

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
Borla Performance Industries, Inc.,)	Docket No. CAA-R9-2020-0044
)	
Respondent.)	

BUSINESS CONFIDENTIALITY ASSERTED

The exhibits submitted with Complainant’s Initial Prehearing Exchange contain material claimed to be confidential business information (“CBI”) pursuant to 40 C.F.R. § 2.203(b). The material claimed as CBI are Complainant’s Exhibits CX 5 - 6, CX 8, CX 19, and CX 22 – 23. Exhibits CX 5 -6, and CX 8 contain information submitted by Borla Performance Industries, Inc. (“Respondent” or “Borla”) regarding its pricing and its wholesale and individual customers of vehicle exhaust parts and components at issue in this case. Respondent has made a claim of CBI over the prices identified in this information and any information that would identify the purchasers or the specific quantity of products sold to such purchaser. In addition, Exhibits CX 19 and CX 22 - 23 contain financial information submitted by Respondent that Respondent has claimed to be CBI. These exhibits are therefore filed under seal pursuant to 40 C.F.R. § 22.5(d).

In addition, Exhibits CX 1 and CX 2 consist of potential witnesses’ resumes and contain personally identifiable information (“PII”), some of which may be sensitive PII. To safeguard these potential witnesses’ privacy in keeping with the Privacy Act of 1974 (codified at 5 U.S.C. § 552a), these exhibits are also filed under seal.

Finally, Exhibit CX 19 - 21 contains reference material subject to copyright and placed in the record under the fair use doctrine. To protect the commercial interest of the copyright holder, Complainant files these Exhibits under seal.

A complete set of the all exhibits, and a set in which the exhibits containing CBI, PII, and copyright material are omitted, have been filed with the Office of Administrative Law Judges.. If you have any questions, please contact Mark Palermo at (202) 564-5805, or at palermo.mark@epa.gov.

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COMPLAINANT’S INITIAL PREHEARING EXCHANGE

The Director of the Enforcement and Compliance Assurance Division (“ECAD”) of the U.S. Environmental Protection Agency’s Region 9 Office (“Complainant”) files this Initial Prehearing Exchange, consistent with section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), and with the Prehearing Order issued by this Tribunal on October 19, 2020. Complainant may amend or supplement this Prehearing Exchange as provided by sections 22.19(f) and 22.22(a)(1) of the Consolidated Rules.

The heading numbers below correspond to those set forth in Judge Biro’s Prehearing Order dated October 19, 2020.

1(A) Potential Witnesses

Complainant may call any or all of the following witnesses at the evidentiary hearing in this matter. Complainant may supplement this list, upon adequate notice to the Tribunal and to Respondent, should Respondent’s Prehearing Exchange or other information reveal the need for additional or alternative witnesses.

