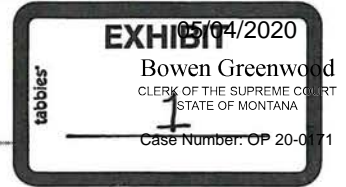


ORAL ARGUMENT HELD ON AUGUST 8, 2019  
No. 18-15937



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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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In re: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES, PRACTICES  
AND PRODUCTS LIABILITY LITIGATION

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THE ENVIRONMENTAL PROTECTION COMMISSION OF  
HILLSBOROUGH COUNTY, FLORIDA; SALT LAKE COUNTY,

Plaintiffs-Appellants

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; ET AL.,

Defendants-Appellees.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES' RESPONSE TO THE COURT'S ORDER OF  
AUGUST 22, 2019, REGARDING AMICUS PARTICIPATION**

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ERIC GRANT

*Deputy Assistant Attorney General*

JENNIFER SCHELLER NEUMANN

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This case is fully briefed, and oral argument was held on August 8, 2019. In an August 22, 2019 order, the Court invited the Solicitor General and the Environmental Protection Agency (EPA) “to submit amicus curiae briefs setting forth their views on a key issue in this case” relating to preemption under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* Doc. No. 64 at 1.

After conducting a careful review, the United States has determined not to file an amicus curiae brief in this case at this stage of the litigation. The choice not to participate as an amicus curiae at this stage of the litigation should not be construed as an indication of the government’s views about the proper resolution of this case. In particular, the decision not to participate as an amicus curiae should not be understood to communicate the government’s agreement with either party’s construction of the Clean Air Act, as Appellants suggested at oral argument. *See* Oral Argument at 49:57-50:05.

We appreciate the Court’s invitation and its patience in this matter.

Respectfully submitted,

ERIC GRANT

*Deputy Assistant Attorney General*

s/David S. Gualtieri

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November 4, 2019  
90-12-15481

**CERTIFICATE OF SERVICE**

I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ David S. Gualtieri  
DAVID S. GUALTIERI  
COUNSEL FOR THE UNITED STATES

DATED: November 4, 2019

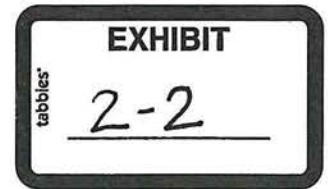


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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN

----- X	
United States of America,	: No. 16-CR-20394
	:
Plaintiff,	: HONORABLE SEAN F. COX
	:
v.	:
	: Offenses: (1) Conspiracy
VOLKSWAGEN AG,	: (2) Obstruction of Justice
	: (3) Entry of Goods by
Defendant.	: False Statement
	:
	: Violations: (1) 18 U.S.C. § 371
	: (2) 18 U.S.C. § 1512(c)
	: (3) 18 U.S.C. § 542
	:
	: Statutory Maximum Period of
	: Probation:
	: Five years per count
	:
	: Statutory Minimum Period of
	: Probation:
	: None/Not Applicable
	:
	: Statutory Maximum Fine: 18 U.S.C.
	: § 3571(d) (the greater of twice the
	: gross gain or twice the gross loss)
	:
	: Statutory Minimum Fine: None/Not
	: Applicable
----- X	

**F I L E D**  
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DETROIT



United States Code, Section 542 (Count Three) is a fine of \$500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of \$400, Title 18, United States Code, Section 3013(a)(2)(B).

**E. Factual Basis for Guilty Plea**

The Defendant is pleading guilty because it is guilty of the charges contained in the Third Superseding Information. The Defendant admits, agrees, and stipulates that the factual allegations set forth in Exhibit 2 (the Statement of Facts) are true and correct, that it is responsible under the laws of the United States for the acts of its employees described in Exhibit 2, and that the facts set forth in Exhibit 2 accurately reflect the Defendant's criminal conduct and provide a factual basis for the guilty plea. The Defendant agrees that it will neither contest the admissibility of, nor contradict, the Statement of Facts contained in Exhibit 2 in any proceeding.

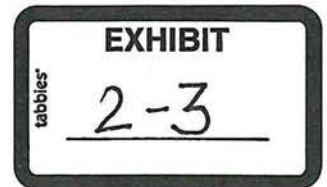
**2. Sentencing Guidelines**

**A. Standard of Proof**

The Court will find sentencing factors by a preponderance of the evidence.

