**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

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| In the Matter of:<br><br>Freedom Performance, LLC.<br><br>Respondent. |

Docket No.
CAA-HQ-2019-8362



**COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT AND ORDER**

**THIS IS THE PUBLIC COPY, CBI-CLAIMED MATERIAL REDACTED**

Complainant's Motion for Default Judgment and Order contains materials claimed to be confidential business information ("CBI") pursuant to 40 C.F.R. § 2.203(b). The materials claimed as CBI are on pages 19, 22, and 34 of the Motion, which consist of sales and expense figures that were stated in the Respondent's tax returns. Respondent has claimed the information stated in the tax returns as CBI. Also, page 21 in the footnote identifies some specific expense information that Respondent has not expressly identified as CBI but is similar to expense information that Respondent has claimed as CBI, so in an abundance of caution, Complainant is treating this information as claimed-CBI. Thus, these specific figures in pages 19, 21, 22, and 34 have been redacted from this public version of the Motion.

In addition, Attachments 1, 7B (partial), 8, 9A, and 10 contain information that Respondent has claimed to be CBI, which consist of certain sales and expense information that Respondent provide in its sales data and tax returns. Also, Attachment 9B contains certain expense information that Respondent has not expressly claimed as CBI but, again, in an abundance of caution, Complainant is treating this information as CBI.

Attachments 1, 8, 9A, 9B, 10, and the portion of 7B that was claimed CBI are not included in this public copy of Complainant's Motion.

With respect to page 12 of Attachment 1, there is a third-party named that is enforcement sensitive and could reveal the third-party's claimed CBI if made public. As the name of this third-party is not relevant to this Motion, this name has been redacted from Attachment 1 both in the public and non-public versions of Attachment 1 filed with the Hearing Clerk.

With the exception of page 12 of Attachment 1 as described above, a complete copy of Complainant's Motion and all Attachments, including the information claimed as CBI, has been filed with the Hearing Clerk under seal. If you have any questions, please contact Mark Palermo, Attorney-Advisor, at (202) 564-884 or palermo.mark@epa.gov.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

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| In the Matter of:<br><br>FREEDOM PERFORMANCE, LLC,<br><br>Respondent. | Docket No.<br>CAA-HQ-2019-8362 |

# MOTION FOR DEFAULT JUDGMENT AND ORDER

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## Table of Attachments

1. Freedom Performance, LLC Inspection Summary, Brent Ruminski and Aasim Rawoot, Eastern Research Group, Nov. 2, 2016 (CMD00001-33).[1]

2. Notice of Violation of the Clean Air Act to Freedom Performance, LLC, Jan. 6, 2017 (CMD00034-39).

3. Email from Josh Coldiron, Gramling Environmental Law, P.A., to Mark Palermo, EPA, regarding "EPA/Freedom Performance, LLC – Notice Letter dated January 6, 2017," Jan. 20, 2017 (CMD00040).

4. Email Chain between George Gramling and Josh Coldiron, Gramling Environmental Law, P.A., and Mark Palermo and Anthony Miller, EPA, regarding "EPA/Freedom Performance, LLC – Notice Letter dated January 6, 2017," Jan. 24 through Mar. 22, 2017 (CMD00041-49).

5. Email from Mark Palermo, EPA, to George Gramling, Gramling Environmental Law, P.A., regarding EPA administrative complaint filed against Freedom Performance, LLC, Mar. 18, 2019 (CMD00050).

6. Email from George Gramling, Gramling Environmental Law, P.A., to Mark Palermo, EPA, regarding waiver of service of the EPA administrative complaint filed against Freedom Performance, LLC, April 3, 2019 (CMD00051-52).

7. A. Letter from George Gramling, Gramling Environmental Law, P.A., to Mark Palermo, EPA, regarding ability-to-pay in the matter of Freedom Performance, LLC, Apr. 12, 2019 (CMD00053-54).

   B. Attachments to Apr. 12, 2019, letter, Freedom Performance LLC tax returns and other financial documents (Freedom-EPA 0001-97).

8. Letter from Mark Palermo, EPA, to George Gramling, Gramling Environmental Law, P.A., regarding Freedom Performance, LLC's ability-to-pay claim, Apr. 24, 2019 (CMD00055-56).

9. A. Email from Josh Coldiron, Gramling Environmental Law, P.A., to Mark Palermo, EPA, regarding Freedom Performance, LLC's ability-to-pay claim, May 14, 2019 (CMD00057-58).

   B. Attachment to May 14, 2019 letter, Freedom Performance, LLC's advertising expense records for 2016-2018. (CMD00059-00127).

10. Letter from Mark Palermo, EPA, to George Gramling, Gramling Environmental Law, P.A., regarding Freedom Performance, LLC's ability-to-pay claim, May 20, 2019 (CMD00128-130).

[1] Given the voluminous data, Complainant did not attach the Excel spreadsheets that comprise Attachments C and E of this Inspection Summary. A product list comprising the violations alleged in the Complaint is included as Appendix A to the Complaint. In addition, the data spreadsheet that comprises Attachment E is summarized in the body of the Inspection Summary. Also, as it does not have relevance to this motion, Complainant did not attach Attachment D to the Inspection Summary.

11. Email from Mark Palermo, EPA, to Geoff Kemper, Freedom Performance, LLC, regarding the EPA May 20, 2019 letter regarding Freedom Performance, LLC's ability-to-pay claim, May 21, 2019 (CMD00131).

12. Suggestion of Bankruptcy, James J. Jackman, Esq., dated June 5, 2019 (CMD00132-133).

13. Letter to Freedom's bankruptcy counsel, James J. Jackman, Esq., advising him that EPA is filing a default motion and that its position is that the automatic stay does not apply, dated August 13, 2019 (CMD00134-135).

14. Letter to the bankruptcy trustee's counsel, Lisa M. Castellano, advising her that EPA is filing a default motion and that its position is that the automatic stay does not apply, dated August 13, 2019 (CMD00136-137).

## I. Introduction

By this Motion for Default Judgment and Order ("Motion"), the Director of the United States Environmental Protection Agency's Air Enforcement Division ("Complainant") requests that the Presiding Officer find that default has occurred in this matter based on respondent Freedom Performance, LLC's ("Freedom" or "Respondent") failure to answer the complaint against Respondent filed on March 18, 2019 ("Complaint"). Complainant further requests that the Presiding Officer issue a default order finding Freedom liable for all of the 13,928 violations of section 203(a)(3)(B) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7522(a)(3)(B) alleged in the Complaint, and assess and order Respondent to pay a civil penalty of $7,058,647 as proposed by this Motion.

Issuance of the default order requested here would resolve all outstanding issues and claims in this proceeding and would therefore constitute an initial decision under the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," 40 C.F.R. Part 22 ("Rules of Practice"). 40 C.F.R. § 22.17(c).

This Motion explains how default has occurred in this matter, states the factual and legal grounds for assessing a civil penalty of $7,058,647 against Respondent for the violations alleged in the Complaint and ordering Respondent to pay this civil penalty, and requests that the Presiding Officer issue a default order consistent with the proposed Order at the close of this Motion.

## II. Jurisdiction

This action is brought under section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), and the Rules of Practice. The Complaint filed in this Proceeding alleges that Respondent has committed violations of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). The EPA may administratively assess a civil penalty for violations of section 203(a) of the CAA, 42 U.S.C. § 7522(a). CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1). Where violations occurred after November 2, 2015, and a penalty is assessed on or

after January 15, 2019, an administrative civil penalty may not exceed $378,852 against each violator, unless the Administrator of the EPA and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment. CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1); 40 C.F.R. § 19.4 tbl. 1; Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019). The Administrator and the Attorney General have jointly determined that this matter, although it may involve a penalty amount greater than $378,852, is appropriate for administrative penalty assessment. Complaint ¶ 10.

The Rules of Practice govern administrative adjudicatory proceedings for the assessment of any administrative civil penalty under section 205(c) of the CAA, 42 U.S.C. § 7524(c). 40 C.F.R. § 22.1(a)(2). Such an assessment "shall be by an order made on the record after opportunity for a hearing." *Id*. "Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person." *Id*. The EPA issues these orders and provides these notices and opportunities to request a hearing by following the Rules of Practice. 40 C.F.R. §§ 22.1(a)(2), 22.34. Penalty assessment proceedings initiated at EPA Headquarters are commenced by filing with the Hearing Clerk a complaint conforming to 40 C.F.R. § 22.14. *Id*. §§ 22.3, 22.13(a). An Administrative Law Judge shall be designated and serve as Presiding Officer in this proceeding until an initial decision becomes final or is appealed. 40 C.F.R. §§ 22.3(a), 22.4, 22.16(c).

## III. Background

### *A. The EPA's Certificate of Conformity Program for Motor Vehicles and Motor Vehicle Engines*

In creating the CAA, Congress found that "the increasing use of motor vehicles[2] … has resulted in mounting dangers to the public health and welfare." CAA § 101(a)(2); 42 U.S.C. § 7401(a)(2). Congress' purposes in creating the CAA were "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," and "to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution." CAA § 101(b)(1)-(2); 42 U.S.C. § 7401(b)(1)-(2).

Title II of the CAA and the regulations promulgated thereunder establish stringent standards for the emissions of air pollutants from motor vehicles and motor vehicle engines that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 202(a), 42 U.S.C. § 7521(a). These pollutants include nitrogen oxides ("$NO_x$"), particulate matter ("PM"), non-methane hydrocarbons ("NMHCs"), and carbon monoxide ("CO").[3] CAA § 202(a)(3)(A), 42 U.S.C. § 7521(a)(3)(A).

The EPA administers Title II of the CAA, 42 U.S.C. §§ 7521 – 7590, in part, by running a motor vehicle certification program. *See generally* 40 C.F.R. Part 86. This program is designed to ensure that

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[2] Under the CAA, "motor vehicle" 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).