1. Andrew Chew, EPA Region 9, Enforcement and Compliance Assurance Division. Mr. Chew is an Environmental Engineer with EPA's Enforcement and Compliance Assurance Division in Region 9. Mr. Chew served as the EPA's lead investigator in this matter, was lead inspector of Borla's facility in California, and may testify as a fact witness. Mr. Chew received, reviewed, and is the custodian of Borla's responses to information requests issued to Borla by the EPA concerning the alleged violations at issue in this case. Mr. Chew also gathered together EPA documents concerning the makes, models, and model years of motor vehicles relevant to this case. Mr. Chew is expected to testify regarding the EPA's investigation of Borla and the inspection of Borla's facility, the EPA's review of Borla's responses to information requests and identification and tabulation of violations documented in Borla's responses, and the compilation of Agency documents demonstrating that Borla's parts and components are designed to fit and remove exhaust emission controls on EPA-certified motor vehicles.
2. Jason Gumbs, EPA, Office of Enforcement and Compliance Assurance ("OECA"), Office of Civil Enforcement ("OCE"), Air Enforcement Division ("AED"), Vehicle & Engine Enforcement Branch ("VEEB"). Mr. Gumbs hold a B.S. in Mechanical Engineering Technology from the State University of New York – Utica, NY. Mr. Gumbs is an Environmental Engineer and may be qualified to testify as an expert in the EPA's Clean Air Act vehicle and engine regulatory program, motor vehicle exhaust systems, the emission control devices and elements of design installed in those systems, and the effects of the exhaust system parts or components manufactured and sold by Borla on the motor vehicles relevant to this case. Mr. Gumbs is expected to testify regarding the function and importance of catalytic converter exhaust emission control devices in a motor vehicle's capability to meet emission standards, the compilation of vehicle manufacturer diagrams and other documentation showing where catalytic converters are located in the exhaust system of the motor vehicles at issue in this case, and his review of the Borla parts and components at issue in this case and their fitment and function to remove catalytic converters on EPA-certified motor vehicles. Mr. Gumbs's resume is included among Complainant's exhibits and is marked as CX 2.
3. Gail Coad, Industrial Economics ("IEc"). Ms. Coad holds a B.A. in Economics from Connecticut College, and an M.B.A. from the Graduate School of Business at Stanford University. Ms. Coad has held managerial positions in the U.S. Office of Management and Budget's Office of Information and Regulatory Affairs, and the U.S. EPA's Office of Water Regulation and Standards. Ms. Coad is a member of the National Association of Business Economists and an Associate of the Certified Fraud Examiners Association, and has extensive experience analyzing the economic benefit financial condition of businesses, individuals, and not-for-profit organizations. Ms. Coad may be called to testify about research conducted to assess Borla's financial condition and size of its business. Ms. Coad may also be called to testify about research concerning the typical profits and expenses of businesses similar to Borla's. Ms. Coad may be qualified to testify as an expert on the economic benefit or savings resulting from the violations identified in the Amended Complaint. Ms. Coad may also be qualified to testify as an expert on the financial condition of Borla and other related persons or entities, and about the impact of a penalty on Borla's ability to continue in business. Ms. Coad's resume is included in Complainant's exhibits and is marked as CX 1.

4. Nathan Dancher, EPA Region 9, Enforcement and Compliance Assurance Division. Mr. Dancher is an Environmental Engineer with EPA Region 9 who has performed numerous penalty calculations in enforcement cases under the Clean Air Act involving mobile sources of air pollution. Mr. Dancher may testify about penalty calculations under the EPA's Clean Air Act Mobile Source Civil Penalty Policy and may testify about the calculation of a specific penalty for this case.

1(B) Documents and Exhibits

See Exhibit CX 0, titled "Complainant's Prehearing Exchange Exhibits," for a list of the exhibits that Complainant may introduce at hearing. Copies of the exhibits are provided in tandem with this Initial Prehearing Exchange. Each exhibit is labeled as prescribed by the Prehearing Order, and the pages of each exhibit are numbered in the manner prescribed by the Prehearing Order.

1(C) Estimate of Time to Present Direct Case and Services of an Interpreter

Complainant estimates that the time needed to present its direct case, should all or the majority of its named witnesses be called to testify, would be approximately three (3) days. Complainant may amend this estimate if it learns of additional relevant information that could complicate or lengthen Complainant's presentation, or if Respondent agrees to stipulate to matters and thereby simplify or shorten Complainant's presentation. The services of an interpreter are not necessary.

2(A) Service of Complaint and Amended Complaint

The original Complaint was filed on June 30, 2020, and pursuant to a prior agreement was served on Respondent's counsel via United Parcel Service ("UPS"). Written verification of delivery on July 2, 2020, was provided by UPS. CX 301.

The Amended Complaint was filed on August 6, 2020, and pursuant to a prior agreement was served on Respondent's counsel via UPS. Written verification of delivery on August 7, 2020, was provided by UPS. CX 302.

2(B) Statement Concerning Allegations Denied or Otherwise Not Admitted by Respondent

The Prehearing Order calls for Respondent to provide as part of its Initial Prehearing Exchange “a brief narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent's Answer.” Prehearing Order at 3.

To provide context to Complainant's response, Complainant first outlines the key statutory and regulatory provisions supporting the allegations of the Amended Complaint.

