UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 21-12928

v.

HON. DENISE PAGE HOOD

DIESEL OPS LLC, ORION DIESEL LLC,
and NICHOLAS PICCOLO,

Defendants.
_______________________________________/

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

This matter is before the Court on Plaintiff United States of America's Motion for Default Judgment against Defendants Diesel Ops LLC, Orion Diesel LLC, and Nicholas Piccolo. (ECF Nos. 16 (redacted) and No. 21 (unredacted and sealed)) To date, no appearance has been filed on behalf of Defendants and no response was filed to the motion.

On December 15, 2021, the United States of America, at the request of the Administrator of the United States Environmental Protection Agency ("EPA") filed a Complaint alleging six claims against Defendants under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7522-24, seeking injunctive relief and assessment of civil penalties for violations of the CAA. Piccolo was the founder and employee of Diesel Opps and Orion Diesel. (ECF No. 1, PageID.3)

Manufacturers of new motor vehicles or motor vehicle engines must apply for and obtain a certificate of conformity ("COC") from the EPA to sell, offer to sell, or introduce or deliver for introduction into commerce any new motor vehicle or motor vehicle engine in the United States. To obtain a COC, the original equipment manufacturer ("OEM") must demonstrate that each class or category of motor vehicle or motor vehicle engine it intends to sell will conform to established emissions standards for NOx, PM, NMHCs, CO, and other pollutants during the motor vehicle or motor vehicle engine's useful life. The COC application must include a description of the motor vehicle's emission control system and fuel system components. Once issued by EPA, a COC covers only those new motor vehicles or motor vehicle engines that conform in all material respects to the specifications provided to EPA in the COC application for the class or category of vehicles or engines. (ECF No. 1, PageID.6)

The CAA prohibits any person from removing or rendering inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with the regulations [promulgated under Title II of the CAA] prior to its sale and delivery to the ultimate purchaser, or for any person to knowingly remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser. 42 U.S.C. § 7522(a)(3)(a). The CAA further prohibits for any person from manufacturing, selling, offering to sell, or installing, any part or

component intended for use with, or as a part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use. 42 U.S.C. § 7522(a)(3)(B). Any person violating these sections of the CAA is subject to injunctive relief and civil penalties.

Third parties, including the Corporate Defendants, manufacture, sell, and offer to sell products for use with existing motor vehicles that are designed to enhance the vehicle's power, performance, or fuel economy ("Aftermarket Performance Products"). In some cases, these products achieve their purpose by replacing, modifying, bypassing, rendering inoperative, facilitating deletion or partial deletion of, interfering with, and/or over-writing OEM-installed Emissions-Related Elements of Design. Such products "bypass, defeat, or render inoperative" Emissions-Related Elements of Design within the meaning of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). The Aftermarket Performance Products relevant to this Complaint fall into the following three categories: EGR Delete Hardware Products, Aftertreatment System Delete Hardware Products, and Tunes. (ECF No. 1, PageID.16)

The Government alleges that the Corporate Defendants manufactured, sold and/or offered to sell products intended for use in motor vehicles. Many of the products that the Corporate Defendants have manufactured, sold, and/or offered to sell are Aftermarket Performance Products that modify a motor vehicle's fuel economy, power, and performance. The Corporate Defendants have sold and/or offered to sell, and/or caused the manufacture, sale, or offering for sale of Aftermarket Performance Products over the internet through Diesel Ops' website (www.dieselops.com), in their physical store in Waterford, Michigan, and/or through sales to other distributors or retailers that then marketed the products to consumers. Diesel Ops also advertised through other online marketplaces, such as Facebook, Instagram, Twitter, YouTube, Google, Jet.com, Newegg.com, Amazon and eBay.

The Government further alleges that the Corporate Defendants have manufactured, sold and/or offered to sell, or caused the manufacture, sale, or offering for sale of the following types of Aftermarket Performance Products: EGR Delete Hardware Products, Aftertreatment Hardware Products, and Defeat Tunes. In some cases, Corporate Defendants combined different Aftermarket Performance Products together into a package; for example, by selling and/or offering for sale Aftertreatment System Delete Hardware Products that physically remove system components with Defeat Tunes that electronically disable Aftertreatment System operations as a single

product (e.g., delete kits). EGR Delete Hardware Products, Aftertreatment Hardware Products, and Defeat Tunes that the Corporate Defendants have manufactured, sold, and/or offered to sell, or that Corporate Defendants caused to be manufactured, sold, or offered for sale, had a principal effect of bypassing, defeating, and/or rendering inoperative Emissions-Related Elements of Design.

The Government claims that Corporate Defendants knew or should have known that one or more of the EGR Delete Hardware Products, Aftertreatment Hardware Products, and/or Defeat Tunes they manufactured, sold and/or offered to sell, or for which they caused the manufacture, sale, or offers to sell, were intended for such use or put to such use. Diesel Ops installed EGR Delete Hardware Products, Aftertreatment System Delete Hardware Products, and/or Defeat Tunes on motor vehicles and/or motor vehicle engines. Diesel Ops knowingly installed EGR Delete Hardware Products, Aftertreatment System Delete Hardware Products, and/or Defeat Tunes on motor vehicles and/or motor vehicle engines that removed or rendered inoperative devices and/or Emissions-Related Elements of Design that were installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under the CAA after such sale and delivery to the ultimate purchaser. (ECF No. 1, PageID.22-.25)