[3] $NO_x$ and NMHCs are reactive gasses that contribute to the formation of PM and ozone. Complaint ¶ 16. PM is a form of air pollution composed of microscopic solids and liquids suspended in air. *Id*. ¶ 17. PM is emitted directly from motor vehicles and is also formed in the atmosphere from the emission of other pollutants, including $NO_x$ and NMHCs emitted from motor vehicles. *Id*. ¶ 17. Ozone is a highly reactive gas that is formed in the atmosphere, in part, from emissions of pollutants from motor vehicles. *Id*. ¶ 18. Exposure to ozone and PM is linked to a number of health effects as well as premature death. *Id*. ¶ 20. Children, older adults, people who are active outdoors (including outdoor workers), and people with heart or lung disease are particularly at risk for health effects related to ozone or PM exposure. *Id*. ¶19. CO is a toxic gas emitted from motor vehicles that can cause headaches, dizziness, vomiting, nausea, loss of consciousness, and death. *Id*. ¶ 20. Long-term exposure to CO has been associated with an increased risk of heart disease. *Id*. ¶ 20.

every motor vehicle sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported into the United States meets air pollutant emission standards and has a design that has been approved by the EPA. *See* 40 C.F.R. Part 86.

Under the motor vehicle certification program, 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 manufacturer ("OEM") must demonstrate that each motor vehicle or motor vehicle engine will conform to established emissions standards for $NO_x$, PM, NMHC, CO, and other pollutants during the motor vehicle or motor vehicle engine's useful life. CAA § 206(a)(2), 42 U.S.C. § 7525(a)(2); *see* 40 C.F.R. §§ 86.004-21, 86.007-21, 86.007-30(a)(1)(i), 86.094-21, 86.096-21, 86.1844-01, 86-1846-01(a)(1). OEMs install a variety of hardware and software elements of design[4] in motor vehicles and motor vehicle engines to control emissions of pollutants to comply with the CAA and regulations promulgated thereunder and obtain certification (hereinafter referred to as "Emissions-Related Elements of Design"). Complaint ¶ 35.

The OEM's COC application to the EPA must describe, among other things, the Emissions-Related Elements of Design of the motor vehicle or motor vehicle engine. *See* 40 C.F.R. § 86.094-21(b)(1) ("The application … shall include the following: … a description of [the vehicle's] … emission

[4] An "element of design" is "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. §§ 86.094-2 and 86.1803-01. An "emissions control system" is a unique group of emission control devices, auxiliary emission control devices ("AECDs"), engine modifications and strategies, and other elements of design designated by the Administrator [of the EPA] used to control exhaust emissions of a vehicle. 40 C.F.R. § 86.1803-01. AECDs are "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purposes of activating, modulating, delaying, or deactivating the operation of any part of the emissions control system" of a motor vehicle or motor vehicle engine. 40 C.F.R. §§ 86.1803-01, 86.1844-01(d)(11).

control system and fuel system components."); *see also* 40 C.F.R. § 86.1844-01(d)-(e). Upon approval of the application, 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. Complaint ¶ 25.

Additionally, under section 202(m) of the CAA, 42 U.S.C. § 7521(m), the EPA promulgated regulations for motor vehicles manufactured after 2007 that require the motor vehicles and motor vehicle engines at issue in the Complaint, heavy-duty diesel engines ("HDDEs"), to have numerous devices or elements of design that, working together, can detect problems, such as malfunction or deterioration, with the vehicle's emissions control systems and elements of design that could cause a vehicle to fail to comply with the CAA emission standards, alert drivers to these problems, and store electronically-generated malfunction information. 40 C.F.R. §§ 86.005-17, 86.007-17, 86.1806-05. These devices or elements of design are referred to as "onboard diagnostic systems" or "OBD" systems. Complaint ¶ 29.

*B. Emission-Related Elements of Design at Issue in this Matter*

Motor vehicles are equipped with "electronic control units" or "ECUs" (also known as "engine control module" or "ECM"), which are computers that monitor and control vehicle operations, including the operation of emission control devices and elements of design. Complaint ¶ 36. OEMs of HDDEs employ certain hardware devices as emissions control systems to manage and treat exhaust to reduce levels of regulated pollutants from being created or emitted into the ambient air. *Id*. ¶ 37. Such devices include exhaust gas recirculation ("EGR")[5], diesel particulate filters ("DPFs")[6], diesel oxidation

[5] EGR is an Emissions-Related Element of Design in diesel-fueled motor vehicles that reduces $NO_x$ emissions, which are formed at the high temperatures caused during fuel combustion. Complaint ¶ 38. By recirculating a portion of engine exhaust gas into the cylinders of the engine, EGR reduces engine temperature and the formation of $NO_x$. *Id*. ¶ 38.

[6] DPF is an Emissions-Related Element of Design in diesel-fueled motor vehicles that controls PM emissions by trapping engine exhaust gas particulates in a filter and periodically oxidizing them through thermal regeneration of the filter. Complaint ¶ 41. Proper operation of the DPF requires periodic regeneration of the filter to prevent accumulated PM from

catalysts ("DOC")[7], nitrogen oxide adsorption catalysts ("NAC")[8], and selective catalytic reduction ("SCR")[9]. *Id*. ¶¶ 38-44.

In addition to emissions control hardware, engine-fueling parameters such as fuel mass, fuel injection pressure, and fuel injection timing are among the Emissions-Related Elements of Design incorporated in HDDEs that can affect the quantity of regulated pollutants that are created by the diesel engine. Complaint ¶ 45. As an example, HDDE manufacturers generally employ retarded fuel injection timing as an emission control method for NOx. *Id*. ¶ 45.

OEMs set software parameters, also known as calibrations, that control, among other things, engine combustion and aftertreatment performance (hereinafter referred to as "Certified Stock Calibrations"). 40 C.F.R. § 86.1803-01. OEMs disclose Certified Stock Calibrations to the EPA on their application for a COC for each vehicle model because they are part of a motor vehicle's overall emissions control strategy. Complaint ¶ 46. Certified Stock Calibrations that must be included on the COC application include "fuel pump flow rate, … fuel pressure, … EGR exhaust gas flow rate, … and basic engine timing." 40 C.F.R. § 86.1844-01(e)(2); *see also* 40 C.F.R. pt. 85 app. VIII (listing vehicle

clogging the filter. *Id*. ¶ 41. HDDE OEMs began designing and building motor vehicles and motor vehicle engines using DPFs in 2007 to meet more stringent PM emission standards. *Id*. ¶ 41. *See also* 40 C.F.R. § 86.007-11.

[7] DOC is an Emissions-Related Element of Design that reduces CO and NMHC emissions by promoting the conversion of those pollutants into less harmful gases in diesel-fueled motor vehicles. Complaint ¶ 42. A DOC system consists of a precious-metal coated, flow-through honeycomb structure contained in a stainless-steel housing. *Id*. ¶ 42. As hot diesel exhaust flows through the honeycomb structure, the coating of precious metal causes a catalytic reaction that breaks down pollutants into less harmful components. *Id*. ¶ 42. HDDE OEMs generally employ DOC systems to meet current emission standards for PM, NMHCs, and CO. *Id*. ¶ 42.

[8] NAC is an Emissions-Related Element of Design for controlling $NO_x$ emissions by means of a periodic chemical adsorption of $NO_x$ from exhaust gas. Complaint ¶ 43. The NAC includes all hardware, parts, sensors, subassemblies, software, AECDs, calibrations, and other components that collectively constitute the system for implementing this strategy. *Id*. ¶ 43.

[9] SCR is an Emissions-Related Element of Design that controls $NO_x$ emissions through catalytic reduction using an ammonia-based diesel exhaust fluid ("DEF"), typically containing urea, as the reducing agent that chemically converts exhaust gas into nitrogen and water. Complaint ¶ 44. DEF must be periodically refilled, which requires sensors in the DEF tank to communicate with the OBD to ensure that SCR is properly controlling $NO_x$ emissions. *Id*. ¶ 44. HDDE manufacturers generally design and build motor vehicles and motor vehicle engines using SCR systems to meet applicable $NO_x$ standards. *Id*. ¶ 44. *See also* 40 C.F.R. § 86.007-11.

and engine parameters and specifications); 40 C.F.R. pt. 86 app. VI (listing vehicle and engine components). Certified Stock Calibrations are Emissions-Related Elements of Design. Complaint ¶ 46

The emission control devices of HDDEs, such as the DPF, EGR, DOC, NAC, and SCR, work in conjunction with the motor vehicle's OBD system, which monitors emissions-related systems or components that could cause the vehicle to fail to comply with the CAA's emission standards. Complaint ¶ 47. The OBD must detect and report malfunctions of EGRs, oxygen sensors, DPFs, DOCs, NACs, and SCRs and other Emissions-Related Elements of Design in motor vehicles by illuminating the malfunction indicator light ("MIL") on the dashboard and recording a diagnostic trouble code ("DTC"). *Id*. ¶ 47; 40 C.F.R. § 86.1806-05(b)-(e). The OBD stores DTCs that service personnel can read to diagnose and repair a vehicle and government inspectors can download to verify compliance with emission standards. *Id*. ¶ 47. The OBD System is an Emissions-Related Element of Design. *Id*. ¶ 47.

The OBD and ECU may also prompt a driver to correct a problem by alerting vehicle performance, such as putting the engine into "limp-home mode." Complaint ¶ 48. *See also* 40 C.F.R. § 86.010-2. In limp-home mode, the ECU commands the engine to downgrade in performance so that the driver is aware that there is a problem with the emission control system, while permitting the vehicle to be driven (albeit slowly) to a service station. *See, e.g.*, 40 C.F.R. § 86.004-25(b)(6)(ii) (requiring the vehicle performance to deteriorate to a point unacceptable for typical driving when DEF replenishment is required).

Additionally, motor vehicles have a network of sensors that detect information relating to the functioning of Emissions-Related Elements of Design and feed such information to the ECU to provide feedback to the engine calibration to enable proper operation and to the OBD so that malfunctions can be identified, including, but not limited to the following sensors: oxygen sensors that detect/monitor the oxygen concentration of exhaust gas or stoichiometry of combustion, oxygen sensors that monitor catalyst efficiency, EGR temperature and pressure sensors, exhaust gas temperature sensors, air flow

sensors, soot/PM sensors, and $NO_x$ sensors. Complaint ¶ 49. These sensors are Emissions-Related Elements of Design. *Id*.

### *C. The HDDEs at Issue in this Matter*

The HDDEs at issue in this matter were manufactured by Ford Motor Company ("Ford"), FCA US LLC (and its predecessors) ("Dodge"), and General Motors ("GMC/Chevy"). Complaint ¶¶ 50-54. Ford is the OEM of Model Year 2003-2007 F250-F350 6.0L Powerstroke, Model Year 2008-2010 Ford F250-F350 6.4L Powerstroke, and Model Year 2011-2017 6.7L Powerstroke HDDE trucks and Ford Excursion Diesel Vehicles and their engines. *Id*. ¶ 50. Dodge is the OEM of Dodge Ram Model Year 2004-2005 2500/3500 5.9L Cummins and Model Year 2006-2017 6.7L Cummins HDDE trucks. *Id*. ¶ 52. Cummins, Inc., is the OEM for the engines for such HDDE trucks. *Id*. GMC/Chevy is the OEM of Model Year 2004-2017 2500/3500 Sierra and Silverado 6.6L Duramax Model Year HDDE trucks and their engines. *Id*. ¶ 51.