Key Legal Provisions Supporting the Allegations of the Amended Complaint

The Defeat Device Prohibition

The violations alleged against Respondent in the Amended Complaint are violations of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), which prohibits “any person from manufacturing, selling, offering to sell, or installing any part or component intended for use with, or as 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 promulgated under [Title II of the CAA], 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.” This provision is generally referred to as the “Defeat Device Prohibition.”

Definition of Motor Vehicle

Of particular importance to the application of the Defeat Device Prohibition is the definition of “motor vehicle” in the CAA, which is defined as “any self-propelled vehicle designed for transporting persons or property on a street or highway.” CAA § 216(2), 42 U.S.C. § 7550(2); *see also* 40 C.F.R. § 85.1703. (adopting statutory definition). Motor vehicles are defined by their attributes and design, and not by how they are used. CAA § 216(2), 42 U.S.C. § 7550(2); 40 C.F.R. § 85.1703.

Relevant Title II Regulations Applicable to Motor Vehicle Manufacturers

Pursuant to section 202 of the CAA, 42 U.S.C. § 7521, the EPA promulgated emissions standards for pollutants applicable to motor vehicles and motor vehicle engines, including, but not limited to, carbon monoxide (“CO”), non-methane hydrocarbons (“NMHC”) and oxides of nitrogen (“NO_x”). *See generally* 40 C.F.R. Part 86. 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. CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1). To obtain a COC, the original equipment manufacturers (“OEMs”) must demonstrate that each motor vehicle or motor vehicle engine will conform to established emission standards for NO_x, NMHC, CO, and other pollutants during the motor vehicle or motor vehicle engine’s useful life. CAA § 206(a), 42 U.S.C. § 7525(a); *see* 40 C.F.R. §§ 86.1844-01, 86-1846-01(a)(1). The COC application must describe, among other things, the emission-related elements of design of the motor vehicle or motor vehicle engine. *See* 40 C.F.R. § 86.1844-01(d)-(e). The EPA issues COCs to OEMs under section 206(a) of the CAA, 42 U.S.C. § 7525(a), to certify that a particular group of motor vehicles conforms to applicable EPA requirements

governing motor vehicle emissions. Motor vehicles are covered by a COC only if they are in all material respects as described in the OEM's application for certification. 40 C.F.R. § 86.1848-01(c)(6).

Emission-Related Elements of Design

Under Title II emission standard regulations, "element of design" is defined as "any control system (i.e., computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interactions, and/or hardware items on a motor vehicle or motor vehicle engine." 40 C.F.R. § 86.1803-01. "Emission related parts" means parts installed for the specific purpose of controlling emissions or those components, systems, or elements of design which must function properly to assure continued vehicle emission compliance. 40 C.F.R. § 85.2102(14).

Factual and Legal Bases for the Allegations Denied or Otherwise Not Admitted

Appendix A to the Amended Complaint identifies the 57 types of motor vehicle exhaust parts at issue in this case (hereinafter "Subject Exhaust Parts"). While admitting to having manufactured and sold the Subject Exhaust Parts (Am. Compl., ¶ 55; Resp't Answer, ¶ 55), Respondent denies or fails to admit that: 1) catalytic converters are devices or elements of design installed on or in a motor vehicle or motor vehicle engine in compliance with the CAA and its implementing regulations (Am. Compl., ¶ 59; Resp't Answer, ¶ 59); 2) the Subject Exhaust Parts are intended for use with, or as part of, any motor vehicle or motor vehicle engine (Am. Compl., ¶¶ 56-57; Resp't Answer, ¶¶ 56-57); 3) a principal effect of the Subject Exhaust Parts is the removal of catalytic converters installed in motor vehicles in compliance with CAA regulations (Am. Compl., ¶ 58; Resp. Answer, ¶ 58) by OEMs; 4) Respondent knew or should have known that its Subject Exhaust Parts were being offered for sale or installed for

such use or put to such use (Am. Compl., ¶ 60; Resp. Answer ¶ 60); and 5) Respondent manufactured, sold, and offered to sell at least 5,296¹ separate exhaust parts or components identified in Appendix A between January 15, 2015, and September 26, 2018 (Am. Compl., ¶ 55; Resp't Answer, ¶ 55).