On July 13, 2018, EPA issued a Finding of Violation to Diesel Ops alleging that

Diesel Ops violated Sections 203(a)(3)(A) and 203(a)(3)(B) of the CAA (42 U.S.C. §§ 7522(a)(3)(A) and (B)), by selling, offering to sell, and/or installing products with a principal effect of bypassing, defeating or rendering inoperative Emissions-Related Elements of Design on motor vehicles and motor vehicle engines ("First Finding of Violation"). On December 19, 2018, EPA issued a Finding of Violation to Orion Diesel alleging that Orion Diesel violated Section 203(a)(3)(B) of the CAA (42 U.S.C. § 7522(a)(3)(B)) by manufacturing, selling, and/or offering to sell products with a principal effect of bypassing, defeating or rendering inoperative Emissions-Related Elements of Design on motor vehicles and motor vehicle engines. Despite EPA's requests that Diesel Ops and Orion Diesel halt all sales of products that violate Section 203, as of February 4, 2020, Diesel Ops' website (www.dieselops.com) still listed several such products for sale at a discounted rate as part of a "Fire Sale." (ECF No. 1, PageID.25)

During the period from March through December of 2018, Diesel Ops made substantial transfers of assets to Piccolo and other Insiders. All but one of the transfers made during this time period occurred after EPA issued the First Finding of Violation to Diesel Ops, and all of the transfers followed EPA's issuance of an information request under Section 208(a) of the CAA, 42 U.S.C. § 7542(a), on February 15, 2018 to Diesel Ops. (ECF No. 1, PageID.26) EPA issued an

information request to Piccolo on May 17, 2021, and as of the filing of the Complaint, EPA has not received written responses to the information from Piccolo. (ECF No. 1, PageID.27-.28)

The entry of default under Fed. R. Civ. P. 55(a) is the first procedural step necessary in obtaining a default judgment. *Shepard Claims Serv., Inc. v. William Darrah & Associates,* 796 F.2d 190, 193 (6th Cir. 1986). Rule 55(a) provides: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Rule 55(b)(2) states that a party must apply to the Court for a default judgment. The Court may conduct an accounting, determine the amount of damages, establish the truth of any allegation by evidence, or investigate any other matter. Fed. R. Civ. P. 55(b)(2).

No Answer has been filed on behalf of the Defendants. The Government sought for and received entries of default entered by the Clerk against all three Defendants on May 31, 2022. (ECF Nos. 13, 14, 15) The instant Motion for Default Judgment was fled on May 31, 2022. (ECF No. 16) The Government filed a Certificate of Service certifying that its motion and supporting documents were served on all three Defendants. (ECF No. 25, Certificate of Service).

In support of its Motion for Default Judgment, the Government submitted

various documents and Declarations of Ethan Chatfield, an environmental engineer of the EPA Enforcement and Compliance Assurance Division, and Dan Leistra-Jones, a Senior Associate at Industrial Economics, Inc, retained as an expert in financial and corporate analysis. (ECF Nos. 16, 17, 18, 19, **21 (Sealed)**)

The Government seeks the following relief:

1) assess a civil penalty against Diesel Ops LLC and Orion Diesel LLC, jointly and severally, in the amount of $1 0 million for their manufacturing, selling, offering for sale, and installing Defeat Devices in violation of Sections 203(a)(3)(A) of the Clean Air Act ("CAA"), 42 U.S.C. § 7522(a)(3)(A), and 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B);

2) Permanently enjoin each of the Corporate Defendants and Piccolo individually from: (1) manufacturing, selling, offering to sell, transferring or installing the twelve products (or components) identified in Exhibit 1 of the motion, or any materially similar products; and (2) selling, offering for sale, or transferring any intellectual property associated with the twelve products identified on Exhibit 1 or any materially similar products where a principal effect of such part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with Title II of the CAA;

3) Find that the cash transfers from Diesel Ops to Piccolo were fraudulent and

enter a monetary judgment pursuant to 28 U.S.C. §§ 3306(a) and 3307(b) in favor of the United States against Piccolo in the amount set forth in its sealed motion. (ECF No. 21, PageID.491);

4) Assess a civil penalty against Piccolo in the amount of $455,925, for failing to provide written responses to EPA's information request in violation of Section 203(a)(2)(A) of the CAA, 42 U.S.C. § 7522(a)(2)(A).

At the hearing, the Court inquired how the requested penalties in this case compared to other CAA cases initiated by the Government. Government counsel responded that he was not aware of any of action filed involving these comparable amount of penalties, but cited two comparable administrative cases which resulted in penalties based on consents or settlement, which took into account the parties' ability to pay and the amount of cooperation in resolving the matter.

The Court finds that the Government supported the allegations in the Complaint and the requested penalties by submitting a motion and brief, extensive documents and the declarations of Ethan Chatfield and Dan Leistra-Jones. The Court further finds that default judgment against the Defendants will be entered since Defendants did not Answer the Complaint and the United States properly supported its Motion for Default Judgment.

Accordingly,

IT IS ORDERED that the United States of America's Motions for Default Judgment **(ECF Nos. 16** (redacted) and **21** (unredacted and sealed)**)** are GRANTED. A proposed default judgment will be submitted by counsel for entry.

IT IS FURTHER ORDERED that the Request for Clarification **(ECF No. 26)** is MOOT.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: July 22, 2022