The HDDE trucks identified above are each a "motor vehicle," as that term is defined under section 216(2) of the CAA, 42 U.S.C. § 7550(2), with a "motor vehicle engine." Complaint ¶ 53. Ford, Chevy/GMC, Dodge, or Cummins obtained COCs from the EPA for each of these motor vehicle or motor vehicle engines. *Id*. ¶ 54. These HDDE trucks and their engines have Emissions-Related Elements of Design in compliance with Title II of the CAA, and in conformance with the relevant EPA-issued COC, including one or more of the following: EGR, DOC, NAC, SCR, DPF, OBD, or fueling strategies. *Id*.

The following HDDE trucks and their engines have the following OEM-installed ("stock") emission control devices consistent with the COCs for the vehicles:

| Motor Vehicle/Engine Model Group | Certified/Stock Emissions Control System |
|---|---|
| MY 2004-2005 Dodge 2500/3500<br>5.9L Cummins | DOC and/or EGR |
| MY 2006 Dodge 2500/3500<br>6.7L Cummins | EGR, DOC, and DPF |
| MY 2007-2012 Dodge 2500/3500<br>6.7L Cummins | EGR, DOC, DPF, and NAC |
| MY 2013-2017 Dodge 2500/3500<br>6.7L Cummins | EGR, DOC, DPF, and SCR |
| MY 2004-2007 Chevy/GMC Silverado<br>6.6L LLY/LBZ Duramax | EGR and DOC |
| MY 2008-2010 Chevy/GMC Silverado/Sierra<br>LMM 6.6L Duramax | EGR, DOC, and DPF |
| MY 2011-2017 Chevy/GMC Sierra LML<br>6.6L Duramax | EGR, DOC, DPF, and SCR |
| MY 2003-2007 Ford F250/F350<br>6.0L Powerstroke | EGR and DOC |
| MY 2008-2010 Ford F250/F350<br>6.4L Powerstroke | EGR, DOC, and DPF |
| MY 2011-2017 Ford F250/F350<br>6.7L Powerstroke | EGR, DOC, DPF, and SCR |

Complaint ¶ 56.

*D. The CAA's Defeat Device Prohibition*

Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(2)(B), includes a prohibition "for any person to manufacture or sell, or offer to sell, or install, 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 under this subchapter, 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 is generally known as the Defeat Device Prohibition. Complaint ¶ 31. It is also a violation for any person to cause any of the acts set forth in CAA section 203(a), 42 U.S.C. § 7522(a).

Any person violating sections 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), is subject to a civil penalty of up to $3,750 for each violation that occurred on or before November 2, 2015, and up to $4,735 for each violation that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2019. CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4; Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019). Any such violation with respect to section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B) shall constitute a separate offense with respect to each part or component. CAA § 205(a), 42 U.S.C. § 7524(a).

### *E. Aftermarket Defeat Devices at Issue in this Matter*

Third-party manufacturers and distributors manufacture, sell, and/or offer to sell products that are designed to alter a motor vehicle's power or fuel economy, or reduce the costs related to maintaining a motor vehicle's Emissions-Related Elements of Design (hereinafter "Aftermarket Performance Products"). Complaint ¶ 57. Aftermarket Performance Products enhance a motor vehicle's power, performance, or fuel economy by altering, bypassing, replacing, or disabling OEM-installed Emissions-Related Elements of Design. *Id*. ¶ 58. The Aftermarket Performance Products relevant to this matter fall into two broad categories: Hardware Products and Software Products.

#### *i. Hardware Products*

Some Aftermarket Performance Products are hardware products that physically interfere with or remove Emissions-Related Elements of Design (hereinafter, "Hardware Products"). Complaint ¶ 59. Some Hardware Products interfere with or remove the EGR system (e.g., blocker plates," "EGR valve deletes," or "EGR cooler deletes"). On certain vehicles, there are also products that force the throttle valve for fresh air to remain fully open, which inhibits EGR flow. *Id*. ¶ 60. These Hardware Products are hereinafter referred to as "EGR Delete Hardware Products." Some Hardware Products physically alter and/or remove all or part of a motor vehicle's exhaust aftertreatment system by changing, removing, and/or replacing essential physical elements of DOCs, DPFs, NACs, and SCRs (*e.g*., "straight pipes" or

"race pipes"). *Id*. ¶ 61. These Hardware Products are hereinafter referred to as "Aftertreatment Delete Hardware Products."

*ii. Software Products*

Other Aftermarket Performance Products consist of electronic software products commonly referred to as "tunes" that are uploaded into a motor vehicle's ECU and alter or overwrite a motor vehicle's Certified Stock Calibrations. Complaint ¶ 62. The tunes may be uploaded from the internet or sold on a handheld device called a "tuner." *Id*. The following types of Certified Stock Calibration are changed or overwritten by tunes, which are relevant to the Complaint:

a. Certified Stock Calibrations relating to EGR and exhaust aftertreatment systems. For example, a tune can delete or change calibrations affecting operation of the EGR, DPF, DOC, SCR, or NAC and/or sensors, signals, or records related to these systems. Such tunes also are designed to reprogram the ECU to prevent malfunction of the motor vehicle or motor vehicle engine when the EGR or exhaust aftertreatment systems are disabled, removed, or rendered inoperative.

b. Certified Stock Calibrations related to engine combustion, performance, and operations. For example, a tune can modify calibrations governing fuel pump flow rate, fuel pressure, EGR exhaust gas flow rate, and basic engine timing and therefore bypass, defeat, or render inoperative engine operation calibrations that are key to a motor vehicle or motor vehicle engine's emission control strategy.

c. Certified Stock Calibrations related to the OBD system functions for the purpose of preventing the illumination of MILs, the recording of DTCs, and preventing the OBD system from derating the engine/vehicle due to changes in other Certified Stock Calibrations or removal of EGR/Aftertreatment hardware (e.g., preventing the OBD from limiting vehicle speed to 25 miles per hour because the DPF has been removed).

*Id*. at ¶ 63.

A single tune can change or overwrite multiple Certified Stock Calibrations and types of Certified Stock Calibrations. Complaint ¶ 64. For example, a tune that deletes EGR functions also typically interferes with OBD functions so that the EGR deletion will not be detected. *Id*. ¶ 65. Moreover, multiple tunes and types of tunes are often sold together as a single product. The tunes and tuners relevant to this case are referred to hereinafter as "Subject Tuning Products."

*F. Factual Background Relating to Respondent*

Respondent is a closely-held, active limited liability company organized under the laws of Florida with a principal office, registered office, and registered mailing address at 3910 Goodrich Avenue, Unit 1, Sarasota, Florida 34234. Complaint ¶ 4. Respondent's managing members are Geoffrey Kemper and Alice Boomer. *Id*. Geoffrey Kemper is the registered agent. *Id*. Respondent is a "person" as defined under section 302(e) of the CAA, 42 U.S.C. § 7602(e). *Id*. ¶ 5. Respondent has sold and offered to sell products intended for use in "motor vehicles" as that term is defined by the Act, 42 U.S.C. § 7550(2), and regulations promulgated thereunder at 40 C.F.R. § 85.1703. *Id*. ¶ 6.

Many of the products that Respondent has sold and/or offered for sale are Aftermarket Performance Products that have been represented to enhance a motor vehicle's power or performance, modify a motor vehicle's fuel economy, or reduce the costs associated with maintaining a motor vehicle's emission control system. Complaint ¶ 68. Until very recently, Respondent sold and offered for sale its Aftermarket Performance Products over the internet through its website, https://freedomdieselperformance.com/. *Id*. ¶ 69. Respondent has sold and offered for sale what it has referred to on its website variously as "Delete Packages," "Delete Pipe Packages," "EGR Delete Packages," or "DPF Delete Packages," which consist of a combination of a Subject Tuning Product and an EGR Delete Hardware Product, an Aftertreatment Delete Hardware Product, or both (hereinafter referred to as "Performance Packages"). *Id*. ¶ 70. At some time after receiving in January 2017 a Notice of Violation by the EPA, Respondent changed its website to refer to these Performance Packages as "Competition Racing Packages." *Id*.

Respondent's website included advertisements for numerous products explicitly extolling how the products allow deletion of vehicle emission control devices. *See* Complaint ¶¶ 74-106. A particularly egregious example, Respondent has sold and offered for sale a Performance Package called "Performance Economy DPF Delete Tuner, Flo~Pro Cat and DPF Delete without Bungs, and EGR

Valve & Cooler Delete Kit for Powerstroke 6.4L." *Id*. ¶ 82. Respondent has advertised the following statements regarding this Performance Package on its website:

> ***This complete delete package includes everything you need to delete your DPF and EGR and is designed to maximize your MPG but not break your budget.*** *It includes a reliable, easy to use GearboxZ Performance Economy Tuner, a high performance Flo~Pro* ***CAT and DPF Delete*** *without Bungs and an* ***EGR Valve and Cooler Delete kit*** *from Flo~Pro.*
>
> *An Upgraded Stainless* ***DPF Delete pipe*** *and a stylish Sinister* ***EGR Delete kit*** *are also available with this package for a small additional cost.*

(Emphasis added). *Id*. Other examples are quoted extensively in the Complaint. *Id*. ¶¶ 74-106.

On November 2, 2016, the EPA and its contractor Eastern Research Group, Inc. ("ERG") inspected the Respondent's business facility located at 409 Cortez Road West, Bradenton, Florida, 34207, with Respondent's permission. Complaint ¶ 71; *see also* Motion Attachment ("Mot. Att.") 1. This inspection was conducted to assess Respondent's compliance with the aftermarket defeat device and tampering prohibitions in Section 203(a)(3) of the CAA. Mot. Att. 1 at CMD00001. The inspection included observing the inventory in store, its product list, and sales database. Mot. Att. 1. The EPA and ERG took photographs, conducted interviews, and obtained tuners sold by Respondent as samples. *Id*.; Complaint ¶ 71. During the inspection, the EPA and ERG requested from Freedom personnel a copy of Freedom's complete sales database. Mot. Att. 1 at CMD00006-7. After consulting with Freedom's owner Geoff Kemper, Freedom's personnel provided to the EPA and ERG a copy of Freedom's entire database in the form of an SQL file. *Id*.; *see also* Complaint ¶ 71.

