IN THE CIRCUIT COURT
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

DONNA LEE HARRISON and JERRY HARRISON	)	
Plaintiffs,	)	Cause No. 1522-CC09759-01 Division 13
v.	)	
VOLKSWAGEN GROUP OF AMERICA, INC., ET. AL.	)	**JURY TRIAL DEMANDED**
Defendants.	)	

DEFENDANT VOLKSWAGEN GROUP OF AMERICA, INC.'S
MOTION IN LIMINE TO EXCLUDE "REPTILE" ARGUMENTS

COMES NOW Defendant Volkswagen Group of America, Inc. ("VWGoA"), by and through its attorneys, and moves this Court, *in limine*, for an order prohibiting improper "Reptile" arguments and tactics at trial, including arguments or suggestions to the jury that they can "send a message" or make their communities safer by entering a verdict for Plaintiffs. Plaintiffs' counsel has relied on these types of arguments and theories in previous trials, in deposition questioning in this and previous matters, and in arguments to this Court. These arguments and tactics violate well-established Missouri law and should be prohibited in all phases of the trial.

I. INTRODUCTION

VWGoA anticipates that Plaintiffs' counsel will, beginning at *voir dire*, and throughout the trial, attempt to utilize improper arguments and tactics that suggest to jurors that they can make their communities and themselves safer by rendering a verdict for Plaintiffs that will reduce or eliminate dangerous conduct. Comments and argument from Plaintiffs' counsel during

the discovery process and in motion practice indicate that they intend to paint VWGoA as a "villainous" corporation and that the jury should punish corporate defendants like VWGoA by entering a large verdict in Plaintiffs' favor. A publically-available book by authors David Ball and Don Keenan describes some of the basic ideas behind these manipulative trial tactics dubbed "reptile" theories or tactics. *See* David Ball and Don Keenan, Reptile: The 2009 Manual of the Plaintiffs' Revolution (1st ed. 2009)(hereinafter "Reptile Manual"), relevant portions of which are attached as **Exhibit A**.

The fundamental premise of the "Reptile" theory is to show the jury that a defendant's alleged conduct is not just a threat to the plaintiff, but is a threat to "society", including the jurors and their families. This theory, as set forth in Keenan and Ball's book, extols the virtues of an array of improper trial tactics such as encouraging the jury to disregard or minimize jury instructions in favor of "God's law" and a host of self-created "safety rules" such as a defendant's imaginary duty to "eliminate all needless danger" or make their operations "as safe as possible." These tactics violate several longstanding tenets of American jurisprudence and have been explicitly prohibited in prior Missouri cases. They likewise should be prohibited at trial in this matter, as they serve only to inflame the jurors and improperly influence any damages awarded. VWGoA requests that the court prohibit all such trial tactics because they violate longstanding Missouri law.

A. Summary of "Reptile" Theory

The psychological premise of the "Reptile" strategy is that people (jurors) have brains consisting of various parts, one of which the authors refer to as the "R Complex," or Reptilian Complex. *See* Ex. A**.** "It's brain chemistry, start to finish. We do have some free will as to how to protect our genes, but we have virtually no free will as to whether we will." *Id.* According to the

authors, the reptilian brain instinctively overpowers the cognitive and emotional parts of the brain when a basic sense of safety becomes threatened. *Id.* at 17. The "major axiom" of the reptile tactic is that "[w]hen the reptile sees survival danger, she protects her genes by impelling the juror to protect himself and the community." *Id.* at 19, 40, 73 (emphasis added).

Because the most powerful reactions occur when one is protecting one's life, the reptile tactic-wielding attorney believes he or she can communicate most effectively by converting every issue into one of self-protection or its close cousin -- "community safety." Attorneys are taught to "answer" three questions for a juror deciding "whether a defendant's act or omission was negligent":

1. How likely was it that the act or omission would hurt someone?

2. How much harm could it have caused [as opposed to how much harm did it cause in this case]?

3. How much harm could it cause in other kinds of situations?

Ex. A, at 31.

