go to arbitration. *See id*. at 217-18. Here, however, the Agreement expressly exempts claims for injunctive relief from the issues that must be submitted to arbitration. Further, while the agreement in *Remy* indicated that the parties "may" pursue injunctive relief in either arbitration or court, *id.* at 215, Volkswagen has gone further. The Agreement prohibits any interpretation that would serve to restrict the parties' access to court on claims for injunctive relief.

The agreement at issue in *Nexteer Auto. Corp. v. Korea Delphi Auto. Sys. Corp.*, No. 13-CV-15189, 2014 WL 562264 (E.D. Mich. Feb. 13, 2014) similarly contained no express carve-out for permanent injunctions, and none of the relevant language of Volkswagen's contract defining the scope of arbitral disputes to preclude proceedings for injunctive relief. *Id.* at 2. Further, the party there sought to continue simultaneously in both court and arbitration on the same issue of injunctive relief. *See id*. at *13. Thus, the court relied in large part on "principles of comity and fairness." *Id*.

Here, Plaintiff seeks to establish Volkswagen's pattern and practice of discrimination in a class-wide proceeding and to obtain corresponding class-wide injunctive relief against the Pact for the Future. Class members affected by the Pact may then proceed to arbitrate their individual claims for damages. *See Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977). Plaintiff's proposed course of action has none of the attendant risks of comity and fairness, nor do bifurcated proceedings under the *Teamsters* model risk inconsistent rulings.

B. Defendants' Bare Preference for a Bilateral "Arbitration Process" for Employee Claims Does Not Prevent Plaintiff From Pursuing Injunctive Relief in Court

Volkswagen also argues that allowing Plaintiff to pursue permanent injunctive relief would somehow "eviscerate the arbitration process," "interfere with the fundamental attributes of

arbitration," "eradicate the prohibition on class action," and "leav[e] nothing to arbitrate." Dkt. 30 at 12. But, Volkswagen's Agreement defines the "arbitration process" and which claims and disputes are subject to arbitration. Volkswagen has elected to exclude injunctive claims from arbitration and is bound by that choice even if it operates to preclude arbitration altogether. *See, e.g., Volt*, 489 U.S. at 478 (recognizing enforcement "according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward."). Moreover, Volkswagen's alarmist parade-of-horribles argument is riddled with error.

Volkswagen's objection that injunctive proceedings will subsume the entire action, leaving nothing for arbitration, is muted in the class discrimination context. Under the *Teamsters* approach, a class trial leaves plenty to arbitrate: namely, class members' individual claims. At Phase I, the Court would determine whether Volkswagen has engaged in a systematic pattern or practice of illegal age discrimination under its Pact for the Future and would enter appropriate class-wide injunctive relief. With a *Teamsters* presumption in hand, class members would still be required to show that they were actual victims of the Company's discriminatory policies and to arbitrate the issue of individual harm and damages. *See also Senter*, 532 F.2d at 524 ("Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the class, has suffered financial loss, and thus entitled to back pay or other appropriate relief.") (citation omitted). In other words, specific "claims or controversies relating to [each] Employee's employment" (Agreement § 1) would remain subject to arbitration.

Moreover, there exists no uniform, idealized "arbitration process" for Plaintiff to "eviscerate" by pursuing this action. Defendants were generally free to structure the Agreement as

they saw fit, *see Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010), and consent to any process they chose. Here, Volkswagen chose to require arbitration of its workers' claims but to exempt all proceedings for injunctive relief. The Supreme Court has "reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement . . . of privately negotiated arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Indeed, the FAA "requires that the parties only be compelled to arbitrate matters within the scope of their agreement, and this is so even when the result may be piecemeal litigation." *Bratt Enterprises, Inc. v. Noble Int'l Ltd.*, 338 F.3d 609, 613 (6th Cir. 2003).