After the inspection, ERG used a text file editor (EditPadLite) to extract sales data. Mot. Att. 1 at CMD00007. The SQL database contained 440 data tables. *Id*. Although all types of tables can be extracted from Freedom's SQL database (sales, purchases, account balances, etc.), ERG focused on exporting only sales-related tables to a workable Excel file format. *Id*. The sales files that were extracted are invoices from May 15, 2015 to the day of inspection, November 2, 2016. *Id*. From Respondent's

sales files, ERG was also able to extract, and aggregate specific product and revenue data associated with each sale of Defeat Devices or Performance Packages. *Id*. at CMD00007, 10-13.

On January 6, 2017, EPA issued a Notice of Violation ("NOV") to Freedom Performance setting forth its determination that Freedom Performance had committed 13,995 violations of the Section 203(a)(3)(B) of the CAA by selling "parts or components for motor vehicles and engines that bypass, defeat, or render inoperative elements of design of those engines that were installed by the original equipment manufacturer in order to comply with the CAA emission standards." Complaint ¶ 72, Mot. Att. 2.

In response to the NOV issued on January 6, 2017, counsel for Respondent contacted the EPA to discuss resolution of this matter. Complaint ¶ 73; Mot. Att. 3. Respondent's counsel indicated that Respondent would be financially unable to pay a substantial penalty for the violations alleged in the NOV. Complaint ¶ 73. In an email dated February 16, 2017, counsel for the EPA requested that Respondent provide certain financial information to support its claim of inability to pay a substantial penalty, including true, accurate, and complete copies of the last five years of signed and dated U.S. tax returns and complete financial statements for the last five years. Complaint ¶ 73; Mot. Att. 4 at CMD00046. Respondent's counsel initially appeared to be receptive to providing Complainant with such requested information, but through March 22, 2017, Complainant was having difficulty obtaining a status update on when Respondent would provide the information. *See* Mot. Att. 4. Ultimately, Respondent's counsel contacted counsel for the EPA in April 2017 indicating that Respondent had declined to provide the requested financial information. Complaint ¶ 73.

On March 18, 2019, Complainant filed an administrative complaint against Respondent alleging 13,928 violations[10] of section 203(a)(3)(B) of the CAA. Complaint ¶ 136. On March 18, 2019,

[10] The Complaint does not include 27 alleged violations regarding Aftertreatment Delete Hardware Products that were identified in the NOV.

Complainant sent the Complaint in this matter, a copy of the Rules of Practice, and a notice of opportunity to request a hearing and the consequences of failure to file an answer, to Geoffrey Kemper at the address for Freedom's registered office via United States Postal Service. Complaint Certificate of Service. On the same date, Complainant sent the Complaint in this matter, a copy of the Rules of Practice, and a notice of opportunity to request a hearing and the consequences of failure to file an answer, to Respondent's counsel, via both email and United States Postal Service. Complaint Certificate of Service; Mot. Att. 5.

On April 3, 2019, Respondent's counsel George Gramling, on behalf of Respondent, confirmed waiver of service of the Complaint via the methods specified in 40 C.F.R. § 22.5(b)(1) and accepted service of the Complaint on Freedom Performance, LLC's behalf via electronic mail. Mot. Att. 6. Accordingly, pursuant to the Rules of Practice, the original filing deadline for Respondent's Answer was May 3, 2019.

After the filing of the Complaint, Respondent decided to provide certain financial information to Complainant to support its ability-to-pay claim. On April 12, 2019, Respondent provided to Complainant Freedom's tax returns and unaudited financial statements covering 2015 to 2018. Mot. Att. 7A and 7B. The financial materials submitted by Respondent on April 12, 2019, showed that from 2017 to 2018, Respondent's sales revenue expanded from [redacted] to [redacted], respectively—a nearly 52% increase. Mot. Att. 7B at Freedom-EPA 0058, 0080. The financial materials also showed a significant increase in advertising expenses between 2017 to 2018, from [redacted] to [redacted]—a nearly 53.9% increase. *Id*. Remarkably, the increases in sales revenue and advertising expenditures occurred after Respondent received the NOV in this matter.

On April 15, 2019, the parties filed a Joint Motion for Extension of Time for Respondent to Answer Complaint ("Joint Motion"). Docket Filing # 4. In the Joint Motion, the parties requested that the filing deadline for Respondent's Answer be extended to June 11, 2019, so that the parties could

pursue a negotiated settlement of this matter. *Id*. On April 19, 2019, this Tribunal issued an Order on Joint Motion for Extension of Time ("Joint Motion Order"). Docket Filing # 6. In the Joint Motion Order, this Tribunal acknowledged that the record reflects Respondent waived service of the Complaint pursuant to the methods addressed in 40 C.F.R. § 22.5(b)(1) on April 3, 2019, and instead accepted service of the Complaint by electronic mail on this date. *Id*. This Tribunal granted Respondent an extension of time to file its Answer until June 11, 2019. *Id*.

Based on the striking increase in sales and advertising expenses shown in Respondent's submitted tax returns, Complainant determined that further inquiry into Respondent's finances and business operations was necessary to appropriately assess the validity of Respondent's claim of inability to pay a penalty. On April 24, 2019, Complainant sent a follow-up request to counsel for Respondent concerning Respondent's ability-to-pay claim. Mot. Att. 8. In the letter, Complainant asked for Respondent to describe the reason(s) for the significant increase in sale between 2017 and 2018, to indicate whether new products or services were being offered or sold by Respondent, and to approximate what percentage of sales in 2018 involved the sale of products alleged to be violations of section 203(a)(3)(B) of the CAA in the Complaint. *Id*. Complainant also asked for a detailed accounting identifying the specific items and corresponding costs expensed as "advertising" from 2016 to 2018. *Id*. Lastly, Complainant noted that it had discovered a separate website, www.freedomperformance.com, offering for sale products for gasoline-fueled vehicles that appeared to be operated through Freedom and asked Respondent to confirm whether this website business is operated through Freedom or another business entity owned or controlled by Geoffrey Kemper or Alice Boomer, members of Freedom Performance, and whether the sales from this website are reflected in the financial documents provided by Respondent to Complainant. *Id*.

Counsel for Respondent sent an email to Complainant on May 14, 2019, attaching advertising invoices and transaction documents. Mot. Att. 9A and 9B. Nearly all of the advertisement transactions

show Freedom had made advertising expenditures to Google Ad Services.[11] *Id*. Importantly, Respondent failed to provide complete answers to all questions in Complainant's April 24, 2019 letter. *Id*. Specifically, in response to Complainant's question regarding why the increase of sales occurred, Respondent's counsel only responded that "Sales increased in direct proportion to advertising expenses." Mot. at 9A. In response to Complainant's question regarding whether Respondent was continuing to sell Aftermarket Defeat Devices, Respondent's counsel indicated that it was "unknown" how many of the products sold were the same as those alleged to be violations of section 203(a)(3)(B) of the CAA in the Complaint. With regard to Complainant's inquiry about Respondent's website www.freedomperformance.com, the only information counsel provided was that "This website no longer exists." *Id*.

On May 20, 2019, Complainant sent a follow-up letter to Respondent's counsel, seeking clarification and expansion on the responses provided by Respondent in its May 14, 2019 response, as well as seeking Respondent's responses to additional questions to ensure that no actions on the part of Respondent and its owners have taken place for the purpose of moving money or assets from Respondent, or shifting of business activities, money, or assets between business entities owned by Mr. Kemper and Ms. Boomer, to avoid paying a penalty for violations alleged in the Complaint. Mot. Att. 10. Complainant noted that not only had Respondent removed its website www.freedomperformance.com from the internet between the time of Complainant's April 24, 2019 letter and the present date, but also www.freedomdieselperformance.com as well. *Id*. Complainant identified a list of 10 questions, including, but not limited to, questions related to other business entities that Mr. Kemper or Ms. Boomer may operate, and seeking explanation for the reported expenditure of

[11] Google Ads involves a business paying Google to prominently feature the business's website at the top of a given Google search result for products the business sells. *See* ads.google.com. Remarkably, the records provided by Freedom show that millions of "clicks" to Freedom's webpages, facilitated by Google Ads, occurred throughout 2016 to 2018. Mot. Att. 9B. For example, the last page of Attachment 9B includes an invoice from Google Ad Services shows that Respondent was charged [redacted] in December 2018 for [redacted] clicks that appear related to the prominent ranking of search results on Google user product searches, and Respondent paid Google [redacted] that month. *Id*. at CMD00127.

over [redacted] in employee wages in 2018, where no employee wages were reported in 2017. *Id*. Complainant noted in this follow-up request that this information was needed to assess what level of reduction in penalty based upon ability-to-pay is justified and appropriate in light of all of the facts of this case. *Id.*

After sending the follow-up letter via email to Mr. Gramling on May 20, 2019, Mr. Gramling reported to Complainant that on May 17, 2019, Respondent had discharged Mr. Gramling as counsel of record. Mot. Att. 10. Unbeknownst to Complainant. Mr. Gramling filed with the Office of Administrative Law Judges a "Notice of Withdrawal as Counsel of Record" ("Withdrawal Notice"). Docket Filing # 7. Mr. Gramling indicated in the Withdrawal Notice that, effective May 17, 2019, Respondent had discharged Mr. Gramling as Respondent's counsel of record for this Proceeding. *Id*. On May 21, 2019, Complainant emailed Respondent's managing member, Geoffrey Kemper, a copy of the May 20, 2019 letter. Mot. Att. 11. Respondent to this date has not responded to the May 20, 2019 letter.

On June 5, 2019, Complainant received an electronic copy of Respondent's Suggestion of Bankruptcy, filed in the Middle District of Florida, Tampa Division, on June 4, 2019, bearing case number 8:19-bk-05338-RCT, from Attorney James D. Jackman, representing Respondent in a Chapter 7 Bankruptcy case. Mot. Att. 12. The Suggestion of Bankruptcy stated that "automatic stay imposed by operation of 11 U.S.C. Section 362 of the Bankruptcy Code is applicable until a ruling herein."