It is readily apparent that evidence related to harm that could have occurred but did not, and how much harm a negligent act could theoretically cause in other situations than the one at issue are completely irrelevant, misleading, and prejudicial. Yet these form the bedrocks of the "reptile" theory. Attorneys employing "reptile" arguments attempt to tell the jury that "safety" is "the purpose of the civil justice system," and that "fair compensation can diminish… danger within the community." *Id.* at 29, 30. Reptile arguments "give jurors [a] personal reason to want to see causation and dollar amount come out justly, because [they are led to believe] a defense verdict will further imperil them. Only a verdict [plaintiff's] way can make them safer." *Id.* at 39.

The reptile theory also emphasizes and insinuates that only the safest possible action, as opposed to one of a range of reasonable choices, meets the standard of care: "The law demands no less, because no prudent person or company chooses to expose anyone to unnecessary danger. So second-safest is always negligent." *Id.* at 63. This is plainly not Missouri law. Another distortion of the law comes in the form of training attorneys to present evidence of "all the dangers" inherent in the activity at issue, ostensibly so that "jurors [can] have the necessary information to see how dangerous a violation is." *Id.* at 66-67. The obvious result of admitting evidence or allowing attorney argument concerning every potential danger associated with automotive work or products is to activate a fear/survival response in the jurors based on completely irrelevant evidence of alleged risks that have nothing to do with the case. For instance, Plaintiffs' counsel will insinuate that anyone who performed automotive repair work is at risk of harm, yet thousands of people worked with automotive products year after year without ill effects, including plaintiff Jerry Harrison, who allegedly worked directly with the Defendants' products.

At their core, "reptile" arguments or tactics are impermissible "golden rule" or "send a message" arguments in disguise, intended to inflate jury awards beyond what the facts of a given case warrant by appealing to a juror's instinct for self-preservation. As set forth herein, these tactics, along with artificial, irrelevant attempts to vilify Defendants as "evil corporations", are improper under Missouri law and should be prohibited at trial.

B. Plaintiffs' Counsel's Reliance on "Reptile" Arguments

VWGoA anticipates that Plaintiffs' counsel will utilize "reptile" arguments and strategies at trial, just as they have done in previous cases and throughout the pretrial phase of this matter.

In recent trials, Plaintiffs' lead counsel, Jessica Dean, has made use of improper "reptile" arguments, including the kinds of appeals to the jury specifically criticized in appellate decisions in Missouri and throughout the country. *See* Argument section, *supra*. In a textbook "reptile" practice, Ms. Dean suggests that the verdict gives the jury the opportunity to "speak out" and be the subject of publicity as the "conscience of the community," and refers to the fact that there are numerous other entities that are just as culpable, but are not present in the courtroom, as an attempt to compel the jurors to protect the community against the endless dangers in the world. Counsel also makes vague, sweeping generalizations about "risk" and people "getting sick" or "dying" from asbestos without context or comparison to the facts of the present case.

For example, in a recent South Carolina case, *Muldoon v. Ford Motor Company*, Greenville County Court of Common Pleas Case No. 2014-CP-23-05534 Ms. Dean made the following statements in her opening statement and closing argument:

1. "[Y]ou are to consider the total loss for this family to prove our case, for what happened to them, and not just from Ford or Toyota or VW, but from everyone that was exposed to asbestos, and there are more companies than just the three that are shown on this board." *Muldoon v. Ford Motor Company*, p. 544:4-10, relevant portions thereof attached hereto as **Exhibit B** and incorporated by reference.

2. "The EPA has looked at this. They have explicitly looked at garage mechanics[, b]efore Joe stopped doing this work, and sent out information saying, mechanics are dying of mesothelioma. So are their wives. So are their children. They're a problem not just for the people doing it firsthand, but customers walking in." *Id.*, p. 560:10-16.

3. "I'm going to call it out and say, you don't want any part of your body touching it. You especially don't want to bring it home to your kids and the family." *Id.*, p. 561:10-13.