C. Nothing in the Plain Language of the Agreement or the Law Prevents Plaintiff From Seeking Class and Collective Relief in Court

Volkswagen presents a number of false conclusions in support of its Motion. Perhaps most glaring is the assertion that Plaintiff concedes that its Agreement "does not provide for any class or collective action. . . ." Dkt. 30 at 4. Plaintiff has said no such thing. From this assumption, Volkswagen derives the argument that Plaintiff's action must be dismissed in part because it seeks to "eradicate the prohibition on class actions." *Id*. at 12. But there is no class or collective action waiver in the Agreement. Even assuming a bar on class arbitrations, nothing in the Agreement or the law operates as a prohibition on Plaintiff's ability to proceed in a representative capacity on those claims and disputes which may be brought in court. To the contrary, the law favors class and collective injunctive relief to prevent and address systemic patterns of abuse.

Defendants attempt to bootstrap recent opinions discussing whether class *arbitration* is available where the parties' arbitration agreement does not expressly provide for it. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 684 (indicating that a court or arbitrator must ascertain a basis for concluding that the parties agreed to authorize class arbitration). This is far from an outright "prohibition."

Here, as permitted by the Agreement, Plaintiff intends to proceed in court to seek class-wide injunctive relief. Doing so does not circumvent the Agreement or the law. Since Plaintiff's injunctive action is outside of the scope of the arbitration mandate, Federal Rule of Civil Procedure 23 (class actions) and 29 U.S.C. § 216(b) (collective actions) apply without restriction.

D. Plaintiff's Proposed Class and Collective Injunctive Relief is the Preferred Procedure for Challenging a Pattern and Practice of Discrimination

Defendants argue that Plaintiff's action for class-based injunctive relief is "inefficiency on steroids" (Dkt. 30 at 5) and "would render most of the language of the Arbitration Agreement meaningless." *Id.* at 11. To the contrary, Plaintiff's proposed course of action is preferred under the law precisely *because* of its efficiency. Class and collective litigation avoids hundreds of individual proceedings on common issues pertaining to a defendant's class-wide conduct and its effect on the class as a whole. *See, e.g.*, *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity."). In fact, pooling the class' claims for purposes of expedient injunctive relief facilitates resolution of this matter and fulfills the Agreement's stated purpose of avoiding "costly expense and lengthy delays." Agreement § 1.

Bifurcated proceedings of the type proposed by Plaintiff are routine in cases of alleged systemic discrimination. *See Teamsters*, 431 U.S. 324. The first phase of a pattern-or-practice suit requires a showing of a discriminatory policy. *Id*. at 360. This phase focuses on common evidence regarding the employer's policy and procedure of discrimination. If the court finds such a pattern or practice of discrimination, it

> may then conclude that a violation has occurred and determine the appropriate remedy. . . . Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by [the law.]

Id. at 361. Then, in the remedial phase, individual employees may seek relief for specific harm they have suffered; the employer may demonstrate non-discriminatory reasons for any adverse employment actions. *Id*. *See also Thiessen v. GE Capital Corp*., 267 F.3d 1095, 1105-1108 (10th Cir. 2001) (describing the *Teamsters* procedure, including its various procedural advantages, in the context of an ADEA action and vacating decision to decertify collective action); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 81 (M.D. Tenn. 2004) ("The Courts of Appeals have repeatedly recognized the general rule that a 'class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damages claims by class members, even if it is based on the same events.'").

Far from inefficient, the Sixth Circuit has long recognized that "[l]awsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." *Senter*, 532 F.2d at 525. And, it is well-recognized that "authorizing the courts to issue broad injunctive relief is the cornerstone to eliminating discrimination in society. The ADEA, like Title VII of the Civil Rights Act of 1964, authorizes courts to award broad, class-based injunctive relief to achieve the purposes of the Act." *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 41-42 (1991) (Stevens, J. dissenting) (citation omitted). Proceeding in two phases—a class-wide liability/injunctive phase and an individual remedial phase—is recognized as the most efficacious method of resolution.

Defendants' proposed alternative is that each employee impacted by their practice of discrimination individually arbitrate his or her claims. Each employee would start the process from scratch, repeatedly presenting similar evidence on whether Volkswagen adopted a Company-wide policy of age discrimination—such as evidence on the import of the Pact and its implementation in the United States, other statements and admissions of company leaders, and costly data analysis

and anecdotal evidence on patterns and trends of employment actions (demotions, transfers, layoffs) taken during the period in which the Pact has been in effect. Such a process is not only burdensome, it risks "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class[.]" Fed. R. Civ. P. 23(b)(1)(A). It could well be described as "inefficiency on steroids."