1. Catalytic Converters are Devices or Elements of Design Installed on or in a Motor Vehicle or Motor Vehicle Engine in Compliance with CAA Title II Regulations.

Catalytic converters are an emission related part and element of design that promote chemical reactions to reduce the concentration of pollutants released into the atmosphere. Am. Compl., ¶ 27. The chemical reaction for pollution abatement is the simultaneous oxidation of CO and NMHC to form carbon dioxide and water and reduce NOx to nitrogen. Precious metals are the catalytic components most commonly used for exhaust emission control, and the elements platinum, palladium, and rhodium are three precious metals most frequently used for this purpose. *Id.* Catalytic converters are contained in stock exhaust pipe systems installed by the original equipment manufacturers (“OEMs”) of motor vehicles. *Id.*

Complainant’s expert witness, Jason Gumbs, is expected to testify as to how catalytic converters are essential emission related parts and elements of design relied upon by OEMs to meet motor vehicle emission standards. The motor vehicle makes and models at issue in this case are identified in Paragraphs 35-45 of the Amended Complaint. Am. Compl., ¶¶ 35-45. As indicated in the Certification Summary Information (“CSI”) Reports which provide a summary of the key information provided in OEM COC applications, California Air Resources Board (“CARB”) Executive Order documents, and/or COC application documents for these makes and models of motor vehicles, , each of the makes

¹ Complainant intends to seek leave to amend the Complaint at Paragraph 55 that Respondent manufactured, sold, and offered to sell at least 5,338 separate exhaust parts or components identified in Appendix A between January 15, 2015, and September 26, 2018. See discussion of number of violations, p. 12-13, *infra*.

and models of motor vehicles at issue in this case are installed with and rely upon catalytic converters to meet emissions standards and COC requirements. CX 40 – 41, CX 45 – 46 , CX 50 – 51, CX 55 – 56, CX 60 – 61, CX 65 – 66, CX 70 – 71, CX 74, CX 80 – 81, CX 85 – 86, CX 90 – 91, CX 95 – 96, CX 100 – 101, CX 105 – CX 106, CX 115 – CX 116, CX 119, CX 123 – 124, CX 128 – 129, CX 133 – 134, CX 138 – 139, CX 143 – 144, CX 148 – 149, CX 153 – 154, CX 158 - 159, CX 163 - 164, CX 168 - 169, CX 173 - 174, CX 178 – CX 179, CX 183 – 184, CX 188 – 189, CX 203 – 204, CX 208 – 209, CX 213 – 214, CX 218 – 219, CX 223 – 224, CX 228 – 229, CX 233 – 234, CX 238 – 239, CX 248 – 249, CX 253 – CX 254, CX 263 – 264, CX 268 – 269, CX 273 - 274, CX 277, CX 283 – 284, CX 288 – 289, and CX 293 – 294. Each of these motor vehicles are subject to a COC. CX 39, CX 44, CX 49, CX 54, CX 59, CX 64, CX 69, CX 74, CX 79 , CX 84, CX 89, CX 94, CX 99, CX 104, CX 114, CX 119, CX 122, CX 127, CX 132, CX 137, CX 142, CX 147, CX 152, CX 157, CX 162, CX 167, CX 172, CX 177, CX 182, CX 187, CX 202, CX 207, CX 212, CX 217, CX 222, CX 227, CX 232, CX 237, CX 247, CX 252, CX 262, CX 267, CX 272, CX 277, CX 282, CX 287, and CX 292. The fact that OEMs applied for and obtained COCs to meet emission standards promulgated pursuant to CAA Title II definitively demonstrates that the motor vehicles identified in Paragraphs 35-45 of the Amended Complaint were designed as self-propelled vehicles for transporting persons or property on a street or highway and thus constitute “motor vehicles” as defined under section 216(2) of the CAA and 40 C.F.R § 85.1703.