**B. Guideline Range**

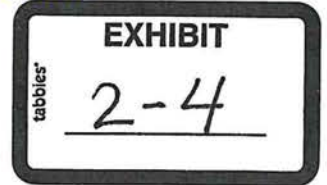
There are no disputes with respect to the sentencing guidelines that require resolution by the court. While the Defendant does not adopt, agree or accept the United States Sentencing Guidelines (U.S.S.G.) analysis contained herein, for



**EXHIBIT 2**

**STATEMENT OF FACTS**

The following Statement of Facts is incorporated by reference as part of the Plea Agreement (the "Agreement") between the United States Department of Justice (the "Department") and Volkswagen AG ("VW AG"). VW AG hereby agrees and stipulates that the following information is true and accurate. VW AG admits, accepts, and acknowledges that under U.S. law it is responsible for the acts of its employees set forth in this Statement of Facts, which acts VW AG acknowledges were within the scope of the employees' employment and, at least in part, for the benefit of VW AG. All references to legal terms and emissions standards, to the extent contained herein, should be understood to refer exclusively to applicable U.S. laws and regulations, and such legal terms contained in this Statement of Facts are not intended to apply to, or affect, VW AG's rights or obligations under the laws or regulations of any jurisdiction outside the United States. This Statement of Facts does not contain all of the facts known to the Department or VW AG; the Department's investigation into individuals is ongoing. The following facts took place during the time frame specified in the Third Superseding Information and establish beyond a reasonable doubt the charges set forth in the criminal Information attached to this Agreement:



California's then-Governor, which were taken during an event at which Supervisor C promoted the 2.0 Liter Subject Vehicles in the United States as "green diesel."

*The Improvement of the 2.0 Liter Defeat Device in the United States*

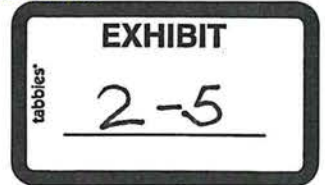
46. Following the launch of the Gen 1 2.0 Liter Subject Vehicles in the United States, Supervisors C and F, and others, worked on a second generation of the vehicle (the "Gen 2"), which also contained software designed to detect, evade and defeat U.S. emissions tests. The Gen 2 2.0 Liter Subject Vehicles were launched in the United States in or around 2011.

47. In or around 2012, hardware failures developed in certain of the 2.0 Liter Subject Vehicles that were being used by customers on the road in the United States. VW AG engineers hypothesized that vehicles equipped with the defeat device stayed in "dyno" mode (i.e., testing mode) even when driven on the road outside of test conditions. Since the 2.0 Liter Subject Vehicles were not designed to be driven for longer periods of time in "dyno" mode, VW AG engineers suspected that the increased stress on the exhaust system from being driven too long in "dyno" mode could be the root cause of the hardware failures.

48. In or around July 2012, engineers from the VW Brand Engine Development department met, in separate meetings, with Supervisors A and E to explain that they suspected that the root cause of the hardware failures in the 2.0 Liter Subject Vehicles was the increased stress on the exhaust system from being

driven too long in “dyno” mode as a result of the use of software designed to detect, evade and defeat U.S. emissions tests. To illustrate the software’s function, the engineers used a document. Although they understood the purpose and significance of the software, Supervisors A and E each encouraged the further concealment of the software. Specifically, Supervisors A and E each instructed the engineers who presented the issue to them to destroy the document they had used to illustrate the operation of the defeat device software.

49. VW AG engineers, having informed the supervisor in charge of the VW AG Engine Development department and within the VW AG Quality Management and Product Safety department of the existence and purpose of the defeat device in the 2.0 Liter Subject Vehicles, then sought ways to improve its operation in existing 2.0 Liter Subject Vehicles to avoid the hardware failures. To solve the hardware failures, VW AG engineers decided to start the 2.0 Liter Subject Vehicles in the “street mode” and, when the defeat device recognized that the vehicle was being tested for compliance with U.S. emissions standards, switch to the “dyno mode.” To increase the likelihood that the vehicle in fact realized that it was being tested on the dynamometer for compliance with U.S. emissions standards, the VW AG engineers activated a “steering wheel angle recognition” feature. The steering wheel angle recognition interacted with the software by



enabling the vehicle to detect whether it was being tested on a dynamometer (where the steering wheel is not turned), or being driven on the road.

50. Certain VW AG employees again expressed concern, specifically about the expansion of the defeat device through the steering wheel angle detection, and sought approval for the function from more senior supervisors within the VW AG Engine Development department. In particular, VW AG engineers asked Supervisor A for a decision on whether or not to use the proposed function in the 2.0 Liter Subject Vehicles. In or about April 2013, Supervisor A authorized activation of the software underlying the steering wheel angle recognition function. VW employees then installed the new software function in new 2.0 Liter Subject Vehicles being sold in the United States, and later installed it in existing 2.0 Liter Subject Vehicles through software updates during maintenance.

51. VW employees falsely told, and caused others to tell, U.S. regulators, U.S. customers and others in the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Subject Vehicles when, in fact, VW employees knew that the update also used the steering wheel angle of the vehicle as a basis to more easily detect when the vehicle was undergoing emissions tests, thereby improving the defeat device's precision in order to reduce the stress on the emissions control systems.