E. At a Minimum, Plaintiff is Entitled to Seek Preliminary Injunctive Relief on a Representative Basis

Volkswagen concedes that the Agreement entitles Plaintiff to seek preliminary injunctive relief during the pendency of arbitration proceedings. Accordingly, regardless of the outcome of Defendants' Motion, the Court should consider Plaintiff's Motion for a Preliminary Injunction (Dkt. 37) and issue an order blocking implementation of Volkswagen's Pact for the Future and restoring Plaintiff Manlove to his rightful position in the Company. Moreover, the Court should authorize corrective notice to the class members informing them of this action and the preliminary injunction against Volkswagen's discriminatory policy and plan to target older workers.

F. This Court Has Authority to Resolve the Current Dispute Over Arbitrability

Volkswagen argues that the Court must refer the parties' dispute about the Court's subject matter jurisdiction to an arbitrator and defer to the arbitrator's decision as to "whether Plaintiff may pursue any injunction in court." Dkt. 30 at 8. This argument has no merit.

First, even where an agreement contains a delegation clause, such as the one in Section 10 of the Agreement here, the law does not require parties to send meritless arguments about arbitrability to the arbitrator. *See, e.g., Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 511 (6th Cir. 2011) (Plaintiff's claims "are with equal clarity outside the scope of the parties' narrow arbitration clause and thus not even arguably subject to arbitration. . . . We therefore see no need for an arbitrator to decide the arbitrability of any of the plaintiffs' claims."). As discussed, the

Agreement's unambiguous carve-out for claims of injunctive relief to proceed in court places Plaintiff's claims squarely outside of the Agreement. Volkswagen is well aware that where a plain reading of the text establishes that the dispute at issue is not arbitrable, "the arbitrability issue is not even arguable and therefore it is not a matter for the arbitrator to decide." *Cinpres Gas Injection Ltd. v. Volkswagen Grp. of Am., Inc.*, No. 12-CV-13000, 2013 WL 11319318, at *1 (E.D. Mich. Jan. 9, 2013).

This is for good reason. Volkswagen's interpretation of the Agreement "would require the parties to take all issues—no matter how unrelated these issues are to the parties' arbitration agreement—to the arbitrator for a threshold determination regarding arbitrability before such issues could properly be brought in court." *Turi*, 633 F. 3d at 507. This roundabout procedure is the height of inefficiency. There is no logical way to square the unambiguous language of Section 2—ensuring that "nothing in this Agreement shall be construed to restrict or prevent either party from pursuing injunctive relief in a court of competent jurisdiction"—with a mandate that every claim for injunctive relief must first be submitted to an arbitrator before then proceeding to court.

Second, the Agreement expressly authorizes the court to determine enforceability of the Agreement by adjudicating petitions to compel arbitration, or otherwise. *See* Agreement § 18. Plaintiff here does nothing more than seek enforcement of the Agreement as written.

Third, the question of the court's subject matter jurisdiction is a threshold question exclusively for the court to decide, as Volkswagen acknowledges in its papers. *See* Dkt. 30 at 6 ("[S]ubject matter jurisdiction is a threshold issue, which the Court must consider prior to reaching the merits of a case."). Nothing in the law requires the Court to defer the threshold question of its own subject matter jurisdiction to a private citizen who happens to serve as an arbitrator. Resolution of the question of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) here

necessarily requires "a limited review to determine whether the dispute is arbitrable; meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Penley v. NPC Int'l, Inc.*, No. 13-1031, 2014 WL 12634491, at *2 (W.D. Tenn. July 25, 2014), *aff'd* 625 F. App'x 261 (6th Cir. 2015).