4. "But you'll also be asked to look at the risk. And here it's not just the risk to Joe Muldoon, but the risk of selling asbestos products to people." *Id.*, p. 563:6-9.

5. "But what we know is that thousands of people have died. In fact, going back to when this work was being done, there were reports that 10,000 Americans alone die from asbestos-related disease a year, that one of every three cancer deaths in this country from occupational cancer is directly related to asbestos exposure." *Id.*, pp. 563:20-564:2.

6. "What they learned is that people working with it weren't the only ones getting sick. Their wives were from laundering their clothes and their children were." *Id.*, p. 571:17-20.

7. "I want to be the first one to tell you there are others to blame. There are others that in our investigation – first, there's others to blame that we've placed blame on… But even for the ones that we figured out, there were a lot of other people." *Id.*, pp. 584:21-585:6.

8. "But we are here because this was not a one-time incidence. This was not a bad day for Ford or VW or Toyota. This was business as usual. This is how they conducted themselves in the '60s and '70 and '80s, and for some of them, going on into the '90s. And so far, this family has been the one to pay the price." *Id.*, pp. 588:20-589:1.

9. "We've produced evidence to show though over and over and over again in many different legal ways these companies acted unresponsibly [*sic*] and in a way that violates the rules and regulations of the state. The first thing you're going to hear though is they are not the only ones." *Id.*, p. 3640:14-20.

10. "This is something that binds all of us, not just car companies, not just companies, drivers, people that are taking care of children, people that are making products. This is a baseline, if you live in this country, rule." *Id.*, pp. 3669:23-3670-3.

11. "People that could be expected to use these products are dads in their backyards, working with their kids, people in

> garages like the Sunoco gas and professional dealerships. It's a huge range of people, and Ford knew that meant [not] just the professional people, that's 900,000 people that are working with their products." *Id.*, p. 3675:18-25.

12. "And so I want to thank you for your time, but we believe we are here because this company not once, not on a bad day, but both of them for the course of decades ignored safety rules, and the persons' lives they were risking, the people that have gotten hurt they've ignored and they're continuing to do so." *Id.*, pp. 3698:25-3699:7.

In the same case, following typical "us against them" reptile strategy, Ms. Dean made improper comments about the wealth of the defendant and the money spent in litigation.

1. "Once litigation started, their response was to – and what I mean by that is $20- to $30 million was investigated by Ford to have scientists create literature saying mechanics don't get hurt in working on brakes." *Id.*, p. 576:21- 25.

2. "They have the resources. They have the ability. For the decades that they were selling it, they didn't do anything." *Id.*, p. 581:3-5.

3. "You heard at best Ford spent $5,000 on grants to fund research while they were actually doing this, and they spent 50 million dollars to fight the harms afterwards." *Id.*, p. 3698:16-20.

4. "Since the time that they got involved before litigation and not settling it, they spent over $50 million." *Id.*, p. 3812:10-12.

Such references to the wealth of a defendant are entirely improper. *Porter v. Toys 'R' Us-Delaware, Inc.*, 152 S.W.3d 310, 324 (Mo. App. W.D. 2004), *as modified* (Nov. 23, 2004). The court should prohibit all unduly prejudicial and inflammatory appeals to the juror's self-interest, Golden Rule or otherwise.

Throughout the course of this case, Plaintiffs' counsel have sought virtually unlimited discovery and argued for the admission of evidence of irrelevant and highly prejudicial topics

totally unrelated to Plaintiff Donna Harrison's claims. As to VWGoA, Mrs. Harrison claims she was exposed to dust on the work clothing that her husband wore to the family home between 1969 and 1975 while employed at Volkswagen dealerships (he was never an employee of VWGoA). Plaintiffs allege that the dust on his work clothing originated from Mr. Harrison's mechanic work on vehicles and/or parts imported or distributed by VWGoA and that some of that dust may have contained asbestos fibers. Mrs. Harrison never performed any automotive work and does not claim any direct exposure to products imported or distributed by VWGoA.