2. The Subject Exhaust Parts are Intended for Use With, or as Part of, a Motor Vehicle or Motor Vehicle Engine.

In this case, the EPA issued to Respondent, on August 16, 2018, a Request for Information pursuant to section 208 of the CAA, 42 U.S.C. § 7542 (“208 Request”). CX 4. Respondent submitted a response to the 208 Request on October 29, 2018. Cover letter CX 5. The 208 Request included a request for the part number for each of the Subject Exhaust Parts and the make, model, and year of every

vehicle in which each of the Subject Exhaust Parts was designed to be used. In response, Respondent provided an Excel spreadsheet covering the 57 types of Subject Exhaust Parts. CX 7. For each Subject Exhaust Part, Respondent identified the types of makes and models of motor vehicles in which each Subject Exhaust Part was designed to be used. These responses are included in the column “Vehicle Application” in Appendix A to the Amended Complaint. As described previously, each of the motor vehicles identified constitute a “motor vehicle” as defined under section 216(2) of the CAA and 40 C.F.R § 85.1703.

In addition, the 208 Request included a request for product manuals, technical specifications, and installation and operating instructions for each of the Subject Exhaust Parts. In response, Respondent’s 208 Response includes manuals² for the installation of the 57 types of the Subject Exhaust Parts (“Installation Manuals”). CX 38, CX 43, CX 48, CX 53, CX 58, CX 63, CX 68, CX 73, CX 78, CX 83, CX 88, CX 93, CX 98, CX 103, CX 113, CX 118, CX 121, CX 126, CX 131, CX 136, CX 141, CX 146, CX 151, CX 156, CX 161, CX 166, CX 171, CX 176, CX 181, CX 186, CX 201, CX 206, CX 211, CX 216, CX 219, CX 221, CX 226, CX 231, CX 236, CX 246, CX 251, CX 261, CX 266, CX 271, CX 276, CX 281, CX 286, and CX 291. Each of the 57 types of Subject Exhaust Parts is described in these Installation Manuals as being “designed for” use on one or more specific make and model of motor vehicles that are identified in Paragraphs 35-45 of the Amended Complaint.

² Respondent’s 208 Response included 65 installation manuals, one manual for each of the 65 types of exhaust parts or components. At this time, Complainant is limiting allegations of violations in the Amended Complaint to 57 types of exhaust parts or components because Complainant does not have definitive information that installation of the remaining 8 types of exhaust parts or components would result in the removal of catalytic converters installed by the OEM. If such information becomes available, Complainant may seek to amend the Complaint to include claims for such exhaust parts or components.

3. The Subject Exhaust Parts Have a Principal Effect of Removing Catalytic Converters That Were Installed in Motor Vehicles to Comply with CAA Title II Regulations.

The 208 Request included a request for the following information: “Describe the function of the component in an exhaust system and, based upon the component’s design, explain how it could enable the customer or end-user to bypass, defeat, or otherwise render inoperative an Emission Related Part.” CX 4. In response to the 208 Request, Respondent provided an Excel spreadsheet, which includes a column entitled “Function.” CX 7. In this column, Respondent provided statements for all 57 types of Subject Exhaust Parts indicating that installing the Subject Exhaust Parts removes catalytic converters. A typical example of these statements is, “Only if the original exhaust system is still in place, has not been modified, and retains the original catalytic converters, an end-user could decide to install this part to remove or replace the original catalytic converters.” *Id.* Respondent’s full responses regarding Subject Exhaust Part function that it provided in response to the 208 Request are recited in the column titled “Function” in the Appendix A to the Amended Complaint.

In addition, each of the Installation Manuals submitted by Respondent contains a statement warning that the exhaust part or component covered by the installation manual could not legally be installed on a motor vehicle or motor vehicle engine. A typical example of these statements is, “LEGAL ONLY FOR RACING VEHICLES THAT MAY NEVER BE USED, OR REGISTERED, OR LICENSED FOR USE, UPON A HIGHWAY.” *E.g.*, CX 88. Another typical example is, “FOR COMPETITION USE ONLY. Not emissions compliant for street use.” *E.g.*, CX 236

Beyond the admissions by Respondent that use of its Subject Exhaust Parts would result in removal of catalytic converters that were installed by OEMs, Complainant’s expert witness Jason Gumbs performed a series of analyses comparing the design of each type of Subject Exhaust Part with the OEM design of one or more of the motor vehicle(s) in which that Subject Exhaust Part was designed to be used. These analyses consisted of a side-by-side comparison of one or more schematics for each of