Finally, the present dispute concerns whether the parties formed an agreement to submit claims of injunctive relief to arbitration. Given the plain language of the Agreement, it is clear that they did not. This carve-out from arbitration for claims seeking injunctive relief applies with equal force to the delegation clause. Under the terms of the Agreement, as written, Plaintiff never formed an agreement to submit questions of arbitrability to an arbitrator where it would serve to "restrict or prevent" his ability to seek injunctive relief in court. Agreement § 2. Questions of formation are a threshold matter for the court to decide. *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) ("It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide."). It is bedrock contract law that "[i]n order that there may be a meeting of the minds which is essential to the formation of a contract, the acceptance of the offer must be substantially as made." *Canton Cotton Mills v. Bowman Overall Co.*, 257 S.W. 398, 402 (Tenn. 1924). Here, Volkswagen offered an arbitration Agreement exempting claims for injunctive relief. Volkswagen cannot now, after acceptance of the offer "substantially as made," modify the terms of the Agreement, as this destroys the requisite "meeting of the minds" element of contract formation. Put another way, Volkswagen never offered, and Plaintiff never accepted, any agreement to submit claims for injunctive relief to arbitration.

Defendants' citation to *Patton v. Volkswagen Grp. of Am. Chattanooga Operations, LLC*, No. 1:16-CV-327-TAV-CHS, 2017 WL 1288677 (E.D. Tenn. Apr. 6, 2017) offers no support of

its position. In *Patton*, a recent case also alleging age discrimination against Volkswagen, plaintiff challenged the entire arbitration agreement as unenforceable in general "because defendant fraudulently misrepresented the paperwork and because defendant did not give plaintiff adequate time to review the documents." *Id.* at *4. Plaintiff sought a ruling that she could proceed in court on all claims, not just claims for injunctive relief. Far from requiring a determination on the face of the agreement that the claims were plainly not arbitrable—as the Court should here—the *Patton* court proceeded to rule against plaintiff on the substantive issue of arbitrability and enforceability. *Id*. at *8-10.

III. CONCLUSION

Plaintiff pursues this action to stop Volkswagen from implementing its Pact for the Future to discriminate against and harm older workers. This is the quintessential situation for class-based injunctive relief. Volkswagen's Arbitration Agreement expressly allows for employees to seek such relief in Court, and the Motion to compel Plaintiff's claims into arbitration should be denied.[10]

[10] Alternatively, in the event Plaintiff's claims are sent to arbitration, this action should be stayed, not dismissed, pursuant to 9 U.S.C. § 3. The Sixth Circuit has recently confirmed that a court shall stay, rather than dismiss, a proceeding where 1) the issue is found to be arbitrable, 2) one of the parties has applied for a stay, and 3) the party requesting the stay is not in default in proceeding with arbitration. *Hilton v. Midland Funding, LLC*, 687 F. App'x 515, 518 (6th Cir. 2017).

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Respectfully submitted,

s/*Kevin Sharp*

Kevin H. Sharp (TN BPR 016287)
Leigh Anne St. Charles (TN BPR 036945)
SANFORD HEISLER SHARP, LLP
611 Commerce Street, Suite 3100
Nashville, Tennessee 37203
Telephone: (615) 434-7000
Facsimile: (615) 434-7020
ksharp@sanfordheisler.com
lstcharles@sanfordheisler.com

Andrew Melzer (*pro hac vice)*
SANFORD HEISLER SHARP, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
Telephone:(646) 402-5657
Facsimile: (646) 402-5651
amelzer@sanfordheisler.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 6, 2018, a true and correct copy of the foregoing document has been furnished to the following individuals via the Court's ECF System:

Bradford G. Harvey
Charles B. Lee
Megan Welton
Miller & Martin, PLLC
832 Georgia Avenue
1200 Volunteer Building
Chattanooga, TN 37402
423-756-6600
bharvey@millermartin.com
clee@millermartin.com
megan.welton@millermartin.com

Attorneys for Defendants
Volkswagen Aktiengesellschaft,
Volkswagen Group of America, Inc.,
and Volkswagen Group of America
Chattanooga Operations, LLC

s/ Kevin Sharp
Kevin H. Sharp **(**TN BPR 16287)
SANFORD HEISLER SHARP, LLP
611 Commerce St., Ste. 3100
Nashville, TN 37203
(615) 434-7001
ksharp@sanfordheisler.com