Despite the limited nature of Mrs. Harrison's secondary exposure claim against VWGoA, Plaintiffs' counsel have argued extensively for the admission of irrelevant and prejudicial evidence, including information related to entities other than VWGoA, information concerning the harmful nature of different types of asbestos that was never used in automotive brakes, information related to use or knowledge of asbestos during time periods outside the relevant years that Plaintiffs' alleged exposure to VWGoA products, and information related to direct, firsthand exposure to asbestos rather than the indirect, secondary exposure alleged by Mrs. Harrison. Moreover, in written and oral argument, Plaintiffs' counsel have continually exaggerated the nature of the allegations against VWGoA, suggesting that VWGoA is some anomalous "evildoer", when in fact, Plaintiffs' allegations against VWGoA are nearly identical to those against all other defendants.

Additionally, Plaintiffs' counsel have repeatedly sought to conflate Defendant VWGoA (an American company, incorporated in New Jersey) with Volkswagen Aktiengesellschaft ("VWAG"), the parent company located in Germany, by referring to both VWGoA and VWAG as "VW" or "Volkswagen" in hearings, pleadings, and depositions. As the Court noted in recent hearings, VWAG is not a party to this litigation. Furthermore, VWAG is a separate entity from

VWGoA. VWAG's alleged actions and knowledge have no bearing on the question of VWGoA's liability for Donna Harrison's damages. Yet, Plaintiffs' counsel continues to refer to VWGoA and VWAG interchangeably and to question VWGoA's corporate representative about VWAG's alleged actions and motives, plainly exceeding the scope of a VWGoA corporate representative deposition. In fact, because Plaintiffs' counsel chose not to sue VWAG in this action, Plaintiffs' counsel should not be permitted to mention VWAG at all during trial.

Plaintiffs' counsel have also resorted to offensive name-calling in their campaign, going so far as to refer to the standard practice of serving subpoenas on non-party witnesses, as "Gestapo like." The Court has already ordered that these offensive aspersions be prohibited at trial, along with other irrelevant, inflammatory information Plaintiffs have sought to admit, such as "clean diesel" emissions issues that have nothing to do with VWGoA or asbestos litigation. *See, e.g.*, VWGoA's Reply in Support of its Motion *in Limine* to Preclude Reference to the Volkswagen TDI "Clean Emissions" Issue at Trial. However, Plaintiffs' counsel still openly seek to backdoor this evidence as "impeachment" of VWGoA's corporate representative at trial, despite that the information will serve no purpose other than to prejudice VWGoA.

These are just a few examples of Plaintiffs' counsel's use of irrelevant and inflammatory remarks and evidence in order to paint VWGoA as a villainous entity from which the jury's community requires protection. VWGoA anticipates that Plaintiffs' counsel will seek to use an array of "Reptile" arguments during voir dire, Plaintiffs' counsel's opening statement, and throughout the trial. The Court should prohibit any attempts by Plaintiffs' counsel to interject inflammatory remarks.

II. ARGUMENT

a. "Reptile" Arguments are Prohibited under Missouri Law

"Reptile" arguments and tactics take a number of forms. However, the basic premise is to encourage the jury to decide the case and verdict amount on improper, emotional grounds not based in law. "Reptile" tactics suggest that jurors may disregard the Court's instructions in favor of "protecting their community" or families. Regardless of the form they take, "reptile" arguments are improper and prohibited by Missouri Courts.

i. "Send a Message" Arguments

An argument or suggestion that the jury should act as the voice of a community to improve public safety or "send a message" to a defendant is improper when the jury is considering questions of liability. *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769 (Mo. 1989) ("Send a message" arguments are improper, and when message argument becomes the theme of entire closing argument, it constitutes reversible error). This type of argument is designed solely to elicit juror emotion, and is not based on any facts or evidence. It improperly suggests to the jury that it should become a "partisan advocate for the injured party" and has the tendency to induce each juror to consider a higher figure than he or she otherwise might to avoid being considered self-abasing. *Id.* Also improper are arguments aligning the plaintiff with "our families" or "our children" and implying that the defendant had taken action against "one of our own." *Id.*; *see also Smith v. Courter*, 531 S.W.2d 743, 747 (Mo. 1976) (Improper for plaintiff's counsel to ask jurors to speak out on social issues through their verdicts.)