Respondent's Subject Exhaust Parts with a schematic of part or all of the OEM vehicle exhaust system. Both the OEM diagrams as well as side-by-side comparisons of the Borla Installation Manual and OEM diagrams showing how installation of the Subject Exhaust Parts eliminates catalytic converters are included in Complainant's Initial Prehearing Exchange. CX 42, CX 47, CX 52, CX 57, CX 62, CX 67, CX 72, CX 82, CX 87, CX 92, CX 97, CX 102, CX 107, CX 117, CX 120, CX 125, CX 130, CX 135, CX 140, CX 145, CX 150, CX 155, CX 160, CX 165, CX 170, CX 175, CX 180, CX 185, CX 190, CX 205, CX 210, CS 215, CX 219, CX 225, CX 230, CX 235, CX 240, CX 250, CX 255, CX 265, CX 270, CX 275, CX 285, CX 290, and CX 295. Mr. Gumbs is expected to testify how installation of each Subject Exhaust Part would require the removal of one or more of the catalytic converters installed by the OEM.

Also, as noted, *supra*, the Installation Manuals indicated that each type of Subject Exhaust Part is designed to fit one or more of the specific types of EPA-certified motor vehicles identified in Paragraphs 35-45 of the Amended Complaint.

4. Respondent Knew or Should Have Known that its Subject Exhaust Parts Were Being Offered for Sale or Installed for Such Use or Put to Such Use.

As described earlier, Respondent: 1) stated that the Subject Exhaust Parts motor vehicle exhaust parts are "designed for" use on specific types of motor vehicles; 2) admitted that use of these Subject Exhaust Parts would result in removal of OEM-installed catalytic converters on those motor vehicles; and 3) included in each of its Installation Manuals statements warning purchasers that these Subject Exhaust Parts would be illegal if installed in motor vehicles. Respondent knew or should have known that the vehicles identified in its own Installation Manuals were "motor vehicles" because and they were manufactured pursuant to COCs that described these vehicles as both light-duty vehicles and passenger cars. All of this is clear evidence that Respondent knew or should have known that the Subject Exhaust

Parts at issue in this case would be put to the use for which they were designed, and this use would require the removal of catalytic converters installed by OEMs in motor vehicles.

5. Respondent Manufactured, Sold, and Offered to Sell at Least 5,338 Separate Subject Exhaust Parts Identified in the Amended Complaint's Appendix A Between January 15, 2015, and September 26, 2018.

As an initial matter, Complainant seeks to clear up confusion that may have occurred with respect to the number of violations identified in the Amended Complaint. The initial filed Complaint at Paragraph 55 alleged that Between January 15, 2015 and September 26, 2018, Respondent manufactured, sold, and offered for sale at least 5,547 Exhaust System Defeat Devices including, but not limited to, those products identified in Appendix A of the Complaint. The initial filed Complaint at Paragraph 62 stated that Complainant seeks an administrative penalty to be assessed against Respondent for approximately 5,547 violations of section 203(a)(3)(B) of the CAA alleged in Count One that occurred between January 15, 2015 and September 26, 2018. After filing the initial Complaint, Complainant filed an Amended Complaint that dropped certain Borla exhaust parts from this Proceeding, and Complainant correspondingly amended Paragraph 55, alleging that between January 15, 2015, and September 26, 2018, Respondent manufactured, sold, and offered for sale at least 5,296 Exhaust System Defeat Devices including, but not limited to, those products identified in Appendix A to the Amended Complaint. Am. Compl., ¶ 55. Complainant inadvertently did not change the number of violations for which Complainant seeks an administrative penalty to match the number in Paragraph 55, and thus the Amended Complaint at Paragraph 62 states that Complainant seeks an administrative penalty to be assessed against Respondent for approximately 5,547 violations of section 203(a)(3)(B) of the CAA alleged in Count One that occurred between January 15, 2015 and September 26, 2018. Am. Compl., ¶ 62. Complainant apologizes for the confusion this error may have caused.