On August 13, 2019, Complainant sent a letter via email to Mr. Jackman's office, indicating its intent to file a Motion for Default with the Office of Administrative Law Judges and advising Mr. Jackman that Complainant was going to make legal arguments that a bankruptcy automatic stay does not stay a penalty assessment proceeding under 40 C.F.R. Part 22. Mot. Att. 13. Also, on August 13, 2019, Complainant sent a letter via email to legal counsel for the Trustee in Respondent's bankruptcy proceeding, Lisa M. Castellano, Esq., providing a similar notice. Mot. Att. 14.

## IV. Standard for Default

Section 22.17(a) of the Consolidated Rules provides that "A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. §22.17(a). The Consolidated Rules provide that "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). The consequences of default are as follows:

> When the Presiding Officer finds that default has occurred, [she] shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. . . . The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17(c).

As to a determination of whether good cause exists for not issuing a default order, the Environmental Appeals Board ("EAB" or "Board") "has traditionally applied a 'totality of circumstances' test to determine whether a default order should be . . . entered . . . ." *JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005). The Board considers several factors under this test, including the alleged procedural omission, namely whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there was a valid excuse or justification for not complying with the procedural requirement. *Id.*

The fact that a party is not represented by counsel is not an excuse for failure to file an answer to the complaint. In administrative proceedings under the Rules, "[a]ny party may appear in person or by . . . other representative" and such representative "must conform to the standards of conduct and ethics required of practitioners before the courts of the United States." 40 C.F.R. § 22.10. Accordingly, the EAB has rejected the contention that a party's lack of legal representation excuses its failure to comply with the Rules or with orders of the administrative law judge. *See, e.g.*, *Rybond, Inc.*, 6 E.A.D. 614, 626-627 (EAB 1996) ("[A] litigant who elects to appear *pro se* takes upon himself or herself the

responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance."); *House Analysis & Assocs.*, 4 E.A.D. 501, 505 (EAB 1993) ("The fact that [the individual respondent], who apparently is not a lawyer, chooses to represent himself and [the business entity respondent] does not excuse respondent from the responsibility of complying with the applicable rules of procedure.").

If a respondent is found in default, it has waived the right to contest factual allegations, but nevertheless default "does not constitute a waiver of respondent's right to have [an administrative law judge] evaluate whether the facts as alleged establish liability or whether the relief sought is appropriate in light of the record." *Peace Industry Group (USA), Inc.,* 17 E.A.D. 348, 354 (EAB 2016) (quoting *Mountain Village Parks, Inc.,* 15 E.A.D. 790, 798 (EAB 2013)). The judge "must ensure that in the pending case the [EPA] has applied the law and the Agency's policies consistently and fairly." *Id.*, 17 E.A.D. 348, 362 (quoting *Mountain Village Parks, Inc.,* 15 E.A.D. 790, 797 (EAB 2013)).

## V. Default has Occurred in this Matter

As detailed in this section, default has occurred based on Freedom's failure to file an answer to the Complaint. The Complaint in this case alleges that Freedom manufactured, sold, offered to sell, or install (or caused the foregoing) at least 13,928 Aftermarket Defeat Devices that constitute prohibited defeat devices under section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Complaint ¶¶ 107-136. The Aftermarket Defeat Devices are designed, marketed, and sold to bypass, defeat, or render inoperative critical emission control elements of design from HDDE trucks that manufacturers designed and installed to comply with the CAA.

The Consolidated Rules authorize a default order in 40 C.F.R. § 22.17. Section 22.17 reads, in pertinent part, as follows:

a. "A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . Default by respondent constitutes, for purposes of the pending

proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations."

b. "A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested."

c. "When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued . . . If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice . . . The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act."

d. "Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c)." 40 C.F.R. § 22.17(d).

Freedom has not filed an answer to the Complaint as of the date of this Motion and Complainant has not received one. By Order of this Tribunal, any answer was due no later than June 11, 2019—30 days after service of the Complaint. 40 C.F.R. § 22.15(a). Consequently, any answer was due no later than June 11, 2019. As no answer was filed by Respondent, Complainant is entitled to an Order of Default against Respondent in accord with 40 C.F.R. § 22.17.

## VI. Proposed Findings of Fact Establishing Respondent's Liability

The allegations in the Complaint provide the Presiding Officer with an ample basis to find that default has occurred based on Freedom's failure to file a timely answer to the Complaint. 40 C.F.R. § 22.17(a). Therefore, the Presiding Officer should find that default has occurred, and consequently issue a default order akin to the Proposed Order at the close of this Motion.

1. Respondent is a "person" as defined under section 302(e) of the CAA, 42 U.S.C. § 7602(e). Complaint ¶ 5.

## COUNT ONE

*Violation for the Sale and/or Offer for Sale of EGR Delete Hardware Products*

2. Between May 1, 2015, and November 1, 2016, Respondent sold and/or offered for sale at least 3,429 EGR Delete Hardware Products (as defined in Paragraph 60 of the Complaint) and include but are not limited to those products identified in Appendix A to the Complaint. Complaint ¶ 108.

3. Respondent's product name for certain of the EGR Delete Hardware Products it sold and/or offered for sale included the phrase "EGR Delete." Complaint ¶ 109.

4. Respondent's website has had an entire product category called "EGR Deletes & Related," stating "Our EGR delete kits are the best approach for the EGR removal process." Complaint ¶ 110.

5. The EGR Delete Hardware Products that Respondent sold and/or offered for sale are intended for use with the motor vehicles or motor vehicle engines identified in Appendix A of the Complaint. Complaint ¶ 112.

6. Respondent's actions that involved the sale and/or offer for sale of EGR Delete Hardware Products were recorded in the sales records it provided to the EPA during the November 2, 2016 inspection, as described and quoted in Appendix A of the Complaint. Complaint ¶ 112.

7. A principal effect of each EGR Delete Hardware Product that Respondent sold and/or offered for sale as identified in Appendix A of the Complaint is to bypass, defeat, or render inoperative a vehicle's EGR system. Complaint ¶ 113.

8. An EGR system is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Complaint ¶ 114.

9. Respondent knew or should have known that the EGR Delete Hardware Products were being offered for sale or installed for such use or put to such use. Complaint ¶ 115.

10. Respondent's sale or offering for sale of (or causing thereof with respect to) each EGR Delete Hardware Product constitutes a separate violation of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). CAA § 205(a), 42 U.S.C. § 7524(a); Complaint ¶ 116.

## COUNT TWO

*Violation for Sale and/or Offer for Sale of Aftertreatment Delete Hardware Products*

11. Between May 1, 2015, and November 1, 2016, Respondent sold and/or offered for sale at least 4,366 Aftertreatment Delete Hardware Products (as defined in Paragraph 61 of the Complaint) and include but are not limited to those products identified in Appendix A to the Complaint. Complaint ¶ 118.

12. Respondent's product names for certain of the Aftertreatment Delete Hardware Products it sold and/or offered for sale include the phrases "DPF Delete," "DPF/CAT Delete," "DPF/SCR/CAT Delete," and "CAT/DPF/DEF Delete." Complaint ¶ 119.

13. Respondent's website has had an entire product category called "Delete Exhaust & Pipes." Complaint ¶ 120.

14. The Aftertreatment Delete Hardware Products that Respondent sold and/or offered for sale are intended for use with the motor vehicles or motor vehicle engines identified in Appendix A to the Complaint. Complaint ¶ 121.

15. Respondent's actions that involved the sale and/or offer for sale of Aftertreatment Delete Hardware Products were recorded in the sales records it provided to the EPA during the November 2, 2016 inspection, as described and quoted in Appendix A of the Complaint. Complaint ¶ 122.

16. A principal effect of each Aftertreatment Delete Hardware Product that Respondent sold and/or offered for sale as identified in Appendix A of this Complaint is to bypass, defeat, or render inoperative a vehicle's DOC, DPF, NAC, and/or SCR systems. Complaint ¶ 123.

17. DOC, DPF, NAC and SCR systems are "device[s] or element of design[s] installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Complaint ¶ 124.

18. Respondent knew or should have known that the Aftertreatment Delete Hardware Products were being offered for sale or installed for such use or put to such use. Complaint ¶ 125.

19. Respondent's sale or offering for sale of (or causing thereof with respect to) each Aftertreatment Delete Hardware Product constitutes a separate violation of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). CAA § 205(a), 42 U.S.C. § 7524(a); Complaint ¶ 126.

## COUNT THREE

*Violation for Sale and/or Offer for Sale of Subject Tuning Products*

20. Between May 1, 2015, and November 1, 2016, Respondent sold and/or offered for sale at least 6,133 Subject Tuning Products (as described in Paragraphs 62 through 66 of the Complaint) and include but are not limited to those products identified in Appendix A to the Complaint. Complaint ¶ 128.

21. Respondent's website has offered for sale Subject Tuning Products on its website, calling the products "DPF Delete Tuners," and stating "DPF/EGR delete tuners will allow you to remove your Diesel Particulate Filter and Exhaust Gas Recirculation without throwing any codes. Depending upon the tuner, you can add horsepower and fuel economy. Gearbox Z, RaceMe, Spartan, and Reaper tuners are all plug and play, with installation taking usually less than 20 minutes." Complaint ¶ 129.

22. The Subject Tuning Products that Respondent sold and/or offered for sale are intended for use with the motor vehicles or motor vehicle engines identified in Appendix A to the Complaint. Complaint ¶ 130.

23. Respondent's actions that involved the sale and/or offer for sale of Subject Tuning Products were recorded in the sales records database it provided to the EPA during the November 2, 2016 inspection, as described and quoted in Appendix A of the Complaint. Complaint ¶ 131.

24. A principal effect of each Subject Tuning Product that Respondent sold and/or offered for sale as identified in Appendix A of the Complaint is to bypass, defeat, or render inoperative a vehicle's Certified Stock Calibration (as defined in Paragraph 46of the Complaint) relating to EGR and/or Aftertreatment (as defined in Paragraph 39 of the Complaint) systems. Complaint ¶ 132.

25. A Subject Tuning Product is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Complaint ¶ 133.

26. Respondent knew or should have known that the Subject Tuning Products were being offered for sale or installed for such use or put to such use. Complaint ¶ 134.

27. Respondent's sale or offering for sale of (or causing thereof with respect to) each Subject Tuning Product constitutes a separate violation of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). CAA § 205(a), 42 U.S.C. § 7524(a); Complaint ¶ 135.