Here, Plaintiffs should be precluded from making arguments intended to tell the jury to "send a message", including arguments suggesting that a juror can act as an agent for social change by penalizing VWGoA, much like the arguments Plaintiffs' counsel made in *Muldoon*,

cited above, because such arguments are improper and appeal to the passion and prejudice of the jury. *See Pierce*, 769 S.W.2d 769. Plaintiffs' counsel should not be permitted to pursue evidence or question experts or fact witnesses about issues unrelated to the case purely to stir sympathy or passion in the jury.

ii. Remarks Made to Incite Prejudice

As Plaintiffs' counsel have demonstrated during discovery and in motion practice, they intend to paint VWGoA as a villain in order to prejudice the jury against VWGoA. Plaintiffs' references to Nazi Germany are the most abhorrent, but certainly not the only example of this tactic. Indeed, Plaintiffs have shown that they intend to reference auto emissions violations and attack the character of VWGoA (e.g. that VWGoA "harasses" or "intimidates" witnesses). These attacks are not permitted by Missouri law. Remarks intended to arouse prejudice, not made within the scope of legitimate argument, are improper. *See Gilbert v. K.T.I., Inc.*, 765 S.W.2d 289, 300[27] (Mo. App. 1988). In *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 537 (Mo.App. E.D. 1991), the Court found that plaintiff's counsel's references to "St. Louis Lawyers" were improper as it was made to arouse prejudice against the opposing party. In the present matter, the name-calling by Plaintiffs' counsel has already gone much further than that in *DeLaporte* and must not be permitted to occur at trial and taint the jury panel.

iii. "Golden Rule" Arguments

Plaintiffs' counsel must also be barred from making "golden rule" arguments to the jury. The "golden rule" argument can take many forms, including the arguments encouraged in "Reptile" seminars. Another form of the "golden rule" argument is to ask, "What sum of money would you suggest that a friend or loved one take in exchange for having sustained the injuries that the plaintiff sustained here?" This kind of argument is equally impermissible as it appeals

only to a juror's sympathy or passion, thereby distracting and confusing the jury and depriving VWGoA of a fair trial. Plaintiffs' counsel must thus be ordered at the outset not to ask the jury to consider whether they, family members or any party would accept a certain amount of money in exchange for not sustaining Donna Harrison's injuries. In *DeLaporte v. Robey Bldg. Supply, Inc.*, the Missouri Court of Appeals found that the plaintiff improperly personalized the case by saying "... you just put this in your own life." 812 S.W.2d at 537. Thus, invoking the "golden rule" in arguing damages is impermissible. *See id.*; *see also Warren Davis Properties V, L.L.C.*, *supra*, 111 S.W.3d 515.

In Missouri, this type of "golden rule" evidence has been held per se inadmissible. *See e.g., Warren Davis Properties V, L.L.C.*, 111 S.W.3d at 527; *Faught*, 329 S.W.2d 588; *Kelsey*, 329 S.W.2d 272; *Brownridge*, 450 S.W.2d 214; *Edwards*, 412 S.W.2d 419; *Fisher*, 327 S.W.2d 256; *Merritt*, 360 S.W.2d 283. The rationale behind excluding such evidence is clear: The appeal to a juror to exercise his or her subjective judgment rather than an impartial judgment predicated on the evidence cannot be condoned. It tends to denigrate the juror's oath to well and truly try the issue and render a true verdict according to the evidence. In effect, it asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced "weigher" of the evidence. Finally, it may tend to induce each juror to consider a higher figure than it otherwise might, to be self-abasing. *DeLaporte*, 812 S.W.2d at 537.