In preparing the Initial Prehearing Exchange and re-reviewing the responses Respondent has provided to the 208 Request, Complainant has found that the number of Subject Exhaust Parts Borla manufactured, sold, and offered for sale between January 15, 2015 and September 26, 2018 to be at least 5,338, constituting 5,338 separate violations of section 203(a)(3)(B) of the CAA. The evidence for this number is the parts sales spreadsheet Respondent and the compilation of sales invoices Respondent has provided in response to the 208 Request. CX 7 and 8, respectively. A table of violations by Subject Exhaust Part type and by year is provided as Exhibit CX 298. Note that the sales numbers for 2015 in Exhibit CX 298 is different than the numbers presented in Respondent's spreadsheet because Complainant has dropped violations outside the statute of limitations (sales of Subject Exhaust Parts that occurred between January 1, 2015 through January 14, 2015). Complainant intends to seek leave to amend the Complaint a second time to change the violation count under Paragraphs 55 and 62 to reflect 5,338 violations alleged and for which Complainant seeks a penalty to be assessed in this Proceeding.

2(C) Information and Policy/Guidance Relied Upon in Calculating a Proposed Penalty

The Prehearing Order at 2(C) states that Complainant shall submit as part of its Initial Prehearing Exchange all factual information and supporting documentation relevant to the assessment of a penalty, and a copy, or a statement of the internet address (URL), of any policy or guidance intended to be relied upon by Complainant in calculating a proposed penalty.

In addition to the factual information Complainant expects to put forth to establish Respondent's liability, Complainant expects to put forth the following additional factual information and documentation supporting its proposed penalty assessment: (1) business research documents compiled for the purpose of assessing Respondent's size of business (CX 20 – 21); (2) a financial data spreadsheet and accompanying letter submitted to Complainant by Respondent that provides information concerning Respondent's size of business and profits Respondent enjoyed from the manufacture and sale of the

Subject Exhaust Parts (CX 22 – 23); (3) a financial data spreadsheet prepared by Industrial Economics for the purpose of assessment of the economic benefit Respondent received from the manufacture and sale of the Subject Exhaust Parts and Management Association financial ratio benchmark data (CX 19).

Complainant's proposed penalty will be calculated according to the EPA's Clean Air Act Mobile Source Civil Penalty Policy, available to the public at

http://www2.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf (last visited January 5, 2021) as amended to account for inflation and in consideration of the statutory factors identified in CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2). The current amendments to EPA civil penalty policies to account for inflation are available to the public at

<https://www.epa.gov/sites/production/files/2020-01/documents/2020penaltyinflationruleadjustments.pdf> (last visited January 5, 2021).

2(D) Guidance and Policies Regarding Regulatory Violations Alleged in the Amended Complaint

This case does not involve alleged violations of regulations promulgated pursuant to the Clean Air Act. Instead, this case involves alleged violations of the statutory prohibition set forth in section 203(a)(3)(B) of the Clean Air Act.

2(E) Detailed Explanation of Proposed Penalty

The Amended Complaint did not specify a proposed penalty. Pursuant to the Prehearing Order, Complainant's proposed penalty and the detailed explanation concerning its proposed penalty will be provided in Complainant's Rebuttal Prehearing Exchange.

Respectfully Submitted,

January 8, 2021

Date

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CERTIFICATE OF SERVICE

I certify that an electronic copy of the foregoing Complainant’s Initial Prehearing Exchange *In the Matter of Borla Performance Industries, Inc.*, Docket No. CAA-R9-2020-0044, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judges’ E-Filing System, with the exception of certain exhibits that have been filed under seal. I certify that a copy of this Initial Prehearing Exchange with exhibits filed under seal via a file-share system established by the Office of Administrative Law Judges. I certify that an electronic copy of this Prehearing Exchange was sent this day by e-mail and links to a file transfer system to the following e-mail addresses for service on Respondent’s counsel: Erik S. Jaffe at ejaffe@schaerr-jaffe.com; Kent Mayo at kent.mayo@bakerbotts.com; Julie Cress at Julie.cress@bakerbotts.com.

January 8, 2021

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