## VII. Bankruptcy Automatic Stay Does Not Halt this Administrative Proceeding

Contrary to what is suggested in Respondent's Suggestion of Bankruptcy, the automatic stay established by Respondent's bankruptcy filing does not impose a stay to this Proceeding.[12] This

[12] Section 362 reads in pertinent parts:
(a) *Except as provided in subsection (b) of this section*, a petition filed under section 301, 302, or 303 of this title, * * *, *operates as a stay*, applicable to all entities, of
(1) the commencement or *continuation, ***,of a* judicial, *administrative*, or other *action* or proceeding *against the debtor that was* or could have been *commenced before the commencement of the case under this title*, or to recover a claim against the debtor that arose before the commencement of the case under this title;
* * *
(6) *any act to* collect, *assess*, or recover *a claim against the debtor* that arose before the commencement of the case under this title;
(b) The filing of a petition under section 301, 302, or 303 of this title, * * *, *does not operate as a stay*
* * *
(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement *or continuation of an action or proceeding by a governmental unit * * * to enforce such governmental unit's or organization's police and regulatory power*, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.
11 U.S.C. § 362(a) and (b) (emphases added).

Proceeding is exempt from an automatic stay in accordance with 11 U.S.C. § 362(b)(4) in the Bankruptcy Code since the EPA is seeking enforcement of "a governmental unit's regulatory power." Direct on-point authority from the Environmental Appeals Board affirms this reading of the Bankruptcy Code. *See In re Munce's Superior Petroleum Products Inc.*, 15 E.A.D. 746 (EAB 2012) (finding that (1) the automatic stay does not apply to bar the administrative penalty assessment proceeding, (2) found the respondent in the case in default for failing to file a timely answer and liable for the violations as alleged in the administrative complaint, and (3) assessed the complainant's proposed penalty and issued an order to the respondent to pay the assessed penalty notwithstanding the respondent's bankruptcy proceeding).

In crafting the "police and regulatory power" exception of section 362(b)(4), Congress intended to allow government agencies to exercise their regulatory powers, particularly their enforcement authority, outside the confines of a bankruptcy proceeding. *See Munce's*, 15 E.A.D. at 752, citing *In re Commerce Oil Co.*, 847 F.2d 291, 295-97 (6th Cir. 1988) (holding that section 362(b)(4) exception applied to proceeding assessing civil penalties and damages in state Water Quality Control Act administrative enforcement proceeding).The Senate Judiciary Committee Report states "where a governmental unit is suing a debtor to prevent or stop violation of *environmental protection*, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." S. Rep. No. 95-989, at 52 (1978), (emphasis added); *accord* H.R. Rep. No. 595, at 343 (1978), quoted by *City of New York v. Exxon Corp*., 932 F.2d 1020, 1024 (2d Cir.1991) (quoting legislative history of the automatic stay provision in support of finding section 362(b)(4) exception applies to government suits for recovery of costs incurred in responding to completed violations of environmental statutes).

Moreover, the Board in *Munce's* noted that:

> to determine whether the "police and regulatory" exception of section 362(b)(4) applies to a specific government action, courts "distinguish[] between situations in which the state acts pursuant to its 'policy and regulatory power' and situations in which the state acts merely to

> protect its status as a creditor"…. In making this determination, courts examine whether deterrence is the primary purpose of the law that the government is attempting to enforce. The automatic stay does not apply to this case.

*Munce's*, 15 E.A.D. at 752 (quoting *Safety-Kleen, Inc., v. Wyche*, 274 F.3d 846, 865 (4th Cir. 2001). As such, the Board held that the "primary purpose" of the administrative penalty proceeding being appealed was "deterrence. *Id.* at 753. The Board found that assessment of penalties for environmental law violations "is one of the most important and effective deterrence tools that Congress provided to EPA," as the "threat of civil or administrative penalties deters the regulated community generally from violating the law." *Id*. The Board further indicated that courts have construed the police and regulatory power exception in section 362(b)(4) as limiting only the government's power to enforce a money judgment outside of the bankruptcy proceeding, and in no way bars the government to seek entry of a civil penalty judgement for violations of environmental laws. *Id*. at 754, citing *United States v. LTV Steel Co.*, 269 B.R. 576, 582 (W.D. Pa 2001); *see also In the Matter of United Global Trading, Inc.,* 2014 WL 983792 at*19, Initial Decision and Order (EPA OALJ Feb. 28, 2014) (citing cases in support of accelerated decision on liability and penalty against a respondent in bankruptcy).

In sum, filing for bankruptcy has no effect on the proceedings of this administrative case, and a default judgment seeking civil penalties may proceed unabated under 40 C.F.R. § 22.17(a). Assessment of a significant penalty in this Proceeding is particularly important for establishing an effective deterrent of violations under section 203(a)(3)(B) of the CAA, as Respondent blatantly advertised and promoted the emission control deletion properties of its Aftermarket Defeat Device products for years and sold thousands of Defeat Devices. And then, when the EPA issued a NOV threatening further legal action, Respondent decided to increase its marketing and product sales by over 50 percent, only stopping its business and filing for bankruptcy after the EPA took the step of filing an administrative complaint. Clearly, the threat of enforcement action is not enough to deter such illegal conduct, and a significant penalty is necessary to be adjudicated to deter others from engaging in this behavior.

## VIII. Request for a Civil Penalty

"Where the motion [for a default order] requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested." 40 C.F.R. § 22.17(b). The Consolidated Rules authorize assessment of a penalty in the event of a default. § 22.27(b). Section 22.27(b) reads, in pertinent part, "If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed in the . . . motion for default . . . ." "The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." *Id*. § 22.17(c).

This Motion specifies the penalties sought and the legal and factual grounds for these penalties. *Id*. § 22.17(b). The requested relief is consistent with the record of this proceeding and the CAA, so the Presiding Officer shall order the relief requested. *Id.* § 22.17(c). Issuance of the Default Order requested here would resolve all outstanding issues and claims in this proceeding and would therefore constitute an initial decision. *Id*. The penalties assessed by this initial decision would become due and payable by Respondents without further proceedings 30 days after such decision becomes a final order under 40 C.F.R. §§ 22.27(c), 22.17(c) and (d). Here, Complainant's requested relief, based on the information available as of the date of this filing, is a civil penalty of $7,058,647. The remainder of this section states the legal and factual grounds for this request.

### *A. Legal Grounds for the Requested Civil Penalty*

In determining civil penalties, the CAA requires that the EPA consider "the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation,

the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require." CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2).

Complainant uses a penalty policy that incorporates these statutory factors and is used to calculate civil penalties for specific cases—the Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements (Jan. 16, 2009) ("Penalty Policy"), *available at* http://www2.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf (last visited July 5, 2019). The Penalty Policy applies to violations of Title II of the CAA, including violations of the prohibition against defeat devices. Penalty Policy at 1, 2.

The Penalty Policy calculates civil penalties as follows. First, the Penalty Policy requires the calculation of the *preliminary deterrence amount*. This is the sum of the *economic benefit* and the *gravity*. Second, the Penalty Policy requires the calculation of the *initial penalty target figure*. This figure is the preliminary deterrence amount, but with the gravity component adjusted to reflect the violator's degree of willfulness or negligence, degree of cooperation or non-cooperation, and history of noncompliance. Finally, the initial penalty target figure can be adjusted to account for unique factors, and such adjustments yield the *adjusted penalty target figure*.

In cases involving uncertified vehicles or engines, the economic benefit component reflects the benefit from delayed cost or avoided cost of compliance and is often calculated using a "Rule of Thumb" estimate. Penalty Policy at 2-8. However, in cases involving the sale of emission control defeat devices, a more appropriate calculation of economic benefit, referred to as "beyond BEN benefit" or BBB, reflects the benefits to a violator "from business transactions that would not have occurred but for the illegal conduct . . . ." Penalty Policy at 7. In such cases the economic benefit is based on the net profits made from the improper transactions, i.e., the profits from the sale of illegal devices. *Id*. at 7, 11.

To determine the gravity component, a base gravity figure is calculated according to horsepower, then multiplied to reflect egregiousness (using a factor of 1 for minor violations, 3.25 for moderate

violations, or 6.5 for major violations), further increased by 0 – 30% for failure to remediate, scaled down according to the number of vehicles, and adjusted to reflect business size. *Id*. at 11-15.

As stated above, the CAA also requires EPA to consider "the effect of the penalty on the violator's ability to continue in business." CAA §205(c)(2); 42 U.S.C. § 7524(c)(2). This statutory factor is often referred to as a violator's "ability to pay." Penalty Policy at 27.

For purposes of this Motion, the facts alleged in the Complaint are deemed to be admitted because default has occurred. 40 C.F.R. § 22.17(a). Based upon EPA's November 2, 2016 inspection of Freedom's business facility and the receipt of sales records from Freedom's sales database, the Complaint alleges that Freedom sold and/or offered to sell at least 13,928 Aftermarket Defeat Devices that disable, defeat or render inoperative devices or elements of design installed on or in heavy-duty diesel trucks, which devices or elements of design were installed in compliance with Title II of the CAA. Complaint ¶¶ 107-136. This subjects Freedom to a civil penalty of not more than $3,750 for each Aftermarket Defeat Device sold or introduced into commerce before November 2, 2015, and of not more than $4,735 for each Aftermarket Defeat Device that Freedom sold or introduced into commerce on and after November 2, 2015. Complaint ¶¶ 33-34.

### *B. Factual Grounds for the Requested Civil Penalty*

The requested civil penalty here is $7,058,647. Below is a narrative description of how this amount was calculated.

#### *i. Economic Benefit*

The economic benefit in this matter is based on Freedom's estimated profit from the sale of the Defeat Devices the comprise the alleged violations. Use of profit to estimate economic benefit is merited because sale of violative products would not have occurred but for the illegal conduct. Penalty Policy at 7. Using the sales data obtained during the inspection of Respondent, ERG tabulated the total sales revenue for 13,955 Defeat Devices Respondent sold between May 1, 2015 and November 1, 2016. Mot.