Thus, Plaintiffs' counsel should be precluded from making appeals to sympathy, such as asking jurors how much they would "charge" to avoid sustaining Mrs. Harrison's injuries or suffering the loss of a spouse or partner. Such statements, and their myriad variations, encourage the jury to depart from neutrality and to decide and evaluate the case on the basis of personal interests and bias rather than on the evidence. Such references are impermissible under Missouri

law and must be precluded at trial as no instruction from the Court can cure the unfair prejudice created by Plaintiffs' counsel invoking the "golden rule."

b. Plaintiffs' Use of "Reptile" Tactics at Trial Must be Prohibited

Counsel who employ reptile tactics are asking the jury to make a decision based not on the evidence, or even issues having any relation to the matter, but on what they would want to ensure their own and their loved one's future safety. These types of statements do not constitute evidence of any kind, much less evidence that proves or disproves an issue of consequence to the outcome of this litigation. Arguments regarding "personal safety" or "community safety" deliberately attempt to blind the jurors with anger, fear, or other intense, subjective emotion. These arguments tell jurors to base their deliberations and verdict not on the evidence of the case, but on the fear that they or other members of their family or community could be injured. From this skewed viewpoint, rendering a verdict in favor of a plaintiff becomes a means of diminishing any danger which could affect the juror's family. Argument by Plaintiffs' counsel regarding the safety of the community is not relevant to any issue before the Court, and as shown above, is unquestionably inadmissible in Missouri. The Court's intervention precluding such evidence and argument at trial is proper.

The purpose, practice, and consequences of the "Reptile" philosophy are a slap in the face to the judicial process that values fair trials free of outside influence. It is a trial strategy that cynically panders to a juror's subconscious fears for the safety of themselves, their family and their community, to their religious beliefs, and to their prejudices against any individuals or entities they view as potentially threatening. It actively encourages the jury to ignore the Court's instructions and suggests that fearful jurors can be persuaded to elevate the legal standard of care to include artificial "safety standards" and biblical decrees.

Accordingly, Plaintiffs should be precluded from making arguments at trial that attempt to paint VWGoA as a villain, including their attempts to misconstrue the relationship between VWGoA and VWAG, comments related to Nazi Germany, comments about alleged auto emissions violations, and any mention, comment, reference, testimony, or argument regarding "community conscience", "personal safety," "family safety," or "community safety" because they are entirely irrelevant to the issues of this case and are instead merely veiled "golden rule" arguments, which are expressly prohibited under Missouri law. *See, e.g., Warren Davis Properties V, L.L.C. v. United Fire & Cas. Co.*, 111 S.W.3d 515, 527 (Mo. App. S.D. 2003); *Faught v. Washam*, 329 S.W.2d 588 (Mo. 1959); *Kelsey v. Kelsey*, 329 S.W.2d 272 (Mo. App. 1959); *Brownridge v. Leslie*, 450 S.W.2d 214 (Mo. 1970); *Edwards v. Lacy*, 412 S.W.2d 419 (Mo. 1967); *Fisher v. Williams*, 327 S.W.2d 256 (Mo. 1959); *Merritt v. Wilkerson*, 360 S.W.2d 283 (Mo. App. 1962).

WHEREFORE, VWGoA respectfully requests that the Court preclude any attempts to utilize Reptile tactics at trial, including without limitation "send a message" arguments, use of irrelevant and/or prejudicial evidence intended to paint VWGoA as a villain or otherwise designed to impermissibly arouse passion or inflame the senses, golden rule arguments, references to Nazi Germany, references to "clean emissions" issues, or references to danger to or safety of the jury's community, family, or friends, and any other relief the Court deems proper and just.

Respectfully submitted,

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Volkswagen Group of America, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via electronic mail on the 12th day of August, 2016 to the following:

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and electronically served upon all Counsel of Record via Missouri Courts eFiling on the 12th day of August, 2016.

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