

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

UNITED STATES OF AMERICA

vs.

**MISC. NO. 17-50336
(Related to Crim. No. 16-20394)**

JAMES ROBERT LIANG, *et al.*,

HON. SEAN F. COX

Defendant.

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RESPONSE TO MOTION FOR RESTITUTION

Defendant Volkswagen AG (“Volkswagen”) and the Government (collectively, the “Parties”) respond to the Motion for Restitution filed on behalf of certain individuals (the “Objectors”) (D.E. 6) and reply to the Objectors’ Response (D.E. 5) to the Parties’ Joint Motion for Finding the Criminal Restitution is Not Appropriate in this Matter (D.E. 4).

As set forth in the Parties’ original Joint Motion, restitution is not appropriate here because individual restitution determinations for the thousands of victims that have not participated in the civil settlement would unduly protract this criminal litigation. The Objectors argue that restitution is easily calculable and propose a calculation; however, the Objectors’ calculation, while simple, would result in a windfall to victims, which is not legally authorized by the Mandatory

Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. Determining the actual loss to each victim for restitution purposes would be a highly-individualized, complicated effort that would needlessly delay this criminal litigation.

To calculate restitution, the Objectors propose to use the value each individual paid for his or her vehicle, plus interest. *See* D.E. 6 at 3 (noting amount paid for vehicle, but not mentioning interest) & Ex. 1; D.E. 7 at 2-3 (noting the Objectors would also seek pre-judgment interest). This calculation of restitution, however, ignores the fact that the Objectors received the use of their vehicles for a lengthy period of time, in some cases, for more than seven years. To simply return the full amount the customer paid for the vehicle (plus interest) without crediting Volkswagen with any value for the customer's use of the vehicle would necessarily result in a windfall to Objectors – the free use of their vehicles for years – and constitute reversible error. *See United States v. Bane*, 720 F.3d 818, 827 (11th Cir. 2013) (“Restitution is not intended to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses. For this reason, ‘any value of the services or items received by the victim ... must be offset against the restitution order.’”) (internal citations omitted); *United States v. Allen*, 529 F.3d 390, 397 (7th Cir. 2008) (“In the realm of restitution under 18 U.S.C. § 3663, the ‘amount of loss’ sustained by victims is synonymous with ‘actual loss,’ and its calculation must take into account (and

deduct) pecuniary value the victim(s) gained by way of the defendant's conduct."); *United States v. Boccagna*, 450 F.3d 107, 117 (2d Cir. 2006) ("[T]he MVRA does not permit awards 'in excess of the amount of the [victim's] loss.' In short, a sentencing court cannot order restitution that 'goes beyond making [the victim] whole.' It cannot award the victim 'a windfall,' i.e., more in restitution than he actually lost.") (internal citations omitted).¹

The Seventh Circuit's decision in *Allen* is instructive here. In that case, the defendant was convicted of defrauding a customer by posing as a licensed mold-testing expert, and while he performed mold-testing for his customer, he was not licensed and was not an expert. The district court held that the restitution was the full amount that the customer had paid Allen for his services, but did not make a determination of what, if anything, those services were actually worth to the customer. The Seventh Circuit reversed and remanded, instructing the district court that it was obligated to make a determination of the value of Allen's (admittedly, non-expert) services, and that by failing to do so, it had committed reversible error. *Id.* at 397.

¹ The Objectors cite *United States v. Church*, 731 F.3d 530, 538 (6th Cir. 2013) for the proposition that Volkswagen is required to pay "full restitution." See D.E. 5 at 6. That is not in dispute. The issue is what constitutes full restitution under the facts of this case, which would necessarily involve determining the value of the victims' use of their vehicles to avoid a windfall recovery by Objectors.

In order to properly calculate restitution here, the Court would need to determine the value of the goods – the vehicles – provided by Volkswagen or its subsidiaries to each purchaser during the time period the fraud occurred. The value would necessarily depend on highly-individualized factors, including, for example, the age of the car, the mileage driven, the make and model of the car, etc., and would likely include expert testimony about the value of each individual vehicle, which the Objectors and Volkswagen are likely to contest.²

Moreover, the parties are likely to litigate what diminution in value of the vehicle, if any, was caused by its pollution of the environment, something for which no precedent exists. Such litigation clearly meets the provision under the MVRA that makes restitution unnecessary when “determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.” 18 U.S.C. §

² For purposes of calculating loss under the United States Sentencing Guidelines in this matter, the Court may apply Section 2B1.1, Application Note 3(F)(v), which provides that the defendant shall receive no value for the items or services provided where, as here, the items were imported and sold in the United States under false pretenses. However, the Guidelines definition of loss does not equate to loss for purposes of restitution. *See Allen*, 529 F.3d at 396-97 (“the determination of loss for a defendant’s sentencing range is different than that for his restitution obligations: while for sentencing purposes ‘loss’ is defined as the greater of either the ‘actual’ or the ‘intended’ amount lost due to the fraud, for restitution purposes the statute implicitly requires that the restitution award be based on the amount of loss actually caused by the defendant’s offense. A court could find that a defendant intended a large amount of loss for sentencing purposes, but then order a much-reduced amount in restitution in light of the actual losses suffered by the victims.”) (internal citations omitted).

3663A(c)(3)(B). And while the Objectors are correct that the Court cannot consider the civil settlements (*see* D.E. 4 at 4-9) in determining the *amount* of restitution, the Court can and should consider them when balancing the need for restitution here against the burden on the criminal case. *United States v. Gallant*, 537 F.3d 1202, 1253 (10th Cir. 2008).³ Unlike in *United States v. Malone*, 747 F.3d 481 (7th Cir. 2014), which the Objectors cite (*see* D.E. 5 at 2), the burden on the Court of this highly-individualized, complex evaluation would be far from minimal, and therefore the civil settlements area relevant factor in determining the need for restitution.

CONCLUSION

For the foregoing reasons, the parties request that the Court grant the Joint Motion for Order Under 18 U.S.C. § 3663A Finding That Individual Restitution Is Not Appropriate in This Matter, and overrule the objections to the Plea Agreement filed by Objectors.

³ In support of its argument that the civil settlements are irrelevant (*see* D.E. 5 at 10), the Objectors cite several cases that are simply inapposite; these cases did not involve a settled, or even pending, civil lawsuit, were not balancing the availability of a more-than-restitution settlement against undue delay of a criminal proceeding, and/or involved crimes of violence, for which the MVRA expressly eliminated the complexity exception at issue here. *See United States v. Hyde*, 497 F.3d 103 (1st Cir. 2007) (MVRA in relation to the Massachusetts homestead exemption and the Bankruptcy Code); *United States v. Alalade*, 204 F.3d 536 (4th Cir. 2000) (MVRA in relation to administrative forfeiture); *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006) (murder case in which the court expressly explained that “the MVRA made the ‘complexity exception’ inapplicable to crimes of violence”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, I served a copy of the foregoing upon counsel of record in Misc. No. 17-50336 via the court's electronic CM/ECF system.

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