Att. 1 at CMD00012. Respondent's total revenue from the sale of these Defeat Devices was [redacted], with an average revenue of [redacted] per Defeat Device[13]. *Id*. As actual cost of goods sold and profit data was not included in the sales records obtained from Respondent, Complainant estimated gross profit by reviewing the total revenue and gross profit reported in Respondent's tax returns for 2015 and 2016, which totaled [redacted] and [redacted], respectively. Mot. Att. 7A at Freedom-EPA 0014; 0038. These values indicate that Respondent received an average [redacted] profit margin for sales during those two years. Applying this profit margin to the total revenue recorded in sales records ([redacted]) for 13,955 Aftermarket Defeat Devices yields an estimated profit of $1,526,444.52, or an average profit of $109.38 per Aftermarket Defeat Device. Multiplying $109.38 to the number of Aftermarket Defeat Devices alleged as violations in the Complaint, 13,928, and rounded to the nearest dollar, yields a value of $1,523,445, which Complainant proposes this Tribunal adopt as the economic benefit penalty for the violations alleged in the Complaint.

This estimate of total profit of $1,523,445 from Respondent's 13,928 violations is a reasonable and conservative representation of the economic benefit from the illegal sale of these Defeat Devices. *See Spartan Diesel Technologies*, Initial Decision and Order on Default, 2018 WL 5887550 at *8, 13 (EPA OALJ Oct. 30, 2018) (*sua sponte* review declined, 2018 WL 6587054 (EAB Dec. 6, 2018)) (ALJ assessed economic benefit penalty calculation similarly based on estimate of illegal profits from the sale of Aftermarket Defeat Devices derived from revenue and profit margin data).

*ii. Gravity*

Applying the Penalty Policy, Complainant calculated a gravity-based penalty of $4,628,880 for the 13,928 violations. The Penalty Policy's gravity component reflects the actual or potential harm from the violations and focuses on "whether the activity of the violator actually resulted in, or was likely to

[13] As shown in Table 5 of ERG's Inspection Summary, the vast majority of Freedom's revenue came from the sale of Delete Performance Packages, which in 2015-2016 averaged a sales price of $1,299 per Package. Mot. Att. 1 at CMD00012.

result in, the emission of a pollutant in violation of the standards specified for the particular vehicles or engines at issue." Penalty Policy at 11. This amount is generally based on the vehicle or engine's horsepower. In the case of violations of the defeat device prohibition, the gravity is calculated based on the vehicles or engines on which the defeat devices are installed or intended to be installed. Penalty Policy at 22. As alleged in the Complaint, Respondent's Aftermarket Defeat Devices were designed and marketed for use for several models of HDDE trucks manufactured by Ford, Dodge, and GMC/Chevy. Complaint ¶¶ 111, 121, and 130 and Appendix A. Complainant used an estimate of 350 horsepower rating for these motor vehicles, consistent with the horsepower rating used by the EPA to assess a section 203(a)(3)(B) penalty in *Spartan Diesel*. *See Spartan Diesel*, 2018 WL 5887550 at *10.

The first step in calculating the gravity portion of the civil penalty is to calculate the base per-vehicle penalty using Table 1 of the Penalty Policy. Here, using 350 horsepower results in a base per-vehicle penalty of $3,850, as indicated below:

| **HP** | **$/HP** | **Total** |
|---|---|---|
| First 10 HP | $80 | $800 |
| Second 90 HP | $20 | $1,800 |
| Next 250 HP | $5 | $1,250 |
| | **Base Per-Vehicle Penalty** | **$3,850** |

The base per-vehicle penalty is then adjusted to reflect the egregiousness of the violations. Under the Penalty Policy, the egregiousness is considered "Major," which is the most egregiousness category of violations. Penalty Policy at 13. It applies to violations where excess emissions are likely to occur. *Id*. Most emission control devices, if missing or defective, are expected to result in increased emissions. *Id*. According to the Penalty Policy, violations are classified as "Major" if there is no information about the emissions from these vehicles or engines. *Id*. Thus, a 6.5-fold increase to the base per-vehicle

amount for "major" violations is appropriate given the massive potential excess emissions that has occurred from the removal or deactivation of major emission controls for diesel trucks through Respondent's thousands of Aftermarket Defeat Devices. This results in a base per-vehicle amount adjusted for gravity of $3,850 x 6.5 = $25,025.

The adjusted base per-vehicle gravity is then scaled to reflect the total number of affected vehicles using Table 3 of the Penalty Policy in order to obtain the multiple vehicle/engine gravity amount. Penalty Policy at 17.

| **Number of Vehicles** | **Scaling Factor** | **Adjusted Per Vehicle Gravity** | **Total** |
|---:|---:|---:|---:|
| 10 | 1 | $25,025 | $250,250 |
| 90 | 0.2 | $25,025 | $450,450 |
| 900 | 0.04 | $25,025 | $900,900 |
| 9,000 | 0.008 | $25,025 | $1,801,800 |
| 3,928 | 0.0016 | $25,025 | $157,277 |
| | | **Total** | **$3,560,677** |

The multiple vehicle/engine gravity amount is then increased to reflect the lack of any remediation of the violations. Penalty Policy at 20. Here Freedom's failure to recall products and mitigate excess emissions in any way justifies a 30% increase resulting in an adjusted gravity amount of 1.30 x $3,560,677 = $4,628,880.

Next, the Penalty Policy calls for an upward adjustment to the gravity penalty component to reflect a company's size. Penalty Policy at 20. Company size is typically calculated based on a company's net worth or net assets. *Id.* Complainant did not make any upward adjustments for business size.

Based on the foregoing, the total preliminary deterrence amount here (i.e., the sum of the economic benefit and the fully adjusted gravity component described above) is $1,523,445 + $4,628,880= $6,152,325.

Under the Penalty Policy, the preliminary deterrence amount is further adjusted to account for willfulness and/or negligence, degree of cooperation/non-cooperation, and history of noncompliance to yield the "initial penalty target figure." Penalty Policy at 23-26. In this case, we increased the gravity portion of the penalty (i.e. $4,628,880) by 10% to reflect Freedom's lack of cooperation in responding to the EPA's inquiries whether Freedom had ceased sales of Aftermarket Defeat Devices and come into compliance with section 203(a)(3)(B) of the CAA after being notified of violations by the EPA in January 2017 (as discussed in the "Factual Background Regarding Respondent" section of this Motion), and Freedom's failure to answer the Complaint. This 10% upward adjustment results in an initial penalty target figure for gravity of $4,628,880 + $462,888 = $5,091,768. Complainant made no further adjustments for willfulness/negligence or history of noncompliance. The sum of the initial penalty target figure for gravity and economic benefit combined is $6,153,731.

Pursuant to the Federal Civil Penalty Inflation Adjustment Act, 40 C.F.R Part 19, and EPA policy memoranda regarding penalty inflation adjustment, the gravity component of the penalty must be further adjusted to account for inflation. The December 6, 2013, EPA memorandum, "Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013),[14] at page 6, provides that, for penalties calculated under the Penalty Policy, gravity penalties for violations that occur after December 6, 2013 must be multiplied by the inflation factor of 1.0487. The July 27, 2016 EPA memorandum "Amendments to the U.S. Environmental Protection Agency's

[14] This memorandum can be found at https://www.epa.gov/sites/production/files/2014-01/documents/guidancetoamendepapenaltypolicyforinflation.pdf.

Civil Penalty Policies to Account for Inflation (Effective August 1, 2016),[15] at page 9, provides that, for penalties calculated under the Penalty Policy, gravity penalties for violations that occur after November 5, 2015 must be multiplied by the inflation factor of 1.10020, and, at page 2, the memorandum indicates that for violations that occur on or before November 2, 2015 the inflation factor under the 2013 policy (1.0487) is to be applied.

In this matter, the number of violations alleged in the Complaint that occurred in 2015 is 3,546, and the number of violations alleged that occurred in 2016 is 10,382. To readily calculate a gravity penalty including inflation, Complainant made the following calculations:

$5,091,768 * 3,546/13,928 * 1.0487 = $1,359,470.76

$5,091,768 * 10,382/13,928 * 1.1002 = $4,175,731.24

$1,359,470.76 + $4,175,731.24 = $5,535,202 total gravity penalty including inflation

$5,532,202 (gravity) + $1,523,445 (economic benefit) = **$7,058,647 total penalty**.

### *C. Consideration of Ability to Continue in Business*

Complainant is required to " . . . take into account the . . . effect of the penalty on the violator's ability to continue in business." CAA §§ 205(a), 205(b), 42 U.S.C. §§ 7524(a), 7524(b). As Freedom apparently has ceased business given its Chapter 7 bankruptcy petition, the penalty assessed in this case will not affect its ability to continue in business. Moreover, Complainant avers that at this point, given Respondent's bankruptcy petition, the bankruptcy court is the appropriate forum to decide whether and how much Respondent can pay a claim arising from this Tribunal's penalty decision in this matter. *Cf. Munce's*, 15 E.A.D. at 754 ("Determining the amount of the administrative penalties for [the respondent's] violations in this administrative proceeding will not interfere in any way with the bankruptcy case pending…. To the contrary, establishing the amount of the EPA's penalty claim in this

[15] This memorandum can be found at https://www.epa.gov/sites/production/files/2017-01/documents/finalpenaltyinflationguidance.pdf.

proceeding, in accordance with applicable law, should assist and advance the Bankruptcy Court's ability to discharge its duties efficiently).

Further, consideration of "the ability to continue in business" in this case does not warrant any reduction of the proposed penalty. The Environmental Appeals Board has consistently held a respondent's ability to pay may be presumed until it is put at issue by a respondent. *New Waterbury, Ltd*., 5 E.A.D. 529, 541 (EAB 1994); *Spitzer Great Lakes, Ltd*., 9 E.A.D. 302, 321 (EAB 2000); *JHNY, Inc. A/K/A Quin-T Technical Papers and Boards,* 12 E.A.D. 372, 397 (EAB 2005). Under the Rules of Practice, a respondent is required in a penalty proceeding to "indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange." *New Waterbury*, 5 E.A.D. at 542, *quoted in JCNY, Inc*., 12 E.A.D. at 397. As the Board further explained:

> In this connection, where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the [complainant] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedure rules and thus this factor does not warrant a reduction of the proposed penalty.

*New Waterbury*, 5, E.A.D. at 542, *quoted in JCNY, Inc*., 12 E.A.D. at 398. This jurisprudence of the Board applies even if a respondent supplies some financial information to make an ability to pay claim in settlement discussions but fails to put forth any such financial information in a penalty proceeding as part of Respondent's prehearing exchange. *See JCNY, Inc*., 12, E.A.D. at 386- 389; 398-399. As Respondent has abandoned filing an answer and specifically making an issue of ability to pay in this Proceeding, Complainant urges this Tribunal to conclude that any objection Respondent may have to the penalty based upon ability to pay has been waived and no reduction of the proposed penalty based on this factor is warranted.

Even if this Tribunal considered Respondent to have put ability to pay at issue in this Proceeding, Complainant has appropriately considered Respondent's ability to pay in light of the totality of all the relevant statutory factors. As held by the EAB, if a respondent puts ability to pay at issue in a penalty proceeding, the Agency "is required to present some evidence to show that it *considered* the respondent's ability to pay a penalty as part of [the Agency's] prima facie case that a proposed penalty is appropriate taking all penalty criteria into consideration." *JHNY* at 398. That is, there is no specific burden of proof with respect to an ability to pay factor; so long as the respondent's ability to pay is considered and "touched upon[,] and the overall penalty is supported by the analysis[,] a prima facie case can be made." *CDT Landfill Corp.*, 11 E.A.D. 88, 121 (EAB 2003) (quoting *New Waterbury Ltd.*, 5 E.A.D. at 538). The Agency need not present any *specific* evidence to show that the respondent can pay or obtain funds to pay the assessed penalty but can simply rely on some general financial information regarding the respondent's financial status which can support the inference that the penalty assessment need not be reduced." *JHNY, Inc.*, 12 E.A.D. at 398. (quoting *New Waterbury Ltd.*, 5 E.A.D. at 542-43). Thus, in its prima facie case, Complainant need not establish that Respondent can pay the penalty Complainant proposes, but just show that Complainant considered the ability-to-pay penalty factor in conjunction with all the other penalty factors under the CAA, and that, in light of all of the penalty factors, the penalty proposed is appropriate. *See New Waterbury Ltd.*, 5 E.A.D. at 539-540 ("There is simply no basis for suggesting that "ability to pay" is a special factor which if not established (as opposed to not considered) precludes imposition of any penalty. Theoretically, a penalty that forces a respondent into bankruptcy is not precluded … the penalty is justified under the totality of the relevant statutory considerations); *United Global Trading*, 2014 WL 983752 at *19 ("Furthermore, bankruptcy by itself is not specific evidence that a respondent cannot pay any penalty.")

After the Agency makes out its prima facie case, the respondent must rebut "with detailed evidence demonstrating it could not afford the penalty." *Id.* at 399 (citing *New Waterbury Ltd.*, 5 E.A.D.

at 542). Respondent must explain how the proposed penalty would cause it to suffer undue financial hardship and prevent it from paying ordinary and necessary business expenses. *See Bil-Dry Corp.*, 9 E.A.D. 575, 614 (EAB 2001).

"[I]f the respondent does not offer 'sufficient, specific evidence as to its inability to continue in business to rebut the [Agency's] prima facie showing,' the ALJ may decide that the penalty is appropriate, at least with respect to the ability to pay issue." *CDT Landfill Corp.*, 11 E.A.D. at 122 (quoting *Lin*, 5 E.A.D. 595, 599 (EAB 1994)). A respondent that could have provided a more detailed picture of its finances but has declined to do, abrogates its right to contest the penalty assessment. *See Bil-Dry Corp.*, 9 E.A.D. 575, 614 (EAB 2001).

As demonstrated by the record presented in this Motion, Complainant took extraordinary effort to consider Respondent's ability to pay a penalty. Complainant made multiple efforts to request financial and other information needed to obtain a complete picture of Respondent's financial and business activity to appropriately assess Respondent's ability to pay claim. See the section "Factual Background Regarding Respondent" of this Motion. Responses to Complainant's requests were incomplete, fragmented, and for several specific questions, Respondent failed to answer at all. Respondent failed to fully account for its substantial increase in sales revenue in 2018 and substantial expenditures on advertising; provide an explanation why Respondent suddenly reported wages as a large portion of its expenditures in 2018 when no wages were reported in between 2015 through 2017; confirm whether Respondent's submitted financial documentation reflected all sales from a second website operated by Respondent devoted to gasoline-fueled vehicles; confirm whether any assets were transferred to Freedom's members or other business entities owned or operated by the members; and confirm whether or not there exists other business entities owned or operated by Freedom's members.

Thus, Complainant has been unable to adequately assess Respondent's ability-to-pay claim, and is left in a quandary as to how Respondent could claim to the EPA its inability to pay a substantial

penalty yet substantially expand its sales revenue and advertising expenditures after the EPA's first inquiry about Respondent's ability-to-pay claim in 2017. This conduct frankly put the validity of Respondent's claim in serious doubt. Moreover, after Complainant's further inquiries as to Respondent's finances and business activity after the Complaint was filed, Respondent suddenly removed its websites from the internet, leading Complainant to become concerned that Respondent's members may have shifted profits or assets from Respondent to avoid having to pay a penalty at all in this proceeding. Respondent only enhanced such concern by discharging its counsel in this Proceeding and failing to answer Complainant's requests concerning whether any asset transfers or financial transactions with other entities owned by Respondent's members have occurred. As these open issues with Respondent's ability-to-pay claims have not been addressed by Respondent, leaving Complainant without means to determine whether Respondent's submitted information has provided complete and accurate picture of Respondent's business finances and access to funds, it is Complainant's assessment that a reduction in penalty based on ability to pay is not warranted nor appropriate.

Therefore, as detailed in this this Motion, Complainant requests that the Presiding Officer issue a default order requiring: Respondent pay a civil penalty of $7,058,532. This amount is consistent with the record of the proceeding and the Act. 40 C.F.R. § 22.17(c). Accordingly, the Rules of Practice direct that the Presiding Officer order this requested relief. *Id*.

Respectfully Submitted,

8/15/19
Date

Mark J. Palermo, Attorney-Advisor
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., N.W.
William J. Clinton Federal Building
Room 1111B, Mailcode 2242A
Washington, DC 20460
(202) 564-8894
palermo.mark@epa.gov

8/15/19
Date

Jessica B. Goldstein, Attorney-Advisor
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., N.W.
William J. Clinton Federal Building
Room 1202F, Mailcode 2232A
Washington, DC 20460
(202) 564-1493
goldstein.jessica@epa.gov

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

| | |
|---|---|
| In the Matter of:<br><br>FREEDOM PERFORMANCE, LLC,<br><br>Respondent. | Docket No.<br>CAA-HQ-2019-8362 |

## ORDER

Pursuant to sections 203, 205, and 213 of the Clean Air Act, 42 U.S.C. §§ 7522, 7524, 7547, and the Consolidated Rules at 40 C.F.R. §§ 22.17 and 22.27:

1. Complainant's Motion for a Default Order is hereby GRANTED.

2. Respondent Freedom Performance, LLC is found liable for 13,928 violations of section 203(a)(3)(B) of the Clean Air Act.

3. Respondent Freedom Performance, LLC is ordered to pay a civil penalty in the amount of $7,058,647 in the manner directed below.

4. This Order constitutes an Initial Decision as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order 30 days after its service upon the Complainant and Respondent unless a party appeals or moves to set aside this Initial Decision, or unless the Environmental Appeals Board elects to review this Initial Decision on its own initiative.

5. Within 30 days after this Order becomes final, Respondent shall pay the above-stated civil penalty as follows: use any method, or combination of methods, provided on the website http://www2.epa.gov/financial/makepayment; identify each and every payment with "Docket No. CAA-HQ-2019-8362"; and, within 24 hours of payment, send proof of payment ("proof of payment" means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to the EPA requirements, in the amount due, and identified with "Docket No. CAA-HQ-2019-8362") to both the EPA Office of Administrative Law Judges and the Complainant, as follows:

    a. The EPA Office of Administrative Law Judges: If by USPS (except Express Mail), send to:

        U.S. Environmental Protection Agency
        Office of Administrative Law Judges
        Mail Code 1900R
        1200 Pennsylvania Ave., N.W.
        Washington, DC 20460

If by any other carrier or hand-delivery, deliver to:

U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Rm. M1200
1300 Pennsylvania Ave., N.W.
Washington, DC 20460

b. Complainant: If by USPS (except Express Mail), send to:

Mark J. Palermo
U.S. EPA, Air Enforcement Division
1200 Pennsylvania Ave., N.W.
Mailcode 2242A
Washington, DC 20460

If by any other carrier or hand-delivery, deliver to:

Mark J. Palermo
U.S. EPA, Air Enforcement Division
1200 Pennsylvania Ave., N.W.
William J. Clinton Federal Building South, Room 2117C
Washington, DC 20004

6. If Respondent fails to timely pay any portion of the penalty ordered, the EPA may:

a. request the Attorney General to bring a civil action in an appropriate district court to recover: the amount assessed; interest at rates established pursuant to 26 U.S.C. § 6621(a)(2); the United States' enforcement expenses; and a 10 percent quarterly nonpayment penalty, 42 U.S.C. § 7413(d)(5);

b. refer the debt to a credit reporting agency or a collection agency, 42 U.S.C. § 7413(d)(5), 40 C.F.R. §§ 13.13, 13.14, and 13.33;

c. collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. Part 13, Subparts C and H; and

d. suspend or revoke Respondent's licenses or other privileges, or suspend or disqualify Respondent from doing business with the EPA or engaging in programs the EPA sponsors or funds, 40 C.F.R. § 13.17.

It is so ordered.

| | |
|---|---|
| _____ | _____ |
| DATE | [Name]<br>[Title] |

## CERTIFICATE OF SERVICE

I certify that this day by hand delivery with the EPA Office of Administrative Law Judges at the address listed below, I filed two originals and two copies of the foregoing Motion for Default *In the Matter of Freedom Performance, LLC*, with one original and one copy being redacted for public disclosure and one original and one copy being filed under seal,

U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Rm. M1200
1300 Pennsylvania Ave., N.W.
Washington, DC 20460

I certify that I sent by United States Postal Service Mail one copy of the foregoing unredacted Motion for Default to each of the following addresses officially registered to Freedom Performance, LLC.

Geoffrey Kemper, Registered Agent
Freedom Performance, LLC
3910 Goodrich Avenue, Unit 1
Sarasota, FL 34234

Geoffrey Kemper, Manager
Freedom Performance, LLC
4501 Manatee Ave W, Box 295
Bradenton, FL 34209

6/15/19
Date

Mark J. Palermo, Attorney-Advisor
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance

1200 Pennsylvania Ave., N.W.
William J. Clinton Federal Building, South
Room 2117C Mailcode 2242A
Washington, DC 20460
(202) 564-8894
Palermo.mark@epa.gov